

COMPANY LAW

Avtar Singh

Seventeenth Edition

REGISTRATION &
INCORPORATION

COMPANY
DIRECTORS

CSR

MEMORANDUM
OF
ASSOCIATION

WINDING UP

DIVIDENDS,
ACCOUNTS
AND AUDITS

GOLDEN JUBILEE
17th Edition

1966-2018

With
Supplement
of Companies
(Amendment)
Act, 2017
(Act 1 of 2018)



EBC

India's leading law information provider

Supporting Resources*

- ▶ Cases
- ▶ Discussion Forum
- ▶ Updates
- ▶ Articles, Blogs and lot more

*Conditions apply.



Accessing Cases!

1. Please go to ebcexplorer.com. Here you should find your book listed. Either search for your title or select it using the panel on the left.



2. Click on the selected book to be directed towards resources for this book. You should reach the following screen.

D. M. Gundlach's India Penal Code
Digitization tools developed by D. M. Gundlach Indian Penal Code
Digitization Project, Institute of Legal Education, Bangalore



Case Briefs



Source File

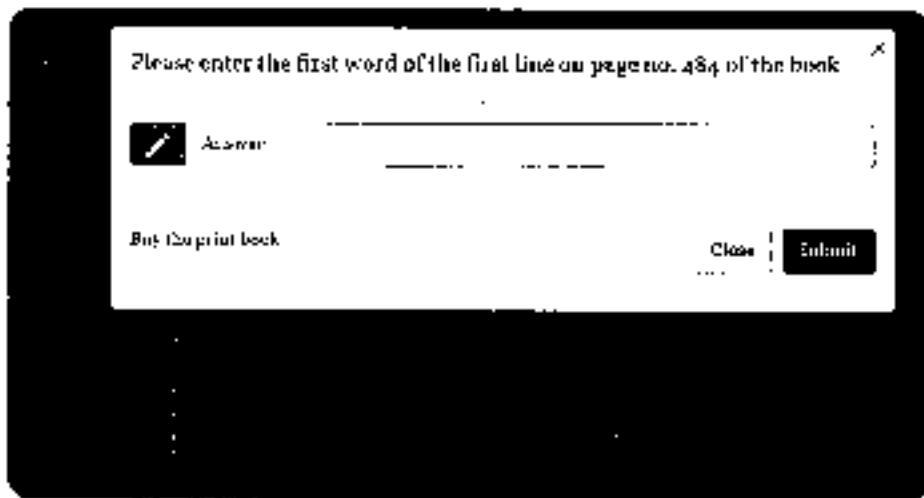


Cross Links

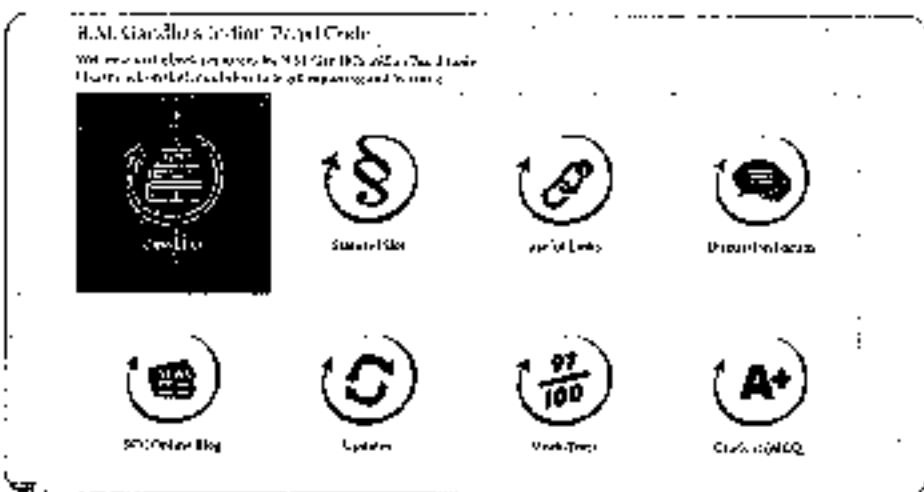


Discussion Forum

3. Once you click on the resources, you will be asked to enter a word from your print publication.



4. You will notice that the icons that were earlier disabled have now been enabled.



5. Click on Case Pilot icon to reach this screen. You will notice right facing arrows before each Chapter name. Click on the arrow to see the leading cases under each chapter.



Case Pilot

- » **Chapter 01: Operation and Extent of the Code**
 - *Commp. v. Velliappa Textiles Ltd.*, (2003) 11 SCC 405; 2004 SCJ (Cri) 1214
 - *MCD v. J.B. Buetling Co. (P) Ltd.*, 1975 SCC OnLine Del 47; 1975 Cri LJ 1148
 - *Standard Chartered Bank v. Directorate of Enforcement*, (2005) 4 SCC 530; 2005 SOC (Cri) 961
 - *Sunil Bharti Mittal v. CBI*, (2015) 4 SCC 609; (2015) 2 SOC (Cri) 687
- » **Chapter 02: General Explanations**
 - *Barendra Kumar Chosh v. King Emperor*, 1924 SCC OnLine PC 49; (1924-25) 52 IA 49
 - *Maina Singh v. State of Rajasthan*, (1976) 2 SOC 827; 1975 SOC (Cri) 332
 - *Tukaram Ganpat Pandare v. State of Maharashtra*, (1974) 4 SCC 544; 1974 SCJ (Cri) 580

6. Use your existing SCC OnLine® account to sign in.

7. Click on any case and you will reach this screen.

Happy reading!

The screenshot shows the SCC OnLine Case Pilot interface. At the top, there's a navigation bar with icons for Home, Search, Logout, and Help. Below it is a search bar with placeholder text "Search by Case Number, Name or Subject". A sidebar on the left lists categories like "All Cases", "Decided", "Pending", "Law Lists", and "Law Lists by Date". The main content area displays a table of cases with columns for Case Number, Name, and Date. One row is selected, showing a detailed view on the right. This view includes the case title, date, law lists, and a large text area containing the full judgment. The text is dense and legal in nature, discussing constitutional challenges to a law.

"Inside EBC Explorer™"

SCC
Powered by
SCC Center



CASE PILOT
(Free Cases)



UPDATES



DISCUSSION FORUM



CRACK-IT
(Mock Tests)



USEFUL LINKS



FACULTY RESOURCES



BOOK RESOURCES



INTERVIEW/LECTURES



SCC ONLINE BLOG



MOCK TESTS



That's not all! We are constantly updating our database with new features and information. Keep visiting ehcexplorer.com for new and exciting updates!

* Features included may vary from book to book.



Turn to the end of the book to see list of
articles available through EBC Explorer™

**COMPANY
LAW**

General Editor
Abhinandan Malik
8A, 11, B, IFFOMS INSTITUTE, 123 M TORONTO,
CANADA M5G 1Z9

By the same author:

- Law of Arbitration and Conciliation
- Laws of Banking and Negotiable Instruments
- Law of Carriage (Air, Land and Sea)
- Business Law (Principles of Mercantile Law)
- Introduction to Company Law
- Competition Law
- Consumer Protection: Law and Practice
- Contract Law (Easy Law Series)
- Law of Contract and Specific Relief
- Textbook on Law of Contract and Specific Relief
- Law of Insolvency
- Law of Insurance
- Intellectual Property Law
- Negotiable Instruments
- Introduction to Law of Negotiable Instruments
- Introduction to Law of Partnership
- Law of Partnership (Principles, Practice & Taxation)
- Law of Sale of Goods
- R.S.A. Pillai's Law of Tort [Ed]

Works in Hindi:

- Bank Kari Vidhi evam Parkramya Likhat Adhiniyam
- Bhagidari Vidhi evam Seemti Dayetav Bhagidari Adhiniyam
Company Vadi
- Company Vidhi (Ek Parichay)
- Madhyastham, Sulah evam Anukalpi Vivad Niptan Vidhi
- Mai Vikranya evam Arkanya Vidhi
- Packramya Likhat
- Samvida Vidhi Ke Sidhant Tatha Vinardikta Anuosh Adhiniyam, 1963
- Samvida Vidhi Evam Vinirdesht Anuosh Adhiniyam—Ek Parichay
- Vaniyyik Vidhi ke Sidhant
- Vidhik Upchar—Legal Remedies

COMPANY LAW

DR AVIAR SINGH

Advocate

B.Com, LL.M, LL.B (Luck.)

Saraswati Samman (U.P. Govt.)

Vidya Bhawan Samman (Hindi Sanathan, U.P.)

Ex-Visiting Professor of Business Laws, IIM, Lucknow

Ex-Reader in Law, Lucknow University

EBC

Lucknow | Delhi | Allahabad

Bangalore | Ahmedabad | Nagpur

EBC

Website: www.ebc.co.in, E-mail: sales@ebc-india.com

Lucknow (H.O.): 34, Lalbagh, Lucknow-226 001

Phone: +91-522-4032600 (30 lines); Fax: +91-522-4033693

New Delhi: 5-B, Atma Ram House, 5th Floor

1, Tulsiani Marg, Connaught Place, New Delhi-110 001

Phone: +91-11-49782323, +91-9871197119; Fax: +91-11-41304440

Delhi: 1267, Kasturba Gandhi Marg, Old Hindu College Building, Delhi-110 006

Phone: +91-11-23917616, +91-9310881904, Fax: +91-11-239921656

Bangalore: 251, Anand Nivas, 2nd Cross, 6th Main, Gopalganj,

Bangalore-560 009. Phone: +91-80-41225568

Allahabad: Manav Law House, Law Publishers & Booksellers, Near Vaishnavi Garden,

Opp. Dr. Chandra's Eye Clinic, Elgin Road, Civil Lines, Allahabad-211 001

Phone: +91-522-2400877, 2422023, Fax: +91-522-2623591

Ahmedabad: Satyamev Complex-I, Ground Floor, Shop No. 7

Opp. High Court Gate No. 2 (Indira Jubilee Gate)

Sarkhej – Gandhinagar Highway Road, Sola, Ahmedabad-380 060

Phone: +91-9228012539, +91-75679001215

Nagpur: P-9, Girish Heights, Near LIC Square, Kamptee Road, Nagpur-440 001

Phone: +91-712-6507650, +91-7028904969

www.facebook.com/easternbookcompany

www.twitter.com/ebcindia

Shop online at: www.ebcwebstore.com

First Edition,	1966	Twelfth Edition,	1999	Reprinted,	2009
Ninth Edition,	1989	Thirteenth Edition,	2001	Reprinted,	2013
Tenth Edition,	1991	Fourteenth Edition,	2004	Sixteenth Edition,	2015
Eleventh Edition,	1996	Fifteenth Edition,	2017	Reprinted with Supp.	2016
				Seventeenth Edition,	2018

Reprinted, 2019 with Supplement



9789383204518

All rights reserved. No part of this work may be copied, reproduced, adapted, abridged or translated, stored in any retrieval system (computer system, photographic or other system) or transmitted in any form by any means whether electronic, mechanical, digital, optical, photographic or otherwise without a prior written permission of the copyright holders, EBC Publishing (P) Ltd., Lucknow. Any legal action will entail legal action and prosecution without further notice.

This book is sold subject to the condition that it, or any part of it, shall not by way of trade or otherwise, be sold, lent, resold, displayed, advertised or otherwise circulated, except by the publishers, prior to its consent. In any form of binding, cover or title other than that in which it is published and without a suitable condition including this condition being inserted in the subsequent purchases of any book or copy of any of these rights or conditions will entitle a civil and/or criminal action without further notice.

While every effort has been made to avoid any mistake or omission, this publication is being sold as no condition, and under no guise whatever, the author or the publisher or printers would be liable in any manner to any person by reason of any mistake or omission in this publication or for any series of acts or omissions or errors or defects in colour, content or otherwise dependent or accepted on the basis of this work. For any defect in the text or any defect in printing or binding, the publisher will be liable only to replace the defective copy by another identical copy of this book then available.

All disputes subject to the exclusive jurisdiction of courts, tribunals and forums of Lucknow only.

Copyright © EBC Publishing (P) Ltd., Lucknow

Highlights of the Companies Act! Copyright © Khaitan & Co.

Published by Eastern Book Company, 34, Lalbagh, Lucknow 226 001 under licence from EBC Publishing (P) Ltd., Lucknow

Printed and Produced by Thomson Press India (I.td.)

To My Father
Gyani Ganga Singh

Preface to the Golden Jubilee Edition

The present work saw the light of the day in 1966. Having completed 51 years of existence, successful or otherwise, only readers can tell, it has now found its way into its Golden Jubilee era. Its successful survival for all these years is the blessing of its readers, for which one has to be thankful.

Since the inception of the new Act in 2013 it has invited two amendments, one in 2015 and the other in 2017. The range of amendments is as follows: The requirement of minimum share capital, both in the case of private and public companies has been abolished. In related party transactions, approval of shareholders was required to be by special resolution. Now this requirement has been reduced to that of ordinary resolution. In the case of a related party transaction between a holding company and its wholly owned subsidiary also the requirement of special resolution has been done away with, provided the accounts of the wholly owned subsidiary are consolidated with the accounts of the holding company and placed before the shareholders at a general meeting for approval. In order to align with clause 49 of the listing agreement, Section 177 has been amended to include a proviso to enable the concerned audit committee to provide omnibus approval for related party transactions subject to certain conditions. Under Section 117 read with Section 399, all special resolutions filed with the Registrar of Companies were available for public inspection and taking out copies. Now this public right has been restricted to access of such resolutions relating mainly to strategic business matters. This will help companies to maintain their business secrets.

Use of common seal has been made optional. It is no longer compulsory. Filing of declaration of commencement of business has now been done away with. Section 11 has been omitted for this purpose. Section 76-A has been introduced to provide penalty about public deposits where it was missing.

The burden of auditors about reporting of frauds has been lessened by making it a primary responsibility of the Central Government. The right to pay dividend has been restricted unless losses and depreciation carried over from past years have been set off against profits in the year the dividend is proposed. Special Courts can now only try cases in which punishment of imprisonment for two years can be awarded. Rest of the cases are to be tried by Metropolitan Magistrate or Judicial Magistrate of First Class.

On the judicial front decisions are to be seen to the following effect: Formation of associations is a fundamental right. Employees of a wholly owned subsidiary could not make the holding company liable for anything wrong done by the subsidiary, particularly where the holding company was exercising no control over the subsidiary. Directors can be appointed by the regularly constituted board of directors and not by any independent director or promoter. A director has been held liable for a competitive engagement without permission. A director holding an office of profit under the company has been held liable to be prosecuted for the offence. A decision to issue bonus shares on revaluation of assets has been held by the Supreme Court to be not valid. A person may be a member though his name is not borne out by the register of members. As usual quite a few rulings have appeared on practices of oppression and mismanagement as well as on mergers, etc. Creditors cannot now seek winding up of the company on the ground of its inability to pay its debts. Such petition has now to be filed under the Insolvency and Bankruptcy Code, 2016. A creditor can however proceed if he can build his case on other available ground. A number of decisions have explained the position and functions of company liquidators and Official Liquidator.

Ghaziabad
2017

— AVTAR SINGH

Brief Contents

<i>Table of Cases</i>	xxxvii
<i>Sectionwise Contents</i>	cix
<i>Highlights of the Companies Act, 2013</i>	xxxi

1. Corporate Personality	1	10. Directors	253
2. Registration and Incorporation	37	11. Meetings	367
3. Memorandum of Association ..	49	12. Dividends, Accounts and Audit ..	403
4. Articles of Association	79	13. Borrowing, Lending, Investments and Contracts ..	453
5. Prospectus	107	14. Debentures	477
6. Promoters	135	15. Majority Powers and Minority Rights ..	495
7. Securities (Shares)	141	16. Prevention of Oppression and Mismanagement ..	509
8. Shareholders and Members ..	197	17. Inspection, Inquiry and Investigations ..	551
9. Share Capital	223		

18. Kinds of Company	577	21. Winding Up	647
19. Compromises, Arrangements and Amalgamations	599	22. Provisions Applicable to Every Mode of Winding Up ..	701
20. Removal of Names of Companies from Register of Companies	639	23. Miscellaneous	753
		<i>Subject Index</i>	771

Contents

Table of Cases	xxxvii
Sectionwise Contents	cix
Highlights of the Companies Act, 2013	xxxxv

1. CORPORATE PERSONALITY

Definition of "company"	1
Companies Act, 2013, Extent of application [S. 1(4)]	1
Evolution	3
Constitutional right to form associations	4
Previous company law [S. 2(67)]	4
Nature of corporate form and advantages	4
1. Independent corporate existence [S. 9]	5
2. Limited liability	8
3. Perpetual succession	9
4. Separate property	10
5. Transferable shares	11
6. Capacity to sue and be sued	11
7. Professional management	12
8. Finances	13
Disadvantages	13
1. Lifting the corporate veil	13
(a) Determination of character ...	16
(b) For benefit of revenue	17

CORPORATE PERSONALITY (contd.)

(c) Fraud or improper conduct	19
(d) Government companies	21
Agency or trust, where no functioning autonomy granted	24
Personal liability of directors and members: Statutory provisions	27
(e) Non-compliance of requirements of incorporation [S. 464]	27
(f) Misdescription of name	28
(g) Fraudulent conduct of business	28
(h) Holding and subsidiary companies [S. 2(46) and (87)]	28
Subsidiary of multinational	30
Liability for insolvent subsidiary	31
Subsidiary establishments (branch office) [S. 2(14)]	32
Conclusion	32
2. Formality and expense	33
3. Company is not citizen	33
Nationality, domicile and residence	34

2. REGISTRATION AND INCORPORATION	MEMORANDUM OF ASSOCIATION (contd.)		
Formation of company [S. 3]	37	Doctrine of ultra vires	62
(i) Public company	37	Objects, powers and charitable contributions	64
(ii) Private company	37	Main objects rule of construction	67
(c) One person company	37	Consequences of ultra vires transactions	69
Punishment for false particulars ..	38	1. Injunction	69
Certificate of incorporation [S. 7] ..	39	2. Personal liability of directors	69
Certificate as conclusive evidence ..	39	3. Breach of warranty of authority	70
Judicial review	41	4. Ultra vires acquired property	70
Pre-incorporation contracts	41	5. Ultra vires contracts	71
Company cannot be sued on pre-incorporation contract	41	6. Ultra vires torts	72
Company cannot sue on pre-incorporation contract	42	Conclusion	73
Ratification of pre-incorporation contract	42	Alteration of objects	74
Personal right and liability of contracting agent	43	Change of objects [S. 13(8)]	74
Statutory reform	45	Procedure of alteration of objects	74
Formation of companies with charitable objects [S. 8]	45	Alteration of provisions of memorandum other than conditions	75
3. MEMORANDUM OF ASSOCIATION		Liability [S. 4(1)(d)]	75
Name clause	49	Capital [S. 4(1)(e)]	76
Resembling names not allowed [S. 4]	50	One person company [S. 4(1)(f)]	76
Advance reservation of name	53	Subscription	76
Use of the word "Limited" and publication of name	53	Rectification of name of company [S. 16]	77
Venture capital companies	55	Copies of memorandum, etc to be given to members [S. 17]	77
License to drop "Limited"	55		
Change of name [S. 13(2-3)]	55	4. ARTICLES OF ASSOCIATION	
Registered office	56	Provisions of entrenchment	79
Change of registered office situation [S. 13(4-6)]	57	Form and signature of articles	80
Alteration of registered office clause [S. 13(4)]	57	Contents of articles	80
Objects and powers	60	Articles in relation to memorandum	80
Why objects?	61	Binding force of memorandum and articles [S. 10]	82
		1. Binding on members in their relation to company	82

ARTICLES OF ASSOCIATION (contd.)		ARTICLES OF ASSOCIATION (contd.)	
2. Binding on company in its relation to members	82	Change of registered office situation	104
3. But not binding in relation to outsiders	83	Conversion of companies already registered [S. 18]	104
Who is an outsider?	83		
4. How far binding between members	84		
Agreement amongst shareholders	85	5. PROSPECTUS	
Alteration of articles [S. 14]	86	Prospectus	107
Alteration of memorandum and articles to be noted on every copy [S. 15]	87	Definition	107
Alteration against memorandum ..	87	Application forms [S. 33]	107
Alteration in breach of contract ..	88	Public offer and private placement [S. 23]	108
Increasing liability of members ..	90	Documents containing offer of securities for sale, deemed prospectus [S. 25]	108
Fraud on minority shareholders ..	90	Contents of prospectus (Matters to be stated in prospectus) [S. 26]	109
Constructive notice of memorandum and articles of association	90	(i) Reports	110
Statutory reform of constructive notice [S. 35-A, Companies Act of 1989] UK	91	(ii) Filing of copy with Registrar	110
Doctrine of "indoor management"	92	(iii) Statement of independent expert	110
Exceptions	94	Delivery of copy to Registrar [S. 26(6)]	111
1. Knowledge of irregularity	94	Registration of prospectus by Registrar [S. 26(7)]	111
2. Suspicion of irregularity	95	Date of issue after registration [S. 26(8)]	111
3. Forgery	95	Penalty for contravention [S. 26(9)]	111
4. Representation through articles	96	Variation in terms of contract or objects stated in prospectus [S. 27]	111
Power of delegation in articles ..	97	Offer of sale of shares of certain members [S. 28]	111
Delegated authority of acting director	98	Members' responsibility in the matter of sale [S. 28(3)]	112
Ostensible position allowed to directors	98	Public offer of securities to be in dematerialised form [S. 29]	112
Contracting party's knowledge of articles	98	Advertisement of prospectus [S. 30]	112
Scope of authority	100	Shelf prospectus [S. 31]	112
5. Acts outside apparent authority	102	Information Memorandum [S. 31(2)]	112
Act to override memorandum and articles [S. 6]	103		
Registered office of company [S. 12] ..	103		

PROSPECTUS (contd.)	PROSPECTUS (contd.)
Red herring prospectus [S. 32]	113
Remedies for misrepresentation	113
1. Damages for deceit	113
2. Compensation under Section 35	113
3. Rescission for misrepresentation	114
(a) By affirmation	114
(b) By unreasonable delay	115
(c) By commencement of winding up	115
When statement deemed to be untrue	115
Who can sue under Sections 34, 35 and 36 [S. 37]	115
Placement without prospectus	115
Disclosures should give true and fair view of company's position ..	116
Remedies for misrepresentation	117
1. Damages for deceit	117
Fraudulent misstatement	117
Representation relating to fact ..	118
Remedy of direct allottees	118
Buyers in secondary market ..	119
Liability of company	120
2. Compensation under Section 35	121
(a) Withdrawal of consent	122
(b) Issue without knowledge ..	122
(c) Ignorance of untrue statement	122
(d) Reasonable ground for belief	122
(e) Statement of expert	122
3. Rescission for misrepresentation	123
(i) False representation	123
Change of circumstances ...	125
(b) Of facts and not of law ..	125
(c) Reliance and inducement ..	126
(d) By or on behalf of company	127
Limits of rescission and loss of right	127
(e) By affirmation	127
(b) By unreasonable delay	128
(c) By commencement of winding up	128
4. Liability under Section 26	128
Criminal liability for misrepresentation [S. 34]	129
Vesting of powers in SHSI [S. 24]	130
Acceptance of deposits by companies [S. 73]	130
Deposits from members [S. 73(2)]	130
Repayment deposits accepted before the Act [S. 74]	131
Tribunal may extend time [S. 74(2)]	131
Penal provision [S. 74(3)]	131
Damages for fraud [S. 75]	132
Acceptance of deposits from public [S. 76]	132
Punishment for contravention of Section 73 or Section 76 [S. 76-A]	132
6. PROMOTERS	
Definition and importance	135
Statutory definition [S. 2(69)]	136
Persons acting in professional capacity	136
Duty and liability	137
Fiduciary position	137
7. SECURITIES (SHARES)	
Allotment of securities	141
Statutory restrictions on allotment ..	141
1. Minimum subscription and application money [S. 39]	141
Return of allotment [S. 39(4)]	142
Penalty for default (S. 39(5))	142

SECURITIES (SHARES) (contd.)

2. Shares to be dealt in on stock exchange [S. 40]	142
Over-subscribed prospectus	144
General principles as to allotment	144
1. Allotment by proper authority	144
2 Within reasonable time	145
3. Must be communicated	145
4. Absolute and unconditional	145
Global depository receipt [S. 41]	146
Private placement [S. 42]	146
Consequences of default [S. 42(10)]	147
Numbering of shares	147
Certificate of shares [S. 46]	147
Object and effect of share certificate [S. 46]	149
1. Estoppel as to title	149
2. Estoppel as to payment	150
Duplicate certificate [S. 46(2-5)]	150
Transfer of shares	151
Restrictions on transfer (private companies) [S. 58(1)]	152
Judicial or quasi-judicial interference in transfer matters	153
1. Mala fide	153
2. Inadequacy of reasons	154
3. Irrelevant considerations	154
Strict construction of restrictions	155
Scope of interference where power unfettered	156
Transfers contravening pre-emptive clauses	158
Private agreement between members	159
Listed public companies and pre-emptive clauses	160
Power to refuse registration and appeal against refusal [S. 58(3) to (6)]	160

SECURITIES (SHARES) (contd.)

Free transferability of shares of public companies [S. 58(2)]	160
Time for exercising power of refusal [S. 58(1)(3)]	161
Compensation for delay	162
Rectification of register of members [S. 59]	162
Limitation Act not applicable	168
Spot delivery contract	170
Directors' power of rectification of entries	170
Appeals to Appellate Tribunal [S. 421]	171
SEBI Takeover Code	172
Civil remedy not barred	173
Restriction on extent of shareholding	173
Conciliation of delay in filing appeals [S. 460]	173
Procedure of transfer [S. 56]	173
Blank transfers	176
Transfer contravening Section 56	177
Demat transfers	178
Unfair trade practices in securities market	178
Forgery in transfer	179
Relationship between transferor and transferee	180
Compensation for misrepresentation as to value	181
Depository scheme	182
Priority between transferees	183
Specific enforcement of agreement to sell shares	183
Mortgage or pledge of shares	184
Nature of share	185
Return as to allotment [S. 39]	188
Issue of shares at discount [S. 53]	189
Sweat equity shares [S. 54]	189
Underwriting commission [S. 40(6)]	190

SECURITIES (SHARES) (contd.)		SHAREHOLDERS AND MEMBERS (contd.)	
Brokerage	191	Payment in kind (Payment by non-cash consideration)	206
Restraining access to market	191	Allotment for non-cash consideration	206
Issue of shares at premium [S. 52]	192	Forfeiture of shares	207
Bona fide reduction of share premium account	194	1. In accordance with articles	208
Penalty for fraudulently inducing investment [S. 36]	194	2. Notice precedent to forfeiture	209
Personation for acquisition of shares [S. 38]	194	3. Resolution of forfeiture	210
		4. Good faith	210
		5. Right and liability after forfeiture	210
B. SHAREHOLDERS AND MEMBERS		Surrender of shares	211
Definition of member [S. 2(55)]	197	Register of members, etc [S. 88]	212
Global Depository Receipt [S. 2(44)]	198	Register and index of beneficial owners [S. 88(3)]	212
How to become a member	198	Foreign register of members [S. 88(4)]	213
1. By subscribing to memorandum [S. 2(55)(i)]	198	Place of keeping, inspection and returns [S. 94]	213
Qualification shares [S. 266]	199	Power to close register of members, debenture-holders, security holders [S. 91]	214
2. By allotment	199	Register, <i>prima facie</i> evidence [S. 95]	214
3. By transfer	199	Declaration of beneficial interest in shares [S. 89]	215
4. By transmission [S. 56]	199	Investigation of beneficial ownership of shares [S. 90]	217
Nomination of shares and debentures [S. 72]	201	Lien on shares	217
Who may be member	202	Postponement and loss of lien	218
Minor	202	Sale of shares under lien	219
Others disqualified	203	Time-barred debt	219
Company as member	203	Annual Return [S. 92]	219
Trade union	203	Penalty provisions [S. 92(5)(6)]	220
Partnership	203	Return to be filed when promoters' stake changes [S. 93]	220
Deity	203	Nature of offence, whether continuing	221
Ceasing to be member	204	Evidentiary value	221
Liability of members	204		
Calls on shares	204		
1. By resolution of Board	204		
2. Amount and time of payment	205		
3. Bona fide in interest of company	205		
4. Uniform basis	206		

9. SHARE CAPITAL		SHARE CAPITAL (contd.)	
Kinds of share capital [S. 43]	224	Exemption of private company from financial assistance	249
Derivative	224	Penalty provision [S. 67(5)]	249
Hybrid	225		
Preference share capital [S. 43]	225	Buy-back of shares [S. 68] (Power of company to purchase its own securities)	249
Cumulative and non-cumulative preference shares	225	Declaration of solvency [sub-s (6)]	250
Participating preference shares ...	226	Physical destruction of securities [S. 68(7)]	251
Issue and redemption of preference shares [S. 55]	228	Further issue after buy-back [S. 68(8)]	251
Irredeemable preference shares [S. 55]	228	Register of bought back securities [S. 68(9)]	251
Ordinary shares compared with preference shares	228	Return of buy-back [S. 68(10)]	251
Alteration of capital [S. 61]	229	Penalty [S. 68(11)]	251
Reduction of capital [S. 66]	230	Transfer of money to Capital Redemption Reserves Account [S. 69]	251
Duties of Tribunal	231		
Interest of creditors	231	Exemption from requirements	251
Interest of shareholders	232	Prohibition of buy-back in certain circumstances [S. 70]	252
Liability of members after reduction [S. 66]. ..	235		
Further issue of capital [S. 62]	236		
Shareholders' pre-emptive right or rights shares	236	10. DIRECTORS	
Role of Directors' Discretion and Judicial Control	237	Position of directors	254
Excluding Operation of the Section	238	Directors as agents	255
Where the Section does not Apply (Debentures or loans)	240	As trustees	256
Freezing out Techniques	242	For whom trustees	258
Employees' Stock Option	242	Trustees of institution	260
Power to convert loans into capital [S. 62(3-6)]	243	Directors as organs of corporate body	260
Variation of shareholders' rights or class rights [S. 48]	243	Personal liability of working organ	263
Purchase by company of its own shares [S. 67]	245	Liability for bouncing of cheques	264
Exceptions	246		
Consequences of illegal financing ..	247	Appointment of directors	265
		Company to have Board of directors [S. 149]	265
		Independent directors [S. 149(4)] ..	265
		Manner of election of independent directors and maintenance of Data Bank [S. 150]	267

DIRECTORS (contd.)	DIRECTORS (contd.)
Appointment of directors elected by small shareholders [S. 151]	Removal by shareholders [S. 169]
First directors [S. 152]	Obstruction to causing Extraordinary General Meeting for removal
Appointment at general meeting [S. 152]	Removal by Company Law Tribunal [S. 242(2)(b)]
Annual rotation	Resignation [S. 168]
Reappointment (deemed reappointment) [S. 152]	Powers of directors
Fresh appointment [S. 160]	General powers vested in Board [S. 179]
Appointment by nomination	Shareholders' intervention in exceptional cases
Appointment by voting on individual basis [S. 162]	1. Mala fide
Appointment by proportional representation [S. 163]	2. Board incompetent
Casual vacancies [S. 161]	3. Deadlock
Additional directors [S. 161]	4. Residuary powers
Appointment by Board	Restrictions on powers under statutory provisions
Appointment by Tribunal	Powers exercisable by resolution at Board meetings [S. 179(3)]
Director Identification Number	Powers exercisable with general meeting approval [S. 180]
Application for allotment of number [S. 153]	Audit Committee [S. 177]
Prohibition on more than one Identification Number [S. 155]	Vigil mechanism [S. 177(9 and 10)]
Director to intimate Identification Number [S. 156]	Nomination and Remuneration Committee; Stakeholders Relationship Committee [S. 178]
Company to inform the Registrar of the Number [S. 157]	Contribution to bona fide charitable and other funds [S. 181]
Obligation to indicate Director Identification Number [S. 158]	Power to make political contributions [S. 182]
Disqualifications [S. 164]	Power to make contributions to National Defence Fund [S. 183]
Disqualification on conviction [Proviso to S. 164]	Duties of directors
Ineligibility for reappointment [S. 164(2)]	Statutory formulation of directors' duties [S. 166]
Provision for additional disqualifications	Fiduciary obligation [Duty of Good faith] [S. 166(2)]
Number of directorships [S. 165]	Liability for breach of trust
Vacation of office by directors [S. 167]	
Automatic operation	
Removal of directors	

DIRECTORS (contd.)

Directors' personal profits	299
Business opportunities	
(Diversion of business)	299
When director may make personal use of company's opportunity	302
Position on cessation of directorship	303
Competition by directors	304
Trading in corporate control ..	305
Statutory provisions relating to sale of controlling shares ..	308
Misuse of corporate information	310
SEBI (Insider Trading) Regulations, 1992	310
Outsiders dealing in inside information	311
Directors' duty of care, diligence and skill [S. 166(3)]	312
Liability for negligence	312
Standard and degree of care and skill]	314
Duty of non-executive director ..	317
Nominee directors	318
Special statutory protection against liability [S. 463]	318
Petition to High Court for relief against apprehended proceeding [S. 463(2)]	321
Duty to attend Board meetings ..	322
Negligence by non-attendance ..	322
Duty not to delegate [S. 166(6)]	
(Assignment of duty)	322
Liability for co-directors' defaults	322
Duty to disclose interest [Ss. 2(49) and 184]	323
Conflict of Interests	323
What constitutes "Interest" ..	327
Where Board already aware ..	328
Effect upon transaction	329

DIRECTORS (contd.)

Accountability for profit from transaction	329
General consequences of default ..	330
Exception	330
Position and liability of nominee director	330
Tax liability	331
Meetings of Directors	331
Notice [S. 173(3)]	332
One person company [S. 173(5)]	334
Quorum [S. 174]	334
Proceedings	335
Passing of resolution by circulation [S. 175]	335
Defects in appointment of directors not to invalidate actions taken [S. 176]	336
Minutes [S. 178]	336
Registers	336
Register of directors, key managerial personnel and their shareholding [S. 170]	336
Members' right to inspect register [S. 171]	336
Punishment to company for default [S. 172]	337
Register of contracts, or arrangements in which directors are interested [S. 189] ..	337
Contract by one person company [S. 193]	337
Prohibition on forward dealings in securities of company by director or key managerial personnel [S. 194]	338
Prohibition of insider trading of securities [S. 195]	338
Appointment and remuneration of managerial personnel	339
Managing or whole-time director or manager [S. 196]	339
Disqualifications [S. 196(3)]	342

DIRECTORS (contd.)	DIRECTORS (contd.)
Overall maximum managerial remuneration; effect of inadequacy of profits [S. 197]	Removal of managing director of Government company 355
Insurance premium against liability for default by managerial personnel [S. 197(13)]	Chief Financial Officer [S. 2(19)] .. 355
Receipt of commission from holding or subsidiary company [S. 197(14)]	Secretary 355
Penalty [S. 197(15)]	Definition 355
Calculation of profits [S. 198]	When appointment obligatory and who can be appointed .. 355
Recovery of remuneration in certain cases [S. 199]	Functions of Company Secretary [S. 205] 356
Central Government or company to fix limit with regard to remuneration [S. 200]	Elevation of status of Secretary: Authority for contracts 356
Forms and procedure for certain applications [S. 201]	Liability of Company for Secretary's acts 358
Compensation for loss of office to managing, whole-time director or manager [S. 202]	Administrative officer 360
Appointment of key managerial personnel: When compulsory [S. 203]	Officer [S. 2(59)] 361
Manager	Officer who is in default [S. 2(60)] .. 361
Secretarial audit for bigger companies [S. 204]	Company's liability for officer's crimes 363
Loans to directors [S. 165]	Sole selling agents 364
Guarantee Commission	Compensation for loss of office .. 364
Prohibition of assignment [S. 166(b)]	
Irregular appointment and validity of acts [S. 176]	11. MEETINGS
Alternate director [S. 167]	Annual general meeting [S. 96] 367
Related party transactions [S. 188]: Related party [S. 2(76)]	Importance of annual general meeting 369
Definition of a relative [S. 2(77)]	Extraordinary general meeting [S. 100] 370
Contract of employment with managing or whole-time director [S. 290]	Power of Tribunal to call meeting [S. 98] 372
Restriction on non-cash transactions involving directors [S. 192]	Procedure and requisites of valid meeting 374
	Meeting should be called by proper authority 374
	Notice [S. 101] 374
	Contents of notice [Ss. 101-102] .. 376
	Explanatory statement 377
	Benefits of non-disclosure [S. 102(4)] 379
	Penal consequences of default [S. 102(5)] 379
	Quorum [S. 103] 379

MEETINGS (contd.)

Chairman [S. 104]	382
Power of adjournment and postponement	382
Mixed nature of duty	384
Casting vote	384
Informal appointment	384
Appointment by court	385
Voting	385
Informal agreements	386
By show of hands [S. 107]	387
Voting by electronic means [S. 108]	387
Poll [S. 109]	388
Voting by proxy [S. 105]	389
Resolution by postal ballot [S. 110]	391
Electronic mode	391
Representation of President and Government at meetings [S. 112]	391
Representation of companies and Government at meetings of companies and creditors [Ss. 112–113]	391
Resolutions	392
Kinds of resolution [S. 114]	392
Resolutions requiring special notice [S. 115]	393
Resolution passed at adjourned meeting [S. 116]	394
Circulation of members' resolutions [S. 111]	394
Registration of resolutions and agreements [S. 117]	394
Minutes of proceedings of general meetings, Board meetings, other meetings and resolutions passed by postal ballot [S. 118]	395
Inspection of minutes book [S. 119]	397
Circulation of advertisement [S. 118(9)]	397
Observance of secretarial standards	397

MEETINGS (contd.)

Default provisions [S. 118(11)]	398
Liability for tampering with minutes [S. 118(12)]	398
Maintenance and inspection of documents in electronic form [S. 120]	398
Report on ACM [S. 121]	398
Applicability of provisions to one person companies [S. 122]	398
Service of documents [S. 20]	399
Filing of documents with Registrar [S. 20(2)]	400
Authentication of documents, proceedings and contracts [S. 21]	400
Service of documents on company [S. 20]	400

12. DIVIDENDS, ACCOUNTS AND AUDIT

Dividends	403
Payment to shareholder-executives	404
Dividend fund	404
Separate bank account for dividend and interim dividend [S. 123(3)]	406
Rule in "Lee v Neuchatel"	406
Unrealised appreciation of assets	408
Statutory provisions	409
Depreciation [S. 123(1)(a) and (2)]	409
Reserves	409
Unpaid dividend account [S. 121]	410
Transfer of unpaid dividend to Investor Education and Protection Fund [S. 124]	411
Investor Education and Protection Fund [S. 125]	411
Utilisation of fund [S. 125(3)]	411
Central Government to constitute Authority [S. 125(5)]	412

**DIVIDENDS, ACCOUNTS
AND AUDIT (contd.)**

Payment to registered holders [S. 123(5)]	422
Declared dividend a statutory debt ..	413
Interim dividend	413
Mode of payment [S. 127]	414
Reserve fund (Free reserves)	415
Capitalisation of profits	415
Bonus shares [S. 63]	416
Right to dividend, rights and bonus shares to be in abeyance pending registration of transfer of shares [S. 126]	417
Punishment for failure to distribute dividends [S. 127]	417
Accounts	418
Books of account or accounting records [S. 128]	418
True and fair view [S. 129]	419
Accrual basis	420
Balance sheet of holding company	420
Preservation of account books [S. 128(5)]	420
Accounts to comply with accounting standards	421
Right of inspection [S. 128(3)(4)] ..	421
Inspection by directors	421
Inspection by Registrar, etc ..	421
Inspection by members	422
Duty of compliance and penalty provision [S. 128(6)]	422
Financial statement [S. 129]	423
Recuperating of accounts on court's or Tribunal's order [S. 150]	424
Voluntary revision of financial statements or Board's report [S. 131]	424
Constitution of National Financial Reporting Authority [S. 132] ..	425

**DIVIDENDS, ACCOUNTS
AND AUDIT (contd.)**

Constitution of authority [S. 132(3)]	425
Powers of authority [S. 132(4)] ..	425
Appellate authority [S. 132(6)] ..	426
Administration of National Financial Reporting Authority [S. 132(10)-(15)] ..	426
Central Government to prescribe accounting standards [S. 133] ..	427
Financial statement, Board's report, etc [S. 134]	427
Directors' responsibility statement	428
Net worth [S. 2(57)]	428
Authentication	428
Publication	428
Penalty [S. 134(8)]	429
Corporate social responsibility [S. 135]	429
Social Responsibility Committee	429
Functions of Committee [S. 135(3)]	429
Right of members to copies of audited financial statement [S. 136]	429
Filing of accounts and penalty provisions [S. 137]	430
Penalty [S. 137(3)]	430
Waiver of penalty	433
Rectification of accounts	433
Internal audit [S. 138]	434
Audit	434
Appointment of auditors [S. 139] ..	434
Term of appointment [S. 139(2)]	434
Rotation of audit team of firm [S. 139(3)]	435
Auditor of Government company [S. 139(5)]	435
Casual vacancy [S. 139(8)]	435

**DIVIDENDS, ACCOUNTS
AND AUDIT (contd.)**

Appointment of retiring auditor [S. 139(9)]	435
Audit Committee [S. 139(11)]	435
Removal and resignation of auditor [S. 140]	436
Fraudulent conduct of auditor [S. 140(5)]	436
Eligibility, qualifications and disqualifications of auditors [S. 141]	437
Persons who are not eligible [S. 141(3)]	437
Vacation of office on disqualification [S. 141(6)]	437
Remuneration of auditors [S. 142]	438
Powers and duties of auditors [S. 143]	438
Additional matters in auditor's report [S. 143(3)]	438
Government companies [S. 143(5)]	439
Audit of branch office accounts [S. 143(8)]	439
Auditing standards [S. 143(9)]	439
Penal provision [S. 143(15)]	440
Auditor not to render certain services [S. 144]	440
Auditor to sign audit reports, etc [S. 145]	441
Auditors to attend general meeting [S. 146]	441
Punishment for contravention [S. 147]	441
Auditors' duty of care	442
Position of auditors	442
Standard of care and skill	443
Duty to company and to third parties	445
Duty in connection with takeover	448
Default in disclosing fraud	450

**DIVIDENDS, ACCOUNTS
AND AUDIT (contd.)**

Liability for fraudulent misrepresentation	450
Accountants' lien	450
Audit of cost accounts [S. 148]	450

**13. BORROWING, LENDING,
INVESTMENTS AND
CONTRACTS**

Borrowing	453
Consequences of unauthorised borrowing	453
1. No loan	453
2. Injunction	453
3. Subrogation	454
4. Identification and tracing	454
Regular borrowings	454
Mortgages and charges	456
Registration of charges [S. 77]	456
Application for registration by charge-holder [S. 78]	457
Constructive notice of charge [S. 80]	457
Registrar to keep register of charges in respect of every company [S. 81]	457
Company to report satisfaction of charge [S. 82]	457
Power of Registrar to make entries of satisfaction and release without intimation from company [S. 83]	458
Rectification by Central Government of register of charges [S. 87]	459
Appeal against Registrar's order	462
Unregistered charge while company going concern	462
Procedure of registration	463
Pledge	463

**BORROWING, LENDING,
INVESTMENTS AND
CONTRACTS (contd.)**

Acquisition of property subject to charge [S. 79]	463
Series of debentures	463
Payment of commissions, etc ..	464
Certificate of registration	464
Register of charges	465
Rights of chargee	466
Intimation of appointment of receiver or manager [S. 84]	466
Company's register of charges [S. 85]	466
Inspection of register [S. 85(2)] ..	466
Penalty provision [S. 86]	466
Inter-corporate loans and investments [S. 186]	467
Register of investments-loans [S. 186(9)(10)(1)	468
Rule-making power	468
Exceptions	468
Penalty provisions [S. 186(13)] ..	469
Loans	469
Investments in own name [S. 187]	469
Penalty provisions [S. 187(4)]	470
Form of contracts [S. 21]	470
Execution of deeds and use of seal [S. 22]	470
Authentication of documents and proceedings [S. 21]	471
Bill of exchange and promissory note [S. 22]	472
Liability for dishonour	474

14. DEBENTURES

View of provisions of Section 71	477
Prescribing procedure [S. 71(13)]	478
Definition	478
Usual features	479
Floating charge	480

DEBENTURES (contd.)

Characteristics of floating charge	481
Subsequent mortgages or charges	483
Statutory restrictions	484
Crystallisation of floating charge ..	485
Debenture trust deed [S. 71(5-10)] ..	486
Supply of copies and inspection ..	487
Appointment of debenture trustees and their duties [S. 71(5)]	487
Persons not qualified	487
Functions	488
Duties	488
Petition to Tribunal	488
Responsibility of company to create security and debenture redemption reserve [S. 71(4)] ..	488
Remedies of debenture-holders	488
Receiver [S. 84]	489
Manager [S. 84]	490
Kinds of debenture	491
1. Redeemable debentures	491
2. Convertible debentures [S. 71(1)]	491
3. Perpetual debentures	491
4. Debentures to registered holder and bearer debentures ..	492
Register of debenture-holders [S. 88]	492
Index	492
Shareholder compared with debenture-holder	493
Debenture with voting rights [S. 71(2)]	494

15. MAJORITY POWERS AND MINORITY RIGHTS

Rule in "Boss v Harbottic"	495
Exceptions	498
1. Acts "ultra vires"	498

MAJORITY POWERS AND MINORITY RIGHTS (contd.)	PREVENTION OF OPPRESSION AND MISMANAGEMENT (contd.)
2. Fraud on minority	Class action [S. 245]
3. Acts requiring special majority	Who can apply [S. 245(3)]
4. Wrongdoers in control	Factors to be considered by Tribunal [S. 245(4)]
5. Individual membership rights	Penal clause [S. 245(7)]
6. Oppression and mismanagement	Application of other sections ..
..... 507	Limitation
16. PREVENTION OF OPPRESSION AND MISMANAGEMENT	Registered valuers ..
Prevention of oppression	Valuation by registered valuers [S. 247]
Who can apply [S. 244]	Penalty provision [S. 247(3)(4)] ..
Pending civil proceedings 548
Civil Procedure Code not applicable 548
Company itself cannot apply 548
Amendment of petition 548
Conditions of relief [S. 241] 548
Meaning of oppression	Power of investigation ..
Existence of alternative relief ..	Power to call for information, inspect books and conduct enquiries [S. 206] ..
Oppression of majority 552
"Oppression qua members"	Conduct of inspection and inquiry [S. 207] ..
Oppression in conduct of affairs 553
Private agreement amongst members as to share transfer ..	Penalty and vacation of office [S. 207(4)] ..
Facts must justify winding up 553
Unfair prejudice ..	Report on inspection [S. 208] ..
"Oppression" and "unfair prejudice", difference ..	Search and seizure [S. 209] ..
Oppression of continuing nature ..	Investigation into affairs of company [S. 210] ..
Fairness of petitioner's conduct 554
Position of non-party ..	Investigation into company's affairs in other cases on Tribunal's order [S. 213] ..
Effect of arbitration clause 556
Prevention of mismanagement [S. 241] ..	1. On members' application ..
Powers of Tribunal [S. 242] ..	2. On discretion of Tribunal ..
Interim relief [S. 242(4)] ..	(a) Fraud, oppression or illegality ..
Compromise ..	(b) Fraud, misfeasance or misconduct ..
Date of valuation ..	(c) Inadequate information ..
	Manner of exercising discretion ..
	Security for payment of costs and expenses of investigation [S. 214] ..
 561

INSPECTION, INQUIRY AND INVESTIGATIONS (contd.)	KINDS OF COMPANY (contd.)
Procedure and powers of inspectors [S. 217]	Private companies 579
Establishment of Serious Fraud Investigation Office [S. 211]	1. Minimum paid-up capital 579
Investigation into affairs of company by SFIO [S. 212]	2. Restriction on transferability of shares 579
Right to bail of persons charged [S. 212(6-7)]	3. Restriction on number of members 579
Arresting guilty person [S. 212(8-10)]	4. Prohibition on issue of prospectus 579
Report of investigation [S. 212(11-17)]	Advantages of a private company 579
Protection of employees during investigation [S. 218]	1. Subscription 580
Investigation into affairs of related companies [S. 219]	2. Exemption from prospectus-provisions 580
Seizure of documents by inspector [S. 220]	3. Directors 580
Freezing of assets on inquiry and investigation [S. 221]	4. Further issue of capital 580
Inspector's report [S. 223]	5. Disclosure of interest 580
Action in terms of report [S. 224].	Conversion of private company into public company 581
Disgorgement of benefits obtained by director, etc [S. 224(5)]	1. Conversion by default 581
Investigation of ownership of company [S. 216]	2. Conversion by choice [S. 14] 581
Restrictions upon shares and debentures [S. 222]	Conversion of public company into private company [S. 14(1)] 581
Position of legal advisers and bankers	One person company [S. 3] 581
Miscellaneous matters	Public company [S. 2(7)] 582
Appeals against orders	Small company [S. 205] 582
Court [S. 2(29)]	Foreign companies 582
Powers of Securities and Exchange Board of India [S. 24]	Documents to be filed 584
	Display of name, etc [S. 382] 585
	Accounts of foreign company [S. 381] 586
	Service on foreign company [S. 383] 586
	Prospectus of foreign company [Ss. 387-391] 586
	Expert's consent and allotment [S. 388] 587
	Registration of prospectus [S. 389] 587
	Offer of Indian Depository Receipts [S. 390] 587
Unlimited companies	Application of Sections 34 to 36 [S. 391] 588
Guarantee companies	

18. KINDS OF COMPANY

KINDS OF COMPANY (contd.)	
Punishment for contravention [S. 392]	588
Government companies	588
Downsizing employees	592
Holding company and subsidiary [S. 2(46) and (87)]	593
Accounts of holding company	594
Inspection of subsidiary's books of account [S. 128(3), proviso]	594
Investment in holding company [S. 19]	594
Associate company [S. 2(6)]	595
Prohibition of association or partnership exceeding certain number [S. 464]	595
When registration compulsory	595
Consequences of illegality	596
 19. COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS	
Compromises and arrangements with members and creditors [S. 230]	599
Sanction of Tribunal [S. 230]	601
Classification	601
Meetings	609
Notice of meeting and disclosures	603
Approval by three-fourth	605
Jurisdiction	606
Duties and powers of Tribunal	606
Compliance with statutory provisions	607
Bona fide exercise of majority power	608
Reasonableness of scheme	609
Burden of proving unfairness	610
Disclosure of material facts	610
Interest of creditors	610
No power to stay criminal proceedings	611
 COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS (contd.)	
Advantages of Tribunal's sanction	611
Power of enforcement and supervision [S. 231]	612
Interests of employees and workers	614
Reconsideration of sanctioned scheme	615
Modification of sanctioned scheme	615
Reconstruction, merger and amalgamation [S. 232]	615
Reconstruction	615
Amalgamation	616
Power of amalgamation	617
Forms of reconstruction and amalgamation	617
Official reports	620
Fairness of exchange ratio [S. 232(3)(h)]	622
Some instances	624
Scheme for utilisation of premium	625
Vesting of rights and transfer of obligations [S. 232(3)]	625
Reduction of capital in amalgamation	627
Increase of authorised share capital	627
Change of name	628
Merger or amalgamation of certain companies [small and holding and subsidiary companies] [S. 233]	628
Merger or amalgamation of company with foreign company [S. 234]	630
Amalgamation of banking companies	630
Deamerger	630
Power to acquire shares of shareholders dissenting from scheme or contract approved by majority [S. 235]	631

COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS (contd.)

Purchase of minority shareholding [S. 236]	632
Fairness of takeover bids	633
Take-over offer to be from single company	634
Adequacy of information	634
Offering same terms to those whose shares are to be acquired	634
Notice of acquisition	635
Amalgamation in public interest [S. 237]	635
Registration of offers of schemes involving transfer of shares [S. 238]	636
Preservation of books and papers of amalgamated company [S. 239]	636
Liability for offences before merger [S. 240]	636

20. REMOVAL OF NAMES OF COMPANIES FROM REGISTER OF COMPANIES

Power of Registrar to remove name from Register of Companies [defunct companies] [S. 248]	639
Restrictions on making application under Section 248 [S. 249]	641
Effect of company notified as dissolved [S. 250]	641
Fraudulent application for removal of name [S. 251]	641
Appeal to Tribunal and restoration [S. 252]	642
Simplified exit scheme	644
Revival and Rehabilitation of Sick Companies	644

21. WINDING UP

Types of winding up [S. 270]	647
Winding up by Tribunal	648
Grounds of winding up by Tribunal [S. 271]	648
1. Special resolution [S. 271(1)(v)]	648
2. Acts against sovereignty	648
3. Fraudulent conduct of affairs	649
4. Default in filing financial statements	649
5. Just and equitable	649
(i) Deadlock	650
(ii) Loss of substratum	651
(iii) Losses	654
(iv) Oppression of minority	654
(v) Fraudulent purpose	655
(vi) Incorporated or quasi-partnership	655
Public interest	660
Existence of alternative remedy	661
Advertisement of petition	662
Who can apply [S. 272]	662
1. Petition by company [S. 272(1)(a)]	663
2. Creditor's petition [S. 272(1)(b)]	663
3. Contributory's petition	666
5. Registrar's petition [S. 272(1)(e) and (4)]	667
6. Central Government's petition	668
7. Central Government or State Government's petition [S. 272(1)(g)]	668
Employee's Petition	668
Filing of copy with Registrar [S. 272(7)]	668
Arbitration agreement	668
Powers of Tribunal [S. 273]	669
Commencement of winding up [S. 357]	671
Rescission of order	671

WINDING UP (contd.)

Stay of proceedings before order [S. 442, 1956 Act] [now S. 443]	672
Company liquidators and their appointments [S. 275]	673
Consequences of winding up order [S. 277]	674
Intimation to company liquidator, provisional liquidator and Registrar	674
Stay of suits, etc, on winding up order [S. 279]	675
Jurisdiction of Tribunal [S. 280]	680
Debt Recovery Tribunal	681
Appointment of Company liquidator [S. 275]	681
Provisional liquidator [S. 275]	682
Company liquidator [S. 2(23)]	683
Direction for filing statement of affairs [S. 274]	683
Removal and replacement of liquidator [S. 276]	684
Report of company liquidator [S. 281]	685
Directions of Tribunal on report of company liquidator [S. 282]	685
Custody of company's property [S. 283]	686
Promoters, Directors, etc, to cooperate [S. 284]	687
Settlement of list of contributories, application of assets [S. 285]	687
Obligations of Directors and managers with unlimited liability [S. 286]	688
Advisory Committee [S. 287]	688
Submission of periodical reports to Tribunal [S. 288]	688
Powers and duties of company liquidator [S. 290]	688
Professional assistance to company liquidator [S. 291]	692
Exercise and Control of Company Liquidator's Powers [S. 292]	692

WINDING UP (contd.)

Adjustment of rights of contributories [S. 297]	693
Books to be kept by company liquidator [S. 293]	693
Audit of company liquidator's accounts [S. 294]	693
Power of Tribunal to make calls [S. 296]	693
Power to summon persons suspected to have property of company [S. 299]	694
Arrest of person trying to leave India or abscond [S. 301]	694
Payment of debt by contributory and right of set-off [S. 295]	694
Power to order examination of Promoters, Directors [S. 300]	695
Dissolution of company [S. 302]	696
Appeals from orders made before commencement of Act [S. 303]	697
Position of liquidator: Duties and liability	697
22. PROVISIONS APPLICABLE TO EVERY MODE OF WINDING UP	
Contributories [S. 2(26)]	701
Settling the list of contributories, liability of past members, application of assets [S. 285]	703
Liability of past members	703
Officers with unlimited liability [S. 286]	704
Set-off [S. 295]	704
Payment of liabilities [S. 324]	705
Debts of all description to be admitted to proof	705
Preferential payments [S. 327]	708
Preferential payments to rank pari passu with workers' dues	712
Deposits on trust	713

PROVISIONS APPLICABLE TO EVERY MODE OF WINDING UP (contd.)	PROVISIONS APPLICABLE TO EVERY MODE OF WINDING UP (contd.)
Employees' Provident Fund	Proceedings against delinquent officers
Recovery of employees' dues	727
Donations	Liability for fraudulent conduct of business [S. 339]
General creditors and shareholders	727
Company Liquidation Dividend and Undistributed Assets Account [S. 352]	Falsification of books [S. 336]
715	Frauds by officers [S. 337]
Liquidator to make returns, etc [S. 353]	731
716	Liability where proper accounts not kept [S. 338]
Meetings to ascertain wishes of creditors or contributories [S. 354]	731
716	Offences by officers [S. 336]
Power of Tribunal to declare dissolution to be void [S. 356]	Penalty for frauds by officers [S. 337]
717	733
Official Liquidators	Misfeasance proceedings [S. 340]
Appointment of Official Liquidator [S. 359]	734
Powers and functions of Official Liquidator [S. 360]	Power of Tribunal to assess damages against delinquent directors
717	734
Summary procedure for liquidation [S. 361]	Liability of partners and directors of body corporate [S. 341]
717	738
Sale of assets and recovery of debts due to company [S. 362]	Prosecution of delinquent officers and members [S. 342]
718	738
Settlement of creditors' claims by Official Liquidator [S. 363]	Wrongful withholding of property [S. 452]
718	739
Appeal by creditor [S. 364]	Annulment of dissolution [S. 356]
718	742
Order of dissolution of company [S. 365]	Disposal of books [S. 347]
718	743
Antecedent and other transactions	Winding up of unregistered company [S. 375]
Fraudulent preference [S. 328]	743
Avoidance of voluntary transfer [S. 329]	Winding up of foreign companies [S. 376]
721	745
Avoidance of transfer of shares and disposition of property [S. 334]	Provisions additional, not derogatory [S. 377]
723	745
Avoidance of attachments, executions, etc [S. 335]	Period of limitation [S. 358]
724	746
Disclaimer of onerous property [S. 338]	Abuse of legal process
725	747
	Information as to pending liquidations [S. 348]
	747
	Company liquidator's miscellaneous powers [S. 349]
	747
	Statement that company is in liquidation [S. 344]
	748
	Books and papers to be evidence [S. 345]
	748

**PROVISIONS APPLICABLE
TO EVERY MODE OF
WINDING UP (contd.)**

Inspection of books and papers [S. 346]	748
Enforcement of duty of company liquidator to make returns, etc [S. 353]	749
Meetings to ascertain wishes of creditors or contributories [S. 354]	749
Courts or persons before whom affidavits may be sworn [S. 355] .	749
Companies authorised to be registered	750
Companies capable of being registered [S. 366]	750
Vesting of property [S. 368]	750

23. MISCELLANEOUS

Registration offices, officers and fees Registration offices [S. 390]	753
Inspection, production, and evidence of documents kept by the Registrar [S. 399]	753
Application of Information Technology Act [S. 402]	754
Filing and inspection through electronic form [S. 398]	754
Power of Central Government to direct companies to furnish information or statistics [S. 403]	755
Fee for filing, etc [S. 403]	755
National Company Law Tribunal and Appellate Tribunal	756
Court [S. 2(29)]	756
Constitution of National Company Law Tribunal [S. 408]	756
Constitution of Appellate Tribunal [S. 410]	757
Selection of members [S. 412]	757

MISCELLANEOUS (contd.)

Term of office [S. 413]	757
Salary, terms, etc [S. 414]	758
Removal of members [S. 417]	758
Orders of Tribunal [S. 420]	759
Appeal from orders of Tribunal [S. 421]	759
Expedited disposal by Tribunal and Appellate Tribunal [S. 422]	759
Appeals to Supreme Court [S. 423]	760
Procedure before Tribunal and Appellate Tribunal [S. 424]	760
Jurisdiction of civil courts [S. 430]	760
Special Courts	761
Establishment of Special Courts [S. 435]	761
Offences triable by Special Courts [S. 436]	761
Appeal and revision [S. 437]	761
Application of CrPC	762
Mediation and conciliation panel [S. 442]	762
Appointment of company prosecutors [S. 443]	762
Appeal against acquittal [S. 444]	762
Compensation for accusation without reasonable cause [S. 445]	762
Application of fines [S. 446]	762
Miscellaneous	763
Punishment for fraud [S. 447]	763
Adjudication of penalties [S. 454]	763
Dormant company [S. 455]	763
Offences	764
Cognizance of offences under the Act [S. 439]	764
Composition of certain offences [S. 441]	765
Penalty for false statements [S. 448]	766
Penalty for false evidence [S. 449]	767
Punishment where no specific penalty provided [S. 450]	767
Power to alter Schedules [S. 467]	767

MISCELLANEOUS (contd.)

Power of Central Government to make Rules [S. 469]	767
Power of Central Government to make Rules relating to winding up [S. 468]	766
Annual report on working of Act [S. 461]	768
Condoning of delays in certain cases [S. 460]	768
Delegation by Central Government of its powers [S. 458]	769
Protection of acts done in good faith [S. 456]	769

MISCELLANEOUS (contd.)

Protection of employees during investigation [S. 218]	769
Non-disclosure of information in certain cases [S. 457]	769
Penalty for improper use of "limited" or "private limited" [S. 453]	769
Undefined words and expressions [S. 2(95)]	769
<i>Subject Index</i>	771

Table of Cases



CASE PILOT

The cases in bold can be accessed on SCC Online® from the Case Pilot feature on EBC Explorer™.

A & BC Chewing Gum, re, (1975) 1 WLR 579	668, 669
A Akhilandam v Great Eastern Shipping Co Ltd, (2000) 100 Comp Cas 349; (2000) 1 Comp L J 110 (C.I.R)	165
A Ananthalakshmi Ammal v Hindustani Investment and Financial Trust, AIR 1991 Mad 927	385
A Anantlakshmi Ammal v Indian Trades & Investment Ltd, AIR 1963 Mad 467	269, 274
A Anantlakshmi Ammal v Tiffin's Barleyes Asbestos & Paints Ltd, AIR 1952 Mad 511	385
A Chetwai v Kalleswarar Mills, AIR 1957 Mad 309	332
A Company (No 002015 of 1990), re, (1997) 2 BCCLC 1	529
A Company (No 003028 of 1987), re, 1988 BCCLC 282 (Ch D)	664
A Company (No 003701 of 1987), ex p Glassop, re, (1988) 1 WLR 2068	528
A Company (No 003843 of 1986), re, 1987 BCCLC 362	544
A Company (No 004415 of 1996), re, (1997) 1 BCCLC 479 (Ch D)	673
A Company (No 01679401 of 1985), re, (1986) 2 BCCLC 48 (Ch D)	669
A Company (No 017070 of 1996), re, (1997) 2 BCCLC 139	674
A Company (No 00836 of 1995), re, (1996) 2 BCCLC 192 (Ch D)	534
A Company, (No 004377 of 1986), re, (1987) 1 WLR 102	514
A Company, (No 001475 of 1982), re, 1983 Ch 178	530
A Company, (No 006834 of 1988), re, (1989) 3 BCCLC 218	544
A Company, (No 017623 of 1984), re, 1984 BCCLC 362	530
A Company, ex p Harries, re, 1989 BCCLC 383 (Ch D)	544
A Company, ex p Kremer, re, 1999 BCCLC 365 (Ch D)	536
A Company, ex p Schwarz (No 2), re, 1989 BCCLC 427 (Ch D)	529
A Company, re (No 005445 of 1996), (1998) 7 BCCLC 98	668
A Company, re (No 007466 of 2003), (2004) 1 WLR 1357; 2004 EWHC 35 (Ch)	434
A Company, re, (No 00195) of 1987, 1988 BCCLC 102 (Ch D)	661
A Company, re, (No 00371 of 1987), (1988) 1 WLR 1068	660
A Company, re, (No 006834 of 1988), (1989) 3 BCCLC 218	530
A Company, re, (No 017120 of 1996), (2000) 1 BCCLC 528 (Ch D)	772

XXXVIII Company Law

A Company, re, (No 3607 of 1995), (2000) 1 BCLC 427 (Ch D)	661	Adams v Thrift, (1915) 2 Ch 21, JI 19 CLT 569 (CA)	114, 322
A Company, re, ex p. SI, 1969 BCLC 579 (Ch D)	669	Addis Ind v Berkeley Supplies Ltd, (1964) 1 WLR 943	403
A Devarejan v NS Nemura Consultancy India (P) Ltd, (2006) 150 Comp Cas 407 (CLB)	169	Adilestone Petroleum Co. re, (1887+UK 57 Ch D) 191 56 LT 428 (CA)	123
A Lakshminarayanan Swami Mudaliar v LDC, AIR 1963 SC 1185; (1963) 33 Comp Cas 420	63, 64, 66	Adishree TradeLinks (P) Ltd, re, (2012) 126 Comp Cas 17 (Guj)	629
A Rama Goud v Orientrade Aditya Electrodes (P) Ltd, (2002) 4 ALD 273, (2004) 318 Comp Cas 151 (AP)	651	Ador Samia Ltd v Indoscan Engg Systems Ltd, (1999) 35 CLA 224 (CLB)	539
A Ramachandran v Natesan Sanket Electric Coop. Ltd, (1972) 42 Comp Cas 152 (AP)	632	ADT Ltd v BDO Binder Marilyn, 1995 BCLC 938	449
A Ravishankar Pasad v Prasad Productions (P) Ltd, (2007) 145 Comp Cas 416 (CLB)	514, 526	Advansys India (P) Ltd v Ponda Investment Ltd, 2014 SCC Online Bom 580; (2015) 168 Comp Cas 122	166
A Shanmugham v Official Liquidator, (1992) 75 Comp Cas 151 (Mad)	621	AEC-Aktiengesellschaft v Inotex (India) Ltd, AIR 1996 Kant 69; (1995) 83 Comp Cas 677	163
A Sivasubramanian v Registrar of Companies, (1996) 83 Comp Cas 141 (CLB)	528	Aerators Ltd v Tollit, (2002) 24 CLJ 319	51, 52
A Shroff & Co v Dilip Kumar Chakrabarti, (1996) 97 Comp Cas 199 (Cal)	736	Aga Estate Agencies Ltd, re, 1986 HCIA 346	643
Aaron's Reets Ltd v Twiss, 1896 AC 273; 74 LT 798 (HL)	123	Agarwal & Co v CII, (1998) 77 ITK III	396
Abani Bhawan Biswas v Hindustan Cables Ltd, (1968) 2 Comp LJ 197	21	Agip (Afrika) Ltd v Jackson, 1990 Ch 266; (1989) 3 WLR 1017	296
Abey Leisure Ltd, re, 1989 BCLC 619 (Ch D)	528, 535	Agnew v IBC, (2001) 2 AC 710; (2001) 3 WLR 154; (2002) 109 Comp Cas 181 (DC)	482
Abbotsford Hotel Ltd v Kingham, (1909) 101 LTR 917; (1910) 102 LT 18	241	Ahmed Saif v Bank of Mysore, (1930) 59 MLJ 28	64, 71
Abbott v Strong, (1998) 2 BCLC 120 (Ch D)	413	Ahmedabad Jubilee Spg Co v Uthpalal Chhaganlal, (1968) 10 Bom LR 141	75
ABC Coupler and Engg Co Ltd, re, (No 3), (1970) 40 Comp Cas 952	726	Ahmedabad Mfg & Calico Printing Co v Bank of India Ltd, (1972) 42 Comp Cas 493 (Guj)	124
Ahdul Haq v Das Mal, (2010) 19 IC 595	8	Almeo Pesticides Ltd, re, (2001) 13 Comp Cas 463 (Bom)	600
Abdul Karim v Sarpur Paper Mills, (1949) 1 Comp LJ 440 (AP)	206	Al Wings (P) Ltd v Victoria Air Cuzco, (1995) 17 CLA 314; AIR 1995 Kant 69	670
Aberdeen Railway Ltd v Blaikie Bros, (1854) 1 Macq 461 (ED)	326	Airfright 116 v K. Krishnamurthy, (1995) 2 Mad LJ 17; (1995) 4 Bom CR 104	742
Abhilash Vinodkumar Jain v Cox and Kings (India) Ltd, (1995) 84 Comp Cas 1 (Bom)	742	Al Coelho v South India Tea & Coffee Estates Ltd, (1996) 93 Comp Cas 401; (1997) 25 CLA 89 (CLB)	161
Abhilash Vinodkumar Jain v Cox and Kings (India) Ltd, (1995) 3 SCC 732; (1995) 17 CLA 90; (1995) 84 Comp Cas 28	740	AJ Judah v Rampada Gupta, AIR 1959 Cal 715	351
Abhipara Capital Ltd v ICT Electronics Ltd, (2002) 111 Comp Cas 363 (CLB)	162	Ajai Kumar Gupta Dochamini Bhagyanagar Silk Mills (P) Ltd, (2013) 128 Comp Cas 135 (AP)	67
Abrash Kaur v Lued Krishna Sugar Mills Ltd, (1974) 44 Comp Cas 310 (Del)	379	Ajit Jayantilal Sheth v Shriram Transport Finance Co Ltd, (2011) 133 Comp Cas 604 (CLB)	151
Accumeture Punjab Ltd v Punjab Wireless Systems Ltd, (2000) 1 Comp LJ 55 (P&H)	506	Ajit Kumar Bose v State of WB, (1998) 20 CLA 222 (CA)	611
Aishwarya Pai v Registrar of Companies, (1966) 1 Comp LJ 104 (Ker)	432	Ajit Kumar Srikar v Registrar of Companies, (1979) 49 Comp Cas 909; 53 CWN 138	221, 433
AD Chaudhary v Mysore Mills, (1976) 46 Comp Cas 548 (Kant)	371	Ajil Singh v 165 Enterprises (P) Ltd, (2002) 109 Comp Cas 597 (CLB)	271, 366

AK Bindra v Union of India, (2003) 5 SCC 163; (2003) 119 Comp Cas 590	23
AK Khinsla v TS Venkatesan, (1994) 80 Comp Cas 81 (Cal)	15
AK Mehta v Fairgrowth Financial Services Ltd, (1994) 81 Comp Cas 516	176
AK Mehta v Karnataka State Financial Corp, (2016) 198 Comp Cas 266 (Karn)	644
AK Puri v Devi Dass Gopal Kishan Ltd, (1995) 17 CLA 1, AIR 1995 J&K 21	530, 669
Akbarali A Kavetc v Kocikan Chemicals (P) Ltd, (1997) 86 Comp Cas 245 (Cal)	821, 828
AKG Acoustics (India) Ltd. re, (1996) 3 Comp LJ 355 (CLB)	59
Akkadian Housing and Infrastructure (P) Ltd v Pantheon Infrastructure (P) Ltd, 2015 SCC OnLine Bom 6355; (2016) 197 Comp Cas 316	526
Al Restauranti International Exchange v Official Liquidator, 2016 SCC Online Mad 9988; (2016) 199 Comp Cas 603	650
Al-Amin Seafarers (P) Ltd v Vessel M V Loyal Bird, (1995) 17 CLA 214 (Cal)	256
Al-Nabib Investments (Jersey) v Longerait, 1991 BCI C 7 (Ch D)	120
Alabama, New Orleans, Texas and Pacific Junction Railway Co. re, (1891) 1 Ch 212; 64 LT 127; 7 TLR 17	599, 604
Alakananda Mfg and Finance Co (P) Ltd v Rahubali Services Ltd, (1995) 3 Comp LJ 423; (1996) 86 Comp Cas 291 (CLB)	569
Alakananda Mfg & Finance Co (P) Ltd v Company Law Board, (1995) 83 Comp Cas 534 (Bom)	161
Albert David Ltd. re, (1964) 68 CWN 163 (Cal)	828
Albert Judah Judah v Rampada Gupta, AIR 1999 Cal 215	94, 254
Albert Life Assurance Co. re, (1873) LR 6 Ch App 381	748
Albion Steel and Wire Co v Martin, (1875) 1 Ch D 380	299
Alchema Ltd. re, 1998 BCC 964 (Ch D)	504
Aleutic Glass Industries Ltd v CCE, (2002) 9 SCC 363; (2002) 112 Comp Cas 379	29
Alembic Glass Industries Ltd. re, (1972) 42 Comp Cas 113 (Guj)	555
Alembic Ltd v Dipak Kumar J Shah, (2002) 112 Comp Cas 64; (2002) 4 Guj LR 3118	631
Alexander v Automatic Telephone Co, (1903) 2 Ch 56 (CA)	205, 206, 257
Alexander Timber Co. re, (1901) 20 I Ch 767	327
Alexander Ward & Co v Sanyang Navigation Co, (1975) 1 WLR 673 (H.L.)	686
Alfa Oicartz Ltd v Cymex Time Ltd, (2001) 104 Comp Cas 71 (Guj)	623
Ali Jawad Amerhasan Razvi v Indo French Biotech Enterprises Ltd, (1999) 96 Comp Cas 373 (Bom)	19
All India Bank Officers Confederation v Dhankashmi Hark Ltd, (1997) 90 Comp Cas 225; (1997) 3 Comp LJ 132; (1997) 26 CLA 33 (CLB)	203
All India Blue Star Employees' Federation v Blue Star Ltd, (2000) 37 C.A. 14, 157; (2000) 29 SCL 265 (Bom)	614, 622
All India Railway Men's Benefit Fund v Baheshwarmalji, AIR 1945 Nag 367	86
All India Reporter Ltd v Sami, India, AIR 1961 Bom 292; ILR 1961 Bom 297	580
All India Shaw Wallace Employees Federation v Shaw Wallace & Co. Ltd, (1997) 1 Comp LJ 304	542
All India Tea & Trading Co v Upendra Narayan Sinha, 42 CWN 774	269
Allahabad Bank v ARC Holdings Ltd, (2001) 1 SCC 756; (2000) 4 CLC 1790	689
Allahabad Bank v Bengal Paper Mills Co Ltd, (1999) 4 SCC 383; AIR 1999 SC 1718; (1999) 95 Comp Cas 804	489
Allahabad Bank v Central Bank, (2000) 4 SCC 406; (2000) 101 Comp Cas 64	672
Allview Ltd v Brightview Ltd, (2004) 2 BCI C 191 (Ch D)	512
Allen v Gold Reefs of West Africa Ltd, (1910) 1 Ch 556 (CA)	217, 219, 503, 608
Allen v Eyaat, (1914) 30 ILR 444	256, 259
Allianz Securities Ltd v Regal Industries Ltd, (2000) 25 SCL 349; (2000) 37 CLA 250 (CLB)	524, 526
Alote Estate v RB Seth Hicamat Kalyanmal, (1970) 1 SCC 425; (1970) 41 Comp Cas 1116	207, 208
Alstom Power Boilers Ltd v SBI & IDBI, (2002) 112 Comp Cas 674; (2003) 4 Bom CR 712	623
Altek Jumboz Needles Ltd v Lachmerts Industries Gmbh, (2000) 129 Comp Cas 108 (CLB)	545
Altos India Ltd v Bharat Telecom Ltd, (2001) 103 Comp Cas 6 (P&H)	449
Amalgamated Syndicate, re, (1897) 2 Ch 600	67
Amalgamations Ltd v Shaktas Sundaram, (2002) 111 Comp Cas 280 (Mad)	536
Amar Alcohol Ltd v SICOMI Ltd, (2006) 1 SCC 199; (2006) 128 Comp Cas 776	589

Amar Nath v Karnal Electric Supply Co Ltd,		Anand Finance (7) Ltd v Amit Desarac
AIR 1952 Nag 411	217	Kakade, (1995) 61 DLT 305 (1997) 90 Comp Cas 380
Amar Nath Malhotra v MCS Ltd, (1993) 75 Comp Cas 669 (Del)	280	681
Amar Singh v Kholse Bank Ltd, AIR 1933 Lah 106	215	Anand Hejwani Patel v Ornate Club (P) Ltd, (2000) 99 Comp Cas 318 (CLB)
Ambala Bus Services (P) Ltd v Roop Narayan Credit & Instrument Co (P) Ltd, (1997) 88 Comp Cas 823 (P&H)	292	168, 200
Ambalel Sarabhai Enterprises Ltd v Rejees Dage, (2014) 1 ICC 733 (2014) 182 Comp Cas L (Cal)	626	Ananta Mills Ltd v City Deputy Collector, (1972) 42 Comp Cas 476 (Kaj)
AMCO Batteries Ltd, re, AIR 2010 NOC 603 (Ker)	630	677
American Express International Banking Corp v Hartley, (1955) 3 All ER 564	491	Anantha R Hegde v Captain IS Copala Krishna, (1995) 2 Comp LJ 553 (1996) 23 CLA 142 (1996) 91 Comp Cas 312 (Kant)
American Pioneer Leather Co, re, (1988) 1 Ch 556; 116 LT 695	678	352, 367
American Remedies Ltd, re, (2001) 2 CLC 677 (2003) 113 Comp Cas 114 (Mud)	623	Anarkali Sacchhi v CIT, (1997) 9 SCC 238 (1997) 99 Comp Cas 24
Amisan Foods Ltd v Registrar of Companies, (1999) 1 Comp LJ 115 (Ker)	229	247
Amisan Foods Ltd v Registrar of Companies, (2001) 103 Comp Cas 846 (Ker)	229	Anchor Health & Beauty Care Ltd v Municipal Corpus of Greater Bombay, (2006) 152 Comp Cas 589 (Bom)
Amit Products (India) Ltd v Chief Engineer (O & M Circle), (2005) 7 SCC 393; (2005) 127 Comp Cas 443	10	209
Ammonia Soda Co Ltd v Chaudhuri, (1918) 1 Ch 266; 118 LT 48 (CA)	407, 408	Anderson v Hogg, 2000 SCT 654 (Scotland)
Ammonia Supplies Ccprn (P) Ltd v Modern Plastic Containers (P) Ltd, (1994) 78 Comp Cas 163; AIR 1994 NOC 155 (Del)	167	524, 529
Amrapali Electric Supply Co v RS Chandak, AIR 1951 Nag 293	171, 175	Anderson v Hyde, (1996) 2 BCLC 144 (CA)
Amrit Kaur Puri v Kapurthala Flour, Oil and General Mills Co (P) Ltd, (1954) 56 Comp Cas 594 (P&J)	165	484
Amrit Kaur Puri v Kapurthala Flour, Oil and General Mills Co (P) Ltd, (1997) 14 Comp LJ 157 (CLB)	373	Anderson v James Sutherland (Peterhead) Ltd, 1941 SC 230 (Scotland)
Amrit Lal Chaturvedi v Deveshwar Dutta Roy, (1966) 2 SCR 269	308	340
Amritlal Pranlal Panchal v Prabhakarhai Rajaram Mehta, (1996) 92 Comp Cas 576 (1997) 26 CLA 102 (Guj)	740	Andhra Bank Housing Finance Ltd, re, (2009) 3 ALD 654 (2010) 118 Comp Cas 295
An Inquiry under the Company Securities (Insider Dealing) Act, 1985, re, 1985 AC 500; (1988) 2 WLR 33; 1988 BCLC 153 (HL)	562	625
Anand Behari Lal v Dinshaw & Co, AIR 1942 Oudh 417	95, 102	Andhra Bank Housing Finance Ltd, re, (2013) 126 Comp Cas 215 (Guj)
Anand Crown and Seal (P) Ltd, re, (1996) 37 Comp Cas 266 (All)	621	630
		Amilcene v Zinc Mines of Great Britain Ltd, (1916) 2 KB 455
		191
		Andrews v Kounnis Freeman, (1999) 2 BCLC 541 (CA)
		498
		Andrews v Gas Meter Co, (1897) 1 Ch 361
		57
		Andrews v Mockford, (1996) 1 QB 372; 73 LT 726 (CA)
		119, 126
		Anaeta Hade v Godfathers Travels & Tours (P) Ltd, (2012) 5 SCC 661
		364
		Anglo Continental Supply Co, re, (1922) 2 Ch 723; 91 LJ Ch 723
		606
		Anglo-Austrian Printing and Publishing Union, re, (1892) 2 Ch 158
		84
		Anglo-French Coop Society, re, (1882) 21 Ch D 192
		695
		Anglo-Overseas Agencies Ltd v Green, (1962) 1 QB 1; (1963) 3 WLR 561
		71
		Anil Arora v Arca Aluminiun & Allied Works (P) Ltd, (2011) 132 Comp Cas 221 (All)
		666
		Anil Child Tyres Retreaders v Rungta Projects Ltd, (2004) 56 SCJ 42 (Raj)
		671
		Anil Gupta v Delhi Cloth and General Mills Co Ltd, (1983) 54 Comp Cas 301 (Del)
		107
		Anil Gupta v Miraj Auto Industries (P) Ltd, (2003) 113 Comp Cas 63 (CLB)
		591
		Anil Iyadu v Indian Acrylic Ltd, (2003) 1 ROC I 200; 700 (Cst); 74; (2010) 49 Comp Cas 56
		674

Anil Kumar Mukherjee v Clarios Advertisement Services Ltd, (1992) 52 Comp Cas 315 (Cal)	396	AP State Financial Corp v Professional Grade Components Ltd, (2005) 1 AIR LT 370 (2005) 125 Comp Cas 345	679
Arati Kumar Poddar v Prime Focus Ltd, (2002) 200 Comp Cas 64 (NCLT)	681	AP Tourism Development Corp v Parma Hotels Ltd, (2010) 5 SCC 425 (2010) 2 SCC (Civ) 440	47
Anil Pratap Singh v Onida Sanak Ltd, (2002) 102 Comp Cas 701 (Del)	665	Apo Industries (P) Ltd, re, (1996) 86 Comp Cas 457 (Guj)	622
Anil K Chhabria v Microlex Industries Ltd, (2003) 197 Comp Cas 166 (CLB)	144, 200	API Corp Ltd v Trans-Asia Link II Semiconductors Ltd, (2014) 14 SCC 716	686
Anil Vasudeo Salgaonkar Kermeen Foods (P) Ltd, re, (1985) 58 Comp Cas 156 (Guj)	665	ATL Industries Ltd v Securities and Exchange Board of India, (2017) 200 Comp Cas 440 (Del)	108
Anilkumar Poddar v Futura Commercials P. Ltd, (2017) 201 Comp Cas 12 (NCLT)	234	Apthorpe v Peter Schoenhofen Brewing Co Ltd, (1899) 4 TC 41; 80 ITR 395 (CA)	37
Anusha K Shah v Foster's (P) Ltd, (1996) 12 CLA 5; A.R. 1995 Mad 47, (1996) 92 Comp Cas 514	660, 668, 673	Aptava J Patel v Eseen Computers Ltd, (2006) 129 Comp Cas 121 (Guj)	608
Anuta Chadha v Registrar of Companies, (1998) 74 DLT 537	432	Academia Beverages & Foods Co Ltd, re, AIR 1995 Del 89, 1996 4th DIR 228, (1996) 93 Comp Cas 899; (1998) 74 DLT 276	622
Animal Trading Co Ltd v Shally Engg Plastics Ltd, (2013) 113 Comp Cas 197 (Bom)	626	Archet Structures Ltd v Griffiths, (2004) 1 BCLC 201, 2003 EWTC 957 (Ch D)	52
Annis v Merton London Borough Council, 1978 AC 728; (1977) 2 WLR 1094 (HL)	672	Anderson v Casson, Beckman, Rutley & Co, 1977 AC 406, (1978) 3 WLR 815	447
Ansal Properties and Industries Ltd, re, AIR 1997 1 L (Del) 449; (1978) 48 Comp Cas 184 Del	601	Angha Sen Abeer Chakravarty v Interco Information Technologies (India) (P) Ltd, ITR (2005) 2 Del 458; (2006) 126 DLT 379; (2006) 133 Comp Cas 49	665
Antony (P) v Renusagar Power Co Ltd, (1996) 72 FLR 63; 1996 1 LR 152 (All)	739	Arjan Singh v Panipat Woollen & General Mills Co Ltd, (1963) 33 Comp Cas 534 (Punjab)	168
Antigritha Jewellers Ltd v KRS Manu, (2002) 113 Comp Cas 501 (Madh)	506	Arjun Kumar Israni v Cipla Ltd, (2000) 99 Comp Cas 237 (CLB)	200
Anuzadha Mukherjee v Incab Industries Ltd, (1996) 4 Comp LJ 462 (CLB)	467	Arjun Prasad v Central Bank of India, AIR 1956 Pat 32	126, 184, 185, 186
ANZ Grindlays Bank Ltd v Directorate of Enforcement, (2004) 6 SCC 531 (2005) 123 Comp Cas 1; (2005) 4 Comp LJ 469	365	Arjun S Kalra v Shree Madhu Industrial Estates Ltd, (1997) 1 Comp LJ 318 (CLB)	540
AP Civil Supplies Corp Ltd v Delta Oils & Fats Ltd, (2007) 136 Comp Cas 172 (AP)	507	Armour v Corps of Liverpool, 1839 4, 14472 (Ch D)	596
AP Potluri v Hindustan Trading Corp (P) Ltd, (1967) 37 Comp Cas 246, AIR 1948 Ker 169	286, 287	ARMS (Multiple Sclerosis Research) Ltd, re, (1997) 1 BCLC 357 (Ch D)	715
AP State Civil Supply Corp Ltd v Delta Oils & Fats Ltd, (1999) 96 Comp Cas 303, (1997) 2 Comp LJ 146 (CLB)	555, 558	Armwood, re, (1975) 1 AIR 193 441	562
AP State Financial Corp v Electretherm (P) Ltd, (1996) 66 Comp Cas 402 (AP)	707	Armstrong & Smith, (1980) 1 LR 41 Ch D 348; 61 LT 65 (CA)	123
AP State Financial Corp v Berger Rubber (P) Industries, (2000) 1 Comp LJ 175 (AP)	689	Arun Dhawan v Lakesh Dhawan, 2014 SCC OnLine Del 6886; (2015) 188 Comp Cas 161, CLB	542
AP State Financial Corp v Mopeds India Ltd, (2005) 124 Comp Cas 833 (AP)	458	Arun Kumar Das v State of WB, (1990) 68 Comp Cas 452 (C-I)	240
AP State Financial Corp v Nagarkurnia Paper Mills Ltd, (1997) 89 Comp Cas 557 (AP)	689	Arun Kumar Mallik v Hindustan Lever Ltd, (1997) 112 Comp Cas 464 (CLB)	173
AP State Financial Corp v Official Liquidator, (2000) 7 SCC 291; (2000) 38 CLA 315	707	Arvind Kalerka v Mahash Kumaz Mathur, (1994) 79 Comp Cas 309 (Bom)	739

Arvindbhai V Patel v State of Gujarat, (1993) 2 CLJ 1142; (1990) 2 Gu; LR 1126; (1945) 23 Comp Cas 508	603	Ashoka Betelnut Co (P) Ltd v MK Chandrukanhi, (1997) 86 Comp Cas 279; (1997) 25 CLA 146 (Mad)	524, 562, 585
Aryavarta Plywood Ltd v Rajasthan State Industries and Investment Corp Ltd, (1991) 72 Comp Cas 5; (1990) 1 Comp 19 222 (Del)	671	Ashoka Mktg Ltd v Company Law Board, (1968) 39 Comp Cas 519 (Cal)	260
AS Damaskib 'Hercules' v Grand Trunk Pacific Railway Co, (1912) 1 KB 222	583	Ashoka Mktg Ltd v Punjab National Bank, (1990) 4 SCC 406	5
AS G.D. v State of Punjab, (2006) 132 Comp Cas 299 (Punjab)	592	Ashoka Mktg Ltd v Union of India, (1966) 1 Comp L 262 (Cal)	560
AS Mantri v Krishnap Processing and Canning Factory Ltd, (1999) 3 Comp LJ 217	175	Ashoka Mktg Ltd v Union of India, (1981) 31 Comp Cas 604 (Del)	559
Asahi Songwon Colors Ltd, re, 2014 SCC OnLine Guj 12794; (2016) 194 Comp Cas 150	631	Asian Coffee Ltd, re, 2000 CLC 17	423
Asbury Railway Carriage and Iron Co Ltd v Riche, (1875) 44 1 Exch 185; (1825) 1 R 7 H.L. 653	62, 71, 91	Asian Investments Ltd, re, (1992) 73 Comp Cas 517 (Mad)	239
Ashutosh K Ray v Bipinbhai Vaid Patel Mehta, (1999) 1 SCC 353; (1998) 91 Comp Cas 1; (1998) 1 Comp LJ 1	308	Aska Investments (P) Ltd v Grab Tea Co Ltd, (2005) 126 Comp Cas 603 (CLB)	172, 513
Ashish Das Gupta v Satyinder Singh, (2000) 17 CLA 104 (CLB)	215	Aspro Travel Ltd v Owners Abroad Group Plc, (1996) 1 WLR 132 (CA)	12
Ashok Cherian & ITC Ltd, (2006) 129 Comp Cas 857 (CLB)	231	ASRS Establishments Ltd, re, (2000) 1 BCIC 727 (CA)	482
Ashok Doshi v Doshi Time Industries (P) Ltd, (2001) 104 Comp Cas 306; (2000) 36 CLA 278 (CLB)	236, 240	Associated Cement Co Ltd v Keslivanand, (1996) 1 SCC 687; (1998) 91 Comp Cas 361	12
Ashok Kumar v Singhal Land & Finance (P) Ltd, (1995) 17 CLA 11; (1995) 82 Comp Cas 430 (Del)	263	Associated Clevercity v Union of India, ILR (1997) 2 Publ 409	41
Ashok Kumar Krishnabai Patel v Continental Textile Mills Ltd, 2013 SCC OnLine Del 1322; (2014) 382 Comp Cas 582	480	Associated Journals Ltd v Mysore Paper Mills Ltd, (2006) 5 SCC 197; (2006) 172 Comp Cas 470	445
Ashrik Kumar Oswal v Panjab C Textile Mfg & Trading Co (P) Ltd, (2002) 110 Comp Cas 925 (CLB)	535	Associated Provincial Pictures Houses Ltd v Wednesbury Corp., (1948) 1 KB 223 (CA)	384
Ashok Mehta v Kencell India (P) Ltd, 11.8.2004 KAR 476; 2004 CLC 10-12; (2005) 60 SCL 549	665	Associated Tool Industries Ltd, re, 1964 AIR 73	528
Ashok Mathew Zacharia v Majestic Kuries and Loans (P) Ltd, (1987) 62 Comp Cas 365 (Ker)	368	Asten Mather Real Tops (P) Ltd v Mather & Co (P) Ltd, 2003 SCC OnLine Ser 24321- (2004) 153 Comp Cas 240	52
Ashok Paper Mills Kampur Union v Union of India, (1997) 10 SCC 113; (1997) 49 Comp Cas 658	613	Astrix Laboratories Ltd v Mylan Laboratories Ltd, 2015 SCC OnLine Hyd 72; (2015) 191 Comp Cas 376	625
Ashok V Doshi v Doshi Time Industries (P) Ltd, (2001) 104 Comp Cas 306 (CLB)	522	Atkins & Co v Wardle, (1988) 86 1 QB 377; 11 LT 29	53
Ashok Auto and General Industries (P) Ltd v Inder Mohan Puri, (2005) 124 Comp Cas 422 (Del)	736	Atmazain Modiz v BCL Agratech Ltd, (1999) 24 CLA 14 (CLB)	278
		Attorney General Ref No 2 of 1982, 1984 QB 624; (1984) 2 WLR 447 (CA)	262
		Attorney General's Ref (No 1 of 1999), 1999 AC 9/1; (1999) 2 WLR 729 (HL)	311
		Attorney General's Reference (No 2 of 1982), 1984 QB 621; (1984) 2 WLR 447 (CA)	14
		Attorney-General v Great Eastern Railway Co, (1860) 1 LR 5 AC 479 (HL)	63, 69
		Attorney-General's Ref (No 1 of 1999), (1999) 2 WLR 195; (1999) 1 All ER 321; 1998 BCAC J93 (CA)	311

- Attorney-General's Reference (No 2 of 1983). 1984 QB 456; (1984) 2 WLR 465 (CA) 14
- Atul Drug House Ltd. re. (1971) 41 Comp Cas 352 (Guj) 457
- Atul Gupta v Trident Projects Ltd, (2010) 153 Comp Cas 474 (Del) 19
- Atul Mehta & Atul Kalra, (1989) 4 SCC 514; 1989 SCC (Civ) 761; (1999) 3 Comp LJ 127; (1990) 68 Comp Cas 324 241
- Atul Products Ltd v Dipyak Kumar Jayanti Lal Shah, (1997) 68 Comp Cas 376 (Guj) 152
- Aung Ban Zeya v CRMDA Chettiar Firm. AIR 1927 Rang 288 462
- Australian Investment Trust Ltd v Strand & Pitt Street Properties Ltd, 1932 AC 235 (PC) 190
- Auto Steering India (P) Ltd. re. (1977) 47 Comp Cas 257 (Del) 608
- Automatic Self-Cleaning Filter Syndicate Co. Ltd v Cunningham, (1916) 2 Ch 34; 94 LT 65t 286
- AV Krishna Karnataka Leasing & Consignment Corp Ltd. I.R 1993 KAR 334; (1995) 2 Kant LJ 365; (1995) 83 Comp Cas 714 663
- AV Mohan Rao v M Kishan Rao, (2002) 6 SCC 174; (2002) 111 Comp Cas 390 194
- Aventix Explosives (P) Ltd v Principal Subordinate Judge, (1987) 42 Comp Cas 300 (AP) 276
- Avco Overseas (P) Ltd. re. (2006) 129 Comp Cas 322 (Guj) 623
- Awling Barford Ltd v Percon Ltd, 1989 BCAC 426 (Ch D) 70
- Awling Barford Ltd. re. (1999) 1 WLR 340 (Ch D) 480
- Avi Experts (India) Ltd v Industrial Finance Corporation India Ltd, (2006) 133 Comp Cas 736 (P&H) 691
- Avi Eng Barford Ltd v Percon Ltd, 1989 BCAC 526 (Ch D) 298
- AW Figgins & Co (P) Ltd. re. (1980) 50 Comp Cas 95 (Cal) 610
- Ayala Holdings Ltd. (No 2), re. (1996) 2 BCAC 467 (Ch D) 689
- Ayers v South Australian Banking Co, (1871) LR 3 DC 545 71
- Ayurvedic amit Uman Tibba College v State of Delhi, AIR 1962 SC 458 5
- B Juhursh & Co (Hulliders) Ltd. re, 1955 Ch 634; (1955) 3 WLR 269 (CA) 490, 558, 738
- B Mohandas v AKMN Cylinders (P) Ltd, (1996) 95 Comp Cas 532 (CLB) 372
- B Pattnik Mines (P) Ltd v Bijayamanda Pattnik, (1994) 80 Comp Cas 237 (Ori) 734
- B Sivaraman v Egmore Benefit Society Ltd, (1992) 75 Comp Cas 198 (Mad) 281, 372, 397
- B Venkat Narendra Prasad v State of AP, (2008) 1 ALD (Civ) 506; (2010) 1 An LT (Civ) 501; (2005) 124 Comp Cas 621 474
- Babu Metawal v United of India, (1997) 91 Comp Cas 456 (Kant) 152
- Babubhai Chandulal Moday v Official Liquidator, (1975) 86 Comp Cas 383 (Mad) 735, 736
- Bahulal Chokhani v Western India Theatres Ltd, (1958) 25 Comp Cas 565; AIR 1957 Cal 709 153, 156
- Bahulal M Verma v New Standard Coal Co (P) Ltd, (1967) 1 Comp L 161 (Cal) 164
- Bacha F Guzder v CIT, AIR 1956 GU 74; (1955) 25 Comp Cas 1 5, 10, 12, 188, 403, 412
- Bachhara Factories v Harjee Mill Ltd, AIR 1955 Bom 355 664
- Bachraj Birla v State of WB, (1992) 24 Comp L 269 (Cal) 432
- Badr Nath Galhotra v Aanaam (P) Ltd, (2007) 135 Comp Cas 534 (CLB) 580
- Badr Prasad v Nagarmal, AIR 1959 SC 559; (1959) 29 Comp Cas 229 397
- Baglan Hall Colliery Co. re, (1970) 13 5 Ch App 346 30
- Bagri Synthetics (P) Ltd v Hanuman Prasad Bagri, (2015) 13 SCC 414 662
- Babla & Son Francisco Railway Co Ltd, re, (1866) I.R. 3 Q.B. 584; 19 LT 467 151, 179
- Barley, Clay & Co Ltd. re, (1973) 1 WLR 1357 376, 386
- Baily v British Equitable Assurance Co, (1904) 1 Ch 370; 90 TLR 335 (CA) 35, 89
- Baird v Queens Moat Houses plc, (2000) 1 NCAC 549 (QHC) 404
- Kajal Auto Ltd v N K Paredia, (1970) 2 SCC 550; (1971) 41 Comp Cas 1 154, 157, 161
- Bajaj Tempo Ltd v Bajaj Auto Ltd, (1994) 30 Comp Cas 618 (CLB) 166
- Bajaj Tempo Ltd v Unit Trust of India, (1992) 73 Comp Cas 451 (CLB) 157
- Bapna Prasad Jain v Malubin Prasad Jain, AIR 1999 Cal 156 539
- Bakhtawar Construction Co (P) Ltd v Blossom Breweries Ltd, (1999) 95 Comp Cas 35 (CLB) 570
- Balki M Kapadia v Bank of India, (1991) 1 Bom CR 213; (1997) 59 Comp Cas 515 689
- Bal Krishna Maheshwari v Uma Shanker Mehta, AIR 1947 All 361 373

Balaji Fabrics Colors (P) Ltd v A Rehana Rao, (2005) 120 Comp Cas 47 (CJRI)	822
Balaiah Krishnamoorthy v A Parvathswara Aiyar, AIR 1957 Mad 122 (1956) 69 I.W. 818	94
BALCO Employees' Union v Union of India, (2002) 2 SCC 333; (2002) 308 Comp Cas 193	589
Haldev Krishna Sahi v Shipping Corps of India Ltd, (1987) 4 SCC 361; 1987 SCC (Cr) 750 (1987) 53 Comp Cas 1	281
Balkis Consolidated Co Ltd v Frederick Tomkinson, 1893 AC 396-59 LT 598 (HL)	179
Balkrishna Gupta v Swadeshi Polytex Ltd, (1985) 2 SCC 172; (1985) 58 Comp Cas 563	371
Bali v Metal Industries Ltd, 1955 S.L.T. 124 (England)	371
Ballav Dass v Mohan Lal Sadhu, AIR 1936 Cal 237; 162 I.C. 282	432
Balmenuchi Cleanlift Distl(Glry), re, 1916 SC 639 (Sect)	640
Balmer Lawrie & Co Ltd v Partha Sarathi Sen Roy, (2013) 128 Comp Cas 247	593
Baldram Kishore et al v Union of India, (2003) 7 SCC 626	362
Baltic Real Estate Ltd (No 1), re, 1999 BCCLC 498 (Ch D)	527
Baltic Real Estate Ltd (No 2), re, 1993 BCCLC 503 (Ch D)	527
Balwant Rai Saluja v Air India Ltd, (2014) 9 SCC 607; (2014) 2 SCC (L&S) 804	30
Balwant Singh v Kishanlal Bus Service (P) Ltd, (1967) 37 Comp Cas 471; (1967) 1 C. Comp 137 (Del)	364
Balwant Singh Sethi v Zuarwan Singh, (1983) 63 Comp Cas 310 (Bom)	375
Balwant Transport Co Ltd v YEE Deshpande, AIR 1956 Nag 20	153
Bamford v Bamford, 1970 Ch 212; (1968) 3 WLR 317	291
Bamford v Bamford, 1971 Ch 212; (1969) 2 WLR 1107; (1969) 1 All ER 909 (CA)	291, 497, 521
Baranasi Breads Ltd, re, (2006) 152 Comp Cas 348 (All)	616
Bangalore Timber Industries v Madras Sapper Ex-Servicemen's Rehabilitation Assn, (1988) 63 Comp Cas 223 (Kant)	744
Bank Muscat Smg, re, (2004) 120 Comp Cas 340; ILR 2004 KAR 1656	611
Bank of Baroda v H.H. Shivedasari, AIR 1926 Bom 427; 95 IC 437	463, 462
Bank of Hindustan v Pramodan, 1987 Ch 335 (1987) 2 WLR 2018 (Ch D)	469
Bank of Baroda Ltd (No 2) v Mahindra Uggie Steel Co Ltd, (1978) 46 Comp Cas 326; 1970 Guj LR 443	613
Bank of Credit & Commerce International SA (Nkr. 15); re, Morris v Bank of India, (2004) 2 BCCLC 229 (Ch D)	724
Bank of Credit & Commerce International SA, re, Morris v SBI, (2004) 2 BCCLC 236 (Ch D)	724
Bank of Credit and Commerce International SA (No 8), re, (1994) 3 All ER 515 (Ch D)	713
Bank of Credit and Commerce International SA (No 8), re, (1996) 2 BCCLC 254 (CA)	704
Bank of Credit and Commerce Investment SA v Al Saud, (1997) 1 BCCLC 457 (CA)	713
Bank of Hindustan, China & Japan Ltd v Eastern Financial Assn Ltd, (1984) 20 J.L. 100 (PC)	288
Bank of India Ltd v Ahmedabad Mfg & Calico Printing Co, (1972) 42 Comp Cas 213 (Bom)	616, 624
Bank of Madura Shareholders Welfare Assn v RHL, (2001) 135 Comp Cas 663 (Mad)	630
Bank of Maharashtra v High Court of Mysore, ILR 1973 Mys 577; (1973) 2 Mys 152; (1973) 43 Comp Cas 305	461
Bank of Maharashtra v Rossmann Auto (P) Ltd, (1992) 24 Comp Cas 272 (Del)	11
Bank of Nova Scotia v RPG Transmission Ltd, (2003) 66 DLR 24; (2002) 101 DLT 154; (2003) 133 Comp Cas 764	680
Bank of Nova Scotia v RGC Transmission Ltd, (2005) 77 DLR 214; ILR (2004) 2 Del 583; (2006) 133 Comp Cas 172	681
Bank of Peshawar Ltd v Mithra Ram, AIR 1919 Lah 551; 51 IC 812	145, 163
Bank of Poona Ltd v Narayanadas Shrivardhan Simanshi, AIR 1941 Bom 272 (1941) 31 Comp Cas 364	298, 327
Bank of United States v Dandridge, 6 L Ed 582; 25 US (12 Wheat) 64 (1827)	3
Baratarayne v Direct Spanish Telegraph Co, (1980) LR 34 Ch D 287	234
Barsdilur Durgadait v Tata Power Co Ltd, (1925) 27 Bom LR 330	125
Barwari Lal v Kundan Cloth Mills Ltd, AIR 1937 Lah 527	77
Baptist Church Trust Assn v Company Law Board, (1986) 1 Comp LJ 187 (Ch)	573
Barukat Ltd v Epitree Ltd, (1997) 1 BCCLC 303 (QBD)	23
Baranagar Jute Factory Ltd v Laksh Narayan Taparia, 2000 Cal 538 (Cal)	675

Baramnagar Jute Factory plc v Laxmi Narayan,	
(2006) 133 Comp Cas 115 (Cal)	672
Bengal Oil Refining Co. re, (1987) LR 36	
Ch D 702	748
Barclays Bank Plc v British & Commonwealth Holdings Plc, (1996) 1 BCCL 1	
(Ch D and CA)	347
Barclays Bank plc v Horizon, 1993 BCCL	
680 (Ch D)	719
Bataja Knitting Factories Ltd v Swastika	
Trading Co, (1940) 60 Comp Cas 552 (P&H)	676
Baring plc v Concorde & Lybrand, (1997) 1 BCCL	
427 (CA)	449
Barium Chemicals Ltd v Company Law	
Board, AIR 1967 SC 295; (1966) 2 Comp LJ	
151; (1966) 36 Comp Cas 639	352, 535, 550, 558
Barleycorn Enterprises Ltd, re, (1990) 2 All ER	
156 (CA)	781
Barnet's Bank Ing Co, re, Peel case, (CR67) LR 2	
Ch App 674; 16 LT 780	40
Barnes v Andrews, 246 F 614, USA	
(Sydney 1924)	315
Barnett, Illores & Co v South London	
Tramways Co, (1887) LR 18 QB 615 (CA)	
815 (CA)	389, 396
Barnicott v Knight, (2004) 2 BCCL 464 (Ch D)	152
Banoda Board & Paper Mills Ltd v ITO,	
(1976) 102 TLR 152; (1976) 46 Comp Cas	
25 (Guj)	709, 711
Banoda Spg & Wev Mills Co Ltd v Coop	
Credit Society Ltd, (1976) 46 Comp	
Cas 1 (Guj)	714
Barron v Potter, (1914) 1 Ch 895; 120 LT 929	
274,	293, 334
Barrow Borough Transport Ltd, re, 1969 BCCL	
653; (1989) 3 WLR 858 (Ch D)	460
Barry Artist Ltd, re, (1985) 1 WLR 1305;	
(1985) BCCL 293	231
Barter v London and North Western Railway	
Co, (1899) 24 QBD 77; 62 LT 164 (CA)	179
Barber v North Staffordshire Railway Co,	
(1889) 28 Ch D 458; 58 LT 549	179
Barlow Mfg Co Ltd, re, (1899) 1 BCCL	
7411 (Ch D)	736
Basant Lal v Emperor, AIR 1908 Pat 170-	
431C 291	349
Basant Ram & Sons v Union of India,	
(2002) 110 Comp Cas 38 (Del)	426
Basant Ram & Sons v Union of India, (2004) 4	
Comp LJ 55 (N.Y.)	436
Basudeb Kataria v Dhanbad Automobiles	
(P) Ltd, (1977) 47 Comp Cas 68 (Pat)	167
Basudeb Lal Modi v Madenla Chhapda,	
AIR 1967 Ori 107	53
Bath v Standard Land Co Ltd, (1970) 2 Ch 406	261
Bayswater Trading Co Ltd, re, (1970) 1 WLR	
343; (1970) 40 Comp Cas 1196 (Ch D)	512, 543
BB Nagpal v State of Haryana, (1996) 93 Comp	
Cas 596 (P&H)	369
BB Verma v National Projects Construction	
Corp Ltd, (1944) 4 Comp LJ 274 (Del)	32
BCCL (SA), re, 1992 BCCL 529 (Ch D)	673
BDA Breweries v Crucible & Co Ltd,	
(1996) 65 Comp Cas 325; (1997) 25 CLA	
275 (Bom)	29, 357
Beattie v E&F Beattie Ltd, 1958 Ch 706 (CA)	85
Beaufort (Jon) (London) Ltd, re, 1953 Ch 131;	
(1953) 2 WLR 465	51
Bede Steam Shipping Co Ltd, re, (1917) 1 Ch	
223; 115 LT 540; 33 TLR 13 (CA)	155
Beena Toshniwal v PTC Ltd, (2005) 129 Comp	
Cas 955 (G.L.B.)	165, 172
Begum v Jalpur Udyog Ltd, (1987) 61 Comp	
Cas 744 (Raj)	741
Bekaji Kumar Kazmani v Registrar of	
Companies, (1985) 58 Comp Cas 393 (Cal)	368
Bell & Lever Bros Ltd, 1932 AC 161; 1931 All ER	
Rep 1	304
Bell Bros Ltd, re, ex p Hodgson, (1891) 45 LT	
245; 7 TLR 689	154
Bell Houses Ltd v City Wall Properties Ltd,	
(1966) 2 QB 456; (1966) 2 WLR 1323 (CA)	69, 72
Bellador Silks Ltd, re, (1965) 2 Comp LJ 30	5-9, 532
Bellerby v Rowland & Macwood's Partnership	
Co, (1901) 2 Ch 14	211, 212
Belmont Finance Corp v Williams Furniture	
Ltd (No. 2), (1980) 1 All ER 393 (CA)	296
Belmont M & Co Ltd, re, (1951) 2 All ER 899	643
Belvedere Fish Guano Co v Rainham	
Chemical Works, 1921 AC 465	256
Benzara Electric Light & Power Co v UP SER,	
(1983) 50 Comp Cas 597 (Cal)	445
Benesse Bank Ltd v Bank of Bihar Ltd,	
AIR 1947 All 137	463
Benarsi Das v Dalmia Dadri Cement Ltd,	
AIR 1959 Punj 232	165
Bengal Bank Ltd v Suresh Chakravarty,	
AIR 1952 Cal 133	606
Bengal Electric Lamp Works Ltd, re, AIR 1942	
Cal 316	208
Bengal Flying Club, re, (1964) 2 Comp LJ 213;	
(1967) 71 CWN 38	653, 664
Bengal Laxmi Cotton Mills Ltd, re, (1945) 35	
Comp Cas 187 (Cal)	511

Bengal Poteries Ltd, re, (1996) 1 CLDN 71; 1996 AIRHC 2490; (1996) 1 CWN 71	689
Bengal Tea Industries v Union of India, (1988-89) 93 Cal WLR 342	616, 621
Bengali Food Products (P) Ltd v Officer Liquidator, (1998) 54 Comp Cas 262 (All)	724
Beni Carbon Co Ltd v Raj Kumar Goel, (1993) 2 PLR 681	580
Benjamin v Elysium Investments (P) Ltd, (1960) 3 SA 467	528
Bennell, Coleman & Co v Union of India, (1972) 2 RCC 788	14
Hennell, Coleman & Co v Union of India, (1977) 47 Comp Cas 92 (Bom)	497, 540
Bentley & Co v Black, (1895) 9 TLR 580 (CA)	124
Bentley-Slevens v Jones, (1974) 1 WLR 638	299, 379
Berar Trading Co Ltd v Gajanan Copal Rao Dixit, (1972) 42 Comp Cas 48 (Bom)	220, 506
Bermuda Cubvisions Ltd v Calico Trust Co Ltd, 1998 AC 198; (1998) 2 WLR 62 (PC)	217
Bossmann Steel Co, re, (1870) LR 1 Ch D 251	609
Bost and Crompton Engg Ltd v Officer Liquidator, AIR 1995 Mad 20; (1995) 82 Comp Cas 77	746
BCS Siemaya v Karnataka Bank Ltd, (1995) 83 Comp Cas 449 (Kant)	261, 370
BGD Roof Bond Ltd v Droughlas, (2000) 1 BCLC 401 (Ch D)	248
Bhadoli Woollens Ltd, re, AIR 2001 All 19; 2001 All LJ 187	689
Bhagat Prasad Taantia v Registrar of Companies, (1983) 53 Comp Cas 56 (Cal)	432
Bhagirath v Impercor, AIR 1948 Cal 42	931
Bhagwati Developers v Peerless General Finance & Investment Co, (2005) 6 SCC 708	170
Bhagwati Developers (P) Ltd v Peerless General Finance & Investment Co Ltd, (2003) 3 Cal LT 393; (2005) 128 Comp Cas 444; (2004) 51 SCL 204	572
Bhagwati Developers (P) Ltd v Peerless General Finance (Investment Co Ltd, (2012) 5 SCC 455; (2013) 176 Comp Cas 1	510
Bhagwati Devi v Dhanraj Mills (P) Ltd, (1970) 1 Comp LJ 21 (Pat)	676
Bhajirage G Ghate v Bom Docking Co (P) Ltd, (1984) 56 Comp Cas 428 (Bom)	536
Bhankerput Simbhawali Beverages (P) Ltd v PR Pandya, (1995) 17 CLA 170 (J&H)	240
Bhankerput Simbhawali Beverages (P) Ltd v PR Pandya, (1995) 86 Comp Cas 842 (P&H)	32, 371, 380, 397
Bharat Aluminium Co Ltd v Special Area Development Authority (1990) 51 Comp Cas 384 (MP)	22, 568
Bharat Bank v Lalpat Rai Sawhney, AIR 1950 EP 329	667
Bharat Bhushan v HB Pethadi Leasing Ltd, (1992) 74 Comp Cas 20 (Del)	251, 279
Bharat Commerce & Industries Ltd v Registrar of Companies, (1973) 43 Comp Cas 275 (Cal)	59
Bharat Commerce & Industries Ltd, re, (1973) 43 Comp Cas 362 (Cal)	59
Bharat Hotels Ltd, re, (1991) 81 Comp Cas 397 (CLB)	175
Bharat Insurance Co Ltd v Kambaiya Lal, AIR 1945 Lah 292; 160 IC 24	498
Bharat J Patel v Jyoti Ltd, 2015 SCC OnLine Guj 3118; (2015) 1 JL Comp Cas 345	284
Bharat K Gehar v Castrol India Ltd, (2013) 315 Comp Cas 396 (CLB)	165
Bharat Kumar Dilwali v Bharat Carbon & Ribbon Mfg Co Ltd, (1973) 43 Comp Cas 397 (Del)	375
Bharat Steel Tubes Ltd v IFCI Ltd, (2011) 11 SCC 385	24
Bharat Steel Tubes Ltd, re, (2003) 70 DR 483; (2004) 106 Ld 1672; (2004) 11K Comp Cas 194	553
Bharat Synthetics Ltd v Bank of India, (1995) 82 Comp Cas 437 (Lah) 17 CLA 152 (Bom)	603, 605
Bhawan Traders Ltd v Sadhu Singh, (1966) 3P Comp Cas 537 (P&H)	734
Bhaskar Stoneware Pipe (P) Ltd v Rajinder Nath Bhaskar, (1989) 63 Comp Cas 384 (Del)	526, 660
Bhatia Industries and Infrastructure Ltd v Asian Natural Resources (India) Ltd, (2017) 211 Comp Cas 46 (Bom)	15
Bhavnagar Veg Products Ltd, Re, (1984) 55 Comp Cas 107 (Guj)	605
Bhengalal v Registrar of Joint Stock Companies, AIR 1954 MB 70	642
Bhokenhi Coal Storage v National Insurance Co Ltd, (1994) 79 Comp Cas 90 (Cal)	21
Bhollar v Bhollar, (2003) 2 BCLC 241 (CA)	302
Bhupinder Rai v SM Kamappa Automobiles (P) Ltd, (1945) 46 CLA 262; (1996) 86 Comp Cas 18 (CB)	166
Bhukeria Hira, re, AIR 1957 Cal 593; (1958) 28 Comp Cas 122	75
Bidwell Bros, re, (1848) 1 Ch 61x 66 1T 342	339
BPCL v Adwasi Paper Mills Ltd, (2000) 1 Comp LJ 209; (1999) 98 Comp Cas 263 (AP)	706

Beggerstaff v Kuwait's Wharf Ltd. (1896) 2 Ch 92 (CA)	93	Bloomenthal v Ford, 1997 AC 154; 261 E 265 (EIL)	150
Bihari Mills Ltd. re. (1965) 58 Comp Cas 6 (Guj)	633	Blue Metal Industries Ltd v RW Dulley, 1970 AC 827; (1969) 3 WLR 357 (PC)	634
Blackband Gyandhaml & Co v A. Chittaswami, (1999) 5 SCC 493; 1999 SCC (Civ) 334; (1999) 98 Comp Cas 573	474	Blue Star Ltd. re. (2000) 2 Bom CR 525; (2001) 104 Comp Cas 371	429
Bilasrai Jitaramlal, re. AIR 1962 Bom 132; (1962) 32 Comp Cas 215	67, 652	Blom v Oil Repartition SA, 1989 BCAC 120 (CA)	54
Bimal Chandra v DCM Ltd. (1998) 92 Comp Cas 680; (1997) 27 CLA 304 (P&H)	790	BM Varma v State of UP, (2006) 98 SC 152; (2005) 128 Comp Cas 860 (All)	356, 392
Bimal Kumar Agarwal v Aarti Sponge and Power Ltd, 2013 SCC Online CLB 110; (2014) 189 Comp Cas 146	541	BN Chikramane v Swashnya Benefit (P) Ltd, 1982 GLI 512; (1982) 1 Guj LR 111; (1983) 13 Comp Cases 519	429
Bimal Singh Kothari v Muir Mills Co Ltd, AIR 1952 Cal 615; ILR (1954) 1 Cal 185; 56 CWN 361	378	BN Viswanathan v Tibbs' Beryl Asbestos (P) Ltd, AIR 1953 Mad 520; (1953) 23 Comp Cas 79	273, 290
Bindu Kothari v Unitedech Ltd, 2016 SCC Online NCLT 73; (2016) 199 Comp Cas 508	191	Boardman v Phipps, (1967) 2 AC 46; (1966) 3 WLR 1089 (HL)	310
Bindu Kumar Agarwal v Ringlong Tea Co Ltd, (1995) 16 CLA 128 (CLB)	524	BOC India Ltd v Zinc Products & Co (P) Ltd, (1996) 66 Comp Cas 353 (Pat)	286, 663
Bindu K. Jain v Sivik Vijay Engg (P) Ltd, (1998) 17 Comp Cas 555 (CLB)	165	Bognor Regis Urban District Council v Campani, (1972) 2 QB 169; (1972) 2 WLR 983	263
Bindu Vadilal Mehta v Kamlesh H. Desai, (1997) 26 CLA 73 (Guj)	69	BOJ Finance Ltd v Custodian, (1997) 10 SCC 488; (1997) 89 Comp Cas 74	196
Bindu Chand v John Brus, AIR 1934 All 161; (1934) ALJ 195	223	Bolton v SBL (P) Ltd, (1999) 48 DRJ 31; (1999) 27 DLT 113; (1998) 33 CLA 51	573
Birch v Sullivan, (1957) 1 WLR 1247	301	Bolton v SBL Ltd, (1998) 30 CLA 21 (CLB)	538, 635
Birch v Sullivan, (1958) 1 All ER 56	497	Bolton v Natal Land and Colonization Co, (1897) 24 Ch 124; 61 L & C 280; 65 LT 784-8 TLR 148	406
Bird Precision Bellows Ltd. re, 1986 Ch 658; (1986) 2 WLR 158 (CA)	543	Bombay Cable Cos (P) Ltd v BM Jain & Sons Co (P) Ltd, (2016) 194 Comp Cas 558 (Bom)	542
Bird Corp. Ltd v East India Investment Co (P) Ltd, (2006) 133 Comp Cas 515; (2006) 4 CWN 510	589	Bombay Castrol Engg (P) Ltd, re. (1994) 55 Comp Cas 73 (Bom)	676
Bird Corp. Ltd v Mabebir Prasad Sharma, 2014 SCC Online Cal I2448; (2014) 185 Comp Cas 43	712	Bombay Gas Co (P) Ltd v Central Govt, (1996) 3 Bom CR 312; (1997) 89 Comp Cas 396	616, 627
Birla Global Finance Ltd. re, (2005) 126 Comp Cas 667 (Bom)	231	Bombay Gas Co (P) Ltd v Central Govt, (1997) 89 Comp Cas 196; (1996) 3 Bom CR 312	643
Bisgaard v Henderson's Transvaal Estates Ltd, (1908) 1 Ch 743; 99 LT 609 (CA)	24, 634	Bombay Gas Co Ltd v Hindustan Mercantile Bank Ltd, (1980) 50 Comp Cas 202 (Bom)	653
Bishan Singh v State of U.P, (2006) 102 Comp Cas 887 (All)	739	Bombay Leasing Co (P) Ltd v Gresoil (India) Ltd, (2000) 103 Comp Cas 666 (Bom)	672
Biship v Bonthams, (1988) 1 WLR 742; 1988 BCAC 656 (CA)	490	Bombay Mercantile Bank v Orde Industries Ltd, AIR 1956 Islm 57; (1955) 57 Bom LR 1039; (1955) 25 Comp Cas 479; ILR 1955 Bom 1072	473
Bishosphate Investment Management Ltd v Maxwell, 1993 Ch 1; (1992) 2 WLR 991 (CA)	563	Bombay Metropolitan Transport Corps Ltd v Employees, (1990) 69 Comp Cas 465 (Bom)	670
BK Muthukrishna Sakthivel Vanavarayach Srinivasan & Sons Ltd, (1973) 86 IWR 466; AIR 1973 Mad 463; (1976) 46 Comp Cas 274	611	Bocid v Barrow Haematite Steel Co, (1902) 1 Ch 353	405, 407
Blair Open Hearth Furnace Co Ltd v Reigart, (1913) 108 LT 465	274		

XLVIII Company Law

Bordana Ltd v Rollaway Shower Blinds Ltd, (1986) 1 WLR 517 (CA)	54
Bonellis Electric Telegraph Co. re; Colic's Claim, (1871) LR 12 Eq 245; 40 LJ Ch 567	329
Bosecock v Hilton International Ltd, (1993) 1 WLR 1085 (CA)	585, 586
Bonalan Engg Corp v Asup Synthetics & Chemicals Ltd, (1994) 81 Comp Cas 972 (Raj)	707
Borax Co. re, (1901) 1 Ch 526 (CA)	483
Bordland's Trustee v Steel Bros & Co Ltd, (1900) 1 Ch 279; 17 TLR 45	82, 132, 187
Boschek Proprietary Co Ltd v Puke, (1905) 1 Ch 148; 91 LT 398	340, 374
Bosher v Richmond Land Co, (1914) 450; 16 SC 360; 37 Atk St Rep 879	135
Bosina Deep Sea Fishing & Ice Co v Ansel, (1888) 39 Ch D 329	298
Bowman v Secular Society Ltd, 1917 AC 406 (HL)	41, 61
Boxby Ltd. re, (1970) 2 WLR 959	645
Boxwell & Co (Steel) Ltd, re, (1988) 5 BCLC 145	514
BP Gupta v Standard Enamel Works (P) Ltd, (1987) 62 Comp Cas 36 (Del)	666
BPL Sunyu Technologies Ltd v Balaji Agarwal, (1995) 63 Comp Cas 51 (Raj)	179
BR Herman v Ashok Rai, (1984) 55 Comp Cas h. (Del)	741
BR Kundan v Motion Pictures Assn, (1976) 46 Comp Cas 339 (Del)	269, 270
Bracken Partners Ltd v Gutteridge, (2004) 1 BCLC 372 (CA)	299
Bradford Banking Co v Briggs, Son & Co, (1886) LR 12 AC 29; 56 LT 62	218
Bradment v Trinity Estate Ltd, 1969 BCLC 757 (Ch D)	374
Brady v Brady, 1989 AC 755; (1988) 2 WLR 1908 (HL)	248, 293
Braunau Ltd, re, 1988 BCLC 594 (Ch D)	462
Brahmanberia Loan Co Ltd. re, AIR 1934 Cal 624; 151 I.C. 693	368
Braint O'Pierson (Contractors) Ltd, re (1998) 8 BCLC 26 (Ch D)	221
Brazilian Rubber Plantations and Estates Ltd, re, (1911) 1 Ch 425; 103 LT 697 (CA)	313
Brockland Group Holdings Ltd v London and Suffolk Properties Ltd, 1989 BCLC 100 (Ch D)	288
Brenfield Squash Racquets Club Ltd, re, (1946) 2 BCLC 184 (Ch D)	535
Bress v Woolley, 1954 AC 337; (1954) 2 WLR 832	260
Briggs, ex parte, (1886) 1 R 4 Ch App A/2	128
Brightlife Ltd, re, 1987 Ch 300; (1987) 2 WLR 194 (Ch D)	465
Brij Copal Daga v State of Kerala, (2015) 181 Comp Cas 320 (Ker)	266
Bristol Tourist Stock Bank, re, (1890) LR 44 Ch D 703; 59 LJ Ch 126	654
British & American Trustee & Finance Corps v Couper, 1894 AC 399; (1891-92) All ER Rep 672 (HL)	87, 234
British Airways Board v Parish, (1979) 2 Lloyd's Rep 3d 1 (CA)	54
British Americas Nickel Corps v O'Brien, 1927 AC 369; 136 LT 615 (PC)	608
British Asbestos Co Ltd v Boyd, (1909) 2 Ch 439	351
British Assay of Glass Beads Mfg Ltd v Nettlefield, (1911) 27 TLR 27	41
British Diabetic Assoc v Diabetic Society Ltd, 1996 FSR 1	55
British India Banking & Industrial Corp Ltd v Shiva Chedumbarish, AIR 1934 Bom 467	233
British India Corps Ltd v Robert Menzies, AIR 1936 All 569; 1936 All LJ 748; 164 IC 387	213
British India Steam Navigation Co v IRC, (1881) 7 QBD 165	479
British Midland Tool v Midland International Tooling Ltd, (2003) 2 BCLC 523 (Ch D)	299
British Maroc Syndicate Ltd v Alporton Rubber Co Ltd, (1915) 2 Ch 156	89
British Polymers Ltd, re, (2005) 123 Comp Cas 345 (ICLB)	129
British Thompson & Houston Cn Ltd v Sterling Accessories Ltd, (1924) 2 Ch 31	7, 24
British Thompson Houston & Co Ltd v Rede-rated European Bank Ltd, (1932) 2 KB 276 (CA)	98, 100, 101
Broderip v Salmon, (1495) 2 Ch 323 (CA)	6
Brooke Bond India Ltd v HIB Ltd, (1994) 29 Comp Cas 346 (Bom)	184
Brophy v Cities Service Co, 3. Del Ch 241 (1949)	311
Brown v Bennet, (1998) 2 BCLC 97 (Ch D)	300
Brown v British Abrasive Wheel Co, (1919) 1 Ch 290	500
Brown Guild Property Society, re, 1898 WN 80 ..	630
Browne v La Trinidad, (1887) LR 17 Ch D 1; 53 LT 137 (CA)	83, 333, 374
Brunton & Co Engineers Ltd, re, (1968) 63 Comp Cas 297 (Ker)	682

Bryon v Metropolitan Saloon Omnibus Co., (1858) 27 L & Ch 685; (1958) 3 DE C&J 122.		C Thiruvernakulamariar v AI Velu Mudaliar, (1937) 46 L & W 867; ILR 1938 Mad 192; AIR 1938 Mad 154
BSN (UK) Ltd v Janardhan Mehandas Rajan Patel, (1996) 86 Comp Cas 371 (Bom)	80	Cacher Ch. re. (1867) 1 L & Ch App 412
BTTR plc, re, (2000) 1 BCCL 740 (CA)	234	Caddies v Hamilt Holdsworth & Co, 1951 SC 11, 27
Buchalter v Talbot, (2004) 2 AC 298; (2004) 2 WLR 882; (2004) 120 Comp Cas 756 (HL)	710	Calculating and Business Machines (Pt) Ltd v State of Bihar, (1963) 54 Comp Cas 100 (Pat)
Buckingham v Francis, (1986) 2 All ER 738 (QBD)	441	Calcutta Chemical Co Ltd v Dharendra Chandra Roy, (1985) 58 Comp Cas 275 (Ca)
Buenos Aires Great Southern Railway Co, re, 1947 Ch 384	226	Calcutta National Bank v Rangamoni Tea Co, AIR 1969 Cal 573
Bugle Press Ltd, re, 1961 Ch 270; (1960) 3 WLR 566 (CA)	633	Calcutta Safe Deposit Co Ltd v Ranjiti Mahimaleswari Sengupta, (1971) 41 Comp Cas 1963 (Cal)
Bukharpur Bihar Light Railway Co Ltd v Union of India, AIR 1964 Cal 499; (1964) 2 Comp Cas 307	652, 653, 664	Calcutta Security Printers Ltd v Calcutta Phototype Co Ltd, (2002) 112 Comp Cas 434 (CLB)
Bursford v Earle, 1902 AC 93; 98 LT 553 (PC)	300, 415	Calcutta Stock Exchange Assn Ltd v Kandy, ILR (1950) 1 Cal 235
Burnmark Investments Ltd, re, (2000) 1 BCCL 353 (NZCA)	482	Calcutta Stock Exchange Assn, re, AIR 1957 Cal 438
Bushell v Hill, (1968) 2 WLR 1057; (1969) 1 All ER 1002 (CA)	386	Caldwell v Caldwel & Co, 1916 SC 120; 1966 WN 70 (HU)
Bushell v Faith, 1970 AC 1099; (1970) 2 WLR 272 (HL)	93, 282, 283	Calmer Ltd, re, (1999) 1 All ER 485; 1989 BCCL 299 (CLD)
BVSS Manu & Kowtha Business Syndicate (P) Ltd, (1969) 65 Comp Cas 305 (AP)	657	Cambridge Coffee Room Assn Ltd, re, (1952) 1 All ER 112
BWE International Ltd v Jones, (2004) 1 BCCL 406 (CA)	154	Campbell v Maund, (1835) 42 All ER Rep 648
Byford Ltd v STC, (1981) 51 Comp Cas 561 (Del)	622	Canada Enterprises Corp Ltd v MacNab Distilleries Ltd, (1987) 1 WLR 813 (CA)
Bying v Roman Life Assn Ltd, (1999) 1 WLR 238; 1989 BCCL 400 (CA)	383	Canada Trust Co v Lkyd, (1968) 66 DLR (2d) 722
Bysani Anjaneyulu v Trilinga Technical & Management Consultant (P) Ltd, (2002) 114 Comp Cas 37 (AI)	670	Canadian Afro Service Ltd v O' Malley, (1973) 40 DLR (3d) 371 (Can)
C Dineswami Iyengar v United India Life Assurance Co, (1956) 49 L & W 57; AIR 1956 Mad 316	46	Canara Bank v Andhra Granite Ltd, (1999) 17 Comp Cas 511 (CLB)
C Evans & Sons Ltd v Spritebrand Ltd, 1985 BCCL 105 (CA)	282, 284	Canara Bank v Maped India Ltd, (2006) 132 Comp Cas 612 (AP)
C Hariprasad v Amalgamated Commercial Traders, (1964) 1 Comp LJ 339; AIR 1964 Mad 519; (1966) 21 Comp Cas 209	405	Canara Bank v NIPCO, (2001) 1 SC 43; (2001) 104 Comp Cas 97
C K Siva Subbu Pillai v Kerala Financial Corps, (1980) 50 Comp Cas 717 (Ker)	455	Canara Bank v Premier Agro Cool Tech (P) Ltd, (2004) 129 Comp Cas 581; (2004) 56 SC 2, 366 (CLB)
C Mathew v Cochin Stock Exchange Ltd, (1997) 4 Comp LJ 455; (1997) 26 CLA 312 (CLB)	168	Canara Bank Ltd v Thampa, (1972) 42 Comp Cas 173 (Ker)
C Sri Hari Rao v Sri Ram Dev Motor Transport (P) Ltd, (1999) 97 Comp Cas 665	573	Capita Land Investments Ltd v Sea Rock Investments Inc, (1999) 35 CLA 209 (CLB)
		Candler v Crane, Christmas & Co, (1961) 2 KH 164
		Cannanore Whole Body CT Scan & Research Centre (P) Ltd v SV Saibunnisa, (1998) 93 Comp Cas 99 (CLB)
		367

L Company Law

Cepaco Industries plc v Dickman, (1990) 2 AC 605; (1990) 2 WLR 358; 1990 BCAC 273 (HL)	120, 449
Cepaco Industries plc v Dickman, 1988 BCAC 387 (QB)	449
Cepaco Industries plc v Dickman, 1989 QB 653; (1989) 2 WLR 316 (CA)	440, 448
Capital Prime Properties pl. v Worthgate Ltd, (2000) 1 BCAC 647 (Ch D)	726
Carbon Corp. Ltd v Abbudaya Properties (P) Ltd, (1992) 73 Comp Cas 572 (CLB)	160
Cardamom Mktg Co v N Krishna Iyer, (1982) 52 Comp Cas 279 (Ker)	270
Cardiff Chemicals Ltd v Fortune Bio-Tech Ltd, (2005) 126 Comp Cas 225 (CLB)	148
Caribbean Cr. v (Trickler case), (1875) LR 10 Ch App 614; 46 LJ Ch 870	150
Carlton Holdings Ltd, re, (1971) 1 WLR 918	633
Carey v Herbert, 1965 AC 301; (1964) 3 WLR 1303 (PC)	246
Carpenter's Patent Davis Boat Lowering & Detaching Gear Co, re, (1888) 1 Min 26	643
Carruth v Imperial Chemical Industries Ltd, 1917 AC 207 (HL)	234
Cartier v Wake, (1877) 1 LR 1 Ch D 605	185
Casterbridge Properties Ltd, re, Jeeves v Official Receiver, (2004) 1 BCAC 76 (CA)	635
Castiglione's Will Trusts, re, 1958 Ch 349; (1950) 2 WLR 403	349
Casual Capers Ltd, re, (1980) 1 NZBC 98	239
Catesby v Burnett, (1916) 2 Ch 325	383
Catholic Life & Fire Assurance & Annuity Institute, re, (1883) 43 LT 675	432
Cattonic (UK) Ltd v Devonic, 1991 BCAC 721 (CA)	45
Cawley & Co, re, (1849) 1 R 42 Ch D 209; 61 LJ 601 (CA)	205, 336, 396
CB-Bhandari v Prudent Fund Inspector, (1988) 63 Comp Cas 487 (Ker)	493
CBS Gramophone Records and Tapes (India) Ltd v S. Naoroodeen, (1992) 73 Comp Cas 494 (Ker)	341
Celtic Extraction Ltd, re, (1999) 4 All ER 694 (CA)	726
Central Bank Executor & Trustee Co Ltd v Magna Elast Temp Ltd, (1997) 69 Comp Cas 40 (AP)	320, 486
Central Bank of India v Amlalal Sarabhai Enterprises Ltd, (1999) 3 Comp L 99 (Guj)	615
Central Bank of India v Asian Global Ltd, (2010) 11 SCC 203; (2010) 4 SC 418; (2011) 1634 Comp Cas 394	474
Central Bank of India v Elmo Engg Co, (1990) 4 SCC 159; (1990) 81 Comp Cas 13	125, 477
Central Bank of India v McKenzies Ltd, (1977) 47 Comp Cas 305 (Bom)	669
Central Bank of India v Recovery Mamlatdar, (1996) 80 Comp Cas 284; (1996) 23 CLA 167 (Guj)	714
Central Bank of India v Surat Textile Industries Ltd, (1998) 28 CLA 62 (CLB)	460
Central Bank of India v Sukhani Mining Industries, (1977) 47 Comp Cas 1 (Pat)	664
Central Klamdyke Gold Mining & Trading Co Ltd, re, 1899 WN 1	195
Central Tipperah Tea Co Ltd, re, (1966) 2 Comp L 82 (Cal)	696
Centralcrest Engg Ltd, re, 2000 BCC 727	738
Centron Industrial Alliance Ltd v Pravin Kantilal Vakil, (1985) 57 Comp Cas 12 (Bom)	626
Cetex Petrochemicals Ltd, re, (1992) 73 Comp Cas 298 (Mad)	605
Chadra Chemicals Ltd v Jef Button Kavasmaneck, (2006) 129 Comp Cas 643 (Bom)	340
Chaitanya D. Mehta v SBBI, 2004 CLC 498 (SAC)	319
Chaitra Rajendra Prasad v Asian Coffee Ltd, (1999) 2 ALD 372; (2000) 103 Comp Cas 17	123
Chaitra Rajendra Prasad v Asian Coffee Ltd, (1999) 20 CLC 414 (AP)	376
Chachundi Chemicals & Fertilisers Ltd v MC Cherian, (1993) 77 Comp Cas 1 (Ker)	731, 735, 737
Chand Mall Panchal v Hathi Mall Panchal, (1999) 95 Comp Cas 368 (Guj)	373
Chandruji Steamer Service Co, re, (1955) 63 CWN 279	460
Chandrakant Khare v Shantaram Kale, (1988) 4 SCC 372; (1989) 65 Comp Cas 121	382
Chandrakant Mulraj v TELCO, (1985) 58 Comp Cas 527 (Bom)	412
Chandra Prasad Sinha v Bala India Ltd, (1997) 168 Comp Cas 81 (CLB)	556, 557
Change Mat v Provincial Bank Ltd, ILR (1914) 36 All 412; (1924) 25 IC 210	94
Charanjit Lal Chowdhury v Union of India, AIR 1951 SC 41; 1951 SCR 669; (1951) 21 Comp Cas 35	14, 187, 240
Charanjit Singh Ghuman v Dr Reddy's Laboratories Ltd, (1997) 25 CLA 204 (CLB)	559
Charitable Organ v Sardhu, (1943) 36 ECR 642	322
Chazwick Colleteres Co Ltd v Gholanath Dhar, ILR (1912) 29 Cal 610	92, 91

Charterbridge Corp Ltd v Lloyds Bank Ltd,				
1970 Ch 62; (1969) 3 WLR 122	65			
Chatterjee Petroluem (India) (P) Ltd v Hindustan Petrochemicals Ltd, (2001) 10 SCC 466;				
(2001) 167 Comp Cas 373	531, 534, 630			
Chatterley-Wallfield Collieries Ltd, re, (1948) 2 All ER 949 (CA)	228			
Chaudhary Builders (P) Ltd v Sanghi Bros (Indore) Ltd, (2000) 37 CLA 341 (MP)	461			
Chaugule v New Kaiser-i-Hind Spg and Wwg Co, (1968) 2 Comp LJ 28 (Bom)	634			
Cheilco Orelund Products Ltd, re, (2004) 4 Kant LJ 83; 2004 AIR Kajri & 2323; (2004) 121 Comp Cas 1	603			
Chennabasappa Kothaibari v Multigear Industries (P) Ltd, (1995) 57 Comp Cas 541 (Kant)	539			
Chesterfield Catering Co Ltd, re, (1976) 5 All ER 294	667			
Cleebill Das v Engenrodt, AIR 1914 Lah 125	532			
Clubtansingh; Nihlasingh Vaghela v State of Gujarat, (1998) 2 Guj 1-K 1426; (1998) 29 CLA 470 (Guj)	763			
Chida Mines Ltd v Anderson, (1905) 22 ILM 27	359			
Chitambaram Chellam v Krishna Aiyangar, ILR (1910) 33 Mad 36 (1910) 1 IC 803	89			
Chief Controlling Revenue Authority v Reliance Industries Ltd, 2016 SCC Online Bom 1429; (2016) 193 Comp Cas 259 (PB)	623			
Chief Controlling Revenue Authority v State Bank of Mysore, AIR 1968 Kant 1 (1967) 3 Kant LJ 438; ILR 1967 KAR 2919; (1969) 65 Comp Cas 427 (PB)	429, 486			
Chinni v Collins, 1961 AC 525; (1947) 2 WLR 14 (H.L.)	158			
Chiranjiv Singh v Omega Exports (P) Ltd, 2015 SCC OnLine CLB 139; (2015) 192 Comp Cas 597	514			
Chitra Kumar Basu v Property Development Trust Ltd, (1999) 93 CWN 725	21			
Chloro Controls (India) (P) Ltd v Seven Trent Water Purification Inc, (2006) 3 Bom CR 119; (2006) 131 Comp Cas 501	666			
Chokkalingam v Official Liquidator, AIR 1944 Mad 87	207			
Choco Financial Services (P) Ltd v SEBI, (2005) 2 Comp LJ 437 (SAT)	192			
Chowdhury Sudh v Bhagwan Finance Corp (P) Ltd, (2006) 150 Comp Cas 567 (CLB)	165			
Choudhary Builders (P) Ltd v Sanghi Bros (Indore) Ltd, (2000) 1 Comp LJ 236	461			
Choudhury Matrix Hebs Ltd v Chowgule & Co Hind (P) Ltd, 2000 CLC 1830 (AP)	178			
Christineville Rubber Estates Ltd, re, (1921) 91 (1) Ch 63; 106 (1) 250; 1911 W.N. 716	115, 124			
Christopher Moran Holdings Ltd v Fairclough, (1996) 1 BCAC 547 (Ch D)	726			
Chua Kien How v Commonwealth Trading (P) Ltd, (1999) 1 SCR 486 (Mal)	650			
Chuter v Freeth & Powcock Ltd, (1911) 2 KB 832	262			
Cine Industries & Recording Co Ltd, re, AIR 1942 Bom 231; (1942) 12 Comp Cas 215	649, 667			
CIT v Associated Contractors Ltd, AIR 1963 Cal 129	18			
CIT v Bharat Nidhi Ltd, (1982) 52 Comp Cas 80; (1982) 133 ITR 447 (Del)	174, 186			
CIT v Cherian Transport Corps Ltd, (1992) 74 Comp Cas 363 (Mad)	25			
CIT v Chennai Kharhalay, (1974) 93 ITR 369; (1974) 44 Comp Cas 93 (Guj)	416, 417			
CIT v City Mills Distributors (P) Ltd, (1996) 2 SOC 325	41			
CIT v Dalmia Magnesite Corp, (1996) 9 SCC 166; (1999) 96 Comp Cas 292	623			
CIT v Express Newspapers Ltd, (1998) 3 SCC 106; (1998) 3 Comp LJ 23	414			
CIT v India Diamond Co Ltd, (1969) 2 SCC 514; (1970) 25 ITR 191	180			
CIT v Industrial Credit & Development Syndicate Ltd, (1998) 2 Comp LJ 266 (Kant)	215			
CIT v KTC Tyres (India) Ltd, (2014) 385 Comp Cas 17 (SC)	712			
CIT v M Ramaswamy, (1987) 57 Comp Cas 7 (Mad)	175			
CIT v Manipal Industries Ltd, (1997) 12 SC 15 (TAT)	205			
CIT v MV Marugappan, (1970) 2 SCC 145; (1970) 40 Comp Cas 994	715			
CIT v Official Liquidator, (1970) 41 Comp Cas 415 (Raj)	709			
CIT v Sri Meenakshi Mills Ltd, AIR 1967 SC 114; (1967) 90 C 934; (1967) 63 ITR 609	12, 18			
CIT v Standard Vacuum Oil Co, AIR 1966 SC 1393; (1966) 1 Comp LJ 167	187, 193, 404			
CIT v Swastik Rubber Products, (1983) 53 Comp Cas 124 (Cal)	611			
CIT v VSSV Meenakshi, (1984) 55 Comp Cas 545	241			
CIT (Ag) v Shree Hanuman Sugarc Mills Ltd, AIR 1965 Pat 58; (1966) 54 JLR 173	43			
CIT Manik N.A v Power Grid Corpn of India, (1995) 17 CLA 25; (1995) 83 Comp Cas 454 (CLB)	169			

City Equitable Fire Insurance Co. re. (1925) Ch 407; 103 LT 520 (CA)	315, 322, 440, 443, 444	Coleman v Myers , (1977) 2 NZLR 225	258
City Equitable Fire Insurance Co. re. (1925) Ch 407; 1924 All ER Rep 485; 133 LT 520 (CA)	257	Collector of Moradabad v Equity Insurance Co , AIR 1918 Oudh 157; (1948) 18 Comp Cas 109	211
Claytidge's Patent Asphalt Co. re. (1921) 1 Ch 543; 125 LT 255	318	Colonial Bank v Cady , (1890) LR 15 AC 267 (HL)	185
Clasper Group Services Ltd. re. 1989 BCLC 143 (Ch D)	721	Colonial Bank v Frederick Whitney , (1886) 1 R 11 AC 426	185
Claude-Lila Paroleesar v Sakaipapers (P) Ltd. , (2005) 11 SLC 73; (2005) 126 Comp Cas 685	159, 162, 175, 176, 177, 372	Colonial Bank v Hepworth , (1887) 36 Ch D 36	185
Clovering Sun & Co v Goodwins Jardine & Co , (1891) 18 R 632 (ED)	358	Coldman , re, (1881) LR 19 Ch D 64	71
CLB Kishore Y Patel v Patel Engg Co Ltd , (1999) 79 Comp Cas 52 (Bom)	372	Coltness Iron Co. re. 1951 SC 426; 1951 SLT 344 (IH)	327
Cleland Trust Ltd. re. 1959 Ch 286 (CA)	359	Comal Infowraps (P) Ltd. re , IJR 2004 KAR 2544; (2014) 5 Kam LJ 393; (2014) 53 SCL 41	625
Clemens v Clemens Bros Ltd , (1976) 2 All ER 269 (Ch D)	242, 521	Combusit Technic (P) Ltd. re , (1988) 60 Comp Cas 572 (Cal)	540
Cleveland Trust plc. re. 1991 BCLC 421 (Ch D)	434	Combusit Technic (P) Ltd. re , (1993) 1 Comp LJ 61 (Cal)	528
Clinton's Claim. re. (1908) 2 Ch 515; 91 I.J. 632 (CA)	42	Comme Cause v Transstar Investments Ltd , (1997) 88 Comp Cas 471 (Mad)	256
CM Varkeyahari v TV Mathew , (2002) 106 Comp Cas 189 (Ker)	396	Commonwealth Tide Insurance & Trig Co v Soltau , 227 Pa 410; 76 AH 77 (1910)	306
CN Shetty v Hilltop Hotel (P) Ltd , (1996) 87 Comp Cas 1 (APL)	531	Comm v Hindustan Union Infrastructure Ltd, (2015) 3 SCL 747; (2015) 189 Comp Cas 253 (SC)	691
CN Shetty v Hilltop Hotels Ltd , (2001) 104 Comp Cas 722 (APL)	531	Comm v Vellappa Textiles Ltd , (2003) 11 SCL 405; (2005) 203 ITR 550	365
Coorscraft Ltd v SWP Fruit Co Ltd , (1978) 9 M.L.R 456	158	Comm (Assessment) v Official Liquidator , (2014) 185 Comp Cas 21 (Ker)	712
Com Economising Gas Co. re. (1875) LR 1 Ch D 182; 33 LT 619	125	Comm of Ireland Revenue v Sansom , (1921) 2 KB 492; 125 LT 37	7
Coal Mining Co. re. (1876) 10 Ch D 450; 40 LT 287	754, 757, 758	Comm Lucknow Division v Commr, Pratapgarh , (1937) 41 CWN 1072; A.I.R. 1937 PC 240	372
Coal Mktg Co of India Ltd. re. (1940) 1 Comp LJ 237 (Cal)	319	Compact Power Sources (P) Ltd. re. (2005) 125 Comp Cas 289 (AP)	608
Cochin Malabar Estates & Industries Ltd v PV Abdul Khader , (2003) 114 Comp Cas 777 (2003) 2 KLJ 1	631	Competent Hotels (P) Ltd. re. (2017) 200 Comp Cas 16 (Raj)	614
Cuetbo (A) v South India Tea & Coffee Estates Ltd , (1966) 13 Comp Cas 401; CLB	168	Connors Bros Ltd v Connors , (1940) 6 All ER 179 (PC)	19
Craibstone Cotton Mills Ltd & Lakshmi Cotton Mills Co Ltd. re. (1960) 50 Comp Cas 623 (Mad)	622	Connolly Bros Ltd. re. (1912) 2 Ch 25; 106 LT 754 (CA)	493
Cribbitv Kammala Mills Ltd v T Sundaram , (1950) 1 MLJ 908; (1950) 20 Comp Cas 61	156	Corporation of Maharashtra Bank AG , 2013 BCLC 177 (Recallant)	643
Crolab Land & Mills Co v Vasani Investment Coopn. (1963) 2 Comp LJ 59	269	Cook v Deeks , (1914) 1 AC 204	500, 500
Crolab Land & Mills Co Ltd. re. (1968) 38 Comp Cas 26; (1968) 67 ITR 299 (Bom)	678	Couper , re, 1902 WN 199; 31 W.R. 314	607
Coleman v London County & Westminster Bank Ltd , (1916) 2 Ch 353	383	Cosletti Contractors (P) Ltd. re. (1996) 1 BCLC 437 (Ch D)	481
		Cotman v Birmingham , 1918 AC 514; 119 LT 162 (LIL)	62, 65, 69
		Cottam v GLS Properties Ltd , (1995) 7 NZCLC 260	239

Coltorti Corp of India Ltd v Radhakrishna Mills Ltd, (1993) 26 Comp Cas 637 (Mad)	577
Coltorti Corp of India Ltd v Telangana Spg & Weig Mills Ltd, (2008) 33 Comp Cas 543- (2005) 61 SCC 219 (AP)	236
Counter Point Advt (P) Ltd v Harita Finance Ltd, (2006) 133 Comp Cas 435; (2006) 2 CCTC 501	676
Countrywide Banking Corp v Denn, (1998) 1 BCLC 306	722
County of Gloucester Bank v Rudy Merthyc Steam & House Coal Colliery Co, (1825) 1 Ch 629 (CA)	93
Coupe v JM Coupe Publishing Ltd, (1981) 1 N.Y. R. 775 (IA)	258
Cousin's International Brick Co, (1913) 2 Ch 90 (CA)	390
Coveling Beach Hotels (India) Ltd, re, (2002) 112 Comp Cas 17 (Mad)	623
Cowasjee v Nath Singh Oil Co Ltd, (1921) 39 I.C. 524	649
CP Gnanasambandam v TN Transports (P) Ltd, (1971) 41 Comp Cas 26 (Mad)	511
CR Prayagendra Kumar v Purnawalkam Permanent Fund Ltd, (1993) 83 Comp Cas 191 (Mad)	379, 397
Cranleigh Precision Engg Ltd v Bryant, (1965) 1 WLR 1293	301, 303
Craven-Jones v Canens Ltd, (1946) 2 KB 409 (CA)	342, 352
CRB Capital Markets Ltd v Beema Devi Sahney, (2006) 132 Comp Cas 738 (Del)	204
Credit Assurance and Guarantee Corp Ltd, re, (1902) 2 Ch 601	234
Creditors of Redrock Ltd v Redrock Ltd, (1998) 7 Bom LR 5	610
CKMF Finance Ltd v Shree Shanti Homes (P) Ltd, (2005) 7 SCC 167; 2005 SCC (Cri) 1697; (2005) 127 Comp Cas 311	474
Cricket Club of India v Madhav L Apte, (1975) 45 Comp Cas 574 (Bom)	272, 371, 372
Crivannan Disney, re, (1996) 2 KLT 664	649
Crown Bahrain v Suttor and Fulton River Projects Ltd, (2004) 1 BCLC 468 (CJLD)	302
Crownbank & Co Ltd v Stridewell Leather (P) Ltd, (1995) 17 CLA 415; (1996) 86 Comp Cas 439 (CLB)	159
CS Lognathan v Registrar, (1964) 1 Comp LJ 211 (Ori)	319
CTS v Oswal Woollen Mills Ltd, (1981) 51 Comp Cas 732 (Del)	409
Colferne v London & Suburban General Permanent Building Society, (1897) 26 QBD 485; 63 LT 511 (CA)	322
Colinbräu Newspapers Group Ltd v Cumberland & Westmorland Herald Newspaper & Printing Co Ltd, 1982 Ch 1 (1980) 3 WLR 26; (1987) 2 Comp LJ 39	89, 244
Customs and Excise Commissr v Hedon Alpha Ltd, (1987) 2 All ER 697 (CA)	321
Cuthbert Cooper & Sons Ltd, re, 1997 Ch 392	656
Cuttis, re, (1956) 1 WLR 728 (CA)	720
Cycloneakers' Coop Supply Co v Sims, (1903) 1 KB 477 (DC)	748
Cyana Distributors Ltd, re, 1957 Ch 689 (CA)	229
D Doss v CP Connell, AIR 1938 Mad 124	324
D Kott Reddy v Auroreous Asian Firms Ltd, 2004 SCC Online Hyd 597 (2005) 189 Comp Cas 139	691
D Ross Porter v Pioneer Seed Co Ltd, (1989) 2 Comp LJ 49 (1989) 66 Comp Cas 365 (Del)	353
D Ross Porter v Pioneer Seed Co Ltd, (1990) 65 Comp Cas 145 (Del)	421
D Sitivasaiah v Vellure Varalakshmi Bank Ltd, ILR 1954 Mad 523; AIR 1954 Mad 802; (1954) 26 Comp Cas 55	56
DA Swamy v Indus Meters Ltd, (1994) 79 Comp Cas 27 (Mad)	602
Dabur India Ltd v Anil Kumar Doddla, (2002) 108 Comp Cas 291 (CLB)	282
Daddy S Marda v KR Irani, (1977) 47 Comp Cas 39 (Cal)	165
Dafen, Timplate Co v Llanelli Steel Co (1907) 1st, (1920) 2 Ch 124; 123 LT 225	501
Daimler Co Ltd v Continental Tyre & Rubber Co Ltd, (1916) 2 AC 307 (HL)	13, 16, 260, 359
Dairy Containers Ltd v NZI Bank Ltd, (1995) 2 NZLR 30	331
Dalbir Singh v Sakaw Industries (P) Ltd, (1983) 54 Comp Cas 359 (Cal)	697
Dale Elgg, (P) Ltd, II Sarla Prabhakar Padhye, (2010) 4 SCC 308	24
Dale & Carrington Investments (P) Ltd v PK Prathapan, (2007) 310 Comp Cas 910 (CLB)	164
Dale & Plant Ltd, re, (1999) 61 CLT 206; 5 TLR 585	25
Delip Singh Sachat v Mata Katta Coal Carriers (P) Ltd, (2006) 130 Comp Cas 641 (CLB)	278, 829
Dalmia Cement (Bharat) Ltd v Registrar of Joint Stock Companies, AIR 1954 Mad 776	369
Damodar Das Jain v Krishna Charan Chakraborti, (1965) 57 Comp Cas 115 (Bom)	741

Damodar Das Jain v Krishna Chatterji Chakrabarti, (1989) 4 SCC 531 AIR 1991 SC 202 (Cri) 420 (1940) 67 Comp Cas 504	761	Deepak Lehta v Kamrup Developers (P) Ltd. (2003) 116 Comp Cas 184 (CLB)	529
Danels v Anderson, (1995) 16 ACSR 607	315	Deepika Leasing & Finance Ltd v Deepika Chit Fini (P) Ltd, (2005) 3 Comp L.J. 51 (AP) ..	616
Danels v Daniels, 1977 New L.J. 938	319	Deflin International (SA) Ltd, re, (2003) 1 BCLC 22 (Ch.D)	583
Dankha Devi Agarwal v Tara Properties (P) Ltd, (2006) 7 SCC 382, (2006) 103 Comp Cas 236	280	Dehra Dun Mussoorie Electric Tramway Co Ltd v Jagmohan Das, AIR 1932 All 341	92
Darius Buttan Kavasmaneek v Ghanda Chemicals Ltd, 2014 SCC OnLine Bom 1851; (2015) 191 Comp Cas 52	12	Delavenee v Broadhurst, (1931) 1 Ch 234; 544 LT 342	151, 153
Darius Buttan Kavasmaneek v Ghanda Chemicals Ltd, (2015) 14 SCC 277; (2015) 186 Comp Cas 291	6, 159	Delhi Floor Mills Co Ltd v Indian Hardware Industries Ltd, (1993) 53 Comp Cas 814; ILR 1990 Del 1162	611
Darshan Antilal Patel v Gitanjali Hotels (P) Ltd, (1995) 2 Bom CR 440, (1994) 81 Comp Cas 806	682	Deloitte Haskins & Sells v National Mutual Life Nominees Ltd, U1991E5 NY CLC 67	337
Darshan Forgings (P) Ltd v Punjab Financial Corporation, (2000) 14 Comp L.J. 55 (P&H)	706	Demite Ltd v Pratec Health Ltd, 2008 RCC 558	347
Dartmouth College v Woodward, 4 L Ed 629; 17 US 518 (1819)	253	Dena Bank Ltd, re, (1976) 46 Comp Cas 541 (Bom)	610
Daulat Makanmal Luthria v Sodhaire Hotel's (P) Ltd, (1993) 26 Comp Cas 215 (Bom)	650, 662	Denham & Co, re, (1889) 25 Ch D 792; 59 I.T. 523	323
Daven Products Ltd v Rameshwari, AIR 1954 Cal 195	612	Dandhat Sharma v Zahoor Ahmed Zaid, 1960 KLR 446, AIR 1960 Raj 25	383
David Payne & Co Ltd, re, (1903) 2 Ch 618 (CA)	456	Detham & Alien Ltd, re, 1946 Ch 31	207
Davis & Co Ltd v Buzzwick Australia Ltd, (1936) 1 AILER 299 (PC)	634	Declarative Co Ltd v Ashworth, (1905) 21 TLR 510	33
Davis & Collett Ltd, re, 1935 Ch 498, (1936) 5 Comp Cas 467	650, 658	Derry v Peek, (1859) LR 14 AC 337 (HL) 113, 212, 318, 421, 445	
Dawson v Afocan Consolidated Land & Trading Co, (1893) 1 Ch 677 LT 392 (CA)	305, 351	Des Raj v Punjab Financial Corp., (1970) 40 Comp Cas 551 (P&H)	464
Dayal Singh v Des Raj, (1962) 1 Comp L.J. 100 (Punj)	396	Desai (P) Ltd v Electram India Ltd, (2013) 116 Comp Cas 341 (CLB)	520, 526
Dayaram Agarwal v Ashok Industries (P) Ltd, (2006) 130 Comp Cas 172 (CLB)	535	Deutsche Balloch Power Systems Ltd, re, (1999) 77 Comp Cas 391 (CLB)	58
DCM Ltd v Lt Governor, (1998) 71 DLT 70	742	Deutsche Bank v SP Kalra, (1998) 4 Bom CR 235; (1999) 94 Comp Cas 841	479
DD Srinivas v Official Liquidator, (2004) 118 Comp Cas 112 (Raj)	684	Deutsche Bank v SP Kalra, 1991 Mad J 728 (1992) 74 Comp Cas 577	690
DDA v Skipper Construction Co, (1997) 11 SCC 430; (1997) 89 Comp Cas 362	14, 19	Deutsche Bank AG v Prithvi Information Solutions Ltd, (2014) 1 ALD 233; (2014) 182 Comp Cas 10	477
DDA v Skipper Construction, (2013) 11 SCC 609	690	Deutsche Bank AG v Prithvi Information Solutions Ltd, (2012) 171 Comp Cas 116 (AP) ..	472
De Beers Consolidated Mines Ltd v Howe, 1996 AC 455 (HL)	34	Deutsche Dampfschiffahrt v Bharat Aluminium Co, (1981) 55 Comp Cas 727 (Cal) ..	745
Deb Paints (P) Ltd v Universal Lime Industries, (2002) 1 Cal L.C. 94; (2002) 101 Comp Cas 429	665	Deutsche Trustee Co Ltd v Maxxim Global Ltd, (2013) 181 Comp Cas 223 (Mad)	663
Debasish Delta v BG Seadder & Sons (P) Ltd, (2003) 115 Comp Cas 70 (CLB)	700	Devaraj Dharam v Firnbirks & Bottles (P) Ltd, (1994) 79 Comp Cas 722; (1991) 4 KLJ 348	520, 535
Devi Jimira Tea Co Ltd v Barindra Krishna Bhowmick, (1980) 50 Comp Cas 771 (Cal)	540	Devganga Traders v Official Liquidator of Mahendra Mill Ltd, 2012 SCC OnLine Guj 3282; (2010) 186 Comp Cas 407	690

Devi Ditta Mal v Standard Bank of India, AIR 1927 Lah 297 (1927) 101 IC 568	94
Devi Talkies (P) Ltd v VR Parthasarathy Iyenger, (1982) 52 Comp Cas 242 (Mad)	278
Devindar Kishore Mehra v Official Liquidator, (1979) 16 DLT 150, (1980) 50 Comp Cas 699	684
Dewan Singh Elara Singh v Minerva Films Ltd, AIR 1939 Punjab 106	94, 365
Dey & Hollinger Engg Co, (1921) 1 KB 77 (DC)	93
Dhanteri Cotton Mills Ltd v Nil Kamal Chakravorty, AIR 1937 Cal 645, 173 IC 622, 41 CWN 1137	387, 504
Dhananjay Pandit v Birla Surgical & Medical Institute (P) Ltd, (2005) 125 Comp Cas 626 (CLB)	102, 512
Dhar Cement Ltd C (in Liquidation), re, 2014 SCC OnLine MP 1396, (2014) 187 Comp Cas 366	662
Dhaval N Patel v CTJ, (2014) 184 Comp Cas 367 (Guj)	19
Dhankhar Tea Co Ltd, re, AIR 1957 Cal 476, (1958) 28 Comp Cas 62	165
Dhirubhai H Ambani v Sonia Sethi, (2001) 318E Comp Cas 486 (MP)	149
DIN Food Distributors Ltd v Tower Hamlets London Borough Council, (1976) 1 WLR 352 (2)	25, 30
Dhulia-Anand Motor Transport Ltd v Raychand Kapoor Dharamshi, [LR 1952 Bom 795; AIR 1952 Bom 337]	8
DIL Lal v S Ganguli, (1990) 68 Comp Cas 576 (Del)	158, 180
Diamond v Creammure, 24 NY 2d 494, (1969)	311
Diamond Fuel Co, re, (1976) LR 13 CLD 400, 41 LT 217 (CA)	667
Diamond Mfg Co Ltd v Hamilton, 1968 NZLR 205	447
Dillibalan Singh v New Sonarpur Transport Co (P) Ltd, (1985) 48 Comp Cas 247 (P&H)	239
Dumbatta Valley (Croydon) Tea Co Ltd v Lourac, (1962) 1 Cr 353	408, 415
Dinidas Shankar Thange v State of Maharashtra, (1998) 17 SCL 194 (Bom)	29
Dinesh Gandhi v Boyce Diagnostics India Ltd, (2002) 111 Comp Cas 547 (CLH)	56
Dinesh Sud v Sutchnelli Quatlex (P) Ltd, 2013 SCC OnLine Del 3734, (2014) 184 Comp Cas 325	120
Dinkar Rai D Desai v RP Bhates, (1985) 1 Comp 1438, (1986) 60 Comp Cas 14 (Del)	369
Dinslaw & Co Bankers Ltd, re, AIR 1937 Oudh 62	458, 460
Dinslaw Maneckjee Petit, re, AIR 1927 Bom 371	17
Dipak G Mehta v Ausipar Chemicals (India) Ltd, (1999) 98 Comp Cas 529 (CLB)	536
Dipak Kumar Jayantilal Shah v Atul Products Ltd, (1995) 82 Comp Cas 603 (CLB)	152
Direct Line Group Ltd v Direct Line Estate Agency Ltd, 1997 FSL 374	56
Director of Central Railway Co v Kochi, (1967) LR 2 ML 99, 36 L Ch 849, 16 LT 500	126
Director of Public Prosecutions v Kent & Sussex Contractors Ltd, 1944 KB 146	261
Discoverex Finance Corp Ltd, re, (1910) 1 Ch 219	152
Divya Chemicals Ltd, re, (2005) 127 Comp Cas 853 (Bom)	206
Divya Mfg Co (P) Ltd v Union Bank of India, (2000) 6 SCC 69, (2000) 38 CLA 206	689
Diwan Chand v Gujranwala Sugar Mills Co Ltd, AIR 1937 Lah 644	127
Diwan Chand Kapoor v New Kishan Chawla (P) Ltd, (1957) 62 Comp Cas 810, (1965) 28 DET 310	443
Dixon v Kennaway & Co, (1930) 1 Cr 832, 82 T 577	109, 129
Dixion Group plc v Murray Obodyski, (2004) 1 BCAC 1 (CA)	182
DK Chatlaji v Rapti Supertronics (P) Ltd, (2003) 114 Comp Cas 265 (CLB)	390, 531, 532
Donoghue v Stevenson, 1932 AC 562, 1932 All ER Rep 1 (HL)	316, 672
Doogar and Associates Securities Ltd v SEBI, (2005) 2 Comp L 51, 2 (2005) 59 SC 1, 336 (SAT)	192
Doverchester Finance Co Ltd v Shobhang, J Co Lawyers 26 USA, 1989 BCAC 498 (Ch Dj)	315, 317
Dorman, Long & Co, re, 1934 Ch 635	604, 605, 633
Dowable S Printers Ltd, re, (1999) 1 BCAC 223	482
Dove Investment (P) Ltd v Gujarat Industrial Investment Corps Ltd, (2005) 124 Comp Cas 399 (Mad)	175
Dowry v Dowry, 1901 AC 477	323, 325, 405
Downview Nutrition Ltd v First City Corp Ltd, 1993 AC 295, (1993) 2 WLR 96, (1994) 1 Comp L 31 (PC)	489
DPP v Schildknecht, (1969) 3 All ER 1640 (HL)	728
Dromfield Silkstone Coal Co, re, (1888) LR 17 Ch D 76	211
Drum v Gaumont-British Picture Corp Ltd, 1937 Ch 402	193

D S Venkateswaran v Gujarat Industries (P) Ltd, (1977) 47 Comp Cas 352; 1977 Tax LR 2323 (Bom)	613	EID Season United Mills, re, AIR 1929 Bom 38	357
DSQ Holdings Ltd v ECDI, (2005) 60 SCL 256 (SAT)	310	Endystone Marine Insurance Co, re, (1895) 3 Ch 9; 69 LT 363	207, 417
DTC (CNC) Ltd v Gary Sergeant & Cix, (1996) 1 TCC 329 (Ch D)	450	Edgington v Tilzmaurice, (1885) 13 LT 29 Ch D 459; (1885) 53 LT 364	112, 118
Duffy Settlements, re, 1951 Ch 923 (CA)	193	Edginton v Dugdale Steam Laundry Co, (1908) 11 SLT 117 (OH)	359
Dulan v ENS Factors plc, (2003) 2 BCLC 411 (Ch D)	170	Edward Keenster Successors (P) Ltd v KK Sud, (1965) 38 Comp Cas 507	376
Dunlop India Ltd v Madura Cements Ltd, 2012 SCC Online Cr 17145; (2014) 166 Comp Cas 460	683	Edwardganj Public Welfare Assoc, re, (1990) e9 Comp Cas 737 (J&EF)	514
Dunlop Triflault Cycle and Tube Mfg Co, re, ex p Alsearman, (1966) 45 LT Ch 25; 25 LT 385 115, 128		Edwards v Halliwell, (1950) 2 All ER 104 (CA)	496
Dunomatic Ltd, re, (1969) 2 Ch 365; (1969) 2 WLR 314	318, 318, 320, 385, 393	Edwin Hill & Partners v First National Finance Corp, 1969 BCAC 99 (CA)	406
Duttaapjan v Waterfall Estates Ltd, (1972) 42 Comp Cas 563 (Mad)	200	Efficient Publications (P) Ltd, re, (1969) 1 Comp L 309 (CLB)	511
Durham Fancy Goods v Michael Jackson (Fancy Goods) Ltd, (1968) 2 QB 809; (1968) 3 WLR 225; (1969) 2 Lloyd's Rep 98	54	Ehrmann Bros Ltd, re, (1908) 2 Ch 597; 95 LT 664 (CA)	460
Ettamaiyal & Co Ltd v Frost, (1998) 4 BCC 3 (CA)	65	EIC Services Ltd v Philippo, 2004 EWCA (Civ) 1069; (2005) 1 WLR 1377 (CA)	42, 193
Eagle Trust plc v SRC Securities Ltd (In re), (1996) 1 BCLC 121 (Ch D)	246	Eita India Ltd, re, (1997) 24 CLA 19 (Cal)	617
Eagle Trust plc v SIC Securities Ltd, (1993) 1 WLR 444; 1997 BCLC 438 (Ch D)	298	Ekmekbasi v Venkatachalam Mills Ltd, (1987) 1 Comp L 133; (1987) 37 Comp Cas 665 (AP)	257
Eaglesfield v Margolis of London (envy), (1976) 1 LR 4 Ch D 693; 35 LT 822 (CA)	124	El Sombrero Ltd, re, 1958 Ch 200; (1958) 3 WLR 319	380, 381
East v Bennett Bros Ltd, (1911) 1 Ch 163; 80 LT Ch 123; 108 LT 826	380	Elaia Nayir v Krishna Pathan, AIR 1944 Mad 74	164
East & West Insurance Co Ltd v Kamala Jayarami (Bal Mehta), AIR 1956 Bom 557	204, 205	Elder Jr Elder & Watson Ltd, 1952 SC 49 (Scotland)	516
East Bengal Sugar Mills Ltd, re, AIR 1941 Cal 343	702	Electra Private Equity Partners v KPMG Peat Marwick, 1998 PNLR 105	450
Eastern Capital Futures Ltd, re, 1988 BCAC 371 (Ch D)	711	Electronic Circuits Ltd (in Liquidation), re, 2015 SCC OnLine Raj 4792; (2015) 191 Comp Cas 282	696
Eastern Counties Railway Co v Hawkes, (1855) 5 111 Cas 321; 10 ER 928	64	Electronics Corp of India Ltd v Govt of AIR 1990) 4 SCC 458; (1999) 97 Comp Cas 420	22
Eastern Telegraph Co Ltd, re, (1948) 18 Comp Cas 46 (Ch D)	652	Eleganza Furnishings (P) Ltd, re, Bank of New York Mellon v Official Liquidator of Zenith Infotech Ltd, 2015 SCC OnLine Bom 6277; (2015) 192 Comp Cas 321	711
Fellow Vale UDC v South Wales Traffic Area Licensing Authority, (1960) 2 KB 366 (CA)	27	Eley v Positive Govt Security Life Assurance Co, (1876) LR 1 Ex D 88; 33 LT 743 (CA)	33
EBM Co Ltd v Dominion Bank, AIR 1937 PC 279	16	Elsecure Technologies (P) Ltd, re, (2013) 176 Comp Cas 297 (Guj)	631
Elshahini v Westbourne Galleries Ltd, 1973 AC 360; (1972) 2 WLR 1289 (HL)	650, 656, 668	Elzington & Co v Millers, (1872) 2 Ch 452, 66 LT 264	255
ED Sason & Co Ltd v K A Patch, (1943) 45 Bom LR 46	180	EM McThapa Chetiar v Salem Rajendra Mills, (1955) 25 Comp Cas 283	155
Emma Silver Minty, Co v Lewis, (1969) 1 LR 4 CPD 394; 40 LT 549	125, 126, 129	Emraa Silver Minty, Co v Lewis, (1969) 1 LR 4 CPD 394; 40 LT 549	125, 126, 129
Emperor v Nasurbin Ali Abdullahi Ladji, AIR 1923 Bom 199	369	Emperor v Nasurbin Ali Abdullahi Ladji, AIR 1923 Bom 199	369

Empire Mining Co. re, (1890) LR 44 Ch D 402; 62 LJ 493	610
Empty Sugars & Chemicals Ltd v Paharpur Cooling Towers Ltd, 2014 SCC Online AY 106; (2014) 187 Comp Cas 28 (AP)	668
English & Colonial Produce Co. re, (1916) 2 Ch 435; 22 TLR 659 (CA)	47
English & Scottish Mercantile Investment Co v Brunton, (1892) 2 QB 200; (1917) 67 LT 406 (CA) ..	483
Eliven Castings (P) Ltd v MM Sundaresan, (2003) 114 Comp Cas 541 (Karn)	737
EOC Tailor Made Polymers India (P) Ltd, re, (2005) 39 SCL J99; (2005) 125 Comp Cas 498 (Bom)	235
Equitable Life Assurance Society v Bowley, (2004) 1 BCILC 360 (QBD)	318
Equity Insurance Co Ltd v Dinshaw & Co, AIR 1910 Oudh 202	466
Equitycorp International plc, re, (1989) 1 WLR 1310; 1889 BCILC 597	335
Eraach Boman Khavas v Tekaram Shridhar Bhast, (2013) 15 SCL 655; (2014) 192 Comp Cas 84	676
Eric Holmes (Property) Ltd, re, 1965 Ch 302; (1965) 2 WLR 1291; (1966) 1 Comp L 19	464, 719, 220
Erlanger v New Sonibreen Phosphate Co, (1878) LR 1 AC 1218; 48 LJ Ch 21; 39 LT 209; 27 WR 65	137
Ernakulam Financiers & Kurries (P) Ltd v Joseph Chandu, (1998) 93 Comp Cas 275 (CLB)	240
Ernest v Loma Gold Mines Ltd, (1897) 1 Ch D 1; 75 LT 317	349
Escorts Ltd v Sri Auton, (1991) 72 Comp Cas 183 (Del)	397
Escorts Ltd v Union of India, (1964) 5 Comp L 387; (1985) 37 Comp Cas 241 (Bom)	291, 299
ESI Cooper v Apex Engg (P) Ltd, (1998) 1 SDC 66; (1998) 1 Comp L 10	342
ESI Cooper v Haryana Biological (P) Ltd, (2011) 163 Comp Cas 202 (P&H)	392
ESI Corp v Official Liquidator, (2006) 131 Comp Cas 652 (Guj)	708
Espacio Trading Co. re, (1879) LR 12 Ch D 191; 308, 210, 257	
Essar Steel Ltd v Gramberry Emerging Market Fund, (2006) 116 Comp Cas 248 (Guj)	665
Essar Steel Ltd, re, (2006) 1301 Comp Cas 124; (2005) 39 SCL 457 (Guj)	201, 205, 205
Essar Usine Corp. v Richemont Silks Ltd, (1999) 21 SCL 137; (1999) 24 CLA 336 (CLB)	559
Estate Aero Ltd v Cross, unreported, noted, 1969 JBL 49	247
Esso Petroleum Co Ltd v Mardon, 1976 QB 811; (1976) 2 WLR 583	447
Estmann (KLiner House) Ltd v Greater London Council, (1982) 1 WLR 2(2)	509
Etisalat Mauritius Ltd v Etisalat DB Telecom (P) Ltd, (2010) 181 Comp Cas 417 (Bom)	651
Etisalat Mauritius Ltd v Etisalat DB Telecom (P) Ltd, (2015) 189 Comp Cas 204 (Bom)	654
Euro India Investments Ltd v Cement Corpn of Gujarat Ltd, (1993) 76 Comp Cas 591 (Guj) ..	220
Eurometal Ltd v Aluminium Cables and Conductors UP (P) Ltd, (1983) 53 Comp Cas 244 (Guj)	661
European Central Rail Co. re, (1872) 1 R 13 Eq 275, 261 LT 92	206
European Hume Products plc, re, 1988 BCILC 590	379
EV Swaminathan v KMMA Industries & Roadways (P) Ltd, (1993) 76 Comp Cas 1 (Mad)	167
Evans v Mr Justice Morel & Co, (1921) 1 Ch 339; 90 LT Ch 294	61, 61
Evans v Rival Granite Quarries Ltd, (1910) 2 KB 979; 26 TLR 509 (CA)	488
Everett Travel Service v ASM Shipping Ltd, (2003) 5 Mah LJ 781; (2004) 2 Busi CN 226; (2004) 118 Comp Cas 209	665
Everlite Lockmills Ltd, re, 1945 Ch 220	634
Ewing v Buttercup Margarine Co, (1917) 2 Ch 1 (CA)	51, 52
Exchange Banking Co, re, (1882) 21 Ch D 549; 48 LT 86 (CA)	70, 245, 414
Exchange Telegraph Co v Central News Ltd, (1897) 2 Ch 48	310
Exchange Telegraph Co Ltd v Gregory & Co, (1996) 1 QB 147 (CA)	310
Exchange Travel (Holdings) Ltd (No 3), re, (1996) 2 BCILC 323 (Ch D)	713
Exchange Travel (Holdings) Ltd (No 4), re, 1999 BCILC 291 (CA)	721
Exclusive Board of Methodist Church v Union of India, (1985) 37 Comp Cas 43 (Bom)	39
Expanded Plugs Ltd, re, (1966) 1 WLR 514; (1966) 2 Comp L 115	650
Expo Xpert (P) Ltd v Jas Copal Angish, (1999) 97 Comp Cas 413; (1999) 3 Comp L 498 (P&H)	726
Express Engg Works Ltd, re, (1920) 1 Ch 466 (CA)	386

LVIII Company Law

F Goldsmith (Sicklesmere) Ltd v Baxter, (1970) 1 Ch 65; (1969) 3 WLR 522	55
F S Chabrech v Keral Financial Corp., (1995) 92 Comp Cas 1 (Ker)	237
F&C Osler (India) Ltd, re, (1978) 48 Comp Cas 698 (Cal)	238
Failure of Sub-circum, re, (1973) 47 Aust LJ 719	67
Sairline Shipping Corp v Aderson, 1975 QB 190; (1971) 2 WLR 824	264
Feizabad Distilleries (P) Ltd v Salma Taylor, AIR 1992 All 321; (1993) 36 Comp Cas 127	677
Falcon Gulf Ceramics Ltd v Industrial Designs Bureau, AIR 1994 Raj 120; (1996) 86 Comp Cas 207	678
Fantus v Denville, (1932) 2 KB 509 (CA)	261
Faqir Chand Gupta v Tanwar Finance (P) Ltd, (1983) 51 Comp Cas 60; (1980) 16 DLT 482	681
Fachal Shekhar v Esomer Metalo Chemicals (P) Ltd, (1991) 21 Comp Cas 98 (Cal)	159
Fachat Shekhar v Esomer Metalo Chemicals (P) Ltd, (1995) 16 CLA 147; (1996) 87 Comp Cas 293 (CLB)	518, 521, 526, 530
Fawwak Iranji v BIFR, (2012) 110 Comp Cas 64 (Mad)	320
Fazir (TN) Ltd, re, 1937 Ch 352; 136 L.J. Ch 305	98
Fatiqa Tile Works v Sudhanshu Traders Co Ltd, (1992) 74 Comp Cas 422 (Mad)	201
Farulthang Jaliar v Credit Bank of India Ltd, AIR 1914 Bom 120; ILR (1914) 39 Bom 331; 27 IC 395	202
FD Jones & Co Ltd v Ranjit Roy, AIR 1927 Cal 782; 103 IC 648	462
Federal Bank Ltd v Sarita Devi Rathi, (1997) 48 Comp Cas 323 (Raj)	761
Ferguson v Wilson, (1866) 1 LR 2 Ch App 77; 36 L.J. Ch 12; 15 LT 230	259
Ferton Electronics (P) Ltd v Vijaya Leasing Ltd, (2000) 36 CLA 327 (Kant)	219
Ferton Electronics (P) Ltd v Vijaya Leasing Ltd, (2002) 109 Comp Cas 467 (Ker)	64
FG (Films) Ltd, re, (1983) 1 WLR 483; (1983) 1 All ER 115	26
Fidelity Industries Ltd v State, (2006) 129 Comp Cas 551 (Mad)	345
Filtex Bios Ltd, re, (1971) 1 WLR 592	457
Fine Industrial Commodities Ltd v Dowling, (1954) 71 RPC 253	301
Fine, ist Ltd, re, 2004 FC 477	214
Frances Industries Ltd v Anil Ranchand Chhabria, (2000) 26 SCL 233 (Bom)	200
First National Reinsurance Co Ltd v Greenfield, (1921) 2 KB 361	129
Five Minute Car Wash Service Ltd, re, (1966) 1 WLR 215	525
Flap Envelope Co Ltd, re, (2004) 1 BCAC 64 (Ch D)	247
FLF Holdings Ltd, re, (1967) 1 WLR 1404	458, 520
Fletcher v Royal Automobile Club Ltd, (2000) 1 BCAC 314 (CA)	615
Fletcher Hunt (Bristol) Ltd, re, 1984 BCAC 308 (Ch D)	298
Flex Industries Ltd, re, (1989) 3 Comp LJ 28 (Del)	611
Floating Deck Co v St Thomas Ltd, re, (1895) 1 Ch 691	234
Floating Services Ltd v M V San Francesco, (2004) 25 SC 1242 (Ker)	639
Florence Land & Public Works Ltd, re, (1885) 29 LR Ch D 421 (CA)	341
Florence Land and Public Works Co, re, (1878) 1 R 10 Ch D 590; 30 LT 589 (CA)	483
Fomenko (Sterling Area) Ltd v Seledkin Fountain Pen Co Ltd, (1958) 1 AER 11	442
Fond Corporation of India v Municipal Committee, (1999) 6 SCC 74; (1999) 96 Comp Cas 524	23
Foremost Industries India v Credit Capital Finance Corp Ltd, (1997) 49 Comp Cas 671 (Del)	686
Freest v Manchester Railway Co, 54 ER 403 (1861)	63
Turquoise Copper Mining Co, re, (1870) LR 13 Eq 390; 22 LT 553	52
Foss v Harbottle, (1843) 2 Hare 461; 67 ER 189	495, 496, 504, 552
Foss v Harbottle, 1964 Camb U 39	506
Foss v Harbottle, (1964) 27 Mod 1, Rep 610	496, 506
Foss v Harbottle, (1981) 44 Mod 1, Rep 202	505
Foster v Coles, Foster & Sons Ltd, (1908) 22 TLR 555	225
Foster v Foster, (1916) 1 Ch 532; (1916-17) All ER Rep 836	291, 328
Foster v London Chatham & Dover Railway Co, (1895) 1 QB 711 (CA)	63
Foster v New Trinidad Lake Asphalt Co Ltd, (1911) 1 Ch 218	408, 420
Bowlin v Slater, (1924) 129 New L 465	245, 247
Fox v Martin, (1895) 14 LT 473	185
IR Paymaster v British Burma Petroleum Co Ltd, (1976) 4b Comp Cas 587 (Bom)	586
France v Clark, (1864) LR 26 Ch D 257	186
Frances v Franceschi, 1967 RPC 149	304
Fraser v Whalley, (1864) 2 H&M 30x 71 ER 361	241

Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd, (1964) 2 Comp LJ 36 (CA)	300, 302
Freewheels (India) Ltd v Veda Mittra, AIR 1969 Del 258- (1969) 39 Comp Cas 1	28, 30
French v Mason, 1998 All Eik (DL) 456	514
Fry, re, (1946) 2 All ER 106	178
Fulham Football Club (1987) Ltd v Richards, 2012 Ch 333; 2012 EWCA Civ 855 (CA)	608
Furniss v Dawson, 1984 AC 474 (HL)	17
 G Kartikey & N Merdi, (1992) 74 Comp Cas 661 (Mad)	657, 660
G Ramesh v Registrar of Companies, (1987) 125 Comp Cas 665 (Mad)	319
G Ravinder Kumar Reddy v Murali Krishna, (2005) 127 Comp Cas 663 (AP)	766, 767
G Subba Rao v Rasna Die-Castings Ltd, AIR 1958 AP 95	471
Gadadhar Dixit v Utkal Flour Mills (P) Ltd, (1988) 2 Comp LJ 45; (1990) 66 Comp Cas 188 (Orissa)	657
Gajanan v National Assn of Mental Health, (1971) 1 Ch 317; (1970) 3 WLR 42; (1970) 2 All Eik 362	41, 502
Gajanan Narayan Patel v Duttadeva Waman Patel, (1950) 3 S.C.R. 684; (1950) 69 Comp Cas 1	374
Gajjarabai v Patni Transport (P) Ltd, (1967) 2 Comp LJ 234	519, 542
Gujrat Geers Ltd v Ashadevi, (2001) 103 Comp Cas 489 (MP)	741
Gallagher v Germany Brewing Co, 53 Minn 214; 54 NW 1115 (1893)	15
Galloway v Helle Concerts Society, (1915) 2 Ch 253; (1914-15) All Eik Rep 543	206
Gammie India Ltd v Hongkong Bank Agency (P) Ltd, (1992) 24 Comp Cas 129; (1992) 1 Comp LJ 279 (CLB)	154
Ganesan v Brahmaniyu & Co, (1946) Comp LJ 262 (Mad)	321
Ganesh Narayan Podar v Official Liquidator, (2006) 133 Comp Cas 643 (Raj)	735
Ganesh Roy v State of Jharkhand, (2004) 55 SCIL 662 (Jhar)	741
Gardner v Icedale, (1912) 1 Ch 700	207
Carware Marine Industries Ltd, re, 2015 SCC OnLine Bom 6094; (2015) 192 Comp Cas 204 (Bom)	723
Gas Authority of India Ltd v Official Liquidator, (2004) 3 Icom C.R. 540; (2005) 128 Comp Cas 690; (2004) 53 SCIL 206	686
Gusque v INC, (1940) 2 KB 80	34
 Guli Candy Management Services v SBL Industries Ltd (No 1), (2014) 1/2 Comp Cas 677	604
Gunnepaddi Ltd, re, (1969) 1 WLR 689 (CA)	606
Ganeshankar Neelkanth Kalyani v Sudochana Neelkanth Kalyani, (2014) 185 Comp Cas 300 (CLB)	531
Gautam Kaneria v Registrar of Companies, (2002) 108 Comp Cas 260 (Bom)	320
Gautam Kapoor v Liangtow Engg (P) Ltd, (2005) 128 Comp Cas 237 (CLB)	278
Gautam R Patil v Karnataka Theatres Ltd, (2003) 37 CLA 244; 2010 CLC 1265 (CLB)	276
GLB Bhagavat v Registrar of Companies, (1970) 40 Comp Cas 664; (1970) 2 Comp LJ 24 (All)	320
GD Zalani v Union of India, 1993 Supp (2) SCC 512; (1995) 84 Comp Cas 40	690
Geets Gems pvt, re, (1987) 1 WLR 1605; 1988 BCLC 340 (CA)	570
Geeta Kapoor v Union of India, (2005) 5 Comp LJ 13 (Del)	237
Geeta Kapoor v Union of India, (2006) 132 Comp Cas 369 (Del)	513
Gemini Silk Ltd v Gemini Overseas Ltd, (2002) 114 Comp Cas 92 (Cal)	627
Gendaraj Bhaggaji v Shri Sujan Mills Ltd, (1989) 65 Comp Cas 460 (MP)	707
General Produce Co Ltd, re, (1994) 81 Comp Cas 570 (CLB)	756
General Radios and Appliances Co Ltd v MA Khader, (1986) 2 SCC 656; (1986) 2 Comp LJ 249; (1986) 60 Comp Cas 1013	621, 626
George v Athmumalai Rubber, AIR 1968 SC 772	653
George Fischer (Great Britain) Ltd v Multi Construction Ltd, (1995) 1 BCLC 260	450
George Newman & Co, re, (1895) 1 Ch 674 (CA)	18, 70
George Whitechurch Ltd v Cavanagh, 1902 AC 117 (HL)	357
Genies v Reynolds, 28 N.Y.S. 2d 622	307
German Date Coffee Co, re, (1992) 1 R. 20 Ch D 169	67, 651
Ghulz Rai Sharmin v Daulat Ram Kashyap, (1994) 80 Comp Cas 367 (Raj)	575
Gibson v Barlow, (1875) 1 R. 10 QB 329	348, 432
Gibson Executor v Gibson, 1980 Scottish LT 52	66
Giles v Rhind, (2011) 2 BCLC 542	311
Giles v Rhind, (2003) 1 BCLC 1 (CA)	301
Giles v Rhind (No 2), (2004) 1 BCLC 385 (Ch D)	302
Gillford Motor Co Ltd v Horne, 1933 Ch 935 (CA)	19

Gillette International v RK Malhotra, (1998) 31 CLA 75 (1998) 1 Cal LT 271	572
Giovanelz Benny Brighten & Co, re, (1990) 67 Comp Cas 461 (1990) 1 Comp LJ 102 (Ker)	702, 710
Girish Kumar Kharia v Industrial Fibre & Engg Co Ltd, (2001) 103 Comp Cas 150 (2000) CLC 105 (Pun)	245
Girni Kaengar Sanghaarch Samiti v Matulaya Mills Ltd, 2002 Cri 1] 243 (Jnom)	518
GR Naidoo v GK Mawleswar, AIR 1952 AP 406	598
GT Bhurial v SS Agarwal, (2011) 153 Comp Cas 205 (CLB)	537
Glanmegashire Banking Co, re, (1864) LR 78 Ch D 20	399
Glass v Alder, (1967) 65 DLR (2d) 503 (Can)	500
Glaxo plc v Glaxowellcome Ltd, 1996 FCR 388	39
Gleitlager (India) P Ltd v Killick Nixon Ltd, (1977) 47 Comp Cas 74 (Rom)	690
Global Trust Bank Ltd, re, (2006) 57 SCL 164: 2005 CLC 359; (2005) 127 Comp Cas 604 (AP)	191
Globe Associates (P) Ltd, re, (1987) 61 Comp Cas 814 (Del)	664
Globe Motors Ltd v Globe United Engine & Foundry Co Ltd, (1975) 45 Comp Cas 429 (Del)	715
Globe Motors Ltd v Mehta Teja Singh, (1944) 55 Comp Cas 465 (Del)	313
Glofame Cetspin Industries Ltd, re, (2006) 150 Comp Cas 334 (Cal)	618, 627
Glussep v Glasssep, (1907) 2 Ch 370; 92 LT 152	285
Gluckstein v Barnes, 1900 AC 240; 69 LT Ch 385; 82 LT 393; 16 TLR 323; 7 Mans 321	123, 136, 139
Glucu Series (P) Ltd, re, (1987) 61 Comp Cas 227 (Cal)	396
Glucoseries (P) Ltd v Deb Kanta Roy, (2000) 38 CLA 39 (Cal)	290
GN Byra Reddy v Arathi Cine Enterprises (P) Ltd, (1997) 99 Comp Cas 745 (CLB)	166, 169
Codavaribbi v Chittankewadi v Anil Agarkar Commercial Traders (P) Ltd, (1966) 2 Comp LJ 272 (Mad)	413
Gudha Electricity Co Ltd v State of Gujarat, (1975) 1 SCC 399	34
Gokak Patel Volkart Ltd v Domdayya Gurushiddappa Hiriyath, (1941) 2 SCL 141 (1941) 71 Comp Cas 403	240, 242
Oukulchand D Morarka v Company Law Board, (1974) 44 Comp Cas 177 (Del)	539
Colcunda Industries Ltd v Register of Companies, AIR 1966 Del 170	202
Golden Chemical Products Ltd, re, 1976 1976 IBL 35	563
Goldsmith (P) (Sicklesmere) Ltd v Bates, (1920) 1 Ch 65; (1969) 3 WLR 522; (1971) 40 Comp Cas 809	473
Guinba Holdings UK Ltd v Human, (1986) 3 All ER 94 (Ch D)	491
Guinba Holdings UK Ltd v Minerva Finance Ltd, (1996) 1 All ER 261	491
Capal Das Gujari v Tagach Papers Mills Co Ltd, (1986) 61 Comp Cas 920 (Cal)	379
Gopal Khallan v State, AIR 1969 Cal 132; (1969) 39 Comp Cas 160	261
Gopal Krishna Shukla v Shahibhi General Finance & Investments Ltd, (2005) 125 Comp Cas 96 (Raj)	665
Gopal Vyas v Sindoor Hotels & Transportations Ltd, AIR 1990 Cal 45; (1990) 1 Comp LJ 388; (1990) 68 Comp Cas 516	291, 290
Gopalkrishna Sengupta v Hindustan Construction Co, (2002) 112 Comp Cas 166 (Cal)	163
Gopalgiri Tea Co Ltd v Peshak Tea Co Ltd, (1962) 52 Comp Cas 239; 83 CWN 147	9
Gordon Woodruffe & Co Ltd v Guadian Woodruffe Ltd, (1995) 97 Comp Cas 582; (1995) 3 CTC 589 (Mad)	571
Gordon Woodruffe Ltd v Trident Investment & Portfolio Services (P) Ltd, (1994) 79 Comp Cas 264; (1994) 1 Comp LJ 313 (CLB)	134, 396
Gulham Solvent Oil Ltd v Mallina Bharathi Rao, (2001) 105 Comp Cas 710; (2001) 2 ALD 516	388
Guruji v Union of Post Office Workers, 1978 AC 405; (1977) 3 WLR 300	556
Govind v Rangnath, (1930) 32 Bom LR 232	313
Govind Goverhandas Daga v Field Mining & Ispat Ltd, AIR 2010 NOC 37 (Bom)	173
Govind Rubber Ltd v Pavan Tyres Ltd, (1995) 83 Comp Cas 556 (Bom)	628
Govind T Jagannath v Sirajuddin S Kazai, (1984) 56 Comp Cas 329 (Bom)	761
Govinda v Khan Sabebi Abdur, Kadje, AIR 1923 Nag 150	486
Govt of India v Satish Jain Ltd, (1969) 1 Comp LJ 231; (1970) 10 Comp Cas 83; 73 CWN 446	561
Govt of India v SN Das Gupta, AIR 1966 Cal 414	439
Govt of Karnataka v NGCI Ltd, (2016) J98 Comp Cas 362	715

Govt Stock and Other Securities Investment Co Ltd v Manila Railway Co Ltd, 1887 AC 81; 75 LT 553 (EIL)	481, 485	Guinness v Land Corp of Ireland, (1982) 1 LR 22 Ch D 349	51, 42, 44
GP Ganapathi v MTR Associates, (1986) 59 Comp Cas 359 (Kant)	245	Guinness plc v Saunders, (1990) 2 WLR 924 (EIL)	329
GR Desai v Registrar of Companies, (1999) 95 Comp Cas 338 (AP)	319	Gujarat Ambuja Calspin Ltd, re, (2001) 104 Comp Cas 397 (Guj)	625
Graham v Allis Chalmers Mfg Co, 41 Del Ch 78 (1963)	315	Gujarat Ambuja Exports Ltd v Gujarat Electricity Board, (2002) 112 Comp Cas 788 (Guj)	626
Gramophone & Typewriter Co Ltd v Stanley, (1906) 2 KB 956	10	Gujarat Amiya Exports Ltd, re, (2004) 108 Comp Cas 265 (Guj)	219
Gramophone & Typewriter Ltd v Stanley, (1906) 2 KB 99, 99 LT 39	287	Gujarat Electricity Board v Rajrana Naranbhai Mills Co Ltd, (1974) 44 Comp Cas 127 (Guj)	215
Grant v Cigman, (1996) 2 BCAC 24 (Ch D)	184	Gujarat Kamdar Sahakari Masjidi v Ahmedabad Shree Ramkrishna Mills Co Ltd, (1996) 2 GCD 317	420
Grant v Gold Exploration & Development Syndicate Ltd, (1990) 1 QB 233 (CA)	300	Gujarat Lease Financing Ltd v Official Liquidator, (2003) 122 Comp Cas 433 (Guj)	627
Grant v John Grant & Sons Ltd, (1950) H2 CLR 1 (Ausl)	352	Gujarat Lease Financing Ltd, re, (2003) 15 Comp Cas 136 (Guj)	504
Graphite India Ltd v Dalpat Rao Mehta, (1978) 48 Comp Cas 682 (Cal)	296	Gujarat Organics Ltd, re, (1997) 16 CLA 280 (Guj)	616
Gray v Slings, (1893) 69 LT 282	219	Gujarat Organics Ltd, re, (1997) 69 Comp Cas 754 (Guj)	607
Great Eastern Railway Co v Turner, (1977) 1 LR 5 Ch App 149	21, 257	Gujarat State Financial Corpus v Official Liquidator, (1996) 87 Comp Cas 658 (Guj)	702, 724
Great India Stearic Navigation Co Ltd v State, (1967) 37 Comp Cas 125 (Cal)	432	Gujarat State Textile Corps v New Jhangir Vakil Mills Co, (1985) 58 Comp Cas 768 (1968) 1 Guj LR 205	605
Great Londonning Railway Co v Sir William Magnay, (1874) 25 Beauv. & H.R. 761	257	Gujarat Steel Tubes Employees Union v Official liquidator, (2003) 131 Comp Cas 430 (Guj)	709
Great Northern Salt & Chemical Works, re, (1889) 2 LR 44 Ch D 472	748	Gulab Singh & Panjab Zainudin Bank Ltd, AIR 1992 Lah 471 (1993) 24 Lah 29	54
Great Wheat Bulgoouth Co Ltd, re, (1883) 53 L 1 Ch 92, 44 LT 20	136	Gulabdas Bhaidas, re, IJR (1892) 17 Bern 672	360
Greenburg v Cooperstein, re, (1926) 1 Ch 657	497	Gulabji Kalidas Naik v Laksmandas Patel, (1977) 47 Comp Cas 151 (Guj)	512
Greene, re, 1949 Ch 333	174	Gulabji Kalidas Naik v Laksmandas Patel, (1979) 48 Comp Cas 453 (Guj)	167
Greenhalgh v Arderne Cinemas Ltd, 1951 Ch 286 (CA)	499, 502	Gulabji Bhargava v Official Liquidator, (1992) 45 Comp Cas 419 (Del)	203
Greenwood v Leadbelly Spool Wheel Co, (1900) 1 Ch 421; 91 LT 846 (CA)	121	Gummadi Aruna v Gummadi Construction Ltd, (2007) 75 SCI 139 (2007) 16 Comp Cas 81 (CLB)	644
Cresham Life Assurance Society, re, ex p Hodgson, (1972) LR 8 Ch App 446; 28 LT 150	154	Gurdino Jivaram Kukreja v Eastern Mining & Allied Industries Ltd, (2004) 121 Comp Cas 762 (Del)	149
Grey Marlin Ltd, re, (2000) 1 WLR 370	710	Gurnam Singh Gopal v Indian Hotels Co Ltd, (2012) 112 Comp Cas 86 (CLB)	169
Grifferson, U.S. Japan & Adams Ltd, re, 1968 Ch 17; (1967) 1 WLR 385	633	Gurinder Singh Gill v Saz International (J) Ltd, (1997) 62 Comp Cas 197 (Del)	543
Grosvenor and West End Railway Terminus Hotel Co Ltd, re, (1967) 76 LT 337 (CA)	545		
Grove v Advantage Health (ED) Ltd, (2000) 1 BCAC 661 (Ch D)	461		
GS Selby & Sons v MCW & S Mills Co Ltd, (1970) 1 Comp LJ 184 (Mys)	606		
GT Swamy v Goodluck Agencies, (1980) 69 Comp Cas 619; (1989) 1 Comp LJ 212 (Kant)	671		
Guardian Assurance Co, re, (1917) 1 Ch 431, 116 LT 193 (CA)	600		

Gurpreet Singh v. Visha Hospital (P) Ltd., 2015 SCC Online Dec. 30/12/2014; 186 Comp Cas 202	515
Gurudas Hazra v. PK Chowdhury, (2002) 109 Comp Cas 530 (Cal)	231
CVK Hotels Ltd. re, (1997) 88 Comp Cas 396 (AP)	607
Gwalior Steels Ltd. re, (1993) 2 Comp LJ 377; (1994) 79 Comp Cas 176 (MP)	624
H (Restaurant Order: Realisable Property), re, (1996) 2 BCCLC 500 (CA)	29
H Picrushnam v. Union of India, (1997) 14 SCR 191 (Cal)	23
Hackney Pavilion Ltd. re, (1924) 1 Ch 276	162
Hackerbridge Llewellyn and Eason Ltd. v. GEC Distribution Transformers Ltd. (1992) 74 Comp Cas 543 (Mad)	30
Hafeez Rustom Dalal v. Registrar of Companies, 2005 CLC 625; (2005) 126 Comp Cas 383 (Gau)	229
Halg v. Bamford, (1972) 32 DLR (3d) 67 (Can) ..	447
Hajim Rai v. Official Liquidator of Peshawar Bank Ltd., AIR 1915 Lah 320	702
Halifax plc v. Halifax Repossessions Ltd., (2004) 2 BCCLC 455 (CA)	52
Hallows v. Fennis, (1868) LR 3 Ch. App. 467-8 Eq 520 ELT	121
Haci Garage 1964 Ltd. re, (1982) 3 All ER 1096 ..	65
Hamilton's Windsor Ironworks Co. re, (1871) 13 Ch 177-89 LT 65H	483
Hartlet International plc. re, 1999 HCLC 508 (CA)	489
Hertshire Credit Co. re, (1896) 2 Ch 745	253
Hingson v. Prince's Patent Candle Co., (1976) 451 Ch 437	66
Hans Raj Gupta v. Asthana, AIR 1922 PC 240	215
Hansraj v. Official Liquidators, AIR 1929 All 353	676
Hanuman Mills (P) Ltd. re, (1977) 17 Comp Cas 644 (All)	294
Hanuman Prasad Bagri v. Hargass Cereals (P) Ltd., (2001) 4 SCC 420; (2001) 106 Comp Cas 493	662
Hanuman Prasad Gupta v. Hiratal, (1966) 2 Comp LJ 136 (All)	414
Happy Home Builders (Karnataka) (P) Ltd. v. Deltic Enterprises, (1994) 13 CLA 405 (Kar)	342
Harbans Lal Sharma v. Chemical Vessels Fabricators, (1969) 65 Comp Cas 506 (P&H)	676, 677
Hassen v. Phillip, (1883) LR 23 Ch D 14; 48 LT 334; 31 WLR 173 (CA)	314, 383
Hardeep Kaur v. Trinited Enterprise (P) Ltd., (2004) 122 Comp Cas 944 (LAH)	376
Hansdasi v. Belitos, 1901 AC 118; 83 LT 373 (PC)	180, 216
Hareendra Nath Ghosal v. Superfoam (P) Ltd., (1992) 74 Comp Cas 740 (Cal)	57
Hargopal v. People's Bank of Northern India Ltd., AIR 1935 Lah 691	146
Hari Chandana Deva v. Hindustan Coup Insurance Society Ltd., AIR 1925 Cal 690	39
Hari Krishna Lohia v. Hoolungouee Tea Co Ltd., AIR 1969 Cal 312; (1970) 40 Comp Cas 456	617
Hari Kumar Rajah v. Ashok R Thakkar, (2004) 51 SCL 735 (Mad)	148
Haribhan Nath v. SBL, (2006) 4 SCC 456; (2016) 181 Comp Cas 109	626, 628
Harikumar Rajah v. Sovereign Dairy Industries Ltd., (1959) 52 CLA 345 (Mad)	453
Hartnagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala, AIR 1963 SC 1689; (1961) 31 Comp Cas 387	153, 154, 161
Harsih C Raskapoor v. Jaferbhai Mohammedbhai Chhapaz, (1989) 45 Comp Cas 163 (Guj)	612
Harsih Kumar Agarwal v. Punjab Communications Ltd., (1998) 28 CLA 219 (CEB)	198
Harsihchand Maganlal v. Union of India, AIR 1990 Bom 34; (1990) 1 Comp LJ 255 (1991) 71 Comp Cas 69	320
Hasten Ltd. re, (1959) 1 WLR 62	518
Hazar Singh v. Bhagwan Singh, (1992) 74 Comp Cas 726 (Del)	167
Hawald Huldsawal & Co v. Gaddiwas, (1955) 1 All ER 726	340
Harold v. Plenty, (1901) 2 Ch 314	185
Harshadhbhai B Patel v. Bhagirath Construction Co (P) Ltd., (2010) 185 Comp Cas 58 (CLB)	532
Harley Rainey Ltd. re, 1905 Ch 143; (1954) 5 WLR 464	381
Harvest Lane Motor Bodies Co. re, (1969) 39 Comp Cas 961	643
Haryana Financial Corp v. PNB Auto Ancillary (India) Ltd. (1991) 81 Comp Cas 568 (Del)	707
Haryana SEB v. Surendry, (1999) 3 SCC 601	23
Haryana Social Development Corp. Ltd v. JK Agarwal, (1989) 63 Comp Cas 95 (P&H)	359

Haryana State v Maruti Ltd, (1992) 25 Comp Cas 663 (P&H)	628
Haryana State Coop Supply and Mktg Federation Ltd v Jayam Textiles, (2014) 4 SDC 704; (2014) 2 SCC (Civ) 732	472
Hathisingh Mfg Co Ltd, re, (1976) 46 Comp Cas 59 (Cal)	614
Haven Gold Mining Co, re, (1982) 1 LR 20 Ch D 151	651, 655
Hawke v McArthur, (1951) 1 All ER 22	138
Hazzell Mill Schenckel v British Columbia Goose, ILR (1970) 45 Ch 1331	166
HB Stockholders Ltd v Jasprakash Industries Ltd, (2013) 116 Comp Cas 29 (CLB)	214
HC Shastri v Dolphin Canpack (P) Ltd, (1948) 99 Comp Cas 201 (Del)	11
IICL Ltd, re, (1994) 80 Comp Cas 228 (Del)	615, 626
Head (Henry) & Co Ltd v Rognier Holdings Ltd, 1952 Ch 124	192, 193
Heald v O'Connor, (1973) 1 WLR 497	246
Healthstar Properties Ltd (No. 2), re, (1966) 1 WLR 993; (1966) 2 Chemp LJ 246	460
Heaton & Dugard Ltd v Cuthing Bros Ltd, (1925) 1 KB 655	485
Heavy Engg Maedoor Union v State of Bihar, (1969) 1 SCL 767; (1969) 39 Comp Cas 100F	21
Hedley Byrne & Co Ltd v Heller & Partners Ltd, 1969 AC 465 (1963) 3 WLR 301	316, 446
Hellenic and General Trust Ltd, re, (1976) 1 WLR 123 (Ch D)	602
Hely-Hutchinson v Brayhead Ltd, (1968) 1 QB 549; (1967) 2 WLR 1312 (QB)	102
Hely-Hutchinson v Brayhead Ltd, (1968) 1 QB 549; (1967) 3 WLR 1409 (CA)	94
Henzignani Finance & Leasing (P) Ltd v TN Mercantile Bank Ltd, (1998) 86 Comp Cas 875 (CLB)	469
Herman D Vakil v RDI Print and Publishing (P) Ltd, (1992) 2 Comp LJ 113 (CLB)	538
Henderson v Bank of Australasia, (1890) 1 LR 45 Ch D 230; (1886-90) All ER Rep Ext 1190 (CA)	507
Henderson v Bank of Australasia, (1890) 1 LR 45 Ch D 330; (1886-90) All ER Rep Ext 1190 (CA)	385
Henderson v Jacon, (1987) 1 B 5 Eq 249; 37 LT 527; 59 LT Ch 794	116, 124
Hendon v Adelman, The Times, June 16, 1973; 1973 New L 637	28, 54, 66, 473
Herdillia Unifiers Ltd v Arun Bhawal, (1999) 96 Comp Cas 521 (Raj)	143
Herdillia Liners Ltd v Reeti Jain, (1998) 92 Comp Cas 841; (1995) 4 Comp LJ 45 (Raj)	148
Hertford & South Wales Waggon & Engg Co, re, (1876) 2 Ch D 621 (CA)	45
Heron International Ltd v Grade, 1983 BCAC 244	158
Hether v New Zealand Glue Co Ltd, (1911) 31 NZ LR 129 (QC)	394
Heyting v Dupont, (1964) 1 WLR 843 (CA)	301, 497
HG Attili v Surattee Boro Bazar Co, (1917) 49 IC 286	164
HHT Manubendra Shah v Official Liquidator, (1977) 47 Comp Cas 356 (Del)	141
Hi-Fi Equipment (Cabinets) Ltd, re, 1988 BCAC 68 (Ch D)	491
Hickman, Harrison, Woolston & Co v Jackson & Sons, 1943 AC 266 (HL)	180
Hightfield Commodities Ltd, re, (1985) 1 WLR 149	642
HITH Casualty & General Insurance Ltd re, McMahon v McGrath, (2006) 2 All ER 671 (Ch D)	584
Hill v Permanent Trustees Co of New South Wales Ltd, 1936 AC 720 (PC)	415
Hill Properties Ltd v Unirex Bank of India, (2014) 1 SCC 653; (2014) 1 SCL 573	82
Hillcrest Realty SDN BHD v Hotel Queen Road (P) Ltd, (2006) 133 Comp Cas 742 (CLB)	333, 526
Hilo Mfg Co Ltd v Williamson, (1911) 28 TLR 164 (CA)	127
Himachal Telecommunications Ltd v Himachal Substratic Communications Ltd, (1996) 37 DIR 476; (1996) 52 DLT 139; (1996) 36 Comp Cas 325	395, 620
Hind Auto Industries Ltd v Premier Motors (P) Ltd, (1969) 39 Comp Cas 139; (1969) 1 Comp H 754; AIR 1970 All 1145	603
Hind Iron Bank Ltd v Rajendra Jagannath Bali, (1959) 29 Comp Cas 418	206
Hind Overseas (P) Ltd v RP Jhunjhunwala, (1976) 3 SCL 259; (1976) 2 SCR 226; (1976) 46 Comp Cas 91	657
Hind Overseas (P) Ltd, re, (1968) 2 Comp LJ 95	651
Hindcastle Ltd v Barbara Atenborough Associates Ltd, (1996) 2 BCAC 234 (HL)	226
Hindhrivac (P) Ltd, re, (2005) 129 Comp Cas 726 JLR 2005 KAR 4523	607
Hindle v John Cotton Ltd, (1919) 56 SLR 625 (HL)	341
Hindustan Club Ltd v Pawan Kumar Jain, (2005) 64 SCL 65; (2006) 129 Comp Cas 171 (Cal)	277

Hindustan Coca-Cola Bottling South West (?) Ltd, re, (1999) 4 Comp LJ 442 (Del), (1999) 81 DLT 165; (1999) 33 DR 142	624
Hindustan Commercial Bank v Hindustan General Electrical Corp., AIR 1960 Cal 637 (1960) 33 Comp Cas 367	234
Hindustan Crop Insurance Society Ltd, re, AIR 1961 Cal 443; (1960) 65 CWN 64; (1960) 21 Comp Cas 193	517
Hindustan Development Coop Ltd v Kusum Chand Bader, (1998) 29 CLA 222; (1998) 1 Comp LJ 110 (Kan);	148
Hindustan Development Corp Ltd v Shaw Wallace & Co Ltd, 2000 CLC 167; (2000) 36 CLA 97 (Cal);	602
Hindustan Development Corp Ltd v Shaw Wallace & Co Ltd, (2001) 107 Comp Cas 50 (Cal);	721
Hindustan Forest Co (P) Ltd v United Commercial Bank, (1994) 79 Comp Cas 669 (P&H);	724
Hindustan Lever Employees' Union v Hindustan Lever Ltd, 1995 Suppl (1) SCC 499; (1995) 83 Comp Cas 3D	614, 622
Hindustan Lever Ltd, re, (1994) 81 Comp Cas 751 (Bom);	622
Hindustan Petroleum Corp Ltd v Sardar Chaudhary, AIR 1991 P&H 785; (1991) 71 Comp Cas 217 (P&H);	285
Hindustan Steel Works Construction Ltd v State of Kerala, (1997) 5 SCC 171; (1998) 2 Comp LJ 383	22
Hindustan Urban Infrastructure Ltd v Gunniz, (2015) 3 SCC 756; (2015) 189 Comp Cas 279	691
Hindustan Wire and Metal Products, re, (1983) 54 Comp Cas 101 (Cal);	350
Hipolit Products Ltd, re, (1996) 2 Comp LJ 61 (Guj);	607
Nilak Ghosh v Amarendra Nath Senha, (1999) 1 Bom CR 460; (1999) 70 Comp Cas 324	760
Hiralal Kalyananji Sethi v Gendalal Mills Ltd, (1975) 2 SCC 515; (1976) 41 Comp Cas 142	695
Hirsch v Siemens, 1891 AC 654	299
Hivac Ltd v Park Scientific Investments Ltd, 1946 1 169; (1948) 19 Comp Cas 14 (I.A);	306
EIK Dave (P) Ltd, re, (2010) 104 Comp Cas 661 (Guj);	623
HL Bolton (Engg) Co Ltd v T J Graham & Sons Ltd, (1952) 1 QB 149; (1956) 3 WLR 914 (CA);	262
Elmace & Co Ltd, re, (1983) 150 LT 374	633
House & Co Ltd, re, (1984) 2 Ch 208; (1984-87) All ER Rep 655 (CA);	233, 415
Hoffland Finance Ltd, re, (1997) 90 Comp Cas 34; (1997) 3 Comp LJ 341 (CLB);	766
Hingga v Chaiaphorn Ltd, 1977 Ch 254; (1968) 31 Mod L Rev (NOC) 688	238, 241, 246, 495, 497, 521
Huicrest Ltd, re, Keene v Martin, (2000) 1 BCCLC 194 (CA);	169
Holders' Investment Trust Ltd, re, (1971) 1 WLR 583; (1971) 2 All ER 289	233, n10
Holiday Promotions (Europe) Ltd, re, (1996) 2 BCCLC 618 (Ch.D);	713
Holmes v Keys, (1958) 2 WLR 772 (CA);	388
Homer & Colonial Insurance Co Ltd, re, (1930) 1 Ch 109	198
Home Office v Hazel Yates Co Ltd, 1970 AD 1034; (1970) 2 WLR 1149 (HL);	672
Homer District Consolidated Gold Mines, re, (1868) 39 Ch D 546; 53 L Ch 134; 60 L 177 (CA);	332, 333
Hong Kong & China Gas Co Ltd v Glen, (1914) 1 Ch 527	207
Hond Sailmakers Ltd v Axford, (1997) 1 BCCLC 221 (QB);	305
Hopkinson v Mortimer Harley & Co Ltd, (1917) 1 Ch 646	208
Hobury Bridge Coal, Iron & Wiggin Co, re, (1879) LR 11 Ch D 389; 40 LT 353 (CA);	270, 389
Hoechst Ltd v Gaithland, 1984 BCCLC 549	304
Hotel Kandath International (P) Ltd v Official Liquidator, (1997) 27 CLA 221 (Kan);	626
Hotel Queen Road (P) Ltd v 1311 Credit Reality SDN BHD, (2006) 140 Comp Cas 59 (Del);	419
Hotel Rajahansa International v Indian Overseas Bank, (2004) 5 All 0517; (2005) 128 Comp Cas 431	679
Houghton v Papers, (2000) 1 BCCLC 511 (CA);	299
Houghton & Co v Notardon, Lowe and Wills Ltd, (1927) 1 KB 246; (1927) All ER Rep 97 (CA); off'd 1928 AC 1; 138 LT 210 (HL);	95, 97
Houghton & Co v Notardon, Lowe and Wills Ltd, (1927) 1 KB 246; (1927) All ER Rep 97 (CA); off'd 1928 AC 1; 138 LT 210 (HL);	359
Houghton case, (1927) 1 KB 246; (1927) All ER Rep 97 (CA); off'd 1928 AC 1; 138 LT 210 (HL);	101
Houldsworth v City of Glasgow Bank, (1980) 1 LR 5 App Cas 317; 42 LT 194 (HL);	113, 120, 127
House of Fraser v ACGE Investments Ltd, 2007 BCCLC 478 (HL);	233
Houschek v Fire and Carriage Accident Insurance Co v Grant, (1879) 1 R 4 Ex Div 216; 48 LJ Ex 577; 41 LT 298; 27 WLR 858 (CA);	146

- Housing and Urban Development Corp v Standard Chartered Bank, (1996) 23 CLA 194 (Del) 154
- Housing Development Finance Corp v Sureshchandram V Parekh, (2002) 112 Comp Cas 650 (CLB) 282
- Iluvel Development (P) Ltd, re, (2003) 278 Comp Cas 251 622
- Howard v Patent Ivory Mfg Co, (1888) LR 38 Ch D 156; 58 LT 395 43
- Howard Smith Ltd v Ampol Petroleum Ltd, 1974 AC 621; (1974) 2 WLR 689 (PC) 242
- HP Horticultural Produce Mktg & Processing Corp Ltd v United India Insurance Co Ltd, AIR 2000 HP 11 671
- HR Hermitz Ltd, re, (1959) 1 WLR 3 62; (1958) 3 All ER 689 516, 520, 523, 540
- Hrushakesh Panda v Indramati Swami, (1988) 63 Comp Cas 368 (Ori) 255
- Huckerby v Elliott, (1973) 1 All ER 189 324
- Hukumchand v Pioneer Mills Ltd, AIR 1927 Oudh 55 463
- Hukumchand v Radhakissen, AIR 1925 Oudh 910 675
- Hunn v Corey, 82 NY 65 (1860) 315
- Illunger Ford Investment Trust Ltd v ITO, (1976) 102 TLR 314; 1977-47 Comp Cas 181 587
- Hunsur Plywood Works Ltd v CIT, (1995) 1 SCC 355; (1996) 1 Comp L 22 416
- Hunter v Hunter, 1836 AC 222 (HL) 156, 159
- Hutton v Scarborough Cliff Hotel Co Ltd, (1865) 2 Drew & Son 523; 62 ER 717 87
- Hutton v West Cork Railway Co, (1883) 1 LR 28 Ch D 654 (CA) 66
- IV Jayaram v ICICI Ltd, (2000) 2 SCC 202; AIR 2000 SC 579; (2000) 99 Comp Cas 341, 343, 434
- Hyderabad (Bind) Electric Supply Corp Union of India, AIR 1959 Punj 199 30, 37
- Hyderabad Industries Ltd, re (No 2), 2004 CLC 1385; (2005) 123 Comp Cas 456 (AP) 194
- Hypine Carbons Ltd v JC Rhalan, (2001) 204 Comp Cas 422 (EP) 728, 731, 736
- Hyslop v Morel, (1891) 2 TLR 263 126
- IBA Health (India) (P) Ltd v Indo-Drive Systems Sdn Bhd, (2010) 13 SCC 553; (2010) 159 Comp Cas 369 613
- ICICI v Official Liquidator, 1994 Supp (2) SCC 721; AIR 1994 SC 167 699
- ICICI Bank Ltd v Abhirubam & Co, (2016) 199 Comp Cas 394 (SC) 699
- ICICI Bank Ltd v Shlemon Steel Tubes Ltd, (2005) 125 Comp Cas 545 (Kant) 706
- ICICI Bank Ltd v SIDCO Leathers Ltd, (2006) 10 SCC 452; (2006) 131 Comp Cas 451 708
- ICICI Ltd v Ahmedabad Mfg & Calico Printing Co Ltd, (2004) 6 SCC 797; (2005) 123 Comp Cas 332 723
- ICICI Ltd v Hyderabad District Coop Central Bank, (1995) 16 CLA 227 (AP) 678
- ICICI Ltd v Hyderabad District Coop Central Bank, (1997) 27 CLA 244 (AP) 690
- ICICI Ltd v Klein & Marshall Mfg (Importers & Exporters) Ltd, (2001) 4 Comp L 411 (CB) 456
- ICICI Ltd v Official Liquidator, (2000) 103 Comp Cas 350 (CLB) 459
- ICICI Ltd v Scintions Agencies, (1996) 4 SCC 365; (1996) 96 Comp Cas 205 660
- ICICI Venture Funds Management Co Ltd v Safil Information Systems (P) Ltd, (2007) 136 Comp Cas 64 (CLB) 171, 173
- ICICI Venture Fund Mktg Ltd v Neptune Inflatables Ltd, (2005) 127 Comp Cas 1 (Mad) 723
- IDC of Orissa Ltd v Snehshila Industries Ltd, (2006) 132 Comp Cas 575 (Ori) 709
- IDFC Ltd, re, 2035 SCC OnLine Mad 3982; (2005) 191 Comp Cas 469 (Mad) 625
- IFB Finance Industries Ltd, re, (2003) 38 CLA 215 (CB) 461
- IKC Ltd v SIDCO Leathers Ltd, (2006) 131 Comp Cas 429 (All) 708
- JL & JS Engg and Construction Co Ltd v Wardha Power Co Ltd, (2013) 176 Comp Cas 156 (AP) 625
- Jtacombe Permanent Mutual Benefit Building Society, re, (1901) 1 Ch 102 596
- Janet India Ltd v ICRAO, (1995) 17 CLA 192 (AP) 556
- Imperial Bank of India Ltd v Bengal National Bank Exd, AIR 1930 Cal 536; (1931) 1 Comp Cas 63; 11 IR (1930) 57 Cal 329 64
- Imperial Chit Funds (P) Ltd v Income Tax Deptt, (1977) 49 Comp Cas 58 AIR 1979 Ker 25 709
- Imperial Chit Funds (P) Ltd v JTC, (1996) 8 SCC 303; (1996) 86 Comp Cas 555 709
- Imperial Hydrographic Hotel On Blackpool v Hampshire, (1892) 1 LR 21 Ch D 1; 49 LT 150 (CA) 82, 254
- Imperial Ice Mfg Co v Manchester Gas & Light Co, (1889) 13 Iom 415 43
- Imperial Oil Soap & General Mills Ltd v Bain, Cland, AIR 1916 L & J 78(2) 667

Imperial Oil, Soap & General Mills Co Ltd v Wazir Singh, AIR 1915 Lah 178	95
India Industries Ltd. v. (1996) 23 CLA 245 (1997) 1 Comp LJ 186 (Del)	357
Incable Net (Andhra) Ltd v AP AKSH Broadband Ltd. (2010) 6 SCC 719 (2010) 157 Comp Cas 301	571
Independent Broadcasting Co Ltd v Rnb McKay (Media) Ltd. (1991) 5 NZCLC 67 . .	304
Inderbar Kaur v Satbir Singh, (1983) 53 Comp Cas 568 (Del)	445
Inderwick v Snell, (1850) 2 Mac & C 216: 42 BK 33	259
India Electric Works Ltd. re, (1993) 53 Comp Cas 573 (Cal)	697
India Electric Works, re, (1969) 2 Comp LJ 169 .	663
India Fruits Ltd v Maitland (P) Ltd (1998) 2 All I.T. 26	164
India Infline Ltd. re, (2004) 51 SCL 396 (2004) 6 Bom CR 411 (Bom)	191
India Nutritional Ltd v Registrar of Companies, (1964) 1 Comp LJ 56	349
India Waste Energy Development Ltd v Govt (NCT of Delhi), (2003) 114 Comp Cas 82 (Del) .	17
Indian Air Gases Ltd v Taiwan Sand, (1999) 33 CLA 157 (Del)	410
Indian Bank v Deepak Fertilizers & Petroleum Corp Ltd, (1999) 53 CLA 389 (Bom)	165
Indian Bank v Kiran Overseas Exports Ltd, (2000) 4 Comp LJ 410 (KLR)	185
Indian Bank v Official Liquidator, (1998) 3 SCC 401: AIR 1998 SC 211	458
Indian Bank v VS Perumal Raja, (1993) 75 Comp Cas 787; (1992) 1 Comp LJ 327 (Mad) .	706
Indian Chemical Products Ltd v State of Orissa, (1966) 2 Comp LJ 65 (1966) 36 Comp Cas 592, AIR 1967 SC 253	154, 166, 201
Indian Coop Navigation & Trading Co Ltd v Parameeswari Premp, (1974) 26 Bom LR 37 .	345
Indian Express Newspapers (Bom) Ltd v Henkel Chemicals India Ltd, (1999) 20 SCL 333 (Bom)	672
Indian Hardware Industries Ltd v SK Gupta, (1981) 51 Comp Cas 51 (Del)	622
Indian Metals Co Ltd v Bhaskar Morediwar Karmu, (1994) 61 Comp Cas 132 (Bom)	741
Indian Iron & Steel Co Ltd v Dallhouse Holdings Ltd, AIR 1957 Cal 292	186, 245
Indian Maize & Chemicals Ltd v Official Liquidator, (2002) 108 Comp Cas 401 (All)	207
Indian National Press (Indore) Ltd. re, (1989) 66 Comp Cas 387 (MP)	230, 235
Indian Oil Corp. Ltd v Chief Inspector of Factories, (1996) 5 SCLC 736; (1998) 5CC 145 1433; (1998) 91 Comp Cas 64	323
Indian Overseas Bank v Essar Machine Works Ltd, (2002) 112 Comp Cas 862 (CIB)	488
Indian Overseas Bank v RM Mktg (P) Ltd. AIR 2002 Del 344; (2001) 107 Comp Cas 606 . .	256
Indian Petro Chemicals Corp. Ltd v State of Rajasthan, (2001) 101 Comp Cas 285 (Raj)	149
Indian Seamless Enterprises Ltd, re, 2015 5CC OnLine Bom 6359; (2015) 193 Comp Cas 25	625
Indian Specie Bank Ltd, re, (1915) 17 Bom LR 342; AIR 1915 Bom 1	164, 174
Indian Spg Mills Ltd v Lt General Madan, AIR 1953 Cal 355; 56 CWN 378	372
Indigo Sector Bank Ltd v Sudar Singh, AIR 1966 All Bom 154 IC 36	142, 163, 265
India Townes v Gujarat State Financial Corp., (1994) 81 Comp Cas 599 (Bom)	207
Indian Turpentine & Resin Co v Pioneer Consolidated Co of India Ltd, (1988) 64 Comp Cas 169 (Del)	669
India Continental Hotels and Resorts Ltd. re (1990) 49 Comp Cas 93 (Raj)	461
Indo-China Steam Navigation Co. re, (1912) 2 Ch 100	359
Indra Prakash Kazmuni v Registrar of Companies, (1985) 57 Comp Cas 662 (Cal) . .	422
Indraben Prasad v UMI Special Steel Ltd, AIR 2012 Jhar 49	712
Indus Farm Ltd, In re, (2016) 199 Comp Cas 392 (NCLT)	581
Indus Film Corp Ltd, re, AIR 1959 Sind 100: 180 IC 488	458
Indus Film Corp Ltd, re, 1972 Ch 414; (1972) 2 WLR 955; (1972) 2 All ES 202	462
Industrial Credit & Investment Corp of India v Financial and Management Services Ltd, AIR 1998 Bom 305; (1998) 3 Bom CR 471; (1998) 3 Bom LR 627; (1999) 96 Comp Cas 243 .	616
Industrial Development Bank of India v Raebat Ltd, (2003) 134 Comp Cas 167; (2003) 42 SCL 726 (Mad)	172
Industrial Development Bank of India Ltd v Parmeshwar Fabrics (P) Ltd, 2016 SCLC OnLine Bom 1058; (2016) 198 Comp Cas 309 .	160
Industrial Development Consultants Ltd v Cooley, (1972) 1 14 L.R. 443; (1972) 2 All ER 162	303
Industrial Development Corp Orissa Ltd v Regd PF Commc, (2002) 112 Comp Cas 527 (Ori)	29

Industrial Finance Corp v Official Liquidator, (1993) 3 SCC 43; (1993) 77 Comp Cas 305; (1993) 3 Comp LJ 137	689	JMC v Thurnton, Kelly & Co Ltd, (1957) 1 WLR 492; (1957) 1 All ER 650	415
Industrial Finance Corp of India v Century Metal's Ltd, (1992) 73 Comp Cas 630 (Del) ..	707	Ireland v Hart, (1902) 1 Ch 522; 86 LT 385	163
Industrial Finance Corp of India v Rama Fibres Ltd, (1998) 29 CLA 342 (P&H)	680	Iron Colliery Co. re, (1882) LR 21 Ch 11442	617
Ingroup Ltd v Denver, (2004) 120 Comp Cas 361; (2004) 1 WLR 451	462	Iron Traders v Hiralsal Mittal, ATR 1962 Pung 277; (1962) 32 Comp Cas 1022	64
Ingroup Ltd v Denver, (2004) 2 BCLC 41 (Ch D) ..	461	Irrigation Development Employees Assn v Govt of AJ, (2004) 55 SCJ 454; (2005) 46 CLA 115 (AP)	392
Inter Investment (P) Ltd v Dynamic Hydraulics Ltd, (1989) 3 Comp LJ 221 (CLB) ..	42	Ishita Ghosh v JDS Technologies (P) Ltd, 2014 SCC OnLine CLB 151; (2015) 188 Comp Cas 53 (CLB)	519, 529
Insetex (India) Ltd v Aeg-Ngef Ltd, (1995) 93 Comp Cas 358 (CLB)	163	ISHS Factors pvt. re, (2004) 2 BCLC 411 (Ch D)	170
Institute of Chartered Accountants of India v PK Mukherjee, (1968) 2 Comp LJ 211; (1968) 38 Comp Cas 624	447	Isle of Wight Railway Co v Tashuddin, (1883) LR 25 Ch D 320; 50 LT 132 (CA)	274, 289
Inter Sales v Reliance Industries Ltd, (1999) 35 CLA 370 (Cal)	399	ITC Veera Prasad v Rayalseema Alkalies, (1997) 59 Comp Cas 13 (CLB)	169
Inter Sales v Reliance Industries Ltd, (2002) 108 Comp Cas 680; (1996) 1 Comp LJ 531 (Cal) ..	151	ITO v Official Liquidator, (1967) 63 ITR 810; (1967) 27 Comp Cas 114 (My)	711
International Ceramics Ltd, re, 2013 SCC OnLine Del 2211; (2014) 186 Comp Cas 395 (Del)	667	ITO v Official Liquidator, (1975) 101 ITR 470; (1976) 46 Comp Cas 46 (AP)	711
International Coach Bus (India) Ltd v Karnataka State Financial Coop, (1994) 81 Comp Cas 19 (Kant)	617	ITO v Official Liquidator, (1977) 47 Comp Cas 54 (AP)	691
International Coach Builders' Ltd v Karnataka State Financial Coop, (2003) 10 SCC 442; (2002) 114 Comp Cas 614	207	ITO v Official Liquidator, (1981) 51 Comp Cas 179; (1981) 128 ITR 228; 1981 Tax LR 369 (Del) ..	678
International Leisure Ltd v First National Trustee Co Ltd, (2013) 2 WLR 466 (Ch D) ..	714	ITO v Official Liquidator, (1982) 134 ITR 132; (1978) 48 Comp Cas 11 (Kar)	209
International Sales and Agencies Ltd v Marcus, (1982) 3 All ER 661	299	ITO v Official Liquidator, (1985) 56 Comp Cas 390 (Kar)	709
International Tin Council, re, (1987) 1 All ER 890 (Ch D)	744	ITO v Short Bros (P) Ltd, AIR 1967 SC 91; (1966) 1 Comp LJ 279	408
Introductions Ltd (No 2), re, 1970 Ch 199; (1969) 2 WLR 791; (1968) 2 Comp LJ 28 (CA) ..	65, 72	ITO (Companies Circle) re, (1970) 1 Comp LJ 46	643
Introductions Ltd (No 2), re, 1970 Ch 199; (1969) 2 WLR 791; (1968) 2 Comp LJ 28 (CA) ..	65, 72	J Burnows (Leeds) Ltd, re, (1982) 1 WLR 1277; (1982) 2 All ER 682 (Ch D)	672
Introductions Ltd (No 2), re, 1970 Ch 199; (1969) 2 WLR 791; (1968) 2 Comp LJ 28 (CA) ..	65, 72	J K Industries Ltd v Registrar of Companies, (1997) 27 CLA 395 (Cal)	767
Introductions Ltd (No 2), re, 1970 Ch 199; (1969) 2 WLR 791; (1968) 2 Comp LJ 28 (CA) ..	65, 72	J S Cambiar v Millennium Health Institute and Diagnostics (P) Ltd, (2014) 183 Comp Cas 71 (Del)	694
Ion Exchange Finance Ltd v Earth India Steel Co Ltd, (2001) 103 Comp Cas 666 (Bom)	476	J Sethuraman v IAC of IT, (1992) 74 Comp Cas 915 (Mad)	330
IRC v George Burrel, (1921) 2 KB 52 (CA)	215	Jubco v Science and Information Technology Ltd, 1992 BCLC 764 (Ch D)	514
IRC v Goldblatt, 1972 Ch 498; (1972) 2 WLR 963; (1972) 2 All ER 202	444	Jackson v Haulyn, (1953) 2 WLR 719	353, 358
IRC v Greenwood, (1921) 2 AC 171 (HL)	416	Jackson & Bassford Ltd, re, (1906) 2 Ch 467; 90 LT 292	720
IRC v Highland Engg Ltd, 1975 SLT 203; 1976 JBL 51	745	Jacob Chelian v KK Chelian, (1973) 13 Comp Cas 295 (Mad)	514
IRC v Korean Syndicate Ltd, (1923) 1 KB 598	596	Jacob Ji Borthelje v Dr Reddy's Laboratories Ltd, (2006) 133 Comp Cas 561 (CLB)	126
IRC v Samson, (1921) 2 KB 492; 125 LT 37	580		

LXVIII Company Law

Jacobus Marler Estates Ltd v Marler, (1912) 65 I.P.C. 157	126	Janak Specific Family Trust v Official Liquidator, 120161 199 Comp Cas 581 (Guj)	686
Jindalpures Tea Co Ltd v Bengal Doobas Natural Tea Co Ltd, (1944) 55 Comp Cas 190 (Cal)	236, 239	Jana & Printing (P) Ltd v Naxar Press Ltd, 2001 103 Comp Cas 516 (2000) 3 Comp L.J. 283 (CLB)	229, 382
Jagmohan Nath v Gupta Chandra, AIR 1915 Lah 100, 29 IC 770	164	Jing Bahadur Singh v Trick India Ltd, 2013 SCC OnLine CLB 125 (2014) 181 Comp Cas 226	575
Jagannath Prasad Thakor v Regional Provident Fund Commr, (1987) 62 Comp Cas 571 (Del)	320	Jing Bahadur Singh v Trick India Ltd, 2013 SCC OnLine P&H 26243 (2014) 186 Comp Cas 232 (P&H)	515
Jugdamba Polymers Ltd v Neo-Sack Co, (2006) 129 Comp Cas 160 (MP)	562	Jimla Works (P) Ltd. re, (1964) 56 Comp Cas 229 (Boar)	679
Jugdish Chandra Mehta v New India Emroidery Mills, (1964) 1 Comp L.J. 291	511	Jervis v Price Waterhouse Coopers, (2010) 2 CLC 365 (Ch D)	280
Jugdish Chandra Nihawan v S.K. Saraf, (1944) 1 SCC 119; (1999) 95 Comp Cas 48; (1999) 1 LJ 295	742	Jervis Motors (Barrow) Ltd v Cavalier, (1964) 1 W.L.R. 1101	152
Jugdish Mills Ltd, re, ACR 1955 Bom 79 (1955) 21 Comp Cas 241	174	Jeta Colton Mills Ltd v Ram: Prowal Bajaj, (1975) 45 Comp Cas 686 (Guj)	177
Jugdish Parasnd Gupta v Youngmen Benefit Chi. Fund (P) Ltd, (1991) 51 Comp Cas 201 (Del)	716	Jawahar Lal Gaurav v State of J&K, (2002) 3 SCC 212; 2002 SCC (J&K) 381	82
Jugdishchandra Champaklal Parekh v German Paper Mills Co Ltd, (1944) 80 Comp Cas 751 (CLB)	154, 170	Jayalakshmi Acharya v Kal Electronics and Consultants (P) Ltd, (1997) 90 Comp Cas 203 (CLB)	198
Jejit Bai Maiti v Punjab Machinery Works (P) Ltd, (2001) 106 Comp Cas 774 (P&H)	169	Jayanthi Bai a Popular Bank Ltd, (1966) 2 Comp L.J. 29 (Ker)	720
Jegjivan Ram Hiralal Doshi v Registrar of Companies, (1989) 5th Comp L.J. 553; (1989) 2 Comp L.J. (Bom)	323	Jayanthi Delegants (P) Ltd v Company Law Board, (1996) 3 Comp L.J. 237 (ALP)	240
Jai Mahal Hotels (P) Ltd v Devraj Singh, (2016) 1 SCC 423	166	Jayanthi R Padukone v ICDS Ltd, AIR 1994 Kant 354	525
Jai Nazir Parashamprasad v Pushpa Devi Saraf, (2006) 2 SC 1736 (2006) 123 Comp Cas 794	21, 43	Jayanthilal V. Munoth & M. Duraiswami, (2000) 132 Comp Cas 797 (Mad)	363
Jainsuvis Exports India v Bindlore Electronics Ltd, (1996) 22 CLA 239; (1996) 34 IHC 657; ILR (1996) 1 Del 292; AIR 1996 Del 105	689	Jayanthilal Pusalkaridas Patel v Gordhandas Desai (P) Ltd, (1967) 1 Comp L.J. 272; (1969) 39 Comp Cas 405 (Bom)	163, 1st, 124
Jigur Palysapin Ltd v Rajashan Singh & W/o Mills Ltd, (2006) 106 Comp Cas 694; (2016) 67 SCL 339 (Raj)	606	Jayaram (GIV) v ICI (C), (2003) 2 SCC 202; (2003) 99 Comp Cas 341	145
Jigur Vastra Vyapar Sangh Ltd v Shyam Sunder Lal Patodia, AIR 1970 Raj 91	735	Jayashree Shantaram Varkundre v Rukmalesh Kalamandir (P) Ltd, AIR 1966 Bom 136; (1963) 20 Comp Cas 141	144
Joint Stock Exchange Asian Ltd. re, AIR 1952 Degac 314	231	Jayesh Kushambhi v Vigilantair Air Conditioning (P) Ltd, (2015) 168 Comp Cas 461 (CLB)	519
Jadhar Chakraborty v Power Tools & Appliances Co Ltd, (1994) 79 Comp Cas 505	529	Jayesh K Mor v State of Gujarat, (2000) 38 CLA 30; 2000 CLC 486 (Guj)	231, 433
Jalpaiguri Cinema Co Ltd v Pratap Nath Mukherjee, (1971) 42 Comp Cas 676 (Del)	153	Jayesh Ramji Kal Doshi v Carbon Corp. Ltd, (1993) 96 Comp Cas 218 (Bom)	275
Jalatarang Motel Ltd v Union of India, (1999) 95 Comp Cas 309 (Guj)	141	Jaypee Cement Ltd. re, (2004) 122 Comp Cas 594; (2014) 2 Comp L.J. 305 (All)	601, 610, 627, 629
James Pilkin & Co Ltd, re, (1916) 85 L.J. Ch. 318	207	JD Jones & Co Ltd v Ranjit Roy, AIR 1927 Cal 662	453

Jehangir R. Modi v Shamji Ladha, (1966-67) 4 Bom HCR 183	64, 70	Joginder Singh v Basava Singh, (1985) 58 Comp Cas 843 (P&H)	164
Jenkin v Pharmaceutical Society of Great Britain, (1921) 1 R. I. Ch. 392	69	Joginder Singh Palta v Time Travels (P) Ltd, (1984) 56 Comp Cas 103 (Cal)	379
Jennings v Hammond, (1882) 1 L.R. 9 QBD 225	596	John v Oriental Xunex Ltd, (1994) 2 KLT 353	61
Jer Rulman Ravenmarco v Chanda Chemicals Ltd, (2000) 2 Bom I.R. 56; (2001) 106 Comp Cas 25	535	John v Rees, (1969) 2 WLR 1294	382
Jerwyn Street Turkish Bath Ltd, re, (1970) 1 W.L.R 1194; (1970) 3 All ER 57	512	John Shaw & Sons (Salford) Ltd v Shaw, (1959) 2 KB 113 (CA)	287
Jerwyn Street Turkish Bath Ltd, re, (1971) 1 W.L.R 1042; (1971) 3 All ER 184 (CA)	525	John Thomas v S. Jugnileagan, (2001) 6 SDC 30; (2001) 106 Comp Cas 614	39
Jetu Jacques Tissa Lalvani v JBA Printing Inks Ltd, (1997) 99 Comp Cas 759 (Bom); (1998) 23 ILR 386, 572		John Tunson & Co (P) Ltd v Surend Malhan, (1997) 9 SCC 651; (1997) 89 Comp Cas 720	
JH Rayner (Mining Lane) Ltd v Deptt of Trade and Industry, (1991) 2 AC 418; (1989) 3 W.L.R 569 (HL)	5	156, 176, 181	
Jhajharia Bros Ltd v Sheldupur Spg & Wvg Co Ltd, AIR 1941 Cal 174; (1940) 72 Cal LJ 458; (1958) 50 C 36	497, 503	John Wilkes (Footwear) Ltd v Lee International (Footwear) Ltd, 1965 BCAC 444	54
Jhamini Kumar Raniwala v Edward Mill Co Ltd, (1971) 2 Comp LJ 43	542	John Wyeth (Iwdin) Ltd, re, (1999) 63 Comp Cas 233 (Bom)	614
Jhoni Kapoor v CIT, (1970) 1 Comp LJ 195; (1970) 40 Comp Cas 780 (Cal)	413	Johnson v Lyttle's Iron Agency, (1877) LR 5 Ch D 687; 36 LT 528	210
JK Industries Ltd v Anmol V Soniwal, (2012) 3 SCC 255, AIR 2012 SC 1079	701	Jabing Chandy v Catholic Syrian Bank Ltd, (1996) 1 KLT 613	324
Jindal (India) Ltd v Cold Rollings India (P) Ltd (1996) 28 CLA 255; (1997) 69 DLJ 363	622	Joint Receivers and Managers of Nilkan Caxton Ltd v Hawthorne, 1964 BC 10294 (QBD)	293
Jindal Agro Processing (P) Ltd, re, (2013) 176 Comp Cas 215 (Guj)	620	Joint Stock Discount Co v Bhawar, (1869) LR 8 Eq 381	313, 360
Jitendra Prasad Agarwal v Associated Turnwell (India) Ltd, 2014 SCC OnLine Del 3443; (2014) 136 Comp Cas 528	534	Joint Stock Discount Co, re, (1896) 1 LR 3 Eq 77	156
Jivubhai Marghabhai Patel v Extrusion Processes (P) Ltd, (1956) 2 Comp LJ 74 (Kor)	648, 650, 651	Jolly Durga Pcl v Godricks Group Ltd, (1998) 97 Comp Cas 495; (1998) 26 CLA 315 (Cal)	762
Jivan Lal v Radha Nethdas, AIR 1971 Odh 322	696	Jonas Hemant Bhutta v Surgi Plast Ltd, (1993) 75 Comp Cas 296 (CLB)	163
Jyoti Ram Cotton Mills v Company Law Board, (1969) 2 Comp LJ 380 (Mys)	559	Jonathan Allen v Zoom Developers (L) Ltd, 2015 SCC OnLine MP 2923; (2015) 192 Comp Cas 501	668
JK (Bombay) (P) Ltd v New Kaiser-Mind Spg and Wvg Co Ltd, AIR 1970 SC 1144; (1970) 40 Comp Cas 687; (1970) 1 Comp LJ 151	613	Jones v EEF Ahmanson & Co, 41 Cal Rptr 592; 1 Cal Ed 93 (1969)	507
JK (Bombay) Ltd v Ilhetu Martha Mishra, (2001) 2440C 2010; AIR 2001 SC 449; (2001) 108 Comp Cas 424	741, 742	Jose Pulikken v Dainton Subsidies & Kuries Ltd, (2001) 114 Comp Cas 699; (2001) 4 Comp LJ 421 (CLB)	171
JK Industries v Chief Inspector of Factories, (1996) 6 SCC 665; (1997) 58 Comp Cas 286	323	Josephine v Official Liquidator, (1979) 49 Comp Cas 170 (Ker)	737
JK Puru v UP State Industrial Development Corp, (1998) 93 Comp Cas 491 (Hl)	243	Joseph Michael v Travancore Rubber & Tea Co Ltd, (1989) 56 Comp Cas 491; (1989) 2 Comp LJ 81 (Ker)	165, 171
JL Mehta (India) Ltd, re, (1949) 96 Comp Cas 907 (CLB)	59	Joshua Darling Co (P) Ltd v Essa Ismail Sait, (1980) 31 Comp Cas 801 (Ker)	626, 677
		Joy v State of Kerala, (1991) 72 Comp Cas 57 (Ker)	275

J P Srivastava & Sons (Raigarh) (P) Ltd v Gwalior Sugar Co Ltd, 2000 CLC 1792 (MP) ...	573	K Venkat Rao v Rockwood (India) Ltd, (2002) 108 Comp Cas 494; (2002) 1 ALD 567 (2002) J An LT 759 279	
Juggilal Kamlapat v CIT, (1968) 2 SCC 376	17	K Venkateswara Rao v Phoenix Share & Stockbrokers (P) Ltd, (2003) 115 Comp Cas 818 (Bom) 662	
Jyoti Ltd v Bharat Patel, (2015) 14 SCC 566; (2015) 191 Comp Cas 371	294	K9 Metal Supplies (Gadilguda) Ltd, re, (1996) 1 WLR 1112 (K.L.D) 9	
Jyoti Indra Mohanty Vakil v Registrar of Companies, (1995) 16 CLA 174 (Bom)	321	Kailash Chandra Dutt v Jagesh Chandra Majumdar, ATR 1926 Cal 369; 32 CWN 1064 .. 269	
K & Co v Aruna Sugars & Enterprises Ltd, AIR 1995 Mad 45	724	Kailash Prasad Mishra v Medwyn Laboratory (P) Ltd, (1996) 1 Comp LJ 291; (1996) 63 Comp Cas 810 n82	
K Balasundaram v GK Alloy Steels (P) Ltd, (2016) 199 Comp Cas 99 (Mad)	522	Kailash Prasad Mohi v Orissa Telecommunication, AIR 1994 Ori 38 1t	
K Joseph Augusthi v MA Narayanan, AIR 1964 SC 1552; (1963) 34 Comp Cas 546	696	Kainth Finance (P) Ltd v Karam Singh Kainth, (1999) 98 Comp Cas 13; (MPH) 736	
K Khathiam v Astech Technologies (P) Ltd, (2016) 196 Comp Cas 461 (Kar)	280	Kalinga Tubes Ltd v Shanti Prasad Jais, (1964) 1 Comp LJ 117 (Ori) 239, 379, 523	
K Letia Kumar v Govt of India, (2002) JIM Comp Cas 610 (Mad)	46	Kalidari Wood Industries Ltd, re, (1989) 3 Comp LJ 24 (J.J.B) 59, 61	
K Madhava Nayak v Popular Bank Ltd, (1967) 39 Comp Cas 217; AIR 1970 Ker 131	403	Kalpana Polytech India Ltd v Union of India, (1978) 16 SCR 207 (Cal) 55	
K Md Farooq Ahmed v Petran Circuit Electronics (P) Ltd, (1998) 92 Comp Cas 499; (1997) 25 CLA 209 (CLB)	150	Kalupur Commercial Coop Bank Ltd v Registrar of Companies, (2M.I) 128 Comp Cas 235	560
K Meenakshi Amma v Sreerama Vilas Press and Publications (P) Ltd, (1992) 73 Comp Cas 285 (Ker)	271, 612	Kalyan Kumar Mukherjee v Institute of Company Secretaries of India, (1987) 62 Comp Cas 466 (Cal)	356
K Mohammed Farooq Adi v Portron Circuits Electronics (P) Ltd, (1997) 25 CLA 209 (CLB)	209	Kalyani Sendaram v Shardlow India Ltd, (1990) 67 Comp Cas 306 (Mad)	367
K Mohan Habu v Heritage Foods India Ltd, (2001) 5 ALD 401; (2002) 106 Comp Cas 793	662	Karmal K Dutta v Ruby General Hospital Ltd, (2000) 36 CLA 214 (CLB)	279
K N Narayanan v ITO, (1984) 50 Comp Cas 162 (Ker)	178	Kandhmu Chemicals (P) Ltd v Advent Computer Services (P) Ltd, (2000) 4 Comp LJ 424 (CLB)	171
K Nagendra Prabhu v Popular Bank Ltd, AIR 1971 Ker 120; (1967) 39 Comp Cas 665; ILR (1969) 1 Ker 540	557	Kamla Devi Mantri v Geasim Industries Ltd, (1970) 59 Comp Cas 1aA; (1999) 3 Comp LJ 278 (MP)	166, 167
K Radhakrishnan v Thirumurli Aspinwall & Bell (P) Ltd, (1996) 91 Comp Cas 31; (1997) 2 LW 790 (Mad)	276, 279	Kamla V Pai v Esso Standard Refining Co (P) Ltd, (1997) 3 Comp LJ 138 (CLB)	198
K Radhakrishnan v Thirumurli Aspinwall & Bell (P) Ltd, (1999) 97 Comp Cas 479 (Mad)	741	Kamla Bai v Vitthal Prasad Co (P) Ltd, (1993) 22 Comp Cas 231 (Ker)	162, 199
K Ramachandra Rao v Rank Cables Ltd, (2004) 118 Comp Cas 122 (AP)	709	Kana Sen v CK Sen & Co (P) Ltd, (1998) 91 Comp Cas 26 (CLB)	169
K Rambalji v Mackintosh Tea Estates (P) Ltd, (1995) 16 CLA 270	190	Kanhaiya Lal Bhargava v Official Liquidator, (1965) 1 Comp LJ 310	408
K Ravinder Reddy v Alliance Business School, (2006) 195 Comp Cas 394 (CLB)	157	Kanika Mukherjee v Rajneeshwar Dayal Dubey, (1966) 1 Comp LJ 65; 71 CWN 256	507, 516
K Seethalakshmi v Registrar of Companies, (2011) 703 Comp Cas 532 (Mad)	221	Kannankandi Copal Krishna Neiry Prakash Chander Juneja, (1990) 91 Comp Cas 104 (Bom)	729, 742
K Subhakar Rao v Minutreck Computers, (2004) 53 SCL 725 (AP)	682		
K V Ravindranath Babu v K Venkateswamy & Co (P) Ltd, (2015) 189 Comp Cas 620 (CLB)	530		

Kanshiram v Kishore Chand, AIR 1915 Lah 109	206, 210
Kantha Devi Agarwal v Registrar of Companies, (2006) 129 Comp Cas 284 (CLB)	165
Kapila Hingorani (D) v State of Bihar, (2003) 6 SCC I 420(3) 116 Comp Cas 133	23
Karak Rubber Co Ltd v Burden (No 2), (1972) 1 WLR 602	268
Karo (P) Ltd, re, (1977) 47 Comp Cas 276 (Del)	510
Karelia Suryanarayana v Ramdas Motor Transport Ltd, (1998) 28 CLA A 233; (1999) 98 Comp Cas 516 (CLB)	371
Karnatak Vegetable Oils & Refineries Ltd v Madras Industrial Investment Corp Ltd, (1954) 2 MLJ 467; (1954) 24 Comp Cas 249; AIR 1955 Mad 582	663, 664
Karnataka Bank Ltd v AH Datar, (1993) 2 KLT 250; (1994) 79 Comp Cas 417	271, 280, 396
Karnataka Leasing and Commercial Corp Ltd v Lahiria Holla, (1995) 83 Comp Cas 127 (Kant)	670
Karnataka State Industrial Investment and Development Corp Ltd v Intermodel Transport Technology Systems, AIR 1998 Kant 195	704
Karnataka Steel & Wire Products v Kohinoor Rolling Shutters & Engg Works, (2003) 1 SCC 26; (2002) 112 Comp Cas 696	766
Karnataka Steel and Wire Products Ltd v Kohinoor Rolling Shutters and Engg Works (P) Ltd, (1995) 78 Comp Cas 96 (Kant)	796
Karnataka Telecom Ltd v Ravi Constructions, (2000) 21 SCL 14 (CLB)	481
Karnataka Theatres Ltd v S Venkatesan, AIR 1996 Kant 18	174
Karnavati Finance Ltd v SEBI, (1996) 27 Comp Cas 166 (Ker)	179
Karthik Service Station v APSS Industrial Deep Coop Ltd, AIR 2010 NOC 183 (AP)	890
Karuppappa v Director of Inspection, CLB, (1986) 59 Comp Cas 814; (1984) 3 Comp L 225 (Ker)	422
Karus v Lloyd Property Ltd, 1965 VR 232 (Aust)	268, 506
Kas Vishwanathan Chettiar v Indo-Burma Petroleum Co Ltd, (1936) 6 Comp Cas 42 (Rang)	208
Kasoori Mal Bonthiya v State, AIR 1951 Ajmer 39	308
Kathiawar Trading Co v Virchand Dipchand, ILR (1874) 18 Bom 319	70
Katz v Nr Nally (Recovery of Preferences), 1999 BC 291 (CA)	721
Kaushalya Aggarwal v Purwile Paging Services Ltd, (2004) 121 Comp Cas 483; 2004 CLC 906 (P&JL)	777
Kausiklal Panikh v Mafatlal Industries Ltd, (1995) 17 CLA JIR 400 (Del)	522, 524
Kavananghi v Commor, Wealth Trust Co, 233 NY 102 (1918)	315
Kavita Dogra v Director of Endorsement, (2014) 182 Comp Cas 376 (Del)	474
Kaye v Croydon Tramways Co, (1898) 1 Ch 558; 76 LT 237; 67 LJ Ch 222	378
Keynet Capital Ltd v SEBI, (2005) 1 Comp L 531 (SAT)	692
Kayteck International, re, (1999) 2 HCILC 351 (CA)	541
KB Madhavan v Federal Bank Ltd, (2007) 135 Comp Cas 234 (CLB)	209
KCP Ltd v KCP Employees Assn, AIR 1969 Mad 370; 18 FLR 52; 1969 Lab IC 1310	591
Kelapa Sawit Sdn Bhd v Yeeh Kun Long, (1991) 1 LSCR 415 (Malaysia)	149
Kelly and Henderson (P) Ltd, re, (1960) 50 Comp Cas 646 (Bom)	514
Kelman v Buxton, (1860) 1 R 2 CP 170; 15 LT 213	43
Kerala State Financial Enterprises Ltd v Official Liquidator, (2006) 10 SDC 709; (2006) 133 Comp Cas 915	458, 628
Kerala State Financial Enterprises Ltd v Official Liquidator, (2006) 133 Comp Cas 915 (Ker)	724
Kerali Stock Broking Ltd v SEBI, (2005) 2 Comp L 434 (SAT)	192
Kerala Water Transport Corp, re, (1967) 39 Comp Cas 508 (Ker)	209
Kerji Tamalya, re, (1960) 68 Comp Cas 142 (Bom)	321
Kerr v John Moirham Ltd, 1940 Ch 657	397
Kesari Singh v Official Liquidator, AIR 1937 Del 61	748
Kesaria Tea Co Ltd, re, (1998) 91 Comp Cas 407 (CLB)	460
Kesha Appliances (P) Ltd v Royal Holdings Services Ltd, (2006) 150 Comp Cas 227 (Bom)	172
Ketan Hakkishan Murvadi v Sahi-Shira-Kutch Stock Exchange Ltd, (2002) 109 Comp Cas 266; (2002) 1 GLH 361; (2001) 1 Guj LR 202	277
Kesione Reactors (P) Ltd, re, (2013) 181 Comp Cas 525 (CLB)	539

RG Anandakrishnan v Burdwan Kutwa Railway Co Ltd, (1978) 48 Comp Cas 211 (Cal)	653
KG Khosla v RC Kizaskar, (1997) 29 CLA 30 (Del)	89
KG Khosla Compressors Ltd, re, (1997) 4 Comp L 461 (CLB)	99
KG Raghavan v Forward Advertising and Marketing (P) Ltd, (2002) 131 Comp Cas 784 (Cal)	520
Khadja v PK Muhammed (P) Ltd, (1985) 58 Comp Cas 543 (Ker)	178, 227
Khalid Mukhlis v Buckeye Beeteries (P) Ltd, (2003) 134 Comp Cas 70 (All)	478
Khanedwal Udyog Ltd, re, (1972) 47 Comp Cas 503 (Bom)	614, 617, 622
Khanewala Securities Ltd v Korea Corp Ltd, (1999) 97 Comp Cas 652 (CLB)	543
Khetan Industries (P) Ltd v Manjusri Vinod Prasad, (1995) 164 CLA 269; AIR 1995 Bom 43; (1994) 4 Bom CR 370	282
Khichildhai Sarashai Patmar v Sevala Cement Works, (2005) 100 SCL 496 (All)	665
Khoday Distilleries Ltd v CIT, (2009) 1 SCC 256	617
Khosla Fara (India) (P) Ltd, re, (1993) 53 Comp Cas 358 (MP)	579
Khulna Loan On Ltd v Jali - Goldar, (1914) 24 10 Cal (Cal)	93
Khurshid Alain v Paganon Co (P) Ltd, (2002) 108 Comp Cas 523 (CLB)	166, 169, 200
Khushal Jain v Siddharth Tubes Ltd, (2005) 57 SCL 390 (MP)	174
Khushi Exports (P) Ltd v State of Gujarat, (2005) 101 Comp Cas 482 (Guj)	643, 649
Khusiram v Hanumappa, 53 CWN 505	85
Kidner, re, (1929) 2 Ch 127	413
Kilburn Electricals Ltd v Regional Director, CLB, (2003) 59 Comp Cas 243 (Mad)	55
Killick Nixon Ltd v Bank of India, (1995) 37 Comp Cas 811 (Bom)	512
Killick Nixon Ltd v Dhanya Mills (P) Ltd, (1983) 54 Comp Cas 432 (Ker)	167, 201
Kalpeki (P) Ltd v Shrikhan Melkun, (1987) 42 Comp Cas 717 (MP)	511
Kalpeki (P) Ltd v Shrikhan Melkun, (1996) 10 SOC 626; (1996) 87 Comp Cas 615	532
Kingfisher Airlines Ltd v SBI, 2013 SCC OnLine Kar 4894; (2014) 186 Comp Cas 239	708
Kingston Cotton Mill Co (No 2), re, (1990) 1 Ch 331	437
Kingston Cotton Mills Co (No 2), re, (1996) 2 Ch 299; 74 LT 566 (CA)	440, 443, 738
Kiran Sandhu v Saraya Sugar Mills Ltd, (1998) 91 Comp Cas 146 (All)	657, 660
Kirby v Wilkins, (1929) 2 Ch 414	249
Kirnapurli Sugars Mills Ltd v G Venkata Rao, (2015) 114 Comp Cas 565 (AP)	473
Kizhakuzhi Proprietary Ltd v Krishnakar Dimensions (P) Ltd, (1999) 96 Comp Cas 726 (Kant)	56
Kizon M Lulla & Vikram Fashion (P) Ltd, (1994) 61 Comp Cas 166 (Cal)	510
Kisan Mehla v Universal Luggage and Mfg Co, (1988) 62 Comp Cas 398 (Bom)	129
Kushan Bains v Majdal Bros & Co, (1986) 1 Comp L 19 (Cal)	93, 101
Kashinath Chellaram v CIT, AIR 1963 SC 390; (1963) 32 Comp Cas 1045	413
Kushneet Patel v Patel Engg Co Ltd, (1994) 79 Comp Cas 53 (Bom)	395
Kilson & Co Ltd, re, (1946) 1 All ER 405 (CA)	68
KK Eramji v Consulting Engg Services (India) Ltd, (2002) 110 Comp Cas 482 (Cal)	544
KK Mehra v Registrar of Companies, (1991) 71 Comp Cas 665 (Del)	323
KK Roy (P) Ltd, re, (1967) 1 Comp L 215; (1967) 37 Comp Cas 277 (Cal)	749
KL Engg v Arab Malaysian Finance, (1996) 1 SCR 65 (Malaysia)	91
Kleinwerk v Associated Automatic Machine Corps Ltd, (1924) 39 Comp Cas 197	96
Klen & Marshall Manufacturers & Exporters Ltd v Scale of J&B, (2003) 100 Comp Cas 160 (Kant)	472
KM Basheer v One Chackola, (2003) 118 Comp Cas 127 (Ker)	13
KM Thomas v Cochin Refineries Ltd, (1963) 58 Comp Cas 48 (Ker)	588
KMA Ltd v Union of India, (1996) 86 Comp Cas 725; (1997) 1 Comp L 343 (Del)	623
KN Bhagwan v Trackparts of India Ltd, (2001) 146 Comp Cas 611 (Ker)	536
KN Erwana Rao v KBL Sharma Rao and Sons, 2010 CJC 403; (2001) 103 Comp Cas 306 (Kant)	241
KN Narayana Iyer v CIT, (1993) 26 Comp Cas 126 (Ker)	722
KN Sankarnayakan v Shree Consultations & Services (P) Ltd, (1994) 80 Comp Cas 558 (Mad)	510
KN Vasudeva Adiga v Vasudeva Adiga East Road (P) Ltd, 2014 SCC OnLine CLB 368; (2015) 189 Comp Cas 491	541

Knightsbridge Estates Ltd v Byrne, (1940) AC 613; (1940) 2 All ER 481; 109 LJ Ch 200; 162 LT 398; 56 TLR 650 (HL)	479, 480	Krishna Lal Ahuja v Suresh Kumar Ahuja, (1983) 53 Comp Cas 60 (Del)	479
Knowles v Scott, (1891) 1 Ch 712; 64 LT 125	695	Krishna Ayyangar v Nalliperumal Pillai, AIR 1920 PC 56	486
Kohn v JRC sub nom Tochako Finance (UK) plc, 1999 STC 922 (Ch D)	710	Krishna Dhont v Kamlaparkar, 1966 Comp LJ 213	640
Kumar Plastic Industries v Roxy Enterprises (P) Ltd, (1991) 72 Comp Cas 61 (Del)	605	Krishna Exports Industries Ltd v DCM Ltd, (2005) 4 Comp LJ 75 (Del)	12
Kundoli Tea Co Ltd, re, ILR (1886) 12 Cal 43	7	Krishnakumar Malls Co Ltd, re, (1975) 45 Comp Cas 246 (Guj)	614
Kostopoulos v Constitution Insurance Co, (1984) 49 DLR (3d) 77 (Can)	10	Kritika Mullengada v Wipro Ltd, (2004) 121 Comp Cas 676 (CLB)	173
Kotash Transport Co v State of Rajasthan, (1957) 37 Comp Cas 286 (Raj)	208	Kriti Plastics (P) Ltd, re, 1992 MPLJ 671; (1993) 78 Comp Cas 138 (MP)	621
Kothari (Madras) Ltd v Myleaf Tobacco Development Co Ltd, (1985) 57 Comp Cas 590 (Kash)	664	KS Narayana Iyengar v TA Mani, AIR 1960 Mad 538	516
Kothari Industrial Corps Ltd v Lazar Dehorgeni (P) Ltd, (1984) 51 Comp Cas 699; (1994) 1 Comp LJ 128 (L.R. (Mad))	176, 177, 412	KS Pillai v Paragon Utility Financiers, (1988) 66 Comp Cas 19 (P&H)	390
Kothari Industrial Corps Ltd v Maxwell Iyengar & Chemicals (P) Ltd, (1996) 80 Comp Cas 79 (Mad)	299	KS Mothilal v KS Kasturi Ceramique (P) Ltd, (2002) 136 Comp Cas 609 (CJ D)	512
Kothari Products Ltd v Registrar of Companies, (2001) 316 Comp Cas 861 (All)	55	KS Narayana Iyengar v Palayam Tea Co Ltd, (1995) 83 Comp Cas 243; (1996) 16 CLA 258 (CLB)	164
Kothari Textiles Ltd v CWT, (1985) 33 Comp Cas 217	415	KS Shavapaa v State Bank of Mysore, (1988) 63 Comp Cas 135 (Karn)	724
Kolla Venkataswamy v Chiota Ramamurthy, AIR 1954 Mad 579	90	Kshemnath Chowdhury v Kero Rajendra Monobrata Ltd, (2002) 110 Comp Cas 401 (CLB)	526
KP Anthony v Thandiyude Plantations (P) Ltd, (1987) 62 Comp Cas 565 (Ker)	157	KTC Tyres (India) Ltd v Kavitha Auto Parts, (1997) 2 KLT 705; AIR 1998 Ker 1471	681
KP Anthony v Thandiyude Plantations (P) Ltd, (1996) 86 Comp Cas 694 (Ker) (FB)	166	KTC Tyres (India) Ltd, re, (2003) 180 CJR 57; (2003) 114 Comp Cas 1E5 (Ker)	707
KP Chackoian v Federal Bank, (1989) 2 Comp LJ 269; (1989) 66 Comp Cas 953 (Ker)	350, 511	Kuenigl v Daimlerschweiz, (1955) 1 QB 515	24
KP Devassy v Official Liquidator, (1997) 2 KLT 53	676	Kuki Lunther (P) Ltd v TNK Govindanaju Chettiar & Co, (2002) 110 Comp Cas 474 (Mys)	507
KP Uthaman v Wandor Jupiter Cells (P) Ltd, AIR 1989 Ker 41; (1989) 65 Comp Cas 178; (1988) 7 KLT 696	481	Kulbir Singh v Union of India, (1997) 98 Comp Cas 584 (Del)	589
KR Lakshmanan v State of TN, (1996) 2 SCC 226; (1996) 86 Comp Cas 66	538	Kuldeep Singh Dhillion v Paragon Utility Financiers (P) Ltd, (1986) 60 Comp Cas 1075 (P&H)	379
Kreditbank Cassel GmbH v Schenkers Ltd, (1927) 1 KB 826 (CA)	98, 101, 192	Kulveer Chandhoke v Eastern Linkers (P) Ltd, (1995) 35 DCR 312; (2000) 103 Comp Cas 947	155
Kripal Ispat Ltd v Dalip Singh; Majithia, (1977) 20 ALR (Swar) 34	539	Kumar Exporters (P) Ltd v Nalco Oxygen Acetylene and Gas Ltd, (1985) 58 Comp Cas 97 (All)	153
Krls Cruisets Ltd, re, 1949 Ch 138; (1948) 2 All LR 105	400	Kumar Exporters (P) Ltd v Nalco Oxygen and Acetylene Gas Ltd, (1986) 60 Comp Cas 964 (All)	514
Krishan Avtar Bahadur v Col Irwin Extross, (1980) 59 Comp Cas 417 (Bom)	739	Kumar Krishna Rehatgi v SBI, (1980) 50 Comp Cas 722 (Pat)	455
Krishan Kumar Bangur v Director General of Foreign Trade, (2006) 135 Comp Cas 53 (Del)	362	Kumaran Pally v Vepak Pharmaceuticals & Chemicals, (1969) 65 Comp Cas 246 (Ker)	167

Kumudamani Multi-graphics Printing & Publishing Co. re. (1983) 54 Comp Cas 520 (Ker)	556
Kumaraswami Chettiar v MSM Chettiarumbi Chettiar, (1950) 2 MLJ 453 (1950) 20 Comp Cas 286 AIR 1951 Mad 291	596, 597
Kundan Singh v Moga Transport Co (P) Ltd, (1987) 16 Comp Cas 600 (Punjab)	255
Kuppuuni Elaya Nayyar v RM Krishna Pillai, AIR 1949 Mad 74	144
Kuriekoor v PKV Caneep Industries, (2007) 101 Comp Cas 825; (2002) 1 KLT 639; (2002) 2 KLT 342	255
Kuttanad Rubber Co Ltd v KT Ilayavizhak, (1997) 88 Comp Cas 408; (1993) 5 Comp L 39 (Ker)	510
Kuwait Asian Bank EC v National Mutual Life Nominees Ltd, (1991) 1 AC 282; (1990) 3 WLR 797; (1990) 3 All ER 414 (4th)	331, 444, 449
KY Sasticharan Pitha v Indian Overseas Bank, AIR 2011 Ker 24	712
Kvality Textiles (Malaysia) Sdn Bhd v Arunchalam Chettiar, (1991) 15 SCR 140 (Malaysia)	161
 L Chandramurthy v KL Kapsi, (2005) 48 SCL 294 (CLB)	510
L. Gupta v Vishwan Baburao Savate, AIR 1986 Nag 209 (1956) 26 Comp Cas 245	732
L Mullick & Co v Binay Properties (P) Ltd, (1983) 53 Comp Cas 695 (Cal)	626
L Optex Photographic Ltd, re 1989 BCCL 761 (Ch D)	380
L Sanivesan v Ravi Nidhi Ltd, (2005) 124 Comp Cas 140 (CLB)	285
La Compagnie de Mayville v Whalley, (1896) 1 Ch 785 (CA)	333, 334
Lachhmar, P Ullabh v Redington (India) Ltd, (2005) 133 Comp Cas 855 (Mad)	3112
Lachmi Narain v Emperor, AIR 1920 All 357	319
Ladies Dress Assn Ltd v Fulbrook, (1960) 2 QB 376 (CA)	211
Laguna Holdings (P) Ltd v Eden Park Hotel (P) Ltd, (2013) 134 DRJ 91; (2013) 176 Comp Cas 118	610
Lequik v Brick Bond Builders (P) Ltd, (2006) 133 Comp Cas 593 (Ker)	481
Lakshmana Chettiar v SI Planting Co, (1953) 21 Comp Cas 246	644
Lakshmi Narayan Anna v Registrar of Companies, (1980) 50 Comp Cas 536 (Punjab)	644
 Lakshmi Natarajan v Bharatian Publications Ltd, (1997) 25 CLA 96 (CLB)	158
Lakshmi Rayar Cotton Mills Co Ltd v JK Jute Mills Co Ltd, AIR 1957 All 311	96, 100
Lakshminathan Cotton Mills Co Ltd v Aluminium Corps of India Ltd, (1971) 1 SCC 67	286, 288
Lakshman Mengaj v Shree Ram Mills Ltd, (1968) 38 Comp Cas 606 (Bom)	270
Lalchand Sureja v Hyderabad Venkatesh Ltd, (1990) 69 Comp Cas 415 (AP)	229
Lalit Surajmal Kanadia v Office Tiger Database Systems Indz (P) Ltd, (2006) 5 LW 666; (2006) 129 Comp Cas 192 (Mad)	12, 27
Lalita Jalan v Bombay Gas Co Ltd, (2002) 2 SCC 37; (2002) 112 Comp Cas 1	240
Lalita Jalan v Bombay Gas Co Ltd, (2003) 6 SCC 107; (2003) 114 Comp Cas 513	240, 241
Lalita Rajya Lakshmi v Indian Motor Co, AIR 1962 Cal 127; (1962) 32 Comp Cas 207	518
Lalithamba Bai v Harrisons Malabar Alum Ltd, (1989) 63 Comp Cas 562 (Ker)	199
Lancashire Brick & Tile Co. Ltd, re, (1965) LR 34 L 173	667
Lant Credit Co of Ireland v Lord Fermoy, (1920) 5 Ch App 263	313, 323
Landhues Leasing pvt. re, (1999) 1 BCCL 266 (Bihar)	323
Lands Alignment Co. re, (1994) 1 Ch 616 (CA)	287
Larneque v Beauchemin, 1897 AC 358; 26 LJ 422	206
Larsen and Toubro Ltd, re, (2004) 182 Comp Cas 43 (CLB)	173
Lata Pramod Datta v Mode Export (P) Ltd, (2016) 500 OnLine Barr 3100; (2016) 598 Comp Cas 433	264
Lata Narendra Singhji v Official Liquidator, (2005) 60 SCL 24 (Guj)	680
Law Society v KPMG Peat Marwick, (2000) 1 WLR 1921; (2000) 1 All RR 515	430
Lawang Tehang v Goenka Commercial Bank, (1961) 64 CWN 828; (1961) 31 Comp Cas 45	632
Laxman Bharmaji v Emperor, ILR 1945 Bom 883; 41 IC 1946 Bom 18; 223 IC 110	479
Laxmi Fibres Ltd v AP Industrial Development Corp Ltd, (2015) 16 SCC 464; (2015) 192 Comp Cas 84	712
Laxminarayana Bhayya v Praga Tools Corp. Ltd, AIR 1953 Hyd 126	164
Lozunas Nitrate Co v Laguna Synthetics, (1999) 2 Ch 392 (CA)	212
Lee et Lee's Air Farming Ltd, 1961 AC 72; (1960) 3 WLR 758 (PC)	10, 250

- Lee v Neuchatel Asphalt Co, [1889] L.R. 41 Ch D 1; (1896-97) A.I.R. Rep. 947; 61 I.C. 11 . . . 405, 436
- Lee Penetration Ltd v Lee Lighting Ltd, 1992 B.C.L.C. 22 (CA) 329
- Lee, Behrens & Co Ltd, re, (1932) 2 Ch 46 65
- Leeds & Hanley Theatres of Varieties Ltd, re, (1902) 2 Ch 809; 72 I.C. 1; 87 I.T. 488 (CA) 139
- Leeds Estate Building and Investment Co v Shepherd, (1867) L.R. 26 Ch D 287; 57 I.T. 684 442
- Leeds United Holdings plc, re, (1996) 2 B.C.L.C. 545 (Ch D) 531
- Leigh & Silsby Ltd v Alpinion Shipping Co Ltd, 1986 A.C. 785; (1986) 2 W.L.R. 902; (1986) 2 A.I.R. 145 (H.L.) 672
- Lemire v Austin Fiduciary Investment Trust Ltd, 1926 Ch D 1; 153 I.T. 790 (CA) 479, 480
- Lennard's Carrying Co Ltd v Astatic Petroleum Co Ltd, 1915 A.C. 206; 113 I.T. 195 (E.L.R.) 253, 262
- Levy v Abercrombie slate & Slab Co, (1887) L.R. 37 Ch D 260; 58 I.T. 218 479
- Leyland DAF Ltd case, (1994) 4 A.I.R. 300 (Ch D) 490
- LG Electronics Systems Indl.(In) Ltd, re, (2003) 302 DLT 320; (2003) 116 Comp Cas 48 611
- LIC v Asia Udyog (P) Ltd, (1964) 55 Comp Cas 187; (1964) 145 I.T.R. 520 (Del.) 679
- LIC v Esopus Ltd, (1966) 1 S.C.C. 264; (1966) 39 Comp Cas 548; (1996) 1 Comp L.J. 91 24, 27, 157, 161, 173, 177, 178, 281, 286, 287, 281, 289, 371
- LIC v Haridas Mundra, (1966) 36 Comp Cas 371 (All) 539
- Lica (P) Ltd (2) v Official Liquidator, (No. 2), (2000) 6 S.C.C. 32; (1996) 85 Comp Cas 792 689
- Lightening Electrical Contractors Ltd, re, (C.1967) 7 B.C.L.C. 302 (Ch D) 275
- Linda Marie Ltd, re, 1999 I.C.L.C. 46 (Ch D) 710
- Lindgren v L & T Estates Co Ltd, (1968) 2 W.L.R. 562 (CA) 306
- Lindsay Bowman Ltd, re, (1969) 1 W.L.R. 1443; (1969) 3 A.I.R. 601 643
- Link Film Purchase & Leasing Co (P) Ltd v State of Kerala, (2001) 103 Comp Cas 941 (Ker) 39
- Lion Nathan Ltd v CC Bottlers Ltd, (1996) 1 W.L.R. 1438; (1996) 2 B.C.L.C. 371 (PC) 382
- Liquidator v Gobind Singh, I.B. (1923) 4 Lab 209 798
- Littewoods Mail Order Stores Ltd v I.R.C., (1968) 1 W.L.R. 1241 (CA) 26
- 1X Prabhu v S.M. Ameeul Millath, AIR 1997 Ker 317 738
- LKS Gold Palace v LKS Gold House (P) Ltd, (2004) 122 Comp Cas 896 (Mad) 750
- Lloyd v Pepple, (2001) 1 B.C.L.C. 19 (Ch D) 182
- Lloyd's Bank plc v Duken, (1987) 1 W.L.R. 1324; (1987) 3 A.I.R. 193 544
- Lloyd's Bank plc v Lampert, 1999 B.C.C. 507 689
- Louth v John Blackwood Ltd, 1924 A.C. 283; 1924 A.I.R. Rep. 730 (I.P.L.) 650, 651, 655
- Lutter Valley Tea Co. Ltd re, A.I.R. 1995 C.A. 1372; (1994) 68 C.W.N. 958 695, 696
- Luk Vilas Urban Coop. Bank Ltd v Luk Vilas Finance Corp. Ltd, (2005) 114 Comp Cas 355 678
- Lokenath Gupta v Credits (P) Ltd, (1968) 38 Comp Cas 399; (1965) 1 Comp L.J. 253 649, 653
- Londhawal Co. A/S v Fowler, 1948 B.C.L.C. 166 (CA) 54
- London & County Securities Ltd v Nicholson, (1980) 1 W.L.R. 948; (1980) 3 A.I.R. 86 (Ch D) 363
- London & General Bank (No 2), re, (1895) 2 Ch 623; (1895-99) A.I.R. 953 (CA); 71 I.T. 304 440, 442, 444
- London & Globe Finance Corp. Ltd, re, (1903) 1 Ch 728 9
- London & Staffordshire Fire Insurance Co, re, (1885) L.R. 24 Ch D 149; 45 I.T. 955 129
- London & Yorkshire Bank Ltd v Cooper, (1889) 15 Q.B.D. 7 (D.C.) 749
- London and Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd, 1891 W.N. 165 300, 304
- London and Mediterranean Bank Ltd, re (Wright case), (1871) L.R. 7 Ch D 55; 25 I.T. 471 170
- London and Midland Bank v Mitchell, (1899) 2 Ch 161 185
- London Chartered Bank of Australia, re, (1893) 3 Ch 540; 69 I.T. 393 609
- London County Council v Attorney General, 1902 A.C. 165 (H.C.) 64
- London Estate Ltd, re, (1969) 1 W.L.R. 713; (1970) 1 Comp L.J. 28 281
- London Founders Assn Ltd v Clarke, (1888) L.R. 20 Q.B.D. 576; 59 I.T. 93 280
- London Edinburgh and Continental Exchange Bank, re, (1867) L.R. 2 Ch App 427 399
- London United Investments plc, re, 1992 Ch 576; (1992) 2 W.L.R. 800; (1992) 2 A.I.R. 562 (CA) 563
- London Ltd v Shell Petroleum Co Ltd, 1980 Q.B. 358; (1980) 2 W.L.R. 367 (CA) 30
- Lord Krishna Sugar Mills Ltd v Abnash Kaur, (1974) 44 Comp Cas 210 (Del) 539

Lothian Jute Mills Ltd, re, (1950) 55 CWN 646 (Cal)	373	Macauley v Northern Assurance Co Ltd, 1925 AC 619 (HL)	10
Lowe v Ishay, (1996) 1 BCLC 292 (Ch D)	499	MacDouall v Gardiner, (1875) 1 Ch D 13; (1874-90) All ER Rep Ext 2348 (CA)	495, 496
Loknayak Nazayan v Pudhutholam Estates Ltd, (1992) 74 Comp Cas 30 (Mad)	513	Mackintosh v Wigan Coal Co, (1916) 2 Ch 293	219
Lubbe v Cape T's, (2001) 1 WLR 1545 (JUL)	51	Mackintosh Mackenzie & Co, re, (1967) 1 Comp Lj 260, (1967) 3 Comp Cas 516 (Ca)	58
Lubbock v British Bank of South America, (1892) 2 Ch 198; (1891-94) All ER Rep Ext 1759, 67 LT 2%	408	McClaine Watson & Co Ltd v International Tax Council, 1969 Ch 253; (1988) 3 All ER 257 (CA)	244
Lucania Temperance Billiard Hall's (Lucania) Ltd, re, 1966 Ch 98; (1966) 2 WLR 5; (1966) 1 Comp Lj 351	23	McLeay v 1st, 1906 AC 24	126
Lucidie Bros, Ltd re, (1905) 1 WLR 3051; (1905) 2 All ER 692; (1906) 1 Comp Lj 30 (Ch D)	519	MacPherson v European Strategic Bureau Ltd, (1999) 2 BCLC 293 (Ch D)	329, 404
Lucrak Mehta & Entertainment Ltd v Stock Exchange, Mumbai, (2000) 49 CLA 267 (SAT)	344	Medalal v Changdon Sugar Mills, AIR 1958 Bom 250	83
Luxmi Printing Works Ltd v Registrar of Companies, (1990) 69 Comp Cas 442 (Cal)	403	Medalal v Hiratalal, (1997) 1 Comp Lj 219; (2000) 32 CLA 223 (MP)	27
Luxxi Tea Co Ltd v PK Sarkar, 1989 Supp (2) SCC 686; (1989) 2 Comp Lj 285	157	Medalal Pakirchand Dudhediya v Changdon Sugar Mills Ltd, AIR 1958 Bom 491; (1958) 60 Bom LR 254	479
LVSR Farms (P) Ltd v Official Liquidator, (2014) 187 Comp Cas 400 (T & AP)	706	Muddi Swarna v CTQ, (2002) 109 Comp Cas 316 (AP)	301
Lydney and Wigpool Iron Ore Co v Bird, (1884) 133 Ch D 55 (CA)	139	Medha Patkar v Bank of Baroda, (1991) 1 Comp Lj 100; (1991) 109 Comp Cas 1 (Mad); (1991) 52 LW 341	82
M A Panjwani v Registrar of Companies, (2015) 192 Comp Cas 382 (Del)	611	Medhavan Namdhari v Registrar of Companies, (2002) 106 Comp Cas 1 (Mad)	321
M Gopalakrishnan v Leaflet India Ltd, (1995) 83 Comp Cas 351 (Mad)	739	Medhu Intra Ltd v Registrar of Companies, (2004) 3 CITN 607; (2004) 1 Cal 11 267; (2004) 130 Comp Cas 510	425
M Krishna Reddy v ACE Forge P Ltd, (2016) 105 Comp Cas 332 (Kar)	509	Medjewi Krishnadevji Kamalji v Chinnia Banking Corp Ltd, AIR 1941 Mad 354	317
M Meiyappan v Registrar of Companies, (2002) 112 Comp Cas 450 (Mad)	319	Madras Central Urban Bank Ltd v Corp of Madras, (1932) 2 Comp Cas 323 (Mad)	5
M Mohan Babu v Heritage Foods India Ltd, (2002) 108 Comp Cas 771 (AP)	662	Madras Native Permanent Fund Ltd, re, (1931) 60 MLJ 270	44, 453
M Moodly v Drivers and Conductors Bus Service (P) Ltd, (1991) 71 Comp Cas 136 (Mad)	352	Madras Stock Exchange Ltd v SSR Rajkumar, (2003) 126 Comp Cas 214; (2003) 21 W 190	80
M Ratnavarma Radhakrishna v Karnataka Theatres Ltd, 2001 CLC 489; (2001) 38 CLA 171; (2002) 109 Comp Cas 461 (Karn)	173, 184	Madras Cube Co Ltd v Iara Kushon Sumana, (1995) 1 Comp Lj 195 (Mad)	325
M S Nedhusoodan v Kerala Kacchi Ltd, (1994) 9 SCC 204	399	Maladai Devi, Ltd v Secret Ltd, AIR 2010 NOC 602 (Guj)	616, 616
M Sreenivasulu Reddy v Kishore & Chhatria, (2002) 109 Comp Cas 18 (Bom)	122, 123	Malabati Industries Ltd v Gujarat Gas Co Ltd, (1999) 97 Comp Cas 303; (1999) 4 Comp Lj 112 (Guj)	360
M Velayethan v Registrar of Companies, (1980) 51 Comp Cas 33 (Ker)	500	Malachal Industries Ltd, re, (1995) 17 CLA 249; (1995) 8d Comp Cas 230 (Guj)	611, 612
M Venkata Rao v M Janardhana Rao, (1988) 64 Comp Cas 167 (Kurn)	744	Malabati Ace Stores v Indian Oil Corp., (1991) 3 SCC 752; (1991) 69 Comp Cas 746	21, 588
M Venkata Rao v M Janardhana Rao, (1988) 64 Comp Cas 167 (Kurn)	744	Malahib Peasad Jalan v Bajrang Peasad Jalan, (1989) 2 Comp Lj 71 (Guj)	529
M Venkata Rao v M Janardhana Rao, (1988) 64 Comp Cas 167 (Kurn)	744	Mahabir Singh v Jai Singh, (1928) 44 Comp Cas 555 (Del)	124

Mahadeo Lal Agarwala v New Darjeeling Union Tea Co, AIR 1952 Cal 58	165	Marblestone Buildings Promotions Ltd, re, (1971) 1 WLR 1083; (1971) 3 AD ER 363 (Civ Ct)	357, 728
Mahalaxmi Mills Cr Ltd v State, (1970) 1 Comp L 80 (Raj)	230	Math v Rio Granite Rubber Estates Ltd, 1913 AC 853 (HL)	125
Mahalaxmi v Part Claster Jute Mfg Co, AIR 1955 Cal 132; 38 CWN 715	386, 389	Majestic Infracom (P) Ltd v Ebasalat Mauritius Ltd, 2014 SCC Online Bom 460; (2014) 195 Comp Cas 145	684
Mahamandal Shashira Prakashak Samity Ltd, re, (1917) 15 All L 193	654	Major Teja Singh v Liquidator of Hindustan Petroleum Co Ltd, (1961) 31 Comp Cas 523 (Punj)	205
Mohammed v Revat Bombay House, (1958) 4 SALJ 704	100	Makhan Lal Jain v Amit Banaspati Co Ltd, (1953) 21 Comp Cas 100	511
Maharaja Exports v Apparels Exports Promotion Council, (1986) 60 Comp Cas 353 (Del)	290	Maheen Singh Devinder Pal Singh v Roja Oil Mills, (1999) 98 Comp Cas 191 (P&H)	763
Maharashtra Apex Corp Ltd, re, (2005) 124 Comp Cas 637 (Kan)	602	Makham Investments Ltd, re, (1996) 57 Comp Cas 587; (1995) 1 CHN 368	605, 606, 624
Maharashtra General Kamgar Union v Hindustani Lever Ltd, (1994) 81 Comp Cas 784 (MKTPC)	607	Mallikarjun Refrigeration Industries, re, (1977) 47 Comp Cas 67 (Pan)	677
Maharashtra General Kamgar Union v Hindustani Lever Ltd, (1994) 81 Comp Cas 784 (MKTPC)	670	Mcalbert and Pioneer Hosiery (P) Ltd, re, (1985) 57 Comp Cas 570 (Ker)	151
Maharashtra Power Development Corp Ltd v Dabhol Power Co, (2004) 120 Comp Cas 540 (Karn)	393	Mcalbar Industries Co Ltd v A John Anilappur, (1983) 77 Comp Cas 717 (Ker)	613
Maharashtra Power Development Corp Ltd v Dabhol Power Co, (2005) 4 Comp L 50 (Bom)	52	Makalai Iron & Steel Works Ltd, re, AIR 1964 Ker 311	142
Maharashtra SEB v Official Liquidator, (1982) 3 SCC 258; (1983) 53 Comp Cas 268	697	Malayalam Plantation India Ltd v Harrisons and Crossfield (India) Ltd, (1966) 2 Comp L 409 (Ker)	621
Maharashtra State Financial Corps v Nasvi & Co (P) Ltd, (1993) 76 Comp Cas 168 (Bom)	52, 456, 464	Malathi Tea Syndicate Ltd v Revenue Officer, (1973) 43 Comp Cas 359; AIR 1973 Cal 76	56
Maharashtra State Financial Corps v Official Liquidator, (1985) 82 Comp Cas 342 (Bom)	707	Malathi Tea Syndicate Ltd, re, 56 CWN 653	372, 373
Maharashtra State Financial Corps v Urkay Industries Ltd, (1995) 1 Comp L 555 (Bom)	670	Malini Rao v Hotel Dwarka, (1997) 90 Comp Cas 179; (1994) 1 All LT 56	743, 744
Malavir Weaves (P) Ltd, re, (1997) 24 CLA I (Guj)	622	Malleson v National Insurance and Guaranty Corporation, (1994) 1 Ch 200; All LT 57	86
Mahendra Kumar Jain v Federal Chemical Works Ltd, (1965) 35 Comp Cas 631; (1965) 1 Comp L 151 (A.I.)	164	Malleswara Finance and Investment Co v Company Law Board, (1994) 81 Comp Cas 64; AIR 1994 Mad 341	168, 512
Mahendra Singh Meher v Lake Palace Hotels & Motels (P) Ltd, (1997) 27 CLA 229 (CLB)	169	Madhava Bharath Rao v Gowthami Solvent Oils Ltd, (2001) 105 Comp Cas 700 (CLB)	170
Maheeshwari Bros v Official Liquidators of Indra Sugar Works Ltd, AIR 1942 All 119	458	Maluk Mohamed v Capital Stock Exchange Kerala Ltd, (1991) 72 Comp Cas 333 (Ker)	41
Maheeshwari Khetan Sugar Mills v Ishwari Khetan Sugar Mills, (1963) 55 Comp Cas 1142; AIR 1963 All 135	124, 177, 200	Malvika Apparels v Union of India, (2007) 312 Comp Cas 335 (Del)	320
Maheeshwari Proteins Ltd, re, (2004) 1 Comp L 429; (2004) 4 BC 430; (2004) 52 SC 399 (MP)	686	Malvika Madan Sehgal v N. M. Sehgal Ltd, (1998) 90 Comp Cas 122; (1997) 65 DLT 381	606
Mahomed v Mortis, (2000) 2 BCLC 526 (CA)	692	Mamta Papers (P) Ltd v State of Orissa, (2003) 99 Comp Cas 294 (Orl)	8
Mahony v East Holyford Mining Co, (1875) LR 7 HL 359; 53 TLR 338	90, 94	Manabendra Singh v Official Liquidator, (1977) 47 Comp Cas 356 (Del)	202
Maneckchowk & Ahmedabad Mfg Co, re, (1970) 40 Comp Cas 816 (Guj)	603	Maneckchowk & Ahmedabad Mfg Co, re, (1970) 40 Comp Cas 816 (Guj)	603

- Manekji Pestonji Bhacucha v Wardle]
Barabhai & Co, (1925-26) 53 IA 92; (1926) 28
Bom LR 777 AIR 1926 PC 39 176, 186
- Manekchowk & Ahmedabad Mfg Co Ltd, re,
(1983) 55 Comp Cas 519 (Guj) 629
- Manekchowk & Ahmedabad Mfg Co, re,
(1988) 66 Comp Cas 729 (Guj) 605
- Maneklal Mansukhlal v Sataspur Mfg Co
Ltd, AIR 1927 Bom 167 463, 626
- Mangal Sein v Indian Merchants Bank, AIR
1928 Lah 240 212
- Mangalore Chemicals & Fertilisers Ltd v
Company Law Board, (2005) 126 Comp Cas
261 (Karn) 461
- Maniam Transports v S Krishna Maorthy,
(1993) 1 Comp LJ 153 (Mad) 261
- Manilal Gangaram v Western India Theatres
Ltd, AIR 1963 Bom 40 165
- Mani Shri Commercial Ltd v NR Dongre, AIR
2000 Del 126 (2000) 101 Comp Cas 106 152
- Manjulalal v Jayant Vilasnagar Ltd, (1991) 71
Comp Cas 443 (MP) 561
- Mannalal Khetan v Kedar Nath Khetan, (1977)
2 SCC 424; (1977) 47 Comp Cas 140 177
- Mannath Balchandran v Purba Fodder
Campbell & Co Ltd, (1996) 2 Mah LJ 930 742
- Manohar Rajaram Chhabria v Union of
India, (2000) 3 Cal LT 434; (2002) 110 Comp
Cas 162 373
- Manojeet Nainik & Associates v Official
Liquidator, (2005) 3 SCC 112; (2005) 188
Comp Cas 329 691
- Manson v Smith, (1997) 2 BCCL 161 (CA) 695
- Manshu & Co (P) Ltd, re, (1973) 48 Comp Cas
244 (Mad) 713
- Mansukhlal v MV Shail, (1976) 46 Comp Cas
279 (Guj) 612
- Marnit Rubber Ltd v K Marzrukalam, (2000)
9 SCC 547; (2001) 204 Comp Cas 1 761
- Margaret T Deneen v Worldwide Agencies (P)
Ltd, (1989) 66 Comp Cas 5 (Del) 199, 512, 526
- Marikar Metres v MI Ravikumar, (1983) 52
Comp Cas 362 (Ker) 379
- Marina World Shipping Corp v Bengal
Exports (P) Ltd, (2004) 122 Comp Cas 399
(Del) 664
- Market Wizard Systems Ltd, re, (1998) 2 BCCL
262 (Ch D) 661
- Marshall Sons & Co (India) Ltd v ITC, (1997) 2
SCC 302; (1997) 88 Comp Cas 528 612, 621
- Marshall Sons & Co (India) Ltd v ITO, (1991) 3
Comp LJ 117 (1992) 74 Comp Cas 236 (Mad) ... 621
- Marshall's Valve Gear Co Ltd v Manning,
Wardle & Co Ltd, (1909) 1 Ch 267, 100 L 55 .. 257,
290, 514
- Martin Castellino v Alpha Omega Ship
Management (P) Ltd, (2001) 104 Comp Cas
687 (CLB) 173, 377
- Maturi Ummaheshwara Rao v Pendayala
Venkatacayudu, (1970) 40 Comp Cas 761;
AIR 1970 AP 225 462
- Macuti Ltd v BG Shirke & Co, (1981) 51 Comp
Cas 11 (P&H) 577
- Maruti Ltd v IIM Tractor and Automobiles
Corpn, (1990) 69 Comp Cas 59 (P&H) 690
- Maruti Ltd v Lexma Patel Traders, (1998) 91
Comp Cas 622 (P&H) 721
- Maruti Ltd v Pan India Plastic (P) Ltd, AIR
1993 P&H 215; (1995) 83 Comp Cas 898 (P&H) ... 255
- Maruti Ltd v Parry & Co Ltd, (1969) 66 Comp
Cas 309; (1989) 3 Comp LJ 384 (P&H) 347
- Maruti Ltd v Parry & Co Ltd, (1990) 66 Comp
Cas 309; (1989) 3 Comp LJ 384; (1990) 97 PLR
470 (P&H) 681
- Maruti Ltd v PR Sasidharan, (1990) 68 Comp
Cas 5 (P&H) 683
- Maruti Udyog Ltd v Blue Star Ltd, (1999) 95
Comp Cas 108 (P&H) 205
- Marwari Stores Ltd v Gauri Shanker Goenka,
AIR 1936 Cal 227 222
- Marybong and Kyel Tea Estate Ltd, re, (1977)
47 Comp Cas 802 (Cal) 600, 621
- Massey, re, (1870) LR 9 Eq 367; 22 LT 195 710
- Master Silk Mills (P) Ltd v DH Nehru, (1980)
50 Comp Cas 365 (Guj) 158
- Matchine pte v Williams Blair & Co LLC,
(2003) 2 BCCL 195 (Ch D) 581
- Matthew Michael v Teekay Rubber & Tea Co
Ltd, (1994) 79 Comp Cas 370; (1993) 3 Comp
LJ 449 (Cal) 181
- Matthew Michael v Teekay Rubber & Tea Co
Ltd, (1983) 54 Comp Cas 88 (Ker) 151
- Matthew Philip v Malayalam Plantations
(India) Ltd, (1994) 81 Comp Cas 48 (Ker) (HII) .. 623
- Mathrubhumi Printing and Publishing Ltd v
Vaidikman Publishers Ltd, (1992) 73 Comp
Cas 80; (1992) 1 Comp LJ 234 (Ker)
86, 89, 131, 156, 174, 175
- Mathrubhumi Manufacturers and Traders (P)
Ltd v Malayalam Industries Ltd, (2010) 186
Comp Cas 295 (CLB) 166
- Matum Ummaheshwara Rao v Pendayala
Venkatacayudu, (1970) 40 Comp Cas 761, AIR
1970 AP 225 462

Maxwell v Deptt of Trade & Industry, 1974 QB 523 (1974) 2 All ER 122 (CA)	364
Maxwell Dyes and Chemicals (P) Ltd v Kothari Industrial Corpn Ltd, (1990) 85 Comp Cas 311 (Mad)	239
Mayfair Property Ltd, re, (1899) 2 Ch 28	224
Mayor Symtex Ltd v Punjab & Sind Bank, (1997) 27 CLA 208; (1998) 96 Comp Cas 974; (1997) 67 DLT 836	490
MC Dhalsawani v Sankhi Sugars Ltd, (1980) 58 Comp Cas 154 (Mad)	510
MCC Finance Ltd v Ramesh Gandhi, (2005) 127 Comp Cas 85 (Mad)	671
MCC Finance Ltd v RBI, (2002) 119 Comp Cas 645 (Mad)	705
McCullagh v Earle, 80 L Ed 121, 246 US 140 (1905)	497
MCD v JB Brilling Co (P) Ltd, (1975) Cri LJ 1148 (Del)	261
McDowell & Co Ltd v CTO, (1965) 3 SCC 230	17
McGuiness v Bremner pk, (1888) 8 CLC 673	544
McKeown v Boudard Pevectil Gear Co Ltd, (1896) 65 L Ch 735 (CA)	126
McL v Pavel, (1962) 46 SASR 69 (SC)	363
MDA Investment Management Ltd, re, (2004) 1 CLC 217	725
Measures Bros Ltd v Measures, (1910) 2 Ch 248 (CA)	304
Mechanisations (Eaglescliffe) Ltd, re, 1964 Ch 20; (1965) 2 WLR 702; (1964) 3 All ER 640	464
Meena Steels Ltd, re, 2016 SCC OnLine Del 1830 (2016) 193 Comp Cas 523	255
Mega Resources v Bombay Dyeing and Mfg Co Ltd, (2003) 116 Comp Cas 205 (CLB)	309
Meghdoot Services Ltd v Registrar of Companies, 2016 SCC OnLine Del 9129; (2016) 199 Comp Cas 819 (Cal)	641
Mehra (UK) v Union of India, 1LR (1993) 2 Del 403; (1997) 88 Comp Cas 213 (Del)	29
Mehra Investments (P) Ltd, re, (1990) 1 Comp LJ 285 (Del)	605, 611
Mehladi Chand Galcha v Official Liquidator, (1981) 51 Comp Cas 103 (Raj)	622, 674
Mela Singh (Maj) v Juhundur Club Ltd, (1969) 1 Comp LJ 273	389
Mellon v Mississippi Glass Wire Glass Co, (1910) 77 NJ Eq 498	406
Memtec Ltd v Lumerotech, (2001) 103 Comp Cas 1078 (Del)	56
Mendonia (RA) v Philips India Ltd, (2000) 3 Comp LJ 129 (CLB)	376
Menell et Cie Ltd, re, (1915) 1 Ch 759	414
Menier v Hooper's Telegraph Works, (1974) LR 9 Ch App 350; (1874-80) All ER Rep Text 2032	499
Merrantile Investment & General Trust Co v International Co of Mexico, (1893) 1 Ch 484; 68 LT 403 (CA)	500
Mercantile Trading Co, re, (1869) 1 R 4 Ch App 475; 20 LT 391	405
Merryweather v Moore, (1892) 2 Ch 513	304
Metal Box (India) Ltd v State of W.B., (1998) 26 CLA 359; (1999) 3 LLJ 1349 (Cal)	742
Metal Box India Ltd, re, (2000) 2 Comp LJ 390 (CLB)	67, 58
Metal Box India Ltd, re, (2001) 105 Comp Cas 459 (CLB)	60, 372
Metal Consultants Ltd, re, (1902) 1 Ch 707; 86 LT 291	77, 127
Metalurgical & Engg Consultants (India) Ltd v Mecon Executive Asso, (1996) 28 CLA 381 (MP)	285
Methodist Church v Union of India, (1985) 37 Comp Cas 43 (Bom)	52
Metro Infrastructure Development Ltd v Bengal Tools Ltd, (2016) 139 Comp Cas 412 (Cal)	626
Metropolitan Coal Consumers' Assn v Serasinghji, (1995) 2 QB 404; 73 LT 137 (CA)	191
Metropolitan Coal Consumers' Assn, re (Karberge case), (1962) 3 Ch L 66; LT 200	121, 125
Mewa's Brewery Co Ltd, re, (1919) 1 Ch 26	231, 232
Mewa Ram v Ram Capal, 1LR (1926) 43 AL 735	597
MFRD'Cruz, re, AIR 1939 Mad 803	215
MG Amarthalingam v Gudiyathen Textiles (P) Ltd, (1972) 42 Comp Cas 350	156
MG Investment & Industrial Co Ltd v New Shorrocks Spg & Mfg Co Ltd, (1912) 42 Comp Cas 345 (Bom)	122
MG Mohanraj v Mylapore Hindu Permanent Fund Ltd, (1998) 1 Comp Cas 87; (1990) 1 Comp LJ 79 (Mad)	280
Michaels v Harley House (Marylebone) Ltd, (1997) 2 CLC 166 (Ch D)	171
Michaels v Harley House (Marylebone) Ltd, 2003 Ch 104 (CA)	30
Michelle Jawaid-Al-Pahoom v Indo Sandi (Frosts) (P) Ltd, (1998) 93 Comp Cas 151; (1998) 30 CLA 42 (CLB)	504
Micromeritics Engineers (P) Ltd v Muthusamy, (2004) 122 Comp Cas 150; (2005) 54 SCL 301 (Mad)	572
Midwest India Ltd v KM Linni, (2003) 315 Comp Cas 184 (Del)	714
Migot case, (1967) 1 LR 4 Eq 238	199

Mahesh H Mafatlal v Mafatlal Industries Ltd, (1996) 87 Comp Cas 705 (Guj)	257	ML Shaw re, (1996) 99 Comp Cas 312 (Cal)	23
Mahesh H Mafatlal v Mafatlal Industries Ltd, (1997) 1 SDC 574, (1996) 87 Comp Cas 792	600	ML Thakral v Krone Communications Ltd, (1996) 96 Comp Cas 643 (CLB)	421
	602, 622	ML Thakral v Krone Communications Ltd, (1996) 96 Comp Cas 648 (Kant)	530
Malini Sen v Guardian Plasticole Ltd, (1998) 91 Comp Cas 105 (Cal)	180, 237	MM Anandaram v Mysore Lachha Seety & Sons (P) Ltd, (1985) 58 Comp Cas 312 (Kant)	158
Miles Aircraft Ltd, re, (No 2), 1948 Ch 188; (1948) 1 All ER 225, 1948 WLN 178	555	MM Dua v Indian Dairy and Allied Services (P) Ltd, (1996) 86 Comp Cas 857 (CLB)	511
Millennium Advanced Technology Ltd, re, (2004) 1 WLR 2177; (2005) 123 Comp Cas 170 (Ch C)	601	MM Elusai v Laminated Package (P) Ltd, 2380 CLC 330 (AP)	459
Mills v Edict Ltd, 1999 BPLR 361 (Ch D)	721	MM Sehgal v Bengal Papers Ltd, (1966) 1 Comp LJ 122 (P&H)	605
Mills v Mills, (1954) 60 CLR 150	522	MM Sehgal Ltd v Sammati Trading Investments Ltd, (1997) 65 DLT 33	622
Mineral Resources Ltd, re, (1999) 1 ALR 323, 706	726	MM Subramanyam v Gulf Orefines (P) Ltd, (2008) 136 Comp Cas 315 (CLB)	542
Minera Nacional Limitada v Sociedade Do Fomento Industrial et al (P) Ltd, (2006) 6 Mah L 731; (2006) 6 Bom CR 1; (2005) 6 AIR Bom R 600; (2007) 136 Comp Cas 290	572	MM Chhaya v PRS Manj, (2005) 3 Bom CR 497; (2006) 3 Mah L 1; 29; (2005) 127 Comp Cas 563	527
Mining and Allied Machinery Corp in liquidation v Official Liquidator, 2014 SCC OnLine Cal 21566; (2015) 189 Comp Cas 84	711	MO Vergheze v Thomas Stephen & Co Ltd, (1979) 40 Comp Cas 131 (Ker)	319, 330
Ministry of Company Affairs v Cavin Plastics & Chemicals (P) Ltd, (2008) 1 CTC 272; (2008) 1 MIL 625; (2008) 141 Comp Cas 475	624	Model Financial Cooper Ltd v AP Mahesh Coop Urban Bank Ltd, (2013) 126 Comp Cas 204	602, 603
Ministry of Finance v Saha Jain Ltd, (1970) 40 Comp Cas 83; 73 CWN 416	561	Model Financial Corp Ltd v Montana International Ltd, (2008) 2 Comp LJ 229 (AP)	686
Mirza P Balsara v Hindustan Petroleum Corp, (1996) 23 CLA 20 (Honr)	742	Modetra Food Industries (India) Ltd v MD Javkar, 1989 Lab KC 224 (Guj)	21
Mirza Ahmad Namazi, re, AIR 1924 Mad 703	212, 204	Modeti Transporters (P) Ltd v Jagdishraj Mehta, (1977) 47 Comp Cas 312 (P&H)	237
Misrati Dhamchandum (P) Ltd v R Balrajk Mines (P) Ltd, (1978) 48 Comp Cas 494 (Orissa)	170	Modern Woodmen of America v Maxx, 191 U.S. 263; 267 US 544 (1925)	388
Mitchell v Carter, (1997) 1 BCCLC 673 (Ch D and CA)	564	Modi Industries Ltd v BC Gold, (1997) 54 Comp Cas 835 (All)	15
Mitchell & Hobbs (UK) Ltd v Mill, (1996) 2 BCAC 102 (QBD)	341	Modi Rubber Ltd v Mahura Conts Ltd, (2006) 138 Comp Cas 37 (All)	623
Mital Steel Re-Rolling & Allied Industries Ltd, re, (1999) 32 CLA 44 (Ker)	711	Mohan Lal Chandramallai v Punjab Co Ltd, AIR 1958 Punj 486; (1962) 32 Comp Cas 937	527, 540
MR Chandrakanth v Kannan, (1996) 90 Comp Cas 307 (Mad)	729	Mohan Lal Mital v Universal Wires Ltd, (1988) 75 Comp Cas 36 (Cal)	361, 514
MK Srinivasan v Emperor, 1944 MWN (Cri) 80	29	Mohar Pyari Sethi v Official Liquidator, (1991) 71 Comp Cas 77 (Del)	715
MK Srinivasan v WS Subramaniam, (1932) 32 Comp Cas 167; AIR 1932 Mad 100	221, 368, 505	Mohankumar Sastri v Swadharman Bhavayya Sangha, (1995) 83 Comp Cas 272 (Mad)	66, 168
MK Srinivasan, re, AIR 1944 Mad 410; (1944) 14 Comp Cas 195	290	Mohd Akbar Abdulla Faiziiboy v Associated Banking Corp of India, AIR 1959 Bom 386	202
MRM Singh v Lake Palace Hotels Ltd, (1985) 58 Comp Cas 806 (Raj)	422	Mohd Akbar Abdulla Faiziiboy v Official Liquidator, AIR 1958 Bom 217; (1952) 20 Comp Cas 26	215
		Mond Shanim Ahmed v Union of India, (2011) 162 Comp Cas 107 (Gau)	472

Muhd Zafar v Nahar Industrial Enterprises Ltd, (1997) 42 DLR 647 (1997) 68 DLT 340; (1997) 4 Comp LJ 201; (1998) 28 CLA 251; (1998) 93 Comp Cas 717	571, 602	Morvah Consols Tin Mining Co Ltd, re, (1875) 2 Ch D 1 (CA)	359, 360
Mohd Zameel Hussain v Labour Commr, (2000) 1 Comp LJ 234 (MP)	742	Moseley v Kraftyentein Mines Ltd, (1904) 2 Ca 108, 91 LT 266	187
Mohinder Singh v Indian Overseas Bank, (1996) 86 Comp Cas 110 (P&H)	710	Moss Steamship Co Ltd v Whitney, 1912 AC 254; (1911-13) All ER Rep 344 (EFL)	490
Mohen Lal v Sri Gungaji Cotton Mills Co, (1961) 4 CWN 369	126	Mother Care (India) Ltd v RamaSwamy P Aiyar, ILR 2004 KAR 1081; (2004) 51 SCL 241 ..	285
Milton Finance Ltd, re, 1958 Ch 325; (1967) 3 WLR 1561 (1967) 3 All ER 843	458	Mohney Krishnamma v Grandlu Achajeyulu, AIR 1954 Mad 113	84
Monarch Insurance Co, re, (1873) LR 8 Ch App 307	191	Modi FILMS (P) Ltd v Harish Bansal, (1982) 21 DLT 150; (1983) 54 Comp Cas 455	660
Morark Enterprises v Kashan Tulip (C), (1992) 74 Comp Cas 88; (1992) 1 Comp LJ 798 (Bom)	721, 722	Motilal Choudhary v Thakorlat, (1912) 14 Bom LR 648	146
Monolith Building Co, re, (1915) 2 Ch 643; 84 T 1 Ch 440; 112 LT 629; (1914-15) All ER Rep 749	459, 462	Mutecol (India) Ltd, re, (2001) 133 Comp Cas 389 (Guj)	605
Montebello Resorts P Ltd v Ascot Hotels & Resorts P Ltd, (2007) 201 Comp Cas 1 (NCLT) ..	513	Muthambi & Grant, (1900) 1 QB 88 (CA)	403
Munsgeney Litho Ltd v Maxwell, 2000 UKC 356 (Scotland)	470	MP Kini v State, (1992) 75 Comp Cas 289 (AP) ..	24
Mondie v W&S Shepherd Ltd, (1949) 2 All ER 1044 (HL)	156	MP Singh v State of Punjab, (2006) 133 Comp Cas 17 (P&H)	365
Moor v Anglo-Italian Bevls, (1879) 1 LR 10 Ch D 681	663, 664	MR Agarwal v Offshore Liquidators, (1973) 43 Comp Cas 423 (Braj)	711
Moore v Breesler Ltd, (1914) 2 All ER 515	263	MR Electronics Components Ltd v Registrar of Companies, (1986) 3 Comp LJ 24 (Mad) ..	330
Moore v North Western Bank, (1891) 2 Ch 599; 61 LT 456	183	MR Goyal v Usha International Ltd, (1997) 27 CLA 187 (Del)	378
Mongate Mercantile Holdings Ltd, re, (1980) 1 WLR 227	392	MR Prateep v VNL Muthukrishnan, (1992) 3 SCC 384; (1992) 74 Comp Cas 403	342
Mosaa Goolam Arif v Ibrahim Goolam Arif, (1911-13) 39 CA 237; ILR (1913) 40 Cal L	39	Midel- Bhushan v Islower Industries Ltd, (1985) 58 Comp Cas 442 (Del)	653, 662
Morgan v Gray, 1853 Ch 83; (1953) 2 WLR 140 ..	203	Mrunalini Puor v Gackwad Investment Corp (P) Ltd, (1993) 1 Comp LJ 49; (1995) 82 Comp Cas 899 (CLB)	513
Morgan Crucible Co plc v J.J. Samuel Sons Ltd, 1991 Ch 295; (1991) 2 WLR 655; (1991) 1 All ER 148	444	MS Fashions Ltd v Bank of Credit and Commerce International SA, 1993 Ch 425; (1993) 3 WLR 220; (1993) 3 All ER 769 (CA) ..	680
Morgan Stanley Mutual Fund v Kartick Das, (1994) 4 SCC 225; (1994) 81 Comp Cas 318	186	MSDC Redharamanam v Shree Bhutarathi Cotton Mills (P) Ltd, (2006) 130 Comp Cas 414 (CLB)	120
Moriarty v Regent's Garage Co, (1921) 1 KB 423 ..	254	MTNL, re, (1993) 3 Comp LJ 259 (CLB)	147
Morison v Moat, (1851) 9 Hare 241; 68 ER 492 ..	204	Mukesh Malhotra v SHIBI, (2005) 124 Comp Cas 336 (SAT)	112
Morning Star (P) Ltd, re, (1970) 40 Comp Cas 29; (1970) 1 Comp LJ 46 (Ker)	640	Mukesh Sood v Incaab Industries Ltd, (1996) 22 CLA 179 (CLB)	367
Morris v Kanssen, 1946 AL 459; 174 LT 339 (IL)	93, 94, 95, 325, 332	Murkikulukare Catholic Co Ltd v Thomas, (1995) 4 Comp LJ 313; (1996) 2 KLT 173; (1996) 22 CLA 348	227
Morris Ltd v Gilman (DST) Ltd, (1943) 40 RPC 20	311	Mukul Harkisondass Delali v Jayesh Bannikar Doshi, (1997) 88 Comp Cas 806; 1994 Maharashtra 299	275
Morrison, James & Taylor Ltd, re, (1914) 1 Ch 511, 519; (1914) 1 LT 722 (CA)	486	Mukundlal Manchanda v Prakash Bindlal Ltd, (1991) 22 Comp Cas 575 (Kant)	181

LXXXII Company Law

Mall v Colt Co, 30 FRD 154 (SDNY 1957)	52
Mumbai Labour Union v India French Tires Industries Ltd, (2002) 110 Comp Cas 418; (2002) 3 Bom LR 201; (2002) 2 Mah LJ 305	665
Muniyamma v Arathi Cine Enterprises (P) Ltd, (1991) 72 Comp Cas 595 (Karn)	175, 180
Murayka Paint and Varnish Works Ltd v Mechanical Muradka, (1950) 65 CWN 32; AIR 1961 Cal 251; (1950) 31 Comp Cas 301	396, 397
Murtiher v Bengal Steamship Co, AIR 1931 Cal 722; 59 (C) 542; ILR (1920) 47 Cal 654	452
Mursidabad Land Office Ltd v Satis Chandra Chakravarty, AIR 1943 Cal 140; 209 IC 317	216
Murugiahendran & Co v Chief Controlling Revenue Authority, AIR 1974 Kant 63; (1974) 1 Kant LJ 177 (FB)	486
Muscilwhite v CH Muscillwhite & Son, 1962 CL 964	374
Mulapil Bank of India v Sohan Singh, AIR 1936 Lah 790	145
Mutual Life Insurance Co of New York v Rank Organisation Ltd, 1995 BCCL 31	90, 500
MV "Dung Do" v Kinnarik Kumar & Co Ltd, (2007) 109 Comp Cas 474 (Cal)	10
MV Javali v Mahajan Betonwell & Co, (1997) 8 SCC 22; 1997 SCC (Cri) 1239; (1998) 91 Comp Cas 706	261
MV Poyyavandhanam v MV Panach Periyal, (1999) 35 CLA 318 (Ker)	294
MV Pauline v City Hospital (P) Ltd, (1998) 28 CLA 46 (CLB)	367
MV Sathyasaiyanan v Global Drugs (P) Ltd, (1999) 95 Comp Cas 593 (CLB)	167
MV Sekharan v Registrar of Coop Societies, 1995 AJHC 2798 (Ker)	84
Mylavapu Ramkrishna Rao v Mothey Krishna Rao, (1997) 37 Comp Cas 63 (Mad)	278
Mysore Cements Ltd, re, (2009) 4 Kant LJ 388; (2009) 5 AIR Kant R 433; (2009) 150 Comp Cas 673	628
Mysore Electro Chemicals Works Ltd v GK Patmashetty, (1995) 66 Comp Cas 571 (Karn)	613
Mysore Paper Mills Ltd v Officers' Assn, (2002) 2 SCC 162; 2002 SCC (J&S) 223; (2002) 108 Comp Cas 652	21
Mysore Paper Mills Ltd v Officers' Assn, (LJR 1998) KAR 3620; (1999) 1 Comp LJ 89	23
Mysore Surgical Centre (P) Ltd v Karnataka State Financial Corporation, (1998) 1 Comp LJ 63 (Karn)	724
Mysore Tools Ltd v Daenchenina Hardware Stores, (2005) 128 Comp Cas 376 (Karn)	674
N Balu Janardhanam v Golden Films (P) Ltd, (1993) 78 Comp Cas 455 (Mys)	689
N Balu Janardhanam v Official Liquidator, (1993) 78 Comp Cas 490 (Mys)	463
Nagan v Investment Trust of India Ltd, (1996) 85 Comp Cas 75 (Mad)	299, 322
N Kubertan v Monarch Steels (India) Ltd, (2006) 130 Comp Cas 109 (CLB)	513, 526
N Nazayannur v SEHL, (2003) 12 SCC 152; (2003) 129 Comp Cas 399	312, 419, 423
N Parthasarathy v Controller of Capital of Issues, (1991) 5 SCC 153	167
N Ramachandran v Carlton Mills Co (Trivandrum) Ltd, (1997) 69 Comp Cas 205 (Ker)	360
N Satyaprasad Rao v Venuparmala Lakshmi Narasimha Sastry, (1989) 64 Comp Cas 692 (AP)	198, 512
N Shankar Rao v Mancherla Cement Co (P) Ltd, 2016 SCC OnLine CLB 30; (2016) 198 Comp Cas 1	522
N Subramanian Iyer v Official Receiver, AIR 1956 SC 1	722
Naga Brahma Trust v Trans Lanka Air Travels (P) Ltd, (1997) 88 Comp Cas 136 (Mad)	17
Nagappa Chettiar v Madras Race Club, (1949) 1 MLJ 662; 31R 1919 MatE 818	408, 504, 505
Nagarajan v Lakshmi Vilas Bank Ltd, (1997) 50 Comp Cas 392; (1997) 25 CLA 308 (CLB)	413
Nugavarpu Krishna Prasad v Andhra Bank Ltd, (1983) 53 Comp Cas 73 (AP)	653
Nagendra Prabhu v Popular Bank, (1969) 39 Comp Cas 685; ILR (1969) 1 Ker 240; AIR 1970 Ker 120	324, 726
Negin M Deobi v Echye Burgings (P) Ltd, (2007) 136 Comp Cas 75 (CLB)	535
Nalam Surya Prasada Rao v Venuparmala Lakshmi Narasimha Sastry, (1991) 70 Comp Cas 302 (AP)	541
Nacoco UK Ltd, re, (2003) 2 BCCL 78 (Ch D)	682
Nanita Gupta v Coochar Native Joint Stock Co Ltd, (1999) 98 Comp Cas 655 (CLB)	674, 731, 739
Nazak Chand v State of UP, 1971 All LJ 3229	35
Nanral Zaveri v Bombay Life Assurance Co Ltd, AIR 1950 SC 172; (1950) 20 Comp Cas 179	257
Nanrali Zaveri v Bumby Life Assurance Co, AIR 1949 Bom 56	236, 237
Nandh Products Promoters (P) Ltd v District Forest Officer, (2005) 129 Comp Cas 367 (Mad)	28

Nandini Dinesh Shingte v NCLEP Ltd, 2016 SCC OnLine Kar 6052; (2016) 198 Comp Cas 299	727
Nankita Bhardwaj v Sapphire Machineries (P) Ltd, (2003) 2 Comp LJ 305 (CLB);	203
Narji Gopal Paul v T Prasad Singh, (1995) 3 SCC 577; (1995) 2 Comp LJ 408	689
Narwa Gold Mines Ltd. re, (1955) 1 W.L.R. 1080 ..	143
Narayan Das v Bristit Grill (P) Ltd, (1997) 90 Comp Cas 79; (1997) 3 Comp LJ 32 (CLB)	538
Naran Singh & Co v UP Oil Industries Ltd, (1964) 1 Comp LJ 223 (All)	489
Nazanbai R Patel v Official Liquidator, (2003) 14 Comp Cas 642 (Guj)	666
Naranjan Singh v Edward Gari Public Welfare Assn, (1983) 54 Comp Cas 330 (P&H)	511
Narayana Chettiar v Kaleswari Mills, AIR 1952 Mad 515; ILR 1952 Mad 218	382, 390
Narayanantry v Official Liquidator, (1958) 30 CLA 146 (Ker)	679
Narayana K v LV Subramanian, (1989) 2 Comp LJ 181 (Mad)	741
Narayandas v Sangi Bank, (1965) 35 Comp Cas 396; (1965) 2 Comp LJ 99	329
Narayanlal Bansalal v Maneckji Pharez Mistry, AIR 1961 SC 29; (1961) 30 Comp Cas 644	560
Narayanlal Bansalal v Maneckji Petit Mfg Co Ltd, (1933) 33 Bom LR 556	378
Narayanlal Bansalal v MP Mistry, AIR 1961 SC 29; (1961) 30 Comp Cas 644	696
Narendra Kumar Agarwal v Saroj Maloo, (1995) 6 SCC 131; (1995) 14 CLA 137; (1995) 5 Comp LJ 34; (1996) 95 Comp Cas 172	529
Narendra Kumar Maheshwari v Union of India, 1970 Supp SCC 460; (1989) 2 Comp LJ 45	478, 482, 483, 487
Narendrakumar Nikhat v Naandi Hasbi Textile Mills, (1998) 7 SCC 673; AIR 1999 SC 1668	669
Naresh Chandra Senyal v Calcutta Stock Exchange Assn Ltd, (1971) 1 SCC 50; (1971) 41 Comp Cas 51	208, 211
Naresh Chandra Senyal v Ramana Kartik Ray, AIR 1949 Cal 60; 49 CWN 503	208, 211
Naresh Kumar Agarwal v Dinesh Kumar Mittal, (1998) 62 DLT 395	666
Naresh Kumar Jain v Union of India, (1997) 90 Comp Cas 445 (Del)	394
Naresh Mohan Mittal v Sangeeta Construction (P) Ltd, (2013) 178 Comp Cas 188 (CLB)	538
Narinder Kumar Sehgal v Leader Valves Ltd, (1993) 77 Comp Cas 293 (Del)	160, 199
Narinda Choudhury v Motor Accidents Claims Tribunal, (1985) 58 Comp Cas 506 (Gau)	640
Narotamdas T Taprani v Bombay Dyeing and Mtg Co Ltd, (1956) 3 Comp LJ 179 (Bom)	665
Narotamdas Trilkamdeo Taprani v Bombay Dyeing & Mtg Co Ltd, (1956) 3 Comp LJ 179; (1956) 88 Bom LR 649; (1950) 68 Comp Cas 300	686
Narsimha Janardhan Kanthi v Registrar of Companies, (1959) 2 Comp LJ 25 (Bom)	319
Nash v Lynde, 1929 AC 156; 140 LT 466 (HL)	109
Nassau Steam Press v Tyler, (1894) 20 LT 376	54
Natal Investment Co. re, (1868) LR 3 Ch App 355; 16 LT 171	492
Nalgi Land & Colonisation Co v Pauline Colliery Syndicate, 1904 AC 120; 89 LT 679	42
Nathuji Lal Chand v Bharat Jute Mills Ltd, (1983) 53 Comp Cas 382 (Cal)	612
National Dwelling Society v Sykes, (1894) 3 Ch 159	393
National Bank Ltd, re, (1966) 1 W.L.R. 919; (1966) 1 All ER 3006 (Ch D)	604
National Bank of Upper India v Dina Nath Sapru, AIR 1926 Oudh 243; 95 IC 734	324
National Bank of Wales Ltd. re, (1894) 2 Ch 629	323, 324
National Bank of Wales Ltd. re, (1899) 2 Ch 629; (1895-99) All ER Rep 715	405, 408
National Bank of Wales Ltd. re, (1907) 1 Ch 452	216
National Breweries Ltd. re, (1991) 1 Gau LR (INC) 44	399
National Conduits (P) Ltd. re, (1970) 44 Comp Cas 219 (Del)	710
National Cotton Mills v Registrar of Companies, 1943 CJN 180; (1994) 56 Comp Cas 277	221, 433
National Dairy Development Board v Indian Immunologicals Ltd, (2002) 108 Comp Cas 419 (CLB)	368
National Dock Labour Board v Pittman and Wheeler Ltd, 1939 AC 647 (QBD)	20
National Exchange Co v Drew, (1855) 2 Macq 103; 25 LT 273 (HL)	127
National House Property Investment Co Ltd v Watson, 1908 SC 888	207
National Insurance Co Ltd v Glaxo India Ltd, (1999) 98 Comp Cas 379 (Bom)	166
Nabemni Motor Mail-Coach Co Ltd. re, (1908) 2 Cl 228	45
National Organic Chemical Industries Ltd v Mihir H Majumdar, (2004) 12 SCC 356; (2004) 121 Comp Cas 519	614

- New Tiruper Area Development Corps Ltd v State of TN, AIR 2010 Mad 376 22, 24
- New Vision Laser Centers (Raj Kothi) Ltd, re, (2012) 131 Comp Cas 736 (Ori) 538
- New Zealand Netherlands Society "Oceania" Inc v Kuyas, (1973) 1 WLR 1126 (PC) 302
- New Zealand Netherlands Society "Oceania" Int. v Kuyas, (1973) 1 WLR 1126; (1973) 2 All ER 1222 (PC) 359
- Newbrene v Sensortec (Great Britain) Ltd, (1954) 1 QB 45; (1953) 2 WLR 396 (CA) 43, 44
- Newspaper Proprietary Syndicate Ltd, re, (1900) 2 CL 349; 83 LT 341 342, 348
- NFIU Development Trust Ltd, re, (1972) 1 WLR 1548 (Ch D) 599, 600
- Nicco Corp Ltd v Cetech Vessels Ltd, (1998) 97 Comp Cas 748 (Mad) 400
- Nirbo Co v Bethlehem Shipbuilding Corp Ltd, 54 L Ed 167; 308 US 165 (1939) 2
- Nikhil Rubbers (P) Ltd, re, (2002) 106 Comp Cas 435 (CLB) 623
- Nilima Chaitanya Ltd, re, (1997) 26 CLA 347 (MP) 625
- Nimesh N Thakkar v Official Liquidator, (1991) 70 Comp Cas 257 (Bom) 714
- Niranjan Chaudhuri Shaha v Lalit Mohan Bhattacharya Shaha, ILR (1988) 2 Cal 366; AIR 1989 Cal 187 596
- Nirmala R Balna v Khanda Singh and Wwg Mills Ltd, (1992) 7 SCC 372; (1992) 24 Comp Cas 1 672, 692
- Nisbet v Shepherd, (1994) 1 BCILC 303; (1995) 19 CLA 234 (CA) 27
- Nitin Mukund Sahasrabuddhe & Venkatesh Automation (P) Ltd, (2014) 146 Comp Cas 290 251
- NK Mohapatra v State of Odisha, AIR 1994 Ori 301; (1995) 16 CLA 275; (1999) 96 Comp Cas 49 601
- Noble v Laygate Investments Ltd, (1978) 2 All ER 3167 80
- Noordisk Insulinlaboratorium v Gorgane Products Ltd, 1923 Ch 400; (1953) 2 WLR 879 303
- Normandy v Ind Ceope & Co Ltd, (1908) 1 Ch B1; 97 LT 672 447
- North Eastern Insurance Co Ltd, re, (1919) 1 Ch 196; 120 LT 222 327, 334
- North of England Protecting & Indemnity Ass., re, (1929) 45 LLR 246 616
- North-West Transportation Co v Beatty, (1887) LR 12 AC 589; 57 LT 426 (PC) 506
- Northumberland Avenue Hotel Co, re, (1986) 53 Ch D 1 (CA) 45
- Norwest Holst Ltd v DTL, The Times, 2-2-1978 560
- Novapan India Ltd, re, (1997) 68 Comp Cas 596; (1997) 25 CLA 224 (AP) 235, 607, 627
- NK Murphy v Industrial Development Corp of Orissa Ltd, (1977) 47 Comp Cas 399 (Ori) 538
- Nripendra Kumar Ghosh v Registrar of Companies, (1985) 56 Comp Cas 672 (Cal) 221
- NS Rajagopal v Official Liquidator, (1993) 78 Comp Cas 587 (Mad) 719
- NSR Gastconomy (Mauritius) LLC v K.N. Vasudeva Adiga, (2015) 189 Comp Cas 476 (Kar) 541
- Nuneaton Borough Asian Football Club Ltd, re, 1969 BCILC 454 (CA) 198
- Nupur Ambekar Ishaankashika Sastha Nudhi Ltd v Registrar of Companies, (1972) 42 Comp Cas 632 (Mad) 368, 369
- Nupur Mitra v Basubani (P) Ltd, (1999) 2 Cal 211; 264; (1995) 65 CLA 97 392
- Nupur Mitra v Basubani (P) Ltd, (2002) 108 Comp Cas 359 (CLB) 163, 165, 166, 168, 169, 171, 279, 286
- Nurcombe v Nurcombe, (1963) 1 All ER 45 (CA) 499
- Nutan Mills Employees Coop Credit Society Ltd v Official Liquidator, (2001) 104 Comp Cas 439 (Guj) 714
- Nutech Agro Ltd v Ch Mithan Rao, (2002) 109 Comp Cas 487 (AP) 414
- Nutech Agro Ltd v Ch Mithan Rao, (2002) 111 Comp Cas 26 (MP) 214
- NVR Nagappa Chettiar v Madras Race Club, 1949(1) MLJ 662 374, 375
- NW Transportation Co v Beatty, (1887) 1 LR 12 AC 589; 57 LT 426 (PC) 328
- Nye (CL) Ltd, re, (1970) 3 WLR 158 (CA) 465
- Nye (CL) Ltd, re, 1971 CL 442; (1969) 2 WLR 1380 (Ch D) 465
- UNNAYAN Nalita v Official Liquidator, AIR 1998 Ker 278 683
- O'Neill v Philips, (1999) 97 Comp Cas 807; (1999) 1 WLR 1092 553
- Oakbank Oil Co v Crum, (1882) 1 LT 8 AC 65; 48 LT 537 (HL) 91
- Oakes v Turquand and Harding, (1867) 1 LR 2 HL 325; 36 L Ch 949 40
- Ocean Coal Co Ltd v Powell Duffryn Steam Coal Co, (1932) 1 Ch 654 153
- Oceanic Steam Navigation Co Ltd, re, 1979 Ch 41 607
- OXL (India) Ltd, re, AIR 1998 Ori 153 232

LXXXVI Company Law

Odyssey (London) Ltd v OIC Run Off Ltd, 2000 ULR 231 (CA)	15
Official Assignee v Madhulal Sindhia, AIR 1947 Ben 217	126
Official Liquidator v Allahabad Bank, (2013) 4 SCC 381; (2013) 177 Comp Cas 426	679, 693
Official Liquidator v APSE Corp Ltd, (2000) 2 Comp LJ 71 (AP)	723
Official Liquidator v Anup Kumar, (1976) 4c Comp Cas 372 (Pat)	735
Official Liquidator v B K Modt, (2007) 2 All LJ 182 (All)	684
Official Liquidator v Bhagwan Singh, (2010) 55 SCI 613 (Raj)	674
Official Liquidator v Bharatpur Princess Trust, (1971) 4J Comp Cas 976 (Mad)	466
Official Liquidator v Bri Mahan Gogna, (2007) 135 Comp Cas 547 (Raj)	729
Official Liquidator v Chinubhai Khulechand, (2008) 14 Comp Cas 277 (Guj)	736
Official Liquidator v Commr of Police, (1968) 35 Comp Cas 899 (Mad)	66, 714
Official Liquidator v Comstar, (1992) 73 Comp Cas 168 (Mad)	647
Official Liquidator v CV Kumar, (1966) 2 Comp LJ 124 (Mad)	695
Official Liquidator v Dhamti Dhan (P) Ltd, (1977) 2 SCC Lmt; (1977) 47 Comp Cas 426	672, 677
Official Liquidator v DP Gupta, (1999) 98 Comp Cas 59 (Raj)	726
Official Liquidator v Faleh Chand Pahwa, (2007) 135 Comp Cas 467 (Raj)	729
Official Liquidator v Gulachand Chandaria, (2003) 114 Comp Cas 654 (Guj)	595
Official Liquidator v Hiradesh Mundra, (1970) 2 Comp LJ 46	696
Official Liquidator v Indra Karkha, (1988) 54 Comp Cas 644 (Ker)	684
Official Liquidator v ITO, (1978) 44 Comp Cas 145 (Raj)	709
Official Liquidator v ITO, (1978) 48 Comp Cas 51 (Ker)	709
Official Liquidator v Jagannath Das, (1969) 2 Comp LJ 12	693
Official Liquidator v Joginder Singh Kohli, (1978) 48 Comp Cas 357 (Del)	598
Official Liquidator v K Madhava Naik, AIR 1965 SC 654; (1965) 1 Comp LJ 161	695
Official Liquidator v Keshav DEH, (1998) 67 Comp Cas 577 (Ker)	680
Official Liquidator v KK Nar, (1975) 45 Comp Cas 276 (Ker)	684
Official Liquidator v Koganti Krishna Kumar, (1993) 3 An ET 542; (1997) 39 Comp Cas 672 ..	683
Official Liquidator v Madura Co (P) Ltd, 1975 KLT 512	671
Official Liquidator v Maganlal Hirachand Shah, (1980) 50 Comp Cas 782 (Kant)	737
Official Liquidator v Mohan Lal, (1978) 49 Comp Cas 271 (P&J)	746
Official Liquidator v N PrabhuKan, (2013) 189 Comp Cas 412 (T & AP)	711
Official Liquidator v Niranjani Jayantilal Telia, (1984) 56 Comp Cas 383 (Guj)	684
Official Liquidator v PA Tendolkar, (1973) 1 SCC 612; (1973) 43 Comp Cas 382	737
Official Liquidator v Parthasarathi Sircar, (1983) 1 SCC 538; (1963) 59 Comp Cas 163	737
Official Liquidator v PC Dhadda, (1980) 50 Comp Cas 175 (Ker)	732
Official Liquidator v Pushpawati Puri, (1978) 48 Comp Cas 365 (Del)	746
Official Liquidator v R Vijayakumar, 2013 SCC OnLine Mad 806; (2013) 161 Comp Cas 62 (Mad)	691
Official Liquidator v Rajendra A Shah, (2002) 108 Comp Cas 599 (Guj)	684
Official Liquidator v Ram Swami, (1997) 48 Comp Cas 567; AIR 1997 All 72	724, 734, 737
Official Liquidator v Revindra Kumar Soren, (2011) 363 Comp Cas 275 (Raj)	683
Official Liquidator v RB Sangare, (2006) 133 Comp Cas 258 (Bom)	736
Official Liquidator v RBI, (2004) 116 Comp Cas 27 (Guj)	719
Official Liquidator v RC Maratho, (1980) 50 Comp Cas 512 (Kant)	736
Official Liquidator v S J Barcas, (2010) 153 Comp Cas 54 (AP)	684
Official Liquidator v S Nihal Singh, (1977) 47 Comp Cas 254 (Del)	684
Official Liquidator v SBC, (2015) 161 Comp Cas 106 (Guj)	711
Official Liquidator v Shailendra Nath Sinha, (1975) 43 Comp Cas 107 (Cal)	725
Official Liquidator v Shri Krishna Prasad Singh, (1949) 1 Comp LJ 327 (Pat)	328
Official Liquidator v Southear Screen (P) Ltd, (1999) 63 Comp Cas 749 (Mad)	746
Official Liquidator v Sulaiman Ishai Karhi, AIR 1955 MB 366	398

Official Liquidator v Surjit Singh, (1995) 2 PLR 447	484
Official Liquidator v T Sundaram, (2005) 116 Comp Cas 88 (Mad)	696
Official Liquidator v Taru Jethmal Lalvani, (1997) 88 Comp Cas 824 (Bom)	738
Official Liquidator v Taru Jethmal Lalvani, AIR 1991 Bom 79	737
Official Liquidator v T Sivam, (1992) 73 Comp Cas 583 (AP)	734
Official Liquidator v V Lakeshni Kirti, (1981) 3 SCC 32; (1981) 51 Comp Cas 566	705
Official Liquidator v V Viswanathan, (1984) 56 Comp Cas 415 (Karn)	721
Official Liquidator v Venkateshwaran, (1966) 1 Comp LJ 243 (AP)	720
Official Liquidator v Vishnu Kumar Pradhan, (2001) 103 Comp Cas 1025 (Raj)	735
Official Liquidator of Aarp Synthetic and Chemicals Ltd v Mahendra Kumar Jain, (2015) 188 Comp Cas 216 (Itaj)	684
Official Liquidator v Ved Prakash Gupta, (1994) 80 Comp Cas 675 (P&H)	684
Official Receiver and Liquidator v Lewis, 1924 AC 958; 93 L Ch 414 (HL)	40
Okay Industries Ltd v State of Maharashtra, (1998) 4 Comp LJ 491 (Bom)	724
Old Silkstone Collieries Ltd, re, 1954 Ch 169 (1954) 2 WLR 77 (CA)	234
Om Prakash Berli v Unit Trust of India, (1983) 54 Comp Cas 136 (Bom)	167, 168, 169
Om Prakash Berli v Unit Trust of India, (1983) 54 Comp Cas 169 (Bom)	168
Om Prakash Khatan v Shree Keshariya Investment Ltd, (1976) 48 Comp Cas 85 (Del)	320
Omkar Textile Mills (P) Ltd, re, 2014 SCC OnLine Guj 114n; (2015) 189 Comp Cas 667 (Guj)	631
Omni India Ltd v Balbir Singh, (1989) 2 Comp LJ 239; 1999] 66 Comp LAs 508 (P&J)	511
Omnium Electric Services Ltd v Holmes, (1914) 1 Ch 533; 109 LT 964 (CA)	157, 159
One Life Ltd v Roy, (1996) 2 BCCLC 638 (Ch D)	583
ONOC v Official Liquidator, (2010) 2 Comp LJ 61; (2016) 132 Comp Cas 579 (Guj)	706
ONOC Ltd v Official Liquidator, (2015) 5 SCC 570; (2014) 184 Comp Cas 405	712
Orangum Gold Mining Co of India v Roper, 1892 AC 123; 66 LT 427 (HL)	199, 206
OP Gupta v Shiv General Finance (P) Ltd, (1977) 47 Comp Cas 275 (Del)	510
Opera Photography Ltd, re, 1999 BCCLC 763 (Ch D)	243
Orient Paper Mills Ltd v Stain, AIR 1952 Orissa 232; (1958) 28 Comp Cas 521	58
Orient Syntex Ltd v Besant Capital Tech Ltd, (2001) 104 Comp Cas 669 (Bom)	363
Orlital Benefil & Deposit Society Ltd v Jhazir Kumar & Shah, (2001) 105 Comp Cas 947 (Mad)	271, 373
Oriental Coal Co v U Roy, (1991) 1 Cal LJ 428	433
Oriental Industrial Investment Corpn Ltd v Union of India, (1981) 51 Comp Cas 482 (Del)	393
Oriental Metal Pressing Works (P) Ltd v Bhaskar Kashinath Thakur, AIR 1961 SC 673; (1962) 30 Comp Cas 143	269, 350
Oriental Navigation Co v Bhanazam Agarwala, AIR 1922 Cal 365; 69 IC 241	653, 663
Oriol Industries Ltd v Bombay Mercantile Bank Ltd, AIR 1961 SC 993; (1961) 31 Comp Cas 105	173
Orissa Chemicals and Distilleries (P) Ltd, re, AIR 1961 Orissa 62; (1962) 32 Comp Cas 497	57, 58
Orkay Industries Ltd v State of Maharashtra, (1998) 100 Bom LR 158	676
Osborn v United States, 6 L Ed 204; 22 US (9 Wheat) 738 (1824)	49
Oswal Vinashpal and Allied Industries v State of UP, (1942) 75 Comp Cas 720; 1985 AJL 1447; (1985) 22 ACJ 251	16, 261
Outlay Assurance Society, re, (1887) LR 39 Ch D 479; 56 LT 427	643
Overend Gurney & Co v Gibb, (1872) LR 5 HL 430	312
P Leslie & Co v VO Wapshare, AIR 1969 SC 843; (1969) 2 Comp LJ 113; 1969] 39 Comp Cas 806; (1969) 3 SCR 203	329
P MuniSwamyappa SonnenGowda v Mysore Lighting Works (P) Ltd, (2007) 136 Comp Cas 108 (CLB)	540
P Punniah v Jaypura Sugar Co Ltd, (1994) 4 SCC 341; (1994) 61 Comp Cas 2	510
P Rajan Rao v BC Somayaji, (1995) 83 Comp Cas 112 (SC)	281
P Rangaswami Reddier v RK Reddier, (1973) 43 Comp Cas 232 (Mys)	473
P Srinivasan v YSA & Sons, (1993) 53 Comp Cas 485 (Ker)	556
P Venkatakrishna Reddy v Registrar of Companies, (1996) 65 Comp Cas 572 (Mys)	422
PA Pendekar v Official Liquidator, (1967) 57 Comp Cas 392 (Mys)	734, 738

LXXXVIII Company Law

Dobnia Dhanabhandar Co Ltd v Jayawaddi MLR AIR 1932 Cal 716; 14 IIC 252; 34 CWN 359	204	Pearbali Dasgupta v Official Liquidator , (2006) 100 Comp Cas 427 (Cal)	666
Pucaya Rubber & Produce Co Ltd, re , (1914) 1 Ch 542; 12 LT 528	125	Parikh Engg & Body Building Co, re , (1975) 45 Comp Cas 357 (Del)	325
Pacific Coast Coal Mines Ltd v Arbutus , 1917 AC 637; 117 L 1 613 (PC)	93	Park Air Services plc, re , (1998) 1 BCLC 542 (Ch Dj)	726
Pacific Finance Ltd, re , (2000) 1 BCLC 494	187	Park Air Services plc, re , (2000) 2 AC 372 (1999) 2 WLR 396 (HL)	726
Padma Taparia v Assam Bank Ltd , (1997) 88 Comp Cas 838; (1996) 3 Comp L 396 (CLB)	569	Parke v Daily News Ltd , (1951) 1 WLR 493	315
Padstow Total Loss and Collision Assurance Assn, re , (1882) 20 Ch D 137	597	Parke v Daily News Ltd , 1962 Ch 927; (1962) 3 WLR 566	66
Pal-Deugeot Ltd, re , (1997) 82 Comp Cas 808; (1997) 3 Comp L 331 (CLB)	59	Parke v Modern Woodmen , 18J (II) 234	411
Palai Central Bank Employee's Union v Official Liquidator , (1965) 35 Comp Cas 279; (1965) 2 Comp L 110 (Ker)	674	Parker v McKenna , (1926) 30 Ch App 95; 32 LT 739	306
Palai Central Bank Ltd v Joseph Augusti , (1966) 1 Comp L 360 (Ker)	393	Parker & Cooper Ltd v Reading , 1926 Ch 928	386
Palaniappu Mudaliar v Official Liquidator , AIR 1942 Mad 470; 2013 3C 731	292	Parkinson & Eurofinance Group Ltd, 2003 AD Eur (I) 226	300
Palighat Export (P) Ltd v TV Chandrarao , (1994) 29 Comp Cas 213 (Ker)	532, 534, 536, 539	Paul Bissell (P) Ltd v Comr. of Customs and Central Excise , (2010) 14 SCC 728; (2011) 263 ELT 15	18
Palighat Warrier Bank v Padmanabhan , AIR 1961 Mad 348	676	Perlett v Guppys (Bridport) Ltd (No 1) , (1996) 2 HLC 31 (SA)	246
Pan Atlantic Insurance Co Ltd, re , (2003) 2 BCLC 678 (Ch Dj)	625	Parmeshwar Das Agarwal v Additional Directors (Investigation) , (2016) 199 Comp Cas 353 (Bom)	554
Panama New Zealand & Australia Royal Mail Co, re , (1970) 1 R & S Ch App 318; 21 LT 424	481	Parmeshwari Prasad Gupta v Union of India , (1973) 2 SCC 543; (1974) 44 Comp Cas 1	333
Panchanan Ditra v Moninath Nath Maitra , (2006) 5 SCC 340; (2006) 131 Comp Cas 577	471	Par v Diamond , (1996) 2 BCLC 662; (Ch Dj)	120
Panchita Mayurakshi Cotton Mill Employees v State of WB , (1993) 2 Cal LJ 176	397	Parvat Patel v State of Orissa , (1994) 80 Comp Cas 659 (Bom)	280
Pandiarang Keshev Chockalingam v Paper and Pulp Converters Ltd , 2005 CLC 97 (Bom)	712	Parry's Confectioners Ltd, re , (2004) 122 Comp Cas 903 (Mad)	231
Panipat Woollen and General Mills Co Ltd v RL Kaushik , (1969) 39 Comp Cas 249; (1969) 1 Comp L 289 (P&J)	278	Paru Ravi Brij Kishore v Jagannath Trading Societarie I M , AIR 1956 Lah 226	213
Pankaj Mehta v State of Maharashtra , (2000) 2 SCC 756; (2000) 100 Comp Cas 417	724	Parsons v Albert J Parsons Ltd , 1978 TRC 456; reduced 1978 JBL 61	259
Parma Ltd v Jagat Jit Distillery Co , AIR 1952 Punjab 47	309	Parsons v Tata Industrial Bank Ltd , (1927-28) 55 I.A. 274; AIR 1926 TC 180	379
Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd , (1971) 2 QB 712; (1971) 3 WLR 440 (CA)	263, 356, 728	Partap Singh v Bank of America , (1971) 46 Comp Cas 532 (Bom)	554
Paradise Plastics Enterprises Ltd, re , (1989) 3 Comp L 248 (CT R)	59	Patthinsarathi Behna v Official Liquidator , (1976) 46 Comp Cas 594 (Cal)	227
Paras Kampria Trading & Finance Co Ltd, re , (2006) 131 Comp Cas 934 (All)	734	Parvatanevi Venkata Brahmacao v Andhra Bank Ltd , AIR 1961 AP 555	489
Paras Kampria Synthetic Ltd v Shankar Prasad , (2005) 123 Comp Cas 419 (Del)	400	Passi Flour Mills Ltd, re , AIR 1961 MP 349; (1962) 32 Comp Cas 446; 1961 Jab LJ 295	269
		Paturola Sanyasi v Gunhar Cotton, Jute & Paper Mills Co , AIR 1915 Mad 325; 26 IC 349	345
		Patel Engg Co Ltd v Patel Reliance (P) Ltd , (1992) 74 Comp Cas 395 (CLD)	154
		Patel Investments v SEBI , (2005) 39 SCL 506 (SAT)	311

Table of Cases LXXXIX

Patent Artificial Stone Co Ltd, re, (1884) 34 LT Ch 320; 55 ER 605	607
Patent Steam Engine Co, re, (1878) LR 9 Ch D 464	666
Patiala Banasgarh Co, re, AIR 1963 Pepsu 185 .	662
Pattakoli Tea Co Ltd, re, (1966) 2 Comp LJ 177 Ch 1	560
Pateck & Lyon Ltd, re, 1945 Ch 786; 149 Ch 231 .	728
Paul v Virginia, 19 U.S. 557; 75 US 16H (1868) .	261
Pauline, re, (1935) 1 KB 26 (CA)	187, 189
Pavan Kumar Budhia v Jay Bee Properties (P) Ltd, (2010) 387 Comp Cas 253 (CLD)	513
Pavan Tyres Ltd, re, (1998) 85 Comp Cas 556 (Bom)	628
Pavlika v Jesleen, [1956] Ch 565; (1956) 3 WLR 224	467
Pawan Gupta v Hicks Thermowelds Ltd, (1999) 46 Comp Cas 814 (CLB)	160
Pawne Jain v Hindustan Club Ltd, (2005) 5 Comp LJ 1; (2005) 62 SCL 610 (Cal)	227
Pazaniappa Chettar v South Indian Planting and Industrial Co Ltd, AIR 1953 TC 161	649
PB Chayaloc & Maitri Udyog Ltd, ILR (1992) 1 Del 469; (1994) 79 Comp Cas 96	24
PC Agarwala v Payment of Wages Inspector, (2001) 8 N.L.T. 114; 2005 SCC (I & S) 1089; (2005) 127 Comp Cas 767	255
Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd, 1995 AC 2:0 (1994) 3 WLR 953 (HL)	672
Pearce Duff & Ltd, re, (1960) 1 WLR 1013	393
Pearson Education Inc v Prentice Hall India (P) Ltd, (2007) 136 Comp Cas 294 (Del)	544
Pearson Education Inc v Prentice Hall of India (P) Ltd, (2007) 136 Comp Cas 211 (CLB)	521, 530, 535, 538
Peat v Clayton, (1906) 1 Ch 659; 94 LT 415	165
Pedley v Inland Waterways Asstn Ltd, 1976 JBL 349 (Ch D)	371, 380
Pedley v Inland Waterways Asstn Ltd, 1976 JBL 349, (1977) 2 All ER 209 (Ch D)	393
Peek v Gurney, (1873) LR 6 HL 377; 43 LT Ch 19	112, 119, 126
Peel v London & North Western Ry Co, (1907) 1 Ch 5 (CA)	390
Peecun Juharmal Bank, Ltd re, AIR 1958 Mad 583; (1958) 29 Comp Cas 546	257
Pearles General Finance & Investment Co Ltd v Essar Oil Ltd, (2006) 129 Comp Cas 370 (Guj)	383, 384
Pearless General Finance & Investment Co Ltd v Majestic Apparel (P) Ltd, (2007) 24 CLA 44 (Del)	207
Pearless General Finance & Investment Co Ltd v Poddar Projects Ltd, (2007) 136 Comp Cas 160 (Cal)	169
Pearless General Finance & Investment Co Ltd v Union of India, (1999) 1 Comp LJ 56 Cal; (1991) 21 Comp Cas 301 (Karn)	515, 534
Pearless General Finance and Investment Co v Poddar Projects Ltd, (2007) 2 SCC 431; (2009) 146 Comp Cas 197	171
Perai v Dale, (1944) 2 BCAC 505 (Ch D)	385
Pendleton Lubington, (1877) 12 & 6 Ch D 70	504
Peninsular Life Assurance Co Ltd, re, AIR 1936 Bom 24	215, 216
People v Maroush, 255 NY 463	314
People's Bank of Northern India, re, AIR 1937 Lab 82	746
People's Insurance Co v Wood & Co, AIR 1960 Punj 388	163, 164, 165, 179
People's Pleasure Park Co v Kuldader, (1906) 109 Va 439; 61 SP 794	16
Peppal Co India Holdings (P) Ltd v Food Inspector, (2011) 1 SCC 176; (2011) 1st Comp Cas 197	474
Percept Advertising Ltd v M Ravindran, (2003) 10 SCC 84; (2003) 14 Comp Cas 632	723
Percival v Wright, (1902) 2 Ch 421, 18 TLR 697	208, 309
Percy v S Mills & Co Ltd, (1920) 14 Ch 77	234, 241
Percent Refractories Ltd, re, (2006) 125 Comp Cas 234 (CLB)	50
Performing Rights Society Ltd v London Theatre of Varieties, (1922) 1 KB 539; 38 13 & 14	41
Perigrin Press Ltd, re, 1971 Ch 358; (1970) 3 WLR 792	502
Perkins, re, (1890) LR 24 QBD 613 (CA)	219
Perlman v Fellmann, 219 F 2d 173; 349 US 952 (1955)	307
Permanent Houses (Holdings) Ltd, re, 1990 BCAC 562 (Ch D)	486
Perkin v Anderson, (2000) 2 BCAC 1; 2000 EWCA Civ 326	255
Pers Silver Mines Ltd v Copper, (1966) 58 DLR (2d) 1; 1966 SCR 673 (Can)	302
Peter [R. Prabhu v CCT, (2002) 109 Comp Cas 299 (Karn)	331
Peter's American Delicacy Co Ltd v Health, (1939) 61 CLR 457 (Aust)	501, 514

Petlad Bulakjandas Mills Ltd v State of Gujarat, (1949) 97 Comp Cas 900; (1998) 2 Guv CD 3213	742	PNB Finance Ltd v Shital Prasad Jain, (1981) 19 LSCJ 368 (1983) 54 Comp Cas 66	15
Doveril Gold Mines Ltd, re, (1986) 1 Ch 122 (CA)	80, 89	PNB Mutual Fund v MS Sheen East Ltd, (1998) 16 SCL 627 (Ch D)	148
Pharmaceutical Products of India Ltd, re, (2004) 131 Comp Cas 717 (Bom)	632, 646, 651, 654	PNC Telecom Plc v Bharat, (2004) 1 BCCL 88 (Ch D)	376
Philips v Bowin Dolphin Rel. Lawrie Ltd, (1999) 1 B.R. 1 C 714 (CA)	722	Pochari Mal v Flour & Oil Mills Co Ltd, AIR 1934 Lah 1015	702
Philips Carbon Black Ltd v Anil Kumar Poddar, (2011) 163 Comp Cas 181 (Cal)	468	Pothean Investment (P) Ltd v Chatha Estates (P) Ltd, (2006) 132 Comp Cas 374 (Ch D)	531
Phoenix Neuro Relaxation Ben. Inc Ltd v Estate Officer, (1996) 2 CCHN 461 (Cal)	589	Polar Latex Ltd v Lakshmi Narayan, (1995) 18 C.L.A. 7 (Ch D)	230
Photogram Ltd v Lanc, 1992 QB 938; (1981) 3 WLR 735 (CA)	43, 45	Polaroid India (P) Ltd v New Nicman Co (No 2), (2001) 105 Comp Cas 683 (2001) 2 Boen CR 632	744
Piccadilly Radio plc, re, (1988) 16 C.L.C. 683 (Ch D)	616	Polly Peck International Plc (No 3), re, (1996) 1 B.R. 1 C 825 (Ch D)	29
Pierce Leslie & Co Ltd v Violet Ouchterlony Wapehace, AIR 1969 SC 613; (1969) 3 SCL 203; (1969) 39 Comp Cas 908	14, 647	Polymerine Industries Ltd v Kosmek Plastics Mfg Co Ltd, (1998) 28 C.L.A. 216 (Burn)	207
Pietry v S Mills and Co Ltd, (1920) 1 Ch 77 (Ch D)	521	Pool v Middleton, (1861) 29 Beav 646; 54 ER 278	158
PIK Securities Management (P) Ltd v United Western Bank Ltd, (2007) 109 Comp Cas 811 (Ch D)	382	Pool Firebrick & Blue Clay Co, re, Hartley case, (1875) LK 10 Ch App 187	170
Pintaki Das Gupta v Madhyam Advertising (P) Ltd, (2003) 110 Comp Cas 346 (Ch D)	517	Polo v National Bank of China Ltd, 1907 AC 229, 96 LT 839	232
Pino Bisazza Glass (P) Ltd v Bisazza India Ltd, (2003) 1 Guj LR 529; (2003) 134 Comp Cas 1st (Gu)	56	Poona Chitrashala Steam Press & Gajanan Industrial & Tramway Co, AIR 1923 Bom 29	456, 473
Pioneer Co v Kaithal Cotton & General Mills, (1970) 40 Comp Cas 562; (1970) 2 Comp LJ 123 (Per H)	191	Popley v Planetarye Ltd, (1997) 1 BCCL 6 (Ch D)	167
Pioneer Motors (P) Ltd v Municipal Council, Nagercoil, AIR 1967 SC 684	375	Port Canning & Land Investment Co, re, (1871) 7 Bengal LR 583	62, 64, 59, 72
Pioneer Protective Glass Fibre (P) Ltd v Fibre Glass Pickerington Ltd, (1986) 60 Comp Cas 707; (1988) 3 Comp LJ 309 (Cal)	56	Port of Calcutta v Efcion Tie-up (P) Ltd, (2006) 9 SCL 761; (2006) 131 Comp Cas 357	686
Pioneer Tubewell Industries (P) Ltd v SIPK Reavis Ltd, (1996) 1 Comp LJ 110 (Cal)	661	Port of Kolkata v Official Liquidators, (2006) 130 Comp Cas 595 (Gau)	686
Piramal Spg & Wvg Mills Ltd, re, (1960) 50 Comp Cas 518 (Bom)	422	Portkasa Clothing Ltd, re, 1993 Ch 389 (Ch D)	710
PJ Johnson v Astrofile Armadore, (1969) 3 Comp LJ 5 (Ker)	585, 584	Portuguese Consolidated Copper Mines Ltd, re, (1889) 42 Ch D 101 (CA)	332, 384
PK Passi v NFIM, India Ltd, (2006) 131 Comp Cas 176 (Mad)	665	Postfund Cusinian Trustee Ltd v Diamond, (1996) 2 BCCL 615 (Ch D)	120
PK Prabharan v Dale & Carrington Investments (P) Ltd, (2002) 111 Comp Cas 428 (Ker)	164, 540	Patel v IRC, (1971) 2 All ER 504 (CD)	414
Plate Dealers Assn (P) Ltd v Satish Chauhan Simwukta, (2006) 129 Comp Cas 315 (Cal)	340	Poulton v London South Western Railway Co, 1867 LR 2 QBD 534	73
Plast v Plast, (1999) 2 BCCL 745 (Ch D)	182	PP Lenka v NJ Mathew, (1967) 19 Comp Cas 291; (1967) 2 Comp LJ 141 (Ker)	419, 730
PPM Auto Industries Ltd, re, (1991) 4 Bom CR 387; (1994) 80 Comp Cas 289	616, 617	PP Ramabhadran v TS Manickkam, AIR 1941 Mad 365	702
PR Chikhalde v TN Mercantile Bank Ltd, (2002) 110 Comp Cas 886 (Ch D)		PPN Power Generating Co Ltd v PPN (Mauritius) Co, 2006 C.L.C. 1 (Mad)	571, 573

PR Krishnaswami, re; AIR 1946 Mad 162; (1947) 60 I.W. 689	703
Prabodh Jammadas Kothari v Vikram Jammadas Kothari, (2013) 177 Comp Cas 193	166
Pradeep Kumar Jhunjhunwala v Union of India, (2002) 108 Comp Cas 692 (K.L.)	235
Pradip Kumar Chetlangia v Bajaj Auto Ltd. (2006) 126 Comp Cas 447 (CLB)	165
Pradip Kumar Chetlangia v Bajaj Auto Ltd. (2005) 59 SCL 352 (CLB)	427
Pradip Kumar Sarkar v Luxon Tea Co Ltd. (1990) 67 Comp Cas 491 (Cal)	181, 549
Praful M Patel v Wonderworld Electrodes (P) Ltd, (2003) 115 Comp Cas 377 (CLB)	526
Praga Tools Corp. v CA Imanullah, (1969) 1 SCC 585; (1969) 39 Comp Cas 889	7, 21
Praga Tools Ltd v Official Liquidator, (1984) 56 Comp Cas 214 (Cal)	459
Pragna Desai v National Stock Exchange of India Ltd, (2006) 132 Comp Cas 509 (Bom)	412
Prabhakarji Vajezam Mehta v Dopeerbhai Haribhai Patel, (1996) 1 Guj CLT 561; (1996) 57 Comp Cas 557 (Guj)	739, 740
Prakash Readymix Ltd v Vijaykumar Narasig, (1993) 4 KLJ 561; (1995) 83 Comp Cas 569 LLR 1946 KAR 408	271, 280, 281
Prakash Timbers (P) Ltd v Sushma Shringla, ATR 1995 All 320, 1995 All J 1721	572
Pramod Kumar Mittal v Southern Steel Ltd. (1980) 50 Comp Cas 566 (Cal)	520
Pronal Jayanand Thakar v VR Shelat, (1973) 42 Comp Cas 203 (Guj)	176
Prasanta Chandra Sen v Union of India, (1990) 67 Comp Cas 87 (Cal)	285
Prashant Kushalchand Shah v Ranku Polychem Ltd, (2000) 100 Comp Cas 120; AIR 1996 Bom 203	667
Protibha Inderjit Kapur v Nalesh Lalit Parekh, (2002) 121 Comp Cas 177 (Bom)	671
Praveen Shankarayya v Elan Professional Appliances (P) Ltd, 2016 SCC OnLine NCLT 85; (2016) 199 Comp Cas 628	547
Pravin Agarwal v Reckitt & Coleman of India Ltd, (2000) 37 CLA LJ 19 (CLB)	175
Pravin Gada v Central Bank of India, (2013) 2 SCC 101; (2013) 176 Comp Cas 301	692, 693, 697
Pravin Jain & Bante of AII, (2003) 106 Comp Cas 554 (All)	221
Prayag Prasad v City Bank and Traders Assn Ltd, AIR 1991 Pat 44	230
Precision Dippings Ltd v Precision Dippings Mktg Ltd, 1985 BCCL 385 (CA)	404
Predie Ardesher Mehta v Union of India, (1991) 70 Comp Cas 210 (Bom)	350
Prefontaine v Cawinet, 1917 AC 101 (PC)	324
Premier Industrial Bank Ltd v Carlton Mfg Co Ltd, (1979) 1 KB 116, 99 LJ 800	93
Premier Motors (P) Ltd v Ashok Teekan, (1971) 41 Comp Cas 656 (All)	601, 609
Premier Plantations Ltd v M Ibrahimankutty, (2002) 106 Comp Cas 221 (Ker)	560
Premila Devi v People's Bank of Northern India, ILR (1939) 201 Jd 1 (PC)	210
Premlal Chandra Mitra v Road Oil Is (India) Ltd, ILR (1929) 57 Cal 1101; AIR 1930 Cal 282	92, 93, 14
Produce Mktg Consortium Ltd (No 2), ex- 1985 BCCL 520	729
Profinance Trust Ltd SA v Gladstone, (2000) 2 BCCL 516 (Ch D)	545
Progressive Aluminium Ltd v Registrar of Companies, (1997) 49 Comp Cas 147 (1997) 4 Comp LJ 215 (AP)	129, 319
Promila Bansal v Wearwell Cycle Co (India) Ltd, (1978) 48 Comp Cas 202 (Del)	210
Promod Kumar Mittal v Southern Steel Ltd, (1980) 50 Comp Cas 555 (Cal)	334
Prudential Assurance Co Ltd v Chatterley Whitfield Collieries Ltd, 1949 AC 512	228, 234
Prudential Assurance Co Ltd v Newman Industries Ltd, (No 2), 1982 Ch 204; (1981) 3 WLR 543	312, 514, 503
Priyavarta Plywood v Rajasthan State Industrial & Investment Corp Ltd, (1991) 72 Comp Cas 5; (1990) 1 Comp LJ 222 (Del)	207
PS Bedi v Registrar of Companies, (1986) 61 Comp Cas 3061 (Del)	321
PS Nanawati v Jaipur Metals and Electricals Ltd, (1990) 69 Comp Cas 769 (Raj)	511
PS Offshore Inter Land Services (P) Ltd v Bombay Offshore Suppliers and Services Ltd, (1982) 77 Comp Cas 583 (Bom)	496, 511, 514
PSI Data Systems Ltd, re, (1999) 96 Comp Cas 1; AIR 2000 Ker 23	244
PSNSA Chelliah & Co v Registrar of Companies, (1966) 1 Comp L 17 (Mad)	368
Public Passenger Service Ltd v MA Khadar, (1965) 1 Comp L 1; AIR 1966 SC 489; (1966) 36 Comp Cas 1; (1966) 1 MLJ 23	165
Public Passenger Service Ltd v MA Khadar, (1965) 1 Comp L 1; AIR 1966 SC 489; (1966) 36 Comp Cas 1; (1966) 1 MLJ 23	210
Public Prosecutor v DVA Lury Co Ltd, (1943) 2 MLJ 487; AIR 1942 Mad 75	432

Public Prosecutor v T P Khatkar, (1954) 2 MLJ 590, AIR 1957 Mad 4, (1957) 27 Comp Cas 717	377, 378
Public Trustee v Kajesthwan Tyagi, (1973) 43 Comp Cas 571, AIR 1972 Del 302	506
Puri Dantu v Ratnadeep Ad. (1999) 95 Comp Cas 566 (CLB)	573
Pudukkottai Ceramics Ltd v Sethia, AIR 1956 Mad 448	702
Pudumjee & Co v NIL Moos, AIR 1926 Bom 28	93
Pelbrook v Richmond Concentrated Mining Co, (1878) 1 K & B (Ch) 610	285
Pullman's Car Co v Central Transportation Co, 35 L Ed 69 (19 US 62) (1891)	71
Pulaski v Dewerish, (1908) 2 Ch 625	698
Pundit Investment & Leasing Co (P) Ltd v Polson Mechanical Industries (P) Ltd, (2000) 23 SCL 220 (Bom)	674
Puneet Goel v Khelgaon Resorts Ltd, (2000) 28 CIA 259 (CLB)	278
Punjab Agro Industries Corp. Ltd v Superior Genetics (India) Ltd, (2002) 116 Comp Cas 349 (CLB)	557
Punjab Commerce Bank Ltd v Ram Narin Vermani, (1973) 43 Comp Cas 323 (P&H)	725
Punjabi Distilling Industries v BPC Mills Ltd, (1973) 43 Comp Cas 189 (Del)	165, 207
Punjab Finance (P) Ltd v Malhera Singh, (1975) 45 Comp Cas 254 (Pell)	678
Purush National Bank v Bareja Knitting Fasteners Ltd, (2001) 103 Comp Cas 458 (P&H)	28
Purush National Bank v Lakshmi Industrial & Trading Co (P) Ltd, AIR 2001 AJ 28	10
Punjab National Bank v Purush Finance (P) Ltd, (1973) 45 Comp Cas 350 (Pell)	626
Punjab National Bank Ltd v Shri Vilken Cotton Mill, (1970) 1 90 C 401 (1970) 46 Comp Cas 927	611, 612
Punjab United Forge Ltd v Purush Financial Corp, (1973) 76 Comp Cas 660 (P&H)	706
Punjab Wireless Systems Ltd v Indian Overseas Bank, (2005) 126 Comp Cas 554 (P&H)	208
Punt v Symors & Co Ltd, (1903) 2 Ch 505	211
Puran Devi v Gurshan Singh, (1977) 47 Comp Cas 264 (P&H)	166
Purnima Manthena v Zenuka Oilts, (2016) 1 SCC 237 (2016) 143 Comp Cas 397	267, 373
Purnothandass v Registrar of Companies, (1985) 60 Comp Cas 154 (Bom)	643, 644
Pushpa Patel v Jhunjhunwala v Official Liquidator, (1993) 1 Cal 1J 427	690
Pushpa Kalochi v Manu Maharani Hotels Ltd, (2003) 110 Comp Cas 584 (CLB)	520
Pushpa Kalochi v Manu Maharani Hotels Ltd, (2003) 131 Comp Cas 42 (Del)	531
Pushpa Vadhera v Thomas Cook India Ltd, (1996) 87 Comp Cas 921 (CLB)	360
Pushpa Wal, Puri v Official Liquidator, (1984) 56 Comp Cas 88 (Del)	746
PV Chandran v Malabar & Pioneer Hosiery Mill Ltd, (1998) 69 Comp Cas 164 (Ker)	182
PV Chandran v Malabar and Pioneer Hosiery (P) Ltd, (1992) 73 Comp Cas 30 (Ker)	174
PV Damodara Reddy v Indian National Agencies Ltd, AIR 1946 Mad 55	93, 94
PV George v Jayemis Engg Co (P) Ltd, (1996) 2 Comp L 62 (Mad)	241
PV Pai v RL Rirawati, (1993) 77 Comp Cas 179 (Ker) 199	15, 261
Pyare Lal Gupta v DIP Agarwal, (1983) 53 Comp Cas 586 (Al)	311
Pyare Lal Sharma v J&K Industrial Ltd, (1999) 3 SCL 448 (1999) 67 Comp Cas 55	21
Pyariher M Shah v NITI Ltd, (2002) 11 Comp Cas 815 (CLB)	181
Quakers Knights and Loane (P) Ltd v Sheena Jose, (1994) 26 Comp Cas 821 (Ker)	280, 371
Quinnian v Essex Finge Co Ltd, (1995) 2 BCLC 47 (Ch D)	529
R v Bichigam, 154 LT 499 (CCA)	123
R v Board of Trade, (1915) 1 QB 600 (1914) 3 WLR 212 (DC)	480
R v Broadcasting Standards Commission, The Times, Sept 1999 and April 12, 2000	17
R v Goodman, (1993) 2 All ER 789 (CA)	301
R v Great Barr, 1994 QB 675 (1994) 2 WLR 815 (CA)	529
R v Harris (Richard), (1970) 1 WLR 252 (CCC)	562
R v ICR I Luggage Ltd, 1994 XE 351 (CCA)	15
R v Kemp, 1988 BCLC 212 (1988) QB 645 (1988) 2 WLR 975 (CA)	779
R v Kylsant, (1992) 1 KB 442 (1991) 1 KB 97 (CCA)	116, 124, 129
R v McCleodie, (2000) 2 BC 14, 438 (CA)	233
R v McDonnell, (1966) 1 QB 233	15
R v Phillipsou, (1989) 5 BCC 669	14
R v Pusey, (1829) 5 BeC 350 (1829) 106 ER 1073	334
R v Registrar of Companies, (1965) 2 All ER 79 (QBD)	464

R v Registrar of Companies, (unreported)		
QBD, Dec 12, 1940	57
R v Registrar of Companies, ex p Central Bank of India, (1980) 1 All 515 (CA)	464
R v Registrar of Joint Stock Companies, (1931) 2 KB 197; 17 TLR 363 (C.A.)	41
R v Robinson, (1969) 1 WLR 815 (CA)	728
R v Razek, (1946) 1 BCCL 289 (CA)	253
R v Secy of State for Trade and Industry, (1949) 1 WLR 525 (HL)	564, 570
R v Secy of State for Trade and Industry, ex p Soden, (1996) 1 WLR 1512; (1996) 2 BCCL 636 (Ch D)	567
R v Secy of State for Trade, ex p Berestello, (1979) 124 SJ 63	562
R v Sinclair, (1968) 1 WLR 1246	70
R v Smith, (1996) 2 BCCL 109 (CA)	730
R v Tyler and International Commercial Co., (1991) 2 Cont MRP 65 (C.A.)	261, 432
R on the application of Pow Trust v Chief Executive and Registrar of Companies, (2003) 2 BCCL 295 (QID)	433
R Bhulman v Buckingham & Carnatic Co Ltd, (1969) 1 Comp L 81 (ICLB)	203
R Banerjee v HD Dubey, (1992) 2 SCC 762 (1992) 25 Comp Cas 722	363
R Chaudhury v Ganpati Dunkerly & Co, (1973) 43 Comp Cas 510 (Mad)	475, 628
R Chandayyuthappa v UK Kafeel, (2004) 118 Comp Cas 167 (Mad)	362
R Khemka v Deccan Enterprises (P) Ltd, (1998) 51 Comp L 258 (AP)	400
R Lakshmi Narsai Reddi v Official Receiver, AIR 1961 Mad 890	402
R Maghalone v Bombay Life Assurance Co, AIR 1953 SC 385; (1954) 26 Comp Cas 1	180
R Prakasam v Sri Narayana Dharmapalayam Yagam, (1980) 51 Comp Cas 611 (Ker)	278
R Rangachari v S Suppiah, (1975) 2 SCC 616; (1976) 45 Comp Cas 641	574
R Ranjanathan v Veerakumar Trading Chit Funds, (1976) 46 Comp Cas 672 (Mad)	677
R Sabapathi Rao v Sabapathi Press Ltd, AIR 1925 Mad 489	655
R Sacaswath, v Shakti Beneficial Corp, (1990) 50 Comp Cas 193 (Ker)	243
R Srinivasan v Official Liquidator, AIR 1956 AP 224; (1967) 17 Comp Cas 544	709
R Venkataswamy Naik v Enforcement Directorate, AIR 1992 Mad 235; (1993) 78 Comp Cas 87 (Mad)	553
Rachna Flour Mills (P) Ltd v Lal Chand Bhangadiya, (1987) 62 Comp Cas 15 (AP)	362
Radha Krishnamozi Lal Chemeria v Ram Narain, AIR 1927 Oudh 310	460
Radhakrishnan Chettiar v Official Liquidator, AIR 1953 Mad 73	563
Rachneesh Beepur Co Ltd v Prabhu Dayal Ram Dhan, AIR 1986 Lah 16	145
Rachey Mohan Sharma v CIT, 2011 5 SCC OnLine Guj 229; (2014) 194 Comp Cas 368 (Guj)	19
Radhey Shyam Gupta v Kamal Oil & Allied Industries Ltd, (2001) JIIS Comp Cas 637 (Del)	503
Radhey Shyam Gupta v Kamal Oil & Allied Industries Ltd, (2006) 133 Comp Cas 90 (Del)	512
Radhey Shyam Kherka v State of Bihar, (1993) 1 SCC 54; (1993) 77 Comp Cas 356	143
Ringfeder Dayal v Bank of Upper India Ltd, (1948-49) 16 IA 135; AIR 1919 PC 4 26 CWN 697	612
Raghunath Vasant v Hind Overseas (P) Ltd, (1976) 1 Comp L 213	600
Raghunath Swarup Mukherjee v Hac Swarup Mathur, (1971) 40 Comp Cas 282; (1970) 1 Comp L 55 (All)	534
Raghunath Swarup Mukherjee v Raghunaj Bahadur Mathur, (1966) 2 Comp L 130 (1967) 37 Comp Cas 304; AIR 1967 All 145	222
Ragunath Prasad Jhunjhunwala v Hind Overseas (P) Ltd, (1971) 41 Comp Cas 308 (Cal)	657
Rahuldev Pratapkumar Vyas v Sargi Aid Lifeline (P) Ltd, (2017) SOC Online NCLT 1734; (2017) 201 Comp Cas 75	540
Rai Sahib LN Mandal's Estate, re, AIR 1954 Cal 493; (1960) 30 Comp Cas 172	643
Rao Sabeb Vishwanath v Astar Netra Mehta, (1996) 54 Comp Cas 554 (All)	506
Rainford v James Keith & Blackrain Co Ltd, (1985) 2 Ch 147 (CA)	218
Raj Shekhar Achari v Union of India, 2016 SOC OnLine Del 12457; (2016) 121 Comp Cas 501	268
Rajahmundry Electric Supply Corp Ltd v A Nagashwara Rao, AIR 1956 SC 213; (1956) 26 Comp Cas 91	495, 511, 537
Rajan Nagindas Lohia v British Burma Petroleum Co Ltd, (1972) 42 Comp Cas 197 (Bom)	652
Rajapalayam Industrial and Commercial Syndicate Ltd v K A Veeraprasadam, (1991) 2 Comp L 296; AIR 1989 Mad 13	268

Rajasthan Financial Corps v. Airport Spg & Wvg Mills Ltd. (2005) 13 SCC 765; (2006) 133 Comp Cas 1	456	Rakesh Kumar v. Registrar of Companies, (1995) 82 Comp Cas 651 (P&H)	453
Rajasthan Financial Corps v. Official Liquidator, (2005) 9 SCC 190; (2005) 128 Comp Cas 387	679	Rakhra Sports (P) Ltd v. Kharilal Rakhra, (1998) 76 Comp Cas 545 (Kant)	543
Rajasthan Financial Corps v. Official Liquidator, I.L.R. (1996) 2 Ker 269	458	Rallis India Ltd. re. (2005) 125 Comp Cas 268 (Bom)	235
Rajeet Kapur v. Gremex & Co. (P) Ltd. (2013) 178 Comp Cas 28 (Bom)	530, 541	Ram Chand & Sons Sugar Mills (P) Ltd v. Kanhaiyalal Bhargava, AIR 1966 SC 1898; (1966) 2 Comp LJ 224	254
Rajeet Kavatra v. Sunil Khanna, (2006) 129 Comp Cas 373 (CLB)	578	Ram Kishan v. Kanwar Paper (P) Ltd, (1990) 69 Comp Cas 209 (HT)	196
Rajeet Sangittra v. Neetu Singh, 2016 5CC On-Line 1341 512; (2016) 198 Comp Cas 359	306	Ram Kisanlal Chhotalal v. Satya Chagan Luv, (1949-50) 77 (A) 126; AIR 1950 PC 81	274
Rajendra Nath Bhaskar v. Bhaskar Stoneware Pipes (P) Ltd, (1990) 1 Comp LJ 351 (1990) 63 Comp Cas 256 (Del)	512, 526	Ram Lal Anand v. Bank of Baroda, I.L.R. (1979) 2 Del 588; (1976) 46 Comp Cas 307	412
Rajendra G Patel v. Sanghi Industries Ltd. (2013) 176 Comp Cas 49	214	Ram Narain v. Ram Kishen, (1911) 10 IC 515	384
Rajendra Kumar Malhotra v. Harbanslal Mehta & Sons Ltd, (1999) 34 CLA 360; (1999) 2 Cal LT 13	472	Ram Nath Gupta v. Phoe Industries Ltd, (2006) 129 Comp Cas 161; (2005) 5 Comp LJ 128 (CLB)	538
Rapendra Nath Dutta v. Shubendu Nath Mukherjee, (1982) 52 Comp Cas 293; 85 CWN 1028	49, 497	Ram Pershad v. CIT, (1972) 2 SCL 696; (1972) 42 Comp Cas 544	262, 348
Rajesh Gupta v. SEBI, (2000) 39 CLA 62 (SAT)	420	Ram Singh v. Fertilizer Corporation of India Ltd, (1980) 50 Comp Cas 533; (1990) 21 LN 375 (P&H)	22
Rajhesh Paper Mills v. Indian Security Press, AIR 2001 Del 239; 2000 CLC 1436 (Del)	471	Ram Yashwant Kotek v. Interimodal Transport & Trading Systems (P) Ltd, (2006) 59 SCL 181 (CLB)	165
Rajinder Steels Ltd. re. (2006) 132 Comp Cas 310 (All)	576	Ratna Corp v. Preved Tir. and General Investments Ltd, (1992) 2 QB 147	99, 101
Rajiv Colton Traders v. Official Liquidator, (1992) 73 Comp Cas 51 (Guj)	614	Rattan Narang v. Ramesh Narang, (1995) 2 SCL 515; (1995) 93 Comp Cas 194; (1995) 16 CLA 247	275, 342
Raju Das v. United Press Ltd, (2002) 111 Comp Cas 584 (CLB)	164	Ramakulshna Raja v. Registrar of Companies, (2004) 123 Comp Cas 319 (Mad)	129
Rajiv Gupta v. State, (2001) 104 Comp Cas 26 (Del)	366	Ramachandra v. Chasiram, I.L.R. (1916) 42 Bom 516	145
Rajiv Nag v. Quality Assurance Institute (India) Ltd, (2000) 4 Comp LJ 365 (CLB)	377	Ramamal Amritlal v. ESI Corp. (1991) 51 Comp Cas 1 (Guj)	677
Rajiv Nag v. Quality Assurance Institute (India) Ltd, (2000) 105 Comp Cas 173 (CLB)	417	Ramashankar Prasad v. Sindri Izio Foundry (P) Ltd, (1966) 1 Comp LJ 316	527
Rajiv Singh v. Western Indian State Motors Ltd, (2015) 14 SCC 131; (2016) 194 Comp Cas 486	537	Ramawat Iyer v. Madras Times Printing & Publishing Co, AIR 1915 Mad 1179	327
Rajnikant Shah v. Decauvill Freres & Distillerins, (1978) 18 Comp Cas 322 (Bom)	167	Ramaswamy Iyer v. Brahamayya & Co, (1966) 1 Comp LJ 107	257, 258
Rajmata Naranbhai M.J. & Co Ltd v. New Quality Bulletin Works, (1973) 43 Comp Cas 131 (Guj)	721	Ramchandra & Sons (P) Ltd. v. State, (1967) 2 Comp LJ 92 (All)	368, 432
Rajendra Narajhaw Mills Co Ltd v. STO, (1991) 4 SCC 283; (1991) 51 Comp Cas 149	709	Ramdas Motor Transport Ltd v. Laddi Adhirayappa Reddy, (1997) 5 SCL 446; (1997) 25 CLA 127; (1997) 90 Comp Cas 383	556
Raka Corp (P) Ltd. re, (1968) 1 Comp LJ 223; (1968) 36 Comp Cas 329 (Mad)	726	Ramdeo Ranglal v. Chhormia Tea Co (P) Ltd, (2005) 60 SCL 449 (Guj)	650
		Ramesh B Desai v. Birla Vadilal Mehta, (2006) 5 SCL 639; (2006) 172 Comp Cas 679	247

Ranveer Chand Goyal v Himalaya Communications Ltd, (2006) 129 Comp Cas 297 (HP)	545	Rashmi Seth v Chemion India (P) Ltd, (1992) 3 Comp L 89; (1995) 42 Comp Cas 563 (CLB)	221, 512, 522, 524
Ranveer Chandra v Jagjot Mehan, [LR (1920) 47 Cal 90]	156	Reatimi Seth v Tillsol Farms (P) Ltd, (1992) 3 Comp L 126; (1995) 32 Comp Cas 409 (CLB)	312, 524
Ranveer Chandra v Wearwell Cycle Co, (1966) 1 Comp L 248	164	Roshtrija Mill Mazdoor Singh & Klatau Makani Spg & Wwg Co Ltd, (2000) 100 Comp Cas 55 (Bom)	14
Ramesh G Bhastik v M Malik, (1994) 79 Comp Cas 44 (Del)	240	Rassal Concern Ltd, re, (2000) 1 ALD 65; (1999) 96 Comp Cas 826	225, 427
Rameshbhai Ramanlal Patel v Shree Bansdjalal (P) Ltd, (2006) 133 Comp Cas 590 (Guj)	662	Rayners Group plc, re, 1998 BCILC 685	193
Rameshbhai Ramanlal Patel v Shree Bansdjalal (P) Ltd, (2006) 133 Comp Cas 590 (Guj)	651	Ravneesh H Bagga v Central Circuit Cine Asstn, (2005) 128 Comp Cas 370 (CLB)	47
Ramchandra Manilal Kotia v State of Gujarat, (1998) 2 Guj LR 1222	151	Ravi Construction v Registrar of Companies, (2000) 1 Comp L 115 (CLB)	161
Ramji Lal Baisiwala v Baiton Cables Ltd, [LR 1964 Kaj 135]	377	Ravi Kant v Consumer Disputes Redressal Commission, (1997) 89 Comp Cas 471; (1997) 3 Comp L 174 (Del)	363
Ramkumar Poddar v Shalapur Spg & Wwg Co Ltd, AJR 1934 SCC OnLine Bom 19; AIR 1934 Bom 427	44	Ravinder Kumar Jain v Punjab Registered Iron and Steel Stock Holders Assn, (1978) 48 Comp Cas 401 (P&H)	369
Ramkumar Poddar v Shalapur Spg & Wwg Co Ltd, AJR 1934 SCC OnLine Bom 18; AIR 1934 Bom 427	75	Ravinder Kumar Sangal v Auto Lamps Ltd, (1984) 55 Comp Cas 242 (Del)	320
Ramkumar Poddar v Shalapur Wwg & Spg Co Ltd, 1934 SCC OnLine Bom 18; AIR 1934 Bom 427	84	Ravindra Ishwardas Sethna v Official Liquidator, (1981) 4 SCC 269; (1983) 54 Comp Cas 702	696
Ramnathao Gupta v MBR Malik, AIR 1969 Nag 225; JLR 1961 Nag 567; 183 JC 748	142, 145	Ravindra Narain P Registrar of Companies, (1994) 81 Comp Cas 925 (Raj)	362
Ranvirjeet Victoria Hotel Co v Maniboccus, (1966) LR 1 Ex 109	146	Rawat Raj Kumar Singh v Banaras Bank Ltd, AIR 1961 All 154	677
Ranwali's v Edwards, (1885) 31 Ch D 100	313	Ray Cylinders & Containers v Hindustan General Industries Ltd, AJR 1976 Del 413; (1998) 75 DLT 889; (2001) 115 Comp Cas 161	256
Ranvary Laboratories Ltd v Intco Kala, (1997) 88 Comp Cas 348 (Kaj)	108, 414, 565	Rayfield v Handa, 1960 Ch 1; (1958) 2 WLR 651	45, 105
Ranvary Laboratories Ltd v Jerath Electronics & Allied Industries (P) Ltd, (2003) 110 Comp Cas 638 (HP)	672	RBI v Bank of Credit & Commerce International (Overseas) Ltd (No 1), (1993) 78 Comp Cas 207 (Bom)	714, 745
Rangkala Investments Ltd, re, (1995) 16 CLA 290 (Guj)	616	RBI v Bank of Credit & Commerce International (Overseas) Ltd (No 2), (1993) 78 Comp Cas 220 (Bom)	143, 714, 745
Rangkala Investments Ltd, re, (1997) 89 Comp Cas 754; (1995) 1 Guj LR 308	607	RBI v Crystal Credit Ccoup Ltd, (2006) 132 Comp Cas 363 (Del)	721
Rani Joseph v Registrar of Companies, (1995) 1 KLT 14	433	RBI v JVC Finance Ltd, (2006) 130 Comp Cas 316 (Del)	627
Ranjit Ray v DA David, AIR 1965 Cal 218	455	RP Singh v Bihar State Small Industries Corp, (1975) 46 Comp Cas 527 (Pat)	21
Rank Film Distributors of India Ltd v Registrar of Companies, AJR 1969 Cal 32; (1966) 38 Comp Cas 482; 72 CWN 384; (1968) 1 Comp L 129	58	RDF Power Projects Ltd v M Muralkirshna, 2005 CLC 234; (2005) 121 Comp Cas 177 (CLB)	165
Ranjanpete pte, re, (1999) 2 BCILC 391 (CA)	193	Read v Asociacion Garage (Streatham) Ltd, 1952 Ch 637 (CA)	282, 341
Rao Balakur MRS Bachanayelusami v MRS Manikavasi, Chennai, AIR 1951 Mad 542; (1951) 64 LW 172; (1951) 21 Comp Cas 93	371, 376		

Real Lifestyle Broadcasting (P) Ltd v Turner Asia Pacific Ventures Inc (No 2), 2013 SCC Online Del 1013 (2014) 186 Comp Cas 177 (Del)	615
Real Lifestyle Broadcasting (P) Ltd v Turner Asia Pacific Ventures Inc, 2013 SCC Online Del 1013 (2014) 186 Comp Cas 180 (Del)	615
Reckitt Benckiser (India) Ltd, re, (2004) 55 SCL 437 (Cal)	601
Reese River Silver Mining Co, re, (1967) 1 L.R. Ch 604	122
Regal (Hastings) Ltd v Gulf Liver, (1912) 1 A.I. E.R. 424	307
Regal (Hastings) Ltd v Gulf Liver, (1967) 2 A.W.C. 134 (J.L.)	305, 306
Reginald Edward Negus v Official Liquidator, (1989) 48 Comp Cas 443; (1993) 2 Comp LJ 100 (Bom)	491
Regional Airports Ltd, re, (1999) 2 BCCL 30 (Ch D)	534
Registrar of Companies v Bihar Investment Trust 1 M., (1978) 48 Comp Cas 579 (Pat)	654
Registrar of Companies v Bipin Bihari Nayak, (1995) 80 Comp Cas 641 (Orl)	221
Registrar of Companies v Bhupesh Behari Nayak, (1995) 43 Comp Cas 95 (Orl)	363
Registrar of Companies v HS Cabral, (1986) 63 Comp Cas 126 (Bom)	248
Registrar of Companies v Hiranmishtha Financers (P) Ltd, (1974) 44 Comp Cas 154 (P&J)	421
Registrar of Companies v MK Bros (P) Ltd, (1977) 47 Comp Cas 314 (All)	654
Registrar of Companies v Navjivan Trading & Finance (P) Ltd, (1978) 48 Comp Cas 402 (Guj)	667
Registrar of Companies v Orissa China Clay Kilnery Co, (1968) 38 Comp Cas 205 (Ori)	683
Registrar of Companies v Orissa Paper Products Ltd, (1988) 63 Comp Cas 449 (Ori)	285, 432, 433
Registrar of Companies v Premier Synthetics (P) Ltd, (1997) 89 Comp Cas 732; (1997) 76 SCL 289 (Mad)	221, 433
Registrar of Companies v Rajshree Sugar & Chemicals Ltd, (2000) 6 SCC 133; (2001) 801 Comp Cas 271	144
Registrar of Companies v Sodasan Liners Ltd, (1988) 63 Comp Cas 217 (Mad)	431
Regl Provident Fund Commr v Narayan Udyog, (1953) 1 R.R.J.L.R. 224	13
Regl Provident Fund Commr v Olftejal Liquorator, (1968) 2 Comp LJ 15 (All)	710
Regl Provident Fund Commr v Raj Kumar Nemani, (1995) 1 Cal LJ 49 (1995) 16 CLA 425; (1995) 1 CHN 115	614
Rehana Rao v Balaji Fabricators (P) Ltd, (2004) 122 Comp Cas 804 (T.M)	151
Reid v Explosives Co, (1887) 19 QBD 269; 57 LT 439 (CA)	309
Reliance Industries Ltd, re, (1997) 89 Comp Cas 47	148, 151, 706
Reliance Jamnagar Infrastructure Ltd, re, (2013) 176 Comp Cas 217 (Guj)	600
Reliance Jute & Industries Ltd, re, (1983) 53 Comp Cas 391 (Cal)	616
Reliant Milk & Services (P) Ltd v Registrar of Companies, 2015 SCC Online Ker 1775n; (2015) 192 Comp Cas 189	644
Renia Pipes Ltd v Industrial Finance Corps of India, (2012) 108 Comp Cas 385 (AP)	647
Renu Kana Dutta v Gour Natty Tea and Industries Ltd, (2007) 136 Comp Cas 271 (C.B)	231
Renuka Datta v Biological E Ltd, 2015 SCC Online Hyd 119; (2015) 193 Comp Cas 366	237
Reshma Estate (P) Ltd, re, (1977) 42 Comp Cas 447 (Bom)	450
Ress River Silver Mining Co v Smith, (1869) 1 L.R. 4 H.L. 64	170
Rewa Gases (P) Ltd v State of LD, (2000) 101 Comp Cas 272 (1996) 2 A.W.C. 1523	22
Rica Gold Washing Co, re, (1879) L.R. 1 Ch D 36 (CA)	607
Ricardo Group plc (No 2), re, 1989 BCCL 771 (Ch D)	561
Ricardo Group plc, re, 1989 BCCL 566 (Ch D)	561
Richi Paints Ltd v Vardha Stock Exchange Ltd, (1996) 15 R.C.L. 326 (Del)	314
Richard Dale Agency v Columns of Ireland Revenue, (2005) 2 Comp LJ 245 (J.C);	465
Richardson & Cruddas Ltd v Heslin Mundea, (1959) 29 Comp Cas 549 (G.A)	558, 560
Ridge Securities Ltd v ITC, (1964) 1 WLR 479	65
Rights and Issues Investment Trust Ltd v Style Shoes Ltd, 1965 Ch 250; (1965) 1 Comp LJ 234	819
Rijash K. Guha v WB Pharmaceuticals Phyto Commercial Corp Ltd, (1982) 1 Comp LJ 199; AIR 1982 Cal 94	507
Ripon Press & Sugar Mills Co Ltd v Gopal Chetty, (1930-31) 58 IA 416; AIR 1932 PC 1	519

Rishima SA Investments LLC v Registrar of Companies, West Bengal, (2017) 203 Comp Cas 64 (Cal)	643	Roundwood Colliery Co. sc. (1897) 1 Ch 525 75 LT 641 (CA)	484
Rishyashringa Jewellers Ltd v Bombay Stock Exchange, (1995) 6 SCC 714; (1996) 85 Comp Cas 479	144	Rover International Ltd v Cannon Ellars Sales Ltd, (1987) 1 WLR 1597	42
Ritech Polymers Ltd, re, 2001 CLC 1628 (CLB)	766	Rowell v John Rowell & Sons Ltd, (1917) 2 Ch 609 107 LT 374	212
River Steamer Navigation Co Ltd, re, (1967) 2 Comp L 106 (Cal)	590	Royal British Bank v Turquand & Indian Law, (1964) 2 Comp L 173	94
RK Nutriprox (India) (P) Ltd, re, Company Petition No. 100 (JAI) ERD of 1999, decided on 15.11.1999 (Cal)	161	Royal British Bank v Turquand, (1856) 6 ExB 327; 119 EB 886	92
RN Jalan v Deccan Enterprises (P) Ltd, (1993) 75 Comp Cas 417 (AP)	524	Royal Trust Bank plc v National Westminster Bank, 1990 DCC 593	482
Robt v Green, (1895) 2 Q.R. 315	404	RN Shah v Engineers' Enterprises (P) Ltd, (1977) 47 Comp Cas 294 (Bom)	159
Robert Stephen Holdings Ltd, re, (1969) 1 WLR 522; (1968) 1 All ER 195 (Ch D)	233	RR Rajendra Menon v Cochin Stock Exchange Ltd, (1990) 69 Comp Cas 231 (Ker)	379
Rochampton Swimming Pool Ltd, re, (1966) 1 WLR 1692	742	RS Livemedia (P) Ltd, re, 2014 SCC Online Del T346; (2014) 197 Comp Cas 243	234
Ruhinter Mazuli v Hy poidis (India) (P) Ltd, (2001) 3 Comp L 446; (2004) 121 Comp Cas 229 (CLB)	565	RS Mathur v HS Mathur, (1970) 1 Comp L 35 (All)	538
Ruhit Chuzamani v Pister Research and Mktg Services (P) Ltd, (2005) 123 Comp Cas 412; (2005) 37 SCL 345 (CLB)	263	RT Decumal v John Devlin, AIR 1961 Mad 43; (1960) 30 Comp Cas 540	10
Ruffles Industries v SD Agarwal, (1969) 1 SCC 325; (1969) 39 Comp Cas 78; (1969) 1 Comp L 380	559, 560	Ruben v Great Fingall Consolidated, 1906 AC 429; 95 LT 214 (HL)	196, 196, 357
Ruffles Industries Ltd v Official Liquidator, (2005) 128 Comp Cas 421 (Pat)	666	Ruber v Gurner, (2004) 2 CLC 113 (Ch D)	728
Ruffles Industries Ltd (In Liquidation), re, (2001) 103 Comp Cas 383 (Pat)	681	Ruby General Hospital Ltd v Kamal Kumar Gupta, (2001) 129 Comp Cas 1 (Cal)	532
Rulls Razor Ltd, (No 2), re, 1970 Ch 526; (1970) 2 WLR 108	597	Rudi v Bléier Dempster & Co, (1933) 1 KB 366 102 LJ KB 275 (CA)	263
Rulla India Ltd v Venice Industries Ltd, (2000) 100 Comp Cas 19; (2000) 2 Bom CR 241; (2000) 3 Maharashtra L 700	274	Rupak Gupta v UP Hotels Ltd, 2016 SCC OnLine NCLT 372; (2016) 138 Comp Cas 346	389
Rume v Punjab National Bank, (No 2), (1969) 1 WLR 1211 (CA)	585, 586	Rupak Ltd v Registrar of Companies, (1976) 46 Comp Cas 53 (Pat)	231
Rondon and Novy Rich Investment Services Ltd, re, 1988 CLC 326 (CLB)	462	Rueli Patel & Investments (P) Ltd v Official Liquidator, (2001) 105 Comp Cas 328 (Guj)	723
Rone v AIA Group (UK) plc, (2008) 1 WLR 2792 (CLB)	722	Russian (Vysotsunsky) Iron Works Co, re, (1866) UK 1 Ch App 574; 15 LT 817	125
Rose v Humbles, (1929) 1 WLR 1061	257	Rudolf Casarjee Cooper v Union of India, (1929) 1 SCC 248; (1970) 40 Comp Cas 325	14
Rueggelin v Judson Engg Corp, 99 NJ 267 (1994)	405	Ruttonjee & Co Ltd, re, (1966) 2 Comp L 155; (1970) 40 Comp Cas 491 (Cal)	373
Roshan Lal Agarwal v Sheshram Bihari, (1990) 50 Comp Cas 213 (Pat)	541	RV Dnyansagar v Maharashtra Industrial and Technical Consultancy Organisation Ltd, (2005) 129 Comp Cas 520 (Bom)	592
Ross v Estates Investment Co, (1969) 1 ER 3 Ch App 682; 19 LJ 61	124	S Bhuneswara v ACT (Agro Chemical Industries) Ltd, (2014) 51 SCL 156 (Mad)	152
Rutherford Alum & Chemical Co, re, (1883) 25 Ch D 103; 85 LJ Ch 291 (CA)	45	S Chatterjee v TD Sarwate, AIR 1960 MP 322	128
S Canesane v AK Joscelyne, AIR 1957 Ch 193; (1957) 27 Comp Cas 114	460, 464	S Govind Rajan v MU Roy, 2014 SCC Online Mad 30290; (2015) 168 Comp Cas 339	320

S Gurucharan Singh Mahant v Rattan Sports (P) Ltd., (1986) 54 Comp Cas 279 (P&H)	165
S Haridas v Official Liquidator, (2006) 133 Comp Cas 24 (AP)	684
S Palaniappan v Tirupur Cotton Spg & Wvg Mills Ltd., (2003) 114 Comp Cas 288 (Mad)	655
S Palaniappan v Tirupur Cotton Spg & Wvg Mills Ltd., (2005) 128 Comp Cas 536 (CLB)	509
S Palaniappan v Sree Jaiherdhana Mills Ltd. (1990) 76 Comp Cas 327 (Mad)	740
S Pandit, re, (1993) 68 Comp Cas 277 (P&H) 2 Comp LJ 120 (Bom)	321
S Patancheswari v Kumardhena Metal Rolling Mills (P) Ltd, AIR 1971 Mad 249	216
S Pazhamalai v Aruna Sugars 1 M, (1949) 98 Comp Cas 500 (Mad)	271
S Ranganathar, v Shyamala Pictures & Heels (P) Ltd, (2002) 108 Comp Cas 980 (CLB)	764
S Seetha v Satyam Computer Services Ltd, (2002) 132 Comp Cas 139 (CLB)	148
S Sivakumar v Circles Data Systems Ltd, (2002) 112 Comp Cas 162 (CLB)	160
S Subrahmanya Pillai v T Govindaswami, AIR 1965 Mad 199 (1987) 82 Comp Cas 414	150
S Sureshagan, v Plast-n-Fibre Industries (P) Ltd, (1993) 76 Comp Cas 38 (Mad)	652, 657, 660
S Varadrayan v Venkateswara Solvent Extraction (P) Ltd, (1954) 60 Comp Cas 693 (Mad)	282, 510
S Viswanathan v East India Distilleries & Sugar Factories, AIR 1967 Mad 341 (1967) 27 Comp Cas 175	185
SA Padmanabha Rao v Union Theatres (P) Ltd, (2002) 106 Comp Cas 108 (Kan)	159
Sahapathi Press Ltd v R Sabapathy Rao, AIR 1930 Mad 240	655
Sahapathi Rao v Sahapathi Press Co Ltd, AIR 1930 Mad 1012	722
Sabitha Ramamurthy v RRS Channabasavapatthy, (2004) 10 SLT 581 (2006) 122 Comp Cas 680	362
Sadashiv v Gandhi Sewa Samaj, AIR 1958 Bom 247; (1958) 26 Comp Cas 137	165
Safia Usman v Union of India, (1999) 23 SCL 272 (Ker)	55b
Safia Usman v Union of India, (2002) 110 Comp Cas 710 (Ker)	559
Sahajanand Cotton Traders v Official Liquidator, (2000) 26 SCL 131 (Guj)	599
Sahara India Real Estate Corp Ltd v SEBI, (2013) 1 SCC 3; (2012) 174 Comp Cas 150	144, 147
Saibal Choudhury v Mahabir Tea Estate (P) Ltd, 2013 SCC OnLine CLB 26; (2014) 164 Comp Cas 50	526
SAll, v Sisir Asimew Mills Ltd, (1998) 1 SCC 465; (1998) 92 Comp Cas 120	22
Sajida Book Shop v Kaumudi Exporters (P) Ltd, (2007) 135 Comp Cas 273 (Ker)	736
SAK Chinnathambi Chettiar v GS Muthugami, (1968) 38 Comp Cas 772; (1968) 3 Comp L 260 (Mad)	14
Sakamari Steel & Alloys Ltd, re, (1981) 51 Comp Cas 266 (Bom)	601
Salford Corpn v Lever, (1891) 1 QB 168; 63 LT 636 (L.A)	303
Salim Akbarali Nanji v Union of India, (2003) 113 Comp Cas 141 (Bom)	43
Salmon, v Quin & Axters Ltd, (1909) 1 Ch 311; 111; 1T 16 (CA)	287
Salomon v Salomon & Co Ltd, 1897 AC 22 (HL)	2, 5, 24
Salmond Estate Co Ltd, re, (1968) 1 WLR 1844	233
Saltman Engg Co Ltd v Campbell Engg Co Ltd, (1948) 65 RPC 203	304, 313
Sambasubraman P-Hai v Official Liquidator, (1967) 2 Comp LJ 257 (Mad)	702
Samayandhir Power Investment (P) Ltd v Coventia Energy India (Balaji) Ltd, (2006) 30 Comp Cas 21 (Mad)	20
Samir C Arora v SEBI, (2015) 125 Comp Cas 405 (SAT)	311
Sanduk Chit Fund & Financiers (P) Ltd v Kannder Kumar Sharma, (1998) 79 Comp Cas 25 (P&H)	735
Sandya, ex p, (1889) 42 Ch D 98; 61 LT 94	189
Sanghvi Bios Brokerage Ltd v SEBI, (2015) 2 Comp LJ 475 (SAT)	192
Sangram Singh P Gaekwad v Bhantadeo P Gaekwad, (2005) 11 SCL 314; (2005) 123 Comp Cas 566	145, 236, 237
Sanitary Social Asr, re, (1990) 2 LCEI 189	710
Sanjay Gundhirkar v DD Industries Ltd, (2013) 177 Comp Cas 99 (Del)	544
Sanjeev Kumar Bhardwaj v Ghanshyam Dass, (1999) 34 CLA 37; (2001) 103 Comp Cas 447 (Del)	538
Sanjeev Kumar Gupta v Registrar of Companies, (1994) 2 Comp LJ 70 (Del)	221
Sejiv Nathani v Vasant Kumar Chordia, (2005) 66 CLA 45 (CLB)	376
Sanjivbhai Kirtibhai Patel v Biocare Remedies P Ltd, (2017) 203 Comp Cas 5 (NCLAT)	542
Sankazar Namblat v Knittayam Bank, AIR 1946 Mad 304; (1946) 59 LW 38	257

Sudartha Finance v Alsa Investment (P) Ltd.	461	Sayedabadi Tea Co Ltd v Srinivarsandra Netli	
47002-110 Comp Cas 713 (CLB)		Ghatalak, (1995) 83 Comp Cas 501 (Cal)	511
Saranya Zaveri v Kathaduri Academy (P) Ltd.	35	SBA Properties Ltd v Cradock, (1987) 1 WLR	
(2006) 133 Comp Cas 546 (Ker)		716 (Ch D)	558
Saraswati Industrial Syndicate Ltd v CIT, 1990		SBA Properties Ltd, re, (1987) 1 WLR 299 (Ch D)	511
Supp SCC 657	621	SBI v Alstom Power Builders Ltd, (2003) 146	
Sareh i Leasing Finance Ltd v B Narayana		Coccy Cas 1 (Bom)	602, 605, 620
Shetty, ILR 2006 KAR 1929; (2006) 3 Kant LJ		SBI v Business Development Consultants (P)	
397; (2006) 131 Comp Cas 708	256	Ltd, (2005) 128 Comp Cas 557 (CLB)	212, 513
Seraf Coenka v Nartman Print Building		SBI v Depro Foods Ltd, (1988) 14 Comp Cas	
Services and Trading (P) Ltd, (1994) 21 W		375 (P&H)	463
342; (1997) 90 Comp Cas 205	522	SBI v Engg Majidur Saigh, (2002) 109 Comp	
Sarmaya Textiles Ltd v Country EPE, (2002)		Cas 6 (Guj)	602
108 Comp Cas 406 (AP)	714	SBI v Haryana Rubber Industries (P) Ltd,	
Sarvopari Investments (P) Ltd v Sama Textiles		(1986) 60 Comp Cas 472 (P&J)	463
& Industries Ltd, 2005 CLC 1312 (Cal)	184	SBI v P Narayanasamy, 2013 SCC OnLine Mad	
Sasee Finance Ltd v KPMG, (2006) 1 All ER		2802; (2010) 186 Comp Cas 269	537
676 (CA)	450	SBI v Pedar Mills Ltd, (1992) 74 Comp Cas 710	
Sashi Prakash Khatri v NEVC Micor Ltd,		(Bom)	716
(1999) 95 Comp Cas 593 (CLB)	200	SBI v Peddar Mills Ltd, ATR 1999 Bom 215;	
Satish Chandra Chowdhury v Bengal Laxmi		(1989) 2 Comp L 189 (Bom)	669
Cotton Mills Ltd, (1965) 1 Comp L 45; (1965)		SBI v Spinlex Tubes and Constructions Ltd,	
35 Comp Cas 187 (Cal)	519	(1995) 82 Comp Cas 290 (Raj)	262
Satish Chandra Sonwaijka v Empink Dealers		SBI v Valva Steel Ltd, (2004) 22 Comp Cas 448	
Assn (P) Ltd, (2001) 117 Comp Cas 98 (CIL)	209	(Guj)	629
	211, 416	SC Bharat v PC Wadhawa, (1998) 30 CLA 130	
Satwant Singh v Registrar of Companies,		(P&H)	764
(1995) 2 ILR 563	318	SC Motra v Nawab Ali Khan, ATR 1926 Oudh	
Secta Chirian Law v Radheeshwar Prasad		153, 523 (Oudh)	324
Dajora, (1950) 20 Comp Cas 39; (1949-50) 11		Schrods v Canadian Meat Processing Corp,	
PCB 673; AIR 1950 PC 130	209, 505	(1983) 147 DLR (3d) 91 (Can)	24
Satyam Computer Services Ltd, In re (No. 2),		Scientific Instruments Cn Ltd v RP Gupta,	
(2004) 186 Comp Cas 475 (AP)	611	(1999) 34 CLA 36 (All)	522
Sathyavathyam Rathi v Aanandamalai Textiles		Scott v Frank F Scott (London) Ltd, 1948 Ch	
(P) Ltd, (1949) 96 Comp Cas 386 (GJH)	158	794 (CA)	86
Seoti D J Larrison & Sons plc, re, (1995) 1		Scott v Scott, (1943) 1 All ER 592	287
BCAC 14	500	Scottish Crop Wholesale Society v Meyer,	
Savitribhai Exports v Plaza Finance & Credits		1959 AD 324; (1968) 5 WLR 404 (HL)	331, 346,
(P) Ltd, (2006) 69 DRJ 372; (2006) 229 DLT		517, 521	
429; (2006) 133 Comp Cas 495	299	Scottish Insurance Corp Ltd v Wilsons &	
Saurashtra Cement & Chemical Industries Ltd		Clyde Coal Co Ltd, 1949 AC 462 (HL)	222
v Esaro Industries (P) Ltd, (2001) 103 Comp			235, 493
Cas 1041; (1995) 1 Cal LR 673	299	Scottish Petroleum Co, re (Anderson's case),	
Saurashtra Cement and Chemical Industries		(1881) LR 17 Ch D 373; 43 LT 723	125
Ltd v Esaro Industries (P) Ltd, (1990) 69		SCV Subramanyam Naikulu v IncabMene:	
Comp Cas 372 (Guj)	511	Tiruputlu (P) Ltd, (2006) 130 Comp Cas	
Saurashtra Cement Ltd v Union of India,		606 (CLB)	164
(2007) 136 Comp Cas 1; (2007) 2 Guj LR 1364	275	Search Chem Industries Ltd, re, (2006) 129	
Saurin T Patel, v Stock Exchange, (2005) 132		Comp Cas 471 (Guj)	628
Comp Cas 910 (Bom)	412	Seaway Maritime (P) Ltd, re, (2000) 39 CLA	
Savings and Investment Bank Ltd v Gas		416; (2002) 121 Comp Cas 78 (CLB)	59
Investments (Netherlands) BV Co, (1984) 1			
WLK 271 (Ch D)	563		

C Company Law

Sebastian v City Hospital (P) Ltd, (1987) 57 Comp Cas 489 (Ker)	527	Sevagiri Investments (P) Ltd v Soma Textiles & Industries Ltd, 2005 CTC 1302 (Cal)	384
SEBI v Krishnamurthy Paper Mills Ltd, (2003) 108 Comp Cas 371 (Ker)	319	Sesa Industries Ltd v Krishna H Bajaj, (2011) 3 SCC 218; (2011) 162 Comp Cas 119	366, 406
SEBI v Lipton Plantation Ltd, (1999) 95 Comp Cas 373; (1999) 1 LJ Comp Cas 294 (Bom)	19, 20	Seth Badri Prasad v Sebi Nagarjala, AIR 1989 SC 559; (1992) 29 Comp Cas 229	598
SEBI v Shriram Mutual Fund, (2006) 5 SCC 481; (2008) 131 Comp Cas 99	179	Seth Jassa Ram Fatehchand v Om Narain Tankha, AIR 1967 SC 1162; (1967) 37 Comp Cas 204	714
Second Consolidated Trust Ltd v Ceylon Amalgamated Tea & Rubber Estates Ltd, (1999) LT 334	384, 390	Seth Kundan Lal v Nanuan Chamber of Commerce Ltd, (1966) 26 Comp Cas 231 (Pun)	640
Securities & Exchange Commission v Texas Gulf Sulphur Co, 400 F 2d 833 (2d Cir 1968)	309	Seth Molai Lal v Chain Chariots Ltd, AIR 1968 SC 772; (1968) Comp 1J 275; (1968) 38 Comp Cas 513	652
Secy v SN Das Gupta, (1955) 25 Comp Cas 413 AIR 1956 Cal 414; 60 CWN 124	442, 443	Seth Subhap Mai Lodhi v Edward T Gills Co, (1922) 42 Comp Cas 1, 197; Tax I.R. 129 (Raj)	379, 382, 383
Secy of State v Swan and North, 2004 BOC 877; 2005 EWTC 603	318	Severn & Wye & Severn Bridge Railway Co, re, LR (1896) 1 CJ 559	413
Secy of State for Trade and Industry v Arif, (1997) 1 BCCLC 34; 1996 BCUC 566 (Ch D)	275	Siwaa Singh v Mukta Singh, ILR (1986) 12 Lah 230; AIR 1986 Lah 729	480
Secy of State for Trade and Industry v Liang, (1996) 2 BCCLC 325 (CA)	61	Sewaldale Cleaners Ltd, re, (1968) 1 WLR 1716 (CA)	162
Secy of State for Trade and Industry v Metric Components plc, Feb 12, 2000 Palmer in company, June 2000 at p 5	601	Shachira (Delhi) Saharcooper Light Railway Co v ITO, (1969) 63 Comp Cas 427 (Cal)	710
Seksaria Cotton Mills Ltd v AE Naik, (1967) 37 Comp Cas 656 (Bom)	611	Shah Steamship Navigation Co, re, (1901) 10 Bern 13, 317	654
Selangor United Rubber Estates Ltd v Cradock (No 3), (1968) 1 WLR 1555; (1968) 2 All ER 1073	71, 248, 252, 313, 331	Sharatkh Harkat Shah v Marashree Textiles Ltd, AIR 1994 Bom 20	273, 328, 372, 376
Selangor United Rubber Estates Ltd v Cradock (No 4), (1968) 1 WLR 1773 (2); (1969) 3 All ER 965	247	Shailesh Prabhudas Mehta v Calico Dyeing & Printing Mills Ltd, (1991) 3 SCC 339; (1994) 50 Comp Cas 64	162
Selangor United Rubber Estates Ltd v Cradock, (1967) 1 WLR 1168; (1967) 2 All ER 1755	558	Shailesh Prabhudas Mehta v Calico Dyeing and Printing Mills Ltd, (1990) 67 Comp Cas 533 (Bom)	162
Self-Help Private Industrial Estates (P) Ltd, re, (1992) 42 Comp Cas 605 (Mad)	575, 592	Shakuntala Bach v Eastern Linkers (P) Ltd, (1995) 60 DLT 437	666
Selvaraj v Mylapore HP Hand, (1969) 1 Comp LJ 93 (Mad)	385	Shalagenee Jaijheen v National Co, (1965) 1 Comp LJ 122 (Cal)	279
Selvarajan v Registrar of Companies, (1966) 3 Comp LJ 275; (1967) 62 Comp Cas 220 (Mad)	38	Shalender Kaushik v SEBI, (2010) 162 Comp Cas 480 (Del)	474
Senapati Kapurchand v Paranjay Devichand, AIR 1930 2C 500; 34 CWN 1107	565, 598	Shankar Narayana Ekalots (P) Ltd v Orlacol Liquidator, (1992) 24 Comp Cas 290 (Kant)	621
Senator Harstatische Verwaltungsgesellschaft MBH, re (1997) 1 WLR 515; (1996) 2 BCCLC 562	583	Shankar Sundaram v Amalgamation (P) Ltd, (2002) 106 Comp Cas 88 (Cal)	583
Senthil Kumar v Sudha Mills (P) Ltd, AIR 1996 AJCC 5230 (Mad)	538	Shankar Sundaram v Amalgamations Ltd, (2001) 104 Comp Cas 638 (Cal)	513
Sequoia Vacuum Systems Inc v Stranks, (1964) 229 Cap App 2d 261	306	Shankar Sundaram v Amalgamations Ltd, (2002) 111 Comp Cas 252 (Mad)	524
Semin Institute of India Ltd v V Yugendran Suriar, (2006) 133 Comp Cas 135 (AP)	21	Shanta Gopinath Venkatesh v Sakal Papers (P) Ltd, (1990) 69 Comp Cas 65 (Bom)	150, 177, 333

Shanti Prasad Jain v Director of Enforcement, AIR 1962 SC 1264; (1963) 2 SCR 297 (963) 33 Comp Cas 231	714	Shivalik Agro Poly Products Ltd v Disco Electronics Ltd, (2003) 14 Comp Cas 399 (Del)	679
Shanti Prasad Jain v Kalinga Tubes Ltd, (1965) 1 Comp LJ 193; AIR 1965 SC 1535; (1965) 35 Comp Cas 351	239, 516, 520, 557	Shivalik Ice Factory & Cold Storage (P) Ltd v Registrar of Companies, (1988) 44 Comp Cas 113 (P&H)	433
Shantidevi Pratap Singh Gaekwad v Sangeet Singh P Gaekwad, (1996) 1 Comp LJ 72 (Guj)	518, 522	Shivam Authesive (P) Ltd v Shiv Kumar Khedawal, 2013 SCC Online Rep 2804; (2014) 186 Comp Cas 343	514
Shantilal Khushaldas & Bees (P) Ltd v Jayabala Suresh Shah, (1993) 77 Comp Cas 253 (Bom)	662	Shivkaran Buchia v Official Liquidator, (2004) 100 Comp Cas 392 (Raj)	677
Shantilal Manibhai Patel v Laxmi Film Laboratory & Studio (P) Ltd, (1984) 3n Comp Cas 110 (Guj)	527	Shivmani Steel Tubes Employers' Assoc. v. (2005) 126 Comp Cas 522 (Kash)	706
Shary v Dewes, (1876) 2 QBD 26-46 UKQB 104; 36 LT 183 (CA)	380	Shivmani Steel Tubes Ltd v Durgapur Steel Plant, (2004) 112 Comp Cas 664 (Kash)	746
Sharp Industries Ltd. re, (2006) 131 Comp Cas 535 (Bom)	462, 469, 511, 513	Shivalk Transport Co Ltd v Atul Singh, (1978) 48 Comp Cas 445 (P&H)	729
Sharpe, re, (1892) 1 Ch 154	257	Shine Specialities Ltd v Standard Distilleries & Breweries (P) Ltd, (1997) 90 Comp Cas 1 (Mad)	281, 370, 542
Sharpley v Smith and East Coast Railway Co, (1876) 2 Ch D 663 (CA)	128	Shine Specialities Ltd v Tristar Investments Ltd, (1997) 88 Comp Cas 471 (Mad)	151, 169, 572
Shashikant G Badani v SEBL, (2005) 123 Comp Cas 473 (SAT)	192	Sheet v Treasury Committee, (1948) 1 KB 116	157
Shaw v Tal Concessions Ltd, (1943) 1 Ch 292	348	Shoebridge v Bosanquet, (1872) 16 Beav 97; 51 ER 206	158
Shaw & Sons v Shaw, (1965) 2 KB 113 (CA)	370	Shraddha Aromatics (P) Ltd v Official Liquidator of Global Area Industries Ltd, (2001) 6 SCC 307; (2001) 6 Comp Cas 376	691, 695
Shearer v Beresini, (1980) 3 All ER 295	193	Shree Balaji Steels v Goebermann-Pipers India Ltd, (2002) 111 Comp Cas 193 (Cal)	714
Sheffield Corp v Barclay, 1905 AC 392; 90 LT 63	179	Shree Cement Ltd v Official Liquidator, AIR 1994 Cal 90	725
Shekhar Nehru v K Post (P) Ltd, (1986) 3 Comp LJ 234 (MP)	278	Shree Cement Ltd v Power Grid Corp Ltd, (2004) 122 Comp Cas 322 (KLB)	164
Shekh Mullan Lal Campbell v Surya Jubilee Cotton & Jute Mills Ltd, (1964) 34 Comp Cas 772; (1965) 5 Gej LR 80d; AIR 1965 Guj 96	524	Shree Hanuman Steel Rolling Mills v Registrar of Companies, (1996) 2 Cal LJ 61	432
Shindler v Northern Raincoat Co Ltd, (1960) 1 WLR 1038	341	Shree Sai Baba Castings (P) Ltd. re, (1997) 27 CLA 72 (Bom)	121
Shivish Finance & Investment (P) Ltd v V. Sreenivasulu Reddy, (2002) 109 Comp Cas 913 (Bom)	172	Shree Shanti Textile Mills Ltd v Siddharth N. Shah, (2005) 125 Comp Cas 576 (Bom)	189
Shivramani Sugar Mills Ltd v Debi Prasad, AIR 1950 All 508; (1950) 20 Comp Cas 296; 1950 All LJ 836	115, 124, 128, 129, 205	Shree Vallabh Glass Works Ltd v CICI Ltd, (1987) 3 SCC 94; (1987) 62 Comp Cas 301	672
Shiv Dyal v Liberty Finance (P) Ltd, (1980) 50 Comp Cas 229 (Del)	446	Shri Antapuri Chemical India (P) Ltd v Dipak G Mehta, (1996) 44 Comp LJ 474 (How)	541
Shri Dayal Agarwal v Siddhartha Polyester (P) Ltd, (1996) 88 Comp Cas 706 (Cal)	766, 769	Shri Ayyanar Spg & Wvg Mills v VVV Rajendran, (1973) 43 Comp Cas 225 (Mad)	141
Shri Kejriwal Dalma v Mangalchand Hukumchand Industries (P) Ltd, (1996) 86 Comp Cas 366; (1996) 2 Comp LJ 219 (MP)	320, 432	Shri Balaji Textile Mills (P) Ltd v Ashok Navle, (1989) 66 Comp Cas 659 (Ker)	198, 512
Shiva Texyarn Ltd v Annamalai Finance Ltd, (2010) 114 Comp Cas 35 (Mad)	623		

Shri Gopal Panchayatan Sansthan Trust v Union of India, (2011) 168 Comp Cas 253 (Bom)	214
Shri Gopal Paper Mills Co Ltd v C.I.T., (1981) 2 SCC 80	141, 416
Shri Ram Sazar: Sharma v Bank of India, (1990) 61 Comp Cas 544 (P&H)	678
Shri Ramdas Mehta Transport Ltd v Kavita Surjananayna, (2012) 110 Comp Cas 193 (AP)	520, 542
Shri Vinayak Vasudeo Sahasrabudhe v Penleyon Drugs (P) Ltd, (2005) 128 Comp Cas 172 (2016) 6 Comp LJ 484 (CLB)	189
Shitali Rao v Gopal Automobiles Ltd, (1998) 30 CLA 373 (CLB)	522
Shrimati Jain v Delhi Flour Mills Co Ltd, (1974) 44 Comp Cas 228 (Del)	236, 369, 381
Shubh Shakti Services Ltd v Meenjala S. Agarwalla, (2005) 5 SCC 30 (2005) 125 Comp Cas 177 (2005) 4 Comp LJ 417	74L, 742
Shuttleworth v Cox Bros & Co (Maidenhead) Ltd, (1927) 2 KB 9 (CA)	502
Shyam Sunder Dalera v SEBI, (2005) 2 Comp LJ 452 (SAT)	192
Shyam Sunder Jalan v State, (1977) 42 Comp Cas 61 (CA)	266
Sidelskotom v Berskens, Leege & Co, (1920) 1 CL 554; 122 LT 525 (CA)	501
Sidaper Mills Co Ltd, re, (1980) 50 Comp Cas 7 (Guj)	612
Sigma Soya Industries (P) Ltd, re, (2015) 189 Comp Cas 447 (Gau)	625
Sikiori Bank Ltd v RS Chowdhury, (2000) 102 Comp Cas 157 (Cal)	369
Siven Properties Ltd v Royal Bank of Scotland, (2004) 1 BCLC 352 (Cl. B)	490
Sunkhadi Sugar Mills Ltd v Biedenstein Bienen Ritter Ltd, (1994) 29 All 15, 27	56
Summer Bay (Diamonds) Ltd, re, 2000 BCC 255	236
Simplex Infrastructure Ltd v Registrar of Companies, (2014) 162 Comp Cas 243 (Cal)	321
Simpson v Malsen's Bank, 1895 AC 231 (PC)	215
Siripuri Kalya v Mahavir Ice Mills (P) Ltd, (1993) 93 Comp Cas 699 (CLB)	230
Sinclair v Brougham, 1914 AC 398, 121 LT 2, 83 1J Ch 465; 30 JT R 315	453, 454
Sindhi Jute Boundary (P) Ltd, re, (1963) 49 CWN 318	527
Singet v Calliele, (1943) 26 NYS 2d 520	305
Sipari Automobiles Ltd, re, (1998) 76 Comp Cas 557	25
Sipso Agencies (P) Ltd v Gujji Singh, (1978) 48 Comp Cas 20 (Del)	684
Sivaram Reddy v Bellary Spg & Wng Co (P) Ltd, (1989) 57 Comp Cas 621 (1985) 2 Comp LJ 215 (Kan)	749
Sivaram Reddy v Bellary Spg & Wng Co, (1984) 56 Comp Cas 281 (Ker)	244
Sivappa Associates v Oshun Treads Ltd (in Liquidation), 2014 BCC OnLine Ker 26413 (2015) 2 NJ 691	490
Siva Persaud v Registrar of Companies, 1997 88 Comp Cas 431 (A/I)	363
Siva Sankara Panicker v Kerala Financial Corp, (1980) 50 Comp Cas 807 (Ker)	450
Sivapandit Adityan v Registrar of Companies, (1995) 83 Comp Cas 616 (Mad)	363
SK Bhargava v Official Liquidator, (2006) 65 SCL (I) 1 (2005) 128 Comp Cas 143 (Raj)	706
SK Bhedicaja v State of Haryana, (1993) 109 PLR 513	210
SK Services Ltd v Ibbipps, (2014) 2 BCLC 588 (CA)	199
SK Sharma and AK Mahajan v Registrar of Companies, (2010) 126 Comp Cas 222 (P&H)	318
SKS Ispat & Power Ltd, re, (2014) 187 Comp Cas 7 (Bom)	621
Skypark Builders & Distributors v Kerala Police Housing & Construction Co Ltd, (2003) 314 Comp Cas 425 (Ker)	55
SL Kapoor v Registrar of Companies, (1954) 1 Comp LJ 211 (Ori)	319
SL Verma Delhi Flour Mills Co Ltd, (1975) 45 Comp Cas 41 (1976) 21 L 123, 226	560
SM Haque Abdul Salim v CNS (P) Ltd, (1995) 91 Comp Cas 845 (CLB)	280
SM Holding & Finance Ltd v Mysore Machinery Manufacturers Ltd, (1993) 78 Comp Cas 432 (Kan)	605
Smallwood v Black, (D 1965-66) 39 ALJR 495 (Aus)	44
Smart Advertising Co (P) Ltd v Ramesh K Nareshwar, (1989) 65 Comp Cas 92 (P&H)	734
Smith v Anderson, (1880) 1 R 15 (1st D) 247	258
Smith v Bridgend Country Borough Council, (2007) 1 BCLC 275 (CA)	479
Smith v Butler, 2012 Bus LR 1896, 2012 EWCA Civ 314 (CA)	339
Smith v Chadwick, (1884) LR 9 App Cas 187 (1883-85) All ER Rep 242; 50 LT 617 (HL)	124
Smith v Croth (No 2), 1986 Ch 119, (1987) 1 WLR 415 (Ch D)	247, 498
Smith v Fencing Mines Ltd, (1906) 2 Ch 193	339

Smith and Fawcett Ltd, re, (1942) Ch 304 (C.A.) ... 154 155, 154, 155	Samayamula v Hope Pradhamme & Ors Ltd, (1963) 2 Comp LJ 61 ... 616
Santini New Court Securities Ltd v Senimgeur Trust Ltd, (1997) 1 BCLC 350 (T.L.) ... 121	Sarveswara Cements & Chemicals Ltd v Power Mak Industries, (2001) 1 Comp LJ 173 (AP) ... 672
Scoti, Stoe & Knight Ltd v Birmingham Corp., (1939) 4 All ER 316 (K.L.J.) ... 25, 30	Sonardit Coal Co Ltd, re, AIR 1930 All 617 ... 702
Smiths Ltd v Middleton, (1979) 3 All ER 642 ... 449	South Indian Shipping Corp. Ltd v Export Import Bank of Korea, (1985) 1 WLR 585 (C.S.D.) ... 563
SMS Pharmaceuticals Ltd v Neeta Bhalla, (2006) 8 SCC 89 (2005) 127 Comp Cas 363 ... 474	South Indian Bank Ltd v Joseph Michael, (1978) 43 Comp Cas 368 (Ker) ... 155
SMS Pharmaceuticals Ltd v Neeta Bhalla, (2007) 4 SCC 70 (2007) 136 Comp Cas 268 ... 362	South Indian Mills Co Ltd v Shivlal Motilal, AIR 1917 Mad 260 ... 677
Smyth v Dacley, (1849) 2 E.R. 789 ... 274	South Lanarkshire Colliery Co. Ltd, (1879) L.R. 12 Ch D 803, 41 LT 567 ... 404
SN Bangur v Klein & Marshall Mfg (P) Ltd, (2004) 119 Comp Cas 236 (Mad) ... 474	South of England Natural Gas and Petroleum Co Ltd, re, (1911) 1 Ch 573, 34 LT 378 ... 109
SNDP Yogam, Quilon, re, (1970) 40 Comp Cas 63 (Ker) ... 187, 223	South Western Mineral Water Co Ltd v Ashmore, (1967) 1 WLR 110 ... 246
Sneath v Valley Gold Ltd, (1890) 1 Ch 477, 68 I.T. 612 (C.A.) ... 599	Southward & Co Ltd, re, (1929) 1 WLR 1198 (C.A.) ... 52
Sneeb Contracts (P) Ltd v Tera Cements (P) Ltd, (2005) 128 Comp Cas 908 (Del) ... 712	Southern Automotive Corporation (P) Ltd, re, AIR 1960 Mad 223; (1960) 30 Comp Cas 119 ... 726
Siowcem India Ltd v Union of India, (2006) 121 Comp Cas 161 (Bom) ... 276	Southern Foundries (1926) Ltd v Shirley, 1949 AC 701 (E.I.L.) ... 86, 94
Sociedad de Fomento Industrial Ltd v Ravinderanath Suthary & Kamal, AIR 1949 Bom 156 ... 471	Southern Pacific Railway Co v Roger, 43 U.S. 1099; 250 U.S. 482 (1919) ... 239
Societe Generale de Paris v James Walser, (1885) LR 11 AC 20, 54 LT 389 (HL) ... 163, 179, 183	Southern Structural Staff Union v Southern Structural Ltd, (1994) 81 Comp Cas 369 (Mad) ... 387
Society of Motor Manufacturers and Traders Ltd v Motor Manufacturers and Traders Mutual Insurance Co Ltd, (1925) 1 Ch 675; 139 LT 330 ... 51	Sovereign Life Insurance Co v Dodd, (1942) 2 QB 573; 67 I.T. 396 (C.A.) ... 601
Soden v British & Commonwealth Holdings plc, (1957) 2 BCLC 501 (HL) ... 705	Sovfracht v Van Udens Scheepvaart, 1943 AC 200 (HL) ... 16
Soden v British and Commonwealth Holdings plc, (1996) 2 BCLC 207 (C.A.) ... 705	SP Bhargava v Hariyana Electric Steel Co, (2006) 94 Comp Cas 857 (2004) 2 PLR 406 ... 660
SOL Pharmaceuticals Ltd v Registrar of Companies, (2002) 111 Comp Cas 845 (AP) ... 414	SP Film v Registrar of Companies, (1991) 71 Comp Cas 509 (Del) ... 320
Solitaire Hotels (P) Ltd, re, (1992) 3 Comp LJ 219 (C.S.B.) ... 543	SP Subbiah v Peria Karuppan, Chettiar, (1967) 1 Comp LJ 168 ... 702
Solloway v McLaughlin, 1918 AC 247 (PC) ... 187	Spectrum Plus Ltd, re, (2005) 2 AC 680; (2005) 3 WLR 536 (JSL) ... 483
Solvex Oils and Fertilisers v Bhandari Cross-fields (P) Ltd, (1978) 48 Comp Cas 260 (P&H) ... 581	Spectrum Plus Ltd, re, 2004 Ch 332; (2004) 3 WLR 503 (C.A.) ... 483
Soni Prakash Rakhi v Union of India, (1981) 1 SCC 449; (1981) 51 Comp Cas 71 ... 22	Spender v Ashworth, Partington & Co, (1925) 1 KB 589 (C.A.) ... 181
Somalingappa Shiva Putrappa Mupabasaw v Shree Renuka Sugars Ltd, (2002) 130 Comp Cas 371 (Karn) ... 375	Spencer & Co v CWT, AIR 1969 Mad 359; (1969) 39 Comp Cas 212 ... 14
Somusundram v Official Liquidator, (1967) 1 Comp LJ 257 ... 165	Spiller v Mayo Development Co, 1926 W.N. 78 ... 390
	Spinck (Benzymonith) Ltd v Spinck, 1936 Ch 544 ... 247
	Spiral Globe Co Ltd, re, (1902) 1 Ch 396 ... 450
	Spitzel v Chinese Corp. Ltd, (1897) 60 LT 347 (5 T.C.R. 261) ... 341

CIV Company Law

Spring Steels Ltd. re. (1993) 2 Comp L 377 (MP)	624
SPS Pharma Ltd. re. (1997) 38 Comp Cas 774 (AP)	617
SR Bhattacharya v Union of India, (1998) 91 Comp Cas 37 (Del)	754
Sree Aravindh Steel (P) Ltd v Jirby Steel Rolling Mills Ltd, (1993) 73 Comp Cas 687 (Mad)	672, 673
Sree Meenakshi Mills Co Ltd v Registrar of Joint Stock Companies, AIR 1936 Mad 640; (1938) 39 Cri L 307	366
Sree Meenakshi Mills Ltd v Callanee & Sons, AIR 1935 Mad 799; (1935) 61 LW 527; (1935) 5 Comp Cas 103	84, 93, 94
Sree Meenakshi Mills Ltd v Rallal Tribhuvandasji Jhakar, AIR 1941 Bom 108; H.R. 1941 Bom 273	254
Sree Ram & Valas Press and Publications (P) Ltd. re, (1992) 72 Comp Cas 275 (Ker)	271, 326, 612
Sreela Mangalulu, P Lister Antiseptic Dressing Co Ltd, AIR 1925 Cal 1062	456, 473
Sri Gopal Jalan & Co v Calcutta Stock Exchange Assn Ltd, AIR 1964 SC 250; (1963) 33 Comp Cas 362	161, 186, 211
Sri Mungan Oil Industries (P) Ltd v AV Suryanarayanan Chettiar, (1960) 32 Comp Cas 833; (1963) 1 Comp L 156 (Mad)	395
Sri Nataraju Textile Mills Ltd v SV Anigidi Chettiar, (1954) 1 MLJ 464	657
Sri Vishneviya Industries Ltd v Supri Central Excise & Customs, (2005) 60 SCJ 321 (AP)	636
Sridhar Sundararajan v Ultramarine & Pigments Ltd, 2015 SCC Online Bom 3817; (2015) 192 Comp Cas 355	393
Srihari Rao v PK Majumdar, (1998) 90 CLA 323 (CLB)	511
Srikanta Datta Narasimha Rao Wadlyar v Sri Venkateswara Real Estates, (1991) 22 Comp Cas 211 (Karn)	536
Srikanta Datta Narasimha Rao Wadlyar v Venkateswara Real Estates Enterprises (P) Ltd, (1990) 68 Comp Cas 216	512
Srinivasan v Subramanian, AIR 1932 Mad 100; 136 IL 198	747
SS Chawla v Globe Motors Ltd, (1987) 62 Comp Cas 315 (Del)	705
SS Jhunjhunwala v State, 1970 All WR 614	369
SS Lakshmana Pillai v Registrar of Companies, (1977) 47 Comp Cas 652 (Mad)	284
SS Rajakumar v Perfect Castings Ltd, (1988) 55 Comp Cas 187 (Mad)	629
SSC & Tatas New Zealand Ltd v Murphy, (1981) 1 NZCLC 98	204
ST Ganesalingam Mudaliar v SG Pandurangan, (1994) 94 Comp Cas 919 (CLB)	278
St Mary's Hotel (P) Ltd v TD Alayes, (2001) 10 SCC 680; (2016) 199 Comp Cas 206	523
St Mary's Finance Ltd v RG Jayaprakash, (2000) 37 CL A 129 (Ker)	623
ST Patel v Registrar of Companies, (1999) 91 Comp Cas 528 (CLB)	611
St. John'son Fuels (P) Club Ltd v Scottish Football Assn Ltd, 1965 Scottish LT 171 (OH)	50
Sealey & Co (L) v Wallis, (1972) 29 TLR 206	54
Scadmed (P) Ltd v Kshetra Mohan Salta, AIR 1968 Cal 572; (1968) 1 Comp L 321; 72 CWN 601	204, 512
Scandia Brande Ltd. re, (1980) 1x Comp Cas 75 (Cal)	608
Standard Chartered Bank v Custodian, (2000) 6 SCC 427	416
Standard Chartered Bank v Housing and Urban Development Corp Ltd, (1996) 23 CLA 84 (CLB)	154
Standard Chartered Bank v Pakistan National Shipping Corp (No 2), (1948) 1 Lloyd's Rep 216 (CA)	117
Standard Chartered Bank v State of Maharashtra, (2016) 6 SCC 62; (2016) 2 SCC (CA) 505; (2016) 199 Comp Cas 177	244
Standard Industries Ltd v Material Services Ltd, (1992) 2 Comp L 113; (1994) 80 Comp Cas 76 (CLB)	524
Standard Mfg Co re, (1891) 1 Ch 627 (CA)	459
Stanley, re, (1916) 1 Ch 157	1
Scaple of England (Mayor etc of Manchester vd) v Governor and Company of Bank of England, (1887) 21 QBD 160; 57 LJQB 418 (CA)	375
Stapleford Colliery Co re, (1880) LR 14 Ch D 432; 42 1 TML (L.A)	150, 359
Scaples v Eastman Photographic Materials Co, (1896) 2 Ch 303	226
Scan Engg Works Ltd v Official Liquidation, (1992) 42 Comp Cas 39 (Ker)	680
Star Tile Works, re, (1980) 50 Comp Cas 286 (Ker)	614
State v S Sudhanshu Pandit, (1986) 50 Comp Cas 889 (Mad)	422
State (NCT of Delhi) v Rajiv Khurana, (2010) 11 SCC 469; (2010) 198 Comp Cas 351	247
State Bank of Hyderabad v Penzor Paterson Ltd, (2010) 14 SCC 598; (2010) 114 Comp Cas 66	681, 687

State Bank of Travancore v. Kingston Computer (India) (P) Ltd. , (2011) 11 SCC 524; (2011) 4 SCC (Civ) 282; (2011) 163 Comp Cas 37	399, 472	Steel Sons (P) Ltd v. Registrar of Companies, CP No 14 of 1969 (Ker)	711
State Industrial and Investment Corp. of Maharashtra Ltd. v. Maharashtra State Financial Corp. , (1966) 64 Comp Cas 102 (Bom)	613, 724	Steen v. Luu , 1966 AC 267 (PC)	247
State of A.P. v. Andhra Provincial Potteries Ltd. , (1973) 2 SCC 735; (1973) 43 Comp Cas 505	220, 421	Steen v. Blakely (No. 2) , (1996) 1 BCDC 573 (CA)	497
State of A.P. v. Rajah Ram Janardhana, AIR 1966 A.P. 230; (1966) 36 Comp Cas 950; (1966) 2 Comp L 222	468	Stephen Aranha v. Finical Leasing Ltd. , (2000) 26 SCL 170 (Del)	724
State of Bihar v. Deekumar Nenshi , (1972) 2 SCC 390; 1973 SCR (Cri) 114	433	Stewart v. Schuah , (1956) 4 SC 791	283
State of Bihar v. Kamleshwar Singh , AIR 1932 SC 252; 1932 SCR 689	671	Sticky Fingers Restaurant Ltd. v. (1992) 10 CLA 64 (Ch.D)	373
State of Bombay v. Baodhan Rani Bhandari , AIR 1961 SC 186; (1961) 1 SCR 811; (1961) 31 Comp Cas 1	220, 431	STD v. Official Liquidator , (1968) 58 Comp Cas 430 (All)	709
State of Gujarat v. Coenmandal Investment P. Ltd. , (1994) 71 Comp Cas 470 (Guj)	356	STD v. Rajratna Nasanbhai Mills Ltd. , (1970) 44 Comp Cas 65 (Guj)	704
State of Gujarat v. Shri Ananda Mills Ltd. , (1994) 6 SCC 636	34	Scrathellsine Estates Ltd. v. 2M&C Ch D 226	8
State of J&K v. UCO Bank , (2005) 10 SCC 331; (2006) 129 Comp Cas 239 (SC)	676	Stradewell Leathers (P) Ltd v. Bhankarpur Simbhooli Beverages (P) Ltd. , (1994) 3 SDC 34; (1994) 79 Comp Cas 139	574
State of Karnataka v. Selvi & J. Jayalakshmi , (2012) 211 Comp Cas 230 (SC)	15	Sukhas Chosh v. Happy Valley Travels (P) Ltd. , (2006) 131 Comp Cas 861; (2006) 6 Comp L 576 (JLM)	363
State of Kerala v. Palni Central Bank , (1987) 62 Comp Cas 742 (Ker)	678	Surbhash Chand Agarwal v. Associated Limestone Ltd. , (1998) 29 CLA 190 (CLB)	581
State of Maharashtra v. Jugnandar Lal , AIR 1966 SC 940	15	Surbhash Chandra v. Vardhman Spic & General Mills Ltd. , (1995) 83 Comp Cas 641 (CLB)	167, 175
State of Maharashtra v. Raymond Woollen Mills Ltd. , (2002) 111 Comp Cas 847 (Bom)	149	Surbhash Mohan Dev v. Sanjesh Mohan Dev , (2000) 164 Comp Cas 415; 2000 CLA 1551 (Gud)	572
State of Punjab v. Xylo Rum , (1982) 32 Comp Cas 101 (SC)	23	Suhbra Mukherjee v. Hiravali Coking Coal Ltd. , (2010) 3 SCC 312	11
State of Rajasthan v. Gotam Lime Stone Khanij Udyog (P) Ltd. , 2015 SCC OnLine Raj 730; (2016) 194 Comp Cas 457	11	Subroto Roy Sahay v. Union of India , (2010) 3 SCC 470; (2014) 3 SCC (Cr) 712	298
State of U.P. v. Remasagar Power Co. , (1998) 1 SCC 39; (1999) 70 Comp Cas 127	28	Suburban Bank (P) Ltd v. Tharlaiah , (1967) 2 Comp L 182; AIR 1968 Ker 206; (1968) 38 Comp Cas 13 (Ker)	285, 288
State of WB v. Progab Kumar Ban , (2003) 9 SCC 490; (2003) 114 Comp Cas 654	615	Suburban Hotel Co. v. (1866-67) LR 2 Ch App 727	450
State of Wyoming Syndicate , re, (1901) 2 Ch 431	369	Sudarshan Chits (India) Ltd v. Madalam Narasimhulu Chetty , (1997) 48 Comp Cas 72; (1993) 3 Comp L 96 (Ker)	746
State Trading Corp. of India Ltd v. CTO , AIR 1963 SC 1811; (1963) 33 Comp Cas 1057; (1964) 4 SCR 99	21, 33, 251	Sudarsan Chits (India) Ltd v. Official Liquidator , (1992) 7 Comp L 34 (Mar)	715
Statewide Tobacco Co. Ltd v. Morley , (1990) 6 AC 1427	317	Sudarshan Chits (India) Ltd v. Registrar of Companies , (1996) 57 Comp Cas 251 (Ker)	433
Stream Navigation Co. v. (1901) 10 Bom L.R. 107	652	Sudarshan Chits (India) Ltd v. Uma Sharma , (1992) 73 Comp Cas 381 (Ker)	716
		Sudarshan Chits (P) Ltd v. Githam Krugg (P) Ltd , (2004) 182 Comp Cas 71 (Ker)	665
		Sudarshan Chits (India) Ltd v. O Sukumaran Pillai , (1984) 4 SCC 657; (1985) 56 Comp Cas 503 (SC)	674
		Sudhir Rao v. Register of Companies , 2014 300 OnLine Cal 12793; (2014) 187 Comp Cas 1	721

Suessen Textile Bearings Ltd v Union of India, (1984) 55 Comp Cas 492 (Del)	350
Sugar Producers (Dharsaipur Wood) Ltd, re, 1948 BCAC 146 (Ch Dl)	722
Suhaili (P) Pophale v Oriental Ins Co Ltd, (2014) 1 SCC 557	626
Sujata Khetwani v Ushakumari Tea (P) Ltd, (2006) 132 Comp Cas 943 (Cal)	151
Sukdev Singh v Bhagat Singh Sandar Singh Raghuvaran, (1975) 1 SCC 421, (1975) 45 Comp Cas 265	21
Sulechha Nathany v Hindustan Mallinex and Forgings Ltd, (2012) 110 Comp Cas 894 (CLB)	209
Suman Kumar Sinha v Barinda Glass Works Ltd, (2013) 161 Comp Cas 115 (CLB)	202
Sunita Kuer v Sitamarhi Sugar Works Ltd, AIR 1938 Pat 297	703
Sum. Imp. Pharmaceuticals & Chemicals Ltd, re, (1997) 48 Comp Cas 119 (AP)	235, 622
Sunair Hotels Ltd v Laxman at India, (2017) 50CC 161 (Del) A1024	565
Sundar Das v Emporium, AIR 1929 Lah 826	432
Sunderam Finance Services Ltd v Grandtrust Finance Ltd, (2012) 112 Comp Cas 360; (2012) 3 CTC 419 (Mad);	194
Sunit Chandra Banerjee v Krishnachandra Nath, AIR 1949 Cal 689	677
Sundar Dev v Delhi and District Cricket Assn, (1994) 30 Comp Cas 176 (Del)	46
Sunil Kumar Debnath v Mining & Allied Machinery Corp. Ltd, (1988) 36 Comp Cas 452; (1988) 1 Comp Lit 213 (Cal)	12, 590
Sunil Mills Ltd v Official Liquidator of Sri Ambica Mills Ltd, (1999) 1 Comp 13, 423 (Guj)	379
Suri & Legal Remembrancer of Legal Affairs, Bengal & Akhil Bharatiya Guna, LR (1971) 1 Cal 324	419, 423
Suraj Bahu v Jaitly & Co, AIR 1946 All 272	453
Suraj Prakash Oberoi v Institute of Company Secretaries of India, (1986) 60 Comp Cas 536 (Del)	356
Surajben Navlakhanlal Shah v Asian Food Products Ltd, (2006) 131 Comp Cas 767; (2006) 5 Bom CR 265	149
Surana Steels (P) Ltd v CIT, (1999) 4 SCC 394	409
Suresh Chandra Narwaha v Lantis (P) Ltd, (1975) 48 Comp Cas 110 (P&H)	379
Suresh Kumar Manchanda v Freshkist Readlines Ltd, (1996) 87 Comp Cas 102 (Kant)	181
Suresh Kumar Songhi v Supreme Motors Ltd, (1983) 54 Comp Cas 235 (Del)	528, 540
Sureshchandra v Bank of Maharashtra Ltd, (1958) 51 CLW N 832	676
Suresh Nayar Ltd, re, (1983) 54 Comp Cas 868 (Kant)	603
Surinder Singh Bindra v Hindustan Fasteners (P) Ltd, (1989) 2 Comp L 236, AIR 1990 Del 32; (1990) 69 Comp Cas 718	534, 540
Suryakantha Gupta v Rajkrishna Corn Products (Punjab) Ltd, (2002) 108 Comp Cas 123 (CLB)	151, 278
Suryakantha Nataraj Singhji v Karmani Bros (P) Ltd, (1963) 58 Comp Cas 121 (Bom)	438
Sushil Kumar Lahiri v Registrar of Companies, (1983) 554 Comp Cas 54 (Cal)	432
Sushil Prasad v Official Liquidator, (1980) 55 Comp Cas 32 (Del)	721
Susham Overseas Marketing (T) Ltd v Registrar of Companies, (1996) 1 Comp L 293 (Del)	181
Suresh Brick Co Ltd, re, (1984) 1 Comp 598; 98 LT 426 (CA)	374
Sutaria Stone and Lime Co Ltd (In Liquidation) v Ajmal Ali, 2014 50CC OnLine Cal 13, 92; (2014) 187 Comp Cas 344	683
Sutodia Investment & Trading Co Ltd v Tivoli Park Apartments (P) Ltd, (2014) 183 Comp Cas 297 (CLB)	179
SV Randeekar v VM Deshpande, (1972) 1 SCC 444; (1974) 42 Comp Cas 116	675, 678
SV Nagarajan v Lakshmi Vilas Bank Ltd, (1997) 93 Comp Cas 392 (CLB)	180
Swabey v Paul Darwin Gold Mining Co, (1889) 1 Meg 385 (CA)	84
Swadee Chemicals Ltd v Kolbari Industrial Corp. Ltd, (1995) 16 CLA 23 (Mad)	385, 422
Swadeshi Polytex v VK Coal, (1989) 63 Comp Cas 686	391
Swaledale Cleaners Ltd, re, (1996) 1 WLR 2710 (CA)	155, 156
Swesthala N. v Chairman, 1988 Writ I.R. 41 (Mad)	66
Swar. v North British Australasian Co Ltd, 7 CBNS 411	179
Swapan Dasgupta v Navin Chand Suckanti, (1983) 64 Comp Cas 562; (1988) 3 Comp L 76 (Cal)	369
Swastaj Maethi Ltd, re, (1992) 73 Comp Cas 559 (CJH)	465
Swastik Cutters (P) Ltd v Deepak Bros, (1997) 89 Comp Cas 364 (AP)	343

Swastik Filaments Corp v Swami Marine Products (P) Ltd. (2006) 32 Comp Cas 340 (Cal)	674
Swift v Dairywise Factories Ltd (No 1). (2001) 1 BCLC 632 (Ch D)	726
Syamal Koy v Madhusudan Roy. AIR 1959 Cal 380	596
Syed Mohammad Ali v R Sundaramurthy. (1958) 29 Comp Cas 554; AIR 1958 Mad 547	534
Synthetic Machine Tools (P) Ltd v UM Suresh Rao. (1994) 79 Comp Cas 863 (Kant)	530
Syndicate Bank v Field Star Cycle Industries (P) Ltd. (1948) 13 Comp Cas 487 (Kant)	689
Syndicate Bank v Panchkula Mill Co. (1997) 67 Comp Cas 472 (P&H)	678
Syndicate Bank v Printersall (P) Ltd. (1981) 51 Comp Cas 6 (Kant)	642, 653
Synco-delux Ltd v K Venkateswara Pillai. AIR 1959 Mad 493	199
T Dhritajan v Waterfall Estates Ltd. (1972) 42 Comp Cas 563 (Mad)	627
T Kannan v Shapre Infotech India Ltd. 2014 SCC OnLine Mad 12772; (2014) 186 Comp Cas 193 (Mad)	557
T Munirao State. (1976) 46 Comp Cas 613 (Mad)	279
TA Antigayam v Coimbatore Mincemen Mills Ltd. (1983) 54 Comp Cas 5 (Mad)	342
Tadi Adinarayana Reddy v Union of India. (1997) 90 Comp Cas 326 (AP)	556
Tahiti Cotton Co. ex. (1876) LR 12 Eq 772; 43 1 Ch 425	185
Talhan Electric Wire Co v TDP Copper Ltd. (1996) 29 CLA 126; (1996) 2 Comp L 351; (1999) 96 Comp Cas 415 (CLB)	368
Tain Construction Co. ex. (2003) 2 BCLC 374; (2004) 120 Comp Cas 163	722
JAK Mohideen Pichai Taraganar v Tunnewelly Mills Co Ltd. AJR 1926 Mad 521	156
Takshila Hospital v Jagdishchandra Malhotra. (2003) 115 Comp Cas 347 (Raj)	662
Talayer Tea Co Ltd v Union of India. 1992 Supp (1) SCC 38	161
Jamlin v Hannaford. (1950) 1 & 2 (CA)	21
Tan Wee Ling v Bo Hein. AIR 1962 Rang 102; (1988) 3 Comp Cas 112	596
Tansukhrai M Karandikar v Official Liquidator. (1949) 2 MLJ 66	463, 482
Tapan Kumar Chowdhury v Registrar of Companies. (2003) 114 Comp Cas 611 (Cal)	55, 518
Tango of Pune Drugs Ltd. ex. (1997) 68 Comp Cas 774 (AP)	617
Tarsq Razvi Azmi v Tata Hydro Electric Supply Co. (2010) 5 Bom CR 211	741
Tardok Chand Kharana v Raj Kumar Kapoor. (1983) 54 Comp Cas 12; (LR 1982 Del 156)	178, 279
Taseri, Kansil v Dey Spanners Ltd. (2000) 37 CLA 132; (2001) 103 Comp Cas 635 (CLB)	165
Tatubala Saha v Nath Bank Ltd. (1972) 42 Comp Cas 583 (Cal)	626
Tata Oil Mills Co Ltd v Hindustan Lever Ltd. (1994) 81 Comp Cas 754 (Bom)	614, 617, 622, 626
Tala Tea Ltd v Farjor Rahman. (2014) 304 Comp Cas 728 (Cal)	740
Talineni Venkata Krishna Rao v NCP Sugar & Industries Corp Ltd. (2016) 133 Comp Cas 422 (AP)	739
TCB Ltd v Czay. 1366 Ch 621; (1966) 2 KLR 517 (Ch d)	91, 470
Tech Invest India (P) Ltd v Assam Power & Electricals Ltd. (2016) 150CC 704; (2015) 152 Comp Cas 69	686, 693
Techno-Electric and Engg Co Ltd v Piyal Singh. (1992) 1 Comp L 334 (Cal)	184
Tenk Corp Ltd v Miller. (1977) 331 F 2d 268 (Car)	242
Tecnor Investments Ltd. ex. 1995 BCLC 434 (CA)	31
Tej Prakash S Dangi v Coenamdal Pharmaceutical I M. (1997) 89 Comp Cas 270 (AP)	208, 279
TELCO Ltd v State of Bihar. AIR 1965 SC 40; (1964) 34 Comp Cas 458	15
Telesound (India) Ltd. ex. (1983) 53 Comp Cas 926 (Del)	626
Televisa Electronics (P) Ltd v Mass Communications & Mktg (P) Ltd. (1980) 20 Comp Cas 1 (Del)	677
Tennent v City of Glasgow Bank. (1879) LR 4 AC 615; 40 LT 674; 27 WR 649 (JIL)	128
Terrapin Ltd v Builders Supply Co (Hayes) Ltd. 1966 RPC 128	510
Lesco Supermarkets Ltd v Netrassa. 1972 AC 153; (1971) 2 WLR 1166	253, 262, 263
Test Holdings (Chittagong) Ltd. ex. (1969) 5 WI R 606	643
Telt v Phoenix Property and Investment Co Ltd. 1993 BCLC 599 (CA)	153, 156

CV(II) Company Law

Texas Tunnelling Co v City of Chattanooga,	1984 F Supp 521 (1962)	447
Textamco Ltd v Arun Kumar Sharma, (1991) 70 Comp Cas 257 (Del)	742	
Textamco Ltd v Ram Dayal, (1993) 78 Comp Cas 518 (Del)	740	
Textile Labour Assn v Official Liquidator, (2004) 118 Comp Cas 133 (Del)	735	
Textile Labour Assn v Official Liquidator, (2004) 4 SCC 741 (2004) 120 Comp Cas 515-2004 CLC 741 (2004) 2 Comp J 409	712	
Textile Labour Assn v Official Liquidator, (2006) 126 Comp Cas 468 (2006) 56 CLC 452 (Karn)	604	
TG Veena Prasad v Sree Ravalaseema Alkalies & Allied Chemicals Ltd, (1997) 98 Comp Cas 13 (CLB)	166	
TG Veena Prasad v Sree Ravalaseema Alkalies & Allied Chemicals Ltd, (1999) 98 Comp Cas 806 (AP)	162, 573	
TH Chowdary v Registrar of Companies, (2004) 182 Comp Cas 13 (AP)	129	
TH Vakil v Bombay Presidency Radio Club, AIR 1945 Bom 475	385	
Thacker, Sarabhai & Co (P) Ltd v SS Thessalon, (1946) 22 CLA 170 (Bomb)	549	
Thanai Electricity Supply Co Ltd, re, 1950 Ch 263	227	
Thenuppa Chettia v G Rajagopal, AIR 1944 Mad 526	324	
Thomas Cook Insurance Services (India) Ltd, re, 2005 SCC Online Bom 4465 (2006) 194 Comp Cas 290	631	
Thomas Gerrard & Sons Ltd, re, 1948 Ch 455 (1967) 31 WLR 84	438, 440, 443, 445	
Thomas Marshall (Exports) Ltd v Gunile, 1979 Ch 227 (1978) 5 WLR 116	301, 303	
Thomas Philip v Registrar of Companies, (2006) 131 Comp Cas 842 (2005 CLC 975 (Karn))	633, 256	
Thomas Pipperton, re, (1864) 1 R 14 QBD 579	267	
Thien ENG plc Case, 1969 BCCLC 812 (Ch)	195	
Tikam Chand Jain v State Govt of Haryana, (1987) 62 Comp Cas 501 (P&H)	255	
Timber (P) Ltd, re, (1961) 51 Comp Cas 18 (P&H)	677	
Time Travel (UK) Ltd, re, March 2003 (CA)	661	
Timen Bank Ltd v Sanj Sharda Parameshwari Textiles Ltd, (2000) 38 CLA 270 (CLB)	462	
Tim Plate Dealers Assn (P) Ltd v Satish Chandra Sunwalkar, (2016) 10 SCC 1: (2016) 199 Comp Cas 205	239, 225, 417, 573	
Tip-Europe Ltd Case, 1988 BCCLC 231 (Ch)	193	
Tivoli Press re, 1972 VR 445	655	
TM Devassay v Periyar Lates (P) Ltd, (1994) 81 Comp Cas 560 (Ker)	569	
TM Paul v City Hospitals Ltd, (2000) 2 Comp J 44: (1999) 97 Comp Cas 216 (Ker)	228, 303	
TN Farrell Ltd, re, 1927 Ch 352	674	
TNK Govindaraju Chettiy & Co v Kader Mills (CBE) Ltd, (1996) 30 CLA 49 (1996) 3 Comp J 329 (CLB)	328, 519	
TNN Narayana Chettiar v Davi Filme (P) Ltd, (1995) 26 Comp Cas 875 (Mad)	740, 242	
TO Supplies (London) Ltd v Jerry Creighton Ltd, (1952) 1 KB 42	57, 403	
Tomberger v Gebruder Vonder Wettern GmbH, (1995) 2 BCCLC 457 (ECJ)	420	
Tonny Mathew v Duratex (P) Ltd, (2004) 122 Comp Cas 731 (CLB)	169	
Tony Francis v Gurkessa v Indekka Software (P) Ltd, (2004) 121 Comp Cas 466 (2005) 2 Bom CL 514	93	
Tapanadas Mukundan Advani v Yescom Electric Supply Co, AIR 1940 Sind 87	371	
Torbeck v Lord Westbury, (1902) 2 Ch 871	393	
Toronto Group Ltd, re, (1994) 2 BCCLC 605 (Ch O)	387	
Toshiba Finance (UK) plc, re, (2000) 1 BCCLC 683 (CA)	710	
Tota Ram v Emporat, AIR 1916 Lah 397: 34 JC 962	432	
Touche v Metropolitan Railway Warehousing Co, (1871) 1 UK 6 Ch App 671	45	
TR Pratt (Bombay) Ltd v ED Sasori & Co Ltd, AIR 1946 Bom 67	7, 455	
TK Pratt (Bomhay) Ltd v M.J. Ltd, AIR 1998 PC 159	255	
TR Technology Investment Trust, re, 1988 BCCLC 256 (Ch O)	529	
Transstar Investments Ltd v Garden Woodroffe Ltd, (1996) 87 Comp Cas 541 (CLB)	153, 168	
Tracy Mandelby Pty Ltd, (1952-53) 88 CLR 215-1953 HCA P (Aust)	116	
Transland Life & Fire Assurance Co Ltd, re, (1993) 1 WLR 47	281	
Transport Corp. of India Ltd v Marjana State Industrial Development Coopn, AIR 1991 P&H 225 (1992) 79 Comp Cas 603 (P&H)	723	
Transworld Trading Ltd, re, 1999 BHIN 626 (Ch D)	721	
Transware Electro-Chemical Industries Ltd v Alogyan Textiles, (1977) 42 Comp Cas 569 (Ker)	176	

Travancore Ogale Glass Mfg Co Ltd, re (1997) 88 Comp Cas 179 (Ker)	706, 724
Travancore Rayons Ltd v Registrar of Companies, (1968) 44 Comp Cas 819 (1969) 1 Con. p.1] 77 (Ker)	723
Tavel and Holiday Clubs Ltd, re, (1967) 1 WLR 711 (Ch D)	563
Trevor v Whitworth, (1887) LR 12 AC 439	245
Trevor Feedy Ltd v Anderson, (1992) 2 NZ LR 517	264
Triplex Safety Glass Co Ltd v Lancashire Safety Glass, (1939) 2 KB 395 (CA)	263
Tritisha Jain & Oswald Agro Mills Ltd, (1996) 86 Comp Cas 46 (CLB)	342
TS Rajagopal Iyer v South Indian Rubber Works Ltd, AIR 1942 Mad 606 (1942) 56 I L R 321	125
TS Satyanaray v Thomas & Co, (1985) 57 Comp Cas 648 (Cal)	240
Tunstall v Steigmann, (1962) 2 QB 595 (1962) 2 WLR 1045 (CA)	13
Turner v Bacik & Bombay, JLR, (1901) 25 Buc 52	71
Turner Morrison & Co Ltd v Shalimar Tar Products (1935) Ltd, (1980) 20 Comp Cas 296 (Cal)	157, 298
TV Krishna v Anilika Prabha (P) Ltd, AIR 1960 AP 123	40
TV Mathew v Nadukarai Agro Processing Co Ltd, (2002) 114 Comp Cas 133 (Ker)	367
TV Prasathkandan Nair v Anandamandiram Hotels (P) Ltd, (2002) 110 Comp Cas 294 (K.L.B)	334, 354
TVS Employees' Federation v TVS & Sons Ltd, (1996) 87 Comp Cas 37 (Mad)	12
Twentieth Century Finance Corp Ltd v ZFB Latex Ltd, (1999) 97 Comp Cas 626 (CLB)	545
Twycross v Grant, (1877) 1 R 2 (P.D) 469; 463 QB 636; 36 LT 812; 25 W.R. 701 (CA)	129
Tyagrajan v Official Liquidator, (1960) 30 Comp Cas 341	135, 136
UA Srinivas v Dig Vijay Civil Fund (P) Ltd, (1965) 53 Comp Cas 403 (Ker)	556
UBAF Ltd v European American Banking Corp, 1984 QB 712 (1981) 2 WLR 508 (CA)	471
UCO Bank v Concast Products Ltd, (1996) 21 CLA 256 (Cal)	680
UCO Bank v Official Liquidator, (1994) 5 SOC 3 (1994) 81 Comp Cas 700	247
Uddhab Dattatre Nagre v Jijamata Sugars (P) Ltd, 2004 SCC Online CLB 153; (2015) 189 Comp Cas 417	283
Ultrafilter (India) (P) Ltd v Ultrafilter GmbH, (2002) 112 Comp Cas 93 (CLB)	515, 536
Ultimarex Corp v Touche, (1931) 235 NY Rep 120	445, 450
Umedbhau v Moreshwar, AIR 1954 MB 146	643
Umesh Kumar Baveja v IL & TS Transportation Network, (2014) 182 Comp Cas 319 (Del)	510
UN Mandir's Estate (P) Ltd, re, AIR 1959 Cal 495; (1960) 30 Comp Cas 172	644
Underwood (A) Ltd v Bank of Liverpool, (1924) 1 EKB 275 (CA)	95
Unico Trading and Chit Funds (India) (P) Ltd v SH Lalwani, (1982) 52 Comp Cas 240 (Ker)	746
Unico Trading and Chit Funds (India) (P) Ltd v Zubair Hassan, (1991) 71 Comp Cas 230 (Ker)	264, 286
Union Bank of Alibahad, re, AIR 1925 All 519; 86 IC 785	313
Union Bank of India v Khaders International Constructors Ltd, (1993) 2 Comp LJ 89 (Ker)	11
Union Bank of India v Official Liquidator, (1993) 3 Comp LJ 614 (SC)	725
Union Bank of India v Official Liquidator, (2000) 5 SCC 274; (2000) 101 Comp Cas 312	689
Union India Sugar Mills Co Ltd, re, AIR 1933 All 607; 1933 ALJ 1022; 146 IC 801	235
Union Music Ltd v Watson, (2003) 1 BCLC 451	381
Union of India v Allied International Products Ltd, (1970) 3 SCC 599; (1971) 41 Comp Cas 127	143
Union of India v Asia Udyog (P) Ltd, (1970) 44 Comp Cas 359 (Del)	621
Union of India v Asia Udyog (P) Ltd, (1993) 28 Comp Cas 468 (Del)	621
Union of India v CRB Resources (P) Ltd, (2005) 128 Comp Cas 766 (CL B)	514
Union of India v JR Ray & Sons, AIR 1962 Punjab 520	708
Union of India v RC Bhargava, (1998) 30 CLA 229 (CLB)	159
Union Services (P) Ltd, re, (1975) 45 Comp Cas 146 (Mad)	624
Unique CardBoard Box Mfg Co, re, (1978) 48 Comp Cas 589 (Cal)	640
Unit Trust of India v Om Prakash Bedia, (1983) 54 Comp Cas 723 (Bom)	231
Unitech Ltd v Giridhar Deepal Sharma, (2013) 177 Comp Cas 254	150

United Bank of India v Bharat Electrical Industries Ltd, (1993) 76 Comp Cas 317 (Cal)	689
United Bank of India v KC Mallik & Sons (1966) 2 Comp L 255	460
United Bank of India v United India Credit and Development Co Ltd, (1977) 47 Comp Cas 689 (Cal)	383, 610
United Bank of India Ltd v Laksharam Somaram & Co, AIR 1965 SC 1098; (1965) 35 Comp Cas 471	486
United Breweries Ltd v Commr of Excise, (2001) 105 Comp Cas 71 (Bom)	625
United Home-Purchase & Land Finance Ltd v Karan Singh, (1996) 87 Comp Cas 266 (P&H)	716
United India General Finance (P) Ltd, re, (1948) 50 Comp Cas 442 (Del)	677
United Privilege Assurance Co, re, (1910) 2 CL 477; 105 LT 531	601
United Provinces Commercial Coop. Co, (1983) 53 Comp Cas 441 (Cal)	678
United Provinces Commercial Coop. Co, (1980) 59 Comp Cas 352 (Cal)	679
Unity Co (P) Ltd v Diamond Sugar Mills, (1970) 2 Comp L 64 (Cal)	219
Universal Incast Ltd v SEBI, (2002) 108 Comp Cas 249; (2002) 2 RCR (Civ) 516; (2001) 125 ILR 256	142
Universal Mutual Aid & Poor Houses Assn v AD Thyagar Naidu, AIR 1933 Mad 16; (1972) 36 IWR 610	61, 656
UP Financial Corp v Narmi Oxygen & Acetylene Gas Ltd, (1995) 2 SCC 754; (1995) 17 CLA 215	286
Upper Canes Sugar & Industries Ltd, re, (2001) 27 SCL 364 (CLB)	619
Urmila Bharuka v Coventry Spring andings Co Ltd, (1997) 38 Comp Cas 197 (Cal)	141
Urmila Bharuka v Union of India, (1999) 37 Comp Cas 97 (Cal)	141
Usha Beltracchi Ltd, re, (2000) 27 SCL 124 (CLB)	60
Usha Chopra v Chopra Hospital (P) Ltd, (2006) 130 Comp Cas 483 (CLB)	268
Usha India Ltd, re, (1996) 45 Comp Cas 581 (CLB)	766
V Radhakrishnan v P S Ramakrishnan, (1944) 1 IWR 163; (1942) 76 Comp Cas 643; (1935) 17 CLA 63 (Mad)	240, 697
V Ramaswami Eyer v Madras Times Printing & Publishing Co, AIR 1915 Mad 1174	528
V Shanker v South Indian Concrete Ltd, (1987) 24 CLA 74 (CLB)	511
V Srikrishnaswamy v Emerald Automobiles Ltd, (2001) 103 Comp Cas 1108 (CLB)	792, 826
V Sundarajan v KR Spinning Mills Ltd, (1998) 30 CLA 39; (1998) 98 Comp Cas 105 (CLB)	514
Vadlamamiddu Rama Rao v Asian Coffee Ltd, (2000) 3 Comp L 113	473
Vadilal Chemicals Ltd v Vortex Ice Cream, (2007) 203 Comp Cas 103 (NCLT)	548
Vadilal Sarabhai v Manekji Desaiji Bharucha, AIR 1923 Bom 922	196
Vaitkay Global Ltd, re, (2007) 201 Comp Cas 52 (Del)	231
Vaishnav Shriram Dutt v Kishore Kundan Supply, (2006) 131 Comp Cas 690 (Bom)	302, 534
Veli Pattabhirama Rao v Raghuraja Ginning and Rice Factory (P) Ltd, (1980) 40 Comp Cas 569 (AP)	43, 139
Velzelot Sanitary Steam Laundry Co Ltd, re, (1903) 2 Ch 656; 89 LT 60	493
Varis Gopal Singh v Lalpur Udyan, (2006) 130 Comp Cas 167 (Raj)	665
Varitech Industry Ltd, re, (1999) 2 Comp L 47	230
Vardhaman Publishers Ltd v Mathurabhaiji Printing and Publishing Co Ltd, (1993) 71 Comp Cas 1 (Ker)	86
Vardhaman Crop Nutrients (P) Ltd v Union of India, 2015 SCC Online P&H 10137; (2015) 192 Comp Cas 312 (Ori)	52
Vickey Soniqa v Kerala Gramin Banking Co Ltd, AIR 1957 Ker 97	94
Vashishtha S Trivedi v Saree Saiguru Switch Gears (P) Ltd, 2014 SCC Online CLB 314; (2015) 186 Comp Cas 445	532
Vasant Holiday Homes (P) Ltd v Madan, V Prabhhu, (2003) 116 Comp Cas 172 (Bom)	691, 696
Vasund Investment Coop v Official Liquidator, (1991) 51 Comp Cas 20 (Bom)	602
Vasantha Ramanan v Official Liquidator, (2003) 114 Comp Cas 767 (Mad)	671, 676
Vasantrao v Shyamrao, (1967) 4 SCC 9; (1977) 47 Comp Cas 666	745
Vasudeva Ramchandra Shetali; Prahlal Jayanand Thakar, (1974) 2 SCC 323; (1975) 1 SCR 534; (1975) 45 Comp Cas 43	176, 181
Vates Industries Ltd v Sankeshwar Surah, (1996) 9 Comp Cas 918	279
Vayaz Indian Pesticides (P) Ltd, re, (1999) 35 CLA 386 (Bom)	612
Vaz Forwarding Ltd v SBI, (1996) 85 Comp Cas 813 (Bom)	689

- Vazir Sultan Tobacco Co v CIT, (1981) 4 SCC 435 414
- VII Balasundaram v New Theatre Carnatic Talkies (P) Ltd, (1993) 77 Comp Cas 324 (Mad) 526, 538
- VII Rangarao v VB Cinelakshmi Arts, (1992) 1 SCC Jit, (1992) 23 Comp Cas 303; (1992) 1 Comp L J 11 153
- Veb Dualfach Seidenerei Rostock v New Central Jute Mills Co Ltd, (1994) 1 SCC 262; (1994) 1 Comp L J 38 587
- Vectone Entertainment Holding Ltd v South Entertainment Ltd, (2004) 2 CLC 224 (Ch D) 381, 382
- Ved Milra v Globe Motors Ltd, (1978) 46 Comp Cas 64 (Del) 612
- Vedica Procon (P) Ltd v Balleshwar Greens (P) Ltd, 2004 SCC OnLine Guj 14377; (2015) 192 Comp Cas 228 692
- Vedica Procon P Ltd v Balleshwar Greens P Ltd, (2015) 10 SCC 94; (2015) 192 Comp Cas 285 692
- Veeramachineni Seethiah v Body Venkatasubbiah, AIR 1949 Mad 675 649, 650
- Velaganti Chendrasekhara Jaisardan Rao v Sree Raja Rajeshwari Paper Mills Ltd, (2006) 199 Comp Cas 315 (C & AP) 640
- Venkatachalampati v Guntur Cotton, Jute and Paper Mills Co Ltd, AIR 1929 Mad 352; LJS 10446 328
- Venkataratna v Comballore Mercantile Bank, AIR 1924 Mad 126; (1923) 74 I.C. 946 76
- Venkoba Rao v BK Sreenivasa Iyengar, (1997) 88 Comp Cas 195 (Karn) 746
- Venu v General & Commercial Investment Trust Co, (1990) 2 Ch 239 408, 409
- VG Balasundaram v New Theatre Carnatic Talkies (P) Ltd, (1993) 77 Comp Cas 324 (Mad) 372, 377, 382, 392
- VG Panicker v Swadeshi Millers, (1986) 2 Comp L J 267 (Mad) 262
- VGM Holdings Ltd, re, 1942 Ch 235 (CA) 185
- Vibank Housing Finance Ltd, re, (2006) 130 Comp Cas 208 (Karn) 620
- Vickers Systems International Ltd v Mahesh P Keawani, (1992) 73 Comp Cas 317 (CLB) 189
- Vicor Battery Co Ltd v Clarry's Ltd, 1946 Ch 242 246, 247
- Victoria Housing Estates Ltd, re, 1983 Ch 110; (1982) 3 WILK 964 461
- Vidiam Engineers Ltd, re, (2002) 36 SCC 689; (2003) 115 Comp Cas 389 (All) 605
- Vidyadhar Upadhyay v Sree Sree Madan Gopal Jeev, (1990) 47 Comp Cas 394 (Cal) 690
- Vijai Devini Singh Mulla, re, AIR 1963 All 55 324
- Vijay Kapur v Guest Keen Williams Ltd, (1995) 43 Comp Cas 334 (Cal) 740
- Vijay Krishna Jaidka v Jaidka Motor Co Ltd, (1996) 23 CLA 289 (CLB) 529, 541
- Vijay Kumar Gupta v Ram Naresh Singh, (2004) 122 Comp Cas 771 (Pat) 273
- Vijay Kumar Narang v Peakash Chopra Builders (P) Ltd, (2015) 128 Comp Cas 476 (CLB) 197
- Vijay Lakshmi Sugar Mills Ltd v CIT, 1991 Supp (2) SCC 331; (1991) 72 Comp Cas 740 211
- Vijay M Purwala v Pentokiyo Organy (India) Ltd, (1994) 87 Comp Cas 331 (CLB) 371
- Vijay M Shah v Flex Industries Ltd, (1996) 61 I.R. 157x; (2001) 109 Comp Cas 1063 (Del) 238, 523
- Vijay R Kirloskar v Kirloskar Proprietary Ltd, (2006) 130 Comp Cas 129 (CLB) 526
- Vijay Sekhri v Union of India, (2001) 165 Comp Cas 198 (Del) 537
- Vijay Commercial Credit Co Ltd v TK Alva, (1994) 79 Comp Cas 656 (CLB) 154
- Vijaya Dutta Cotton Trading Ltd, re, (1980) 50 Comp Cas 785 (AP) 622
- Vijayawada Chamber of Commerce and Industry v Registrar of Non-Trading Companies, (2004) 122 Comp Cas 796 (AP) 642
- Vikas Jalan v Hyderabad Industries Ltd, (1997) 88 Comp Cas 551 (CLB) 155, 156, 181
- Vikas Jalan v Nucor Industries (P) Ltd, (2001) 109 Comp Cas 343 (AP) 575
- Vikram Hakshi v Sonia Khosla, (2014) 15 SCC 80; (2014) 184 Comp Cas 392 531
- Vikram Organics (P) Ltd v Anirox Pigments Ltd, (1997) 88 Comp Cas 804; (1997) 3 Comp L J 193 (Cal) 624
- Vikrant Tyres Ltd, re, (1995) 17 CLA 101; (1995) 53 Comp Cas 310 (CLB) 765
- Vimal C Sudhuri v Puzag Fats & Cooling Systems Ltd, (2006) 133 Comp Cas 286 (MP) 666
- Vinayak Oil & Fats (P) Ltd v Andre (Cayman Islands) Trading Co Ltd, 2005 CLC 588 (Cal) 664
- Vinod K Patel v Industrial Finance Corp of India Ltd, (1999) 3 Comp L J 235; (2001) 103 Comp Cas 557 (Del) 160
- Vined Krishan Khanna v Amardeep Swadeshi Textile Corps (P) Ltd, 2005 SCC OnLine P&H 19901; (2006) 196 Comp Cas 469 660
- Vipin Aggarwal v HCL Infusys Ltd, (2006) 127 Comp Cas 593 (CLB) 163

Veral Filaments Ltd v Indus Jnd Bank Ltd (2002) 113 Comp Cas 65; (2001) 4 Comp LJ 44 (Bom)	664	Vodafone Essex Mobile Services Ltd, re, (2011) 1st Comp Cas 119 (Del) 600, 617
Virendra Singh Bhandari v Nandlal Bhandari & Sons (P) Ltd, (1996) 17 CLA 226 (MP); Virendra Singh Motalalji Bhandari v Nandlal & Sons Ltd, (1980) 51 Comp Cas 59 (MP)	639	Vodafone International Holdings BV v Union of India, (2012) 6 SCC 613; (2012) 170 Comp Cas 349 5, 16, 385
Vista Television Network Ltd v Gemini Television (P) Ltd, (2005) 125 Comp Cas 815 (AP)	655	Villalal Jd v Hiravil Agarwalla, (1991) 71 Comp Cas 273 (Cal) 264
Vishnu Dayal Jhunjhunwala v Union of India, (1989) 66 Comp Cas 661 (All)	667	Voluntary Liquidator v Rattan Singh, (1978) 48 Comp Cas 427 (P&H) 238
Vistram Financial Services (P) Ltd v V Rajendrani, 2013 SCC Online Mad 3146; (2013) 188 Comp Cas 79	672	Volvo Lastvagnar Komponenter AB v Margardshammar (India) Ltd, (1998) 33 CLA 382; (1998) 6 Comp LJ 112; (2000) 109 Comp Cas 131 (CLH) 155, 160, 181
Viswanath Prasad Jallan v Holyland Cinemas Ltd, AIR 1939 All 739; (1939) All 1J 950	678	W.P. Chemicals (P) Ltd v Union of India (2013) 178 Comp Cas 163 (Del) 52
Vithalrao Narayannarao Patil v Maharashtra State Seva Coop Ltd, (1990) 68 Comp Cas 606 (Bom)	684	VP Singh v Metropolitan Council of Delhi, AIR 1959 Del 295 504
Vivtek Eltex Purchase & Leasing Ltd v Puisa Power Com (P) Ltd, (2006) 129 Comp Cas 343 (Mad)	694	VR Meenakshi v Mycom X-linekar (M), (2006) 183 Comp Cas 469 (Kan) 723
Vivek Kumar v Pearl Cycle Industries Ltd, (1983) 54 Comp Cas 77 (Del)	698	VR Textiles (P) Ltd, re, (2012) 177 Comp Cas 83 (Mad) 624
VJ Thomas Veettil v Kuttanad Rubber Co Ltd, (1984) 56 Comp Cas 284 (Ker)	706	VS Ratnam v Oster Escutte Ltd, (1987) 3 Comp LJ 359 (C. HI) 155
VK Jain v Union of India, (2000) 1 SCC 709; (2000) 100 Comp Cas 327	714	VTB Capital Plc v Nutrirk International Corpn, (2012) 2 WLR 398 (SC) 89
V.K. Lakshminarayana Mudaliar v Uniprene, AIR 1992 Mad 497; 131 IC 317	722	VV Parikh v EMC Steel Ltd, ILR (1979) 1 LD& 477; (1980) 50 Comp Cas 177 633
VKKST Fund v Oriental Investment Trust Ltd, AIR 1944 Mad 532	736	VV Raja v S Dalma, AIR 1968 Bom 342; (1968) 1 Comp LJ 226; (1968) 35 Comp Cas 572 596
VL Pathade v Vinay L Deshpande, (1999) 97 Comp Cas 489; (1999) 4 ALD 342; (1999) 4 All LT 522	746	Vyasa Bank Ltd v Randhir Steel and Alloys (P) Ltd, (1993) 76 Comp Cas 244 (Bom) 57
VLS Finance Ltd v Sunair Hotels Ltd, (2002) 111 Comp Cas 910; (2001) 4 Comp LJ 321 (CLB)	757	Vyerneshi M Shah v Vinay Developer P Ltd, (2012) 2014 Comp Cas 162 (NUCL) 516
VLS Finance Ltd v Union of India, (2013) 6 SCC 278; (2013) 178 Comp Cas 348	765	Vyasa Bank Ltd v Official Liquidator, (1995) 84 Comp Cas 493 (Bom) 477
VM Mehta v State of Gujarat, (1997) 984 Comp Cas 871; (1997) 5 Comp LJ 244 (Gau)	764	Vyasa Bank Ltd v Universal Investment Trust Ltd, (1940) 1 Comp LJ 353 (Del) 663
VM Rao v Rajeshwari Balkrishnan, (1986) 1 Comp LJ 1; (1987) 61 Comp Cas 20 (Mad)	770	W Foster & Sons Ltd, re, (1942) 1 All ER 314 227
VM Shah v State of Maharashtra, (1965) 5 SCC 260; 1965 SLL (Civ) 1077	772	W Gunther v Switching Technologies Gunther Ltd, (2004) 4 Comp LJ 537 (CLB) 163
VM Thomas v Registrar of Companies, (1980) 59 Comp Cas 247 (Ker)	773	W B Small Industries Development Corp Ltd v Official Liquidator, (2006) 133 Comp Cas 737 (Cal) 725
VN Bhujekar v KM Shrikar, AIR 1974 Bom 243; (1974) 4 Comp Cas 434	774	W&M Reuth Ltd, re, (1967) 1 WLR 432 65
Vocation (Foreign) Ltd, (1982) 7 Ch 146	772	WA Boardwill & Co (P) Ltd, re, (1968) 544 Comp Cas 157 (Mad) 616
		Walford Transport Ltd v SK Mandai, (1980) 50 Comp Cas 600 (Gau) 465
		Wallerstein v Moir (No. 2), 1971 QB 374; (1975) 2 WLR 589 (CA) 505
		Wallerstein v Moir, (1971) 1 WLR 991 (CA) 25

Walbrough v Holt, (1841) 4 Myle & Cr 635 (4 ER 238)	501	Westminster Corp v Haste, 1950 Ch 442	490
Walter L Jacob & Co Ltd, re, 1989 BCILC 345 (CA)	660	Whaley Bridge Calico Printing Co v Green, (1980) LR 5 QBD 109; 28 WLR 351; 41 LT 674	135
Walker's Deed of Guarantee, re, 1933 Ch 321; 346 LT 473	404	Wheatley v Silkstone and Haigh Moor Coal Co Ltd, (1885) LR 29 Ch D 215; 52 LT 798	463
Walvis Flora Mills Co Ltd, re, (1996) 76 Comp Cas 376 (Bom)	47	Wheeler v New Merton Board Mills, (1933) 2 KB 569 (CA)	263
Warman Ltd v Arindra Shrew Navigation Co, AIR 1944 Bom 131 (1944) 14 Comp Cas 69 (Bom)	61, 64	White v Bristol Aeroplane Co Ltd, 1953 Ch 65; (1953) 2 WLR 144	244
Waziyam Singh v Bhalinda Transport Co Ltd, (1963) 39 Comp Cas 897; (1963) 1 Comp LJ 17 (Punj)	682	White & Oxmond (Parkstone) Ltd, re, 1976 [BL 225]	729
Waziyam Singh v Official Liquidator of Eastern Commercial & Banking Co Ltd, AIR 1926 LdL 414	315	Whitehouse v Carlton Hotel (P) Ltd, (1997) 20 Aug LT 251	253
Waste Recycling Group plc, re, (2004) 1 BCILC 557 (Ch D)	633	Whitwood Chemical Co Ltd v Haedrian, (1891) 2 Ch 316 (CA)	305
Weekley v Amalgamated Union of Engineering Workers, The Times, June 12, 1975, ruled 1975 [BL 222]	335	Wilke's Charity, re, (1854) 3 Mac & G 440 42 ER 330	290
Wearwell Cycle Co (India) Ltd v AK Mishra, 1994 Comp Cas 219 (Del)	601	WLL v United Lankester Plantations Co Ltd, (1912) 2 Ch 571; 107 LT 311 (CA); J914 AC 31 (DLT)	226
Wearwell Cycle Co (India) Ltd v AK Misra, ILR (1994) 1 Del 109; (1996) 94 Comp Cas 723	601	William C Leitch Bros Ltd, re, (1932) 2 Ch 71 (Ch D)	28, 557
Weavers Mills Ltd v Belisia Ammavil, AIR 1969 Mad 492	135, 137	Williamis v Natural Life Health Foods Ltd, (1996) 1 BCILC 246	286
Webb v Earle, (1875) LR 20 Eq 556; 44 LT Ch 608	226	Williamson v Natural Life Health Foods, (1997) 1 BCILC 131 (CA)	256, 254
Webb's Factor Mechanisations (P) Ltd v Official Liquidator, (1996) 85 Comp Cas 146; AIR 1996 Bom 65	421	Williamson v Jenkins, (2004) 1 BCILC 64 (Ch D)	247
Wedgwood Coal and Iron Co re, (1876-77) 1 LR 7 Ch D 26	81	Willits v Curle Jewellery Ltd, (1998) 2 BCILC 75 (Ch D)	221
Weeks v Propriet, (1873) LR 8 CP 427	79	Wilmott Trading Ltd (No. 42), (1999) 2 BCILC 541 (Ch D)	726
Welton v Saffery, 1897 AC 299 (JIL)	82, 84	Wilson v Kelland, (1911) 2 Ch 306; 103 LT 17	483
Westburnt Sugar Refineries Ltd, re, 1951 AC 625 (HL)	232	Wilson v Wilson, 1999 SLI 249 (Scotland)	11
West Hills Realty P. Ltd. v Neelkamal Realtors Tower P. Ltd, (2007) 200 Comp Cas 179 (Bom)	681	Wimbleton & Olympia Ltd, re, (1910) 1 Ch 400; 31 LT 425	125
West Mid-Safetywear Ltd v Dodd, 1986 HCAC 250 (CA)	734	Wimbush, re, 1910 Ch 92; 162 LT 133	180
Westbourne Galleries Ltd, re, (1970) 1 WLR 1378	654	Windsor Steel Coal Co (1931) Ltd, re, (1929) 1 Ch 151; 141 LT 81 (CA)	698
Westbourne Galleries Ltd, re, 1971 Ch 799 (1971) 2 WLR 618 (CA)	582, 607	Winfield Agro Services (P) Ltd and Hindustan Antipests P Ltd, re, (1995) 86 Comp Cas 557; AIR 1996 AP 230 (1996) 2 Ac LT 309	607
Westbourne Galleries Ltd, re, 1973 AC 300, (1972) 2 WLR 1289 (JIL)	253, 659	Winsome Yarn Ltd v Punjab Wireless Systems Ltd, (2006) 129 Comp Cas 41 (P&H)	690
Westlowe Storage & Distribution Ltd, re, (2000) 2 BCILC 590 (Ch D)	734	Wipro Finance Ltd v Suman Matrix Ltd, (2002) 108 Comp Cas 569 (Bom)	602
Westmaze Ltd, re, The Times, 15-7-1996 (Ch)	482	Wondoflex Textiles Pty Ltd, re, 1981 WLR 458	659
		Wood n Odessa Waterworks Co, (1889) 42 Ch 14336; 58 LT 628	83, 416
		Wood Polymer Ltd, re, (1977) 47 Comp Cas 597	620

Wainfleet v Strathclyde Regional Council. 1978 UKHL & 1978 SLT 159 (Scot Hmrd)	30
Worcester Corsetry Ltd v Willing, 1916 Ch 640 (CA)	274
Workmen v Associated Rubber Industry Ltd, (1985) 4 SCC 114	20
Work vale Ltd, re, (1993) 1 WLR 294 (CA)	643
World Phone India (P) Ltd v WPI Group Inc. (2003) 178 Comp Cas 173 (Del)	96
World Wide Agencies (P) Ltd v Margaret, (1990) 1 SCC 536; (1990) 67 Comp Cas 507; (1990) 1 Comp LJ 209	199, 512, 626
Woven Rugs Ltd, re, (2002) 1 BCCL 124	381
Wragg Ltd, re, (1997) 1 Ch 796	207
Wrexham, Mold & Connah's Quay Railway Co Ltd, re, (1999) 1 Ch D 441, 80 LT 150	454
Wright v Max Wright (Europe) Ltd, (1999) 2 BCCL 301 (CA)	387
Xavier Joseph v Indo-Scottish Brand (P) Ltd, (2002) 110 Comp Cas 206 (CLB)	153
Yamuna Das Kanodia v Bihar Engineer & Contractors Ltd, (1940) 14 Comp Cas 163; AJR 1944, Pml 776	702
Yashoda Sethi v Cross-Berkert Sethi Ltd, (1993) 1 Comp LJ 20; (1995) 63 Comp Cas 371 (CLB)	535, 541
Yenidje Tobacco Co Ltd, re, (1916) 2 Ch 426	650, 656
Yeshwant M Desai v SEBI, (2003) 56 SCGL 376 (SAT)	318
Yeshwant Raghunath Bhide v JTC, (1971) 41 Comp Cas 290 (Kan)	644
YLAD Holdings (P) Ltd, re, (2001) 106 Comp Cas 249 (Del)	624
Yogamaya Chosh v Official Liquidator, (1993) 1 Cal 1, 485	680
Yogesh K Shah v Diliphai K Shah, 2003 SLC Out-Law Cr, 2901; (2004) 185 Comp Cas 108	761
Yogesh Kumar Kamal Shah v Gujarat Steel Tubes, (1993) 2 Guj L.H. 1039	240
Yokogawa Blue Star Ltd v Secha Software Ltd, (2004) 119 Comp Cas 723 (Mad)	671
Yilmaz, Hissam & Hikmet Ltd, re, (1998) 1 Ch 152 (CA)	444
York & North Midland Railway Co v Hudson, (1853) 16 Beau 485; 22 L.J. Ch 529, 51 ER 866	257
Yorkshire Woolcombers' Assn Ltd, re, (1903) 2 Ch 294; 98 LT 811 (CA)	481
Young v Ladies' Imperial Club, (1920) 2 KB 523; 1920 All ER Rep 725 (CA)	532
YS Spdness Ltd v Official Liquidator (1999) 1 Comp LJ 442; (2000) 100 Comp Cas 547 (Guj)	379, 671
Yuen Kun Yiu v Attorney General of Hong Kong, 1988 AC 175; (1987) 3 WLR 776	622
Yuill v Greymouth Port Elizabeth Railway and Coal Co Ltd, (1904) 1 Ch 53	329
Zee Tele Filmz Ltd, re, (2005) 124 Comp Cas 102 (Bom)	193
Zee Telefilms Ltd v State of AP, (2002) 110 Comp Cas 694 (AP)	149
Zinuity Properties Ltd, re, (1984) 1 WLR 1249 (ChD)	162, 359, 658

Sectionwise Contents

Companies Act, 1956

- 41(2). Every other person who and whose name is entered in its register of member, shall be a member of company [agrees in writing] to become a member of a company 510
62. Civil liability for misstatements in prospectus 667
81. Further issue of capital 521
100. Special resolution for reduction of share capital 627
101. Application to [Tribunal] for confirming order, objections by creditors, and settlement of list of objecting creditors 627
102. Order confirming reduction and powers of court on making such order 627
115(I). Bearer of a share warrant is a shareholder, but not a member as his name is struck off register of members 197
209-A. Inspection of books of account, etc. of companies 526
377. Restrictions on right of managing agent to appoint directors 517
391. Power to compromise or make arrangements with creditors and members 590, 591, 691

Companies Act, 1956 (contd.)

- 391(6). Recovery proceedings under RDB Act are not liable to be stayed 606
397. Application to Tribunal for relief in cases of oppression 521, 557
433. Circumstances in which company may be wound up by Tribunal 526
439(1)(c). Registrar's petition 667
439(4). Conditions for contributary to present a petition for winding up a company 667
442. Power of Court to stay or restrain proceedings against company 672
454. Statement of affairs to be made to official liquidator 683
529. Application of insolvency rules in winding up of insolvent companies 713
530. Preferential payments 713
542. Liability for fraudulent conduct of business 557
582(b). Expression "unregistered company" shall include any partnership, association, or company consisting of more than seven members 590, 591
619. Application of Sections 224 to 233 to Government companies 592

Companies Act, 2013	4, 151, 509	Companies Act, 2013 (contd.)	
2(4). Extent of application	1	2(71). Public company	562
2(5). Abridged prospectus	107	2(76). Related party	139
2(6). Alter or alteration	74	2(77). Relativer	363
2(7). Articles	79	2(78). Remuneration	543
2(8). Associate company	563	2(81). Securities	224
2(9). Authorised capital or nominal capital	221	2(84). Share	193
2(10). Board of Directors or Board	254	2(87). Small company	582
2(11). Body corporate or corporation	5	2(87). Subsidiary company	593
2(14). Branch office	32	2(88). Sweat equity shares	189
2(15). Called-up capital	224	2(89). Total voting power	568
2(16). Charge	456	2(92). Unlimited company	577
2(19). Chief Financial Officer	355	2(93). Voting right	365
2(20). Company	2	2(94). Whole-time director	340
2(22). Company limited by shares	577	2(95). Undefined words and expressions	769
2(23). Company Liquidatur	673, 683	3. Formation of company	72, 37
2(24). Company secretary or secretary	355		580, 581
2(25). Company secretary in practice	355		
2(26). Contributory	201	3(1)(b). Company may be formed for any lawful purpose by two or more persons, where company to be formed is to be private company	521
2(27). Control	268	3(2). Categories of company	528
2(29). Court	574, 756	4. Memorandum	50
2(30). Debenture	478	4(1)(i). Use of word "Limited" and "Private Limited"	53
2(32). Depository	182	4(1)(l). Limited or unlimited liability of members of a company	27
2(34). Director	253	4(1)(d). Liability	75
2(35). Dividend	403	4(1)(e). A company having a share capital	76
2(40). Financial statement	428, 430	4(1)(f). Memorandum in case of One Person Company	76
2(41). Financial year	438	4(2). Name in memorandum	49
2(42). Foreign company	583	4(3). Advance reservation of name	53
2(43). Free reserves	415, 469	4(5). Period for reservation of name	53
2(44). Global Depository Receipt	198	4(7). When provision void in memorandum or articles of company	578
2(45). Government company	588	5. Articles	29
2(46). Holding company	593	5(2). Matters in articles	29
2(48). Indian Depository Receipt	388	6. Act to override memorandum and articles	103
2(49). Interested director	325, 327	6(2). Provisions of Act to have effect on commencement	103
2(55). Member	510	6(3). Provisions in memorandum repugnant to provisions of Act	103
2(55)(i). Subscriber to memorandum	198		
2(56). Memorandum	19		
2(57). Net worth	428		
2(59). Officer	361		
2(60). Officer who is in default	361		
2(62). One-person company	581		
2(64). Paid-up share capital or share capital paid-up	224		
2(67). Previous company law	4		
2(68). Private company	152, 529		
2(68)(iii). Prohibits any invitation to public to subscribe for any securities of company	580		
2(69). Promoter	116, 139		

Companies Act, 2013 (contd.)

7.	Certificate of incorporation	39
7(1).	Documents required for registration duly signed by subscribers of memorandum	39
7(2).	To issue certificate of incorporation by registrar	39
7(3).	Allotment of corporate identity number to company by registrar	39
7(5).	Punishment for false or incorrect particulars	38
7(6).	Punishment for incorporation of company by furnishing false or incorrect information	38
7(7).	Opportunity for hearing	39
8.	Formation of companies with charitable objects	45
9.	Effect of registration	5
10.	Binding force of memorandum and articles	82
12.	Registered office of company	50, 56, 58, 103
12(1)	Registered office of company to acknowledge all communications and notices	103
12(2).	Verification of registered office	103
12(3).	First Proviso: Change of name	53, 103
12(4).	Notice to registrar for every change in the situation of the registered office	104
12(5).	Penal provision	53, 104
13.	Alteration of memorandum	81
13(2)(3).	Alteration of name	55
13(4).	Alteration of registered office clause	57
13(5).	Central Government approval of shifting of registered office	57
13(6).	Save as provided in Section 64	74
13(7).	Fresh certificate of incorporation indicating shifting of registered office	57
13(8).	Change of objects	74
13(10).	Alteration to have effect after registration with Registrar	74
13(11).	Alteration of memorandum, void	74
14.	Alteration of articles	86, 581
14(1).	Alteration subject to memorandum	87, 581

Companies Act, 2013 (contd.)

15.	Alteration of memorandum and articles to be noted on every copy	87
16.	Rectification of name of company	77
17.	Copies of memorandum, articles etc to be given to members	77
18.	Conversion of companies already registered	104
19.	Investment in holding company	594
20.	Service of documents	399, 400
20(2).	Filing of documents with Registrar	409
21.	Authentication of documents, proceedings and contracts	55, 400, 470, 471
22.	Execution of bills of exchange	112, 470, 472
22(1).	Execution of deeds by authorise person on behalf of company shall be deemed execution of deeds by company	472
22(2).	To authorise a person for executing deeds as its attorney by a company	473
22(3).	Holding effect of deeds signed by attorney on behalf of company	473
23.	Public offer of securities to be in dematerialised form	109
24.	SEBI's power to regulate issue and transfer of securities, etc	130, 574
24(1).	Explanation: Exercise of power by appropriate authority	130
25.	Documents containing offer of securities for sale to be deemed prospectus	108
25(2).	Securities for sale to public	108
25(3).	Application of Section 26	109
25(4).	Signing of document	109
26.	Contents of prospectus (matters to be stated in prospectus)	109
26(1).	Informations given in the prospectus issued by company	128

Companies Act, 2013 (contd.)

26(6). Delivery of copy to Registrar	111
26(7). Registration of prospectus by Registrar	111
26(8). Date of issue after registration	111
26(9). Penalty for contravention	111
27. Variation in terms of contract or objects stated in prospectus	111
28. Offer of sale of shares to certain members	111
28(1). To offer holding of shares to public in accordance with prescribed procedure	111
28(3). Members' responsibility in matter of sale	112
29(1). Public offer to issue their securities only in dematerialised form	112
29(2). Conversion of securities into dematerialised form or issue its securities in physical form	112
30. Advertisement of prospectus	112
31. Shelf prospectus	112
31(1). Any class or classes of companies	112
31(2). Information memorandum	112
32. Red herring prospectus	113
32(1). Issue of red herring prospectus prior to issue of prospectus	113
32(2). Filing of prospectus before registrar	113
32(3). Obligations under red herring prospectus	113
32(4). Securities upon closing of offer	113
33. Application forms	137
33(1). Application form accompanied by an abridged prospectus	137
33(2). Request for copy of prospectus	137
34. Criminal liability for misstatements in prospectus	129
35. Civil liability for misstatements in prospectus	687
35(2). Conditions when no person liable under 35(1)	122
36. Punishment for fraudulently inducing persons to invest money	194
37. Who can sue under Sections 31, 35 and 36	115

Companies Act, 2013 (contd.)

38. Punishment for participation for acquisition, etc. of securities	194
39. Allotment of securities by company	141, 188
39(4). Filing of return of allotment	142, 188
39(5). Penalty	142
40. Securities to be dealt in on stock exchange	142
40(3). Purpose of utilisation of money received from public	143
40(5). Punishment	143
40(6). Commission in connection with subscription to securities	190
41. Global depository receipt	146
42. Private placement	188, 146
42(2). Explanation I: Offer or invitation for subscription of securities on private placement when deemed to be offer to public	146
42(3). No fresh offer or invitation by company	146
42(4). Offer not comply with provisions of this section	147
42(5). Payable money towards subscription paid through cheque or demand draft	147
42(6). Allotment of securities after receiving of application	147
42(7). Offers made only to persons whose names recorded by company prior to offer	147
42(8). Prohibition to release any public advertisements	147
42(9). Filing return of allotment with list of all security holders	147
42(10). Consequences of default	147
43. Kinds of share capital	224, 225
44. Nature of shares or debentures	186
46. Certificate of shares	142, 149
46(2-5). Provisions regarding duplicate certificate	150
48. Variation of shareholders' rights	243
49. Calls on shares of same class to be made on uniform basis	206
52. Issue of shares at premium	192

Companies Act, 2013 (contd.)

52(3). Securities premium account	may be applied by such class of companies as may be prescribed and whose financial statements comply with the accounting standards prescribed for such class of companies under Section 133	195
53. Prohibition on issue of shares at discount	189	
53(1)(2) To issue shares at discount by company is void	189	
54. Issue of sweat equity shares	189	
54(2) Limitations, restrictions and provisions applicable to sweat equity shares	190	
55. Redeemable preference shares	228, 253	
56. Transfer and transmission of securities	173, 174, 199	
56(1) A company shall not register a transfer of securities	175, 176	
56(2) Transmission of shares	175, 199	
56(3) Transfer of partly paid shares	175	
56(4) Delivery of certificates of securities allotted, transferred or transmitted	178	
56(5) Transfer by legal representative	176	
58(1). Refusal must specify reasons for such refusal	152, 160	
58(1)(3). Time for exercising power of refusal	161	
58(2). Securities or other interest of any member in a public company shall be freely transferable	159, 160	
58(3). Period for appeal to Tribunal against refusal	160	
58(4). Appeal on refusal to register the transfer of securities without sufficient cause	160	
58(5). Dismissal in order of appeal by Tribunal	160, 161	
58(5)(a). Tribunal direct that transfer or transmission shall be registered by company	161	
58(5)(b). Tribunal direct rectification of register and also direct company to pay damages	162	
58(6). Penalty provision	160, 162	
59. Rectification of register of members	162	
59(1). Appeal to Tribunal or competent court	163, 164	
60. Publication of authorized, subscribed and paid-up capital	51	
61. Power of limited company to alter its share capital	229	
62. Further issue of share capital	216, 521	
62(1). Nothing of Section 62 shall apply to the increase of the subscribed capital of a company	240, 243	
62(4). Conversion of debentures or loans into shares in the company on terms and condition directed by government	240, 243	
62(5). Factors which are considered by government in determining terms and conditions under sub-section 62(4)	241, 243	
62(6). Conversion under sub-section (4) shall stand conversion of debentures or loans into equal amount of shares	243	
63. Bonus shares	416	
66. Reduction of share capital	230, 235, 427	
67. Restrictions on purchase by company or giving of loans by it for purchase of	245, 578	
67(1). When company have no power to buy its own shares	245	
67(2). Prohibition on providing loan, guarantee or security or otherwise any financial assistance	246	
67(3). Provisions on which Section 67(2) not to be apply	246	
67(5). Penalty provision	249	
68. Buy-back of shares	249	
68(6). Declaration of solvency	250	
68(7). Physical destruction of securities	251	
68(8). Further issue after buy-back	251	
68(9). Register of bought back securities	251	
68(10). Return of buy-back	251	

Companies Act, 2013 (contd.)

69. Transfer of certain sums to capital redemption reserve account	251
70. Prohibition of buy-back in certain circumstances	252
71. Statutory Provisions	477
71(1). Issue of debentures	477, 491
71(2). Prohibition or issue of debentures	477, 494
71(3). Issue of secured debentures	477
71(4). Creation of debenture redemption reserve account	477, 498
71(5). Appointment of debenture trustees	477, 487
71(6). Protection of interest of debenture holders	477
71(7). Provision in trust deed to be void	477
71(8). Company has interest for redeeming debentures in accordance with their issue	478
71(9). Filing of petition before Tribunal by debenture trustees	478
71(10). Direction by Tribunal to redeem debenture	478
71(11). Punishment on default to comply with order of Tribunal	479
71(12). Enforcement of contract by decree for specific performance	479
71(13). Prescribing proceeding	479, 480
72. Appointment of nominee by security holder	201
73. Acceptance of deposits by companies	130
73(2). Deposit from members	130, 131
73(3). Repayment of deposits	131
74. Repayment deposits accepted before the Act	131
74(1). Deposition before commencement of this Act	131
74(2). Time for repayment of deposit	131
74(3). Failure to repay deposit	131
75. Damages for fraud	132
76. Acceptance of deposits from public	132

Companies Act, 2013 (contd.)

77. Duty to register charges	91, 456
77(2). To issue certificate of registration of charge by registrar	457
77(3). Effect of non-registration of charge	457
77(4). Section 77(3) shall prejudice any contract or obligation for repayment of money secured by a charge	457
78. Application for registration of charge	457
79. Section 77 to apply in certain matters	463, 465
80. Date notice of charge and date	457
81. Register of charges to be kept by registrar	457, 465
82. Company to report satisfaction of charge	457, 465
83. Power of registrar to make entries of satisfaction and release in absence of information from company	458, 465
84. Elimination or appointment of receiver or manager	466, 469, 490
84(1). Notice of appointment of receiver or manager	466
84(2). Notice to cease appointment	466
85. Company's register of charges	465, 466
85(1). Company's register in prescribed form and manner	466
85(2). Inspection of register	466
86. Punishment for contravention	466
87. Rectification by Central Government of register of charges	459
88. Register of members, etc	212, 492
88(3). Register and index of beneficial owners	212
88(4). Foreign register of members	213
89. Declaration in respect of beneficial interest in any share	215
89(1). Name and other particulars of person holds beneficial interest in shares	215
89(2). Declaration to specify nature of interest	215
89(3). Change in beneficial interest	215

Companies Act, 2013 (contd.)

89(4). Central Government may make rules to provide for manner of holding and disclosing beneficial interest and beneficial ownership under Section 89	215
89(6). Noting of declaration and filing of return	216
89(8). No right in relation to any share in respect of which declaration is required to be made under this section but not made by the beneficial owner, shall be enforceable by him or by any person claiming through him	216
89(9). Prohibition to prejudice obligation	216
90. Investigation of beneficial ownership of shares in certain cases	217
91. Power to close register of members, debenture holders and other security holders	218
92. Annual return	219
92(1). To prepare annual return by company	220
92(2). To certify annual return by a company secretary in practice in prescribed form	220
92(3). An extract of annual return in such form as may be prescribed shall form part of the Board's report	220
92(4). Fees and period for filing of annual return	220
92(5). Penalty when company fails to file annual return within specified period	220
92(6). Penalty when company secretary in practice certifies annual return otherwise than prescribed manner	220
93. Return to be filed with Registrar in case when promoters' stake changes	220
94. Place of keeping registers, returns and inspection of registers, return	213

Companies Act, 2013 (contd.)

95. Registers etc. to be evidence	214
96. Annual general meeting	367
98. Power of Tribunal to call annual general meeting	372
100. Calling of extraordinary general meeting	370, 393
101. Notice of meeting	374, 375
102. Statement to be annexed to notice	376
102(4). Benefits of non-disclosure	379
102(5). Penal consequence of default	379
103. Quorum	379, 382
105(2). If quorum is not present within half-an-hour from the time appointed	382
104. Chairman	382
105. Proxies	389
105(1). Any member of a company entitled to attend and vote at a meeting of company	390
105(2). Company provide for proxy voting	390
105(4). Instrument appointing a proxy in writing and signed	390
107. Voting by show of hands	387
108. Voting through electronic means	387
109. Demand for poll	388
109(5). Chairman has to appoint such number of persons as he deems necessary to scrutinise poll process and votes given on poll	389
109(6). Chairman has power to regulate the manner in which poll is to be taken	389
109(7). Result of poll is deemed to be decision of meeting or resolution on which the poll was taken	389
110. Postal ballot	391
111. Circulation of members' resolution	393, 394
111(2). A company shall not be bound under this section to give notice of any resolution	394
111(3). Company shall not be bound to circulate any statement as required	394

Companies Act, 2013 (contd.)

111(4). An order made under sub-section (3)	394
112. Representation of President and Governors in meetings	391
112(1). Appointment of Representative by President and Governor	391
113. Representation of corporations at meetings of companies and creditors	391
114. Kinds of resolution	392
115. Resolutions requiring special notice	391
116. Resolution passed at adjourned meeting	394
117. Resolutions and agreements to be filed	91, 394
117(3). A typed or printed copy of every special resolution must be registered with the registrar within thirty days of its date	393
118. Minutes of proceedings of general meetings, meeting of Board of directors and other meetings and resolutions passed by postal ballot ..	336, 393
118(3). Prohibition to circulate report of proceedings	397
118(10). Observation of secretarial standards	396
118(11). Default provisions	399
118(12). Liability for tampering with minutes	398
119. Inspection of minutes-book of general meetings	397
119(1). Books maintaining minutes have to be kept at registered office and open to inspection ..	397
120. Maintenance and inspection of documents in electronic form	398
121. Report on annual general meeting	394
121(1). AGM including confirmation to effect that meeting was convened, held and concluded as per provisions of Act	396
121(2). Limitation for filing of report ..	396

Companies Act, 2013 (contd.)

122. Applicability of Provisions to One Person Companies	398
122(2). Transaction of ordinary business by one person company	398
122(3). Communication of resolution by member of company	398
122(4). In one person company resolution signed and dated by director	399
123. Declaration of dividend	403
123(1)(a). Prohibition to declare or pay dividend for any financial year ..	409
123(2). Depreciation has to be provided in accordance with the provisions of schedule ..	409
123(3). Interim dividend	406
123(4). To deposit dividend in scheduled bank	406
123(5). Payment to registered shareholder only	412
124. Unpaid dividend account ..	410, 411
125. Investor Education and Protection Fund	411
125(3). Utilisation of Fund	411
125(5). Central Government to constitute authority	412
126. Right to dividend, rights and bonus shares to be held in abeyance pending registration of transfer of shares	417
127. Punishment for failure to distribute dividends	414, 417
128. Books of account etc to be kept by Company	418, 419
128(1). To keep books of account at registered office	419
128(2). Branch office of company	419
128(3). Proviso: Inspection of subsidiary's books of account ..	594
128(3)(4). Inspection of accounts	421
128(5). Preservation of books of account	420
128(6). Penalty provision	422
129. Financial statement	423
129(3). Explanation subsidiary	594
130. Reopening of accounts on court's or tribunal's orders	424

Companies Act, 2013 (contd.)

131.	Voluntary revision of financial statements or Board's report	424
132.	Constitution of National Financial Reporting Authority	425
132(2).	Function of National Financial Reporting Authority	425
132(3).	Constitution of authority	425
132(4).	Power of authority	425
132(6).	Appellate authority	425
132(7).	Appointment of chairperson and member of appellate authority	426
132(8).	Fee for filing appeal	426
132(9).	To prepare annual report	426
102 (10–15)	Administration of National Financial Reporting Authority	426
133.	Central Government to prescribe accounting standards	427
134.	Financial statement, Board's report, etc	427
134(5).	Directors' responsibility statement	428
134(6).	Signing of Board's report with annexures	428
134(7).	Circulation or publication of signed copy of financial statement	429
134(8).	Penalty	429
135.	Corporate Social Responsibility	429
135(3).	Functions of committee	429
136.	Right of member to copies of audited financial statement	429
137.	Copies of financial statements to be filed with Registrar	430
137(3).	Penalty	430
138.	Internal audit	434
139.	Appointment of auditors	434, 592
139(2).	Term of appointment	434
139(3).	Rotation of audit team of firm	435
139(5).	Auditor of Government company	435
139(8).	Casual vacancy	435
139(9).	Appointment of retiring auditor	435
139(11).	Audit Committee	435
140.	Removal, resignation of auditor, and giving of special notice	436

Companies Act, 2013 (contd.)

140(5).	Fraudulent conduct of auditor	436
141.	Eligibility, qualifications and disqualifications of auditors	437
141(3).	Persons not eligible for appointment as auditors	437
141(4).	Vacation of office on disqualification	437
142.	Remunerations of auditors	438
143.	Powers and duties of auditors	438, 592
143(1).	Right of access to books of account	438
143(3).	Additional matters in auditor's report	438
143(5).	Government companies	439
143(6).	Audit of branch office accounts	439
143(9).	Auditor to comply with auditing standards	439
143(11).	Direction for auditor's report	439
143(15).	Penal provision	440
144.	Auditor not to render certain services	440
145.	Auditor to sign audit reports, etc	441
146.	Auditors to attend general meeting	57, 441
147.	Punishment for contravention	441
148.	Audit of cost accounts	450
149.	Company to leave Board of directors	265, 580, 582
149(4).	Independent Directors	265
149(6).	Independent director in relation to a company means a director other than a managing director or a whole-time director or a nominee director	265
149(7).	Independent director has to make declaration of his independence at first meeting of Board which he attends and subsequently every year at first meeting of Board in financial year	266
150.	Manner of election of Independent directors and Maintenance of data bank	267
150(1).	Selection of independent director from data bank	267

Companies Act, 2013 (contd.)

150(2). Approval of appointment of independent director	267
151. Appointment of directors elected by small shareholders ..	267
152. Appointment of directors	268, 272, 380
152(3). No person shall be appointed as a director of a company unless he has been allotted Director Identification Number under Section 154	268, 276
152(4). Every person proposed to be appointed as a director by the company in general meetings or otherwise, shall furnish his Director Identification Number and a declaration that he is not disqualified to become a director under this Act	268
152(5). The person appointed as director is not to act as such unless he has filed with company his consent to act as such. He has to file his consent with Registrar within 30 days of his appointment in prescribed manner	268
152(6)(c). Total number of directors	270
153. Director Identification Number	274
155. Prohibition to obtain more than one Director Identification Number	274
156. Director to intitiate Director Identification Number to register	274
157. Company to intitiate Director Identification Number	275
158. Obligation to mention Director Identification Number	275
159. Punishment for contravention ..	275
160. Directorship	270
161. Appointment of additional director; alternate director and nominee director	273, 352
161(3). Nominee director	271
161(4). Casual vacancies	273

Companies Act, 2013 (contd.)

162. Appointment of directors to be voted individually	271
162(1). At a general meeting of a company, a motion for the appointment	271
163. Option to adopt principle of proportionate representation for appointment of directors ..	272
164. Disqualifications	273, 276
164(2). Disqualification for re-appointment	276
164(3). A private company may by its articles provide for additional disqualification	276
165. Number of directorships	277, 339
166(2). Members of a company may by a special resolution specify any number of companies in which a director of company may act as directors	277
166(4). A director of a company shall act in accordance with the articles of the company	297
166(5). Fiduciary obligation (duty of good faith)	296
166(7). Directors' duty of care, diligence and skill	312
166(8). A director of a company shall not assign his office and any assignment so made shall be void	323, 350
167. Vacation of office of director ..	277
168. Resignation of director ..	284, 295
169. Removal of directors	279
170. Register of directors and key managerial personnel and their shareholding	336
171. Member's right to inspect	336
172. Punishment	337
173(1). Period for meeting of Board of directors	332
173(2). Mode of participation of directors in a meeting of Board of directors	312
173(3). Notice	332, 334
174. Quorum for meetings of Board of directors	334
175. Passing of resolution by circulation	335

Companies Act, 2013 (contd.)

176. Defects in appointment of Directors not to invalidate actions taken 296, 297
 177. Audit Committee 293
 177(4). Audit Committee has authority to investigate into any matter in relation to items specified in this section 294
 177(5). Calling for comments of auditors about internal control systems by Audit Committee 294
 177(6). Investigation by Audit Committee into any matter in relation to items specified in sub-section (4) or referred to it by Board of directors 294
 177(7). The auditors of a company and key managerial personnel shall have a right to be heard in the meetings of Audit Committee when it considers auditor's report but shall not have right to vote 294
 177(8). Board's report under Section 134(3) has to disclose composition of an Audit Committee 294
 177(9). To establish a vigil mechanism for directors and employees to report genuine concerns in such manner as may be prescribed 294
 177(10). Vigil mechanism has to provide for adequate safeguards against victimisation of persons who use such mechanism and make provision for direct access to chairperson of Audit Committee in appropriate or exceptional cases 294
 178. Nomination and Remuneration Committee and Stakeholders Relationship Committee 295
 178(1). Board of directors of every listed company and such other class or classes of companies, as may be

Companies Act, 2013 (contd.)

- prescribed shall constitute Nomination and Remuneration committee consisting of three or more non-executive directors out of which not less than one half shall be independent directors 295
 178(2). To identify persons who are qualified to become directors and who may be appointed in senior management in accordance with criteria laid down and recommend to Board 295
 178(3). To formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to remuneration for directors, key managerial personnel and other employees 295
 178(4). To ensure conditions while formulating policy under sub-section (3) 295
 178(5). To constitute Stakeholders Relationship Committee 295
 178(6). Stakeholders Relationship Committee shall consider and resolve grievance of security holders of company 295
 178(7). To attend general meetings of company by chairperson or any other member of authorised by him 295
 179. Powers of Board of directors 295
 179(3). To exercise powers of company by means of resolutions 291
 180. Restrictions on powers of Board of Directors 292
 180(3). If directors have in breach of restrictions sold or leased undertaking of the company, title of purchaser or lessee will not be affected, provided he acted in good faith and with due care and caution 293

Companies Act, 2013 (contd.)

- 180(5). Where borrowing has been effected exceeding amount of paid-up share capital, lender may not be able to enforce loan against company, unless he can prove that he advanced loan in good faith and without knowledge that limit had been exceeded 293
181. Company to contribute to bona fide and charitable funds etc 296
182. Prohibitions and restrictions regarding political contributions 296
183. Powers of Board and other persons to make contributions to national defence fund etc 296
184. Disclosure of interest by director 325
185. Loans to directors, etc 349
186. Loan and investment by company 467
- 186(3). Prior approval necessary for giving loan exceeding limit 468
- 186(4). Financial statement with full particulars of loan 468
- 186(6). Prohibition to take inter-corporate loans 467, 468
- 186(7). Prohibition to give loan below prevailing interest rate 467
- 186(8). Prohibition to loan during period of default 467, 469
- 186(9)(10). Register of investments, loans 468
- 186(12). Rule-making power 468
- 186(13). Liability and penalty provisions 469
187. Investment of company to be held in its own name 469
- 187(3). Inspection of register by any member or debenture holder of the company without any charge during business hours subject to such reasonable restrictions 470
- 187(4). Penalty provisions 470
189. Related party transactions 553, 559

Companies Act, 2013 (contd.)

189. Register of contracts or arrangements in which directors are interested 337
190. Contract of employment with managing or whole-time director 351
- 191(1)(b). Mode for purchasing of shares 309
- 191(2). Provisions related with payments to its managing director or whole-time director or manager by way of compensation for loss of office not to be affected by this section 308
- 191(3). If payment is not approved for want of quorum in a meeting or adjourned meeting, the proposal is taken to be not approved 308
- 191(4). Receiving of amount by director as trust for company 308
- 191(5). Penalty provision 308
- 191(6). Is section does not prejudice the operation of any law requiring disclosure to be made with respect to any payment received under section or such other like payment made to a director 309
192. Restriction on non-cash transactions involving directors 356
193. Contract by One Person Company 397
194. Prohibition on forward dealings in securities of company by director or key managerial personnel 338
- 194(2). Punishment for violation of sub-section (1) 338
- 194(3). Acquisition of securities in violation of sub-section (1) 338
195. Prohibition of Insider Trading of Securities 338
- 195(1). Prohibition to enter insider trading 338
196. Appointment of managing director or whole-time director or manager 339

Companies Act, 2013 (contd.)

- 196(1). Prohibition to appoint managing director and manager at same time 339
 197. Overall maximum managerial remuneration and managerial remuneration in case of absence of inadequacy of profits 343, 580
 197(3). Insurance premium against liability for default by managerial personnel 314, 344
 197(4). Receipt of commission from holding or subsidiary company 344
 197(5). Penalty 344
 198. Calculation of profits 344
 199. Recovery of remuneration in certain cases 346
 200. Central Government or company to fix limit with regard to remuneration 346
 201. Forms of and procedure in relation to, certain applications 346
 202. Compensation for loss of office to managing, whole-time director or manager 347
 203. Appointment of key managerial personnel 347
 204. Secretarial audit for bigger companies 349
 205. Functions of company secretary 356
 206. Power to call for information, inspect books and conduct enquiries 362
 207. Conduct of inspection and inquiry 362, 363
 207(4). Penalty and vacation of office 363
 208. Report on inspection made 364
 209. Search and seizure 364
 210. Investigation into affairs of company 364
 211. Establishment of Serious Fraud Investigation Office 364
 212. Investigation into affairs of company by Serious Fraud Investigation Office 361, 364
 212(6)(7). Right to bail of persons charged 365
 212(6–10). Arresting guilty person 365

Companies Act, 2013 (contd.)

- 212(11–17). Report of investigation 365
 213. Investigation into company's affairs in other cases 366, 367, 368
 214. Security for payment of costs and expenses of investigation 361
 215. Firm, body corporate or association not to be appointed as inspector 361
 216. Investigation of ownership of company 368
 217. Procedure, powers, etc, of inspectors 361
 217(6). Disobedience of direction 362
 217(8). Failure to furnish information, etc 362
 217(10–12). Procedure for implementation of reciprocal arrangement 362
 218. Protection of employees during investigation 362, 366, 369
 219. Power of inspector to conduct investigation into affairs of related companies, etc 361, 366
 220. Seizure of documents by Inspector 366
 221. Freezing of assets of company on inquiry and investigation 362, 367
 222. Imposition of restrictions upon securities 362, 369
 223. Inspector's report 367
 224. Action to be taken in pursuance of Inspector's report 368
 224(5). Disgorgement of benefits obtained by director, etc 368
 225. Expenses of investigation 371
 226. Voluntary winding up of company, etc not to stop investigation proceedings 371
 227. Legal advisers and bankers not to disclose certain information 370, 371
 228. Investigation, etc of foreign companies 371
 229. Penalty for furnishing false statement, mutilation, destruction of documents 371

Companies Act, 2013 (contd.)

230. Power to compromise or make arrangements with creditors and members	590, 591, 593, 601, 606, 607, 631
230(2). To disclose some facts to Tribunal on affidavit	603
230(3). To make available copies of compromise to concerned persons free of charge	604
230(4). Information of voting through notice	604
230(5). Notice sent to Central Government, etc	604
230(7). Matters for which order of Tribunal sanctioning a scheme	604
230(9). Tribunal may dispense with a meeting of creditors	608
230(10). Scheme of buy-back of securities not to be confirmed by Tribunal	608
230(11). Scheme of compromise may include a takeover offer	616
230(12). Grievances with respect to takeover offer	607, 608
231. Powers of Tribunal to enforce compromise or arrangement ..	612
232. Merger and amalgamation of companies	615, 620, 629
232(1). Vesting of rights and transfer of obligations	619, 625
232(3)(i). Fairness of Exchange Ratio	622
232(5). Every company in relation to which the order is made has to file within thirty days a copy of the order with Registrar for registration	620
233. Merger or amalgamation of certain companies	629
233(1). Requirements to facilitate a scheme of merger or amalgamation between two or more small companies or between a holding company and its wholly owned subsidiary or such other class or classes of companies as may be prescribed	629
234. Merger or amalgamation of company with foreign company	630

Companies Act, 2013 (contd.)

235. Power to acquire shares of shareholders dissenting from scheme or contract approved by majority	631, 632
235(3). Right to transfer company ..	632
236. Purchase of minority shareholding	632
237. Power of Central Government to provide for amalgamation of companies in public interest	635
238. Registration of offsets of schemes involving transfer of shares	636
239. Preservation of books and papers of amalgamated companies	636
240. Liability of officers in respect of offences committed prior to merger/amalgamation, etc ..	636
241. Application to Tribunal for relief in cases of oppression, etc	515, 517, 521, 537, 537
241(i)(b). Relief in case of mismanagement	537
242. Powers of Tribunal	539
242(4). Interim relief	544
242(i). Removal by Company Law Tribunal	294
242(j). Company Law Tribunal has power to appoint directors for prevention of oppression and mismanagement	294
243. Consequence of termination or modification of certain agreements	545
244. Right to apply under Section 241	509
244(i). Members of a company shall have right to apply under Section 241	510
245. Class action	546
245(1). Grounds of action	546
245(2). Demand for compensation or suitable action	546
245(3). Number of member	546
245(4). Factors to be considered by Tribunal	546
245(7). Petal clause	547

Companies Act, 2013 (contd.)

246. Application of certain provisions to proceedings under Section 241 or Section 245	547
247. Valuation by registered valuers	548
247(3)(d). Penalty provision	548
248. Power of Registrar to remove name of company from register of companies	639
248(8). To preserve power of Tribunal to wind up a company name of which has been struck off register	644
249. Restrictions on making application under Section 248 in certain situations	641
250. Effect of company notified as dissolved	641
251. Fraudulent application for removal of name	641
252. Appeal to Tribunal	642
252(3). To place company in position as if name of company had never been struck off from register by order of Tribunal ..	642
270. Modes of winding up	647
271. Circumstances in which company may be wound up by Tribunal	526, 648
271(1)(b). Special resolution	648
272. Petition for winding up	80, 662
272(1)(a). Petition by Company	663
272(1)(b). Creditor's petition	663
272(1)(g). Central Government or State Government's petition	668
272(3). A contributary shall be entitled to present a petition for winding up of a company	667
272(7). Filing of copy with Registrar	668
272(7). Central Government's petition	668
273. Powers of Tribunal	669
274. Directions for filing statement of affairs	683
275. Company Liquidators and their appointment	673, 682

Companies Act, 2013 (contd.)

275(2). Appointment of provisional liquidator or Company liquidator from a panel of professionals maintained by the Central Government ..	623, 683
276. Removal and replacement of liquidator	684
277. Information to Company Liquidator, provisional liquidator and Registrar	674
277(3). Winding up order as notice of discharge	674
277(4). Application to Tribunal for constitution of a winding-up committee	675
278. Effect of winding-up order	671
279. Stay of suits, etc, on winding-up order	674, 675
280. Jurisdiction of Tribunal	680
281. Submission of report of Company Liquidator	685
282. Directions of Tribunal on report of liquidator	685
283. Custody of Company's properties	686
284. Promoters, directors, etc, to cooperate with Company Liquidator	687
285. Settlement of list of contributories and application of assets	701, 687
285(1). To settle list of contributories after passing order of winding up	703
286. Obligations of directors and managers	688
287. Advisory Committee	688
288. Submission of periodical reports to Tribunal	688
290. Powers and duties of Company Liquidator	688
291. Provision for professional assistance to Company Liquidator	692
292. Exercise and control of Company Liquidator's powers ..	692
293. Books to be kept by Company Liquidator	693
294. Audit of Company Liquidator's accounts	693

Companies Act, 2013 (contd.)

295. Payment of debts by contributory and extent of set off	694
296. Power of Tribunal to make calls	693
297. Adjustment of rights of contributors	693
298. Power to order costs	694
299. Power to summon persons suspected of having property of company	694
300. Power to order examination of promoters, directors, etc.	695
301. Arrest of persons trying to leave India or absconded	694
302. Dissolution of company by Tribunal	696
303. Appeals from orders made before commencement of Act ..	697
324. Debts of all descriptions to be admitted to proof	705
325. Application of insolvency rules in winding up of insolvent companies	713
325(1). Provisions regarding winding up of an insolvent company ..	705
327. Preferential payments	708, 713
327(1)(aj). In a winding up a company, provisions regarding payment of debts	711
328. Fraudulent preference	716
329. Transfers not in good faith to be void	721
330. Certain transfers to be void	721
331. Disclaimer of other's property	725
335(1) Provision: Where, liquidator does not come to know of existence of other's property within one month of commencement of winding up, period of twelve months shall begin to run from date of his knowledge	726
335(2) Disclaimer determines in respect of property disclaimed, rights, interests and liabilities of company	726

Companies Act, 2013 (contd.)

333(3). Tribunal, before or on granting leave to disclaim, may require notices to be given to persons interested ..	726
333(4). Company Liquidator shall not be entitled to disclaim any property	727
333(5). Tribunal may, on application of any person who is, as against Company Liquidator, make an order rescinding contract	726
334. Transfer, etc. after commencement of winding-up to be void	728
335. Certain attachments, executions etc. in winding up by Tribunal to be void	724
336. Offences by officers of companies in liquidation ..	730, 731
337. Penalty for frauds by officers ..	733
338. Liability where proper accounts not kept	731
339. Liability for fraudulent conduct of business	557, 727
339(2). Tribunal makes a declaration of liability. In particular direction, it may make a provision for securing recovery against declared liability	730
339(3). Persons found guilty under this section are liable to be proceeded against under Section 442	730
340. Power of Tribunal to assess damages against delinquent directors, etc	734
341. Liability under Sections 339 and 340 to extend to partners or directors in firms or companies	730, 738
342. Prosecution of delinquent officers and members of company	736
342(4) Power exercised by Tribunal in the case of a voluntary winding up under parallel circumstances and procedure	739

Companies Act, 2013 (contd.)

343. Company Liquidator to exercise certain powers subject to sanction	747
344. Statement that company is in liquidation	748
345. Books and papers of company to be evidence	748
346. Inspection of books and papers by creditors and contributories	748
347. Disposal of books and papers of company	749
348. Information as to pending liquidations	747
352. Company Liquidation Dividend and Undistributed Assets Account	715
352(6). Payment of Company Liquidator Dividend and Undistributed Assets Account after receiving claim application	716
352(7). If money remains in account unclaimed for a period of 15 years, it has to be transferred to the general revenue account of the Central Government. Any claim for such money would then be treated as an order for refund of revenue	716
353. Liquidator to make returns, etc.	716, 749
354. Meetings to ascertain wishes of creditors or contributories	716, 749
355. Court, Tribunal or person, etc. before whom affidavit may be sworn	717, 749
356. Powers of Tribunal to declare dissolution of company void	717, 742
357. Commencement of winding up by Tribunal	671
358. Exclusion of certain time in computing period of limitation	746
359. Appointment of Official Liquidator	717
360. Powers and functions of Official Liquidator	717

Companies Act, 2013 (contd.)

361. Summary procedure for liquidation	717
362. Sale of assets and recovery of debts due to company	718
363. Settlement of claims of creditors by Official Liquidator	718
364. Appeal by creditor	718
365. Order of dissolution of company	718
366. Companies capable of being registered	750
368. Vesting of property on registration	750
375. Winding up of unregistered company	590, 743
375(3). Circumstances when unregistered company may be wound up	744
375(4). Conditions when unregistered company shall, for purposes of this Act, be deemed to be unable to pay its debts	745
376. Power to wind up foreign companies, although dissolved	745
377. Provisions of Chapter cumulative	745
380. Documents, etc. to be delivered to Registrar by foreign companies	584
380(2). When any change occurs in particulars given under Section 380(1), the Registrar must be notified accordingly	585
381. Accounts of foreign company	586
381(1). Function of foreign company for maintaining accounts	586
381(2). If any such document is not in English language, a certified translation in English language has to be annexed	586
381(3). Every foreign company shall send to Registrar along with documents required to be delivered to him under sub-section (1), a copy of a list in prescribed form of all places of business established by company in India as at date with reference to which balance sheet is made out	585, 586

Companies Act, 2013 (contd.)

382. Display of name, etc, of foreign company	585
383. Service on foreign company	586
387. Dating of prospectus and particulars to be contained therein	586, 587
388. Provisions as to expert's consent and allotment	586, 587
389. Registration of prospectus	586, 587
390. Offer of Indirect Depository Receipts	586, 587
391. Application of Sections 34 to 36 and Chapter XX	586, 588
392. Punishment for contravention	588
393. Company's failure to comply with provisions of Chapter 22 not to affect validity of contracts, etc	586
394. Registration Offices	593
398. Provisions relating to filing of applications, documents, inspection, etc, in electronic form	754
399(1). Inspection, production and evidence of documents kept by Registrar	755
400. Right of inspection can be exercised on payment of prescribed fees	755
402. Application of provisions of Information Technology Act, 2000	754
403. Fee for filing, etc	755
405. Power of Central Government to direct companies to furnish information or statistics	755
407. Delinquent	756
408. Constitution of National Company Law Tribunal	756
410. Constitution of Appellate Tribunal	757
411. Qualifications of chairperson and members of Appellate Tribunal	757
412. Selection of members of Tribunal and Appellate Tribunal	757
413. Term of office of President, chairperson and other members	757

Companies Act, 2013 (contd.)

414. Salary, allowances and other terms and conditions of service of members	758
415. Acting President and chairperson of Tribunal or Appellate Tribunal	758
416. Resignation of members	758
417. Removal of members	758
420. Orders of Tribunal	759
421. Appeal from orders of Tribunal	171, 759
422. Expedited disposal by Tribunal and Appellate Tribunal	759
423. Appeal to Supreme Court	760
424. Procedure before Tribunal and Appellate Tribunal	760
425. Power to punish for contempt	760
426. Delegation of powers	760
428. Protection of action taken in good faith	760
429. Power to seek assistance of Chief Metropolitan Magistrate, etc	760
432. Right to legal representation	760
435. Establishment of Special Courts	761
436. Offences triable by Special Courts	761
437. Appeal and revision	761
439. Offences to be non-cognizable	764
441. Compounding of certain offences	765
442. Mediation and Conciliation Panel	762
443. Power of Central Government to appoint company prosecutors	762
444. Appeal against acquittal	762
445. Compensation for accusation without reasonable cause	762
446. Application of fines	762
447. Punishment for fraud	763
448. Punishment for false statement	766
449. Punishment for false evidence	767

Companies Act, 2013 (contd.)

450. Punishment where no specific penalty or punishment is provided	767
452. Punishment for wrongful withholding of property	739
453. Punishment for improper use of "Limited" or "Private Limited"	769
454. Adjudication of penalties	763
455. Dormant company	763
456. Protection of action taken in good faith	769
457. Non-disclosure of information in certain cases	769
458. Delegation by Central Government of its powers and functions	769
460. Confirmation of delay in certain cases	173, 764
461. Annual report by Central Government	768
463. Power of court to grant relief in certain cases	318
464. Prohibition of association or partnership of persons exceeding certain number	595
467. Power of Central Government to amend Schedules	767
468. Powers of Central Government to make rules relating to winding up	768
469. Power of Central Government to make rules	767

Contract Act, 1872

15. "Consent" defined	510
17. "Fraud" defined	123
17(2). Fraud means active concealment of a fact by one having knowledge or belief of the fact	123

Contract Act, 1872 (contd.)

18. "Misrepresentation" defined	123
18(1). Misrepresentation means positive assertion, in a manner not warranted by information	123
18(2). Misrepresentation means any breach of duty which, without an intent to deceive, gains an advantage	123
18(3). Misrepresentation means causing, however innocently, a party to an agreement, to make a mistake as	123
19. Unenforceability of agreements without free consent	126
24. Consequences of rescission of voidable contract	123
75. Party rightfully rescinding contract entitled to compensation	123

Negotiable Instruments Act, 1881

138. Dishonour of cheque for insufficiency, etc, not found in account	724
---	-----

Partnership Act, 1932

29. Rights of transferee of a partners interest	11
---	----

Sale of Goods Act, 1930

2. Definitions	186
19. Property passes when intended to pass	186
20. Specific goods in deliverable state	186

Highlights of the Companies Act, 2013*

The Companies Act, 2013 ("Act") has replaced the Companies Act, 1956 ("1956 Act").

The Act has 470 (four hundred and seventy) sections and 7 (seven) schedules as against 658 (six hundred and fifty eight) sections and 15 (fifteen) schedules in the 1956 Act. Many facets of the Act have been explained in the rules, which the Government of India ("GOI") has prescribed. Interestingly, 74% (seventy four per cent) of the Act provides for delegated legislation as a means of operationalising the provisions as opposed to 16% (sixteen per cent) in the 1956 Act.

Highlights of the Act

I. Key Managerial Personnel.—Every listed company and every other public company having a paid-up share capital of INR 10,00,00,000 (ten crores) or more will now have to appoint whole time Key Managerial Personnel, such as (1) Managing Director or Chief Executive Officer or Manager, (2) Whole time director, (3) Chief Financial Officer, (4) Company Secretary and such other officers as may be prescribed. A company, other than a company covered above, which, has a paid-up share capital of INR 5,00,00,000 (five crore) or more is required to have a whole-time Company Secretary. The Act mandates the Key Managerial Personnel to disclose to the Board of Directors all such contracts and/or arrangements in which they have any direct or indirect interest.

II. Class Action Suits.—The Act provides for class action suits by requisite number of members, depositors or any class of them, if they are of the

* Authored by Anand Mehta, Sharad Abhyankar, Nidhi Killawala and Nalini Madan, Khaitan & Co.

opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors. They can claim damages from directors, auditors or expert or any other person.

III. Corporate Social Responsibility ("CSR").—Every company (including its holding or subsidiary company, and a foreign company having its branch office in India) having a net worth of INR 500,00,00,000 (five hundred crore) or more, or turnover of INR 1000,00,00,000 (one thousand crore) or more or a net profit of INR 5,00,00,000 (five crore) or more during any of the three preceding financial years has to constitute a Corporate Social Responsibility Committee (Committee) of the Board with at least 1 (one) Independent Director. The Committee will formulate the policy including the activities specified in Schedule VII to the Act, which includes activities relating to promoting education, employment enhancing vocational skills etc. Companies are given preference for their local areas and areas around its operations for spending the amount earmarked for CSR. The Act mandates that concerned companies will have to spend, in every financial year, at least 2% (two per cent) of the average net profits of immediately preceding 3 (three) years on CSR activities. If they do not spend such amount, an explanation should be given in the Directors Report for the same.

IV. National Companies Law Tribunal (Tribunal).—The Act contemplates the constitution of the Tribunal and an Appellate Tribunal to facilitate expeditious disposal of proceedings. The High Courts will now have no jurisdiction in matters relating to the Act and the Tribunal will exercise and discharge all the powers and functions conferred under the Act including the power to approve mergers, corporate reorganisation, capital reduction etc. which were hitherto exercised by the High Courts.

V. Vigil Mechanism. Every listed company or companies which accept deposits from the public or companies which have borrowed money from banks and public financial institutions in excess of INR 50,00,00,000 (fifty crores) have to establish a vigil mechanism for directors and employees to report genuine concerns. Such mechanism is required to have in place adequate safeguards for protection of persons who use it. There is direct access to the chairperson of the Audit Committee in appropriate cases. Further, the details of establishment of such mechanism will have to be disclosed on the website of the company, if any, and in the report of the Board of Directors.

VI. Purchase of Minority Shareholding.—A viable squeeze out provision has now been introduced in the Act, where in the event an acquirer or a person acting in concert with such an acquirer becomes the registered holder of 90% (ninety per cent) of the issued equity share capital of a company, such acquirer has to notify the company of its intention to buy out the minority shareholders of the company. The acquirer has to offer to the minority shareholders of the company, a price to be determined on the basis of valuation by a registered valuer based on the rules that may be prescribed. The draft rules provide for a mechanism for determination of

price for purchase of minority shareholding. In case of a listed company, the offer price is to be determined in the manner specified by the Securities Exchange Board of India ("SEBI"). In case of public unlisted companies and private companies, the offer price is to be determined by considering the highest price paid by the acquiree for acquisition during last 12 (twelve) months and the fair price of shares as determined by the registered valuer. In addition, minority shareholders may also offer the majority shareholders to purchase the minority shareholding, at the price determined by a registered valuer in accordance with the prescribed rules.

VII. Power of a Company to Buyback its own Securities. The Act provides that no offer of buy-back shall be made within 1 (one) year from the date of closure of the preceding offer of the buy-back. Therefore, every company now has to comply with a "cooling off" period of 1 (one) year between 2 (two) buy-backs. The Act also states that a company has to wait for a compulsory period of 3 (three) years after cessation of and remedying a default in *inter alia* repayment of any term loan or interest thereon to any financial institution or banking company, repayment of deposits or payment of dividend to its own shareholders, before making an offer to buy-back its own shares.

The Act has removed the option given to a listed company to buy-back individual lots, i.e. where the lot of securities is smaller than such marketable lot as specified by the stock exchange.

VIII. Reduction of Share Capital.—The Act aims to consolidate the capital reduction process and introduces some more checks and balances for any reduction in capital being undertaken by a company. A company is prohibited from undergoing a reduction if it is in arrears of repayment of any deposits accepted by it, or the interest payable thereon. The Tribunal is now required to give notice of every application made to it by a company, to the creditors, GOI, Registrar of Companies ("RoC") and SEBI (the latter, in case of listed companies only). The Tribunal is also mandated to take into consideration any representations made by the GOI/RoC/SEBI/creditors within a period of 3 (three) months from the date of receipt by them of the notice. If no representation is received within such time, the Tribunal will presume that none of the above recipients have any representations to make in respect of the reduction. The applicant company while applying to the Tribunal is also mandatorily required to furnish an auditor's certificate certifying conformity with prescribed accounting standards.

The introduction of the pre-condition that arrears of deposits must be repaid by the applicant company makes it evident that adequate protection of depositors has been made in case of a capital reduction. Higher penalty has also been prescribed for officers who *inter alia* deliberately conceal the name of a creditor.

However, the involvement of multiple regulatory authorities and the requirement of furnishing an auditor's certificate, although desirable, may delay the approval process. Such a conclusion is supported by the fact that

the Act prescribes no timeline by which the Tribunal is required to pass its final confirmatory order.

IX. Mergers and Amalgamations.—The Act introduces significant changes with respect to mergers and amalgamations. Some of these are:

A fast track procedure for mergers and amalgamations involving certain classes of companies, such as between a holding company and its wholly owned subsidiary, has been introduced, at the option of these companies. Approval of the company court is no longer necessary as long as the official liquidator and the RoC have no objection and the GOI has given its approval. However, given that additional compliance requirements have also been imposed on those companies that opt for this route instead of the traditional route, it remains to be seen whether or not these changes result in faster approval of the scheme.

It is now possible for Indian companies to merge into foreign companies. Under the Act, any type of scheme of merger and amalgamation involving a foreign company requires prior approval of the Reserve Bank of India ("RBI") and the foreign company must be incorporated in a jurisdiction to be notified by the GOI.

In case of a compromise/arrangement between a listed transferor company and an unlisted transferee company, the Tribunal may now provide that the transferee company shall remain an unlisted company until it becomes a listed company. Further, if the shareholders of the transferor company decide to exit, the exit price cannot be less than the price under any regulations framed by SEBI.

X. Equity Shares with Differential Voting Rights.—The 1956 Act permitted companies to issue shares with differential rights. The Companies (Issue of Share Capital with Differential Voting Rights) Rules, 2001 (DVR Rules) inter alia prescribed that a company must satisfy certain conditions for issuing shares with differential rights which included (a) in case of listed companies, that such an issue should be approved by way of postal ballot; (b) shares with differential rights should not exceed 25% (twenty five per cent) of the paid-up share capital of the company, etc.

The requirements of the 1956 Act and the DVR Rules vis à vis issuance of shares with differential rights applied only to a public company or a private company which are subsidiary of a public company. These requirements are not applicable to a private company and therefore, a private company is free to issue any class of shares with differential rights. The new regime proposed under the Act has retained the concept of shares with differential rights, however, no relaxation has been provided for private companies. Unlike under the 1956 Act, Conditions to be fulfilled for issuance of equity shares with differential rights as to dividend, voting or otherwise by a company limited by shares include the requirement of authorisation in the Articles of Association of the company, authorisation by ordinary resolution passed at a general meeting of the shareholders, the shares with differential rights cannot exceed 26% (twenty six per cent) of the total post-issue

paid up equity share capital including equity shares with differential rights issued at any point of time etc.

It has, however, been clarified that equity shares with differential rights issued by any company under the provisions of the 1956 Act and the DVR Rules, will continue to be regulated under such provisions and rules.

XI. Directors Broad Spectrum

Composition.—The Act introduces the concept of a residency test of at least 182 (one hundred and eighty two) days stay in India in the previous calendar year for at least 1 (one) director on the board of a company. Further, the Act mandates that every listed company and every other public company having a paid-up share capital of INR 100,00,00,000 (one hundred crores) or more or a turnover of INR 300,00,00,000 (three hundred crores) or more, must have at least 1 (one) woman director on its board.

The Act further requires at least 1/3rd (one-third) of the appointed directors on the board¹ of a listed company to be Independent Directors to ensure transparency and independence in the decisions taken by the board. Public companies having a paid-up share capital of INR 10,00,00,000 (ten crores) or more; or having a turnover of INR 100,00,00,000 (one hundred crores) or more; or which have, in aggregate, outstanding loans, debentures and deposits, exceeding INR 50,00,00,000 (fifty crores), are required to have a minimum of 2 (two) independent directors on its board.

Maximum Limit.—The maximum limit on the number of directors for a public company has been raised from 12 (twelve) to 15 (fifteen), which may be increased beyond 15 (fifteen) by shareholders voting with a 75% (seventy five per cent) majority. Approval of the GOI need not be sought for this increase in the maximum number of directors as was required under the 1956 Act.

Number of Directorships.—The Act has increased the number of directorships a person can hold in different companies. A person can now hold directorship in 20 (twenty) companies, as opposed to 15 (fifteen) prescribed under the 1956 Act. Out of these 20 (twenty) companies, a person can be a director in a maximum of 10 (ten) public companies. A transition period of 1 (one) year from the date of commencement of the Act has been provided for compliance with this requirement.

Independent Directors.—The Act stipulates that the Independent Directors may be selected from a data bank of persons eligible and willing, which would be maintained by any institute or association as may be prescribed by GOI. The appointment of directors has to be approved by members in a general meeting and the explanatory statement to the notice should indicate justification for such appointment. Independent Directors are not to retire by rotation and can hold office for up to 2 (two) consecutive terms of 5 (five) years each following which, there would be

a 3 (three) year "cooling off" period before the Director is reappointed. Independent Directors would be eligible for sitting fees, commission from profits (so authorised by members at a meeting) and reimbursement of expenses. However, they would not be eligible for stock options which were allowed to be granted to them under the 1956 Act. Further, the Act provides a code of conduct for Independent Directors, which includes a description of their roles, functions, and duties, the manner of their appointment, resignation, evaluation requirements etc. The Act now clarifies that a nominee director will not be considered to be an Independent Director.

Listing Agreement and Independent Directors.—Several aspects of the Act are at variance with Clause 49 of the Listing Agreement which all listed companies are required to abide by. The Act specifies certain conditions for determining if a person may be appointed as an Independent Director, which includes the proposed Independent Director's relationship with the Promoters or Directors of the company. The stipulation in the Listing Agreement, which prescribes that in case the Chairman of the board is a non-executive director, Independent Directors should comprise at least 1/3rd (one-third) of the board or where the non-executive chairman is a promoter or person occupying management positions at the Board level or at one level below the board, at least half of the board should be independent are not reflected in the Act.

Liability of Independent Directors.—The Act has drawn a distinction between the liability of an Independent Director and a Non-Executive director from rest of the board. The Act has circumscribed the liability of Independent Directors only for all such acts of omission or commission by a company, which occurred with his/her knowledge, or attributable to him/her through the board processes and with his/her consent or connivance or where there has been lack of diligence. The burden of proof to establish this is, however, on the director concerned.

Liability of Directors.—Liability of the company and any officer in default for any contravention for which no specific penalty is prescribed, has been increased from fine which may extend to INR 5,000 (five thousand) to fine which may extend to INR 10,000 (ten thousand).

Duties of Directors.—The Act has codified duties of directors and has included concepts of "acting in good faith", "exercise of due and reasonable care", "skill and diligence", "exercise of independent judgment", avoiding of conflict of interest etc. This attempt of codification cannot be said to be an exhaustive enumeration of the directors' duties as the Common Law principles as enunciated by the courts from time to time would still be relevant. Courts may not be inhibited by the codification of the general duties in dealing with this somewhat vexed question.

Disqualification of Directors.—New criteria for disqualification of directors have been introduced in the Act. Amongst others, a director is now disqualified from appointment if any of the companies on the

board of which he is a director has not filed any financial statements and annual returns for 3 (three) continuous financial years or has defaulted in payment of debentures, etc. Every director is required to inform the company concerned about his disqualification before he is appointed or re-appointed.

Vacation of office. In a major departure from the 1956 Act, the Act requires a director to vacate his office on a conviction of any offence involving moral turpitude or otherwise where he is sentenced to imprisonment of at least 6 (six) months irrespective of whether the director has preferred an appeal against such conviction.

Resignation of Directors—The resignation of a director (although effective from the date of receipt by the company) has to be placed before the next general meeting of members. The company has to intimate the Registrar and post the information on its website, if any, within 30 (thirty) days from the date of receipt of notice of resignation from a director. Directors have to mandatorily forward their resignation along with reasons for the resignation to the RoC, within 30 (thirty) days of the date of resignation.

Meetings of Board and its powers

Notice of board meetings.—The Act states that a 7 (seven) day notice has to be provided for convening board meetings. However, a board meeting may be called at shorter notice subject to the condition that at least 1 (one) Independent Director, if any, is present at the meeting. In case of absence of Independent Directors at a meeting with shorter notice, the decision taken at such meeting is to be circulated to all directors and will be treated as final on ratification by at least 1 (one) Independent Director.

Circular Resolution.—The Act requires that all circular resolutions have to be approved by a majority of the directors, as opposed to consent of all directors present in India or by a majority of directors present in India as stipulated in the 1956 Act. Further, where any resolution has been put to vote by circulation and at least 1/3rd (one-third) of the total number of directors require that the same be decided at a meeting then the resolution will be decided at a meeting of the board and not by circulation.

Board committees. Besides the Audit Committee, the Act has introduced separate criteria and incidental provisions for the constitution of the Nomination and Remuneration Committee, Corporate Social Responsibility Committee and Stakeholders Relationship Committee. Every listed company and all public companies with a paid up capital of INR 10,00,00,000 (ten crore) or more or having turnover of INR 100,00,00,000 (one hundred crore) or more or having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding INR 50,00,00,000 (fifty crore) or more are required to have these committees.

Loans to Directors.—There is a blanket prohibition on the company to make any loan or provide any guarantee or security to any director or person in whom the director is interested in connection with a loan taken by any director or the person in whom the director is interested. "To any person in whom the director is interested" has been defined under the Act. Neither the giving of a loan to a managing or whole time director as part of the conditions of service or pursuant to any scheme approved by the members of the company by a special resolution nor the loans made or guarantees or securities provided by a company which does so in the ordinary course of its business subject to the rate of interest charged not being less than the bank rate declared by the RBI are covered by this provision.

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 is exempted from these requirements as is 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 such loans are utilised by the subsidiary company for its principle business activities.

Related party transactions.—The Act has widened the scope of transactions included in this category but has done away with the requirement of GOI approval. An arm's length transaction in the ordinary course of business continues to remain an exception and would be outside the scope of the section and would not constitute a related party transaction. The board's report to the shareholders must include details of all the related party transactions including all reasons for entering into such transactions. For listed companies, related party transactions are to be reviewed and approved by the Audit Committee.

Managerial Personnel.—The provisions of Schedule V of the Act, which deal with appointment and remuneration of managerial personnel broadly corresponds to Schedule XIII of the 1956 Act relating to limits on remuneration provided in the 1956 Act, have been retained in the Act with certain additions. For companies with no profit or inadequate profits for remuneration, the company will not pay its directors by way of remuneration any sum exclusive of any fees payable to directors for attending meetings of the Board or Committee thereto or for any other purpose whatsoever as may be decided by the Board except in accordance with the provisions of Schedule V and if it is not able to comply with such provisions, with the previous approval of GOI. In a major departure from the 1956 Act, provisions relating to appointment as contained in Schedule V will now be applicable to private companies as well and if conditions are not met, the approval of the GOI will be required.

XII. Shareholders' Meetings

Notice.—The Act provides for clear 21 (twenty one) days' notice for all General Meetings, which notice may be sent through electronic mode and should be served on directors as well.

Quorum.—The quorum requirement for general meetings of members has been substantially altered by taking the number of members that will constitute a quorum to the total number of shareholders of the company. 5 (five) members personally present will be the quorum for public companies if the total number of members does not exceed 1000 (one thousand); 15 (fifteen) members if the total number of members are up to 5000 (five thousand); and 30 (thirty) members if the total number of members exceeds 5000 (five thousand).

Proxies.—A member of a company registered under Section 3 of the Act is not entitled to appoint any other person as his/her proxy unless such other person is also a member of this company. Further, a person can act as proxy on behalf of members not exceeding 50 (fifty) and holding in aggregate not more than 10% (ten per cent) of the total share capital of the company carrying voting rights.

Voting through electronic means.— Every listed company or a company having at least 1000 (one thousand) shareholders, has to provide to its members, facility to exercise their right to vote at general meetings by electronic means. The Company may provide the facility on or before 1 January 2015. The GOI has specified the manner in which voting through electronic means is to be organised in the Companies (Management and Administration) Rules, 2014.

Poll.—The distinction between private and public companies in terms of eligibility of members for making a demand for poll has been omitted. Further, 1 (one) member, present in person or by proxy and having at least 1/10th (one-tenth) of the total voting power or holding shares on which an aggregate of not less than INR 5,00,000 (five lakhs) or such higher amount as may be prescribed has been paid up, has the power to demand poll.

Postal Ballot.—This has been made applicable to all companies irrespective whether they are listed or unlisted. The GOI has provided what specific items would require members' resolutions passed through postal ballot, including the alteration of the object clause of the memorandum, issue of shares with differential rights and buy back of shares. Generally, a company may pass any resolution by postal ballot instead of transacting such business at a meeting other than ordinary business and business in which directors and auditors have to be heard. In a meeting where electronic voting facilities are offered, a shareholder who is not able to participate in the general meeting personally and is also not exercising voting through electronic means, does not have an option to vote through postal ballot.

XIII. Audit

Appointment of Auditors.—Unlike appointment at each annual general meeting of shareholders under the preceding law, the Act requires an auditor to be appointed for a period of 5 (five) years and such appointment must be ratified at each Annual General Meeting (AGM).

Rotation of Auditors.—Under the 1956 Act, there was no provision for compulsory rotation of auditors. To ensure independence of the audit process, the Act has introduced the concept of mandatory rotation of auditors and audit firms. The Act provides that in case of listed companies, all unlisted public companies having a paid up share capital of INR 10,00,00,000 (ten crores) or more, all private limited companies having a paid up share capital of INR 20,00,00,000 (twenty crores) or more and all companies having paid up share capital below the abovementioned threshold limits, but having public borrowings from financial institutions, banks or public deposits of INR 50,00,00,000 (fifty crores) or more, but excluding small companies and one person companies, it would be mandatory to rotate auditors after one term of 5 (five) consecutive years in case of the appointment of an individual as auditor and after 2 (two) terms of 5 (five) consecutive years each in case of appointment of an audit firm with a uniform "cooling off" period of 5 (five) years in both cases. Further, firms with common partners in the outgoing audit firm, will also be ineligible for appointment as auditors during the cooling off period. The Act has allowed a transition period of 3 (three) years for complying with the requirements of rotation of auditors from the commencement of the Act.

Removal of Auditors.—The Act empowers the Tribunal in suo motu or on an application from the GOI or persons concerned, direct the company to change its auditor, if it is satisfied that the auditor has, directly or indirectly, acted in a fraudulent manner or sheltered or colluded in any fraud by, or in relation to, the company or its directors. In addition to the above, the Act prescribes that the permission of the shareholders by way of a special resolution would be required for removing an already appointed auditor of the company.

Restriction on auditors from performing non-audit services.—The Act proposes that any services to be rendered by an auditor should be approved by the board of directors or the audit committee of the company. Additionally, the auditor is restricted from providing non-audit services to ensure independence and accountability of auditor. Auditors or the audit firms providing non-audit services before the commencement of the Act have to comply with these provisions before the closure of the first financial year after the commencement of the Act.

National Financial Reporting Authority (NFRA).—The National Advisory Committee on Accounting and Auditing Standards, which has been constituted under the 1956 Act to advise the GOI on the formulation of accounting standards is sought to be replaced by the NFRA.

The NPA shall monitor and regulate the activities of both auditors and companies to enforce compliance of accounting and auditing standards.

XIV. Dividend. The provisions in the 1956 Act in relation to transfer of specified percentage of profits to reserves have been dispensed with. Instead, companies are now free to transfer such amounts to reserves as they may deem fit. In the event of inadequacy or absence of profits in any year, a company may declare dividend out of free reserves subject to the fulfilment of certain conditions. A company which has incurred any loss during the current financial year up to the end of the quarter immediately preceding the date of the interim dividend declaration cannot pay interim dividend at a rate higher than the average dividends declared during the immediately preceding 3 (three) financial years.

XV. Miscellaneous

Acceptance of Deposits.—Under the Act, companies can accept deposits only from members, if the same has been approved by members in a general meeting and subject to compliance of rules and conditions, which include (a) depositing at least 15% (fifteen per cent) of the amount maturing during the current and next financial year in a scheduled bank to be called as deposit repayment reserve account; (b) providing deposit insurance at least 30 (thirty) days before the issue of circular or advertisement or at least 30 (thirty) days before the date of renewal, as the case may be; (c) providing security, if any, for due repayment.

Only such public companies, which have such net worth of at least INR 100,00,00,000 (one hundred crores) or turnover of at least INR 500,00,00,000 (five hundred crores) and have obtained consent of the members by way of a special resolution can raise deposits from the public. Such companies, in addition to complying with the requirements stipulated for raising deposit from members will also have to procure credit rating from a recognised credit rating agency for accepting deposits.

Deposits accepted before commencement of the Act or any interest due on them will have to be repaid within 1 (one) year from commencement or from the date on which such payments are due, whichever is earlier.

These restrictions on acceptance of deposits are not to apply to banking companies, non-banking financial companies and housing finance companies.

Dormant Companies.—The Act has introduced the concept of a dormant company which would have to adhere to fewer compliance requirements. The Act defines a dormant company as one that has been formed for a future project or to hold an asset or intellectual property and has no significant accounting transactions. In such a case, the company may make an application to the RoC in the prescribed manner to obtain the status of a "dormant company". The Act also provides that in case of a company which has not filed its financial statements or annual returns for 2 (two) financial years consecutively, the RoC shall have the

power to issue a notice to the concerned company and enter the name of such company in the register maintained for dormant companies.

One Person Companies ("OPC").—A new business vehicle in the form of a single member company, which dispenses with the need to incorporate a company with a minimum of 2 (two) shareholders, as is currently the case, can be incorporated. However, the one person has to be a natural person who is an Indian citizen and has stayed in India for a period at least 182 (one hundred and eighty two) days during the immediately preceding one calendar year). The flexibility to incorporate OPCs, thus, has been greatly reduced due to such stringent conditions.

This would encourage entrepreneurship and corporatisation of business.

Small Companies.—The Act has defined a "small company" to be a company other than a public company having a paid-up share capital which does not exceed INR 50,00,000 (fifty lakhs) or such higher amount as may be prescribed not exceeding INR 5,00,00,000 (five crores) or turnover of which does not exceed INR 2,00,00,000 (two crores) or such higher amount as may be prescribed not exceeding INR 20,00,00,000 (twenty crores). All such small companies are exempted from the compliance requirements as set out in the Act such as information to be otherwise provided in the financial statements, manner of filing returns, etc.

Subsidiary Companies.—The Act provides that unless otherwise provided, a company can make an investment only through 2 (two) layers of investment companies. This provision does not affect a situation wherein an Indian company is acquiring a foreign company, which has investment subsidiaries beyond 2 (two) layers as per applicable law of the foreign country; and subsidiary company from having any investment subsidiaries for meeting requirements of applicable law.

Chapter on Sick Companies has been removed from the Companies Act. It has been added to Insolvency and Bankruptcy Code, 2016.

Winding up by Tribunal.—The amendment introduced in 2016 in the Companies Act has abolished the categories of creditors' and members' voluntary winding up. Now, there is only one kind of winding up and that is winding up by the Tribunal. Summary procedure winding up has also been removed.

The provision about winding up by Tribunal has also been retouched. The very first ground of winding up by Tribunal, namely, "inability to pay debts", has been removed and put under the Insolvency and Bankruptcy Code, 2016. This ground is now available in IB Code under the Chapter on Corporate Insolvency.

Powers of Official Liquidator.—On appointment, the official liquidator is forthwith required to take into his custody or control all assets, effects and actionable claims to which the company is entitled. Within 30 (thirty) days of his appointment, the official liquidator is required to

submit a report to the GOI in such manner and form as may be prescribed (Form E of the draft rules), including the report providing his opinion on any fraud being committed in promotion, formation or management of the affairs of the company. On receipt of this report, if the GOI is satisfied that any fraud has been committed by the promoters, directors or any other officer of the company, the GOI can direct further investigation into the affairs of the company.

Sale of Assets.—The official liquidator is required to expeditiously dispose off all the assets (movable or immovable) of the company within 60 (sixty) days of his appointment.

Recovery of Debts.—The official liquidator is required to serve notice of his appointment calling upon debtors of the company or the other contributors to deposit within 30 (thirty) days the amount payable to the company. If the debtor does not pay or deposit within 30 (thirty) days on the application of the official liquidator, the GOI may pass orders as it deems fit.

Settlement of Claims.—The creditors of the company are required to prove their claims within 30 (thirty) days of the receipt of the letter from the official liquidator. The official liquidator on receipt of such claims is then required to prepare a list of claims in such a manner as may be prescribed (Form J of the draft rules) and is required to communicate to each of the creditors informing them of the exceptions or rejections of his claims and reasons thereof. Any creditor aggrieved by the decision and reasons given by the official liquidator, may appeal to the GOI.

Disclaimer: Please note that this document is only a high level analysis of some of the many issues and introductions brought about by the Companies Act, 2013 and is not a comprehensive guide to the Act. It does not cover all the nuanced questions that arise under the Act. Professional advice should be sought on any question that arises under the Act.

Addenda

Companies (Amendment) Act, 2017

The enactment of the Companies Act, 2013 was a milestone of legal reforms in India, aimed at bringing Indian companies law at par with the global standards. The Act introduced significant changes in the companies law in India, especially in relation to accountability, disclosures, investor protection and corporate governance.

However, some practical difficulties were being faced in the implementation of the Companies Act, 2013. Representations from several quarters for further review and simplification of the 2013 Act were made to the Government of India. Pursuant to these representations, the Ministry of Corporate Affairs constituted a Companies Law Committee for addressing these concerns.

The Government considered many of the suggestions made by the Committee and introduced the Companies (Amendment) Bill, 2016 in the Lok Sabha in March 2016. It was later referred to the Standing Committee on Finance for further examination. After considering the suggestions of the Standing Committee and other related developments, the 2016 Bill renamed as the Companies (Amendment) Bill, 2017 was reintroduced in the Lok Sabha and passed in July 2017. The 2017 Amendment Bill was approved by the Rajya Sabha on 19 December 2017. It got assent from the President of India on 3 January 2018 and has been notified in the Official Gazette as Act I of 2018.

The Companies (Amendment) Act, 2017 addresses difficulties in implementation, facilitates ease of doing business, helps achieving better harmonisation with other statutes such as the Reserve Bank of India Act, 1934 and regulations made thereunder, and rectifies inconsistencies in the 2013 Act.

The changes can be broadly categorised into: definitions, loans and investments, related party transactions, corporate social responsibility, corporate governance, declaration and payment of dividend, financial reporting, audit and auditors, board matters, managerial remuneration, acceptance of deposits by companies, merger, amalgamation and reconstruction and other matters.

The following are the changes brought about by the Companies (Amendment) Act, 2017 which are linked to the affected pages of the book.

A-2 Addenda

At page 28, In the definition of subsidiary company, following change has been made [S. 2(87)]

In sub-clause (ii) for the words "total share capital", the words "total voting power" are to be substituted.

At page 38, Members' several liability [S. 3-A]

After Section 3, the following section shall be inserted, namely:

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

At page 39, Amendment of Section 7

Section 7 requires in its sub-section (1)(c) that documents for registration should contain an affidavit from such subscriber. This requirement has been reduced to a declaration instead of an affidavit.

At page 53, Advance reservation of name [S. 4(5)]

The existing provision is that an advance reservation of name was allowed for 60 days. The Amendment has reduced it to 20 days. But where reservation is sought by an existing company for change of its name, it may be allowed for 60 days.

At page 56, Amendment of Section 12

As at present after incorporation of the company, it has to establish its registered office within 15 days. The Amendment has extended this period to 30 days. Similarly, whenever any change occurred in the address of the company's registered office, the Registrar has to be informed within 15 days. The Amendment has extended this time also to 30 days.

At page 109, Amendment of Section 26: Matters to be stated in prospectus

In Section 26(1), after the words "signed and shall" the following has to be inserted:

"state such information and set out such reports on financial information as may be specified by the Securities and Exchange Board in consultation with the Central Government:

Provided that until the Securities and Exchange Board specifies the information and reports on financial information under this sub-section, the regulations made by the Securities and Exchange Board under the Securities and Exchange

Board of India Act, 1992, in respect of such financial information or reports on financial information shall apply."

(ii) Clauses (i), (ii) and (iii) are to be omitted.

At page 113, Amendment of Section 35: Civil liability for misstatement in prospectus

In Section 35 of the principal Act, in sub-section (2), after clause (b), the following clause shall be inserted, namely:

"(c) that, as regards every misleading statement purported to be made by an expert or contained in what purports to be a copy of or an extract from a report or valuation of an expert, it was a correct and fair representation of the statement, or a correct copy of, or a correct and fair extract from, the report or valuation; and he had reasonable ground to believe and did up to the time of the issue of the prospectus believe, that the person making the statement was competent to make it and that the said person had given the consent required by sub-section (5) of Section 26 to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration or, to the defendant's knowledge, before allotment thereunder.".

Amendment of Section 47: Voting rights

In Section 47(1) for the words, "provisions of Section 43 and Section 50(2)", the words "provisions of Section 43 and Section 50(2) and Section 188(1)" are to be substituted.

At page 130, Amendment of Section 73: Acceptance of deposits by companies

In Section 73 of the principal Act, in sub-section (2),—

(i) for clause (e), the following clause shall be substituted, namely:—

"(c) depositing, on or before the thirtieth day of April each year, such sum which shall not be less than twenty per cent of the amount of its deposits maturing during the following financial year and kept in a scheduled bank in a separate bank account to be called deposit repayment reserve account";

(ii) clause (f) shall be omitted;

(iii) in clause (e), for the words "such deposits", the following shall be substituted, namely:—

"such deposits and where a default had occurred, the company made good the default and a period of five years had lapsed since the date of making good the default";.

At page 131, Amendment of Section 74: Repayment of deposits etc, accepted before commencement of this Act

In Section 74(1) for clause (b), the following clause is to be substituted:

"(b) repay within three years from such commencement or on or before expiry of the period for which the deposits were accepted, whichever is earlier;

A-4 Addenda

Provided that renewal of such deposits shall be done in accordance with provisions of Chapter V and the rules made thereunder".

At page 132, Amendment of Section 76-A: Punishment for contravention of Section 73 or Section 76

In Section 76-A, in clause (a), for the words "one crore rupees" the words, "one crore rupees or twice the amount of deposit accepted by the company, whichever is lower" are to be substituted.

In clause (b).—

- (i) for the words "seven years or with fine", the words "seven years and with fine" shall be substituted.
- (ii) the words "or with both" are to be omitted.

At page 146, Amendment of Section 42: Issue of shares on private placement basis

Section 42 as it originally stood, has been replaced by new Section 42 which is as follows:

42. Issue of shares on private placement basis.—(1) A company may, subject to the provisions of this section, make a private placement of securities.

(2) A private placement shall be made only to a select group of persons who have been identified by the Board (herein referred to as "identified persons"), whose number shall not exceed fifty or such higher number as may be prescribed [excluding the qualified institutional buyers and employees of the company being offered securities under a scheme of employees stock option in terms of provisions of clause (b) of sub-section (1) of Section 62], in a financial year subject to such conditions as may be prescribed.

(3) A company making private placement shall issue private placement offer and application in such form and manner as may be prescribed to identified persons, whose names and addresses are recorded by the company in such manner as may be prescribed:

Provided that the private placement offer and application shall not carry any right of renunciation.

Explanation I.—"private placement" means any offer or invitation to subscribe or issue of securities to a select group of persons by a company (other than by way of public offer) through private placement offer-cum-application, which satisfies the conditions specified in this section.

Explanation II.—"qualified institutional buyer" means the qualified institutional buyer as defined in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, as amended from time to time, made under the Securities and Exchange Board of India Act, 1992.

Explanation III.—If a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognised stock exchange in or outside India, the same shall

be deemed to be an offer to the public and shall accordingly be governed by the provisions of Part I of this Chapter.

(4) Every identified person willing to subscribe to the private placement issue shall apply in the private placement and application issued to such person along with subscription money paid either by cheque or demand draft or other banking channel and not by cash:

Provided that a company shall not utilise monies raised through private placement unless allotment is made and the return of allotment is filed with the Registrar in accordance with sub-section (8).

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

Provided that, subject to the maximum number of identified persons under sub-section (2), a company may, at any time, make more than one issue of securities to such class of identified persons as may be prescribed.

(6) A company making an offer or invitation under this section shall allot its securities within sixty days from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen days from the expiry of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent per annum from the expiry of the sixtieth day:

Provided that monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than

- (a) for adjustment against allotment of securities; or
- (b) for the repayment of monies where the company is unable to allot securities.

(7) No company issuing securities under this section shall release any public advertisements or utilise any media, marketing or distribution channels or agents to inform the public at large about such an issue.

(8) A company making any allotment of securities under this section, shall file with the Registrar a return of allotment within fifteen days from the date of the allotment in such manner as may be prescribed, including a complete list of all allottees, with their full names, addresses, number of securities allotted and such other relevant information as may be prescribed.

(9) If a company defaults in filing the return of allotment within the period prescribed under sub-section (8), the company, its promoters and directors shall be liable to a penalty for each default of one thousand rupees for each day during which such default continues but not exceeding twenty-five lakh rupees.

(10) Subject to sub-section (11), if a company makes an offer or accepts monies in contravention of this section, the company, its promoters and directors shall be liable for a penalty which may extend to the amount raised through the private placement or two crore rupees, whichever is lower, and the company shall

also refund all monies with interest as specified in sub-section (6) to subscribers within a period of thirty days of the order imposing the penalty.

(11) Notwithstanding anything contained in sub-section (9) and sub-section (10), any private placement issue not made in compliance of the provisions of sub-section (2) shall be deemed to be a public offer and all the provisions of this Act and the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 shall be applicable.

At page 189, Amendment of Section 53: Prohibition on issue of shares at discount

In Section 53(2), for the words "discounted price", the word "discount" is to be substituted.

After sub-section (2), the following sub-section shall be inserted, namely:—

"(2-A) Notwithstanding anything contained in sub-sections (1) and (2), a company may issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the Reserve Bank of India under the Reserve Bank of India Act, 1934 or the Banking (Regulation) Act, 1949."

At page 189, Amendment of Section 54: Issue of sweat equity shares

In Section 54(I), clause (c) is to be omitted.

At page 192, Share premium account [S. 52] [S. 2(57)]

For the words "and securities premium account", the words "securities premium account and debit or credit balance of profit and loss account" are to be substituted.

At page 213, Amendment of Section 94: Place of keeping and Inspection of registers, returns, etc

In sub-section (1), in the first proviso, the words "and the Registrar has been given a copy of the proposed special resolution in advance" are required to be omitted.

In sub-section (3), the following proviso has to be inserted:

"Provided that such particulars of the register or index or return as may be prescribed shall not be available for inspection under sub-section (2) or for taking extracts or copies under this sub-section."

At page 215, Amendment of Section 89: Declaration in respect of beneficial interest in any shares

- (i) in sub-section (6), the words and figures, "within the time specified under Section 403" have been deleted;
- (ii) in sub-section (7), the words "under the first proviso in Section 403(1)" have been deleted and in their place the word "therin" has been substituted;
- (iii) Sub-section (10), has been added after sub-section (9);

"(10) For the purposes of this section and Section 90, beneficial interest in a share includes, directly or indirectly, through any contract, arrangement

or otherwise, the right or entitlement of a person alone or together with any other person to—

- (i) exercise or cause to be exercised any or all of the rights attached to such share; or
- (ii) receive or participate in any dividend or other distribution in respect of such share."

At page 217, Substitution of new section for Section 90: Investigation of beneficial ownership of shares... .

The section deals with investigation of beneficial ownership of shares. Sub-section (1) identifies a person who can be regarded as a significant beneficial owner of shares. The section says that it covers every individual, who by himself or along with others or a trust or persons resident outside India, holds beneficial interest of not less than 25 per cent, or such other percentage as may be prescribed in shares of the company or right to exercise or exercising of significant influence or control, as defined in Section 2(27). Such person has to make a declaration to the company specifying the shares of his interest and other particulars. The declaration has to be in such manner and within such period of the acquisition or any change in it, as may be prescribed. The Central Government can prescribe a class or classes of persons who would be exempt from the declaration under the sub-section.

Register of declared interest [S. 90(2)].—Every company has to maintain a register for noting down the details of interests declared and of persons involved, giving their date of birth, address, details of ownership in company and such other details as may be prescribed.

Inspection of register [S. 90(3)].—The register shall be open to inspection by any member of the company on payment of such fees as may be prescribed.

Return of register to be filed with Registrar [S. 90(4)].—The company concerned has to file with the Registrar a return of the significant beneficial owners and changes, if any. The return has to contain names, addresses, and other details as may be prescribed within such time and manner as may be prescribed.

Notice to others whether members or not [S. 90(5)].—The company has to give notice in the prescribed manner to any person, whether member or not, about whom the company knows or has a reasonable cause to believe—(a) to be a significant beneficial owner of the company; (b) to be having knowledge of the identity of a significant beneficial owner or another person likely to have such knowledge; (c) to have been a significant beneficial owner of the company at any time during the three years immediately preceding the date on which the notice is given. It is necessary that such person should not be a registered beneficial owner with the company as required under this section. Sub-section (6) requires that the information required by the notice is to be given by a concerned person within a period not exceeding 30 days from the date of notice.

Application to Tribunal [Sub-s. (7), (8) & (9)].—Where the notified person fails to give the company the information required by the notice within the specified time or the information given is not satisfactory, the company shall apply to the

A-8 Addenda

Tribunal within 15 days of expiry of the notice period for an order directing that person to be subject to restrictions with regard to transfer of interest, suspension of all rights attached to the shares and such other matters as may be prescribed. The Tribunal may give an opportunity to the parties to be heard. It may then make such order restricting the rights attached with the shares within a period of 60 days of receipt of the application or such other period as may be prescribed. The company or the person aggrieved by the order may by seeking an order of the Tribunal relax or lift the restrictions which have been placed upon the person concerned within a period of 60 days of receipt of application or such other period as may be prescribed.

Punishment for failure to make declaration [Sub-s. (10)].—If the person in question fails to make the declaration, he can be punished with fine which is not to be less than Rs 1 lakh but which may extend to Rs 10 lakhs; where the failure is a continuing one, a further fine may be imposed which may extend to one thousand rupees for every day after the first during which the failure continues.

Where the company required to maintain the register and file the information fails to do so or denies inspection, the company and every officer of the company who is in default becomes punishable with fine which is not to be less than Rs 10 lakhs but which may extend to Rs 50 lakhs. Where the failure is a continuing one, the punishment may be with a further fine extending up to one thousand rupees for every day after the first day during which the default continues. [Sub-s. (11)]

If any person wilfully furnishes any false or incorrect information or suppresses any material information of which he is aware in the declaration made under this section, he becomes liable to an action under Section 447. [Sub-s. (12)]

At page 219, Amendment of Section 92, Annual returns

In sub-section (1), clause (c) is to be omitted. It talks of indebtedness of the company. In clause (j), the words "indicating their names, addresses, countries of incorporation, registration and percentage of shareholding held by them" have to be omitted.

After the proviso, a new proviso is to be inserted which is as follows:

"Provided further that the Central Government may prescribe abridged form of annual return for "One Person Company, small company and such other class or classes of companies as may be prescribed."

Sub-section (3) of Section 92 has to be substituted with the following:

"Every company shall place a copy of the annual return on the website of the company, if any, and the web-link of such annual return shall be disclosed in the Board's report."

In sub-section (4), the words and figures, "within the time as specified, under Section 403" are to be omitted.

In sub-section (5), for the words and figures, "under Section 403 with additional fees" the word "therein" is to be substituted.

At page 220, Amendment of Section 93: Return to be filed with Registrar in case of promoters' stake changes

This section provided for a return to be filed when promoters' stake changes. This section is now omitted.

At page 236, Amendment of Section 62: Further issue of share capital

In Section 62 of the principal Act,—

- (i) in sub-section (1), in clause (c), for the words "of a registered valuer subject to such conditions as may be prescribed", the words and figures "of a registered valuer, subject to the compliance with the applicable provisions of Chapter III and any other conditions as may be prescribed" shall be substituted;
- (ii) for sub-section (2), the following sub-section shall be substituted, namely:—
"(2) The notice referred to in sub-clause (i) of clause (a) of sub-section (1) shall be dispatched through registered post or speed post or through electronic mode or courier or any other mode having proof of delivery to all the existing shareholders at least three days before the opening of the issue.".

At page 265, Amendment of Section 149: Company to have Board of Directors

In Section 149, for sub-section (3) the following has to be substituted:

- (3) Every company shall have at least one director who stays in India for a total period of not less than one hundred and eighty-two days during the financial year:

Provided that in case of a newly incorporated company the requirement under this sub-section shall apply proportionately at the end of the financial year in which it is incorporated."

In sub-section (6):

- (i) in clause (e), for the words "pecuniary relationship", the words "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," shall be substituted;

- (ii) for clause (a), the following clause shall be substituted, namely:—

"(d) none of whose relatives—

- (i) is holding any security 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;

- (ii) 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
 - (iii) 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);
- (c) in clause (e), in sub-clause (i), the following proviso shall be inserted, namely—

"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."

At page 268, Amendment of Section 152: Appointment of directors

In Section 152(3) after the word "Section 154", the following has to be inserted: "or any other number as may be prescribed under Section 153."

In Section 152(4) after the word "Number", the following has to be inserted: "or such other number as may be prescribed under Section 153.

At page 270, Amendment of Section 160: Right of persons other than retiring directors for directorship

In Section 160(1) the following proviso has to be inserted:

"Provided that requirements of deposit of amount shall not apply in case of appointment of an independent director or a director recommended by the Nomination and Remuneration Committee, if any, constituted under sub-section (1) of Section 178 or a director recommended by the Board of Directors of the Company, in the case of a company not required to constitute Nomination and Remuneration Committee".

At page 273, Amendment of Section 161: Appointment of additional director, alternate director, and nominee director

In Section 161(2) after the words "alternate directorship for any other director in the company", the words "or holding directorship in the same company" are to be inserted.

In Section 161(4) the words "In the case of a public company" are to be omitted. After the words "meeting of the Board", the words "which shall be subsequently approved by members in the immediate next general meeting" are to be inserted.

At page 274, Amendment of Section 153: Application for allotment of Director Identification Number

In Section 153 the following proviso has to be inserted:

"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".

At page 275, Amendment of Section 157: Company to Inform Director Identification Number to Registrar

In Section 157(I) the words "within the time specified under Section 403" are to be omitted.

In Section 157(2), the words "before the expiry of the period specified under Section 403 with additional fee", are to be omitted.

At page 275, Amendment of Section 164: Disqualification for appointment of director

In sub-section (2), the following proviso shall be inserted, namely:

"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."

In sub-section (3), for the proviso, the following proviso shall be substituted, namely:

"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"

At page 277, Amendment of Section 165: Number of directorship

A second Explanation is to be added to the section:

"Explanation II.—For reckoning the limit of directorships of twenty companies, the directorship in a dormant company shall not be included."

At page 277, Amendment of Section 167: Vacation of office of director

In Section 167(1)(g) the following proviso is to be inserted:

"Provided that where he incurs disqualification under sub-section (2) of Section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section."

In Section 167(1)(f), in place of the existing proviso, the following new proviso is to be inserted:

"Provided that the office shall not be vacated by the director in case of orders referred to in clauses (a) and (f)—

- (i) for thirty days from the date of conviction or order of disqualification;
- (ii) where an appeal or petition is preferred within thirty days as aforesaid against the conviction resulting in sentence or order, until expiry of seven days from the date on which such appeal or petition is disposed of; or

(iii) where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed of."

At page 284, Amendment of Section 168: Resignation of director

In Section 168(1) in the proviso, for the words "director shall also forward", the words "director may also forward" are to be substituted.

At page 292, Amendment of Section 180: Restrictions on powers of Board

In Section 180(1)(c) for the words "paid-up share capital and free reserves", the words "paid-up share capital, free reserves and securities premium" are to be substituted.

At page 293, Amendment of Section 177: Audit Committee

In Section 177(1) for the words "every listed company," the words "every listed public company" are to be substituted.

In Section 177(4) clause (b), after the proviso, following provisos are to be inserted:

"Provided further that in case of transaction, other than transactions referred to in Section 188, and where Audit Committee does not approve the transaction, it shall make its recommendations to the Board;

Provided also that in case any transaction involving any amount not exceeding one crore rupees is entered into by a director or officer of the company without obtaining the approval of the Audit Committee and it is not ratified by the Audit Committee within three months from the date of the transaction, such transaction shall be voidable at the option of the Audit Committee and if the transaction is with the related party to any director or is authorised by any other director, the director concerned shall indemnify the company against any loss incurred by it;

Provided also that the provisions of this clause shall not apply to a transaction, other than a transaction referred to in Section 188, between a holding company and its wholly owned subsidiary company."

At page 295, Amendment of Section 178: Nomination and Remuneration Committee and Stakeholders Relationship Committee

In Section 178(1) for the words "every listed company", the words "every listed public company" are to be substituted.

In sub-section (2), for the words "shall carry out evaluation of every director's performance", the words "shall specify the manner for effective evaluation of performance of Board, its committees and individual directors to be carried out either by the Board, by the Nomination and Remuneration Committee or by an independent external agency and review its implementation and compliance" shall be substituted;

In sub-section (4), in clause (c), for the proviso, the following proviso shall be substituted, namely:

"Provided that such policy shall be placed on the website of the company, if any, and the salient features of the policy and changes thereon, if any, along with the web address of the policy, if any, shall be disclosed in the Board's report";

In sub-section (3), in the proviso, for the words "non-consideration of resolution of any grievance", the words "inability to resolve or consider any grievance" shall be substituted.

At page 325, Amendment of Section 184: Disclosure of interest by director

In Section 184(4) the words "shall not be less than fifty thousand rupees but which" are to be omitted.

In Section 184(5)(b) the following clause is to be substituted:

"(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.".

At page 332, Amendment of Section 173: Meetings of Board

In Section 173(2) after the first proviso, the following proviso is to be inserted:

"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."

At page 335, The expression "interested director" occurs

This expression "interested director" was defined in Section 2(19). Now this clause has been omitted.

At page 338, Amendment of Section 194: Prohibition on forward dealings in securities of company by director or key managerial personnel

The Amendment has deleted this section.

At page 338, Amendment of Section 195: Prohibition on insider trading of securities

The Amendment has deleted this section.

At page 339, Amendment of Section 196: Appointment of managing director, whole-time director or manager

In Section 196, sub-section (3), clause (a), after the proviso, the following proviso is to be inserted:

"Provided further that where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board,

that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made."

In Section 196, sub-section (4) for the words "specified in that Schedule", the words "specified in Part I of that Schedule" are to be substituted.

At page 343, Amendment of Section 197: Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits

In Section 197, sub-section (1) in the first proviso, the words "with the approval of the Central Government" are to be omitted.

In the second proviso, after the words "general meeting", the words "by a special resolution" are to be inserted.

After the second proviso, the following new proviso is to be inserted:

"Provided also that, where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining the approval in the general meeting."

In Section 197, sub-section (3) the words "and if it is not able to comply with such provisions, with the previous approval of the Central Government" are to be omitted.

For Section 197, sub-section (9), the following sub-section is to be substituted:

"(9) if any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without approval required under this section, he shall refund such sums to the company, within two years or such lesser period as may be allowed by the company, and until such sum is refunded, hold it in trust for the company."

In sub-section (10),

(i) for the words "permitted by the Central Government", the words "approved by the company by special resolution within two years from the date the sum becomes refundable" shall be substituted;

(ii) the following proviso shall be inserted, namely:—

"Provided that where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining approval of such waiver."

In Section 197, sub-section (11) the words "and if such conditions are not being complied, the approval of the Central Government had been obtained," are to be deleted.

After sub-section (15), the following sub-sections shall be inserted, namely:—

"(16) The auditor of the company shall, in his report under Section 143, make a statement as to whether the remuneration paid by the company to its directors is in accordance with the provisions of this section, whether remuneration paid to any director is in excess of the limit laid down under this section and give such other details as may be prescribed.

(17) On and from the commencement of the Companies (Amendment) Act, 2017, any application made to the Central Government under the provisions of this section [as it stood before such commencement], which is pending with that Government shall abate, and the company shall, within one year of such commencement, obtain the approval in accordance with the provisions of this section, as so amended."

At page 344, Amendment of Section 198: Calculation of profits

In sub-section (3), clause (a), after the words "sold by the company", the words "unless the company is an investment company as referred to in clause (j) of the Explanation to Section 186" are to be inserted.

In sub-section (3), after the clause (e), the following clause is to be added:

"(f) any amount representing unrealised gains, notional gains or revaluation of assets"

In sub-section (4), clause (i), the words "which begins at or after the commencement of this Act" are to be deleted.

At page 346, Amendment of Section 200: Central Government or company to fix limit with regard to remuneration

In Section 200, the words "the Central Government or" appearing at both the places are to be omitted.

At page 346, Amendment of Section 201: Forms of, and procedure in relation to, certain applications

In sub-section (1) for the words "this Chapter", the words "Section 196" are to be substituted.

In sub-section (2), clause (a) for the words "any of the sections aforesaid", the words "Section 196" are to be substituted.

At page 347, Key-managerial personnel [S. 2(51)]

In the list of categories, after the (iv) category, the word "and" has to be dropped. In place of clause (v) the following has to be inserted:

"(v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board, and (vi) such other officer as may be prescribed."

At page 349, Substitution of Section 185: Loans to directors, etc

For Section 185 of the principal Act, the following section shall be substituted, namely:

'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 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 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, wherent 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.
- (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.'

At page 353, Related party transactions [S. 188]

In place of clause (vii), the following has to be substituted:

- "(vii) any body corporate which is—
 (A) a holding, subsidiary or an associate company of such company;
 (B) a subsidiary of a holding company to which it is also a subsidiary; or
 (C) an investing company or the venturer of the company;"

Explanation.—For the purpose of this clause, "the investing company or the venturer of a company" means a body corporate whose investment in the company would result in the company becoming an associate company of the body corporate.

At page 353, Amendment of Section 188: Related party transactions

In Section 188, sub-section (1), after the second proviso, the following proviso shall be inserted, namely:—

"Provided also that nothing contained in the second proviso shall apply to a company in which ninety per cent or more members, in number, are relatives of promoters or are related parties;"

In sub-section (3), for the words "shall be voidable at the option of the Board", the word "shall be voidable at the option of the Board or, as the case may be, of the shareholders" shall be substituted.

At page 367, Amendment of Section 96: Annual General Meeting

Proviso to sub-section (2) is to be substituted as follows:

"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—

At page 370, Amendment of Section 100: Calling of Extraordinary General Meeting

The following proviso has to be inserted:

"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."

At page 374, Amendment of Section 101: Notice of meeting

In Section 101 of the Act, in sub-section (1) the provision is to be substituted by a new proviso:

"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 purpose of this sub-section in respect of the former resolution or resolutions and not in respect of the latter."

At page 391, Amendment of Section 110: Postal ballot

A proviso is to be added to sub-section (1) of Section 110:

"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."

At page 394, Amendment of Section 117: Resolutions and agreements to be filed

- (i) in sub-section (1), the words and figures "within the time specified under Section 403" shall be omitted;
- (ii) in sub-section (2)—
 - (a) for the words and figures "under Section 403 with additional fees", the word "therein" shall be substituted;
 - (b) for the words "not be less than five lakh rupees", the words "not be less than one lakh rupees" shall be substituted;

- (c) for the words "one lakh rupees", the words "fifty thousand rupees" shall be substituted;
- (iii) in sub-section (3),—
 - (a) clause (e) shall be omitted;
 - (b) in clause (g), in the proviso, the word "and" shall be omitted and the following proviso shall be inserted, namely:—
"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.".

At page 398, Amendment of Section 121: Report on Annual General Meeting

In sub-section (2), the words and figures "within the time as specified, under Section 403" have to be omitted.

In sub-section (3), for the words and figures "under Section 403 with additional fees", the word "therein" shall be substituted.

At page 400, Amendment of Section 21

Under this section authentication of documents had to be made by an officer of the company. The Amendment has allowed it to be done by an officer or employee of the company.

At page 403, Amendment of Section 123: Declaration of dividend

The Amendment requires that in Section 123(1)(a), for the words, "both; or", the word "both" is to be substituted.

A new proviso given below has to be inserted:

"Provided that in computing profits any amount representing unrealised gains, nominal gains or revaluation of assets and any change in carrying amount of an asset or of a liability on measurement of the asset or the liability at fair value shall be excluded; or";

In the second proviso, for the words "transferred by the company to the reserves", the words "transferred by the company to the free reserves" are to be substituted.

In place of sub-section (3), the following sub-section is to be substituted:

"(3) The Board of Directors of a company may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting out of the surplus in the profit and loss account or out of profits of the financial year for which such interim dividend is sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend:

Provided that in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during immediately preceding three financial years."

At page 418, Turnover, its definition substituted [S. 2(91)]

(91) "turnover" means the gross amount of revenue recognised in the profit and loss account from the sale, supply, or distribution of goods or on account of services rendered, or both, by a company during a financial year.'

At page 423, Amendment of Section 129: Financial statement

In Section 129, sub-section (3) has to be replaced by the following:

"(3) Where a company has one or more subsidiaries or associate companies, it shall, in addition to financial statements provided under sub-section (2), prepare a consolidated financial statement of the company and of all the subsidiaries and associate companies in the same form and manner as that of its own and in accordance with applicable accounting standards, which shall also be laid before the annual general meeting of the company along with the laying of its financial statement under sub-section (2):

Provided that the company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or subsidiaries and associate company or companies in such form as may be prescribed:

Provided further that the Central Government may provide for the consolidation of accounts of companies in such manner as may be prescribed."

At page 424, Amendment of Section 130: Reopening of accounts on court's or tribunal's orders

In sub-section (1) of Section 130, after the words "regulatory body or authorities concerned," the following should be added: "or any other person concerned." Further after the words "the body or authority concerned," the following words are to be added: "or the other person concerned."

After sub-section (2), the following new sub-section has to be added:

"(3) No order shall be made under sub-section (1) in respect of re-opening of books of account relating to a period earlier than eight financial years immediately preceding the current financial year:

Provided that where a direction has been issued by the Central Government under the proviso to sub-section (3) of Section 128 for keeping of books of account for a period longer than eight years, the books of account may be ordered to be re-opened within such longer period."

At page 425, Amendment of Section 132: Constitution of National Financial Reporting Authority

Sub-section (4) of Section 132, clause (c), sub-clause (A), item II prescribed "ten lakh rupees", the Amendment has reduced it to "five lakh rupees".

In Section 132(5), for the words "the Appellate Authority constituted under sub-section (6) in such manner as may be prescribed", the words "the Appellate Tribunal in such manner and on payment of such fee as may be prescribed" are to be substituted.

Sub-sections 6, 7, 8 and 9 are to be omitted.

At page 427, Amendment of Section 134: Financial Statement, Board's Report, etc

The Amendment of the section requires substitution of sub-section (1) as follows:

"(1) The financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by the chairperson of the company where he is authorised by the Board or by two directors out of which one shall be managing director, if any, and the Chief Executive Officer, the Chief Financial Officer and the company secretary of the company, wherever they are appointed, or in the case of One Person Company, only by one director, for submission to the auditor for his report thereon."

In Section 134(2) for clause (a), the following is to be substituted:

"(a) the web address, if any, where annual return referred to in sub-section (3) of Section 92 has been placed."

In clause (p) for the words "annual evaluation has been made by the Board of its own performance and that of its committees and individual directors", the following has to be substituted: "annual evaluation of the performance of the Board, its Committees and of individual directors has been made."

After clause (q) the following provisos are to be added.

"Provided that where disclosures referred to in this sub-section have been included in the financial statements, such disclosures shall be referred to instead of being repeated in the Board's report:

Provided further that where the policy referred to in clause (e) or clause (p) is made available on company's website, if any, it shall be sufficient compliance of the requirements under such clauses if the salient features of the policy and any change therein are specified in brief in the Board's report and the web-address is indicated therein at which the complete policy is available."

After sub-section (3), the following sub-section shall be inserted, namely:—

"(3-A) The Central Government may prescribe an abridged Board's report, for the purpose of compliance with this section by One Person Company or small company."

At page 429, Amendment of Section 135: Corporate Social Responsibility

In Section 135(1), for the words "any financial year", the words "the immediately preceding financial year" are to be substituted.

The following proviso is to be inserted:

"Provided that 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."

In Section 135(3), in clause (x) for the words and figures "as specified in Schedule VII", the words and figures "in areas or subject, specified in Schedule VII" are to be substituted.

In Section 135(5), the following Explanation is to be substituted:

'Explanation.—For the purposes of this section "net profit" shall not include such sums as may be prescribed, and shall be calculated in accordance with the provisions of Section 198.'

At page 429, Amendment of Section 136: Right of members to copies of audited financial statement

In Section 136(1) the words "Without prejudice to the provisions of Section 101" are to be omitted.

In the first proviso, for the words "Provided that", the following is to be substituted:

"Provided that if the copies of the documents are sent less than twenty-one days before the date of the meeting, they shall, notwithstanding that fact, be deemed to have been duly sent if it is so agreed by members—

- (a) holding, if the company has a share capital, majority in number 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 the meeting;

Provided further that";

In the second proviso, for the words "Provided further", the words, "Provided also" shall be substituted:

"Provided also that every listed company having a subsidiary or subsidiaries shall place separate audited accounts in respect of each of subsidiary on its website, if any:

Provided also that a listed company which has a subsidiary incorporated outside India (herein referred to as "foreign subsidiary")—

- (a) where such foreign subsidiary is statutorily required to prepare consolidated financial statement under any law of the country of its incorporation, the requirement of this proviso shall be met if consolidated financial statement of such foreign subsidiary is placed on the website of the listed company;
- (b) where such foreign subsidiary is not required to get its financial statement audited under any law of the country of its incorporation and which does not get such financial statement audited, the holding Indian listed company may place such unaudited financial statement on its website and where such financial statement is in a language other than English, a translated copy of the financial statement in English, shall also be placed on the website.);

In sub-section (2), the following proviso shall be inserted, namely:—

"Provided that every company having a subsidiary or subsidiaries shall provide a copy of separate audited or unaudited financial statements, as the case

may be, as prepared in respect of each of its subsidiary to any member of the company who asks for it."

At page 430, Amendment of Section 137: Copy of financial statement to be filed with Registrar

In Section 137(1) the words "within the time specified under Section 403" are to be omitted.

In the second proviso the words "within the time specified under Section 403" are to be omitted.

After the fourth proviso, the following proviso is to be inserted, namely:

"Provided also that in the case of a subsidiary which has been incorporated outside India (herein referred to as "foreign subsidiary"), which is not required to get its financial statement audited under any law of the country of its incorporation and which does not get such financial statement audited, the requirements of the fourth proviso shall be met if the holding Indian company files such unaudited financial statement along with a declaration to this effect and where such financial statement is in a language other than English, along with a translated copy of the financial statement in English."

In Section 137(2) the words "within the time specified, under Section 403" are to be deleted.

In Section 137(3) for the words "in Section 403" the word "therein" is to be substituted.

At page 434, Amendment of Section 139: Appointment of auditors

In Section 139, in sub-section (1) the first proviso is to be omitted.

At page 436, Amendment of Section 140: Removal, resignation of auditor and giving of special notice

In Section 140(3) in place of the words "fifty thousand rupees", the words "fifty thousand rupees or the remuneration of the auditor, whichever is less" are to be substituted.

At page 437, Amendment of Section 141: Eligibility, qualifications, and disqualification of auditors

In Section 141(3)(i) the following clause is to be substituted:

(i) a person who, directly or indirectly, renders any service referred to in Section 144 to the company or its holding company or its subsidiary company.

Explanation.—For the purposes of this clause, the term "directly or indirectly" shall have the meaning assigned to it in the Explanation to Section 144.

At page 438, Amendment of Section 143: Powers and duties of auditors and auditing standards

In Section 143 of the principal Act—

- (i) in sub-section (1), in the proviso, for the words "its subsidiaries", at both the places, the words "its subsidiaries and associate companies" shall be substituted;
- (ii) in sub-section (3), in clause (i), for the words "internal financial controls system", the words "internal financial controls with reference to financial statements" shall be substituted;
- (iii) in sub-section (14), in clause (a), for the words "cost accountant in practice", the words "cost accountant" shall be substituted.

At page 441, Amendment of Section 147: Punishment for contravention of provisions of Sections 139–146

In Section 147(2), after the words "five lakh rupees", the words "or four times the remuneration of the auditor, whichever is less" are to be inserted.

In the proviso, for the words "and with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees", the words "and with fine which shall not be less than fifty thousand rupees but which may extend to twenty-five lakh rupees or eight times the remuneration of the auditor, whichever is less" shall be substituted.

In sub-section (3), in clause (ii), for the words "or to any other persons", the words "or to members or creditors of the company" shall be substituted.

In sub-section (5), the following proviso shall be inserted, namely:—

"Provided that in case of criminal liability of an audit firm, in respect of liability other than fine, the concerned partner or partners, who acted in a fraudulent manner or abetted or, as the case may be, colluded in any fraud shall only be liable."

At page 450, Amendment of Section 148: Central Government to specify audit of items of cost in respect of certain companies

In Section 148(3):

- (a) for the words "Cost Accountant in practice", the words "cost accountant" should be substituted.
- (b) in the Explanation, for the words "Institute of Cost and Works Accountants of India", the words "Institute of Cost Accountants of India" are to be substituted.

In Section 148(5) in the proviso, for the words "cost accountant in practice", the words "cost accountant" are to be substituted.

At page 450, Definition of Cost Accountant [S. 148]

In Section 2(28) substituted definition of "Cost Accountant" has been given as follows:

"Cost Accountant" means a cost accountant as defined in clause (b) of sub-section (1) of Section 2 of the Cost and Works Accountants Act, 1959 (23 of 1959) and who holds a valid certificate of practice under sub-section (1) of Section 6 of that Act;

At page 457, Amendment of Section 77: Duty to register charges, etc

The following proviso is to be added at the end of sub-section (1), after the third proviso:

"Provided also that this section shall not apply to such charges as may be prescribed in consultation with the Reserve Bank of India."

At page 457, Amendment of Section 78: Application for registration of charge

The Amendment requires that the charge should be registered within the period of 30 days referred to in Section 77(1).

At page 457, Amendment of Section 82: Company to report satisfaction of charge

The words "and the provisions of sub-section (1) of Section 77 shall, as far as may be, apply to an intimation given under this section" are to be deleted. The following proviso is to be inserted:

"Provided that the Registrar may, on an application by the company or the charge holder, allow such intimation of payment or satisfaction to be made within the period of three hundred days of such payment or satisfaction on payment of such additional fees as may be prescribed."

At page 465, Amendment of Section 441: Compounding of certain offences

In Section 441, in sub-section (1), for the words "with fine only", the words "not being an offence punishable with imprisonment only, or punishable with imprisonment and also with fine" are to be substituted.

At page 467, Amendment of Section 186: Loans and investment by company

In Section 186 of the principal Act,—

- (i) In sub-section (2), the following Explanation shall be inserted, namely:—

'Explanation.—For the purposes of this sub-section, the word "person" does not include any individual who is in the employment of the company;

- (ii) for sub-section (3), the following sub-section shall be substituted, namely:—

"(3) Where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under sub-section (2), no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting:

Provided that where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company, the requirement of this sub-section shall not apply:

Provided further that the company shall disclose the details of such loans or guarantee or security or acquisition in the financial statement as provided under sub-section (4)."

(ii) for sub-section (1), the following sub-section shall be substituted, namely:—

"(1) Nothing contained in this section, except sub-section (1), shall apply :—

- (a) to any loan made, any guarantee given or any security provided or any investment made by a banking company, or an insurance company, or a housing finance company in the ordinary course of its business, or a company established with the object of and engaged in the business of financing industrial enterprises, or of providing infrastructural facilities;
- (b) to any investment—
 - (i) made by an investment company;
 - (ii) made in shares allotted in pursuance of clause (a) of sub-section (1) of Section 62 or in shares allotted in pursuance of rights issues made by a body corporate;
 - (iii) made, in respect of investment or lending activities, by a non-banking financial company registered under Chapter III-B of the Reserve Bank of India Act, 1934 (2 of 1934) and whose principal business is acquisition of securities."
- (c) in the Explanation, in clause (a), after the words "other securities" the following shall be inserted, namely:—

"and a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in the form of investment in shares, debentures or other securities constitute not less than fifty per cent of its total assets, or if its income derived from investment business constitutes not less than fifty per cent as a proportion of its gross income."

At page 478, Definition of debenture [S. 2(30)]

To the definition of "debenture" as given under Section 2(30), the following provisions have been added:

"Provided that—

- (a) the instruments referred to in Chapter III-D of the Reserve Bank of India Act, 1934 (2 of 1934); and
- (b) such other instrument, as may be prescribed by the Central Government in consultation with the Reserve Bank of India, issued by a company, shall not be treated as debenture."

At page 548, Amendment of Section 247: Valuation of registered valuers

In sub-section (2), clause (d), for the words "during or after the valuation of assets", the words "during a period of three years prior to his appointment as valuer or three years after the valuation of assets was conducted by him" are to be substituted.

At page 567, Amendment of Section 223: Inspector's report

In Section 223, in sub-section (A), after the words "may be obtained", the words "by members, creditors or any other person whose interest is likely to be affected" are to be inserted.

At page 568, Amendment of Section 216: Investigation of ownership of company

In sub-section (1), clause (b), for the word "company" the words "company; or" are to be substituted.

After sub-section (1), clause (b), the following clause is to be inserted:

"(c) who have or had beneficial interest in shares of a company or who are or have been beneficial owners or significant beneficial owner of a company".

At page 582, In the definition of "small company" following amendments have been made [S. 2(85)]

- (a) in sub-clause (i), for the words "five crore rupees", the words "ten crore rupees" shall be substituted;
- (b) in sub-clause (ii), -

 - (A) for the words "as per its last profit and loss account", the words "as per profit and loss account for the immediately preceding financial year" shall be substituted;
 - (B) for the words "twenty crore rupees", the words "one hundred crore rupees" shall be substituted.

At page 588, Amendment of Section 391: Application of Sections 34 to 36 and Chapter XX

In Section 391, for sub-section (2), the following sub-section is to be substituted:

"(2) Subject to the provisions of Section 376, the provisions of Chapter XX shall apply mutatis mutandis for closure of the place of business of a foreign company in India as if it were a company incorporated in India in case such foreign company has raised monies through offer or issue of securities under this Chapter which have not been repaid or redeemed".

At page 593, Definition of holding company

In Section 2(46), the Amendment adds this Explanation that for the purpose of this clause, the expression "company" includes any body corporate.

At page 595, Definition of "Associate Company" [S. 2(6)]

The expression "associate company" is defined with an Explanation. The Explanation has been substituted by the Amendment of 2017. The substituted Explanation now runs as follows.

Explanation.—For the purpose of this clause,—

- (a) the expression "significant influence" means control of at least twenty per cent of total voting power, or control of or participation in business decisions under an agreement;

(b) the expression "joint venture" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.

At page 632, Amendment of Section 236: Purchase of minority shareholding

In sub-sections (4), (5) and (6), for the words "transferor company", wherever they occur, the words "company whose shares are being transferred" are to be substituted.

At page 750, Amendment of Section 366: Companies capable of being registered

In sub-section (2) for the words "seven or more members", the words "two or more members" are to be substituted.

In the proviso, after clause (vi), the following clause is to be inserted:

"(vii) a company with less than seven members shall register as a private company."

Amendment of Section 374: Responsibility of companies registered under Part I of Chapter XXI

In Section 374, after clause (i), the following proviso is to be inserted:

"Provided that upon registration as a company under this Part a limited liability partnership incorporated under the Limited Liability Partnership Act, 2008 (6 of 2009) shall be deemed to have been dissolved under that Act without any further act or deed."

Amendment of Section 379: Application of Act to foreign companies

Section 379 is to be regarded as sub-section (2) and before this, the following is to be inserted as sub-section (1).

"(1) Sections 380 to 386 (both inclusive) and Sections 392 and 393 shall apply to all foreign companies:

Provided that the Central Government may, by Order published in the Official Gazette, exempt any class of foreign companies, specified in the Order, from any of the provisions of Sections 380 to 386 and Sections 392 and 393 and a copy of every such Order shall, as soon as may be after it is made, be laid before both Houses of Parliament".

Amendment of Section 384: Debentures, annual return, registration of charges, books of account and their inspection

In sub-section (2), after the word "Section 92" the words "and Section 137" are to be inserted.

At page 755, Amendment of Section 403: Fee for filing, etc

In Section 403 of the principal Act.—

(i) in sub-section (1), for the first and second provisos, the following provisus shall be substituted, namely:—

"Provided that where any document, fact or information required to be submitted, filed, registered or recorded, as the case may be, under Section 92 or 137 is not submitted, filed, registered or recorded, as the case may be, within the period provided in those sections, without prejudice to any other legal action or liability under this Act, it may be submitted, filed, registered or recorded, as the case may be, after expiry of the period so provided in those sections, on payment of such additional fee as may be prescribed, which shall not be less than one hundred rupees per day and different amounts may be prescribed for different classes of companies:

Provided further that where the document, fact or information, as the case may be, in cases other than referred to in the first proviso, is not submitted, filed, registered or recorded, as the case may be, within the period provided in the relevant section, it may, without prejudice to any other legal action or liability under this Act, be submitted, filed, registered or recorded as the case may be, on payment of such additional fee as may be prescribed and different fees may be prescribed for different classes of companies:

Provided also that where there is default on two or more occasions in submitting, filing, registering or recording of the document, fact or information, it may, without prejudice to any other legal action or liability under this Act, be submitted, filed, registered or recorded, as the case may be, on payment of a higher additional fee, as may be prescribed and which shall not be lesser than twice the additional fee provided under the first or the second proviso as applicable".

(ii) for sub-section (2), the following sub-section shall be substituted, namely:—

"(2) Where a company fails or commits any default to submit, file, register or record any document, fact or information under sub-section (1) before the expiry of the period specified in the relevant section, the company and the officers of the company who are in default, shall, without prejudice to the liability for the payment of fee and additional fee, be liable for the penalty or punishment provided under this Act for such failure or default."

Substitution of new section for Section 406: Provision relating to Nidhis and its application, etc.

For Section 406 of the principal Act, the following section shall be substituted, namely:

406. (2) In this section, "Nidhi" or "Mutual Benefit Society" means a company which the Central Government may, by notification in the Official Gazette, declare to be a Nidhi or Mutual Benefit Society, as the case may be.

(2) The Central Government may, by notification in the Official Gazette, direct that any of the provisions of this Act specified in the notification—

- (a) shall not apply to any Nidhi or Mutual Benefit Society; or
- (b) shall apply to any Nidhi or Mutual Benefit Society with such exceptions, modifications and adaptations as may be specified in the notification.

(3) A copy of every notification proposed to be issued under sub-section (2), shall be laid in draft before each House of Parliament, while it is in session, for a

total period of thirty days, and if both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.

(4) In reckoning any such period of thirty days as is referred to in sub-section (3), no account shall be taken of any period during which the House referred to in sub-section (3) is prorogued or adjourned for more than four consecutive days.

(5) The copies of every notification issued under this section shall, as soon as may be after it has been issued, be laid before each House of Parliament.'

Amendment of Section 409: Qualification of President and Members of Tribunal

In Section 409 of the principal Act, in sub-section (3),

(i) in clause (a), for the words "out of which at least three years shall be in the pay scale of Joint Secretary to the Government of India or equivalent or above in that service", the words "and has been holding the rank of Secretary or Additional Secretary to the Government of India" shall be substituted;

(ii) for clause (c), the following clause shall be substituted, namely:—

"(c) is a person of proven ability, integrity and standing, having special knowledge and professional experience of not less than fifteen years in industrial finance, industrial management, industrial reconstruction, investment and accountancy".

At page 757, Amendment of Section 410: Constitution of Appellate Tribunal

In Section 410, for the words "orders of the Tribunal", the words "orders of the Tribunal or of the National Financial Reporting Authority" are to be substituted.

At page 757, Amendment of Section 411: Qualifications of Chairperson and Members of Appellate Tribunal

In Section 411 of the principal Act, for sub-section (3), the following sub-section shall be substituted, namely:—

"(3) A technical member shall be a person of proven ability, integrity and standing having special knowledge and professional experience of not less than twenty-five years in industrial finance, industrial management, industrial reconstruction, investment and accountancy".

At page 757, Amendment of Section 412: Selection of Members of Tribunal and Appellate Tribunal

In Section 412 of the principal Act, for sub-section (2), the following sub-sections shall be substituted, namely:

"(2) The Members of the Tribunal and the Technical Members of the Appellate Tribunal shall be appointed on the recommendation of a Selection Committee consisting of—

(a) Chief Justice of India or his nominee—Chairperson;

- (b) a senior Judge of the Supreme Court or Chief Justice of High Court—Member;
- (c) Secretary in the Ministry of Corporate Affairs—Member; and
- (d) Secretary in the Ministry of Law and Justice—Member.

(2-A) Where in a meeting of the Selection Committee, there is equality of votes on any matter, the Chairperson shall have a casting vote".

At page 761, Amendment of Section 435: Establishment of Special Courts

For Section 435 of the principal Act, the following shall be substituted, namely:—

"435 (1) The Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary.

(2) A Special Court shall consist of—

- (a) a single judge holding office as Session Judge or Additional Session Judge, in case of offences punishable under this Act with imprisonment of two years or more; and
- (b) a Metropolitan Magistrate or a Judicial Magistrate of the First Class, in the case of other offences, who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working".

Amendment of Section 438: Application of Code to proceedings before Special Court

In Section 438, for the words "deemed to be a Court of Session", the words "deemed to be a Court of Session or the court of Metropolitan Magistrate or a Judicial Magistrate of the First Class, as the case may be" are to be substituted.

At page 762, Insertion of new sections

After Section 446 the following two new sections are to be inserted.

Section 446-A: Factors for determining level of punishment

"446-A. The court or the Special Court, while deciding the amount of fine or imprisonment under this Act, shall have due regard to the following factors, namely:—

- (a) size of the company;
- (b) nature of business carried on by the company;
- (c) injury to public interest;
- (d) nature of the default; and
- (e) repetition of the default."

Section 446-B: Lesser penalties for One Person Companies or small companies

"446-B. Notwithstanding anything contained in this Act, if a One Person Company or a small company fails to comply with the provisions of sub-section (3) of Section 92, sub-section (2) of Section 117 or sub-section (3) of Section 137,

such company and officer in default of such company shall be punishable with fine or imprisonment or fine and imprisonment, as the case may be, which shall not be more than one-half of the fine or imprisonment or fine and imprisonment, as the case may be, of the minimum or maximum fine or imprisonment or fine and imprisonment, as the case may be, specified in such sections."

At page 763, Amendment of Section 447: Punishment for fraud

In Section 447 of the principal Act,—

- (i) after the words "guilty of fraud", the words "involving an amount of at least ten lakh rupees or one per cent of the turnover of the company, whichever is lower" shall be inserted;
- (ii) after the proviso, the following proviso shall be inserted, namely:—

"Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to twenty lakh rupees or with both".

At page 764, Amendment of Section 439: Offences to be non-cognizable

In Section 439, in sub-section (2), after the words "a shareholder", the words "or a member" are to be inserted.

Amendment of Section 440: Transitional provisions

In Section 440, for the words "Court of Session", at both the places, the words "Court of Session or the Court of Metropolitan Magistrate or a Judicial Magistrate of the First Class, as the case may be" are to be substituted.

At page 769, Amendment of Section 458: Delegation by Central Government of its powers and functions

In sub-section (1), the proviso is to be omitted.

Chapter 1

Corporate Personality

DEFINITION OF "COMPANY"

Companies Act, 2013, Extent of application [S. 1(4)]

The provisions of the Act are to apply to the following companies and bodies corporate:

- (a) companies incorporated under this Act or under any previous company law;
- (b) insurance companies; this application is only to the extent to which the provisions of the Act are not inconsistent with those of the Insurance Act, 1938 and the Insurance Regulatory and Development Authority Act, 1999;
- (c) banking companies, subject to the provisions of the Banking Regulation Act, 1949; banking company means a company as defined in Section 5(i), Banking Regulation Act;
- (d) companies engaged in generation or supply of electricity, to the extent to which the provisions of the Act are not inconsistent with those of the Electricity Act, 2003;
- (e) any other company governed by any special Act except to the extent the said provisions are inconsistent with the provisions of such special Act, and
- (f) any such body corporate, incorporated by any Act, as the Central Government may by notification specify for such application subject to such exceptions, modifications or adaptations as may be specified in the notification.

"The word 'company' has no strictly technical or legal meaning."¹ In the terms of the Companies Act, a "company means a company formed and registered under" the Companies Act.² "A body corporate or corporation

1. Buckley J in *Stanley, re.* (1906) 1 Ch. 121, 134.

2. S. 2(20) or under any previous law.

includes a company incorporated outside India, but does not include a co-operative society registered under the law relating to co-operative societies, and any body corporate (not being a company as defined in the Act) which the Central Government may, by notification, specify for this purpose.

"Company" means a company incorporated under the Companies Act, 2013 or under any previous company law. [S. 2(20)] In common law a company is a "legal person" or "legal entity" separate from, and capable of surviving beyond the lives of, its members.³ "Like any juristic person, a company is legally an entity apart from its members, capable of rights and duties of its own, and endowed with the potential of perpetual succession."⁴ But a "company" is not merely a legal institution. It is rather a legal device for the attainment of any social or economic end and to a large extent publicly and socially responsible. It is, therefore, a combined political, social, economic and legal institution.⁵ Thus, the term has been variously described. "[It] is a means of co-operation in the conduct of an enterprise . . ."⁶ "Corporate device is one form of associated enterprise."⁷ It is "an intricate, centralised, economic administrative structure run by professional managers who hire capital from the investor".⁸

In a practical way, a company means a company of certain persons registered under the Companies Act. Two or more persons who are desirous of carrying on joint business enterprises, have the choice of either forming a company or a partnership. Partnership is a suitable device for a small-scale business which can be financed and managed by a small group of partners who take personal interest and there is mutual trust and confidence among them. But where the enterprise requires a rather greater mobilisation of capital which the resources of a few persons cannot provide, the formation of a company is the only choice. Even for a small-scale business the choice of a company would be better, as this is the only form of business organisation which offers the privilege of limiting personal liability for business debts. Accordingly, the company has become the most dominant form of business organisation.⁹ One of the best assessments in reference to companies in the context of the modern economies is enshrined in the following words:

"[C]ompanies abound in the national economy. Ranging from the small family or partnership concern to the faceless multinational corporation, they provide the structural framework of the modern industrial society."¹⁰

3. *Salomon v Salomon & Co Ltd*, 1897 AC 22 (HL). And see, Grah Evans, "What is Company" (1930) 26 LQR 259.

4. H.L. and Trelawny, *Halsbury's Casenook on Company Law* (2nd Edn) 42.

5. A.A. Beck, Jr. in Foreword to *The Corporation in Modern Society* (1956).

6. Woodrow Wilson, *The New Freedom* (1910) 1968 26.

7. *Frankforter* in *Nerns Co v Bethlehem Shipbuilding Corp Ltd*, 84 L Ed 862, 306 US 265 (1939).

8. Manning, "Review of Livingston, *The Australian Stock Exchange*" (1958) 67 Yale LJ 1476.

9. See, Lee Laevinger, *The Law of Free Enterprise* (1949) 59.

10. *Halsbury's Casenook on Company Law*.

Evolution

"They [corporations] are not novelties. They are institutions of very ancient date."¹¹ But the large partnerships from which the modern business company evolved appeared on the English scene during the commercial revolution.

A body corporate during the 17th and 18th centuries could be brought into existence either by a Royal Charter or by a special Act of Parliament. Both these methods were very expensive and dilatory. Consequently, to meet the growing commercial needs of the nation, large unincorporated partnerships came into existence, trading, however, in corporate form. The membership of each such concern being very large, the management of the business was left to a few trustees. This resulted in separation of ownership from management. Trustees had the opportunity of trading with other people's money. Rules of law applicable to such companies were not yet developed. Consequently, fraudulent promoters had a unique opportunity of exploiting public money. Many spurious companies were created which would appear only to disappear resulting in loss to the investing public. The English Parliament, therefore, passed an Act, known as the Bubbles Act of 1720¹² which, instead of prohibiting the formation of fraudulent companies, made the very business of promoting companies illegal. This proved to be a great setback to the expanding trade and commerce. Yet the Act remained on the statute book for over a century. It was repealed in 1825.¹³ But it was only in 1844¹⁴ that registration and incorporation of large partnerships was made compulsory. The Joint Stock Companies Act of 1844 was the first legislative measure which facilitated registration, although the concerns registered under it were still known as partnerships and the principle of unlimited liability was maintained. The right to trade with limited liability was granted in 1855¹⁵ and a year later in 1856 the whole law relating to such companies was consolidated.¹⁶ Since then Companies Acts have been considerably amended, enlarged and improved upon until we got the English Acts of 1948, 1985 and of 1989.

The history of Indian company law began with the Joint Stock Companies Act of 1850. Since then the cumulative process of amendment and consolidation brought us to the most comprehensive and complicated piece of legislation, the Companies Act, 1956. But even so it is not exhaustive of all the modes of incorporating business concerns. Organisations for business or commercial purposes can still be incorporated by special Acts of Parliament. The Life Insurance Corporation of India, for example, has been incorporated for business in life insurance under the Life Insurance Corporation Act of 1956. Institutions so created are better known as "corporations". Business firms or other institutions incorporated under the Companies Act are known as

11. MARSHAL L. in *Bank of United States v Dandridge*, 6 U.S. 552, 25 US (12 Wheat) 64 (1825).

12. Royal Exchange & London Insurance Corporation Act (6 Geo I C 18).

13. By the Bubble Companies, etc., Act (6 Geo 4, C 91).

14. Joint Stock Companies Act (7 & 8 Vict C 11B).

15. By the Limited Liability Act of that year (18 Vict C 132).

16. Joint Stock Companies Act, 1856 (19 & 20 Vict C 47).

companies. After some process of amendments, the Companies Act of 1956 has been replaced by the Companies Act of 2013. The enforcement date of this Act is 1 April 2014.

The Companies Act is also not exhaustive of the whole of company law. It only amends and consolidates certain portions of company law. Common law has still a lot of role to play in this field. The duties of corporate directors and their social responsibilities, which is at present one of the most developing aspects of company law, are still largely governed by the principles of common law. But now both these concepts, namely, directors' duties and corporate social responsibility, have been provided statutory framework under the Companies Act, 2013.

Constitutional right to form associations.—Right to form associations on such terms and conditions as may be agreed upon by members is guaranteed by the Constitution. A company is a voluntary association of its members who have the fundamental right to form associations. Any restriction on such right must conform to Article 19(4) and must be reasonable.¹⁷

Previous company law [5. 2(67)]

Previous company law means any of the laws specified below:

- (i) Acts relating to companies in force before the Indian Companies Act, 1866;
- (ii) the Indian Companies Act, 1866;
- (iii) the Indian Companies Act, 1882;
- (iv) the Indian Companies Act, 1913;
- (v) the Registration of Transferred Companies Ordinance, 1942;
- (vi) the Companies Act, 1956; and
- (vii) any law corresponding to any of the aforesaid Acts or the Ordinances and in force—
 - (A) in the merged territories or in a Part B State (other than the State of J&K), or any part thereof, before the extension thereof of the Indian Companies Act, 1913;
 - (B) in the State of J&K, or any part thereof, before the commencement of J&K (Extension of Laws) Act, 1956, insofar as banking, insurance and financial corporations are concerned, and before the commencement of the Central Laws (Extension to J&K) Act, 1968, insofar as other corporations are concerned;
 - (viii) the Portuguese Commercial Code, insofar as it relates to *sociedades mercantis*; and
 - (ix) the Registration of Companies (Sikkim) Act, 1961.

NATURE OF CORPORATE FORM AND ADVANTAGES

Incorporation offers certain advantages to the business community as compared with all other kinds of business organisation.

¹⁷ *Darius Rulfon Kurusamayek v Chardz Chemicals Ltd.*, (2015) 14 SCC 277; (2015) 189 Comp Cas 291.

1. Independent corporate existence [S. 9]

The outstanding feature of a company is its independent corporate existence. A partnership has no existence apart from its members. It is nothing but a collection of the partners.¹⁸ A company, on the other hand, is in law a person. It is a distinct legal persona existing independent of its members. By incorporation under the Act, the company is vested with a corporate personality which is distinct from the members who compose it. One of the effects of incorporation as stated in Section 9 is that upon the issue of the certificate of incorporation, the subscribers to the memorandum and other persons, who may from time to time be the members of the company, shall be a *body corporate*¹⁹ capable forthwith of exercising all the functions of an incorporated company and having perpetual succession and common seal. Thus, the company becomes a body corporate which is capable immediately of functioning as an incorporated individual. The enterprise acquires its own entity. It becomes impersonalised. No one can say that he is the owner of the company. The business now belongs to an institution. The entity of the enterprise becomes institutionalised. In the words of Palmer: "The benefits following from incorporation can hardly be exaggerated. It is because of incorporation that the owner of the business ceases to trade in his own person. The company carries on the business, the liabilities are the company's liabilities and the former owner is under no liability for anything the company does, although, as principal shareholder, he is able to take full advantage of profits which the company makes."²⁰ The following further passage from Palmer²¹ was cited by WADHWA J²²:

"The principle that, apart from exceptional cases, the company is a body corporate, distinct from members, lies at the root of many of the most perplexing questions that beset company law. It is a fundamental

18. This basic difference between a company and a partnership has been explained by CHARLES HASSAN J in *Bacchus F Grainer v CIT*, AIR 1955 SC 76; (1955) 24 Comp Cas 1.

19. See, the decision of the Supreme Court in *Ashoka Milk Ltd v Panjab National Bank*, (1990) 4 SCC 466, 423, 24, for an explanation of the term "body corporate" in the context of the modern corporations. The expression "body corporate" or "corporation" as defined in S. 2(1) of the Act as including a company incorporated outside India, but as not including a cooperative society registered under any law relating to cooperative societies, and any other body corporate which the Central Government may by notification specify in this behalf. The Government may by notification exclude from the scope of the definition any other body corporate also. Thus, the expression "body corporate" is wider than the term "company" though every company registered under the Act is a body corporate. This expression would include all corporations created under special Acts of Parliament. An incorporated company is a body corporate but incorporation under the Companies Act is not the only method of creating a body corporate. *Muthus Central Urban Bank Ltd v Corps of Madras*, (1932) 2 Comp Cas 328 (Mad). A registered society under the Societies Registration Act, 1860 has been held to be not a body corporate. *Ayurvedic and Unani Tibb College v State of Delhi*, AIR 1962 SC 458.

20. PALMER'S PRIVATE COMPANIES (42nd Edn 1961) 13.

21. PALMER'S COMPANY LAW (25th Edn) 1523, para 2.

22. In *Near Horizons Ltd v Union of India*, (1997) 59 Comp Cas 785, 602 (Del) overruled by the Supreme Court on other grounds in *Near Horizons Ltd v Union of India*, (1998) 1 SCC 475; (1997) 69 Comp Cas 849.

or cardinal distinction—a distinction which must be firmly grasped. This principle is thrown into clear relief by contrasting an incorporated company with a partnership, for under English law [though not under Scottish law or that of the most Continental systems] a firm or partnership is not a separate entity from its members.²³

In the 19th century, Pope Innocent IV espoused the theory of legal fiction by saying that corporate bodies could not be excommunicated because they existed only in abstract. The Supreme Court regarded this enunciation as the foundation of separate entity principle.²⁴

A well known illustration of this principle is the decision of the House of Lords in *Salomon v Salomon & Co Ltd*.²⁵



CASEPOINT

One Salomon was a boot and shoe manufacturer. His business was in sound condition and there was a substantial surplus of assets over liabilities. He incorporated a company named Salomon & Co Ltd for the purpose of taking over and carrying on his business. The seven subscribers to the memorandum were Salomon, his wife, his daughter and four sons and they remained the only members of the company. Salomon and two of his sons constituted the Board of directors of the company. The business was transferred to the company for £40,000. In payment, Salomon took 20,000 shares of £1 each and debentures worth £10,000. These debentures certified that the company owed Salomon £10,000 and created a charge on the company's assets. One share was given to each remaining member of his family. The company went into liquidation within a year.²⁶ On winding up, the state of affairs was broadly something like this: Assets £6000; Liabilities—Salomon as debenture holder £10,000 and unsecured creditors: £7000. Thus, after paying off the debenture holder nothing would be left for the unsecured creditors.

The unsecured creditors, therefore, contended that, though incorporated under the Act, the company never had an independent existence; it was in fact Salomon under another name; he was the managing director, the other directors being his sons and under his control. His vast preponderance of shares made him absolute master. The business was solely his, conducted solely for and by him and the company was a mere sham and fraud, in effect entirely contrary to the intent and meaning of the Companies Act. But it was held that Salomon & Co Ltd was a real company fulfilling all the legal requirements. It must be treated as a company, as an entity consisting of certain corporators, but a distinct and independent corporation. Their Lordships of the House of Lords observed: "When the memorandum

23. *Vodafone International Holdings BV v Union of India*, (2012) 6 SCC 613 (2012) 170 Comp Cas 369.

24. 1897 AC 72 (HL).

25. Salomon was not to blame for the liquidation, for it was due to general trade depression.

26. Salomon had transferred his debentures to another who had a receiver appointed and started the winding up. *Brockip v Salomon*, (1895) 2 Ch 323 (CA), reversed, sub nom *Salomon v Salomon & Co Ltd*, 1897 AC 22 (HL).

is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate capable forthwith of exercising all the functions of an incorporated company. It is difficult to understand how a body corporate thus created by statute can lose its individuality by issuing the bulk of its capital to one person. The company is at law a different person altogether from the subscribers of the memorandum; and though it may be that after incorporation the business is precisely the same as before, the same persons are managers, and the same hands receive the profits, the company is not in law their agent or trustee. The statute enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or majority of the shareholders over others. There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any of them should take a substantial interest in the undertaking, or that they should have a mind or will of their own, or that there should be anything like a balance of power in the constitution of the company."²⁷

The principle had been recognised in India even before the *Salomon* case. The decision of the Calcutta High Court in *Kendali Tea Co Ltd, re*,²⁸ seems to be the first on the subject.

Certain persons transferred a tea estate to a company and claimed exemptions from *ad valorem* duty on the ground that they themselves were the shareholders in the company and, therefore, it was nothing but a transfer from them in one to themselves under another name.

Rejecting this, the court observed: "The company was a separate person, a separate body altogether from the shareholders and the transfer was as much a conveyance, a transfer of the property, as if the shareholders had been totally different persons."

In reference to one-man companies of the *Salomon* type, the Bombay High Court observed:²⁹ "Under the law, an incorporated company is a distinct entity, and although all the shares may be practically controlled by one person, in law a company is a distinct entity and it is not permissible or relevant to enquire whether the directors belonged to the same family or whether it is, as compendiously described, a 'one-man company'."

Thus, one-man companies exist with the encouragement of the legislature, and "the great majority of them are as bona fide and genuine as in a business sense they are convenient and suitable media for provision and application of capital to industry".³⁰

27. For a criticism of this decision see O. Kahn-Freund, "Some Reflections on Company Law Reforms" (1944) 7 Mod. L. Rev. 54; K. Irally, "Some Unforeseen Consequences of Private Incorporation" (1949) 65 LQR 227.

28. 112 (1946) 13 Cal 43.

29. *JR Prod (Bombay) Ltd v E.D. Sagar & Co Ltd*, AIR 1936 Bom 62. See, *Prugh Tools Corp v CAI Mumbai*, (1969) 1 SCC 585; (1969) 39 Comp Cas 889.

30. *Yachana (I) Ltd v Compt of Inland Revenue v Sarsam*, (1921) 2 KB 492; 125 LT 37. Also see, *British Thompson & Houston Co Ltd v Sterling Amalgamated Ltd*, (1924) 2 Ch 33; *Warner Fuller*,





In *Dhiraj-Amarbar Motor Transport Ltd v Raychandil Rapsi Dharausti*³¹

A partnership firm carrying on the business of plying buses having worked for some time, some of the partners formed a private limited company, which they could do under the law even while the partnership continued to be a running concern. Such of the partners who formed the company sold to the company their own buses which were heretofore being used by the firm. The other set of partners who constituted the majority sued the section forming the company for accounts and their share of profits on the ground that in reality the company was not a different entity from the firm and that the business carried on by it was the same as that of the firm.

It was held that the plaintiffs had no legal right to sue for accounts of the business done by the company which was altogether a third person. Buses which the company was plying were the property not of its shareholders, but the property of the company itself. The company was a corporate body whose entity was entirely different from the entities of its shareholders. Motive for becoming shareholders is not a field of enquiry. The law recognises the existence of the company quite irrespective of the motives, intentions, schemes, or conduct of the individual shareholders.³²

2. Limited liability

The privilege of limiting liability for business debts is one of the principal advantages of doing business under the corporate form of organisation. The company, being a separate person, is the owner of its assets and bound by its liabilities. Members, even as a whole, are neither the owners of the company's undertaking, nor liable for its debts. Where the subscribers exercise the choice of registering the company with limited liability, the members' liability becomes limited or restricted to the nominal value of the shares taken by them or the amount guaranteed by them. No member is bound to contribute anything more than the nominal value of the shares held by him.³³ In a partnership, on the other hand, the liability of the partners for

³¹ "The Incorporated Individual: A Study of One-man Companies", (1938) 51 Hary L Rev 1373; S. 21(3) of the 2013 Act now expressly provides for such companies to mean a company which has only one member.

³² ILR 1952 Bom 719; AIR 1952 Bom 337.

³³ *Abdu Haq v Dns Mal*, (1910) 15 IC 595, the plaintiff sued for his wages and that of his chaprasi employed by him on behalf of the company and in doing so impleaded as defendants, the secretary and managing director of the company and not the company itself. It was held that a suit to recover salary or wages due from a company lies against the company and not against its officers or members; *Sankbhadr Estates Ltd v. 1946 Cr. D 228*, the members of a company attempted to dissolve it by distributing between them, selves the title deeds of the company's assets. A. Erkabi, "Problem of Juristic Personality of a Corporation", 1965 JIL 158. A company was allowed to sue in its proper name. *Manu Papers P. Ltd v State of Orissa*, (2000) 99 Comp Cas 734 (Orl).

³⁴ *IN Banker Financing Corp Ltd v Deptt of Trade and Industry*, (1990) 2 AC 416 (1989) 3 WLR 969 (FIR). Member States which created an international company were held not liable to pay its debts. Lord Oliver observed, "Once given the existence of the International Tin Council as a separate legal person and given that it was the contracting party in the

the debts of the business is unlimited. They are bound to meet, without any limit, all the business obligations of the firm. The whole fortune of a partner is at stake, as the creditors can levy execution even on his private property. Speaking of the advantage of trading with limited liability, BUCKLEY J observed:³⁴

"The statutes relating to limited liability have probably done more than any legislation of the last fifty years to further the commercial prosperity of the country. They have, to the advantage of the investor as well as of the public, allowed and encouraged aggregation of small sums into large capitals which have been employed in undertakings of great public utility largely increasing the wealth of the country. One of the primary and accepted motivations behind incorporating a company is to limit personal risks by obtaining the benefit of limited liability."

3. Perpetual succession

An incorporated company never dies. It is an entity with perpetual succession. A, B and C are the only members of a company, holding all its shares. Their shares may be transferred to, or inherited by X, Y and Z, who may, therefore, become the new members and managers of the company. But the company will remain the same entity. In spite of the total change in membership, "the company will be the same entity, with the same privileges and immunities, estates, and possessions".³⁵ Perpetual succession, therefore, means that the membership of a company may keep changing from time to time, but that does not affect the company's continuity "in the like manner as the river Thames is still the same river, though the parts which compose it are changing every instant".³⁶ The death or insolvency of individual members does not, in any way, affect the corporate existence of the company. "Members may come and go but the company can go on forever."³⁷

transactions upon which the appellants claim, there is no room for any further inquiry as to what type of legal person the contracting party is. The persons who can enforce contracts and the persons against whom they can be enforced in English law are the parties to the contract and in identifying the parties to the contract there are no gradations of legal personality."

³⁴ London & Gisle Finance Corp Ltd. re. (1903) 1 Ch 728, 731.

³⁵ Canfield & Warmer, *Cases on Private Corporations* (2nd Edn) 1.

³⁶ Blackstone, *Commentaries*, quoted by E. Pollock, *JURISPRUDENCE AND LEGAL HISTORY THE TRADITION THEORY OF CORPORATIONS* (1961) 219.

³⁷ Gower cited this illustration in a footnote in his book *PRINCIPLES OF MODERN COMPANY LAW* (2nd Edn, 1969) 76. "During the war all the members of one private company, while in general meeting, were killed by a bomb. But the company survived, not even a hydrogen bomb could have destroyed it." *Gopelnor Tea Co Ltd v Peacock Tea Co Ltd*, (1982) 52 Comp Cas 239; 58 CWN 1142, the whole undertaking of a company was taken over under an Act which purported to extinguish all rights of action against the company, the court held that neither the company was thereby extinguished nor any body's claim against it. W. Jetton Brown, "The Personality of the Corporation and the State", (1905) 21 LQR 365, 366 and *KO Metal Supplies (Guildford) Ltd. re.* (1966) 1 WLR 1112 (Ch D), the bankruptcy of a member of a private company is no ground for winding up of the company.

The guarantors of a company's loan could not claim to be relieved of liability by reason of the fact that the company's management had totally changed including the managing director. Such changes do not affect the continuity of the company or its commercial and contractual relations.³⁸ The identity of a company is not linked with its membership or management. The liability of the company for electricity dues remained the same, though the arrears belonged to a period when the company was in the hands of some other persons.³⁹

4. Separate property

A company, being a legal person, is capable of owning, enjoying and disposing of property in its own name. The company becomes the owner of its capital and assets. The shareholders are not the several or joint owners of the company's property. "The company is the real person in which all its property is vested, and by which it is controlled, managed and disposed of."⁴⁰ A member does not even have an insurable interest in the property of the company. A person was the holder of nearly all the shares, except one, of a timber company and was also a substantial creditor. He insured the company's timber in his own name. The timber having been destroyed by fire, the insurance company was held not liable to him.⁴¹ "No shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein."⁴² "In WALTON's simple truism:⁴³ 'The property of the company is not the property of the shareholders; it is the property of the company'."⁴⁴

Thus, incorporation helps the property of the company to be clearly distinguished from that of its members. "The property is vested in the company as a body corporate, and no changes of individual membership affect the title. The property, however much, the shareholders may come and go, remains vested in the company, and the company can convey, assign, mortgage, or otherwise deal with it irrespective of these mutations."⁴⁵ On the

38. *Punjab National Bank v Lohakuni Industrial & Trading Co (P) Ltd.*, AIR 2001 All 29.

39. *Amit Products Limited Ltd v Chief Engineer (O & M Circle)*, (2005) 7 SCC 190; (2005) 127 Comp Cas 143.

40. *Basha F Gazdar v C.P.I.*, AIR 1953 SC 74 (1956) 25 Comp Cas 1; *RT Personnel v John Dewar*, AIR 1960 Mad 43; (1960) 30 Comp Cas 310, the court observed that "no member can claim himself to be the owner of the company's property during its existence or in its winding up". *Sugil Prakash Fund Committee v Nanjeeri Udyan*, (1992) 1 Raj LR 224, property is that of the company and not of its members, nor directors are the Company's employees.

41. *MacNaull v Northern Assurance Co. Ltd.*, 1925 AC 619 (HL). It has been held in a Canadian decision that a sole shareholder has insurable interest in the company's property, *Kosmopoulos v Constitution Insurance Co.* (1964) 149 DLR (3d) 77 (Can).

42. *Lord Beaconsfield, Marquess v Northern Assurance Co Ltd.*, 1925 AC 619, 625 (HL).

43. See, Murray A. Pickering, "The Company as a Separate Legal Entity", (1984) 31 Mod L Rev 497.

44. *Gramophone & Typewriter Co Ltd v Stanley*, (1906) 2 KB 856, 868; *Hyderabad (Sind) Electric Supply Co v Union of India*, AIR 1959 Punj 129; *MV "Dong Di" v Basmat Kumar & Co Ltd*, (2002) 109 Comp Cas 450 (Cal), assets of company not assets of shareholders in a maritime claim, it was held that ships belonging to different companies which were all controlled by the Government were not sister ships.

45. *Palmer's Powers Conferences* (42nd Edn. 1963) 19.



nationalisation of the coal mines of a company, it was found that it had sold an item of its immovable property to the wife of one of its directors. The court ripped open the veil to probe into the genuineness of the transaction and discovered it to be sham. The property continued to be that of the company and became vested in the Government.⁴⁶ The assets of a company were not allowed to be used for payment of a shareholder's debts.⁴⁷ Unless a company's incorporation can be viewed as a sham, its property would fall outside the distribution of matrimonial assets on divorce.⁴⁸ In a partnership, on the other hand, the distinction between the joint property of the firm and the private property of the partners is often not clear.

Properties of a company including licences, permits, concessions and leases are not property of shareholders, only of company. Transfer of shares, change of management, company becoming subsidiary of another company, rights belonging to the company remain as they were before.⁴⁹

5. Transferable shares

When joint stock companies were established the great object was that their shares should be capable of being easily transferred. Accordingly the Companies Act in Section 44 declares: "The shares or debentures or other interest of any member in a company shall be movable property, transferable in the manner provided by the articles of the company." Thus, incorporation enables a member to sell his shares in the open market and to get back his investment without having to withdraw the money from the company. This provides liquidity to the investor and stability to the company. In a partnership, on the other hand, a partner cannot transfer his share in the capital of the firm except with the unanimous consent of all the partners. If a transfer is made against the will of the partners, the transferee does not become a partner, although he has some rights in the dissolution of the firm.⁵⁰

6. Capacity to sue and be sued

A company, being a body corporate, can sue and be sued in its own name.⁵¹

Criminal complaint can be filed by a company but it must be represented by a natural person. It is not necessary that the same person should act as a representative throughout. The complaint by a company is liable to be dismissed because of the absence of the representative in the same way in

46. *Suklendra Mukherjee v. Bharat Coking Coal Ltd.*, (2010) 3 SCC 312.

47. *HC Shastri v. Dolphin Compacting (P) Ltd.*, (1998) 90 Comp Cas 2M (Del)

48. *Wilson v. Wilson*, 1999 SLT 249 (Scotland).

49. *State of Rajasthan v. Guler Lime Stone Khewari Mining (P) Ltd.*, 2015 SCC OnLine Raj 780; (2016) 194 Comp Cas 457.

50. S. 29, Indian Partnership Act, 1932.

51. A company can be allowed to sue in forma pauperis under Cl. 33, R. 3, Civil Procedure Code. *Union Bank of India v. Khadars International Constructions Ltd.*, (1993) 2 Comp LJ 89 (Ker). Managing director is not a necessary party to corporate proceedings. *Bank of Maharashtra v. Kamlesh Arora (P) Ltd.*, (1992) 74 Comp Cas 752 (Del).

which an individual complaint is liable to be dismissed for absence of the complainant.⁵²

A company has the right to protect its fair name. It can sue for such defamatory remarks against it as are likely to damage its business or property, etc. It can be defamatory to a company to allege that its directors allowed the company to continue trading at a time when it ought to have been facing insolvency.⁵³ A company has a right to seek damages where a defamatory material published about it affects its business. The preparation of a video cassette by the workmen of a company showing their struggle against the company's management and its exhibition could be restrained only on showing that the matter would be defamatory.⁵⁴

The Court of Appeal⁵⁵ held that a company can complain under the Broadcasting Act, 1996 about unwarranted infringement of its privacy. The court said that a company may have activities of a private nature which need protection from unwarranted intrusion. Without such right the company would be disadvantaged as against individuals under a legislation which is designed to encourage and achieve proper standards of conduct in public life. The complaint was about the secret filming of transactions in shops by the BBC and the allegation was that this constituted an infringement of the company's privacy.

7. Professional management

The corporate sector is capable of attracting the growing cadre of professional managers. Young management graduates willingly join companies because of the feeling that they would thereby belong to a managerial class. Their independent functioning as managers is assured because of the fact that there is no human employer and the shareholders exercise only a formative control and that also for the sake of name only. Such an atmosphere of independence gives them an opportunity to develop extraordinary managerial capabilities. With the financial backing that companies are able to provide, they are able to develop the business to a considerable extent. Prudent developments may be made, and new branches established in different places, and other concerns may be acquired. Thus, before very long a great business may be built up which is worthy and capable of absorbing the attention of such a competent manager, assisted by other directors working



CASE PILOT



CASE PILOT



CASE PILOT

52. *Associated Cement Co Ltd v Keshornawali*, [1998] 1 SCC 687, 414481 91 Comp Cas 361.

53. *Aspro Travel Ltd v Owners Alvega Group Plc*, (1996) 1 WLR 102 (CA).

54. *TVS Employees Federation v TVS & Sons Ltd*, [1996] 57 Comp Cas 37 (Mad), *Krishna Exports India Pvt Ltd v DCM Ltd*, (2005) 4 Comp L J 26 (Del), company held not liable for contempt committed by its officer, *Lalit Suryavanshi Kansal v Office Tiger Database Systems (India) Pvt Ltd*, (2006) 3 Comp 688, (2006) 129 Comp Cas 192 (Mad), employees of one company not liable for contempt of court committed by another company in the same group though they were common employees.

55. *S v Broadcasting Standards Commission, The Times*, Sept 1999 and 12-1-2000, *Darius Rafferty Kangnamukk v Chardo Chemicals Ltd*, 2014 SCC Online Bom 1HST (2015) 191 Comp Cas 52, suit filed by minority shareholder for benefit of company, known as derivative action, it should be in good faith and not with ulterior motive. Patent was in the name of majority shareholder but in company's use, Not allowed to be questioned.

in harmony with him. Men of this calibre are not to be found everyday, but, when found and supported by capital, they are capable of achieving the very highest success in commercial undertakings."⁵⁶

8. Finances

The company is the only medium of organising business which is given the privilege of raising capital by public subscriptions either by way of shares or debentures. Further, public financial institutions lend their resources more willingly to companies than to other forms of business organisation. The facility of borrowing and giving security by way of a floating charge is also an exclusive privilege of companies. "Capital in many cases is the lifeblood of a concern, and it is always a great misfortune where the development of a business is arrested or restricted by want of capital."⁵⁷

DISADVANTAGES

The above advantages of incorporation are by no means inconsiderable and, as compared with them, the disadvantages are, indeed very few. Yet some of them, which are in essence complications arising out of the privilege of trading with limited liability, deserve to be pointed out.

1. Lifting the corporate veil

The chief advantage of incorporation from which all others follow is the separate legal entity of the company. In reality, however, the business of the legal person is always carried on by, and for the benefit of, some individuals. In the ultimate analysis, some human beings are the real beneficiaries of the corporate advantages, "for while, by fiction, of law, a corporation is a distinct entity, yet in reality it is an association of persons who are in fact the beneficial owners of all the corporate property".⁵⁸ And what the *Salomon* case decides is that "in questions of property and capacity, of acts done and rights acquired or, liabilities assumed thereby ... the personalities of the natural persons who are the company's corporators is to be ignored".⁵⁹

This theory of corporate entity is indeed the basic principle on which the whole law of corporations is based. Instances are not few in which the courts have successfully resisted the temptation to break through the corporate veil. A landlady's bid to regain tenanted premises for self-business could not succeed as the business was in the name of her company.⁶⁰ The Supreme Court did not allow a shareholder to sue for the violation of the

56. *Palmer's Private Companies* (12nd Edn. 1961) 25, 26.

57. Ibid. 26.

58. *Galligian v Germania Brewing Co.*, 35 Minn 224, 54 N.W. 115 (1893), per Merriam J.

59. Lord Parker in *Daimler Co. Ltd v Continental Tyre & Rubber Co. Ltd.*, (1916) 2 AC 307 (33L), cited by C. A. Master, "One-man Companies and Their Controlling Shareholder", (1966) 14 Can BR 663.

60. *Tandy v Shigumon*, (1962) 2 QB 593; (1962) 2 WLR 1045 (CA); *KM Basir v Low Chok Koh*, (1966) 115 Comp Cas 127 (Kerr the need for occupation of the premises by the company is something different from the personal need of a director).

fundamental rights of his company.⁴¹ Where a company acquires a majority of the shares and also the assets of another company, that does not extinguish the debt of one to the other.⁴² The shareholders and creditors of a dissolved company cannot maintain an action for the recovery of its left-over assets.⁴³ A managing director cannot be compelled in his personal capacity to produce books of which he has custody in official capacity.⁴⁴ In *Lee v Lee's Air Farming Ltd*,⁴⁵ Lee incorporated a company of which he was the managing director. In that capacity he appointed himself as a pilot of the company. While on the business of the company he was lost in a flying accident. His widow recovered compensation under the Workmen's Compensation Act. "In effect the magic of corporate personality enabled him to be master and servant at the same time."⁴⁶ Where the total number of directors and shareholders consent to the misuse of the company's money, they can be prosecuted for theft because the consent of the whole number may not be the consent of the company.⁴⁷

But the theory cannot be pushed to unnatural limits. Circumstances must occur which compel the courts to identify a company with its

-  CASE PILOT
61. Churniraj Lal Choudhury v Union of India, AIR 1951 SC 41; 1950 SCR 461. The Supreme Court in *Rasputra Cazaqsoz Cooper v Union of India*, (1970) 1 SCC 248; (1970) 40 Comp Cas 325 also known as the Bank Nationalisation case held that a shareholder, a depositor or a director is not entitled to move a petition for infringement of the rights of the company, unless by the State action unpermitted by him, his rights are also infringed. The test in determining whether the shareholders' right is impaired is not formal, it is essentially qualitative, if the State action impairs the right of the shareholders as well as the company, the court will not, concentrating merely upon the technical operation of the action, deny to itself jurisdiction to grant relief. In applying this proposition, the court in *Bennet, Coleman & Co v Union of India*, (1972) 2 SCC 785, extended the rule by stating, "It is now clear that the fundamental rights of citizens are not lost when they associate to form a company. When their fundamental rights as shareholders are impaired by State action, their rights as shareholders are protected. The reason is that the shareholders' rights are equally and necessarily affected if the rights of the company are affected". So the company acquires a standing by impleading a shareholder with itself in the action. See also, Godhra Electricity Co Ltd v State of Gujarat, (1977) 1 SC 199, 211-12.
62. *Spratt & Co v CWI*, AIR 1969 Mad 359; (1968) 39 Comp Cas 212.
63. *Pierce Leslie & Co Ltd v Viola Chicheley Whistone*, AIR 1969 SC 613; (1969) 3 SCR 203; (1968) 39 Comp Cas 803.
64. *S&K Channabasappa Chettiar v CS Mungan*, (1969) 36 Comp Cas 772; (1965) 2 Comp LJ 260 (Mad).
65. 1961 AC 12, (1961) 5 WLR 756 (PC), reversing the New Zealand Court of Appeal. An employee cannot bring an action for an unfair dismissal against the majority shareholder of a company which selected him. *Symonds v Canadian Metal Processing Corp*, (1953) 147 DLR (3d) 81 (Can).
66. *Gower, Principles of Modern Company Law* (Red Edn 1969) 202.
67. Attorney-General's Reference (No 2 of 1980); 1984 QB 456, (1984) 2 WLR 465 (CA); Attorney-General's Reference (No 2 of 1982); 1984 QB 624; (1984) 2 WI R 447 (CA); *R v Philippou*, (1989) 5 BCC 663. A director's personal telephone was not allowed to be disconnected for the company's default in payment. *Kailash Prasad Modi v Orissa Telecommunication*, AIR 1994 Ori 98. In *Rashtriya Mill Muzdoor Sangh v Khewa Makwani Spp & Wig Cr Dl*, (2000) 100 Comp Cas 33 (Bom), a company was directed to pay salary and though the decree could have been executed, the company was also held liable to be punished for contempt of court. The human agents through whom the company committed contempt are not absolved from their liability. *DDA v Skipper Construction Co*, (1997) 11 SCC 430; (1997) 89 Comp Cas 362.

CASE PILOT

members. "There are situations where the court will lift the veil of incorporation in order to examine the 'realities' which lay behind. Sometimes this is expressly authorised by statute ... and sometimes the court will lift it of its own volition."⁶⁸ In *State of Karnataka v Selvi J. Jayalalitha*,⁶⁹ the Supreme Court emphasised that company is a separate entity from the members subject to the exception when corporate entity is a mere cloak or sham used to misdirect shareholders and authorities. A company cannot, for example, be convicted of conspiring with its sole director. In the circumstances, the court said: "where the sole responsible person in the company is the defendant himself, it would not be right to say that there were two persons or two minds."⁷⁰ The corporate veil is said to be lifted when the court ignores the company and concerns itself directly with the members or managers. "It is impossible to ascertain the factors which operate to break down the corporate insulation."⁷¹ The matter is largely in the discretion of the courts and will depend upon "the underlying social, economic and moral factors as they operate in and through the corporation".⁷² All that can be said is "that adherence to the Salomon principle will not be doggedly followed where this would cause an unjust result".⁷³ Corporate veil can be lifted, not only in the case of holding subsidiary company or in cases of tax evasion, but also for execution proceedings. The other instances where the doctrine is to be applied are as follows:

- (i) Partnership of two separate corporate entities with one acting as alter ego.
- (ii) Where actual control in the subsidiary company lies with the parent company.
- (iii) Where the name of the company is just a sham.
- (iv) Where two companies are interlinked.

⁶⁸ John P Lowry, "Lifting the Corporate Veil" (1993) 1 BL 41; Ruthven, "Lifting the Veil of Incorporation in Scotland" (1989) Juridical Review 1.

⁶⁹ (2017) 201 Comp Cas 230 (SC).

⁷⁰ *R v McDowell*, (1966) 1 QB 233. A company has, however, been held liable for conspiring with its directors where there are at least two of them. *R v J C H Haulage Ltd*, 1944 KB 551 (CCA). A company cannot be prosecuted for the violation of an Act which provides for compulsory imprisonment. *Modi Industries Ltd v BC Guj.* (1993) 54 Comp Cas 855 (All); *State of Maharashtra v Sigmundar Ltd*, AIR 1966 SC 140 and *Nehal Chand v State of UP*, 1971 All LJ 1229; *IPF Asia v R C Kizengi*, ILR 1993 KAR 709. (1993) 27 Comp Cas 129. A company cannot be prosecuted for cheating and conspiracy because such offences require mens rea. *AK Khushi v TS Mukalee*, (1994) 80 Comp Cas 81 (Cal). A company cannot be imprisoned for evasion of taxes or any other crime. But penalties can be imposed. *Osmel Venkatesh and Allied Industries v State of UP*, (1992) 75 Comp Cas 770.

⁷¹ Warner Toller, "The Incorporated Individual. A Study of One man Company". (1936) 51 Harv L Rev 1973, 1977.

⁷² *Ibid*, 1379. *TELCO Ltd v State of Bihar*, AIR 1965 SC 40; (1969) 34 Comp Cas 458.

⁷³ John P Lowry, "Lifting the Corporate Veil" (1993) 1 BL 41. A company can be held liable for perjury if false evidence is given by a witness appearing on its behalf. *Odyssey (London) Ltd v ONGC Oilfield Ltd*, 2000 TLR 201 (CA), noted in (2001) 1161 QR 527. The circumstances under which the corporate veil can be pierced have been discussed in *Bharti Industries and Infrastructure Ltd v Asian Natural Resources (India) Ltd*, (2017) 201 Comp Cas 46 (Bom).



CASE PILOT



CASE PILOT



CASE PILOT



CASE PILOT

The following grounds have become well-established.⁷⁴

(a) *Determination of character.*—Occasionally it becomes necessary to determine the character of a company, for example, to see whether it is "enemy". In such a case, the courts may in their discretion examine the character of persons in real control of the corporate affairs. *Dunlop Co Ltd v Continental Tyre & Rubber Co Ltd*⁷⁵ is illustrative:

A company was incorporated in England for the purpose of selling tyres manufactured in Germany by a German company. The German company held the bulk of the shares in the English company. The holders of the remaining shares (except one) and all the directors were Germans, resident in Germany. Thus the real control of the English company was in German hands. During the World War I the English company commenced an action to recover a trade debt. And the question was whether the company had become an enemy company and should, therefore, be barred from maintaining the action.

The House of Lords laid down that a company incorporated in the UK is a legal entity, a creation of law with the status and capacity which the law confers. It is not a natural person with mind or conscience. It can be neither loyal nor disloyal. It can be neither friend nor enemy. But it may assume an enemy character when persons in *de facto* control of its affairs are residents in any enemy country or, wherever resident, are acting under the control of enemies. Accordingly the company was not allowed to proceed with the action. If the action had been allowed the company would have been used as a machinery by which the purpose of giving money to the enemy would be accomplished. That would be monstrous and against public policy.⁷⁶

But where there is no such danger to public interest, the courts may refuse to tear open the corporate veil. The American case, *People's Pleasure Park Co v Rosleider*,⁷⁷ is an instructive illustration.

Certain lands were transferred by one person to another perpetually enjoining the transferee from selling the said property to coloured persons. He transferred the property to a company composed exclusively of negroes. An action was commenced for annulment of this conveyance on the ground that all the members of the company being negroes, the property had, in breach of the restriction, passed to the hands of coloured persons.

The court, however, rejected this argument and held that members individually or collectively are not the corporation, which "has a distinct

74. Such cases have been summed up by Prof. Wuncser, "Piercing the Veil of Corporate Entity" (1912) 12 Calcutta Rev 496, and by Murray A. Pickering, "Company as a Separate Legal Entity" (1968) 31 Mod J. Rev 481; Mervyn Woods, "Lifting the Corporate Veil in Canada" (1977) 23 Can LR 1176.

75. (1916) 2 AC 337 (HL), considered by James Edward Hagg, "The Personal Character of a Corporation" (1917) 23 LQR 76.

76. *Sosbach v Van Uden Schepman*, 1945 AC 203 (HL).

77. (1908) 109 Va 439 61 SE 714.

existence—an existence separate from that of its shareholders. It leads its own life ... It stands apart as a separate subject and, in contemplation of law, as a stranger to its own members".⁷⁴

The interest of a company in a leasehold property was not affected by the fact that the company admitted new members. The company remains the same entity in spite of the total change in membership.⁷⁵

(ii) **For benefit of revenue**—"The court has the power to disregard corporate entity if it is used for tax evasion or to circumvent tax obligation."⁷⁶ A clear illustration is *Dinshaw Maneckjee Petit, re*.⁷⁷



CASE PILOT



CASE PILOT

The assessee was a wealthy man enjoying huge dividend and interest income. He formed four private companies and agreed with each to hold a block of investment as an agent for it. Income received was credited in the accounts of the company but the company handed back the amount to him as a pretended loan. This way he divided his income into four parts in a bid to reduce his tax liability.

But it was held that "the company was formed by the assessee purely and simply as a means of avoiding super tax and the company was nothing more than the assessee himself. It did no business, but was created simply as a legal entity to ostensibly receive the dividends and interests and to hand them over to the assessee as pretended loans".

The leading English authority is *Apthorpe v Peter Schoenhofen Brewing Co Ltd*.⁷⁸

Aliens were not allowed to hold land in New York. An English company acquired the business and assets of a New York company. But the American company was kept on foot to hold the land. The business was financed and run by the English company.

It was held that the American company had become the agent of the English company and therefore, the whole of its profits were liable to be taxed as the income of the English company.⁷⁹

Members themselves, however, are not allowed to claim that they should be regarded as economically identical with the company, particularly when this is not in the interest of revenue. In *Bacha F Gazdar v CIT*.⁸⁰

74. *Sonal Kumar Debnath v Mining & Allied Machinery Corp Ltd*, (1968) 39 Comp Cas 652; (1968) 1 Cwng LJ 214 (Cal); and *Hyderabad Sind Electric Supply Co v Union of India*, AIR 1969 Punj 199 where the court held that the fact that a majority of the shareholders of a company had migrated to India did not and could not change the nationality of the company.

75. *Naga Bhawan Trust v Taxis Laksh Air Travels (P) Ltd*, (1997) 86 Comp Cas 106 (Mad); *Jagat Lal Kanshiram v CIT*, (1969) 2 S.L.C. 376; *India Water Energy Development Ltd v Govt (NCT of Delhi)*, (2003) 118 Comp Cas 42 (Del), lifting corporate veil permissible in cases of tax evasion even in the absence of any statutory provisions.

76. AIR 1927 Bom 371.

77. (1892) 4 TC 41; AC 1T 395 (CA).

78. Subsequently, however, the courts have been more cautious, see, *CII v Sri Mahakali Mills Ltd*, AIR 1967 SC 819; (1967) 1 SCR 934, 941; (1967) 63 ITR 609; *McDowell & Co Ltd v CTD*, (1983) 3 SCC 210; *Furman v Denison*, 1984 AC 474 (HL).

79. AIR 1955 SC 74; (1968) 25 Comp Cas 1.

Under the Income Tax Act, then in force, agricultural income was exempt from tax. The income of a tea company was exempt up to 50 per cent as agricultural income and 40 per cent was taxed as income from manufacture and sale of tea. The plaintiff was a member of a tea company. She received a certain amount as dividend in respect of shares held by her in the company and claimed that this dividend income should be regarded as agricultural income up to 60 per cent.

But it was held that although the income in the hands of the company was partly agricultural, yet the same income when received by the shareholders as dividends could not be regarded as agricultural income.

Another attempt by the members of a company to treat themselves at par with the company was frustrated by the Calcutta High Court in CIT v Associated Clothiers Ltd.⁸⁵

The assessees, Associated Clothiers, formed a company holding all its shares. They sold certain premises to the new company. The difference between the selling price and the cost of the property in the hands of assessees was assessed as their income.

They contended that this could not be done as there was no commercial sale, but only a transfer from self to self. The court rejected this and held that it was sale from one entity to another and not a trading with oneself.

From this point of view, incorporation sometimes becomes too dear. Shareholders are virtually compelled to pay the price for the advantages of incorporation. Those shareholders who become directors have then to owe duties of fiduciary nature to their own company and they cannot use the assets of the company as if they were their own. In a way they become strangers to their own enterprise.⁸⁶ This is one of those situations which go to prove the truth in Prof. Kahn-Freund's statement that "sometimes corporate entity works like a boomerang and hits the man who was trying to use it".⁸⁷

Benefits under excise law were denied to a company when it was found that it was a part of a group of three companies which were related not only in financial control but also through managerial personnel. They were intertwined in their management and operation. Their production had to be clubbed together so as to see whether it was within exemption limits.⁸⁸ This principle is applied where the facts reveal that the companies (holding and subsidiary) are indulging in dubious methods for tax evasion.⁸⁹

85 AIT 1962 Cal 629. See also, CIT v Sri Meenakshi Mills Ltd, AIR 1967 SC 614; (1967) 1 SCR 934, 941. (1967) 61 ITR 609.

86 See, George Newman & Co. m. (1895) 1 Ch 674 (CA); EBM Cr Ld v Dhanjee Bank, AIT 1937 PC 279.

87 See, O. Kahn-Freund, "Company Law Reforms", 9 Mod J. Rev 235.

88 Turle Bisteri (P) Ltd v Commt. of Customs and Central Excise, (2010) 14 SCC 398; (2011) 263 IELR 15.

89 Wingrove International Holdings PVT v Union of India, (2012) 6 SCC 413 (2012) 170 Comp Cas 360.

Directors of a public company cannot be made liable for tax dues of the company. Principles governing piercing of corporate veil were not applicable on the facts of the case.⁹³ In another similar case, directors were not made liable. The court said that the mere circumstance that the company used wrong code in the return of income tax was not sufficient to hold that the company was not a public company.⁹⁴

1st Fraud or improper conduct.—The corporate entity is wholly incapable of being strained to an illegal or fraudulent purpose. The courts will refuse to uphold the separate existence of the company where it is formed to defeat or circumvent law, to defraud creditors or to avoid legal obligations. Corporate veil can be lifted in cases of fraud, misrepresentation, diversion of funds.⁹⁵ One clear illustration is *Gilford Motor Co Ltd v Horne*.⁹⁶

Horne was appointed as a managing director of the plaintiff company on the condition that "he shall not at any time while he shall hold the office of a managing director or afterwards, solicit or entice away the customers of the company". His employment was determined under an agreement. Shortly afterwards he opened a business in the name of a company which solicited the plaintiff's customers.

It was held that "the company was a mere cloak or sham for the purpose of enabling the defendant to commit a breach of his covenant against solicitation. Evidence as to the formation of the company and as to the position of its shareholders and directors leads to that inference. The defendant company was a mere channel used by the defendant Horne for the purpose of enabling him, for his own benefit, to obtain the advantage of the customers of the plaintiff company, and that the defendant company ought to be restrained as well as the defendant Horne".

Where a person borrowed money from a company and invested it in shares of three different companies in all of which he and his son were the only members, the lending company was permitted to attach the assets of such companies as they were created only to hoodwink the lending company.⁹⁷ Where a company created a subsidiary and transferred its investment

93. *Rodney Mallesha Shashik v CIT*, 2014 SLC Online Guj 1329; (2014) 184 Comp Cas 358 (Guj).

94. *Chauhan N Patel v CIT*, (2010) 184 Comp Cas 367 (Guj).

95. *Afroz Gupta v Trident Property Ltd*, (2010) 153 Comp Cas 174 (Del); *VTB Capital Plc v Nutritek International Corp*, (2012); 2 WLR 394 (SC), a claimant entered into a contract with a company because of misrepresentations made by third parties who controlled the company. The court refused to lift the corporate veil in order to discover such persons and hold them liable for breach of the agreement.

96. 1933 (1) 935 (CA). Another illustration is *Connors Bros Ltd v Chatters*, (1940) 4 All ER 179 (PC). See also, *DDA v Skipper Construction Co*, (1997) 11 SLC 430; (1997) 189 Comp Cas 362, where the corporate veil was lifted to bring to the surface persons who were using the company for defrauding people by luring them into booking for plots and flats.

97. *PNB Finance Ltd v Shital Prasad Jain*, (1981) 19 DLT 368; (1983) 54 Comp Cas 66. Property acquired under fraudulent schemes was allowed to be chased even in the hands of third persons. *SEBI v Lala Platinum Ltd*, (1999) 95 Comp Cas 373; (1999) 1 Comp LJ 294 (Bom); money collected under fraudulent investment schemes was ordered to be chased in whatsoever hands it might be. *Ali Javed Ameerbasu Razvi v Envi French Biotech Enterprises Ltd*,



CASE PILOT



CASE PILOT

holdings to it in a bid to reduce its liability to pay bonus to its workers, the Supreme Court brushed aside the separate existence of the subsidiary company. "It is the duty of the court, in every case where ingenuity is expended to avoid taxing and welfare legislation, to get behind the smokescreen and discover the true state of affairs."⁹⁵ The following statement in the judgment of **CHINNAPPA REDDY I** shows how the court guessed that evasion was the only purpose:

"A new company is created, wholly owned by the principal company, with no assets of its own except those transferred to it by the principal company, with no business or income of its own except receiving dividends from shares transferred to it by the principal company and serving no purpose whatsoever except to reduce the gross profits of the principal company. These facts speak for themselves. There cannot be direct evidence that the second company was formed as a device to reduce the gross profits of the principal company for whatever purpose. An obvious purpose that it served and which stares one in the face is to reduce the amount to be paid by way of bonus to workmen."

This finding was further supported by the fact that the subsidiary was subsequently wound up and amalgamated into the holding company.

A person who had incurred a disqualification, for example, blacklisting as a contractor, was not allowed to hide his disqualification by forming a company and tendering in its name.⁹⁶ The court further held that the experience of the shareholders of a company could not be regarded as that of the company for tendering purposes. This decision was reversed by the Supreme Court.⁹⁷ The court said that it was permissible to see through the corporate veil to find out from the shareholders or from the people controlling the company something about the nature of the company. The company was composed of two joint venturers who, among other things, contributed their personal expertise. In such circumstances, the court said, the experience of the company can only mean the experience of its constituents. Such experience was ignored by the tender evaluation committee on a wrong hypothesis. This resulted in a disqualification of the tendering company. A legal wrong was caused to it.

A controlling shareholder commenced action against a company for recovery of a loan supposed to have been made by his company to the debtor company. The alleged loan agreement pre-dated the incorporation of the lending company. The action was, therefore, dismissed. Subsequent

⁹⁵ 1999) 95 Comp Cas 375 (Bom); SEBI v LILY PLANTATION LTD, (1999) 95 Comp Cas 373; (1999) 1 Comp LJ 294 (Bom); Dindayi Bhawar Thangji v State of Maharashtra, (1998) 17 SCL 194 (Bom).

⁹⁶ Workmen v Associated Rubber Industry Ltd, 1985I 4 SCC 114, 118–19; Nafimco Dock Labour Board v Pinn and Wheeler Ltd, 1989 BLDC 647 (QBD), where a group of three companies working in the same geographical location of a dock were not allowed to claim that they should be treated as three different companies when their purpose was to avoid the effect of the Dock Labour Scheme; Chaito Kumar Banerjee v Property Development Trust Ltd, (1988) 93 CWN 725; evasion of welfare legislation.

⁹⁷ New Horizons Ltd v Union of India, AIR 1994 Del 126.

⁹⁸ New Horizons Ltd v Union of India, (1993) 1 SCC 478; (1997) 59 Comp Cas 849.



CASEPILOT



CASEPILOT

to this the company commenced an action on the basis of a written loan agreement. This action was dismissed under the principle of *res judicata*. The company was wholly owned and controlled by one person and might have started the action at his behest.⁹⁸

A director's knowledge that there was a winding up petition against the company was attributed to the company. An *ex parte* order was passed. The director moved for having the order set aside long after. The court refused to condone the delay.⁹⁹

(d) **Government companies.**—A company may sometimes be regarded as an agent or trustee of its members or of another company and may, therefore, be deemed to have lost its individuality in favour of its principal. In India this question has frequently arisen in connection with Government companies. A large number of private companies for commercial purposes have been registered under the Companies Act with the President and a few other officers as the shareholders.¹⁰⁰ The obvious advantage of forming a Government company is that it gives the activities of the State "a little of the freedom which was enjoyed by private corporations and [the Government] escaped the rules and principles which hampered action when it was done by a Government department instead of a Government corporation. In other words, it gave the Government some of the robes of the individual".¹⁰¹ And in order to assure this freedom the Supreme Court has reiterated in a number of cases that a Government company is not a department or an extension of the State.¹⁰² It is not an agent of the State. Accordingly its employees are not civil servants¹⁰³ and prerogative writs cannot issue against it.¹⁰⁴ In one of these cases, the court remarked:

"The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty

98. *Barakat Ltd v Epictet Ltd*, (1937) 1 BCLC 303 (MLR); *Jai Narain Parasramgurus v Puspa Devi Singh*, (2006) 7 SCC 756; (2006) 123 Comp Cas 794. promoters represented that the property was purchased for the company. the company was shown as the owner in all documents signed by promoters, they were the only shareholders and director in the company; they were estopped from claiming that the property belonged to them personally, they were using the personality of the company for personal motive, not to be allowed to set up a case contrary to the company's interests.

99. *Serum Institute of India Ltd v V Yegnani Kumar*, (2006) 123 Comp Cas 135 (AP).

100. Shewdhuk Kothari, "Government Companies in India" (1959) Indian Law Journal 143.

101. Thurman W. Arnold, *The Foundations of CAPITALISM* (1946) 198.

102. *State Tramming Corps of India Ltd v CTD*, AIR 1963 SC 1811; (1963) 33 Comp Cas 1057; *Sukhdev Singh v Bhagwan Singh Raghuwanshi*, (1975) 1 SC 421; (1975) 45 Comp Cas 285.

103. *Praga Tools Corp v CA Imsoni*, (1969) 1 SOC 585; (1970) 39 Comp Cas 380; *Abni Binsar Bigni v Hindustan Cables Ltd*, (1966) 2 Comp LJ 137; *Piyush Lal Sharma v J&K Industrial Ltd*, (1999) 3 SOC 448; (1999) 67 Comp Cas 195. But otherwise it being an organ of the State, it cannot be permitted to enforce against an employee a contract which is unfair. *Modern Food Industries (India) Ltd v M.L. Joshi*, T989 Lah IC 224 (GJ). It is also required to act fairly in trade matters and commercial bargains. *Msalibai Auto Stores v Indian Oil Corp*, (1990) 5 SOC 752; (1990) 69 Comp Cas 746. The Supreme Court did not permit the IOC to cancel without proper procedure an 18 year old contract of distribution.

104. *Heavy Engg Machine Union v State of Bihar*, (1969) 1 SCC 765; (1969) 39 Comp Cas 905; *R.D. Siegh v Bihar State Small Industries Unit*, (1975) 45 Comp Cas 527 (Pat).

imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus".¹⁰⁵

The Madhya Pradesh High Court regarded a Government company to be a separate entity for the purpose of enabling a Development Authority to subject it to developmental tax.¹⁰⁶ The assets of a Government company were held to be not exempt from payment of non-agricultural assessment under an AP legislation. The exemption enjoyed by the Central Government property from State taxation was not allowed to be claimed by a Government company.¹⁰⁷ The subsidiary of a Government company which also becomes a Government company was not allowed the benefit of the U.P. Public Money (Recovery of Dues) Act, 1972.¹⁰⁸ Steel Authority of India has been held to be not a department of the State.¹⁰⁹ Similarly, the Court of Appeal in England in *Fallow Vale LDC v South Wales Traffic Area Licensing Authority*¹¹⁰ refused to hold that transport services provided by a company all of whose shares were owned by the Transport Commission were services provided "by the Commission or by any person acting as agent for the Commission". A Government company will be regarded as an agent of the State only when it is performing in substance governmental or sovereign and not merely commercial functions.¹¹¹

Ultimately the employees have found some success at the hands of Krishna Iyer J. The case before the Supreme Court was *Soni Prakash Rekhi v Union of India*.¹¹² The company in question arose out of the acquisition and vesting in the Central Government of the assets and business of Burmah Shell. The employee, who had certain rights as to provident fund, etc, against the former company, claimed them against the Government by means of a writ. His claim was resisted on the ground that the undertaking had been vested in a company registered under the Companies Act and the question of a writ against a private company could not arise. Krishna Iyer J brushed aside this contention. He laid emphasis upon the fact that the whole

105. Cited in *Ram Singh v Fertiliser Corporation of India Ltd.* (1980) 30 Comp Cas 583; (1980) 2 LLN 373 (P&H), where the court refused to issue a writ in favour of an employee whose pay had been reduced by the company, the petitioner to pursue his remedy mainly in the law of contract.

106. *Bharat Aluminium Co Ltd v Special Area Development Authority*, (1981) 51 Comp Cas 184 (MP).

107. *Electronics Corp. of India Ltd v Govt of AP*, (1999) 4 SCC 438; (1999) 97 Comp Cas 170. The Food Corporation was held to be not exempt from State taxes. It does not enjoy the status of the Central Government. *Enid Corporation of India v Municipal Committee*, (1999) 5 SCC 70; (1999) 98 Comp Cas 824.

108. *Re�u Gases (P) Ltd v State of UP*, (2000) 101 Comp Cas 212; (1995) 2 AWC 1523.

109. *Sati v Shri Ambika Mills Ltd*, (1998) 1 SCC 455; (1998) 92 Comp Cas 120; *Hindustan Steel Works Construction Ltd v State of Kerla*, (1997) 5 SCC 171; (1996) 2 Comp LJ 383.

110. (1951) 2 KB 366 (CA).

111. *Tenlin v Hastings*, (1950) 1 KB 18, 25 (CA); *New Tirupur Area Development Corp Ltd v State of TN*, AIR 2010 Mad 176, the court found on lifting the veil that though the Government had put in only 17.04 per cent money into the company's share capital, the Government company was State controlled for public services. The company became a public authority for the purposes of the Right to Information Act, 2005.

112. (1992) 1 SCC 449; (1981) 51 Comp Cas 71.



undertaking had been vested in the Central Government and, therefore, it became a State undertaking. The learned judge also stressed the fact that the law should not go by the tact whether the company is registered under the Companies Act or otherwise, but by the nature of the functions that the unit was performing. Here the statement of reasons stated that the company was being acquired in public interest and thus the new company was created to perform a function of public nature. The court noted the fact that the reason why the State chose to function through companies was not to frustrate employees, but to assure commercial flexibility and freedom from departmental rigidity, slow motion procedures and hierarchy of officers.¹³³ The learned judge cited the following remark of President Roosevelt¹³⁴

"Concentration of economic power in all-embracing corporations... represents private enterprise become a kind of private Government which is a power unto itself—a regimentation of other people's money and other people's lives."

Hitting at the reality of the situation, Kausura Iyer J remarked:

"The true owner is the State, the real operator is the State and the effective collectarate is the State and the accountability for actions to the community and to Parliament is of the State. Nevertheless a distinct juristic person with a corporate structure conducts the business. Be it remembered though that while the formal ownership is cast in the corporate mould, the reality reaches down to State control.... What we wish to emphasise is that merely because a company or other legal person has functional and juridical individuality for certain purposes, it does not

133. There is, however, an equivalent amount of hierarchy of officers in the corporate infrastructure also. The word "State" as defined in Art. 12 of the Constitution includes all authorities within the territory of India or under the control of the Government of India. The word "authority" has all along been taken to mean only those authorities whose orders are to be obeyed. The word will accordingly exclude associations registered under the Companies Act. The Allahabad High Court accordingly held in *M.L. Saini, m.* (1986) 39 Comp Cas 312 (Cal), that the Bengal Chamber of Commerce which is registered under the Companies Act is not an authority within the meaning of Art. 12. In *Sale of Puriyah v Raw Row*, (1982) 52 Comp Cas 134 (SC), a statutory corporation, i.e., The Food Corporation of India, has been held to be not equivalent to State for the purposes of the Land Acquisition Act. An employee was allowed to proceed against a Government company under writ jurisdiction to question the termination of his services. *H. Purushottam v Union of India*, (1997) 14 SCR 391 (Cal). *Mysore Paper Mills Ltd v Officers' Assn*, JLR 159; KAR 3620; (1999) 1 Comp LJ 88. In *Harianna SEB v Sircilla*, (1999) 3 SCC 601, the Supreme Court observed that although the doctrine of not "lifting of the veil", as enunciated in *Solomon* case, came to be recognised in the corporate jurisprudence but its inapplicability in the present context cannot be doubted, since the law court invariably has to step up to the occasion to do justice between the parties in a manner as it deems fit. *Kapila Hingorani (I) v State of Bihar*, (2003) 6 SCC 1; (2003) 116 Comp Cas 133, the Government not allowed to shelter behind the lack of resources in discharging its obligation to pay wages of the employees of a Government company. *A.K. Biswal v Union of India*, (2003) 5 SCC 163; (2003) 114 Comp Cas 598, the Government held not liable to pay the salary of the staff of a Government company. The company was an independent legal person and its staff members were not Government employees.

134 Franklin D. Roosevelt, Acceptance Speech, Democratic National Convention, 27-6-1936.



necessarily follow that for the effective enforcement of fundamental rights, we should not scan the real character of that entity; and if it is found to be a mere agent or surrogate of the State, in fact owned by the State, in truth controlled by the State and in effect an incarnation of the State, constitutional lawyers must not blink at these facts and frustrate the enforcement of fundamental rights despite the inclusive definition of Article 12 that any authority controlled by the Government of India is itself State."

The Supreme Court refused to hold the Life Insurance Corporation as an instrumentality of the State when it was exercising its ordinary right as a majority shareholder in a company for removing the existing management and reconstituting the Board of directors.¹¹⁵ In another case the court pierced the veil of incorporation and found that the Area Development Corporation was in fact a public authority though the Government investment in it was only 17.4 per cent. It was created under public-private-participation to build, operate and transfer water supply and sewerage treatment system.¹¹⁶ It became a public authority for the purposes of the Right to Information Act, 2005.

Agency or trust, where no functioning autonomy granted.—Thus, it appears that it is very difficult to persuade the courts to go behind the corporate entity of a company to determine whether it is really independent or is being used as an agent or a trustee. "Under the ordinary rules of law" observes CORTEX LJ "a parent company and a subsidiary company, even a 100 per cent subsidiary company, are distinct legal entities, and in the absence of an agency contract between the two companies, one cannot be said to be the agent of the other."¹¹⁷ If one company is to be fixed with liability

115. LIC v Escorts Ltd, (1986) 1 SCC 261, 343; (1986) 59 Comp Cas 548. Employees of nationalised banks have been held to be public servants for the purposes of the Prevention of Corruption Act, 1947; M/P Kisan v State, (1992) 26 Comp Cas 249 (AP). A nationalised insurance company was held to be an instrumentality of the State so as to enable the court to issue directions under writ jurisdiction. Jinalalal Chid Bhagat v National Insurance Co Ltd, (1994) 29 Comp Cas 441 (Cal). A company with maximum Government control would not be so regarded. P/B Gingeev v Maruti Udyog Ltd, ILR (1992) 1 Del 669; (1994) 29 Comp Cas 96. A company in which the Government had only 17 per cent shareholding and no control over management, was not held to be a Government company or a State instrumentality. Mar Hindust Corp v Nagarjuna Fertilizers & Chemicals Ltd, (1991) 27 Comp Cas 518 (AP). Myopic Paper Mills Ltd v Officers' Assn, (2002) 2 SCC 167, 2002 SCC (L&S) 223; (2002) 106 Comp Cas 652. 97 per cent mixed Government holding, appointment of directors required Government concurrence, important duties of public nature were entrusted to the company. The company was regarded as an instrumentality or agency of the State.

116. New Tigray Anti-Development Corp v State of TN, AIR 2010 Mad 176; Bharat Shil Shakti Tibes Ltd v IFCL Ltd, (2011) 1 SC 585, it is not necessary for a public financial institution under S. 4-A [now S. 2(72)] that the Government should hold 51 per cent or more paid-up capital. Shiva Engg. Co Ltd v Satish Prakash Malhotra, (2010) 4 SC 1379, a company is not an entity established under the Companies Act for the purposes of Persons with Disabilities (Equal Opportunities, Protection of Rights, and Full Participation) Act, 1995. Such companies are only registered and incorporated under the Act and not established.

117. The court considered this to be clearly established by Simon v Salomon & Co Ltd, 1897 AC 22 (HL), and the observations of Justice L in British Thompson & Houston Co Ltd v Sterling Accessories Ltd, (1924) 2 CA 33.

as a principal for the acts of another company, the relationship of agency should be substantively established. The facts of *Smith, Stone & Knight Ltd v Birmingham Corp*¹¹⁸ revealed a relationship of this kind. A company acquired a partnership concern, registered it as a company, and then continued to carry it on as a subsidiary company. The parent company held all the shares except a few, treated the subsidiary's profits as its own, appointed managers and exercised effectual and constant control. When the business of the subsidiary was acquired by the defendant corporation the court allowed the parent company, brushing aside the legal distinction between the two companies, to claim compensation in respect of removal and disturbance. The subsidiary company was not operative on its own behalf, but on behalf of the parent company. Atkinson J first noted the rule that "it is well settled that the mere fact that a man holds all the shares in a company does not make the business carried on by that company his business. It is also well settled that there may be such an arrangement between the shareholders and a company as will constitute the company the shareholders' agent for the purpose of carrying on the business and make it the business of the shareholders". The learned judge then referred to six points which are useful for ascertaining who really was carrying on the business. The first point was: Were the profits treated as the profits of the parent company? Secondly, were the persons conducting the business appointed by the parent company? Thirdly, was the parent company the head and the brain of the trading company? Fourthly, did the parent company govern the adventure, decide what should be done and what capital should be embarked on the venture? Fifthly, did the subsidiary company make the profits by its skill and direction? Was the parent company in constant and effectual control of the subsidiary company? After considering the answer to these questions the learned judge concluded that if ever one company could be said to be the agent or employee, or tool or simulation of another, that was the case here.¹¹⁹

Thus, exclusive control in all respects and without any other person having any voice in the affairs is the surest indication of agency or trust. The following statement of Lord DENNING, MR pictorially portrays the circumstances in which a company is nothing but the controller himself under another hat¹²⁰:

"It is plain that W used many companies, trusts, or other legal entities as if they belonged to him. He was in control of them as much as any 'one-man company' is under the control of one who owns all the shares and is the chairman and managing director. He made contracts of enormous magnitude on their behalf on a sheet of note paper without reference to

118. (1929) 4 All ER 116 (KB). A similar claim has again been upheld in *DJIN Food Distributors Ltd v Tower Hamlets London Borough Council*, (1976) 1 WLR 852 (2).

119. This formula was cited in *CIT v Cheredi Transport Corp Ltd*, (1992) 74 Comp Cas 563 (Mad), for the guidance of the IT authorities as to when they can club the income of certain companies together for a single assessment.

120. *Wilestein v Mow*, (1974) 1 WLR 991 (CA).



anyone else. I am prepared to accept that the companies ... were distinct legal entities ... even so they were just the puppets of W. He controlled their every movement. Each danced to his bidding. He pulled the strings. No one else got within the reach of them. Transformed into legal language, they were his agents to do as he commanded. He was the principal behind them. I am of the opinion that the court should put aside the corporate veil and treat these concerns as being his creatures for whose doings he should be, and is, responsible."

For purposes of taxation also the same tests are applicable to see whether a company is not an agent or trustee of another. Lord DUNNING MR said in a case:¹²¹

"The doctrine laid down in *Salomon v Salomon & Co* has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should also follow suit. We should look at the Fork company and see it as it really is—the wholly owned subsidiary of the taxpayers. It is the creature, the puppet of the taxpayers in point of fact, and it should be so regarded in point of law."

Another illustration is *FG (Fries) Ltd*, re.¹²²

An American company produced a film called "Monsun" in India technically in the name of a company incorporated in England. The English company had a capital of £100 in £1 shares, 90 of which were held by an American director. The production was financed by the American company. In these circumstances the Board of Trade refused to register it as a British film and their decision was upheld by the court. It would be a mere travesty of the facts to say or to believe that this insignificant company undertook the arrangements for the making of the film. They acted, insofar as they acted at all in the matter, merely as the nominee of, and agent for the American company.

A group of 13 companies incorporated abroad separately applied for permission under the Foreign Exchange Regulation Act, 1974 for investment in Indian companies. The Act, on the one hand, encouraged flow of such investment from non-resident Indians, and, on the other, imposed a ceiling so that the privilege may not be used to destabilise Indian companies. It was contended that all the 13 companies belonged to one family trust and therefore the ceilings were violated. The Supreme Court refused to accept this. This Act itself permits the veil to be lifted for the purpose of knowing whether 60 per cent holding makes the company belong to non-resident

121. *Johnnes Mail Order Stores Ltd v IRC*, (1969) 1 WLR 1261 (CA); 122. (1953) 1 WLR 683; (1953) 1 All ER 615

Indians. To go further with lifting the veil would be against national interest because it would discourage the flow of non-resident investment.¹²³

Personal liability of directors and members: Statutory provisions

The Act also imposes personal liability on the directors or members of a company in certain cases. Independent existence of the company is maintained and the company may also be liable. But, apart from the liability of the company, those cloaked behind it are also made liable. Following are some such provisions of the Act.

(i) *Non-compliance of requirements of incorporation [S. 464].*—The purpose of the provision is to withdraw the advantages of incorporation when the conditions of incorporation are not maintained. Personal liability follows.

A member of a company became liable severally and jointly with the company for the debts incurred during the period when he was the sole member of the company. He had himself purchased the shares of the only other member of the company.¹²⁴ Horrigan J observed:

"I have considerable sympathy with the appellant, who has fallen into a trap created by an ancient and obsolete rule. Section 24 of the [English] Companies Act, 1985 requires that a company should have at least two members. In default of compliance it strips the remaining member of the protection of limited liability. The rule goes back to Section 48 of the [English] Companies Act, 1862 when the minimum number of members was seven. This reflects the evolution of company law from partnership, but the reason why it has survived through successive Companies Act is obscure. It seems to serve no purpose in protecting the public or anyone else. It is not necessary that the second member should hold his share or shares beneficially. The appellant could have satisfied the requirement of the Act by transferring a single share to his wife, lawyer or accountant to hold in trust for himself, but he did none of these things. Since 1983, the appellant has been the sole member and is liable accordingly."

All the remaining members would have to be impleaded as necessary parties, even if the circumstances are such that some of them would not be severally liable.¹²⁵

¹²³ *JKT v Farsons Ltd.*, (1986) 1 SCC 314, 336-37; (1986) 59 Comp Cas 548. It is not easy for the creditor-controller of a company to get rid of his personal handicaps by operating through a company. Thus, in *Canada Enterprises Corp Ltd v MacNab Distilleries Ltd.*, (1987) 1 WLR 813 (CA), three different debenture-holders of a company transferred their debentures to their self-controlled companies, which demanded repayment of the debentures. The defendant company was granted a stay against them for a counter-claim which the company had against the controlling shareholders for breaches of their lending agreements. They were treated as being identical with their companies, the court considering the substance of the transaction to be more important than the legal form. *Abil Sumjatil Kamal v Office Tiger Dubmash Systems India (P) Ltd.*, (2006) 3 I.W. 688; (2006) 129 Comp Cas 192 (Mad); employees of one group company committed contempt of court, employees of other group companies could not be punished.

¹²⁴ *Nisar v Shepherd*, (1994) 1 BCLC 300; (1995) 19 CLA 234 (CA).

¹²⁵ *Madamed v Nizamot*, (1997) 1 Comp L 399; (2000) 37 CLA 273 (MP).

(b) *Misdescription of name*.—Secondly, where in any act or contract of a company, its name is not fully or properly indicated as required by Section 12 those who have actually done the act or made the contract shall be personally liable for it. Thus, the directors were held personally liable on a cheque signed by them in the name of a company stating the company's name as "T. R Agencies Ltd", the real name being "L & R Agencies Ltd".¹²⁶

(c) *Fraudulent conduct of business*.—Thirdly, Section 339 imposes liability for fraudulent conduct of a company's business. According to the section, "if in the course of winding up of a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or any other persons, or for any fraudulent purpose", those who were knowingly parties to such conduct of business may, in the discretion of the Tribunal, be made personally liable for all or any of the debts of the company.¹²⁷

(d) *Holding and subsidiary companies [S. 2(46) and (87)]*.—A company qualifies as a holding company when it has the power to control the composition of the Board of directors of another company or holds a majority of its shares. It has been seen that a subsidiary company, even a 100 per cent subsidiary, is a separate legal entity and its creator and controller is not to be held liable for its acts merely because he is the creator and controller. Nor is the subsidiary to be held as an agent of the holding company. The decision of the Delhi High Court in *Freecashels (India) Ltd v. Vedit Mittal*¹²⁸ is an illustration in point:

A 52 per cent subsidiary company proposed to issue further capital which, following Section 81, [now S. 62] was offered to the existing holders of equity shares. The holding company requested the court that its subsidiary should be restrained from going ahead with the issue as it would deprive its parent of their controlling interest and would also depreciate the value of its shares.

Karev I refused to issue the injunction prayed for and said: "Here the parent holds only a nominal majority in the share capital of the subsidiary. With the meagre majority alone I am not prepared to hold, even if it were possible to do so for such a purpose, that the subsidiary company has lost its identity as a separate legal entity."¹²⁹

126. *Hendin v. Adelman*, The Times, June 16, 1973, 1973 New L.J. 637.

127. *William C. Little Bros. Ltd. v. rr.* (1932) 2 Cr. 71 (ChD); Nigel L. Macasey, "Responsibility for Fraudulent Trading", 1973 New L.J. 822.

128. AIR 1969 Del 258; (1969) 39 Comp Cas 1; *Monili Products Promoters (P) Ltd v. District Forest Officer*, (2005) 123 Comp Cas 347 (Mad), the dues of the company to the Forest Department were not allowed to be adjusted against the Department's dues to a firm, only because some of the partners of the firm were also officers of the company.

129. See also, *State of UP v. Reinsiger Power Co.* (1988) 4 SOL 59; (1991) 1 AL Comp Cas 122, a subsidiary company was created for the purpose of generating and supplying power only to its parent company and the two were treated as one for excise purposes. *Punjab National Bank v. Boreja Knipping Fasteners Ltd.* (2001) 103 Comp Cas 958 (Mad), companies in a group are nevertheless distinct juristic personalities with different sets of shareholders.



A holding company was not allowed to interfere in the disinvestment decision of a sub-subsidiary company (subsidiary of subsidiary) even if one of the effects of the disinvestment could have been the loss of position as a holding company.¹³⁰ The application of a foreign company for approval for establishing a wholly owned subsidiary company was held to be not an application for establishing a joint venture because a parent company and its subsidiary are usually treated as one economic entity whereas a joint venture presupposes two independent parties.¹³¹ A holding company can not be made liable for dues of the subsidiary. In this case, the subsidiary owed certain sums to the Employees' Provident Fund. The holding company was held to be not liable in that respect, because it could not be supposed to be the employer of workers of its subsidiary. The subsidiary was not a branch of the holding company.¹³²

An English company created a foreign subsidiary for listing and tax advantages. The foreign subsidiary was used for raising money on bonds through financing banks. The money thus raised was loaned to the holding company. When the holding company became unable to pay and was put under administration, the financing banks lodged their claims for the money provided by them to the subsidiary and the subsidiary also lodged its claim for the same money because it provided the loans to the holding company. The financing banks wanted that the claim of the subsidiary should be ignored because it was a part of the same economic entity. The court refused to do so and said that those two companies could not be regarded as one and the same entity. All the companies in a group are separate legal entities and have to be so regarded unless there are compelling circumstances. The court said that even if in certain circumstances the court could go behind the veil to examine the real substance of the transaction, it would still be looking at the legal substance and not the economic substance.¹³³

A subsidiary company may, however, lose its separate identity to a certain extent in two cases. Firstly, the legislature may brush aside the legal forms and require the companies in a group to present a joint picture. Thus, Section 129 contains provisions "designed primarily to give better information of the accounts and financial position of the group as a whole to the creditors, shareholders and public".

^{130.} *BDA Breweries v Crichton & Co Ltd*, (1990) 83 Comp Cas 325; (1997) 25 CLA 273 (Bom).

^{131.} *Hukin (UK) v Union of India, I.R* (1983) 2 Del 403; (1987) 88 Comp Cas 213 (Del).

^{132.} *Industrial Development Corp Orissa Ltd v Krigl PP Glass*, (2002) 112 Comp Cas 527 (Or); *Almabic Glass Industries Ltd v CCE*, (2002) 9 SCC 463; (2002) 112 Comp Cas 379, two public limited companies holding shares in each other, not allowed to be regarded as related persons. The court also said that a shareholder does not have any interest in the business of the company.

^{133.} *Poly Peck International Plc (No 3)*, re, (1996) 1 BCLC 428 (Ch D). See also, *IT (Revaluation Order, Realistic Property), re*, (1996) 2 BCLC 500 (CA); the corporate structure was used as a device or facade to conceal criminal activities (evasion of taxes).



CARE PILOT

Secondly, the court may, on facts of a case, refuse to grant a subsidiary company an independent status. "It may not be possible to put in a strait-jacket of judicial definition as to when the subsidiary company can really be treated as a branch, or an agent, or a trustee of the holding company. Circumstances such as the profits of the subsidiary company being treated as those of the parent company, the control and conduct of business of the subsidiary company resting completely in the nominees of the holding company ... may indicate that in fact the subsidiary company is only a branch of the holding company."¹³⁴ That result followed in the case of a wholly owned subsidiary whose parent company was allowed to recover compensation when the land of its subsidiary on which it was carrying on business was acquired.¹³⁵ A change of majority shareholding between two companies associated with each other being the subsidiaries of the same company, did not have the effect of enabling the statutory tenants of the company's flats to say that the landlord had changed.¹³⁶

Subsidiary of multinational.—That result did not follow in reference to the wholly owned foreign subsidiaries of a multinational corporation. A group of oil companies in the UK owned and controlled certain oil companies in Rhodesia. The English parent company was called upon to produce certain documents relating to a pipeline contract which were in the possession of its subsidiaries. The court rules empowered the court to require the disclosure of all documents in the "possession, custody or power" of a party. The question was whether the documents in the possession of a foreign subsidiary could be deemed to be in the possession of the "parent". The Court of Appeal answered the question in the negative.¹³⁷ Lord DENNING laid emphasis upon the position of the company in the setting of

134. *Kauru [in Freeholders (Leslie) Ltd v Veda Mills Ltd*, AIR 1969 Del 258; (1969) 39 Comp Cas 1. See also *Smith, Stone & Knight Ltd v Birmingham Corps.* (1999) 4 All ER 316 (K3) where all such cases have been reviewed.

135. *DHM Food Distributors Ltd v Tracy Hauliers London Borough Council*. (1976) 1 WLR 652 (2), distinguishing it from the Scottish case of *Westfjord v Strathclyde Regional Council*. 1978 UXCIL 5, 1978 SLC 199 (Scotland), ruled 1977 JBL 250-51, because here the subsidiary was not wholly owned but only one in a group. In *Hackbridge-Hawthorn and Eason Ltd v GEC Distribution Transformers Ltd*. (1992) 79 Comp Cas 543 (Mad), a company becoming a subsidiary company for a business right which is held exclusively granted to another company was held to have violated the covenant. In *Palmes Talc Works v Suderside Traders Co Ltd*. (1992) 76 Comp Cas 423 (Man), the subsidiary was a completely controlled company and therefore the subsidiary's use of a trade mark was regarded as that of the holding company so as to show a connection between the goods and the owner of the trade mark.

136. *Mirheels v Hirley House (Marylebone) Ltd*, 2010 Ch 104 (CA); *Sunaymuller Power Investment Pte Ltd v Country Energy India (Bihar) Ltd*, (2006) 30 Comp Cas 21 (Mad), the holding company proposed to sell its entire shareholding in its subsidiary which was holding shares in a joint venture company. This company's articles provided for pre-emptive rights. The holding company became subjected to the clause, but the shareholders, entitled to pre-emptive rights had waived it by making a bid for the shares. *Bishwamati Rai Bahadur v Air India Ltd*, (2014) 9 SCC 407; (2014) 2 SCC (L&S) 904, Air India created a wholly owned subsidiary for staff canteen, Air India exercised no control over its affairs and, therefore, could not be held liable to employees for anything wrong done by the subsidiary.

137. *Lovins Ltd v Shell Petroleum Co Ltd*, 1980 QB 358; (1980) 2 WLR 367 (CA).



local laws applicable to it and the degree of freedom from interference by the parent:

"These South African and Rhodesian companies were very much self-controlled. Their directors were local directors—running their own show, operating it with comparatively little interference from London. They were subject, of course, to all local laws and ordinances. That seems to be a different position from the concept of a one-man company, or a 100 per cent company, which is operating in this country with the self-same directors, or a 100 per cent parent with various subsidiaries. It is important to realise that subsidiaries of multinational companies have a great deal of autonomy in the countries concerned."

A learned commentator explains in the following words the value of this decision to the international community:¹³⁸

"The importance of this case lies in the fact that for the first time an English court has held that, if a multinational finds itself in a conflict between the interest of the home and the host country, the interests of the host country will prevail. This rule which was also adopted in France in the *Frachef* case¹³⁹ should now be regarded as an established principle of international law."

In a case before the House of Lords,¹⁴⁰ certain South African miners were employed by the local subsidiary of a UK multinational company. They wished to sue the parent company for compensation for industrial diseases contracted while working for the subsidiary. Their Lordships found that there was likely to be greater access to justice under the English Law because the English court was more appropriate forum for a trial for a complex group action. Their Lordships accordingly held in favour of the minors.

Liability for insolvent subsidiary.—The question whether the parent company should be held liable for the debts of its insolvent subsidiary involves a difficult problem. The difficulty has been indicated in a case which exposes the legal inadequacy and which has been thus presented.¹⁴¹

English company law possesses some curious features, which may generate various results. A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company. If one of the subsidiary companies turns out to be the ruin of the litter and declines into insolvency to the dismay of its creditors, the parent company and the other subsidiary companies may

138 Clive M. Schmidholz, "Lifting the Corporate Veil" (1980) 18L 158; *Tecnia Investments Ltd. v. re. 1985 BC1C 434* (CA). a company would be the alter ego of an individual so as to regard his company's possession as his possession if the company was under his unlettered control. Merely that he is a dominant figure in running the company's business would not be enough.

139 Clive M. Schmidholz, "Multinationals in Court" (1972) 18L 103, 106

140 *Lukke v. Cape Plc.* (2000) 1 WLR 1545 (HL)

141. *Southard & Co Ltd. v. (1971) 1 WLR 1196, 1208 (CA); Tewleton L.*, noted 1996 (BL 160: 1999) 3 All ER 505 (CA).



prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary. It is not surprising that when a subsidiary collapses, the unsecured creditors wish the finances of the company and its relationship with other members of the group to be narrowly examined, to ensure that no assets of the subsidiary company have leaked away; that no liabilities of the subsidiary company ought to be laid at the door of the other members of the group and that no indemnity from or right of action against any other company, or against any individual is by some mischief overlooked.¹⁴²

Subsidiary establishments (branch office) [S. 2(14)].—The expression "branch office", in relation to a company, means any establishment described as such by the company.

Where proceedings were initiated against a company at the place of its branch office, it was held that notwithstanding the *Explanation* to Section 20 CPC which confers jurisdiction on the courts at the place of the company's branch office, it is also necessary that the cause of action should have arisen there. A charge of interference in management of the complainant's business could be alleged only against the head office of the company and not against the branch office unless it can be shown that the branch office was used for the purpose of committing the wrong.¹⁴³

Conclusion

Thus, it is abundantly clear that incorporation does not cut off personal liability at all times and in all circumstances.¹⁴⁴ "Honest enterprise, by means of companies is allowed; but the public are protected against kiting and humbuggery."¹⁴⁵ "The sanctity of a separate corporate identity is upheld only insular as the entity is consonant with the underlying policies which give it life."¹⁴⁶ Those who enjoy the benefits of the machinery of incorporation have to assure a capital structure adequate to the size of the enterprise. They must not withdraw the corporate assets or mingle their own individual accounts with those of the corporation or represent to third parties that no difference exists between themselves and the company. The courts have at times seized upon these facts as evidence to justify the imposition of liability upon the shareholders.¹⁴⁷

142. For comments upon the decision see, Clive M. Schmitthoff, "The Wholly Owned and Controlled Subsidiary" (1979) 1BL 218, 226, where it is suggested that the Companies Act should provide for such liability.

143. *Bhaktrupriya Simalpuri Beverages (P) Ltd v PR Pandya*, (1998) 86 Comp Cas 842 (Delhi). See also, *GU Verma v National Projects Construction Corp Ltd*, (1999) 4 Comp L 274 (Delhi), the company's project site was regarded as the place where the company was carrying on its business and consequently the company also had its subordinate office there.

144. Clive M. Schmitthoff, "Salvation in the Shadow", 1976 JBL 305.

145. Cadman, *The Corporation in New Jersey* (1949) 302.

146. *Adull v Coli Co*, 31 ERJ 154 (SDNY 1962), quoted in W. Friedmann, *Legal Theory* (5th Edn 1967) 564.

147. "Judicial Supervision of One-man Corporation", 46 Harry L Rev 1054; Cohen & Simitis, "Lifting the Veil" (1983) 12 IC 141, 189; Adelie A. Berle Jr., "The Theory of Corporate Entity" (1947) 47 Columbia L Rev 543; Douglas and Shanks, "Insulation from Liability through Subsidiary Corporation" (1959) 39 Yale LJ 196.

2. Formality and expense

Another disadvantage of incorporation is its expense and formality. Incorporation is a very expensive affair and requires a number of formalities to be complied with. As compared with it, the formation of a partnership is very simple. Again, the administration of a company has to be carried on strictly in accordance with the provisions of the Act. General meetings must be held in time; accounts must be prepared and audited and then presented to the shareholders in general meetings; copies of accounts are to be filed with the Registrar; mortgages and charges and certain resolutions have to be registered with the Registrar and in many other ways companies are under Government control and regulation. As many returns have to be filed with the Registrar as there are weeks in a year and every failure is penalised.¹⁴³ Accordingly "corporate directors wake up each morning as potential criminals". A partnership firm is comparatively free from all these complications. In the words of a critic who suggests that the formation of a small company should be made much more simple than at present:

"Incorporation of a business as a limited company involves expense, capital duty and stamp duty, printing etc., and recurring expenditure on company registration fees and audit fees and also a not inconsiderable expenditure of time in complying with the provisions of the Companies Act. It also involves disclosure to the public of the company's accounts and various other matters."¹⁴⁴

3. Company is not citizen

Lastly, it may be added that a company, though a legal person, is not a citizen neither under the Constitution of India nor under the Citizenship Act. This has been the conclusion of a special Bench of the Supreme Court in *State Trading Corps of India Ltd v CTO*.¹⁴⁵



CASE STUDY

"The State Trading Corporation of India is incorporated as a private company under the Companies Act. All the shares are held by the President of India and two secretaries in their official capacities. The question was whether the corporation was a citizen. One of the contentions put forth on behalf of the corporation was that 'if the corporate veil is pierced ... one sees three persons who are admittedly the citizens of India', and, therefore, the corporation should also be regarded as a citizen."

But it was held that "neither the provisions of the Constitution, Part II, nor of the Citizenship Act, either confer the right of citizenship on, or recognise

143. C. Narayanaswamy, "Complexity, Cumberousness and Anomalies of Company Law" (1966) 2 Comp LJ 211, where the learned writer counts 51 items in respect of which returns have to be filed. There are more than 200 offences under the Act. See, Tahir Mahmood, "Offences under the Companies Act and the Doctrine of Mens Rea" (1969) 2 Comp LJ 25. Some more have been added by the subsequent amendments.

144. W.J. Sanders, "Small Business Suggestions for Simplified Forms of Incorporation" (1979) JBL 11.

145. AIR 1963 SC 1811, (1963) 33 Comp Cas 1057.

as citizen, any person other than a natural person". In the striking words of HONNAVARULUJI (afterwards CJ):

"... if all of them (the members) are citizens of India the company does not become a citizen of India any more than, if all are married the company would be a married person."

A company is, however, a person in the eyes of law and it can claim the protection of such fundamental rights as are guaranteed to all persons whether citizens or not. A company cannot claim the protection of such fundamental rights as are expressly guaranteed to citizens only. But even so there is no "cause for anxiety about corporations in general and companies in which States hold all or the majority of the shares in particular. They are amply protected under our Constitution. There can be no discrimination, no taxation without authority of law, no curbs involving freedom of trade, commerce or intercourse, and no compulsory acquisition of property. There is sufficient guarantee there and if more is needed then any member (if citizen) is free to invoke Article 19(1)(f) and (g) and there is no doubt that the corporation in most cases will share the benefit. We need not be apprehensive that corporations are at the mercy of State Governments".

The hardship caused by this pronouncement has, however, been subsequently modified (though not by conceding in so many words that a company may be a citizen for certain purposes) by holding that a citizen shareholder may petition, proceeding on behalf of the company, against violation of his company's fundamental rights.¹⁵¹

Nationality, domicile and residence.—A company does, however, have a nationality, domicile and residence. Speaking of this MacNAULIE [laid down]:¹⁵²

"It was suggested that a body corporate has no domicile. It is quite true that a body corporate cannot have a domicile in the same sense as an individual any more than it can have a residence in the same sense as an individual. But by analogy with a natural person, the attributes of residence, domicile and nationality can be given to a body corporate."

A company incorporated in a particular country has the nationality of that country, though, unlike a natural person, it cannot change its nationality.¹⁵³

The same principles apply to the determination of the residence of a company. Lord LOREBURN stated in a case before the House of Lords¹⁵⁴ that in applying the concept of residence to a company we ought to proceed as nearly as we can upon the analogy of an individual:

"A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does

151. See, *State of Gujarat v. Sipri Ambien Mills Ltd.*, (1974) 4 SC 656; *Nocturne Assurance Co Ltd v. Union of India*, (1973) 1 SC 310, 335; (1973) 43 Comp Cas 469.

152. *Gasper v. IRC*, (1940) 2 KB 80.

153. See also, *Kurangi v. Drennemarck*, (1955) 1 QB 515, 535.

154. *The Beers Consolidated Mines Ltd v. Howe*, 1906 AC 455 (HL).



business. An individual may be of a foreign nationality and yet reside in the United Kingdom, so may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English laws, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. A company resides for purposes of income tax where its real business is carried on. The real business is carried on where the central management and control actually resides."¹⁵⁶

Ordinarily the residence of the company is at the place where its registered office is situated. This observation occurs in a case in which the company was incorporated in Australia and it also carried on business and personally worked for gain at that place. It filed a case under the Copyright Act in Ernakulam whereas the breach of the copyright had taken place in Chennai. No part of the cause of action had taken place in Ernakulam. The mere fact that the company's power of attorney was residing and doing business there did not confer any jurisdiction on the courts at that place.¹⁵⁷

156. For further study see Vaughan Williams and M. Crossacoff, "The Nationality of Corporations" (1933) 49 LQR 324 and F.J. Young, "The Nationality of a Juristic Person" (1908) 22 Envoy L Rev 41.

157. *Srinivas Zaveri v Kamakshi Academy (P) Ltd.*, (2006) 133 Comp Cas 546 (Ker).

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online™; along with updates, articles, videos, blogs and a host of different resources.



The following cases from this chapter are available through EBC Explorer™:

- *Aptihorpe v Peter Schenckhafen Brewing Co Ltd.*, (1899) 4 TC 41; 50 LT 395 (CA)
- *Associated Cement Co Ltd v Keshramand*, (1998) 1 SCC 667
- *Bukwanti Kuz Salery v Air India Ltd.*, (2014) 9 SCC 407; (2014) 2 SCC (J&S) 804
- *Bhatia Industries and Infrastructure Ltd v Asian Natural Resources (India) Ltd.*, (2017) 201 Comp Cas 46 (Bom)



- *Counters Bros Ltd v Counters*, (1940) 4 All ER 179 (PC)
- *Dangler Co Ltd v Continental Tyre & Rubber Co Ltd*, (1916) 2 AC 307 (HL)
- *Darius Rutton Kavasmebeck v Giarda Chemicals Ltd*, (2015) 14 SCC 277
- *Darius Rutton Kavasmebeck v Giarda Chemicals Ltd*, 2014 SCC OnLine Bom 1851
- *DDA v Skipper Construction Co*, (1997) 11 SCC 430
- *De Beers Consolidated Mines Ltd v Horne*, 1906 AC 455 (HL)
- *DHN Food Distributors Ltd v Tower Hamlets London Borough Council*, (1976) 1 WLR 852 (2)
- *Dharia-Arnalner Motor Transport Ltd v Raychand Rupsi Dharamsi*, ILR 1952 Bom 795; AIR 1952 Bom 337
- *Dinskaur Maneekjeet Petil*, re, AIR 1927 Bom 371
- *Furnishings (India) Ltd v Veda Mitra*, AIR 1969 Del 258; (1969) 39 Comp Cas 1
- *Gifford Motor Co Ltd v Horne*, 1933 Ch 935 (CA)
- *Kapila Hirugiani (I) v State of Bihar*, (2003) 6 SCC 1
- *Kondoli Tea Co Ltd*, re, ILR (1896) 13 Cal 43
- *Lee v Lee's Air Farming Ltd*, 1961 AC 12; (1960) 3 WLR 758 (PC)
- *Micacene v Narcotic Assurance Co Ltd*, 1925 AC 619 (HL)
- *New Horizons Ltd v Union of India*, (1995) 1 SCC 478
- *Polly Peck International Plc (No 3)*, re, (1996) 1 BCAC 426 (Ch D)
- *R v McDaniell*, (1966) 1 QB 233
- *Rustom Cawasjee Cooper v Union of India*, (1920) 1 SCC 248
- *Solomon v Solomon & Co Ltd*, 1897 AC 22 (HL)
- *Soni Prakash Kekhi v Union of India*, (1981) 1 SCC 449
- *State of Karnataka v Smt J. Jayalakshmi*, (2017) 201 Comp Cas 230 (SC)
- *State Trading Corp of India Ltd v CTO*, AIR 1963 SC 1911; (1963) 33 Comp Cas 1057; (1964) 4 SCR 99
- *Traction Investments Ltd*, re, 1985 BCAC 434 (CA)
- *TVS Employees' Federation v TVS & Sons Ltd*, (1996) 87 Comp Cas 37 (Mad)
- *Union Bank of India v Khodars International Constructors Ltd*, (1993) 2 Comp LJ 89 (Ker)
- *Workmen v Associated Rubber Industry Ltd*, (1985) 4 SCC 114

Chapter 2

Registration and Incorporation

Formation of company [S. 3]

A company may be formed for any lawful purpose by the following:

(a) **Public company**—any seven or more persons when the company to be formed is a public company.

(b) **Private company**—any two or more persons when the company to be formed is a private company.

(c) **One person company**—any one person, when the company to be formed is "One Person Company", i.e. a private company with one member.

They have to subscribe their names to the memorandum of the company.

The memorandum of "one person company" has to indicate the name of an other person, with his prior written consent in the prescribed form. Such person is to become a member of the company in the event of the subscriber's death or his incapacity to contract. Such person's written consent has to be filed with the Registrar at the time of incorporation of one person company along with its memorandum and articles. Such person may withdraw his consent in accordance with the prescribed manner. The member of such company may also change the name of such person by following the prescribed procedure. He has to intitiate the change to his nominee by indicating in the memorandum or otherwise. The company has then to notify the Registrar of the change. Such change is not to be taken as an alteration of the memorandum.

A company formed under this section may be either a company limited by shares or a company limited by guarantee or an unlimited company.

Registration of a company is obtained by filing an application with the Registrar of Companies. [S. 7(1)]¹ The application should be accompanied by the following documents: (1) memorandum of association; (2) articles

1. The application has to be made to the Registrar in whose jurisdiction the registered office of the company is situated.

of association; (3) a copy of the agreement, if any, which the company proposes to enter into with any individual for his appointment as managing or whole-time director or manager; and (4) a declaration that all the requirements of the Act have been complied with.²

Section 7 of the 2013 Act introduces certain new requirements. An affidavit has to be filed by each of the subscribers to the memorandum and persons named as the first directors, if any, in the article that he has not been convicted of any offence in connection with the promotion, formation, or management of any company or found guilty of any fraud or misfeasance or of any breach of duty to the company under the Act or preceding company law during the preceding five years and that the documents filed for registration contain correct and complete information and true to the best of his knowledge and belief; the address for correspondence till the company's registered office is established; the particulars of name, including surname, or family name, residential address, nationality and such other particulars of every subscriber to the memorandum along with proof of identity as may be prescribed. Where the subscriber is a body corporate, such particulars have to be disclosed as may be prescribed; the particulars of persons mentioned in the articles as the first directors of the company, their names including surnames or family names, Director Identification Number, residential address, nationality and such other particulars including proof of identity as may be prescribed; and the particulars of interests of persons mentioned in the articles as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as may be prescribed. [S. 7(1)]

The company has to maintain and preserve at its registered office copies of all the documents and information as originally filed under Section 7(1) till its dissolution under the Act.

Punishment for false particulars.—If any person furnishes any false or incorrect particulars of any material information of which he was aware, he is to be liable for action under Section 447. [S. 7(5)] Section 447 provides punishment for fraud.

If it is proved after incorporation of the company that the incorporation was obtained by furnishing false or incorrect information or by suppressing any material fact or information or by any fraudulent action, the promoters, the persons named as first directors and those making the declaration are also liable for action under Section 447. [S. 7(6)]

In such cases, an application can also be made to the Tribunal which may according to its satisfaction pass any of the following orders:

2. The declaration should be signed by an advocate, or any proposed director, manager or secretary of the company or by a secretary or cost accountant, or chartered accountant who is in whitetime practice in India. [S. 7(1)(b)] The documents have to be in print or computer printing by laser, but not xerox. *Selvarajan v. Registrar of Companies*, (1996) 3 Comp L 275; (1997) 12 Comp Cas 220 (Mad).

- (a) pass orders for regulation of the management of the company including any changes in its memorandum and articles in public interest or in the interest of the company and its members and creditors;
- (b) direct that the liability of the members is to be unlimited;
- (c) direct removal of company's name from the Register of Companies;
- (d) pass an order for winding up; or
- (e) pass such other orders as it may deem fit.

Before any such orders the company has to be given a reasonable opportunity of being heard in the matter. The Tribunal has to take into consideration transactions entered into by the company, including all the obligations, contracts or payment of any liability. [S. 7(7)]

If the Registrar finds the documents to be satisfactory, he registers them and enters the name of the company in the Register of Companies³ and issues a certificate called the certificate of incorporation. [S. 7(2)]⁴ The Registrar has then to allot to the company a corporate identity number which is to be a distinct identity for the company. This number has also to be included in the certificate. [S. 7(3)]

Certificate of incorporation [S. 7]

The certificate of incorporation brings the company into existence as a legal person. Upon its issue the company is born. For the Act provides that "from the date of incorporation such of the subscribers of the memorandum and other persons, as may from time to time be the members of the company, shall be a body corporate, ... capable forthwith of exercising all the functions of an incorporated company".⁵ The company's life commences from the date mentioned in the certificate of incorporation and the date appearing on it is conclusive, even if wrong.

Certificate as conclusive evidence.—Not only does the certificate create the company. It also is "the conclusive evidence that all the requirements of this Act have been complied with in respect of registration and matters precedent and incidental thereto and that the association is a company authorised to be registered and duly registered under this Act". In other words, the validity of the certificate cannot be disputed on any grounds whatsoever. This is illustrated by the decision of the Judicial Committee of the Privy Council in *Moush Coulon Ariff v Ebrikim Coulon Ariff*⁶.

The memorandum of association of a company was signed by two adult persons and by a guardian of the other five members, who were

3. S. 2(4) says that Register of Companies means the register maintained by the Registrar on paper or any electronic mode.
4. Refusal to register which is not proper can be set right through court order. *Exclusair Board of Methodist Church v Union of India*, (1985) 57 Comp Cas 43 (Bom).
5. *Link Hill Purchasing & Leasing Co (P) Ltd v State of Kerala*, (2001) 103 Comp Cas 941 (Ker), the company, a person for the purposes of the Kerala Money Lenders Act, bound to obtain licence like an individual. *John Thomas v K Jayakrishnan*, (2007) 6 SCC 30, (2007) 106 Comp Cas 619. In the case of defamatory of company, its director is an "aggrieved person", entitled to maintain prosecution under Ss. 499–500 IPC.
6. (1911–12) 39 IA 237; ILR (1913) 40 Cal 1.

minors at the time, the guardian making a separate signature for each of the minors. The Registrar, however, registered the company and issued under his hand a certificate of incorporation. The plaintiff contended that this certificate of incorporation should be declared void.

Lord MACNAULIFFE said:

"Their Lordships will assume that the conditions of registration prescribed by the Indian Companies Act were not duly complied with; that there were not seven subscribers to the memorandum and that the Registrar ought not to have granted the certificate. But the certificate is conclusive for all purposes.

In England the question whether the Registrar's certificate is conclusive was decided so far back as 1867 by Lord CAIRNS. In *Barnet's Banking Co. re, Peel case*² after signature and before registration a proposed memorandum of association had been altered without the authority of the subscribers so materially that ... the alteration entirely neutralised and annihilated the original execution and signature of the document'. The company, however, was registered and the Registrar gave his certificate of incorporation. It was objected that the memorandum of association had not been signed by seven or indeed by any subscribers and that the provisions of the Act had not been complied with. To that proposition Lord CAIRNS assented. But 'the certificate of incorporation', he said, 'is not merely a *prima facie* answer, but a conclusive answer to such objection When once the certificate of incorporation is given nothing is to be inquired into as to the regularity of the prior proceedings'. ... The observations of Lord CHAMBERS in *Oakes v. Taprajan and Harding*³ are to the same effect. 'I think', said His Lordship, 'the certificate prevents all recrudescence to prior matters essential to registration ... and that it is conclusive ... that all previous requisites have been complied with'."

"Thus the position is firmly established that if a company is born, the only method to get it extinguished is not by assaulting its incorporation, but by resorting to the provisions of enactments, which provide for the winding up of the companies." This summary view of the position is to be found in the judgment of CHANDRA REDDY CJ in *TV Krishna v. Andhra Prabha (P) Ltd.*⁴

In this case, the Express Newspapers (P) Ltd were the leading publishers of newspapers and weeklies. The Government adopted certain recommendations of the Wage Board for improvement in the terms of

2. (1867) 1 K 2 Ch App 674; 16 LT 791

3. (1867) LR 2 IEL 325; 31 L Ch 949. See also *Official Receiver and Liquidator v. Lewis*, [1924] AC 458; 93 LJ Ch 434 (HL).

4. (1911) 12 Bom 1A 237; ILR (1903) 40 Cal 1

10. AIR 1968 AP 123. *See also Akhilesh Kumar v. Union of India*, (2003) 115 Comp Cas 141 (Delhi). A certificate of incorporation was not allowed to be challenged. The company could have been extinguished only by winding up. A cooperative society which fulfilled the requirements of registration as company was registered in this case.

service and salaries of the working journalists. Thereupon the Express Newspapers sold its undertaking to a new company known as Andhra Prabha Private Ltd. It was alleged that the new company was formed for the illegal purpose of evading the new responsibility imposed by the Wage Board and, therefore, the registration of the company should be declared void.

The court, however, did not assent to the proposition that the purpose for which the company was formed was in any way unlawful or opposed to public policy and, therefore, held that company was validly incorporated. But even if some of the objects were illegal, the legal persona of the company could not have been extinguished by cancelling the certificate. Even in such a case the certificate is conclusive and the remedy would be to wind up the company. The illegal objects, however, do not become legal by the issue of the certificate.¹¹ Section 12 clearly mentions that "persons associated for any lawful purpose may ... form an incorporated company".

Judicial review.—In some English cases the courts have explored the possibility of reviewing the Registrar's certificates and have come to the conclusion that they should be open to judicial review. Accordingly, a company which happened to be registered for an unlawful object, was ordered to be struck off.¹² The Kerala High Court held that a writ cannot be issued to cancel the registration of a company under the Companies Act.¹³

Pre-incorporation contracts

Company cannot be sued on pre-incorporation contract—Sometimes contracts are made on behalf of a company even before it is duly incorporated. But no contract can bind a company before it becomes capable of contracting by incorporation. "Two consenting parties are necessary to a contract, whereas the company, before incorporation, is a non-entity". A company has no status prior to incorporation. It can have no income before incorporation for tax purposes.¹⁴ Shares cannot be acquired in the name of a company before its incorporation. A transfer firm is liable to be rejected

11. *Universal Mutual Ass & Poor Houses Assn v AD Thoppil Naidu*, AIR 1923 Mad 16; (1922) 36 L.W. 610. Registrar can refuse to register a memorandum with unlawful objects and, if perchance, he happens to do so, his certificate is not conclusive as to lawfulness of objects. *Performing Right Society Ltd v London Theatre of Burmese*, (1922) 1 K.B. 539, 38 T.L.R. 184; *R v Registrar of Joint Stock Companies*, (1931) 2 K.B. 197, 47 T.L.R. 387 (CA).

12. R.R. Drury, "Nullity of Companies in English Law" (1985) 48 Mod. L. Rev. 569. This is so because a company cannot properly be registered for an unlawful purpose. The registration may be cancelled by appropriate proceedings. *Bonham v Society* [1917] 1 K.B. 406, 438-439 (HL). The conclusive presumption may not be raised where, e.g., non-compliance with a material statutory provision leaves the registration an incomplete fact. *Gulman v National Assn of Mental Health*, (1971) 1 Ch 307 (1970); 3 WLR 42; (1970) 2 All ER 342. The certificate would not be conclusive where a trade union is registered as a company. *British Assn of Glass Bottles Ltd v Matfield*, (1911) 27 T.L.R. 27.

13. *Malur Mohamed v Capital Stock Exchange Kerala Ltd*, (1991) 72 Comp Cas 333 Ker.

14. *CIT v City Mills Distributors (P) Ltd*, (1996) 2 SCC 575.

where the name of a proposed company is entered in the column of transferee.¹⁵ Thus, for example, in *English & Colonial Practice Co, re**¹⁶

A solicitor, on the instructions of certain gentlemen, prepared the necessary documents and obtained the registration of a company. He paid the registration fee and incurred the incidental expenses of registration.

But the company was held not bound to pay for those services and expenses. "The company could not be sued in law for those expenses, inasmuch as it was not in existence at the time when the expenses were incurred ... and ratification was impossible."

An arbitration agreement was held to be non-existent when the company with which it was made was incorporated subsequent to it.¹⁷ "It is not desirable to saddle the corporation with burdens imposed upon it in advance by overly optimistic promoters."¹⁸

Company cannot sue on pre-incorporation contract.—Secondly, the company is also not entitled to sue on a pre-incorporation contract. "A company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence." This was held in *Natal Land & Colonisation Co v Pauline Colliery Syndicate*.¹⁹

N Co entered into an agreement with one C, who acted on behalf of a proposed syndicate. Under the agreement *N Co* was to give the syndicate a lease of coal mining rights. The syndicate was then registered and struck a seam of coal and claimed a lease which *N Co* refused. An action by the syndicate for specific performance of the agreement or in the alternative for damages was held not maintainable as the syndicate was not in existence when the contract was signed.

Ratification of pre-incorporation contract.—Thus, so far as the company is concerned, it is neither bound by, nor can have the benefit of, a pre-incorporation contract. But this is subject to the provisions of the Specific Relief Act, 1963. Section 15 of the Act provides that where the promoters of a company have made a contract before its incorporation for the purposes of the company, and if the contract is warranted by the terms of incorporation, the company may adopt and enforce it. "Warranted by the terms of incorporation" means within the scope of the company's objects as stated in the memorandum. The contract should be for the purposes of the company. A person, who intended to promote a company, acquired a leasehold interest for it. He held it for sometime for a partnership firm.

15. *Inter Investoren (P) Ltd v Dynamic Hydraulics Ltd*, [1989] 3 Comp LJ 221, 225 (CLB).

16. [1906] 2 Ch 435; 22 TLR 669 (CA). In *Clinton Glass, W. (1908) 2 Ch 515* [1908] LT 632 (CA), a promoter was not allowed to recover registration fee paid by him. *Roser International Ltd v Ocean Film Sales Ltd*, [1987] 1 WLR 1397. Somebody who does not exist cannot contract.

17. *AP Tourism Development Corp v Paga Hotels Ltd*, [2003] 5 SCC 423, [2003] 2 SC C (Civ) 440.

18. Joseph H. Gross, "Pre-incorporation Contracts" (1971) 97 UQR 367, 368.

19. 1904 AC 139; 89 LT 675.

converted the firm into a company which adopted the lease. The lessor was held bound to the company under the lease.²⁰

According to a decision of the Supreme Court, the company has to accept the transaction but it is not necessary that the transaction should be mentioned in the company's articles. The very fact that the company was seeking a declaration of its ownership of the property which the directors had purchased for it before incorporation was sufficient to signify acceptance of the transaction.²¹ A contract to allot shares after the company is incorporated is not for the purposes of the company so that the company cannot enforce it against the other party.²²

Section 19 of the same Act provides that the other party can also enforce the contract if the company has adopted it after incorporation and the contract is within the terms of incorporation.

Personal right and liability of contracting agent. Now, in reference to contracts which do not fall within the purview of the above provisions, the question arises whether they can be enforced by or against the agent who acted on behalf of the projected corporation? The answer will depend upon the construction of the contract. If the contract is made on behalf of a company not yet in existence, the agent might incur personal liability. For, where a contract is made on behalf of a principal known to both the parties to be non-existent the contract is deemed to have been entered into personally by the actual maker. Similarly, "where a person purports to contract as agent he may nevertheless disclose himself as being in truth a principal, and bring an action in his own name".²³ Thus, the agents were held personally liable in *Kelner v Baxter*.²⁴

The facts were that the plaintiff intended to sell wine to a company which was to be formed, but under the contract he agreed to sell to the proposed directors of the company. The proposed directors intended to buy the wine on behalf of the company, but, as it was not in existence when the contract was made, they personally took delivery. It was held that as they had contracted on behalf of a principal who did not exist, they having received the wine, must pay for it.²⁵

20. *Vahi Pathakshinrao Rao v Ramanuj Girsing and Rice Factory (P) Ltd.* (1986) 50 Comp Cas 566 (AP). A new contract can also be made by the company after incorporation in terms of the earlier contract, *Howard v Palmerbury Mfg Co.* (1888) 1 R 384, 4 h D 156, 58 LT 395. An implied contract may arise if the company after incorporation relies on the contract but not when it is under mistaken belief of being bound by the earlier contract, *Northumberland Avenue Hotel Co. re.* (1908) 33 Ch D 16 (CA).

21. *Lei Namin Parasurampuria v Prabhy Devi Singh*, (2006) 7 SCC 756; (2006) 133 Comp Cas 794.

22. *Imperial Ice Mfg Co v Muckundlal Barjaji Wadia*, [LR (1889) 13 Bom 415].

23. Lord Goddard CJ in *Newburne v Sensolit (Great Britain) Ltd.* (1954) 1 QB 45; (1953) 2 WLR 596 (CA).

24. (1886) LR 2 CP 170; 15 LT 213.

25. Lord Goddard CJ at p 709 in *Newburne v Sensolit (Great Britain) Ltd.* (1954) 1 QB 45; (1953) 2 WLR 596 (CA). The company had gone into liquidation before paying the plaintiff's bill. By virtue of S. 92(1), European Communities Act, (S. 36, English Companies Act, 2006) an agent of an unincorporated company becomes personally liable. See, *Plimogram Ltd v Lane*, 1982 QB 938; (1981) 3 WLR 256 (CA).

As against it, in an Australian case, a vendor of land was not allowed to sue for specific performance the directors of a proposed company who contracted to buy something under the name of the company which subsequently refused to adopt the purchase.²⁶

Where the contract is purported to be made by the company itself, it cannot be enforced by or against the agent through whom the company contracted, because "the relationship between a company and its directors is not the ordinary one of principal and agent. Where a company contracts, it is the company who contracts and its contract is merely authenticated by the signature of one or more of the directors". And so in *Newborne v Senouf (Great Britain) Ltd*.²⁷

The plaintiff was a promoter and prospective director of a limited company, named Leopold Newborne (London) Ltd, which at the material time had not been registered. A contract for the supply of goods by the company to the defendants was signed thus, "Leopold Newborne (London) Ltd"; and the plaintiff's name "L.N." was written underneath. In an action for breach of the contract brought by the plaintiff against the defendants it was held that the contract was made not with the plaintiff whether as agent or as principal, but with a limited company which at the date of the making was non-existent, and, therefore, it was a nullity, and the plaintiff could not adopt it or sue on it as his contract.

To the same effect is the decision of the Bombay High Court in *Ramkumar Poddar v Sholpar Spg & Wag Co Ltd*.²⁸

There was a clause in the memorandum of a proposed company under which a certain firm was to be appointed as managing agent of the company. After incorporation the company appointed them, but, subsequently, the directors resolved to dismiss them. In an action to restrain the company from committing breach of the contract, it was held that a clause of this kind in the memorandum or articles does not constitute a contract between the company and an outsider. Even if it does constitute an implied contract, yet, "this was a preliminary contract such as the promoters make before incorporation of the company. It is not possible to bring a company into existence under the Act bound by a contract previously made".

Thus, it seems that the desire of the courts is to protect the new company from the burden of promoters' promises, for they "are proverbially profuse in their promises, and if the corporation were to be bound by them it would be subject to many unknown, unjust and heavy obligations".²⁹ With this protection goes some sacrifice also, for a company could not sue a person

26. *Senouf v Black*, (1965-66) 39 ALR 405 (Aust). Facts borrowed from R. Bass, "Personal Liability of Agent of Unincorporated Company" 5*vcl-n* W.F. Davies, "Personal Liability of Directors of Non-Existent Companies" (1964) 6 *Litt. of W Australia* 18 400.

27. (1954) 1 QIB 47; (1955) 2 WLR 596 (CA).

28. 1934 SCC OnLine Bom 18, AIR 1934 Bom 427.

29. *Herr v Modern Wholesaler*, 38 L 211 231, (SC of Illinois, USA).

who before its incorporation had contracted to buy its shares. In some cases persons rendering services before incorporation had to go unremunerated.³¹ Here the courts will as far as possible saddle the promoter with personal liability. Thus, for example, in *Touche v Metropolitan Railway Warehousing Co*³² under a contract with a promoter services were rendered by a third party to a company before its incorporation. The third party not being able to sue, it was held that the promoter must sue the company as a constructive trustee for the benefit of the third party.

Statutory reform.—Some of these complications have been solved by the European Communities Act, 1972. Section 9(2)³³ provides that when a contract purports to be made by a company, or by a person as agent for a company, at a time when the company has not been formed, then, subject to any agreement to the contrary, the contract shall have effect as a contract entered into by the person purporting to act for the company or as agent for it and he shall be personally liable on the contract accordingly. These provisions were incorporated into Section 36-C, [UK] Companies Act, 1989.

A person attempting to incorporate a pop group, obtained financial assistance from a recording company. He was held personally liable to refund the amount on his project failing to materialise.³⁴

Formation of companies with charitable objects [S. 8]

This section comes into play where it is proved to the satisfaction of the Central Government that a person or an association of persons proposed to be registered under the Act as a limited company satisfies the following requirements of a charitable company: (a) it has for its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object; (b) it intends to apply its profits, if any, or other income in promoting its objects; and (c) it intends to prohibit payment of any dividend to its members.

The Government may give it a licence allowing it to be registered as a limited company without using the word "limited" or "private limited" as a part of its name. The Registrar has then to be approached with a prescribed form so that he may register the company as a charitable institution. The company will enjoy all the privileges of a limited company and also be subject to the obligations of such companies.

A partnership firm may be a member of such a company. The company so registered is not to alter the provisions of its memorandum and articles

31. See, *Garsfield v South Wales Waggon & Lorry Co*, (1878) 2 Ch D 121 (CA); *Kirkhamium Alum & Chemical Co*, re, (1883) 25 Ch D 103; 53 T C 290 (CA); *National Motor Manufacturing Co Ltd*, re, (1909) 2 Ch 229.

32. (1871) LR 6 Ch App 671.

33. This provision was incorporated in S. 36(4) of the 1985 Act [English] and re-enacted as S. 34(3) in the 1989 Act. In order to avoid such personal liability the modern practice is to keep a draft contract ready to be executed by the company after incorporation.

34. *Prinzipal Ltd v Lure*, 1992 QB 936; (1992) 3 WLR 734 (C.A.). *inter alia*: John McMullen, "Preliminary Contracts by Promoters" (1982) Camb L 47. See also, *Entropic (UK) Ltd v Deacon*, 1991 ECLC 721 (CA). here also the contracting agent was held liable but that his liability by itself would not give him the right to sue the other party.

except with the previous approval of the Central Government. Such company may convert itself into a company of any other kind only after complying with prescribed conditions. Any other kind of company which satisfies the requirement may come under the section subject to conditions, etc. that may be imposed by the Central Government. The Central Government may deprive the company of its licence if there is no compliance. A reasonable opportunity of hearing has to be given to the company. A copy of the order has to be served on the Registrar. After revocation of licence, the Central Government may order winding up of the company if it is necessary in public interest or order its merger with another company registered as charitable company. Here also an opportunity of being heard has to be given to the company. Amalgamation with another charitable company may be required to be subject to conditions and requirements as may be specified in the order.

Where such company is ordered to be wound up and there are surplus assets, they may be transferred to another charitable company with similar objects subject to the conditions that the Tribunal may impose, or may be sold and the proceeds may be credited to the Rehabilitation and Insolvency Fund formed under Section 269. Amalgamation by choice can also be made with a charitable company with similar objects.

Default in complying with the requirements of the section is a punishable offence. Both the company and its directors are punishable. Any fraud on the part of the officers would make them liable to be proceeded against under Section 447.³⁴

This privilege is intended to encourage the incorporation of associations and societies of public utility with the members having to incur no liability. And to give further encouragement it is provided especially that "a firm may be a member of any association or company licensed under this section . . .".³⁵

Such companies have been exempted from the requirement of having a minimum amount of share capital.

The licence is revocable at the discretion of the Central Government. The discretion is unrestricted, but it may be exercised only when the

34. *MC Baisli v Union of India*, (2013) 178 Comp Cas 289, (2013) 191 DLT 589, alteration of articles was approved without considering representation of some members of the company which was alleged to be against provisions relating to appointment of directors. A writ petition could lie to challenge the alteration.

35. A departmental circular points out that restrictions on inter-corporate loans are applicable to such companies also. [No 1/6/88, CL Vol dated 25-4-1989]. Many exceptions have been conferred upon such companies including the manner of enrolling members and appointing directors. *Sonal Bhiv v Delhi and District Credit Assn*, (1994) 80 Comp Cas 171 (Del). Failure to lay accounts before the AGM did not invalidate the meeting. *K Lala Kumar v Govt of India*, (2002) 108 Comp Cas 610 (Mad). Another privilege is the right to suspend members temporarily in accordance with the company's articles. The articles were approved by the Regional Director. The suspension of the member of a club (registered as S. 25 company [now S. 8]), which was intended to protect discipline and fair image of the club was held to be not a public act or involving violation of a statute or a fundamental right and, therefore, writ remedy was not available.

fundamental conditions of the licence are contravened. This should be apparent from Section 8(a) which prohibits the company from changing its objects "except with the previous approval of the Central Government".³⁶

If such a company refuses to accept any person as a member, he cannot proceed under Section 58 for an order that he should be granted membership.³⁷

36. Some business companies were allowed to merge into a charitable company. If any violation of S. 25 (now S. 8) was involved, the Government could take care of the matter. *Waknis Elkar Mills Co. P.Ltd. v. C.*, (1965) 31 Comp Cas 376 (Bom).

37. *Ramnesh H Bagga v. Central Circuit Cine Assn.*, (2005) 128 Comp Cas 320 (CLB).

Chapter 3

Memorandum of Association

An important step in the formation of a company is to prepare a document called the memorandum of association. Section 2(56) defines it as the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or the present Act. It is a document of great importance in relation to the proposed company. Its importance lies in the fact that it contains the following fundamental clauses which have often been described as the conditions of the company's incorporation:¹

1. Name clause;
2. Registered office clause;
3. Objects clause;
4. Liability clause; and
5. Capital clause.

Name clause

The first clause of the memorandum is required to state the name of the proposed company. A company, being a legal person, must have a name to establish its identity. "The name of a corporation is the symbol of its personal existence."² Any suitable name may be selected subject, however, to the following. The name should not be such as, in the opinion of the Central Government, is undesirable. (S. 4(2)). Generally, a name is undesirable when it is identical with, or too nearly resembles, the name of another company. The name should not indicate connection with or patronage of Government. The name should not be such that its use by the company will be an offence under any law. If the company is with "limited liability" the last word of the

1. S. 4 states the requirements with respect to memorandum. Sub-s (6) provides that the form of memorandum should be in such one of the forms in Tables A, B, C, D and E in Sch. 1, as may be applicable to the company.

2. Jensisus J in *Osborn v United States*, 6 U.S. 204; 22 U.S. (9 Wheat) 738, 877 (1824) borrowed from *Percival & Jackson, The Western Court* (1962) 79.

name should be "limited" and in the case of a private company "private limited". This informs persons contracting with the company that the liabilities of its members are limited. The Central Government may, however, permit a company to drop the word "limited" from its name if it is a charitable company within the meaning of Section 8.

The name of the company must be painted on the outside of every place where the company carries on business and printed on every business document and official letter. Misdescription of name entails personal liability. [S. 12]

Resembling names not allowed [S. 4].—In the first place, no company can be registered with a name which, in the opinion of the Central Government, is undesirable.² The Trade Marks Act, 1999 introduced a change into the provisions of the section. Without prejudice to the generality of the provision in sub-section (1), sub-section (2) provides:

- (1) a name is undesirable if there is a previously registered company bearing that name;
- (2) a name is undesirable if it is identical with or too nearly resembles a registered trade mark or the trade mark which is the subject of an application for registration of another person under the Trade Marks Act, 1999.

3. S. 5(2)(b)(ii) Abbreviated names are not allowed at the first instance. An established company may change its name into an abbreviated form by showing that it has become well-known in its field under its abbreviation. [CIC Circular No 4/93 of 30-3-1993]. The name should not violate the provisions of the Emblems and Names (Prevention of Improper Use) Act, 1950. The Act prohibits the use of names given in its Schedule which is as follows:

1. The name, emblem or official seal of the United Nations Organization.
2. The name, emblem or official seal of the World Health Organization.
3. The Indian National Flag.
4. The name, emblem or official seal or emblem of the Government of India or of any State or any insignia or coat of arms used by any such Government or by a Department of any such Government.
5. The emblems of the St. John's Ambulance Association (India) and the St. John's Ambulance Brigade (India) consisting of the device of a white eight pointed cross embellished in the four principal angles alternatively with a lion rampant Quadrant and a Unicorn passant whether or not the device is surrounded or accompanied by concentric circles or other decoration or by lettering.
6. The name, emblem or official seal of the President, Governor, Salar-i-Riyasat or Republic or Union of India.
7. Any name which may suggest or be calculated to suggest (i) the patronage of the Government of India or the Government of State or (ii) connection with any local authority or any corporation or body constituted by the Government under any law for the time being in force.
8. The name, emblem or official seal of the United Nations Educational, Scientific and Cultural Organization.
9. The name or pictorial representation of Rashtrapati Bhawan, Rashtrapati Bhavan, Raj Bhawan.
- (a) The name or pictorial representation of Mahatma Gandhi or the Prime Minister of India.
10. The medals, badges or decorations instituted by the Government from time to time or the miniatures or replicas of such medals, badges or decorations or the names of such medals, badges or decorations or the miniatures or replicas thereof.
11. The name, emblem or the official seal of the International Civil Aviation Organization.
12. The word (hereinafter) which is an integral part of the International Criminal Police Organization.
13. The name, emblem or official seal of the World Meteorological Organization.

The Central Government may consult the Registrar of Trade Marks before declaring a name to be undesirable.

The name of the company should not be identical with or should not too nearly resemble, the name of another registered company, for such a name may be declared undesirable by the Central Government. [S. 4(2)] Moreover, the other company can also apply for an injunction to restrain the newcomer from having an identical name.⁴ The reason for the rule was explained by Lawrence J in *Society of Motor Manufacturers and Traders Ltd v Motor Manufacturers and Traders Mutual Insurance Co Ltd*.⁵ He said: "Under the Companies Act, a company by registering its name gains a monopoly of the use of that name since no other company can be registered under a name identical with it or so nearly resembling it as to be calculated to deceive." The name of a company is a part of its business reputation and that would definitely be injured if a new company could adopt an allied name.

The resemblance between the two names must be such as to be "calculated to deceive". A name is said to be "calculated to deceive" when it suggests that the corporation adopting it is in some way connected or associated with the existing corporation. In the case referred to above:

The plaintiff society was incorporated in 1902 under the name: The Society of Motor Manufacturers and Traders Ltd. In 1924 the defendant society was incorporated under the name: Motor Manufacturers and Traders Mutual Insurance Ltd. The plaintiff company brought an action to restrain the use of this name.

It was held that the defendant company's name could not be regarded as one "calculated to deceive". "Anyone who took the trouble to think about the matter would see that the defendant company was an insurance company and that the plaintiff society was a trade protection society and I [Lawrence J.] do not think that the defendant company is liable to have its business stopped unless it changes its name simply because a thoughtless person might unwarrantedly jump to the conclusion that it is connected with the plaintiff society."⁶

⁴ The promoters have to seek an advance approval of the name and once an advance approval is granted to a particular applicant, the Registrar will not make that name available to any other person. This process can be abused so as to pre-empt others from a particular name. In order to prevent such abuse the Registrars have been directed to see that the promoters, as per availability of name and application, are also the subscribers to the memorandum and articles of association of the proposed company at the time of its registration. In the case of any change in the name(s) amongst the subscribers, the changed subscribers are advised to make fresh application for availability of name. The Registrar may, as per existing procedure, allow the same name to any other applicant, if otherwise available, after three months from the date when the name was allowed to the original promoters.

⁵ (1925) 1 C.L.J. 475; 139 F.T. 331.

⁶ Ibid. See also, P.T. Mutch, "A Practice Note on Company Incorporation" (1969); 12 Can NJ 292. Dealing with similarity of names: *Aviator Ltd v Taxis Ltd*, (1907) 2 Ch 314; *Aling v Buttercup Margarine Co*, (1917) 2 Ch 1 (C.A.). The Registrar is under a duty to inquire as to



According to a practice direction issued by the Companies' Registrar in England, a name is misleading when the company is with small resources, but the name suggests that it is trading on a great scale or over a wide field. The name must not suggest connection with an unlawful activity or be offensive in form. Section 4(2)(j) requires that the name should not be in such form that its use by the company will constitute an offence under any laws for the time being in force.⁷ Two women forming a company for their personalised services were not allowed the name "Prostitutes Ltd."⁸ The name "Air Equipment" was held to be not available name because a comparison of the names "Air Equipment" and "Air Component" in the context of all the circumstances in which they were actually used or likely to be used, namely, the types of products the companies dealt in, the location of the business, the types of customers and the persons involved in the operation of the two companies, suggested an association between the two companies or that they were a part of the same group.⁹ The name "MR Contractors Ltd" was held to be as nearly similar to "MPJ Construction Ltd" as it was possible to be. This effect could not be avoided simply by adopting stationery of a different style. The get up adopted by a company could be an important element in public awareness or perception of a company but it could not have the effect of allowing a company to rely on its get up to avoid the thrust of the prohibition on similar names.¹⁰

When a company is directed to change its name, the court cannot directly tell the Registrar to effect the change in the name of the company. It can only direct the company to do so. The company would have to follow the prescribed statutory procedure of special resolution and approval of the Central Government and then filing the documents with the Registrar. The company cannot simply file the court order regarding the change.¹¹

7. The genuineness of the proposed name. Where the Registrar registered a company under the name the 'Methodist Church of India' without inquiry into its credentials, that was held to be wrong. Accordingly when a genuine representative of the Methodist Church sought registration under that name the Bombay HC ordered the Registrar to accept the name. *Methodist Church v Union of India*, (1985) 57 Comp Cas 42 (Bom). *Ernest v Buttercup Margarine Co.* (1917) 2 Ch 1 (CA). The plaintiff's trade name was Buttercup Jersey Co. He was allowed to restrain a new company adopting the name, Buttercup Margarine Co Ltd. It was likely to create the impression that new company was connected with his business. But in *Aerators Ltd v Taxis*, (1902) 2 Ch 319, Aerators Ltd could not prevent the registration under the name, Automatic Aerators Patents Ltd. the word "aerator" being a word of language and of common use.

7. *WV Cosmetics (P) Ltd v Union of India*, (2012) 179 Comp Cas 169 (Del), effect, where new company inadvertently or otherwise adopt a name which is identical with an existing company's name.

8. *R v Registrar of Companies*, (unreported) QBD, 17-12-1980.

9. *Brooklets v Adi Vakreni Factors Ltd*, (2004) 1 BCLC 7 (CA).

10. *Archer Structures Ltd v Crayens*, (2010) 1 BCLC 201, 2003 EW11C 957 (Ch D); *Venkatesh Emp Nutrients (P) Ltd v Union of India*, 2015 SCC OnLine P&H LJ157; (2015) 192 Comp Cas 312 (DB), name identical to an existing trademark. Existing company has remedies under the Companies Act, as well as civil law. Application filed within five years was held to be not time-barred.

11. *Halifax plc v Halifax Repossessions Ltd*, (2004) 2 BCLC 455 (CA); *Aston Martin Real Tops (P) Ltd v Aston Martin & Co (P) Ltd*, 2013 SCC OnLine Ker 2432; (2014) 189 Comp Cas 240, cause of

Advance reservation of name. A person may make an application in a prescribed form and manner and on payment of prescribed fee for reserving name for the proposed company or for changing the name of an existing company. [S. 4(4)] Such name may be reserved for 60 days from the date of application. If no such company is formed, the reservation is to be cancelled, and the applicant is to be punished with fine extending up to one lakh rupees. If the company is formed but particulars were wrong or incorrect, the company may be directed to change its name within three months after passing an ordinary resolution, or the Government may take action for removing the company's name from the Register of Companies or for winding up of the company. [S. 4(5)]

Use of the word "Limited" and publication of name.—Secondly, whatever be the name of the company, if the liability of the members is limited, the last word of the name must be "Limited",¹² and in the case of a private company "Private Limited". This is to ensure that all persons dealing with the company shall have clear notice that the liability of the members is limited. And for the same reason it is further required that such name of the company must be painted on the outside of every place where the business of the company is carried on.¹³ Such name, including the address of the registered office, must also be mentioned on all business letters and other official publications, on all negotiable instruments issued or endorsed by the company and on all other orders, receipts, etc. Any default in this respect might involve the officers of the company in most serious consequences. For example, if a bill of exchange is issued by a company on which its name is not properly mentioned or if the word "Limited" has been omitted, and if the company fails to pay the bill, the officer who issued or authorised the issue of such a bill would be personally liable under it¹⁴ and will also be punishable with fine.¹⁵

But the omission must be deliberate or of negligent origin and not merely accidental. Thus in *Dermatine Co Ltd v Ashworth*,¹⁶

A bill of exchange was drawn upon a limited company in its proper name and it was accepted by two directors of the company. The word "limited", however, did not appear in acceptance. The reason was that the rubber stamp by which the words of acceptance were impressed on the bill was longer than the paper of the bill, and therefore, the word "limited" overlapped the paper.

action for directing change of name had arisen in State of Tamil Nadu, petition challenging order of Regional Director not maintainable before the High Court of Kerala.

12. S. 4(1)(e).

13. S. 12(3), sub-s (6) imposes penalty for default upon "the company and every officer of the company who is in default".

14. *Bassiner Lalji Modi v Madanlal Chhedaia*, AIR 1947 Ori 107; *Atkins & Co v Mandle*, (1889) 56 I.C.R. 372; 61 I.T. 23.

15. S. 12(8). S. 60 requires that documents issued by the company mentioning its authorised capital must similarly mention the amount actually subscribed and paid-up.

16. (1905) 21 I.L.R. 521.

On the company's failure to pay the bill it was held that the directors would not be personally liable thereon "It was an obvious error of most trifling kind and the mischief aimed at by the Act did not here exist."

But in *Nassau Steam Press v Tyler*:¹⁷

The registered name of a company was Bastille Syndicate Ltd. The defendants who were two directors and the secretary of the company accepted a bill of exchange on its behalf giving the name of the company as The Old Paris and Bastille Ltd.

It was held that the name of the company was not mentioned in accordance with the requirements of the Act and that the company not having paid the bill, the defendants were personally liable thereon. The correct name of the company should be inserted. Any omission or addition amounting to misdescription would make the person purporting to sign the bill personally liable.

On the same principle the directors were held personally liable on a cheque signed by them on the company's behalf stating the name as "L R Agencies Ltd", the true name being "L & R Agencies Ltd".¹⁸ The personal liability imposed by the section is not identical with the liability of the company. Thus, where the name of the company was not fully stated on a cheque which was dishonoured and the payee accepted part payment from the company, the liability of the officer was not thereby discharged. The liability arose when the cheque was dishonoured and could not be affected thereafter in the way in which the liability under a contract of guarantee might be affected.¹⁹ Taking note of the modern banking practice to issue to the customers cheque forms showing the name of the customer and his account number, a director who had inserted his bare signature on such cheques was held to be personally not liable when they were dishonoured.²⁰ Commenting on this it has been said:²¹

"The decision will be welcomed by the business community. As the cheque contained the printed name and account number of the company, the payee could be under no doubt that the cheque was a company cheque. The Draconian imposition of personal liability on a director who signed a company cheque without indicating his representative capacity, has thus lost much of its sting."

17. (1894) 70 LT 376. No action will be possible where the omission is due to the holder's own conduct, *Dudson Party Goods v Michael Jackson (Fancy Goods) Ltd*, (1968) 2 QB 629; (1968) 3 WLR 225; (1968) 2 Lloyd's Rep 98. Personal liability where the name was not accurately stated, *Lundquist Co A/S v Funder*, 1986 BCSC 166 (CA); *Brown v Oil Reptation SA*, 1990 BCSC J70 (CA).

18. *Pendon v Adelmen*, The Times, June 16, 1973; 1973 New L1 637.

19. *British Airways Board v Parish*, (1979) 2 Lloyd's Rep 361 (CA).

20. *Bowditch Ltd v Following Shutter Blinds Ltd*, (1986) 1 WLR 837 (CA).

21. 1986 JBL 9-10, editorial note. Acceptance in full form of a bill which was drawn on the company in an abbreviated name was held, in the right, *Sidney & Co Ltd v Wilks*, (1912) 28 TLR 205. An order for supply of goods placed innocently in the odd pad of the company carrying its old name did not make the signer personally liable, *John Wilkes (Footwear) Ltd v Lee International (Footwear) Ltd*, 1985 BCSC 444.

Misdescription of name does not, however, affect the validity of the contract. "A limited company has characteristics other than its name by reference to which it can be identified."²²

Venture capital companies.—The Department of Economic Affairs of the Finance Ministry has issued this guideline that a company should be allowed to use, as part of its name, expressions like Venture Capital/Venture Capital Company/Venture Capital Fund/Venture Capital Finance Co or such similar expressions only when the company or its promoters have obtained approval from the Department of Economic Affairs or any other nominated authority. This became necessary to properly identify companies which should be entitled to tax benefits on account of its venture capital services.

Licence to drop "Limited".—The Central Government may, by licence, allow a charitable company to drop the word "Limited" from its name. [See under S. 8]

Change of name (S. 13(2-3)).—A company may change its name by passing a special resolution and with the approval of the Central Government signified in writing.²³ Any change in the name of company will be subject to the provisions of Section 4(2) and (3) which have been stated in the requirements of name clause of the memorandum. Approval of the Central Government is not necessary where the only change in the name is deletion or addition of the word "Private" consequent upon conversion of the company from one class to another in accordance with the provisions of the Act. Alteration of name does not affect the rights and obligations of the company. Alteration becomes effective when it is registered with the Registrar and a new certificate of incorporation with the new name has been issued. Thereafter the company should use its new name. Use of the old name would be improper. The British Diabetic Society was compelled to change its corporate name to something that would not impinge upon the goodwill of the British Diabetic Association. There was a sufficient similarity between the two names to necessitate a change, even though there was no intention to mislead the public.²⁴ An injunction was not allowed to prevent

22. F Goldsmith (*Sicklesmore Ltd v Bader*, (1971) 1 Ch 88, (1969) 3 WLR 522. See also, Vincent Powell & Hill, "Misdescribing a Company" (1968) LIB New 14901.

23. S. 21. The power under the section has been delegated to Regional Directors.

24. *British Diabetic Assn v Diabetic Society Ltd*, 1996 ESR 1. *Kothari Products Ltd v Registrar of Companies*, (2001) 103 Comp Cas 801 (All), company registered under the name of "Pataje International (KNP) (P) Ltd". The owner of the trade mark "Pataje" obtained an order from the court directing the Registrar to cancel the registration and permitting the company to apply for change of name. Where the Calcutta based "Kilburn" company permitted a Mumbai based company to use the word Kilburn as a part of its name, the latter was ordered to drop the word from the names of two other companies which it floated. *Kilburn Electricals Ltd v Regional Director, CLB*, (2000) 99 Comp Cas 213 (Mad). In *Kalyana Polyleaks India Ltd v Union of India*, (1998) 16 SCR 207 (Cal), the company was ordered to drop the word "Kalpana" from its name. See, *Glenair v GlaxoWellcome Ltd*, 1996 ESR 386 and *Direct Line Group Ltd v Direct Line Estate Agency Ltd*, 1997 FSR 379, where the court noted and considered it necessary to counter people who get certain same such names registered in advance which real businessmen would like to use and then

the use of an ancestral name (Kirloskar). There is a right to use in a bona fide manner one's own name or the name of a place or ancestral name.²⁵

The power of the Central Government is being exercised by the Regional Directors to whom it has been delegated. The Gujarat High Court described the power to be of quasi-judicial nature because orders passed in exercise of this power are likely to have civil consequences. Regional Directors must record reasons for their orders.²⁶

When a company changes its name, it becomes the duty of the Registrar to enter the new name in the register and to issue a new certificate of incorporation with necessary alterations. Change of name becomes effective only on the issue of such a certificate.

Change of name does not affect the rights and obligations of the company.²⁷

The degree of protection afforded by this provision was considered by the Calcutta High Court in *Malhati Tea Syndicate Ltd v Revenue Officer*.²⁸

A company had changed its name from "Malhati Tea Syndicate Ltd" to "Malhati Tea and Industries Ltd." It filed a writ petition in its former name.

Declaring the petition to be incompetent, the court said: Nothing in this sub-section [S. 23(3) 1956 Act] authorised the company to commence a legal proceeding in its former name at a time when it had acquired its new name which has been put on the register of joint stock companies.²⁹

Registered office

The second clause of the memorandum must specify the State in which the registered office of the company is to be situated [See further under S. 12].

Within 30 days of incorporation or commencement of business, whichever is earlier, the exact place where the registered office is to be located

they sell the readymade registered company in such names to needy people for large sums.

- 25. *Kirloskar Proprietary Ltd v Kirloskar Dimensions (P) Ltd*, (1999) 46 Comp Cas 726 (Karn).
- 26. *Pine Bianca Glass (P) Ltd v Basavaraj India Ltd*, (2003) 1 Guj LR 528; (2003) 14 Comp Cas 163 (Guj). The unseasoned order passed in this case was set aside.
- 27. *Minrite Ltd v Luminarwif*, (2001) 103 Comp Cas 1078 (Del), change in ownership of company resulting in change of name alone was held to be not a ground for dismissing a suit pending against the company. Corporate identity does not change with transfer of shareholding. *Dinesh Chandra v Rayat Diagnostic India Ltd*, (2002) 131 Comp Cas 547 (CLB); obligations of the company in pending proceedings constitute its action. The change of name necessitates issuing of new share certificates in place of those which were issued bearing the former name. In this case, the company had cancelled the old certificates with effect from certain date under intimation to the shareholders and the stock exchange.
- 28. (1973) 43 Comp Cas 337; AIR 1973 Cal 78. A company, which changes its name, is allowed to change the name in pending legal proceedings. S. 115 read Dr. A. K. (7 CPC, Simla) Sugar Mills Ltd v Hindustan Brown Bevani Ltd, (1994) 22 All LR 299.
- 29. The court distinguished *D. Samudrala v Vellur Muralsikari Bank Ltd*, ILR 1954 Mad 530; AIR 1954 Mad 802; (1954) 21 Comp Cas 55, where proceedings were commenced in the old name, the court said that it was a misdescription and the suit was maintainable. *Pioneer Protective Glass Fibre (P) Ltd v Fibre Glass Pilkington Ltd*, (1986) 60 Comp Cas 707; (1985) 3 Comp L 309 (Cal).



must be decided and notice of the location must be given to the Registrar who has to record the same. All communications to the company must be addressed to its registered office.³¹

Change of registered office situation [S. 13(4–6)]

Alteration of registered office clause [S. 13(4)].—Shifting of registered office from one State to another and alteration of objects may affect not only the company's shareholders, but also its creditors, dealers and employees.³² That is why the objects can be altered by a special resolution and the registered office can be removed from one State to another by a special resolution and sanction of the Central Government. [S. 13(4)]

The Central Government has to dispose of the application within 60 days. Before passing its order it has to satisfy itself that the alteration has the consent of creditors, debenture-holders and other persons concerned with the company. Alternatively the Central Government has to be satisfied that sufficient provision has been made by the company for due discharge of all its debts and obligations or that adequate security has been provided for such discharge. [S. 13(5)] A certified copy of the order of the Central Government approving the alteration has to be filed with the Registrar of each of the States within the prescribed time. The Registrar has to register the same. The Registrar of the State to which the registered office is being shifted has to issue a fresh certificate of incorporation indicating the alteration. [S. 13(7)]

A company can shift its registered office from one place to another within the same city, town or village. But if it is proposed to carry the registered office from one city to another within the same State, a special resolution to that effect must be passed.³³ A notice of any such change must be given to the Registrar within 30 days of the change.³⁴ If the shifting of the registered office has the effect of taking the office from the jurisdiction of one Registrar of Companies to that of another within the same State, permission of the Regional Director must be taken. Application for permission has to be made

30. S. 20, dealing with service of documents on company. A notice of recovery on a company which was received by the company's managing director was held to be a good service. *Mahewchira State Financial Corps v. Masi & Co.* (2) Ld, (1991); 26 Comp. Cas. 168 (Bom). There is uncertainty as to whether S. 51 provides an exclusive mode of service on a company, but there are rulings to the effect that S. 51 prevails over the modes of service recognised by the Civil Procedure Code. *Harmida Nark Chossal v. Superfame (P) Ltd.*, (1992) 74 Comp. Cas. 740 (Cal). A service at any other place as not good. *Vijaya Bank Ltd. v. Remalir Steel and Alloys (P) Ltd.*, (1993) 26 Comp. Cas. 744 (Delhi), distinguishing *Ferrum Copper Mining Co.* 14, (1970) L.R. 10 Eq. 360, 22 L.T. 650, where the building of the company's registered office was demolished and service at some other place was considered a good service. *TU Supplies (London) Ltd v. Jerry Freightton Ltd.*, (1952) 1 K.B. 42, serving by personally delivering or by post at registered office, registered post not necessary.
31. Shifting of the registered office cannot be opposed by the State on the ground of loss of revenue. *Onica Chemicals and Distilleries (P) Ltd. v. A.R.R. 1961 Oct. 62;* (1962) 32 Comp. Cas. 497.
32. S. 12. It is not necessary that the meeting for such resolution should be held at the registered office. It may be held anywhere allowed by S. 196, *Mehm Ben. India Ltd. v. (2000) 7 Comp. L.J. 390 (CLB).*
33. S. 12. There is a penalty for default. The company and every officer of the company who is in default is punishable with fine extending up to Rs 500 for every day of default.

on a prescribed form. The Regional Directors are required to confirm the company's application and inform it accordingly within a period of four weeks. After getting the confirmation of the Regional Director, the company must file a copy of the same with the Registrar of Companies within two months from the date of confirmation together with a copy of the altered memorandum. The Registrars are required to register the same and inform companies within one month from the date of filing. The Registrar's certificate is a conclusive evidence of the fact of alteration and of compliance with requirements. [S. 12]

The Central Government has to consider the objections of a "person or class of persons whose interest will be affected by the alteration".³⁴ In two cases before the Orissa High Court,³⁵ shifting of the registered offices of certain companies to places outside Orissa was opposed by the State on several grounds, including the loss of revenue and employment opportunities. The court declined confirmation in both cases. In one of them BARMAN J based his decision on the ground that in a Federal Constitution every State has got the right to protect its revenue and, therefore, the interests of the State must be taken into account and are of considerable importance in confirming inter-State change of registered office. The Calcutta High Court described this as a "parochial" consideration. In a case before it³⁶ a company desired to shift its registered office from the State of West Bengal to Bombay. The company's petition was resisted by the State on the ground of loss of revenue. The court refused to sustain the contention of the State and allowed the transfer.

"There is no statutory right of the State, as a State, to intervene in an application for alteration of the place of the registered office of a company. To hold that the possibility of the loss of revenue is not only relevant, but of persuasive force in regard to the change is to rob the company of the statutory power conferred on it by the Act. The question of loss of revenue to one State would have to be considered in the total conspectus of revenue for the Republic of India and no parochial considerations should be allowed to turn the scale in regard to change of registered office from one State to another within India."

This decision was endorsed by a Division Bench of the Calcutta High Court in *Rank Palm Distributors of India Ltd v Registrar of Companies*.³⁷ But the problem does not seem to have ended with it. Capital has a tendency to fly away from areas of labour trouble. Another evidence of this is *Bharat*

34. Where an objection was raised by a creditor not of the company but that of a company in the same group, the CLB directed that the company should take care of the interests of such a creditor also. *Denbydale Balmain Paper Systems Ltd*, re. (1999) 97 Comp Cas 341 (C.B.)

35. *Orient Paper Mills Ltd v State*, AIR 1957 Ori 232; (1958) 28 Comp Cas 523 and *Orissa Chemicals and Distilleries Ltd*, re. AIR 1961 Ori 62; (1962) 32 Comp Cas 197

36. *Mackinlay Mackenzie & Co. re*, (1967) 1 Comp L 203; (1967) 37 Comp Cas 516 (Cal). Other rulings to the same effect, *Metal Rep. Indiv Ltd*, re. (2000) 2 Comp L 390 (C.B.), shifting in accordance with BIFR approved scheme, workers' objections were already heard and considered.

37. AIR 1969 Cal 32; (1968) 36 Comp Cas 487; 72 CWN 384; (1968) 1 Comp L 129

Commerce & Industries Ltd., re,³⁸ also before the same court. A company resolved and sought confirmation for removing its office from West Bengal to New Delhi. Explaining its reasons the company said that due to disturbances at the registered office caused by two or three employees it had become impossible to manage the branches of the company located at different places. The State of West Bengal having learned its lessons in the earlier cases did not oppose but the employees opposed the confirmation. They felt that the management had taken this course to frustrate the outcome of an industrial dispute. They fairly well succeeded. For Datta J held that the decision of the management was *mala fide*. But on appeal to a Division Bench his decision was overruled.³⁹ The court did not like to decide whether it was open to the court to examine the *bona fides* of the shareholders' resolution for removing their office from one State to another.

The Company Law Board (CLB) [now Central Government] did not hesitate in granting permission to a company to move out of the host State whose actions and policies frustrated the hopes and aspirations of the company and to shift its registered office to any other State which was willing to provide the necessary facilities.⁴⁰ Where a company wanted to shift its registered office from New Delhi to Gurgaon, the company's resolution was confirmed subject to this condition that Delhi based shareholders, who were willing to attend annual general meetings, must be provided free transport facility.⁴¹ No hesitation was shown in permitting shifting of the registered office to a place where majority of the shareholders of the company resided.⁴² A company which was taken over by another company was allowed to carry its registered office to the place of the registered office of the other company.⁴³

Where some employees objected to the proposed shifting on the ground that they would be prejudiced in respect of their cases pending before labour courts, shifting was permitted but with this order that the workers' interests should be safeguarded, and that none of them should be prejudiced either by way of transfer or retrenchment or otherwise and that pending cases before local courts should not be prejudiced.⁴⁴ A person who has no stake in the company either as a shareholder or as a creditor was not allowed to raise any objections. He was personal creditor of the managing director. He had no *locus standi*, his criminal proceedings against the managing director notwithstanding.⁴⁵

38. (1973) 43 Comp Cas 162 (Cal).

39. *Bharat Commerce & Industries Ltd v Registrar of Companies*, (1973) 43 Comp Cas 275 (Cal).

40. *Paradise Hindustan Enterprises Ltd*, re, (1989) 3 Comp LJ 248, 250 (CLB). See also, *Kajlara Wand Industries Ltd*, re, (1989) 3 Comp LJ 21, 27 (CLB), where the CLB did not approve the policy of the State Financial Corporations and the State Industrial Development Corporation insisting upon shifting of office to their State in order to avail loan facilities.

41. *AKG Acoustics (India) Ltd*, re, (1996) 3 Comp LJ 355 (CLB).

42. *Pet-Peugeot Ltd*, re, (1997) 89 Comp Cas 808 (1997) 3 Comp LJ 334 (CLB).

43. *KG Klaude Compressors Ltd*, re, (1997) 4 Comp LJ 461 (CLB).

44. *JL Morrison (India) Ltd*, re, (1999) 95 Comp Cas 907 (CLB).

45. *Seawise Maritime (P) Ltd*, re, (2000) 39 CLA 49; (2002) 111 Comp Cas 78 (CLB), allegations of

Where a company had all its manufacturing units in Uttar Pradesh and none in West Bengal, the CLB [now Central Government] confirmed its special resolution to shift its registered office from West Bengal to Uttar Pradesh.⁴⁶ Where a company had one manufacturing unit in Bihar and the other in Maharashtra and because it had undertaken massive expansion programme in Maharashtra, its desire to carry the registered office to Pune was allowed. Its Bihar unit was to continue as it was.⁴⁷ A company was allowed to take away its registered office from Bihar to West Bengal in spite of the fact that the Bihar Government had granted land on lease for the company's factory on the condition that the registered office would not be shifted. The CLB said that the fact of interest-free loans, sales-tax, holidays, concessional electricity and other subsidies had no bearing on the company's right to shift.⁴⁸

Before confirming the alteration, the sanctioning authority must satisfy itself that sufficient notice has been given to every debenture-holder or person or class of persons whose interests are likely to be affected.⁴⁹ In reference to creditors, the CLB has to feel satisfied that those who have raised objections, their interests have been safeguarded either by paying them off or securing their payment. The CLB may, if necessary, dispense with the requirement of the consent of any such person.

The Central Government has also to see that a notice has been served on the Registrar of the company to enable him to state his objections, if any. It may make a conditional order of confirmation. Where there are dissenting members, the Central Government may formulate a scheme or arrangement under which they will be paid off but not in a manner as to affect the structure of the company's share capital.

Objects and powers

In the third clause, the memorandum must state the objects for which the proposed company is to be established.

The new Companies Act, 2006 [UK] does not require objects to be stated in the memorandum. The objects, if at all, have only to be stated in the articles. If there is no such statement, the company would be with unrestricted objects. Thus, the statement of objects, if any, would operate as a contract

⁴⁶ Only 50% against the managing director were not considered to be anything worthwhile, when there were no allegations against the company, shifting was sanctioned.

⁴⁷ Upper Ganges Singer & Industries Ltd, re, (2003) 27 SCL 369 (CLB).

⁴⁸ Niranjan Auto Ltd, re, (2000) 38 CLA 217 (CLB).

⁴⁹ Udit Beltron Ltd, re, (2000) 27 SCL 124 (CLB); Rockit Bencheset (India) Ltd, re, (2004) 46 SCL 437 (CLB), shifting from West Bengal to National Capital Region allowed, care was taken of the interest of objecting creditors and employees. Shifting was necessary for better business avenues.

⁵⁰ Publication of notice of the petition in two newspapers inviting objections from any person whose interest is likely to be affected by the proposed alteration of memorandum regarding change of registered office was held to be sufficient notice to "every other person or class of persons" within the meaning of the sections. Mtel Asia India Ltd, re, (2001) 105 Comp Cas 939 (CLB); Perfect Refinements Ltd, re, (2005) 125 Comp Cas 234 (CLB), shareholders cannot object after unanimous resolution.

between the company and its members. This has the effect of eliminating all the complications caused by the doctrine of *ultra vires*. This doctrine would no longer be operative in a dealing by the company with outsiders.

Choice of objects lies with the subscribers to the memorandum and their freedom in this respect is almost unrestricted. The only obvious restrictions are that the objects should not go against the law of the land and the provisions of the Companies Act.⁵⁰ For example, law prohibits gambling. Obviously, no company can be incorporated for that purpose. Thus, where a company was incorporated for conducting a lottery, it was ordered to be wound up, that object being illegal.⁵¹

Why objects?—The ownership of the corporate capital is vested in the company itself. But in reality that capital has been contributed by the shareholders and is held by the company as though in trust for them. Such a fund must obviously be dedicated to some defined objects so that the contributors may know the purposes to which it can be lawfully applied. The statement of objects, therefore, gives a very important protection to the shareholders by ensuring that funds raised for one undertaking are not going to be risked in another.⁵²

The objects clause, in the second place, affords a certain degree of protection to the creditors also. The creditors of a company trust the corporation and not the shareholders and they have to seek their repayment only out of the company's assets. The fact that the corporate capital cannot be spent on any project not directly within the terms of the company's objects gives the creditors a feeling of security. Public financial institutions providing loans to companies have to go object-wise because they have their own list of priorities. The objects clause is their only guidance in this respect.

Thirdly, by confining the corporate activities within a defined field, the statement of objects serves public interest also. It prevents diversification of a company's activities in directions not closely connected with the business for which the company may have been initially established.⁵³ It also prevents concentration of economic power. Any change of objects would require sanctions, thus giving the sanctioning authority an opportunity to examine whether the proposed plan of diversification would not be against public interest.

50. The memorandum and articles of asset management companies (AMCs) require SEBI approval. Such companies are compulsory for organising a mutual fund. [Circular No 492 of 4-9-2002.] See SEBI Guidelines for Asset Management Companies. "Trading Corporation" means a trading corporation within the meaning of Entries 43 and 44 in List I in the 7th Sch. of the Constitution." [S. 2(2)]. A public financial institution cannot insist that the company seeking loan from it should confine itself to one State. *Kalidasa Wool Industries Ltd. vs. (1989) 2 Comp L 26, 27 (CLB).* The business of turis has been held to be of trading nature, *John v. Oriental Turis Ltd. (1954) 2 KLT 353.*

51. *Universal Mutual Ad & Prop. Assurance Assn. v. A.O. Bhagya Naidu, AIR 1954 Mad 16; (1952) 36 L.W. 610; Esso Motor v. Security Society Ltd., 1917 AC 406 (HL).* S. 3 clearly says that a company may be formed for any lawful purpose.

52. *Waman Lal v. Scindia Steam Navigation Co., AIR 1944 Bom. 131, 135; (1944) 14 Comp Cas 69 (Bom);*

53. D.I. Mazumdar, *THEORY AND PHILOSOPHY OF THE MODERN CORPORATION* (1967) 119.

Doctrine of ultra vires

Those then are the reasons which explain the necessity of an objects clause. The same reasons require that the company should devote itself only to the objects set out in the memorandum and to no others. It is the function of the memorandum "to delimit and identify the objects in such plain and unambiguous manner as that the reader can identify the field of industry within which the corporate activities are to be confined".⁵⁴ And it is the function of the courts to see that the company does not move in a direction away from that field.⁵⁵ That is where the doctrine of ultra vires comes into play in relation to joint stock companies. "Ultra" means beyond, "vires" means powers. An action outside the memorandum is ultra vires the company. Its application to such companies was first demonstrated by the House of Lords in *Ashbury Railway Carriage and Iron Co Ltd v Riche*.⁵⁶ (*Ashbury*).



CASE PILOT

The memorandum of association of a company thus defined its objects: "The objects for which the company is established are to make and sell, or lend or hire, railway carriages and wagons and all kinds of railway plants, etc., ...; to carry on the business of mechanical engineers, and general contractors, ...". The company entered into a contract with Riche, a firm of railway contractors, to finance the construction of a railway line in Belgium. The company, however, repudiated the contract as one ultra vires. And Riche brought an action for damages for breach of contract. His contentions were that the contract in question came well within the meaning of the words "general contractors" and, was, therefore, within the powers of the company, and, secondly, that the contract was ratified by a majority of the shareholders.

But the House of Lords held that the contract was ultra vires and, therefore, null and void. In substance the judgment of Lord Cottenham LC was this: "The subscribers are to state the objects for which the proposed company is to be established and then the company comes into existence for those objects and those only. Such a statement of objects has a two-fold operation. It states affirmatively the ambit and extent of powers of the company and it states negatively that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified. The terms 'general contractors' must be taken to indicate the making generally of such contracts as are connected with the business of mechanical engineers. If the term 'general contractors' is not so interpreted, it would authorise the making of contracts of any and every description, such as, for instance, of fire and marine insurance and the memorandum in place of specifying the particular kind of business,

54. Lord Wensley in *Cobbeau v Brumfitt*, 1918 AC 514, 522, 119 LT 162 (H.L.).

55. Pilkington J in *Port Canning & Land Investment Co. re*, (1871) 2 Bengal LR 583, 598-611, where the learned judge explains the great mischief, public and private, which might ensue if companies were not held strictly to the terms of their incorporation.

56. (1875) 44 LJ Excl 385 (1875) LR 7 HL 653

would virtually point to the carrying on of the business of any kind whatsoever and would, therefore, be altogether unmeaning. Hence the contract was entirely beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If the company could not make it, much less could it be ratified. If every shareholder of the company had been in the room and had said: "That is a contract which we desire to make, which we authorise the directors to make" the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by Act of Parliament, they were prohibited from doing."

So far as English Law is concerned, this decision and others of the same kind are to a certain extent of historic value only. This is so because the objects are not required to be stated in the memorandum. They may be stated in the articles. Articles are a contract between the company and its members. They do not bind outsiders unless it can be shown that a particular outsider had knowledge of the provision and knew that it was being exceeded.

In the next leading case of *Attorney-General v Great Eastern Railway Co.*⁵⁷ the House of Lords observed that the doctrine of *ultra vires*, as it was explained in the *Ashbury* case, should be maintained. But it ought to be reasonably and not unreasonably understood and applied and that whatever may be fairly regarded as incidental to the objects authorised ought not to be held as *ultra vires*, unless it is expressly prohibited.

Thus, a company may do an act which is (a) necessary for, or (b) incidental to, the attainment of its objects, or (c) which is otherwise authorised by the Act.

The Companies Act now requires any matter also to be stated in the memorandum which is considered necessary for furtherance of the stated objects. But even if they are not so stated, they would be allowed by the principle of reasonable construction. Thus, a railway company, having authority to keep steam vessels for the purpose of a ferry, may use them for excursion trips to the sea when they are otherwise unemployed.⁵⁸ Again a railway company whose railroad is carried over arches may convert the arches into shops,⁵⁹ otherwise "it might as reasonably be contended that a railway company are not entitled to sell the hay which grows on their banks so as to make something out of it". A chemical manufacturer was allowed to distribute £1,00,000 to universities and scientific institutions for the furtherance of scientific education and research as it was conducive to the continued progress of the company as chemical manufacturers.⁶⁰

57. (1900) 1 R.S. 423 (H.L.). The Supreme Court of India in *A. Lakshmanaswami Mudaliar v. LIC*, AIR 1963 SC 1285; (1963) 33 Comp Cas 420, affirmed that an *ultra vires* contract remains *ultra vires* even if all the shareholders agree to it.

58. *Forest v Manchester Railway Co.*, 5 ER 803 (1861).

59. *Tester v London Chatham & Dover Railway Co.*, (1915) 1 QB 731 (C.A.).

60. *Furness, Birkenhead, Mond & Co.*, (1921) 1 Ch 359; 90 L.J. Ch 294.



"But no company can devote any part of its funds to an object which is neither essential nor incidental to the fulfilment of its objects, how beneficial so ever that object might seem likely to prove."⁶¹ Accordingly, in *London County Council v Attorney General*,⁶²

The Council having statutory power to work tramways was restrained from running omnibuses in connection with the tramways. The court found that the omnibus business was in no way incidental to the business of working tramways, and, therefore, could not be undertaken although it might have materially contributed to the success of the Council's tramways.

In India the origin of the doctrine dates back to 1866 when the Bombay High Court applied it to a joint stock company and held on the facts of the case before it that "the purchase by the directors of a company, on behalf of the company, of shares in other joint stock companies, unless expressly authorised in the memorandum is ultra vires".⁶³ Since then the rule has been applied and acted upon in a number of cases.⁶⁴

The doctrine has been affirmed by the Supreme Court in its decision in *A Lakshmanaswamy Mudaliar v LIC*.⁶⁵

The directors of a company were authorised "to make payments towards any charitable or any benevolent object, or for any general public, general or useful object". In accordance with a shareholders' resolution the directors paid two lakh rupees to a trust formed for the purpose of promoting technical and business knowledge.

The payment was held to be *ultra vires*. The court said that the directors could not spend the company's money on any charitable or general object which they might choose. They could spend for the promotion of only such charitable objects as would be useful for the attainment of the company's own objects. The company's business having been taken over by the Life Insurance Corporation, it had no business left to promote.

Objects, powers and charitable contributions.—The above Supreme Court decision is an authority for two propositions. Firstly, that a company's funds cannot be diverted to every kind of charity even if there is an unrestricted power to that effect in the company's memorandum. Secondly, that objects must be distinguished from powers. The power, for example, to borrow or to make a charity, is not an object. Objects have to be stated in the

61. *Eastern Counties Railway Co v Hawkes* (1855) 5 11 L.Cas 331; 10 E.R. 528.

62. 1932 A.C. 265 (I.H.L.).

63. *Iehungir R. Irudhi v Shanti Lal*, (1866-67) 4 Bom. E.K.R. 165.

64. See, *Paid Casting & Land Investment Co. Ltd.* (1921) 7 Bengal L.R. 583; *Ahmed Seth v Bank of Mysore*, (1930) 59 M.L.J. 28; *Imperial Bank of India Ltd v Benjan National Bank Ltd*, AIR 1930 Cal 536; (1931) 1 Comp Cas 63; (1931) 57 Cal 1328; *Students Native Permeation Fund Ltd. re*, (1931) 60 M.E.J. 271; *Whitman Lal v Simla Sircar Navigation Co*, AIR 1944 Bom 121; (1944) 14 Comp Cas 69 (*Benji Dev Thakur v Hirulal Mitra*, AIR 1962 Punj 277; (1962) 32 Comp Cas 162).

65. AIR 1963 SC 1085; (1963) 33 Comp Cas 420.



memorandum, but not powers. Even if powers are stated, they can be used only to effectuate the objects of the company.⁶⁶ They do not become independent objects by themselves. Thus, in *Introductions Ltd (No 2)*, n⁶⁷:

A company had an independent clause in its memorandum empowering it to borrow money on debentures. Yet its act of loan for a purpose known to the lender to be outside the scope of its objects was held to be ultra vires.

The power to borrow is not an object. It cannot stand on its own, but must be exercised in order to promote the company's objects. But it is for the directors to decide in good faith what is necessary to promote the objects of the company. Thus, where under an express power to that effect the directors of a company charged its assets to secure a benefit to another company in the same group, the charge was held to be valid.⁶⁸ The contention that it was not made in the interest of the company was not accepted. While the separate interest of a company cannot be sacrificed or ignored, yet the directors are not required to consider the interest of an entity in a group in isolation.

Similarly, a power to make charitable contributions cannot be acted upon to make grants of every kind. According to Evis J in *Lee, Behrens & Co Ltd, re*,⁶⁹ the validity of such grants must be tested by the answer to three pertinent questions: (1) Is the transaction reasonably incidental to the carrying on of the company's business? (2) Is it a bona fide transaction? (3) Is it done for the benefit and to promote the prosperity of the company? Applying these tests to the facts the learned judge held that the grant of an annual pension of £500 to the widow of a managing director five years after his death was ultra vires. "The predominant consideration operating in the minds of the directors was a desire to provide for the applicant (widow), and the question what, if any, benefit would accrue to the company never presented itself to their minds."⁷⁰

66 I-H. Leigh, "Objects, Powers & Ultra Vires" (1970) 53 Mod L Rev 81

67 1970 Ch 199, (1969) 2 WLR 791, [1968] 2 Comp LJ 28 (CA).

68 *Cherterbridge Corp: Ltd v Lloyds Bank Ltd*, 1970 Ch 62, [1968] 3 WLR 122. Considered in L.H. Leigh, "Objects, Powers & Ultra Vires" (1970) 53 Mod L Rev 81 and D. Li Morgan, "Corporate Collateral Security", 1970 [JBL] 256. Ralph Instone, "Powers and Objects" (1976) [JBL] 943. See also, *Kilgore Securities Ltd v IXL*, 1956 [1 WLR 471] where the grant of a debenture to the company's parent company at a high rate of interest for the purpose of avoidance of taxes, was held to be a dressed up gift of capital to the parent company and, therefore, ultra vires. Similarly, in *Hall Girog*, 1964 Ltd, *re*, (1962) 3 All ER 8016, remuneration of £30 to a non-working shareholder director was held to be excessive amounting to a dressed-up return of capital. A remuneration of £10 a week has been regarded as reasonable in such cases.

69 [1952] 24 Ch 46.

70 Where payment of a sum of money was made by the company's managing director by way of bribe in return work for the company, the company was allowed to recover the amount from the managing director, it being neither within his authority, nor authorised by the company's shareholders. *E Haundorf & Co Ltd v Frost*, (1968) 4 BCC 3 (CA). Times, 6-10-1968.

Similarly, where the directors of a company proposed to distribute the money received on the sale of its assets as compensation to the employees who had lost their jobs, the court restrained the scheme.⁷¹ Their motives may be laudable from the point of view of industrial relations, but the law does not recognise them as a sufficient justification to enable the majority to spend the money of the company. In *Hutton v West Cork Rly Co*,⁷² Bowen LJ explained the judicial attitude:

Charity has no business to sit at boards of directors qua charity. There is, however, a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb, charity may sit at the board, but for no other purpose.

Thus, the interests of the company cannot be elbowed out. Charity is allowed only to the extent to which it is necessary in the reasonable management of the affairs of the company. There must be proximate connection between the gift and the company's business interests.⁷³ Thus, "gifts to foster research relevant to the company's activities"⁷⁴; ex gratia payments to workers to induce them to work hard⁷⁵; and "payment to widows of ex-employees on the footing that such payment encouraged persons to enter the employment of the company"⁷⁶ have been upheld.⁷⁷ Some limit on corporate charity is obviously necessary. But the question whether the limit has been exceeded has to be considered by keeping in mind the fact that "the image of the business corporation is evolving from the nineteenth century one of a heartless exploiter of a wage slave labour, single mindedly bent upon the maximisation of profits to that of the corporate good citizenship of today. Corporations are coming to focus their attention upon their duty to serve mankind. The goal of the enlightened corporation is to provide full employment and high wages for labour, to lower its prices to consumers, to help the needy, to contribute to education and to secure the needs of

71. *Hutton v West Cork Railway Co*, (1893) 1 R 23 Ch D 654 (CA). *Parkes v Daily News Ltd*, 1962 Ch 927; (1962) 3 WLR 566.

72. *Ibid.* 623. *Gibson Assurance v Gibson*, 1980 Scr 1st Ct 57, where ex gratia payment in lieu of pension was not allowed on the eve of liquidation.

73. *A. I. Aspinwall & Son, Mudaliar v L/C*, AIR 1953 SC 1185; (1953) 32 Comp Cas 420. Donation of money by a charitable company to a trust having similar objects was not ultra vires and not questionable. *Mohammed Sestry v Similiaran Sumraja Seigle*, (1995) 83 Comp Cas 272 (Mad).

74. *Lewis v Brincker, Almond & Co*, (1921) 1 Ch 359; 90 L J Ch 294.

75. *Humphries v Price's Patent Candle Co*, (1876) 45 L J Ch 472.

76. *Henderson v Bank of Australia*, (1899) 46 Ch D 171. See also, *W&M Reith Ltd v. (1967) 1 WLR 432*, where the attempt of a creator and managing director of two companies to provide pension to his widow after his death from the companies' income was frustrated, it being not reasonably incidental to, nor necessary to promote, the prosperity of the companies. The case is adversely commented upon by Harry Silberberg, "Gratuitous Payments for the Benefit of a Company", 1968 JBL 213.

77. For a remarkable account of such cases and other interests that corporate directors can consider see, R.C. Hegditch, "The Range of a Company's Interests", (1969) 56 SALJ 155; R. Bell, *Corporate Giving in a Free Society* (1986); J.A.C. Hetherington, "Corporate Responsibility" (1969) Stan L Rev 273-79.

society generally.⁷⁷ The Companies Act of 2013 [S. 135] makes compulsory provisions for charitable dispensation under the heading "Corporate Social Responsibility".

Since the application of the European Community Law in England, the doctrine of *ultra vires* stands restricted to a certain extent. Section 9(1) of the Act provides that "in favour of a person dealing with a company in good faith, any transaction decided on by the directors shall be deemed to be one which it is within the capacity of the company". Thus, as against a third person acting in good faith, the company can no longer plead that the act was *ultra vires*.⁷⁸

Main objects rule of construction —The *ultra vires* doctrine confines corporate action within fixed limits. While it handicaps the ambitious manager, it lays a trap for the unwary creditor. That is why there has been a revolt against it almost ever since its inception. The businessman has always endeavoured to evade the limitations imposed by the doctrine on their freedom of action. One of the methods of bypassing *ultra vires* is the practice of registering memoranda containing a profusion of objects and powers.⁷⁹ For example, in *Cottee v Brougham*⁸⁰ the House of Lords had to consider a memorandum which contained an objects clause with 30 sub-clauses enabling the company to carry on almost every conceivable kind of business which a company could adopt. Such an objects clause naturally defeats the very purpose for which it is there.⁸¹ In a bid to control this tendency the courts adopted the "main objects rule" of construction. The rule owes its origin to the decision in the *Ashbury* case where it was held that the words "general contractors" must be read in connection with the company's main business. *German Date Coffee Co. re*,⁸² is another illustration of its application.

The memorandum of a company stated that it was formed for working a German patent which would be granted for manufacturing coffee from dates; for obtaining other patents for improvements and extension of the said invention; and to acquire and purchase any other invention for



CASE PILOT

77. Louis O. Kelso, "Corporate Benevolence and Welfare Redistribution" (1960) *Business Lawyer* 259; D.L. Mazumdar, *Towards A Philosophy of the Modern Corporation* (1967); A. Hackel (Ed.), *The Corporation Take-Over* (1964) and Mason (Ed.), *The Corporation in Modern Society* (1959). D. Cohen, "Gratuitous Payments to Employees and the Ultra Vires Doctrine," 134 *New L.J.* 716.

78. For comments on the provision see, 1972 *JBL* 85; James H. Thompson, "Directors' Powers under the European Communities Act" (1992) *New L.J.* 592; A.T. Birkenstein, "European Communities Act, 1972" (1973) *New L.J.* 312 and (1973) *Canc's L.J.* 1. The provision has been incorporated into the [English] Companies Act, 1985 [S. 38].

79. Lord Wrenbury in *Cottee v Brougham*, 1918 AC 514, 523; (1918) 19 All ER Rep 205, 119 LT 162 (HL). The main objects rule of construction has been explained by the Birla HC, *Bilesai Juharwal*, 14, AIR 1962 Bom 133, (1962) 32 Comp Cas 215.

80. 1918 AC 514; (1918-19) All ER Rep 265; 119 LT 162 (HL); *Ajay Kumar Goyal v Bhagwanpur Silk Mills* (P) Ltd, (2013) 178 Comp Cas 133 (A.P.). company could not give up its sole main objects and pursue other objects without altering its memorandum.

81. Sangeet, "Ultra Vires and Companies: The Indian Experience" (1963) 12 ILJ 967.

83. (1882) LR 20 Ch. D 161. See also, *Amalgamated Syndicate*, 14, (1897) 2 Ch. 600 and D.C. Eeerey, *Winding Up on the Just and Equitable Ground: Failure of Substitution*, 7c, (1973) 47 Aust L.J. 718.

similar purposes. The intended German patent was never granted, but the company purchased a Swedish patent, and also established works in Hamburg where they made and sold coffee from dates without any patent.

A petition having been presented by two shareholders, it was held that the main object for which the company was formed had become impossible and, therefore, it was just and equitable that the company should be wound up. The court said: "In construing a memorandum in which there are general words ... they must be taken in connection with what are shown by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else. Taking that as the governing principle, it seems to be plain that the real objects of this company which is called German Date Coffee Co, was to manufacture a substitute for coffee in Germany under a patent. It is what the company was formed for and all the rest is subordinate to that."

This principle will, however, be of no help where a company is formed for general purposes as opposed to a defined subject-matter. Pointing this out in *Kilson & Co Ltd v. n.*,⁸⁴ the court said: "The impossibility of applying such a construction seems to be manifest when one remembers that business is a thing which changes. It grows or it contracts. It changes; it disposes of the whole of its plant; it moves its factory; it entirely changes its range of products, and so forth. It is more like an organic thing. It must be remembered that in these substratum cases there is every difference between a company which on the true construction of its memorandum is formed for the paramount purpose of dealing with some specific subject-matter and a company which is formed with wider and more comprehensive objects. With regard to a company which is formed to acquire and exploit a mine, when you come to construe its memorandum of association you must construe the language used in reference to the subject-matter, namely, a mine and, accordingly, if the mine cannot be acquired or if the mine turns out to be no mine at all the object of the company is frustrated, because the subject-matter which the company was formed to exploit has ceased to exist. . . . But when you come to the subject-matter of a totally different kind like the carrying on of a type of business, then, so long as the company can carry on that type of business, it seems that *prima facie* at any rate it is impossible to say that its substratum has gone." The facts of the case were:

A company was incorporated with the object of (a) acquiring an existing engineering concern and (b) carrying on the business of general engineering. Subsequently the company proposed to sell the original business and to embark upon other general engineering activities. Some of the shareholders petitioned for winding up on the ground that the company's substratum had disappeared. The court rejected the petition.⁸⁵

84. (1946) 1 All ER 425 (CA).

85. *Ferron Electronics (P) Ltd v. Vixen Leasing Ltd*. [2002] 109 Comp Cas 487 (Banc); the company was not carrying on its main objects, carrying on of ancillary objects, alright.

In *Colman v Broughton*⁸⁶ the main objects rule was excluded by a declaration in the objects clause that "every clause should be construed as a substantive clause and not limited or restricted by reference to any other sub-clause or by the name of the company and none of them should be deemed as merely subsidiary or auxiliary". The House of Lords expressed strong disapproval of the inclusion of such a clause, but their Lordships held that it excluded the "main objects rule" of interpretation.

Thus, the rule has failed to prevent the evasion of ultra vires. And now the decision of the Court of Appeal in *Bell Houses Ltd v City Wall Properties Ltd*⁸⁷ has stamped its approval upon another technique of evasion. In this case a company's objects clause authorised it to carry on any other trade or business which in the opinion of the Board of directors could be carried on advantageously in connection with the company's general business. The court held the clause to be valid and an act done in bona fide exercise of it to be ultra vires. But a clause of this kind does not state any objects at all. Rather, it leaves the objects to be determined by the directors' bona fides.⁸⁸

Consequences of ultra vires transactions

When a company gets involved in an ultra vires transaction the question arises as to what are its effects.

1. *Injunction*.—In the first place, that members are entitled to hold a registered company to its registered objects has been recognised long since. Hence whenever an ultra vires act has been or is about to be undertaken, any member of the company can get an injunction to restrain it from proceeding with it.⁸⁹

2. *Personal liability of directors*.—It is one of the duties of directors to see that the corporate capital is used only for the legitimate business of the company. If any part of it has been diverted to purposes foreign to the



CASE PILOT

86. [1918] AC 514; (1918-19) All ER Rep 265, 119 LT 162 (H.L.).

87. (1966) 2 QB 676; (1966) 2 WLR 1323 (C.A.).

88. See, S.C. Beathin, "The Ultra Vires Doctrine: An Obituary Notice" (1966) 85 SALJ 461; "The Death of Ultra Vires" (1966) 29 Mod L Rev 674; "Ultra Vires or the Directors: Bona Fides?" (1967) 30 Mod L Rev 366; R. Hank, "Is the Doctrine of Ultra Vires Dead?", 20 JCLQ 301.

89. *Attorney-General v Great Eastern Railway Co.* (1880) 1 K.B. 5, AC 473 (H.L.). See, an interesting article, H.L. Laski, "Personality of Associations", 29 Harry L Rev 404; *Jeskin v Pharmaceutical Society of Great Britain*, (1921) LR 1 Ch 392; Avtar Singh, "Injunctions against Ultra Vires Acts of Companies", 1998 Mad LJ 75, *Punjab Turf Park Casting & Land Investment Co. re*, (1991) 7 Bengal LR 583, 598-611, where the learned judge explains the great mischief, public and private, which might ensue if companies were not held strictly to the terms of their incorporation. Abolition of the doctrine of ultra vires in England by virtue of the provision in S. 35(1) of the 1989 Act nevertheless preserves this right by providing in S. 35(2) that a member may restrain an act which but for S. 35(1) would have been beyond the company's capacity. But such proceedings cannot be allowed in respect of acts to be done in fulfilment of legal obligations arising from a previous act of the company. The company's freedom in altering its objects as now granted and therefore of ratifying unauthorised acts would also be a stumbling block in the right to get an injunction. Now that in England the objects have to be stated, if at all, only in the articles, members would have a right to restrain any activity outside such objects (1996 Act, UK).



CASEPILOT

company's memorandum, the directors will be personally liable to replace it.⁹⁰ Thus, for example, the Bombay High Court in *Jehangir R Modi v Shantji Ladha*⁹¹ held that a shareholder can maintain an action against the directors to compel them to restore to the company the funds of the company that have been employed by them in transactions that they have no authority to enter into, without making the company a party to the suit.⁹²

3. Breach of warranty of authority.—It is the duty of an agent to act within the scope of his authority. For if he goes beyond he will be personally liable to the third party for breach of warranty of authority. The directors of a company are its agents. As such it is their duty to keep within the limits of the company's powers. If they induce, however innocently, an outsider to contract with the company in a matter in which the company does not have the power to act, they will be personally liable to him for his loss. In *Weeks v Proprietary Co.*⁹³

A railway company invited proposals for a loan on debentures. At the time the advertisement was published the company had issued debentures of the amount of £60,000 being the full amount which it was by its constitution authorised to issue. It had thus exhausted its borrowing powers. The plaintiff offered a loan of £500 upon the footing of that advertisement. The directors accepted it and issued to him a debenture of the company. The loan being *ultra vires* was held to be void. In an action by the plaintiff against the directors, it was held that the directors by inserting the advertisement had warranted that they had the power to borrow which they did not in fact possess. Their warranty consequently was broken and they were personally liable.

It must, however, be remembered that the representation of authority which the directors hold out must be a representation of facts and not of law. For example, whether a company is authorised by its memorandum to borrow is a question of law which every man dealing with the company is supposed to know. But where the memorandum authorises a company to borrow, whether that power has been fully exercised or not becomes a question of fact. A misrepresentation of the former will not, but that of the latter will, give a cause of action against the directors.

4. Ultra vires acquired property.—If a company's money has been spent *ultra vires* in purchasing some property, the company's right over that

90. *Exchange Banking Co. re.* (1882) 21 Ch D 519, 46 LT 86 (CA); *George Newmarch & Co. re.* (1895) 1 Ch 424 (C.A.)

91. (1866-67) 4 Bom 14CR 185, *Karlaumar Trading Co v Pimpal Deychand*, ILR (1894) 18 Bom 134.

92. In the case of deliberate misapplication, criminal action can also be taken for fraud. See, *R v Sindlitz*, (1968) 1 WLR 1246. To the same effect is *Audley (Surford) Ltd v Pyramid Ltd*, 1989 W.L.C. 676 (Ch.D.), where it was pointed out that directors who throw away the company's money on unauthorised objects are personally liable to make good the company's loss. Sale of property at half of its price to a shareholder was held to be *ultra vires* and beyond ratification constituting the recipient as a constructive trustee to the company.

93. (1873) LR 8 CP 427

property must be held secure. For, that asset, though wrongly acquired, represents the corporate capital. Thus, for example, the Madras High Court⁹⁴ allowed a company to sue on a mortgage to recover the money lent in spite of the fact that the transaction was beyond the powers of the company. The court relied upon the following observation of BRICK in the *Doctrine of Ultra Vires*: "Property legally and by formal transfer or conveyance transferred to a corporation is in law duly vested in such corporation, even though the corporation was not empowered to acquire such property."⁹⁵

Similarly, in *Selangor United Rubber Estates Ltd v Cradock (No 3)*,⁹⁶ it was held that "the fact that the Companies Act makes it unlawful for a company to give any financial assistance for anyone to purchase any of its shares does not prevent such a person from being held a constructive trustee for the company of such of its money as is unlawfully provided for such purpose".⁹⁷ A Canadian court allowed recovery of ultra vires payments 43 years after they were made.⁹⁸

5. Ultra vires contracts.—"A contract of a corporation", observed GRAY J., "which is ultra vires, that is to say, outside the objects as defined by its memorandum is wholly void and of no legal effect."⁹⁹ The objection to an ultra vires contract is, not merely that the corporation ought not to have made it, but that it could not make it. The question is as to the legality of the contract: the question is as to the competency and power of the company to make it. "An ultra vires contract, being void ab initio, cannot become ultra vires by reason of estoppel, lapse of time, ratification, acquiescence or delay."¹⁰⁰ "No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it."¹⁰¹ This incapacity of a company occasionally results in manifest injustice. For example, in *Benfoste (Jew) (London) Ltd, re*,¹⁰²

A company was authorised by its memorandum to carry on the business of costumiers, gown-makers and other activities of allied nature. The company decided to undertake the business of making veneered panels which was admittedly ultra vires and for this purpose erected a factory at Bristol. A firm of builders who constructed the factory claimed £ 2078 as owing to them. Another firm supplied veneers to the company

94. *Akived Sait v Bank of Hyderab.* (1930) 79 M.L.J. 28.

95. The following authorities are cited: *Ayers v South Australian Banking Co.* (1872) L.R. 3 P.C. 556; *Cotman, re*, (1881) L.R. 19 Ch. D. 64; *Dunyer v Bank of Bombay*, L.R. (1911) 25 Bom. 52, where the court held that the contract is void, and no action can be brought on it, but the company can sue for the recovery of its assets wrongfully delivered under the contract.

96. (1969) 1 WLR 1550; (1968) 2 All ER 1073.

97. See also, *Great Eastern Railway Co v Turner*, (1872) L.R. 6 Ch App. 149, where shares purchased after mere the company were held in the name of a director, but they could not pass in the assigns of the director.

98. *Canada Trust Co v Loyal*, (1968) 56 DLR (2d) 722.

99. *Pulliman's Car Co v Central Transport Co*, 35 L Ed 69; 139 U.S. 62 (1891).

100. *Lord Caxton LC in Ashbury Railway Carriage and Iron Co Ltd v Riches*, (1875) 44 L.J. Exch 185; (1875) 1 Q.J. 7 H.L. 653.

101. *Ukray J In* (1980) 138 US 24.

102. 1953 Ch 131; (1953) 2 WLR 465, noted 67 LQR 166.



and had a claim of £1011. A third firm sought to prove for a simple contract debt of £107 in respect of coke supplied to the factory. None of these applicants had actual knowledge that veneered business was *ultra vires*, yet none of them could make the company liable for his claim.

The reason is that every one dealing with a company is supposed to know its powers. In India there is an even earlier authority on the point.¹⁰³

A company purchased and operated a rice mill beyond its powers. The rice was consigned to certain persons who had paid the price. The consignees had to sell the rice, owing to its inferior quality, at considerable loss. The company gave them drafts promising to pay for the loss. The company went into liquidation and the question about the enforceability of the drafts arose.

The court held that trading in rice was a transaction *ultra vires* the company; the directors, therefore, could not bind the company, and the consignees could not recover.

There is yet another problem concerning *ultra vires* contracts. "Who can plead that a contract is *ultra vires*?"

This question arose in two cases.¹⁰⁴ The question could not be decided because in both of them the deal was found to be valid and not beyond powers. In one of them SALMON LJ observed:

It seems strange that third parties could take advantage of a doctrine, manifestly for the protection of the shareholders, in order to deprive the company of the money which in justice should be paid to it by the third party.¹⁰⁵

6. *Ultra vires* torts. The rule of constructive notice of memorandum and articles explains why a company is not liable for an *ultra vires* contract, but that does not solve the problem of injustice involved. Moreover, the rule altogether fails to hold ground when a company is sought to be made liable for a tort committed by a servant of the company while acting beyond the company's powers. Anyone dealing with a company may, at the pain of losing the bargain, be required to acquaint himself with the company's memorandum. But that can hardly be expected of a person who has been the victim of an *ultra vires* tort. For example, a company is operating omnibuses—a venture entirely alien to its objects as described in the memorandum. The driver of one such bus negligently injures the plaintiff

103. *Puri Casting & Investment Co. v. H.* (1871) 7 Bengal LR 583. A later illustration of such injustice is *Introductions Ltd (No 2) v. H.* 1970 Ch. 299; (1970) 2 WLR 791; (1968) 2 Comp. L.J. 28 (CA). Criticised by K. W. Wedderburn, "Unenformed Company Law" (1967) 32 Mod. L. Rev. 553.

104. *Anglo-Overses Agencies Ltd v. Green*. (1961) 1 QB 1; (1960) 3 WLR 561, and *Bell Houses Ltd v. City Wall Enterprises Ltd*. (1966) 2 QB 656; (1966) 2 WLR 1323 (CA).

105. *Bell Houses Ltd v. City Wall Properties Ltd*. (1966) 2 QB 656; (1966) 2 WLR 1323 (CA). But the leading text writers on the law of contract believe that the company should not be able to enforce an *ultra vires* contract. See, Guest, *ANSWERS TO CONTRACT* (22nd Edn 1964) 232.

who sues the company for the tort. It can, no doubt, be contended against him that the driver was not a servant of the company. The company, having no existence outside its corporate sphere, could not have appointed him.¹⁰⁶ But can it be said that the plaintiff ought to have known that fact? Doubtless the plaintiff deserves to be compensated. But the law has not yet clearly declared the justice of his demand.¹⁰⁷ As the law seems to stand at present, to make a company liable for any tort it must be shown:

- (1) that the activity in the course of which it has been committed falls within the scope of the memorandum; and
- (2) that the servant committed the tort within the course of his employment.

Officers and employees who bring about such a situation can be held liable personally.

Conclusion

This brief study of the nature and consequences of *ultra vires* rule points to some of its inherent complications resulting in occasional injustice. The English Company Law Revision Committee (known as the Cohen Committee, 1945) recommended its abolition. It has to be conceded that the rule of *ultra vires* is not based on any dogmatic concept of a limited liability company.¹⁰⁸ The statement of objects indicates the permissible range of corporate activity. Everything else beyond that is implicitly prohibited so that the corporate capital may be preserved for the benefit of shareholders and creditors. But that protection does not in any way suffer if the memorandum, like articles, is made a contract only between the shareholders and the company. Every contract made on behalf of the company whether within or beyond its powers should be valid. But if it involves a misapplication of corporate capital the directors should be, and already are, bound to replace it.

This reform has been adopted by the European Communities Act, 1972. It was incorporated in Section 35 of the [English] Companies Act of 1985. A company will now be liable to a person acting in good faith for every act decided on by the directors. As a result of the amendment made by the 1999 Act, Section 35(1) of the Act now is as follows: "The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum."

The UK Act of 1999 has not made the statement of any objects in the memorandum compulsory. Such statement, if considered necessary, should be in the articles. It is then only a contract between company and members.

¹⁰⁶ See E.H. Warren, "Executory Ultra Vires Transactions" (1910-11) 24 *Harv L Rev* 387.

¹⁰⁷ See, "Liability of Corporations for the Torts of their Servants", 10 *Camb Lj* 419; *Paxton v London South Western Railway Co*, (1867) *LR 2 QBD* 334; A.L. Goodhart, "Corporate Liability in Tort and the Doctrine of Ultra Vires", 25 *Camb Lj* 350; E.H. Warren, "Torts by Corporations in Ultra vires Undertakings" (1921) *Carib Lj* 182; Oldsworthy, *History of England*, 49-62; H.J. Laski, "Personality of Associations", 29 *Harv L Rev* 404.

¹⁰⁸ "Company Law Reform and the Doctrine of Ultra Vires", 62 *LQR* 66.



Alteration of objects

The words "alter" or "alteration" has been defined to include the making of additions, omissions, and substitutions. [S. 2(3)]

Change of objects [S. 13(8)].—A company which has raised money from the public through prospectus and has not still utilised the whole of the money is not to change its objects except with the company's special resolution. The second requirement is that the prescribed details of the resolution have to be published in newspapers (one in English and one in vernacular language) which is in circulation at the place of the company's registered office. It has also to be placed on the website of the company, if any. The publication has to indicate justifications for the change. The dissenting shareholders have to be given an opportunity to leave the company, if they so desire. This opportunity has to be given by the promoters and shareholders who have control over the company in accordance with the regulations to be specified by SEBI.

The alteration has to be filed with the Registrar. He has to certify the registration within 30 days from the date of filing of the special resolution under Section 13(6). No alteration is to have effect unless it has been registered with the Registrar in accordance with the provisions of this section. [S. 13(10)] Any alteration of the memorandum in the case of a company limited by guarantee and not having a sharing capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member is to be void. [S. 13(11)]

Under the 1956 Act, shifting of the registered office from one State to another and change of objects were allowed subject to certain substantive limits and procedural requirements of approval, etc. The new Act has dispensed with all the substantive limits in both cases. So far as change of objects is concerned, no approvals are now prescribed. The procedure of alteration has also been simplified. The only requirement is registration with the Registrar and publicity.

There is no requirement of information to creditors, bankers, financiers and other lenders. But because the alteration has to be published in newspapers they are likely to come to know. If they think that their loan facilities are likely to be jeopardised because of new adventurous objects, they can take steps for better protection.

Procedure of alteration of objects

Since the amendment of Section 17 of the 1956 Act by the Companies (Amendment) Act, 1996, the prescribed procedure for altering objects has been only the requirement of a special resolution and its filing with the Registrar. The requirement of seeking confirmation of the CLB was dispensed with. The alteration of objects has become an internal matter. No outside confirmation is necessary. The memorandum is a contract between the company and its members. This contract operates within the framework of the Companies Act. Members can prevent through a civil court action violation of the Companies Act by their company. Lending institutions and

creditors would not be able to object. It would, however, be better to inform them and to take their approval because they can think in terms of withdrawing loan facilities where such facilities were extended on the basis of objects as they then stood. They may not like to risk their financial resources in new and adventurous objects.

The Act of 2013 has reenacted the same position. The company can be required to make an arrangement for the purchase of the interest of such members.²⁹

Under the English Act confirmation of the court was not necessary except when an application had been lodged against the alteration within 21 days of the passing of the special resolution. The application had to be filed by the holders of not less than 15 per cent in nominal value of the company's issued share capital or any class thereof. If the company was limited by shares the application had to be filed by at least 15 per cent of the company's members. Fifteen per cent of the company's debenture-holders could also proceed under the section. The English procedure saved a good deal of time and expense. The sanction had already become a needless ritual. Alterations were seldom opposed. Explaining the reason why the same had not been adopted in India, a learned judge said:

It may be that the Indian Parliament in its wisdom might have thought that the shareholders in India have neither the sense of responsibility, nor the maturity of business experience of the English shareholder to be left free to judge by themselves the ultimate desirability of altering so important a feature of the company as the objects clause of the memorandum.³⁰

But now, the procedure in India is also very liberal. No outside approval is necessary; complaining members may have to be paid out.

Alteration of provisions of memorandum other than conditions.—The above procedure has to be followed only for the alteration of the conditions contained in the memorandum. And only those provisions are regarded as conditions as are required to be stated in the memorandum, namely, its five clauses. Anything else contained in the memorandum can be altered simply by passing a special resolution.³¹

Liability [S. 4(1)(d)]

The fourth clause has to state the nature of liability that the members incur. If the company is to be incorporated with limited liability, the clause must state that "the liability of the members shall be limited by shares".

29. S. 17(6). In *Syam Automobile Ltd. v. I.* (1993) 79 Comp Cas 552, the CLB refused its confirmation because there was the probability that new business would be financed out of the depositors' money and not by raising new capital thereby exposing it to new risks.

30. *Rukhsat Brothers v. AIR 1957 Cal. 493*, (1958) 28 Comp Cas 122, per Mukundan J at p 597.

31. The effect is that any such other provision, including the provision, if any, for the appointment of a managing director or manager, can be altered in the manner of articles. Any extra provisions in the memorandum are treated as a part of the company's articles. See, *Bankim Kumar Potdar v. Sholapur Spg & Wng Co Ltd.*, AIR 1934 Bom 427, (1934) 26 Bom LR 907; *Ahmedabad Jute Mills Spg Co v. Chintalal Chhaganlal*, (1909) 10 Bom LR 111; *Venkateswara Venkateswara Mercantile Bank*, AIR 1924 Mad 326; (1923) 74 IC 966.

This means that no member can be called upon to pay anything more than the nominal value of the shares held by him, or so much thereof as remains unpaid; and if his shares be fully paid-up his liability is nil. If it is proposed to register the company limited by guarantee, this clause will state the amount which every member undertakes to contribute to the assets of the company in the event of its winding up. The clause will, for example, run like this: "Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up such amounts as may be required, not exceeding one thousand rupees," and to the costs, charges and expenses of winding up for adjustment of rights of contributors among themselves.

Capital [S. 4(1)(e)]

The last clause states the amount of the nominal capital of the company and the number and value of the shares into which it is divided.¹¹² The Companies (Amendment) Act, 2010 has, by amending Section 3, prescribed the requirement that a public company must have a minimum paid-up capital of five lakh rupees or such higher amount as may be prescribed.¹¹³ A private company is required to have a minimum paid-up capital of one lakh rupees or such higher amount as may be prescribed by its articles. The Amendment of 2015 has dropped the requirement of any amount whatsoever both for public and private companies.

*One person company [S. 4(1)(f)].—*In the case of one person company, this clause has to state the name of the person who, in the event of death of the subscriber, is to become the member of the company.

Subscription

The memorandum concludes with the subscribers' declaration. The subscribers declare, "We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names."¹¹⁴ The memorandum has to be subscribed by at least seven persons

112. In an unusual case on this point a company sought court permissions for reduction of capital to enable it to state a part of the capital in terms of foreign currencies. The court had no choice but to allow it because all that the section requires is that the memorandum shall state the amount of share capital and the division thereof into shares of fixed amount. It does not prescribe any currency in which the amount has to be stated, nor that it should be stated in a single lump sum. L.S. Sealy in his book on *Cases and Materials in Company Law* (4th Edn 1989), 329 describes the effect of the decision in these words: "However, [the] court ruled that it was in order for a company to have the nominal capital denominated in 'mixed basket of currencies'."

113. The definition of public company now (after amendment) is that it is a company which is not a private company, which has a minimum paid capital of 5 lakh rupees or higher as may be prescribed or a private company which is the subsidiary of a company which is not a private company.

114. Table A, Schedule I can give a specimen of the memorandum of a company limited by shares.

in the case of a public company and by at least two persons in the case of a private company. [S. 3] Each subscriber must sign the document and must write opposite his name the number of shares he takes. But no subscriber shall take less than one share. [S. 4(d)]

After incorporation no subscriber can withdraw his name on any ground whatsoever. "The subscriber to the memorandum cannot have rescission on the ground that he was induced to become a subscriber by the misrepresentation of an agent of the company".¹¹⁵ But he may withdraw his name before the memorandum is actually registered as up to that time "there is no contract at all".¹¹⁶

Rectification of name of company [S. 16]

Where through inadvertence or otherwise a company on first registration or after altered name, happens to be registered by a name which, in the opinion of the Central Government, is identical with or too nearly resembles the name of an existing company, it may direct the company to change its name. The company has to do so within three months from the date of such direction after adopting an ordinary resolution for the purpose. The owner of the trade mark which was being infringed by the name may apply to the Central Government under the Trade Marks Act, 1999 within three years of the infringement, and the Government may direct rectification of the name which has to be done within six months. The new name has to be registered with the Registrar within 15 days alongwith the order of the Central Government so that the Registrar may issue the new certificate of incorporation. The company is punishable for default with Rs 1000 for every day of default and defaulting officer with fine of not less than Rs 5000 which may extend to Rs 1,00,000.

Copies of memorandum, etc to be given to members [S. 17]

If a member asks on payment of prescribed fee for a copy of the memorandum, articles and every agreement and every resolution referred to in Section 117(1) insofar as not embodied in memorandum and articles, the company has to do so within seven days. Default in this respect is punishable for the company and defaulting officer with Rs 1000 for each default and days for which it continues extending up to Rs 1,00,000.

115. *Duckaney Jairn Metal Constituents Ltd. v. Co.* (1902) 1 Ch 702, 709; H6 LT 291.

116. *Ibid.* But see, *Srinivas Iyer v. Kundan & Link Mills Ltd.*, AIR 1937 Lah 527, where the court refused a subscriber's attempt to withdraw his name even before the company was duly incorporated by registration of the memorandum.



Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®; along with updates, articles, videos, blogs and a host of different resources.



The following cases from this chapter are available through EBC Explorer™:

- *A Lakshminarayanan Mudaliar v LIC*, AIR 1963 SC 1185; (1963) 33 Comp Cas 420
- *Ashbury Railway Carriage and Iron Co Ltd v Riche*, (1875) 44 1 J Exch 185; (1875) 1 R 7 Hl. 653
- *Attorney-General v Great Eastern Railway Co*, (1880) LR 5 AC 473; (1874-80) All ER Rep Ext 1434 (Hl.)
- *Bell Houses Ltd v City Wall Properties Ltd*, (1966) 2 QB 656; (1966) 2 WIJR 1323; (1966) 2 All ER 674 (CA)
- *German Date Coffee Co. re*, (1882) LR 20 Ch D 169; (1881-85) All ER Rep 572
- *Jhanger R Mudi v Shamji Ladha*, (1866-67) 4 Bom 1 ICR 185
- *Madras Native Permanent Fund Ltd. re*, (1931) 60 MLJ 270
- *Metal Constituents Ltd. re*, (1902) 1 Ch 707; 86 LT 291
- *Pioneer Protective Glass Fibre (P) Ltd v Fibre Glass Pilkington Ltd*, (1986) 60 Comp Cas 702; (1985) 3 Comp LJ 309 (Cal)
- *Poulton v London South Western Railway Co*, (1867) 1 R 2 QBD 504
- *Society of Motor Manufacturers and Traders Ltd v Motor Manufacturers and Traders Mutual Insurance Co Ltd*, (1925) 1 Ch 675; 133 LT 330
- *Weeks v Propert*, (1873) 1 R 8 CP 427



CASE PILOT

Chapter 4

Articles of Association

Articles of association is the second document which has to be registered along with the memorandum. Articles as defined in Section 2(5) means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act.

Articles are internal regulations and bye-laws. Articles are to contain regulations for management of the company. Schedule 1 of the Act sets out tables of model forms of articles for different companies. [Tables F, G, H, I and J] Table F is applicable to companies limited by shares. Such a company may either frame its own articles or adopt Table F and the Table automatically applies to the extent to which it is not excluded. The chief advantage of adopting Table F is that its provisions are legal beyond all doubt. The document has to be divided into paragraphs, numbered consecutively and must be signed by every subscriber.

The articles may have to contain matters that may be prescribed from time to time. They may also contain any additional matter that may be requisite for the needs of the company [S. 5(2)]

Provisions of entrenchment.—The articles may contain provisions for entrenchment to the effect that the specified provisions of the articles may be altered only if conditions or procedures that are more restrictive than those applicable in the case of a special resolution are met or complied with. Such provisions may be made on the formation of the company or by subsequent amendment with the consent of all the members of a private company or by special resolution in the case of a public company. The provisions for entrenchment whenever brought in have to be notified to the Registrar in the prescribed manner. [S. 5(3)(4)(5)] Articles are now compulsory in all cases.

Form and signature of articles

If articles are proposed to be registered they must be printed. They should be divided into paragraphs, each consisting generally of one regulation and numbered consecutively. Each subscriber of the memorandum has to sign the document in the presence of at least one attesting witness, both of them adding their addresses and occupations.

Contents of articles

Articles of association may prescribe such regulations for the company as the subscribers to the memorandum deem expedient. The Act gives the subscribers a free hand. Any stipulations as to the relations between the company and its members, and between members *inter se* may be inserted in the articles. But everything stated therein is subject to the Companies Act.

The document must not conflict with the provisions of the Act.¹ Any clause which is contrary to the provisions of the Act or of any other law for the time being in force, is simply inoperative and void.² Section 273, Companies Act, 2013, for example, confers the right on a shareholder to petition for winding up of the company in certain circumstances. This right cannot be excluded or limited by the articles.³ Similarly, the articles cannot sanction something which is forbidden by the Act. Section 123, for example, declares that no dividend shall be paid by a company except out of profits. The force of this section cannot be undone by any provision in the articles of association.

Articles in relation to memorandum

Articles have always been held to be subordinate to the memorandum. If, therefore, the memorandum and articles are inconsistent, the articles must give way. In other words, articles must not contain anything the effect of which is to alter a condition contained in the memorandum or which is contrary to its provisions.⁴ "This is so because the object of the memorandum is to state the purposes for which the company has been established, while the articles provide the manner in which the company is to be carried on and its proceedings disposed of."⁵ This constitutes the principal difference between the two documents. In the words of Lord Cairns, the difference is

1. S. 5 gives overriding effect to the Act. *Adams Stock Exchange Ltd v S&R Reynolds*, (2003) 116 Comp Cas 214, [2003] 2 All ER 190. The Stock Exchange was a guarantee company. A provision for expulsion of members in the interests of discipline was held to be consistent with the Act and Rule C. The member under expulsion was holding office in another company in violation of the company's articles. The provision and forfeiture valid.

2. See for example, *Noble v Laygate Investments Ltd*, [1978] 2 All ER 1367, where the provisions of a company's articles had to give way because they were in conflict with the Income and Corporation Taxes Act, 1970 [English]. An article prohibiting members from proceeding against the company would be contrary to public policy and, therefore, void. *S. Johnson Football Club Ltd v Scottish Football Assn Ltd*, 1965 Scottish LT 171 (OJ).

3. *Priestli Gold Mines Ltd v. (1998) 1 L & T 222 (C.A.).*

4. *England United Colliery Co. v. (1970) ER 5 Ch App 346.*

5. *Eryen v Metropolitan Saloon Omnibus Co.*, (1980) 27 1. Ch 685, 697; [1980] 3 DLR 660 322-34 ER 1225.

thus: The memorandum is, as it were, the area beyond which the action of the company cannot go; inside that area the shareholders may make such regulations for their own government as they think fit.⁶ In the words of BOWEN LJ,⁷ There is an essential difference between the memorandum and the articles. The memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated. They are conditions introduced for the benefit of the creditors, and the outside public, as well as of the shareholders. The articles of association are internal regulations of the company.

Some of the conditions of incorporation contained in the memorandum cannot be altered except with authoritative sanction. Articles of association, on the other hand, can be altered simply by a special resolution. [S. 13] If the memorandum ever comes to be altered by the same procedure by which articles can be, the difference between these two documents will disappear.⁸

But, unless the ultra vires rule is abolished, the memorandum will always differ from articles in a principal respect. If a company does something beyond the scope of the objects stated in the memorandum, it is absolutely void and altogether incapable of ratification. Whereas anything done by a company in contravention of the provisions of its articles is only irregular and can always be confirmed by the shareholders. Now that the objects clause of the memorandum has become alterable by a special resolution only, a company should be in a position to ratify or adopt a transaction by introducing by means of a special resolution suitable or requisite changes in the objects clause. Some of the clauses of the memorandum can be altered only with the sanction of the Tribunal.⁹

Lastly, it is suggested in PALMER'S COMPANY LAW¹⁰ with the authority of a passage in the judgment of JESSER, MR in *Wedgwood Coal and Iron Co. re* (Anderson case),¹¹ that "though the articles cannot alter or control the memorandum, yet, if there is an ambiguity in the memorandum, the articles registered at the same time may be used to explain it, but not so as to extend the objects". This rule, as is shown in the above work itself, will not apply to the interpretation "of those portions of the memorandum of association which the Act of Parliament requires to be stated in the memorandum". "In any case" to quote BOWEN LJ again, "it is certain that for any thing which the Act of Parliament says shall be in the memorandum, you must look to

6. *Ashbury Railway Carriage and Iron Co. Ltd v Hinch*, (1876) 44 LT Exch 186 (1875) 1 R 7 H1 663.

7. *Guinness v Land Corps of Ireland*, (1882) LR 22 Ch D 349, 381.

8. The possibility of disappearance of the dichotomy of memorandum and articles has been explained by Geoffrey Horncastle, "Alterations to the Constitution of Companies" (1949) 61 Jur Rev 263. The Amendment of 1996 has allowed objects to be altered in the same manner as articles, namely, by passing a special resolution. Now there is only one clause of the memorandum, namely, registered office clause, which requires sanction of the Central Government for shifting the registered office from one State to another.

9. Capital cannot be reduced except with the sanction of the Tribunal, S. 100.

10. By Schmitthoff and Curney (20th Edn 1959), 58.

11. (1876-77) LR 7 Ch D 75. The passage relating to contemporaneous documents occurs at p 90.

the memorandum alone. If the Legislature has said one instrument is to be dominant you cannot turn to another instrument and read it in order to modify the provisions of the dominant instrument."¹²

Binding force of memorandum and articles [S. 10]

Section 10 declares:

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

The articles of a company do not have the force of a statute.¹³

The section aims to impart contractual force to the memorandum and articles. It is only the exact limits of that effect and the persons it is intended to cover that are somewhat uncertain. The law may be stated in terms of the following propositions:

1. Binding on members in their relation to company.—In the first place, the members are bound to the company by the provisions of the articles "just as much as if they had all put their seals to them"¹⁴ and had thus contracted to conform to them. In the words of Lord Halsbury: "It is quite true that the articles constitute a contract between each member and the company."¹⁵ In *Borland's Trustee v Steel Bros & Co Ltd*:

The articles of association of the defendant company contained clauses to the effect that on the bankruptcy of a member his shares would be sold to a person and at a price fixed by the directors. B, a shareholder, was adjudicated bankrupt. His trustee in bankruptcy claimed that he was not bound by these provisions and should be at liberty to sell the shares at their true value. But it was held that "contracts contained in the articles of association is one of the original incidents of the shares. Shares having been purchased on those terms and conditions, it is impossible to say that those terms and conditions are not to be observed."¹⁶

2. Binding on company in its relation to members.—Secondly, just as members are bound to the company, the company is bound to the members to observe and follow the articles. "Each member is entitled to say that

12. *Guinness v Land Corps of Ireland*, (1892) 1 R 2243; D 3-19, 381.

13. *Hill Properties Ltd v Union Bank of India*, (2014) 1 SCC 636 (2014) 15 SCC (Civil) 513. If allotted by a company to its member on full payment, he borrowed money to pay for it by mortgaging the flat. The mortgage was held effective to enable the bank to dispose of its security for recovery of dues, irrespective of what the articles provided.

14. *Brown J J in Imperial Hydroelectric Hotel Co Blenheim v Hampton*, (1882) LR 23 Ch D 11, 13-49 LT 150 (CA).

15. *Weller v Saffery*, 1897 AC 299, 315 (HL).

16. (1901) 1 Ch 279, 17 TLR 45.

17. See also, *Nic. Lounsbury & Brazilian Bank v Brockle Bank*, (1882) 1 UK 21 Ch D 302, 308 (CA). In the exercise of the powers of a Government company under its articles, the Government could change the status of a permanent Government servant serving in the company. *Jawahar Lal Snazwell v State of J&K*, (2002) 3 SCC 219; 2002 SCC (L&S) 381.



there shall be no breach of the articles and he is entitled to an injunction to prevent the breach."¹⁶ This is clear from the section itself which says that "the memorandum and articles shall bind the company". In *Wood v Odessa Waterworks Co.*¹⁷



The articles of the Waterworks Co provided that "the directors may, with the sanction of the company at general meeting, declare a dividend to be paid to the members". Instead of paying the dividend in cash to the shareholders a resolution was passed to give them debenture bonds. In an action by a member to restrain the directors from acting on the resolution, STIRLING J held, "The question is whether that which is proposed to be done in the present case is in accordance with the articles of association of the company. Those articles provide that the directors may, with the sanction of a general meeting, declare a dividend to be paid to shareholders. *Prima facie* that means to be paid in cash. The debenture bonds proposed to be issued are not a payment in cash." Accordingly the directors were restrained from acting on the resolution.

3. But not binding in relation to outsiders. Thus, the articles bind the members in the company and the company to the members. But neither of them is bound to an outsider to give effect to the articles. "No article can constitute a contract between the company and a third person." For example, in *Bhuvan v Lt Trinidad*.¹⁸

The articles of association of a company contained a clause to the effect that B should be a director and should not be removable till after 1888. He was, however, removed earlier and had brought an action to restrain the company from excluding him. It was held that there was no contract between B and the company. No outsider can enforce articles against the company even if they purport to give him certain rights.

Who is an outsider?—Who is an outsider for this purpose? The expression naturally means a person who is not a member. But even a member may be an outsider. Section 10 creates an obligation binding on the company in its dealings with the "members", but the word "members" in this section means members in their capacity as members, that is, excluding any relationship which does not flow from the membership itself. *Eley v Positive Cost Security Life Assurance Co*¹⁹ is a leading authority.

The articles of a company contained a clause that the plaintiff (Eley) should be the solicitor to the company and should not be removed from

16. *Brown J in General Gold Mines Ltd. re.* (1898) 1 Ch 122 (CA)

17. (1889) 42 Ch D 636; 38 14 Ch 628. *Tony Francy Games v Indekta Software (P) Ltd.*, (2006) 131 Comp Cas 846; (2006) 2 Bom CR 504, provision in the articles for increasing capital by passing a resolution by consent vote, resolution was passed without consent vote, there was failure to communicate the offer of shares to the complaining shareholder either by registered post or under certificate of posting, directors were restrained from acting on the resolution.

20. (1887) 37 Ch D 1; 58 LT 137.

21. (1976) 1 R 1 Ex C 88 33 LT 243 (CA).

his office unless there was misconduct [he was a member also. He acted as a solicitor to the company for some time, but ultimately the company substituted other solicitors for him. He brought an action against the company for breach of the contract in not employing him as a solicitor on the terms of the articles. His action was dismissed. Even a member cannot enforce the provisions of articles for his benefit in some other capacity than that of a member.]

"The purpose of the memorandum and articles is to define the position of the shareholder as shareholder, not to bind him in his capacity as an individual."²² Thus, "a third person who purports to have rights against the company would be precluded from relying on the articles as a basis of his claim and must prove a special contract outside the articles".²³ But sometimes the articles may create an implied contract between the company and a third person.²⁴ Where, for example, on the footing of a clause in the articles a person is employed to serve the company in some capacity, such as a director, and he accepts the offer, the terms of the article are embodied in and form part of the contract between the company and the director.²⁵ "Articles do not themselves form a contract, but from them you get the terms upon which the director is serving."²⁶ Following these principles the Lahore High Court held in a case before it that

Where in pursuance of certain articles acted upon by the company, a member was appointed managing director and acted for eleven years in that capacity, the articles constitute an implied contract between the member and the company. If the company removes him from office, he would be entitled to damages for the breach.²⁷

4. How far binding between members.—Lastly, how far do the articles bind one member to another? Unfortunately, on this point the law has yet to take a final shape. The Companies Act does not purport to settle the rights of members *inter se*. It leaves these to be determined by the articles. Hence articles define the rights and liabilities of members. But whether those rights and liabilities can be enforced by one member against another is the moot point. Lord Halsbury said in *Welton v Saffery*:²⁸ "It is quite true that

22. *Brockley J. In Bisgood v Henderson's Thrasum Estates Ltd.* (1908) 1 Ch 743, 259, 96 L.J. 409 (CA).

23. *C Duraiswami Iyengar v United India Life Assurance Co.* (1926) 65 L.W. 37; AIR 1926 Mad. 316; *Ramkumar Poddar v Shantipati Woy & Sons Co. Ltd.* M34 SCC OnLine Bom 18; AIR 1934 Bom 427.

24. *Anglo-Austrian Printing and Publishing Union, re.* (1892) 2 Ch 158; *New British Iron Co. re.* (*Beckwith case*); (1898) 1 Ch 324.

25. See, *W.R.C.H. J. In New British Iron Co. re.* (*Beckwith case*). (1898) 1 Ch 324.

26. *Lord Erskine MR in Steadley v Pure Derron Gold Mining Co.* (1889) 1 Mac 385 (CA).

27. *Gulab Singh v Panjab Zamindars Bank Ltd.* AIR 1942 Lah 47 (I.L.J. (1943) 24 I.L.J. 28). See also, *Moholy Krishna Rao v Grandhi Anjaneyulu*, AIR 1950 Mad 113; *Sree Meenakshi Mills Ltd v Calitamjee & Sons*, AIR 1925 Mad 799; (1935) 41 L.W. 527; (1935) 5 Comp Cas 103. For further study, see, G.D. Goldberg, "The Enforcement of Outsider Rights" (1972) 55 Mod. L. Rev. 362.

28. 1897 A.C. 299, 315 (L.L.).



articles constitute a contract between each member and the company, and that there is no contract in terms between individual members of the company; but the articles do not any the less regulate their rights *inter se*. Such rights can only be enforced by or against a member through the company."²⁹ "Memorandum and articles did not constitute a contract between the members *inter se*, although they regulated their rights which could be enforced through the company and that they only regulated the rights of the members *qua* members for the purposes of the company law."³⁰ Thus, in a case before the Calcutta High Court, [ibid] a member of a company who had a commercial dispute of private nature with another member could not be compelled to refer the dispute to arbitration in terms of the company's articles. The court said: "Articles do not affect or regulate the rights arising out of a commercial contract with which the members have no concern, rights completely outside the company relationship."³¹

It follows that the extent to which the articles seek to regulate the rights of shareholders as shareholders, they can be directly enforced by one member against another without joining the company as a party. The case of *Rayfield v Hands*³² lends support to this conclusion:

The plaintiff was a shareholder in a company. Clause 11 of the company's articles required him to inform the directors of his intention to transfer his shares in the company and which provided that the directors will take the said shares equally between them at a fair value. In accordance with this provision the plaintiff so notified the directors, who contended that they were not bound to take and pay for the plaintiff's shares. The articles, they said, could impose no such obligation upon them in their capacity as directors. This argument was brushed aside by the court by treating the directors as members. Accordingly the directors were compelled to take the plaintiff's shares at a fair value and it was not considered necessary for the plaintiff to succeed in his action, that he should join the company as a party.

Agreement amongst shareholders.—The articles of a private company did not contain a clause contained in a joint venture agreement amongst shareholders about voting in the matter of further issue of shares. Section 6 of the 2013 Act corresponding to Section 9 of the 1956 Act provides that any



CASE PILOT

29. *Khusroo v Hournali*, 53 CWN 505, 520.

30. Similarly, in *Dale & Pleat Ltd. v. (1889) 61 LT 206: 5 TLR 595*, a secretary working on the terms of articles of association was not allowed to prove a claim for damages for termination of services on account of winding up. In *Bruitte v F&F Bruitte Ltd.*, 1938 CL 206 (CA), a provision in the articles for arbitration could not be enforced by a director who was sued for wrongs done in his capacity as a director. All such cases have been considered in G D Goldberg, "The Enforcement of Outsider Rights" (1972) 35 Mod L Rev 362 under S. 20(3), Companies Act; *Sympark Builders & Distributors v Kerala Public Housing & Construction Co Ltd*, (2013) 114 Comp Cas 425 (Ker), the memorandum and articles of a Government company provided that the directors would be competent to refer disputes to arbitration. This was held to be an enabling provision and not a compulsory requirement. No agreement could be inferred from it.

31. 1960 Ch 1: (1958) 2 WLR 651.

provisions in an agreement which is repugnant to the provisions of the Act shall be void. The agreement in question was not repugnant to the Act. The court said that if the articles are silent on the type of voting contemplated in the agreement, the clause in it, the agreement would not be binding on the company without being contained in its articles. Its repugnancy with the Act will be in question only when it is contained in the company's articles. The shareholders cannot bind their company by their private agreement.³²

Alteration of articles [S. 14]

Every company has a clear power to alter its articles of association by a special resolution. It is a statutory power given by Section 14, and, therefore, it cannot be negated by contract. If, for example, there is a clause in the articles providing that the company would not introduce any change in its original articles, it will be invalid on the ground that it is contrary to the statute. Similarly, a company cannot deprive itself of the power of alteration by a contract with anyone.³³

The altered articles will bind the members just in the same way as did the original articles.³⁴ But that will not give the alteration a retrospective effect.³⁵ A transfer of shares when first presented was permissible within the company's articles, but it was rejected because the stamps were not cancelled. Before it could be presented again, the company changed articles excluding such transfers. The alteration was held to be effective against the transfer.³⁶

The power of alteration of articles as conferred by Section 14 is almost absolute. It is subject only to two restrictions. In the first place, the alteration must not be in contravention of the provisions of the Act. It should not be

32. *World Phone India (P) Ltd v WPI Group Inc.*, (2003) 178 Comp Cas 121 (Del).

33. *Sect. All India Railway Men's Benefit Fund v Indeslumuni*, AIR 1945 Nag 182. A provision in the articles depriving the company of its power of alteration would be void. *Malloren v National Insurance and Guarantee Co.* (1894) 1 Ch 200, 70 LT 162. The court does not have an inherent power to force a company to alter its articles. *Scott v Frank F Sealf (London) Ltd*, 1940 Ch 794 (CA). The Company Law Board has the power under ss. 402-404 to force a company to alter its articles if it is necessary for prevention of oppression and mismanagement. An irregular alteration pushed through without observing the requirements of a special resolution can be rectified through court order. The court may not interfere where the alteration had been acted upon for long or was the result of the shareholders' agreement without a formal resolution. *Joseph Michael v Tideland Rubber & Tex Co Ltd*, (1989) 59 Comp Cas 896 (Ker).

34. S. 31(2), S. 2(2) says that "articles" means the articles of association of a company as originally framed or as altered from time to time. . ." The procedure of special resolution has to be followed for making any change in the articles even if the change is intended only to rectify an error or a mistake. *Scott v Frank F Sealf (London) Ltd*, 1940 Ch 794 (1940) 1 All FR 508 (CA).

35. *Sivaraman M v Chairman*, 1988 April LR 41, 51 (Mad). S. 15 requires that the alteration shall be noted in every copy of the document subsequently issued. *MV Sehara v Registrar of Comp Societies*, 1995 ADHC 2746 (Ker), alteration of articles retrospectively to enable a company to recover its dues from members was held to be for the benefit of the company and, therefore, valid.

36. *Muthukumar Printing and Publishing Ltd v Vaidhikam Publishers Ltd*, (1992) 23 Comp Cas 80; (1992) 1 Comp LJ 234 (Ker); overturning on this point *Vaidhikam Publishers Ltd v Muthukumar Printing and Publishing Co Ltd*, (1991) 21 Comp Cas 1, 37 (Ker).



an attempt to do something which the Act forbids.³⁷ Secondly, the power of alteration of articles is subject to the conditions contained in the memorandum of association. The proviso to sub-section (1) says that an alteration which has the effect of converting a public company into a private company would not have any effect unless it is approved by the Tribunal. A private company may similarly be converted into a public company. This does not require approval. Section 14(1) says that where a private company changes its articles in such manner that they no longer include the restrictions and limitations of a private company, it will cease to be a private company as from the date of alteration.

Alteration of memorandum and articles to be noted on every copy
[S. 15]—Every alteration of the memorandum or articles is to be noted on every respective document. Default in this respect is punishable. The company and the defaulting officer may have to pay Rs 1000 for every copy issued without noting the alteration.

Alteration against memorandum.—Sometimes a change in the articles seems apparently to influence the memorandum. To take, for example, *Hutton v Scarborough Cliff Hotel Co Ltd*.³⁸

A resolution passed at a general meeting of a company altered the articles of association by inserting the power to issue new shares with preferential dividend. No such power existed in the memorandum.

The alteration was held to be inoperative. The issuing of new shares with a preferential dividend was considered to be a variation of the constitution of the company as fixed by the memorandum. "The question is", said the Vice-Chancellor, "whether the power given to the general meeting, by special resolution to modify the regulations of the company is unlimited; clearly there must be some limit to the power; otherwise they might alter not only such articles as relate to the management of the company, but they might alter the very nature and constitution of the company."

It must be noted that the memorandum was silent. It neither authorised nor prohibited the issue of preference shares. The court inferred from its silence that it intended equality of status of all the shareholders. But now the courts refuse to draw this inference. The power of alteration of articles is subject only to what is clearly prohibited by the memorandum, expressly or impliedly. This change was brought about by the decision in *Andretus v Gas Meter Co*.³⁹

37. See for example, *Muthiah Ramurundu Kamath v Central Banking Corp Ltd*, AIR 1941 Mad 354; (1940) 52 L.W. 701, where a resolution was passed expelling a member and authorising the directors to register the transfer of his shares without an instrument of transfer. The resolution was held to be invalid as being against the Companies Act. 39. (1845) 2 Drew & Son 521, 42 ER 717.

38. (1897) 1 Ch 361. The unreasonableness of the decision in *Hutton v Scarborough, etc* was distinctly pointed by Lord Macnaghten in *British & American Trustee & Finance Corp v Conner*, 1894 AC 399; (1891-92) All ER Rep 667 (HL). Cornew LJ disapproved of the chief ground on which the decision was based. "In reality it is not by implication from the construction of the memorandum that equality of the shareholders as regards dividends



CASE PILOT



CASE PILOT

By the 5th clause of a company's memorandum it was stated that the nominal capital of the company was £60,000 divided into 600 shares of £100 each. Neither in the memorandum nor in the original articles was there any provision as to preference shares. A special resolution was passed authorising the directors to issue shares bearing a preferential dividend, which was accordingly done.

It was held that the issue was valid. "If this had been forbidden by the memorandum, it could not have been done; but as it was not; it was immaterial that the change quite altered the composition of the company."

Alteration of articles to provide for compulsory transfer of shares against the shareholders' wishes was held to be permissible and binding on the shareholders.⁴⁰

Alteration in breach of contract. Sometimes an alteration of articles may operate as a breach of contract with an outsider. To take, for instance, a Madras case.⁴¹ A clause in the articles of a company provided Rs 250 a month as the remuneration of the company's secretary. The plaintiff accepted the post upon those terms. Subsequently, the company modified the article and reduced the secretary's pay to Rs 25 a month. Could this be done? The answer depends upon the nature of the contract. If the contract is wholly dependent upon the provisions of the articles, as it was in this case, the alteration would naturally be operative. Articles are subject to the statutory power of alteration. Anyone accepting an appointment purely on the terms of the articles takes the risk of those terms being altered.⁴²

But, where apart from the articles, the company has entered into an independent agreement, the company may repudiate it by changing articles, but it will be answerable in damages for the breach. "A company cannot, by altering articles, justify a breach of contract."⁴³ *Southern Foundries (1926) Ltd v Shirlaw*⁴⁴ is the leading authority.

The plaintiff was a director in the defendant company. In 1933 he was appointed as the managing director for a term of 10 years. In 1935 the defendant company was amalgamated with another company and new articles were adopted under which powers were taken to dismiss a director. It was further provided that a managing director's appointment would be subject to determination, *ipso facto*, if he ceased to be a director. Under these articles the plaintiff was removed from the office of director.

arises, but by the implication which the law raises as between partners unless their contract has provided the contrary. *Guinness v Laval Corp of Ireland*, (1882) 18 LR 22 Co 1349, 377 I agree that the equality of shareholders as regards dividend is an implied condition of the memorandum."

40. *Gotham Seavent Oilts Ltd v Manilal Dharshil Reo*, (2001) 105 Comp Cas 710; (2001) 2 ALD 115.

41. *Chittumbeezum Chettiar v Kesling Antanges*, ILR (1910) 33 Mac. 310; (1910) 1 IC 803.

42. *Farm (T.N.) Ltd*, 1937 Ch 352; 106 L.J. Ch 395.

43. *Daily v British Equitable Assurance Co*, (1918) 1 Ch 578; 91 L.R. 335 (C.A); *Coxhead-Hawley* (J) received an appeal 1918; A.C. 25. *Mahindra and Malabar Publishing and Publishing Ltd v Vandiben Publishers Ltd*, (1982) 73 Comp Cas 801; (1992) 1 Comp J 234 (K.R.), where the court held that the alteration would be valid in spite of breach of contract.

44. 1940 A.C. 201 (I.L); *Manilal v Charnico Sugar Mills*, AIR 1956 Bom 259.

He sued for the wrongful repudiation of the contract. It was held that the agreement was unqualified in regard to the term of 10 years. The removal was, therefore, a breach of the agreement for which the employer must answer in damages.

The court may even restrain an alteration where it is likely to cause a damage which cannot be adequately compensated in terms of money. The facts of *British Marine Syndicate Ltd v Alporton Rubber Co Ltd*⁴⁵ involved a situation of this kind.

An agreement provided that so long as the plaintiff syndicate should hold 5000 shares in the defendant company, it should have the right of nominating two directors on the Board of the defendant company. A provision to the same effect was contained in Article 88 of the defendant company's articles. The plaintiff syndicate had nominated two persons as directors whom the defendant company refused to accept. An attempt was then made to cancel Article 88, but an injunction was granted to restrain it. "The contract clearly involved as one of its terms that Article 88 was not to be altered, that is, that the plaintiff syndicate so long as it held the stipulated number of shares, was to have a perpetual right of nominating two directors of the company."⁴⁶

In another case, COZENS HARDY LJ said:⁴⁷

It would be dangerous to hold that in a contract of loan or a contract of service or a contract of insurance validly entered into by a company there is any greater power of variation of the rights and liabilities of the parties than would exist if instead of the company, the contracting party had been an individual.

In a case before the Calcutta High Court⁴⁸

The plaintiff had taken out a policy of life insurance in the defendant company. He was entitled under the contract to draw from the company a certain sum on a certain date. The company altered its articles by which such sums were made payable out of a special fund. At the time the amount became payable to the assured, that fund was insolvent. The plaintiff sued for his payment under the original contract.

45. (1915) 2 Ch 186. An injunction was not issued to prevent the holding of an extraordinary general meeting called for the purpose of changing articles in such wise as could affect seriously the position of the company's managing or whole-time directors. *KG Khalsa v RC Kirkosher*, (1927) 24 CLA 30 (H.C.).

46. (1915) 2 Ch 186. *Saxton L.J.* at p 196. Thus, there can be a provision that articles will not be altered except with the consent of a particular person. Special rights of a shareholder may not be alterable without his consent. *Cumberland & Westmorland Herald Newspaper & Printing Co Ltd*, 1987 Ch 1; (1986) 3 WLR 36 (1987) 2 Comp LJ 39. In the case of a private company specially weighted voting rights may be given to a member-director to safeguard his interest. *Bushell v Rees*, 1970 AC 1899; (1971) 2 WLR 272 (H.C.).

47. *Baily v British Equitable Assurance Co*, (1904) 1 Ch 374; 90 TLR 335 (CA); on appeal 1906 AC 35.

48. *Hari Chandana Deo v Hindustan Corp Insurance Society Ltd*, AIR 1925 Cal 690.



It was held that "the effect of the alteration of articles was that it involved a fundamental breach of contract which the company had previously entered into with the plaintiff and in respect of that contract the (new) article was inapplicable".

Increasing liability of members.—An alteration cannot require a member to purchase more shares or increase his liability in any way except with his consent in writing. A person who becomes a member under the protection of limited liability cannot be converted into a member with unlimited liability except with his consent in writing.

Fraud on minority shareholders.—Lastly, the alteration must not constitute a "fraud on the minority".⁴⁹

Constructive notice of memorandum and articles of association

The memorandum and articles of association of every company are registered with the Registrar of Companies. The office of the Registrar is a public office and, consequently the memorandum and articles become public documents. They are open and accessible to all.⁵⁰ It is, therefore, the duty of every person dealing with a company to inspect its public documents and make sure that his contract is in conformity with their provisions. But whether a person actually reads them or not, "he is to be in the same position as if he had read them". He will be presumed to know the contents of those documents.⁵¹ This kind of presumed notice is called constructive notice. *Katla Venkataswamy v Chinta Ramamurthy*⁵² shows the practical effects of this rule.

The articles of association of a company required that all deeds etc., should be signed by the managing director, the secretary and a working director on behalf of the company. The plaintiff accepted a deed of mortgage executed by the secretary and a working director only. It was held that the plaintiff could not claim under this deed. The court observed: "If the plaintiff had consulted the articles she would have discovered that a deed such as she took required execution by three specified officers of the company and she would have refrained from accepting a deed inadequately signed. Notwithstanding, therefore, she may have acted in good faith and her money may have been applied to the purposes of the company, the bond is nevertheless invalid."

49 For detailed study of the concept of "fraud on the minority", see Chap. 15 below on "Majority Powers and Minority Rights". The basic requirements are that the power of alteration must be exercised in good faith in the interests of the company and also fairly as between different classes of shareholders. *Mutual Life Insurance Co of New York v Rank Organisation Ltd*, [2015] BCLC 11.

50 The right of inspection, etc. is expressly granted by S. 399 of the Act.

51 See Lord Halsbury in *Malony v East Midlands Minigas Co*, (1875) LR 7 131 869, 693; 33 TLR 339; Willan-Price, "Law and Economics" (1966) JBL 301, where the protection afforded by a public register is explained.

52 AIR 1931 Mad 579.



Another effect of this rule is that a person dealing with the company is "taken not only to have read those documents but to have understood them according to their proper meaning".⁵³ He is presumed to have understood not merely the company's powers but also those of its officers. Further, there is constructive notice not merely of the memorandum and articles, but also of all the documents, such as special resolutions [S. 117] and particulars of charges [S. 77] which are required by the Act to be registered with the Registrar. But there is no notice of documents which are filed only for the sake of record, such as returns and accounts. According to Palmer, the principle applies only to documents which affect the powers of the company.⁵⁴ One of the suggested approaches is that all documents which are open to public inspection should be regarded as public documents.⁵⁵ This is in keeping with the disclosure philosophy of company law and things which are required to be disclosed in a public office, should have public effects and should be usable as instruments of public accountability. In reference to the document containing "particulars of directors" it has been held that it becomes a "public document". Persons dealing with the company would be deemed to have constructive notice as to who are the directors of the company. Accordingly, if a document is required to be signed by a director and the person actually signing is not there in the document filed by the company, it would not be a properly signed document. The court said: "... the common law doctrine of constructive notice should apply to the form. To reiterate the form is a public document which contains particulars of directors who are the mind and will of a company, as well as managers and secretaries who are responsible for the day-to-day running of the company. It is a document which affects the powers of the company and its agents. Certainly, its purpose must be more than just to provide information about the company's directors, manager and secretary. Therefore, persons dealing with the company should check with the Registrar of Companies who its directors, managers and secretaries are at any given time."⁵⁶

Statutory reform of constructive notice [S. 35-A, Companies Act of 1989] UK.—Constructive notice is more or less an unreal doctrine. It does not take notice of the realities of business life. People know a company through its officers and not through its documents. Section 9, European Communities Act, 1972 abrogated this doctrine. The provisions of Section 9 were incorporated in Section 35, UK Companies Act, 1985. An example of the impact of the new provisions has been provided by a case⁵⁷ where a debenture issued by a company was signed by a solicitor as attorney of a director of the company, but not by the director personally. The articles of the company provided that "every instrument to which the seal shall be

53. Schmitthoff and Curry, *PALMER'S COMPANY LAW* (20th Edn 1979) 243. See also, *Oakbank Oil Co v Crum*, (1862) 1 LR 8 AC 65, 71; 18 LT 537 (HL).

54. *Company Law* (20th Edn 1979) 243.

55. Soc. R. Bart, "Negligent Statements in Company Accounts" (1973) 36 Med L Rev 43-44.

56. *Rt. Egg v Arab Malayan Financ.* (1995) 1 SCLR 85 (Malaysia).

57. *JCB Ltd v Gray*, 1986 Ch 621, (1986) 2 WLR 517 (Ch d), 1986 (HL) 10, where it is felt that the decision indicated the great change—and a change to the better.



affixed shall be signed by a director". Even so the company was held liable. Stating the effect of the new provision, the court said that before this enactment came into force a person dealing with the company was required to look at the memorandum and articles of the company to satisfy himself that the transaction was within the corporate capacity, but that Section 9(1) had changed this. The sub-section said that good faith is to be presumed and that the person dealing with the company is not bound to inquire. The expression "a person dealing with a company" has been held not to include a shareholder allottee. The court refused to validate an allotment of bonus shares by using the share premium account without authorisation.⁵⁸ The courts in India also do not seem to have taken the rule of constructive notice seriously. For example, in *Dehra Dun Masonic Electric Tramway Co Ltd v Jagannath Das*,⁵⁹ the articles of a company expressly provided that the directors could delegate all their powers except the power to borrow. Even so an overdraft taken by the managing agents without approval of the Board was held to be binding, the court saying that such temporary loans must be kept outside the purview of the relevant provision. Similarly, the Calcutta High Court enforced a security which was not signed in accordance with the company's articles.⁶⁰

Doctrine of "indoor management"

The role of the doctrine of indoor management is opposed to that of the rule of constructive notice. The latter seeks to protect the company against the outsider, the former operates to protect outsiders against the company. The rule of constructive notice is confined to the external position of the company and, therefore, it follows that there is no notice as to how the company's internal machinery is handled by its officers. If the contract is consistent with the public documents, the person contracting will not be prejudiced by irregularities that may beset the indoor working of the company. The rule had its genesis in *Royal British Bank v Targuard*.⁶¹

 **Case Point**
The directors of a company borrowed a sum of money from the plaintiff. The company's articles provided that the directors might borrow on bonds such sums as may from time to time be authorised by a resolution passed at a general meeting of the company. The shareholders claimed that there had been no such resolution authorising the loan and, therefore, it was taken without their authority. The company was, however, held bound by the loan. Once it was found that the directors could borrow subject to a resolution, the plaintiff had the right to infer that the necessary resolution must have been passed.

In a subsequent case the rule is thus stated: "If the directors have power and authority to bind the company, but certain preliminaries are required

58. *ABC Services Ltd v Phillips*, 2004 EWCA (Civ) 1069; (2005) 1 WLR 1377 (Civ).

59. AIR 1932 All 141.

60. *Chittick Collieries Co Ltd v Bhola Nath Dhar*, ILR (1912) 39 Cal 830; and *Premchand Chandra Mitra v Ram Das (Burdin) Ltd*, ILR (1929) 57 Cal 1131; AIR 1930 Cal 782.

61. (1856) 6 E&B 327, 119 ER 986.

to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do.⁶²

The rule is based upon obvious reasons of convenience in business relations. Firstly, the memorandum and articles of association are public documents, open to public inspection. But the details of internal procedure are not thus open to public inspection. Hence an outsider "is presumed to know the constitution of a company; but not what may or may not have taken place within the doors that are closed to him".⁶³ The wheels of commerce would not go round smoothly if persons dealing with companies were compelled to investigate thoroughly "the internal machinery of a company to see if something is not wrong".⁶⁴ People in business would be very shy in dealing with such companies.⁶⁵

Yet another reason is explained by Gower in these words: "The lot of creditors of a limited company is not a particularly happy one; it would be unhappier still if the company could escape liability by denying the authority of the officials to act on its behalf."⁶⁶

The rule is of great practical utility. It has been applied in a great variety of cases involving rights and liabilities. It has been used to cover acts done on behalf of a company by *de facto* directors who have never been appointed,⁶⁷ or whose appointment is defective,⁶⁸ or who, having been regularly appointed, have exercised an authority which could have been delegated to them under the company's articles, but never has been so delegated,⁶⁹ or who have exercised an authority without proper quorum.⁷⁰ Thus, where the directors of a company having the power to allot shares only with the consent of the general meeting, allotted them without any such consent,⁷¹ where the managing director of a company granted a lease of the company's properties, something which he could do only with the approval of the Board;⁷² where the managing agents having the power to borrow with the

62. *Premier Industrial Bank Ltd v Carlton Mfg Co Ltd*, (1909) 1 KB 206; 99 T.L.J. 810; *Rajendra Nath Datta v Shibaendra Nath Mukherjee*, (1982) 52 Comp Cas 293; 85 CWN 1025.

63. *Pacific Coast Coal Mines Ltd v Arthurbank*, 1912 AC 476; 117 I.T. 613 (PC).

64. *Thy v Pullinger King Co*, (1921) 1 KB 27 (DC).

65. *Morris v Kanser*, 1916 AC 459; 124 LT 153 (HL).

66. *Moreton Company Law* (ed Edn 1969) 153.

67. *Mahoney v East Hyllyard Mining Co*, (1879) LR 7 11L 869, 893; 33 TLR 338; money withdrawn from company's banking account by *de facto* directors; *Sera Jharkhand Mills Ltd v Callicombe & Sons*, AIR 1935 Mad 799; (1935) 41 I.A. 527; (1935) 5 Comp Cas 103; *Imperial Oil, Soap & General Mills Co Ltd v Wazir Singh*, AIR 1915 Lah 478.

68. *Pinfarice & Co v NH Mills*, AIR 1926 Bom 78; *Probodhji Bandra Mitra v Read Oils (India) Ltd*, ILR (1929) 37 Cal 1111; AIR 1930 Cal 282.

69. *Biggerstaff v Borchart's Wharf Ltd*, (1896) 2 Ch 83 (CA); *Kishan Rajh v Mandal Brothers Co*, (1966) 1 Comp LJ 19 Cal.

70. *County of Gloucester Bank v Rudy Merthyr Steam & House Coll Colliery Co*, (1895) 1 Ch 629 (CA).

71. *PV Mamduha Reddy v Indian National Agencies Ltd*, AIR 1945 Mad 35; *C/T (Agl) v Shree Hanuman Sugar Mills Ltd*, AIR 1965 Pat 53; (1964) 54 ITR 113.

72. *Khanna Lacs Co Ltd v Jatin Gulati*, (1914) 24 IC 26 (Cal).

approval of directors borrowed without any such approval,⁷³ the company was held bound.⁷⁴

Exceptions

The rule is now more than a century old. In view of the fact that companies having come to occupy the central position in the social and economic life of modern communities, it was expected that its scope would be widened. But the course of decisions has made it subject to the following exceptions:

1. Knowledge of irregularity.—The first and the most obvious restrictions is that the rule has no application where the party affected by an irregularity had actual notice of it. "Thus where a transfer of shares was approved by two directors, one of whom within the knowledge of the transferor was disqualified by reason of being the transferee himself and the other was never validly appointed, the transfer was held to be ineffective."⁷⁵ Knowledge of an irregularity may arise from the fact that the person contracting was himself a party to the inside procedure. In *Hinwood v Patent Ivory Mfg Co*,⁷⁶ for example, the directors could not defend the issue of debentures to themselves because they should have known that the extent to which they were lending money to the company required the assent of the general meeting which they had not obtained. Similarly, in *Morris v Kresser*,⁷⁷ a director could not defend an allotment of shares to him as he participated in the meeting which made the allotment. His appointment as a director also fell through because none of the directors appointing him was validly in office. The trend of decisions has been slightly altered by *Hely-Hutchinson v Brayfield Ltd*,⁷⁸ according to which the mere fact that a person is a director

73. *Churnet Collieries Co Ltd v Bhulabhai Dhir*, II R (1912) 39 Cal 810; *Baleswarawali Tel v A Parameswara Aiyar*, AIR 1957 Mad 122; (1956) 60 IWR 818; *Vakily Shroff v Kishorelal Banking Co Ltd*, AIR 1957 Ker 97; *PV Damodar Reddy v India National Agencies Ltd*, AIR 1946 Mad 35.

74. See also, *Sree Meenakshi Mills Ltd v Collanjeri & Sons*, AIR 1935 Mad 799 (1935) 41 IWR 527; (1935) 5 Comp Cas 103. There are, indeed, many illustrations. For example, *Dewan Singh Dua Singh v Mineral Fibre Ltd*, AIR 1959 Puri 106. Under a company's articles the Directors had the power to allot only 5000 "A" class shares. They, however, went much beyond and allotted above 13,000. It was held that "the allottees of shares were contracting in good faith with the company, and they were entitled to assume that the acts of the directors in making allotments to them were within the scope of their powers conferred upon them by the shareholders of the company. They were not bound to inquire whether the acts of the directors which related to internal management had been properly and regularly performed." *Chirga Min v Procurimini Bank Ltd*, ILR (1914) 38 All 912; (1914) 25 IC 210; an allotment of shares by an irregularly constituted Board of directors was held binding on the company. *Prakash Chandra Mitra v Reed Oils India Ltd*, ILR (1929) 57 Cal 1101; AIR 1930 Cal 782, it was held that irregularity in affixing seal on documents required by articles to be under seal is a part of internal machinery. For a detailed account of the cases on the subject, see, J.S. Sangal, "Royal British Bank v Torquand & Indian Law" (1964) 2 Comp LJ 172.

75. *Devi Ditta Mal v Standard Bank of India*, AIR 1927 Lah 797 (1); (1927) JIL 1C 568. All such cases have been reviewed in *Allerjudah Judah v Kempson Gingle*, AIR 1959 Cal 715, 732; 76. (1988) LR 36 Ch D (Suz) 58 LT 395.

77. (1946) AC 359, 374 LT 353 (HL).

78. (1948) 1 QBD 549; (1967) 3 WLR 1408 (CA).

does not mean that he shall be deemed to have knowledge of the irregularities practised by the other directors. A newly appointed director entered into contracts of indemnity and guarantee with the company through a director whom the company had knowingly allowed to hold himself out as having the authority to enter into such transactions, although in fact he had no such authority. The new director had no knowledge of the irregularity. The company was held liable.

But apart from this, the principle is clear that a person who is himself a part of the internal machinery cannot take the advantage of irregularities. Any other rule would "encourage ignorance and condone dereliction from duty".⁷⁹

2. Suspicion of irregularity.—The protection of "the Turquand rule" is also not available where the circumstances surrounding the contract are suspicious and, therefore, invite inquiry. Suspicion should arise, for example, from the fact that an officer is purporting to act in a manner which is apparently outside the scope of his authority. Where, for example, the plaintiff accepted a transfer of a company's property from its accountant, the transfer was held void. The plaintiff could not have supposed, in the absence of a power of attorney, that the accountant had authority to effect transfer of the company's property.⁸⁰ Where a person holding directorship in two companies agreed to apply the money of one company in payment of the debt of the other, the court said that it was something so unusual "that the plaintiffs were put upon inquiry to ascertain whether the persons making the contract had any authority in fact to make it". Any other rule would "place limited companies without any sufficient reasons for so doing, at the mercy of any servant or agent who should purport to contract on their behalf".⁸¹

3. Forgery.—Forgery may in circumstances exclude the Turquand rule. The only clear illustration is *Ruben v Great Fibreglass Consolidated*.⁸²

The plaintiff was the transferee of a share certificate issued under the seal of the defendant company. The certificate was issued by the company's secretary, who had affixed the seal of the company and forged the signatures of two directors.

The plaintiff contended that whether the signatures were genuine or forged was a part of the internal management and, therefore, the company should be estopped from denying genuineness of the document. But it was held that the rule has never been extended to cover such a complete forgery. Lord LORERSON said: "It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management

79. *Morris v Keussen*, 1946 AC 459; 176 LT 353 (HL). (*Undersigned (AT) Ltd v Bank of Liverpool*, (1924) 1 KB 775 (CA))

80. *Anup Singh Lal v Dinsdale & Co*, ADR 1912 Quash 417

81. *Houghton & Co v Nethland, Lester and Wills Ltd*, (1927) 1 KB 246 (CA) aff'd 1928 AC 1; 136 LT 210 (HL).

82. 1906 AC 439; 95 LT 214 (JUL).

and will not be affected by irregularities of which they have no notice. But this doctrine, which is well established, applies to irregularities which otherwise might affect a genuine transaction. It cannot apply to a forgery.⁸³

This statement has been regarded as a *dictum*, as the case was decided on the principle that the secretary did not have actual or implied authority to represent that a forged document was genuine and, therefore, there was no estoppel against the company. Hence, a general statement that "the *Turquand rule*" does not apply to forgeries is not exactly warranted by the present authorities. Andrew R. Thompson,⁸⁴ writing in an extensive article on the subject, says: "A company may represent that a forged instrument is genuine. In such a case, it will be estopped from denying that a forged instrument is genuine as against an outsider who has relied to his detriment upon the representation. Also, a company may represent that the forger has authority to execute the forged instrument. In that event it will be bound by the forged instrument as against an outsider who has relied on the apparent authority to execute the instrument."

In a case before the Madras High Court, a document on which a company borrowed a sum of money was executed by the managing director who was the chief functionary of the company and, to comply with the requirements of the articles, the signatures of two other directors were forged, the company was not allowed to eschew liability under the document.⁸⁵

"We hold the company liable as a matter of social and economic policy. The basis of liability is the eminently practical view that if authority is conditioned on facts peculiarly within the agent's knowledge, his representation express or implied should bind the principal."⁸⁶

4. Representation through articles.—This exception deals with the most controversial and highly confusing aspect of "the *Turquand rule*". Articles of association generally contain what is called the "power of delegation". *Lakshmi Ratan Cotton Mills Co Ltd v JK Jute Mills Co Ltd*⁸⁷ explains the meaning and effect of a "delegation clause".

One G was a director of a company. The company had managing agents of which also G was a director. Articles authorised directors to borrow money and also empowered them to delegate this power to any or more of them. G borrowed a sum of money from the plaintiffs. The company refused to be bound by the loan on the ground that there was no resolution of the Board delegating the power to borrow to G. Yet the company was held bound by the loan. "Even supposing that there was no actual resolution authorising G to enter into the transaction, the plaintiff

83. Another illustration of forgery *Klimmurr v Associated Automatic Machine Corps* (1934) 39 Comp Cas 189.

84. "Company Law Doctrines and the Authority to Contract" (1955-56) 11 Toronto LJ 228, 275.

85. *Official Liquidator v Compt of Police*, (1969) 38 Comp Cas 834 (Mad).

86. "The Tort of a Company's Servant", 13 Can BB J 161, where the decision in *Rudkin v Great Tigray Consolidated*, 1906 AC 439, 95 LT 216 (HL) has been criticised.

87. AIR 1977 All 312.



could assume that a power which could have been delegated under the articles must have been actually conferred. The actual delegation being a matter of internal management, the plaintiff was not bound to enter into that."

Power of delegation in articles.- Thus, the effect of a "delegation clause" is "that a person who contracts with an individual director of a company, knowing that the board has power to delegate its authority to such an individual, may assume that the power of delegation has been exercised".³⁸

Suppose that the plaintiff when he contracted with an individual director had not consulted the company's articles and, therefore, had no knowledge of the existence of the power of delegation. Could he assume that the power of which he did not know at the time had been exercised? This question arose in *Houghton & Co v Nethard, Lowe and Wills Ltd*.³⁹

The defendant company and one P & Co were engaged in fruit trade. One ML was a director of both companies. By the articles of the defendant company the directors could "delegate any of their powers to committees consisting of such member or members of their body as they think fit". ML, acting on behalf of the defendant company, contracted with the plaintiffs, a firm of fruit brokers, that in consideration of the plaintiffs advancing a sum of money to P & Co, the plaintiffs should have the right to sell on commission all the fruits imported by the defendants and P & Co and to retain the sale proceeds belonging to both companies as security for the advance. The plaintiffs required the confirmation of the agreement by the defendant company itself. The secretary of the defendant company accordingly wrote a letter confirming the agreement and then the plaintiffs made the advance. The defendants subsequently repudiated the agreement as made without their authority. In an action for the breach of the agreement, the plaintiffs claimed that ML or the secretary had ostensible authority as the Board could have delegated their powers to them under the company's articles.

But it was held that the plaintiffs were not entitled to assume that any authority to make the contract had been delegated to them by the Board, and this for the following reasons: Firstly, that "the plaintiffs are not entitled to rely on the supposed exercise of a power which was never in fact exercised and of the existence of which they were in ignorance at the date when they contracted, and secondly, that there was something so unusual in an agreement to apply the money of one company in payment of the debt of another that the plaintiffs were put upon inquiry to ascertain whether the persons making the contract had any authority in fact to make it". SARGENT LJ added that "even if the plaintiffs had known of the existence of the express power of delegation, they would not have been entitled to assume that it had been exercised in favour of ML or the secretary to any greater extent than was

38. *Houghton & Co v Nethard, Lowe and Wills Ltd*, (1927) 1 KB 246 (CA) aff'd 1928 AC 1: 138 LT 210 (HL).

39. (1927) 1 KB 246 (CA) aff'd 1928 AC 1: 138 LT 210 (HL).

to be inferred from the position that they occupied or were held out by the company as occupying".

Delegated authority of acting director. It appears that the unusual nature of the transaction more than anything else was responsible for this result. That this is so becomes clear from the subsequent decision of the same court in *British Thomson Houston & Co Ltd v Federated European Bank Ltd*.⁹¹

Under a company's articles of association, the directors had power to determine who should be entitled to sign contracts and documents on the company's behalf. One director NP (describing himself as the chairman and without having been so authorised) executed and gave a guarantee to the plaintiffs in the name of the company.

It was held that "if the outsiders find an officer of the company openly exercising an authority which the directors have power to confer upon him, they are relieved from the duty of further inquiry and are entitled to assume that the power has been regularly and duly conferred . . . In the present case we have a director acting in a matter which are normally entrusted to directors. He was permitted to assume the title of the chairman of the board of Directors. The plaintiffs were entitled to assume that he was duly authorised to act for the company". Knowledge on the part of the plaintiffs of the contents of the articles was considered to be irrelevant.

Ostensible position allowed to directors.—Thus, the ostensible position allowed to an officer is the most crucial factor. The decision of the Court of Appeal in *Ford Motor Credit Co Ltd v Hammick*⁹² is a further evidence of this.

One Y was in control of three companies. He acquired a car on hire-purchase in the name of one company and gave it to the sales manager of the second company and also issued a cheque on the account of the second company for the liquidation of a debt of the third company. The recipient thought that Y owned all the three companies and they all seemed to be one company.

Lord Denman MR said: "Where there was a group of companies all controlled by the same person who was in full control of everything—it had to be supposed that he was the chairman and managing director of each. It seemed that he had not only actual but also ostensible authority."

The decision has been described to be "in harmony with the modern tendency to afford protection to a third party contracting in good faith with a director having ostensible authority".

Contracting party's knowledge of articles.—The extent to which knowledge of articles is essential was once again in question in *Rama Corp v Praised Tin and General Investments Ltd*.⁹³

91. (1932) 2 K.B. 178 (C.A.) Nohd 48 L.Q.J. 451.

92. *The Times*, 27-1972; cited 1972 J.D.L. 226.

93. (1952) 2 QB 147.

One T was the active director of the defendant company. He, purporting to act on behalf of his company, entered into a contract with the plaintiff company under which he took a cheque from the plaintiffs. The company's articles contained a clause providing that "the directors may delegate any of their powers, other than the power to borrow and make calls, to committees consisting of such members of their body as they think fit". The Board had not in fact delegated any of their powers to T and the plaintiffs had not inspected the defendant's articles and, therefore, did not know of the existence of the power to delegate.

It was held that the defendant company was not bound by the agreement. Sir ALEX. J was of the opinion that knowledge of articles was essential "A person who at the time of entering into a contract with a company has no knowledge of the company's articles of association, cannot rely on those articles as conferring ostensible or apparent authority on the agent of the company with whom he dealt." He could have relied on the power of delegation only if he knew that it existed and had acted on the belief that it must have been duly exercised.

Knowledge of articles is considered essential because in the opinion of Sir ALEX. J the rule of "indoor management" is based upon the principle of estoppel. Articles of association contain a representation that a particular officer can be invested with certain of the powers of the company. An outsider, with knowledge of the articles, finds that an officer is openly exercising an authority of that kind. He, therefore, contracts with the officer. The company is estopped from alleging that the officer was not in fact so authorised.

This view that knowledge of the contents of articles is essential to create an estoppel against the company has been subjected to great criticism. One point of attack is that everybody is deemed to have constructive notice of the articles. But this suggestion was brushed aside by Sir ALEX. J on the ground that the doctrine of constructive notice is a negative one. It operates against the outsider who has not inquired. It cannot be used against the interests of the company.³³ The principal point of criticism, however, is that even if the plaintiffs had read the articles, all that they would see would be that the directors had the power to delegate their authority. They would not yet be able to know whether the directors had actually delegated their authority. Moreover, the company can make a representation of authority even apart from its articles. The company may have held out an officer as possessing an authority. A person believes upon that representation and contracts with him. The company shall naturally be estopped from denying the authority of that officer for dealing on its behalf, irrespective of what the articles provide. Articles would be relevant only if they had contained a restriction on the apparent authority of the officer concerned. Hence, the rule of law should be as stated by ATKIN LJ in *Kreditbank Cassel GmbH v Schenkers Ltd*:³⁴

33. See, Scammon at p 149 of (1962) 2 QB 147 and I.D. Campbell, "Contracts with Companies", 75 LQR 469, 471.

34. (1927) 1 KB 826 (C.A.).

"If you are dealing with a director in a matter in which normally a director would have power to act for the company, you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power."⁹⁵

Scope of authority—In other words, "if the act is one which is ordinarily within the powers of such an officer, then the company cannot dispute the officer's authority to do the act, whether the directors have or have not actually invested him with authority to do it."⁹⁶ To refer again to *Lakshmi Ratan Cotton Mills Co Ltd v JK Jute Mills Co Ltd*⁹⁷ where, referring to the ostensible authority of a director who borrowed money on behalf of the company, the court observed: "The creditor was, therefore, dealing with a person who was armed with such formidable and all embracing powers. There was no reason whatsoever to suspect the propriety or validity of the transaction." The act was within the scope of his apparent authority and it was irrelevant that the plaintiff had not read the articles or that there was no actual resolution authorising him to enter into the transaction. To the same effect is *Mohammed v Renat Bombay House*,⁹⁸ reported from South Africa.

The plaintiff sued on two promissory notes signed by one of two directors on behalf of the defendant company. Unknown to the plaintiff the articles of the company provided that documents requiring the signature of the company should be sufficiently signed if signed by two directors unless and until otherwise determined at a meeting of the directors.

The Supreme Court of South Africa held that the plaintiff was entitled to rely on the apparent authority of a single director to bind the company even though no directors' meeting had determined that a single director should have power to bind the company.⁹⁹

In *Freeman & Fackyer v Buckhurst Park Properties (Mangall) Ltd*,¹⁰⁰ WILKINSON LJ attempted to reconcile all the previous authorities. The facts of the case may be noted first:

K, who carried on business as a property developer, entered into a contract to purchase an estate. He had not enough money to pay for it and obtained financial assistance from H. They formed a limited company with certain capital subscribed equally by K and H to buy the estate

95. This view of this hardship has been supported in leading textbooks. In Palmer's *Company Law* (20th Edn 1959) it is said: "it is submitted that the wider interpretation of the rule in the *Tompson* case, which ALLEN LJ expounded, is not only salutary and consonant with business principle but is also defensible in law because the true *ratio* of that rule is the principle of construction, *omnis potestimur* rule, and not the equitable doctrine of estoppel."¹⁰¹ Similarly, Gower says: "On this point the judgment of ALLEN LJ in the *Schenkens* case is greatly to be preferred." *Modern Company Law* (2nd Edn 1957) 152.

96. Adopted from the note by WHG to the case of *British Thomson Houston & Co Ltd v Federated European Bank Ltd*, [1932] 2 KB 176 (CA).

97. AIR 1957 All 311.

98. (1958) 4 SALJ 704.

99. See also, G.A. Milligan, "Companies Contracting through Agents" (1960) 27 SALJ 102.

100. (1964) 2 Comp LJ 36 (CA).

with a view to selling it for development. K and H with a nominee of each, comprised the Board. The quorum of directors was, by the articles of association, four. H was at all material times abroad. There was power under the articles to appoint a managing director, but the Board did not in fact do so. K to the knowledge of the Board acted as if he were managing director of the company in relation to finding a purchaser for the estate, and, again without express authority of the Board, employed on behalf of the company, a firm of architects and surveyors for the submission of an application for planning permission, etc. The firm claimed from the company their fees for work done.

It was held that the company was liable for the fees claimed because K throughout acted as managing director to the knowledge of the company and thus was held out by the company as being managing director, and the ostensible authority thus conferred could bind the company since its articles of association in fact provided for there being a managing director of the company. K's act in employing the plaintiff's was within the ordinary ambit of the authority of such a managing director. The fact that the plaintiffs had not examined the company's articles and had not enquired whether K was a properly appointed managing director did not prevent them from establishing their claim against the company based on their reliance on K's ostensible authority. Referring to the authorities WILLMIS LJ observed:

"Though I have no doubt that *Ritma case*¹⁰¹ was rightly decided on its own facts, I cannot agree with the view expressed by SLADE J that the previous decisions of this Court were conflicting. I do not think that, when properly understood, the *Houghton case*,¹⁰² the *Kreditbank case*¹⁰³ and the *Rama case* are in conflict with the decision in the *British Thomson Houston case*.¹⁰⁴ They were all cases of most unusual transactions, which would not be within what would ordinarily be expected to be the scope of the authority of the officer purporting to act on behalf of the company. In none of these cases were the plaintiffs in a position to allege that the person with whom they contracted was acting within the scope of such authority as one in his position would be expected to possess."

In India it does not seem to have been insisted in any of the cases on the subject that knowledge of articles is essential. But as late as 1966, MUKHARJI observed obiter in a decision of the Calcutta High Court¹⁰⁵ that "if a person has not, in fact, knowledge of the existence of the power of delegation contained in the company's articles he cannot rely upon its suggested exercise".¹⁰⁶ The net conclusion, however, to be drawn from this string of authorities is that what matters is not the plaintiff's knowledge of the company's articles, but

101. (1952) 2 QB 147.

102. (1927) 1 KB 246; 1927 All ER Rep 97 (CA) aff'd 1928 AC 1; 138 LT 210 (1)EJ.

103. (1927) 1 KB 826 (CA).

104. (1932) 2 KB 156 (CA).

105. *Kishan Lalji v Mumtaz Eros & Co*, (1966) 1 Calcutta LJ 19, 15 (Cal).

106. The company was held liable as the court found that the plaintiff had relied upon the provisions of the articles in giving loan on a chundri to an officer of the company.

whether the act in question is within the ostensible authority of the officer through whom he contracted with the company. The lead given by WILLIAMS JJ in *Freeman & Lockyer v Buckhurst Park Properties (Mengal) Ltd*,¹⁰⁷ has been followed by the Court of Queen's Bench in its decision in *Hely-Hutchinson v Brighfield Ltd*.¹⁰⁸ In this case a company was held liable upon the contracts of indemnity and guarantee made by a director whom the company had knowingly allowed to hold himself out as having the authority to enter into such transactions. The principle that emerges from these two recent authorities is that once it is shown that the contract in question is within the ostensible authority of the officer through whom it was made, the company cannot escape liability, unless, of course, it can show that under its memorandum or articles of association it had no capacity either to enter into a contract of that kind or to delegate the authority in the matter to the officer. But even this principle has been described "to be too narrow in the modern circumstances of business".¹⁰⁹

5. Acts outside apparent authority.—Lastly, if the act of an officer of a company is one which would ordinarily be beyond the powers of such an officer, the plaintiff cannot claim the protection of "the Tarquinius rule" simply because under the articles power to do the act could have been delegated to him. In such a case the plaintiff cannot sue the company unless the power has, in fact, been delegated to the officer with whom he dealt. A clear illustration is *Anand Beimri Lal v Dinshaw & Co*.¹¹⁰

The plaintiff accepted a transfer of a company's property from its accountant. Since such a transaction is apparently beyond the scope of an accountant's authority, it was void. Not even a "delegation clause" in the articles could have validated it, unless he was, in fact, authorised.

The well-known English authority is *Kreditbank Cassel GmbH v Schenkers Ltd*.¹¹¹

The defendant company, by its memorandum, had power to draw and accept bills of exchange and, by its articles, the directors were empowered "to determine who shall be entitled to sign, draw, accept, etc. bills on company's behalf". The defendant's business was that of forwarding agents. They had a branch at Manchester under a branch manager who, without having received any authority from the company, and in fraud, drew seven bills purporting to do so on company's behalf. The company was sued on these bills as drawers.

It was held that having regard to his position, drawing of bills was not within the ostensible authority of this branch manager and, therefore, the

¹⁰⁷ (1964) 1 All ER 620 (1964) 2 Comp L 36 (CA).

¹⁰⁸ (1968) 1 QB 549 (1967) 2 WLR 1312 (QB).

¹⁰⁹ Cf. M. Schmidhuber, "The Companies Bill and the Company Law Reform" (1966) JBL 106, 111.

¹¹⁰ AIR 1942 Oudh 437.

¹¹¹ (1927) 1 KB 826 (CA).

company was not bound, unless it had given him actual authority or was otherwise precluded from setting up the want of authority.¹¹²

Act to override memorandum and articles [S. 6]

Any provisions in the memorandum, articles, agreement or resolution is to be void or become void to the extent in which it is repugnant to the provisions of the Act [S. 6(b)]. The provisions of the Act are to have effect irrespective of any thing contrary contained in the memorandum or articles of a company or any agreement executed by it, or any resolution passed at its general meeting or by its Board of directors. This will be so whether the company be registered before commencement of the Act or afterwards or whether agreements executed or resolutions passed before or after commencement of the Act. [S. 6(c)]

Registered office of company [S. 12]

The section requires a company to establish its functional registered office from the 15th day of its incorporation and for all times from that time onwards. The office should be capable of receiving and acknowledging all communications and notices addressed to it. [S. 12(1)] The company has to furnish in the prescribed manner the verification of its registered office within 30 days of its incorporation. [S. 12(2)] Every company is required to do the following acts: (a) it has to paint or affix its name, and the registered office address and maintain it on the outside of every office or place in which its business is being carried on. It has to be in a conspicuous position, in legible letters also in a language which is in general use in that locality. It should also be in the characters of that language or one of those languages; (b) the name should be engraved in legible characters in its seal; (c) the name and address of the registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and web site addresses, if any, must be printed in all business letters, bill heads, letter papers, and all its notices and other official publications; (d) to have the name printed on hundies, promissory notes, bills of exchange and all such documents as may be prescribed.

On change of name, the earlier name should also remain indicated along with the new name for two years. In case of one person company, the words "One-Person-Company" must be mentioned below such company's name. [S. 12(3)]

¹¹² See generally, Andrew R. Thompson, "Company Law: Doctrines and Authority in Contract" (1955-56) 11 *Toronto LJ* 268; Arthur Strelak, "Ostensible Powers of Directors" (1933) 44 *1.Q. 910*; J.L. Montrose, "Apparent Authority of an Agent of a Company" (1934) 50 *LQR* 224; V. Rimeshan, "Protection of Contractors with Companies" (1964) 2 *Comp J* 718; I.D. Campbell, "Contracts with Companies" (1969) 75 *1.QN* 469 and "Contracts with Companies II: The Juridical Management Rule" (1969) 76 *LQR* 115; G.A. Milligan, "Companies Contracting through Agents" (1960) 77 *SALJ* 322; Aharon Barak, "Company Law (Incorporation and the Law of Agency in Israel)" (1968) 19 *ICJQ* 847; I.M. Montrose, "The Basis of Power of an Agent in Cases of Actual and Apparent Authority" (1938) 16 *Can LR* 757.

Change of registered office situation.—Every change of registered office situation verified in the prescribed manner has to be notified with the Registrar within 15 days. [S. 12(4)] Following changes can be effected in the situation of the registered office only with the authority of a special resolution: (a) in the case of an existing company, shifting the registered office outside the local limits of any city, town or village where the office was situate at the commencement of the Act or where it may have been shifted by the company's special resolution; and (b) in the case of any other company, shifting of the office outside the local limits of any city, town or village where such office was first situated or later by the company's special resolution.

No company is to change the place of its registered office from the jurisdiction of one Registrar to that of another Registrar within the same State unless such change is confirmed by the Regional Director on application in the prescribed manner. The Regional Director has to confirm the shifting within 30 days of the application and the company has to file the same with the Registrar within 60 days of the date of confirmation. The Registrar has to certify the registration within 30 days. The certificate of the Registrar is conclusive evidence that all the requirements of the Act were complied with. [S. 12(3-7)]

Any default under the section is punishable. The company and every officer in default is liable to a penalty of Rs 1000 for every day during which the default continues but not exceeding Rs 1,00,000. [S. 12(8)]

Conversion of companies already registered [S. 18]

A company of any class registered under the Act may convert itself as a company of another class by alteration of the memorandum and articles in accordance with applicable provisions. Where the conversion is required to be done under the section, the Registrar has to satisfy himself on an application by the company that the provisions for registration of companies have been complied with. He may then close the former registration of the company, register the new documents and issue a certificate of registration like that of a new company. The company remains the same entity as it was before in respect of its debts and liabilities, obligations or contracts.

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®; along with updates, articles, videos, blogs and a host of different resources.



Casebook Solutions for Legal Research

The following cases from this chapter are available through EBC Explorer™:

- *Bally v British Equitable Assurance Co*, (1904) 1 Ch 374; 90 TLR 335 (CA); on appeal 1906 AC 35
- *Ilionard's Trustee v Steel Bros & Co Ltd*, (1901) 1 Ch 279; 12 TLR 45
- *British & American Trustee & Finance Corp v Couper*, 1894 AC 399; (1891-94) All ER Rep 667 (HL)
- *Hutton v Scarborough Cliff Hotel Co Ltd*, (1865) 2 Drew & Sim 521; 62 ER 717
- *Kefla Venkataswamy v Chintu Ramamurthy*, AIR 1934 Mad 579
- *Lakshmi Ratan Cotton Mills Co Ltd v JK Jute Mills Co Ltd*, AIR 1957 All 311
- *Oakbank Oil Co v Crum*, (1882) LR 8 AC 65, 71; 48 LT 537 (HL)
- *Rayfield v Hanis*, 1960 Ch 1; (1958) 2 WLR 851; (1958) 2 All ER 194
- *Royal British Bank v Turquand*, (1856) 6 E&B 527; 119 ER 886
- *Scott v Frank F Scott (London) Ltd*, 1940 Ch 794; (1940) 1 All ER 508 (CA)
- *Sree Meenakshi Mills Ltd v Cullianjee & Sons*, AIR 1933 Mad 799; (1935) 41 LW 527; (1935) 5 Comp Cas 103
- *Wood v Dibuss Waterworks Co*, (1889) 42 Ch D 636, 58 LJ Ch 628



CASEBOOK

Chapter 5

Prospectus

PROSPECTUS

Definition

A public company, but not a private company, is entitled, by issuing a prospectus, to invite applications for its shares or debentures. "Prospectus" is defined by Section 2(70) in the following words: "Prospectus" means any document described or issued as a prospectus and includes a red herring prospectus referred to in Section 32 or shelf prospectus referred to in Section 31 or any notice, circular, advertisement or other document inviting offers from the public for subscription or purchase of any securities of a body corporate."

An abridged prospectus means a memorandum containing such salient features of a prospectus as may be specified by SEBI by making regulations. [S. 2(1)]

Application forms [S. 33]

Application forms for securities cannot be issued unless they are accompanied by a memorandum containing such salient features of a prospectus as may be prescribed. This is known as abridged prospectus. The purpose is to reduce the expense-burden of a public issue. The full "prospectus" has to be maintained in the office of the company.

This requirement is not to apply if it is shown that the form of application was issued (a) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to securities; or (b) in relation to securities which are not offered to the public. [S. 33(1)]

A copy of the prospectus has to be given to a person who requests for it before closing of the offer and the subscription list. [S. 33(2)] A default in complying with the provisions of the section makes the company liable to a penalty of Rs 50,000 for each default.



CASE PILI

Public offer and private placement [S. 23]

A public company may issue securities to public through prospectus (to be referred to as "public offer" by complying with the provisions of Part I of Chapter 3 on Prospectus and Allotment of Securities). [Ss. 23-41] It may also be done through private placement by complying with the provisions of Part II of Chapter 3. [S. 42] It may also be done through rights issue or bonus issue by complying with the provisions of the Act and in case of listed companies by complying with the provisions of the SEBI Act, 1992, and rules and regulations made under it. In *APL Industries Ltd v Securities and Exchange Board of India*,¹ SEBI ordered refund of monies with interest to subscribers where public issue of shares was unsubscribed. The court further ordered that after 2 decades of litigation on the matter, the issue of refund along with interest cannot be delayed any further.

A private company may issue securities by way of rights issue or bonus issue or through private placement by complying with the provisions of Part II of Chapter 3. [S. 42]

An Explanation to the section says that a public offer includes initial public offer or further public offer of securities to the public by a company, or an offer for sale of securities to the public by an existing shareholder, through issue of a prospectus.

Documents containing offer of securities for sale, deemed prospectus [S. 25]

Where a company allots or agrees to allot any securities of the company with a view to those securities being offered for sale to the public, any document by which the offer for sale is made to the public is to be deemed for all purposes as a prospectus issued by the company. All enactments and rules of law as to contents of prospectus and as to liability for misstatement in and omissions from prospectus or otherwise relating to prospectus are to become applicable. This is subject to modifications specified in Section 25(3) and (4). The original allotment is presumed to have been made with a view of offering them to the public where (1) shares are offered to the public within six months of allotment and (2) where at the date of offer to the public the whole of the consideration has not been received by the company. [S. 25(2)]

Section 26 which provides for matters to be stated in the prospectus is applicable to the offer for sale with the following additional requirements: (a) a statement of the net amount received or to be received as consideration for the securities to which the offer relates; (b) the time and place at which the underlying contract for allotment may be inspected; and (c) the persons making the offer were named in the prospectus as directors of the company. [S. 25(3)]

Where the person making the offer is a company or firm, it is to be sufficient if the offering document is signed on behalf of the company by its two directors or by not less than one-half of the partners of the firm. [S. 25(4)]

The provisions of the Act relating to prospectus and the penal provisions are attracted only when the prospectus has been issued. "Issued" means issued to the public. "Public" includes any section of the public, whether selected as members or debenture holders of a company concerned or as clients of the person issuing prospectus or in any other manner. Thus, where 3000 copies were distributed among the members of certain gas companies only, it was held to be an offer of shares to the public.² But where a company's prospectus was given to a solicitor of the company and he forwarded it to one of his clients, this did not amount to an issue to the public and accordingly the provisions of the Act relating to liability for omissions, etc were not attracted.³ The term "issue" is not satisfied by a single private communication. There must be some measure of publicity, however modest.

Where a rights issue is made to existing members with a right to renounce in favour of others, if the number of such others exceeds fifty, it also becomes a deemed prospectus.⁴

Contents of prospectus (Matters to be stated in prospectus) [S. 26]

Every prospectus issued by or on behalf of a company either on its formation or subsequently or by or on behalf of a person engaged or interested in the formation of a public company has to be dated and signed and has to state the following information: Sub-section (1)(a) contains (i) names and addresses of the registered office of the company, company secretary, chief financial officer, auditors, legal advisers, bankers, trustees, if any, underwriters and such other persons as may be prescribed; (ii) dates of opening and closing of the issue and declaration about issue of allotment letters and refunds within the prescribed time; (iii) statement by the Board of directors about the separate bank account where receipts of issue are to be kept and details of utilisation and non-utilisation of receipts of previous issues; (iv) underwriting details; (v) consent of directors, auditors, bankers to the issue, expert's opinion and of such other person as may be prescribed; (vi) authority for the issue and details of resolution passed for it; (vii) procedure and time schedule for allotment and issue of securities; (viii) capital structure of the company in the manner which may be prescribed; (ix) main objects of public offer, terms of the present issue and such other particulars as may be prescribed; (x) main objects and present business and its location, schedule of implementation of the project; (xi) particulars relating to (A) management perception of risk factors specific to the project; (B) gestation period of the project; (C) extent of progress in the project; (D) deadlines for completion of the project, and (E) any litigation or legal action pending or taken by a Government Department or a statutory body during the last five years immediately preceding the year of the issue of prospectus against the promoter of the company; (xii) minimum subscription, amount payable by way of premium, issue of shares otherwise than on cash, (xiii) details of directors including their appointments and remuneration, and such particulars of the

2. *South of England Natural Gas and Petroleum Co Ltd v. (1911) 1 Ch 575, 104 LT 378*.

3. *Nash v. Lunde*, 1929 AC 158, 140 LT 146 (HL).

4. *SEBI v. Kuzhankulam Paper Mills Ltd*, (2013) 178 Comp Cas 371 (Ker).

nature and extent of their interests in the company as may be prescribed; and (xvi) disclosures in such manner as may be prescribed about sources of the promoters' contribution.

(ii) *Reports*.—Following reports for the purposes of the financial information have to be set out, namely: (i) reports by the auditors of the company about its profits and losses and assets and liabilities and such other matters as may be prescribed; (ii) reports relating to profits and losses for each of the five financial years (or less as the case may be) immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries and in such manner as may be prescribed; (iii) reports made in the prescribed manner by the auditors upon profits and losses of business for each of the five financial years (or less period), immediately preceding the issue and assets and liabilities of business on the last date of the accounts not exceeding 180 days before the issue; (iv) reports about the business or transaction as to which proceeds of the securities are to be applied directly or indirectly; (v) a statement about compliance of provisions of the Act and a statement to the effect that nothing in the prospectus is contrary to the provisions of the Act, Securities Contracts (Regulation) Act, 1956 and SEBI Act, 1992 and rules and regulations made under it; (vi) such other matters and other reports as may be prescribed.

(2) Sub-section (2) provides that nothing in sub-section (1) is to apply (i) to issue to existing members or debenture holders of a prospectus or form of application relating to shares or debentures, whether the applicant has a right to renounce the shares or not [under S. 62] in favour of any other person; or (ii) issue of a prospectus or form of application relating to shares or debentures which is in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a recognised stock exchange.

(3) *

(4) *Filing of copy with Registrar*.—Sub-section (4) provides that no prospectus is to be issued by or on behalf of or in relation to an intended company unless on or before the date of its publication a copy has been delivered to the Registrar for registration. The copy should be signed by every person who is named in the prospectus as a director or proposed director or by his duly authorised attorney.

(5) *Statement of independent expert*.—A prospectus is not to include a statement purporting to be made by an expert unless the expert is a person who is not and has not been engaged in the formation, promotion or management of the company and has given his consent to the issue of prospectus and has not withdrawn his consent before delivery of a copy to the Registrar. A statement to that effect has to be included in the prospectus.⁵

5. The term "expert" has been defined in S. 2(38) as including an engineer, valuer, chartered accountant, company secretary, cost accountant, and any other person who has the power or authority to issue a certificate in pursuance of any law for the time being in force.

Delivery of copy to Registrar [S. 26(6)].—The prospectus has to state on the face of it that a copy has been delivered to the Registrar. The statement has also to specify the documents which have been delivered along with the copy of the prospectus.

Registration of prospectus by Registrar [S. 26(7)].—The Registrar is not to register a prospectus unless the requirements of section with respect to registration have been complied with and it is accompanied by consent in writing of all the persons named in the prospectus.

Date of issue after registration [S. 26(8)].—No prospectus is to be valid if it is issued more than 90 days after the date on which a copy was delivered to the Registrar.⁶

Penalty for contravention [S. 26(9)].—If a prospectus is issued in contravention of the provisions of the section, the company becomes punishable with fine of not less than Rs 50,000 but extending up to Rs 3,00,000. Every person who is knowingly a party to such a prospectus is punishable with imprisonment for a term which may extend to three years or with fine of not less than Rs 50,000 but extending up to Rs 3,00,000 or both.

Variation in terms of contract or objects stated in prospectus [S. 27]

The terms of a contract referred to in the prospectus or objects for which the prospectus has been issued can be varied only with the authority of the company given by it in general meeting by way of special resolution. The prescribed details of the notice which has to be given to the shareholders are to be published in newspapers (one in English and one in vernacular language) circulating in the city where the registered office of the company is situated indicating clearly the justification for such variation. The second proviso to sub-section (1) also prescribes that such company is not to use any amount raised by it through the prospectus for buying, trading or otherwise dealing in equity shares of any other listed company.

Sub-section (2) provides that the dissenting shareholders, i.e. those who did not agree to the variation are to be given an exit offer by promoters or controlling shareholders at such exit price and in such manner and conditions as may be specified by SEBI by making regulations for this purpose.

Offer of sale of shares of certain members [S. 28]

Where certain members of a company, in consultation with the Board of directors, and in accordance with applicable law, propose to offer the whole or a part of their holding of shares to the public, they may do so in accordance with the prescribed procedure. [Sub-s (1)]

Sub-section (2) provides that any document by which the offer of sale of shares to the public is made is to be deemed a prospectus issued by the company and, therefore, all requirements as to contents of prospectus and liability for misstatements and omissions become applicable.

6. The date of issue is important for many reasons, one of them being the value of securities keeps changing.

Members' responsibility in the matter of sale [S. 28(3)].—The members whether individual or bodies corporate or both, whose shares are proposed to be offered to the public, have collectively to authorise the company to take all actions on their behalf for carrying out the transaction. They also have to reimburse the company for all expenses made by it on this matter.

Public offer of securities to be in dematerialised form [S. 29]

Every company making a public offer and, such other class or classes of companies as may be prescribed, have to issue their securities only in dematerialised form by complying with the provisions of the Depositories Act, 1996 and regulations made under it.⁷ [S. 29(1)]

Any other company may convert its securities into dematerialised form or issue its securities in physical form. [S. 29(2)]

Advertisement of prospectus [S. 30]

Where an advertisement of a company's prospectus is published in any manner, it is necessary to specify in it the contents of the company's memorandum as regards the objects, liability of members and the amount of the company's share capital, the names of signatories to the memorandum and the number of share subscribed by them and its capital structure.

Shelf prospectus [S. 31]

Securities and Exchange Board of India (SEBI) has to provide by making regulations for any class or classes of companies which may file a shelf prospectus with the Registrar at the stage of first offer of securities. It has to indicate a period not exceeding one year as the period of validity of such prospectus. The period is to commence from the date of opening of the first offer of securities under such prospectus. In respect of any second or subsequent offer of such securities issued during the period of validity of such prospectus, no further prospectus is required. [S. 31(1)]

Information Memorandum [S. 31(2)]. A company filing a shelf prospectus is required to file an information memorandum containing all the material facts relating to new charges created, changes in the financial position of the company occurring since the first offer of securities or between the preceding offer and succeeding offer. Other particulars may also be prescribed. Filing has to be done with the Registrar within the prescribed time prior to the issue of second or subsequent offer of securities under the shelf prospectus. The precise to the sub-section has it that where a company or any other person has received applications for allotment of securities along with advance payments of subscription before the occurrence of any such change, information of the change must be given to him. If they express the desire to withdraw their application, within 15 days, their money must be refunded to them.

After filing of an information memorandum, if any offer of securities is made, the memorandum together with shelf prospectus is deemed to be

⁷ *Mallesh Adilkeri v SEBI*, (2005) 124 Comp Cas 336 (SAT), failure to furnish information.

a prospectus. The Explanation to sub-section (3) says that for the purposes of the section, the expression "shelf prospectus" means a prospectus in respect of which the securities or class of securities included in it are issued for subscription in one or more issues over a certain period without the issue of further prospectus.

Red herring prospectus (S. 32)

A company proposing to make an offer of securities may issue a red herring prospectus prior to the issue of a prospectus. [S. 32(1)] Such prospectus has to be filed with the Registrar at least three days before the opening of the subscription list and the offer. [S. 32(2)] A red herring prospectus carries the same obligations as are applicable to a prospectus. Any variation between the red herring prospectus and a prospectus is to be highlighted as variations in the prospectus. [S. 32(3)] Upon closing of the offer of securities, the prospectus has to state the total capital raised, whether by way of debt or share capital and the closing price of securities and any other details which are not included in the red herring prospectus has to be filed with the Registrar and SEBI. [S. 32(4)]

The Explanation to the section says that for the purposes of the section, the expression "red herring" means a prospectus which does not include complete particulars of the quantum or price of the securities.

Remedies for misrepresentation

The fear of heavy liability and criminal sanctions have controlled the directors' tendency of "using extravagant terms and flattering description". The law allows the following remedies for misrepresentation.

1. Damages for deceit.—Those who issue a prospectus with fraudulent statements are liable to pay damages to anyone who purchased shares on the faith of the prospectus. In *Derry v Peek*,⁸ the prospectus of a company stated that the company had been authorised to use steam power in moving its trams. The authority was in fact subject to the approval of the Board of Trade, which refused its approval. Yet the directors were held to be not guilty of fraud, because they were honest, whereas fraud requires a statement which the maker knows to be false, or does not believe it to be true or is too reckless as to its truth. The company may also be sued for damages provided that the fraudulent statement was made by its officers within the scope of their authority, though in that case as laid down by the House of Lords in *Houldsworth v City of Glasgow Bank*,⁹ the contract of allotment must first be rescinded. But the (UK) Misrepresentation Act, 1967, now "entitles the Court to award damages in lieu of rescission". The provisions of Section 75, Indian Contract Act, 1872 are to the same effect.

2. Compensation under Section 35.—The acquittal of the directors by the House of Lords in *Derry v Peek* caused such widespread resentment that within a year the Directors Liability Act, 1890 was passed which rendered

8. (1889) LR 14 AC 337 (HL).

9. (1860) LR 5 App Cas 317, 421, 719 (HL).

directors liable for false statements, although they might have believed their assertions to be substantially true. The provisions of this Act were re-enacted in Section 62, Indian Companies Act, 1956. Now they are included in Section 35 of the 2013 Act. Following persons are liable under the section: (1) every person who is a director at the time of the issue of the prospectus; (2) every person who has authorised himself to be named as a director in the prospectus; (3) every promoter of the company; (4) every person who has authorised the issue of the prospectus; (5) every person who is an expert referred to in Section 26(5). Their liability is joint and several. The person who is made liable may recover contribution from others equally guilty. They are liable to compensate the investor for any loss sustained by him by reason of any statement. Subject to the special defences allowed under the section, they are liable for every untrue statement.

A person sued under the section is entitled to the following special defences: (1) That he withdrew his consent to be a director before the prospectus was issued and that it was issued without his authority or consent. (2) That the prospectus was issued without his knowledge or consent and on becoming aware he forthwith gave reasonable public notice to that effect. (3) That he was ignorant of the untrue statement and on becoming aware of it, he withdrew his consent by a reasonable public notice. This must obviously be done before allotment. (4) That "he had reasonable ground to believe and did up to the time of allotment believe the statements to be true". In *Derry v Peek*, the directors were held not liable because they honestly believed their statement to be true. But under Section 62 of 1956 Act and present Section 35 mere honesty was and is not enough, the honest belief must be based upon reasonable grounds. Thus, where a prospectus was issued by the directors under the assurance given by the promoters that everything was alright, they were held liable for untrue statements because to put faith upon promoters is not reasonable.¹⁰ (5) That the untrue statement was contained in the report of an expert and he had reasonable ground to believe and did up to the time of allotment believe the expert to be competent and, if it was in some public official document, that it was a correct and fair representation of the document. The points from (3) to (5) are not there in the new section. But they will become applicable as a matter of common law.

3. Rescission for misrepresentation.—The shareholder can also sue the company for rescission of the contract. Under this remedy the contract is cancelled and the money given by the shareholder refunded. Under Section 75, Contract Act, a person who lawfully rescinds a contract is entitled to compensation for any damage which he has sustained through non-fulfilment of the contract. The right is lost in the following circumstances:

(a) **By affirmation.**—If the allottee with full knowledge of the misrepresentation upholds the contract, he cannot afterwards rescind. Affirmation may be express or implied. An implied affirmation takes place by the

10. *Adams v Thrift*, (1915) 2 Ch 21; 113 LT 569 (CA).

shareholder's conduct, where, for example, he endeavours to sell his shares, attends meetings of the company, receives dividends or pays calls.¹¹

(b) *By unreasonable delay.*—Any man who claims to retire from a company on the ground that he was induced to become a member by misrepresentation, is bound to come at the earliest possible moment after he becomes aware of the misrepresentation. An action after five months was held to be too late.¹²

(c) *By commencement of winding up.*—The right of rescission is lost on the commencement of the winding up of the company. "But where a shareholder has started active proceedings to be relieved of his shares, the passing of the winding up order during their pendency would not prevent his getting the relief."¹³

When statement deemed to be untrue

A statement is deemed to be untrue if it is false in the form and context in which it is included. Omissions which are calculated to mislead shall also render the prospectus false. In *R v Kyleant*,¹⁴ a prospectus correctly disclosed that the company had paid dividends from 1911 to 1927, but did not disclose that the company had suffered losses from 1921 onwards and dividends had been paid out of war-time profits. Thus, although what the prospectus said was true, it was held to be a misleading prospectus and those who issued it were held liable to punishment. Where a statement is true at the time of the issue of the prospectus, but ceases to be so when allotment is made, the allotment is voidable. Further, it is necessary to avail of the above remedies that the plaintiff should have purchased his shares on the faith of the prospectus directly from the company. A purchaser of shares in the open market has no remedy against the company or its officers even if he was influenced by the prospectus. But where a company has so placed its prospectus as to induce purchases of shares in the open market, the liability follows.

Who can sue under Sections 34, 35 and 36 [S. 37]

A suit may be filed or any other action can be taken under Sections 34, 35 or 36 by any person or group of persons or any association of persons affected by any misleading statement or for the inclusion or omission of any matter in the prospectus.

Placement without prospectus

The process of issuing securities through such method is a kind of private placement. The other documents and application form are not issued to the public in general. They are circulated among selected persons for their personal use and with no right to pass them on to others. This method is

11. *Dunlop Tyre & Rubber Mfg Co. re, ex p. Shrivastava*, (1895) 66 LT Ch 25-75 LT 585.

12. *Christiansville Rubber Estates Ltd. m.*, (1911) 81 LT Ch 63; 104 LT 266; 1911 WN 216.

13. *Dessai J in Shrivastava Sugar Mills Ltd v Debi Prasad*, AIR 1950 All 508 (1950) 20 Comp Cas 296; 1950 All LJ 834.

14. (1932) 1 KB 442; 101 LT 97 (CCA).

gradually slipping into the hands of banking and financial institutions. The functioning is in the name of book building process. Orders are collected from investment bankers and larger investors based on an indicative price. SEBI guidelines have been issued.¹⁵ Even in the case of a public issue, operation through book building is allowed to the extent to which reservation in issues is permissible. It will be identified separately in the placement portion. Where the issue is above one crore rupees, book building process can be used to the extent of 100 per cent. The process is advantageous because the demand for and value of the company's securities is discovered by providing price flexibility and bidding.

Most companies have, however, to issue a public appeal for subscription. This involves the issue of a prospectus. No applications for shares or debentures of a company can be invited unless the appeal is accompanied by a memorandum containing such salient features of a prospectus as may be prescribed, and complying with the requirements of the section.

Disclosures should give true and fair view of company's position

Above all, the golden rule as to the framing of prospectus must be observed. The rule was laid down by Kinnear VC in *New Brunswick and Canada Railway and Land Co v Muggridge*,¹⁶ and was described as a "golden legacy" by Pace Wood VC in *Henderson v Lason*.¹⁷ Briefly, the rule is this:

Those who issue a prospectus hold out to the public great advantages which will accrue to the persons who will take shares in the proposed undertaking. Public is invited to take shares on the faith of the representations contained in the prospectus. The public is at the mercy of company promoters. Everything must, therefore, be stated with strict and scrupulous accuracy. Nothing should be stated as fact which is not so, and no tact should be omitted the existence of which might in any degree affect the nature or quality of the privileges and advantages which the prospectus holds out as inducement to take shares. In a word, the true nature of the company's venture should be disclosed.

This golden legacy has condensed in few words the whole doctrine as to the rule of conduct between shareholders and directors.¹⁸

15. Clarification XIII, 12-12-1995; Clarification XVII, 9-12-1996 and Clarification XXI, 23-10-1997.

16. [1960] 3 LT 651 30 L.J. Ch 202.

17. [1967] 1 R. 5 Eq 249; 17 I.L. 527; 59 L.J. Ch 794.

18. *Henderson v Lason*, (1967) 1 R. 5 Eq 249; 17 I.L. 527; 59 L.J. Ch 794. In addition to these requirements of the Companies Act, SEBI's guidelines for disclosures in prospectus have also to be observed. Sec. SEBI Guidelines for Disclosure and Investor Protection of 1992. SEBI, with headquarters at Mumbai, was established under the SEBI Act, 1992 to take over the supervision of the capital market from the erstwhile Controller of Capital Issues who was functioning under the now repealed Capital Issues Control Act, 1947. SEBI is functioning by sub-dividing its workload into two divisions, one for controlling the primary market, namely issue of securities and the other for controlling the market transactions in securities, the secondary market. For issue of securities it has laid down guidelines as to disclosures in accordance with which prospectus must be prepared for selling



CASE PILOT



CASE PILOT

REMEDIES FOR MISREPRESENTATION

(Law as settled up to 2013 Act)

These stringent provisions have proved to be very useful. As a result litigation on this subject has already declined. The fear of heavy liability and of criminal sanctions has controlled the directors' tendency of "using extravagant terms and flattering descriptions".¹⁹ The law allows the following remedies for misrepresentation in a prospectus.

1. Damages for deceit

Deceit is a tort. It means fraud. Anyone who has been induced to invest money in a company by a fraudulent statement in a prospectus can sue the persons responsible for issuing it. If his action is successful he recovers full compensation for the losses sustained by him directly as a result of the fraud. But the burden of proof lies on him to establish the following main points of the action. When a claim under the tort of deceit has been established, the amount of damages would not be reduced on the ground of contributory negligence, if any, on the part of the claimant.²⁰

Fraudulent misstatement.—In the first place, the plaintiff must prove that there was a fraudulent misstatement. "To support an action of deceit", said Lord Herschell,²¹ "fraud must be proved and nothing less than fraud will do. Fraud is proved when it is shown that false representation has been made—

- (a) knowingly, or
- (b) without belief in its truth, or
- (c) recklessly, carelessly whether it be false or true."

In other words, if the directors publish a statement with knowledge that it is false or without any knowledge, whether it is true or false, it is a fraud. "Fraud may be committed by reckless representations without knowing how the matter stands one way or the other".²² Section 17, Indian Contract Act defines "fraud" as including, among other things, the suggestion that a fact is true when it is not so and the person making the suggestion does not

For transactions in securities markets it has identified a number of market intermediaries who have been subjected to discipline through registration and conduct rules. S. 55-A provides that provisions of Ss. 55 to 58, 59 to 64, 106, 109, 110, 112, 113, 116, 117, 118, 119, 120, 121, 122, 206, 206-A, in so far as they relate to issue and transfer of securities and non-payment of dividend are to be administered by SEBI in case of listed public companies and companies intend to get their securities listed on any recognised stock exchange. In other respects, the administration has to be by the Central Government. The Explanation to the section says that all powers relating to all other matters including prospectus, statement in lieu of prospectus, return of allotment, issue of shares and redemption of irredeemable preference shares are to be exercised by the Central Government, CLB or the ROCs.

19. Lord Carnes in *Peek v Gurney*, (1873) LR 6 HL 377; 43 LJ Ch 19.

20. *Singhund Chartered Bank v Pakistan National Shipping Corp (No 2)*, [2000] 1 Lloyds Rep 218 (CA).

21. *Derry v Peek*, (1889) LR 14 AC 337 (HL).

22. *DUNN & CO LTD v EDEINGTON & FILMSTOCKS*, (1895) LR 29 Ch D 459, 465; (1895) 53 LT 369.

believe it to be true and the active concealment of a fact. These definitions show that if the person making the statement honestly believes it to be true, he is not guilty of fraud, even if the statement is not true. *Derry v Peek*²³ involved a situation of this kind.

A special Act incorporating a tramway company provided that carriages might be moved by animal power and, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by their special Act, the company had the right to use steam power instead of horses and that a saving would be effected thereby. No reference was made to the Board of Trade who refused their consent. Consequently, the company had to be wound up. The plaintiff having taken shares on the faith of the statement brought an action of deceit against the directors. But they were held not liable.

The statement was certainly untrue because the power to use steam was stated to be an absolute right, when in truth it was conditional on the approval of the Board of Trade. But the directors honestly believed that once the Act of Parliament had authorised the use of steam the consent of the Board of Trade was practically concluded.

Representation relating to fact.—Secondly, the false representation must relate to some existing facts which are material to the contract of purchasing shares. The purposes for which the new money is going to be used is an important fact. In *Edgington v Fitzmaurice*,²⁴ for example,

The directors of a company issued a prospectus inviting subscriptions for debentures and stating that the objects of the issue of debentures were to complete alterations in the buildings of the company, to purchase horses and vans and to develop the trade of the company. The real object of the loan, however, was to enable the directors to pay off pressing liabilities. Relying upon the statement the plaintiff advanced money. The company became insolvent and the plaintiff sued the directors for fraud.

The directors argued that the suggestion of possible purposes in which the money might be applied was not a statement of existing facts. But they were held liable. Brown J said that the directors had misrepresented their state of mind and "the state of a man's mind is as much a fact as the state of his digestion". The statement was also regarded as material to the contract. "A man who lends money reasonably wishes to know for what purpose it is borrowed, and he is more willing to advance it if he knows that it is not wanted to pay off liabilities already incurred."²⁵

Realty of direct allottees.—Thirdly, the plaintiff should have taken the shares directly from the company by allotment. "Those only who are drawn

23. (1886) LR 14 AC 337 (HL).

24. (1885) LR 29 Ch D 459; (1885) 36 LT 369.

25. Another illustration of liability for fraud, *S Chatterji v TR Seaweed*, AIR 1960 MP 322.

in by the misrepresentation in the prospectus to become allottees can have a remedy against the directors.²⁶ A purchaser of shares in the open market has no remedy against the company or the promoters though he might have bought on the faith of the representations contained in the prospectus. This rule owes its origin to *Peek v Gurney*.²⁷

A deceitful prospectus was issued by the defendants on behalf of a company. The plaintiff received a copy of it but did not take any shares originally in the company. The allotment was completed and several months afterwards the plaintiff bought 2000 shares on the stock exchange. His action against the directors for deceit was rejected. "The office of a prospectus", the court said, "is to invite persons to become allottees, and, the allotment having been completed, such office is exhausted and the liability to allottees does not follow the shares into the hands of subsequent transferees. Directors cannot be made liable *ad infinitum* for all the subsequent dealings which may take place with regard to those shares upon the stock exchange."²⁸

Buyers in secondary market — But "where the object with which the prospectus of a company is issued is not merely to induce applications for allotment of shares, but also to induce persons to whom it is sent to purchase shares in the market, its function is not exhausted when the company has gone to allotment, and the person issuing the prospectus is responsible for the consequences of false representation contained in it".²⁹ In other words, "there must be something to connect the directors making the representation with the party complaining that he has been deceived and injured by it, as, for example, where the fraudulent prospectus is delivered to a person who thereupon becomes a purchaser of shares".³⁰ This principle found application in *Andrews v Mockford*.³¹

The defendants sent to the plaintiff a prospectus of a company which they knew would be a sham or pretended company in order to induce the plaintiff to purchase shares therein. The plaintiff did not then do so. The prospectus, having produced but a scanty subscription for shares, the defendants thereupon fraudulently published a telegram in a newspaper. The plaintiff believing in the truth of the telegram was induced to purchase shares in the open market. The directors were held liable for the systematic fraud. "The function of the prospectus was not exhausted, and the false telegram was brought into play by the defendants to reflect back upon and countenance the false statements in the prospectus."



CASE PILOT



CASE PILOT

26. *Peek v Gurney*, (1873) LR 6 HL 377; 43 LJ Ch 19.

27. (1873) LR 6 HL 377; 43 LJ Ch 19.

28. Similar is the position of a person in whose favour shares were renounced. For a criticism of this principle, see, Joseph J J Cross case, (1973) 36 Mod LR 600.

29. *Ricks* 1J in *Andrews v Mockford*, (1896) 1 QB 372, 383; 73 LT 726 (CA).

30. *Peek v Gurney*, (1873) LR 6 HL 377; 43 LJ Ch 19. The Explanatory to S. 19, Indian Contract Act.

31. (1896) 1 QB 372; 73 LT 726 (CA).

Further, by reason of the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,³² a person may become liable for holding out a false statement to anyone whom he knew or ought to have known would act in reliance upon the statement.

Where a prospectus was circulated among the existing shareholders inviting them to subscribe to the company's rights issue and one of them, thinking that the offer was good, not only accepted the rights shares offered to him, but also bought more shares of the category in the market. He was not allowed to hold the directors liable for misleading statements in the prospectus in respect of his market purchases. The court said that there was no sufficient proximity for a duty to be owed to those buying shares in the open market.³³

Further developments in this respect have been noted in *Possifield Custodian Trustee Ltd v Diamond*.³⁴ The prospectus here was for floatation of securities on the unlisted securities market. A majority of the complainants were original allottees and others were buyers in the open market (after-market purchasers). The company went into receivership. There were actions against the company for false statements in the prospectus. The company applied for striking out the claims of after-market purchasers. The court said that such purchasers would have to establish that they had reasonably relied on the representations made in the prospectus and reasonably believed that the representor intended them to act on the statements and that there existed a sufficiently direct connection between the purchaser and the representor to render the imposition of such a duty fair, just and reasonable. The wide publicity of a prospectus would go to show that the intention was to influence not only the first buyers but also subsequent market operations. The issue should, therefore, be tried on merits and was not to be struck out.

Liability of company.—The company may also be sued for damages provided that the fraud was committed by the directors within the scope of their authority. But the action against the company is beset with the limitation laid down by the House of Lords in *Florisworth v City of Glasgow Bank*,³⁵ that the contract of allotment must first be rescinded. One cannot remain in the company as a shareholder and yet sue it for damages.³⁶ But the English Misrepresentation Act, 1977 now "entitles the court to award damages in lieu of rescission".³⁷ Thus, rescission is no longer necessary as a prerequisite for liability of the company.

32. 1961 AC 465; (1963) 3 WLR 101.

33. *Al-Nobah Investments (Jersey) v Langforth*, 1991 BCILC 7 (Ch D) applying *Cape Industries plc v Dickson*, (1990) 2 AC 605; (1990) 2 WLR 358; 1990 BCILC 273 (EIL).

34. (1986) 7 BCILC 445 (Ch D) and also, *Parr v Diamond*, (1990) 2 BCILC 660 (Ch D).

35. (1880) LR 5 App Cas 317; 42 LT 191 (EIL).

36. Followed in *Addlesmore London Ltd v. (1887) 1 R 37 Ch D 191; 58 LT 424 (CA)*.

37. S. 2(2). See, *Clarke, Principles of Modern Company Law* (3rd Edn 1969) 304.

2. Compensation under Section 35

The decision of the House of Lords in *Derry v Peek*³⁸ exposed the inadequacy of the tort action of deceit to protect the interest of investors in public companies. The directors in that case had, no doubt, told their falsehood in good faith rather than from corrupt motive.³⁹ But that would not console the misled investor for he is not concerned with the state of the directors' mind or conscience. His loss is just the same whether the misrepresentation is innocent or fraudulent. Accordingly, within a year of the decision in *Derry v Peek* the Directors' Liability Act, 1890 was passed and the directors were made answerable for false statements although they might have believed their assertions to be substantially true. The provisions of this Act have been re-enacted in Section 43, English Companies Act, 1948. Section 35 is the corresponding provision in the Indian Act. Following persons are liable under this section:

1. Every person who is a director of the company at the time of the issue of the prospectus.
2. Every person who has authorised himself to be named as a director in the prospectus.
3. Every promoter who was a party to the preparation of the prospectus.
4. Every person who authorised the issue of the prospectus.

They are liable to compensate the investor for any loss sustained by him by reason of any untrue statement contained in the prospectus.⁴⁰ A statement is deemed to be untrue if it is false in the form and context in which it is included. Omissions which are calculated to mislead shall also render the prospectus false. An instance of liability under the section is provided by *Greenwood v Leaffer Sheet Metal Co.*⁴¹

The prospectus issued by a wheel manufacturing company stated: "Orders have already been received (inter alia), from the House of Commons Wheels for the trolleys in the House of Commons have been ordered and are now in use." In fact no single order had been obtained except for trial and by way of experiment. It was held that the prospectus contained untrue statement.

The chief advantage of proceeding under this section is that the plaintiff does not have to prove fraud. If the representation is false, the directors

38. (1889) LR 14 AC 372 (HL).

39. See, *Frederick Pollock*, *Derry v Peek*, (1889) LR 14 AC 372 (F.P.). The amount of compensation to the misled investor is the value taken from him and the real value of the share. One method of ascertaining such value is to see the difference between the allotment value and the market value of the security. *Swank New Court Securities Ltd v Serangewur Trust Co.* (1997) 1 BCLC 250 (H.L.). Here the price which the buyer paid for the share less the price which he realised on resale was allowed by way of compensation. Delay on his part in reselling the share was not taken into account because he has justifiable reasons for the delay.

40. The liability is joint and several and the persons who becomes liable may recover contribution from others equally guilty of misrepresentation S. 35(3).

41. (1900) 1 Ch 42; 81 LT 595 (CA).

cannot escape liability even if they had made it bona fide and not with intent to deceive. But they have the following special defences under the section. [S. 35(2)]

(i) *Withdrawal of consent.*—A director will not be liable if he had withdrawn his consent to become a director before the issue of the prospectus and the same was issued without his authority or consent.

(ii) *Issue without knowledge.*—Even where a director's name appears in the prospectus he can escape liability by proving that it was issued without his knowledge or consent and on becoming aware he forthwith gave a public notice to that effect.

(iii) *Ignorance of untrue statement.*—Sometimes a director may be ignorant of the untruth of the statements made in the prospectus. Such a director can defend himself by showing that, on becoming aware of the untrue statement, he withdrew his consent by a reasonable public notice. Obviously, this must be done before allotment.

(iv) *Reasonable ground for belief.*—A director will also be protected if he can show that "he had reasonable ground to believe, and did up to the time of allotment believe the statements to be true". It may be recalled that under the rule in *Derry v Peek*, a director having honest belief in the truth of his statement is protected. But under this section it is not enough for him to say that he was honest. He must go further and show that his honest belief was based upon reasonable grounds. And so in *Adams v Iliff*:⁴²

An action was brought by the plaintiff to recover compensation from a director of a company in respect of false statements in a prospectus. The director contended that the statements were prepared by the promoters and before issuing he enquired from one of them, 'Is everything perfectly alright' and he said 'of course, it is'. It was held that although the director did honestly believe the statement to be true, he had no reasonable ground to do so. 'The promoter is the very last person whose uncorroborated statement ought to be relied upon by an intending director as justification for saying that he had reasonable ground for belief. If they had taken the opinion or obtained a report of competent people as to material facts in the prospectus that might have afforded a reasonable ground for belief.'⁴³

(v) *Statement of expert.*—If the untrue statement happens to be contained in the report of an expert, the director sued has to show that he had reasonable ground to believe and did up to the time of allotment believe that the expert was competent, and if it is in some public official document, that it was a correct and fair representation of the document.

42. (1915) 2 Ch 21; 113 LT 569 (CA).

43. *Lord Chaces-Hardy MR*, (1915) 2 Ch 22; 113 LT 569 (C/A). See also, *Reese River Silver Mining Co*, re, [1867] LR 2 Ch 604.

3. Rescission for misrepresentation

An allotment of shares can be avoided at the option of the allottee if it was caused by misrepresentation whether innocent or fraudulent.⁴⁴ By avoiding the contract he is able to get rid of his shares and claim the money he paid for them.⁴⁵ Further under Section 75, Contract Act, a person who lawfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract. The action is against the company to have the subscriber's name removed from the register of shareholders. The essential requisites of the action are as follows:

(a) *False representation.*—In the first place, there must be a false representation in the prospectus. False representation means a positive mis-statement,⁴⁶ or a concealment of material facts.⁴⁷ But, generally speaking, "a mere non-disclosure does not amount to misrepresentation unless the concealment has prevented an adequate appreciation of what was stated".⁴⁸ "Everybody knows that sometimes half a truth is no better than a downright falsehood".⁴⁹ *R v Kylsant*⁵⁰ illustrates the point.

Lord Kylsant was prosecuted for issuing a prospectus with untrue statements. A table was set out in the prospectus showing that between (1911–1927), the company had paid dividends varying from 5 to 8 per cent, except in 1914, when no dividend was paid and in 1926 when a dividend of 4 per cent was paid. This statement created the impression that the company was in a sound financial position; whereas the truth was that during the seven years preceding the date of the prospectus the company had made substantial trading losses and dividends could be paid only by recourse to funds which had been stored up during the war period. The whole prospectus was held to be false, not because of what it stated, but because of what it did not state.

Avery J relied upon the following statement of Lord Halsbury in *Arrow's Reefs Ltd v Twiss*:⁵¹ "... taking the whole thing together was, there false representation? I do not care by what means it is conveyed—by what trick or device or ambiguous language: all those are expedients by which fraudulent people seem to think that they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false

44. S. 13, Indian Contract Act.

45. S. 64, Indian Contract Act, 1872.

46. S. 18(1), Indian Contract Act, 1872.

47. Ss. 18(2), (3) and 17(7), Indian Contract Act.

48. The Explanation to S. 12, Indian Contract Act also declares that mere silence is not fraud unless there is duty to speak or silence is, in itself, equivalent to speech. See also, *Amison v Simpkins*, [1899] 1 LR 41 Ch D 348; 61 LT 63 (CA).

49. Lord Macnaghten in *Gluckstein v Barnes*, 1900 AC 240, 250; 69 LJ Ch 385; 82 LT 393; 16 TLR 321; 7 Mart 321.

50. (1932) 1 KB 442; 101 LJ KB 97 (CCA), followed in *R v Biedermann*, 194 LT 499 (CCA).

51. 1896 AC 273, 281; 71 LT 794 (HL).



although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue."⁵²

Even if those who issued a prospectus were prompted by innocent motives, the subscriber would be entitled to his remedy.⁵³ Accordingly, a prospectus stating that "more than half the shares have already been sold", when, in fact, only one promoter of the company had signed documents applying for more than half the shares, but had not paid any money and ultimately he took only two hundred;⁵⁴ a prospectus stating that "the directors and their friends have subscribed a large portion of the capital and they now offer to the public remaining shares", the fact being that the directors had subscribed only 10 shares each;⁵⁵ a prospectus stating that "P and M, two leading businessmen of repute, have agreed to become directors of the company", when they had only expressed their willingness to help the company⁵⁶ were all held to be misleading, giving the subscribers the right to rescind.

With these may be contrasted the facts of *Siriamani Sugar Mills Ltd v Debi Prasad*.⁵⁷

Printed in red ink on the cover of a prospectus was the statement that "the managing agents with their friends, promoters and directors have already promised to subscribe shares worth six lakh rupees". But they had taken much less. Yet it was held that this could not be assailed as a misrepresentation of fact. "The only fact asserted was the existence of promise... and the existence of promise is not falsified by breaking of it."

To the same way where the alleged misrepresentation in a prospectus was the statement that "the company will commence business with six steamships of special tonnage and rate of speed" and at the time of the prospectus the company had no ships and had only contracted for the supply of two ships, this was not a misrepresentation there being nothing to show that the ships of the specified character might not at any time be purchased in the market.⁵⁸

Sometimes an ambiguous statement is put forward bearing two different meanings, one of which is true and the other untrue. A case of this kind is *Smith v Chelwick*.⁵⁹

The prospectus of a company which was being formed to take over certain iron works contained the statement that "the present value of the

52. See, Ayer J's judgment at p. 448, 1932 KB 447. See also *Bentley & Co v Black*, (1866) 9 TLR 580 (CA), where the court said that the prospectus must be taken as a whole to see whether it conveyed a meaning which amounted to a misstatement of fact, even if each paragraph taken separately contains no falsehood.

53. *Eaglefield v Marquis of Lansdowne*, (1870) LR 1 Ch D 693: 35 LT 822 (CA).

54. *Ross v Estates Investment Co*, (1864) 1 LR 5 Ch App 482: 19 LT 51.

55. *Henderson v Lawton*, (1867) 1 LR 5 Eq 249: 17 LT 527: 59 LJ Ch 794.

56. *Metropolitan Coal Consumers' Assn v Kirkberg (over)*, (1892) 54 Ch 1: 66 LT 700.

57. A (1950) 1950 All MR (1951) 20 Comp Cas 299: 1950 All 1J 856.

58. *Willous v Ferrie*, (1866) LR 3 Ch App 467: 3 Eq 526 ER.

59. (1884) LR 9 App Cas 187: 50 13 (H&F) 111.



turnover is £1,000,000 sterling per annum". If the statement meant that the works had actually in one year turned out produce worth more than a million, it was untrue. If, on the other hand, it meant that works were capable of turning out that amount of produce, it was true. It was held that "if they put forth a statement which they knew may bear two meanings one of which is false to their knowledge and thereby the plaintiff putting that meaning on it is misled, they cannot escape by saying 'he ought to have put the other'."

A misreading of the prospectus will not, however, entitle a purchaser of shares to rescission.⁶⁰

Change of circumstances. There is often an interval of time between the publication of a prospectus and the allotment of shares. During this interval a statement which was true when made may cease to be so owing to some change of circumstances. For example, in *TS Rajagopal Iyer v South Indian Rubber Works Ltd*:⁶¹

The plaintiff had applied for shares in a company on the basis of a prospectus containing the names of several persons as directors. But before the allotment took place, there were changes in the directorate, some directors having retired. That was held sufficient to entitle the plaintiff to revoke his application as few matters are more important than the names of directors. "Moreover, the persons who applied for shares on the faith of one state of things should have the option of retiring when a totally different state of things came into existence."⁶²

(b) *Of facts and not of law.*—Secondly, the misrepresentation must be of facts and not of law. If, for example, a prospectus represents that the company's fully paid shares will be issued at half their nominal price, when the Companies Act prohibits the issue of shares at so much discount,⁶³ it is a misrepresentation of law and a person deceived by it will have no remedy. Again, the facts misrepresented must be material to the contract of taking shares. Materiality of misrepresentation is a question of fact in each case.⁶⁴ Generally speaking, a fact is said to be material if it is likely to influence the decision of an average purchaser of shares, that is, if it will urge or induce

60. MacBain C.J. in *Bakshidhar Durgadutt v Teta Power Co Ltd*, (1925) 27 Bom LR 330; 337

61. AIR 1942 Mad 656; (1942) 55 LWP 521

62. Maitre VC in *Saintish Petroleum Co. v Anderson case*, (1881) 17 Ch D 373; 43 LT 725

63. S. 29.

64. For illustrations of material misrepresentation see *Metropolitan Conf Consumers' Assn. v. (Kurlege case)*, (1942) 3 Ch 1; (1940) 1 LT 200, where Linley LJ said that "few matters are more material than the names of the first directors. What is a prospectus worth without the names of good men upon it?"; *Wimbledon Olympia Ltd. v. (1910) 1 Ch 630; 102 LT 425*, where the omission to disclose the state of previous insolvencies was held to be a material misrepresentation; *Civil Engineering Co. v. (1875) LR 1 Ch D 182; 33 LT 619*, where the meaning of material contracts is explained; *Mair v Rap Granite Rubber Estates Ltd*, 1913 AC 850 (HL) and *Phenix Rubber & Protein Co Ltd. v. (1914) 1 Ch 542; 110 LT 528*, in both of which there were material inaccuracies in reports included in the prospectus; *Kusien (Vylamexyl) Ray Works Co. v. (GB66) LR 1 Ch App 674; 15 LT 817*; objects misstated.

him to purchase or restrain from purchasing shares. This rule enables the directors to include what are commonly known as "flourishing or puffing up statements" and make the prospectus attractive, as was done, for example, in *Mckesson v Boudard Peperil Gear Co Ltd.*⁶⁵

A company was incorporated for working inventions of one Boudard relating to the driving gear of cycles. Its prospectus stated: "Within a few weeks the following exciting, and at the time unheard of, performances took place." Then the results of various cycle races were set out in all of which the company's cycle was claimed to have bettered the record and the prospectus concluded with these words: "This is the first occasion that a mile has been done under two minutes in England. Every rider to whom speed is an object will be bound to have it. What cycle riders are there who will buy slow machines when one admittedly faster is there in the market." All the records set out in the prospectus were indeed true. But the plaintiff complained on the ground that the prospectus did not disclose that they had already been beaten at the time of the prospectus.

It was held that the omission of later performances which had outdone the records referred to in the prospectus was not material and did not render the prospectus misleading. "It is impossible to suppose that the plaintiff could have been really deceived by such a common quality in the prospectus as puffing or that he was blind to the possibility that the records and the performances set forth might possibly be due not solely to the merits of the gear, but also to the merits and skill of the riders and to the general improvement in cycles."

(c) *Reliance and inducement*.—It is further necessary that the plaintiff should have acted in reliance on the statements contained in the prospectus. Misrepresentation should be at least one of the inducements for his contract of taking shares. It is for this reason that a purchaser of shares in the open market cannot proceed against the company⁶⁶ unless the company had done something to induce him to purchase in the market.⁶⁷ For the same reason a person cannot complain of misrepresentation if "he had the means of discovering the truth with ordinary diligence".⁶⁸ But a recipient of a prospectus is entitled to rely on it. He is not bound to verify it. Explaining this in a case, the House of Lords observed:⁶⁹

But the Appellants say that even admitting the prospectus to be open to the objections which are made to it, the respondent has no ground of

65. (1896) 65 L.J. Ch 735 (C.A.)

66. *Hyslop v Mowat*, (1891) 7 T.R. 263; *Boni v Gurney*, (1873) 1 R.L. 322; 43 L.J. Ch. J. 19.

67. *Andrews v Buckley*, (1896) 1 Q.B. 372; 73 L.T. 726 (C.A.).

68. In *Muthu Lal v Sri Gangaji Cotton Mills Co.*, (1906) 4 C.W.N. 269, the prospectus was issued in May and shares were allotted in November. The court held that between these dates there was ample time and opportunity to find out whether Mr Camphall who was represented to be a provisional director had actually consented to be a director. The court applied the exception to S. 19, Contract Act.

69. *Director of Central Railway Co v Kothi*, (1867) 1 R.L. 99; 36 L.J. Ch. 849; 16 L.T. 510.

complaint, because he had an opportunity of ascertaining the truth of the representations contained in it, of which he did not choose to avail himself; that he was told by the prospectus that "the engineer's report together with maps, plans and surveys of the line, might be inspected, and any further information obtained, on application at the temporary offices of the company," and in his letter of application he agreed to be bound by all the conditions and regulations contained in the memorandum and articles of the company, which, if he had examined, would have given him all the information necessary to correct the errors and omissions in the prospectus.

But it appears that when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry.

(d) *By or on behalf of company.*—A company is not responsible for the statements in a prospectus unless it is shown that the prospectus was issued by the company or by someone with the authority of the company—by the Board of directors, for instance,⁷⁰ or that the prospectus, having been issued by the promoters was ratified by the company.⁷¹ This becomes particularly important where a representation is made apart from prospectus. Thus where a person was induced to join a company as a shareholder by representations of the secretary of the company, he could not obtain rescission as the secretary has no general authority to make representations.⁷² But where shares were applied for on the basis of fraudulent representations made by a person both before and after he had become a director, rescission was allowed.⁷³

Limits of rescission and loss of right

A contract induced by misrepresentation is valid until it is rescinded. The option to rescind is not an unlimited one. It is lost in the following circumstances.

(a) *By affirmation.*—If the allottee, with full knowledge of misrepresentation, upholds the contract, he cannot afterwards rescind. Affirmation may be express or implied. An implied affirmation takes place by the shareholder's conduct, where, for example, after discovering his right to rescind, he

70. Palmer's Company Law (20th Edn 1959) 105. See, *Merut Components Ltd. v. re* (1902) 1 Ch 707; 86 LT 291, where a misrepresentation was made before incorporation and the company was held not liable.

71. *National Exchange Co v. Drew*, (1855) 2 Macq 103; 25 UPO 223 (1 IL); *Houldsworth v. City of Glasgow Bank*, (1880) LR 5 App Cas 317; 42 T.L.J. 194 (1 IL).

72. *Dinamit Chand v. Gurukumar Sugar Mills Co. Ltd.*, AIR 1937 Lah 644.

73. *Illo Mfg Co Ltd v. Williamson*, (1911) 23 ICR 164 (CA). A stranger, which means a person who has not invested any money in the company on the faith of the prospectus, has no right to start a public interest litigation against the company on the ground that it has published a misleading prospectus. *Kisan Mehta v. Universal Luggage and Mfg. Co.* (1964) 63 Comp Cas 386 (Bom).



endeavours to sell his shares, attends meetings of the company, receives dividends or pays calls.⁷⁴

(b) *By unreasonable delay.*—"Any man who claims to retire from a company on the ground that he was induced to become a member by misrepresentation, is bound to come at the earliest possible moment after he becomes aware of the misrepresentation."⁷⁵ Accordingly in *Christineville Rubber Estates Ltd, re*⁷⁶

An applicant to whom shares were allotted in a company became fully aware of misrepresentation in the prospectus by the end of July, but in December he moved to have his name removed from the register. It was held that the unexplained delay of five months precluded him from obtaining relief.⁷⁷

(c) *By commencement of winding up.*—The right of rescission is lost on the commencement of winding up of the company. Shareholders cannot be permitted to get rid of their shares after the proceedings for the winding up of the company have been initiated. The names of the shareholders are entered in the register of members and the register is *prima facie* evidence of membership. It is open to public inspection. "The object being that the creditors might form their own opinion as to the person who constituted the shareholders of the company."⁷⁸ Creditors might have lent money on the faith of so many good names being there on the register. And if the shareholders can get their names removed from the register even after the winding up is on, the creditors would be seriously misled.⁷⁹ "But where a shareholder has started active proceedings to be relieved of his shares, the passing of the winding up order during their pendency would not prevent his getting the relief."⁸⁰

4. Liability under Section 26

Section 26(1) states that a company's prospectus must contain certain particulars and sub-section (9) imposes penalty for its contravention. But the section is silent as to the subscriber's remedy in case all the required particulars are not disclosed. "The section in terms gives no remedy or cause of action; but it is a remedial section for the protection of applicants for shares against wiles of promoters and others."⁸¹ The provision does contemplate a

74. *Briggs, ex p.* (1866) 1 R & Ch App 332; *Sherpby v South and East Coast Railway Co.* (1876) 2 Ch D 665 (CA); *Dirlop Trefidol Cycle and Tricke Mfg Co, re, v p Shriman*, (1896) 66 L & Ch 25; 75 LT 385.

75. *London & Staffordshire Fire Insurance Co, re*, (1843) LR 24 Ch D 149, 46 LT 255.

76. (1921) 81 L & Ch 63; 106 LT 260; 1921 WN 216.

77. See also, *Shriman Sugar Mills Ltd v Mohi Prasad*, AIR 1950 All 508; (1950) 20 Comp Cas 296; 1950 All LJ 835.

78. *First National Refining Co Ltd v Greenfield*, (1921) 2 KB 260.

79. *Lord Caithness in Chancery Co, re*, (1867) 1 R & Ch App 412; *Witten v City of Glasgow Bank* (1879) LR 1 AC 615; 40 LT 674; 27 WR 649 (HL).

80. *Dessai I in Shriman Sugar Mills Ltd v Mohi Prasad*, AIR 1950 All 508; (1950) 20 Comp Cas 296; 1950 All LJ 836.

81. *Lord Lindsey in Madeley v Yell*, 1906 AC 24, 28.

liability in damages on the part of directors and other persons responsible for prospectus, for sub-section (4) exonerates such persons from liability if they can prove certain matters. That is equivalent to saying that they are liable if they cannot prove those defences. Hence an allottee can recover damages from the directors for mere failure to comply with Section 26. But the plaintiff who has subscribed for shares on the faith of a prospectus which did not disclose the material particulars required to be disclosed by the section must prove that he has sustained damage. The onus lies on him to show that he has acted on the faith of the prospectus, that is to say, if he had known of the undisclosed matter he would not have become a shareholder.⁸² It should be noted that the section does not entitle a shareholder to get rid of his shares by reason merely of the omission of any of the facts required to be disclosed by the section.⁸³ Where, however, the omission amounts to fraud or misrepresentation within the meaning of Sections 17 and 18, Indian Contract Act, an action for rescission will also lie.

Criminal liability for misrepresentation [S. 34]

Where a prospectus issued, circulated or distributed includes any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead, every person who authorises the issue of such prospectus is to be liable under Section 447 (liability for fraudulent conduct).⁸⁴

The proviso to the section says that nothing in the section is to apply to a person who proves that such statement or omission was immaterial or that he had reasonable grounds to believe and believed so up to time of issue of the prospectus that the statement was true or the inclusion or omission was necessary.⁸⁵

A company's prospectus stated that the company had the experience in its line of business of two and a half decades. The experience was, in fact, that of the partners of a firm which had been taken over by the company and not that of the company itself. The court granted relief against any possible liability. There was no *mala fide* intention behind the statement. The management was successful. The statement was not so materially false as to invite prosecution.⁸⁶

82. *Tawgerjee v. Gurdit*, (1879) LR 2 CPD 469; 46 LJ QB 636; 36 LT 812; 25 WR 701 (CA).

83. *Shrimati Sugar Mills Ltd v. Debi Prasad*, AIR 1950 All 508; [1950] 20 Comp Cas 296, 1950 All LT 836.

84. *MA Somarat v. Emperor*, 1946 MWN (Cr) 80 and *R v. Kuisari*, (1931) 1 KB 442; 101 L 1 KB 97 (OCA). The power of prosecution under the section has been delegated to the SEBI.

85. *JH Choudhury v. Registrar of Companies*, (2014) 1B2 Comp Cas 13 (AP), questions of fact can be decided at the trial. There were no specific allegations in this case as to the role played by the accused and his participation in the process of issue of the prospectus.

86. *Progressive Aluminium Ltd v. Registrar of Companies*, (1997) 99 Comp Cas 147; (1997) 4 Comp LJ 215 (AP); *Banakrishna & Juju v. Registrar of Companies*, (2005) 123 Comp Cas 319 (Mad), a complaint against false representation in prospectus was made after seven years. S. 46B, CrPC, prescribed a period of three years from the date of knowledge of the offence. *British Polymers Ltd. v. British Polymers Ltd.*, (2005) 123 Comp Cas 348 (CLB), the offence is compoundable under S. 521-A even if a prosecution is pending. *Hajira Rustom Doshi v. Registrar of*



Vesting of powers in SEBI [S. 24]

The provisions contained in Chapter III running from Sections 23 to 42, Chapter IV running from Sections 43 to 72 and those of Section 127 (punishment for failure to distribute dividend) are to be administered by SEBI insofar as they relate to issue and transfer of securities and non-payment of dividend. The rest of the provisions are to be administered by the Central Government. [Sub-s (1)]

SEBI has to exercise the powers in respect of matters specified in sub-section (1) and the matters delegated to it under Section 458(1) (Proviso), and exercise the powers conferred upon it under Section 11(1), (2-A), (3) and (4), Sections 11-A, 11-B, 11-D, SEBI Act, 1992.

The operation of this section is restricted to listed companies and those which are proposed to be listed. In other respects the powers are to be exercised by the Central Government or CLB or the Registrar of Companies, as the case may be. Those other respects as clarified in the Explanation to the section are all matters relating to prospectus, return of allotment, redemption of preference shares, and any other matter specifically provided in the Act SEBI has been established under Section 3, SEBI Act, 1992.

ACCEPTANCE OF DEPOSITS BY COMPANIES [S. 73]

The provisions relating to deposits are contained in Sections 73 to 76 of Chapter 5 of the Companies Act, 2013. Section 73 opens with the declaration that on the commencement of the Act of 2013, no company is to invite, accept, or renew deposits under the Act from the public except in a manner provided in this Chapter. The proviso to this declaration immediately adds that nothing in this sub-section is to apply to a banking company and a non-banking financial company as defined in the RBI Act, 1934 and to such other company as the Central Government may after consultation with RBI, specify in this behalf. [S. 73(1)]

Deposits from members [S. 73(2)].—For this purpose a resolution in general meeting has to be passed and rules prescribed in consultation with RBI have to be observed. The deposits can be taken on such terms and conditions including the provision of security for repayment with interest as may be agreed upon between the company and its members and subject to the fulfilment of the following conditions: (a) issuance of a circular to members including a statement showing the financial position of the company, the credit rating obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits and such other particulars, in such form and manner as may be prescribed; (b) filing a copy of the circular along with such statement with the Registrar within 30 days before issue of the circular; (c) depositing such sums which is not to be less than 15 per cent of the amount of deposits maturing during the financial

Companies, 2005 C.I.C.625, (2005) 129 Comp Cas 883 (Gau), notice issued after 10 years of the prospectus, held barred by delay and laches.

year and the financial year next following, to be kept in a scheduled bank in a separate bank account to be called "Deposit Repayment Reserve Account"; (d) providing such deposit insurance in such manner and to such extent as may be prescribed; (e) certifying that the company has not committed any default in repayment of deposits accepted either before or after commencement of the Act or payment of interest on such deposits; and (f) providing security, if any, for due payment of the amount of deposits or interests on them including the creation of such charge on the property or assets of the company.

Where a company does not secure its deposits or secures them partially, such deposits are to be regarded as unsecured deposits. The company has to quote this fact in every circular, form, advertisement or in any document related to any invitation or acceptance of deposits. [Proviso to Sub-s (2)]

Every deposit accepted by a company has to be repaid with interest in accordance with the terms and conditions of the agreement. [S. 73(3)] Where a company fails to repay a deposit or any part of it or any interest due on it, the depositor may apply to the Tribunal for an order directing the company to pay the sum due or for any loss or damage incurred by him and such other order as the Tribunal may consider necessary. The Deposit Repayment Reserve Account is not to be used by the company for any purpose other than repayment of deposits. [Sub-s (5)]

Repayment deposits accepted before the Act [S. 74]

Where a company had accepted deposits before the present Act of 2013 and they remain wholly or partly unpaid for the amount or interest due, the company is required to do the following: file a statement with the Registrar within three months of commencement of the Act or due date for payment showing all such deposits and sums and interests remaining unpaid along with arrangements made for repayments irrespective of what the law then was or what were the terms and conditions of the deposits. The company has to repay within one year from commencement date or from the date on which payments are due, whichever is earlier. [Sub-s (1)]⁶⁷

Tribunal may extend time [S. 74(2)].—The company may approach the Tribunal for extension of time. On the application of the company, the Tribunal considers the financial condition of the company, the amount of deposits and interests payable and other relevant matters. It may then allow further time as it may consider reasonable to the company to enable it to pay the deposits.

Penal provision [S. 74(3)].—The company has to pay off the depositor within the original time or extended time. Any failure in this respect makes the company liable to refund the amount due and also to pay a fine

⁶⁷ *Bimla Kothari v UnitedH Ltd.*, 2016 SCC Online NCLT 73; (2016) 199 Comp Cas 508, deposits accepted before commencement of 2013 Act, petition for repayment filed under 2013 Act. Held, there was no categorization or difference between deposits accepted prior or after 2013 Act. The petition was maintainable. [R. 19 of the Companies (Acceptance of Deposits) Rules, 2014.]



of an amount not less than Rs 1 crore but may extend to Rs 10 crores. Every defaulting officer is punishable with imprisonment which may extend to seven years or with fine of not less than Rs 25 lakhs but may extend to Rs 2 crores, or with both.

Damages for fraud [S. 75]

Where the failure of the company to pay back depositors is accompanied with the proof that deposits were accepted with intent to defraud depositors or for any fraudulent purpose, every officer responsible for such conduct would also be liable under Section 447 and also personally liable for all or any of the losses incurred by the depositors.

Acceptance of deposits from public [S. 76]

A public company, having the prescribed net worth or turnover, may accept deposits from persons other than its members. This can be done by complying with requirements of Section 73(2) and subject to such rules as the Central Government may prescribe in consultation with RBI. The proviso to the section provides that the company is required to obtain its rating (including its net worth, liquidity and ability to pay its deposits on due date) from recognised credit rating agency. This information has to be given to the public at the time of invitation of deposits from public so as to ensure adequate safety. Such rating has to be obtained every year during the tenure of deposits. The second proviso says that every company accepting secured deposits from the public has to create a charge on its assets within 30 days of acceptance. The charge has to be for an amount not less than the amount of deposits accepted and in favour of the deposit holders in accordance with rules which may be prescribed.

The provisions of Chapter 5 running from Sections 73 to 76 are to apply mutatis mutandis to acceptance of deposits from public.

Punishment for contravention of Section 73 or Section 76 [S. 76-A]

This section has been introduced by the Amendment of 2015 to provide punishment for contravention of Section 73 or Section 76. Where a company accepts or invites or allows or causes any other person to accept or invite on its behalf any deposit in contravention of the manner or conditions prescribed under Section 73 or Section 76 or rules made under them, in whole, or if a company fails to repay a deposit in whole or in part or interest due within the specified in the sections or rules or such further time as may be allowed by the Tribunal under Section 73,

1. the company has to pay the amount or interest due and is also punishable with fine which is to be not less than Rs 1 crore but which may extend up to Rs 10 crores, and
2. every officer of the company who is in default is punishable with imprisonment which may extend to seven years or with fine which is not to be less than Rs 25 lakhs but may extend to Rs 1 crore or with both.

The proviso to the section further says that if it is proved that the officer of the company who is in default has contravened the provisions knowingly or wilfully with the intention of deceiving the company or its shareholders or depositors or creditors or tax authorities, he will be liable for action under Section 447 (Punishment for Fraud).

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®, along with updates, articles, videos, blogs and a host of different resources.


Corporate Chambers for Legal Research

The following cases from this chapter are available through EBC Explorer™:

- *Arbutus v Moulford*, (1896) 1 QB 372; 73 LT 726 (CA)
- *APL Industries Ltd v Securities and Exchange Board of India*, (2017) 200 Comp Cas 440 (Delhi)
- *Bimla Kotikari v Unitedech Ltd*, 2016 SCC OnLine NCLT 73; (2016) 199 Comp Cas 508
- *Gluckstein v Barnes*, 1900 AC 240; 250; 69 LJ Ch 385; 82 LT 393; 16 TLR 321; 7 Mans 321
- *Henderson v Lacon*, (1867) 1 R 5 Eq 249; 17 T.L.R. 52%; 59 LJ Ch 294
- *Metal Constituents Ltd, re*, (1902) 1 Ch 707; 86 LT 291
- *New Brunswick and Canada Railway and Lind Co v Maggeridge*, (1860) 3 LT 651; 30 LJ Ch 242
- *Pek v Gurney*, (1873) LR 6 H.L. 377; 43 LJ Ch 19; (1861-70) All ER Rep 116
- *Shironam Sugar Mills Ltd v Debi Prasad*, AIR 1950 All 508; (1950) 20 Comp Cas 296; 1950 All IJ 836
- *Troycross v Gurnet*, (1877) 1 R 2 CPO 469; 46 LJ QB 636; 36 LT 812; 25 WR 701 (CA)


Corporate Chambers for Legal Research

Chapter 6

Promoters

Definition and importance

In many company matters, the term "promoter" is of frequent occurrence. The Companies Act itself uses the word at some places for the purpose of imposing liability upon promoters.¹ Yet "it has never been clearly defined either judicially or legislatively".² "The difficulties in defining the term led the judges to state that the term 'promoter' is not a term of art, nor a term of law, but of business."³ The emphasis upon its business implication is quite apparent from the statement of *Bowen J* that the term is used to sum up "in a single word a number of business operations, familiar to the commercial world, by which a company is generally brought into existence".⁴ Most of the definitions are in terms of categories of work that promoters usually perform. "A promoter is a person who brings about the incorporation and organisation of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation itself."⁵ "A promoter is one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose."⁶ The term, therefore, "has no very definite meaning".⁷ Whether a

1. For example, ss. 2(69), 30 and 300 impose liability upon promoters. "Before a company can be formed there must be some persons who have the intention to form a company, and who take the necessary steps to carry that intention into operation. such persons are called 'promoters'." Charlesworth and Maise, *Companies Law* (14th Edn 1991) 98.
2. Joseph H. Gross, "Who is a Company Promoter", [1970] 86 LQR 493.
3. *Ibid.* 516.
4. *Wharley Bridge Calico Printing Co v Green*, (1880) LR 5 QBD 109; 28 WR 351; 41 LT 674.
5. *Barker v Richmond Land Co*, 69 Vt 455; 16 SE 360; 37 Am St Rep 875. Collected from Canfield and Wormser, *Cases on PRIVATE CORPORATIONS*.
6. Coulson CJ in *Tycross v Grant*, (1877) LR 2 CTD 469; 46 LJ QB 636; 36 LT 812; 25 WR 701 (CA). This definition was adopted by the Madras High Court in *Whittier Mills Ltd v Balkis Animal*, AIR 1969 Mad 462, 468-69.
7. Lindley J. in *Emmav Silver Mining Co v Lenox*, (1879) 1 LR 4 CTD 296; 407; 40 LT 749; followed in *C Thirunelveliarai v AY Velu Mudaliar*, (1937) 45 IWR 987; ILR 1938 Mad 792; AIR 1938





CASE POINT

person is a promoter or not is a question of fact in each case. Much depends upon the nature of the role played by him in the promotion of business. In *Twycross v Grant*,⁶ the court said "that the defendants were the promoters of the company from the very beginning can admit of no doubt. They framed the scheme, they not only provisionally formed the company, but were, in fact, to the end its creators; they found the directors, and qualified them, they prepared the prospectus, they paid for printing and advertising, and the expenses incidental to bringing the undertaking before the world." The court added that the functions of promoters come to an end as soon as they hand over the company to a governing body, like a Board of directors.⁷

Statutory definition [S. 2(69)].—The Companies Act, 2013 contains a statutory definition of promoter which is also more or less in terms of functional categories: Promoter means a person (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in Section 92; (b) who has control over the affairs of the company, directly or indirectly, whether as a shareholder, director or otherwise; (c) in accordance with whose advice, directions or instructions the Board of directors of the company is accustomed to act. The proviso excludes persons acting in a professional capacity.

Persons acting in professional capacity.—A person who acts in a professional capacity is not a promoter. Thus a solicitor, who prepares on behalf of the promoters the primary documents of the proposed company, is not a promoter.⁸ Similarly, an accountant or a valuer who helps the promotion in his professional capacity is not a promoter. But any such person may become a promoter if he helps the formation of the company by doing an act outside the scope of his professional duty. A person may, for example, help in getting a purchaser for the company's patent, or of shares, or in getting personnel for the company. Any such role may make him a promoter.⁹

6. *Med JSL*. The advantage of having a flexible definition is that only those would be subjected to the strict duties of a promoter who fulfil the functional concept of the definition. *Jaemus Marler Estates Ltd v Marler*, [1913] 85 LJP 167.

7. [1877] LR 2 CTD 469-46 LJ QB 636, 36 LT 403, 25 WLR 701 (CA).

8. A person may become a promoter even after the formation of the company, for example, by becoming party to share issues or to procuring subscriptions. S. 50 makes liable for mis-statements in prospectus every person who is promoter of the company. Stringent provisions of the Companies Act and of the allied Acts have virtually eliminated fraudulent practices in company promotions.

9. A servant or agent of a promoter is not to be regarded as a promoter for that reason alone; also a solicitor doing only legal work. *Great Wheel Pulwark Co Ltd v. (1883) 50 1J Ch 42; 49 LT 2D*.

10. A person who leaves the task of promotion to others and sits behind to share their profits is likely to be regarded as a promoter. *Exxon Sohar Mining Co v J Razis*, (1979) 1 LR 4 CPD 996 40 CIT 749 and *Tracy v Manditory Pty Ltd*, (1952) 50 CLR 215; 1951 HCA 9 (Aust).

DUTY AND LIABILITY

Fiduciary position

The position of promoters in relation to the company was explained by Lord CARROTS in *Erlanger v New Sonbrero Phosphate Co*¹² in the following words:

They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company. They have the power of defining how and when, in what shape and under what supervision the company shall start into existence and begin to act as a trading corporation.

The business of promotion thus gives a very advantageous position to the promoter in relation to the proposed company. The courts have, therefore, fixed him with the responsibility of a fiduciary agent. "The promoter is in the situation akin to that of a trustee of the company, and his dealings with it must be open and fair."¹³ Thus the first and the foremost duty of a promoter is that if he starts a company for the purpose of buying his property and wants to draw his payment from the money obtained from shareholders, he must faithfully disclose all facts relating to the property. If he conceals any fact in relation to the character or value of the property, or his personal interest in the proposed sale, the company will be entitled to set aside the transaction or recover compensation for its loss. He is guilty of breach of trust if he sells property to the company without informing the company that the property belongs to him or he may commit a breach of trust by accepting a bonus or commission from a person who sells property to the company. In short, the chief duty of the promoter as a fiduciary agent is to disclose to the company his position, his profit and his interest in the property which is the subject of purchase or sale by the company.¹⁴

The only difficult question is to whom the disclosure is to be made. It was suggested by the House of Lords in *Erlanger v New Sonbrero Phosphate Co*¹⁵ that it should be made to an independent and competent Board of directors. The facts of the case were as follows:

A group of persons headed by E purchased an island containing phosphate mines for £55,000. A company was then incorporated to take over the island and to work the mines. E named five persons as directors. Two

12. (1879) LR 3 AC 3216, 3235; 48 LJ Ch 72; 39 LT 269; 27 WR 65. The Madras High Court accepted this position of principles in *Watsons Mills Ltd v Jinkis Animal*, AIR 1969 Mad 462, 468–69. The basic element in the duty is something that needs no saying, namely, their duty is to promote the interests of the company.

13. *Moraneux Corporation*, S. 546. *Omnium Electric Princes Ltd v Beines*, (1914) 1 Ch 332; 109 LT 964 (CA), they are not trustees in the real sense of the word because the company may not be in existence as a legal person. Fiduciary position emerges from agency.

14. There is no duty that the promoter must restrain himself from making any profit whatsoever in the business of promotion. *Omnium Electric Princes Ltd v Beines*, (1914) 1 Ch 332; 109 LT 964 (CA).

15. (1879) LR 3 AC 3216, 3226; 48 LJ Ch 72; 39 LT 269; 27 WR 65

were abroad. Of the three others, two were persons entirely under E's control. These three directors purchased the island for the company at a price of £1,10,000. A prospectus was then issued. Many persons took shares. The purchase of the island was adopted by the shareholders at their first meeting; but the real circumstances were not disclosed to them. The company failed and the liquidator sued the promoter for refund of the profit.

The only material contention urged on behalf of the promoter was that the company's Board of directors had full knowledge of the facts. Rejecting this Lord Cairns said:

If they (promoters) propose to sell their property to the company, it is incumbent upon them to take care that they provide the company with an executive body who shall both be aware that the property which they are asked to purchase is the promoter's property and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. They should sell the property to the company through the medium of a Board of directors who can and do exercise an independent and intelligent judgment on the transaction.¹⁶

Subsequent experience, however, showed that it may not always be possible for the promoters to give to the company an independent Board of directors. In the case of a private company, or a public company which, like that of Salomon & Co, consists of only the family members, it is just not possible to constitute an independent Board of directors. In such a case the promoter should disclose his interest and profit to the shareholders of the company. But it will not be enough to disclose the truth to the first few shareholders. The disclosure should be made to the whole body of persons who are invited to become the shareholders. This was emphasised by the House of Lords in their well-known decision in *Ghickstein v Barnes*.¹⁷

A syndicate of persons was formed to raise a fund, buy a property, called "Olympia" and resell it to a company. They first bought up some of the charges upon the property for sums below the amount which the charges afterwards realised, and thereby made a profit of £20,000. They bought the property for £1,40,000, formed a limited company and resold the property for £1,60,000 to the company, of which they were first directors. They issued a prospectus inviting applications for shares and disclosing the two prices of £1,40,000 and £1,60,000 but not the profit of £20,000. Shares were issued but the company afterwards went into liquidation.

It was held that the promoters ought to have disclosed to the company the profit of £20,000. The defendant, who was one of the promoters, contended that the fact was known to the parties to the transaction. Rejecting this, Halsbury LC said:

16 (1878) 3 App Cas 328; 48 LJ Ch 79; 39 LT 269, 27 WR 65, 1223

17 1900 AC 240; 69 LJ Ch 365; 62 LT 393; 16 TLR 321; 7 Mars 221.



It is too absurd to suggest that a disclosure to the parties to this transaction is a disclosure to the company. They were there by the terms of the agreement to do the work of the syndicate, that is to say, to cheat the shareholders; and this, forsooth, is to be treated as a disclosure to the company, when they were really there to hoodwink the shareholders, and so, far from protecting them, were to obtain from them the money, the produce of their nefarious plans.¹⁸

Disclosure is not the most appropriate word to use when a person who plays many parts announces to himself in one character what he has done and is doing in another.

The duty continues even after incorporation until the profits are fully disclosed and fully accounted for.¹⁹

Where rescission is not possible, that is, the company is not in a position to return the property, it can recover damages for breach of the duty of good faith, though the measure of damages is the profit which the promoter made from the breach of his duty.²⁰

The definition of "promoter" in Section 2(69) of the 2013 Act includes in its category (c) a person in accordance with whose advice, directions or instructions the Board of directors of the company is accustomed to act. This category is included in point (iii) of the definition of related party in Section 2(76), and, therefore, all the restrictions stated in Section 188 applicable to "Related Party Transactions" become applicable upon promoters. [See under S. 188]

A leasehold interest was purchased by a promoter for a company which he intended to form. However, he first formed a partnership firm and then converted it into a company. It was held that the interest in the lease became the property of the company without any formality of conveyance. From the very first day of purchase it became in equity the property of the company.²¹

18 *Gilchrist v Burnes*, 1900 AC 240, 247.

19 *Emma Silver Mining Co v Lewis*, (1879) LR 4 CPD 396; 40 LT 749. Subject to such disclosures, it is quite lawful for a promoter to sell his property to the company at a profit to himself. *Ovenium Electric Policies Ltd v Daines*, (1913) 1 CL 332; 109 LT 964 (CA). He is bound to disclose his profit minus the expenses in earning the same. *Laidley and Wiggin v Iron Ore Co v Bird*, (1886) LR 33 Ch D 89 (CA).

20 *Lewis & Hamley Theatres of Varieties Ltd v. (1902) 2 Ch 809; 72 LJ Ch 1-87 LT 485 (CA)*. See generally, Joseph Gold, "The Liability of Promoters for Secret Profits in English Law" (1943-44) 5 Toronto LJ 21 and J.H. Cross, *Cosmopolitan Promotions*, Thagard Publishing House, 1972.

21 *Valli Pathakeewa Rao v Ramazuja Ginning and Rice Factory (P) Ltd*, (1986) 101 Comp Cas 568 (AP). In addition to all these obligations, the promoters have to comply with SEBI Guidelines, 1992 relating to their contribution to the public issue and lock-in-period.



Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®; along with updates, articles, videos, blogs and a host of different resources.



The following cases from this chapter are available through EBC Explorer™:

- *Glickstein v Barnes*, 1900 AC 240; 69 1 J Ch 385; 82 LT 399; 16 TLR 321; 7 Marsh 321
- *Lindley and Wigpool Iron Ore Co v Bird*, (1886) 1 R 33 Ch D 85 (CA)
- *Hugcross v Grant*, (1877) LR 2 CPD 459; 46 1 J QB 636; 36 CJ 812; 25 WR 701 (CA)
- *Wraeley Bridge Calico Printing Co v Green*, (1880) 1 R 5 QBD 109; 28 WR 351; 41 LT 674



CASE POINT™

Chapter 7

Securities (Shares)

Allotment of securities

Offers for shares are made on application forms supplied by the company. When an application is accepted, it is an allotment.¹ "What is termed 'allotment' is generally neither more nor less than the acceptance by the company of the offer to take shares."² "Broadly speaking it is an appropriation by the directors ... of shares to a particular person."³ "It is an appropriation out of the previously unappropriated capital of a company."⁴ Consequently where forfeited shares are re-issued, it is not the same thing as an allotment.⁵

A valid allotment has to comply with the requirements of the Act and principles of the law of contract relating to acceptance of offers.

Statutory restrictions on allotment

1. Minimum subscription and application money [S. 39].—The first requisite of a valid allotment is that of minimum subscription. When shares are offered to the public, the amount of minimum subscription has to be stated in the prospectus. No shares can be allotted unless at least so much amount has been subscribed and the application money, which must not be less than

1. See, *Sri Gopal Jalan & Co v Calcutta Stock Exchange Asso Ltd*, AIR 1964 SC 250, 261; (1963) 33 Comp Cas 862. Reaffirmed by the Supreme Court in *Sri Gopal Paper Mills Co Ltd v CIT*, (1993) 2 SCC 80, 86; *Associated Clothiers v Union of India*, I.L.R. (1957) 2 Punj 505, 511-12. The Madras High Court held in *Srinivasan Singh & Wug Mills v V V V Rayamajhi*, (1973) 43 Comp Cas 224 (Mad), that an oral application for shares is equally valid. But since S. 2(5)(ii) requires an agreement in writing, no allotment can be made without a written application for allotment. *HR Mahadeva Shastri v Official Liquidator*, (1977) 47 Comp Cas 256 (Del).
2. *Country Linen Fibre & Pulver Works Ltd*, *ibid*, (1888) 29 I.R Ch D 421, 426 (CA), adopted by the Supreme Court in *Gopal Jalan & Co v Calcutta Stock Exchange Asso Ltd*, AIR 1964 SC 250, 252; (1963) 33 Comp Cas 862.
3. *Scandium Lin Spitzki v Chandra Corpex Ltd*, (1899) 80 LT 347, 351; 15 TLR 281.
4. *Skaraks J Lin Sri Gopal Jalan & Co v Calcutta Stock Exchange Asso Ltd*, AIR 1964 SC 250 (1963) 32 Comp Cas 362.
5. *CIT v VSSV Marwakali*, (1994) 88 Comp Cas 545. In *Plate Dealers Assn (P) Ltd v Sushil Chandra Samanta*, (2006) 129 Comp Cas 316 (Ca), refusal of forfeited shares.

five per cent SEBI may prescribe different percentage of the nominal value of the share, has been received in by cheque or other instrument.⁶

A number of cases have established that it is a condition precedent to valid allotment that the whole of the application money should have been paid to and received by the company by cheque or other instrument.⁷ Any means by which money can be remitted may be used, but remittances must be cleared and actual cash received by the company before proceeding to allotment. An application for shares, if not accompanied by any such payment, does not constitute a valid offer.⁸ Further, it has been held that an allotment of shares made without the application money being paid is invalid and the directors are guilty of misfeasance.⁹ The object of these provisions, says Guver, is to prevent the company getting under way until it has raised the capital needed to carry out the objects in which it has invited the public to participate; it would obviously be iniquitous to force an applicant, who has accepted an invitation to participate in a one million issue for the purpose of buying Wembley Stadium, to sink his capital in a company which has only raised enough money to buy a suburban villa. They also afford protection to the creditors by ensuring that a limited company is not able to incur commitments if it is grossly under-capitalised.¹⁰

If the minimum subscription has not been received within 30 days of the issue of the prospectus, or such other period as may be specified by SEBI, the amount received is to be returned within such time and manner as may be prescribed. [S. 39(3)] Application money can be appropriated towards allotment or it has to be refunded. It cannot be adjusted towards any claim of the company against the applicant.¹¹

Return of allotment [S. 39(4)].—Where a company having a share capital makes an allotment of securities, it has to file with the Registrar a return of allotment in such manner as may be prescribed.

Penalty for default [S. 39(5)].—In case of any default, the company and its officer who is in default is liable to a penalty for each default of Rs 1000 for each day during which the default continues or Rs 1,00,000 whichever is less.

2. Shares to be dealt in on stock exchange [S. 40].—Every company intending to offer shares or debentures to the public by the issue of a prospectus has to make an application before the issue to any one or more of

6. S. 39(1). Cash means actual cash received whether by means of cheque, draft or otherwise.
7. *Mahindra & Steel Works Ltd. v. AIR 1994 Ker 521; Universal Incast Alfr v. SEBI*, (2003) 108 Comp Cas 248; (2003) 2 RCR (Civ) 516; (2000) 125 PLR 256, the application money has to be kept in a separate bank account with the bankers to the issue and not in any bank of the company's choice. The money must remain there till all the mandatory requirements are complied with and the company can proceed to make allotment. Where the company did not do so even after receiving notice from the SEBI (Authority), the Stock Exchange was held to be justified in refusing to list the company's securities.
8. *Ramniklal Gupta v. M&ER Hsab*, AIR 1939 Nag 225; I.C.R. 1941 Nag 567; 103 I.C. 798.
9. *Indian States Bank Ltd v. Sardar Singh*, AIR 1934 All 88; 10 I.C. 33.
10. *The Principles of Modern Company Law* (3rd Edn. 1969) 200
11. *Lokanayak Pandit v. Bois Surgical & Medical Institute (P) Ltd.*, (2005) 125 Comp Cas 626 (K.L.B.)

the recognised stock exchanges for permission for the shares or debentures to be dealt with at the exchange.¹² The requirement is not merely to apply but also to obtain permission. The name or names of the stock exchanges to which the application has been made must also be stated in the prospectus. It is a condition precedent for listing permission that the application money is deposited in a separate bank account and is to be used only for adjustment against allotment of securities if the securities have been permitted to be dealt with in the exchange or exchanges specified in the prospectus. Otherwise the money has to be used for repayment to applicants within the time specified by SEBI, if the company is for any other reason is unable to allot securities.¹³ [S. 40(3)]

Any condition purporting to require or bind any applicant to waive compliance with any of the requirements of the section is to be void.

If a default is made in complying with the provisions of the section, the company is to be punishable with a fine which is not to be less than Rs 5,000,000 but may extend to Rs 50,00,000. Every officer in default is punishable with imprisonment for a term extending to one year or fine not less than Rs 50,000 extending up to Rs 3,00,000 or with both. [S. 40(5)]

The company may pay commission to any person in connection with subscription to its securities subject to such conditions as may be prescribed.

The object of the section has been explained by the Supreme Court in *Union of India v. Allied International Products Ltd.*¹⁴ The object of the provision is to enable shareholders to find a ready market for their shares so that they can convert their investment into cash whenever they like. The Supreme Court held that even if one out of the several stock exchanges applied for and granted recognition it would be sufficient to validate the allotment; the facility of at least one stock exchange would thereby be available. The amendment of 1974 nullified this part of the judgment. The position after the amendment was that if, out of the stock exchanges applied for, a single stock exchange refused to grant listing, the allotment, if already made,

12. This is known as listing. Stock Exchanges charge their fee for listing. Agreements, Provisions of Securities (Contracts Regulation) Act, 1956 are applicable to the subject. Government guidelines on the subject are also there.
13. Since the money lies in a separate bank account, it is refundable even if the company is in winding up. *Nirma Gold Mines Ltd. v. re.* (1955) 1 WLR 1080, 1085. Refund orders are required under Government prescription to be sent by registered post.
14. (1970) 3 SCC 594 (J77) 41 Comp Cas 127. The advantage of listing is that shares become freely marketable and this enhances their value. The subscription money has been held to be in the nature of trust money and not a part of the banker's general assets so as to be usable in his insolvency. It is refundable in specie. *RBI v. Bank of Credit & Commerce International (Overseas) Ltd.* (No. 24, 1993) 78 Comp Cas 230 (Bom). Misuse of the money may amount to criminal breach of trust and punishable as such under the Indian Penal Code, 1860. Power of prosecution has been delegated to SEBI. *Radiy Shyam Khemka v. State of Bihar.* (1953) 3 SCC 54 (1995) 77 Comp Cas 336. The offence involved in failure to promptly withdraw the shares was held to be wiped out where as soon as the failure was discovered, the default was made good by sending duplicate refund warrants. *Herdilal Umbers Ltd. v. Aarti Bansal.* (1996) 96 Comp Cas 521 (Raj).

became void. The company could appeal to the Central Government. If the appeal was successful, the decision of stock exchange was set aside and the listing would be granted. The allotment would be saved.¹⁵ Where a stock exchange failed to dispose of the company's application and the Central Government, on appeal, ordered listing, the allotment was saved.¹⁶

Where an appeal has been preferred under Section 22, Securities Contracts (Regulation) Act, 1956 against the refusal of a stock exchange, the allotment does not become void until the disposal of the appeal.¹⁷

A decision of the Supreme Court has been to the effect that the effect of the provisions of Section 73 of the 1956 Act is that listing is mandatory. A default in this respect makes allotment violative of the provisions and therefore allottees' money has to be refunded to them with interest at 15 per cent.¹⁸

Over-subscribed prospectus. Where the permission of a stock exchange has been granted and, therefore, the allotment completed is valid, the prospectus being over-subscribed, the over-subscribed portion of the money received must be sent back to the applicants within the same specified period.

General principles as to allotment

An effective allotment has to comply with the requirements of the law of contract relating to acceptance of an offer.

1. Allotment by proper authority.— In the first place, an allotment must be made by a resolution of the Board of directors. "Allotment is a duty primarily falling upon the directors", and this duty cannot be delegated except in accordance with the provisions of the articles. Accordingly, an allotment made by a general manager under an improper delegation by the directors

15. *Kishorlalji Jhaveri Ltd v. Bombay Stock Exchange*, (1995) 6 SCC 714; (1996) 45 Comp Cas 179; *Rich Paints Ltd v. Vadodara Stock Exchange Ltd*, (1998) 15 SCL 128 (Guj). Followed in *Jefferson Metals Ltd v. Union of India*, (1999) 95 Comp Cas 339 (Guj). The refundable money was invested in purchasing land, the court directed attachment of the land and deposit of a sum of money with SEBI.

16. *Urmila Bharkha v. Country Spring and Egg Co. Ltd*, (1997) 86 Comp Cas 197 (Cal). Another litigation arising out of the same case is *Urmila Bharkha v. Union of India*, (1999) 97 Comp Cas 97 (Cal). One of the effects of the refusal is that the Stock Exchange can ask the company to delete its name from the company's prospectus. *United Melina & Entertainment Ltd v. Stock Exchange, Mumbai*, (2000) 29 CLA 297 (SAT).

17. The procedure for appeals is prescribed by Appeal to Central Government Rules, 1993. Rules and Regulations have also been prescribed for Registrars to Issue and Transfer agents. The listing is done in accordance with the rules framed under the Securities Contracts (Regulation) Act, 1956. The rules and requirements of the Stock Exchange have to be complied with. Listing particulars are required to be published in the prospectus. A listing agreement has to be entered into.

Brokers at stock exchanges may not accept unlisted securities. For the convenience of investors in new and small companies an Over The Counter Exchange of India (OTCEI) has been established which provides liquidity for titles to such investments.

18. *Sahara India Real Estate Corp. Ltd v. SEBI*, (2012) 1 SCC 1; (2012) 171 Comp Cas 134. The Supreme Court also explained the effect of the expression "company intending to make a public issue".



was held to be void.¹⁹ But where the articles so provided, an allotment made by secretaries and treasurers was held to be regular.²⁰

2. Within reasonable time.—Secondly, allotment must be made within a reasonable period of time, otherwise the application lapses. What is reasonable time must remain a question of fact in each case. The interval of about six months between application and allotment has been held to be not reasonable. On the expiry of reasonable time Section 6, Contract Act applies and the application must be deemed to have been revoked.²¹

3. Must be communicated.—Thirdly, the allotment must be communicated to the applicant. Posting of a properly addressed and stamped letter of allotment is a sufficient communication even if the letter is delayed or lost in the course of post.²² *Household Fire and Carriage Accident Insurance Co v Grant*²³ is the leading authority.

The defendant Grant applied for some shares in the plaintiff company. His application was sent by post and a letter of allotment was despatched by the company soon after. But the letter never reached the applicant. He was nevertheless held liable as a shareholder.



CASE PILOT

4. Absolute and unconditional.—Allotment must be absolute and in accordance with the terms and conditions of the application, if any. Thus where a person applied for 400 shares on the condition that he would be appointed cashier of a new branch of the company, the Bombay High Court²⁴ held that he was not bound by any allotment unless he was so appointed. A condition which is to operate subsequently to allotment will not affect its validity. An applicant to whom shares were allotted on the condition that he would pay for them only when the company paid dividends was held to be

19. *Bank of Prokmer Ltd v Madhu Ram*, AIR 1919 Ich 351; 51 IC RJ 2.

20. *Barain Sengar v Gurur Cottam, Jute & Paper Mills Co*, AIR 1915 Mad 323; 26 IC 349.

21. *Ramniran Singh v M.R. Malik*, AIR 1939 Nag 225; P.R. 1941 Nag 867; 183 I.C. 248. Where an application was made in December and accepted in August—allotment was held to be too late. See also, *Mangun Victoria Hmt Co v Morley Inc.* (1865) L.R. 1 Ex 109; application in June, allotment in November, held invalid, *Kadru Shiva Amrit Co. Ltd v Purna Dayal Ram Dhan*, AIR 1936 Lah 16; *Indian Coop. Negotiation & Training Co Ltd v Padmasey Preagi*, (1934) 36 Bom LR 32, in both of which allotment was delayed for a whole year and was held void. Now such time has been prescribed under S. 39.

22. See, Ss. 4, 5 and 6, Indian Contract Act, 1872. *Sangram Singh P Gaekwad v Shantadecji P Gaekwad*, (2005) 11 SCC 314; (2005) 123 Com Cas 566. The right to get shares trundles only when the application for shares is accepted by allotment of which information has been given to the applicant. The personal right of a shareholder to be allotted shares is another tale.

23. (1879) L.R. 4 Ex Div 216; 48 I.C. Ex 577; 41 I.C. 299; 27 W.R. 858 (C.A.). According to the Indian Contract Act, 1872 acceptance becomes binding on the offeror, when the letter of acceptance is posted to him so as to be out of power of the accepter [S. 4]. An application may be withdrawn before the letter of allotment is posted and in that case the applicant will not be bound by the allotment. See, *National Savings Bank Asst. m.* (1867) 1 R. 4 Eq 4. Allotment letters are required under Government prescription to be sent to allottees by registered post.

24. *Ramdas v Glassman*, II R. (1910) 42 Bom. 595; *Mutual Bank of India v Sultan Singh*, AIR 1936 Lah 790.

bond even though the company had gone into liquidation before paying any dividend.²⁵

The applicant must promptly reject the allotment when shares have been allotted to him without his condition being fulfilled. An acquiescence on his part would amount to a waiver of the condition. Thus where a shareholder accepted or pledged his shares, he was held to have lost his right to insist on the condition in his application.²⁶

Global depository receipt [S. 41]

A company may pass a special resolution in its general meeting authorising it to issue depository receipts in any foreign country in such manner and subject to such conditions as may be prescribed.

Private placement [S. 42]

A company may make a private placement through issue of offer letters for private placement. Provisions of Section 42 become applicable to such placement. The offer of securities or invitation to subscribe for securities can be made to a number of persons but not exceeding 50 or such higher number as may be prescribed. This number is not to include qualified institutional buyers and employees of the company being offered securities under a scheme of employees stock option as per the provisions of Section 62(1) (b). This can be done in one financial year and on such conditions as may be prescribed which is to include the form and manner of private placement. [S. 42(2)]

The Explanation 1 to sub-section (2) provides that an offer of private placement to more than the prescribed number is deemed to be an offer to the public and is to be governed by the provisions of Chapter 3 [Ss. 23–41] relating to public issues. This will be so whether the company is listed or unlisted, whether payment has been received or not or whether the company intends to go in for enlistment or not in or outside India.

The second Explanation to sub-section (2) states that for the purposes of this sub-section, the expression used in it will have the following meaning: "A qualified institutional buyer" means one as defined in SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2004 as amended from time to time. A "private placement" means any offer of securities or invitation to subscribe for securities to a select group of persons by a company (other than by way of public offer) through issue of a "private placement" offer letter which satisfies the conditions of Section 42.

No fresh offer or invitation is to be made by the company unless allotments under any earlier offer have been completed or that offer has been withdrawn or abandoned. [S. 42(3)]

An offer, etc. which does not comply with the provisions of this section would be treated as a public offer and would have to comply with the

25. *Motilal Chauhan v. Thackeray*, (1912) 14 Bom LR 618.

26. *Harpal Singh v. People's Bank of Northern India Ltd.*, AIR 1935 Lah 691.

requirements of the Securities Contracts (Regulation) Act, 1956 and SEBI Act, 1992.²⁷ [S. 42(4)]

All moneys payable towards subscription have to be paid through cheque or demand draft or other banking channels and not cash. [S. 42(5)] Securities have to be allotted within 60 days of receipt of application money failing which the application money would have to be refunded within 15 days or else 12 per cent interest would become chargeable. The money received on application is to be kept in a separate bank account in a scheduled bank and is to be utilised only for adjustment against allotment of securities or refund. [S. 42(6)]

Offers can be made only to persons whose names are recorded by the company prior to the offer. They should receive the offer by name. A complete record of such offers has to be kept by the company in a prescribed manner. A complete information about an offer has to be filed with the Registrar within a period of 30 days of circulation of the relevant private placement offer letter. [S. 42(7)] A company offering securities under this section is not to release any public advertisements or utilise any media, marketing distribution channels or agents to inform the public about the offer. [S. 42(8)] After making allotments, the company has to file with the Registrar a return of allotment in the prescribed manner, including the complete list of all security holders, with their full names, addresses, number of securities allotted and also any other prescribed information. [S. 42(9)]

Consequences of default [S. 42(10)].—Any contravention of the section would make the company, its promoters and directors liable to a penalty which may extend to the amount involved in the offer, or two crore rupees whichever is higher. The company has also to refund all monies to subscribers within a period of 30 days of the order imposing the penalty.

Numbering of shares

Every share in a company has to be distinguished by its distinctive number. The proviso to this declaration says that this section is not to apply to a share held by a person whose name is entered as a holder of beneficial interest in a share on the records of a depository.

Certificate of shares [S. 46]

An allottee of shares is entitled to have from the company a document, called share certificate, certifying that he is the holder of the specified number of shares in the company. Accordingly, every company making an allotment of shares or debentures or debenture-stock is obliged to deliver to the allottee a certificate of shares, etc, within two months after the allotment.²⁸

27. *Sahara India Real Estate Corp. Ltd v. SEBI*, (2012) 1 SCC L: (2012) 124 Comp Cas 154, listing becomes obligatory. Consequence of default is avoidance of allotment and refund to allottees at 15 per cent interest.

28. The section is not applicable to issue of bonds. MTNL, re, (1993) 3 Comp L 239 (CLB). The requirement prescribed by the Department for uniform size certificates has been withdrawn. The prescription was under the Companies (Issue of Share Certificate) Rules, 1960.

The delivery must be effected in accordance with Section 20 of the Act. The burden of proof is on the company to show that share certificates have been despatched.²⁹

A consequential amendment to the section introduced by the Depositories Act, 1996 provides that where shares are dealt with in a depository, the company has to intimate the details of the allotment to the depository immediately on such allotment. Shares in a depository record would not have to be given their distinctive numbers.

The right of an allottee to get his certificate cannot be defeated by pulling up the right of lien for any dues owed by the allottee to the company. Lien is not exercisable against the responsibility to issue certificates to allottees.³⁰

A complaint was allowed to be filed at a place other than the company's registered office. The court was of the view that the trade in securities was taking place throughout the country and that trade would be defeated if a complaint could be filed only at one place.³¹ The Supreme Court has laid down that a complaint would lie only at the place of the company's registered office.³² The jurisdiction under the section allows only the recovery of share certificates and not compensation for any losses caused by the delay in getting the certificate.³³

29. *Gurdip Chemicals Ltd v Fortinet Bio-Tech Ltd*, (2005) 126 Comp Cas 275 (CLB), the company did not produce any conclusive proof of despatch, hence, in default. This is a positive duty of the company to deliver. *Sri. PNB Mutual Fund v MS Shoes East Ltd*, (1998) 16 SCL 427 (CLB), the company directed to deliver debenture certificates.
30. *Trisakti Irum v Osewal Agro Mills Ltd*, (1996) 86 Comp Cas 46 (CLB).
31. *Runcay Laboratories Ltd v India Kali*, (1997) 96 Comp Cas 368 (Raj). The company had failed to register a debenture transfer and to issue new certificate. The issue of process against the company and defaulting directors was upheld. *Hindustan Development Corps Ltd v Knabul Chaudhary*, (1998) 29 CLA 222; (1998) 1 Comp LJ 110 (Raj). The mere fact that the company has appointed transfer agents and authorised them to carry out the transfer work does not give immunity to the company from its responsibility. The company, its transfer agents, directors and other officers were allowed to go in for compensating. *Hemalata (Inventor) Ltd v Renu Jain*, (1998) 92 Comp Cas 841; (1995) 4 Comp LJ 45 (Raj); *Reliance Industries Ltd*, re, (1997) 89 Comp Cas 67.
32. *HIV/Avian v ICICI Ltd*, (2003) 25 SCC 202 (2000) 99 Comp Cas 341. Followed in *Xia Telelinks Ltd v State of AP*, (2002) 110 Comp Cas 681 (AP), which followed another Supreme Court decision to the same effect in *Sugram (HIV) v ICICI*, (2000) 7 SCC 202; (2002) 99 Comp Cas 341. *Hari Kumar Raju v Aslak R Thakore*, (2004) 51 SCL 736 (Mad).
33. *Hari Kumar Agarwal v Punjab Communications Ltd*, (1969) 28 CLA 249 (CLB). *Hindustan Development Corps Ltd v Kushal Chaudhary*, (1998) 29 CLA 222; (1998) 1 Comp LJ 110 (Raj). The Special Magistrate (Economic Offences) at Jaipur was held to have jurisdiction to entertain a complaint against a Calcutta based company. The complainant purchased debentures in the open market and applied to the company to register him as a debenture holder. The company failed to do so within the statutory period. *Naturlul A Juri v NIN [m]*, (1998) 29 CLA 415 (Guj). The substitution of the word 'CLB' for 'court' in 2000 had not taken away the jurisdiction of the court to entertain complaints for violation of S. 113 of 1956 Act. Prosecution for an offence under the section can be launched before a Magistrate and not before the CLB. *Nestle India Ltd v State*, (1999) 1 Comp LJ 346 (Del), the transferee is an aggrieved person for the purposes of a complaint, the period of limitation commences from the date of the commission of the offence, namely failure to deliver in time. The Supreme Court held in *Registrar of Companies v Bajajree Sugar & Chemicals Ltd*, (2000) 6 SCC 183; (2000) 101 Comp Cas 271 that the Registrar is an aggrieved person

Object and effect of share certificate [S. 46]

Section 46 speaks in plain language of the object of a share certificate, "A share certificate under the common seal of the company, specifying any shares held by any member, shall be *prima facie* evidence of the title of the member to such shares." Thus, the share certificate being *prima facie* evidence of title, it gives the shareholder the facility of dealing more easily with his shares in the market. It enables him to sell his shares by showing at once a marketable title.³²

1. Estoppel as to title.—A share certificate once issued binds the company in two ways. In the first place, "it is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company."³³ In other words, the company is estopped from denying his title to the shares.

Suppose A, by practising fraud on a company, obtains a share certificate in his name as the holder of some shares. He then sells them in the market. B, purchasing them in good faith applied to the company to have the shares registered in his name. The company, having discovered the fraud, refuses. The company must compensate B for the loss he has sustained by acting on the faith of the share certificate. The measure of damages would be the market price of the shares at that time.

In a case of this kind,³⁴

The plaintiff applied for 300 shares in a company. A clerk in the company who owned no shares executed a transfer in favour of the plaintiff. The company without requiring the clerk to produce his certificate registered the transfer and issued a new certificate to the plaintiff. The company was held liable to the plaintiff in damages.

within the meaning of S. 11(2) [BSC Act] and, therefore, competent to file a complaint. Followed in *Indian Petro Chemicals Corp. Ltd v State of Rajasthan*, (2001) 104 Comp Cas 285 (Raj). *Dhirubhai H. Ambani v Sania Sethi*, (2003) 106 Comp Cas 486 (MP), notice issued to the vice-president of the company, he was bound to honour the court summons and was not allowed to say that he had nothing to do with the offence. *State of Maharashtra v Raymond Woolen Mills Ltd*, (2002) 131 Comp Cas 847 (Bom), a complaint against delay in delivering certificates which was filed out of time without application for condonation of delay was not allowed to be entertained. *Gardino Finisterrae Kukutya v Eastern Mining & Allied Industries Ltd*, (2004) 121 Comp Cas 762 (Calcutta), three years period of limitation is available under Art. 42, Limitation Act, 1963; *Saraben Niranjanlal Shah v Asian Food Products Ltd*, (2006) 131 Comp Cas 565 (2004) 5 BOML 1 'K' 260, contempt of court for not complying with the direction of producing share certificates in original or duplicate.

34. It is necessary for this presumption of *prima facie* title to operate that the share certificate must have been issued under the company's seal affixed in accordance with the statutory requirements and the company's articles. *Kelimp Sdn Bhd v Yeoh Kim Leng*, (1991) 1 SCR 415 (Malaysia).

35. It is necessary for this presumption of *prima facie* title to operate that the share certificate must have been issued under the company's seal affixed in accordance with the statutory requirements and the company's articles. *Kelimp Sdn Bhd v Yeoh Kim Leng*, (1991) 1 SCR 415 (Malaysia).

36. *Dixon v Kennaway & Co* (1900) 1 Ch 833; 92 LT 527.

2. Estoppel as to payment. Secondly, if the certificate states that on each of the shares full amount has been paid, the company is estopped, as against a bona fide purchaser of the shares, from alleging that they are not fully paid.³⁷ Thus in *Rheinmetall v Ford*.³⁸

B lent £1,000 to a company on the security of 10,000 shares which were issued to him as fully paid. In fact nothing had been paid on them. In the winding up of the company, it was held that neither the company nor the liquidator could deny that the shares were fully paid and, therefore, B could not be placed on the list of contributors.

Where a person knows that the statements in a certificate are not true, he cannot claim any estoppel against the company.³⁹ But a bona fide transferee from him can claim an estoppel.⁴⁰ Where shares were issued as fully paid and there was no fraud in the transaction on the part of the holder, the company was held to be under an estoppel as to payment and was not allowed to question it after a long period of time during which the holder had obtained loans on the security of the shares from financial institutions which acted in good faith.⁴¹

Duplicate certificate [S. 46(2-5)]

A shareholder is expected to keep his share certificate in safe custody, for he is not entitled to a duplicate unless he shows that the original has been lost or destroyed, or having been defaced or mutilated or torn, is surrendered to the company. In case of loss, a police report has to be registered and a copy of it sent to the company in proof of the fact of loss. In case the shareholder wants that his shares should not be registered in any other name under a transfer, he has to lodge with the company alongwith the report of loss, a notice that shares of the description covered by the notice should not be registered under any transfer. The company is bound to take such notice and act on it.⁴² The articles of the company may further require him to give an indemnity bond. Any other terms and conditions may also be prescribed.⁴³ Where the share certificates were delivered to the holder's

37. *K Md Farooq Ahmed v Fortuni Circuit Electronics (P) Ltd.*, (1998); 92 Comp Cas 498; (1997) 25 CLA 209 (C.I.B.), a company is completely estopped from denying the amount of payment indicated on the share certificate.

38. 1897 AC 156; 26 LT 205 (HL).

39. See *Christianson Co. re (Cricklader case)*, (1975) LR 10 Ch App 516; 46 LJ Ch 470.

40. *Stapleford Colliery Co. re*, (1980) 1 LR 14 Ch D 432; 42 LT 891 (CA).

41. *K Md Farooq Ahmed v Fortuni Circuit Electronics (P) Ltd.*, (1998); 92 Comp Cas 498; (1997) 25 CLA 209 (C.I.B.).

42. *Unitech Infra v Gridhar Gopal Sharma*, (2013); 177 Comp Cas 756; affirming (2010) 160 Comp Cas 476.

43. Before passing a mandatory injunction against the company for issuing duplicates, the court should insist upon some proof of the title of the claimant to the shares. *S Sudhir Kumar Patel v P G Companies*, AIR 1985 Mad 199; (1987) 62 Comp Cas 410. Precautions necessary for ascertaining whether the original has been lost must be observed. It could not be said that the original was lost when the company was supposed to know that it was under pledge. The purpose of the provision is to safeguard the market from fraudulent dealings in duplicates. *Intesir Investments Ltd v Cancom Wireless Ltd.*, (1996) 87 Comp

husband but because of matrimonial differences they could not reach her, the Company Law Board (CLB) ordered issue of duplicate certificates.⁴³ A civil suit lies for determining ownership of shares and for an order of issue of duplicate share certificates. Civil court jurisdiction becomes barred only in respect of matters for which special jurisdiction has been constituted under the Act.⁴⁴ The CLB had no power under Section 113 of the 1956 Act, to give directions for issue of duplicate certificates. The remedy lay under Rule 4(3), Companies (Issue of Share Certificates) Rules, 1960. The CLB advised the petitioner to approach the company in accordance with the rules.⁴⁵

TRANSFER OF SHARES

"When joint stock companies were established, the great object was that the shares should be capable of being easily transferred."⁴⁶ Accordingly, by Section 44, Companies Act, 2013 it is provided that the shares or debentures or other interest of a member in a company shall be moveable property capable of being transferred in the manner provided by the articles of the company.⁴⁷ "The regulations of the company may impose fetters upon the right of transfer. But in the absence of restrictions in the articles the share holder has by virtue of the statute the right to transfer his shares without the consent of anybody to any transferee, even though he be a man of straw, provided it is a *bona fide* transaction in the sense that it is an out and out disposal of the property without retaining any interest in the shares."⁴⁸ A

Cas 361 (CLB). Affirmed in *Sinc Specialties Ltd v Bharatlu Investments Ltd*, (1997) 89 Comp Cas 471 (Mad). The offence committed by directors in issuing duplicates without precautions was compounded in *Reliance Industries Ltd. v.* (1997) 89 Comp Cas 87. *Inter Sales v. Reliance Industries Ltd.* (2002) 108 Comp Cas 690; (1998) 1 Comp LJ 531 (Cal); the matters connected with issue of duplicate securities are not within the jurisdiction of company courts. Companies (Issue of Share Certificates) Rules, 1960, Rule 4(3) is not mandatory. *Kavishwarlaudia Mandal Kolap v. State of Gujarat*, [1998] 2 Guj LR 1222, S. 197 IPC would be attracted if the false share certificate would be admissible in evidence without proof. *Suryakant Gupta v. Rajkumar Corn Products (Punjab) Ltd.* (2002) 108 Comp Cas 133 (CLB). In the case of a closely held company, a sentimental stand was taken that shares had been despatched to all members. The company was directed to issue duplicates.

44. *Sujata Khemlani v. Utkalshree Textiles Ltd.* (2006) 133 Comp Cas 943 (CILR).

45. *Inter Sales v. Reliance Industries Ltd.* (2002) 108 Comp Cas 690; (1998) 1 Comp LJ 531 (Cal).

46. *Ajit Jayantilal Sheth v. Shriram Transport Finance Co. Ltd.* (2006) 133 Comp Cas 604 (CILR).

47. *Black & Decker Ltd. v. Bhabhi & San Francisco Railway Co. Ltd.* v. (1868) L.R. 3 QB 584; 18 LT 467, 595.

48. The requirements of the articles must be satisfied. Where the articles required that transfer fee and the share certificates must be deposited in the office, court did not compel the company to register a transfer which did not satisfy the requirements and held that depositing them in the court would not do. *Malehar and Pionner Hosiery (P) Ltd. v.* (1995) 57 Comp Cas 570 (Ker); *PV Chendran v. Mainkar & Pioneer Hosiery Mill Ltd.* (1990) 69 Comp Cas 164 (Ker). Followed in *Muthukumaran Printing and Publishing Ltd v. Vaidikaiva Publishers Ltd.* (1992) 73 Comp Cas 86; (1992) 1 Comp LJ 234 (Ker); *Rahela Rao v. Balaji Fabricators (P) Ltd.* (2004) 122 Comp Cas 804 (CLB); the articles required transfer only to a person approved by the Board, transfer without such approval was not possible.

49. *Burner J. in Delverine v. Broadhurst*; (1901) 1 Ch 224, 258; 141 LT 342. Disinvestment of shares by the Government in a public sector company, no interference; employees had no right to demand any percentage, prior to employees, no interference; the court directed

transfer made with the avowed object of escaping liability was held to be valid in *Discoverers Finance Corp Ltd, re*⁵⁰

A holder of partly paid shares, being alienated at the precarious condition of the company and with a view to escape liability on the shares, sold his shares, to a purchaser in Germany for nominal price, which he never received. The transfers were duly lodged and passed by the Board of directors. It was held that, in the absence of any collusion between him and the directors, the transfers were effective.⁵¹

Restrictions on transfer (private companies) [S. 58(1)]

It is open to a company to restrict the right of its members to transfer their shares.⁵² The articles of a private company as against those of a public company contain more rigorous restrictions on the right of its members to transfer shares. This is so because "private companies are (no doubt) in law separate entities just as much as are public companies, but from the business and personal point of view they are much more analogous to partnerships than to public corporations". Accordingly, it is to be expected that in the articles of such a company the control of the directors over the members may be very strict indeed.⁵³ Moreover, the Act itself requires a private company to impose some restrictions on the right of transfer. [S. 2(6B)] Articles requiring that on the insolvency of a member his shares would be transferred at a fair value to a nominee of the directors⁵⁴ or that on the death of a member his shares must be offered to the other members have been held to be valid.⁵⁵ Articles providing that shares can be transferred to outsiders only if no existing members accept them at face value, are called pre-emption

the Government to devise a scheme for effective worker participation in its disinvestment. *Ruba Mathew v Union of India*, (1997) 90 Comp Cas 455 (Kan).

50 (1919) 1 C.I. 219. *Harmash v Knight*, (2002) 2 B.C.L.C. 464 (Ch D), a transfer of shares by directors was subject to the condition that the purchaser would see to it that the directors paid loans to the company. The transfer was held to be valid and the condition ineffective against the purchaser to make them liable in the manner of a guarantee.

51. See, *Mamisic Commercial Ltd v NR Deshp*, AIR 2000 Del 75; (2000) 101 Comp Cas 106, the Court refused to stay transfer of shares inspite of the allegation that they were a part of a long time trust and were, not transferable. The beneficiary of the trust was seeking transfer in his own name.

52 There is no inherent power of rejection. It would have to be acceded by provisions in the company's constitutional documents. *Luzmi Tea Co Ltd v P.K. Sarbar*, 1989 Supp (2) SCC 656; (1989) 3 Comp LJ 285, 286. The power of refusal based on the company's articles (for not accepting odd lot shares) as required also under the listing agreement was held to be not questionable. *Dipak Kumar Jayanti Shah v Airtel Products Ltd*, (1995) 82 Comp Cas 603 (G.LB) not approved in *Airtel Products Ltd v Dipak Kumar Jayanti Lal Suri*, (1997) 88 Comp Cas 876 (Guj).

53. *Lord Gernet M.R. in Smith and French Ltd, re*, (1942) Ch 304, 306 (CA); *S. Bhansali & v ACI Algo Chemical Industries Ltd*, (2004) 51 SCJ 156 (Mad), transfer in violation of a provision in the articles that the transferring member should inform the directors who would offer the shares to other members proportionately. The transfer not valid, *Maharashtra Power Development Corp Ltd v Dholal Power Co*, (2005) 4 Comp LJ 50 (Bom).

54. *Burford's Trustee v Steel Bros & Co Ltd*, (1901) 1 C.B. 279.

55. *Jamie Morris (Harrow) Ltd v Cavill*, (1964) 1 W.L.R. 101, though at the particular moment there was only one other shareholder in the company.



clauses. Such a clause does not authorise the directors to refuse to register a transfer so long as it is made to an existing member only.⁵⁶ Where no existing member accepts the proposal, transfer in favour of an outsider should be allowed.⁵⁷ Articles may contain a clause that the other members will be bound to take shares so offered.⁵⁸ The question is in what manner the directors shall exercise this power and to what extent the Tribunal can interfere in its exercise. Some of the principles were laid down in *Smith and Eboratt Ltd.*, *n.*⁵⁹

A clause in the articles of a private company provided: "The directors may at any time in their absolute and uncontrolled discretion refuse to register any transfer of shares." The issued capital of the company consisted of 8002 shares of which the two directors of the company S and F held 4001 each. F died and his son applied to have the shares registered in his name. But S, in the exercise of the above power, refused to consent to the registration. He, however, offered to accept the applicant upto 2001 shares, provided the remaining were sold to him at a fixed price. The plaintiff brought an action contending that S's refusal to register the transfer was on a wrong principle since it was not made for the benefit of the company but was rather to preserve his own dominating position.

It was held that the court would not be justified in interfering in the discretion of the directors. "The directors must exercise their discretion *bona fide* in what they consider—not what a court may consider—is in the interest of the company." And if they have done that, the court cannot substitute its judgment for theirs.⁶⁰

Judicial or quasi-judicial interference in transfer matters

In the following circumstances, however, there can be judicial or quasi-judicial intervention:

1. *Mala fide*.—Where it is proved that the directors have not exercised their power of refusal in good faith for the benefit of the company. The power of declining

56. *Delvenne v. Brookhurst*, (1931) 1 Ch 234; 141 LT 342.

57. *Ocean Coal Co. Ltd. v. Purnell Duffry & Stein Coal Co.*, [1932] 1 Ch 654.

58. See, *Keyfield v. Hanks*, 1960 Ch 1 (1961) 2 WLR 651.

59. 1942 Ch 304 (CA). The principles laid down in this case were cited with approval by the Nagpur High Court in *Buljajpur Traders Cr. Ltd. v. YH Deshpande*, AIR 1956 Nag 26, where the court refused to interfere with the director's discretion. See also, the decision of the Supreme Court in *Hirnagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala*, AIR 1961 SC 1669 (1961) 31 Comp Cas 387, where all the implications of the power of authoritative interference were elaborately explained.

60. Similar sentiments were expressed in *IRB v. Phoenix Property and Investment Co. Ltd.*, 1994 BCAC 399, (2002) CA, non-interference if the directors' decision was such that a reasonable Board could honestly believe it to be in the interest of the company. *Xumer Joseph v. Industrial Board I.P. Ltd.*, (2002) 110 Comp Cas 706 (C.I.B.), transmission in the case of a closely held company in favour of the son of a deceased member not allowed because he could have caused disarray. The directors were required to purchase his shares. *Kulvinder Chandok v. Eastern Linkers*, (P) 124, (1997) 35 DR 312; (2001) 103 Comp Cas 997, the High Court decided and the Supreme Court affirmed that the applicant had no title to the shares in question, an application for permission for transfer when the company was in winding up was not allowed.

a transfer is vested in the Board of directors for the purpose of protecting the interests of the company. Hence their refusal must appear to have proceeded out of an honest desire to benefit the company. A *mala fide* refusal to register a transfer will not be sustained.⁶¹ It has to be decided whether in exercising their power, the directors are acting oppressively, capriciously or corruptly, or in some way *mala fide*.⁶²

2. Inadequacy of reasons.—The practice with the courts was not to ask the directors to supply reasons for their refusal to pass a transfer.⁶³ But, if they voluntarily disclosed their reasons, the court had the power to look into them and if they did not seem to be sufficient to justify their decision the court might set it aside.⁶⁴ By virtue of the amendment of 1988 of the 1956 Act it had become compulsory to disclose such reasons. Section 58(1) of the Act of 2013 requires refusal to be communicated within 30 days giving reasons for it. This gives an opportunity to the Tribunal to examine the relevancy of the reasons and proceed accordingly as the reasons are adequate or inadequate to support the directors' decision.

3. Irrelevant considerations.—“The directors (in refusing a transfer) must have regard to those considerations and those only, which the articles on their true construction permit them to take into consideration.”⁶⁵

61. *Gresham Life Assurance Society, re, ex p Hulgeri*, (1872) L.R. 5 Ch. App. 446, 452; 28 LT 150; 601 *Bom. Ld. n. 21 p Hulgeri*, (1891) 45 LT 245; 7 T.L.R. 464. Refusal on the ground that it was necessary to protect the interest of directors is not good, their interest is not equal to that of company as on the ground that there was no consideration for transfer. *Jyoti Bhawan Champaikali Parikh v Dwaran Pappi Mills Co. Ltd.*, (1994) 14 Comp Cas 159 (CLB). A refusal on the ground that the transferee was a member of a company which was heavily indebted to the company and that transfer of 4 per cent shares would prejudicially affect the balance of power in the company was not accepted. *Vijaya Commercial Credit Co. Ltd v TK Aher*, (1994) 29 Comp Cas 656 (CLB). As against this an application for 6.81 per cent shares was held to be justifiably refused because it was likely to prejudicially change the composition of the Board of directors. *Gordon Weymouth Ltd v Thakur Jitendraji & Purulia Services (P) Ltd*, (1994) 29 Comp Cas 764. (1993) 1 Comp LJ 313 (CLB). Where, the changes apprehended in the Board of Directors had already taken place, refusal on that ground was held to be not good. *Patel Engg Co Ltd v Patel Brothers (P) Ltd*, (1992) 24 Comp Cas 446 (CLB). These decisions were under S. 22-A, Securities Contracts (Regulation) Act, 1956. The role of CLB under that Act was explained in *Guinnow Indiv Ltd v Hongkong Bank Agency (P) Ltd*, (1992) 24 Comp Cas 123. (1992) 1 Comp LJ 279 (CLB).
62. *Sarkar v Herinagar Sugar Mills Ltd v Shyam Sunder Jain, Jamshedpur*, AIR 1961 SC 1669, 1675; (1963) 51 Comp Cas 397. See also, *Indian Chemical Products Ltd v State of Orissa*, (1966) 2 Comp LJ 303; (1966) 36 Comp Cas 542.
63. *Matthew Michael v Techug Rubbers (India) Ltd*, (1983) 54 Comp Cas 88 (Ker), the directors had disclosed no reasons and the court expressed its helplessness in the matter.
64. *Matthew Michael v Techug Rubbers (India) Ltd*, (1983) 54 Comp Cas 88 Ker, the directors had disclosed no reasons and the court expressed its helplessness in the matter. See also, *Rajni Auna Ltd v N K Firdose*, (1971) 2 SCC 550; (1971) 41 Comp Cas 1.
65. *Ladd Gazzet M/s in Simha and Everett Ltd, re*, [1942] Ch. 301, 306 (CA). Refusal on frivolous grounds is not sustainable. *Welling-Binton and Sons Co Ltd v Sewa Singh*, (1992) 1 Comp LJ 320 (Cal). DCA is of the same view. Circular No. 3 of 1992, 22/3/1992. *Standard Chartered Bank v Housing and Urban Development Corp. Ltd*, (1996) 75 C.L.A. 64 (S.L.B.), no empowerment in articles for refusing registration of transfer at the company's bands, innocent buyer cannot be prejudiced by private agreements. *Housing and Urban Development Corp. Ltd v Standard Chartered Bank*, (1996) 23 C.L.A. 199 (Del), restrictions imposed by

A refusal based on extraneous considerations will be wrong.⁶⁴ The directors have to specify the grounds on which they have declined a transfer.⁶⁵ Refusal by directors on the ground of inadequacy of consideration was held to be not proper.⁶⁶

Thus, where the directors were empowered to refuse to register a transferee if it was not in the interest of the company that he should be a member, it was held that a refusal on the ground that the shares were transferred singly or in small amounts and to persons who had no interest in shipping was unjustified.⁶⁷ In another case,⁶⁸ the directors had the power to refuse a transfer of partly paid shares to a person of whom they would not approve. In the exercise of this power they rejected a transfer of fully paid shares on the ground that the transferee had bought them, not so much for investment, as for the purpose of acquiring control of the company. This was held to be unwarranted by the articles. Where the directors of a private company refused to accept a transfer in favour of a company whereas they had power to exclude only undesirable persons, the Calcutta High Court⁶⁹ held that such blanket ban on admission of companies was beyond their authority. The court pointed out: "Approval of the transferee means approval of the transferee personally as distinguished from laying down a general rule that no corporate body would be allowed to join the company as a shareholder."⁷⁰

Strict construction of restrictions. — "In construing the relevant provisions in the articles it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases, and this right is not to be cut down by uncertain language or doubtful implications."⁷¹ "Any limitation on the right of transfer must be strictly complied with."⁷² Moreover, "the directors must exercise their right to decline registration only by passing a resolution to that effect; mere failure, due to a deadlock or something, to pass a resolution is not a

64. the Controller of Capital Issues were meant to be observed by the company and not by all others. *Vikram Langhaar Knapsackenfabrik A/B v Mongardshammar* (Sweden) Ltd, (1988) 30 CLA 382; (1998) 6 Comp L] 112. (2000) 130 Comp Cas 131 (C.B); private agreements, not incorporated in articles, cannot be used for refusing transfers.

65. *Nabulal Chokharia v Wilson India Theatres Ltd.* (U.S.) 26 Comp Cas 565; AIR 1967 Cal 700. A refusal on the ground of an agreement between members not contained in the company's article was held to be wrong. *VP Ranganji v V.P. Gopinathkumar*, (1992) 1 SCC 160. (1992) 75 Comp Cas 281. (1993) 1 Comp LJ 11.

66. *Coimbatore Kannai Mills Ltd v T Sundaram*, (1950) 1 MLJ 808; (1950) 20 Comp Cas 61. There is now adverse presumption if they do not do so. *EM Maridav Cherur v Salem Rajendra Mills*, (1988) 25 Comp Cas 283.

67. *Vikas Jalan v Hyderabad Industries Ltd.* (1997) 88 Comp Cas 551 (CLB).

68. *Bene Sirum Shipping Co Ltd v. m.* (1917) 1 Ch 723, 115 I.T. 500, 33 TLR 13 (CA).

70. *Indiavari Cinema Co Ltd v Premlata Nath Mukherjee*, (1971) 41 Comp Cas 679 (Del). See also, *South Indian Bank Ltd v Joseph Michael*, (1978) 48 Comp Cas 368 (Ber).

71. *Master Silk Mills (P) Ltd v D/L Mehta*, (1980) 30 Com Cas 363 (Guj).

72. *See further, V.S. Ramnani v Oster Estates Ltd.* (1989) 3 Comp L] 355, 359 (C.B), where a transfer was rejected on the ground that the transferee was the nominee of another person who was an undesirable person, and the same was held to be not proper.

73. *Lord GREENE MR in Smith and Fallech Ltd. re*, (1942) Ch 304, 306 (CA).

74. *Pannicuick Jr. v Smedale Cleaners Ltd. re*, (1968) 1 WLR 1710 (C.A).

formal active exercise of the right to decline, and therefore the applicant will be entitled to be registered as a member of the company".⁷⁵ Thus, for example, in *Moudie v W&J Shepherd Ltd*,⁷⁶

The directors failed to agree to an application for transfer; one in favour of granting it and the other refused to do so. It was held that the transfer had not been declined and, therefore, the applicant must be registered.

Further, "the power must be exercised within a reasonable time; four months is not a reasonable time". "The period of two months specified in Section 78 of the (English) Companies Act" [at that time] could safely be taken as the outside limit after which there is unnecessary delay. By reason of such delay the power ceases to be capable of being exercised."⁷⁷ Similarly, where the directors have the power to veto a transfer they will lose it if it is not exercised within the prescribed time after a transfer application is lodged.⁷⁸

Under the articles of a private company no transfer was possible without the previous sanction of the Board of directors. It was held that this would require a written resolution for sanctioning a proposed transfer.⁷⁹

Scope of interference where power unfettered.—Where, however, the directors have an unfettered discretion, it is difficult for the Tribunal to interfere.⁸⁰ The Tribunal has to presume, unless the contrary is shown, good faith on the part of the directors. The directors have to disclose their reasons. The first decision on the adequacy of such reasons has to be that of the Tribunal under the section. If subsequently the matter is taken to the court, it can also pronounce upon the adequacy of the reasons. Earlier to the amendment of 1986, [1956 Act] disclosure of reasons was not compulsory. The rejected transferee had to make an application to the Central Government under Section 111 as it then stood and the Government had the power to demand

75. *Moudie v W&J Shepherd Ltd*, (1949) 2 All ER 1044 (H.L.).

76. *Ibid.* See also, *Ramchand Chandra v Jagmohi Malwa*, L.R. (1920) 47 Cal 901 and *TAK Mahineen Pichai Tongvong v Thammavong Mills Co. Ltd*, A.R. (1928) Mad 521; *Rahul Chankhui v Western India (Bomra) Ltd*, (1928) 28 Comp Cas 515; A.R. 1957 Cal 709.

77. The Present Act of 2013 Act permits one month period.

78. Following, *Jaini Sharif Discount Co. Ltd*, (1996) L.R. 3 Eq 77, the Madras High Court in *MG Amirthalingam v Giuligartham Textiles (P) Ltd*, (1972) 42 Comp Cas 350, upheld a rejection notified after two and a half months.

79. *Sealedair (Grenada) Ltd v. m*, (1968) 1 WLR 1710; (1968) 1 WLR 1710 (CA).

80. *John Tinison & Co (P) Ltd v Surjeet Minnow*, (1997) 9 SCC 651; (1997) 28 Comp Cas 730; a transfer without any such approval was held to be void.

81. In the case of a public company, listed or otherwise, an absolute power of refusal does not give the directors an unfettered discretion to refuse. The power would have to be exercised in good faith in the interest of the company. *Mathrubhumi Printing and Publishing Ltd v Varklinian Publishers Ltd*, (1992) 73 Comp Cas 80; (1992) 1 Comp L.J. 234 (Ker). A company listed at a recognised stock exchange was fully authorised to reject a transfer which fell in the four point formula of S. 22-A, Securities (Contractual Regulation) Act, 1956, *Bapuji Tissue Ltd v Bapuji Auto Ltd*, (2004) 811 Comp Cas 616 (CLB). But only this section has been omitted. The only surviving power of rejection is to be found in the provisions of the Act. There cannot be a contrary provision in the articles.

a disclosure of the reasons at the pain of adverse presumption. This course proved useful to the transferee in *Bajaj Auto Ltd v N K Firodia*.⁸²

The shareholders of a company were divided into two groups. Both bought shares in the open market at exaggerated prices. The purchases effected by the controlling group were registered. Some instalments of the opposite block were also registered, but the rest were suddenly refused. The directors had the unfettered discretion to do so.

Rejected transferees applied to the Central Government under Section 111. The Government demarcated reasons. The directors disclosed that they were prompted by the report of the opposite group to the Central Government that the appointment of managing agents was renewed without proper formalities; that if all the purchases were registered it would reduce the majority of the controlling block to less than three-fourth and thus jeopardise the functioning of the company. But both the Government, and on appeal, the Supreme Court, regarded these reasons as absolutely irrelevant to the consideration of the company's best interests. The report was not only in the interest of the company but also in public interest. Any reduction in the strength of the majority cannot by itself mean that the company's business would be paralysed.

Thus, it appears that the function of approving or rejecting a transfer is no longer a private affair. However widely drafted the power of rejection may be, its exercise would now have to be justified on objective reasons. This has been re-emphasised by the Supreme Court in *LIC v Escorts I.td*⁸³ because "discretion implies just and proper consideration of the proposal in the facts and circumstances of the case". The directors refused to register a bulk purchase of shares by a group of foreign companies all operated by a non-resident Indian under a family trust. The directors contended that if the purchases ostensibly effected in the name of 13 companies were regarded as a one-man affair, the ceilings prescribed by the rules under the Foreign Exchange Regulation Act, 1973 [now FEMA] would be violated and further the purchases were effected without the permission of the Reserve Bank. The permission was, however, retrospectively granted. The court advised the directors that they had no right to sit in judgment over the decision of the Reserve Bank or of the Central Government as to retrospective permissions. The FEMA did not insist upon prior permission. The court would not lift the corporate veil in this case to see whether all the companies were under the control of one man.⁸⁴

82. (1970) 2 SCC 550; (1971) 41 Comp Cas 1. See also, *Yunker Morrison & Co Ltd v Shulman Jit Prakash* (1935); 142, (1980) 50 Comp Cas 296 (Cal). transfer passed in haste. *K Radhakrishna Reddy v Alliance Business School*, (2016) 195 Comp Cas 394 (CLB). allegations of forgery and fabrication of records, complicated issues involved need detailed examination including forensic examination of signatures in the documents. To be decided by civil court.

83. (1986) 190C 264, 226; (1986) 1 Comp L 91 SC. (1986) 59 Comp Cas 546.

84. See further, *Bajaj Tempo Ltd v Unit Trust of India*, (1992) 29 Comp Cas 451 (CLB); the directors' decision to refuse was based on the apprehension that the transferee company



CASE PILOT

Directors were not allowed to reject a duly executed transfer only on the ground that there was a family dispute between the transferor and his son,⁶⁵ or on the ground that the share certificate submitted along with the instrument of transfer was of greater number of shares than those transferred.⁶⁶

Transfers contravening pre-emptive clauses.—A company can reject a transfer contravening the provisions of the company's articles,⁶⁷ but the company can waive its right and accept a contravening transfer and once it does so, it loses the right to question the validity of the transfer. Hence, a transfer contravening articles is not a nullity,⁶⁸ nor void *ab initio*.⁶⁹ A transfer in violation of pre-emptive provision can be set right by subsequent assent of shareholders or by ratification or even by acquiescence.⁷⁰ Further, as between transferor and transferee, the latter does become an equitable owner of the shares and this despite the fact that no specific enforcement can be had against the company because of the contravention of pre-emptive or other provisions.⁷¹ The purchaser is not totally without remedies. The seller is accountable to him for all accretions to the shares, such as bonus and dividend.⁷² What has been described as "the most explicit authority" is *Tett v Phoenix Property and Investment Co Ltd*⁷³ (*Tett*) where VINELOTT J "held that despite the disregard of the pre-emptive provisions there had occurred a complete and effective transfer between transferor and transferee in terms of which the equitable title passed to the latter".⁷⁴ In this case, the shares in question were sold to an outsider and a transfer deed executed in his favour completely forgetting the pre-emptive clauses. Some shareholders were interested in acquiring the shares but not at a price which *Tett* was prepared

would, by reason of its inter-connections, become a monopolistic undertaking was not upheld by the CLB.

65. *MM Annadurai v Mysore Lathika Sutti & Sons (P) Ltd.*, (1985) 53 Comp Cas 162 (Kant).

66. *Kumar Exporters (P) Ltd v Neini Oxygen Acetylene and Gas Ltd.*, (1985) 58 Comp Cas 97 (AI). A transferee was not allowed to question the validity of an article empowering directors to decline a transfer of fully paid shares replacing the old article which permitted refusal of only partly paid shares. *Joseph Markari v Transonic Rubber & Tex Co Ltd.*, (1986) 59 Comp Cas 398 (Ker).

67. See, *Satyendra and Rukhi v Anumuluru Tetrafris (P) Ltd.*, (1989) 85 Comp Cas 286 (CLB), a transfer in violation of pre-emptive clauses.

68. See the old case of *Sherriffge v Beaumont*, (1852) 16 Beav 97; 51 ER 706.

69. See, *Hawker v Hunter*, 1936 AC 222 EH, 264; *Coupe v JM Coupe Publishing Ltd.*, (1981) 1 NZLR 275 (CA) and *Tett v Phoenix Property and Investment Co Ltd.*, 1984 10 CLC 749 (CA).

70. See, *Hawker v Hunter*, 1936 AC 222 EH, 264; *Coupe v JM Coupe Publishing Ltd.*, (1981) 1 NZLR 275 CA and *Tett v Phoenix Property and Investment Co Ltd.*, 1984 10 CLC 749. A member cannot be denied his proportion under pre-emptive rights out of the shares offered by another member even if there was some irregularity in observing the company's articles which was rectifiable. *Lakshmi Narayan v Bharat Publications Ltd.*, (1992) 26 CLA 96 (CH).

71. *Pool v Middlesex*, (1961) 29 B&R 546; 54 ECR 776; *Miror International Ltd v Gurd*, 1983 10 CLC 249.

72. *Chinchani Ltd v SVP Fruit Co Ltd.*, (1979) 1 ACLR 658.

73. 1984 10 CLC 599.

74. As summarised by A. Burrowdale, "The Effect of Breach of Share Transfer Restrictions" (1988) 18L 307; *Hawks v McAllister*, (1951) 1 All ER 22 and *Chinn v Collins*, 1981 AC 593 (1981) 2 WLR 1d (HL), both recognising the validity of transfer of beneficial interest without formalities and also *Oj Lai v S Gaiguli*, (1990) 68 Comp Cas 526 Del.

to pay. Even so the Court of Appeal held that the company was not compelled to accept the transfer. The decision has been appreciated. "The privacy of a 'close corporation' is more important than the price offered by an outsider. A different decision would have defeated the intention of the incorporators when they formed the company."⁹⁵ In *Hunter v Hunter*,⁹⁶ shares were mortgaged to a bank. This transaction was viewed as a valid one inspite of the pre-emptive provisions. But the bank having gone to the extent of getting its nominee registered as a holder of those shares, an order was granted for rectification of the register of members by restoring the name of the original shareholder-mortgagor. The bank then transferred the shares to an existing shareholder of the company thus complying with the requirements of the company's articles that the shares could be transferred to existing members only. The original mortgagor's action questioning the validity of the transfer failed.

Where the articles required a member desiring to transfer his shares to inform the company specifying his price and he specified a price which was likely to vary according to certain future events, it was held that the notice had to specify a certain price and the same having not been done, the notice was defective.⁹⁷ The articles of a private company prohibited transfer to non-members. The shares of a member were sold under a court auction. It was held that even such a sale could not knock off the prohibition. The Board of directors were entitled not to accept the transfer.⁹⁸ Section 58(2), proviso, 2013 Act, says that any contract or arrangement between two or more persons in respect of transfer of securities is to be enforceable as a contract.

Right to form an association is a fundamental right. It can be formed on terms and conditions agreed by members. The State has the power to impose restrictions, which must be reasonable. Restrictions on rights of shareholders of private companies on transfer of shares contained in pre-emptive clauses require express legal authority, such restrictions cannot be brought in by inference.⁹⁹

Private agreement between members.—A private agreement between two or more shareholders, which is not incorporated in the company's articles, restricting the right of transfer, does not bind the company. The

95. See the editorial note :r, 1986 JBF 8-9. To the same effect is *Sheria Genuviv Payment v Sakai Papers (P) Ltd.*, (1990) 69 Comp Cas 65 (Bom).

96. 1936 AC 222 HC. The principle of the Hunter case was followed in *Cruckshank Co Ltd v Stridehill Leather (P) Ltd.*, (1995) 17 CLA 415; (1996) 86 Comp Cas 439 (CLB), where transfer of shares to outsiders was registered by the company and CLB ordered rectification of the register of members by retransferring in the original member.

97. *PWE International Ltd v Jones*, (2004) 1 BCAC 406 (CA).

98. *SA Palimannabha Rao v Union Thematics (P) Ltd.*, (2002) 108 Comp Cas 108 (Kant); *Claude-Edie Poulidor v Sakai Papers (P) Ltd.*, (2003) 11 SCC 23; (2003) 124 Comp Cas 605, where no time limit was prescribed in the articles for exercising the right of pre-emption, reasonable time formula was to apply, the directors could not of their own fix a time limit and defeat the right.

99. *Darius Rutton Karmawadee v Ghanda Chemicals Ltd.*, (2015) 14 SCC 227; (2015) 158 Comp Cas 291.



company can be compelled to register a transfer even if it violates such an agreement.¹⁰⁰

Listed public companies and pre-emptive clauses.—Refusal by a listed public company to register a transfer of shares on the ground of pre-emptive rights of existing shareholders was held to be not justified. Where shares of such companies are subject to pre-emptive clauses, they have to carry a warning on the face of the certificate. There being no such warning in the present case, the company had no right to refuse either under any of the statutory provisions.¹⁰¹

Power to refuse registration and appeal against refusal [S. 58(3) to (6)]

Free transferability of shares of public companies [S. 58(2)].—This section specifically declares that securities or other interest of any member in a public company shall be freely transferable. This declaration is followed by the proviso that any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract.

A company refusing to register a transfer on any grounds whatsoever is required by Section 58(1) to send within 30 days a notice of the refusal to both the transferor and the transferee or the person claiming transmission.¹⁰² The company must disclose reasons for such refusal.¹⁰³ The transferor¹⁰⁴ or the transferee can prefer an appeal to the Tribunal against the refusal. The appeal must be lodged within 30 days of either the notice of refusal or where the company has not given any such notice, within 60 days from the date on which the papers were lodged with the company, as the case may be.¹⁰⁵ An opportunity must be afforded to the transferee,

100. *Kiran Lashgir Konjwala et al v Margadhanamur (Idm) Ltd.*, (1998) 30 CLA 382 (1998); 4 Comp LJ 112; (2000) 100 Comp Cas 131 (CLB); *Mafatl Industries Ltd v Gujarat Gas Co Ltd*, (1997) 97 Comp Cas 301; (1998) 4 Comp LJ 112 (Guj); *Industrial Development Bank of India Ltd v Parmeshwar Sheth*, (2000) 105 Comp Cas 1058 (CLB) 199 Comp Cas 309, the section does not cover situation of transfer of shares in violation of private agreement.

101. *Bunni Gupta v Hicks Thermometers Ltd.*, (1999) 98 Comp Cas 814 (CLB).

102. An appeal cannot be filed by a person who is neither a transferor nor a transferee. An appeal by an inter-mediat or in the transaction of sale of shares between the transferor and transferee was not allowed. *Vimal K Patel v Industrial Finance Corp of India Ltd.*, (1999) 3 Comp LJ 215; (2001) 102 Comp Cas 557 (Del); *Vimal K Patel v Industrial Finance Corp of India Ltd.*, (1999) 3 Comp LJ 215; (2001) 103 Comp Cas 557 (Del), a stranger cannot file an appeal.

103. S. 58(1); There is no power to condone delay by a company in accepting or rejecting a transfer of shares. *Girdhar Corp Ltd v A Bhupathi Properties (P) Ltd.*, (1992) 73 Comp Cas 572 (CLB).

104. The "person aggrieved" would include the transferor. *S.V. Nagerajini v Lakshmi Mills Bank Ltd.*, (1997) 90 Comp Cas 392 (CLB). In this case the transferor had forged the transfer documents.

105. An informal refusal is sufficient to invoke the provision. Thus where the directors observed in their resolution that the application forms were defective and one member of the Board personally informed the transferee, that was held to be an informal refusal for purposes of the section. *Narinder Kumar Sehgal v Leader Valves Ltd.*, (1993) 77 Comp Cas 393 (C.B.). Where a company sent the notice of refusal after prolonged correspondence and long delay, it was held that the period of two months (as then applicable) started running from the date of the receipt of the letter. *Pushpa Vadhera v Thomas Cook (Idm) Ltd.*, (1996) 67 Comp Cas 921 (CLB).

transferor and the company to make their representations. [S. 58(5)] If the refusal, on a consideration of the whole case, does not seem to be justified, the Tribunal will issue an order to the company to register the transfer, which must be done within 10 days of the receipt of the order. [S. 58(5)(a)] The nature and scope of the power of the Central Government, which was inherited by the CLB, and now by the Tribunal was explained by the Supreme Court in *Harihar Sugar Mills Ltd v Shyam Sunder Jhunjhunwala*.¹⁰⁴



CARE PLOT

A company having refused to register a transfer, an appeal was preferred before the Central Government. The latter ordered the company to register the transfer but gave no reasons. The company appealed against the Government's order.

It was held that the power of the Central Government (now Tribunal) was of a judicial nature and must be exercised subject to the limitations of a judicial tribunal. "The Central Government has to decide whether in exercising their power the directors are acting oppressively, capriciously, or corruptly, or in some way *mala fide*. The decision has manifestly to stand those objective tests, and has not merely to be founded on the subjective satisfaction of the authority deciding the questions."¹⁰⁵ Hence the CLB had to decide the appeal on the basis of the reasons for refusal as they have been submitted by the company. This was not done in the present case and, therefore, the matter was referred back.¹⁰⁶ The power of directors to refuse to accept a transfer is exercisable whether the transfer is by one member to another or from a member to an outsider.¹⁰⁷

Time for exercising power of refusal [S. 58(1)(3)]

The period prescribed by the section for refusing an application for transfer is that of 30 days. This raises the question whether on the expiry of such period the company loses the right of rejection and the transferee gets a vested right to get himself registered. The section does not speak anything

104 AIR 1961 SC 1569; (1961) 51 Comp Cas 367. See the judgment of Sircar J (afterwards CJ).

105 See the judgment of Sircar J at AIR 1961 SC 1569, 1674-75. Reinforced by the Supreme Court in *Bajaj Auto Ltd v N K Finclit*, (1970) 2 SCC 546; (1971) 41 Comp Cas 1; I.C.C v Escorts Ltd, (1986) 1 SCC 244, 326; (1986) 59 Comp Cas 548; 1 Comp LJ 91. Where reasons were not given, the company should be given an opportunity to state its reasons, if any. *Tulsiyan Tex Co Ltd v Union of India*, 1997 Supp (2) 90 L 36.

106 The Supreme Court advised public financial institutions to keep in mind while considering disinvestment of shares in bulk and transferring them in private hands that such a policy would be against public interest and not congenial to promotion of business. Care should also be taken to see that transferees are proper persons. *M Parhsunday v Controller of Capital of issues*, (1991) 3 SCC 153. An order of the CLB was appealable and, therefore, a writ petition did not lie against the order. *Alimuddin Ajiq & Finance Co (P) Ltd v Company Law Board*, (1995) 83 Comp Cas 511 (Bom).

107 *Kualiti Textiles (Malaysia) Sdn Bhd v Aranckalum Chellai*, (1991) 1 SCR 146 (Malaysia). Though the CLB did not have the power under the section to prevent the company from parting with its estate, the CLB could prescribe its approval for alienation of property where the transferees' shares would become worthless if the property was gone. *Al Coello v South India Tea & Coffee Estates Ltd*, (1996) 93 Comp Cas 401; (1997) 26 C.L.A. 89 (CLB).

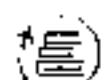
on the point and, if it speaks at all, it only talks of penalty for the default in complying with order of Tribunal. [S. 58(6)] The Bombay High Court, facing this problem, as it seems to be, for the first time, did not agree with the view either that the company would lose the right of rejection or that the transferee would acquire vested right.¹¹⁰ The view reflects truism to this extent that in such a case a court order would be necessary and the court would in any case go by merits. But the position as established through cases is that the disposal must be within reasonable time and that 30 days time allowed by the Act is quite reasonable.¹¹¹ The transferee has silently to sit through this waiting period because he cannot resort to any proceedings till then.¹¹² Even if the transferee does not get any vested right, his position becomes stronger because the belated exercise of the power may not carry much conviction. The penalty incurred by the expiry of the prescribed period cannot be wiped out by subsequently attending to the application. The intention of the legislature seems to be to confer only a time-bound right of rejection. It is a characteristic of such privileges that they lapse with the expiry of time. The legislature means to say that the transfer shall be registered if not rejected within time.¹¹³

Compensation for delay.—A transfer had remained pending for 20 years. During this period the company remained in the hands of rival groups and had also become a public company. For certain periods in between the transferee herself was a part of the management and partly responsible for the delay. She could not get the relief of an order for registering shares in her name and rectifying the register of members accordingly. She was held entitled to compensation for her loss.¹¹⁴ Section 58(3)(b) provides that the Tribunal may direct rectification of the register and also direct the company to pay damages, if any, sustained by any party aggrieved.

Rectification of register of members [S. 59]

If a person's name appears in the register of members, he is presumed to be the shareholder or member, even if, in fact, he is not so. Contrarily, if a person's name is absent from the register, apparently he is not a member, although he may have done everything to entitle him to become one. Injustice may, therefore, result if a company's register of members is not

110. *Shankesh Patelbhai Mehta v. Calico Dyeing and Printing Mills Ltd.* (1993) 67 Comp Cas 533 (Bomb). Affirmed by the Supreme Court in *Shankesh Patelbhai Mehta v. Calico Dyeing & Printing Mills Ltd.* (1994) 3 SCC 328. (1994) 60 Comp Cas 64.
111. *Sensudhi Cleaners Ltd. re.* (1963) 1 WLR 1710 (CA). Following this case in *Pipley v. Pleaserry* (1977) 1 BCLC 8 (Ch D), it was held that it would be enough compliance with the requirement of time if the directors decide the matter within time though they failed to communicate the party of their decision. They may incur personal liability for their failure to the party or the company but there would be no violation of the requirement of time.
112. *Zionry Properties Ltd. re.* (1984) 1 WLR 1249 (ChD).
113. *Hackney Pavilion Ltd. re.* (1924) 1 Ch 276. The Karnataka High Court in *Kommalabai v. Yellu Prasad Co. (P) Ltd.* (1993) 27 Comp Cas 231 (Kant), came to the conclusion that a company which did not reject an application for transmission within two months [then prescribe time] was no longer in a position to do so.
114. *Girade-Lily Purnekar v. Sawai Papers (P) Ltd.* (2005) 11 SCC 73; (2005) 124 Comp Cas 685.



maintained according to law. It is, therefore, the duty of the company to keep the register up to date so as to give at all times the accurate and correct position as to particulars of shareholding. If the company does not do so, an order can be sought from the Tribunal in respect of all matters falling within Section 59. The power to order rectification of the register has, therefore, been conferred on the Tribunal. An aggrieved person or any member or the company itself can apply for rectification on any of the following grounds: [S. 59(1)]

1. Where a person's name has been entered in the register without sufficient cause. Thus rectification has been ordered on this ground where a person was induced to become a member by misleading prospectus, where allotment was invalid,¹¹⁴ or where a forged transfer has been registered,¹¹⁵ or where the allotment was subject to shareholders' approval and they did not do so,¹¹⁶ or where a transfer could be effected only with the approval of the Board of directors and there was no evidence of any such approval.¹¹⁷

2. Where a person's name being in the register has been without sufficient cause deleted.¹¹⁸

114. *Indian States Bank Ltd v Sudar Singh*, AIR 1934 All 856; 154 IC 23; *Bank of Punjab Ltd v Martin Rum*, AIR 1919 Lah 351 SLR 812.

115. *Societe Generale de Paris v Jenn Walker*, (1986) 1 R 11 AC 21; 54 LT 381 (HLD); *People's Insurance Co v Wood & Co*, AIR 1960 Punj 388. Where shares were registered in the name of a minor through signatures by the minor's mother as a natural guardian, an application by the minor's father to have the name removed was not allowed. This would require a civil adjudication as to who could act for the minor. *Jones v Elmont Blinds v Sungi Plastic Ltd*, (1995) 78 Comp Cas 2nd 6 (CLB). *Nagpur Mitra v Bhandari (P) Ltd*, (2002) 109 Comp Cas 359 (CLB), the CLB could permit rectification of the register of members for the purpose of reduction of capital.

116. *Subho Ghosh v Happy Valley Tex Co (P) Ltd*, (2006) 133 Comp Cas 861; (2006) 6 Comp L J 526 (CLB).

117. *Chetna Suri v Bhagwan Finance Corp (P) Ltd*, (2006) 130 Comp Cas 367 (CLB).

118. *Narainchandra v Gorakhnath*, (1967) 1 Comp LJ 82; (1967) 37 Comp Cas 767 (Bom), a minor's name struck off, rectification ordered. *Jayantilal Purnchandmal Patel v Gorakhnath Desai (P) Ltd*, (1967) 1 Comp LJ 272; (1968) 38 Comp Cas 404 (Bom). An appeal was not stayed where the dispute as to the agreement of transfer was to be adjudicated by International Arbitration; and the Indian company whose register was sought to be rectified was not a party to the agreement. *Bunbury (India) Ltd v Asg-Nigf Ltd*, (1995) 93 Comp Cas 358 (CLB). Affirmed on appeal in *AGG-Alkriegesellschaft v Unistar (India) Ltd*, AIR 1996 Kant 69; (1995) 85 Comp Cas 677. The court further found that many other matters were there before CLB and the balance of convenience was also against stay. The CLB had to record a finding as to how the matter before it was covered by one clause or the other and the power became exercisable. *TG Vora Prasad v Sree Rayalasamis Alkaline & Allied Chemicals Ltd*, (1999) 96 Comp Cas 886 (APL). *S Shankar v Circuit Data Systems Ltd*, (2002) 112 Comp Cas 142 (CLB), name deleted under allegedly forged transfer documents, criminal court conducting inquiry into the forgery aspects, the CLB, being not proper forum for such inquiry, waiting for the result of the criminal case. *Gopalkrishna Sehgal v Hindustan Construction Co*, (2002) 112 Comp Cas 166 (CLB), the CLB not competent for investigating whether signatures on transfer deeds forged. *W Günther v Suzicoking Technologies Gmbh Ltd*, (2004) 4 Comp LJ 507 (CLB), a German company's shares were transferred to another company without any authorisation from the side of the company. *Vipin Aggarwal v HCL Infotech Ltd*, (2016) 127 Comp Cas 393 (CLB), shares stolen from the petitioner's office, he informed police and also the company with particulars requesting it not to register them in any other person's name. The company did register them but was compelled to rectify them re-

3. Where a person has fulfilled every requirement of law to enable him to become a member, but the company has defaulted or delayed or caused "unnecessary delay" in placing his name in the register¹²¹ including refusal to register a transfer within the meaning of Section 58 and where a person has rightly ceased to be a member but his name has not been removed with due promptitude from the register.¹²²

In the matter of foreign members or debenture holders residing outside India, the petition for rectification has to be made to a competent court outside India specified by the Central Government. [S. 59(1)]

This is no longer merely a summary remedy obtained by petition to the Tribunal.¹²³ Earlier to 1988 when this power was vested in the court under the now repealed Section 155, the view taken was that a regular suit for rectification could also be filed and this used to be the only appropriate remedy where complicated questions were involved.¹²⁴ Although great discretionary powers had been given to the court to "decide all questions which it was necessary or expedient to decide in connection with an application for rectification", yet a petition under this section was not viewed with favour in some cases. For example, in *Jayashree Shantaram Vachare v Rajkumar Kalamandalir (P) Ltd.*¹²⁵ the Bombay High Court held that: Where

the petitioner's name, *Silice Cement (P) v Power Grid Corpn Ltd.*, (2004) 123 Comp Cas 332 (CLB), transfer of allotted bonds, refusal on the ground that the original allottee had not paid for them.

121. *HG Arif v Sircilla Jars Bazar Co.* (1919) 49 IC 288. See also, *Juniper Spices (A) Ltd. re*, (1915) 17 Bom LR 342; AIR 1915 Bom 1, where a member had transferred all his shares and applications for registration of the transfer were duly lodged with the company. But the company went into liquidation before the transfer could be registered in the usual course of things. It was held that the transferor was not entitled to rectification of the register of members as he had not shown any unnecessary delay on the part of the company. But see, *Babulal M Varma v New Standard Coal Co (P) Ltd.*, (1957) 1 Comp L 161 (Cal), where a rectification was ordered in favour of a bona fide purchaser of shares who had fulfilled the requirements of transfer. There is no question of delay where the petitioner has no established his title to the shares. *K S Narayan Iyer v Telmex Tel Co Ltd.*, (1946) 65 Comp Cas 743; (1946) 16 CLA 258 (CLB).
122. *Dhir & Carrington Investments (P) Ltd v PK Pathapati*, (2002) 111 Comp Cas 410 (CLB); permission to hold shares in an Indian company could be granted ex post facto, rectification not to be ordered patently for deleting names of foreign investors. Confirmed in appeal to High Court in *PK Pathapati v Dhir & Carrington Investments (P) Ltd.*, (2002) 111 Comp Cas 425 (Ker); *Rajiv Dua v United Press Ltd.*, (2002) 111 Comp Cas 584 (CLB); joint shareholding, company has no power to split it. This can be done only through a suit for partition. *SCV Subramanyam Naik v Incidental Thirupuram (P) Ltd.*, (2006) 230 Comp Cas 606 (CLB); stamp not cancelled, no proof of delivery of documents to the company, no proof of directors' approval, rectification in favour of the purchaser not ordered.
123. Relief could be obtained under the section from any civil court, *Joginder Singh v Bezwani Singh*, (1985) 58 Comp Cas 845 (P&H).
124. See, for example, *Babuji Singh v Krishna Bus Service (P) Ltd.*, (1967) 57 Comp Cas 471 (1967) 1 Comp L 137 (Del); *Ranesh Chandra v Wizmark Cycle Co.*, (1986) 1 Comp L 248, where all the earlier authorities have been reviewed. Where a matter was pending under S. 155, 1956 Act, it was held that no other action would lie elsewhere in respect of the same cause of action. *India Fruits Ltd v Montreal (P) Ltd.*, (1993) 2 All LR 726.
125. AIR 1960 Bom 106 (1960) 30 Comp Cas 141. For some other cases where petitions for rectification of register of members were dismissed, see, *Proprietary Insurance Co v Wind & Co*, AIR 1960 Punj 388; *Laxminarayana Bhagya v Prince Tools Corp Ltd.*, AIR 1953 Hyd 22; *Jyoti*

discovery and inspection are necessary and complicated questions such as forgery and fabricated documents arise, the summary procedure trial under Section 155 [now S. 59] should not be allowed.¹²⁵

Similarly, Delhi High Court¹²⁶ rejected a petition under the section as it involved ascertainment of a number of facts like the value of imported

Nath v. Gopi Chaudhary, AIR 1915 Lah 130; 29 IC 770; *Duddy & Mazda v. K.R. Irani*, (1977) 47 Comp Cas 34 (Cal).

125. Similar opinions were expressed in *Satishchandra v. Gopal Singh Samra*, AIR 1966 Bom 247; (1968) 28 Comp Cas 137; *Mamidla (Gangaram) v. Western India Theatres Ltd.*, AIR 1965 Bom 30, where Suah explained the objects of the provisions of the Act. See, *Mahadev Lal Agarwal v. New Darjeeling Union Tea Co.*, AIR 1952 Cal 56; *Dhruvshet Yer Co. Ltd. v. AIR 1957 Cal 476*; (1958) 28 Comp Cas 62; *Dhruv Singh Heri Singh v. Minerva Films Ltd.*, AIR 1959 Punj 106; *Banarsi Das v. Dalmia Adm. Cement Ltd.*, AIR 1959 Punj 232; where a petition was rejected as it involved controversies under several heads; *People's Insurance Co. v. Andhra Co.*, AIR 1960 Punj 388. The remedy is not available as of right without the court having discretion to decide it, see at p. 390; *Mukesh Kumar Jain v. Federal Chemical Works Ltd.*, (1965) 36 Comp Cas 651; (1965) 1 Comp LJ 251 (All), where the Allahabad High Court pointed out that the petitioner's title to shares being defective petition under the section was not proper, see also, *Srinivasadeva v. Official Liquidator*, (1967) 1 Comp LJ 257, where a delayed petition for rectification was not allowed. *Public Passenger Service Ltd v. M.A. Khader*, (1965) 1 Comp LJ 1; (1966) 36 Comp Cas 1; AIR 1966 SC 489; Bachawal J., 492 P&J; *Panu Devi v. Gurram Singh*, (1977) 47 Comp Cas 796 (P&H), where signature was denied. Where a person challenged the validity of the register long after his name was deleted and that in circumstances involving voluminous evidence, discretionary remedy of the section was not allowed. *S. Gurukaran Singh Manohar v. Ratten Sports (P) Ltd.*, (1986) 59 Comp Cas 279 (P&H). Rectification was ordered where a transfer was registered violating the requirement of the articles that shares must be offered first to existing members. *Amrit Kaur Puri v. Kaparkhia Puri, Oil and Chemical Mills Co. (P) Ltd.*, (1984) 56 Comp Cas 194 (P&H). A dispute about genuineness of signature of the transferor, should be relegated to a civil court. *Jindal Bank v. Deepak Fertilizers & Petrochemical Corp. Ltd.*, (1999) 35 CLA 389 (Bom); *Tarsem Kansil v. Dey Spinners Ltd.*, (2000) 37 CLA 132; (2001) 102 Comp Cas 835 (CLB). The company disputed the validity of the documents which were produced for showing that the removal of the petitioner's name was wrongful, void, matter fit for civil suit, *Epin K. Jain v. Smit Vijay Engg. (P) Ltd.*, (1986) 91 Comp Cas 835 (CLB); complications arising out of unauthorised sale of shares by a bank to whom the shares were not even pledged and, therefore, had no lien over them, matter fit for civil court trial, *A. Akhiladevan v. Great Eastern Shipping Co. (P) Ltd.*, (2001) 108 Comp Cas 309; (2000) 1 Comp LJ 110 (CLB); *Nipur Mills v. Bishwanthi (P) Ltd.*, (2002) 216 Comp Cas 359 (CLB); there is no role of law that in all cases the parties should be called upon to refer complicated questions of fact to a civil suit. *Wheest K. Gajjar v. Central India Ltd.*, (2003) 115 Comp Cas 396 (CLB), proceedings under the section are in the nature of summary proceedings, serious disputes relating to title cannot be tried in a summary jurisdiction, civil suit is the proper remedy. *Tarsem Kansil v. Dey Spinners Ltd.*, (2000) 37 CLA 132 (2001) 102 Comp Cas 835 (CLB); allegations of fraud, forgery, manipulation, collusion, and misrepresentation, etc. can not be decided in summary jurisdiction. *Philip Kumar Chettrieng v. Raju Auto Ltd.*, (2005) 126 Comp Cas 247 (CLB), questions of title, *Berao Tashinwali v. ITC Ltd.*, (2005) 128 Comp Cas 955 (CLB), essentially a jurisdiction for rectification of register. *Kenka Laxmi Agarwal v. Registrar of Companies*, (2006) 129 Comp Cas 234 (CLB), no jurisdiction to examine orders of Registrar of Companies.

126. *Punjabi Distilling Industries v. BPC Mills Ltd.*, (1973) 43 Comp Cas 189; *Dell, R.D.T. Power Projects Ltd v. M. Murulikrishna*, 2005 CLC 294; (2005) 124 Comp Cas 177 (CLB). Rectification is exclusive jurisdiction, questions of right and title can be decided by the Civil Court. *R.D.T. Power Projects Ltd v. M. Murulikrishna*, 2005 CLC 294; (2005) 124 Comp Cas 177 (CLB), stay of proceedings hence the CLB not warranted. *Kam Vasari Kolok v. International Transport & Trading Systems (P) Ltd.*, (2005) 59 SCL 181 (CLB) the CLB can go on with the



machinery against which shares were allotted and which required expert opinion and its cross-examination and the Madhya Pradesh High Court did not entertain a petition which required investigation as to whether there was a free consent or one under undue influence or fraud.¹²⁷ The Court of Appeal expressed the opinion that the court can deal with, even in this summary nature proceedings of the power of rectification, the matters relating to the petitioner's ownership of shares.¹²⁸ Where the question was whether the petitioner was the real transferee and questions of fraud, etc., were not at all involved, the court said that it was not necessary to drive the parties to a civil suit. There should be no hesitation in exercising the jurisdiction where matters are not too complicated and can be sorted out on the basis of evidence produced by the parties.¹²⁹ There is no general rule that whenever complicated questions of fact are involved the parties must be relegated to a civil suit.¹³⁰ The matter is to not be decided under summary jurisdiction.¹³¹

But apart from the case where complicated questions arise, the Supreme Court has laid down that "the jurisdiction created by the section is very beneficial and should be liberally exercised".¹³² The question whether an

matter even if criminal proceedings have also been initiated, Pralayit Jannardas Kurkari v. Vikas Janardas Kothari, (2003) 177 Comp Cas 199, civil court jurisdiction not barred.

- 127 Kunlu Dem Mautri v. Gramin Bidurias Ltd, (1991) 69 Comp Cas 188; (1989) 3 Comp LJ 278 (MP). A dispute between joint purchasers of shares. A Full Bench of the Kerala High Court ordered the company to register the respective names in the agreed proportion. The Supreme Court rejected appeal against it. It was a matter of civil court jurisdiction and not of the company court. NP Airton v. Thirumalai Flotations (P) Ltd, (1996) 86 Comp Cas 68 (Ker) (FB). Dispute about the validity of a will cannot be considered under this jurisdiction. TG Veera Prasad v. Sri Rajalakshmi Alkalies & Allied Chemicals Ltd, (1997) 89 Comp Cas 13 (CLB); GN Byre Reddy v. Anithi Care Enterprises (P) Ltd, (1997) 89 Comp Cas 245 (CLB). This jurisdiction would include an inquiry into the validity of an allotment of securities. Skin Doyal Agarwal v. Sandharthu Agarwal (P) Ltd, (1996) 88 Comp Cas 205 (CLB); Malabarunni Marginsurers and Traders (P) Ltd v. Maniyadevi Industries (D), (2004) 186 Comp Cas 295 (CLB), rectification is available only in respect of transfers of existing shares. A prayer for enforcement of an agreement for allotment of shares being in the nature of specific performance is not available. Petition dismissed.

128. Holcim Ltd. re. Koenig v. Merlin, (2010) 1 BCC 191 (CA).
129. PL Paisode v. Vinay i. Deshpandek, (1999) 97 Comp Cas 889; (1999) 4 A.I.D 342; (1999) 4 An LT 522. Disputes involving ownership, fraud, forgery can be relegated to a civil suit. National Insurance Co. Ltd v. Glemo Indus Ltd, (1999) 90 Comp Cas 378 (Bom).
130. Nigar Mirza v. Basabam (P) Ltd, (2002) 108 Comp Cas 359 (CLB); Jet Mutual Hotels (P) Ltd v. Dinesh Singh, (2016) 1 SCC 423, complex questions of title fall outside the jurisdiction of the Tribunal. In this case there was no question of title and no real dispute as to entitlement to shares, nor to have allowed the petition for rectification was held to be erroneous.
131. Khursheed Aliw v. P. Pagnir (P) Ltd, (2002) 108 Comp Cas 523 (CLB); Advanexs (India) (P) Ltd v. Fund's Investment Ltd, 2014 SOC OnLine Bom 540, (2015) 166 Comp Cas 122, membership of the petitioner in relation to disputed shares was not established. Such person could not apply for rectification. He must have recourse to civil proceedings.
132. Indian Chemical Products Ltd v. State of Orissa, (1961) 2 Comp LJ 63; (1961) 36 Comp Cas 592. The court was required by the now repealed S. 156 to order the company to send a copy of the order of rectification to the Registrar within 30 days. Bhupinder Singh v. SM Kamappa Automobiles (P) Ltd, (1995) 16 CLA 262; (1996) 86 Comp Cas 19 (CLB). Further issue of capital and its allotment to a block of shareholders to the exclusion of others is not a matter under the section. The CLB would not provide the relief of rectification where it would involve reduction of capital because the CLB did not have the jurisdiction in the matter of reduction of capital.



allotment of shares is in accordance with the articles of the company has been held by the Patna High Court to be not such a complicated question as cannot be disposed of in a petition for rectification. The court accordingly ordered deletion of names of certain persons to whom shares were allotted in violation of articles.¹³³ The Gujarat High Court expressed the opinion that a petition under the section is more or less analogous to a suit and, therefore, the court can decide all questions which can be tackled in a regular suit.¹³⁴ Where the claimant was not able to produce even a transfer form, the court allowed him to prove his title to the shares, because if he could do so, the execution of the transfer form could be ordered.¹³⁵

The words "unnecessary delay" have not been defined in the Act and, therefore, it becomes a question of evidence to be decided on the facts of each case. A failure to register a transfer within one month of the application, which was contrary to the listing agreement, was held to be an unreasonable delay.¹³⁶

133. *Rasheed Kahnmal v. Bharat Automobiles (P) Ltd.*, (1977) 47 Comp Cas 68 (Pat). No such order could be made in a case where the company never prepared its register of members or filed any return of allotment. *Rajnikant Shah v. Deccan Ferries & Distilleries*, (1978) 48 Comp Cas 322 (Bom). Rectification was allowed where allotment of securities was in violation of the company's memorandum of association. *MV Sathyanarayana v. Global Drags*, (1998) 46 Comp Cas 595 (Ker).
134. *Kalebrai Kalidas Neeli v. Laxmidas Lalimbhai Patel*, (1978) 48 Comp Cas 436 (Guj). The irregularity, if any, can be challenged within three years from the date of its entry in the register. *Art. 337 of the Limitation Act, 1963*. *Amil Gupta v. Delhi Cloth and General Mills Co. Ltd.*, (1983) 54 Comp Cas 301 (Del). Any member can challenge an irregularity. *Bullock Nixon Ltd v. Dheung Mills (P) Ltd.*, (1983) 54 Comp Cas 432 (Bom). The same case decided that a company can make changes in the register of members even when it is closed to the public. The reason why every member can question the validity of the register is also explained in *Ovi Prakash Burki v. Unit Trust of India*, (1985) 54 Comp Cas 136 (Bom). Questions of title can now be decided, but earlier the position was different. See, *Kamla Devi Mehta v. Gramin Industries Ltd.*, (1990) 69 Comp Cas 188; (1991) 3 Comp LJ 278 (MP); question of the validity of a will, not decided under the erstwhile S. 155; *Kalyani Sundaram v. Shanmugam Indut. Ltd.*, (1990) 67 Comp Cas 306 (Mad); a dispute about a right of pre-emption not taken up; *Kamalrao Patti v. Venaz Pharmaceuticals & Chemicals*, (1989) 65 Comp Cas 245 (Ker). Agreement to convert a loan into capital, not proved. *Vishnu Dusal Bhimkuntha v. Union of India*, (1989) 66 Comp Cas 564 (All). Where the question of the title of a person has to be decided, and if such person is not a party, he must be brought on record, otherwise no order can be passed about his title. *Sukhdev Chander v. Vardhaman Spg & General Mills Ltd.*, (1995) 83 Comp Cas 641 (CJ.B).
135. *KP Anilnay v. Thindiyala Plantations (P) Ltd.*, (1987) 62 Comp Cas 553 (Ker). The same view was adopted in *Harmar Singh v. Bhupinder Singh*, (1992) 74 Comp Cas 726 (Del), questions of title; *EV Sudhindrahan v. KMMA Industries & Readymix (P) Ltd.*, (1993) 76 Comp Cas 1 (Mad); the territorial nature of the jurisdiction would be lost if it were reduced to a summary jurisdiction; *Ammunition Supplies Corp. (P) Ltd v. Modern Plastic Containers (P) Ltd.*, (1994) 79 Comp Cas 163; AIR 1994 NOC 155 (Del); the matter can be relegated to a civil suit only in cases of extreme factual complexity. *Abhiyana Capital Ltd v. JCT Electronics Ltd.*, (2000) 111 Comp Cas 863 (CJ.H); company refused to accept a transfer on the ground that the signature of the transeece did not tally. The transferee proved that his letter to the transferor came back unserved. Original share certificates were with the transferee. The transferor did not lodge any objection nor asked for duplicates. No other claimant. The company directed to register the transfer.
136. *Joseph Michael v. Trichinopoly Rubber & Tea Co. Ltd.*, (1989) 66 Comp Cas 491; (1989) 2 Comp LJ 81 (Ker).

Every shareholder has an interest in the proper maintenance of the company's register of members. Any member can make an application without showing any injury or prejudice to him. Personal grievance is not necessary for locus standi.¹³⁷

On receiving such appeal against refusal or an application for rectification, the Tribunal has to hear the parties.¹³⁸ It may either dismiss the appeal or reject the application, or may order that the company shall register the transfer or transmission and the company has to comply with the order within 10 days or direct rectification of the register and require the company to compensate the aggrieved person for any loss sustained by him.¹³⁹ The Tribunal has been empowered to make necessary interim orders, orders as to costs and incidental and consequential orders regarding payment of dividends or allotment of bonus or rights shares.¹⁴⁰ The Tribunal has the power of clarifying the applicant's title to the shares in question and of deciding generally any question which it is necessary to decide in connection with the application for rectification.¹⁴¹ These provisions are applicable to the rectification of the register of debenture holders also. An appeal against refusal or an application for rectification has to be in the form of a petition in writing and accompanied by such fee as may be prescribed.

Limitation Act not applicable.—Though the period of limitation is not applicable, an action which is initiated several years after the cause of action may not be entertained because of inordinate delay and latches.¹⁴²



CASE PLOT

137. *Om Prakash Beria v Unit Trust of India*, (1983) 59 Comp Cas 136 (Bom), reversed on other grounds in. *Om Prakash Beria v Unit Trust of India*, (1983) 54 Comp Cas 469 (Bom); *Ajish Singh v Punjab Woven & Ceramic Mills Co Ltd*, (1983) 33 Comp Cas 534 (Punjab); *Treestar Investments Ltd v Gontak Woodruffe Ltd*, (1995) 87 Comp Cas 991 (CLB), affirmed in. *Shoe Specialties Ltd v Treestar Investments Ltd*, (1997) 88 Comp Cas 471 (Mad).
138. Where a pledgee of shares was registered as member and on an order of rectification his name was removed, it was not necessary that he should have been heard on the matter. *Millicomni Finance and Investment Co v Company Law Board*, (1994) 81 Comp Cas 66 A.R. 1944 Mad 341. Delays of a petition for prevention of oppression and mismanagement is not a ground for refusing an application for rectification. The applicant's name was substituted on the register without any sufficient cause and he was seeking rectification. *Aszend Heuson Paints v Ornate Clay Art Ltd*, (2000) 99 Comp Cas 318 (CLB).
139. An application for rectification filed by directors who participated in the decision to accept the impugned transfer was not allowed. There was a long delay also. *Abinashit Serry v Sudharmal Swargya Rayuli*, (1995) 43 Comp Cas 272 (Mad); *S. Serry v Satyam Computer Services Ltd*, (2002) 112 Comp Cas 109 (CLB). Instead of accepting a duly lodged transfer, the company by negligence issued duplicates to the transferee. The company directed to register the transfer and also to give the transferee the bonus shares and dividend amount to which he became entitled in the meantime.
140. Where a substantial acquisition of shares was under question, the CLB restrained the company from transferring its assets because otherwise the transferee would ultimately get control over a larger company. *Cyrilm (A) v South India Tea & Coffee Estates Ltd*, (1998) 91 Comp Cas 401 CLB.
141. *Nupur Milro v Busibeni (P) Ltd*, (2002) 108 Comp Cas 359 (CLB); CLB order of rectification having the effect of reduction of capital was held to be permissible.
142. *C Mathew v Cochin Stock Exchange Ltd*, (1997) 4 Comp LJ 455 (1997) 26 CLA 312 (CLB). The CLB is not a court for the purposes of jurisdiction for rectification of register of members. Hence, the periods of limitation as prescribed by the Limitations Act, 1963

An aggrieved person could not be prevented from approaching the CLB by reason of delay in exercising his rights, the period of limitation being not applicable.¹⁴² Delay can be condoned. In this case the delay was condoned because it was due to a bona fide pursuit of other remedies.¹⁴³

Where there was delay in filing an application for transmission of shares, the CLB said that the Limitation Act was applicable and the delay could be condoned because the applicant remained preoccupied with other proceedings relating to the shares.¹⁴⁴

The discretion in ordering or refusing to order rectification of the register of members is the same as discretion in granting or refusing to grant specific performance of an agreement to allot shares. Prejudicial delay may be one of the causes of refusal. By sitting back and doing nothing for seven years until it suited him to enforce his right, the petitioner had failed to display the need for promptitude which was ordinarily required of a person seeking specific performance. In this case a person had purchased

shares not applicable. The only requirement will be that the petition must not suffer from laches or acquiescence, i.e., there should be no unreasonable delay in seeking relief. *Sikhs Dyal Agency v Sikkharlu Polymer (P) Ltd.*, (1996) 88 Comp Cas 705 (CLB); *JTG Virendra Prasad v Kavishwar Alkalies*, (1997) 89 Comp Cas 13 (CLB), the CLB had the power to ask parties to go to a civil court for settling out factual complications; *CN Rayas Reddy v Amithi Cine Enterprises (P) Ltd.*, (1997) 89 Comp Cas 245 (CLB). An application after two months of refusal was held to be maintainable. *Kansu Sen v CN Sen & Co (P) Ltd.*, (1998) 91 Comp Cas 28 (CLB). When matters of rectification were in the jurisdiction of courts, three-year period of limitation was applicable. *Bijin Vadali Mittal v Razam & Desai*, (1997) 26 CLA 71 (Guj); *Peerless General Finance & Investment Co Ltd v Poddar Projects Ltd*, (2007) 136 Comp Cas 168 (Cal). Limitation Act not applicable. *CPB Bank Ltd v Power Grid Corporation of India*, (1995) 27 CLA 25; (1995) 83 Comp Cas 454 (CLB). Unauthorised transfers are liable to be struck out, e.g., one executed by the holder of a power of attorney in a surreptitious exercise of his authority. Delay in application will not be a material factor in such a case. *Firoz Sheikh v Eemam Mehta Charminar (P) Ltd.*, (1997) 71 Comp Cas 88 (Cal). *Gurman Singh Gujral v Indian Hotels Co Ltd*, (2012) 112 Comp Cas 85 (CLB); petition filed two years after the name of the original owner was restored to register, held barred by time. Shares in question were a stolen property, transfer deeds were also found to be forged.

143. *Mahadev Singh Meher v Lake Palace Hotels & Motels (P) Ltd.*, (1997) 27 CLA 279 (CLB); *Union of India v R.C. Bhargava*, (1998) 30 CLA 229 (CLB). The time limit prescribed by the Companies Act would be applicable, but not that of the Limitation Act because the Tribunal is not a court, and the Limitation Act applies only to courts. *Amil R Chhabria v Faridji Industries (P) Ltd.*, (2012) 99 Comp Cas 168 (CLB). To the same effect *Nipur Mitta v Babubhai (P) Ltd.*, (2002) 108 Comp Cas 359 (CLB), unexplained long delay, laches and acquiescence may bar a petition. *Jagir Rai Mani v Panjab Machinery Works (P) Ltd.*, (2001) 108 Comp Cas 979 (P&J); allotment and transfer of 1972, petition in 1981 for rectification, too late.

144. *Khusro Aliam v P. Pagoda Co (P) Ltd.*, (2011) 118 Comp Cas 523 (CLB); *Cultivate Sproutly Phoenix Ltd v Colcomin Phototype Co Ltd*, (2002) 113 Comp Cas 434 (CLB), the question of limitation viewed liberally where the transfer was based on forged papers.

145. *Tomyay Meher v Dumpery (P) Ltd.*, (2004) 122 Comp Cas 74; (K.L.H); *Shri Vinayak Vasudeo Saluswadhe v Peingon Drugs (P) Ltd.*, (2006) 128 Comp Cas 122; (2015) 6 Comp LJ 484 (CLB), the complainant's shares were transferred to another person in 1997 but he came to know only in 2001. His application in 2001 was held to be not time-barred. *A Debenjir v AS Neuman Consultancy India (P) Ltd.*, (2006) 130 Comp Cas 407 (CLB), petition in 2005, transfer in 1995, petitioner came to know only in 2002 during inspection, petition within three years. The company could not produce any documents for the transfer, petitioner's name directed to be restored to the register.

the controlling power in the company thinking that the shares purchased by him represented the whole of the company's issued share capital being totally unaware of the large number of unregistered shares. The court, therefore, held that even if the plaintiff established his right to the allotment of 10,000 shares, the court could refuse to exercise discretion in his favour.¹²⁶

Spot delivery contract.—In a spot delivery contract, the consideration was offered much after the date of the sale. The transfer was held to be void and refusal of registration justified.¹²⁷

Directors' power of rectification of entries

It is open to directors to rectify the register of members of their own even where there are no objections and a wrong entry has been detected. There is no need, in such a case, to apply to the Tribunal for an order of rectification. "If there is no dispute, and if the circumstances are such that the Tribunal would order rectification," the Board may itself effect the necessary corrections.¹²⁸ "An application to the court is only essential when the company disputes the right to rectification. There is no reason why the directors if they bona fide agree and that a shareholder has the right to avoid a contract should not thereupon assent to the rescission of the contract and rectify the register in the appropriate manner. An order of the court is not necessary in such cases."¹²⁹ However, the directors have no power to rectify the register by substituting the name of another person in the place of an existing member, except on an application for transfer duly made in compliance with the provisions of the Act.¹³⁰ Where the shareholder alleged fraud in respect of transfer of its shares in the company, it was held that the issue was triable by the civil court and not by the CLB. The petition was dismissed.¹³¹

Under an oral agreement in a family company, a shareholder gave up his rights. All parties acted on the agreement. The shareholder was not allowed to challenge the transfer of shares after 16 years. He was guilty of delay and laches. His petition was dismissed.¹³²

126. *ISIS Factors plc. re.* (2003) 2 BCLC 431 (Ch D); *Dutta v. ISIS Factors plc.* (2003) 2 BCLC 451 (Ch D); *MSDC Mukkavunnu v. Shree Bhavatthi Cotton Mills (P) Ltd.* (2016) 130 Comp Cas 414 (CLB), 16 years delay, no condonation.

127. *Bhagwati Developers v. Peerless General Finance & Investment Co.* (2005) 6 SCC 718.

128. *Macmillan's Laws of England*, Vol 7(C) (11th Edn 1996) 176, para 306; *Paul Hirst v. St Blue Clay Co. re. Herdley case*, (1876) 1 R. 30 Ch App 157.

129. That was decided in *Lemon and Mediterranean Bank Ltd. v. Wright case*, (1971) 1 R. 7 Ch D 55, 25 LT 471 and *Bess River Silver Mining Co v. Smith*, (1869) LR 4 11L 64; *Michaels v. Hurley House (Marlborough) Ltd.*, (1997) 2 BCLC 366 (Ch D).

130. *Arunidip Parichittamias Pati v. Gurudas Dasgupta (P) Ltd.* (1967) 1 Comp LJ 272; (1968) 38 Comp Cas 405 (Bom).

131. *Suhail Investment & Trading Co Ltd v. Tivoli Park Apartments (P) Ltd.* (2014) 183 Comp Cas 297 (CLB).

132. *Omresh Seal v. Saffronell Quality (P) Ltd.* 2013 SCC Online Laff 3738; (2014) 184 Comp Cas 325.

Appeals to Appellate Tribunal [S. 421]

An appeal used to lie to the High Court against an order of the CLB on a question of law but not on a question of fact.¹⁵³ But now that the Companies Act, 2013 has established its own appeal system, appeals against the orders of the Tribunal would go to the National Company Law Appellate Tribunal. (See notes under S. 421)

Section 58 says that shares, debentures and any interest in a public company shall be freely transferable. Where the securities are transferred through a depository, an appeal was to lie to the CLB in connection with any transfer only if it was in contravention of the provisions of the Securities and Exchange Board of India Act, 1992 or any regulations made thereunder or the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)¹⁵⁴ or any other law for the time being in-force.¹⁵⁵ An application under the section could be filed by a depository, by the company itself, or by a participant or an investor. The CLB was given the discretionary power to make an interim order suspending voting rights in respect of the shares under transfer till the completion of inquiry and making of final orders. The transferee could exercise voting rights unless they were suspended by an order of the CLB. Pending the disposal of the application, any further transfer of the shares in question would entitle the transferee to exercise voting rights.

The CLB should not mechanically reject a petition because of some pendency of the same matter before a civil court. The matter had to be disposed of on due consideration of affidavits so as to find out whether there is a real possibility of conflicting decisions.¹⁵⁶

The Act of 2013 lays down that subject only to the provisions in Section 58, the shares or debentures of a public company shall be freely transferable. Thus, the transfer of securities has been made the subject-matter of a free market independent of the director's discretionary power of refusal. For example, where the refusal to accept a transfer was on ground that the shares were a part of the trust which was of perpetual nature, it was held that the shares being those of a public limited company, they were freely transferable and the company was not concerned with the conditions of the trust.¹⁵⁷ A company was not allowed to refuse a transfer on the ground that

¹⁵³ The distinct trend of authorities at present is to restrict the scope of refusal to accept a transfer of shares and this trend has been confirmed by the Amendment of 1988 of 1956 Act by making it compulsory that reasons for refusal must be indicated. *Jagjiwan Mittal v Transicare Rubber & Tex Co Ltd*, (1989) 66 Comp Cas 491; (1989) 2 Comp LJ 81 Ker.

¹⁵⁴ Provisions of this Act have been merged into the Companies Act, 2013.

¹⁵⁵ *ICICI Venture Funds Management Co Ltd v Singh Information Systems (P) Ltd*, (2007) 134 Comp Cas 84 (CLB), agreement between buyer and seller of shares containing restrictions on transferee not incorporated in the company's articles not binding on the company.

¹⁵⁶ *Nipper Mittal v Basulmki (P) Ltd*, (2002) 108 Comp Cas 359 (CLB).

¹⁵⁷ *Iose Padikken v Diversim Subsidiaries P Kurien Ltd*, (2000) 109 Comp Cas 699; (2000) 4 Comp LJ 421 (CLB). See also, *Razdhanou Chemicals (P) Ltd v Adenam Computer Services (P) Ltd*, (2003) 4 Comp LJ 121 (CLB), another case of unjustified refusal. *Pearless General Finance and Investment Co v Pothdar Projects Ltd*, (2007) 2 SCC 431; (2007) 136 Comp Cas 197, order of rectification for implementing a scheme of amalgamation. The order already implemented. Appeal to Supreme Court infructuous.

the transferees were not the natives of the company's State of registration.¹⁵⁸ A company was not allowed to refuse a transfer on the ground that the transferee was an ex-employee who was dismissed for irregularities and his admission as a shareholder would not be in the interest of the company.¹⁵⁹

The CLB could not look into validity of an allotment of shares by a public company. The CLB was no longer in a position to look into title disputes relating to transfers to which the company was not a party. A public listed company is bound to accept a transfer for which all the appropriate papers have been filed. The CLB could not go into questions as to whether there had been an actual sale or not or whether documents were genuine or forged. All such matters have now to be the subject-matter of a civil suit.

If a company refused to register a transfer within two months of lodgement and the transferee brought the matter before the CLB, it could direct the company to register the transfer. Thus, the right of appeal to the Tribunal against the refusal is allowed only to the transferee. Unlawful transfers are open to rectification. In the case of a depository, two months run from the date of transfer; in other cases, from the date of delivery of the transfer papers. During the inquiry before the Tribunal, the transfer would remain effective giving the transferee his voting rights unless suspended by the CLB. As a matter of interim relief, the CLB could also suspend exercise of voting rights. This power is, of course, there in the civil court. The power of the civil court in this respect has not been taken away. The matters of title and rights are generally raised in civil proceedings.¹⁶⁰ The shares will also remain further transferable with similar effects.

SEBI Takeover Code.—SEBI violations can be taken care of by SEBI itself. When a company's shares have been acquired in violation of SEBI Takeover Code Regulations and entered in the company's register of members, the company itself can apply for rectification of the register of members. Notwithstanding the SEBI's powers to rectify the matters, the CAT can look into the petition and pass appropriate orders.¹⁶¹

158. *Naveen Gupta v Cadher Native Joint Stock Co Ltd*, (1999) 98 Comp Cas 655 (CLB). The ground of refusal that the transfer was prejudicial to the interest of the company is no longer applicable. S. 22-A, Securities Contracts (Regulation) Act, 1956 was scrapped in 1995 by the Depositories Act. *Crown Land Investments Ltd v Sri Balaji Investments Ltd*, (1999) 35 CLA 314 (CLB); *Industrial Developers Bank of India v Ranbaxy Ltd*, (2003) 114 Comp Cas 67; (2003) 42 SCL 726 (Mad); bank credit facilities given to a company subject to the condition that promoters would not abut the shares. The company agreed to disinvestment of its shares to the extent of 26 per cent in favour of a foreign company. This being contrary to the loan agreement, the bank was granted an injunction to restrain it.

159. *PR Golchha v TN Mercantile Bank Ltd*, (2002) 130 Comp Cas 866 (CLB).

160. *Shriram Finance & Investment (P) Ltd v M Sreenivasulu Reddy*, (2002) 109 Comp Cas 913 (Bom); *M Sreenivasulu Reddy v Krishnaji G. (Maharashtra)*, (2002) 109 Comp Cas 18 (Bom); *Berna Technical v ITC Ltd*, (2005) 128 Comp Cas 955 (CLB); jurisdiction is only for rectification and not for recovery of the consideration money. *New Millennium Experiences Ltd v. w. 2003 EWHC 1824*, (2004) 1 FCLC 19 (Ch), creditor's application not maintainable.

161. *Aska Investments (P) Ltd v Grub Tex Co Ltd*, (2005) 126 Comp Cas 603 (CLB); *Festu Appliances (P) Ltd v Royal Holdings Services Ltd*, (2006) 130 Comp Cas 227 (Bom); the Tribunal High Court was of the view that violation of SEBI Takeover Code should be adjudicated only by SEBI Authority (CAT).

Civil remedy not barred

A wrong entry affects the rights of shareholder in so many respects, e.g., the right to dividend, participation in meetings and in further issues, etc. It partakes of the nature of a common law right. Therefore, the right to file a civil suit for rectification of the register has not been taken away by the Act.¹⁶² A petition under the section for declaration of title to certain shares was not allowed. A civil suit is the only appropriate remedy for such relief.¹⁶³

An approach to the Consumer Forum is also not barred. A transferee of shares filed his complaint before a Consumer Forum in the matter of bonus shares which happened to be allotted to the transferor. The Consumer Forum did not permit him to go to any other forum. The CLB did not entertain his petition.¹⁶⁴

Restriction on extent of shareholding

The articles of a company provided that no member shall hold more than 10 per cent of the company's share capital. It was also provided that a member holding more than 10 per cent would not count for voting in excess of 10 per cent. A member purchased shares in excess of 10 per cent. The rejection of his application for registration was held to be not justified. The provision did not have the effect of a blanket prohibition. The court directed registration of transfer subject to the restriction on voting rights.¹⁶⁵

Condonation of delay in filing appeals [S. 460]

Section 460 is a general authorisation to the Central Government to condone delays in making applications to the Central Government. The section provides for condonation of delay by the Central Government wherever it had to be filed before the Central Government or before the Registrar within a certain time but it was not so done. The Central Government has to pass its order in writing recording the reasons for the same.

Procedure of transfer [S. 56]

A transfer of shares is completed by registration with the company, or in other words, a transfer is incomplete until registered and the transferor remains legal owner of the shares liable for the unpaid amount, if any.¹⁶⁶

162. *M. Greenbacks Reddy v. Kishore R. Chhabria*, (2002) 109 Comp Cas 18 (Bom).

163. *Arav Kumar Mullick v. Hindustan Lever Ltd.* (2002) 112 Comp Cas 464 (CLB). *ICICI Venture Funds Management Co Ltd v. Sofii Information Systems (P) Ltd.* (2007) 136 Comp Cas 64 (CLB); questions of law and fact, civil court should itself adjudicate. *Gowda Gokhale v. Digni v. Exhil Housing & Ispar Ltd.* AIR 2010 NOC 57 (Bom), an agreement for transfer of shares can be specifically enforced through civil proceedings. Such jurisdictions are not barred. *Loyola and London Ltd. v. (2004) 102 Comp Cas 43 (CLB)*; rights arising through succession and transfer issues often require civil court adjudication.

164. *Kritikkr Mullengadu v. Wipro Ltd.* (2004) 121 Comp Cas 576 (CLB).

165. *M. Ratnayaka Padukone v. Kurukshetra Thimber Ltd.* 2000 CLC 489; (2000) 58 CLA 171; (2002) 109 Comp Cas 461 (Kant).

166. See, *LIC v. Estors Ltd.* (1996) 1 SCC 264, 327; (1986) 59 Comp Cas 549; (1986) 1 Comp LJ 91. *Martin Castilla v. Alpha Omega Ship Management (P) Ltd.* (2001) 104 Comp Cas 587 (CLB); a mere agreement to sell shares does not deprive a member from exercising his rights as a member.

Thus where,¹⁶⁷ without any fault or unnecessary delay on the part of the company, duly lodged transfers could not be registered before the commencement of winding up, the transferor could not have his name removed from the list of contributors.¹⁶⁸ But where a transfer was omitted by mistake or oversight, rectification was ordered notwithstanding winding up.¹⁶⁹

The transferee is the proper person to apply for registration of transfer, but the transferor may also apply.¹⁷⁰ The transferor is entitled as much as the transferee to enforce registration.¹⁷¹

The following conditions must be fulfilled before a company can lawfully register a transfer:¹⁷²

1. The instrument of transfer must be executed both by the transferor and the transferee. The instrument must specify the name, address and occupation, if any, of the transferee. It should also comply with the requirements of the company's articles.¹⁷³

167. *Indian Specific Bank Ltd. v.* (1915) 17 Bom LR 242.

168. See also *Amrach Electric Supply Co v K S Chendekar*, AIR 1954 Nag 204.

169. *Sussex Brick Co Ltd. v.* (1900) 1 Ch 598; 90 LT 226 (CA).

170. Where the application is made by the transferor and relates to partly paid shares, the transfer shall not be registered, unless the company gives notice of the application to the transferee and he makes no objection to the transfer within two weeks from the receipt of the notice. S. 56(3).

171. S. 56. Oral transfers are not recognised by the Act. See, *Gowarikar v.* 1949 Cl 333. A company cannot lawfully register a transfer unless the requirements of the section are complied with. See, *Jagdish Prashantilal Patel v. Gondhankar Devi* (P) Ltd. (1967) 1 Comp LJ 272 (Bom); 26 Comp Cas 405 (Bom). The same point observed in *Jagdish Mills Ltd. v.* AIR 1955 Bom 79; (1954) 24 Comp Cas 241 "that if a company registers an instrument of transfer which is not duly stamped, it would be doing something which is not lawful". Cf *Mulshiapur Khalsa Sugar Mills v. Jethwani Nihari Sugar Mills* (1965) 33 Comp Cas 1147, AIR 1965 All 135. Such registration can be rectified by an order of the Board. *Malsahi Singh v. Jai Singh*, (1978) 18 Comp Cas 556 (Del); Formalities of S. 56 are, however, not necessary where shares have been sold under an order of a court. *Himmatpur Mills (P) Ltd. v.* (1977) 47 Comp Cas 644 (All) and also by the Delhi High Court in *CIT v. Bharat Nihari Ltd.* (1982) 52 Comp Cas 60 (1982) 136 ITR 147 (Del), the court saying that unless the requisite documents are prepared and signed the ownership would not pass because the shares would not be in a deliverable state.

172. For example, the transfer fee prescribed by the articles must be paid to the company itself. Subsequent deposit of the fee in the court will not do. *PV Chandran v. Mulukar and Pioneer Histry (P) Ltd.* (1992) 72 Comp Cas 60 (Ker); *Mathrubhumi Printing and Publishing Ltd v. Madhavan Publishers Ltd.* (1992) 73 Comp Cas 80; (1992) 1 Comp LJ 234 (Ker). Though consideration amount has to be mentioned in the instrument, the company is not concerned with that fact. That is a matter between the transferor and transferee. Though inadequacy of consideration is no defense, where shares and transfer forms were handed over by the husband without the authority or signature of his wife to whom the shares belonged, and the consideration amount was also Re 1, the transaction was held to be void. *John Jason & Co (P) Ltd v. Sajid Mithan*, (1992) 4 SCL 611; (1997) 98 Comp Cas 750. In *Kurnamku Theaters Ltd v. S Venkatesan*, AIR 1996 Kant 1B, the CLD did not approve the rejection of a transfer on the ground that the price paid for the shares was very high. *Melliw Bhurathi & Co v. Geetlaxmi Solvent Oil Ltd.* (2001) 105 Comp Cas 201 (CLD), the articles of the company enabled a director to sign transfer documents as an agent of the expelled shareholder without his consent, the transfer was held to be void. The article was against the mandatory provision of S. 108 which requires that the document must be signed by the transferor or his authorised signatory. *Kausik Jain v. Sudhirji Walas J.L.* (2006) 57 SCL 360 (MP), transfer without instrument, the applicant not entitled to declaration.

2. The instrument of transfer should be duly stamped and dated.¹⁷³
3. The instrument should be delivered to the¹⁷⁴ company along with the certificate relating to the shares transferred.¹⁷⁵ It has to be presented within 60 days from the date of execution. If the share certificate is not in existence, the letter of allotment of securities should be filed.
4. The instrument of transfer should be in the prescribed form.

The provision in Section 56(1) says that where the instrument of transfer has been lost or it has not been delivered within the prescribed period, the company may register the transfer on such terms as to indemnity as the Board may think fit.

The person to whom the legal right to shares has become transmitted by inheritance by operation of law, and he has applied to the company for registration in his name, the company can do so. This power of the company is not to be prejudiced by the prescribed requirements. [S. 56(2)]

Where the application has been made by the transferor alone and the shares are only partly paid, the company should inform the transferee about it and if he makes no objection within two weeks, the company should only then register the transfer in his favour. [S. 56(3)] Within one month the company has to deliver the share certificate to the transferee or transmittee.

of his ownership. *Junk F. Reiffel v. Dr Reddy's Laboratories Ltd.* (2006) 133 Comp Cas 561 (CLB), refusal by company to register because of difference in transferor's signature. The Stock Exchange conducted enquiry and advised the company to accept the transfer if the transferor did not serve a restraint order on the company within a particular time. No such stay order came within the designated time. *Chintu Sud v. Bhagwanji Finance Corp.* (P) Ltd. (2006) 131 Comp Cas 387 (CLB), articles required directors' approval, no proof of any such approval and also no proof of articles' requirement for payment of transfer fee. Transfer ineffective. Register of members rectified.

173. *Claudi-Jas Panikar v. Sekai Papers* (P) Ltd. (2006) 11 SCC 73; (2006) 124 Comp Cas 695, the requirement of stamp is mandatory. *Dove Investment (P) Ltd v. Gujarat Industrial Investment Corporation Ltd.* (2005) 124 Comp Cas 399 (Mad), stamp got endorsed from prescribed authority. Stamps on the transfer for no value or defaced or cancelled or else the company can reject it and where a form was resubmitted after cancellation and by that time its validity period had expired, the company was held to have rightfully rejected the same. *A5 Macau v. Krishnap Processing and Ginning Factory Ltd.* (1993) 2 Comp L 217, 220 CLB. Where the company changed its articles of association before the rectified instrument was presented again, the alteration would be effective against the transferor. *Maharashtra Printing and Publishing Ltd v. Varakarai Publishers Ltd.* (1992) 25 Comp Cas 88; (1992) 1 Comp LJ 234 (Ker); *Munigowda v. Anantkumar Enterprises* (P) Ltd. (1991) 72 Comp Cas 555 (Karn). The CCR did not accept a petition for rectification which was based on transfer form carrying uncancelled stamps. *Blarot Hotels Ltd. re.* (1994) 81 Comp Cas 897 (CLB). Company itself cancelling stamps, registration of the transfer was held to be invalid, *Sukesh Chandra v. Vardhaman Singh & General Mills Ltd.* (1994) 85 Comp Cas 641 (CLB).

174. These requirements are prescribed by S. 108, a proviso to which provides that where the instrument of transfer has been lost, the company may register the transfer on such terms of indemnity as the Board of directors may think fit. S. 108(1) proviso.

175. If no such certificate is in existence, the letter of allotment should be sent S. 108(1) S+P, *Axcenti Electric Supply Co. v. S.S. Chaudhary*, AIR 1964 Nag 283. A company cannot be compelled to register a share purchaser's name unless the certificate for the relevant shares along with the instrument of transfer are made available to the company. *Promod Agarwal v. Rockit & Coieven of India Ltd.* (2008) 32 CLA 1194 (CLB).

A legal heir to shares can transfer them without having first to get himself registered as a shareholder [S. 56(5)].

The transfer should be approved at a valid meeting of the company's Board of directors.¹⁷⁶

Blank transfers.—A blank transfer form means a form which has been signed by the transferor only and there is no other entry on it. It is given over to the transferee with the right to have himself or any other person registered as a shareholder. A blank form can remain in circulation for any length of time creating many problems mostly that of evasion of taxes and priority between transferees. A blank transfer form is a valid instrument. The basic principles were restated by the Gujarat High Court in *Prahlad Jayaram Thakar v V&S Shelat*.¹⁷⁷ Firstly, an instrument of transfer which carries no entry except the signature of the transferor is a valid instrument. Secondly, a person to whom such an instrument is delivered along with share scrips gets an implied authority to complete the instrument. Thirdly, the transferee acquires good title to the shares if he has received the documents in good faith and for consideration.¹⁷⁸

The facts of the case were that the transferee had received the shares under a gift deed from a lady who signed blank transfer forms which, however, could not be registered before her death.

The other heirs having claimed the shares, the court held that the transferee had not acquired a good title to shares as he had received them without consideration. The gift was not complete without registration. But on appeal to the Supreme Court this decision was reversed.¹⁷⁹ In the view of the Supreme Court a complete gift had taken place on delivery of the share

176. *Claude-Lise Perinckx v. Sekal Papers (P) Ltd.* (2006) 11 SCC 79; (2005) 124 Comp Cas 68; the meeting was invalid because of deficient notice.

177. (1973) 4J Comp Cas 203 (Guj).

178. The following cases establish these principles: *Quirat Assignee v. Madhukar Sheth*, AIR 1947 Bom 217; *Mangalji Desaiji Bhawani Whalal Samlal & Co.* (1925) 20 52 IA 92; (1926) 28 Bom LR 777; AIR 1926 PC 38; *Arjun Prasad v. Central Bank of India*, AIR 1956 Pat 32; the transferor put his self registered and that was held to be valid. A blank transfer does not operate in anybody's favour unless the formalities of transfer have been complied with. *Tulsiwarkar Electro-Chemical Industries Ltd v. Alwynpur Textiles*, (1972) 42 Comp Cas 561 (Ker). A blank transfer which is delivered as a pledge and not as transfer does not have this effect. Violation of marketing regulations such as the Securities Contracts (Regulation) Act, 1956 enables the transfer to be ineffective. The transferor remains the owner for purposes of attachment. The above Act applies to shares of non-listed companies as well if they are marketable. *AK Menon v. Fairgrowth Financial Services Ltd*, (1994) 81 Comp Cas 508 (Special Court); *BOL Finance Ltd v. Custerline*, (1997) 10 SCC 488; (1997) 89 Comp Cas 74 (Special Court). The word "law" as used in that Act means the law in force in India and not merely the Companies Act. A transfer for not complying with stamp law is not valid. *Kothari Industrial Corp. Ltd v. Laxor Detergents (P) Ltd*, (1994) 81 Comp Cas 699; (1994) 1 Comp U 178 (Mad). Where there was no such violation of laws, a pledge of shares-cum-contract to sell, was held to pass property upon delivery of certificate and blank transfer form. *JyotiShankar Chivayekhli Parikh v. Decon Paper Mills Co. Ltd*, (1994) 80 Comp Cas 159 (C.L.B.).

179. *Vasudeo Nanubhai Patel v. Prahlad Jayaram Thakar*, (1974) 2 SCC 323; (1975) 1 SC 2534; (1975) 45 Comp Cas 43.

scrips and transfer deeds. Registration with the company was a formality which had nothing to do with the completeness of the gift as between the parties.¹⁸⁰

Transfer contravening Section 56

When requirements of Section 56 are complied with, the company registers the transfer. The name of the transferor is struck off the register of members and that of the transferee substituted. It has been held by the Calcutta High Court that the requirements of the section are directory and not mandatory.¹⁸¹ The court followed a decision of the Allahabad High Court¹⁸² where it was pointed out that the section does not indicate any consequences of its non-observance. It is also not exhaustive of all the modes of transfer. It covers only two. It has no application to other modes of transfer. Hence a company can register a transfer without the original scrips being produced. All that it can require to protect itself is an indemnity against untoward consequences. The court accordingly ordered the company to register a transfer when the transferee was not able to produce the original scrips. But the decision of the Allahabad High Court which the Calcutta High Court purported to follow had been reversed by the Supreme Court in *Mamandal Khetan v Kedar Nath Khetan*.¹⁸³ Ray CJ laid emphasis upon the words "shall not register" as used in the section, which leave no doubt that the provision is mandatory. "The mandatory character is strengthened by the negative form of the language. The prohibition against transfer without complying with the provisions of the Act is emphasised by the negative language. Negative language is worded to emphasise the insistence on compliance with the provisions of the Act." The facts were that on the partition of a family shares were agreed to be transferred in blocks between members and the company registered the transfers on the basis of the partition deed itself without any transfer form having been executed. The Supreme Court accordingly held that this transfer should not have been registered.¹⁸⁴

Where the trustees of the shares passed a resolution authorising one of them to transfer the shares, it was held that the transfer under such authority was not valid. The trustees could not delegate the power to one of them. The transferee could not apply for rectification of the register of members.¹⁸⁵

¹⁸⁰ Reemphasised by the Supreme Court in *LIC v Kamla Ltd.* (1986) 1 SCC 264, 323–34.

¹⁸¹ *Jars Cotton Mills Ltd v Renu Prasad Rajuria*, (1975) 45 Comp Cas 686 (Cal).

¹⁸² *Malerkotla Khetan Sugar Mills v Ishwari Khetan Sugar Mills*, (1963) 33 Comp Cas 1142.

¹⁸³ (1977) 2 SCC 479; (1977) 47 Comp Cas 186.

¹⁸⁴ See further *Sukha Chandra Pannaraj v Salal Papers (P) Ltd*, (1990) 69 Comp Cas 65 Bom, of the four transfers, the signature of one for the transfer from tens not there and the firm was held to be ineffective as a transfer. *Kankar Industrial Corp. Ltd v Lazar Detergents (P) Ltd*, (1984) 81 Comp Cas 699; (1994) 1 Comp LJ 178 (Mad). In the case of a transfer which has already been registered, deficiency in stamp, if any, must be pointed out within one year because otherwise the transferee would be deprived of his opportunity of getting things rectified.

¹⁸⁵ *Cloud-Tek Paravur v Sekai Papers (P) Ltd*, (2005) 11 SCC 73; (2005) 124 Comp Cas 685.

Once the necessary formalities have been complied with, the transferee gets the right to be put on the register. Emphasising this fact in *ITC v Escorts Ltd.*¹⁸⁶ Chinnappa Reddy J of the Supreme Court observed:

Where the transfer is regulated by a statute, as in the case of a transfer to a non-resident which is regulated by the Foreign Exchange Regulation Act, the permission, if any, prescribed by the statute must be obtained. In the absence of the permission, the transfer will not clothe the transferee with the right 'to get on the register' [W]here [the] permission has been obtained, [the transferee] may ask the company to register the transfer and the company ... may not refuse ... except for a *bona fide* reason, [but] neither arbitrarily nor for any collateral purpose. The paramount consideration is the interest of the company and the general interest of [its] shareholders. ... [O]nce [the] permission is obtained, ... [it is not] open to the company ... to take upon itself ... the task of deciding whether the permission was rightly granted.¹⁸⁷

Direct transfers.—The provisions of this section as to procedure and formalities of transfer are not to apply where both the transferor and transferee are entered as beneficial owners in the records of a depository. [S. 56(1)] Where the securities are dealt with in a depository, the company has to intimate the details of allotment of securities to the depository immediately on allotment of such securities. [S. 56(4)]

The same sub-section also provides, that in the case of allotment of securities to the subscribers of the memorandum, certificates must be delivered to them within two months of incorporation. In the case of allotment of shares, delivery has to be made within two months of the allotment. In the case of transfer of shares, it has to be done within one month from the date of receipt of transfer papers and in case of allotment of debentures within six months.

Unfair trade practices in securities market

For prevention of unfair trade practices in the securities market, the Securities and Exchange Board of India (SEBI) has prescribed SEBI

186. (1986) 1 SCC 264, 327; (1986) 39 Comp Cas 548; (1986) 1 Comp LJ 71.

187. Citing *Arg. Re. (1946) 2 All ER 106*, the permission of the Treasury was requisite and that being not obtained the company was not compelled to register the transfer. A transfer not approved at a meeting of the Board is not effective and is liable to be struck down. *Tarif Chaudhury v Raj Kumar Kapoor*, (1983) 54 Comp Cas 12; (I.R. 1982 Dec 15). As between transferor and transferee, transfer becomes complete when the contract is documented and tax authorities are bound to recognise it whether it has been accepted by the company or not. *CII v M. Ramaswamy*, (1985) 57 Comp Cas 7 (Mad). Transfer of the right to receive dividends in shares is not the same thing as transfer of the shares themselves. Shares are not ordinary goods. They are a part of a complex web of relations. The principles relating to ordinary goods cannot apply to them in. *Ito Ekiishi v PK Mohammad* (P) Ltd., (1985) 58 Comp Cas 543 (Ker). The right to have the transfer registered arises when it is complete in all respects. *KN Nirayana v ITC*, (1984) 55 Comp Cas 182 (Ker). Where the company did not accept a legal transfer and continued to deal with the transferor, it was enjoined from preventing the transferee from exercising the normal rights of a shareholder. *Chungie Matrix Hosi Ltd v Chosagne & Co India P. Ltd.* 2000 CLC 1803 (AP).

(Prohibition of Fraudulent and Unfair Trade Practices relating to the Securities Market) Regulations, 1995. The rules provide for an investigation in respect of the conduct and affairs of any person buying, selling or otherwise dealing in any securities. Persons connected with the securities market would include primary sellers or buyers. Such persons can be proceeded against even if the transaction in question has been carried through a broker or agent. Securities market is not confined to stock exchanges only. SEBI has the power to call for information and documents relevant to an inquiry even from persons against whom an inquiry cannot be or has not been constituted.¹⁸⁸

Forgery in transfer

Sometimes a forged instrument of transfer may be presented for registration. "The first thing that a company should, therefore, do when a transfer is tendered, is to inquire into its validity."¹⁸⁹ It has, therefore, become usual, when a transfer is brought, not to register it at once, but, as one precaution, to write to the registered address of the shareholder, and inform him that such a transfer has been lodged, and that if no objection is made before a day specified, it would be registered.¹⁹⁰ But, notwithstanding this precaution, a forged transfer may chance to slip through¹⁹¹ and the consequences will be:

Firstly, a forged transfer is a nullity and, therefore, the original owner of the shares continues to be the shareholder and the company is bound to restore his name to the register of members.¹⁹²

Secondly, if the company has issued a share certificate to the transferee and he has sold the shares to an innocent purchaser, the company is liable to compensate such a purchaser if it refuses to register him as a shareholder.¹⁹³

Thirdly, if the company has been put to loss by reason of the forged transfer, it may recover indemnity from the person who lodged it.¹⁹⁴

188. *Karmazari Finance Ltd v SEBI*, (1996) 87 Comp Cas 186 (Guj); *SEBI v Shriram Mutual Fund*, (2006) 5 SCC 361; (2006) 131 Comp Cas 591, penalty imposed for excess of transaction through brokers. There is no discretion with the authority about the levy of penalty the same being mandatory, discretion is only about quantum of penalty.

189. *Blackett & Sons Francisco Railway Co Ltd*, re, (1868) LR 3 QB 564; CB LT 467.

190. *Blackburne J in Societe Generale de Paris v Lund Walker*, (1885) 1 R 11 AC 20; 54 LT 399 (H.L.).

191. This was the course pursued in *Swan v North British Administration Co Ltd*, 7 CBNS 411, but the company's letter was intercepted by the forger. The result of the consequent litigation showed that even after all those precautions the company did suffer from registering the transfer, being obliged in the end to restore shares to Swan.

192. *Barton v North Staffordshire Railway Co*, (1889) 38 I Ch D 478; 58 LT 549; *Hartson v London and North Western Railway Co*, (1889) 24 QBD 77; 62 LT 164 (CA); *People's Insurance Co v Wood & Co* AIR 1960 Punj 368, 380.

193. See, *Balkis Consolidated Co Ltd v Frederick Townshend*, 1893 AC 396; 69 LT 598 (H.E); *Dixon v Kenway & Co*, (1908) 1 Ch 803; 82 LT 527.

194. *Shehzad Corp v Brarley*, 2005 AC 392; 193 LT 83. Where the share certificate was sent to a wrong person of the same name and he transferred the shares to a bank, he faced prosecution for impersonation under S. 116, *BTI Star Technologies Ltd v Kishan Agarwal*, (1995) 53 Comp Cas 985 (Raj).

Relationship between transferor and transferee

A shareholder who has contracted to sell his shares becomes a constructive trustee of the transferee for those shares until the transfer is duly registered. It is, therefore, the duty of the transferor not to sell the shares again; "nor should he prevent or do anything to prevent the company from accepting the purchaser or his nominee".¹⁹⁵ But he is not bound to do more. And so a transferor who sold his shares on a stock exchange was held not liable when the company, having the power to do so, refused to register the transferee as a member.¹⁹⁶ In such a case the legal title to the shares remains in the vendor, but the beneficial interest is transferred to the purchaser. "The vendor is the trustee of all property annexed to the shares. He is a trustee not only of the corpus but also of the income".¹⁹⁷ The transferee is entitled to recover dividend amount or bonus shares that might have been received by the transferor.¹⁹⁸ He must pay the dividends, if any, to the purchaser.¹⁹⁹ The purchaser also has the right to control the exercise by the vendor of the right to vote and he may so control it as to ask the vendor to vote for the alteration of the company's articles so as to procure transfer of shares in his name.²⁰⁰

But then how far is the transferor bound to obey the wishes of the transferee? The limits have been explained by the Supreme Court in *R Muthalalage v Bootbay Life Assurance Co.*²⁰¹

A shareholder disposed of a part of his holding, but the company refused to register the transferee as a shareholder. Meanwhile the company increased capital by issuing further shares to the existing shareholders. A number of shares were offered to the transferor, but he applied

195. *Lundon Founders Assur Ltd v Clark*, 1886J LR 20 QBD 576; 59 LT 93. Where transfer documents are valid and the same have been registered by the company, their validity cannot be brought into question on account of any dispute between transferor and transferee, such as failure to pay purchase price in full. *K Ramamj v Mahadevji Ter Estates (P) Ltd*, (1995) 1n CLA 270. *Munayyid v Amthi Cine Enterprises (P) Ltd*, (1991) 77 Comp Cas 555 (Kant). When a person was present as a director in the board meeting which approved a transfer he was not allowed afterwards to question its validity. *Mukundal Manchandji v Prakash Rustomji*, (1991) 72 Comp Cas 575 (Kant). This decision was affirmed in *Suresh Kumar Manchandaji v Prakash Renuka Ltd*, (1996) 87 Comp Cas 102 (Kant). *Miles Son v Guardian Institute Ltd*, (1998) 93 Comp Cas 105 (Cal).
196. *Id*. but where the transferor obstructs the transfer, he will have to indemnify a person who has suffered by reason of the obstruction. *Harrison, Harrison & Co v Jackson & Sons*, 1943 AC 266 (HL).
197. ED Saseen & Co Ltd v K A Patel, (1943) 45 Bom LR 46; *Wimblish, re*, 1910 Ch 92; 162 LT 123.
198. *Tikus Juhu v Hydraloid Industries Ltd*, (1997) 88 Comp Cas 551 CLB, transferor's right to dividend.
199. Expressly recognised by the Supreme Court in *CJI v Indira Discount Co Ltd*, (1979) 2 SCC 514; (1979) 75 ECR 191. The beneficial interest of the transferee cannot be attacked for claims against the transferor. See, *D Lal v S Ganguli*, (1990) 68 Comp Cas 526 (Del), where the court permitted review of an order of attachment passed in ignorance of the fact that shares standing in the name of the transferor in the company's records in fact stood transferred to another.
200. *Id*. *See also*, the decision of the Supreme Court in *R Muthalalage v Bootbay Life Assurance Co*, AIR 1953 SC 385; (1954) 34 Comp Cas 1; *Harden v Bellairs*, 1901 AC 111; 1523 (PC).
201. AIR 1953 SC 385; (1954) 21 Comp Cas 1.



to take only those few which appertained to his unsold shares. The transferee sought to compel him to apply in his name for the whole of the shares and that for the benefit of the transferee.

But the argument did not find favour with MARAJAN J of the Supreme Court. He laid down "that as long as a transfer is not registered the transferor is the trustee of the transferee for the shares — a trustee for the dividends and the right to vote. But he cannot be called upon to incur additional liability. He is not bound to obtain for the benefit of the transferee new shares in the further issue of capital. Nor is the principle of equitable trust extended to cases where the transferee has not taken active steps to get his name registered with due diligence." But His Lordship added that if the transferor of his own volition chose to obtain the new shares which appertain to the shares sold by him, he would have to hand over those shares to the transferee on payment of the amount spent.²²²

If the shares are partly paid and the company calls upon the transferor to pay the unpaid balance, the transferee must provide the money or indemnify the transferor against the amount of the call.²²³

A person who gets shares under a gift deed with blank transfer forms and is not able to get them registered until the transferor's death, acquires a good title to them, as against the legal heirs.²²⁴ This was not applied in a situation in which blank transfer forms were handed over not by the owner herself or under her signature but by her husband without her authority.²²⁵

Bonus shares issued after the transfer were held to be the property of the transferee and not that of the transferor.²²⁶ Where the transfer documents were lost in post and the transfer became delayed because the company did not receive the original documents and in the meantime bonus shares were issued, the transferee was not allowed to sue the company in respect of those shares. His remedy was to proceed against the transferor to whom they were allotted because his name was still there in the register.²²⁷

Compensation for misrepresentation as to value.—Any misrepresentation by the transferor as to the value of the shares will make the transferor liable to make good the transferee's loss, if any. Where the transferor told the transferee that according to his forecast the company's earnings would

222. Reaffirmed by the Supreme Court in *UCI v. Edwards Ltd.*, (1986) 1 SCC 264, 323. (1986) 59 Comp Cas 548 (1986) 1 Comp L 91. Followed in *Pradyip Kumar Sarker v. Lucent Tel Co Ltd.* (1990) 87 Comp Cas 491, 509 (Ct.). Where the transfer in question was registered by the company and the transferee received the dividend amount and subsequently the transfer was held to be invalid with the result that the shares reverted to the transferor, the transferee was held to be not bound to pay back the dividend amount received by him. *Monheo Michael v. Teekay Rubber & Tea Co Ltd.*, (1991) 79 Comp Cas 370 (1993) 3 Comp L 449 (CLB).

223. *Spencer v. Ashworth, Purlington & Co.*, (1925) 1 KB 589 (CA).

224. *Volvo Lastvagnar Kungswuster AB v. Murganikshamvar (India) Ltd.* (1998) 20 CLA 382 (1999) 4 Comp L 112 (2000) 100 Comp Cas 131 (CLB). *Vasudeo Ranadeendra Shidat v. Pramod Jayaramji Thakar*, (1974) 2 S.L.C. 323; (1975) 1 SCR 534; (1975) 45 Comp Cas 43.

225. *John Tinson & Co (P) Ltd v. Surjeet Malhan*, (1997) 11 SCC 651. (1997) 88 Comp Cas 720.

226. *Vikas Jain v. Hyderabad Industries Ltd.*, (1997) 88 Comp Cas 551 CLB.

227. *Pyareben M Singh v. NWT Ltd.*, (2002) 111 Comp Cas 816 (CLB).

touch a particular figure which turned out to be wrong, the transferor was held liable to pay damages ascertained on the basis of the difference between the warranted earnings and actual earnings.²⁰⁸ A founder member signed a blank transfer form to enable the company to increase the membership base of the company by transferring some of his founder member's shares. The company used the shares for other purposes. The aggrieved member was allowed to recover compensation measured by the value of his shares.²⁰⁹ Where a director is buying from a member there is a fiduciary duty to disclose the truth about the value of the shares. If this duty is not performed the seller member would be entitled to compensation for his loss. The measure of compensation would be the value of his shares at the time of sale. A valuation based on estimated future income stream would be preferable to the one based on the value of non-realisable assets. But because of uncertainties in the income position, the assets value was held to be preferable in this case.²¹⁰ A clause in a sale agreement excluding liability for breach or warranty about the value of shares would be given narrowest possible meaning against the seller.²¹¹

Depository scheme

Depository has been defined in Section 2(32) to mean a depository as defined in Section 2(1)(c), Depositories Act, 1996.

The procedural requirements, as noted above, show that the country's stock markets are functioning under a cumbersome process for effecting transfers of securities. A scheme for establishing depositories has been established to record ownership details in book entry forms.²¹² Investors in securities will have the option to continue with the existing system of ownership and transfer through share certificates or to come under the depository mode. Each depository would have to register itself with SEBI and to obtain from it a certificate for commencement of business. Each depository will have its agents to be known as participants. Such agency can be conferred on banks, financial institutions, or large corporate brokerage firms. A shareholder who joins a participant, his shares will be dematerialised. His name will be entered in a book showing him as a beneficial owner. In the company's records the depository will be shown as the registered member. But all the benefits of shareholding will remain vested in the individual shareholders. A shareholder will have the right to withdraw from the scheme after joining it. His share certificate will be restored to him and his name brought back to the register of members.

Transfers are recorded automatically on delivery versus payment basis with constant flow of information to the company's depository.

208. *Lion Nathan Ltd v CC Bottlers Ltd*, (1996) 1 WLR 1438; (1996) 2 BCAC 97; (PC).

209. *Doyal v Popdy*, (2000) 1 BCAC 19 (Ch D).

210. *Blair v Blair*, (1999) 2 BCAC 245 (Ch D).

211. *Union Carbide v Murray Olshanski*, (2000) 1 BCAC 1 CA.

212. *Hindustan Times* 22-9-1995, p 19, by means of a Presidential Ordinance.

Other things will remain the same. The duty of the company to accept a transfer and the right of the transferor or transferee to appeal to the Tribunal against refusal by the company will remain the same.

It is predicted that scores of foreign institutional investors (FIIs) will pump in billions of dollars into Indian Stock Exchanges. Market operations will be very convenient with the elimination of the physical movement of share certificates, etc., and minimisation of forged and other bad deliveries of transfer documents. The system will involve consequential changes in the Companies Act, Stamp Act and the Income Tax Act. The costs of transfer will be minimised because of the elimination of burdensome paper work. [Depositories Act, 1996]

Depository does not have the power of deciding questions of title or ownership of shares. The depository is a devise in the nature of a mechanical agency. The disputes have to be decided by adjudicatory bodies like the Tribunal or court. The depository has to act according to the orders of such adjudicatory bodies.²¹²

Priority between transferees

Where a shareholder has fraudulently sold his shares to two different transferees, the first purchaser will, on the ground of time alone, be entitled to the shares in priority to the second.²¹³ A person assigned his property, including some shares, for the benefit of his creditors. The assignee failed to get the share certificate, but gave notice of assignment to the company. The assignor sold the shares to another, who applied for registration. It was held that the assignee's claim was prior in time and, therefore, entitled to registration.²¹⁴ Similarly, where a person, holding shares in trust for his wife, mortgaged them, but, before the mortgage could be registered, the wife asserted her claim and was held to have priority.²¹⁵ But the second claimant in point of time may displace the original priority of the first purchaser by showing that as against him he has acquired the full status of a shareholder; or, at any rate, that all the formalities have been complied with and that nothing more than some purely ministerial act remains to be done by the company.²¹⁶ But the subsequent transferee who gets his name registered with notice of the prior transfer is not entitled to priority.²¹⁷

Specific enforcement of agreement to sell shares

An agreement for dealing in shares is specifically enforceable. A company, having contracted to buy a controlling block of shares, applied for specific enforcement and it was held to be no defence for the other party to

213. *National Securities Depository Ltd v Kamlesh Shah*, (2013) 172 Comp Cas 131 (Bom).

214. *Societe Generale de Paris v Janet Walker*, (1886) 1R 11 AC 20; 34 LT 389 (HL).

215. *Pest v Clayton*, (1906) 1 Ch 639; 94 LT 465.

216. *Ireland v Hart*, (1902) 1 Ch 522; 86 LT 385.

217. *Maire v North Western Bank*, (1891) 2 Ch 599; 61 LT 456.

218. *Coleman v London County & Westminster Bank Ltd*, (1916) 2 Ch 353.

say that the company had not yet complied with the requirements of the Act to enable it to invest in shares of other companies.²¹⁹

Mortgage or pledge of shares

A share in a company is moveable property. It can, therefore, be delivered as a security for raising a loan. Where a share certificate is delivered to the pledgee it will operate as a pledge. The pledgee can only retain possession till his dues are paid.²²⁰ Where not merely possession of share certificates is delivered, but some right or interest is created in favour of the lender, such as, for example, handing over blank transfer forms under the signature of the transferor, it operates as a mortgage. The mortgagee gets a special interest, for he can have himself registered as a shareholder and the same will be effective against the transferor and his representatives. Where the pledging shareholder executed an agreement in favour of the bank authorising it to exercise voting rights and the company was also a party to it, the court said that the bank became entitled to exercise voting rights at a meeting on filing the transfer documents. The entry in the register of members was a mere formality. The validity of the pledge, etc., could not be adjudicated by the chairman under the in-house procedure.²²¹ Where the lender gets himself registered as a shareholder, it would be a clear cut complete transfer. No residuary interest in the pledged shares would survive in favour of the borrower. His interest is protected by his right of redemption, i.e. his right to recover back the shares on paying back the lender.²²² In a case of this kind before the Patna High Court:²²³

Certain share certificates were delivered to a bank as against a loan. The blank transfer forms in respect of those shares were signed by all the persons whose signatures were necessary and were delivered to the bank. The company subsequently went into winding up and the bank had the scrips registered in its name, which was done by the liquidator with the permission of the court.

219. *Bonnie Bowl India Ltd v CIP Ltd*, (1990) 29 Comp Cas 246 (Bom). Where the purchaser is a joint family, the contract would be enforceable by asking for registration in the name of the head of the family. *Vickers Systems International Ltd v Mahesh P Keswani*, (1992) 73 Comp Cas 317 (CLB). There is also the decision of the CLB that a company can lawfully refuse to register a transfer of shares which is, in reference to the buying company, void by reason of violation of S. 372, 1956 Act [now 186]. *Gordon Woodcroft Ltd v Trident Management & Portfolio Services (P) Ltd*, (1994) 79 Comp Cas 764 (1994) 1 Comp LJ 313 (CLB). An agreement to sell shares was specifically enforced even when there was some delay in delivery caused by the fact that the seller received the share certificate from the company with some delay. *Credit v Cigna*, (1996) 2 BCLC 26 (Ch D).

220. See, *Konfiderasi Ekyu Nyayam v R.D Krishna Pothu*, AIR 1943 Mad 74, where [earlier CL] recognised the validity of a pledge of shares by mere delivery of possession and without the need for any instrument of transfer. The only difference would be that for enforcing the security he would have to resort to a court of law.

221. *Saroyan Investments (P) Ltd v Soma Textiles & Industries Ltd*, 2000 CLC 1382 (Cal).

222. *Id Natarajappa Padipet v Krishnadeva Theertha Ltd*, 2000 CLC 489; (2000) 26 CLA 171; (2000) 109 Comp Cas 661 (Karn).

223. *Arjum Pressad v Central Bank of India*, AIR 1956 Pat 32.

It was held that the registration in favour of the bank was valid. Das J stated the effect of authorities in these words:²²⁴

Thus where under the articles of the company a transfer of shares may be made by an instrument in writing, the shareholder may sign a blank transfer and hand it over to a purchaser or mortgagee with authority to the holder of it for the time being to file in the name of the transferee, and such a transfer when filed in can be sent in for registration and no objection can be raised by the company to its validity.²²⁵

Where the original transferee of blank forms further delivers them in blank to another person, the latter will get the rights of the transferor but no better rights. The transfer being in blank, he cannot say that he had received it in good faith.

A simple delivery of share certificates unaccompanied by any transfer forms operates only as a simple mortgage, what is called in English Law as an equitable mortgage.

Nature of share

A man's movable property is of two kinds, namely, chose-in-possession and chose-in-action. Chose-in-possession means property of which one has actual physical possession, but chose-in-action means property of which one does not have immediate possession, but has a right to it, which can be enforced by a legal action. This right is generally evidenced by a document, for example, a railway receipt. A share in a company is also a chose-in-action and a share certificate is the evidence of it.²²⁶ Section 2(84) defines "shares" as share in the share capital of the company, and includes "stock" except where a distinction between stocks and shares is express or

224. *Ibid.* 35.

225. Banks have been directed by the Reserve Bank of India to have the shares pledged to them registered in their names. A pledge under a short term loan was held not to confer that right and, therefore, refusal by the company to register the shares in the name of a bank was held to be justified. *Caranz Bank v. Ankit Granites Ltd.* (1999) 27 Comp Cas 511 (CLB). The bank has the right to get itself registered where the pledge is under a long term cash credit arrangement. The fact that no consideration was mentioned in the transfer form was immaterial because this requirement is for stamp duty and the nationalised banks are exempt from stamp duty. *Indian Bank v. Kisan Overseas Express Ltd.* (2000) 4 Comp 114 416 (CLB). Where a "deed" is requisite for a transfer, mere form will not do beyond serving as an evidence of the parties' intentions. *Colonial Bank v. Frederick Whitney*, (1886) LR 11 AC 426. Other cases considered by the court where blank transfers were recognised as conferring right upon the transferee: *Tidbits Colours Co. v.* (1874) 1 R 12 Eq 273; 43 1 Ch 426; *Colonial Bank v. Cody*, (1890) 1 R 15 AC 267 (33L); *Fox v. Martin*, (1895) 64 L Ch 673; *Colonial Bank v. Hepworth*, (1867) 26 Ch D 36; *Harrold v. Pienry*, (1901) 2 Ch 524; *Carter v. Wake*, (1877) 1 R 4 Ch D 605; *London and Midland Bank v. Mitchell*, (1899) 2 Ch 163.

226. *PGM Holdings Ltd. v.* (1942) 2 Ch 235, 241 (CA). Adopted by the Supreme Court in *Gund Julian & Co v. Calcutta Stock Exchange Assoc. Ltd.* AIR 1964 SC 240, 252. (1963) 23 Comp Cas 862; *S Viswanathan v. East India Distilleries & Sugar Factories*, AIR 1957 Mad 341; (1957) 27 Comp Cas 175.

implied.²²⁷ But in India a share is also regarded as "goods".²²⁸ Section 44, Companies Act, 2013, provides that shares or other interest of any member in a company shall be movable property. An amendment of Section 82 introduced by the Companies (Amendment) Act, 1999 says that while before this amendment Section 82 confined itself to the "shares or other interest of any member", the statement should now be read as "shares, debentures or any other interest of any member." Section 44 of 2013 Act is to the same effect. Section 2, Sale of Goods Act defines goods as including every kind of moveable property. Hence shares in a company in India are goods and not mere chose-in-action.²²⁹ The analysis of the "share" in terms of goods has been carried further to some of its natural implications by the Supreme Court in *LIC v Escorts Ltd*.²³⁰ If shares are goods, rules relating to passing of ownership in goods would apply. Section 19, Sale of Goods Act says that property in the goods sold passes when it is intended to pass. "Shares" are specific goods and Section 20 of the Act says that ownership in specific goods passes when the contract is made. Thus a purchaser of shares becomes the owner of the property in the shares when he contracts to buy them. The inevitable implication of these provisions is that the company cannot deprive him of his ownership by refusing to register him as a shareholder unless there is a genuine reason to do so. But even so shares are not "goods" in the ordinary sense of the word.²³¹ Shares are a peculiar kind of movable property which cannot pass from hand to hand like bales of cotton. The property in these shares belonged to the registered shareholders and could not be transferred to another except according to the articles of the company.²³²

Thus the exact nature of a share does not admit of easy explanation, the company being an altogether distinct person from the members composing it. It is universal, though not obligatory, for an incorporated company to have a capital stock. It is equally universal to divide the capital into shares of nominal value. A person who holds such a share is known,

227 *LIC v Escorts Ltd*, (1986) 1 SCC 264, 320; (1986) 59 Comp Cas 545; (1986) 1 Comp LJ 91, where the nature of a share and the position of shareholder is explained.

228 *Mukundji Devnaji Bhavaria v Madipal Sanbhau & Co*, (1925-26) 53 IA 92; (1924) 28 Bom LR 777; AIR 1926 TC 136; *Rajya Niwar v Krishna Patil*, (1942) 2 MLJ 120; AIR 1943 Mai 74; *Ajmal Prasad v Central Bank of India*, AIR 1956 Pat 32, in all these cases shares were considered as goods. *Indian Corp & Steel Co Ltd v Dallekush Holdings Ltd*, AIR 1997 Cal 283. It has been held that shares do not mature into goods before issue. Hence an applicant for shares is not a co-owner so as to create jurisdiction in a co-owner Indian to interfere in the matter on the ground of an alleged unfair trade practice. *Morgan Stanley Mutual Fund v Janick Dms*, (1994) 6 SCC 225; (1994) 51 Comp Cas 318.

229 It was held in *Hazarewadi Sankalp v Jyoti Chaitanya Ghosh*, (LR (1919) 46 Cal 331, that a share certificate passing from hand to hand with blank transfer deeds does not thereby become a negotiable instrument. Accordingly, a bona fide purchaser of shares from a person who is in possession of them by fraud, does not acquire a good title to them.

230 (1986) 1 SCC 264, 321; (1986) 59 Comp Cas 518; (1986) 1 Comp LJ 91 SC. In an earlier decision of the Delhi High Court, *CIT v Bhawani Nath Ltd*, (1982) 32 Comp Cas 80; (1982) 135 ITR 447 (Del) it was recognised that unless the requisite documents were prepared and signed, the shares would be unascertained goods and not in a deliverable state.

231 *Fusaro v Clark*, (1964) 1 LR 36 (Ch D) 297.

232 *Vishwanath Sanbhau v Mukundji Devnaji Bhavaria*, AIR 1923 Bom 423.

as the shareholder. Each shareholder, therefore, holds a portion of the capital of the company. "A share means a share in the capital of the company. It is a tangible property."²³² "But shareholders are not, in the eyes of law, part owners of the undertaking. The undertaking is something different from the totality of the shareholdings."²³³ All the assets of the company are vested in the corporate body and not in the individuals composing it. Hence a share does not constitute the holder a part owner of the company's capital.

But shareholders are the owners of certain rights and interests and subject to some liabilities. A shareholder acquires an interest not in a mere chattel, but in the company itself, an interest of a permanent nature. "A share is the interest of a shareholder in the company measured by a sum of money for the purpose of liability and dividends, in the first place, and of interest, in the second, and also consisting of a series of contract as contained in the articles of association."²³⁴ "A share is not a sum of money but an interest measured by a sum of money and made up of various rights and liabilities. A share is an existing bundle of rights."²³⁵ It is well established that shares are simply bundles of intangible rights against the company which had issued them. Share certificates are not valuable property in themselves—they are just evidence of the true property, which are the proportionate interests of the shareholders in the ownership of the company. One *per se* share is exactly the same as any other. This was recognised in *Solloway v McLaaglin*.²³⁶ Therefore, each share certificate with the depository evidences the same bundle of rights and each bundle of rights can satisfy the client's proprietary interest as any other.²³⁷ A share, for example, entitles the holder to receive a proportionate part of the profits of the company; to take part in the management of the company's business in accordance with the articles, to receive a proportion of the assets in the event of winding up and all other benefits of membership.²³⁸ A share also carries some liabilities, for example, the liability to pay the full value in winding up. All these rights and liabilities are subject to the terms and conditions contained in the company's article. Rights and liabilities as regulated by articles are of the very essence of a share. "When, therefore, the owner of the share dies, what

232. *SNP Vagan, Quilon, re*, ILR 1969 Ker 516; (1970) 1 Comp LJ 85.

233. *Short v Treasury Commissioners*, [1948] 1 KB 116, 122.

234. *Brahm's Trustee v Steel Bros & Co Ltd*, [1961] 1 Ch 279, 288. Adopted by the Supreme Court in *Chhajilal Chhajilal v Union of India*, AIR 1961 SC 41, 5 (1961) 21 Comp Cas 33.

235. *Pandit, re*, (1935) 1 KB 26 (CA) cited with approval by the Supreme Court in *CIT v Standard Vacuum Oil Co*, AIR 1966 SC 1393; (1966) 1 Comp LJ 187.

236. 1938 AC 247 (PC).

237. *Pacific Finance Ltd, re*, (2000) 1 BCAC 494.

238. See comment on "share" in *A.L.C. Murray on English Law*. Some of the rights of shareholders have been listed in the judgment of the Supreme Court in *LIC v Escorts Ltd*, (1985) 1 SCC 264, 326; (1986) 56 Comp Cas 546; (1986) 1 Comp LJ 91. "The rights of a shareholder are (i) to elect directors and thus to participate in management through them; (ii) to vote on resolutions at meetings of the company; (iii) to enjoy the profits of the company in the shape of dividends; (iv) to apply to the court for relief against oppression; (v) to apply for relief against mismanagement; (vi) to apply for winding up; (vii) to share in the surplus on winding up.

passes upon his death and what has to be valued is nothing more than the totality of his rights and liabilities as they exist under the provisions of the Companies Act and the constitution of the particular company.²⁴⁰ "The act of becoming a member [of a corporation] is something more than a contract; it is entering into a complex and abiding relation."²⁴¹

A share has become a symbol of "passive property".²⁴² The "active property" is under the control of the corporate managers. The legal concept of the shareholder is still that of the owner of the enterprise. But in fact his position has reverted to that of the "functionless tenant" of capital.²⁴³ Having supplied capital to the enterprise, he does not wish to be bothered except by dividends. His investment confers upon him a claim on income. "What is bought and sold in the market is not productive wealth itself, but income producing prospects. Right to income has become commodity for exchange."²⁴⁴ "Tensely, the shareholder has a piece of property with an open market value."²⁴⁵

Return as to allotment [S. 39]

Section 39(4) of the 2013 Act contains a very simple provision on the point. It says that whenever a company having a share capital makes any allotment of securities, it has to file with the Registrar a return of allotment in such manner as may be prescribed. In the preceding 1956 Act, the provision for return as to allotment was in Section 75 and that was as follows:

[Such particulars are likely to be prescribed]

Within 30 days²⁴⁶ of allotment of shares, a company is required to send to the Registrar a report, known as the "return as to allotment". It must contain the following particulars:

1. The number and nominal amount of shares allotted; the names, addresses and occupations of the allottees, the amount, if any, paid or payable on each share. No shares should be shown as allotted for cash unless cash has actually been received in respect of the allotment.
2. Contracts in writing²⁴⁷ under which shares have been allotted for any consideration other than cash, must be produced for examination of the Registrar.

240. Penrice, *et al.*, (1935) LKB 26, 57 (C.A). The nature of a share has been fully explained in *Burke v Cheshire CCJ*, AIR 1955 SC 74, (1955) 25 Comp Cas 1.

241. Holmes, *in Modern Problems of American Law*, 61 L Re 293, 287 US 544, 561 (1925).

242. The concepts of "active property" which means control of the corporate wealth and of "passive property" which means the interest of the shareholder in the corporation first coined by Berle and Means, *MODERN CORPORATION AND PRIVATE PROPERTY* (1932) 279.

243. See, Introduction in Mason, *THE CORPORATION IN MODERN SOCIETY* (1960); and Hetherington, *Corporate Responsibility*, (1969) Stan LR 255.

244. Paul D. Harbrecht, "The Modern Corporation" (1954) 46 Columbia LR 310, 315.

245. Berle and Means, *MODERN CORPORATION AND PRIVATE PROPERTY* (1932) 287.

246. The Registrar could extend this period if he was satisfied on an application by the company that it was inadequate for complying with the requirements of the section. Such application could be made before or after the expiry of the period of 30 days [S. 250(3)] (1956 Act).

247. S. 250(3)(b) (1956 Act) Where such a contract was not in writing, the company must submit a document containing the prescribed particulars of the contract. The document must be

3. Where bonus shares have been issued, the return must show the nominal amount of the shares allotted; names and addresses and occupations of the allottees and a copy of the resolution authorising the issue of such shares.²³⁸

4. Where the shares have been issued at a discount, the return must include a copy of the resolution authorising such an issue, a copy of the Tribunal's order sanctioning the issue, and, where the rate of discount is more than 10 per cent, a copy of the order of the Central Government permitting the issue.²³⁹

Issue of shares at discount [S. 53]

Generally speaking, the Companies Acts have always discouraged issue of shares for a price less than their face value. Allotment of shares at a discount is ultra vires and, therefore, the allottees who have been put on the register of members become bound to pay the full value of their shares.²⁴⁰ But a contract to take shares at a discount is not enforceable.²⁴¹ Law does not tolerate issue of shares at a discount even in an indirect way. Thus where a company issued debentures at a discount, which is allowed by the Act, and gave each debenture holder the right to convert his debentures into shares, it was held that it was a colourable scheme for issuing shares at a discount and, therefore, was not legal.²⁴²

Section 53 of the 2013 Act permits no concession for discount issues. It clearly says that no company is to issue shares at a discount. Any such issue is void. [S. 53(1)(2)] Subs. s (3) provides penalty for violation of the section. The section makes exception for issue of sweat equity shares under Section 54.

Sweat equity shares [S. 54]

"Sweat equity shares" means such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called. [S. 2(88)]

stamped with the same amount of stamp duty as would have been payable if the contract had been in writing. S. 75(1) [1956 Act] SK Services Ltd v Phillips, (2004) 2 BCLC 589 (CA). shares can be paid for in cash or by some other consideration. There is no special way in which payment for shares has to be made.

238. S. 75(1)(c)(ii) [1956 Act] Shree Simuri Textile Mills Ltd v Siddhuram N. Shah, (2009) 125 Comp Cas 576 (Bom); the return had to show the names of all joint holders. In this case the return showed only a carrier in respect of certain shares but in the company's record, joint holding was shown, the court said that what was recorded with the Registrar must prevail.

239. S. 75(3)(c)(ii). The "return" need not include the allotment of such shares as were forfeited for non-payment of calls [sub-s. (5)]. Evidently the value of the contents of the return is that they are presumed to be true until the contrary is shown. Om Prakash Beniwal v Uttar Trust of India, (1963) 54 Comp Cas 136 (Bom).

240. Oregum Gold Mining Co of India v Rayal, 1992 AC 125; 66 LT 427 (JH).

241. *Stanley*, 21 I. (1889) 42 Ch D 96; 61 LT 94.

242. *Moody v Koffyfountain Miner Ltd.* (1904) 2 Ch 106; 91 T 366.

The Companies (Amendment) Act, 1999 introduced this provision. Section 54 of 2013 Act retains the provision (w.e.f. 31-10-96) enabling companies to issue shares in lieu of services. The shares should be of a class which has already been once issued. The issue should be authorised by a special resolution at a general meeting of the company. The resolution should specify the number of shares and their current market price and also the class or classes of directors or employees to whom they are to be issued and consideration for the sweat equity shares proposed to be issued. At least one year must have elapsed between the commencement of business by the company and the date of such issue. Where the equity shares of the company are listed at a stock exchange, such shares can be issued in accordance with SEBI Regulations. Where the shares are not listed at a stock exchange, they can be issued as sweat equity in accordance with the guidelines which may be prescribed.

Shares issued as sweat equity shares are to be treated for all purposes like other shares and, therefore, all the limitations, restrictions and provisions relating to equity shares will be applicable to them. [S. 54(2)]

Underwriting commission [S. 40(6)]

Section 40(6) allows a company to pay commission to any person for his subscribing or agreeing to subscribe for shares or debentures or for procuring or agreeing to procure subscription for shares or debentures of the company. When shares are offered to the public the company would naturally like to ensure success of the issue. The company may, therefore, make an agreement with financial institutions who, in consideration of the commission, agree to subscribe for the shares to the extent to which they are not taken up by the public. Section 40(6) provides that a company may pay commission to any person in connection with subscription to its securities subject to such conditions as may be prescribed. It is necessary that securities have been offered to the public. The agreement may be limited to a "certain number of shares if and so far as not applied for by the public".²⁵³ Underwriting is now compulsory for the full issue and minimum requirement of 90 per cent subscription of the portion offered to the public is also mandatory for each issue of capital to public.²⁵⁴

Underwriting commission could be paid subject to the following conditions: as provided by Section 76(1) of the 1956 Act.

1. The payment of the commission must be authorised by the articles.
2. The rate of commission should not exceed five per cent of the price at which the shares are issued or any less amount prescribed by the articles. In the case of debentures it should not exceed 2.5 per cent.

253. *Lord Tomlin in Australian Investments Trust Ltd v Stansfield & Pitt Street Properties Ltd*, 1932 AC 735, 745 (PC). An underwriter does not guarantee the success of the prospectus. He only agrees to take those shares which would not be taken by the public.

254. See S. Dv. SEBI Guidelines for Disclosure and Investor Protection, 1992 and SEBI Underwriter Rules and Regulations, 1993. Managers to the issue must satisfy themselves of the net worth of the underwriters. Model underwriting agreements have also been prescribed.

3. The rate should be disclosed in the prospectus.
4. The prospectus should also indicate the number of shares or debentures which have been underwritten.
5. A copy of the underwriting contract should be delivered to the Registrar along with the prospectus.

The effect of an underwriting agreement is that it is not merely a guarantee, but also an application for shares which are not taken up by the public. Hence, the company can allot shares in terms of the contract without further application.²⁵⁵

Brokerage

The Act, however, permits such brokerage to be paid as has been lawful for a company to pay.²⁵⁶ It has been recognised in *Metropolitan Coal Consumers' Assn v Scrimgeour*²⁵⁷ that reasonable brokerage should always be allowed. In that case a commission of two and a half per cent to brokers was held to be reasonable. Brokerage is different from underwriting commission. A broker does not undertake to subscribe for shares to the extent of public default. Brokers are professional men, such as "stock-brokers, bankers and the like, who exhibit prospectuses and send them to their customers, and by whose mediation the customers are induced to subscribe".²⁵⁸ Thus brokerage can be paid only to a person who carries on the profession of a broker and not to a person who has casually induced others to subscribe. Thus in *Andrew v Zinc Mines of Great Britain*.²⁵⁹

There was an agreement to pay commission for sale of shares to a lady who was not carrying on any business, the court held: "It cannot be suggested that what was to be paid to the plaintiff was brokerage. She was in no sense a broker. She did not carry on business as a broker, and it was a mere accident that she came into the company's office and was consulted in this matter."

Restraining access to market

A broker who works without registration commits violation of Section 12, SEBI Act and Rule 3 of the Broker Rules as well as the provisions of the Code of Conduct of sub-brokers specified under Broker Regulations. The inquiry

255. *Pioneer Co v Keinkai Colli & General Mills*, (1970) 43 Comp Cas 562; (1970) 2 Comp L 123 (P&H). The underwriter may relieve himself of the burden by entering into sub-underwriting contracts on the same basis. The sub-underwriter becomes bound to the company in the same way as the original underwriter.

256. The business of brokers is now under SEBI Rules and Regulations for Brokers and Sub-Brokers, 1992 and Guidelines for Foreign Brokers. Brokers who play the role of market makers of companies have to observe SEBI Guidelines for Market Makers.

257. (1995) 2 QB 606; 73 LT 137 (CA).

258. *Ballincar J vs Andrew v Zinc Mines of Great Britain* 12d, (1918) 2 KB 454. By agreeing to "place" the company's shares the broker does not become a shareholder. *Monarch Insurance Co. re.* (1873) LR 3 Ch App 507.

259. *Ballincar J vs Andrew v Zinc Mines of Great Britain* 12d, (1918) 2 KB 454. By agreeing to "place" the company's shares the broker does not become a shareholder. *Monarch Insurance Co. re.* (1873) LR 3 Ch App 507.

had found him guilty of trading without registration. SAT is slow to interfere in findings of fact. Punishment was reduced to suitable warning.²⁶⁰

An investor indulged in large volumes of trading in a particular scrip creating an artificial market in that security. He offered no plausible explanation. Indulgence of insiders for trading in the scrip could be inferred in the circumstances. Direction by SEBI prohibiting the investor from buying and selling or dealing in securities directly or indirectly for a period of one year was held to be justified.²⁶¹

A broker has to keep the money of his client in a separate account. In this case the money of the client was withdrawn from his account in violation of the conditions of registration. He put the money to his personal use. The certificate of registration of the broker was suspended for a modified period of seven days as against the period of three months ordered by SEBI.²⁶²

There should be parity in imposing penalty otherwise it may entail a charge of discrimination. Where the alleged irregularities were not serious, the debarment of four months was reduced to a simple warning.²⁶³

Every opportunity should be given to the broker to rehabilitate himself. The charges in this case were of minor nature. None of them were serious enough to warrant a penalty of suspension. Having regard to other comparable cases, a strong warning was held to be sufficient as against suspension of certificate of registration for three months.²⁶⁴ Where the alleged irregularities were not serious, the SAT reduced the penalty of four months imposed by SEBI to a mere warning. SAT said that punishment should not so harass as to deprive the broker for a long period of his trading rights to his own detriment and also to the detriment of his clients.²⁶⁵

Issue of shares at premium [S. 52]

If the market exists, a company may issue its shares or securities at a price higher than their nominal value. There is no restriction whatever on the sale of shares at a premium. But SEBI Guidelines have to be observed as they indicate when an issue has to be at par and when premium is chargeable.²⁶⁶ Premium may be received in cash or in kind. Where the value of the assets received by a company as a consideration for allotment is greater than the nominal value of shares, it is in essence an allotment at a premium. An amount equal to the extra value of assets would have to be carried to the securities premium account.²⁶⁷ The Act does regulate the disbursement of the amount collected as premium. It is clearly provided that the amount so received, whether in cash or kind, shall be carried to a separate account to be known as the *The Securities Premium Account*. The amount to

260. *Durgar and Associates Securities Ltd v SEBI*, (2005) 2 Comp LJ 502; (2005) 59 SCL 356 (SAT).

261. *Shashikant D. Kadam v SEBI*, (2005) 124 Comp L 474 (SAT).

262. *Kemis Stock Broking Ltd v SEBI*, (2005) 2 Comp LJ 434 (SAT).

263. *Chitra Financial Services (P) Ltd v SEBI*, (2005) 2 Comp LJ 437 (SAT); *Keynet Capital Ltd v SEBI*, (2005) 3 Comp LJ 531 (SAT).

264. *Rajiv Sardar Dulmi v SEBI*, (2005) 2 Comp LJ 452 (SAT).

265. *Sangita Dms Brokerage Ltd v SEBI*, (2005) 2 Comp LJ 476 (SAT).

266. SEBI Guidelines for Disclosure and Investor Protection, S. A.

267. *Hed (Henry) Is Co Ltd v Rajni Holdings Ltd*, 1962 Ch 124.

the credit of share premium account has to be maintained with the same sanctity as share capital and can be reduced only in the manner of share capital.²⁶⁸ Liberty is, however, given to use the fund in the following five ways:²⁶⁹

1. It may be applied to issue to the members as fully paid by way of bonus the unissued shares of the company.²⁷⁰
2. It may be used to write off preliminary expenses.
3. It may be used to write off expenses of, commission or discount account.
4. It may be spent in providing for the premium payable on the redemption of preference shares or debentures of the company.
5. For purchase of its own shares or other securities under Section 68.

Section 52(3) provides that securities premium account may also be applied by such class of companies as may be prescribed and whose financial statements comply with the accounting standards prescribed for such class of companies under Section 133 for the following: (a) in paying up unissued equity shares of the company to be issued to members as fully paid bonus shares; or (b) in writing off expenses of or commission paid or discount allowed on any issue of equity shares of the company; or (c) for purchase of its shares or other securities under Section 68.

A reduction of the premium account was allowed under a scheme which experts had approved as fair, just and proper.²⁷¹ Reduction of the share premium account for wiping out losses incurred in trading in securities was allowed. The articles of association enabled the company to reduce its share

²⁶⁸ See, *Thorn EMC plc Case*, 1989 BCLC 812 (Ch); *Tif Europe Ltd Case*, 1986 BCLC 231 (Ch); *Ratners Group plc v. re*, 1988 BCLC 685. These cases were on reduction share premium account. The decision of the Court of Appeal in *Ruisnelles plc v. re*, (1999) 2 BCLC 591 (CA), affirmed the decision of the court below in sanctioning reduction of share premium account irrespective of irregularities like short notice of meeting, increasing the number of shareholders to ensure smooth passage of the resolution and highly abbreviated notice, because the interests of the shareholders were not prejudiced. There being otherwise good resources for paying them back in full in case of need. Dividends cannot be paid out of the premium amount. *Drown v. Gypsum British Picture Corp Ltd*, 1937 Ch 402, 1937 Settlements, m, 1951 Ch 923 (CA); *Shewer v. Berwin*, (1980) 5 All ER 295; *Head (Fleury) & Co Ltd v. Rupare Holdings Ltd*, 1982 Ch 324. Shares of extra value received on merger not allowed to be used for being distributed as dividend.

²⁶⁹ The amount in the credit of the share premium account has to be shown as a separate item in the Balance-sheet and if it was disposed of, wholly or partly, how it was disposed of (See III, Part B) The DLUK is of opinion that the amount of premium cannot be treated as a free reserve as it is in the nature of a capital reserve. Circular No 3/77 of 30-4-1977.

²⁷⁰ S. 53(2). It has been held by the Supreme Court that a company may charge varying premiums in respect of blocks of shares having the same rights issued under different resolutions and "on principle there is no objection to the charging of varying rate of premium on shares issued under a single resolution if all the parties concerned agree". *CIT v. Shandland Vacuum (2011) 1 All 1966 SC 1333, (1966) 1 Ctxp 111 187, 192.*

²⁷¹ *EIC Services Ltd v. Phipps*, 2004 EWCA (Civ) 1069; (2005) 1 WLR 1377 (CA). Bonus shares were not allowed to be issued by capitalisation of the share premium account without authority of an ordinary resolution of the company and to shareholders whose shares were not fully paid. It could not be regularised by an agreement of the shareholders.

²⁷² See *Tafe Finsa Ltd, re*, (2005) ECR Comp C-107 (Rom).



CASE PILOT

premium account. The reduction of capital did not involve either diminution of liability in respect of unpaid capital or payment to any shareholder of paid up capital. Creditors and shareholders raised no objections.²⁷²

Bona fide reduction of share premium account.—The company proposed to write off accumulated losses by utilising the share premium account and by reducing the face value of its shares. The need and purpose of reduction was duly explained and discussed at an extraordinary general meeting at which a special resolution was unanimously passed. The company had no secured creditors. The unsecured creditors had given their written consent. Nothing was shown to be there either against public interest or against law. The court allowed the proposed reduction.²⁷³ The share premium account is treated as paid up share capital for a limited purpose. But not as a reserve fund. A company can be allowed to write off or adjust a loss against share premium account if there is no diminution of the share capital account and corresponding reduction in the share premium account.²⁷⁴

Penalty for fraudulently inducing investment [S. 36]

A person who either knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading, or deliberately conceals any material facts for the purpose of inducing a person to enter into any agreement for acquiring, disposing of or subscribing for, or underwriting securities; or any agreement, the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of securities or by reason of fluctuations in the value of securities; or any agreement for, or with a view to obtaining credit facilities from any bank or financial institution, is to be liable for action under Section 447 (Fraudulent conduct).²⁷⁵

Personation for acquisition of shares [S. 38]

The purpose of the section is to prevent allotment of shares in fictitious names. Accordingly, if any person makes or abets the making of an application in a fictitious name to a company for acquiring, or subscribing for, its securities; or makes or abets the making of multiple applications in different names or different combinations of his name or surname for acquiring or subscribing for its securities; or otherwise induces, directly or indirectly a company to allot or register any transfer of any securities to him or to any other person in a fictitious name, he becomes liable for action under Section 447 (Prosecution for fraud).

272. *Hydrocast Industries Ltd. v. (No. 2) 2005 CLC 1381*; (2005); 223 Comp Cas 458 (AP).

273. *India Infoline Ltd. v. (2004) 53 SCL 396*; (2004) 6 Bom CR 431 (Bom).

274. *Global Trust Bank Ltd. v. (2005) 57 SCL 164*; 2005 CLC 353; (2005); 127 Comp Cas 601 (AP).

275. *MK Srinivasan, 14 AIR 1944 Mad 410*; 14 Comp Cas 136. Power of prosecution under the section has been delegated to SEBL Sureshni Finance Services Ltd v Grandruji Finance Ltd, (2002) 112 Comp Cas 361; (2002) 3 CTC 419 (Mad); a prosecution launched under the section, *AV Muthuram v M Kalaiarasi*, (2002) 6 SCC 174; (2002) 11 Comp Cas 390, huge sums of money were collected under a document described as "project overview" by NRIs but shares not allotted. In the proposed joint venture company instead the money was diverted to some off-share companies controlled by the accused persons, offence under Ss. 40, 53, 49, 49-A, 472, 473 and 474 made out.

Every company which issues a prospectus is required to reproduce prominently the provisions of the section in the prospectus and application forms. [S. 38(2)]

A person who gets shares allotted in a fictitious name becomes liable as a shareholder. Thus where a person carried on business under an assumed name and took shares in that name, his trustee in bankruptcy could not avoid liability.²⁶

Where a person has been convicted under the section, the court may order disgorgement of any gain made by such person. The order may also include seizure and disposal of securities which may be found in his possession. The amount received through disgorgement is to be credited to the Investor Education and Protection Fund.

²⁶ *Crescent Mining Gold Mining & Trading Co. Ltd.*, n, 1999 WN 1

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online™; along with updates, articles, videos, blogs and a host of different resources.



The following cases from this chapter are available through EBC Explorer™:

- *Bajaj Auto Ltd v N K Firodia*, (1970) 2 SCC 550
- *Birkland's Trustee v Steel Arms & Co Ltd*, (1907) 1 Ch 279
- *Darius Rutton Kausamroojee v Ghanda Chemicals Ltd*, (2015) 14 SCC 277
- *Hackney Pavilion Ltd. re*, (1924) 1 Ch 276; 1923 All ER Rep 524
- *Hariangar Sager Mills Ltd v Shyam Sunder Jhunjhunwala*. AIR 1961 SC 1669; (1961) 31 Comp Cas 387
- *Household Fire and Carriage Accident Insurance Co v Great*, (1879) I.R. & Ex Div 216; 8 I.J. 577; 4 I.T. 298; 27 W.R. 858 (C.A.)
- *Jai Mahal Hotels (P) Ltd v Devraj Singh*, (2016) 1 SCC 423
- *K Rastgader Ruddy v Alliance Business School*, (2016) 195 Comp Cas 394 (CLB)
- *LIC v Escorts Ltd*, (1986) 1 SCC 264
- *Omt Prakash Beria v Unit Trust of India*, (1983) 54 Comp Cas 136 (Bom)
- *Punjab Distilling Industries v BPC Mills Ltd*, (1973) 43 Comp Cas 189 (Del)
- *Ranadees plc. re*, (1999) 2 BCAC 591 (CA)
- *R. Maffiaone v Bimbing Life Assurance Co*, AIR 1953 SC 385; (1954) 24 Comp Cas 1
- *Sahara India Real Estate Corp. Ltd v SEBI*, (2013) 1 SCC 1



Shareholders and Members

The words "member" and "shareholder" are used interchangeably and, generally speaking, apart from a few exceptional cases, they are synonymous. There are, for example, companies limited by guarantee or unlimited companies, which may not have share capital and, therefore, can have no shareholders, but they do have members. Contrarily, the bearer of a share warrant [abolished by 2013 Act] is a shareholder, but not a member, as his name is struck off the register of members.¹

Definition of member [S. 2(55)]

The real definition is to be found in the provisions of Section 2(55) and here the emphasis in both the sub-sections is entry in the register of members. Here is what the section says:

According to Section 2(55) "member" in relation to a company means:

- (i) the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company and, on its registration, is to be entered as member in the register of members;
- (ii) every other person who agrees in writing to become a member of the company and whose name is entered in register of members;
- (iii) every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository.

In reference to the subscribers of the memorandum, the section ordains that they shall be entered as members in the register of members or registration of the company and in reference to others the section prescribes that there should be an application in writing² and the name should be there in the register of members. The words "agreed in writing" were brought

1. S. 135(1) 1956 Act.

2. *Vijay Kumar Narang v Prakash Chark Builders (P) Ltd.* (2005) 128 Comp Cas 996 (C.L.B), this requirement applies when a person is becoming a member for the first time and not when a person, being already a shareholder, purchases further shares.

in by the amendment of 1960 so as to prevent in the circumstances of our country a person being surprised by the presence of his name in the register and then facing the burden of a *prima facie* evidence and leading evidence to show that he never agreed to be a member. In either case the section requires as a condition of membership that the name of the person in question is there in the register of members. But even so the courts have ruled that a person may be regarded as a member if he has acquired the right of membership though his name is not in the register⁵ and a person whose name is in the register may not be regarded as a member if he did not agree to be a member in writing or is not accepting his position as such.⁶

Shares can be held jointly. The principles relating to rights and liabilities under joint promises would apply. Where one joint holder died and the shares were registered in the name of the surviving joint holder, that was held to be justified though the legal heirs were claiming registration in their name.⁷

The Depositories Act provides that a person holding an equity share capital of a company and whose name is entered as a beneficial owner in the records of a depository is a member of the company. Holding equity shares through a depository constitutes the holder into a member. [S. 2(55)(vi)] A person who holds shares in a demat form, his name does not appear in the company's register of members.

Global Depository Receipt [S. 2(44)]

It means any instrument in the form of a depository receipt, by whatever name called, created by a foreign depository outside India and authorised by a company making an issue of such depository receipts.

How to become a member

One may become a shareholder in a company in any one of the following ways:

1. **By subscribing to memorandum (S. 2(55)(i)).**—In the first place, Section 2(55)(i) of the Act provides that the subscribers of the memorandum of association shall be deemed to have agreed to become the members of the company, and on its registration shall be entered as members in the register of members. Accordingly, it was held in *Official Liquidator v Suleman Bhai Kachhi*⁸ that: The subscriber of the memorandum is to be treated as having become a member by the very fact of subscription. Neither application form, nor allotment of shares is necessary. Even an absence of entry in

5. *N. Suryaprasad Rao v Venkupanayi Lakshmi Narasimha Sastry*, (1988) 64 Comp Cas 492 (AP).

6. *Shri Balaji Textile Mills (P) Ltd v Ashok Kumar*, (1999) 66 Comp Cas 654, 661-62 (Ker). This is more true in English law where the words "in writing" are not used. See, *Narrator Through Axon Courtall Club Ltd. v. 1969 BCCLC 451 (CA); National Steel & General Mills v Official Liquidator*, (1989) 2 Comp LJ 214, (1990) 49 Comp Cas 416 (Del); continuity of membership, *Ram Kishen v Kramer Paper (P) Ltd*, (1990) 69 Comp Cas 209 (HP), the name was ordered to be removed from the register because there was no agreement in writing.

7. *Jyotiklal Acharya v KN Electronics and Consultants (P) Ltd*, (1997) 70 Comp Cas 201 (GJ); *Kanta V Pati v Essar Standard Refining Co (P) Ltd*, (1997) 3 Comp LJ 138 (CLB).

8. AIR 1955 MB 166.

the register of members cannot deprive him of his status. He acquires, as soon as the company is registered, the full status of a member with all the rights and liabilities. The facts were that one S had subscribed the memorandum of a company for 200 shares. The company was duly registered, but he ultimately took only 20 shares. He was held liable in the winding up of the company to pay for all the 200 shares although they were, in fact, never allotted to him.⁷

[*Qualification shares* [S. 266].—This has been dropped by 2013 Act.]

2. By allotment.—A person may become a shareholder by agreeing in writing to take shares in the company by allotment. This has been dealt with in the preceding chapter.

3. By transfer.—One may purchase shares of a company in the open market and then apply to the company to register him as a member. Section 2(55) which defines "member" says that it includes the subscribers to the memorandum of a company and every other person who agrees in writing to become a member of the company and whose name is entered in its register of members. Thus it requires two things: (a) an agreement in writing to become a member and (b) an entry in the register.⁸

4. By transmission [S. 56].—On the death of a member his executor or the person who is entitled under the law to succeed to his estate gets the right to have the shares transmitted to his name in the company's register of members. Transmission is different from transfer. Section 56(2) which lays down the formalities of transfer specially provides that nothing in the section shall prejudice the power of the company to register as shareholder any person to whom the right to any shares has been transmitted by operation of law.⁹ It follows that an instrument of transfer is not necessary. No formalities like transfer deed, execution, attestation and stamp duty are needed. Legal heirs as shown by the succession certificate are aggrieved persons entitled to seek relief against refusal.¹⁰ Provisions relating to formalities of

7. *London Banking and Confidential Exchange Bank. re.* (1867) LR 2 Ch App 427, 451; *Megiff case*, (1867) LR 4 Eq 238, where it was held that an allotment to the subscriber of fully paid shares belonging to another is not enough. In *Sukdeo das vs K Venkannan* AICR 1939 Mad 498, it was held that an express allotment of shares to the subscriber is necessary to make him liable. It appears that proper authorities were not cited before the court. If the subscriber pays by transferring assets (non-cash payment) expert valuation report would be needed.

8. The Kerala High Court emphasised in *Lalithavalli Rao v Harrison Malsymin Ltd.* (1988) 63 Comp 124, 466 (Ker) the importance of the fact of "agreement in writing" by holding that it must be proved and that an agreement for taking over the assets of a company does not have the effect of taking over its shares from its members.

9. S. 56(2). It may be necessary to submit a succession certificate, but vesting takes place from the moment of death and not from the date of the grant of certificate. *Margaret T Desir v Worldwide Agencies* (1971) 141 I.Jd. (1969) 66 Comp Cas 5 (Del); the Supreme Court affirmation on either points, *Worldwide Agencies (P) Ltd v Margiraj*, (1990) 1 SCC 536; (1990) 67 Comp Cas 607; (1990) 1 Comp L.J. 210B.

10. *Kambai v Vilhal Prasad Co (P) Ltd.* (1993) 77 Comp Cas 221 (Ker). Succession certificate or letters of administration, would be necessary, particularly where there is no agreement among known legal heirs. *Narindri Kumar Selgal v Lander Valves Ltd.* (1993) 77 Comp

transmission are generally found in the company's articles. Clauses 23 to 27 of Schedule I contain such provisions. If the company unduly refuses to accept a transmission, the same remedies are available as in the case of a transfer, namely, an appeal to the Tribunal under Section 58. The refusal by directors to accept a transmission has been held to be appealable.¹¹ A company's refusal to accept a transmission unless a succession certificate is produced has been held to be a refusal enabling the legal heir to file an appeal against it. A succession certificate obtained after death would apply not only to transmission but also to bonus shares, dividend, interest and other benefits accruing to the shares. A fresh certificate is not necessary for such benefits.¹²

The provisions relating to transfers are equally applicable to transmissions.¹³

Where the company had accepted transmission in respect of a part of the shares but demanded succession certificate or probated "will" in respect of the rest of the shares, the C.I.B held that the company had lost the right to refuse transmission for all the shares. No other person had raised any claim or objection.¹⁴ Thus, for example, in a case before the Supreme Court, the State of Orissa became entitled by devolution to the shares of a Maharaja, but the company refused to register the State's representative as a shareholder. Bachawat J held that the State became entitled to the shares by operation of law. It was, therefore, a case of transmission and the company was bound to accept the same.¹⁵ A company was not allowed to refuse the registration of transmission in favour of the legal heir of a deceased member on the ground that he was carrying on a competing business.¹⁶ Among Christians, a letter of probate is not required for succession under a will. The legal heir

Cas 363 (CLB), relying upon *Kitsi Vishwanatham Chaitra v Indo-Burma Petroleum Co. Ltd.*, (1936) 4 Comp Cas 42 (Rang). Where it was certain that the widow was the sole surviving heir, insistence upon succession certificate was held to be not justified. The shareholding being established otherwise also, production of share deeds may also be not necessary. *Sunil Karpal v Mahant Dev Mills* (1975) 63 Comp Cas 699 (CLB). For effecting a transmission, the procedure prescribed by the Act and the company's articles has to be followed. *Ahund Hamid Patel v Orient Club* (1970) 2000 99 Comp Cas 316 (CLB).

11. *Anil R Chhabria v Funder Industries Ltd.* (2004) 99 Comp Cas 168 (K.LH)
12. *Anjan Kumar Islam v Cipla Ltd.* (2000) 99 Comp Cas 227 (CLB). *Kerala Alco v P Pugazh Co. (P) Ltd.* (2002) 138 Comp Cas 573 (K.LH). shares stand in the name of a deceased Mohammedan, son applied for transmission. In producing his father's will favouring him, other legal heirs did not object, the company was held not justified in insisting upon probate or letters of administration.
13. *Funder Industries Ltd v Anil Ramchand Chimbirin.* (2000) 26 ECL 233 Bom. not approving the ruling in *Aski Prakash Khanna v N.H.C. Milk Co. Ltd.* (1996) 95 Comp Cas 583 (CLB).
14. *Mandil Bhambhani v Sapphire Machines (P) Ltd.* (2000) 2 Comp LJ 109 (CLB).
15. *Indian Chemicals & Products (I) Ltd v State of Orissa.* (1966) 2 Comp LJ 63 (Sif); 36 Comp Cas 342 AIR 1967 SC 253. See also, *Maheshwari Khetia Sugar Mills v Jamnari Khetia Sugar Mills.* (1963) 32 Comp Cas 1142 AIR 1965 All 135, where the matters relating to transmission are explained, see, 140.
16. *SM Heje Abid Sahib v KMS Co (P) Ltd.* (1998) 91 Comp Cas 843 (CLB). Rectification of register of members was ordered. *Debashish Datta v B.G. Somadder & Sons (P) Ltd.* (2003) 115 Comp Cas 70 (CLB), company directed to register legal heirs under transmission.

(son) had established an unopposed will in his favour. The CLB said that the company was not justified in demanding a letter of jawahat.¹⁷

Where the succession certificate was produced, but the company objected to non-payment of stamp duty, the CLB directed transmission to be carried out. The matter of stamp duty to be sorted out in the court.¹⁸

The executor or the successor also has the right to transfer the shares. Section 56 specially enables the legal representative to effect a transfer even if he is not a member himself. Thus he has an option. But he must decide within a reasonable time. The directors may require him by notice to make up his mind within 90 days and if the notice is not complied with, payments due on the shares may be withheld, until the notice is complied with.¹⁹

In the above three cases, namely, allotment, transfer and transmission, a person does not become a member unless his name is entered in the company's register of members.²⁰

Nomination of shares and debentures [S. 72]

This section provides the facility to shareholders, etc., to register the name of any person with the company in whom the shares will be vested on the death of the nominating shareholder. Debenture holders and depositors have also been given similar rights. Nomination can be filed at any time in a manner to be prescribed. Joint holders can also nominate any person for the purpose of vesting of shares in the event of the death of all the joint holders. Such nomination will supersede the law of succession and any "will" or disposition whether testamentary or otherwise. The shares or debentures will be vested in the nominee to the exclusion of any claimant whether under "will" or succession. The only process by which any change can be brought about is that the security holder should himself change the nomination. Where the nominee is a minor, the security holder may suggest any other name in the prescribed manner in whom the shares would be vested should the nominee die during his minority.

The nominator gets the right on the death of the security holder to register himself as the security holder or transfer the securities. His right of transfer will be subject to the same limits and restrictions as the right of the original security holder was. The Board of directors will have the same right of refusal as would have been there had the securities been transferred by the original holder. If the nominee wants to register himself as the holder he should send to the company in writing a notice under his signature accompanied by the death certificate. Since this also amounts to a transfer, it will be under the same restrictions which would have been applicable as if the original holder had made a transfer. Even before he gets himself registered, he will be entitled to all the advantages as to dividend, etc., but unless he

17. *Ashok Chariah v ITC Ltd.*, (2005) 128 Comp Cas 857 (CLB).

18. *Renu Kaur Ditta v Gaur Nitro Tech and Industries Ltd.*, (2007) 135 Comp Cas 221 (CLB).

19. Cl. 26 (proviso), Table F, Sch. L.

20. S. 52 provides penalty for impersonation of shareholder. For a statement of the formalities of a transmission see, *Joint Trust of India v Om Prakash Beria*, (1983) 54 Comp Cas 723 (Bom); *Kulak Khan Ltd v Dharmaj Mills (P) Ltd.*, (1983) 54 Comp Cas 432 (Bom).

gets himself registered as a holder, he will have no right in relation to the meetings of the company. If he does not exercise his right of becoming a security holder or of transferring the securities, the Board of directors may ask him to regularise the matter. If he does not do so within 90 days of the receipt of notice, the company may deny him the benefit of dividend, bonus or moneys becoming payable in respect of the shares.

Where there is no nomination, the right of succession must be proved, say, for example, by a will, gift deed or court succession certificate. Where such certificate was filed but the company did not act on it, the court placed time bound order upon the company to comply with the order.²¹

Who may be member

Minor. Every person who is competent to contract may become a member. A minor and a person of unsound mind, being incompetent to contract, cannot be members of a company.²² A minor may be allotted shares. His name may remain on a company's register of members, but during minority he incurs no liability. In *Palaniappa Mudaliar v Official Liquidator*,²³

Shares were allotted to a minor on an application signed on her behalf by her guardian. In the winding up of the company neither the minor nor her guardian were held liable as contributories.

On attaining majority and becoming aware of the presence of his name in the register of members, the minor has the option to repudiate his shares within a reasonable time. Where he does not do so he may safely be taken to have accepted his position. His liability as a shareholder commences. This was laid down by the Bombay High Court in *Fazalibhai Jaffer v Credit Bank of India Ltd*.²⁴

An infant was registered as a shareholder. After attaining majority he received dividends from the company. The court observed:

"Under these circumstances it cannot be doubted that he has intentionally permitted the company to believe him to be a shareholder and in that belief to pay him dividends since he attained majority. He is, therefore, estopped now by his conduct from denying that he is a shareholder."

The company was in winding up.

The erstwhile Companies Tribunal held in *Nareshchandra v Gordhanlal*²⁵ that if a minor's name is entered in the register of members as an allottee, the company cannot afterwards suo motu delete it and the minor is entitled to rectification if the company does so. The Delhi High Court in *Golkonda Industries Ltd v Registrar of Companies*²⁶ held that the Registrar of Companies cannot refuse to accept a return as to allotment in which a minor is shown

21. *Sukdeo Kumar Singh v Bawali Glass Works Ltd*, (2010) 381 Comp Cas 63 CLB.

22. Ss. 13 and 11, Indian Contract Act, 1872.

23. AIR 1942 Mad 470; 261 IC 731.

24. AIR 1944 Bom 128; IJR (1944) 39 Bom 351; 27 IC 335.

25. [1967] 1 Comp LJ 62; (1967) 37 Comp Cas 447 (Arun).

26. AIR 1968 Del 120.



as an allottee. The court agreed that the whole law relating to a minor joining a company is still uncertain. There is nothing in the Companies Act prohibiting a minor from becoming the member of a company. The agreement may be signed by the minor's guardian. It will not be a case of a trust because the minor's name will be entered in the register of members. The shares being fully paid, he would incur no liability.²⁷

Others disqualified.—Others disqualified would include, for example, persons of unsound mind and insolvents. The position of a person of unsound mind is akin to that of a minor. So far as an insolvent is concerned, if he was a member before, his name can remain in the register notwithstanding his insolvency, unless the articles provide otherwise. The changes which occur under insolvency laws as to his position as a shareholder are only those that the beneficial interest in the shares would be vested in his assignee, who would also control voting rights. In all other respects he can exercise the normal membership rights, for example, the right of instituting a minority action for redressing corporate wrongs.²⁸

Company as member.—A company, being a legal person, may become the member of another company. But a company can invest money in another company only if it is so authorised by its memorandum of association.

A company cannot, however, buy its own shares, except in a limited manner permitted by Sections 62, 68 and 70. Similarly, subject to a few exceptions given in Section 19, a company cannot buy shares of its holding company. Restrictions on inter-corporate investments are stated in Section 186.

Trade union.—A trade union registered under the Trade Unions Act, can be registered as a member and can hold shares in a company in its own corporate name.²⁹

Partnership.—A partnership firm, not being a person, cannot buy shares in its own name. It may buy shares as a part of the assets of the firm, though they will have to be held in the name of individual partners. A firm may be a member of any association or company licensed under Section 8 as a charitable institution, but it shall cease to be a member on its dissolution. [S. 8(3)]

Deity.—A question arose before the Bombay High Court as to whether a demat account could be opened in the name of deity. It was held that although under the Income Tax Act, 1961, individual income received by a particular trust for a particular deity may be treated as the income of the deity, the provisions of that Act could not be relied upon for opening of demat account. Since personal skill, judgment and supervision was required for its operation, such an account could not be allowed to be operated in the name of an artificial person. The petitioner, which was an unregistered private trust, could not open a demat account; it could not be indirectly permitted

27. *Gaudium R Palauv v Kerenmaka Theatres Ltd.* (2003) 37 CLA 244; 2000 CLC 1765 (CLB), following *R Belamra v Buckingham & Cornhill Co Ltd.* (1969) 1 Comp LJ 81 (CLB).

28. See, *Morgan v Gray*, 1953 Ch 63; (1953) 2 WLR 140; *Birrell v Sullivan*, (1952) 1 WLR 1247.

29. *All India Bank Officers Confederation v Usha Lakshmi Bank Ltd.* (1997) 40 Comp Cas 725; (1997) 3 Comp LJ 132 (1997) 26 CLA 39 (CLB).

to open an account, in favour of such an artificial person and in the names of gods or goddesses. The trustees could apply in their individual capacity as trustees for opening of such an account in their individual names.³⁰

Ceasing to be member

A person may cease to be a member by transfer, death, forfeiture, surrender, on winding up of the company and otherwise in accordance with the provisions of the company's articles of association.

Liability of members

Liability of members depends on the nature of the company. If the company is registered with unlimited liability, every member is liable in full for all the debts of the company contracted during the period of his membership. Where the company is limited by guarantee, each member will be bound to contribute in the event of winding up a sum of money specified in the liability clause of the memorandum of association.³¹ Most companies are, however, incorporated with the liability of members limited by shares. Each member is bound to contribute the full nominal value of his shares and his liability ends there.

Calls on shares

The liability of a shareholder to pay the full value of the shares held by him is enforced by making "calls" for payment. Every shareholder is under a statutory liability to pay the full amount of his shares as Section 10(2) declares that "all money payable by any member to the company ... shall be a debt due from him to the company". But the liability to pay this debt arises only when a valid call has been made. For example, in *Pabna Dhanubander Co Ltd v Foyezuddin Mirza*³² it was held that "a mere demand by a company acquiring the rights of another company in respect of its uncalled capital cannot take the place of a formal call".

However, according to Section 50 a company can accept voluntary payment of the uncalled amount, if it is so authorised by its articles. Voting rights are, however, regulated only by the amount actually called by the company.

An enforceable call shall have to conform to the provisions of the Act and the articles of association of the company. The following are some of the important requisites of a valid call:

1. *By resolution of Board*.—In the first place, a call must be made under a resolution of the Board of directors.³³ In making a call care must be taken that the directors making it are duly appointed, and duly qualified, and

30. *Steri Campbell Penchayatan Sanction Trust v Union of India*, (2011) 163 Comp Cas 253 (Bom), a writ petition was maintainable.

31. See, "Guarantee Companies" "Unlimited Companies" *Isru Ch. 18*, and *Stedman (P) Ltd v Kshetra Mohan Samu*, AIR 1968 Cal 572; (1968) 1 Comp L 321, 72 CWN 401.

32. AIR 1932 Cal 716; 110 IC 252, 36 CWN 589.

33. Accordingly, the High Court of Bombay held in *East & West Insurance Co Ltd v Karsikl Jagannath Mehta*, AIR 1956 Bom 537 that "such an important power which is vested in the directors could not be delegated by them to anyone and could not be exercised by any

that the meeting of the directors has been duly convened, that the proper quorum is present and that the resolution making the call is duly passed.³⁴ However, every small irregularity should not be taken to render a call invalid. To cover minor discrepancies the articles often provide that the acts of directors would be valid notwithstanding that it should be afterwards discovered that there was some defect in the appointment or qualifications, etc of such directors. Accordingly, in *Davson v African Consolidated Land & Trading Co.*³⁵ where a clause of this kind existed, it was held that a call made by a resolution of three directors was valid, although one of them had under the articles of association vacated his office by parting with all his qualification shares for a few days. *Shriram Sugar Mills Ltd v Debi Prasad*³⁶ is another illustration: The directors had by not paying allotment and call moneys disqualified themselves, yet their act in making a call was held to be valid.³⁷

Section 50 gives the company the power, if so authorised by its articles, to accept from any member the whole or a part of the amount remaining unpaid on any shares held by him, although no part of that amount has been called up. Such payment will not entitle the member to more voting rights as compared with other members until all have been called upon to pay.³⁸

2. Amount and time of payment.—Secondly, the resolution must state the amount of the call and the time at which it is to be paid, otherwise the call will be invalid. In *S&W Insurance Co Ltd v Kanshi Mehta*,³⁹ The directors of a company had, by two resolutions, resolved to make a call. But neither resolution specified the date and the amount of payment. The blanks were subsequently filled by the secretary, who sent a notice of call to the defendant. The call notice was held to be invalid.⁴⁰

3. Bonit side in interest of company.—Thirdly, the capital of a company is a trust fund in the hands of directors. The amount called up must be used scrupulously for the objects of the company and the amount uncalled must be called only when it is necessary for the promotion of those objects. Hence the power to make a call is in the nature of a trust and is to be exercised in

“... but if they do not wish to do what the articles require them to do and leave the doing of it to someone else, they must clearly resolve to that effect.”

34. *Palekar's Company Law* (20th Edn. 1959) 316.

35. (1898) 1 Ch. 6; 77 LT 392 (CA).

36. AIR 1950 All 508; (1951) 20 Comp Cas 246; 1950 All LJ 936.

37. Ordinarily this should have been regarded a breach of trust and the directors should be compelled to pay as much as other shareholders had paid. See *Alexander v Automatic Telephone Co.* (1901) 2 Ch 56 (CA).

38. Where the rate of interest permitted by the articles on such advance payment was 6 per cent, but it could be varied by shareholders in general meeting, 10 per cent interest as resolved by shareholders was considered to be quite reasonable. *CIT v Mangal Industries Ltd.* (1997) 12 SCL 15 (JAT).

39. AIR 1956 Bom 597.

40. See also, *Cadby & Co. re.* (1889) LR 12 Ch D 209; 61 LT 501 (CA), where it was held that in such cases there is no proper call made until the directors pass a second resolution fixing the date of payment. To the same effect is *Mohit Teja Singh v Liquidator of Hindustani Petroleum Co Ltd.* (1961) 21 Comp Cas 573 (Pesh).

the interest of the company. Good faith is lacking where, without paying what is due on their own shares, the directors call upon the other shareholders to pay. In such a case the court would require them to pay as others have paid.⁴¹ Similarly, where the directors paid into the company's account the amount due on their shares and immediately thereafter withdrew it as their fee, it was held that the payment was not for the benefit of the company and they remained liable to pay.⁴²

4. Uniform basis.—Section 49 provides that "calls shall be made on a uniform basis on all shares falling under the same class". Hence a call cannot be made on some of the members only, unless they constitute a separate class of shareholders. Thus where a shareholder paid the first two calls after a great delay and neglected to pay the third call and the directors, being annoyed, called upon him to pay the whole amount due, the call was held to be invalid.⁴³ But "shares of the same nominal value on which different sums have been paid shall not be deemed, for this purpose, to fall under the same class."⁴⁴

A shareholder on whom a regular call for payment has been served may choose to pay the sum due in respect of only a part of his shares. In the view of the Punjab High Court the debt is not "an entire and indivisible debt", and, therefore, the company may be bound to accept the amount tendered by the shareholder.⁴⁵

Payment in kind (*Payment by non-cash consideration*)

Shares may be paid for in cash or kind or in any manner that has the effect of actual cash being received by the company. In *Lamque v Beuchemin*:⁴⁶ A company purchased a paper mill for 35,000 dollars payable in cash. Subsequently, however, the vendors purchased shares in the company and allowed it to retain a part of the sale proceeds in payment of the shares. It was held that the effect of the agreement was that the shares had been paid in full in cash as it was not necessary that the company should first receive the share money and then hand it back to the vendor in payment of its debt. Similarly, the company may allow a shareholder set-off for the amount due to him against his liability to pay for his shares. Thus payment for shares may be in property, goods or services.⁴⁷

Allotment for non-cash consideration.—Where shares were allotted for any consideration other than cash, that is to say, for purchase of property or in return for services, the company had to file with the Registrar under Section 75 of the [1956] Act a copy of the contract in writing showing the title of the allottee or other consideration he gave for the shares. This is

41. *Alexander v Automatic Telephone Co.* (1900) 2 Ch 56 (CA).

42. *European Central Rv Co. Ltd.* (1872) 1 L & Ex 755; 26 LT 42.

43. *Gilligan v Haili Concrete Society*. (1915) 2 Ch 233.

44. Explanation to S. 49.

45. *Hind Iron Bkld Ltd v Radoda Jagan Nath Hali*, (1959) 29 Comp Cas 418. For a detailed account of the subject see, M.S. Srinivasan, "Calls on Shares in Companies" (1964) 1 Comp LJ 91.

46. 1697 AC 358; 76 LT 473.

47. *Uruguay Gold Mining Co of India v Rover*, 1892 AC 125; 66 LT 427 (31).

necessary to prevent frauds inherent in a transaction of this kind by overvaluing the assets transferred to the company. Where the consideration is grossly inadequate or illusory or colourable or apparently less than the value of the shares allotted, the agreement is set aside and the allottee is ordered to pay for the shares in full. Thus where a director was given 200 shares of £1 each in return for a loan of £100, it was held to be a colourable transaction to issue shares at a discount.⁴⁸ But, in the absence of a fraud in valuation, the court may not interfere only on the ground of inadequacy of consideration.⁴⁹ In *Alote Estate v R.B. Seth Hirale Kalyanmal*,⁵⁰ Shares were allotted in return for sugarcane growing land transferred to the company. In the winding up of the company it was alleged that the value of the land was ten times less than the value of the shares allotted. Even so Grover J of the Supreme Court, refused to interfere. The learned judge said that there was no allegation of fraud. The facts stated related more to inadequacy of price or consideration and not to its being illusory. There should be no inquiry into the question whether the appellants had paid consideration which was inadequate.⁵¹

It has been held by the Madras High Court that shares cannot be allotted in consideration of promissory notes.⁵²

There seems to be no corresponding provision in 2013 Act. Under Section 62 there is provision for rights issue and also for employees' stock option in which there may be no cash consideration. The privilege can be extended to persons other than employees. In mergers, amalgamations, etc, also shares are allotted in lieu of shares.

Forfeiture of shares

If a member, having been called upon to pay defaults, the company may, of course, bring an action against him. But articles of association often provide that in such a case the company may proceed to forfeit his shares. Shares cannot be forfeited unless there is a clear power to that effect in the articles. Thus in *Madras Rumachandra Kamath v Coimra Banking Corp Ltd*,⁵³ The articles of a company only authorised it to expel a member. That was

48. *James Pilkin & Co Ltd, re.* (1916) 85 IJ Ch 319; *Derham & Allin (Ad, re.* 1946 Ch 33; *Alot Estate v R.B. Seth Hirale Kalyanmal*, (1970) 1 SCC 425, 429. (1970) 40 Comp Cas 1116.

49. *Hong Kong & China Cas Co Ltd v Glen*, (1914) 1 Ch 527; *Wingy Ltd, re.* (1977) 1 Ch 796; *Thijsje Distilling Industries v MPC Mills Ltd*, (1975) 43 Comp Cas 189 (1976), shares allotted in consideration of out of date foreign machinery.

50. (1970) 1 SCC 425; (1970) 40 Comp Cas 1116.

51. Where shares were allotted to directors, on the company becoming a public company, for their past services in establishing the company and its business, they were held liable to pay the price in the company's winding up because past services are no consideration. *Eddyman Maran Insurance Co, re.* (1890) 9 Ch 9, 69 LT 363. An allotment of shares for a future service would be equally without consideration making the allottee liable to pay the price. *National House Property Investment Co Ltd v Watson*, 1908 SC 688, Scotland. A company may make immediate payment for hiring future services and then take back the money as consideration for shares. *Gandhar v Hidale*, (1912) 1 Ch 2011.

52. *Chakravarti v Official Liquidator*, AIR 1949 Mad 87.

53. AIR 1941 Mad 254. Regulations 28 to 34 of Table A provide for the power of forfeiture.

held to be not sufficient to enable the company to deprive the expelled member of his shares.

Forfeited shares become the property of the company. To this extent forfeiture involves a reduction of the company's capital. The shares can, however, be re-issued, even at a discount, but that is not the same thing as an allotment.⁵⁴

"The right to forfeit shares must be pursued with the greatest exactness: it must be exercised by the proper parties, that is, by directors properly appointed, and by the requisite number of them and in the proper manner and for the proper cause. The right must be exercised bona fide for the purpose for which it is conferred. The power of expulsion is a trust the execution of which will be narrowly scanned by the courts."⁵⁵ The proper procedure to be observed in carrying out a forfeiture is as follows:

1. In accordance with articles.—A forfeiture to be valid must proceed on the grounds specified in the company's articles. It seems to be a principle of English law that shares can be forfeited only for non-payment of calls.⁵⁶ A call which does not fix the time for payment cannot support a valid forfeiture.⁵⁷ A forfeiture on any other ground would be an illegal reduction of capital.⁵⁸ But the Supreme Court has now held in *Naresit Chandra Samyil v Calcutta Stock Exchange Assn Ltd*⁵⁹ that "there is no provision in the Companies Act restricting the exercise of the right to non-payment of calls only".

54. *Calcutta Stock Exchange Assn*, re, AIR 1957 J Cal 438. Upon reissue the capital becomes intact. See, *Calcutta Stock Exchange Assn Ltd v Nandy*, ILR (1959) 4 Cal 235.

55. *Sanklaji* J (afterwards, CJ), in *Kakshirun v Kishtore Chaudhury*, AIR 1915 Lah 108. The learned judge added: "It (the power of forfeiture) cannot, for example, be exercised surreptitiously for the purpose of expelling a shareholder, nor by compliance for the purpose of as [A]lleviating him in getting rid of his shares." See also, *Esparto Trading Co*, re, (1879) 1 R 12 Ch D 101, where a forfeiture that happened to have been carried out at the request of a shareholder to relieve him from liability was set aside. *Ahmed Karav v Sirajul Paper Mills*, (1960) 1 Comp LJ 244 (AP).

56. See, for example, *Viswanath Prasad Julian v Huiyland Cincque Ltd*, AIR 1939 All 229; 1939 All LJ 950, where it was held that where certain subscribers had undertaken to purchase a certain number of shares but there was no term in the articles of association by which they were to pay the amount on a particular date, 1910 was any date fixed by the Board of Directors, their shares were not liable to forfeiture. Similarly in *Purna Lal v Jagatji Distillery Co*, AIR 1952 Patna 42, it was held that where a call for payment is made on the transferee of shares before his name is registered as a member, the call would be invalid and consequently the forfeiture of shares for non-payment of the call money would also be invalid.

57. *Bengal Jute & Lamp Works Ltd*, re, AIR 1942 Cal 51.

58. See, for example, *Hopkinson v Mortimer Harley & Co Ltd*, (1917) 1 Ch 616, where it was held that a forfeiture for debts due from a member generally as distinct from those due from him as a contributory, would amount to an illegal reduction of capital. This view has been accepted in Palmer's Company Law, 329 (20th Edn). But the Calcutta High Court held in *Naresit Chandra Samyil v Ramnati Kanta Ray*, AIR 1949 Cal 260; 49 CWN 503, that forfeiture is justifiable on any grounds provided for in the company's articles of association. See also, *Kotsch Transport Co v Smith of Ruesselsheim*, (1967) 37 Comp Cas 286 (Raj), where forfeiture on irrelevant considerations was not allowed.

59. (1971) 1 SCC 50; (1971) 41 Comp Cas 51.

A stock broker, holding one fully paid share in the Exchange, carried on business on its premises. He had agreed to buy certain shares from a company, but failed to carry out his commitment. The shares were then resold by the company with the authority of the Exchange. The broker was required to pay the difference between the contract and resale prices. On his failure to do so his share was forfeited.

The Supreme Court held the forfeiture to be valid.⁶⁰ The court said: [A] company may by its Articles lawfully provide for grounds of forfeiture other than nonpayment of call, subject to the qualification that the Articles relating to forfeiture do not offend against the general law of the land and in particular the Companies Act, and public policy; and that the forfeiture contemplated does not entail or effect a reduction in capital or involve or amount to purchase by the company of its own shares, nor does it amount to trafficking in its own shares.

The learned judge then stated that the forfeiture of shares did not result in reduction of capital. The company was under an obligation to dispose of the forfeited share, and could not retain the same. Further, the reissue of a forfeited share was not an allotment, but only a sale, for otherwise the forfeiture, even for non-payment of call, would be invalid as involving an illegal reduction of capital.

Where the buses of a transport company were divided into two groups of shareholders, each group operating them separately, and one of them causing losses, that would not justify forfeiture of their shares.⁶¹

2. Notice precedent to forfeiture.—A notice under the authority of the Board of directors must be served on the defaulting shareholder.⁶² The notice should require him to pay the amount on a day specified which should not be earlier than fourteen days from the date of service. The notice should clearly warn him that in the event of non-payment before the time fixed, the shares would be liable to be forfeited.⁶³ The notice must also specify the

60. For a criticism of this approach see K. Ponnuswami, "Forfeiture of Shares" (1964) 1 Comp LJ 127. For a discussion of the whole on law of forfeiture see Srinivasan, "Forfeiture of Shares in Companies" (1964) 1 Comp LJ 135.

61. Dilbhajan Singh v. New Sumandri Transport Co. (P) Ltd., (1985) 58 Comp Cas 247 (P&H). K. Mohammed Farouq Ad v. Portraun Cloth Enterprises (P) Ltd., (1997) 25 CLA 205 (CLB), fully paid shares paid, not allowed to be forfeited for the fact that the NRI holder had not obtained RBI approval. Seven years had passed and the allottee had already become a resident.

62. Salochan Malhotra v. Hindustani Mailorder and Fashions Ltd., (2002) 100 Comp Cas 874 (CIL). notice of forfeiture was not given because the shares were held by a trust and the same should not have been entered in the register of members. The company had been dealing with the trust issued bonus shares to it and paid dividends. Forfeiture ordered to be cancelled and the name of the trust restored with direction that shares be registered in the names of trustees. KB Minimann v. Federal Bank Ltd., (2007) T35 Comp Cas 244 (CIL), notice sent to the NRI's address in India as recorded in India, all other documents were also addressed to the same place, not allowed to say that forfeiture notice should have been sent to his foreign address.

63. Selvi Chandra Senwala v. Tipplate Dealers Assoc. (P) Ltd., (2001) 107 Comp Cas 98 (CLB), a notice which does not specify that the failure to pay the call would result in the forfeiture being regarded invalid. Tip Plate Dealers Assoc. (P) Ltd. v. Selvi Chandra Senwala, (2016) 10

exact amount due from the shareholder. Where, for example, the notice of forfeiture claimed interest from the date of the call instead of the date fixed for its payment, it was held to be a bad notice and the forfeiture invalid.⁴⁴ "This seems to be somewhat technical. But in the matter of forfeiture of shares, technicalities must be strictly observed."⁴⁵ "A very little inaccuracy is as fatal as the greatest." It has been held by BACHAWAT J in a decision of the Supreme Court,⁴⁶ that a notice which does not specify the amount claimed by the company as call money, interest and expenses, is defective. "The defect in the notice, though slight, invalidates it and is fatal to the forfeiture." In a case before the Delhi High Court,⁴⁷ shares were forfeited on the basis of a registered acknowledgment due notice which came back as unserved. It was held that the forfeiture was bad, for it was the duty of the company to know whether the address of the member had changed. The fact that forfeited shares had been reallocated to others was held to be no defence and the member was entitled to have her name put back on the register for the same shares which she held before forfeiture. Even laches or delay on the part of the shareholder in protesting against the forfeiture was held to be not sufficient to disentitle her from her remedies.

3. Resolution of forfeiture.—The above notice does not by itself operate as a forfeiture. The directors have further to pass a resolution declaring the forfeiture. Thus where the final resolution of forfeiture was not passed the court held⁴⁸ that, "a declared intention to forfeit not carried into effect is no forfeiture at all".⁴⁹ But the notice threatening forfeiture may incorporate the resolution of forfeiture as well. It may state that in the event of default the shares shall be deemed to have been forfeited. In such a case no further resolution is necessary.

4. Good faith.—Lastly, "the object of a power of forfeiture is that the company shall be enabled, for its own benefit, and adversely to the shareholder, to forfeit his shares if he fails to pay his calls. The power cannot be used at the request of the shareholder to relieve him of shares. The power must be exercised in good faith in the interest of the company."⁵⁰

5. Right and liability after forfeiture.—The liability of a member whose shares have been forfeited depends upon the provisions of the articles. The

50. C.C. 2: (2006) 159 Comp Cas 205, notice did not indicate that failure to pay call will result in forfeiture, not valid. "An account sheet showing sums due cannot operate as alternative to call notice."

44. *Johnson v. Lyttle's Iron Agency*, (1877) LR 5 Ch D 587, 36 LT 528.

45. *Lead Rover in Prudential Corp v. People's Bank of Northern India*, 11 IR (1939) 28 Lab 1 (PC).

46. *Public Passenger Service Ltd v. M.A. Khadar*, (1965) 1 Comp LJ 1 AIR 1965 SC 469 (1966) 36 Comp Cas 1 (1966) 2 MLJ 23.

47. *Premji Sonsal v. Venkraali Cycles Co* (1978) 49 Comp Cas 202 (Del).

48. *Prayag Prasad v. Gyan Bank and Traders Assn Ltd*, AIR 1931 Pat 44. See also, *Kanaklal v. Kishore Chand*, AIR 1973 Lab 109.

49. *Loved Lincoln, Companies* (6th Edn.) 730. "but if everything required to be done is substantially done by the company, and if the shares have been treated both by the company and the shareholder as forfeited, the shareholder will not be a contributory".

50. See, *Espurna Trading Co. v. (1879) LR 12 Ch D 391*.

articles may provide that the member should be liable to pay all calls owing upon the shares at the time of the forfeiture. In such a case the members will remain liable as a debtor of the company, but not as a contributory,⁷¹ even if the winding up follows more than one year after the forfeiture. He, however, remains a contributory as a past member for one year from the date of forfeiture.

His right is that when his shares are resold he can collect from the company the surplus of the sale proceeds after deducting the amount due. Thus the Supreme Court in *Naren Chandra Sanyal v Calcutta Stock Exchange Assn Ltd*⁷² declared that the articles of the Exchange which allowed it to retain such proceeds were invalid for two reasons: first, it would amount to penalty against the spirit of Section 74, Indian Contract Act, secondly, it would also be equivalent to a purchase by the company of its own shares in contravention of Section 67. The case is different from others, for forfeiture is generally carried out for non-payment of calls. Whereas, here, a fully paid share was forfeited. The grounds on which the court ordered refund of surplus may not apply to the case of a forfeiture for non-payment.

A person to whom forfeited shares have been reissued is governed by the terms of reissue. When the reissue is without any stipulation as to the outstanding calls, the new allottee cannot be held liable for the previous calls and interest on the overdue amount and his shares cannot be forfeited on that ground.⁷³

Surrender of shares

Every surrender of shares, like forfeiture, amounts to reduction of capital.⁷⁴ But, while forfeiture is recognised by the Act, surrender is not. "There is no reference in the Act to surrender of shares; but these have been admitted by the courts, upon the principle, that they have practically the same effect as forfeiture, the main difference being that one is a proceeding in *suitum* and the other a proceeding taken with the assent of the shareholder who is unable to retain and pay future calls on the shares."⁷⁵ Hence, a company can only accept a surrender under conditions and limitations subject to which shares can be forfeited. A valid call and a default must exist and the directors may, instead of going to the length of forfeiture, in good faith accept a surrender from the shareholder. Surrender should not be used as a device for relieving a shareholder from his liability.⁷⁶

71. *Ladies Dress Assn Ltd v Paliyank*, (1903) 2 QB 375 (CA). See further, *Sri Gopal Jalan & Co v Calcutta Stock Exchange Assn Ltd*, AIR 1964 SC 250 (1963) 30 Comp Cas 812; *Calcutta Stock Exchange Assn Ltd v Needy*, ILR (1950) 1 Cat 235; *Naren Chandra Sanyal v Banmali Kunro Roy*, AIR 1949 Cal 360-49 CWN 506.

72. (1971) 1 SLC 50; (1971) 41 Comp Cas 51.

73. *Satish Chandra Sircarika v Tipplate Dealers Assn* (P) Ltd, (2001) 107 Comp Cas 96 (C.I.B.).

74. *Civens-Hawkins Ltd v Beirley v Rogaland & Marstrand's Steamship Co*, (1902) 2 Ch 14, 32.

75. See, *Dronfield Sulphurine Coal Co. v*, (1880) L.R. 17 Ch D 76.

76. Following cases are illustrations of bad surrender of shares: *Collector of Mysoreh v Equity Investor Co*, AIR 1948 Oudh 192; (1948) 18 Comp Cas 309. In this case, after the death of a Raja who held several shares in a company, his shares were surrendered to



CASE PILOT

Register of members, etc [S. 88]

Every company has to keep and maintain certain registers in such form and such manner as may be prescribed. Such registers are:

- (a) register of members indicating separately for each class of equity and preference shares held by each member residing in or outside India;
- (b) register of debenture holders; and
- (c) register of any other security holders. The contents of such registers, their form and manner are now to be prescribed under the rules. Earlier under Section 150 of the 1956 Act, the Register of Members had to contain the following particulars:

[(1) The name and address of each member and his occupation; (2) The number of shares held by each member and the extent to which the shares have been paid up. Each share should be distinguished by its appropriate number; the class of shareholders to which the member belongs should be indicated; (3) The date at which he was entered in the register as a member; and (4) The date at which any person ceased to be a member.]

The register may be in the form of a bound book or a computer record. Required particulars should be recorded and adequate precautions should be taken against tampering. Companies are required to maintain an index of members.²⁷ The register itself may be kept in the form of an index or a separate card index may be used for the purpose. This is to enable entries relating to a particular member to be readily found. Any change in the register had to be noted on the index within fourteen days.

Register and index of beneficial owners [S. 88(3)].—Where shares or debentures are held in the demat form, the register and index of beneficial owners maintained by a depository under Section 11, Depositories Act, 1996 is to be deemed as an index and register of members and that of debenture-holders, as the case may be.

the company and the surrender was accepted by the secretary of the company. It was held that "even if the secretary intended to accept the surrender, the transaction would be ultra vires. Under our law it is just open to a shareholder to surrender the shares held by him, or to the company to accept the surrender, unless the act of the company can be brought within the rules relating to forfeiture of shares". Yet another case is *Mangal Singh v. Indian Merchants Bank*, AIR 1929 Lah 241. The objector having been placed in the list of contributories in the winding up of a company contended that he had surrendered his shares, and that the directors had, under a clear power in the articles of association, accepted the surrendee. It was held that a company can only accept a surrender under conditions and limitations under which shares can be forfeited, which did not exist in the present case. See also *Mirza Anumud Niazai, v.* AIR 1929 Mad 703; *Bellamy v. Routhal & Maitzen's Steamship Co.* (1902) 2 Ch 14. Where old shares are surrendered to get new ones of the same value, that is not a surrender, for it does not involve reduction of capital or of liability. *Riazil v. John Rawal & Sons Ltd.* (1912) 2 I.L.R. 609, 107 I.C. 174.

27. S. 88(2). Company and its officers are punishable for default with a fine not less than Rs 50,000 extending up to Rs 3,00,000 and where it is continuing default, Rs 1000 for every day of default. [S. 88(5)]

Foreign register of members [S. 88(4)]

Where a company has issued shares or debentures to persons resident in another country, the company may, if so authorised by its articles, keep a branch register in that country. It will be known as a "foreign register". It has to be maintained in the prescribed manner.

The foreign register is to be a part of the company's home register which shall, in contrast to that, be called the principal register. In respect of closure, copies, extracts, inspection, etc., the foreign register is bound by the same provisions as apply to the principal register. An additional requirement, however, is that an advertisement for closure must also be published in a newspaper circulating in the district where the foreign register is maintained. Entries in the foreign register have to be transmitted to home office and a duplicate register has to be maintained in the home office. Entries in the foreign register should not be reflected in the principal register. But when the foreign register is discontinued, they may be shifted either to some other foreign register or to the principal register. For the rest of the matters, companies can frame their own rules.

Place of keeping, inspection and returns [S. 94]

The appropriate place for keeping the register is the registered office of the company.⁷⁸ The period for which the registers, returns and records are required to be kept is to be such as may be prescribed. Every member and debenture holder, security holder or beneficial owner has the right of inspection without fee but a prescribed fee can be charged from any outsider who wishes to inspect. This is to enable persons dealing with the company to ascertain for themselves the membership of the company. The company may, however, impose reasonable restrictions on the right of inspection, but the register must remain open during business hours each day. The right to inspect also includes the right to make extracts from the register. The company is also bound to supply on demand a copy of the register on payment of prescribed fee.⁷⁹ Thus in *British India Corps Ltd v Robert Menzies*,⁸⁰

A member applied for a copy of the register of members. The company received from him a fee of five hundred rupees, but put him off under pretexts of many kinds. On his application to the High Court, the latter ordered the company to supply a copy immediately. The court said, "It is a fundamental principle of legal administration that where the law requires something to be done there must be in existence a court that can directly order it to be done."

Now sub-section (5) has, in very clear words, given power to the Central Government to order the company to allow inspection and to give copies

78. The register may, of course, be kept at any other place in India in which more than one-tenth of the total number of members are residing provided a special resolution is passed to that effect and a copy of which has been given in advance to the Registrar. [S. 94(1)].

79. S. 94(3)(b).

80. AIR 1936 All 568; 1936 All LT 748; 164 IC 382.



CASE PILOT

forthwith. The provision says that the Central Government may compel an immediate inspection of the document or supply of extracts.⁸¹

Where shares are in dematerialised form and the register of members is also in the magnetic form, only the stock holding corporation is shown as a member and not the individual beneficial holders of those shares. Such beneficial holders are not entitled to get a copy of the register. Their names are not there in the register at all.⁸² The right being of statutory origin, it cannot be denied to any member on the ground that he is seeking to exercise the right with improper motive. It can be exercised without assigning any reason and can be enforced by an injunction.⁸³

In *Anilkumar Poddar v Future Commercials P. Ltd.*,⁸⁴ it was held that a petitioner who does not have any kind of interest in the company is not entitled to seek inspection of the records falling in ambit of Section 163, Companies Act, 1956 [S. 94, Companies Act, 2013]. More so, when petitioner is a rank outsider, and the company is a private limited company closely held by limited members. The words "any other person" mentioned in Section 163(2)(b) cannot be construed to mean that any person can seek inspection and supply copies of the records falling in the ambit of Section 163. A person can be called aggrieved only when such person's interest is affected by the affairs of the company.

Power to close register of members, debenture-holders, security holders [S. 91]

A company may close the register of members, debenture-holders, other security holders, for any period or periods, not exceeding in the aggregate 45 days in each year, but not exceeding 30 days at any one time. Seven days previous notice has to be given for the same. SEBI may prescribe lesser period for listed companies or companies which intend to get listed. The manner of giving notice is to be prescribed. Any departure from these requirements would entail a penalty for the company and officers in default of Rs 5000 for every day subject to the maximum of Rs 1,00,000 during which the default continues.

Register, prima facie evidence [S. 95]

The register of members is a *prima facie* evidence of the truth of its contents happened to be superfluous.⁸⁵ The contents of the register of members are of decisive importance in determining as to who were the shareholders.

81. *Nirvan Agro Ind. v Ch. Mohan Rao*, (2002) 1st Comp Cas 75 (AP), a complaint under the section was entertained for the company's failure to comply with the requirements even after the complainant had satisfied all the requirements for getting copies.

82. *JTB Stockholders Ltd v Jaiprakash Industries Ltd*, (2003) 116 Comp Cas 29 (CLB).

83. *JTB Stockholders Ltd v Jaiprakash Industries Ltd*, (2003) 115 Comp Cas 29 (CLB); *Rajendra D. Patel v Sanghi Industries Ltd*, (2013) 176 Comp Cas 49, CLB could compel immediate inspection.

84. (2017) 217 Comp Cas 12 (VCJL).

85. S. 95. This presumption, however, applies only to those contents which are required by the Act to be inserted therein. They are, the registers, their indices and copies of annual returns maintained under Ss. 88 and 96.



CASE PILOT

of the company at the crucial time.⁸⁶ Accordingly, if a person's name, to his knowledge, is there in the register, he shall be deemed to be a member and onus lies on him to show that he is not a member.⁸⁷ Moreover, he must quickly apply to the court to take his name off the register, failing which the doctrine of holding out comes into play. For example, in *MFRD v Cruz, re*⁸⁸

The plaintiff had applied for 4000 shares in a company. No allotment was, however, made. But, without his application, 4000 shares were transferred to him and his name placed in the register. The plaintiff, knowing that his name was in the register, took no steps to have it rectified. The company collapsed and it was held that his name was rightly placed in the list of contributors. The court said, "When a person knows that his name is included in the register of shareholders and stands by and allows his name to remain, he is holding out to the public that he is shareholder and thereby he loses his right to have his name removed."⁸⁹

Declaration of beneficial Interest in shares [S. 89]

Sometimes shares of which A is the real owner may be had by him registered in the name of B. A is the beneficial owner and B is the trustee. In other words, B holds the shares in trust for A. Now, as the company's register of members will only show the name of B, therefore, for all purposes of company law, B alone is the member entitled to the rights and bound by the liability of membership. The company is not bound to recognise the existence of the trust. Now this regime has been changed. Such a person is required to make a declaration, within the prescribed time and manner, to the company specifying the name and other particulars of the person who holds the beneficial interest in the shares. [S. 89(1)] Every such person has also to file his declaration with the company. The Act requires that every person who holds or acquires a beneficial interest in shares of a company, has to make a declaration specifying the nature of his interest, particulars of the person in whose name the shares are registered in the books of the company and such other particulars as may be prescribed. [S. 89(2)] If any change occurs in such particulars, both the registered owner and beneficial owner have to make a declaration about the change and such other particulars as may be prescribed. [S. 89(3)] The Central Government has been authorised to make rules to provide for the manner of holding and disclosing beneficial interest and beneficial ownership. [S. 89(4)]

86. *Ashish Das Gupti v Sudhinder Singh*, (2000) 37 CLA 104 (CLB).

87. See, for example, *Amar Singh v Kanha Bank Ltd*. AIR 1933 Lah 108; *Waryam Singh v Official Liquidator*, AIR 1926 Lah 411; *Peninsular Life Assurance Co Ltd, re*, AIR 1906 Bom 24; *Hans Raj Gupta v Adilnur*, AIR 1937 Pat 740.

88. AIR 1939 Mad 803.

89. There are many cases of this nature where a person had the right to have his name removed, but did not in time insist on it and, therefore suffered. See, for example, *Peninsular Life Assurance Co Ltd, re*, AIR 1936 Bom 24; *Mohd Akbar Abdulla Fazlakay v Official Liquidator*, AIR 1950 Bom 217; (1950) 30 Comp Cas 26; *Hans Raj Gupta v Aslam*, AIR 1932 PC 240; *Simpson v Molson's Bank*, 1895 AC 271 (PC); the company was not bound to take notice of the restrictions on transfer in a will under which shares were registered in the name of the present holder and a copy of the will was there with the company.

The note of such declaration has to be put on the register of members and the Registrar has to be informed of it in the prescribed form within 30 days from the date of receipt of the declaration with the prescribed fee. Delayed filing would require additional fee under Section 403. [S. 89(6)] The beneficial owner who fails to make the requisite declaration will not be able to enforce his rights. [S. 89(8)] The company's duty and right to pay dividend to the person who is on the register is not to be prejudiced. [S. 89(9)]

The section makes a departure from the earlier regime only to this extent that earlier no notice of trust was to be entered on the register. Now it is the beneficial owner's duty to inform the company and the company's duty to put the fact on the register.

The failure on the part of the registered owner and beneficial owner to file the declaration without reasonable cause entails the penalty extending up to Rs 50,000 and if the default is of continuing nature, Rs 1000 for every day of default. If the company fails to file the return with the Registrar within the time specified in Section 403(1) (first proviso), the company and every defaulting officer becomes liable to fine of Rs 500 extending to Rs 1000 for every day of default.

The literature which was generated under the earlier provision and which continues to be valid was as follows:

S, a lady, was the registered holder of certain shares in a company. The company, on learning that the shares really belonged to her husband, sued him for the unpaid calls on the shares. Holding that the husband was not liable, although he was the real owner, the court said, "Assuming that the registered shareholder is not the real owner but if he is the member in the books of the company, it is he alone who would be entitled to the rights of a shareholder and he alone is liable for share calls and to be put on the list of contributors."⁹⁰

But it is the beneficiary who is ultimately liable for the calls. He has to indemnify the trustee against calls and perhaps the company may directly sue him in the rights of the beneficiary.⁹¹

The company could, however, take notice of a trust for its own benefit without entering it in the register. In a Madras case,⁹² A managing director's wife, having quarrelled with her husband and to teach him a lesson, brought an action for winding up. All the shares held by her were financed by her husband. The court held that the company could take notice of this fact and present it to the court for the purpose of showing that her petition was not *bona fide* and was brought to exert pressure upon the managing director for settlement of the family dispute.

90. *Marshallford Land Office Ltd v. Satish Chandra Chakraborty*, AIR 1943 Cal 410-209 IC 317.

91. *Hindoo v. Beilios*, 1901 AC 128; 83 LT 573 (PC).

92. *S. Rammeswari v. Kinnadienau Metal Rolling Mills (P) Ltd*, AIR 1971 Mad 293. Shares purchased by a firm of two partners were registered in the name of a minor. The liquidator of the company was not allowed to have the name of the minor substituted with those of the partners. The person on the register was liable whatever be his worth. *National Bank of Wales Ltd. v. (1907) 1 Ch 582*

The articles of a company contained a clause that not more than a given percentage of shares were to be held by non-Bermudians. It was held that this clause was to apply only to registered shareholders and not to the beneficial owners of the shares. The registered holder was a Bermudian company. The provision was accordingly not violated whatever be the characteristic of shareholding in that member company.⁹³

Certain bonds were purchased by a mutual fund. They were not allowed to be registered in the name of the trustee of the fund as Section 153 [1956 Act] prohibited registration of any relationship of trustee and beneficiary in the register.⁹⁴ A shareholder executed a will before his death bequeathing the shares to his bank and constituting it as a trustee of the holding. It was held that Section 153 [1956 Act] was not an obstruction to registering the trustee as a shareholder of the company.⁹⁵

Investigation of beneficial ownership of shares [S. 90]

Where it appears to the Central Government that there are reasons to do so, it may appoint one or more competent persons to investigate and report as to beneficial ownership of any shares or class of shares. The provisions of Section 216 are to apply to such investigation as if it were an investigation ordered under that section itself.

Lien on shares

"It is eminently fair for a company to provide by its articles, that the shareholders who are indebted to the company should not be permitted to dispose of their shares without paying their debts and that the company should have a lien on the shares for the debts."⁹⁶ Lien is the right to retain some property for some debt and in the case of a company, lien on a share ultimately means that the member would not be permitted to transfer his shares unless he pays his debt to the company. The right of lien is not inherent, but must be clearly provided for in the articles. It is safer to adopt clauses 9 to 12 of Table A, which provide for this right.⁹⁷ The effect of lien on shares may be illustrated with *Anwar Naib v Kurnail Electric Supply Co Ltd*.⁹⁸

A company had by its articles the first and paramount lien on the shares of each member for his debts to the company. The company was in liquidation and the plaintiff was a contributory. The liquidator was ordered by the court to pay back half the value of each share to contributors, but he had not paid this amount to the plaintiff who brought an action to recover it. The liquidator contended that the company had a claim against him for which proceedings under Section 235

93. *Bermundi Caribbean Ltd v Calin Trust Co Ltd*, 1996 AC 198 (1993) 2 WLR 82 (PC).

94. *Central Bank v NTPC*, (2001) 1 SCC 43 (2001) 104 Comp Cas 97.

95. *SBI v Business Development Consultants (P) Ltd*, (2005) 128 Comp Cas 557 (CLB).

96. *Allen v Gold Reef of West Africa Ltd*, (1900) 1 Ch 656, 676 (ICA).

97. Lien is governed strictly by the provisions of the Companies Act and the company's articles and not by those of the Contract Act relating to pledge of goods. *Khanij v PK Mohammad (P) Ltd*, (1980) 58 Comp Cas 543 (Kar).

98. AIR 1952 Punj 411.

of the 1913 Act were pending and that he was withholding the payment in the exercise of the right of lien. He was held entitled to do so until the company's claim was settled. The mere fact that the claim was disputed could not suspend the lien for otherwise "any shareholder has only to dispute the liability and thereby to defeat the lien".

Postponement and loss of lien.—A company's lien will, however, be postponed if the shareholder has mortgaged or pledged his shares before he has incurred any debt to the company and the company has notice of it. Thus where certain shares which were subject to a "first and paramount lien" were given to a bank as security for an overdraft and the bank had given notice to the company, it was held that the bank had priority over the company's claim which arose subsequently.⁹⁹ Notice obtained by the directors in the course of business will definitely amount to notice to the company. But if a director knows about the mortgage in his private capacity, will that operate as a notice to the company? The High Court of Allahabad held that it would. The case is *Union India Sugar Mills Co Ltd, re*.¹⁰⁰ The liquidator of a company had a surplus and he proposed to divide it among the shareholders. The company had lien on shares. The managing director was indebted to the company for a large sum of money but he had mortgaged his shares before the commencement of winding up. Neither he nor the mortgagee had given notice to the company. As against the managing director the company was clearly entitled to exercise its lien on the amount payable to him. But the mortgagee claimed the amount on the ground that as the managing director had himself pledged the shares, his knowledge amounted to notice to the company. The court upheld this contention and said, "The company shall be deemed to have knowledge of such transaction when the managing director who has all powers of the Board has himself pledged his shares, although in his private capacity."

The decision amounted to this that knowledge obtained by a managing director in the course of a private transaction of his own amounts to notice to the company. The only case cited as an authority in support of this view is *Rainford v James Keith & Blackman Co Ltd*,¹⁰¹ but in this case the facts were entirely different. A shareholder who was also a servant of the company had informed the directors that his shares were with someone else from whom, the court said, the directors should have inferred that they must have been pledged. Even according to the ordinary principles of the law of agency notice to an agent is not deemed to be notice to the principal if the agent fraudulently withholds it from his principal.¹⁰²

Where the holder of shares is a trustee, the company's lien will prevail over the claim of the beneficiary unless he has given notice to the company

99. *Bradfield Packing Co v Briggs, Son & Co*, (1896) 1R 12 AC 29; 56 LT 62.

100. AIR 1933 All 607; 1933 All 1ML 2; 16 IC 801.

101. (1905) 2 Ch J 47 (C.A.)

102. S. 229, Indian Contract Act, 1872, Avtar Singh, Law of Contracts

before any occasion arose for enforcing the lien.¹⁰³ A company's claim against the beneficial owner of shares cannot entitle the company to exercise the right of lien against the trustee-holder of those shares.¹⁰⁴ Where the right to exercise the lien has arisen and the shareholder transfers a part of his shares, the transferee can insist that the company should satisfy its claim to the extent possible from the shares remaining in the hands of the shareholder.¹⁰⁵ Lien remains effective even after the death of the shareholder and can be exercised against his executors.¹⁰⁶

Sale of shares under lien.—In order to realise the money due to it the company may take the power to sell the shares held under lien. The transferee of such shares will get a good title even if there has been some irregularity in the procedure of transfer as it will be covered by the principle of indoor management.¹⁰⁷

The present position of a listed public company being that it can no longer reject a transfer on any ground whatsoever, its lien may also become defeated under the doctrine of absolutely free transferability. In this case, the shares held by the managing director were transferred by his legal heirs after his death. The company was directed to accept the transfer and also to pay the amount of dividend which it had withheld under its lien for claims against the managing director.¹⁰⁸

Time-barred debt. Lien on shares may be exercised even for a time-barred debt, provided that it can be done without resort to a court of law.¹⁰⁹

Annual Return [S. 92]

Every company has to prepare a return, to be known as "Annual Return" in the prescribed form containing the following particulars as they stand on the close of the financial year: (a) its registered office, principal business activities, particulars of its holding, subsidiary and associate companies; (b) its shares, debentures and other securities and shareholding pattern; (c) its indebtedness; (d) its members and debenture holders along with changes in them since the close of the previous financial year; (e) its promoters, directors, key managerial personnel along with any changes since close of the previous financial year; (f) meetings of members or a class of members, Board and its various committees along with attendance details; (g) remuneration of directors and key managerial personnel; (h) penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment; (i) matters relating to certify compliances, disclosures, as may be prescribed; (j) details, as may be prescribed, of shares held by or on behalf

103. *New London & Brazilian Bank v Broch's Bank*, (1882) LR 21 Ch D 302 (CA); *Mashvele v Wigun* (1911) 24 Ch 293.

104. *Perkins, re*, (1890) LR 24 QBD 613 (CA).

105. *Gary v Stump*, (1893) 69 LT 282.

106. *Alim v Gold Reefs of West Africa Ltd*, (1900) 1 Ch 656 (CA).

107. *Unity Co (P) Ltd v Diamond Sugar Mills*, (1970) 2 Comp LJ 64 (Civ).

108. *Ernest Electronics (P) Ltd v Virgin Leasing Ltd*, (2004) 36 CLA 327 (Kant).

109. *Ibid*.

of Foreign Institutional Investors indicating their names, addresses, countries of incorporation, registration and percentage of shareholding held by them; and (k) such other matters as may be prescribed.

The return has to be signed by a director and the company secretary, or where there is no company secretary, by a company secretary in practice. In the case of a one person company and small company, the return has to be signed by the company secretary, or where there is no company secretary, by the director of the company. [S. 92(1)]

The "annual return" filed by a listed company or by a company with such paid-up capital and turnover as may be prescribed, has to be certified by a company secretary in practice in the prescribed form. It has to state that the return discloses the facts correctly and adequately and that the company has complied with all the provisions of the Act. [S. 92(2)]

An extract of the annual return in such form as may be prescribed is to form part of the Board's report. [S. 92(3)]

Every company has to file with the Registrar a copy of the annual return within 60 days from the date on which the annual general meeting is held. If no such meeting is held in a particular year, within 60 days from the date on which such meeting ought to have been held, specifying the reasons for not holding AGM. Fees or additional fees has to be paid in accordance with the provisions of Section 403. [S. 92(4)]

Penalty provisions [S. 92(5)(6)].—Where a company fails to file its annual return either originally or, with additional fees under Section 403, the company is punishable with fine for an amount of not less than Rs. 50,000 but extending up to Rs 5,00,000. Every defaulting officer is punishable with imprisonment for a term which may extend to six months or with fine of not less than Rs 50,000 but extending up to Rs 5,00,000 or both.

If a company secretary in practice certifies the annual return otherwise than in conformity with the requirements of the section or rules, he is punishable with fine of not less than Rs 50,000 but extending up to Rs 5,00,000.¹¹¹

Return to be filed when promoters' stake changes [S. 93]

Every listed company has to file a return, in the prescribed form, of any change in the number of shares held by promoters and top 10 shareholders of the company within 15 days of the change.

Although 60 days are reckoned from the date of the annual meeting, it has been held by the Supreme Court in *State of Bombay v Bandhan Ram Bhandari*¹¹² that the obligation to file returns is not excused by any default in calling the meeting, for they can be prepared independently of the annual meeting.¹¹³ The penalty is imposed upon "every officer in default", which according to Section 2(h) means a person who is knowingly guilty of the

111. *State of Bombay v Bandhan Ram Bhandari*, AIR 1961 SC 186; (1961) 1 SCR 801; (1961) 31 Comp Cas 1, the obligation to file is not excused by the fact that the AGM was not held.

112. AIR 1961 SC 186; (1961) 1 SCR 801; (1961) 31 Comp Cas 1.

113. Reaffirmed in *State of AP v United Provincial Estates Ltd.* (1973) 2 SCR 795; (1973) 43 Comp Cas 514.

default or who knowingly or wilfully permits or authorises such default. Kerala High Court did not allow this penalty to be imposed upon an officer merely on the ground that he should have known that no return was filed from the fact that he did not sign any. It could as well have been signed by others.¹¹³

Nature of offence, whether continuing.—There is a conflict of views between the High Courts as to whether offences punishable under this Section are of a continuing nature. Failure to file the annual return has been held not to be a continuing offence in some cases. The opposite view has been taken in this case.¹¹⁴

Evidentiary value.—Where the holding of a given percentage of shares is a requisite qualification for exercising certain rights under the Companies Act, entries in the annual returns can serve as evidence for the purpose.¹¹⁵ The annual return has been held to be not a conclusive evidence of membership. It serves only as a *prima facie* evidence. Its contents can be overthrown by evidence to the contrary.¹¹⁶

113 *V.M. Timins v. Registrar of Companies*, (1980) 50 Comp Cas 247 (Ker). The Calcutta High Court has held that the default is a single offence and not a continuing offence. Prosecution must be commenced within six months from the date of default otherwise it becomes time barred. *Nripendra Kumar Chakraborty v. Registrar of Companies*, (1985) 58 Comp Cas 672 (Cal), overruling its earlier decision in *Aml Kumar Sarkar v. Registrar of Companies*, (1979) 49 Comp Cas 909; 63 CWN 108 and following *National Cotton Mills v. Registrar of Companies*, 1983 CHN 190; (1984) 56 Comp Cas 222. The plea of time-bar should be raised at the trial stage. *Sanjeev Kumar Gupta v. Registrar of Companies*, (1990) 2 Comp L 70 (Del); Members and debenture-holders are entitled to free inspection and Rep 1 for 100 words copy; others, Rep 10. Rule 21-A of the Companies (Central Govt's) Rules and Forms, 1956. A director who was not connected with the default, not allowed to be prosecuted. *Registrar of Companies v. Bipin Bihari Mitra*, (1996) 86 Comp Cas 641 (Ori); prosecution quashed where the director in question had ceased to be so on the due date of the return. *Jayesh R. Mehta v. State of Gujarat*, (2000) 38 CLA 30; 2000 CLC 486 (*Gujj K. Senthilaksumi v. Registrar of Companies*, (2001) 103 Comp Cas 557 (Mad)), on the demise of the accused director his wife was allowed to be impleaded because she was also a director in her right and was also in a position of being in charge.

114 *Registrar of Companies v. Premier Synthetic (P) Ltd.*, (1997) 89 Comp Cas 732; (1997) 26 CLA 269 (Mad). One serious implication of a continuing offence is that the provisions of Sections 467 to 473 of CrPC dealing in periods of limitation for starting proceedings do not apply. S. 472 of the Code says that in the case of continuing offence, a fresh period of limitation begins to run at every moment of the time during which the offence continues. *Premji Jiwji Patel v. AMI*, (2000) 10th Comp Cas 564 (All), not a continuing offence, cognizance has to be taken within six months from the date of the offence. S. 468 CrPC.

115 *Basmati Sethi v. Chemtex India (P) Ltd.*, (1992) 3 Comp L 89; 4199; 82 Comp Cas 563 (CLB), the petition here was for prevention of oppression and mismanagement.

116 *Chaitra Sud v. Jingmen Finance Corp* (P) Ltd., (2006) 130 Comp Cas 569 (CLB).

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®; along with updates, articles, videos, blogs and a host of different resources.



The following cases from this chapter are available through EBC Explorer™:

- *Aurikumar Poddar v Future Commercials P. Ltd.*, (2017) 201 Comp Cas t2 (NCLT)
- *British India Corpn Ltd v Robert Menzies*, AIR 1936 All 568; 1936 All LJ 748; 164 IC 387
- *Naresh Chandra Sanyal v Calcutta Stock Exchange Assn Ltd*, (1971) 1 SCC 50
- *Palimparappa Mitalas v Official Liquidator*, AIR 1942 Mad 470; (1942) 1 MLJ 425; 201 IC 731



CASEPILOT

Chapter 9

Share Capital

Share capital is not a necessary condition of incorporation, although greater number of companies are registered with it than without it. In case share capital is thought necessary, the memorandum must state the amount of capital with which the company is desired to be registered and the number of shares into which it is to be divided.¹ Authorised share capital or nominal capital means such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company. [S. 2(8)] The meaning of "share capital" was explained by the Kerala High Court in *SNIY? Yogam, Quilon, re*.²

An application was presented under Section 397 [1956 Act] against "Yogam" and the question was whether the company was with or without share capital. According to the memorandum, the liability of the members was limited; each member was required to take at least one share, but no authorised capital was mentioned.

The court quoted from Buckley on THE COMPANIES ACTS and from PALMER'S COMPANY LAW to find support for the proposition that the words "capital" and "share capital" are synonymous. For a company to have share capital it is necessary that its memorandum should state the amount and its division. Thus share capital is different from membership fee, even if the payment is symbolised by the issue of a share.

The amount stated in the memorandum becomes the authorised capital of the company. The whole or any part of it may be issued. Supposing that only half of it is issued, then that is the issued capital of the company.³ If the offer of issue is made to the public the whole of it may not be taken up. That

1. S. 4(1)(e). S. 44 says that the shares or debentures or other interest of a member in the company shall be movable property transferable in the manner provided in the company's articles.

2. (1970) 40 Comp Cas 60, TLR 1969 Ker 516; (1970) 1 Comp LJ 85.

3. S. 2(8).

part of the issued capital which has been allotted is the *subscribed capital*. The company need not immediately call up the whole amount. The *called-up capital* means such part of the capital which has been called for payment. [S. 2(15)] The actual amount received is the *paid-up capital*. According to Section 2(64) "paid up share capital" or "share capital paid up" means such aggregate amount of money credited as paid up as is equivalent to the amount received as paid up in respect of shares issued and also includes any amount credited as paid up in respect of shares of the company, but does not include any other amount received in respect of such shares, by whatever name called.

The uncalled capital of a company can be converted into reserve capital. By passing a special resolution the company may declare that a portion or whole of its uncalled capital shall not be called except in the event of the company's winding up.⁴ Such a capital cannot be called except in winding up; it cannot be converted except with the leave of the court; it cannot be charged by the directors. Thus, where a company issued debentures charging its undertaking including the uncalled capital, it was held that the charge was not operative on the reserve capital.⁵

Kinds of share capital [S. 43]

Capital must be divided into shares of a fixed amount. All the shares may be of only one class or may be divided into two different classes of securities. For this purpose securities means securities defined in Section 2(i), Securities Contracts (Regulation) Act, 1956 [S. 2(51)] and includes "hybrids". The Act permitted only two kinds of shares to be issued, namely:⁶

1. Equity share capital, that is, ordinary shares, and
2. Preference shares, which constitute the preference share capital.

Ordinary share capital or "equity share capital" is defined in the Act as meaning all share capital which is not preference share capital.

The share capital of a company limited by shares shall be of two kinds only, namely: (a) equity share capital (i) with voting rights; or (ii) with differential rights as to dividend, voting as otherwise in accordance with such rules and subject to such conditions as may be prescribed; (b) preference share capital. [S. 43]

The Companies (Amendment) Act, 2000 introduced some other categories of shares:

Derivative.—Which has been given the same meaning as in Section 2, Securities Contracts (Regulation) Act, 1956. [S. 2(33)]

4. S. 65 gives the power to an unlimited company on getting itself registered as a limited company to increase the nominal amount of its share capital by increasing the nominal value of shares provided that the increased amount shall not be called up except for the purpose of winding up. The company can provide that a specified portion of its uncalled capital shall not be capable of being called up except on winding up.

5. *Mujlir Property Ltd. v. re*, (1898) 2 Ch. 26.

6. S. 43. Each share shall be distinguished by its appropriate number. S. 53. Private companies are exempted and, therefore, they enjoy the freedom of having any other kinds also.

Hybrid.—It means any security which has the characteristics of more than one type of security, including their derivatives.

Preference share capital [S. 43]

Preference share capital means that part of the share capital of a company which fulfils both the following requirements:

1. During the continuance of the company it must be assured of a preferential dividend. The preferential dividend may consist of a fixed amount (say Rs. 50,000 in one year) payable to preference shareholders before anything is paid to the ordinary shareholders, or the amount payable as preferential dividend may be calculated at a fixed rate, for example, 5 per cent of the nominal value of each share.
2. On the winding up of the company it must carry a preferential right to be paid, that is, the amount paid up on preference shares must be paid back before anything is paid to the ordinary shareholders. This preference, unless there is an agreement to the contrary, exists only up to amount paid up or deemed to have been paid up on the shares.

Equity shares were proposed to be issued against preference shares on the ground that no dividend was paid. There was no material to show that equity shares represented fair value of dividends claimed. The court cancelled the proposal.⁷

Cumulative and non-cumulative preference shares.—Preference shares may be either cumulative or non-cumulative. If there are no profits in one year and the arrears of dividends are to be carried forward and paid out of the profits of subsequent years, the preference shares are said to be cumulative. But if unpaid dividend lapses, the shares are said to be non-cumulative preference shares. Whether they are of one class or the other will depend upon the terms of issue and provisions in the company's articles. But, in the absence of any clear provision to the contrary, preference shares are presumed to be cumulative. *Foster v. Cefes, Foster & Sons Ltd*⁸ is an authority:

A company whose memorandum and articles provided for preference shares carrying a "cumulative preferential dividend" was reconstructed and clause 95 of the articles was altered by striking out the word "cumulative" before "preferential" so as to read thus, "The net profits from time to time available for distribution as dividend shall be applied first in payment to holders of preference shares of a preferential dividend." Even so it was held that the holders of preference shares were entitled to a cumulative preferential dividend. The word "cumulative" was dropped obviously with the intention of converting the preference shares into

7. *Ibid.* It is not necessary to give any priority to the amount of dividend remaining unpaid up to the commencement of winding up or to any fixed premium or premium on any fixed sum specified in the memorandum or articles of the company [S. 43(Explanation)].
8. *Tin Plate Dealers Assn. P. Ltd v. Sufi Sh Chandra Ranazekha*, (2016) 10 SCC 1; (2016) 199 Comp Cas 205.
9. (1906) 22 TLR 566.

non-cumulative shares. But unless there was a clear provision in the articles to that effect they were presumed to be cumulative preference shares.

Thus preference shares are always presumed to be cumulative and the accumulation of dividend can be excluded only by a clear provision in the articles of association. As, for example, in *Steples v Eastman Photographic Materials Co.*¹⁰:

The provision in the articles of association of a company was like this: "The holders of preference shares shall be entitled out of the net profits of each year to a preference dividend at the rate of 10 per cent per annum." It was held that according to this provision, preference shareholders were not entitled to a cumulative dividend of 10 per cent so as to have the deficiency in one year paid out of the profits of a subsequent year. The provision meant that the profits of each year only were to be paid in that way.

Preference shareholders cannot compel the directors to pay dividends, whatever be the amount of accumulation.¹¹

Participating preference shares. There is yet another problem concerning preference shares. After the fixed amount of dividend has been paid to the preference shareholders and some amount has by way of dividend been paid to the ordinary shareholders, there may be surplus profits which are proposed to be distributed among the shareholders. The question is whether the preference shareholders are also entitled to take part in the distribution of the surplus. Again, in the winding up of a company, if, after paying back both the preference and ordinary shareholders, there is a surplus, the question will be whether preference shareholders are also entitled to a share in the distribution of the surplus. If they are so entitled they will be known as *participating preference shares*.

The general principle is that preference shares are presumed to be not participating. The holders of such shares are not entitled to any share in the distribution of any such surplus, unless there is a clear provision in the memorandum, or the terms of issue or the articles conferring upon them the right of participation. This appears from a consideration of the authorities. Reference may be made here to one of them, namely, *Will v United Lankan Plantations Co. Ltd.*¹²

Preference shareholders were entitled to a cumulative preference dividend at the rate of 10 per cent per annum and, it was further provided in the company's articles, that such preference shares ranked both as regards capital and dividend in priority to other shares. It was held that preference shareholders were not entitled in the distribution of the profits to anything more than 10 per cent dividend.

10 (1896) 2 Ch 303. See also *Webb v Earle* (1875) 1 R 20 En 364 441 J Ch 608.

11. *Buenos Aires Great Southern & Eastern Co. re* 1947 Ch 384.

12 (1912) 2 Ch 571 107 LT 360 (CA); 1914 AC 31 (HL).

Accordingly, to find out the rights of a special class of shareholders we must look within the four corners of the articles of association and the company and the terms of the issue. If the right to participate in the surplus is not specified in the terms of the issue, preference shares are presumed to be not participating. This was affirmed by the House of Lords in *Scottish Insurance Corp Ltd v Wilsons & Clyde Coal Co Ltd*.¹³

A company intended to go into voluntary liquidation. Meanwhile it proposed to reduce its capital by returning their capital to the holders of the preference stock. Under the articles of the company, in the event of winding up, preference stock ranked before the ordinary to the extent of the amount paid thereon. The reduction of capital was opposed by certain preference stockholders on the ground that it deprived them of the right to participate in the liquidation and the division of the company's surplus assets. Thus the question was whether the preference stockholders would be entitled in winding up to a share in the surplus assets or, in other words, to receive more than a return of their paid up capital.

Lord Simon said, "It is clear from the authorities that subject to any relevant provisions of the general law, the rights inter se of the preference and ordinary shareholders must depend on the terms of the instrument which contains the bargain that they have made with the company and each other."

It means that their right to participate in the surplus depends upon the terms of the contract they have made with the company and there is no presumption that they have the right to participate unless it is excluded by the articles. There was nothing in the articles giving them the right to receive anything beyond the amount paid on their shares.

Then again the mere fact that under a company's articles preference shareholders are entitled to participate with the ordinary shareholders in the surplus profits does not entitle them in the company's winding up to participate in the surplus assets also. This was the position taken in *Isle of Thanet Electricity Supply Co Ltd, re*.¹⁴ A clause in the articles of association of a company defined the rights of shareholders as follows: "The issued preference shares shall confer on the holders the right to a fixed cumulative dividend at the rate of 6 per cent per annum in priority to the ordinary shares and the right to participate pari passu with the ordinary shares in the surplus profits which in respect of any year it shall be determined to distribute . . . and the preference shares shall confer the right in a winding up of the company to repayment of capital, together with arrears, if any." The company went into voluntary liquidation. Certain arrears of dividend on the preference stock were paid and the capital on both the preference and ordinary stock was repaid. As regards the surplus, it was held that the onus lay on the preference stockholders to show that they were entitled to participate therein; the above provision in the articles must be taken as

13. 1949 AC 462 (HL).

14. 1950 Ch 161; W Fawcett & Sons Ltd, re, (1942) 1 All ER 314.

being exhaustive in defining their rights and, therefore, the onus had not been discharged.¹⁵

Issue and redemption of preference shares [S. 55]

A company has the power under Section 55 to issue what are known as redeemable preference shares. There must, however be an authority to issue such shares in the articles of the company. The option of redemption lies with the company, that is to say, the company may choose to pay back the holders of such shares. Paying back is called redemption. There are following restrictions in regard to the fund out of which shares can be redeemed. [S. 55(2) Proviso]

Firstly, the shares to be redeemed must be fully paid.

Secondly, shares shall be redeemed only out of profits of the company which would otherwise be available for dividends. The only other method allowed by the Act is to make a fresh issue of shares and utilise the proceeds to carry out the redemption. Again, if any premium is payable on redemption, the amount must have been provided for out of the profits of the company or out of the company's Securities Premium Account.

Lastly, where redemption is made out of profits, a sum equivalent to the amount paid on redemption shall be transferred to a reserve fund to be called, *Capital Redemption Reserve Account*. This amount is to be preserved with the same sanctity as the company's share capital and can be reduced only in the like manner. Redemption of preference shares is not taken as reduction of the company's authorised share capital. The company may issue new shares up to the nominal amount of the shares redeemed and the capital shall not be deemed to have been increased.

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

Irredeemable preference shares [S. 55].—The amendment of 1988 abolished the category of irredeemable preference shares. Section 56(1) says that no company limited by shares shall issue any preference share which is irredeemable after 20 years. Companies have been permitted to issue preference shares for a period exceeding 20 years for infrastructure projects. A prescribed percentage of such shares may be redeemed on an annual basis at the option of preference shareholders.

Ordinary shares compared with preference shares

Preference shares, particularly redeemable preference shares, are more like debentures than like shares. They are entitled to a fixed rate of dividend even as debentures earn a fixed rate of interest. The company may choose

15. For other cases see, *Chatterley-Whitfield Collieries Ltd. v. M.* (1948) 2 All ER 593 (CA) and *Prudential Assurance Co Ltd v Chatterley-Whitfield Collieries Ltd.* 1949 All 512.

to pay them back;¹⁶ but ordinary shareholders cannot be paid back except under a scheme involving reduction of capital. [S. 66]

Secondly, an ordinary shareholder is entitled to vote on all matters affecting the company. But the right of a preference shareholder to vote is restricted to resolutions which directly affect the rights attached to his preference shares, except when dividend has remained unpaid in which case he may vote on any resolution in respect of preference share capital.¹⁷

Thirdly, preference shares offer a profitable and safe source of investment. While the fixed rate of income is guaranteed, the risk involved is much less as compared to the risk undertaken by an ordinary shareholder.

Alteration of capital [S. 61]

A limited company with a share capital can alter the capital clause of its memorandum of association in any of the following ways, provided authority to alter is given by the articles:¹⁸

- (a) It may increase its authorised capital by such amount as it thinks expedient.¹⁹
- (b) Consolidate and divide the whole or any part of its share capital into shares of larger amount.
- (c) Convert all and any of its fully paid up shares into stock or vice versa into any denomination.
- (d) Sub-divide the whole or any part of its share capital into shares of smaller amount.
- (e) Cancel those shares which have not been taken up and reduce its capital accordingly.

Any of the above things can be done by the company by passing a resolution at a general meeting, but do not require to be confirmed by the National Company Law Tribunal.²⁰ Within 30 days of alteration notice must be given to the Registrar who will record the same and make necessary alterations in the company's memorandum and articles.²¹ Notice to the Registrar

16. S. 36. This, however, does not mean that the holder of redeemable preference shares can treat himself like a creditor if his shares are not redeemed in time on maturity and take the liberty of filing a creditor's petition for an order of winding up. *Emidical Swans v. Hyderabad Vakaspatti Ltd.*, (1990) 119 Comp Cas 415 (AP).

17. S. 17(2)(y) previous.

18. S. 61(1). Cancellation of shares under cl. (e) does not amount to reduction of capital for the purposes of the Act (S. 61(2)).

19. *Nagar Mitra v. Busimhi* (1971) 104 Comp Cas 359 (CLB). Increase of capital beyond the authorised limit set in the memorandum is *ultra vires*. The capital clause of the memorandum would have to be altered for that purpose.

20. S. 60(2). The section requires only an ordinary resolution for increase of capital. *Junkki Printing (P) Ltd v. Nadir Press Ltd.*, (2001) 102 Comp Cas 546 (2000) 3 Comp L.J. 283 (C.L.B.).

21. S. 64. See also, sub-s (3) which imposes penalty for default. The default is a continuing offence. Subsequent replacement of the original resolution which remained unratified did not wipe out the offence. *Amison Fuchs Ltd v. Registrar of Companies*, (1999) 1 Comp L.J. 115 (Ker). Another ruling to the same effect is *Amason Foods Ltd v. Registrar of Companies*, (2001) 110 Comp Cas 846 (Ker).

has similarly to be given when redeemable preference shares have been redeemed.²² Similar information is also required to be sent where the capital has been increased beyond the authorised limit, or where a company, being not limited by shares, has increased the number of its members.²³

Reduction of capital [S. 66]

A reduction of capital is unlawful except when sanctioned by the Tribunal.²⁴ "Conservation of capital is one of the main principles of company law." The share capital of a company is the only security on which the creditors rely. Any reduction of capital, therefore, diminishes the fund out of which they are to be paid. It is for this reason that companies limited by shares are not allowed to purchase their own shares, because the capital is thereby reduced.²⁵ For the same reason, the power to forfeit, and to accept a surrender of, shares is strictly guarded.²⁶ But sometimes there may be a genuine necessity for the reduction of capital. Closely fenced power is, therefore, given by Section 66. Under this section a company limited by shares or a guarantee company having a share capital may reduce its capital in any way. It may, for example:

1. extinguish or reduce the liability on any of its shares in respect of the share capital not paid-up; or
2. cancel any paid-up share capital which is lost or is unrepresented by any available assets;²⁷
3. pay off any paid-up share capital which is in excess of the wants of the company.²⁸

Complete details of the procedure to be followed for effecting a reduction are given in the Act itself. Authority to reduce capital must be present in the articles. In pursuance of that authority a special resolution must be passed

22 S. 64(1)(c).

23 S. 44, sub-s (2) which imposes penalty for default. See also, *Mahadevi Mills Co Ltd v State*, (1970) 1 Comp LJ 80 (Raj).

24 S. 66(1).

25 S. 67.

26 See, *Registration of Shares*, Chap. 8, "Shareholders and Members". Where rights issued meant for employees was allotted under misrepresentation to employees' relatives, the company was permitted to rectify the register of members by substituting the names of employees but not to cancel them because that would have amounted to reduction of capital. *Puri Jatra Ltd v Lakshmi Nasarwan*, (1995) 16 CLA 7 (CLB). Some other provisions founded on the requirement of maintaining the capital are, a subsidiary cannot purchase shares in its holding company; [s. 19] dividends are not allowed to be paid out of capital; [s. 120] in England, under EC directives a winding up committee has to be called when the company has lost half or more than half of its share capital.

27 See, *Vantek Indradev Ltd v. M*, (1999) 2 Comp LJ 47, a company allowed to cancel capital in respect of shares which were allotted to public but which remained unpaid.

28 S. 66(1). For a statement of the ways in which the need for reduction may arise, see, *Jadson National Press (India) Ltd v. re*, (1989) 66 Comp Cas 387, 392 (MP). Where a scheme of amalgamation under Ss. 230-240 involves reduction of capital, the procedure prescribed for such reduction has to be followed. *Asian Investments Ltd v. re*, (1992) 23 Comp Cas 507 (Mad); *Dumirajan v. Waterfall Estates Ltd*, (1992) 42 Comp Cas 563 (Mad).



which should authorise the contemplated reduction of capital.²⁹ The next stage is to apply, by petition, to the Tribunal for an order confirming the reduction.³⁰

Duties of Tribunal

The court is burdened with onerous duties. The basic function, however, is to look after the interest of the creditors and different classes of shareholders.

Interest of creditors.—Creditors are likely to be hit only when the reduction diminishes the liability of shareholders to pay the uncalled capital or where the proposed reduction involves payment to any shareholders of any paid-up share capital.³¹ In other cases creditors are not entitled to object. Again only such creditors are entitled to object to whom the company owes a debt which would have been payable in the winding up of the company. Of such creditors who are entitled to object the court must settle a list. Should all the creditors not consent to the reduction, the court may dispense with the consent of dissenting creditors provided that their debts are secured to the satisfaction of the court. The court has also been given the discretionary power of dispensing altogether with the consent of creditors, but this the court will do only when it is convinced that they are not in any way affected.³² In one of the cases on the subject,³³ a company had issued shares and debentures in equal amount. It lost the bigger part of its capital. A part of the lost capital was recouped out of subsequent profits. The rest was proposed to be written off. The debenture holders were not

29. There should be a valid meeting and a valid resolution. See, *Iyton Stock Exchange Assn Ltd. v. AIR [1952] Pergo. II* In *Berry Artist Ltd. v. (1985) 1 WLR 1305*; (*1985*) BCILC 225, the court allowed reduction on the basis of a resolution signed by all the members without a formal meeting. The court, however, issued this warning that the practice should not be repeated. *Birla Global Finance Ltd. v. (2005) 126 Comp Cas 647* (Bom), redemption of preference share capital amounts to reduction, all formalities were complied with. *Perry's Confectioners Ltd. v. (2004) 122 Comp Cas 903* (Mad), restructuring of capital by wiping out losses by using the share premium account. The Rajasthan High Court in *Vishwanath Gulati Ltd. v. re. (2017) 201 Comp Cas 32* (Raj) stated that the adjustment of consolidated loss with surplus or deficit in securities premium account is completely a commercial decision to be taken by the shareholders by way of a special resolution in consonance with the articles of association of the company.

30. S. 66. Where shares were allotted to a lender by mistake and he claimed back his money, it was held that even in such a case the formalities of reduction should be met. *Rapak Ltd v. Registrar of Companies*, (*1976*) 46 Comp Cas 55 (Pun).

31. S. 66(1). Officers of the company concealing the names of creditors are made punishable under S. 105.

32. S. 66(2)(3). See, for example, *Lucrative Temperance Billiard Halls (London) Ltd. v. (1966) 1 Ch 96*; (*1966*) 2 WLR 5; (*1966*) 1 Comp L 350. Another case in which creditors are not likely to be affected is where a company had in rectify its register of members by removing the names of members of its own parent companies to whom shares had been allotted in violation of the Exchange Control Act, 1947 (English). See, *Transatlantic Life Assurance Co. Ltd. v. (1980) 1 WLR 75*. *Paster Steel Ltd. v. (2006) 100 Comp Cas 123*; (*2006*) 59 SCL 457 (Guj), restructuring of capital for improving financial resources not affecting creditors, approved, an objecting shareholder was not present at the meeting and also not representing majority.

33. *Menz's Brewery Co. Ltd. v. (1919) 1 Ch 28*.

allowed to raise any objection. Their position remained the same whether with or without reduction. Where certain creditors objected but the company secured their dues and also complied with the direction of the court to keep an amount in fixed deposit in the name of the Registrar of the court, the reduction was confirmed.³⁴

Interest of shareholders.—The second duty of the court is to look after the interest of the shareholders. The proposed scheme of reduction must be reasonable and fair between all the classes of shareholders in the company. If the capital of a company consists of only one class of shares and all of them are to bear the reduction proportionately the scheme is obviously fair and must be confirmed. And so in *Marsuri Stores Ltd v Gauri Shanker Guorka*.³⁵

The defendant company had a capital of Rs 1,92,000 divided into 1920 shares of Rs 100 each. By a special resolution the company resolved to reduce the capital to half, that is, to Rs 96,000 divided into 1920 shares of Rs 50 each. In other words, the paid-up capital was to be cancelled to the extent of Rs 50 on each share. The petitioner, a shareholder, opposed the reduction on the ground that there had been no loss of capital and, therefore, the reduction was unwarranted.

The question was whether a scheme of reduction can be confirmed only on the proof of the fact that there has been a real loss of capital. This fact was, however, proved by the company and, therefore, the court did not hesitate in confirming the scheme but cited with approval the opinion of Lord MACNAULY in *Poole v National Bank of China Ltd*,³⁶ where his Lordship said, "The condition that gives jurisdiction is not proof of loss of capital or proof that capital is unrepresented by any available assets or that capital is in excess of the wants of the company. The jurisdiction arises whenever the company seeking reduction has duly passed a special resolution to that effect".

But a warning was issued in the case of *Caldwell v Caldwell & Co*:³⁷

...if capital not lost or unrepresented by available assets were cancelled, it might be possible thereafter by some adjustment of the figures in the company's balance sheet to carry the amount so cancelled to the company's profit and loss account and so indirectly return the paid-up capital to shareholders, thus affecting the rights of creditors. It was

34. OCL (India) Ltd. re, AIR 1998 Orissa 3. The court concurred Meng's Brothers Co Ltd. re (1919) 1 Ch. 28 where the debentureholders unsuccessfully objected that the proposed reduction would be prejudicial to their security by enabling the company to pay dividends out of profits instead of such profits being applied in making good the lost capital. No evidence was adduced to show that the lost capital was attributable to circulating capital. Westcourt Sugar Refineries Ltd. re, 1911 AC 625 (HL), paying off capital can be done otherwise than by payment of money.

35. AIR 1936 Cal. 421.

36. 1907 AC 229; 96 LT 889.

37. 1916 SC 321; 1966 WN 71 (HL).

therefore thought, if not necessary, at any rate wise and prudent to insist on some evidence of the fact of loss of capital.

"The court cannot, however, always so insist for the simple reason that the question of reducing capital is a domestic one for the decision of the majority. The company may reduce the capital of all its shareholders *pro rata*, or may reduce the shares of any individual shareholder or any class of shareholders wholly or in part. Although the court must see that the interests of the minority have been protected and there is no unfairness shown to them, but in doing so the court shall keep in view the consideration that the decision has been arrived at by businessmen who are fully cognizant of their necessities and are the best custodians of their interest and should therefore be slow to interfere."³⁸ Moreover, lost capital can be written off even where it is still represented by available assets.³⁹

The court's job becomes a little more difficult where there are two classes of shareholders enjoying different rights and the proposed resolution for reduction affects them differently. In such a case the court has to see that the scheme of reduction should be fair and equitable as between the ordinary and preference shareholders. But what is fair and equitable must depend upon the circumstances of each case. The decision of the House of Lords in *Scotish Insurance Corps Ltd v Wilsons & Clyde Coal Co Ltd*⁴⁰ is an instructive illustration.

Under an Act the colliery assets of a coal mining company were acquired. The company intended, after receiving compensation, to go into voluntary liquidation. Meanwhile, it proposed to reduce its capital by paying back the preference stock which would be thereby extinguished. The power to pay off the preferential stock was there in the articles. It was also provided that in the event of winding up the preference stock ranked before the ordinary to the extent of the amount paid thereon. The reduction was opposed by some preference stockholders on the ground (*inter alia*) that it deprived them of the advantage of their investment rather prematurely and, therefore, the proposed reduction was unfair.

It was, however, held that the proposed reduction was not unfair or inequitable, because, even without it, the preference shareholders would not be entitled to anything more than a return of their paid-up capital. Lord Stadikos said: Whether a man lends money to a company at 7 per cent or

38. The discretionary nature of the court's power has been explained by B.H. Burke, "Reduction of Share Capital—The Assertion of Discretionary Power" (1970) 87 SALJ 161.

39. *Havre & Co Ltd*, re, (1914) 2 Ch 204 (CA).

40. 1949 AC 462 (HL). See also, *Robert Stephen Holdings Ltd*, re, (1968) 1 WLR 522; (1968) 1 All ER 195 (Ch D); *Saffron Estate Co Ltd*, re, (1968) 1 WLR 1844; *Holders' Investment Trust Ltd*, re, (1971) 1 WLR 383. In this case it was held that a cancellation of preference shares by repayment of the capital paid on them and also consistently with the rights attached to those shares did not involve variation of the rights of other shareholders. Followed in *House of Glass v ACCF Investments Ltd*, 1987 BCSC 479 (DL).

subscribes for its shares carrying a cumulative preferential dividend at that rate, he cannot complain of unfairness if the company, being in a position lawfully to do so, proposes to pay him off. No doubt, if the company is content not to do so, he may get something he may never have expected but so long as the company can lawfully repay him, whether it be months or years before a contemplated liquidation, I see no ground for the court refusing its confirmation. Funds being available for payment of the capital, the natural order is to pay off the capital which has priority and I see no glimmer of unfairness in the company doing so at the earliest possible moment.

The Calcutta High Court also faced a problem of this kind in *Hindustan Commercial Bank v Hindustan General Electrical Corp.*⁴¹

A company, having lost nearly the whole of its capital, proposed a scheme of reduction under which the preference shareholders had to forego their accumulated arrears of dividend and 70 per cent of their capital and ordinary shareholders to forego 50 per cent of their capital. The scheme was approved by necessary majority at a separate meeting of preference shareholders and also at a general meeting of the company.

Some preference shareholders subsequently contended that "prima facie the whole of the capital paid-up on the ordinary shares should be cancelled before any part of the capital paid-up on preference shares is cancelled". The court, however, sanctioned the scheme and said that "special circumstances may justify a departure from this *prima facie* rule". And the special circumstances here were that due to the loss of almost the whole of the paid-up capital of the company the only alternative to reduction was winding up in which case neither class of shareholders would have got anything.⁴²

Where reduction involves paying back capital to shareholders, priority must be given to those who would be entitled to prior refund of capital in the winding up.⁴³ Where reduction involves variation of class rights, the procedure prescribed by the Act and the company's articles must also be complied with.⁴⁴

41. AIR 1960 Cal 637; (1960) 31 Comp Cas 307.

42. The court relied upon the following authorities: *Credit Assurance and Guarantee Corp. Ltd.*, re, (1902) 2 Ch 601; *Bassett v Direct Spanish Telegraph Co.* (1886) 1 R 34 Ch D 287, 299-300; *Flouring Dock Co. of St Thunis Ltd.* re, (1896) 1 Ch 691; *British & American Trustee & Lender Corp. v Cooper*, 1894 AC 399 (HL). See also, Surendra Nath, "Reduction of Share Capital of a Company", AIR 1969 Journal 7, 18; *RS Lifecentury (P) Ltd.* re, 2014 SCC OnLine Del 1346; (2014) 187 Comp C 243, reduction by cancelling specified number of shares held by foreign investors. All procedural requirements complied with the basis of length of the period of holding, not on any arbitrary basis. Permission for reduction was granted. See, *Prudential Assurance Co. Ltd. v Clatford-Whitfield Collieries Ltd.*, 1949 AC 512.

43. *Old Saltstone Collieries Ltd.* re, 1954 Ch 110; (1954) 2 WLR 77 (CA). Burden of proving unreasonableness lies on those who oppose the scheme, see, *Carruth v Imperial Chemical Industries Ltd.*, 1967 AC 737 (HL). In a takeover scheme all the ordinary shares were to be transferred to the acquiring company and the scheme was approved by 97 per cent of the shareholders. The court approved the scheme; though the company had some "B" shares, a separate meeting of that class was considered to be not necessary. *STR plc.* re, (2000) 1 BCLC 740 (CA).



If the court (now Tribunal) is satisfied in all respects it may make an order confirming the reduction on such terms and conditions as it thinks fit.⁴⁵ The company may also be directed to publish for public information the reasons for the reduction.⁴⁶ The company should get the reduction registered with the Registrar.⁴⁷

Where reduction became necessary as a part of a scheme of amalgamation the court passed necessary orders for the purpose without the need for following the special procedure except this that a special resolution which is a mandatory requirement must be observed.⁴⁸

This special procedure is not applicable when reduction of share capital is the result of adjustment of accumulated losses against Capital Redemption Reserve Account and Share Premium Account because in such a case interests of creditors are not affected.⁴⁹

Liability of members after reduction [S. 66].— Liability of members in respect of reduced shares is explained in Section 66 of the Act. A member shall be liable to pay the amount deemed to have been unpaid on his shares. His liability is to pay the difference between the amount deemed to have been paid on his shares and the nominal value of the reduced shares.⁵⁰ However, the members' liability to pay the original nominal value of the shares can be restored in one case. Sometimes a creditor having the right to object to a reduction may have been left out of the list of creditors because of his ignorance of the proceedings or their effect on his interest and subsequently the company has become unable to pay its debts.⁵¹ The court may, to meet the claim of such a creditor, order the members to pay that amount on their shares which they would have been liable to pay before the reduction.⁵²

45. S. 66(3). The court has to watch the interest of even those shareholders who do not appear. *Indian National Press (Jaipur) Ltd. v.* (1989) 66 Comp Cas 387 (MP).

46. S. 66(4).

47. S. 66(5). The detailed procedure of registration is explained in the section. The effective date of reduction is the date of filing the return of reduction with the Registrar. *CIT v. Industrial Credit & Development Syndicate Ltd.* (1989) 2 Comp L 266 (Karn). A certified copy of the court order and the minute of reduction approved by the court should be filed. The Registrar issues a certificate which is conclusive that requirements have been complied with. The minute becomes incorporated in the capital clause of the memorandum. *Merim Steels Ltd. v. 2MMSCC Online Del 11.30. (2016) 195 Comp Cas 523*, cancellation of shares held by public shareholders allotment to investors who infused funds to pay off secured and unsecured creditors which helped company to come out of winding up proceeding, scheme sanctioned.

48. *Neerjan Indus Ltd. v.* (1997) 88 Comp Cas 596 (AP) and *Semitrax Pharmaceuticals and Chemicals Ltd. v.* (1997) 88 Comp Cas 619 (AP); *EDC Tailor Made Polymers India (P) Ltd. v.* (2005) 59 SCL 199 (2005) 125 Comp Cas 648 (Bom).

49. *Rallis India Ltd. v.* (2006) 125 Comp Cas 268 (Bom); *Essar Steel Ltd. v.* (2006) 130 Comp Cas 129; (2008) 59 SCL 437 (Guj). the reduction was confirmed because there was no diminution of liability on unpaid capital or any payment to any shareholders from paid-up capital.

50. S. 66(7).

51. S. 66 penalises any officer of the company who conceals information as to creditors.

52. S. 66.

Further issue of capital (S. 62)

Under Section 62 of the Act a company can at any time by passing an ordinary resolution at its general meeting resolve to increase its capital by such amount as it thinks expedient by issuing new shares. The time at which and the persons to whom new shares are to be allotted is an important question in company law. If the directors or the majority of shareholders are allowed to dispose the new issue at their discretion, they would naturally offer it to their nominees, thus adding to their own majority and reducing the strength of the minority. Section 62 partly deals with this problem.

Shareholders' pre-emptive right or rights shares. -The section comes into play whenever it is proposed to increase the subscribed capital of the company (within the limit of authorised capital) by allotment of further shares.⁵³

The new issue must be offered to the existing holders of equity shares in the proportion, as nearly as the circumstances admit, of the shares held by them.⁵⁴ "The object of the section obviously is that there should be an equitable distribution of shares and the holding of shares by each shareholder should not be affected by the issue of new shares."⁵⁵

Offer must be made to the existing holders of equity shares in the company in proportion, as nearly as the circumstances admit, to the capital paid up on those shares. Offer is to be made by giving a notice specifying the number of shares offered.⁵⁶ The notice must fix a time which should not be less than 15 days and not exceeding 30 days from the date of the offer within which the offer must be accepted.⁵⁷ The notice must also inform the

53. S. 62(l); b. 1, SEBI Guidelines for Investor and Creditor Protection, 1992 prescribes the minimum interval of 12 months between two issues. *Ashok Dashi v Doshi Trilek Industries* [79] Ltd. (2001) 104 Comp Cas 305. (2000) 38 CLA 278 (CLB); two years had still not passed when the next issue was made. Section not applicable. Two year gap was prescribed by S. 81(1) of the 1956 Act.

54. S. 81(l)(a) of the 1956 Act. *Nagar Milk v Biswajit P. Ltd.* (2002) 108 Comp Cas 359 (CLB); the provision is mandatory; increase was with the consent of the whole Board of the family company, lawful, though there was absence of minutes and notices to members.

55. *Neelal Zaveri v Amritay Life Assurance Co.* AIR 1919 Bom 56; *Sangramini P. Garkhwal v Shantakar P. Garkhwal*, (2005) 11 SCC 314. (2005) 123 Comp Cas 866, shareholders who were aware of the decision were not allowed to question the further issue.

56. See, *Jadhpur Tex Co Ltd v Bengal Dyers Nekamal Thi Co I M.* (1986) 56 Comp Cas 160 (Cal), where the notice was under certificate of posting and the court presumed delivery. *Citrus Corp of India Ltd v Tyamguda Spc & Wng Mills Ltd.* (2006) 133 Comp Cas 848; (2005) 61 SCL 219 (AP). It was difficult for the court to believe that a very important letter like offer of rights shares should have been sent by ordinary post. Thus there was no *prima facie* evidence of posting of letters. An *ad interim* relief was granted to restrain the person to whom the plaintiff's proportion was allotted. He was restrained from dealing with shares or to exercise any right in respect of them.

57. The Delhi High Court held in *Shrimati Jais v Delhi Flour Mills Co Ltd.* (1974) 44 Comp Cas 228 (Del) that a notice posted within Delhi and giving seventeen days' time to accept was a good notice. Such a letter is likely to be delivered the next day and thus leaves a time of fifteen clear days exclusive of the date of posting and of delivery. The court also pointed out that the validity of an allotment under the section cannot be challenged in the absence of the allottee as that would be against the principle of natural justice. See, 250. Letters of offer have to be sent by registered post.

shareholders that if the offer is not accepted within the specified time, it shall be deemed to have been declined. Again, the notice has to inform the shareholders that they have the right to renounce all or any of the shares offered to them in favour of their nominees.

The notice can be despatched through registered post or speed post or through electronic mode at least three days before opening of the issue.

If a shareholder has neither nominated anyone nor accepted the shares himself, the Board of Directors will get the discretion to dispose of the shares declined in such manner as they think most beneficial to the company.⁵⁶ Similarly, if after carrying out proportional allotment as nearly as the circumstances admit, some shares are left, they may be disposed of by the directors in such manner as they think most beneficial to the company.⁵⁷

Such shares can also be offered to employees under a scheme of employees' stock option. It can be done under the authority of a special resolution and also subject to such conditions as may be prescribed. They can also be offered to any persons, if so authorised by a special resolution even if they are not within the two categories mentioned above. Such offer can be for cash or for a consideration other than cash. This would require the price of the non-cash consideration to be determined by valuation report of a registered valuer subject to such conditions as may be prescribed.

Role of Directors' Discretion and Judicial Control.—Subject to these restrictions, directors enjoy the full discretion of deciding whether an increase in the capital of the company is necessary or not and at what particular time the capital should be increased. This appears from the decision of the Bombay High Court as affirmed by the Supreme Court in *Niratul Zaver v. Bombay Life Assurance Co.*⁵⁸

Tempted by the soundness of a company, one S purchased a majority of its shares in the open market. The directors immediately came out



CASE PILOT

56. S. 62(1)(g)(ii). *Sangamnagar P. Gokhale v. Shrimadtri P. Gokhale*, (2000) 11 SCC 314; (2005) 123 Comp Cas 556, some of the shareholders did not participate in the issue, directors allotted their proportion to persons of choice, not objectionable. There was no proof that the proportion of the Chairman was surrounded by him, its allotment to others, not proper. A part of the allotment was transferred by the majority shareholders to their private company. This was held to be not valid because it was in violation of articles, other shareholders could not claim allotment of such shares to them.

57. *V. Shanmuganathan v. Emerald Automobile Ltd.*, (2009) 103 Comp Cas 1108 (CLB), rights shares first offered to existing shareholders and then to outsiders, allotment valid. *Guru Kapoor v. Union of India*, (2005) 5 Comp LJ 13 (Del), rights shares can be offered to foreign shareholders either under automatic approval scheme for raising foreign equity or under formal approval. The Government policy applicable at the time of allotment would hold good and not any subsequent revised policy.

58. AIR 1949 Bom 56. The directors' discretion in this connection was emphasised in *Miles H. Majedji v. Majahil Industries Ltd.*, (1996) 87 Comp Cas 205 (Guj). The court added that an allotment of shares is a contract. If it is made in contravention of a court injunction, would be contrary to public policy and void as between the company and the allottee. If the company is in need of more capital in accordance with director decision, it can make further issue, the only constraint being that the directors should decide the matter in good faith and proceed in accordance with the requirements of the section. *Mihir Sen v. Gaudium Plasticine Ltd.*, (1998) 91 Comp Cas 113 (Cal).

with a further issue of capital and allotted it to the existing members in accordance with 1956 Act [now S. 62]. Two of the shareholders who had sold their interest to S objected to the scheme on two grounds, firstly, that the company was in no need of further capital and, therefore, the allotment was not made in the *bona fide* interest of the company, and, secondly, some 272 shares of the total new issue were not offered to the shareholders at all.

Both these contentions were rejected. Regarding the second, it was held that "the legislature did not intend that each one of the shares had to be offered to the members in proportion to the existing shares held by each member. Such shares had to be offered only as nearly as the circumstances admit" and that was done in the present case. As for the first argument, the Bombay High Court, as upheld by the Supreme Court, observed: The scheme of the section is fairly clear. It is left to the discretion of directors to decide whether an increase in the capital of the company is necessary or not. It is also left to their discretion to determine at what particular time the capital should be increased.... Once it is established that the company is in need for funds, then, whatever other motives might have actuated the directors, the court will not interfere with their discretion. However mixed the motives might be, if it is established that in fact the company was in need of funds, then it could not be said that the exercise of their fiduciary powers by the directors was not a *bona fide* exercise. It is only when that discretion is exercised solely for the personal ends of the directors, for their personal aggrandisement, for keeping themselves in power, then undoubtedly that discretion cannot be said to have been exercised *bona fide*.⁶²

Excluding Operation of the Section.—Under 1956 Act, the operation of this section could, however, be excluded and the new shares offered to outsiders to the total exclusion of the existing shareholders in the following two cases: (1) If the company had, by passing a special resolution, resolved to allot the new issue in a different manner than that provided in the section, or (2) If an ordinary resolution to that effect had been passed and the Central Government was satisfied, on an application made by the Board of directors, that the proposal to offer the shares to outsiders was most beneficial to the company.

62. See, MARIAN J., p 179, AIR 1950 SC 172. Cf. *Perry v S Millis & Co Ltd*, (1920) 1 Ct 27; *Hogg v Cramphorn Ltd*, 1947 Ch 254; (1968) 51 Mod L Rev (NOC) 688; noted K.W. Webleyburn, "Shareholders' Control of Directors' Powers: A Judicial Innovation" (1967) 31 Mod L Rev 2. See also, E.E. Leigh, "Companies Act, 1967" (1968) 31 Mod L Rev 185, 186, where the learned writer maintains that *Hogg v Cramphorn Ltd*, 1947 Ch 254, (1968) 51 Mod L Rev (NOC) 688 shows that "it will be improper to issue shares to management primarily with a view to maintain control, and the directors will have to ensure that an issue is made in the company's interest if litigation is to be avoided". *Vijay Al Shahi v Pico Industries Ltd*, (2001) 103 Comp Cas 1043 (Del), a case filed under S. 91 alleging failure of company to send rights offer in time because of *misra fides*, fraud and oppression, the court said that it was in essence a matter under Ss. 397-398. It should have gone before the CLT (now National Company Law Tribunal).

In either case the question arose whether the exercise of this majority power was governed by the fiduciary principle or whether the majority could act in its personal interest in disregard to that of the company. This in essence was the question before the Supreme Court in *Shanti Prasad Jain v Kalinga Tubes Ltd.*⁶²

The shares of one private company were held equally by two groups. The petitioner was introduced to provide financial and administrative help. He was allotted shares equal to both the groups and was made Chairman of the Board of directors. The company's business was successful. In order to avail of the loan facilities provided by the Orissa Government the company was converted into a public company. A substantial increase of capital was proposed. The two groups having majority both in the Board and general meeting resolved to offer and allotted the new issue to outsiders selected by them.

The question was whether the majority power was exercised in good faith in the interest of the company or only to deprive the petitioner of his right under the Section. If the voting power of the new allottees was utilised by the majority group, 75 per cent of the votes would concentrate in their hands. But that, the court held, was not sufficient to show that there was a "combination"⁶³ to squeeze out the petitioner. WANGCHOK J said, "The seven persons to whom the new shares were allotted were respectable persons of independent means and there was nothing to show that they were stooges of the majority groups."

The decision, with due respect, did not seem to take into account the footing on which majority powers stand. For "the majority has the right to control; but when it does so, it occupies a fiduciary relation towards the minority, as much as the corporation itself, or its officers or directors."⁶⁴

62. (1965) 1 Comp LJ 193, AIR 1965 SC 1535; (1965) 35 Comp Cas 350. Again affirmed by the Supreme Court in *Needle Industries (India) Ltd v Nivdhi Industrial Needs (India) Holding Ltd*, (1981) 3 SCL 333; (1981) 51 Comp Cas 793. The court will set aside the allotment where it would appear to have been made only to reduce the strength of a shareholder. *Jain v Trico Ltd v Engel Doors National Tea Co Ltd*, (1984) 55 Comp Cas 160 (Karn).

63. Misra J in *Kalinga Tubes Ltd v Shanti Prasad Jain*, (1964) 1 Comp LJ 117 (Oriz). A similar compulsion was there in *Selvam Jacques Tern Laleoni v JDA Printing Inks Ltd*, (1997) 88 Comp Cas 759 (Bom) because a private company's capital had to be increased on the eve of making it a public company. Any incidental benefit to the directors could not be a decisive factor. *N Jayaraj v Investment Trust of India Ltd*, (1996) 85 Comp Cas 73 (Mad); statutory right of shareholders to exclude pre-emptive rights. The court did not interfere in the shareholders' resolution authorising the directors to allot further issue to the promoters' group. A similar resolution was not interfered with in *Kirtiawati Industrial Corps Ltd v Marwell Oils & Chemicals (P) Ltd*, (1996) 85 Comp Cas 29 (Mad), where also the shareholders resolved that the further issue be allotted to NRKA, overseas corporate bodies and promoters' group. This decision was affirmed by the Divisional Bench in *Marwell Oils and Chemicals (P) Ltd v Kalmari Industrial Corps Ltd*, (1996) 85 Comp Cas 111 (Mad).

64. Brandeis J in *Southern Pacific Railing Co v Argent*, 43 U. Ed. 1099; 250 US 482, 492 (1919). Many such opinions have been cited by Berle and Means, *The Modern Corporation, Inc AND Private Property* (1932) 258; Carlos L. Israel, "Are Corporate Powers still held in Trust?" (1964) 64 Colum L Rev 1446.

This state of litigation showed chances of abuse of power of exclusion. The legislature seems to have dropped this provision for this reason. There is no longer any power to exclude the operation of Section 62(1).

Where the Section does not Apply (Debentures or loans).—The above restrictions, however, do not apply to any increase in the subscribed capital caused by the exercise of an option attached to debentures issued or loans raised by the company to convert such debentures or loans into shares or to subscribe for shares in the company.⁶⁵ The option to convert must be contained in the terms of issue of the debentures or loan. Again, approval of special resolution for such terms must have been obtained before the issue was made. It is also necessary that the terms should have been approved by a special resolution of the company except where the loan is from the Government or any institution specified by it.⁶⁶ A private company is also exempt from the provision.⁶⁷

Where the Government considers it necessary in public interest to do so it can order the company to convert its debentures or loans wholly or partly into shares in the company on such terms and conditions as appear to the Government to be reasonable in the circumstances of the case. This can be done even if the terms of the issue of debentures or raising of loans did not include a term for providing an option for conversion.

As against such exercise of power, this relief is allowed to the company that if the terms and conditions of conversion are not acceptable to it, it may within 60 days of communication of the order of conversion appeal to the Tribunal. Such order may then be passed after hearing the company and the Government as the Tribunal deems fit. [S. 62(4)]

Sub-section (5) provides that in determining the terms and conditions of conversion, the Government should have regard to financial position of the company, the terms of debentures and loans and rates of interest payable on them and other matters that the Government may consider necessary.

If the Tribunal dismisses the company's appeal or where no appeal has been preferred, the memorandum of the company would become altered if the Government order has the effect of increasing the authorised

65. S. 62(3)

66. S. 62(4)

67. See, *Nearle Industries (India) Ltd v Nordic Industries (Neville) Holdings Ltd*, (1981) 3 SCC 255 (1981) 51 Comp Cas 743. The decision was to the effect that S. 81 would not apply to private companies which have become deemed public companies by virtue of S. 42-A and which have retained the features of a private company. *V Radiukurthi v P R Ramkrishnan*, (1993) 78 Comp Cas 699; (1995) 17 CLA 61 (Mad); here the shareholding was that of a company in winding up and it was held that its proportionate shares ought to have been offered to it. The section does not apply to private companies including a private company which is subsidiary of a public company. The interests of shareholders of such companies are usually protected by pre-emptive clauses in articles of association. *Astek Dushni v Dusnit Textile Industries (P) Ltd*, (2001) 136 Comp Cas 306; (2001) 38 CLA 278 (Kt). Any decision about the applicability of the section to such companies is likely to go wrong if the state of the company's articles is not taken into account. *Jayanta Detergents (P) Ltd v Company Law Board*, (1999) 1 Comp LJ 207 (AP).

share capital of the company. The authorised share capital would become increased by the shares issued under conversion of debentures or loans. [S. 62(5)]

The English Companies Act, 1948, does not provide for pre-emptive rights.⁶⁸ "England has never adopted this doctrine as a compulsory legal rule.... The only restraint on the directors is that entailed by the rule that they must act as fiduciaries when issuing further capital."⁶⁹ One aspect of this fiduciary principle is that the directors must not allot new shares to themselves or their nominees solely for the purpose of maintaining themselves in power. Thus they have been restrained from issuing shares to enable themselves to control the next general meeting,⁷⁰ or to pass a special resolution.⁷¹ The fiduciary principle has been reaffirmed in the cases of *Hogg v Camphorn Ltd*⁷² and *Bawford v Bonfond*.⁷³ In both cases the directors had to face a takeover bid and by way of defence new shares were allotted. In the first case the allotment was made to certain trustees for the benefit of the company's employees, the company providing an interest free loan for the purpose. This helped the directors to regain majority at a general meeting. BUCKLEY J said:

Assuming that the directors acted in good faith and they believed that the establishment of a trust would benefit the company and that avoidance of takeover would also benefit the company, I must still remember that an essential element of the scheme, and its primary purpose, was to ensure control of the company by the directors and those whom they could confidently regard as their supporters. Was such a manipulation of the voting position a legitimate act on the part of the directors?

The learned judge held that it was not so, unless it was affirmed by a majority of shareholders in general meeting. The decision was accordingly deferred until the wishes of shareholders could be ascertained in a general meeting at which new allottees would not vote.

In the other case the directors took the precaution of having the shareholders' sanction to the allotment. The court held that even assuming that the allotment was not made in the *bona fide* interest of the company, the

68. *Whitgord Hotel Ltd v Kingham*, (1909) 101 LTR 917; (1910) 102 LT 138. For American literature on the subject of pre-emptive rights, following articles may be consulted: Henry S. Drinker, Jr., "The Pre-emptive Right of Shareholders" (1925-30) 43 Harv L Rev 556; "The Right of Stockholder to New Stock" (1908-09) 18 Yale J. 101; Victor Morawetz, "The Pre-emptive Right of Shareholders" (1928-29) 42 Harv L Rev 166; Gower, "British & American Corporation Law" (1956) 69 Harv L Rev 1359, 1380; "Freezing Out Minority Shareholders" (1963) 74 Harv L Rev 1630, 1631-37. See also, Avtar Singh, "Shareholders' Pre-emptive Right: A Comparative Study" (1969) Shareholders' Journal 16.

69. Gower, "British and American Corporation Law", 69 Harv L Rev 1344, 1380.

70. *Fraser v Whinley*, (1884) 2 H&M 10-71 ER 361; *Berry v S Mills & Co Ltd*, (1920) 1 Ch 77.

71. *Pwitt v Sympois & Co Ltd*, (1923) 2 Ch 506.

72. 1967 Ch 254. (1968) 31 Mod L Rev (NJC) 688. Considered by K.W. Wedderburn, "Shareholders' Control of Directors' Powers: A Judicial Innovation" (1967) 30 Mod L Rev 7 and During the Whole *Hogg v Camphorn Ltd*, 1967 Ch 254; (1968) 31 Mod L Rev (NJC) 688. See also, 1964 JBL 51.

73. 1970 Ch 212 (1969) 2 WLR 1107 (CA).

members could ratify it, they not being subject to the fiduciary duty of directors to act in the best interest of the company. The Court of Appeal affirmed the decision but on a different ground. It held that according to the articles, the residual power of allotment was with the company and the company exercised it in its own right and not in the right of the Board.

Freezing out Techniques. Subject to these considerations, however, issuing new shares with the dominant purpose of diminishing the voting power of the minority shareholder is an abuse of their position by a majority of the shareholders.

A small private company had only two shareholders, the plaintiff holding 45 per cent and her aunt 55 per cent. The aunt was a director along with some others who were not shareholders. A resolution was passed increasing share capital which was to be allotted partly to the directors and partly in trust for employees. The plaintiff's holding would thereby be reduced to half and that of the majority group along with the new shares would be increased to 75 per cent.

The House of Lords restrained the scheme. The dominant purpose was to diminish the voting strength of the minority and the resolution was adopted to serve only that purpose.⁷⁴

One of the results of these cases is the development of the "proper purpose" doctrine which requires directors to use their powers in good faith only for the purpose for which they are meant. A Canadian court found that the directors of a company had issued shares in good faith to a third person in order to wipe off the control by a majority shareholder and held that the proper purpose doctrine was merely an aspect of the broader principle that directors must act bona fide and, therefore, there was no breach of duty.⁷⁵ But this decision seems to have been not approved by the Privy Council in a case where their Lordships held that the directors were in breach of their proper purpose duty irrespective of their bona fides.⁷⁶

Besides this, the stock exchange regulations (effective in England) now require the new issues of quoted securities to "be offered in the first place to the equity shareholders unless those holders have agreed in general meeting to other specific proposals".⁷⁷

Employees' Stock Option.—This expression has been defined in Section 2(37) as follows.

"Employees' stock option" means the option given to the directors, officers or employees of a company or of its holding company or subsidiary company or companies, which gives such directors, officers or

74. *Clowens v Clements Bros Ltd*, (1976) 1 All ER 269 (Civ L).

75. *Tek Corp v Li v Miller*, (1972) 33 DLR (3d) 233 (Can).

76. *Howard Smith Ltd v Amjal Petroleum* (1974) AC 821; (1974) 2 WLR 689 (PC). All the different view points on the subject have been collected and considered by Kenneth C.K. Chow, "Proper Purpose Doctrine and the Companies Bill" (1979) New LJ 123.

77. See, Clive M. Schmidhoff, "The Issue of Securities in Great Britain" (1969) IBL 1, 4.

employees, etc the benefit or right to purchase or to subscribe at a future date, the securities offered by the company at a pre-determined price."⁷⁸

"Option in securities" has been given the same meaning as in Section 2(h), Securities Contracts (Regulation) Act, 1956."

Power to convert loans into capital [S. 62(3-6)]

By the amendment of 1963 the Central Government has taken a new power of converting into shares any debentures issued to or loan taken from the Government by a company. Where a company has issued any debentures to the Government or has taken any loan from it, the Central Government may direct that such debentures or loan (or any part of it) shall be converted into shares in the company. The power is to be exercised only if such conversion appears to be necessary in the public interest. The conversion shall be on such terms and conditions as appear to the Government to be reasonable in the circumstances of a particular case. Regard shall be given to the financial position of the company, the original terms of the issue, the rate of interest, the capital of the company, its liabilities, its reserves, its profits during the preceding five years and the current market value of the company's shares. Further, the Government must exercise the power at a time when it will not cause undue violent fluctuations in the market value of shares. Care has also to be taken to avoid serious imbalance in the ratio of debt to equity capital of the company.

If the terms and conditions proposed by the Government are not acceptable to the company, it may within 60 days prefer an appeal to the Tribunal and the decision of the Tribunal shall be final. Subject to the decision of the Tribunal, the order shall become final and conclusive.

A copy of every order proposed to be issued by the Government is to be laid in draft before each House of Parliament for a total period of 30 days.

A power of this kind opens the door to backdoor nationalisation.⁷⁹

Where the Government has converted its debentures or loans into capital, the capital of the company shall thereby stand increased by an equal amount and its memorandum altered accordingly. The Central Government is required to send a copy of the order to the Registrar so that he may effect the necessary alterations in the company's memorandum.

Variation of shareholders' rights or class rights [S. 48]

The share capital of a company can be divided into two different classes of shares, namely, preference shares and ordinary shares. Frequently, and obviously, rights attached to one class of shares may be different from those attached to the other class. A shareholder who was given the right to purchase the shares of the company on a pre-emptive basis was held to constitute a special class distinguishing him from other shareholders who did not have any such right, and consequently, his right was not permitted to

78. S. 62(3)(b).

79. S. 2(31-A) as introduced by the Amendment Act, 2000.

80. See, 1970 JISL, 242, reviewing Avtar Singh's *Companies Law*.

be taken away without his consent.⁸¹ If it is proposed to change the rights of any class, certain procedure has to be followed. Firstly, there should be a provision in the memorandum or articles of the company entitling it to vary such class rights or, at any rate, there should be nothing in the terms of issue of the shares of that class prohibiting such a variation.⁸² Secondly, the holders of three-fourths of the issued shares of that class must have given their consent in writing or a special resolution sanctioning the variation must have been passed at a separate meeting of the shareholders of that class. Thirdly, the holders of at least 10 per cent of the shares of that class who did not consent to or vote in favour of the resolution may apply to the Tribunal and then variation shall not take effect unless and until it is confirmed by the Tribunal. An application should be made within 21 days of the date of consent or resolution. Such application has to be made within 21 days after the date on which the consent was given or resolution was passed. It can be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose. The decision of the Tribunal is to have binding effect upon shareholders of the class. The company has to file a copy of the order with the Registrar within 30 days of the date of the order.

Any default on the part of the company in complying with the provisions of the section is punishable with fine by an amount not less than Rs 25,000 extending up to Rs 25,00,000. Every officer in default is punishable with imprisonment for a term extending up to 6 months or fine not less than Rs 25,000 but extending up to Rs 5,00,000. [S. 48(2)] The Tribunal shall grant a hearing to the applicant and any other persons who apply to it to be heard and appear to be interested in the application. If the Tribunal, having regard to all the circumstances of the case, is satisfied that the variation would unfairly prejudice the shareholders of that class, it would be disallowed. But if the scheme appears to be reasonable and fair it would be confirmed. The decision of the court is final. The company shall, within 30 days, send a copy of the court's order to the Registrar.

New issue of preference shares ranking *pari passu* with the existing shares does not amount to variation so as to require the consent of preference shareholders.⁸³ The conversion of the loans of an ex director into shares was held not to violate class rights, although voting power of shareholders was affected. Proper procedure was followed and the scheme was also of

81. *Guardian Newspapers Group Ltd v Cumberland & Westmorland Herald Newspaper & Printing Co Ltd*, 1987 Ch 1, (1986) 3 WLR 26; (1987) 2 Comp L J 39.

82. S. 48(1); and (2). See, *Zemra Keddy v Jellary Sing & Wig Cr*, (1986) 26 Comp Cas 281 (Ker) where the resolution was not passed in accordance with the provisions.

83. *White v Prista Aerospace Co Ltd*, 1992 Ch 45; (1993) 2 WLR 144. See, *PSI Data Systems Ltd v. K*, 1999-99 Comp Cas 1 AIR 2000 Ker 23, where a company unilaterally and without the participation of preference shareholders decided to redeem their stakes, the court said that the scheme would have to satisfy the requirements of S. 55 and approved under S. 2(3).

*bona fide nature.*⁸⁴ Cancellation of shares and reduction of capital also do not amount to variation of class rights.⁸⁵

Purchase by company of its own shares [S. 67]

It is not open to a company to purchase its own shares, for Section 67 declares in so many words that "no company limited by shares, and no company limited by guarantee and having a share capital, shall have power to buy its own shares, unless the consequent reduction of capital is effected and sanctioned in pursuance of provisions of the Act". [S. 67(1)] Buying its own shares by a company involves a permanent reduction of capital without sanction of the Tribunal which is "illegitimate" and "in violation of statute law". "The object of the section is to prevent a person from acquiring control of a company and paying for its shares out of the accumulated assets of the company itself, in other words, to prevent a person from plundering the coffers of the company for his own benefit."⁸⁶ For the same reason a subsidiary company is not allowed to purchase the shares of its holding company.

This principle was laid down by the House of Lords as early as 1887 in *Trevar v Whitworth*.⁸⁷

The articles of a company contained a clause to the effect that "any share may be purchased by the company from any person willing to sell it, and at such price as the Board think reasonable". A director bought on behalf of the company 533 shares from the executors of a shareholder. The company, before paying the whole price, went into liquidation and the executor claimed the money. It was held that "the whole transaction was ultra vires the company". "In my opinion", said Lord Watson, "the application of the company's funds in furtherance of any such object is altogether illegitimate because it is foreign to the proper business of the company and in violation of statute law"⁸⁸

The reason for the rule was explained in a subsequent case by Jusser MR in the following words:

The creditor ... gives credit to the company on the faith of the implied representation that the capital shall be applied only for the purposes of the business and has, therefore, a right to say that the corporation shall keep its capital and not return it to the shareholders.⁸⁹

84. *Görki Kumar Kharia v Industrial Forge & Engg Co Ltd*, (2001) 105 Comp Cas 150: 2000 CLC 105 (Pvt). The scheme could not be implemented without the permission of the Board of Industrial & Financial Reconstruction, the company being under a scheme prepared under Sick Industrial Companies (Special Provisions) Act, 1985. *Credit Kumar Kharia v Industrial Forge & Engg Co Ltd*, (2001) 103 Comp Cas 150: 2000 CLC 125 (Pvt), a variation which affects enjoyment of rights without affecting the right itself is not actionable, e.g., a valid increase of capital which causes proportional diminution of existing rights.

85. *Easay Steel Ltd v. (2006) 130 Comp Cas 123*: (2005) 59 SCL 437 (Guj).

86. Paul L. Davies, editing *Tunnicliffe v Siner*, (1979) 129 New LJ 465 in 1980 JAI 48.

87. (1887) 1 H. & C. 414.

88. See also, *Indian Iron & Steel Co Ltd v Dalsassie Holdings Ltd*, AIR 1987 Cal 296.

89. *Exchange Banking Co. Ltd*, (1882) 21 4th D 519, 533-34; 48 13 86 (I.A.). See also, W. Strachan, "Return of Company's Capital to Shareholders" (1930) 26 UQR 231.

To make the restriction really effective sub-section (2) provides that no public company shall in any way provide money or financial assistance to any person to enable him to buy any shares in the company or in its holding company. Thus an agreement to provide a loan for purchase of the company's own shares is void and a guarantee given for the performance of the agreement is also void.⁹⁰ The section clearly forbids the giving of, whether directly or indirectly, whether by means of a loan, guarantee, security, or otherwise any financial assistance for the purpose of or in connection with, a purchase or subscription, made or to be made, by any person of or for any shares in the company or in its holding company.

An agreement between a company and the managing director of group companies under which he was to transfer his shares in one of the companies to his son and the company was to pay him salary, bonus and pension on his retirement was held to be not an agreement to pay for the purchase of the company's shares. The company was to pay him salary etc for his working and services to the company. Thus there was no reduction in the net assets of the company and no financial assistance in violation of the provisions.⁹¹

Exceptions.—The sub-section, however, does not prohibit the following kinds of transactions:

1. The lending of money by a banking company in the ordinary course of its business.
2. The provision of money for the purchase of fully paid shares in the company by trustees for and on behalf of the company's employees.⁹² (Employee share schemes).
3. Lending money by a company to its employees to enable them to buy fully paid shares in the company and to hold them by way of beneficial ownership. The amount of loan cannot exceed the employees' salary for a period of six months. The word "employee" for this purpose does not include directors or key managerial personnel.⁹³ [S. 67(3)]

90. *Hould v. O'Connor*, (1971) 1 WLR 497. Where a loan was given by a company to a person to enable him to purchase another company's shares and that other company issued a debenture to the lending company for the loan, the arrangement was held to be valid. *Victor Kellaway Co Ltd v. Carrig's Ltd*, (1946) Ch 292. This decision was questioned and has not been followed in the subsequent case of *Hould v. O'Connor*, (1971) 1 WLR 497; (1971) 2 All ER 1185; *Curney v. Haworth*, 1985 AC 301; (1984) 3 WLR 1305 (PC), where it was held that where the unlawful element in the agreement could be severed from the lawful part, the latter would be enforceable.

91. *Pattell v. Gurnays (Bridport) Ltd* (No. 1), (1996) 2 BCLC 34 (CA).

92. *Flegg v. Creighton Ltd*, 1967 Ch 254; (1968) 31 Mod. L. Rev. (NOC) 688, where a trust for the purchase of a company's shares on behalf of its employees was financed by an interest free loan by the company. S. 193 of the English 1989 Act widened the provision to allow companies to guarantee loans made to such schemes. The new provision adds good-faith criteria to such schemes. Assistance can also be given by group companies for trading under the scheme.

93. See, *Financial Assistance by a Company in the Purchase of its Shares*, (1965) XLIII Can. BR. 502; *Joss B. Murray*, "Financial Assistance by a Company in Connection with Purchase of its Shares" (1990) 3 All 17; *South Western Mineral Water Co Ltd v. Ashmore*, (1967) 1 WLR 1110.

Disclosures in respect of voting rights not exercised directly by the employees in respect of shares to which the scheme relates is to be made in the Board's report in such manner as may be prescribed.

The provision in the first exception is to protect banks. They have to make loans in the ordinary course of their business and they can hardly supervise the purpose for which the borrower uses the loan money. Hence if a borrower from a bank uses the money for purchasing the bank's shares, the bank and its officers will be protected from liability. The words "lending in the ordinary course of business" are not defined. An English court held that where money is given for the very purpose of purchasing the bank's shares that would not be lending in the ordinary course of business and the provision would be violated.²⁴

Redemption of preference shares constitutes an exception to the restriction contained in the section though redemption is the same thing as a company buying its own shares.²⁵

Consequences of illegal financing.—Where the directors provide the company's money for the purchase of its own shares outside the scope of the above exceptions, it is a breach of trust for which they are liable. "The illegality of the transaction could not shield those responsible for the transaction by virtue of their fiduciary position."²⁶ The transaction is ultra vires and incapable of ratification. Any shareholder can sue on behalf of the company for restituting the company to its former position. But can the company abandon its claims? The Court of Chancery Division faced this problem in *Smith v Croft (No 2)*.²⁷ A 14.5 per cent minority shareholder showed that payments were made to associated companies for purchasing the company's

²⁴ *Foolji v Sitali*, (1979) 129 New LJ 465. For details see, Keith Walmsley, "Lending in the Ordinary Course of Business" (1979) 129 New LJ 801. The court followed *Sister v Lyc*, 1924 AC 287 (PC), the effect of which is that loans deliberately made for the very purpose of financing the purchase of the company's shares are not in the ordinary course of business. See also, Keith Walmsley, "Lessons from the Steinhause Investigation" (1979) New LJ 252.

²⁵ S. 67(4). *Anubhai Surbhi v CII*, (1997) 2 SCC 246, (1997) 89 Comp Cas 24. Redemption is different from buyback, *Barclays Bank Plc v British & Commonwealth Holdings Plc*, (1996) 1 BCAC 1 (Ch D and CA).

²⁶ *Selenger United Rubber Estates Ltd v Cradock* [1969] 41 (1969) 1 WLR 1723 (2); (1969) 3 All ER 965. Noted, "Directors' Liability for Breach of Trust" 1919 JBL 47, 49, where the learned writer supports the decision with reference to the Privy Council case of *Smith v Law*, (1964) AC 267 (PC). But whether the money provided by the company to the third party contrary to the section can be recovered is "an open question". But see *Victor Battery Co Ltd v Curry's Ltd*, (1946) Ch 242 and *Estate Agents Ltd v China*, unreported, noted, 1969 (BL 19; Spink (Amersham) Ltd v Spink, 1936 Ch 514; *Flap Envelope Co Ltd, re*, (2004) 1 BCAC 64 (Ch D); *Wilmott v Scrim*, (2000) 1 BCAC 64 (Ch D). The company lent money to a person for purchasing shares for a director. A figurehead director was appointed for a single day to make the statutory declaration for lending. The declaration was not properly made. The directors were held guilty of breach of a fiduciary duty. The company's net assets had become reduced in the extent of the loan. *Ramkish & Desai v Bipin Vasant Mehta*, (2006) 5 SCC 438; (2006) 122 Comp Cas 479 any valuable consideration paid out of the company's assets amounts to a transaction of purchase, invalid.

²⁷ 1989 Ch 114, (1997) 3 WLR 4015 (Ch D).

shares, and that the same were illegal. The circumstances as they developed disentitled the company from proceeding against the matter because a great majority of the shareholders, including a financial institution which was independent of the majority block, resolved to abandon or compromise the company's rights and the company thereby having become disentitled from enforcing its rights, it was not open to a minority shareholder to reopen a chapter of closed rights.⁹⁸

A buy-back of shares by the company was held to be invalid where the company did not have the necessary distributable profits as required by Section 160(1)(a), (English) Companies Act, 1985. The relevant accounts were qualified and auditors' statement that the qualification was not material had not been made and laid before the company in general meeting as required by the Act. The purchase was held to be invalid even though the auditors believed that the company had sufficient distributable reserves and they could have made a statement to that effect.⁹⁹

The company's bank paid the company's cheque not knowing that the withdrawal was a part of an elaborate arrangement to cause the company's own funds to be used to finance a takeover. The bank was held liable despite its being unaware of the real purpose of the transaction. *Unicoed Thomas* J said (in *Selangor No 3*) that the bank paid the cheque out of the company's money in circumstances known to the bank before the payment in which a reasonable banker would have concluded that the payment was to finance the purchase of the stock in the company.¹⁰⁰

A company's fully paid shares may be transferred to a nominee or trustee of the company for its benefit. There is nothing wrong where the company does not become its own member, or does not have to pay for its own shares or does not reduce its capital. Where shares were allotted to partners of a firm for taking over their business and the allotment happened to exceed the value of assets acquired; allottees returned the extra shares to the company which were taken in the name of a trustee for the benefit of the company, the court could find nothing wrong with it.¹⁰¹ Similarly, where a shareholder bequests by his will his shares in the company to the company itself, the

98. For a critical appreciation of the decision, see, L.S. Sealy, *CASES AND MATERIALS IN COMPANY LAW* (4th Edn 1989) 480.

99. *HGID Royal Bond Ltd v Douglas*, (2000) 1 BCCLC 403 (Ch D). A buy-back scheme was not restrained because if the shareholders had any grievances, they could resort to proceedings for prevention of oppression etc. *JK Fertil v HP State Industrial Development Corp*, (1998) 43 Comp Cas 491 (JIP).

100. *Selenger United Rubber Estates Ltd v Coutinho (No 3)*, (1966) 1 WLR 1555; (1966) 2 All ER 1079 and *Kings Rubber Co Ltd v Burden (No 2)*, (1972) 1 WLR 462. An underwriter was held not liable for the fact that his sub-underwriter had carried on the financing of his portion of the shares with the company's money. Knowledge of the misuse of the company's money could not be imputed to him from the fact that his sub-underwriter was the Chief Executive of the company. *Eagle Trust plc v SEC Securities Ltd (No 2)*, (1995) 1 BCCLC 121 (Ch D).

101. *Kirby v Willins*, (1929) 2 Ch 444.

latter can hold them in the name of a trustee for its benefit.¹⁰² Voting rights on such shares are exercisable by the directors of the company.¹⁰³

Exemption of private company from financial assistance.—Sub-section (2) of Section 67 confines itself to a public company and subsidiaries of public companies. This leaves a private company free to provide loans, guarantees or securities for the purpose of financing the purchase of its own shares. Such assistance should be confined to use of funds otherwise available for dividend distribution. If it is to go beyond that, the book value of the net assets of the company must remain untouched. Sections 154 to 158 of the English 1969 Act prescribe an elaborate procedure for the exercise of this power requiring a statutory declaration of the financial position, auditors' report, special resolution of shareholders and the right of dissenting holders of 10 per cent shares to apply to court.

Penalty provision [S. 67(5)].—Any contravention by the company of the provisions of the section, makes the company punishable with fine of not less than Rs 1,00,000 but extending up to Rs 25,00,000. Every defaulting officer is liable to a term of imprisonment extending up to three years and also with fine of not less than Rs 1,00,000 but extending up to Rs 25,00,000.

Buy-back of shares [S. 68] (Power of company to purchase its own securities)

Traditionally, subject only to a few exceptions specified in Section 67, companies were not permitted to purchase their own shares. Section 77-A, brought in by the Companies (Amendment) Act, 1999, [1956 Act] caused this structural change in the theme and philosophy of Company Law that, subject to the restrictions envisaged in the section, a company may buy back its own shares. Now this power is contained in Section 68 of the 2013 Act.

Sub-section (1) indicates the fund out of which the exercise of buy back is to be financed. The sources allowed are the company's free reserves, securities premium account, proceeds of an earlier issue of shares or other specified securities. No buy-back of any kind of shares or other specified securities can be made out of the earlier proceeds of the same kind of shares or the same kind of other specified securities. [Parsia to sub-s (1)] The expression "free reserves" has the same meaning as is attached to it in Section 2(43).

Sub-section (2) prescribes certain formalities. There should be a provision in the articles authorising buy-back of shares. In the exercise of that authority a special resolution at a meeting of the shareholders¹⁰⁴ has been

102. *Castiglione's Will Trusts*, n. 1956 Ch 849; (1956) 2 WLR 400.

103. Jenkins Committee recommended that this should not be allowed as directors can thereby perpetuate themselves para 156. See also, the decision of the House of Lords in *Brady v Brady*, 1989 AC 755; (1988) 2 WLR 1308 (HL), which examines the extent to which financial assistance can be provided in good faith for the larger interests of the company.

104. *Central Alloys Exports Ltd.*, re, (2004) 118 Comp Cas 265 (Guj). scheme of buy-back of shares from small shareholders approved by majority of such shareholders. The court refused to examine the propriety of every clause of the scheme or to examine the commercial



passed authorising the scheme of buy-back. This requirement is not to apply where (i) the buy-back is to be of only of 10 per cent or less of the total paid up equity capital and free reserves of the company; and (ii) it has been authorised by the Board of Directors by means of a resolution passed at its meeting. The amount involved in buy-back should be less than 25 per cent of the company's total paid up capital and free resources.¹⁰⁵ After the buy-back, the ratio between the debts owed by the company should not be more than twice the capital and free resources of the company.¹⁰⁶ The shares to be bought back should be fully paid. The buy-back should be in accordance with the regulations made by the Securities and Exchange Board of India in case of listed companies. This requirement applies to listed securities. In the case of other securities, the buy-back has to be in accordance with guidelines as may be prescribed. No offer of buy-back can be made within one year (365 days) reckoned from the date of the preceding offer of buy back.

The section permits shares and other specified securities¹⁰⁷ to be bought back. The Explanation to sub-section (2) says that "specified securities" would include employees' stock option or other securities as may be notified by the Central Government from time to time.

The notice for convening the meeting of shareholders for passing a special resolution should carry the information prescribed by sub-section (3). The information is (i) a full and complete disclosure of all material facts; (ii) the necessity for the buy-back; (iii) the class of security intended to be purchased; (iv) the amount to be invested in buy-back; (v) time limit for completion of the transaction. This is subject to the restriction set out in sub-section (4) that every such transaction must be completed within 12 months from the date of the special resolution or of the Board resolution.

The power may be exercised in buying back the shares from the existing shareholders of the company directly on a proportionate basis or from the open market or from the employees' stock option shares or sweat equity shares.¹⁰⁸

Declaration of solvency [sub-s (6)].—A declaration of solvency has to be filed with the Registrar and SEBI. This has to be filed before the resolution for buying back is implemented. It has to state that the Board of Directors has made a full inquiry into the affairs of the company and have found that it is capable of meeting all its liabilities and will not be rendered insolvent for a period of 12 months from the date of the declaration. It has to be on a prescribed form and verified by an affidavit. It has to be signed by at least

wisdom of shareholders and to reject the scheme merely because a better scheme was also possible.

105. A provision adds that the buy-back of equity shares in any financial year shall not exceed 25 per cent of the company's total paid up equity capital in that financial year.

106. A proviso adds that the Central Government may prescribe a higher ratio of the debt than specified under this clause for a class or classes of companies. Debt means secured or unsecured debts.

107. Which may be specified by the Central Government from time to time.

108. For meaning of sweat equity see, S. 54.

two directors of the company, one of whom should be the managing director, if any. A company whose shares are not listed at a stock exchange has not to file this declaration with SEBI.

Physical destruction of securities [S. 68(7)].—Where a company has bought back its securities, it has to extinguish them and physically destroy them. This should be done within seven days of the last day on which the buy-back process is completed.

Further issue after buy-back [S. 68(8)].—Where a company has resorted to the buying back of its securities, it cannot make a further issue of securities within a period of six months. It may, however, make a bonus issue and discharge its existing obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares. This restriction applies only to the type of securities bought back. The company is free to issue other types of security.

Register of bought back securities [S. 68(9)].—A register has to be maintained containing the particulars of the bought back securities, including the consideration paid for them, the date of cancellation and such other particulars as may be prescribed.

Return of buy-back [S. 68(10)].—After completing the process of buy-back, the company has to file a return with SEBI and Registrar. The return has to contain the prescribed particulars. It should be filed within 30 days from the date of completion. Return to SEBI is not necessary if the securities are not listed.

Penalty [S. 68(11)].—A default in complying with the requirements of the section and rules made under it has been made a punishable offence. The company is punishable with fine of not less than Rs 1,00,000 extending up to Rs 3,00,000 and every officer of the company who is in default will have to face an imprisonment which may extend up to three years or also fine not less than Rs 1,00,000 extending up to Rs 3,00,000 or both.

Transfer of money to Capital Redemption Reserves Account [S. 69]

Where a company purchases its own shares out of free reserves, or securities premium account then a sum equal to the nominal value of the shares purchased has to be transferred to the Capital Redemption Reserve Account and its details have to be disclosed in the balance-sheet.

Exemption from requirements

There was a mutual settlement between parties for buy-back of shares as per the settlement. An application was made to the CLB seeking exemption from complying with the requirements of Section 77-A [now S. 68]. The Board found that nobody's interest was prejudicially affected if the exemption was granted. Accordingly, the application was allowed with necessary directions.¹⁰⁹

109. Nitin Mukund Subasralojanee v. Veins Automation (P) Ltd., (2014) 186 Comp Cas 290.

Prohibition of buy-back in certain circumstances [S. 70]

A buy-back exercise has to be done directly and not through the medium of other companies. The section says that buy-back shall not be done through any subsidiary company including the company's own subsidiaries. It should also not be done through any investment company or a group of investment companies. A company shall not resort to buy-back if it is in default in payment of deposits, redemption of debentures or preference shares or repayment of a term loan to any financial institution or a bank. Buy-back is not prohibited if the defaults stated above have been remedied and a period of three years has lapsed after such default has ceased to exist.

No company is allowed to purchase its own shares directly or indirectly if the company has not complied with the provisions of Section 92 (annual return), Section 128 (default in paying declared dividend); and Sections 127 and 129 (not filing financial statement) (filing of annual report or accounts).

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®; along with updates, articles, videos, blogs and a host of different resources.

The following cases from this chapter are available through EBC Explorer™:

- *Brady v Brady*, 1989 AC 755; (1988) 2 WLR 1508; (1988) 2 All ER 627 (FHL)
- *Indian National Press (Indore) Ltd, re*, (1989) 66 Comp Cas 387 (MP)
- *Nanrali Zaveri v Bombay Life Assurance Co*, AIR 1949 Bom 56; 50 Bom LR 413
- *RS Livemedia (P) Ltd, re*, 2014 SCC OnLine Del 1346; (2014) 187 Comp Cas 243



Computer Document Library Services



CASE PILOT

Chapter 10

Directors

"A corporation is an artificial being, invisible, intangible and existing only in contemplation of law."¹ "It has neither a mind nor a body of its own."² "A living person has a mind which can have knowledge or intention and he has hands to carry out his intention. A corporation has none of these, it must act through living persons."³ This makes it necessary that the company's business should be entrusted to some human agents. Hence the necessity of directors. A director means a director appointed to the Board of a company. [S. 2(4)] Section 149 of the Act, therefore, requires that "every public company shall have at least three directors and every private company shall have at least two directors".⁴ In the case of one person company, there has to be at least one director. There can be a maximum of 15 directors. Companies have been permitted to have more than 15 directors by passing a special resolution. The Government may prescribe a class or classes of companies which will have to appoint at least one woman director. There has to be at least one such director who has stayed in India not less than 182 days in the previous calendar year. In the case of a listed company, at least one third of the directors have to be independent directors. A public company having a paid-up share capital of rupees five crore or more and one thousand or more small shareholders, should have a director elected by the small shareholders. [S. 55] The manner of such election is to be prescribed. A small shareholder for this purpose means having shares of the nominal value of twenty thousand rupees or less in a public company.

1. MARSHALL J in *Bertinouk College v Woontford*, 4 T. Rd 629; 17 125 518 (1819), 636, cited in Laski, "The Personality of Associations" 29 *Hary L Rev* 404.

2. HALDANE LC in *Lehmann's Carrying Co Ltd v Asiatic Petroleum Co Ltd*, 1915 AC 705, 713; 183 LT 195 (HL).

3. *Tesco Supermarkets Ltd v Nattrass*, 1972 AC 253; (1971) 2 WLR 1066, per Lord Rank.

4. S. 149(1). As long as the requisite figure is maintained, the requirements of the Act are fully satisfied even if all or substantially all the powers are delegated to a single director as long as he is in office. *Whitethouse v Carlton Hotel (P) Ltd*, (1962) 21 Ausl L.R. 25; High Court of Australia, S. 2(10) says that directors collectively are referred to as the "Board of directors" or as "Board".

The Board of directors or Board, in relation to a company, means the collective body of directors of the company. [S. 2(10)]

POSITION OF DIRECTORS

The position that the directors occupy in a corporate enterprise is not easy to explain.⁹ They are professional men hired by the company to direct its affairs. Yet they are not the servants of the company. They are rather the officers of the company. "A director is not a servant of any master. He cannot be described as a servant of the company or of anyone."¹⁰ "A director is in fact a director or controller of the company's affairs. He is not a servant."¹¹ A director may, however, work as an employee in a different capacity. For example, in *Lee v Lee's Air Farming Ltd*.¹²



CASE PILOT

The principal controller and a director of a company was also working as its pilot. Following his death while acting as a pilot, his widow received compensation under the Workmen's Compensation Act.¹³

The Companies Act makes no effort to define their position. Sub-section (13) of Section 2 [1956 Act] only provided that "director includes any person occupying the position of a director, by whatever name called". The Nigerian Act carries a better definition: "Directors of a company registered under this Act¹⁴ are persons duly appointed by the company to direct and manage the business of the company".¹⁵ In the words of Bowes: L:

Directors are described sometimes as agents, sometimes as trustees and sometimes as managing partners. But each of these expressions is used not as exhaustive of their powers and responsibilities, but as indicating useful points of view from which they may for the moment and for the particular purpose be considered.

According to JESSEL MR:¹⁶ "Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners, it does not matter what you call them so long as you understand what their true position is, which is that they are really commercial men.

5. *Ram Chaud & Sons Sugar Mills (P) Ltd v Karmalji Bhargav*, AIR 1966 SC 1894. (1966) 2 Comp LJ 224.

6. *Moriarty v Regent's Garage Co.*, (1921) 1 KB 423. Lush J. 431.

7. *McCawie* J at 446. *Moriarty v Regent's Garage Co.*, (1921) 1 KB 423.

8. 1961 AC 12; (1960) 3 WLR 758 (PC).

9. This principle will not apply where no proof of employment apart from being a director is available. Thus in *Parsons v Abbott & Parsons Ltd*, 1978 IRL 456 noted 1978 (BL 5), a person who was removed from directorship of a private company was not allowed to recover compensation for unfair dismissal. Though the Employment Appeal Tribunal had allowed his claim, the Court of Appeal disallowed it.

10. Companies and Allied Matters Act, 1990 (Nigeria).

11. See Amieze Giubordio, "The Criminal Liability of Directors of Failed Banks in Nigeria" (1998) 1 BL 198.

12. *Imperial Hydropathic Hotel Co Blackpool v Thompson*, (1882) LR 23 Ch D 1: 49 LT 150 (CA). See also, *Ahmed Judah Judah v Rempanda Cuplu*, AIR 1959 Cal 715.

13. *Can Mixing Co. re*, (1878) 10 Ch D 450, 451-52; 40 LT 287.

managing a trading concern for the benefit of themselves and of all other shareholders in it.¹⁴

Directors as agents

It was clearly recognised as early as 1866 in *Ferguson v Wilson*,¹⁵ that directors are in the eyes of law, agents of the company. The court said:

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.

The general principles of agency, therefore, govern the relations of directors with the company and of persons dealing with the company through its directors. Where the directors contract in the name, and on behalf of the company, it is the company which is liable on it and not the directors. Thus where the plaintiff supplied certain goods to a company through its Chairman, who promised to issue him a debenture for the price, but never did so and the company went into liquidation, he was held not liable to the plaintiff.¹⁶ Similarly, where the directors allotted certain shares to the plaintiff, they were held not liable when the company, having exhausted its shares, failed to give effect to the allotment.¹⁷ Just as notice to an agent in the course of business amounts to notice to the principal so it is true of directors in relation to the company.¹⁸ But notice to a director will amount to notice to the company only if the director is, like an agent, bound in the course of his duty to receive the notice and to communicate it to the company. It was held in *Hampshire Land Co. re*,¹⁹ that where one person is an officer of two companies, his personal knowledge is not necessarily the knowledge of both the companies unless he is under a duty to receive the notice and

14. (1866) LR 2 Ch App 77; 36 L.J. Ch 67; 15 LT 230.

15. *Eckington & Co v Hurst*, (1892) 2 Ch 452; 66 LT 764; *Karnikar v PKV Group Industries*, (2002) 111 Comp Cas 826; (2002) 1 K.L.J. 460; (2002) 2 K.L.T. 342, a director was held to be not personally liable in a suit against a private chit fund company. Attachment of the property of the managing director was held to be not permissible.

16. *Ferguson v Wilson*, (1866) LR 2 Ch App 77; 36 L.J. Ch 67; 15 LT 230. See also, *Debadere Fish Guano Co v Rainshaw Chemical Works*, 1921 AC 465, 488; *Harshikesh Pandya v Indramani Senia*, (1988) 63 Comp Cas 363 (Ori); a director held not personally liable for the debts of the company. *Kanfar Singh v Mega Transport Co (P) Ltd*, (1987) 62 Comp Cas 600 (P&H) where the court said that there is no provision in the Companies Act or in the Industrial Disputes Act which makes the managing director of a company personally liable for claims against the company; so is true of liability in respect of taxes. *PC Agarwala v Payment of Wages Inspector*, (2005) 8 SCC 104; 2005 SCC (L&S) 1089; (2005) 127 Comp Cas 787, overdues wages could not be recovered from the director. There is no such liability unless there is a specific statutory provision to that effect. *Tikam Chand Jain v State Govt of Bihar*, (1987) 62 Comp Cas 601 (P&H). A managing director was not allowed to be put under arrest and detention for company's debts, *Morati Ltd v Pair Jain Plastic (P) Ltd*, AIR 1993 Del 215; (1995) 53 Comp Cas 388 (P&H).

17. See, for example, S. 229, Indian Contract Act, 1872 and 'UK Kraft (Bombay) Ltd v M/I Ltd', AIR 1938 PC 179, common directors of three companies in a group were supposed to know that the assets of one company were merged for the loss to another.

18. (1896) 2 Ch 755.

to communicate it to the other.¹⁹ Like agents, they have to disclose their personal interest, if any, in any transaction of the company. It should, however, be remembered that they are the agents of an institution and not of its individual members, except when that relationship arises due to the special facts of a case.²⁰

For a loan taken by a company, the directors, who had not given any personal guarantee to the creditor, could not be made liable merely because they were directors.²¹

The articles of association empowered the managing director to represent the company in legal proceedings. It was held that a further authorisation was not necessary to enable him to file a complaint for dishonour of a cheque under Section 135, Negotiable Instruments Act.²²

As trustees

On the position of directors as trustees, the Nigerian Act contains this provision:²³

Directors are trustees of the company's money, properties and their powers and as such must account for all the moneys over which they exercise control and shall refund any money improperly paid away, and shall exercise their powers honestly in the interest of the company and all the shareholders, and not their own sectional interests.

Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misappropriated upon the same footing as if they

19 Followed in *Smt. Meenabai Mills Ltd v Railel Tribhuvandas Thakar*, AIR 1941 Bom 109; II.R 1941 Bom 273. Receipt of money by directors from agents known to them for investment in the company when those agents knew that it was misappropriated trust money.

20. See, for example, *Alien v Hyatt*, (1943) 51 TLR 444. It is a matter of evidence in each case whether a director can be regarded as a principal officer or agent for income tax purposes, *Shyam Sunder Jain v State*, (1977) 42 Comp Cas 46 (Cal). Directors who issued duplicate share certificates against those which were lying under pledge with the company were held personally liable to the deceived person. The company was not liable because the directors resorted to the tactics to clinch a takeover bid as a part of their own game plan, *Common Cause v Tristar Investments Ltd*, (1997) 38 Comp Cas 671 (Mad). The company was held liable when its directors in order to promote the company's business gave unfounded estimates to a person to persuade him to accept the company's franchise, *Williams v National Life Health Foods*, (1997) 1 BCLC 288, affirmed by the Court of Appeal, *Williams v National Life Health Foods*, (1997) 1 BCLC 131 (CA). *Roy Cylinders & Containers v Hindustan General Industries Ltd*, AIR 1998 Del 438; (1998) 75 DLT 859 (2001) 103 Comp Cas 161, permission granted to file a suit against a company was not allowed to be treated as a permission against directors as well.

21 *Imtiaz Overseas Bank v K M Akhyari (P) Ltd*, AIR 2002 Del 344; (2001) 117 Comp Cas 606.

22 *Senthil Laxmi Finance Ltd v Ji Narayana Shetty*, II.R 2006 KAR 2529; (2006) 3 Kar Lit 307; (2006) 130 Comp Cas 798.

23 S. 293, Companies and Allied Matters Act, 1990 (Nigeria).

were trustees.²⁴ In *Ramakrishna Iyer v Brahmanya & Co.*,²⁵ the Madras High Court observed:

The directors of a company are trustees for the company, and with reference to their power of applying funds of the company and for misuse of the power they could be rendered liable as trustees and on their death, the cause of action survives against their legal representatives.²⁶

Another reason why directors have been described as trustees is the peculiar nature of their office. "The directors are persons selected to manage the affairs of the company for the benefit of the shareholders. It is an office of trust, which if they undertake, it is their duty to perform fully and entirely."²⁷ Some of their duties to the company are of the same nature as those of a trustee. For example, they, like trustees, occupy a fiduciary position. Moreover, almost all the powers of directors are powers in trust.²⁸ The power to make calls,²⁹ to forfeit shares,³⁰ to issue further capital,³¹ the general powers of management³² and the power to accept or refuse a transfer of shares, are all powers in trust which have to be exercised in good faith for the benefit of the company as a whole.

Yet directors are not trustees in the real sense of the word. There is nothing in common between a director and "a trustee of a will or of a marriage settlement".³³ Moreover, a trustee is the legal owner of the trust property and contracts in his own name. A director, on the other hand, is a paid agent

24. LINDLEY LJ in *Lewis Allotment Co. v.* (1895) 1 Ch 636, 631 (CA). See also, Sharpe, *re* (1892) 1 Ch 154, where directors were held liable to replace capital which was spent by them in paying interest when owing the company. Some other examples are: *Great Luxembourg Railway Co. v. Sir William Maybury*, (1858) 25 West 586, 53 Ex 756; *Rosa v. Hummels*, (1870) 1 WLR 1047. See also, *Sir George Jason Coal Mining Co. re*, (1878) 10 Ch D 450; 41 LT 267 and *Lord Scawen ex parte Great Eastern Railway Co v. Turner*, (1872) LR 8 Ch App 149, 152, where his Lordship said: "The directors are mere agents or trustees of the company, trustees of the company's money or property; agents in transactions which they enter into on behalf of the company." See also, *Springer United Rubber Estates Ltd v. Crooksh (No 3)*, (1968) 1 WLR 1555; (1968) 2 All ER 1323. Where the directors have been held trustees of the money standing to the credit of the company's bank account which they operate.

25. (1966) 1 Comp LJ 102.

26. See, the judgment of P. Chavara Raoov CJ, (1966) 1 Comp LJ 107, 130-32 where he discusses w.r.t. the English authorities on the subject. See also, *Dhanlakshmi v. Venkateswara Mills Ltd*, (1917) 1 Comp LJ 113; (1967) 37 Comp Cas 593 (AP), where for certain loans granted in contravention of s. 86-D(1) of the Act of 1913 and which remained unpaid, the legal representatives of a deceased director were held liable. "Such cause of action *prima facie* survives the death of such a person 'liable'." The court considered *Purdue Julianal Bank*, (1941) AIR 1958 Mad 593; (1968) 28 Comp Cas 346; *Sankari Nimbir v. Kothayam Bank*, AIR 1946 Mad 304; (1966) 39 LW 38.

27. *Ranadev MR in York & North Midland Railway Co. v. Hudson*, (1855) 16 Excr 495; 22 LT Ch 529, 51 HR 564.

28. See, for example, Berle, "Corporate Powers as Powers in Trust", (1949) 44 Harvard Rev., where the learned writer enunciates the powers which have been held as powers in trust.

29. *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch 56 (CA).

30. *Espresso Tracing Co. re*, (1871) 18 LT 12 Ch D 191.

31. *Mesopotamia Gaur v. Bimbing Life Assurance Co. Ltd*, AIR 1950 SC 172; (1950) 20 Comp Cas 179.

32. *Marsdale's Value Gear Co. Ltd v. Manning, Whinie & Co. Ltd*, (1900) 1 Ch 267; 100 LT 65.

33. *Roxek J in City Equitable Fire Insurance Co. re*, 1925 Ch 407; 1924 All ER Rep 485; 100 LT 520.

or officer of the company and contracts for the company.³⁴ The real truth of the matter is that "directors are commercial men managing a trading concern for the benefit of themselves and of all the shareholders in it".³⁵

For whom trustees?—Directors are trustees of the company and not of individual shareholders. This principle was laid down in 1902 in *Percival v Wright*,³⁶ and still holds ground as a basic proposition.³⁷ In that case:

Negotiations for the sale of a company's undertaking were on foot and without disclosing this the directors purchased shares from the plaintiff-shareholders. The selling shareholders had written to the company's secretary asking him if he knew anyone willing to purchase their shares. Three directors offered to buy the shares at a price assessed by an independent valuer but they did not disclose that they were in the process of negotiating the sale of the company at a price per share considerably higher than the amount offered to the shareholders. The negotiations proved to be abortive, but the plaintiffs claimed that the non-disclosure was a breach of the fiduciary duty entitling them to repudiate the sale.

But the court held that there was no such fiduciary duty towards individual shareholders and, therefore, the directors were not bound to disclose negotiations which ultimately proved abortive. The court also pointed out that a premature disclosure of this kind might well be against the best interests of the company.

The principle of the case was reiterated in *Peskin v Anderson*.³⁸ Ordinarily the directors are not agents or trustees of members or shareholders and owe no fiduciary duties to them.

This decision remained unchallenged in common law jurisdictions until the New Zealand decision in *Coleman v Myers*.³⁹

The case involved a struggle for control of a privately held family company. The company had substantial assets, like cash reserves, valuable lands and buildings. The assets were undervalued in the books of account. They showed the share value to be at \$4.10 on a going concern basis. If accounts were taken of the true asset backing of the shares, they were worth \$7.75. The dominant majority shareholder formed another company which made a takeover offer at \$4.80 per share. The reluctant minority shareholders were given notices of compulsory acquisition of

34. James L) in *Smith v Anderson*, (1890) LR 25 Ch D 247, 275.

35. JESSEL MR, *Conf Mining Co. re* (1878) 10 Ch D 430, 451–52, 40 LT 267. Their position is that of constructive trustees. See an excellent study by T W Prox, "Constructive Trusts in a Company Setting" (1986) 1 BL 23.

36. (1902) 2 Ch 421; 18 TLR 692, cited with approval by the Madras High Court in *Ramaseswamy Iyer v Balakrishna & Co*, (1956) 11 Comp LJ 102.

37. Sir Louis Loss, "The Fiduciary concept as applied to Trading by Corporate Insiders" in the U.S." (1971) 30 Med L Rev 34, 40–41, where the learned writer says that although abandoned or escaped by importing special circumstances, the *Fiduciary* concept still represents "majority rule".

38. [2001] 2 BCLC 1; 2000 EWCA Civ 326.

39. 1977) 2 NZLR 225.



shares. They eventually agreed. They had no access to inside information on the true value of the assets. No information was given to them. When they discovered the true facts they sought setting aside of the sale because of the breach of fiduciary duty.

Merton J. said that the case could not be distinguished from *Percival v Wright* but that, in fact, *Percival v Wright* was incorrectly decided and, in the circumstances of the two cases, where directors were buying shares in their own company, a fiduciary duty was owed to shareholders. The Court of Appeal⁴⁰ was, however, content to distinguish *Percival v Wright* on the special facts of the case. It held that the court will not impose a fiduciary duty automatically upon directors when they enter into transactions with the company's shareholders. Because of the special circumstances of this case, the court did impose a fiduciary duty. The circumstances were:

Face-to-face negotiations in which the members relied upon the directors to disclose all material information; the directors had a high degree of inside knowledge; and the directors actively promoted the scheme and advised the shareholders to accept.⁴¹

The decision in *Percival v Wright* left scope for the rule that when negotiations reach a certain stage of maturity a disclosure of the director's profits to the selling shareholders would be necessary, otherwise the directors would be failing in their fiduciary obligation towards them.⁴² The principle found application in *Alfer v Hyatt*.⁴³

The directors of a company represented to the shareholders that their consent was necessary in order to effect an amalgamation and induced the shareholders to give them the option to purchase their shares. They exercised the option, carried out the amalgamation and made a profit.

It was held that the directors were trustees of this profit for the benefit of the shareholders. They cannot always act under the impression that they owe no duty to individual shareholders. No doubt the duty of the directors is primarily one to the company itself. But the facts of the present case showed that the directors had held themselves out to the individual shareholders as acting for them. Now, of course, there is a statutory obligation to disclose any profit of this kind to the shareholders alongwith the offer by which their shares are proposed to be acquired.⁴⁴

In situations like this where the directors act as agents for the shareholders, the latter would be liable to the purchasers of their shares for

⁴⁰ For other cases on the subject see, *Causal Copies Ltd. re*, (1983) 1 NZCLC 98, 636, here the shareholder in question was also a director of the company with professional experience and had access to all the information contained in the company's records and *Gillies v GUS Properties Ltd.*, (1995) 7 NZCLC 281, where the duty was violated.

⁴¹ See, Robert E. Mundheim, "The Texas Gulf Sulphur Complaint" (1966) 18C 284 which discusses the duty of a corporate insider to disclose information materially enhancing the value of corporate stock before purchasing it.

⁴² (1944) 20 TLR 444. A decision of the Privy Council on appeal from Ontario.

⁴³ Ss. 30–32, Companies Act, 2013. See also index, "Duties of Directors", *infra*.

any fraudulent misrepresentation made by the directors in the course of negotiations.⁴⁴

Trustees of institution.—The role of the corporation in the modern society is something different from what it was in the previous century. "The modern company should function not simply as an economic machine designed to churn out profits for its shareholders, but rather as an institution which owes social responsibilities to a wide circle of interests."⁴⁵ The Supreme Court has already conferred its recognition upon the "social character" of a company. In *Charanjit Lal Choudhury v Union of India*,⁴⁶ Mukherjee J observed, "A corporation which is engaged in the production of a commodity vitally essential to the community, has a social character of its own and it must not be regarded as the concern primarily or only of those who invest money in it." Accordingly, the directors become "the administrators of a community system".⁴⁷ A business executive once declared: "I am a trustee of the institution and not merely an attorney of the investor."⁴⁸ If this position comes to be accepted, the corporation law would become "in substance a branch of the law of trusts".⁴⁹ Whether this is so or not, it is widely recognised that the directors have to consider the interests of labour, consumers, the general public and the State.⁵⁰ Public responsibility of a company means to take account of outside interests affected by corporate operations. To the extent the directors are bound to consult outside interests, they become the trustees of such interests.⁵¹

Directors as organs of corporate body

"There was a time when corporations played a very minor part in our business affairs, but now they play the chief part, and most men are the servants of corporations."⁵² "There is scarcely any business pursued requiring the expenditure of large capital, or the union of large numbers that is not carried on by corporations. It is not too much to say that the wealth and

44 It has been so held by the House of Lords in *Priest v Woolley*, 1954 AC 333; (1954) 2 WLR 832. See also, Metcalf and Jr., *For Whom are Corporate Managers Trustees?*, (1932) 45 Harv L Rev 145, and *Duty of Good Faith*, infra.

45 R.C. Beetham, "The Range of a Company's Interests" (1969) 3b SALJ 155, 166. The concept of the company as a social institution is developed in the following works: George Gaynor, *The Future of Private Enterprise* (1951) and *The Responsible Corporation* (1961); Peter F. Drucker, *The Evolution of the Corporation*, (1st. Macmillan, Toronto & Princeton) or *The Modern Corporation* (Asia 1967).

46 AIR 1951 SC 41, 59; 1950 SCR 869; (1951) 21 Comp Cas 33.

47 Joseph L. Weiler, "The Berle-Dodd Dialogue on the Concept of the Corp" (1964) 64 Colum L Rev 1658.

48 Cited in the above article.

49 Cited in the above article. See also, Carlos E. Israels, "Are Corporate Powers still held in Trust?" (1959) 64 Colum L Rev 1656.

50 See, Lord Denning, at the 14th Legal Convention of the Law Council of Australia, cited in (1967) 41 AUSLJ 312-314, and Schmitthoff in (1966) [BL] 212-13.

51 See Eugene W. Reutov, "To Whom and For What Ends is the Corporate Management Responsible" in Mason, *THE CORPORATION IN MODERN SOCIETY* (1959) 46, and W.H. Ferry, "Irresponsibilities in Metro-Corporate America" in Andrews Blacker, *THE CORPORATION TAKE-OVER*, (1964) 108.

52 Woodrow Wilson, *The New Era* (1910) 1967 2d.



CASE PLOT

business of the country are to a great extent controlled by them."⁵² This gives the company and its executive an enormous power to affect the lives of labourers and consumers and shareholders.⁵³ Every position of power implies responsibility.⁵⁴ But it often became difficult to hold a company to its responsibilities in view of the artificial nature of its personality. There was a time when a company could not be held responsible for any wrong involving mental element. But today the range of corporate responsibility almost corresponds with that of an individual,⁵⁵ as "the offending corporation cannot escape from the consequences which would follow in the case of an individual by saying that they are a corporation".⁵⁶

This transformation has been brought about under the influence of the organic theory of corporate life, "a theory which treats certain officials as organs of the company, for whose action the company is to be held liable just as a natural person is for the action of his limbs".⁵⁷ Thus "the modern directors are something more than mere agents or trustees. The Board is also correctly recognised to be a primary organ of the company."⁵⁸ As NEVILLE J put it in *Bullock v Standard Land Co Ltd*,⁵⁹

The Board of directors are the brain and the only brain of the company, which is the body and the company can and does act only through them.

"When the brain functions the corporation is said to function."⁶⁰ Similarly, GREER LJ said in *Faxton v Dewville*⁶¹ that "a general manager of the business is

53. FIELD in *Perry v Virginia*, 19 U.S. 357; 75 US 166 (1868); borrowed from Jackson, *Wisdom of Men*; St. JOHN COLBERT, 80. This statement is true of every modern democratic society.

54. Dodd, reviewing Diclock and Hyde, "Bureaucracy and Trusteeship in Large Corporations" (1942) 9 Den Ch. L. Rev. 538.

55. *Ibid.* Cited by Joseph L. Werner, "The Reisch-Dodd Dialogue of the Concept of the Corporation" (1964) 62 Colum L. Rev. 1456. See also, Adolf A. Berle, "Modern Functions of the Corporate System" (1962) 62 Colum L. Rev. 433 and Henry G. Maine, "The Higher Criticism of the Modern Corporation" 62 Colum L. Rev. 349.

56. C.R.N. Winn, "Criminal Liability of Corporations" (1929) 3 Camb L. J. 398. The company would be liable in civil respects where the criminal conduct of those working for the company is either within the range of their authority or in the course of their employment. *MV Jaihali v Mahajan Jairawal & Co*, (1997) 8 SCC 72; 1997 SCC (Cr) 1239; (1998) 91 Comp Cas 708.

57. Bowes LJ in *R v Tyler and International Commercial Co*, (1891) 2 QB 588, 594; 65 LT 662 (CA). Cited by Lazarus in *Director of Public Prosecutions v Keat & Swiss Contractors Ltd*, 1944 KB 146. A company can be punished by way of fine and not imprisonment. *Casual Vanepath and Alitalo Industries v State of UP*, (1992) 75 Comp Cas 770; 1995 All LJ 647; (1995) 22 NOC 251; *Menam Transport v S Krishna Rao et al*, (1993) 1 Comp LJ 153 (Mad). Where imprisonment is the only punishment prescribed under an Act, a company cannot be prosecuted. *PP Pai & K L Banerjee*, (1993) 77 Comp Cas 179; ILR 1993 KAR 709; *MCD v O Beaufit Co (P) Ltd*, (1975) Cri LJ 1148 (Del). A company can be held liable for statutory violations like no individual, but it cannot be imprisoned. *MV Jaihali v Mahajan Jairawal & Co*, (1997) 8 SCC 72; 1997 SCC (Cr) 1239; (1998) 91 Comp Cas 708.

58. TALUKDAR in *Gopil Nathan v State*, AIR 1969 Orissa 132, 138; (1969) 39 Comp Cas 150.

59. R.C. Bhattacharyya, "The Range of a Company's Interests" (1969) 96 SALT 155, 156.

60. (1910) 2 Ch 408, 416.

61. *State Trading Corp of India Ltd v CTG*, AIR 1963 SC 1811, 1832; (1963) 33 Comp Cas 1052; (1964) 4 SCR 99.

62. (1932) 2 KB 309, 329 (CA).

regarded as the alter ego of the company; and it would be responsible for his personal negligence'. Likewise, a company was held liable for giving a false warranty without having reason to believe that it was true.⁶³ The decision of the House of Lords in *Leonard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*⁶⁴ gave a further fillip to this development:

The facts were that the Merchant Shipping Act of 1874 provided that a shipowner would not be liable to make good a loss of or damage to the goods happening without "his actual fault". The shipowner in this case was an incorporated company and the loss had taken place due to the negligence of a managing director. The company was sued for the loss and its chief defence was that the company, being an artificial person, was incapable of committing "actual fault". D

Rejecting this contention, Lord Halsbury in his well-known passage said:⁶⁵ "A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its acting and directing will must, consequently, be sought in the person of somebody who for some purpose may be called an agent, but who is really the directing mind and the will of the corporation. That person may be under the direction of shareholders in general meeting, that person may be the Board of directors itself. (His) fault is the fault of somebody who is not merely a servant or agent for whose action the company is liable upon the footing respondent *superior*, but somebody for whom the company is liable because his action is the very action of the company itself."

The company's intention to occupy a premises for its own business requisite under the Tenancy Acts to evict a tenant, can be known by referring to the directors' conduct irrespective of any formalities.⁶⁶ Denning LJ explained the organic character of the company's life in the following words:⁶⁷

A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It has also hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said

63. *Oliver v French & Pocock Ltd*, (1911) 2 K.B. 832.

64. 1915 AC 205; (1914-15) All ER Rep 280; 11 LT 195 (H.L.).

65. 1915 AC 705, 713-14; (1914-15) All ER Rep 280; 113 LT 195. Reinforced by the House of Lords in *Tenn Supermarkets Ltd v Neillass*, 1972 AC 154, (1972) 2 WLR 1166.

66. *H.L. Halsbury (Engg) Co Ltd v J. Gralieu & Sons Ltd*, (1957) 1 QB 159; (1956) 3 WLR 804 (CA). For the liability of a company to be evicted, see, *V.G. Powers v Southdown*, (1986) 2 Comp L.J. 367 (Mad). A director can be held personally liable for the offence of cheating by issuing a cheque if he knew of inadequate funds and also intended to cheat. *Raelina Fleur Milk Products Ltd v Lal Chund Bhungadiya*, (1987) 42 Crimp Cas. 15 (AP).

67. *Ibid*. See also, *C Evans & Sons Ltd v Spratlemon Ltd*, 1985 BCLC 105; 1 WLR 327 (CA). A director and his company held liable for infringement of copyright which the director authorised, directed and procured. Attorney General Ref No 2 of 1982, 1984 QB 124; (1984) 2 WLR 447 (CA). Whether directors depriving the company of its property in connivance with shareholders can be prosecuted for theft.

to represent the mind or will. Others are directors and managers who represent the directing mind or will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.⁶⁸

"But the courts have not attempted to define the persons whose acts or intentions are to be considered the acts or intentions of the company."⁶⁹ It has, however, been suggested that it would include the company's governing body, directors, managing director⁷⁰ or general manager or other persons having authority from the Board of directors to conduct the company's business.⁷¹ For certain purposes even the secretary has been recognised as an essential organ. For example, in *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd*,⁷² a company was held liable for the hire of taxis engaged by the secretary for his personal purposes while operating from the office of the company. Commenting upon the growing importance of the secretary, Lord Denning MR said:

A modern secretary is not a mere clerk but an officer of the company with extensive duties and responsibilities and has authority to sign contracts connected with the administrative side of a company's affairs and has ostensible authority to enter into a wide range of contracts. In that respect his position has altered very materially since the 19th century.⁷³

Personal liability of working organ.—When a tort or some other wrong happens to occur in the working processes of a company, the question would be whether the responsibility for it is to be attributed to the company or it should be borne by the director alone. The applicable principle has been thus stated:

68. See also, Lord Denning in *Daimler Co Ltd v Continental Tyre & Rubber Co Ltd*, (1916) 2 AC 302, 235 (HL); and Du Preez J in *Triplex Safety Glass Co Ltd v Lancashire Safety Glass*, (1939) 2 KB 395, 406 (CA).
69. Talbot J in *Wheeler v New Merton Board Mills*, (1923) 2 KB 669 (CA).
70. Adiak Kumar v Singai Land & Finance (P) Ltd, (1995) 17 CLA 111; (1995) 82 Comp Cas 430 (Del), managing director disposing of land of a colonising company vis-à-vis authority under the articles in act on behalf of the company, held company bound.
71. See, the judgments of Scammon and Lawrence LJ in *Rudd v Eider Dempster & Co*, (1933) 1 KB 566, 576 and 591; 302 LJ KB 275 (CA); *Adieu v I Broder Ltd*, (1944) 3 All ER 515; *Tesco Supermarkets Ltd v Nellies*, 1972 AC 163, (1971) 2 WLR 1166 where it was held that a branch manager of a shop was not sufficiently senior for the purpose that his default should be regarded as that of the company. He was not the alter ego of the company. Such an ego would be found amongst directors, managers, secretary or other officers of the company or someone to whom they delegated, control and management with full discretionary powers in reference to some part of the company's business. Branch managers have not been regarded as the brain and the mind of the company. The deception practised on a branch manager was not the same thing as deception of the company, *R v Kozel*, (1946) 1 BCAC 380 (CA).
72. (1971) 2 QB 711; (1971) 1 WLR 440 (CA).
73. Nield (1971) 87 LQR 457. Another influence of the organic theory is shown by *Bognor Regis Urban District Council v Compton*, (1972) 2 QB 169; (1972) 2 WLR 965, where it has been held that a corporation not only has a right to sue for that affecting its property, but also for one affecting its personal reputation.



CASE PILOT

"The authorities... clearly show that a director of a company is not automatically to be identified with his company for the purpose of the law of tort, however small the company may be and however powerful his control over its affairs. Commercial enterprise and adventure is not to be discouraged by subjecting a director to such onerous potential liabilities. In every case where it is sought to make him liable for his company's torts, it is necessary to examine with care what part he played personally in regard to the act or acts complained of."²⁴

In a New Zealand case²⁵ the director of a one-man company gave advice, through the company, to a client for spraying of an insecticide around fruit trees. The advice was so negligent that fruit trees perished along with their parasites. The court did not consider the circumstances to be such as to impose personal liability on the director. He had made it clear that he was trading through the company and the company was the legal contracting party to be charged with liability. As compared with this, in *Fairline Shipping Corp v Adamson*²⁶ the director became personally liable for loss of perishable goods from the storage provided by his one-man company. The liability hinged on a letter written by the managing director to the plaintiffs on his own note paper rather than that of the company, an act which the court thought displayed an assumption of personal duty of care. In *Williams v Natural Life Health Foods*,²⁷ a health food shop was established under a franchise agreement. The franchiser company provided income projections estimates from the shop on which the plaintiff company relied in accepting the franchise. These projections proved inaccurate and after 18 months the plaintiff's business closed with substantial losses. The franchiser company came to be wound up. The plaintiffs sued the promoter-director of the company who had provided the estimate. The Court of Appeal held that in this case the director had acted in a capacity outside that of a mere director and had assumed a personal responsibility to the plaintiffs which was additional to that of the company.²⁸

Liability for bouncing of cheques. The company would be liable to be prosecuted for the bouncing of a cheque if it was issued under the authority of the company. A complaint which alleged that the cheque was issued by a director who was in charge of and responsible for the day to day administration of the affairs of the company, was not liable to be quashed.²⁹

24. Per Squire LJ in *C Dennis & Sons Ltd v Spriteland Ltd*, 1985 BCLC 105; (1985) 1 WLR 317 (CA).

25. *Tropic Honey Ltd v Anderson*, (1992) 2 NZ L.R. 517.

26. 1925 QB 180; (1974) 2 W.L.R. 624.

27. (1997) 1 BCLC 121 (CA).

28. See notes by Jennelle Payne, "Personal Liability of Directors" and "The Attribution of Tortious Liability between Director and Company" (1996) JBL 183.

29. *Union Trading and CWI (Tanzania) Ltd v Ziyah Hassan*, (1991) 71 Comp Cas 270 (Kant); *Vulfix Ltd v Hizbul Agerwala*, (1991) 71 Comp Cas 273 (U.A.). The prosecution is under S. 136, Negotiable Instruments Act, 1881. *Lata Pramod Dhar v Muthi Export P. Ltd*, 2016 SCC Online Bom 1005; (2016) 198 Comp Cas 433, a cheque issued before the director in question had resigned. Complaint not liable to be quashed. *Standard Chartered Bank v State of Maharashtra*, (2016) 1 SCC 62; (2016) 2 SCC (Cri); 505; (2016) 196 Comp Cas 177.

APPOINTMENT OF DIRECTORS

The success of a company depends, to a very large extent, upon the competence and integrity of its directors. It is, therefore, necessary that management of companies should be in proper hands.¹⁹ The appointment of directors is accordingly strictly regulated by the Act. There are now special provisions for preventing management by undesirable persons.

One evil which has been abolished by the Act is that of a company or a firm acting as a director of another company. Now, according to Section 149, only an individual can be the director of a company. No company or firm or association can be appointed as a director. No company is to appoint or appoint any individual as a director unless he has been allotted a Director Identification Number under Section 154, [S. 152(3)].

Company to have Board of directors [S. 149]

Every company is to have a Board of directors consisting of individuals as directors. A public company is to have a minimum number of three directors and a private company is to have two directors. In the case of one person company, only one director is compulsory. There can be a maximum of 15 directors. A company may appoint more than 15 only after passing a special resolution. The Central Government may prescribe a class or classes of companies who are to have at least one woman director. These requirements have to be complied within one year of enforcement of the Act of 2013. Every company is to have at least one director who has stayed in India in the previous year at least for 182 days.

Independent directors [S. 149(4)]

Every listed public company is to have at least one-third of the total number of directors as independent directors. The Central Government may prescribe the minimum number of independent directors in a class or classes of public companies. Any fraction contained in the one-third number is to be rounded off to one. Sub-section (6) provides that an independent director in relation to a company means a director who is not 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) who is or was not a promoter of the company or of its holding, subsidiary or associate company; (c) who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company or their promoters or directors during the immediately preceding two financial years or during the current financial year; (d) none of whose relatives has or had pecuniary relationship or transactions with the company, its holding, subsidiary or associate company, or their promoters, or directors amounting to two per cent or more of its gross turnover or total income or Rs 50,00,000 or such higher amount as may be prescribed, whichever is lower, during

¹⁹ Executive director and whole-time director, liability for dishonour of cheque, justified, quashing of complaint against them set aside.

See, the judgment of Yousuf J in Indian States Bank Ltd v Sankar Singh, AIR 1934 All 555.

the two immediately preceding financial years or during the current financial year; (e) who, neither himself nor any of his relatives (i) holds or has held the position of 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; (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 (A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or (B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to 10 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 per cent or more of its receipts from the company or that holds two per cent or more of the total voting power of the company; or (f) who possesses such other qualifications as may be prescribed.

The independent director has to make the declaration of his independence at the first meeting of the Board which he attends and subsequently every year at first meeting of the Board in the financial year. A nominee director means a director nominated by any financial institution in pursuance of a statutory provision or agreement or appointed by any Government to represent its interest or any other person for that purpose. [Sub-s (7)]

The company and independent directors have to abide by the provisions of Schedule IV.

An independent director is not entitled to any stock option. He may receive his remuneration by way of fee provided under Section 197(3), reimbursement of expenses for participation in Board and other meetings and profit related commission as may be approved by the members. Such director has to hold office for a term of five years on the Board. He remains eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report. No independent director is to hold office for more than two consecutive terms. Even such a director will become eligible after expiry of three years of ceasing to become an independent director. It is necessary that during the three gap years he should not have become associated with the company in any other capacity either directly or indirectly. The tenure of an independent director before commencement of the Act is not to be counted as a term spelling out the liability of an independent director; and an independent director and a non-executive director [not being promoter or key managerial personnel] is to be held liable only for such acts of omission or commission by a company which occurred with his knowledge attributable through Board processes and with his consent or connivance or he did not act diligently. [S. 149(12)⁶¹]

61. *Brijlalji Dage v. State of Kerala*, (2013) 191 Comp Cas 220 (Ker). A vivid case would have to be spelled out in the complaint. The conditions would have to be meticulously pleaded.

The provisions of Section 152(6) and (7) relating to retirement of directors by rotation are not to apply to independent directors.

The managing director of a family company died leaving behind an executive director and an independent director. An appointment was made by the independent director who had first resigned and then withdrew his resignation. The articles of the company provided that the office of a director would become vacant the moment he submitted to the company his letter of resignation in writing. He could not be permitted to withdraw his resignation. Anything done by such director after withdrawal of his resignation could not be valid. Appointment of daughters of deceased managing director as directors and transfer of shares were not valid. All actions taken by the independent director and new directors appointed by him were not valid. No Board of directors was legally in office. The ad hoc Board of directors consisting of the shareholder's wife and daughters who had filed a petition was to remain pending till disposal of the suit about validity of their appointment.⁶² This decision of the High Court was reversed by the Supreme Court because the oppression petition was still pending before the Company Law Board.⁶³

Manner of election of Independent directors and maintenance of Data Bank [S. 150]

Independent directors have to be selected from a data bank which should contain names, addresses and qualifications of persons who are eligible and willing to act as such. This has to be maintained by any body, institute or association as may be notified by the Central Government. A body to be notified should have expertise in creation and maintenance of such data bank and put it on their website for use by the company making the appointment of such directors. The responsibility of exercising due diligence before picking up a person from such data bank is to be that of the company. [S. 150(1)]

The appointment has to be approved by the company in general meeting. The explanatory statement annexed to the notice of general meeting called to consider an appointment has to indicate the justification for choosing the appointee. [Sub-s (2)] Data bank has to be maintained in accordance with such rules as may be prescribed. The Central Government may prescribe the manner and procedure of selection of independent directors who fulfil the qualification and requirements stated in Section 149.

Appointment of directors elected by small shareholders [S. 151]

A listed company may have one director elected by such small shareholders as may be prescribed. For the purposes of this section a small

and strictly proved. The case concerned liability under S. 141, NI Act for dishonour of cheque. National Small Industries Corp Ltd v Harjinder Singh Randhawa, (2010) 3 SCC 330, (2010) 154 Comp Cas 313; State (NCT) of Delhi v Rajiv Kherwani, (2010) 11 SCC 465; (2010) 158 Com Cas 151.

62. Kripika Datta v Highlights! P Ltd, 2015 SCC OnLine Hyd 119; (2015) 193 Comp Cas 356.

63. Purushottama Martius v Reinaika Darla, (2016) 1 SCC 237; (2015) 173 Comp Cas 397.

shareholder means a shareholder holding shares of nominal value of not more than Rs 20,000 or such other sum as may be prescribed.

First directors [S. 152]

The first directors of a company are to be appointed by the subscribers of the memorandum. They are generally listed in the articles of the company. If they do not appoint any, all the subscribers who are individuals become directors. The very fact of incorporation makes them the first directors of the company. The first directors, however appointed, hold office only up to the date of the first annual general meeting of the company and the subsequent directors must be appointed in accordance with the provisions of Section 152.⁹⁴

Promoters have no special right in the matter of appointment of directors. There is a prescribed procedure for appointment of directors. Even if directors are not appointed by following such procedure, promoters would have no clear right to act as directors. Registrar of Companies dismissed their application for uploading their signatures in the website.⁹⁵

Appointment at general meeting [S. 152]

Shareholder control is possible through the power of appointment of directors. "Control" has been defined in Section 2(27) to include the right to appoint majority of directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders' agreements or voting agreements or in any other manner.

"Election of directors is the primary managerial function of stockholders in business corporations, and one that needed careful regulation in their interest."⁹⁶ According to Section 152, directors must be appointed by the company in general meetings.⁹⁷ The person to be appointed has to furnish his Director's Identification Number and a declaration that he is not disqualified to become a director under the Act. [S. 152(4)] The person appointed as director is not to act as such unless he has filed with the company his consent to act as such. He has to file his consent with the Registrar within 30 days of his appointment in the prescribed manner [S. 152(5)] When any such person is appointed as an independent director it is necessary that an explanatory statement was annexed to the notice calling the meeting included a statement that in the opinion of the Board he fulfils the conditions specified in the Act for such appointment.

94. *Usha Chaturvedi v. Chopra Hospital (P) Ltd.* (2006) 130 Comp Cas 483 (C.B.), two-member, two-director company both of them NRIs, new directors appointed with no record of board meeting or of notice to directors, appointments held to be wrong and oppressive.

95. *Raj Shukla Agarwal v. Ministry of India*, 2015 SCC Online Del 12357; (2016) 194 Comp Cas 511.

96. *Calman, The Corporation in New Jersey* (1949) 302.

97. It is necessary that the person in question must have obtained his Director Identification Number S. 154 (3, 152(4)).

Annual rotation.—The Articles of the company may provide for retirement of all the directors by annual rotation. Otherwise only one-third can be given permanent appointment. The office of the rest of them must be liable to determination by rotation. The articles can provide for all the directors to be rotational. The effect of these provisions is that the rotational directors have to be appointed at general meetings except where the Act provides otherwise and other directors of a public and all the directors of a private company which is not subsidiary of a public company have also to be appointed at general meetings subject only to the regulations in the company's articles.

"The provision is designed to eradicate the mischief caused by self-perpetuating managements."⁵⁸ At an annual meeting only one-third of such directors shall go out.⁵⁹ In the first place those directors will retire who have been longest in office since their last appointment. As between persons who became directors on the same day, retirement is to be determined either by mutual agreement, or, in default, by lot.⁶⁰

It has been held by the Delhi High Court⁶¹ that directors cannot prolong their tenure by not holding a meeting in time. They would automatically retire from office on the expiry of the maximum permissible period within which a meeting ought to have been held. If no *de jure* directors are left in office to call an annual general meeting, the Tribunal may call a meeting to appoint directors, which will not be an annual meeting, nor conduct the business of such meeting, for the court did not have the power to call an annual meeting. Now both the powers, namely, the power of calling the annual general meeting and that of calling the extraordinary general meeting are vested in the Tribunal.

Where a director to be rotated out is also holding the office of managing director, the latter office will also go with the former, but expiry of the term of, or removal from managing directorship, does not entail the cessation of his office as a director.⁶²

58. *Oriental Metal Pressing Works (P) Ltd v Bhaskar Kashinath Shuker*, AIR 1961 SC 575 (1961) 31 Comp Cas 140. A company not for profit or which prohibits payment of dividend to members may have in its articles its own provisions on the matter. [S. 5].

59. S. 152(6)(a). If their number is not three or a multiple of three, then the number nearest to one third shall retire.

60. S. 152(5)(d). This may give rise to serious disputes. See, for example, *All India Tea & Trading Co v Uppadas Narain Singh*, 42 CWN 774 and *Kalish Chandra Dutt v Jagat Chandra Majumdar*, AIR 1925 Cal 868 32 CWN 1064, where it was held that "so long as the general meeting is not held at which new directors are to be elected, the directors elected at the previous general meeting would continue to be in office". The Madras High Court in *A. Annamalai & Anr v Indian Traders & Importers Ltd*, AIR 1953 Mad 467 and the Bombay High Court in *Calaba Land & Mills Co v Vasant Investment Corp*, (1963) 7 Comp LJ 89 have held that the directors retire at a time when the meeting ought to have been held. But cf. *Pearl Flour Mills Ltd*, cr. AIR 1916 MP 340; (1962) 32 Comp Cas 596; 1961 Jnt LJ 299. See also, *Kasur v Linda Property Ltd*, 1965 VR 232 (Aust). The controversy is still going on. A later decision is *Srimati Jain v Delhi Flour Mills Co Ltd*, (1974) 44 Comp Cas 228 (Del). The effect of the provisions and of preponderance of authorities is that their office stands vacated on the last day by which the meeting ought to have been held.

61. *DR Kundan v Motion Pictures Assn*, (1976) 46 Comp Cas 239 (Del).

62. *Swapan Debnath v Nevin Chand Sardarji*, (1988) 64 Comp Cas 562 (1988) 3 Comp LJ 76 (Cal).

For this purpose the total number of directors is not to include independent directors whether appointed under the Act or any other law for the time being in force on the Board of a company. [S. 152(6)(c) *Explanation*]

Reappointment (deemed reappointment) [S. 152].—The vacancies thus created should be filled up at the same meeting. But the general meeting may also resolve that the vacancies shall not be filled up. If it has done neither, the meeting shall be deemed to have been adjourned for a week.⁹³ If at the reassembled meeting, also no fresh appointment is made, nor there is a resolution against appointment, the retiring directors shall be deemed to have been reappointed, except in the following cases:⁹⁴

1. Where the appointment of a particular director was put to vote, but the resolution was lost.
2. Where the retiring director has, in writing addressed to the company or its Board, expressed his unwillingness to continue.
3. Where he is unqualified or has incurred a disqualification.
4. Where a special or ordinary resolution is necessary for his appointment by virtue of any of the provisions of the Act.⁹⁵
5. A motion to appoint two or more persons as directors by a single resolution, if passed without unanimous consent, being void under Section 162, it shall not have the effect of reappointing rotated out directors.

The Explanation to sub-section (7), says that for the purposes of this section and Section 160, the expression retiring director means a director retiring by rotation.

Fresh appointment [S. 160].—If it is proposed to appoint a new director in place of a retiring one the procedure prescribed by Section 160 must be followed. A notice in writing for his appointment should be left at the office of the company at least 14 days before the date of the meeting alongwith a deposit of Rs 1,00,000⁹⁶ which shall be refunded to such person or member, if the candidate gets elected as a director,⁹⁷ or gets more than 25 per cent of total valid votes cast on show of hands or poll. Notice may be given by

⁹³ If that day happens to be a national holiday the meeting is to be held at the next succeeding day. [S. 152(7)]

⁹⁴ *S.R. Kunder v. Motion Pictures Assn.*, (1926) 46 Comp Cas 399 (Del). Cf. *III v. Subba & Co. Ltd v. Lakshmi Mangal v. Shree Ram Mills Ltd.*, (1958) 38 Comp Cas 606 (Bom). Following this case it was held in *Euro India Investments Ltd v. Central Corp. of Gujarat Ltd.*, (1973) 76 Comp Cas 691 (Guj). That a director, whose reappointment was deferred to the adjourned meeting, but no such meeting was held, nor the matter was put to vote and lost, was deemed to have been reappointed. Directors so reappointed have not to file with the Registrar their consent to act as director. [S. 264]

⁹⁵ It is also necessary that the meeting must be a validly constituted meeting. *Cardamom Mktg Co v. N Krishna Iyer*, (1962) 52 Comp Cas 299 (Ker).

⁹⁶ Higher amount can be prescribed

⁹⁷ S. 160. Relying upon the section and the decision in *Hawbury Bridge Coal, Iron & Waggon Co. v. II*, (1879) LR 11 Ch D 139; 40 LT 353 (CA), the Nagpur High Court has held in *Bear Trading Co. Ltd v. Gajanan Govind Rao Dixit*, (1972) 42 Comp Cas 48 (Bom) that the candidature for directorship need not be seconded and if the Chairman rules it out on this

the proposed director himself or by anyone intending to propose him. The company is required to inform the members about the candidature in the prescribed manner.⁹⁸

Appointment by nomination

Section 161(3) leaves scope for appointments to be made in accordance with the company's articles without being routed through the company's general meeting. An agreement among the shareholders may be imbibed in the articles to the effect that every holder of 10 per cent shares shall have the right to nominate a director on the Board.⁹⁹ Lending institutions also insist upon putting upon the company's Board of directors some of their nominees for watching their interest. The phenomenon of nominee directors is now a part of the corporate scenario.

Section 161(3) provides that subject to the Articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government by virtue of its shareholding in a Government company.

Appointment by voting on individual basis [S. 162]

The appointment of every director is required to be made by voting at the general meeting. The candidates cannot be put to vote en bloc. Rather each candidate has to be voted on individually. [S. 162(1)] Wishes of shareholders in relation to each proposed director should be obtained. If two or more persons are appointed directors by a single resolution, the same is void and

ground that would invalidate all subsequent proceedings. *Oriental Benefit & Orpheus Society Ltd v Bhawal Kumar K Shah*, (2001) 103 Comp Cas 947 (Mad), the section does not prescribe any particular time of the last day for filing of nomination.

- 98 The information may be given to the members either by personal notices or by publication in two local newspapers of which one must be in English and the other in the regional language. [Sub-s (1-A)] Where only two directors were retiring under annual rotation, but the company received notices from three persons for appointment and the company informed the members that appointing one more director would increase the number of directors, this was a sufficient compliance with the requirements of the Act. The appointment was valid because the increase was within the maximum stated in the articles. *S Puzhalamai Amies Sagars Ltd*, (1984) 55 Comp Cas 580 (Mad). It is not necessary for proposing a candidate by a special notice that the requirements of S. 161 relating to circulation of members' resolution can be complied with. *Cepal Vysas v Siscainir Hotels & Transformation Ltd*, AIR 1990 Cal 45; (1990) 1 Comp Li 388 (1990) 58 Comp Cas 515 distinguishing *Polymer v Inland Waterways Board Ltd*, 1976 JBL 347 (Ch D). The ruling in Cepal Vysas case has been followed in *Karnataka Bank Ltd v AB Ganesh*, (1993) 2 KLT 230 (1993) 79 Comp Cas 417 and *Dnyaneshwar Bindias Ltd v Vinayakumar Narendra*, (1995) 4 KLT 561, (1995) 23 Comp Cas 569 (ILR 1994 KAR 408). On receiving a notice the company becomes bound to inform the members. It has no discretion in the matter. See, the first cited case above. *Nanita Gupta v Cachar Native Joint Stock Co Ltd*, (1999) 96 Comp Cas 656 (CLB), non-compliance with the requirements of procedure renders the appointment void. In this case, the members were not informed. Section 160 does not apply to a private company which is not a subsidiary of a public company. See *Rama Vilas Press and Publications (P) Ltd. v (1992) 79 Comp Cas 295 (Ker); K Meenakshi Amma v Sreemati Vilas Press and Publications (P) Ltd*, (1992) 73 Comp Cas 285 (Ker).
- 99 *Bharat Bhawan v HB Portfolio Tracing Ltd*, (1992) 74 Comp Cas 20 (Del).

non-existent in the eyes of law.¹⁰⁰ But if the meeting has unanimously so resolved, more than one person may be elected by a single resolution.¹⁰¹ A person who has been appointed as a director for the first time is required to submit within 30 days of his appointment a written consent to act as a director to the Registrar of Companies. [S. 152]

Appointment by proportional representation [S. 163]

It is apparent from the above provisions that the basic method adopted by the Act for the appointment of directors is election by simple majority. All the directors of a company can, therefore, be appointed by a simple majority of shareholders and a substantial minority cannot succeed in placing even a single director on the Board. "Section 163 was, therefore, enacted by the legislature so that the minority may have an opportunity of placing their representative on the board."¹⁰² This section enables a company to provide in its articles the system of voting by proportional representation for the appointment of directors. This system of voting is devised to make minority votes effective. It is thus explained by Ballantine in his book on CORPORATIONS:

"Cumulative voting is the privilege where several directors are to be voted for at the same time, of casting votes of the whole number of shares held, multiplied by the number of directors to be elected, for the candidate, for distributing the votes among part of the vacancies to be filled."¹⁰³

"Cumulative voting is a voting procedure which permits a substantial minority of stockholders to elect one or more directors. A group owning one-seventh of the shares can always elect one-seventh of the directors."¹⁰⁴ Under this system each shareholder's vote is more important than under straight voting. It also facilitates the removal of an inefficient management. "Thus in some cases in the United States companies were salvaged by a single director placed on the board by cumulative voting and who brought out correct information."¹⁰⁵

The section has this to say about the system: appointment in accordance with the principle of proportional representation, whether by the single transferable vote or by a system of cumulative voting or otherwise. Such appointments may be made once in every three years. Casual vacancies of such directors are to be filled as provided in Section 161(4), namely, by the Board of directors.

100 *Raghunath Swami Marbur v Raghunath Boddam Malhip* (1966) 2 Comp LJ 190; (1967) 37 Comp Cas 394; AIR 1967 All 145. But that is not a punishable offence.

101 There should first be an agreement to that effect at the meeting without any vote being given against it.

102 For a remarkable account of the importance of this system see, P.N. Balawali & J. "Rights of Minority Shareholders", published in *Current Problems of Corporate Law Management and Practice* of the Indian Law Institute, New Delhi.

103 (1946) 60 ILJR 172.

104 John G. Sobieski, "In Support of Cumulative Voting" (1960) 18 L 516.

105 *Ved Prakash Juneja, "Proportional Representation on Boards of Companies"* (1969) 2 Comp LJ 28.

Casual vacancies [S. 161]

A casual vacancy occurs when the office of a director is vacated before the expiry of his term. Such a vacancy may be filled in accordance with the procedure prescribed by the articles. In the absence of any such clause in the articles, power is given to the directors to till the vacancy at a Board meeting. Any person so appointed holds office until the expiry of the period for which the outgoing director would have held office.

Additional directors [S. 161]

Additional directors can be appointed by the Board if there is a power to that effect in the articles, provided that the total number of directors shall not exceed the maximum fixed by the articles. Where the strength of directors fell below the legal minimum, the appointment of an additional director by the remaining directors was held to be valid.¹⁰⁶ Such additional directors shall hold office only up to the date of the next annual general meeting or the last day on which meeting should have been held. They are exempted by Section 152 from the requirement of filing consent to act as director.

Appointment by Board

While the general power to appoint directors is vested in the general meeting of shareholders, there are at least two cases when the Board can also appoint new directors. Firstly, articles may empower the directors to appoint additional directors subject, of course, to the maximum number fixed therein. [S. 161(1)] And, secondly, the Act itself by Section 161 authorises the directors to fill casual vacancies.

This may occasionally result in a conflict between the general meeting and the Directorate. This kind of situation developed in *BN Viswanathan v Tiffins Barry Asbestos (P) Ltd.*¹⁰⁷

A clause in the articles of a company authorised the directors to fill casual vacancies and also to increase the number of directors within the maximum number fixed in the articles. Some casual vacancies occurred but they were promptly filled at a general meeting of the shareholders. This was challenged on the ground that once the power to appoint was delegated to the Board, it could not have been exercised at a general meeting.

After an extensive review of English authorities, VENKATRAMA TYER J upheld the appointment and said, "The principles can be summed up thus: A company has inherent power to take all steps to ensure its proper working and that, of course, includes the power to appoint directors. It can delegate this power to the Board and such delegation will be binding upon it, but if there is no legally constituted Board which could function or if there

106. *Sharadk Harilal Shah v Marusree Textiles Ltd.*, AIR 1994 Bom 20. That power of the directors is not to be affected by the provisions of S. 152. There being no special provision, appointment of additional directors and employees can be questioned in a civil suit; *Vijay Kumar Gupta v Ram Naren Singh*, (2004) 122 Comp Cas 771 (P&H).

107. AIR 1950 Mad 520; (1953) 23 Comp Cas 79.

is a Board that is unable or unwilling to function then the authority delegated to the Board lapses and the members can exercise the right inherent in them of appointing directors.¹⁰⁸

The court found that at the time of the general meeting there was no director validly in office and, therefore, the members had the right to elect.¹⁰⁹

A similar appointment was upheld by the Privy Council in *Ram Kishore Dhamka v Satya Churn Lal*.¹¹⁰ But their Lordships added: The articles may, however, be so expressed as to delegate the power of appointing new directors to the Board to the exclusion of the general meeting. It follows, therefore, that the question turns upon the construction of the language used in the articles.

Appointment by Tribunal

The Company Law Tribunal has the power to appoint directors for prevention of oppression and mismanagement. [S. 242(j)]

An agreement between groups of shareholders not to increase the number of directors and capital of the company and also not to do anything disturbing the existing pattern of management was held to be not binding on the company so as to prevent it from doing any of those things.¹¹¹

Director Identification Number

Application for allotment of number [S. 153].—Existing directors as well as persons seeking to become directors have to apply to the Central Government for allotment of a number. The application has to be in a prescribed form and has also to be filed in the prescribed manner including electronic filing. Once an application is made, the existing directors can continue in position. The Central Government has to make the allotment within one month in such manner as may be prescribed. [S. 154]

Prohibition on more than one Identification Number [S. 155].—Once a number has been allotted, the individual concerned cannot seek allotment of any other number. The director has then to inform his companies of the number allotted to him. [S. 156]

Director to intimate Identification Number [S. 156].—Every existing director, within one month after receiving his Director Identification Number from the Central Government, has to intimate it to the company and also to all the companies in which he is a director.

108. The authorities reviewed by the learned judge were: *Bharat Open Mouth Furnace Co Ltd v Regret*, (1918) 108 LT 665, which was considered to be of doubtful validity; *Worcester Cosetary Ltd v Wrigg*, 1916 Ch 641 (CA); *Revi & Kessuji Olympia v Satya Churn Lal*, (1919-20) 27 IA 129; AIR 1950 PC 81; *Isle of Wight Ratnag Co v Tolundam*, (1983) 18 25 Ch 1332; 501, 27 132 (CA); *Burton v Turner* (1914) 1 Ch 295; 110 LT 929.

109. (1919-20) 27 IA 128; AIR 1950 PC 81. See also, *A. Amudha Sivamani Ammal v Indian Traders & Intermediary Ltd*, AIR 1953 Mad 467 and *MK Srinivasan v Vis Subramaniam Iyer*, (1953) 42 Comp Cas 147, AIR 1952 Mad 100, where the power of appointment vested in the shareholders, having been usurped by the directors, the appointments were held to be void.

110. *Ram Kishore Dhamka v Satya Churn Lal*, (2000) 100 Comp Cas 19; (2000) 2 Bom CR 241; (2000) 3 Mah LJ 700.

Company to inform the Registrar of the Number [S. 157]. Within 15 days of the receipt of information from the director concerned of his Identification Number, the company has to furnish this information to the Registrar or any other officer or authority as may be specified by the Central Government. The information has to be furnished in prescribed form and manner and also with prescribed fees or additional fee under Section 403 for late filing. Where the company fails to do so even after expiry of the late filing period under Section 403, the company becomes punishable with fine not less than Rs 25,000 but extending up to Rs 1,00,000. Every officer who is in default has to pay a fine of not less than Rs 25,000 extending up to Rs 1,00,000.

Obligation to indicate Director Identification Number [S. 158]

Every person or company has to indicate Director Identification Number on any return, information, or particulars required to be furnished under the Act if they relate to the director or have any reference to him.

If any individual or director of a company contravenes any of the provisions of Section 152, Section 155 and Section 156 he becomes punishable with imprisonment for a term extending up to 6 months or with fine extending up to Rs 50,000. If the default happens to be of continuing nature, a further fine of Rs 500 is levied on daily basis. [S. 159]

Disqualifications [S. 164]

Section 164 lays down the minimum eligibility requirements. A person is not capable of being appointed a director in the following cases:

- (a) Where he is of unsound mind, provided that the fact has been certified by a court of competent jurisdiction and the finding is in force;
- (b) Where he is an undischarged insolvent;¹¹
- (c) Where he has applied to be adjudicated as an insolvent and his application is pending;
- (d) Where he has been sentenced to at least six months of or otherwise imprisonment for an offence involving moral turpitude or otherwise and five years have not elapsed from the date of the expiry of the sentence.¹² The Preamble to the clause says that if a person has been

11. *Jayish Ramakrishna Doshi v Carlton Corp Ltd*, (1993) 96 Comp Cas 746 (Bom). On appeal to the Supreme Court, *Mukul Harkisondas Doshi v Jayish Ramakrishna Doshi*, (1997) 88 Comp Cas 809; 1994 Mah L J 259. The Supreme Court discharged the proceedings itself and the director remained qualified for his post.

12. Leave can be granted to a person about whom there was no evidence to show that he was misusing the names or assets of the company. *Lighthing Electrical Contractors Ltd. re*, (1990) 2 BCAC 302 (Ch D). The period of disqualification during the pendency of the proceeding is a relevant consideration for granting leave to a disqualified person. *Smt of State for Trade and Industry v Arif*, (1997) 1 BCAC 34; 1996 BOC 586 (Ch D). Where such conviction is under appeal and there is a prayer for suspending the sentence for the purposes of this disqualification, the court should consider the possible effect of the director continuing in office upon the interests of the company and its shareholders. *Rama Narang v Ramesh Narang*, (1995) 2 SC 533 (1995) 43 Comp Cas 194; (1995) 16 CLA 247. The meaning of the expression "moral turpitude" was fixed by the Kerala High Court in *Govt of State of Kerala*, (1991) 72 Comp Cas 57 (Ker). K J Thomas] said: "The expression 'moral

- convicted of any offence and sentenced to imprisonment for a period of seven years or more, he ceases to be eligible for appointment as director in any company;
- an order for disqualifying him for appointment as director has been passed by a court or the Tribunal and the order is still in force;
 - he has not paid his 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 date fixed for payment;
 - he has been convicted of an offence dealing with related party transactions under Section 188 at any time during the last preceding five years;
 - he has not complied with the requirement of Director Identification Number. [S. 162(3)]

A private company may by its articles provide for additional disqualification. [S. 164(3)]

Disqualification on conviction [Proviso to S. 164].—The Proviso contains the following three points about the effect of conviction:

The disqualifications stated in clauses (d), (e) and (f) are not to take effect (i) for 30 days from the date of conviction; (ii) where an appeal or petition is preferred within such 30 days, until the expiry of seven days from the date on which such appeal or petition is disposed of; or (iii) where any further appeal or petition is preferred against the order or sentence within seven days, until such further appeal or petition is disposed of.

Ineligibility for reappointment [S. 164(2)].—Where such person is already a director of a public company,—

- which has not filed the annual accounts and annual returns for any continuous three financial years, (commencing on and after the first day of April, 1999); or
- has failed to repay its deposit or interest on it on due date or redeem its debentures on due date or pay dividend and such failure continues for one year or more. (The person so disqualified shall not be eligible for appointment as director of any other public company for five years from the date of the specified types of failure).¹¹³

'delinquency' or 'moral turpitude' has not been defined. All offences do not necessarily involve moral turpitude, e.g., violation of traffic rules, or non-compliance with certain statutory requirements such as filing of returns. Though the expression is vague, it is generally taken to mean a conduct contrary to justice, honesty, modesty or good morals. It implies depravity and wickedness of character. In Bulwer's Law Dictionary it is described as an act of baseness or depravity in private or social duties which a man owes to his fellowmen or to the society in general, contrary to the accepted and customary rule of right and duty between man and man. The offence must be of such a type as would bring the offender into disrepute among the right thinking members of the society.¹¹⁴ Now moral turpitude is not required.

113. *Srinivas India Ltd v Union of India*, (2005) 124 Comp Cas 101 (Minn). These provisions have been held valid. The circular prohibiting company directors from these provisions, also valid. Also to the same effect, *Saurashtra Cement Ltd v Union of India*, (2007) 126 Comp

Provision for additional disqualifications

A private company which is not a subsidiary of a public company may add to the above further disqualifications.¹¹⁴ It has been held by the Supreme Court¹¹⁵ that this is an indirect way of saying that a public company and its subsidiary private companies cannot increase the disqualifications or add any other qualification, such as, for example, that the candidate should be a graduate.

The restriction on providing for additional disqualifications has been held to be not applicable to a Stock Exchange Public Company. Such a company can increase the grounds of disqualification for the membership of its governing council.¹¹⁶

Number of directorships [S. 165]

A person cannot hold office of a director in more than 20 companies (including alternate directorships) at the same time. Facts are the only basis on which a director can properly exercise his judgment in the affairs of the company. No man can have the detailed knowledge of the facts of many enterprises. Where a director already holding office in 20 companies is appointed, the appointment shall not take effect and shall become void unless within 15 days he vacates his office in some companies so as to bring down the number to 20.

In the case of a public company, the maximum number of public companies in which a person can be a director has been restricted to 10. For reckoning this limit of public companies, directorship in private companies that are either holding or subsidiary company of a public company is to be included.

The members of a company may by a special resolution specify any number of companies in which a director of the company may act as directors. [S. 165(2)]

After the commencement of the Act, directors holding office in companies more than those permitted under the section have to choose the companies in which he would like to continue and intitiate his resignation to others. After such resignation, he cannot accept directorship in more than the specified number except up to one year. Contraventions of the section are punishable.

Vacation of office by directors [S. 167]

The office of a director is vacated in the following cases:

- (i) when he incurs any of the disqualifications specified in Section 164;

Cas I: (2007) 2 Guj LR 1384; Hindustan Club Ltd v Pravin Kumar Jain, (2005) 64 SCL 65; (2005) 129 Comp Cas 17E (Cal); Declaration of disqualification before appointment or nomination. Pravin Jain v Hindustan Club Ltd, (2006) 5 Comp L 1; (2005) 62 SCL 610 (Cal).

114. S. 164(3).

115. Cricket Club of India v Mahadev L Apte, (1975) 45 Comp Cas 574 (Bom).

116. Kishor Harkishin Merchant v Saharsikha-Kutch Stock Exchange Ltd, (2002) 109 Comp Cas 269; (2000) 1 GLP 331. (2000) 1 Guj LR 507.

- (b) he absents himself from all the meetings of the Board held during a period of 12 months with or without seeking leave of absence of the Board;¹¹⁷
- (c) he acts in contravention of the provisions of Section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested;
- (d) he fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested in contravention of the provisions of Section 184;¹¹⁸
- (e) he becomes disqualified by an order of a court or the Tribunal;
- (f) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced to imprisonment for not less than six months. The office has to be vacated even if an appeal has been filed against the conviction;
- (g) he is removed in pursuance of the provisions of the Act;¹¹⁹

117. See, *Daval Tahrir Ltd v V.K. Paripurnath Iyengar*, (1962) 52 Comp Cas 242 (Mad), where the director proved that of the three alleged meetings two were never held and the other was notified late, but even so the court did not reinstate him, as he was not re-elected at a subsequent meeting. Though a director may question the fact of a meeting or the fact of notice to him, he is not entitled to an opportunity of being heard before the section is permitted to operate. *Sukhbir Mehta v Kilest Ltd*, (1988) 3 Comp LJ 224 (Mys); *Gaurav Kapoor v Linenstar Engg & P Ltd*, (2005) 128 Comp Cas 237 (CLB), in point that those meetings were actually held. The matter is within the jurisdiction of ordinary civil courts and, therefore, the court can examine no evidence whether the requirements for vacation of office have been made out or not. *K. Radhakrishnaia v Durancon Aspinalls & Feirs (P) Ltd*, (1998) 9L Comp Cas 31 (1997) 21 W 730 (Mad). Notice of meeting given at a time when the director was known to be abroad and, therefore, unable to attend and there was also no proof of despatch, no automatic vacation. *T.M. Patel v City Hospitals Ltd*, (2000) 2 Comp LJ 84; (1999) 97 Comp Cas 216 (Ber). *Aminza Modi v ECI Agrotech Ltd*, (1999) 30 CLA 14 (CLB), meeting not properly convened; *Puneet Goyal v Khargpur Resorts Ltd*, (2000) 35 CLA 259 (CLB); also no proof of notices. *S. Ganguly v Mitali & SG Panigrahi*, (1999) 96 Comp Cas 319 (CLB), notice sent to an address where the director was not residing, failure to attend meeting did not constitute a ground for automatic vacation. *Kamal K. Dutt v Ruby General Hospitals Ltd*, (2000) 36 CLA 214, 231 (CLB), notice at local address, when the director was in abroad, served no purpose. *Ati Singh v DIS Enterprises (P) Ltd*, (2002) 109 Comp Cas 397 (KLH); *Dalip Singh Sehrai v Mar Kurru Coal Carriers (P) Ltd*, (2006) 130 Comp Cas 611 (CLB); time is not to be computed from calendar month.

118. The matter of the appointment of a director, his qualification and disqualification, vacation of office, etc, are matters of the jurisdiction of ordinary civil courts. *Acadithi Explosives (P) Ltd v Principal Subordinate Judge*, (1967) 62 Comp Cas 301 (AP); *Suryalal Chipli v Rayamandir Co-operative Society Ltd*, (2002) 108 Comp Cas 133 (CLB); in the case of a closely held company the dealings of the company with a firm in which the director was interested was known to all the directors. The failure to formally disclose his interest did not invalidate the resolution.

119. See, *Vithalram Bhimjiwala Patel v Mahomed Haji Sethi* (1940) 48 Comp Cas 518 (Gau); All matters relating to appointment, disqualification, vacation of office, removal of directors are matters for the jurisdiction of civil courts and not those of company courts. See *Punjab Woolens and General Mills (P) Ltd v R. Kaushik*, (1968) 39 Comp Cas 249, (1969) 1 Comp LJ 289 (P&EB), followed in *R. Prashant v Sri Narayan Charmer Parijatak Iyengar*, (1980) 50 Comp Cas 611 (Ker); *Tej Prakash S. Dangi v Government Pharmaceutical Ltd*, (1997) 89 Comp Cas 270 (AT). There is no provision in Companies Act which gives exclusive jurisdiction in all company matters to company courts. *Mylavarapu Venkateswara Rao v Molihy Krishna Rao*, (1947) 17 Comp Cas 65 (Mad); *Malati Jummanishwari Rao v Pendyala*

- (ii) he, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment.

A director is obliged at the pain of penalty to leave office when he incurs any of the above disqualifications.¹²¹

Automatic operation.—The tenor of the section and the penalty provision which becomes effective from the date of disqualification show that the operation of the section is automatic. The office becomes vacated from the date of disqualification. No formalities, no show-cause notice, no hearing and no decision are necessary. All that is necessary is that there should be proof of the happening of the disqualifying event.¹²²

Removal of directors

Removal by shareholders [S. 169]. Section 169 provides that "a company may, by ordinary resolution, remove a director before the expiration of his period of office". Section 184 of the English Companies Act, after providing the same, adds "notwithstanding anything in its [company's] articles or any agreement between it and him". But despite the absence of these words from the Indian provision, the same effect would follow as any provision in the company's articles or in any agreement between a director and the company by which the director is rendered irremovable by an ordinary resolution would be void, being contrary to the Act. The section is intended to do away with arrangements under which directors were either irremovable or removable only by extraordinary resolutions. "The field over which [the section] operates is thus extensive".¹²³ But it admits of the following exceptions:

¹²⁰ *Pankarayyaiah*, (1970) 40 Comp Cas 751; AIR 1970 AP 225; *Mazdar Motors v M. Razikumar*, (1982) 52 Comp Cas 362 (Ker); suits for refund of subscription money, *Varse Industries Ltd v Shantadurga Bank*, (1996) 87 Comp Cas 916 and relating to forfeiture of shares; *T. P. Prakash S. Desai v Commando Pharmaceuticals Ltd*, (1997) 89 Comp Cas 290 (AP), have been held to be matters of civil court jurisdiction.

¹²¹ Where there is no provision in the articles regarding resignation, a director's resignation takes effect from the date of submission. Formality of acceptance by the Board is not necessary. He will not be liable for any default happening afterwards, such as failure to file accounts. *T. Munni v State*, (1975) 46 Comp Cas 613 (Mad). For a study of the liability of such directors see, I. S. Sealy, *DISQUALIFICATION AND PERSONAL LIABILITY OF DIRECTORS* (1967). *K. Venkateswaran v Rockwani (India) Ltd*, (2002) 136 Comp Cas 494; (2002) 1 ALD 547; (2002) 1 AIR LT 759; Section 169 matters fall within the jurisdiction of the company court.

¹²² *Blairit Litigation v JHL Portfolios Leasing Ltd*, (1992) 24 Comp Cas 20 (Del). If the company's records show despatch of Board meeting notices, it would create a presumption under S. 20 of proper service. Under S. 162, directors have to file their consent to act as such with the company. Not applicable to directors reappointed after retirement by rotation and those who apply for免職 under S. 161. Directors have also to file within 30 days of appointment a consent letter with the Registrar. Not applicable to reappointment, alternate and additional directors and those named in the articles as first directors. The vacating of office is a matter for civil court jurisdiction and not company court. *K. Radhakrishnan v Thirumurthy Agnihotri & Fets (P) Ltd*, (1996) 91 Comp Cas 31; (1997) 2 LW 790 (Mad).

¹²³ Any restriction upon the power of removal would be void. See, *Zainul Quam Khan v Raj Kumar Kapoor*, (1993) 54 Comp Cas 12; ILR 1982 Del 156.

- It does not apply to the case of a director appointed by the Tribunal in pursuance of Section 242.
- It does not apply to the case of a company which has adopted the system of electing two-thirds of its directors by the principle of proportional representation under Section 163. [Proviso]¹²³

A special notice of a resolution to remove a director is required, that is, notice of the intention to move the resolution should be given to the company not less than 14 days before the meeting.¹²⁴ This is to enable the company to inform the members beforehand. As soon as the company receives the notice, it must furnish a copy of it to the director concerned who will have the right to make a representation against the resolution and to be heard at the general meeting. If the director submits a representation and requests the company to circulate it among the members, the company should, if there is time enough to do so, send a copy of the representation to every member of the company to whom notice of the meeting is sent. If this is not possible, the representation may be read out to the members at the meeting.¹²⁵

¹²³ The section also does not apply to nominated directors and those of a Government company. The matter of appointment and removal is in the realm of contract and therefore cannot be challenged under writ jurisdiction. *Purushottam v. State of Orissa*, (1994) 90 Comp Cas 859 (Bom); *K. Khatib v. Astrotech Technologies (P) Ltd.*, (2016) 196 Comp Cas 461 (Kar), otherwise the provision is general in nature, applies to all directors, whether permanent, life, fixed term, or in accordance with articles.

¹²⁴ This privilege of members to propose by special notice for appointment or removal of a director cannot be subjected to the requirement of S. 111 relating to circulation of members' resolutions. *Goyal Tyres v. Sandeep Hinds & Transportation Ltd.*, AIR 1990 Cal 46 (1991) 1 Comp L 539 (1990) 64 Comp Cas 516. Followed in *Karnataka Bank Ltd v. A.B. Damodar*, (1993) 2 CLJ 230; (1994) 29 Comp Cas 412; *Prakash Readymade Ltd v. Vijaykumar Narang*, (1993) 4 CLJ 562; (1995) 83 Comp Cas 369; I.L.R. 1994 KAR 408 and in *Emaukulam Financials & Karies (P) Ltd v. Joseph Chandy*, (1998) 92 Comp Cas 775 (1998), the company was not entitled to a direction that the requirements of circulation of a members' resolution should be satisfied. Also to the effect that the requirement of circulation of members' resolution has not to be satisfied is *Karsifidh Surendra Prasad v. Kamala Motor Transport Ltd.*, (1996) 28 CLA 235 (1996) 99 Comp Cas 519 (C.I.B.). Contrary rulings are *Finley v. Indian Waterworks Assn. Ltd.*, 1976 IBL 349 (Ch. D); *Amar Nath Malhotra v. MCS Ltd.*, (1993) 26 Comp Cas 469 (Del). A resolution passed without special notice would be invalid irrespective of the fact whether the meeting was valid or not. *Queens Kitchens and Locks (P) Ltd v. Sheena Jose*, (1993) 26 Comp Cas 821 (Ker).

¹²⁵ S. 169. The meeting should be a valid meeting on all its aspects. *MD Melting v. Myinport Hinda Permanent Found Ltd.*, (1990) 1 Comp Cas 87; (1990) 1 Comp L 73 (Mad). A resolution without affording the opportunity of making a representation would be null and void. Where there is no evidence of the posting of a letter to the director sought to be removed, it is a denial of opportunity. *Bhawarkpur Simkhuli Beverages (P) Ltd v. P.K. Pandya*, (1996) 17 CLA 170 (T&F). The proviso to sub-s. (8) provides that the representation need not be circulated nor read at the meeting when, on application to the Tribunal, the latter is satisfied that the rights conferred by the section are being abused for giving needless publicity to defamatory matter. The director may be ordered to pay the costs of the application even if he is not a party to it; see for a discussion on the point, *Jarvis v. Peter Whitehouse (Corporation)*, (2000) 23 CLC 348 (Ch. O). The same considerations apply to the representation of an auditor. *Dinkha Devi Agrawal v. Tami Projects (P) Ltd.*, (2006) 7 SCC 352; (2006) 133 Comp Cas 236. If there is no proof of notice of meeting, the meeting as well as removal become invalid.



Where a meeting is requisitioned by the shareholders for the very purpose of removing a director, the Supreme Court laid down that it is not necessary for the requisitionists to state the reasons on which they wish to proceed against the director.¹²⁶ Earlier the Bombay High Court had expressed the opinion that a notice of removal which does not mention the grounds would be against the meaning and intent of the Companies Act because it would defeat the director's statutory right of representation in the sense that it would be impossible to write a representation without proper information. This proposition was not accepted by the Supreme Court. CHINNAPPA REDDY J¹²⁷ cited an observation of COTTON LJ¹²⁸

Then there is a second object, "To remove, (if deemed necessary or expedient) any of the present directors, and to elect directors to fill any vacancy in the board." The learned judge below thought that too indefinite, but in my opinion a notice to remove "any of the present directors" would justify a resolution for removing all who are directors at the present time; "any" would involve "all". I think a notice in that form is quite sufficient for all practical purposes.

The court also cited a passage from the speech of FRS [J]:

The second objection was, that a requisition to call a meeting "to remove (if deemed necessary or expedient) any of the present directors" is too vague. I think that it is not. It appears to me that there is a reasonably sufficient particularity in that statement. It is said that each director does not know whether he is attacked or not. The answer is that all the directors know that they are laid open to attack. I think that any other form of requisition would have been embarrassing, because it is obvious that the meeting might think fit to remove a director or allow him to remain, according to his behaviour and demeanour at the meeting with regard to the proposal made at it.

The court also pointed out that the company cannot go behind the apparent exercise of a shareholder's statutory right of requisitioning a meeting. The company was accordingly not allowed to say that the LIC in requisitioning the meeting had gone beyond its constitutional competence. That aspect

¹²⁶ L/C v Escorts Ltd, (1966) 1 SCC 264 (1966) 1 Comp LJ 91 (1986) 59 Comp Cas 543. This Section cannot be used for calling a meeting for a declaration that election of directors at a previous meeting was not valid. S. Somayaji v Eymore Benefit Society Ltd, (1992) 75 Comp Cas 396 (Mad). Where for the removal of two directors of a banking company a letter was written by the company to the Reserve Bank recommending removal on stated grounds, it was held that a copy of the same letter should have been attached with the notice to the directors concerned, without which the notice was not valid. BG Somayaji v Karnataka Bank Ltd, (1995) 83 Comp Cas 649 (Kant). The stay order on the ground of incomplete notice was vacated by the Supreme Court on the condition that a letter containing necessary information be circulated before the meeting, P Rajen Rao v BG Somayaji, (1995) 83 Comp Cas 662 (SC).

¹²⁷ Overruled Lands Ltd v Union of India, (1964) 5 Comp LJ 367 (1985) 57 Comp Cas 241 (Bom).

¹²⁸ L/C v Escorts LM, (1996) 1 SCC 264 at p 340 (1996) 1 Comp LJ PL (1986) 59 Comp Cas 548.

is for the State to take care of.¹²⁴ The Company Law Board (now Tribunal) restrained the company from putting the resolution before the meeting where it found that the member sending the notice was not honestly motivated. He had made it a practice of sending such notices to all companies wherein he was a member.¹²⁵

The vacancy thus created may be filled at the same meeting, provided special notice of the proposed appointment was also given. The director so appointed would hold office for the period for which the director removed would have been in office. If the vacancy is not filled at the meeting, it may be filled by the Board as a casual vacancy, provided that the director removed should not be reappointed. [Sub-s (5) and (6)]

The section, however, does not deprive the person removed of any compensation or damages payable to him on the termination of his appointment.¹²⁶

The powers of management are generally vested in the directors and the shareholders do not, ordinarily, have the right to interfere in the matter. But if they are not agreeable with the policy of a particular director, they can use their power of removal and thus have a greater voice in the administration of the company.¹²⁷

The section applies to private companies as well. But they can evade its operation in the manner shown by the decision of the House of Lords in *Sugden v Faith*.¹²⁸

A small private company was composed of three persons, C, K and G, each holding 100 shares of £1 each. C and G were directors. Clause 9 of the articles of association provided that when it was proposed to remove a director he would, on a poll, have the right to three votes per share. C and K, being dissatisfied with G as a director, proposed to remove him. He demanded a poll, at which he cast 300 votes for his 100 shares and thus defeated the motion.

The trial judge held that the clause which gave a shareholder treble voting power was invalid as it would make a "mockery" of Section 184. The

¹²⁴ The court cannot prevent shareholders from exercising their power. It can only examine whether the procedure prescribed by the Act has been followed or not. *Khetan Industries (P) Ltd v Meenakshi Prasad*, (1995) 14 CLA 194; AIR 1995 Bom 43; (1994) 4 Bom CR 370, not available as a result of removal of a director.

¹²⁵ *Dabur India Ltd v Aril Kumar Poddar*, (2002) 103 Comp Cas 293 (CLB); *Housing Development Finance Corp v Surendra K Patnaik*, (2002) 112 Comp Cas 630 (CLB), another case in which the company was restrained from considering the resolution because the member concerned had made it a practice to send such notices year after year.

¹²⁶ S. 169(7)(ii). Though if the removal is in accordance with the articles or terms of service, no compensation may be payable. *Reed v Astoria Garage (Groombridge) Ltd*, 1952 Ch 637 (CA).

¹²⁷ Where the directors do not call a meeting on requisition, the requisitioning shareholders can themselves call it. In their notice of meeting the requirement of explanatory statement is not applicable. The court did not restrain the meeting and also held that S. 284 (now S. 169) is not applicable to the removal of a managing director from his management as distinguished from his directorship. *S Venkateswari v Venkateswari Saloor Extrusion* (1994) 1994 (1) Comp Cas 463 (Mad).

¹²⁸ 1970 AC 139; (1970) 2 WLR 272 (HL).

Court of Appeal, as upheld by a majority of the House of Lords, reversed this decision. The majority found that the clause was consistent with the Act. Lord DONOVAN pointed out that Parliament, being fully aware of the phenomenon of articles of association carrying "weighted votes" made no provision against it and left to companies and their shareholders liberty to allocate voting rights as they pleased.

The decision has been criticised. It has been described as one that defeats "the clear intention of the legislature"; that "contravenes the spirit, if not letter, of Section 184"; that "severely evades of the Companies Act".¹³⁴ Its merit, however, has not been ignored. "In this particular field it may be highly desirable that 'partners' should be safeguarded in directorships, whether by means of special voting rights or by means of shareholders' voting agreements".¹³⁵ In a South African case¹³⁶ two shareholders of a company contracted between themselves not to vote on a resolution removing the third from his office of director. They were restrained from voting against the terms of their agreement. Now another remedy that would be available to a director of a small private company who has been successfully removed from office is to apply for winding up on the just and equitable ground. In the words of Lord WILBERFORCE:¹³⁷

The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some underlying obligation of his fellow members in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved.

In a two-member-director company the attempt of the majority shareholder to remove the minority shareholder (49 per cent) from his office as director was frustrated by the latter by not attending the meeting. The court ordered a meeting to be called and held to consider the motion and that the meeting would be valid even if only one member attended. The quorum provision cannot be used so as to veto the power. The decision highlights the importance of the majority's statutory right to remove a director.¹³⁸

134. Clive M. Schmitzoff, "HL Sanction Evasion of the Companies Act" (1970) JBL 1. See also, D. Prentice, "Removal of Directors from Office" (1969) 32 Mod L Rev 693 and Bushell v Bulk, 1970 AC 1099 (1970) 2 WLR 272; Beattie, "The Removal of Company Directors" (1980) JBL 17 where the decision has been supported.

135. R.C. Beattie, "A Director Directly in the Saddle" (1959) 5 ALJ 469; noted, "Removal of Directors" (1921) 75 CAL WN 1; Journal.

136. Stewart v Schmid, (1956) 4 SA 791; Bushell v Smith, 1970 AC 1099; (1970) 2 WLR 272; (1970) 1 All ER 53 (HL).

137. Westbourne Chillerus (Jd. rr, 1973 AC 360; (1972) 2 WLR 1289 (HL).

138. Open Photography Ltd, re, 1969 BCAC 763 (Ch D); Rohit Chennamari v Disha Research and Mktg Services (P) Ltd, (2005) 124 Comp Cas 457; (2005) 57 SCL 383 (CIB), two-member, two-director company, one could not remove the other because latter did not attend meeting, restitution ordered. Malhar Dulemar Nagni v Sijamata Sugars (P) Ltd, 2014 SCC OnLine CIB 153k (2015) 189 Comp Cas 417, company in the nature of quasi-partnership with equality of shareholding and powers, removal of a director without proper notice was viewed as an act of oppressive nature.

The procedure prescribed by this section is not applicable where a relief sought under Section 242 contemplates en bloc removal of all the directors.¹³⁹

Obstruction to causing extraordinary general meeting for removal

The suit was for direction to facilitate holding of extraordinary general meeting as requisitioned. In consequence, voting rights of shareholders and directors were suspended so as to make proceedings before the Company Law Board to be not maintainable. The company failed to supply the list of members to requisitionists. This caused prejudice to shareholders and directors. Interim relief was granted directing the company to supply the list. [Companies Act, 2013, S. 100]¹⁴⁰ On appeal to the Supreme Court, the High Court order was held to be not proper. Grant of interim relief without recording any reasons as to string *prima facie* case, set aside.¹⁴¹

Removal by Company Law Tribunal [S. 242(2)(h)]

When, on an application to the Tribunal for prevention of oppression or mismanagement, it finds that a relief ought to be granted, it may terminate or set aside any agreement of the company with a director or managing director or other managerial personnel. When the appointment of a director is so terminated he cannot, except with the leave of the Tribunal, serve any company in a managerial capacity for a period of five years.¹⁴² It is necessary that the Central Government should be notified of the intention to apply for such leave. This is to enable the Tribunal to hear the Central Government's point of view on the matter of leave. Neither can he sue the company for damages or compensation for loss of office.¹⁴³

Resignation [S. 168]

In a case before the Madras High Court,¹⁴⁴ of the two directors of a company, one died and the other wanted to resign. There was no provision in the company's articles about resignation. Nor was there anything in the Companies Act as to whether, and by what procedure, a director could resign. The Act, however, indirectly recognised resignation by the provisions in Section 318 [1956 Act] one of which was that no director was entitled to compensation if he resigned his office. If there is a provision in the articles, resignation will take effect in accordance with such provision and, if there is no provision, resignation will take effect in accordance with its terms. The court accordingly held that the resignation was effective even when no other director was in office, but added that no resignation can

139. *Sles Specialities Ltd v Standard Distilleries & Breweries (P) Ltd.* (1997) 90 Comp Cas I (Mad).

140. *Bijoli J Patel v Jyoti Ltd.* 2015 SCC OnLine Guj 3128 (2015) 191 Comp Cas 343.

141. *Jyoti Ltd v Bijoli J Patel.* (2015) 19 SCC 546 (2016) 191 Comp Cas 371.

142. S. 242(1)(b).

143. S. 243(1)(c) contains penalty provisions. Disputes about appointment, removal, qualifications, etc., are matters within the jurisdiction of ordinary civil courts and not that of company courts. *Prakash Knuckles Ltd v Vijay Kumar Narang.* (1993) 4 E.L.J 561 (1995) 83 Comp Cas 544, 11 B.R. 1994 KAR 408.

144. *SS Lakshmi Dilli v Registrar of Companies.* (1977) 47 Comp Cas 152 (Mad).

avail a director to evade his obligations by severing his connection with the company.¹⁴⁵

Once a director has given a notice of resignation of his office, he is not entitled to withdraw that notice, but, if it is withdrawn, it must be by the consent of the company properly exercised by their managers who are the directors of the company.¹⁴⁶

Now, the provisions of the new section [S. 168] may be noted. A director may resign from his office by giving a notice in writing to the company. On receiving it, the Board has to take notice of the same. The company has then to intimate the Registrar in such manner, within such time and in such form as may be prescribed. The company has to place the fact of such resignation in the report of directors laid in the immediately following general meeting of the company. The director has also to send a copy of his resignation with detailed reasons to the Registrar within 30 days of the resignation in the prescribed manner.

The resignation takes effect on the date on which it is received by the company or the date specified in the notice whichever is later.

The director is to be responsible for anything wrong taking place in his tenure and which is attributable to him. Where all the directors resign or vacate office, appointments may be made by the promoters, or, in their absence, by the Central Government. They are to hold office till new directors are appointed by the company in general meeting.

POWERS OF DIRECTORS

General powers vested in Board [S. 179]

Section 179 declares that "subject to the provisions of the Act, the Board of directors of a company shall be entitled to exercise all such powers and to do all such acts and things as the company is authorised to exercise and do".¹⁴⁷ The effect of this section is that subject to the restrictions contained in the Act, and in the memorandum and articles of the company, or in any regulations not inconsistent with them including regulations made by the company in general meeting,¹⁴⁸ the powers of directors are co-extensive

145. *Muthur Curr (India) Ltd v Kewaswamy P Arun*, ILR 2004 KAR 1091; (2004) 51 CLA 243, effective when communicated to the Board. *L Srinivasan v Ravi Nidhi Ltd*, (2005) 12a Comp Cas 140 (C.B.), after such communication, directors bound to inform Registrar in appropriate form.

146. *Glossop v Glossop*, (1907) 2 Ch 370-97 (T. 372). The notice of resignation must be addressed to the company. A letter addressed to a third party has no effect. *Registrar of Co-operative v Orissa Paper Products Ltd*, (1988) 63 Comp Cas 460 (Ori). A person appointed to the post of managing director of a government company has a right to resign though he is appointed by the President to hold office during the pleasure of the President. *Prasanta Chandra Sen v Union of India*, (1990) 67 Comp Cas 57 (Cal).

147. A director, therefore, cannot be deprived of his right by the other directors. *Puhrink v Richmond Consolidated Mining Co*, (1878) LR 9 Ch D 610. The Board of directors have the power to regulate the working hours of the company's employees. *Metallurgical & Engg Consultants (India) Ltd v Mecon Executive Assn*, (1993) 28 CLA 381 (MP).

148. No regulation made by the company in general meeting is to invalidate any prior act of the Board which would have been valid if such regulation had not been made. [S. 179(2)]

with those of the company itself. Once elected and in control, the directors have almost total power over the operations of the company, until they are removed. The share market crash highlighted the problem inherent in directors' autonomy over all company affairs. There is no restriction on the appointment of directors. There are, however, two important limitations upon their powers. Firstly, the Board is not competent to do what the Act, memorandum and articles require to be done by the shareholders in general meeting and, secondly, in the exercise of their powers the directors are subject to the provisions of the Act, memorandum and articles and other regulations not inconsistent therewith, made by the company in general meeting. "Individual directors have such powers only as are vested in them by the memorandum and articles. It is true that ordinarily the courts do not unsuit a person on account of technicalities. But the question of authority to institute a suit on behalf of a company is not a technical matter. It has far reaching effects. It often affects policy and finances of the company. Thus unless the power to institute a suit is specifically conferred on a particular director, he has no authority to institute a suit on behalf of the company ... such power can be conferred by the Board of directors only by passing a resolution in that regard."¹⁴⁷

"The Act thus tries to demarcate the area of proper management control and proper shareholder control."¹⁴⁸ But however precise the demarcation may be, there will always be a scope for clash between the two basic organs of the company, namely, shareholders and directors, as to their respective powers. A prototype of the clash which they are likely to pick up is *Automatic Self-Cleansing Filter Syndicate Co Ltd v Crumlinham*.¹⁴⁹

A company had power under its memorandum of association to sell its undertaking to another company having similar objects. By its articles the general management and control of the company were vested in the

¹⁴⁷ *Al-Arin Stations (P) Ltd v Vessel M V Loyal Bini*, [1997] 17 CLA 204 (Cal), per Basu Lal Jain J who construed the managing director in his attempt to get possession of a ship because he had no authority of the Board of directors to sue. Where the directors by their resolution authorised a particular director and he delegated the power to an officer of the company, an appeal filed by that officer was held to be incompetent because it was not necessary that for every piece of work a Board resolution should be passed. *Hindustan Petroleum Corps Ltd v Sardar Chand*, AIR 1991 P&J 185, [1991] 21 Comp Cas 257 (P&H). The courts do not interfere in decisions of corporate bodies made through responsible organs. *U.P. Financial Corp v Naini Oxygen & Acetylene Gas Ltd*, [1995] 2 SCC 754, [1995] 17 CLA 214, the court did not interfere in the decision of a corporation to enforce recovery by disposing of the unit of the borrower and did not accept the argument that more loans should have been provided to keep the unit afloat. *AOI India Ltd v Zoro Trading & Co (P) Ltd*, [1996] 26 Comp Cas 359 (Pat), winding up petition on behalf of company filed by person not authorised, incompetent.

¹⁴⁸ See, Henry G. Maine, "The Higher Criticism of the Modern Corporation" (1962) 62 Columbia L Rev 399, 408.

¹⁴⁹ [1936] 2 Ch 34, 44, 117, 651. Followed in India in *Murarka Paint and Vernish Works Ltd v Adelade Murarka*, (1960) 43 CWN 32, AIR 1961 Cal 251; [1961] 31 Comp Cas 301, which relies to a large number of decided cases on the point. *A.P. Petrol v Hindustan Trading Corps (P) Ltd*, [1967] 37 Comp Cas 266; AIR 1968 Ker 149; *Suburban Bus & Tram (P) Ltd v Bharathi*, [1967] 2 Comp L 182; AIR 1969 Ker 206, [1969] 38 Comp Cas 13 (Ker), where the members were not allowed to interfere in the directors' discretion.

directors subject to such regulations as might from time to time be made by extraordinary resolution. Particularly important was the provision in the articles by which directors were empowered to sell or otherwise deal with the property of the company on such terms as they thought fit. The shareholders passed a simple resolution for the sale of the company's assets on certain terms and required the directors to carry the sale into effect.

On the director's refusal to do so it was contended by the shareholders that it was a mere question of principal and agent. The shareholders are the principal, and directors, the agents, and it would be an absurd thing if an agent should act like a dictator and manage the principal. But it was held that "directors are agents not of a majority of the shareholders, but of the company, of the whole entity made up of all the shareholders. And if the whole entity of shareholders has entrusted the directors with a particular power a simple majority could not interfere in exercise of it."

In a subsequent case, *Baxwell Ltd*¹⁵² observed:¹⁵³ "Even a resolution of a numerical majority at a general meeting cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs." In another leading case¹⁵⁴ *Greef Ltd* explained the principle in the following words:

A company is an entity distinct alike from its shareholders and directors. Some of its powers may, according to articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose action they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of the shareholders.

This principle was followed in *Scott v Scott*¹⁵⁵ and applied to the case even of a private company. The court observed:

Under the articles of this private company the management of the business and the declaration of the interim dividends were both assigned to the directors. That being so, they were not subject to any control in

152. *Gilmiphine & Tycoster Ltd v Stanley*, (1906) 2 KB 39 99 LT 37 See also, *Salmon v Quin & Ayres Ltd*, (1909) 1 Ch 311; 100 LT 161 (CA).

153. *John Shaw & Sons (Salford) Ltd v Shaw*, (1935) 2 KB 113 (CA).

154. (1943) 1 All ER 592. For an Indian authority see, *MK Srinivasan v WS Subramanian Iyer*, (1932) 32 Comp Cas 147; AIR 1932 Mad 100, where the directors were not allowed to exercise a power expressly vested in the shareholders. Followed in *AP Pollock v Hindustan Trading Corp* (1957) 37 Comp Cas 256; AIR 1955 Ker 149. See also, *Mirrata Paint and Vernish Works Ltd v Midland Minerals*, (1960) 65 CWN 32; AIR 1961 Cal 251; (1961) 31 Comp Cas 311, which refers to a large number of decided cases on the point.

that respect by the shareholders in general meeting. It is true that if the company in general meeting disapproved of the management or the declaration of an interim dividend, they could remove the directors, but the general meeting could not, as the articles stood, directly interfere by resolution with the management or the declaration of an interim dividend. The division of authority is important even in the case of what may be called family companies and having regard to the liability of directors as occupying a fiduciary position, it is necessary that it should be strictly observed.

Thus the relationship of the Board of directors "with the general meeting is more of federation than one of subordinate and superior".¹⁵⁵

These principles have been generally followed by the courts in India. For example, in a case before the Kerala High Court,¹⁵⁶ by the articles of a banking company, the power of management was vested in the directors. The shareholders by a resolution pressed the directors to foreign a debt. The court held that the directors were entitled to enforce the payment of the debt.¹⁵⁷

Shareholders' intervention in exceptional cases. "But the fact should not be overlooked that the company is an institution owned and controlled by its shareholders. According to the legal theory the shareholder is the ultimate and final authority within the corporate enterprise."¹⁵⁸ The Act itself provides in the second Proviso to Section 179(1) that the Board is not to exercise any power or do any act or thing which is directed or required, whether under this Act, or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting. The inherent, residuary and ultimate powers of a company lie with the general

155. R.C. Beattie, "The Range of a Company's Interests" (1969) 56 SALJ 155, 155.

156. *Suburban Bank (P) Ltd v Thariath*, (1967) 2 Comp L 182; AIR 1968 Ker 346. (1968) 38 Comp Cas 13 (Ker).

157. The directors of a company cannot be restrained from exercising their managerial powers in general, though they can be restrained in reference to some particular act. *Kayalpady Industrial and Commercial Syndicate Ltd v K A Vimalakumar*, (1989) 2 Comp LJ 236; AIR 1989 Mad 15. Unauthorized legal proceedings cannot be ratified. *Berkland Group Holdings Ltd v London and Suffolk Properties Ltd*, 1989 BCAC 103 (Ch D). A solicitor was not permitted to recover his fee for conducting such proceedings. *Fletcher Haze (Bristol) Ltd, re*, 1989 BCAC 108 (Ch D). The courts may have in fact practical difficulties in weighing in review the merits of the Board's decision. "The courts have not been slow to acknowledge that their skill is not that of the businessman, and that the so-called business judgment doctrine acknowledges that it is both unfair to review, with the benefit of hindsight, the Board's decision, and that the court is ill-placed to judge entrepreneurship." Ross Grantham, "The Content of the Director's Loyalty" (1990) 1 JBL 149.

158. T.A.C. Worthington, "Corporate Responsibility" (1969) 56 SALJ 245, 251. Sylvie Hebert, "Corporate Governance 'French Style'" (2004) JBL 656, explaining how after the Cadbury Committee Report on Corporate Governance, France has focused on the way in which companies can be better managed and monitored, explaining important topics like transparency in remuneration and auditing. John Birrell, "Duties of Good Fails in Commercial Joint Ventures? Contractual Duties and Shareholder Remedies" (2005) 16L 364. A. Worthington, "Corporate Governance: Rectifying and Ratifying Directors Breaches" (2000) 16L LQR 638.

meeting of shareholders.¹⁵⁹ Thus the shareholders can interfere in management by replacing the existing management with a new one which would be more responsive to their and the company's interests. This aspect of the relationship between the directorate and shareholders has been highlighted in the decision of the Supreme Court in *LIC v Esorts Ltd.*¹⁶⁰ CHINNAPPA RANJUN J cited a passage from the speech of CURTON LJ.¹⁶¹

It is a very strong thing indeed to prevent shareholders from holding a meeting of the company, when such a meeting is the only way in which they can interfere if the majority of them think that the course taken by the director, in a matter *inter se* of the directors, is not for the benefit of the company.

In the case before the Supreme Court, public financial institutions, including LIC were holding a majority of shares in the company. They requisitioned a meeting to remove nine directors. No reasons were stated. But the background was that the directors had refused to register certain transfers and had engaged the company in a calamitous litigation against the Government and also in a litigation to stay the requisitioned meeting and all this without consulting the principal block of majority shareholders who had so much at stake in the company. The Bombay High Court granted the stay.¹⁶² The Supreme Court vacated it. The shareholders had a right to meet and decide whether the destinies of the company were safe in the hands of the present management. The company had no right to say that the public financial institutions were going beyond their powers in trying to interfere in management, they being constitutionally only investing institutions. They have a right to be vigilant in safeguarding their investment and putting it in the hands of a management which can assure safety and security. In this respect they exercise their elementary right as shareholders. They do not thereby directly undertake to manage the company.

In the following exceptional situations the general meeting is competent to act even in a matter delegated to the Board.

1. *Mala fide*.—In the words of FAZL ALI J of the Supreme Court:¹⁶³ "[O]rdinarily the directors of a company are the only persons who can conduct litigation in the name of the company, but when they are themselves the wrongdoers, and have acted *mala fide* ... and their personal interest is in conflict with their duty in such a way that they cannot or will not take steps to seek redress for the wrong done to the company, the majority of the shareholders [may take steps to redress the wrong]." "The duty of supervision on

¹⁵⁹ See, M.A. Pickering, "Shareholders' Voting Rights & Company Control" (1969) 81 LQR 296.

¹⁶⁰ (1986) 1 SCC 264; (1986) 1 Comp LJ 91; (1986) 39 Comp Cas 568.

¹⁶¹ *Isl of Wight Railway Co v Jamshedji*, (1883) LR 25 Ch D 320; 50 LT 132 (CA).

¹⁶² *Excerts /d v Jam of India*, (1984) 3 Comp LJ 387; (1985) 57 Comp Cas 241 (Bom). The court also relied upon *Islewick v Swift*, (1950) 2 Mai & G 216, 42 ER 80 and *Bentley-Slyman v Jones*, (1979) 1 WLR 638 also involving removal of directors.

¹⁶³ *Surya Chakra Law v Rameshwar Prasad Bhujwak*, (1950) 20 Comp Cas 39; (1949-50) 11 FCIR 673; AIR 1950 PC 133.

the part of this court will thus be confined to the honesty, integrity and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at."¹⁶⁴ *Marshall's Valve Gear Co Ltd v Manning, Wandle & Co Ltd*¹⁶⁵ is a case of this kind.

A and three other persons were the four directors of M Co and they held substantially the whole of the subscribed capital of the company. A was the majority shareholder, but held less than three-fourth. Another company, known as N Co, was committing an infringement of M Co's trademark and the other three directors were interested in that company. With the result that at a meeting of the Board they declined to sanction any proceeding against N Co. A, at a general meeting of the shareholders, resolved and commenced an action to restrain the alleged infringement. The other directors applied for striking down the name of the company on the ground that as the articles had left the powers of management with the Board, the shareholders could not interfere by a simple resolution.

It was held that the majority of the shareholders had the right to control the action of the directors in the matter. NEVILLE J explained the reason thus:

Now it is obvious that in the position in which they (directors) have placed themselves on this question their duty and their interest are in direct conflict. On the one hand, it is their duty as directors to protect the interest of the original patent which is the property of the company; on the other hand, their personal interests are clearly to maintain the validity of the patent which belongs to them. And, therefore, the majority shareholders are entitled to decide whether or not an action in the name of the company shall proceed.

2. Board incompetent.—Secondly, majority of the shareholders may exercise a power vested in the Board when the directors have, for some valid reason, become incompetent to act. One situation would be when all the directors are interested in a transaction of the company. Another illustration is *BN Viswanathan v Tiffins Bitref Asbestos (P) Ltd*,¹⁶⁶ where the power to fill casual vacancies was delegated to the Board, but the appointments made by shareholders in general meeting were held to be valid as at the material time no director was validly in office. Where the circumstances were such that a valid Board could not be constituted, it was held that the majority shareholders could act to protect the interests of the company and they could conduct the company's defence in a suit pending against it.¹⁶⁷

164. *Wilks's Charity*, re, (1855) 3 Mac & G 440; 42 ER 330.

165. (1909) 1 Ch 267; 100 LJ 65.

166. AIR 1953 Mad 520; (1953) 29 Comp Cas 7% the full facts and judgment of the case have been discussed above in connection with appointment of directors. Where the Board of directors is validly constituted and whether its meeting should be stayed is a matter for the ordinary civil court and not a company court. *Mihara's Reports v Apparels Export Protection Council*, (1946) 60 Comp Cas 253 (Del).

167. *Glosseries (P) Ltd v Deb Kent Roy*, (2000) 39 CLA 39 (Cal).

3. Deadlock.—A third occasion for shareholders to intervene would be when the directors are unwilling to act, or, on account of a deadlock, unable to act. The leading case in line is *Barron v. Pather*.¹⁶⁸

There were only two directors on the Board of a company and the one refused to act with the other. There was no provision in the articles enabling the general meeting of the shareholders to increase or reduce the number of directors.

It was held that as there was a deadlock in the administration resulting from the fact that the directors were unwilling to act and exercise their powers, the company had the inherent power to take necessary steps to ensure the working of the company and to appoint additional directors for the purpose.

4. Residuary powers.—The residuary powers of a company reside in the general meeting of shareholders.¹⁶⁹ Thus it has been held that "where a power to allot shares is conferred by the articles of a company on its directors and they act in excess of that power a residuary inherent power remains in the company to validate the allotment by an ordinary resolution in general meeting".¹⁷⁰

Restrictions on powers under statutory provisions

Powers exercisable by resolution at Board meetings [S. 179(3)].—The Act also makes a careful effort to lay down the manner in which certain powers of the company are to be exercised. Section 179 provides that following powers of the company can be exercised only by means of resolutions passed at meetings of the Board: The power (a) to make calls; (b) to authorise buy-back referred to in the first proviso to clause (b) of Section 68(2); (c) to issue securities including debentures; (d) to borrow money; (e) to invest the funds of the company; (f) to grant loans or give guarantees or provide security in respect of loans; (g) to approve financial statements and the Board's report; (h) to diversify the business of the company; (i) to approve amalgamation, merger or reconstruction; (j) to take over a company or to acquire a controlling or substantial interest in another company; (k) any other matter which may be prescribed.

The Board may by its resolution at a meeting delegate the powers to borrow moneys and to grant loans, etc [(d), (e) and (f)] to a committee of directors, the managing director, the manager or any other principal officer of the company, or in the case of branch office, principal officer of the branch.

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, or the placing

168. (1914) 1 Ch 895; 110 LT 129. See also, *Foster v. Foster*, (1916) 1 Ch 582; (1916-17) All ER Rep 834.

169. C.D. Goldberg, "Article 33 of Table A of the [English] Companies Act" 33 Mod L Rev 177.

170. *Bamjiwala v. Bamjiwala*, 1961 1 Ch 212; (1968) 3 WLR 317. Judgment of PLOWMAN J affirmed on appeal on different grounds, (1969) 2 WLR 1107; (1969) 1 All ER 909.

of monies on deposit by a banking company with another banking company on such conditions as the Board may prescribe, is not to be deemed to be a borrowing of monies or, as a making of loans by a banking company within the meaning of this section.

Clause (d) is not to apply to borrowings by a banking company from other banking companies or from RBI, SBI or any other bank established by or under any Act. In dealings between a company and its bankers, the exercise by the company of the power to borrow money [clause (d)] is to mean arrangement made by the company with its bankers for borrowing of money by way of overdraft or cash credit or otherwise and not the actual day to day operation by which the arrangement so made is actually availed of.

Sub-section (4) says that the section is not to affect the right of a company in general meeting to impose restrictions and conditions as to the exercise by the Board of any of the powers specified in the section.

The shareholders in general meeting may place any restrictions on, or otherwise regulate, the exercise of the above powers. Delegation must be by a specific resolution of the Board. In a case where a hire purchase agreement was entered into by directors without authorisation, the agreement was held to be not enforceable against the company. Entries in the company's ledger were not sufficient by themselves to fasten liability on the company.¹⁷¹

Powers exercisable with general meeting approval [S. 180].—Further, Section 180 imposes important restrictions on the powers of the Board of directors of a public company or any subsidiary of a public company. Following powers can be exercised by the Board only with the consent of the company in general meeting:

- (a) sale, lease or otherwise disposal of the whole or substantially the whole of the undertaking of the company; where the company owns more than one undertakings, of the whole or substantially the whole of any such undertakings. Giving the meaning of "undertaking", the Explanation says that (i) undertaking is to mean the undertaking in which the investment of the company exceeds 20 per cent of its net worth as per the audited balance-sheet of the preceding financial year or the undertaking which generates 20 per cent of the total income of the company during the previous financial year. The expression "substantially the whole of the undertaking in any financial year" means 20 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 the company as a result of any merger or amalgamation.
- (c) To borrow money, in cases where the money to be borrowed by the company, together with the money already borrowed, will exceed the aggregate of the paid-up share capital and free reserves, apart from temporary loans obtained from the company's bankers in the

171. Ambika Bus Syndicate (P) Ltd v Rang Nager Credit & Instrument Co (P) Ltd, (1997) 86 Comp Cas R21 (P&H).

ordinary course of business. The proviso to this clause states that deposits in a banking company in the ordinary course of banking business are not to be taken as borrowing of moneys. The Explanation to the clause states that for the purposes of this clause, the expression "temporary loans" means loans repayable on demand or within six months from the date of loan, such as short term cash-credit arrangements, discounting of bills, and issue of other short term loans of a seasonal character, but does not include loans raised for the purpose of financial expenditure of capital nature.

- (d) To remit or give time for repayment of any debt from a director.

If the directors have in breach of the above restrictions sold or leased the undertaking of the company, the title of the purchaser or lessee will not be affected, provided he acted in good faith and with due care and caution. Thus the purchaser must see that the transaction is executed in accordance with the company's articles, because otherwise it would be ineffective to pass any title to him. [S. 180(3)] This restriction does not apply to the case of a company whose ordinary business is to sell or lease property. Where borrowing has been effected exceeding the amount of the paid-up share capital, the lender may not be able to enforce the loan against the company, unless he can prove that he advanced the loan in good faith and without knowledge that the limit had been exceeded. [S. 180(5)]

The consent of the general meeting may be expressed by means of a formal resolution or informally through conduct as it happened, for example, in *Joint Receivers and Managers of Nilan Carson Ltd v Hawthorne*.¹⁷² The hotel premises of the company were handed over to a director of the company under a lease granted by the managing director without the approval of the shareholders. The lessee director had acted with complete honesty and openness and with the agreement of practically all the shareholders who desired that she should run the community home independently of the company. The transaction was held to be not voidable without showing that there was no proper consideration.

Audit Committee [S. 177]

The Board of directors of every listed company and such other class or classes of companies as may be prescribed are required to constitute an Audit Committee. It has to consist of a minimum of three directors with independent directors forming a majority. The majority of the members of the Audit Committee including its Chairperson are to be persons with ability to read and understand the financial statements.

The Audit Committee has to act in accordance with the terms of reference specified in writing by the Board which are to include the following among other things:

- (i) the recommendation for appointment, remuneration and terms of appointment of auditors of the company;

¹⁷² 1988 BCLC 298 (QBD). See also, *Brady v Brady*, 1989 AC 755; (1988) 2 WLR 1308 (HL).

- (ii) review and monitor the auditor's independence and performance, and effectiveness of audit process;
- (iii) examination of the financial statement and the auditors' report thereon;
- (iv) approval or any subsequent modification of transactions of the company with related parties;¹⁷³
- (v) scrutiny of inter-corporate loans and investments;
- (vi) valuation of undertakings or assets of the company, wherever it is necessary;
- (vii) evaluation of internal financial controls and risk management systems;
- (viii) monitoring the end use of funds raised through public offers and related matters.

The Audit Committee may call for the comments of the auditors about internal control systems, the scope of audit, including the observations of the auditors and review of financial statement before their submission to the Board and may also discuss any related issues with the internal and statutory auditors and management of the company. [S. 177(5)]

The Audit Committee has the authority to investigate into any matter in relation to the items specified in sub-section (4) or referred to it by the Board and for this purpose it has power to obtain professional advice from external sources and have full access to information contained in the records of the company. [S. 177(6)] The auditors of a company and the key managerial personnel are to have a right to be heard in the meetings of the Audit Committee when it considers the auditor's report but shall not have the right to vote. [S. 177(7)]

The Board's report under Section 134(3) has to disclose the composition of an Audit Committee. Where the Board had not accepted any recommendation of the Audit Committee, the same has to be disclosed in such report alongwith the reasons therefor. [S. 177(8)]

Vigil mechanism [S. 177(9 and 10)].—Every listed company or such class or classes of companies, as may be prescribed, have to establish a vigil mechanism for directors and employees to report genuine concerns in such manner as may be prescribed. The vigil mechanism has to provide for adequate safeguards against victimisation of persons who use such mechanism and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases. The details of establishment of such mechanism have to be disclosed by the company on its website, if any, and in the Board's report.

173. Provided that the audit committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to such conditions as may be prescribed. [Added by the Amendment of 2015]

Nomination and Remuneration Committee; Stakeholders**Relationship Committee [S. 178]**

The Board of directors of every listed company and such other class or classes of companies as may be prescribed have to constitute the Nomination and Remuneration Committee consisting of three or more non-executive directors out of which not less than one half are to be independent directors. The chairperson of the company (whether executive or non-executive) may be appointed as a member of the Nomination and Remuneration Committee but is not to chair such Committee. [S. 178(1)] The Committee has to identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down and recommend to the Board, their appointment and removal and has to carry out evaluation of every director's performance. [Sub-s (2)] The Committee has to formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy relating to remuneration for directors, key managerial personnel and other employees. [Sub-s (3)]

The Committee has, while formulating the policy under sub-section (3) to ensure that –(i) the level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully; (ii) relationship of remuneration to performance is clear and meets appropriate performance benchmarks; and (c) remuneration to directors, key managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long-term performance objectives appropriate to the working of the company and its goals. Such policy has to be disclosed in the Board's report. [Sub-s (4)]

The Board of directors of a company which consists of more than one thousand shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year has to constitute a Stakeholders Relationship Committee consisting of a chairperson who shall be a non-executive director and such other members as may be decided by the Board. The Stakeholders Relationship Committee shall consider and resolve the grievances of security holders of the company. [Sub-s (5)(6)]

The chairperson of each of the committees constituted under the section or, in his absence, any other member of the committee authorised by him in this behalf has to attend the general meetings of the company. [Sub-s (7)]

In case of any contravention of the provisions of Section 177 and this section, the company is punishable with fine which is not be less than one lakh rupees but which may extend to five lakh rupees and every officer of the company who is in default is punishable with imprisonment for a term which may extend to one year or with fine which is not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both:

Provided that non-consideration of resolution of any grievance by the Stakeholders Relationship Committee in good faith is not to constitute a contravention of this section.

The Explanation appended to the section says that the expression "senior management" means personnel of the company who are members of its core management team excluding Board of directors comprising all members of management one level below the executive directors, including the functional heads.

Contribution to bona fide charitable and other funds [S. 181]

The Board of directors of a company may contribute to bona fide charitable and other funds. Prior permission of the company in general meeting shall be required for such contribution in case any amount the aggregate of which, in any financial year, exceed five per cent of its average net profits for the three immediately preceding financial years.

Power to make political contributions [S. 182]

Before the Companies (Amendment) Act, 1985 (35 of 1985) companies were not permitted to make contributions for political purposes. Now this ban has been lifted, except in the case of Government companies and companies which have been in existence for less than three years. Rest of the companies have been permitted to contribute money to any political party or to any person for political purposes.¹⁷⁴ The amount should not exceed 7½ per cent of the company's net profits during the three immediately preceding financial years. Contribution should be sanctioned by a resolution of the company's Board of directors and that will be sufficient authorisation for all-round validity. Donation given to enable a party to win public support would also be a contribution so also those for publication of a souvenir, brochure, tract, pamphlet or the like.¹⁷⁵ The amount contributed must appear in annual accounts. Defaulting company will be punishable with five times the amount and defaulting officers with fine of the same amount and imprisonment extending up to six months.

Power to make contributions to National Defence Fund [S. 183]

Contributions to the National Defence Fund can be made by the Board of directors or any person or authority exercising the powers of the Board or of the company in general meeting. This power is exercisable notwithstanding anything contained in Sections 180, 181 and 182 or any other provision of the Act, or in the memorandum, articles or any other instrument relating to the company. Contribution can be of such amount as may be thought fit. It

174 Political party means a party registered under S. 29-A, Representation of the People Act, 1951.

175 This restriction is not violated where contribution has been made as the cost of advertisement appearing in a party's souvenir. *Gyanika India Ltd v Duker Rai Mehta*, (1978) 48 Comp Cas 483 (Cal). But if the consideration is unreal or illusory or a mere pretence for a contribution, different result should follow. J. Packerson, 'Political Donations and Companies' 5 BLR 200. S. 293-B empowers directors and other persons to make contributions to National Defence Fund, etc.

has to be made to the National Defence Fund or any other Fund approved by the Central Government for the purpose of national defence.

The company has to disclose in its profit and loss account the total amount or amounts contributed by it to the Fund during the financial year to which the amount relates.

DUTIES OF DIRECTORS

Corporate executives are today possessed of "immense power which must be regulated not only for the public good, but also for the protection of those whose investments are involved."¹⁷⁶ Directorships will always be susceptible to abuse. "Some directors will always be faithless to their trust. They can capitalise their strategic position in the company to serve their own interest."¹⁷⁷ The law, therefore, continues to struggle against their wiles and imposes upon them certain duties which, when properly enforced, will, without driving away from the field competent men, materially reduce the chances of abuse.¹⁷⁸

Statutory formulation of directors' duties [S. 166]

The Act of 2013 has in Section 166 made a statutory formulation of directors' duties. Such duties have been spelled out in terms of the following six points:

(1) Subject to the provisions of this Act, a director of a company shall act in accordance with the articles of the company.

(2) A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.

(3) A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.

(4) A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

(5) A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

(6) A director of a company shall not assign his office and any assignment so made shall be void.

(7) If a director of a company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

*Duties of
directors*

176. William C. Douglas, "Directors who do not Direct" (1934) 37 Harvard Law Review 1305, 1307.

177. *Ibid.*, 1317.

178. For a systematic account of the duties of directors see, D N. Hossie, "The Civil Liability of the Directors of a Corporation" (1972) 30 Calcutta Bar Review 90, and for a broader view of directors' fiduciary, common law and statutory duties in general as well as their enforcement, covering duties to shareholders and creditors as well as to the company, see, Robert R. Pennington, *DIRECTORS' PERSONAL LIABILITY* (1987).

Fiduciary obligation [Duty of Good faith] [S. 166(2)]

This duty conforms to the duty stated at point number 2 in Section 166. Point number 1 is a restatement of the all pervading principle of company law which requires directors to act in accordance with the company's articles. The first duty stated here corresponds to point number 2 which says that the directors of a company have to act in good faith in order to promote company's objects for the benefit of its members as a whole. They have to act in the best interest of the company, its employees, shareholders, community and also for protection of environment.

Liability for breach of trust.—Traditionally the duties of directors were non-statutory. They were fashioned out essentially from the common law as developed through the cases. But now company legislation of some countries has made a departure from this tradition. The Nigerian Act contains the following provision on the point:¹⁷⁹

"A director of a company stands in a fiduciary relationship towards the company and shall observe the utmost good faith towards the company in any transaction with it or on its behalf."

The first and the most obvious obligation of persons in fiduciary position is to act with honesty. "Greatest good faith is expected in the discharge of their duties."¹⁸⁰ Good faith requires that all their endeavours must be directed to the benefit of the company. Thus where a director of a company, being also the member of another company, earned bonuses from the other company by providing some business facility of his company; he was held liable to account for such profits, although the company had itself lost nothing and also could not have earned the bonus.¹⁸¹ Where a director was aware of the fact that the company's property was being sold for £ 350,000 when its real value stood at £ 650,000, this was a breach of the fiduciary duty and since the recipient of the property was aware of this fact, he became a constructive trustee towards the company for his undeserved gain.¹⁸² Where a

179. S. 299, The Companies and Allied Matters Act, 1990.

180. See, Part 7 in *Bank of Bihar Ltd v Mangalay Shriwan Simoni*, AIR 1961 Bihar 252, 253 (1961) 31 Comp Cas 364. See also, *Huzur Murtaza P.C. Lal v Shulman Ice Products* (1943) 274 (1960) 50 Comp Cas 296 (Cal); general statement of duty of good faith. *Sabrate Roy Sakhu v Union of India*, (2019) 8 SCC 470; (2019) 3 SCC (Cri) 712. Liability of directors and detention of promoters and other directors for non-compliance of court order imposing financial liability on the company.

181. *Bajwa Deep Sea Fishing & Ice Co v Axell*, (1988) 39 Ch D 339. A good account of such cases is to be seen in D.W. Fox, "Constructive Trusts in a Company Setting" (1986) JBL 20.

182. *Amring Kurjwi Ltd v Persico Ltd*, 1949 BCILC 626 (Ch D); *International Sales and Agencies Ltd v Marcus*, (1982) 3 All ER 551, liability for giving away the company's property to an outsider without consideration and, without shareholders' consent. This is on the basis of the principle that a person who receives money or property from the hands of a person knowing that the disposal was in breach of trust, would become a constructive trustee. The court applied the principle of *Shivaji Finance Corp v Williams Furniture Ltd* (No. 2), (1980) 1 All ER 391 (Ch). Before a person can be held liable as a constructive trustee it has to be shown that he is guilty of something amounting to dishonesty or want of probity. *Eagle Trust plc v ABC Securities Ltd*, (1993) 1 WLR 484, 1991 BCILC 439 (Ch D); *Agyip (Africa) Ltd v Jackson*, 1990 Ch 265 (1989) 3 WLR 1367. Another case in which the recipient



company's funds were used to buy a house in the name of the wife of the majority shareholder and Chairman, it was held that the money so applied was held in trust for the company. An order could be passed for tracing the money in the properties of the Chairman.¹⁸³ The directors of a family company were held personally liable to account for the money received by them on the company's behalf. The court conceded that it could look behind the corporate curtain for imposing such liability on directors.¹⁸⁴

The managing director and three other directors of a company devised a secret plan to set up a rival company and to leave jobs to join that company. Initially, the managing director resigned and left. The three others were allowed to continue for the time being. The managing director broke away most of the skilled workers of the company causing closure of the company. When the plot came to light, it was held that the managing director was perfectly free to proceed to set up a company of his own and invite employees from other organisations to join it. But the remaining three directors, who were still on the Board, were under a duty to inform the company of what was going on. They were executive directors. They were held liable to the company for its losses for which sums had been assessed.¹⁸⁵

Directors' personal profits.—In *Hirsch v Simons*,¹⁸⁶ on the eve of issuing a prospectus for additional capital, the assets of the company were revalued by a leading firm of surveyors and revised values were quoted. This brought about an increase in the market price of the company's shares. The directors sold some of their existing shares and obtained the benefit of the market situation. They were held by the House of Lords to be not accountable for this profit. Directors exercising their powers in a normal way are not accountable if the sensitive market is incidentally influenced creating opportunities of beneficial disposal of existing shares. In *Albion Steel and Wire Co v Martin*,¹⁸⁷ a director sold certain goods to his company out of his personal stock but at the market price of the day, but even so he did make a profit because he had obtained the stock earlier at lower rates. He was required by the court to account for his profit.

Business opportunities (Diversion of business). Similarly, a director should not exploit to his own use the corporate opportunities. The doctrine of corporate opportunity has been described as an act of a director or controlling shareholder in diverting from the benefit of the corporation any enterprise or transaction in which reasonable persons would agree that

became liable because he had knowledge that he was receiving the shareholders' money is *Houghton v Fawkes*, (2000) 1 BCLC 511 (CA). *Associated Crown & Chemical Industries Ltd v Essex Industries (P) Ltd*, (2001) 103 Comp Cas 104; (1995) 1 Guj LR 673, the main object of the proposal to purchase shares in another company was to fulfil the personal obligation of director, the proposal was restrained.

¹⁸³ *Bracken Partners Ltd v Guttridge*, (2004) 1 BCLC 377 (CA).

¹⁸⁴ *Gurnell Partners v Blair Finster & Codus (P) Ltd*, (2006) 89 DIR 372; (2006) 129 DLT 429; (2006) 133 Comp Cas 485.

¹⁸⁵ *British Midland Tool v Midland International Trading Ltd*, (2003) 2 BCLC 523 (Ch D).

¹⁸⁶ 1894 AC 634.

¹⁸⁷ (1875) 1 Ch D 580.

the corporation had some expectancy or interest."¹⁸⁸ In *Coul v Deeks*,¹⁸⁹ for example, the directors of a company diverted a contract opportunity of the company to themselves and by their votes as holders of three-fourths majority resolved that the company had no interest in the contract. It was held that the benefits of the contract belonged in equity to the company and the directors could not validly use their voting power to vest it in themselves. Their Lordships observed:

It is quite right to point out the importance of avoiding the establishment of rules as to directors' duties which would impose upon them burdens so heavy and responsibilities so great that men of good position would hesitate to accept the office. But, on the other hand, men who assume complete control of a company's business must remember that they are not at liberty to sacrifice the interests, which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent.¹⁹⁰

On the same principle, where a director is instructed to purchase some property for the company, and he purchases the same for himself and then sells it to the company at a profit, he is clearly liable to account for the profit so made. As he was under an obligation to acquire the property for the company, the same belonged in equity to the company from the moment he purchased it and he could not have made a profit on its resale. Supposing now that he is not under any such direction to purchase for the company, but purchases some property on his own account which is subsequently sold to the company at a profit. Is the company entitled to this profit also? This was precisely the question in *Burland v Fairly*,¹⁹¹ which the Judicial Committee answered in the negative. "It is one thing if a director sells a property to the company which in equity as well as at law is his own. It would be quite another thing if the director had originally acquired the property which he sold to the company under circumstances which made it in equity the property of the company."

One Burland was a director of the plaintiff company. He was also a shareholder and creditor of another company known as Burland Lithographic Company, which was being wound up. At a public sale by the liquidator, Burland purchased all the assets of the company in four lots. The price paid by him for lot 1 was £27,564 and he shortly afterwards sold it to the plaintiff company for £60,000. In these circumstances

188. Jan Bruwink, "The American Close Corporation and its Dutch Equivalent" (*1958 Business Lawyer* 250).

189. (1919) 1 AC 554.

190. Other illustrative cases on the right of a company to recover such secret commissions are: *Gnat v Gulf Exploration & Development Syndicate Ltd*, (1920) 1 QB 233 (CA); *Sulfur Corp v Leier*, (1891) 1 QB 168; *t3 LT 658* (CA) is a case on agency. No duty is breached by merely being a director in a rival company: *Zorilim and Mithenthal Exploration Co Ltd v Neu Mashinaland Exploration Co Ltd*, 1891 Wh 165.

191. 1902 AC 83; *t5 LT 553* (PC).

he was ordered by the lower court to pay to the company the sum of £38,436, being the amount of the profit made by him on the resale.

Their Lordships of the Judicial Committee of the Privy Council set aside this decision and observed, "There is no evidence whatever of any commission or mandate to Burland to purchase on behalf of the company, or that he was in any sense a trustee for the company for the purchased property. It may be that he had an intention in his own mind to resell it to the company, but it was an intention which he was at liberty to carry out or abandon at his own will."¹⁹²

A similar case is *Thomas Marshall (Exports) Ltd v Guinle*.¹⁹³ A company was importing foreign goods for resale in the UK. Its managing director formed a new import company and solicited orders on its behalf from the UK buyers. He imported goods from those very firms with whom he had established contact while acting for the company. He was restrained from this course of conduct. It was a breach of service contract and also of the fiduciary duty. In *Fine Industrial Commodities Ltd v Pooling*,¹⁹⁴ the demand for the company's product had fallen. The director in question knew of an alternative product for which there was a demand and he was also aware of the modification of the company's plant and machinery which was necessary for that purpose. But, instead of doing that, he created a new company and obtained a patent of the new product in the name of his new company. He was held accountable for his profits. His knowledge of the product in demand and of the fact that the company's plant and machinery could be modified for that purpose was considered by the court to be the company's knowledge. Another parallel case is *Cranleigh Precision Engg Ltd v Bryant*.¹⁹⁵ Here a director after resigning from directorship, formed a company with another person and embarked upon manufacturing a product which embodied his own earlier invention made by him while working for the company. He and his company were restrained from doing so. In *Heyting v Dupont*,¹⁹⁶ the company was not able to undertake a product which required a patent in a specialised sector of engineering, because it lacked resources. Both the directors formed their different companies for that product and both sued each other for mutual restraint on behalf of the original company. Their actions were dismissed.

A director-shareholder had set up a rival company. He diverted a major contract of the company to his new company by using the company's confidential information. The company had to go into receivership. Its trading ceased. It was held that the shareholders of the company were entitled to damages from the defaulting director for the loss of the value of their investment in the company, a reflective loss. The failure of the company was a direct and foreseeable consequence flowing from the diversion of its business.¹⁹⁷

¹⁹² 1979 Ch 227; (1979) 3 WLR 116.

¹⁹³ (1954) 71 RPC 255.

¹⁹⁴ (1965) 1 WLR 1293.

¹⁹⁵ (1964) 1 WLR 843 (CA).

¹⁹⁶ *Liles v Blund*; (2001) 2 ECLC 582, reversed by the Court of Appeal in *Giles v Reind*, (2003).

The duty to account for business opportunity arises only if at the time of the opportunity the director in question had genuine fiduciary relationship with the company. This observation was made in a case in which there was a total lack of confidence between two equal shareholding groups owing to inter se disputes. The main business of the company was an agency. The principal terminated the agency after notice in accordance with the terms of the agency agreement. The principal clearly stated that it was dealing with only one group. The principal awarded the agency to that group. There was no evidence of any collusion between them. The court said that it was not a case of diversion of business opportunity.¹⁹⁷

When director may make personal use of company's opportunity.—There are, however, some cases when a director may profit by a corporate opportunity without incurring the liability to account for it. "Where the corporation is insolvent and defunct, its officers are free to act for themselves, since such condition is ascertainable and not easily feigned. Similarly, if the undertaking would be ultra vires for the corporation, that fact, being capable of exact determination by the court, should be a complete defence. Where the opportunity is outside the scope of corporate business, or where the corporation has shown no interest in the property, an officer may buy for himself."¹⁹⁸

Similarly, where a new venture is offered to a company and its directors *bona fide* come to the conclusion that it is not an investment that the company ought to make, the individual directors who subsequently buy the same do not violate any duty to the company even though they have consulted the company's geologist.¹⁹⁹ These are facts of the Canadian case of *Peso Silver Mines Ltd v Cropper*.²⁰⁰ If *Regni (Hastings) Ltd v Galilite*²⁰¹ is reviewed in this background, it would seem to be an abnormally strict decision. But the English courts are in no mood to relax their standards.²⁰²



¹⁹⁷ BCCLC 1 (CA), the action for reflective loss was held to be allowable. The assessment took place in *Giles v Kundi* (No 2) (2004) 1 BCCLC 365 (Ch D); *Biedler v Biedler*, (2003) 2 BCCLC 241 (CA). company's opportunity of making a valuable investment was used up by a director, liable for damages see, Dr Hans C. Hirt, "The Law on Corporate Opportunities in the Court of Appeal: Re Khullar Brce Ltd" (2005) JBL 669; Payne and Prentice, "The Corporate Opportunity Doctrine" (2004) 12(1) LQR 15M; *Crown Oilman v Sullim and Others (Kior Brugge Ltd)*, (2004) 1 BCCLC 468 (Ch D); it is no defence to say that the company would not have taken interest in the opportunity. The company has to be made aware of the opportunity and only then it may decide to waive it. The breach of duty commences from the moment of the failure to make a full disclosure.

¹⁹⁸ *Kishore Sherilal Parji v Kishore Kishore Sippy*, (2004) 131 Comp Cas 691 (Bom).

¹⁹⁹ *Peso Silver Mines Ltd v Cropper*, (1966) 58 DLR (2d) 1; 1966 SCR 673 (Can).

²⁰⁰ *Ibid*. See further, New Zealand Netherlands Society "Oraouje" Inc v Kays, (1973) 1 WLR 1125 (PC), where the Judicial Committee took the view that there may be circumstances in which a person in a fiduciary position vis à vis the company may hold that position only in respect of a part of his duties.

²⁰¹ [1942] 1 All ER 378, see infra, 202.

²⁰² This despite criticism. See, for example, C.D. Baker, "Disclosure of Director's Interests in Contracts" (1973) 15(1) LCL; and John Birds, "The Permissible Scope of Articles excluding

Position on cessation of directorship.—The decision in *Industrial Development Consultants Ltd v Cooley*,²²¹ is a reaffirmation of the belief in the Royal standard of honesty.



The managing director of a company tried to get from the Gas Board a Government contract for the company. But the Gas Board plainly told him that the Government would not allow the contract to the company, but was willing to deal with him personally. He resigned from the company, under the pretence of ill-health and then promptly obtained the contract for himself. Having earned a handsome profit, he had to face an action from the company to account for it.

The court held that the managing director had acted in breach of his duty and, therefore, must account. In the *Pew Silver Mines* case the directors had in good faith rejected the opportunity to acquire adjacent mines and then some directors used the opportunity. Here the company greatly desired the contract and employed Cooley only in a bid to obtain it.²²² But the fact remains that it was the Government, not Cooley, who was to blame for what had happened. The moral of the decision is that either Cooley should have refrained from the contract or executed it at his personal risk and responsibility, but all the time for the benefit of the company.²²³

In *Cranleigh Precision Flegg Ltd v Bryant*²²⁴ in the course of his work in designing the company's products, a director discovered the existence of a patent which hindered the company from adding a refinement to its product, so as to make them readily marketable. He resigned his directorship and then purchased that patent from its owner. He formed a new company to manufacture the product with the addition of the patented improvement. He had to account to the company for the profits of his new company.²²⁵

Fiduciary obligation does not cease with resignation, but on the company exercising its right on full information to accept the resignation or to terminate his services if it so wishes.²²⁶ Where the termination is due to

"The Duties of Company Directors" (1976) 39 Med Ls 394. Both consider the validity of Article 84 of Table A of the English Act which came into being in response to the decision in *Rego (Hastings)* case and permits reduction of the fiduciary obligation.

223. (1972) 1 WLR 443.

224. For an appreciation of this decision see, 1973 1 QSR 187 and J.C. Collier, "Directors' Duties" (1972-A) Camb LJ 222; (1973) 35 Med L Rev 655.

225. For another similar authority see, Canadian Auto Service Ltd v O'Malley, (1973) 40 DLR (4d) 371 (Can), Supreme Court of Canada, where it was held that it is breach of duty on the part of directors to resign their office and to appropriate a chance to their new company which came before the company while they were still in office. See further, *Gilbert* case, (1870) 5 Ch App 559, where the payment of a call was postponed only to enable a director to transfer his shares for avoiding liability and he was nevertheless held liable. For the wisdom of a rule which equates the position of an honest director with that of the dishonest see, N.A. Bratton, "The Honest Director and Section 1 Profits" (1978) New LJ 527.

226. (1968) 1 WLR 1293.

227. This is in contrast to *Nordisk Insulinlaboratorium v Gergits Products Ltd*, [1953] Ch 450; (1955) 2 WLR 679, in which an agent had made a profit after the termination of his agency and he was held not liable.

228. *Thomson Marshall (Exports) Ltd v Guenly*, [1975] Ch 222; (1976) 3 WLR 116.

operation of law, the director ceases to hold office immediately and his fiduciary duties terminate forthwith.²⁰⁹ However, even in such a situation the duty to maintain confidential information survives. The duty of confidence as to business secrets terminates only when the company releases him from the obligation or when the secret information is published or becomes generally known, that is to say, it is converted by the owner into a matter of public knowledge.²¹⁰

Competition by directors.—In a decision on the point, the judicial opinion was that there is no breach of duty if a director competes with his company or holds some interest in a rival company or is a director in a competing company.²¹¹ But accountability will chase a director if he uses the company's assets for the benefit of a rival concern and this includes its business connection, goodwill, trade assets and the list of customers.²¹² If a company has invested resources in providing some training to a director or special skills, he may be restrained from using such skills for the benefit of a rival concern.²¹³ A director can also be restrained by the terms of his appointment from competing with the company or from joining any other concern as a director whatever be its business. A wholename director has by virtue of the very nature of employment to restrain himself from joining any other company. He can be sued for breach of his contract with

209. *Reil v Explosives Co.* (1887) 19 QB 264, 57 LT 435 (CA); *Missouri Pipe Line v McNeelys*, (1911) 2 Ch 248 (CA).

210. *Manson v Mair*, (1851) 9 Hare 241; *Re EK 492*; *Merryweather v Morris*, (1892) 2 Ch 528; *Reed v Green*, (1895) 2 QB 305; *Franchi v Franchi*, (1967) R2C 149. A breach of this duty is illustrated by a plethora of cases involving directors leaving a company and setting up a business in competition. *SSC & Limas New Zealand Ltd v Murphy*, (1981) 1 NZCLC 98, 348 where the incoming director of an advertising agency left taking staff and clients is one example; *Independent Broadcasting Co Ltd v Rex McKay (Aust) Ltd*, (1991) 5 NZCLC 67, 627 where a radio broadcasting executive and director successfully tendered for a broadcasting frequency, and then left the company to operate a new radio station is another. The director's former company was successful in obtaining an interim injunction. *Lucas* J discussed the corporate opportunity doctrine in the judgment, which requires that "if the corporation has a present interest in the opportunity, then the fiduciary must present it to the corporation prior to exploiting it himself". For a further discussion of the scope of the prohibition on the misuse of confidential information by directors, see *Harris, "Fiduciary Duties of Directors under the Companies Act, 1993"* (1994) NCLJ 242, 242-43.

211. *London and Mishkenovski Exploration Co Ltd v New Mishkenovski Exploration Co Ltd*, 1891 WN 165.

212. *Bell v Lever Bros Ltd*, 1932 AC 161; 1931 All ER Rep 1; *Saltman Egg Co Ltd v Campbell Egg Co Ltd*, (1948) 65 RPC 203; *Noreal Ltd v Cattland*, 1981 BCCL 549.

213. *Hines Ltd v Park Scientific Investments Ltd*, 1946 Ch 169. (1946) 18 Comp Cas 16 (CA). The position is thus stated in *Charlesworth and Co. Company Law*, 406 (13th Edn 1987): "Under the general law, apart from the case where a director has a service agreement with the company which requires him to serve only the company, there is authority to the effect that he may become a director of a rival company, i.e. in this way he may compete with the first company, provided that he does not disclose to the second company any confidential information obtained by him as a director of the first company, and that what he may do for a rival company, he may do for himself or a rival firm... He must not subordinate the interests of the first company to those of the second..." *Citing London and Mishkenovski Exploration Co Ltd v New Mishkenovski Exploration Co Ltd*, 1891 WN 165; *Bell v Lever Bros Ltd*, 1932 AC 161. Also see, *Gower's Principles of Modern Company Law* (11th Edn) 568.

the company,²¹⁴ though not for an account of his profits elsewhere.²¹⁵ If his personal influence weakens the company's ability to offer competition to his other concern and thereby suffers loss of business, he will be liable for the company's setback.²¹⁶ He will also be liable if he prevents the company's expansion into an area already occupied by the rival concern.²¹⁷ The courts have been somewhat liberal in this respect because they recognise, particularly in the case of part-time directors, that too strict an interpretation of directors' duties of loyalty as part of their fiduciary duties could result in a stifling of enterprise and a bottling up of management talent.

If there is no provision permitting a director to start a competing business, the director who engages in such activity is bound to account for pecuniary advantages gained by such action. The company had two directors. One of them started a competing business and diverted the company's business. It was held that a suit by a shareholder on behalf of the company as a derivative action was maintainable.²¹⁸

Trading in corporate control.—A learned writer says:²¹⁹ "A director who acquires property while in office will, however, be liable to account for his profit upon resale if two elements are present. He must have acquired property only by reason of the fact that he was a director and in the course of the exercise of the office of director." *Regal (Hastings) Ltd v Galliver*²²⁰ (*Regal*) carries the principle to the farthest limit.

The plaintiff company were the owners of a cinema in Hastings. Its directors were anxious to acquire two other cinemas in Hastings and then to sell the whole property of the company as a going concern. For the purpose of acquiring the new cinemas they formed a subsidiary company with a capital of £5000 divided into shares of £1 each. They were offered a lease of the two cinemas, but the landlord required a guarantee of the rent by the directors unless the paid-up capital of the subsidiary company was £5000. The original intention was that the plaintiff company should hold all the shares in the subsidiary, but it was unable to provide for more than 2000 shares. The matter was, therefore, rearranged: 2000 shares were allotted to the plaintiff company; 500 shares were taken by each of the three directors, 500 by the solicitor of the company and the

214. *Sequoia Victoria Systems Inc v Shrawan*, (1964) 229 Cap App 24(23).

215. *Whiteword Chemical Co Ltd v Hindman*, (1891) 2 Ch 416 (CA).

216. *Singer v Carlisle*, (1941) 26 NYS 2d 320.

217. *Rosenblum v Indian Engg Corp*, 99 NH 267 (1954).

218. *Rajeev Saamnitra v Neetu Singh*, 2016 SCC OnLine Del 512 (2016) 198 Contip Cas 350.

219. D.N. Hossie, "The Civil Liability of the Directors of a Corporation" (1952) 30 Can BR 908. Following articles on the subject of corporate control may be consulted: Hill, "Sale of Controlling Shares" (1951) 20 Harv L Rev 936; Berk, "Control in Corporate Law" (1958) 38 Colum L Rev 1212; "Liability of Directors for Taking Unopposed Opportunities, Using Corporate Facilities or Engaging in a Competing Business" (1939) 27 Colum L Rev 219; William D. Andrews, "The Stockholders' Right in Equal Opportunity in the Sale of Shares" (1963) 79 Harv 303; Hornstein, "The Future of Corporate Control" 63 Harv L Rev 476; See also, Louis Loss, *Securities Regulation*, (1951).

220. (1957) 2 AC 134 (HL).

remaining 500 were allotted to certain persons found by the Chairman or directors. And thus a capital of £5000 was raised. The two cinemas were taken and all the shares in the plaintiff company and the subsidiary company were sold. The 3000 shares allotted to the directors, the solicitor and the Chairman were sold at a profit of £2 16s-1d. per share. The action was brought by the plaintiff company to recover this profit.

It was held that in the circumstances the directors, other than the Chairman, were in a fiduciary relation to the company and liable, therefore, to repay to it the profit they had made on the shares. The solicitor was not in a fiduciary relationship and was not liable. They acquired these shares only by reason of the fact that they were the directors of the Regal case and in the course of their execution of that office. Lord Macmillan added:²²¹ "The plaintiff company has to establish two things: firstly, that what the directors did was so related to the affairs of the company that it can properly be said to have been done in the course of their management and in the utilisation of their opportunities and special knowledge as directors and, secondly, that what they did resulted in a profit to themselves."

The real ground for the decision seems to be that the opportunity to take 5000 shares was the corporate opportunity.²²² The directors, however, took the shares in good faith because the company was financially unable to make use of the opportunity. But if they were permitted to retain the profit, there would be temptation to induce such inability on the part of the company and to profit by it. The liability of the directors in account, therefore, seems to be just and clear. But to hand over this profit to the purchaser shareholders would be to give them the benefit of an undeserved reduction in price which they had willingly paid up. Recovery, therefore, should have been in favour of the old shareholders who had really suffered. This course was preferred in the American case of *Commonwealth Title Insurance & Trust Co v Seltzer*.²²³

Directors of a corporation had agreed to sell to a prospective purchaser the assets of the corporation indirectly by selling all the stock at a stated price. The directors then bought up the whole of the stock from the shareholders at a lower figure and completed the sale. They were held liable to return the profit thus realised not to the corporation but to the old shareholders whose stock was bought. "The payment to the corporation would in substance be a return of a part of the purchase price to the buyer who, of course, had no claim to such a windfall."

Still another duty of controlling shareholders is not to make money for themselves from selling their controlling block of shares. According to Berle

221. *Regal (Hastings) Ltd v Gillham*, (1947) 2 AC 134 (HL).

222. The full implications of the decision have been discussed by Cowen, *THE PRINCIPLES OF MONOPOLY COMPETITION LAW* (3rd Edn, 1967) 535-37. See also, *Linnigren v L & P Estates Co Ltd*, (1963) 2 WLR 562 (CA); noted 1968 (BL) 152; *Parker v McLean*, (1879) 1 R 10 (Ch App 96) 31 LT 739.

223. 227 Pa 410; 26 Atl 77 (1910), discussed in a note on "Fiduciary Duty of Directors not to Compete with the Corporation" (1911) 51 Harry L Rev 190.

and Means: "Control power is itself an asset which may not be traded or disposed of without regard to the interest of the corporation or the totality of shareholders."²²⁴ If the price received by the directors for the controlling block of shareholders is greater than the prevailing market price of their shares, the real consideration for the inflated price is the "control" which the purchaser has acquired. The minority shareholders should, therefore, be entitled to a *pro rata* distribution of the price which is attributable to the right of control.²²⁵ But this broad general principle does not yet seem to have been adopted by the courts.²²⁶ On the contrary, it has been frequently pointed out that "shares" are the private property of the shareholder and he may sell them for any price or in any manner he pleases, even if his shares carry the right to control the company.²²⁷ Yet two inroads upon this principle have already been made.

In the first place, any profit obtained through breach of a fiduciary obligation, such as, sale of office or interception of corporate opportunities, has to be shared with the minority shareholders. *Perriman v Feldman*²²⁸ is the well-known illustration.

During the period when steel was in short supply, a small steel company was offered by a syndicate of steel users an interest-free loan for the expansion of its plants in return for commitment for future deliveries. Instead of accepting this offer, the directors sold to the syndicate their controlling block of shares at a price approximately twice their market value and allowed the purchasers to assume control, who then withdrew the offer of free loan.

In an action brought by minority stockholders the court granted *pro rata* recovery in their favour. The directors had tried to make profit from "the ability to allocate steel in the time of short supply", which was a corporate asset.

Secondly, the sellers of the controlling block would be liable if they have "negligently or fraudulently" passed the "control" to a person who would loot the assets of the company.²²⁹ Such purchasers are often tempted by large liquid assets which they afterwards utilise in paying off short-term

224. *THE MORSE CORPORATION AND PRIVATE PROPERTY* (1922) 244. This statement is quoted in William C. Warren, Adolf A. Bede, (1961) 61 Colum L Rev 1377. For reasons why corporate control is a valuable asset see Henry G. Manne, "Some Theoretical Aspects of Share Voting" 1964 Colum L Rev 1427. "A controlling block of shares is worth more than a non-controlling block". See, Leonard J. Connolly, *Professor v Plaintiff Is the Sale of Control* (1971) 181, 1279.

225. See, "Individual Pro Rata Recovery in Stockholder's Derivative Suit" (1956) 69 Harv L Rev 1324.

226. See, Anthony John Boyle, "The Sale of Controlling Shares" (1968) 13 ICLQ 185, 189, where the learned writer also considers the academic criticism of the view.

227. *Gruis v Reynolds*, 29 N.Y.S.2d 622. For a consideration of this and other cases on the subject see, a note in (1955) 68 Harv L Rev 1275.

228. 219 F.2d 173 (2d Cir 1955), cert denied 349 U.S. 952 (1957), from where the facts have been collected.

229. See, a note in (1955) 68 Harv L Rev 1275; Also see, Hall, "Sale of Controlling Shares" (1957) 73 Harv L Rev 1066 and Jamming, (1956) 44 Cal L.R. 1.

loans taken to finance the takeover bid.²³⁰ In such cases it is not necessary that the seller should have actual knowledge of the purchaser's design to loot. It will be enough to make him liable that there were circumstances putting him on inquiry, for example, the purchaser's previous history, excessive price offered, liquidity of the corporate assets, etc.²³¹

Statutory provisions relating to sale of controlling shares.—Apart from these judicial developments the legislature have also tried to modify the inequitable result of *Regal*. Sections 319 to 321, Companies Act, 1956 replaced by Section 191 of the Act of 2013 are designed to catch any extra payment that may be received by directors in connection with transfer of the undertaking or property or shares of a company. The right to control the management of a company is a valuable asset and it is desirable that if any price is obtained for the sale of this right, the same should be shared by the members in accordance with their rights. The control of a company may pass in several ways. The whole undertaking or property of the company may be sold.²³² In such a case the directors of the company have to retire from office as the purchasers will like to place their nominees on the Board. The directors may receive some payment from the company by way of compensation for loss of office or from the transferee as a consideration for retirement. The section does not affect any payment made by a company to its managing director or whole time director or manager by way of compensation for loss of office or as consideration for retirement from office or in connection with such loss or retirement subject to limits or priorities as may be prescribed. [S. 191(2)] But what may happen is that under the cover of compensation for loss of office, they may manage to make money as an inducement to retire and to facilitate the transfer of control. Indeed, they may be getting the money as a price for the right of control. That is why Section 191 provides that any money received from the transferee in connection with the transfer of the company's property or undertaking must be disclosed to the members of the company and approved by the company in general meeting. Where this is not done, the amount shall be held by the directors in trust for the company. [S. 191(3)] If the payment is not approved for want of quorum in a meeting or adjourned meeting, the proposal is taken to be not approved. [S. 191(3)] The contravention is punishable with fine not less than Rs 25,000 extending up to Rs 1,00,000. [S. 191(3)]

230. See, Anthony John Boyle, "The Sale of Controlling Shares" (1959) 13 ICLO 185, 187, where the learned writer cites recommendations of the Jenkins Committee, para 176 to 176 of the Report. Where the funds of a company were diverted to another company to enable the two sons of the managing director to acquire control over that company, the two sons were not allowed to be charged with conspiracy and criminal breach of trust because they were not even the directors of the company at that time. *Ashim K Ray v Biplabchand Mitra*, (1998) 1 SC C 135, (1998) 41 Compl Cas L; (1998) 1 Comp LJ 1.

231. *ibid*, 192.

232. For a discussion of the various modes of transfer of control and how side-payments are obtained by the majority sellers, see, Henry G. Manne, "Some Theoretical Aspects of Share Voting" (1964) Colum L Rev 1427.

The section does not prejudice the operation of any law requiring disclosure to be made with respect to any payment received under the section or such other like payment made to a director. [S. 191(6)]

Another method of acquiring the control of a company is by purchasing its shares. Shares may be purchased: [S. 191(1)(b)]

1. by making an offer to the general body of shareholders;
2. where the purchaser is a company, by inviting the company to become its subsidiary or a subsidiary of its holding company;
3. by making an offer with a view to obtaining the right to control the exercise of one-third of the total voting power;
4. by making any other offer which is conditional on acceptance to a given extent.

Here also those who acquire control will replace the existing management. The outgoing director may be induced on payment of money to facilitate the transfer of control, although outwardly the payment may have been made as compensation for retirement. If the transferee proposes to pay something to the directors, the latter must take reasonable steps to inform the shareholders of the particulars of such payment alongwith any notice of the offer made for their shares.

These statutory provisions also modify the result of *Percival v Wright*.²³³ In cases falling within the scope of the above sections, directors became trustees for those individual shareholders who have sold their shares for any profits made by the directors.

The scope of the disclosure obligation has been considerably widened in the United States. The interpretation of Rule 10B-5 of the Securities Exchange Regulations²³⁴ creates a situation where "fiduciary obligations are no longer owed only to the current owners of the corporation, that is, the stockholders, but are also owed to outside non-stockholders. The insider owes a duty not only to refrain from stating falsehoods, or half-truths, but affirmatively to disclose all the material facts of the transaction."²³⁵ The case of *Securities & Exchange Commission v Texas Gulf Sulphur Co*²³⁶ has become well known in this connection.

The Texas Gulf Sulphur Co carried on certain drilling operations and discovered important mineral deposits. Before disclosing this fact to the public, the directors purchased the company's shares in the market and also acquired options to purchase further shares (calls). They also tipped their relatives and friends to purchase the company's shares. Ultimately,

233. (1902) 2 Ch 421.

234. Federal Securities Exchange Act, 1934.

235. "Scienter and Rule 10B-5" (1969) Colum L Rev 1037-61. Also see, "The National Securities case"; "The Supreme Court and Rule 10B-5" (1969) Colum L Rev 906; Israels and Loss, "Recent Developments in Securities Regulations" (1963) 63 Colum L Rev 856; William Henry Navin, "Insiders' Liability under Rule 10B-5 of the Illegal Purchase of Actively Traded Securities" (1968) 58 Yale LJ 814.

236. 401 F 2d 833 (2d Cir 1968). Considered in, "Scienter and Rule 10B-5" (1969) Colum L Rev 1037.

when the fact of discovery was made public, the prices of the company's shares soared up.

The SEC brought an action against the insiders to restrain them from purchasing shares unless a full disclosure of the facts was made and to offer restitution to those whose shares they and their "tippees" had purchased. They contended that they had no intent to defraud and had in good faith withheld the information because any disclosure of this kind would have materially affected the prices of adjoining areas thus defeating the company's chances of acquiring the land at reasonable prices. But even so they were held liable. It is no doubt primarily the function of the management to decide when an information is ripe for disclosure, but in the meantime they should not operate in the company's stock market.²²⁷

Misuse of corporate information.—Exploitation of unpublished and confidential information belonging to the company is a breach of duty and the company can ask the director in question to make good its loss, if any. Any knowledge or information generated by the company is the property of the company, commonly known as intellectual property. Turnover of business, profit margins, list of customers, future plans, any personal use of such knowledge is equivalent to misappropriation of property.²²⁸ Use of such information can be restrained by means of an injunction.²²⁹ Any gain made by the use of inside information has to be accounted for to the company.

At common law, equity imposes fiduciary duties on directors because of their position of power in, and their relationship of confidence to the company. In the course of their office, directors often can and do, obtain access to confidential information relating to sensitive transactions of the company. Also, information is acquired in circumstances where the recipient is required to keep it confidential. It is part of each director's fiduciary duty not to misuse this information. Each director owes a duty to the company not to disclose or use confidential information without the company's consent.

SEBI (Insider Trading) Regulations, 1992.—The Securities and Exchange Board of India has formulated regulations for preventing and punishing the use of price sensitive unpublished inside information in dealings with the company's securities.²³⁰

227. For criticism of this decision see, Louis Ross, "The Fiduciary Concept as Applied to Trading by Corporate 'Insiders' in the US" (1970) 33 Mod L Rev 34 and Henry G. Manze, *Economic Policy and the Regulation of Corporate Securities* (1968). For a view of all the possible aspects of directors' liability, see, Robert K. Pennington, *Directors' Personal Liability* (1967).

228. *Boorham v Phillips*, (1967) 2 All 46 (1966) 3 WLR 3079 (*Hk Exchange Telegraph Co Ltd v Gregory & Co*, (1896) 1 QB 147 (CA); *Exchange Telegraph Co v Central News Ltd*, (1897) 2 Ch 48).

229. *Salmien Engg Co Ltd v Campbell Engg Co Ltd*, (1948) 45 RPC 205; *Irenikon Ltd v Building Supply Co (Hkys) Ltd*, 1960 RPC 128; *Morris Ltd v Gilman (SJT) Ltd*, (1931) 60 RPC 20.

230. *(Hk) Holdings Ltd v SEBI*, (2005) 60 SC 11, 156 (SAT) A promoter/group company was held to be an insider within the meaning of Regulation 2(d). There was violation of Regulation 3(1).

Where the directors sold their shares before publishing half-yearly statements and the market went down after the publication because the accounts were not according to expectations, they were held liable to hand over profits to the company.²⁴¹ Purchase of company's shares by directors cheaply with the knowledge that soon they were due to issue an offer to buy from willing shareholders at a higher price out of the company's reserves, made them accountable.²⁴²

Apart from violations of the regulatory framework, directors' dealings in their own company shares are not illegal. It is considered desirable that directors of listed companies should hold the shares of their companies. As a part of remuneration package, directors are often given share options which enable them to acquire shares in their company, which they may afterwards sell. When directors decide to sell their shares however acquired or to buy more shares, their trading comes to be governed by the legislation on insider trading. They commit an offence if they trade on some specific non-public information about their companies' securities. "For instance, if the director has access to unpublished price sensitive information, such as information on future earnings' figures, security issues, assets disposal and purchases, etc, which if it were made public would have significant effect on the share prices, it is illegal for them to trade on the information. Consequently, directors can trade in the shares of their own company but the trading must not be based on any inside information."²⁴³

Outsiders dealing in inside information.—A dealer in a company's securities receiving inside information commits an offence under Section 1(3) and (4), Companies Securities (Insider Dealing) Act, 1985 (UK) whether he procured that information from a primary insider by purpose or came by it without any positive action on his part.²⁴⁴

and, therefore, disbarment from dealing in securities for four years. The information in his possession related to rights issue. *Samir C Arora v SEBI*, (2005) 125 Comp Cas 409 (SAT), the person in question must have access to price sensitive information, which means such unpublished information which when published would affect prices of the company's securities.

241. *Diamond v Dreznitz*, 24 NY 2d 494 (1969).

242. *Bruffy v Cities Service Co*, 31 Del Ch 2d 1 (1949). Insider trading is a violation of the law has been held to be an offence connected with the management of a company and is therefore a ground for disqualification under the [English] Directors' Disqualification Act, 1986 and under s. 203, [Indian] Companies Act, 1956, *R v Goodman*, (1990) 2 All ER 789 (CA).

243. David Hillier and Andrew Marshall, "The Timings of Directors' Trades in the United Kingdom and the Model Code" (1998) JBL 456; *Pard Investments v SEBI*, (2005) 59 SCL 506 (SAT), the managing director created artificial market for the company's shares by effecting purchases through attached brokers.

244. Attorney General's Ref (No 1 of 1988), (1989) 2 WLR 196; (1989) 1 All ER 321-1966 BCILC 193 (CA). The same would be the position where the information comes his way without any effort on his part. Attorney General's Ref (No 2 of 1988), 1989 AC 971; (1989) 2 WLR 729 (EIL). For further study, see, P.Sr. J. Smart, "Misuse of Confidential Information: The Company and Minority Shareholder's Remedies" (1987) JBL 464. Teepees are liable to be prosecuted under S. 1(1) if they had knowledge that the information was still unpublished. See, Charles Rickett and Ross Grantham, *ESSAYS ON INSIDER TRADING AND SECURITIES*

Directors' duty of care, diligence and skill [S. 166(3)]

This duty is spelled out in Section 166(3) in the following words: "A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment." The Supreme Court has described it as a failure of corporate governance on the part of directors if they fail to exercise due care and diligence thereby allowing fabrication of figures and false disclosure. They would be liable for such omissions and commissions.²⁴⁵

Liability for negligence.—Fidelity alone is not enough. A director has to perform his functions with reasonable care. He has to attend with due diligence and caution the work assigned to him. The Nigerian Act contains a set of provisions on this aspect of directors' duties:

"A director shall act at all times in what he believes to be the best interests of the company as a whole so as to preserve the assets, further its business and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances."²⁴⁶

Another provision runs as follows:²⁴⁷

"Every director of a company shall exercise the powers and discharge the duties of his office honestly, in good faith and in the best interests of the company and shall exercise that degree of care, diligence, and skill which a reasonably prudent director would exercise in comparable circumstances."

The New Zealand Companies Act, 1993 also provides that a director must exercise his powers for a proper purpose.

The courts have been very liberal in the matter of the expected standards of skill and care. An early example is *Oxfam Garsley & Co v Gibb*.²⁴⁸ A company was formed to take over a private bank. Without investigating the value of the bank's assets and the extent of its liabilities and with knowledge that the bank was in a state of insolvency, the directors paid £50,000 for goodwill. Still holding them not liable, the House of Lords laid down that there should be violation of either the Act or the memorandum or the transaction was such that no man of ordinary prudence would have entered into. In another case of overvaluation of assets, acquitting the directors, the court said that in order to make them liable their negligence must be in a business sense culpable and gross.²⁴⁹ Directors may not know the

REGULATION (1997) on the desirability of such regulation and whether inside trading is really objectionable.

245. *N. Naryanan v SEBI*, (2013) 12 SCC 152. The case involved many SEBI violations including insider trading.

246. S. 279(1), Companies and Allied Matters Act, 1990.

247. S. 282, *ibid.*

248. (1872) LR 5 HL 480. See further, *Prudential Assurance Co Ltd v Nehruv Industries Ltd*, (No 2), (1940) 3 WLR 647, no liability where assets reduced to less than liabilities.

249. *Lazard Frères Co v Lazard's Syndicate*, (1899) 2 Ch 392 (CA).

nature of the company's trade, because all that the law expects from them is that if they know they must use the knowledge for the company's benefit.²⁵⁰ Accordingly directors were held guilty of negligence when they participated in a transaction without trying to know whether the transaction was really for the purposes of the company or whether they were authorised by the Board in that respect, and it was no defence for any director to show that he believed that he was bound to sign because the other directors wanted it or that he joined under protest or that even without his joining, the other directors were determined to carry out the transaction.²⁵¹ Directors were also held liable where they released the company's funds for paying a debt without trying to know whether anything was really due and for purchasing assets without knowing whether there was any real transfer of those assets.²⁵² Liability for negligence also followed where without any Board resolution being properly passed a single member was allowed to manage a part of the company's business and he misconducted himself.²⁵³ A director would also be guilty of negligence where he discovers something wrong and, instead of informing the shareholders, rests content after pointing it out to the directors only.²⁵⁴

Beginning with ROMER J's formulation of directors' duties, a constant judicial effort has been maintained in putting some objectivity into the standards of skill and care expected from directors. "His duties will depend upon the nature of the company's business and the manner in which the work of the company is distributed between the directors and other officials of the company. In discharging these duties a director must exercise some degree of skill and diligence. But he does not owe to his company the duty to take all possible care or to act with best care. Indeed, he need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. It is, therefore, perhaps, another way of stating the same proposition that directors are not liable for mere errors of judgment."²⁵⁵ This is a well-known observation of ROMER J in the celebrated case of *City Equitable Fire Insurance Company, re.*²⁵⁶

One B was a director of the City Equitable Fire Insurance Co. The company was ordered to be wound up. A searching investigation of the affairs of the company was then made and this investigation showed a shortage in the funds which the company should have been possessed of over £12,000,000. The collapse of the company was due to bad investments, bad

250. *Brazilian Rubber Plantations and Estates Ltd, re.* (1931) 1 Ch 425; 103 LT 697 (CA).

251. *Land Credit Co of Ireland v Lord Fermoy*, (1870) 5 Ch App 263.

252. *Saltregur Limited Rubber Estates Ltd v Croftock (No 3)*, (1966) 1 WLR 1555; (1968) 2 All ER 1073; *Joint Stock Discount Co v Brown*, (1869) LR 8 Eq 381; *Renshaw v Edwards*, (1885) 31 Ch D 700.

253. *City Equitable Fire Insurance Co, re*, 1925 Ch 407; 153 LT 520 (CA).

254. *Joint Stock Discount Co v Weston*, (1869) LR 8 Eq 381; *Renshaw v Edwards*, (1885) 31 Ch D 700.

255. See, *Brazilian Rubber Plantations and Estates Ltd, re*, (1931) 1 Ch 425; 103 LT 697 (CA); directors not liable for ignorance of trade practices.

256. *City Equitable Fire Insurance Co, re*, 1925 Ch 407; 153 LT 520 (CA). See also, *Union Bank of Allahabad, re*, AIR 1925 All 519; 86 IC 785; *Gowind v Rangnath*, (1936) 32 Bom LR 232; *Furke v Daily News Ltd*, (1961) 1 WLR 450.

debts and misappropriation. All the losses were due to B's instrumentalities. He was accordingly convicted for his frauds.

But the question naturally arose as to whether during the period covered by B's nefarious activities the other directors were properly discharging their duties to the company? It was alleged that they were guilty of negligence in not detecting the frauds. But there was an exemption clause in the articles according to which the directors were liable only for gross negligence. The facts of the case did not disclose that degree of negligence and, therefore, the case of the official receiver against B's co-directors failed.

Exclusion from liability either by agreement or by a provision in the Articles was rendered void under Section 201 of the 1956 Act. There is no direct provision on this point in 1913 Act. The effect of Section 201 (1956 Act) would still be there indirectly. There is now a statutory formulation of directors' duties under Section 166. That section contains no provision for modification of duties. The only relief now is through court under Section 463 by proving honest conduct. If the company had taken out a policy of insurance of such liability, the premium would not be considered as a part of remuneration if the director in question is acquitted. [S. 197(1.3)] No relief is possible against criminal liability.

Though this provision came into being in reaction to the decision in the City Equitable case, its scope is not confined merely to contracting out of the consequences of negligence. Apart from negligence, it renders void any provision in the articles or in an agreement which exempts a director from liability for default, misfeasance, breach of duty or breach of trust.²⁵⁷

Standard and degree of care and skill.—Quite apart from this statutory development, the courts have also been trying to reconsider the standard of care expected of directors. Romne J formulation is largely subjective, as a director has to use only such "skill as may reasonably be expected from a person of his knowledge and experience". The standard of care required of directors at common law has traditionally been light compared with their duties in other areas. Usually it took gross negligence for directors to be liable. But the current trend is towards objectivity.²⁵⁸ In the words of CARBONI J:

The diligent director is the one who exhibits in the performance of his trust the same degree of care and prudence that met, prompted by self-interest generally exercise on their own affairs.²⁵⁹

This standard demands reasonable business prudence from managers. To the same effect is the observation of BUCKLEY J in *Diamondic Ltd*, n.²⁶⁰ A director has to act "in the way in which a man of affairs dealing with his

257. It has been maintained by some eminent authors that this provision still permits diminution of duty apart from exemption from liability. Duty itself may be modified, though liability for breach of duty cannot be excluded. See Gore-Browne, *Company Law* (42nd Edn) 773 and Gower, *Company Law* (3rd Edn) 532.

258. See, M.J. Trebillock, "Liability of Directors for Negligence" (1969) 32 Mod L Rev 409.

259. *People v. Marquise*, 255 N.Y. 453, 462. Borrowed from Jackson, *Wisdom of the Supreme Court*, (1942) 82.

260. (1969) 2 Ch 365; (1969) 2 WLR 114.

own affairs with reasonable care, and circumspection could reasonably be expected to act ...". Applying this standard to the case before him, the learned judge held that payment of £4000, without legal advice, as compensation to a director for retirement when, in fact, he was entitled to no compensation was, an act which could not be regarded as reasonable.²⁶¹

The directors of a company manufacturing car components were held liable because they failed to ensure that their company had established an efficient production system before commencing production and caused loss by paying wages, salaries and general overheads which were not matched by output.²⁶² Hand J said:

I cannot agree with the language of *Him v. Carey*²⁶³ that in effect a director gives an implied warranty of any special fitness for his position. Directors are not specialists like lawyers or doctors. They must have good sense; perhaps they must have an acquaintance with the affairs; but they need not, indeed, perhaps they should not, have a technical talent. They are the general advisers of the business, and if they have faithfully given such ability as they have to their charge, it would not be lawful to hold them liable.

Directors would decidedly be liable for omitting to do what they could have done in the circumstances. Where the President of an investment company improvidently invested in companies in which he was interested and caused loss, his fellow directors were held liable because they had left the investment of the company's funds to the President's unfeathered discretion and exercised no supervision over him.²⁶⁴ In another similar case, a money lending company had two chartered accountant directors. They left the matter of the negotiations for loans wholly to the discretion of the third professionally unqualified director without supervision and also for making loans without inquiring for what purpose the loans were made, what was the security, if any, and what were the terms of repayment. The company had suffered loss in the transactions. The directors were held liable.²⁶⁵

Where the senior executives of a company caused loss because of illegal price fixing agreements, the directors were held not liable when there was no evidence to show that they knew or had reason to believe that such things were being done or that they were negligent in their choice of senior executives.²⁶⁶

What seems now to be the leading case on directors' duty of care is the New South Wales Court of Appeal decision in *Daniels v. Anderson*.²⁶⁷ It was

261. See, (1967) 181: 139-40. See also, J.A.J. Hellierington, "Corporate Responsibility" (1969) Stan LR 248, 257; M. Feuer, *PERSONAL LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* (1961).

262. *Barnes v. Anderson*, 298 F 614, LSA (Sydney 1924).

263. 82 NY 65 (1880), USA, where it was stated that directors should possess at least ordinary knowledge and skill.

264. *Kammann v. Common Wealth Trust Co.* 233 NY 303 (1918).

265. *Dorchester Finance Co. Ltd v. Stebbings*, 1 Co Lawyers 36 (USA); 1989 BCAC 498 (Ch D).

266. *Graham v. Allis Chalmers Mfg Co.* 43 Del Ch 78 (1965).

267. (1995) 16 AC5R 607.

observed in this case that the old cases, with their notions of subjective tests and gross negligence have become outdated. "The idea that the shareholders were ultimately responsible for the unwise appointment of directors led to the duty of care, skill and diligence, which a director owed to a company being characterised as remarkably low."²⁶⁸ The court said:

"We see no reason why the relationship of a director to a company should not, in accordance with the law as it has been developed since *Hedley Byrne & Co Ltd v Heller & Partners Ltd*"²⁶⁹ satisfy the proximity test. One must look to see whether there are reasons of policy for saying that a director does not owe a duty of care to the company."

The court further said:

"In our opinion, the responsibilities of directors require that they take reasonable steps to place themselves in a position to guide and monitor the management of the company. The courts have recognised that directors must be allowed to make business judgments and business decisions in the spirit of enterprise. Any entrepreneur will rely upon a variety of talents in deciding whether to invest in a business venture. These may include legitimate but ephemeral political insights, a feel for future economic trends, trust in the capacity of other human beings. Great risks may be taken in the hope of commensurate rewards. If such venture fails, how is the undertaking of it to be judged against the allegation of negligence by the entrepreneur? In our opinion, the concept of negligence which depends ultimately upon a general public sentiment of moral wrongdoing for which the offender must pay"²⁷⁰ can adopt to measure appropriately in the given case whether the acts or omission of an entrepreneur are negligent."

The practical difference that the developments have made between the old and new version of the duty has been spelt out to be this:

"The new duty is therefore in effect not greatly different from the Re Equitable standard. The major differences are first that the focus is on the level of responsibility taken on by directors rather than the director's actual level of expertise or experience, and secondly that it is likely that the courts will continue the line of applying a higher standard of care and attention to business by all directors. The standard required is that to be reasonably expected of someone occupying the office in question."²⁷¹

The New Zealand Companies Act, 1993 imposes a new duty on directors, not to engage in reckless trading. This expression is defined in the Act as agreeing to cause or allowing conduct likely to create a substantial risk of

268. Sir, S.M. Watson, "Directors Duties in New Zealand" (1996) 1BL 495, 502.

269. 1964 AC 465; (1963) 3 WLR 161.

270. *Citing Dowling v Stevenson*, 1982 AC 562, 583; 1982 All ER Rep 1 (EIL).

271. S.M. Watson, "Directors' Duties in New Zealand" (1996) 1BL 495, 504.

serious loss to the company's creditors. The duty of directors in this respect has been thus explained:²²²

"The taking of business risks and allowing directors a wide discretion in matters in business judgment requires a sober assessment by directors as to the company's likely future income stream. Given current economic conditions, did the directors make reasonable assumption in their forecasts of future revenue? Creditors are likely to suffer serious losses if future outflows of cash exceed cash inflows for the same period. If there is no profit margin on goods being sold or services provided the company will reach a stage where the shareholders' risk capital has been exhausted and directors are instead using resources otherwise available to meet all creditor's claims. In those circumstances, the company should have stopped trading. To continue trading is to risk creditor's money."

Duty of non-executive director:—It has been laid down that in the application of the standards of care and skill, no distinction can be made between executive and non-executive directors. On facts, the two non-executive directors were held guilty of negligence inasmuch as they signed blank cheques which enabled the executive director to act at pleasure in completing the cheques. They were held liable to compensate the company for its loss.²²³ Summarising the present position of the duty of care and skill, the court crystallised it into the following three points: (1) There ought to be an exhibition of such a degree of skill as may reasonably be expected from a person with the particular director's knowledge and experience; (2) The director has to exercise in the performance of his duty such care as an ordinary man might be expected to do on his own behalf, and (3) All powers vested in directors must be exercised in good faith and in the interest of the company.

When exercising powers or performing duties, directors are charged with exercising the care, diligence and skill that a reasonable director would exercise in the same circumstances. Despite arguments in its favour and some case law supporting the approach, the extra knowledge and abilities of professional executive directors do not mean there is a higher duty of care specifically imposed on them. Conversely, a director with a lesser level of skill and experience must, on the exercise of his or her power, still reach the level of the mythical reasonable director. Similarly, traditionally non-executive directors owed lower duties to the company at common law. But there were indications of changing attitudes in the courts. In *Morley*,²²⁴ Mrs Morley, who took no active part in a company run by her husband, was still found to be liable to a third party. In *Delville Huskies & Sets v National Mutual Life Nominees Ltd*,²²⁵ the court did not accept that a

222. M. Ross, *Directors' Liability and Company Insolvencies—The New COMPANIES ACT* (Commerce Clearing House 1994) 98.

223. *Doverchester Finance Co Ltd v Strelcyns*, 1 Co Law Cases 38 USA, 1989 BCCLC 196 (Ch D) 396, 51.

Jacobs, "Non-Executive Directors" (1987) 1 BL 269.

224. *Strelcyns Tribunal Co Ltd v Morley*, (1990) 3 ACTLC 327.

225. (1991) 5 NZCLC 67, 416.



lower standard of care should be imposed on a non-executive director than an executive director. The difference from the common law must be more academic than problematic since practically, in most cases, directors will take on responsibilities commensurate with their abilities. If they do not, it is perhaps reasonable they should face liability if they do not reach the requisite standard.²⁷⁶

Nominee directors.—Where the directors failed to carry out directions of the court for arranging payment to the workers of the sick industrial company, the court said that the nominee director representing the BIFR in the company's Board was not to be held liable for contempt of court.²⁷⁷ Nominated directors do not have control over day-to-day affairs of the company. They are thus entitled to be protected. The court quashed the summons, orders and subsequent proceedings against such directors.²⁷⁸

Special statutory protection against liability [S. 463].—The Act, however, in Section 463, extends special protection against a liability that may have been incurred in good faith. Where in a proceeding for negligence, default, breach of duty, misfeasance or breach of trust, it appears to the court that the director sued "has acted honestly and reasonably, and that 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."²⁷⁹ Thus three circumstances must be shown to exist. The position must be such that the person to be excused is shown to have acted firstly, honestly, secondly, reasonably, and thirdly having regard to all the circumstances he ought fairly to be excused.²⁸⁰ A good illustration is *Claridge's Patent Asphalte Co*, *ra*.²⁸¹

276. S.M. Watson, "Directors' Duties in New Zealand" (1998) JBL 495, 505. For another contribution on the subject see Jones, *COMPANY LAW IN NEW ZEALAND* (Butterworth 1993) 119–20. Yesterday M. Desai v SEBI, (2003) 39 SCL 376 (SAT); Chaitanya D. Mehta v SEBI, 2004 CLA 499 (SAT). Orders of disqualification were vacated in reference to non-executive directors. Equitable Life Assurance Society v Buckley, (2004) 1 BCCLC 180 (QBD). Facelift Ltd v. 2004 BCC 877, the application of a non-executive director for striking out case against him, the court has to consider reasonableness of his conduct, which is in essence a fact sensitive question and cannot be considered in a summary manner. It could not be said that there was no probability of success. Socy of State v. Sacks and North, 2004 BCC 877; 2005 EWTC 6/01, position considered in the context of disqualification proceedings. In a note on the case by the Editor, John T. Lowry, citing Adrija Cadbury as observing in *CORPORATE GOVERNANCE AND CHAIRMANSHIP* (Oxford) 57, that the personal qualities needed of a non-executive director are clearly defined by Mills, *CONTROLLING COMPANIES* (Unwin, London 1988) 94, "A good non-executive director needs to have intellect, integrity and courage. Of these qualities, courage is the most important for without it the other two characteristics are useless".

277. UPH Kangan Singhji Sumit v Mahadev Mills Ltd, 2002 Civ I 1 253 (Bren).

278. SK Sharma and AK Mahajan v Registrar of Companies, (2005) 126 Comp Cas 222 (P&H).

279. S. 463(1): The word "officer" as used in the section has been held to include an officer whose service has been terminated. *Amrit Lal Chawla v Denipressad (Delta Ray)*, (1988) 2 SCC 269. Relief is allowed only to officers of the company and not to the company itself. *Selmeen Singh v Registrar of Companies*, (1995) 2 PLR 563.

280. Buckley J in *Ducouedic Ltd*, 14. (1964) 2 Cb 365; (1969) 2 WLR 111.

281. (1921) 1 Ch 543; 125 I.T 255.

A company was formed for the production of certain compositions of cement for making roads. Owing to great increase in motor traffic there was a profitable future in making roads and it was proposed that the company should embark upon this new business. After consulting the company's solicitors, who advised that the scheme was not *ultra vires*, the directors applied the company's capital, but the new business proved a failure.

They were sued for misapplication of funds. But the court allowed relief. "They were acting for the benefit of the company and took the best advice." Similarly, in a case before the Orissa High Court,²⁸² where the annual general meeting of a company could not be held in time on account of the dissolution at the material time of the company's Board of directors by a court order, the court granted relief against liability for default. The Kerala High Court granted relief to a director who had not disclosed that his joint family was carrying on a contract with the company, the same having been entered into by his deceased father eighteen years ago and, he being not an active member of the family, did not know it.²⁸³ Where a statement in the prospectus was that the company had 25 years of experience in its line of business, whereas the experience was that of the partnership which it had taken over and the business was commenced a bit late than what was stated in the prospectus, the directors were held not guilty of misrepresentation. Relief against prosecution was granted.²⁸⁴ Relief was granted against the consequences of delay in registering a transfer of shares because the directors had acted on the advice of competent legal advisers.²⁸⁵ Relief was allowed to a managing director because the delay of 24 days in filing the cost audit report was due to labour problems in the company.²⁸⁶ Relief was allowed to directors who had resigned before the relevant period during which offences were alleged to have been committed and their resignations were registered with the ROC.²⁸⁷

The Calcutta High Court refused to grant relief in a case where there was a default in holding five successive meetings.²⁸⁸ Relief was allowed where the directors could not hold AGMs and file annual returns, the failure being due to the takeover of the company by the Government and

282. *SI Kapoor v. Registrar of Companies*, (1964) 1 Comp LJ 211 (Ori); *CS Logashan v. Registrar*, (1964) 1 Comp LJ 211 (Ori). *Tajen Kumar Chowdhury v. Registrar of Companies*, (2005) 114 Comp Cas 601 (Cal), there was sufficient cause for failure to hold AGM and file statutory documents with Registrar, relief was granted to the petitioning director alone because for the defaults committed by the directors, the directors were individually responsible and liable for conviction, one director could not make the application in a representative capacity for all the directors.

283. *MD Varghese v. Thomas Stephen & Co Ltd*, (1977) 41 Comp Cas 1131 (Ker).

284. *Progressive Aluminiium Ltd v. Registrar of Companies*, (1997) 89 Comp Cas 147; (1997) 4 Comp LJ 215 (AP).

285. *GR Desai v. Registrar of Companies*, (1999) 49 Comp Cas 138 (AP); *Narsundia Janardhan Kamath v. Registrar of Companies*, (1999) 2 Comp LJ 25 (Bom).

286. *M Meyappan v. Registrar of Companies*, (2002) 122 Comp Cas 450 (Mad).

287. *G Ramesh v. Registrar of Companies*, (2007) 125 Comp Cas 655 (Mad).

288. *Cour Mldg Co. of India Ltd, re*, (1967) 1 Comp LJ 237 (Cal).

the matters being beyond their control.²⁸⁹ Similarly, where the directors over-drew their remuneration in anticipation of its being voted to them in future, the court held that they could not be said to be acting reasonably and ought not to be excused,²⁹⁰ or directors who knowingly accepted deposits beyond the statutory limits.²⁹¹ No relief was allowed to directors who had collected contributions under the Employees' State Insurance Act and the Provident Fund Act but did not pay the employees according as their claims became due.²⁹² Relief was not allowed where correct returns were not filed and the offence was *prima facie* made out.²⁹³ Relief has been allowed under the section to persons who become directors only for the purpose of rendering some professional or technical services. Such directors may not be aware of what administrative directors have been doing.²⁹⁴ Relief was allowed in anticipation to two Japanese directors who were not concerned with the day to day management of the company.²⁹⁵ Part-time directors are not entitled to any special consideration, but they may be more readily relieved where no evidence of their role in management is adduced.²⁹⁶ The section was applied to relieve a marketing manager,²⁹⁷ but not to debenture trustees.²⁹⁸

289. *Gandevi Kumaras v. Registrar of Companies*, (2002) 108 Comp Cas 290 (Bom).
290. *Dinamalar Ltd. v. (1969) 2 Ch 365; (1969) 2 WLR 114*. The Allahabad High Court has further pointed out in *CJ Bhagwan v. Registrar of Companies*, (1970) 40 Comp Cas 661; (1970) 2 Comp LJ 24 (All), that relief under the section is not allowed where the offences are so serious as to attract the provisions of the Indian Penal Code relating to forgery or falsification.
291. *Jagmohan Ram Hirshal Doshi v. Registrar of Companies*, (1989) 46 Comp Cas 553; (1989) 2 Comp LJ 315 (Bom).
292. *Jagmohan Prasad Jaiswal v. Registrar Prudent Fund Commr*, (1987) 62 Comp Cas 371 (Del). Relief is not allowable for defaults under other Acts. It is confined to defaults under the Companies Act. *Hariharlal Mehta v. Union of India*, AIR 1990 Bom 34; (1990) 1 Comp LJ 456; (1991) 21 Comp Cas 69.
293. *Farouk Inayat v. BIFR*, (2002) 120 Comp Cas 64 (Mad).
294. *Om Prakash Khedia v. Shree Keshavji Investment Ltd.*, (1978) 48 Comp Cas 45 (All).
295. *Karp Yamada, re*, (1970) 68 Comp Cas 192 (Bom). Anticipatory relief was also allowed to directors who apprehended prosecution for defaults in reference to annual accounts through the period of limitation for proceeding against them had expired, the offence being out of continuing nature. *K.B. Mokha v. Registrar of Companies*, (1991) 71 Comp Cas 669 (Del).
296. Jagmohan (supra) followed in *Hariharlal Mehta v. Union of India*, AIR 1990 Bom 34, 36; (1990) 1 Comp LJ 355; (1991) 21 Comp Cas 69, where the court held that "such other person" whom notice of the proceedings under the section had to be given would include shareholders of the company. *SP Purji v. Registrar of Companies*, (1991) 71 Comp Cas 509 (Del), relief was granted where it was doubtful whether deposits had been taken in excess of limits and whether the accused directors were parties to the resolution for inviting further deposits. Relief was allowed to directors of the sick industrial company which was under reference to the Board for Industrial and Finance at Reconstruction (BIFR). One and a half year period of relief was extended for two years, *Oriental Power Cables Ltd. v. ROC*, (1995) 81 Comp Cas 442 Raj. There cannot be an automatic relief in favour of a director who was appointed for compliance of laws only in a specified respect, though the default did not relate to the specified matter. *Sohil Kumar Doshi v. Maharashtra and Gujarat Industries (P) Ltd.*, [1996] 66 Comp Cas 386; (1996) 2 Comp LJ 219 (MP).
297. *Raninder Kumar Sangit v. Amt. Lampz Ltd.*, (1964) 55 Comp Cas 742 (Del).
298. *Central Bank Executive & Trustee Co Ltd v. Magus Hard Temp Ltd.*, (1997) 89 Comp Cas 40 (AP).

The totality of the circumstances have to be examined for considering whether relief is to be allowed or not. In this case, an *ex officio* Chairman of a Government enterprise was also the Chairman and managing director of a joint venture company. He was not to be exonerated of his duty to take care to see that the provisions of the Act were complied with. The Board had delegated substantial powers of management to another director. There was also a company secretary in the employ of the company. The court said that the Chairman-cum-managing director deserved to be relieved of the alleged statutory violations. A director who was not on the Board at the time of violations was also to be relieved.²⁹⁹ The directors and officers of a company were charged for violation of Section 211 (1956 Act) [S. 129, 2013 Act] because the foreign exchange fluctuation loss as relating to a loan did not figure in the profit and loss account. It was a contravention of the section. They were relieved. There were no specific allegations of dishonest intention. It was a technical default. It did not affect any person, nor opposed to public policy. The Board of directors explained why the loss was not reflected through profit and loss account.³⁰⁰

The proviso to Section 463(1) declares that in a criminal proceeding under the section the court shall have no power to grant relief from any civil liability.

It has been held by the Court of Appeal in England that although the provision is expressed in wide language, in its context of company law and on its true construction the only proceeding for which relief can be claimed were proceedings against a director by, on behalf of, or for the benefit of his company for breach of his duty to the company as a director.³⁰¹

Petition to High Court for relief against apprehended proceeding IS. 463(2).—Where any officer has a reason to apprehend that any proceeding will or might be brought against him, he may apply to the High Court for relief. On such application being filed, the High Court is to have the same power to relieve him as it would have had if it had been a court before which proceedings against the officer had been brought under sub-section (1).

299. *Madhavji Nambiar v Registrar of Companies*, (2002) 706 Comp Cas 1 (Mad).

300. *Simplex Infrastructure Ltd v Registrar of Companies*, (2010) 162 Comp Cas 293 (Cal); *Sushir Ray v Registrar of Companies*, 2014 SOC OnLine Cas 12783; (2014) 167 Comp Cas 1. Failure of a director to disclose the fact of loan to him, court could have taken cognizance of offence within one year from the date of offence; this was not done, the court said that the director could be relieved under S. 463. But there could be no relief from liability for failure to maintain proper books of account.

301. *Customs and Excise Officers v Hudson Alpax Ltd*, (1981) 2 All ER 697 (CA). According to a circular of the Company Law Board, the Registrar should not file a criminal complaint to set at naught the application of a director for relief under S. 463. *PS Belli v Registrar of Companies*, (1986) 16 Comp Cas 1061 (Del). The jurisdiction under the section is not a proper focus for determining the question whether there had been a default or not. *S Pandit, re*, (1990) 64 Comp Cas 129; (1990) 2 Comp LJ 170 (Bom). Seizure of books was not a sufficient ground for excuse particularly when copies were supplied. Where proceedings have already been launched, relief can be claimed only from the court where the proceedings are pending. *Syntexin Mutharai Vellu v Registrar of Companies*, (1995) 16 CLA 124 (Bom).

Sub-section (3) provides that no court is to grant any relief to any officer under sub-section (1) or sub-section (2) unless it has by notice served in the manner specified by it, required the Registrar and such other person, if any, as it thinks necessary, to show cause why such relief should not be granted.

It has been held that the distinction between Section 633(1) and (2) is not referable to court, but to the status of proceedings. Section 633(2) does not limit jurisdiction and powers of the High Court only to "apprehended proceedings". Additional powers are available to the High Court in view of the larger jurisdiction exercised by it in respect of several matters prescribed under the Act.³⁰²

Duty to attend Board meetings

Negligence by non-attendance.—Duties of directors are of intermittent nature to be performed at periodical Board meetings. In other words, they are not bound to pay continuous attention to the affairs of the company. "They do not undertake to manage the company."³⁰³ A director is not even bound to attend all the meetings of the Board, although he is under an obligation to attend whenever in the circumstances he is reasonably able to do so. According to Section 167(1)(b) the office of a director will be vacated if he absents himself from all meetings of the Board for a consecutive period of 12 months, with or without obtaining leave of absence from the Board. Moreover, a director's habitual absence from Board meetings may, taken in the light of other circumstances, become evidence of negligence on his part. In an early case in which liability was imposed for failure in this respect, the court said: "[I]f some persons are guilty of gross non-attendance, and leave the management entirely to others, they may be guilty by this means if breaches of trust are committed by others."³⁰⁴

Duty not to delegate [S. 166(6)] (Assignment of duty)

Section 166(6) says that a director of a company shall not assign his office and any assignment so made shall be void.

Liability for co-directors' defaults.—Generally, a director has to perform his functions personally. He is bound by the maxim *delegatus non-potest delegare*. Shareholders have appointed him because of their faith in his skill, competence and integrity and they may not have the same faith in another person. The rule is, however, not inflexible. In the following two cases at least delegation is proper and valid. Firstly, a delegation of functions may be made to the extent to which it is authorised by the Act or articles of association of the company.³⁰⁵ Secondly, there are certain duties which

302. *Vision Financial Services (P) Ltd v Y Rajendran*, 2013 SCC OnLine Mad 3196; (2015) 186 Comp Cas 175.

303. *Romer J in City Equitable Fire Insurance Co, re*, 1925 Ch 407 133 LT 520 (CA).

304. *Charitable Corps v Sutcliffe*, [1742] 26 ER 642. The general practice, however, is not to hold a director liable for things that transpire in his absence at a Board meeting. See, *Gilligan v London & Suburban General Permanent Building Society*, (1890) 25 QBD 485 63 LT 517 (CA).

305. See, S. 153 under "Statutory Provisions" supra. The directors, being in control of the company's affairs, they cannot get rid of their managerial responsibility by delegating a

may, having regard to the exigencies of business, properly be left to some other officials. Directors must be able to entrust details of management to subordinates, or else business could not be carried on. A proper degree of delegation and division of responsibility by the Board is permissible but not a total abrogation of responsibility since this would undermine the collegiate or collective responsibility of the Board of directors which is of fundamental importance to corporate governance. A director might be in breach of duty if he left to others the matters for which the Board as a whole had to take responsibility.³⁰⁶ These two exceptions permit a reasonable distribution of work among all the directors and other officials of the company. Now, if a co-director or other official to whom a function is so delegated commits a fraud and the company suffers a loss, to what extent are the other directors liable. This was the question before the House of Lords in the leading case of *Doney v Cory*.³⁰⁷

A banking company had suffered heavy losses on account of advances of money made to irresponsible persons and without security; and also on account of payment of dividends out of capital. These losses were due to the mechanism of the Chairman and the manager who manipulated the accounts and showed a profit. At a meeting of the Board, the defendant was ensured of the correctness of the accounts and, therefore, he gave his authority in the payment of a dividend which was obviously paid out of capital.

He was sued for the losses, but was held not liable. Lord Halsbury observed:

Each and all of the charges may be disposed of by the proposition that Mr Cory was not himself conscious of any one of these things being done. Was he under a duty to probe into and know these things? It cannot be expected of a director that he should be watching the inferior officers or verifying the calculations of auditors. Business of life could not go on if people could not trust those who are put in a position of trust for the express purpose of attending to the details of management. He could have been held liable only if he had some reasonable grounds to suspect the honesty of the other officials.³⁰⁸

person as the occupier of the factory. *JK Industries v Chief Inspector of Factories*, (1996) 6 SCC 665; (1997) 89 Comp Cas 285. This will not apply to the case of a Government company, the ultimate responsibility being that of the Government, special rules become necessary. *Indian Oil Corp Ltd v Chief Inspector of Factories*, (1998) 5 SCC 238; 1998 SOT (L&S) 1433; (1998) 9d Comp Cas 64.

³⁰⁶ *Swallowtail Drilling plc v m*, (1999) 1 BCLC 286 (Ch D).

³⁰⁷ 1901 AC 477. See R.K. Goel, "Delegation of Directors' Powers and Duties: A Comparative Analysis" (1967) 18 ICIAJ 150.

³⁰⁸ 1901 AC 485. See also, *Tannay & L* in *National Bank of Wales Ltd v re*, (1899) 2 Ch 639, 673; *Denham & Co. re*, (1883) 25 Ch D 752; 50 LT 523. See also, *Lund Credit Co of Ireland v Lund Ferry*, (1970) 5 Ch App 765, where a company's Board had, in accordance with the company's constitution, quite properly delegated the making of a transaction to a sub-committee, which made illegal loans; the director who was not a member of the

This principle was followed by the Madras High Court in *D. Doss v CP Cornell*.³⁰⁹

An undischarged insolvent,³¹⁰ having been appointed advisory director of a banking company, misappropriated a part of the security money received from the employees of the company which was at his disposal.

The official liquidator could not succeed in his effort to charge his co-directors with the liability. The court said that the respondents had no reason whatsoever to suspect the integrity of the Chairman. "Insolvency does not necessarily mean that a man is a dishonest man."³¹¹ In a subsequent decision, the same court added:³¹²

The ordinary directors of a company are entitled to presume in the absence of features arousing their suspicion that the affairs of the company are being properly conducted by the managing director and the managing committee, and unless any mismanagement or other act of misfeasance is brought to the notice of the directors, they cannot be held liable in respect of the same.

On the same principle, directors were held not liable for misappropriation of stores by the stores manager,³¹³ or for failure to detect cashier's concealment of overdrafts,³¹⁴ or for payment of dividends on false accounts declared at a meeting where the director sought to be made liable was absent,³¹⁵ or for allowing, by one of the two directors, the company's premises to be used for gaming purposes without licence, the other director knowing nothing.³¹⁶

A director is also permitted to rely on professional or expert advice given by reliable competent employees, professional advisors and experts, and other directors. This is provided the reliance is in good faith, after proper inquiry when appropriate, and without knowledge that the reliance was unwarranted. A prudent director aware that he or she lacked expertise in a particular area could avoid potential liability by obtaining the advice of an expert. In common with other provisions in the Act, the best way a director can protect him or herself from later liability is to lay a 'paper trail' before entering into any transaction or carrying out any action.³¹⁷

³⁰⁹ sub-committee said who had no reason to suspect the impropriety of the transaction was held not liable for the loss suffered by the company.

³¹⁰ S. 164 now prevents an undischarged insolvent from holding any managerial office.

³¹¹ Quoting *Lixulus M.R. v National Bank of Wales Ltd.*, 12 (1899) 2 Ch 629, 673.

³¹² *Ganesan v Krishnamurthy & Co.* (1946) Comp LJ 262 (Mad).

³¹³ *Vijai Laxmi Super Mills*, n. AIR 1963 All 55.

³¹⁴ *Prestonians v Grenier*, 1907 AC 101 (PC).

³¹⁵ *Nagendro Prabhu v Piyushji Bhatk.* (1959) 59 Comp Cas 685; *JLR* (1960) 1 Ker 340; AIR 1970 Ker 120.

³¹⁶ *Huckby v Elliott*, (1970) 1 All ER 189. The City Equitable principles have been followed in the following Indian cases—*SC Miller v Naresh Ali Khan*, AIR 1926 Oudh 153; 92 IC 50; *National Bank of Upper India v Dina Nath Sapru*, AIR 1926 Oudh 243; 95 IC 294; *Thangappa Chinnai v G Rajagopalan*, AIR 1944 Mad 556.

³¹⁷ S.M. Watson, "Directors' Duties in New Zealand" (1996) JBL 495, 504.

This, however, does not mean that directors can always throw up their hands and say, "we knew nothing and believed that everything was alright". Sometimes it is their duty to know. These words of Lord Somers in *Morris v Kanssen*,²¹⁸ though spoken in a different context, were borrowed by Nazir J of the Kerala High Court in deciding the typical case of *Palai Central Bank Ltd v Joseph Augusti*:²¹⁹

The accounts of a banking company in liquidation showed that taxes and dividends were paid for as many as 22 years (i.e. from 1936-1958) on profits not really earned, but made to appear firstly by fictitious entries, and subsequently by showing interest, which there was no prospect of ever realising, on the bad and irrecoverable advances. The length of time was by itself a sufficient proof of the deliberateness of the falsification.

The court rejected the directors' plea that they had relied on competent staff and auditors who always certified the accounts as true. Referring to the magnitude of the loss involved, which could not be easily explained, the court said:

Not one of them has cared to disclose who were the persons in actual charge of these matters, what exactly were the duties imposed on them, and what scrutiny there was over their work in order to assure that it was properly done. At best the plea of the respondents can only amount to a plea of complete ignorance born of a complete inadvertence to their duties, as directors, a reckless indifference, or, otherwise put, a wilful shutting of their eyes.... The deliberate falsification of the books year after year could not have been the handiwork of the staff of the company; it could only have been at the specific instructions of those at the helm of affairs. In a company, the directors are at the helm of affairs, and although the rudder might be in the hands of the managing director, it is their duty to keep an eye on him and see that he steers a proper course.²²⁰

Similarly, "the position of a managing director or Chairman of the Board of directors is different. He cannot say that he signed the accounts without understanding the implication of its entries."²²¹

Duty to disclose interest [Ss. 2(49) and 184]

Conflict of interests.—Every agent occupies a fiduciary position towards his principal. As such it is his duty to see that his personal interest and his duty to his principal do not conflict. For the proper exercise of the functions of a director, it is essential that he be disinterested, that is, be free from any

218. 1946 AC 459, 476; 171 LT 353 (HL).

219. (1966) 1 Comp LJ 360 (Ker).

220. (1966) 1 Comp E] 381. The learned Judge then cited passages from the speech of Lord Davy in *Deery v Cox*, 1903, A.C. 477 and distinguished the case on the ground that there the defendant faced a searching examination which verified his innocence.

221. *Official Liquidator v Shri Krishna Prasad Singh*, (1969) 1 Comp L] 327 (Pat); *National Sagar Mills Ltd, re.* (1978) 48 Comp Cas 339 (Cal), where the managing director was held liable for misappropriations but not his co-directors.



CASE PILOT

conflicting interest.³²² This conflict invariably arises when a director is personally interested in a transaction of the company. Naturally a man is likely to prefer his personal interest. This principle was established in the leading case, *Aberdeen Railway Ltd v Blaikie Bros.*³²³ There, Blaikie had a conflict of interest as director and Chairman of the company and managing partner of a firm which supplied office furniture to the company. Despite the fact that the price the company paid for the furniture was fair, the company was entitled to set the contract aside. The judge said:

"A corporate body can only act by agents and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one, having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."

Blaikie had an interest as a partner in the firm to sell as high as possible but an interest as director, of the company to purchase as low as possible. The fairness or otherwise of the price was irrelevant; what the court considered was the possibility of unfairness.³²⁴

The Act lays down a special procedure to be followed in such cases.

A director has to disclose his concern or interest in any company or companies or bodies corporate, firms or other association of individuals. His disclosure has to include the shareholding in such manner as may be prescribed. The disclosure has to be made at the first meeting of the Board in which he participates as a director, whenever any change occurs in the disclosures already made, such change must be disclosed at the first meeting of the Board after such change. Such disclosure has to be renewed in every financial year.

Every director of a company who is in any way, whether directly or indirectly interested in an actual or proposed contract or arrangement to be entered into—(a) with a body corporate in which such director either himself or in association with any other director, holds more than 2 per cent shareholding 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

322. Jackson, *The Wisdom of the Supreme Court* (1962) 417–18.

323. (1864) 1 Macq 461 (HL).

324. Under S. 138, New Zealand Companies Act, 1993, directors are deemed to be interested in the following circumstances:

- If the director is a party to or will or may derive a material financial benefit from the transaction;
- If the director has a material financial interest in another party to the transaction;
- If the director is a director, officer or trustee of another party or person who will or may derive a material financial benefit from the transaction;
- If the director is the parent, child or spouse of another party or person who will or may derive a material financial benefit from the contract;
- If the director is otherwise directly or indirectly materially interested in the transaction.

a partner, owner or member, he has to disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed. He has not to participate in such meeting. If he becomes subsequently so interested, he must make the disclosure at the first meeting of the Board.

The contract becomes voidable if there was no disclosure or the director participated in the meeting.

As noted above, these provisions are based upon the sound principle that the company is entitled to the unbiased advice of every director upon matters which are brought before the Board.

It is possible, of course, that a person may be altruistic and in coming to an arrangement in which he is concerned he will give better terms to the other contracting party than if he had no interest at all, but persons of such disposition are not usually found among the directors of a company and it must be assumed that in the making of an arrangement a man will consider his own interest rather than the interest of the other contracting party.³²⁵

What constitutes "Interest".—This obviously raises the question as to what constitutes an "interest" within the mischief of the rule. Section 2(49) identifies persons who can be said to have interest. "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.³²⁶ "The interest to be disclosed is that which in a business sense might be regarded as influencing judgment; the essence of the matter being that any kind of personal interest which is material in the sense of not being insignificant must be revealed."³²⁷ In short, the interest must be such which conflicts with the director's duties towards the company. Thus, for example, where the directors took part in and voted at a meeting of the Board which granted debentures to two of them, the resolution was held to be bad.³²⁸

Only such interest comes within the mischief of the rule and has to be disclosed which is "personal" in the business sense of the word. Thus the appointment of a director as a Chairman or as a managing director is not

325. *Alexander Timler Co. v. (1901) 20 I.J.C. 762*. See also, *Ramaswami Iyer v. Madras Times Printing & Publishing Co.* AIR 1915 Mad 1179.

326. *Cultures Iron Co. v. (1951) 5 C 476 1951 S.C. 344 (IH).*

327. *North Eastern Insurance Co. Ltd. v. (1919) 1 Cn J 98c*; 20 LT 223. This may be compared with *Bank of Poona Ltd. v. Narayandas Shrivati Sunjani*, AIR 1961 Bom 252; (1961) 31 Comp Cas 364, where a resolution allotting shares to a defaulting director in a meeting at which he was present and voted was held not valid. See also, *Public Prosecutor v. T.P. Khular*, (1956) 2 MLJ 590; AIR 1957 Mad 4; (1957) 27 Comp Cas 717; *Mukkallikure Gathlir Co. Ltd. v. Thomm*, (1995) 4 Comp LJ 311; (1996) 2 KLT 175; (1996) 22 CLA 348. The mechanical function of accepting or rejecting transfer of shares at Board meetings does not create conflict of duty and interest.

such an interest and the appointment will, therefore, be valid even if the director to be appointed was present at the meeting and voted.³²⁶ But in *V RamaSwami Tyer v Madras Times Printing & Publishing Co.*³²⁷

Under a company's articles two directors constituted a quorum for a meeting of the Board. Two were present and they appointed one of themselves as managing director and co-editor of the paper run by the company. The appointments were held to be invalid as when the vote of the interested director was excluded there was no quorum to make the appointment in each case.

Where Board already aware.—Where the whole body of directors is already aware of the facts, a formal disclosure is not necessary. A very illustrative case is *Pidah Venkatchalapathy v Gantur Cotton Jute and Paper Mills Co Ltd.*³²⁸

A mortgage of Rs 1,25,354 was created over the mill property of a company. The loan was advanced by the wife of a director. Thus he was interested in the transaction. But he neither disclosed his interest, nor abstained from voting. In an action by the company to have the mortgage set aside, it was held that as the fact was already known to the directors there was no necessity of a formal disclosure.

It was also contended by the company that his voting on the matter vitiated the contract. The court was, however, of the opinion that mere voting by an interested director could not render the contract void or voidable unless, in the absence of that vote, there would have been no quorum qualified to contract. The mere fact that voting is an offence³²⁹ punishable with fine does not ipso facto render the contract void or voidable. The court agreed with the company's argument that an interested director not declaring his interest

326. See, *Foster v Foster*, (1916) 1 Ch 532 and *N.W. Transportfond Co v Beatty*, (1887) LR 12 AC 589; 57 LT 42h (DC). In *Pahlala Panchayat v TP Kherlan*, (1966) 2 AIR 1940, AIR 1957 Mad 4 (1957) 27 Comp Cas 717, it was held that a resolution by which a director was authorised to draw cheques on the company's bankers was not void simply because the director so authorised had participated in the meeting of the Board. *Shivdas Hanjil Shah v Matsushiro Textiles Ltd.*, AIR 1994 Bom 20, appointment of a director's brother as a director in the company was not viewed as a matter of personal interest so as to be vitiated by the director's presence and voting. Such appointment is neither a contract nor arrangement within the meaning of S. 294. The court cited *Madras Jute Co Ltd v Hiru Krishen Soni*, (1995) 1 Comp LJ 195 (Mad) where the court in turn relied upon *Foster v Foster*, (1916) 1 Ch 532, 1 NK (Gandharaju Chetty & Co v Andhra Mills

(CBZ) 1951, (1958) 50 CLA 48, issue of shares or warrants has been held to be not an arrangement or contract within the meaning of Ss 299–300 so as to require disclosure.

327. AIR 1915 Mad 1779.

328. AIR 1929 Mad 353; 115 IC 486. Where the daughter of the Chairman-cum-managing director was to be appointed as vice-president and the whole number of directors were already aware of this fact, as having been disclosed on an earlier occasion, non-disclosure of this extension was held to be not a failure in duty, *A Sankaran v Registrar of Companies*, (1995) 83 Comp Cas 34 (CTB).

329. For a critical examination of these provisions see, P.A.S. Rao, "Law Relating to Directors' Interest" (1966) 2 Comp LJ 47.

would be liable to account for secret profit made by him in the transaction, but the present case revealed no such profits. The mortgage was found to be fair and in the interest of the company.

An English ruling on this point was handed down in *Lee Precision Ltd v Lee Lighting Ltd*.³³² The court said that it would hesitate to find that the failure to formally disclose at a Board meeting an interest common to all members and, *ex hypothesi*, already known to all the members of the Board would be a breach of duty. This ruling was followed in *MacPherson v European Strategic Barons Ltd*.³³³ In this case, the fact of mutual interest was known to all the directors and, therefore, no importance was attached to the lack of a formal disclosure. But the Court of Appeal³³⁴ did not approve the contract because there was the breach of a fiduciary duty in exercising powers of management for their own benefit rather than for the benefit of the company. The distribution of the company's assets was an attempt to effect an informal winding without making a provision for its creditors.

Effect upon transaction. — It has been pointed out by the Supreme Court that there is no ban on a contract in which a director is interested; only that it should be disclosed, *bona fide et fait*.³³⁵ Even where the interest is not disclosed the transaction is only voidable against the interested director and not void.³³⁶ If the company waives the irregularity and affirms the transaction, he becomes bound by it. He cannot insist on the irregularity.³³⁷

Accountability for profit from transaction. — The director in question is bound to hand over the benefits, if any, that he might have secured under the transaction and he cannot ask for set off for any claim that he may have against the company. This is the grand contribution of the decision of the House of Lords in *Guinness plc v Saunders*.³³⁸ The plaintiff company launched a takeover bid for another company. W and two other directors formed a committee of the Board for the purpose of conducting the bid. A company controlled by W submitted a bill for £5.2m by way of remuneration for services rendered in connection with the take-over. The calculation was in terms of a percentage linked with the amount involved in the take-over. W claimed that the payment was under an agreement with the company, but, in fact, it was only under an agreement with the committee of directors and the fact that he had become interested in the transaction by linking his remuneration with the takeover amount was also disclosed only to this committee. He was compelled to refund the whole amount to the

³³² 1992 BCLC 22 (CA).

³³³ (1999) 2 BCLC 203 (Ch D).

³³⁴ *MacPherson v European Strategic Barons Ltd*, (1999) 2 BCLC 203 (Ch D). *The Times*, Sept 5, 2000 CA.

³³⁵ *P Layla & Co v VO Wapshare*, AIR 1969 SC 843; (1969) 2 Comp LJ 113; (1969) 39 Comp Cas 808 (1969) 3 SCR 203.

³³⁶ *Narayandas v Seagull Bank*, (1965) 30 Comp Cas 595; (1965) 2 Comp LJ 99.

³³⁷ *Ibid*. See also, *Yell v Greatorex Ltd*, (1904) 1 Ch 32, where a director was not allowed to avail an alibi on the ground that he took part in it.

³³⁸ (1990) 2 WLR 324 (112), the decision of the court of appeal is reported in (1989) 2 All ER 940; 1988 BCLC 607; (1988) 4 BCC 377 (CA).

company. The matter of his interest had to be disclosed at a meeting of the full Board of directors duly convened and not merely to a sub-committee of directors. He thus held the money as a constructive trustee and was obliged to account for it irrespective of any cross-claim he might have by way of quantum meruit or equitable compensation for services rendered.

A director is not to hold an office of profit under the company. If any such offence is committed, it is not necessary to take consent of the Central Government for prosecution of such director. The period spent in obtaining permission is not to be extended from the period of limitation. Prosecution in this case became barred because of the expiry of the period of limitation.³³⁹

General consequences of default.—According to Isaac J of the Kerala High Court³⁴⁰ the consequences of default under the section are: (1) liability to be prosecuted under Section 184(4); (2) cessation of the office of directorship under Section 167(1)(d);³⁴¹ (3) liability to be prosecuted under Section 283(2) for acting as director after incurring a disqualification; and (4) liability to refund remuneration. It is not possible for the court to relieve the director concerned under Section 463 from the cessation of directorship and its consequences.

Exception.—This procedure has not to be followed where the contract is between two companies and a director does not hold more than 2 per cent [or two or more of them together hold not more than 2 per cent] of the paid-up share capital of the company.³⁴² The section is also not to be taken to prejudice the operation of any rule of law restricting a director from having any concern or interest in any contract or arrangement with the company.

Position and liability of nominee director.—A nominee director is not supposed to be in charge of a company's affairs. He is not liable for the failures of the company to comply with the Companies Act and other regulatory laws. His duty is to watch the interest of the institution which nominated him. As a member of the Board the only expectation from him is that he should not do anything against the interest of the company. Where a complaint showed that a nominee director wilfully abetted the making of a false statement under the Income Tax Act, the court refused to quash the complaint against him. His position was to be considered on evidence.³⁴³

A nominee director suffers from an essential conflict of duty and interest. He owes his duty to the nominator but he is sitting in the Board of the denominator. A holding company nominated a majority of the directors in the subsidiary company's Board who remained docile and because of their inaction, the holding company suppressed the business of the

339. S. Gound Rajan v. M.O. Roy, 2014 SCC OnLine Mad 10240; (2015) 116 Comp Cas 379.

340. M.O. Varghese v. Thomas Stephen & Co Ltd, (1970) 40 Comp Cas 1131 (Ker).

341. See further, Glorie Motors Ltd v. Makhan Tej Singh, (1984) 55 Comp Cas 645 (Del); K.S. Dhilip v. Paruppu Utility Financiers, (1988) 64 Comp Cas 19, 32 (P&H), automatic vacation of office of director.

342. S. 184(5). For an account of liabilities of officers and directors of companies, see, Dr V. Couri Shanker, (1986) 3 Comp LJ 127 (Journal section).

343. J. Sethuraman v. IAC of T, (1992) 74 Comp Cas 515 (Mad).

subsidiary. Without exploring the possibilities of making the nominees liable for destroying the business of the subsidiary, the court allowed the alternative relief of compelling the holding company to refund the minority investment in the subsidiary taken at a value before the repressive policy began. The court observed that nominee directors cannot consider themselves as merely the watchdog of the nominator's interest. No problem arises so long as the interests of both the companies are in harmony. But when their interests are at a conflict, the nominees would be placed in an impossible position.³⁴⁴

In a subsequent case³⁴⁵ the nominator company and its nominees were sued by those who lost their investment because of acting upon quarterly financial statements issued by the nominees on behalf of the denominominator company, the statements being false. They were held not liable because shareholders or investors who appoint or nominate directors owe no duty to anybody about their conscientious functioning unless there is some impropriety in the conduct of the nominator. But the judges were agreed that nominee directors are in the same position as other directors and they owe the same duties.³⁴⁶ The question of nominee directors was again dealt with in the New Zealand case of *Dairy Containers Ltd v NZI Bank Ltd*.³⁴⁷ Three nominee directors of a New Zealand Dairy Board subsidiary stole large amounts of money for that subsidiary. The court was critical of the Privy Council decision in *Kuwait Asia Bank*³⁴⁸ but felt obliged to follow it and state that the Dairy Board was not liable for the acts of its nominee directors since it did not exercise direct control over Dairy Containers Ltd.

Tax liability.—Where the bank account of a director of a private company was frozen for recovering income tax dues of the company, it was held that it was for the director to show that the default on the part of the company was not attributable to any breach of duty on his part.³⁴⁹ But apart from any provisions of the taxing statute, arrears of the tax amount are not to be recovered from any director personally.³⁵⁰

MEETINGS OF DIRECTORS

Directors of a company have to exercise most of their powers at periodical meetings of the Board. The Act, therefore, requires every company to hold its first meeting within 30 days of the date of its incorporation.

344. *Scottish Coop Wholesale Society v Meyer*, 1954 AC 324; (1956) 3 WLR 401 (H.L.).

345. *Kuwait Asian Bank EC v National Mutual Life Nominees Ltd*, (1991) 1 AC 187; (1990) 3 WLR 297 (PC).

346. See, *Selangor United Rubber Estates Ltd v Cradock (No 3)*, (1968) 1 WLR 1555; (1968) 2 All ER 1073.

347. (1995) 2 NZLR 30.

348. *Kuwait Asian Bank EC v National Mutual Life Nominees Ltd*, (1991) 1 AC 187; (1990) 3 WLR 297 (PC).

349. *Ganidas Hora v PK Chowdhury*, (2002) 109 Comp Cas 530 (Cal).

350. *Peter IR Prakke v CCT*, (2002) 109 Comp Cas 299 (Kan); *Maddi Sazina v CTD*, (2002) 109 Comp Cas 308 (AP). sales tax arrears could not be recovered from the director except as provided in the winding up, i.e. in the course of winding up.

Subsequently, the company has to hold a minimum number of four meetings every year in such manner that not more than 120 days are to intervene between two consecutive meetings of the Board. [S. 173(1)]³⁵¹ The proviso to the sub-section empowers the Central Government to direct by notification that this provision is not to apply in relation to class or description of companies or is to apply subject to such exceptions, modifications, or conditions as may be specified in the notification.

The participation of directors in a meeting may be either in person or through video conferencing or other audio visual means as may be prescribed. The means should be capable of recording and recognising the participation of directors. It should also be capable of recording and storing proceedings of such meetings alongwith the date and time. The Central Government may by notification specify certain matters which are not to be dealt with in a meeting through electronic means. [Proviso and S. 173(2)]

Notice [S. 173(3)]

Notice of every Board meeting has to be given in writing to every director who is in India. "The Act does not prescribe the form of notice or mode of service and if the directors are duly informed that in future meetings would be held on the first Saturday of every month, it is a sufficient compliance of the statute."³⁵² But now Section 173(3) prescribes both the time and means of notice. It says that a meeting has to be called by giving not less than seven days' notice in writing to every director at his address registered with the company. It may be sent by hand delivery or by post or by electronic means.

The Proviso to the sub-section says that a meeting may be called by shorter notice to transact some urgent business. It is necessary in such a case that at least one independent director should be present. If there is no independent director, the decision taken at the meeting should be circulated to all the directors. The decision is to be final by ratification by at least one independent director, if any. Failure to give notice to any director renders the meeting invalid,³⁵³ and the business conducted at it is void.³⁵⁴ Where the general manager of a company was removed by a meeting of the Board in which one director could not participate as he was not informed, the Supreme Court held that the confirmation of the proceedings and of the notice of termination served by the Chairman at a subsequently regularly convened meeting of the Board validated the termination. It amounted to a

351. It is a sufficient compliance that the meeting was called within time, but could not be held because of want of quorum.

352. *A Chetner v Kalenaar Mills*, AIR 1957 Mad 304, 319.

353. See, *Young v Ladies' Imperial Club*, (1920) 2 KB 523; 1920 All ER Rep 223 (CA), where a person consented to be a member of the committee only on a premise that she would not be troubled, a failure to send notice to her vitiated the meeting. Also see, *Portuguese Consolidated Copper Mines Ltd. v. (1889) 42 Ch D 360 (CA)*.

354. *Homer District Consolidated Gold Mines, re*, (1885) 12 39 Ch D 546; 58 LJ Ch 104; 60 LT 57 (CA), subject, of course, to the principle of induce management.

ratification."³⁵³ Explaining the role of the Chairman in a subsequent case, the Supreme Court said:³⁵⁴

"The Chairman of the Board of directors is the central figure in holding the meeting and is the controlling factor in the conduct of the meeting. He authenticates the minutes of the meeting and performs such other functions as empowered under the Companies Act. A Chairman is always elected by the Board of directors; thus he has the full support of the majority of directors which helps him in the control of the meeting and recording authenticated minutes."

The notice need not specify the agenda for the meeting. The agenda may be set out as a matter of prudence, but it is not required.³⁵⁵ Even where agenda is specified, the directors need not confine themselves to it. Any other business conducted at the meeting would be equally valid. Any other rule "would be extremely embarrassing in the transaction of the business of companies". However, the members of the Board should not be taken by surprise particularly over serious matters. A notice convening a meeting was held to be invalid because it did not specify that the meeting was being called to consider and approve the transfer of controlling interest in the private company and that too in violation of the pre-emptive provisions in the company's articles.³⁵⁶

At a time when the law did not prescribe any length of notice, "rulings were that a few minutes' notice may suffice."³⁵⁷ Even a chance meeting of directors may be resolved into a Board meeting. In *Smith v Parlung Mines Ltd.*³⁵⁸

A directors' meeting was duly summoned for filling up a vacancy. There were only two directors T, and B, B, being the Chairman. T did not attend. B went to T's personal office and met him in the passage outside

353. *Parmeshwarji Prasad Gotha v Union of India*, (1973) 2 SCC 543, (1994) 44 Comp Cas 1; *Hillcrest Realty SDN BHD v Hotel Queen, Kuala Lumpur (P) Ltd.*, (2006) 120 Comp Cas 742 (CLB), the principle of invalidation because of want of notice to a single director was not applied on the facts of the case because the shares had been allotted in and accepted by the petitioners and their complaint against it would have to be dismissed, their membership being not valid.

354. *Nasir Hussain v Dinares Bhathena*, (2000) 5 SCC 601, 42 (1997) 37 L.L.A. 414.

355. See, *Lindau UG (an Lt Compagnie de Mayenne v Whitley*, (1896) 1 Ch 285, 296 (CA); *Maharashtra Power Development Corp. Ltd v Dubal Power Co.*, (2004) 120 Comp Cas 560 (Bom), not necessary to state agenda.

356. *Shanti Ganeswaran Dhammik v Sakaip Papers (P) Ltd.*, (1993) 68 Comp Cas 65 (Bom).

357. *Hughes v La Florida*, (1987) 37 Ch D 1, 58 LT 137 (CA). See, H. Goetzl, *COMPANY LAW* (1966) 129. A few hours' notice has, however, been held to be not sufficient, particularly in view of the fact that those who attended wanted the others opposing them, not to attend. See, *Hornet District Consolidated Gold Mines, re*, (1898) LR 37 Ch D 546, 58 LT 134, 60 LT 97 (CA).

358. (1936) 2 Ch 193. Calling meeting at a time when some directors were abroad and, therefore, could not attend and thereby to take advantage of that absence for passing resolutions which it would not have been possible to pass otherwise. This was held to be a fraudulent purpose which vitiated the meeting. The court also held that questioning resolutions and appointment of directors is a matter for civil court jurisdiction. *JM Paul v City Hospitals Ltd.*, (1999) 97 Comp Cas 216 (Ker).



CASE PLOT

his office. While standing there *B* proposed *F*'s name. *I* objected. *B*, being in the chair, gave his casting vote and declared *F* elected.

The court upheld the election and said, "There is no reason why a meeting should not be held in the passage." As against it, in another case³⁶¹ the only two directors of a company were not on speaking terms, for which reason it became necessary to appoint additional directors. One of them, *B*, waited for the other, *C*, at a railway station and finding him alighting from a train proposed three names. *C* remained silent. Thereupon *M* gave his casting vote and declared the three directors as elected. But the court did not uphold these appointments. "A director cannot have a board thrust upon him without his consent and against his will."

In this respect meetings of Board are immensely different from those of shareholders which have to be held in an atmosphere of considerable formality.³⁶²

One person company [S. 173(5)].—In the case of a closely held company the proceedings of meetings of the Board of directors used to be very informal. Minutes were signed only by the Chairman. Names of directors who attended were not always recorded. The CLB (now Tribunal) refused to draw the inference of the absence of a director from a meeting only because his signature on the minutes was not there.³⁶³ Sub-section (5) provides that a one-person company, small company and dormant company are deemed to have complied with the provisions of the 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 two meetings is not less than 90 days. The Preamble to the sub-section says that nothing contained in this subsection and succeeding Section 174 about quorum is to apply to one person company in which there is only one director on its Board of directors.

Quorum [S. 174]

The quorum for a meeting of the Board is one-third of its total strength (any fraction to be rounded off as one) or two directors, whichever is higher. Participation of directors by video conferencing or by other audio visual means is to be counted for the purposes of quorum. But where this quorum cannot be formed, because of interested directors, then the number of directors who are not interested, being not less than two, shall be the quorum. [S. 174(3)] If a meeting cannot be held for want of a quorum, it stands adjourned till the same day in the next week.³⁶⁴ If that day is a public

361. *Burrer v. Potter*, (1914) 1 Ch 925, 110 LT 929.

362. See, Lord Testerton in *R. v. Philford*, (1829) 8 B&C 350; 108 ER 1473, cited by Laxmiji J. in *Le Compagnie de Mayenne v. Whaley*, (1895) 1 Ch 788, 796 (CA).

363. *T.V. Prasadiahudra Naik v. Anandamurari Hebbal* (2012) 130 Comp Cas 294 (CLB).

364. S. 174(4). Business transacted without a quorum being present is void. So, for example, *North Eastern Insurance Co. Ltd. v. (1939) 1 Ch 199*; 120 LT 223, where allotment of debentures to two directors, being resolved upon with the help of an interested director's vote, was held void. The Calcutta High Court has held that the directors can fix a time for reassembling and no further notice is necessary. *Panjab Kauri Mills v. Southern Steel Ltd.* (1980) 50 Comp Cas 555 (Cal).

holiday, the meeting will be held at the next succeeding day which is not a public holiday. The quorum requirement does not become dispensed with because one out of two directors is abroad. A meeting attended by only one director was held to be not valid.³⁶⁵

Where the company's articles provided for a total number of 15 directors but at the material time only six directors were in office, it was held that quorum meant one-third of the six directors and, therefore, a meeting attended by two directors only was valid.³⁶⁶

For the purposes of the section "interested director" means a director within the meaning of Section 184(2). [Explanation to Sub-s (3)] Any fraction of a number is to be rounded off as one. "Total strength" of directors is not to include directors whose places are vacant. [Explanation to the Section]

Proceedings

The manner of conducting the business of the Board is something to be provided for in the articles. According to the regulations given in Schedule I of the Act³⁶⁷ questions arising at any meeting of the Board are to be decided by a majority of votes. The Chairman may be given a second or casting vote in case of an equality of votes.³⁶⁸ Matters decided are put in the form of resolutions proposed and approved. A resolution may be passed either at a meeting of the Board or by circulation.³⁶⁹ Section 175 requires that if a resolution is to be passed by circulation it should be circulated in draft, together with all the necessary papers, to all the directors³⁷⁰ and should be approved by a majority.³⁷¹ The resolutions of the Board, even if passed by a majority, are binding on all the directors and all of them are bound to help others in carrying them out whether they voted with or against the majority.³⁷²

Passing of resolution by circulation [S. 175]

It is necessary for passing a resolution by circulation that it should be circulated in draft together with necessary papers, if any, to all the directors or members of the committee at their addresses by hand delivery or by post or by courier or through any prescribed electronic means. It should be approved by a majority of the directors or members who are entitled to vote

^{365.} *Naaf Sailmakers Ltd v Axforf*, (1997) 1 BCLC 721 (QBD); *Rupak Gurha v UP Hotels Ltd*, 201F SCC OnLine NCIT 572; [2016] 198 Comp Cas 346, a meeting was called for appointment of company secretary. Two directors who were abroad wanted to participate by video conferencing, but that opportunity could not be given to them. Appointment was stayed.

^{366.} *Punjeep Kunur Beverages v Union of India*, (2002) 118 Comp Cas 492 (Cal).

^{367.} See, Regulations, ii, 78.

^{368.} In the absence of any such provision, the Chairman does not have a casting vote. *Weedley v Amalgamated Union of Engineering Workers*, Tnd Ticks, June 12, 1975.

^{369.} The fact that directors should act by "combined wisdom" is satisfied where they give consent with full knowledge though they do not meet at any one place. See, *Borelli's Electric Telegraph Co. v. Colfe's Climax*, (1871) 1R 12 Eq 2d 401] Ch 567.

^{370.} Exempting those who are not in India. But the number present must be sufficient to constitute a quorum.

^{371.} Of those who are present in India. For a study of few cases on how informal a meeting of the Board may be, see, Goitein, *COMPANY LAW* (1966).

^{372.} *Equitrac International plc. re*, (1989) 1 WLR 1010; 1989 BCLC 597.

on the resolution. Where one third of the total number of directors require that any resolution must be decided at a meeting, the Chairman would have to put it at a meeting of the Board.

Defects in appointment of directors not to invalidate actions taken [S. 176]

An act done by a person as a director is not to be deemed as invalid even if it subsequently came to notice that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision of the Act or articles.

Minutes [S. 118]

The proceedings of every meeting of the Board or of any of its committees have to be recorded in a minutes book. Explaining the purpose, Lord Esher said in *Coxley & Co, re*:³²³

Minutes of the Board meeting are kept in order that shareholders of the company may know exactly what their directors have been doing, why it was done, and when it was done.³²⁴

Registers

For the information of shareholders, companies are required to maintain certain registers concerning directors.

Register of directors, key managerial personnel and their shareholding [S. 170]

The first important register to be maintained is known as the Register of Directors. Every company has to keep at its registered office a register of its directors and key managerial personnel. The Register has to contain such particulars as may be prescribed. The particulars have to include the details of securities held by each of them, in the company, or its holding, subsidiary, subsidiary of company's holding company or associate companies. [S. 170(1)] A return containing such particulars and documents as may be prescribed of the directors or key managerial personnel has to be filed with the Registrar within 30 days from the appointment of every director and key managerial personnel and within 30 days of any change taking place.

Members' right to inspect register [S. 171].—The register of directors, key managerial personnel and their shareholding has to remain open for inspection to the members during business hours. The members have the right to take extracts from the register. Copies of the register on a member's request have to be provided free of cost within 30 days. The register has also to be kept open for inspection at every general meeting and has to be made accessible to any person attending the meeting. If the company defaults in

³²³. (1869) 1 R 42 Ch D 209: (7 11 1869) (CA).

³²⁴. For further details about the minutes book see, Minutes of General Meeting, *infra*, as S. 193 applies uniformly to both kinds of meetings.

providing inspection or copies, the aggrieved member may apply to the Registrar who may order immediate inspection and supply of copies.

Punishment to company for default [S. 172].—The company and every officer of the company who is in default becomes punishable with fine not less than Rs 50,000 extending up to Rs 5,00,000.

Register of contracts, or arrangements in which directors are interested [S. 189]

Every company has to keep a register giving separately the particulars of all contracts or arrangements in which Sections 184 and 188 apply. Section 184 is for disclosure of directors' interest and Section 188 is about related party transactions. The register has to contain such particulars as may be prescribed. After entering the requisite particulars, the register has to be placed before the next meeting of the Board and signed by all the directors present at the meeting. Every director or key managerial personnel, within 30 days of his appointment or relinquishment of office, has to disclose to the company the particulars specified in Section 184(1) relating to his concern or interest in other transactions which are required to be included in the register or such other information about himself as may be prescribed. The register has also to be produced at the commencement of every general meeting of the company at its registered office. It should remain open to inspection during business hours. Extracts may be taken from it. If any members ask for copies they have to be furnished by the company in the manner prescribed and on prescribed fee. It has to remain open and accessible during continuance of the meeting to any person having the right to attend the meeting.

The provisions of the section are not to apply to any contract or arrangement for the sale, purchase or supply of any goods and materials or services if the cost of such material, etc., does not exceed five lakh rupees in the aggregate in any year, or by a banking company for collection of bills in the ordinary course of its business.

A director who fails to comply has to face the penalty of Rs 25,000.

Contract by one person company [S. 193]

Where a one person company is limited by shares or by guarantee and it enters into a contract with the sole member of the company who is also its director, the company should make the contract in writing otherwise it should ensure that the terms of the contract are contained in a memorandum or are recorded in the minutes of the first meeting of the Board of directors held next after entering into the contract. This requirement is not applicable to contracts entered into by the company in the ordinary course of its business.

Sub-section (2) requires that the company should inform the Registrar about every contract entered into by the company which has been recorded in the minutes of the meeting of its Board and approved at the Board meeting within 15 days of the date of approval.

Prohibition on forward dealings in securities of company by director or key managerial personnel [S. 194]

A director of a company or any of its key managerial personnel is not to buy in the company or its holding, subsidiary or associate company (i) a right to call for delivery or a right to make delivery at a specified price and within a specified time, of a specified number of relevant shares or a specified amount of relevant debentures; or (ii) a right, as he may elect, to call for delivery or to make delivery at a specified price and within specified time of a specified number of relevant shares or a specified amount of relevant debentures. Defaulting personnel incur the penalty of imprisonment for a term extending up to two years or fine of not less than Rs 1,00,000 but extending up to Rs 5,00,000 or both. (Sub-s (2))

Acquisition of any securities in violation of the provisions makes the person in question liable to surrender them to the company. The company is not to register them in the name of the acquirer and, if they are in dematerialised form, the company has to inform the depository and to register the acquisition. In both cases, they are to continue in the name of the transferor. (Sub-s (3))

The Explanation to the section clarifies that for the purposes of the section "relevant shares" and "relevant debentures" mean shares and debentures of the company in which the person concerned is a whole-time director or key managerial personnel or shares or debentures of its holding and subsidiary companies.

Prohibition of Insider trading of securities [S. 195]

The section opens with a blanket ban as it says that no person including any director or key managerial personnel of a company shall enter into insider trading. This declaration is not to apply to any communication required in the ordinary course of business or profession or employment or under any law.

The Explanation appended to this declaration in Section 195(1) develops the concept of insider trading for the purposes of the section. It says that insider trading means (i) an act of subscribing, buying, selling, dealing or agreeing to subscribe, buy, sell or deal in any securities by any director or key managerial personnel or any officer of the company either as principal or agent if he is reasonably expected to have access to any non-public price sensitive information in respect of the securities of the company; (ii) an act of counselling about procuring or communicating directly or indirectly any non-public price sensitive information in respect of securities of the company. The price sensitive information means any information which relates, directly or indirectly, to a company and which if published is likely to materially affect the price of securities of the company.

Contravention of the provisions by any person makes him liable to be punished with imprisonment for term extending up to five years or fine of not less than Rs 5,00,000 but extending up to 25 crore rupees or three times

the amount of profit made out of insider trading, whichever is higher or both.

Appointment and remuneration of managerial personnel

The general principle is that the Board of directors should direct and control the company's affairs. But at the same time the Act allows a person to accept directorship in 20 companies (10 in the case of public companies) and does not prescribe the time and attention that he should devote to a particular company. [S. 165] Moreover, a Board meeting is a very formal affair and cannot be called very frequently, whereas the business has to be managed every day. Accordingly, the day-to-day management has to be delegated to professional management. A company may have either a managing director or manager. [S. 196(1)] This provision says that no company shall appoint or employ at the same time a managing director and a manager.

Managing or whole-time director or manager (S. 196)

A managing director, as defined in Section 2(54), means a director who is entrusted with substantial powers of management which would not otherwise be exercisable by him. The "substantial powers" of management may be conferred upon him by virtue of an agreement with the company, or by a resolution of the company or the Board, or by virtue of its memorandum and articles. It includes a director occupying the position of managing director by whatever name called. The powers so conferred are alterable by the company. Where the articles of a company contained no provision as to Board's delegation of powers to the managing director, the Court of Appeal said that in the absence of any express delegation of any specific powers by the Board to the managing director, the implied delegation of powers extended to carrying out those functions on which the managing director did not have to obtain specific directions of the Board. The managing director, all by himself, suspended the Chairman who was in executive position and who was the only other shareholder of the two member company. This would have required approval of the Board and therefore it was ineffective. The managing director then called a general meeting of the company with the agenda of removing the Chairman, who being the only other member did not attend. There was no quorum. The court said that the managing director, as member, was entitled to apply to the court for sanctioning a one-member meeting.²⁵ He is also removable in the same way as he was appointed irrespective of the fact that his appointment has been approved by the Central Government. But if he is prematurely removed from office he is entitled to compensation. A managing director is an employee of the company, but not to the extent so as to be entitled to preferential payments.

The Explanation appended to the definition says that for the purposes of this definition, the power to do administrative works of routine nature

25. *Smith v. Berlin*, 2012 Bus LR 1936; 2012 EWCA Civ 314 (CA). *State Bank of Travancore v. Kingston Computer (India) (P) Ltd.*, (2011) 11 SCC 524; (2011) 4 SCC (Civ) 282; (2011) 163 Comp Cas 37, suit filed on behalf of the company by a person who was not authorised, held not maintainable.



when so authorised by the Board such as the power to affix 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 instruments or to sign any certificate of share or to direct registration of transfer of any share are not deemed to be included within the concept of substantial powers of management.

A company cannot appoint or reappoint any person as its managing director, whole-time director or manager for a term exceeding five years at a time. No reappointment can be made earlier than one year before the expiry of his term. The appointment has to be subject to the provisions of Section 197 and Schedule V. The terms and conditions of appointee and remuneration payable have to be approved by the Board of directors at a meeting and has also to be approved by the company at a general meeting. If the appointment is at variance with the conditions specified in Schedule V, it would have to be approved by the Central Government also. The notice convening the meeting of the Board and general meeting has to include a statement of the terms and conditions and remuneration including the interest of directors in the appointment, if any. A return of the appointment in the prescribed form has to be filed with the Registrar within 60 days of the appointment. Any act done by the appointee before approval by the general meeting is not deemed to be invalid.

The expression "wholetime director" which has also been used in Section 203 alongwith the expression "managing director" has been defined in Section 2(94) as including a person who is in the wholetime employment of the company. [S. 2(94)] Thus he is also an employee of the company. Like the managing director, he occupies dual capacity, namely, that of a director and of an employee.³⁷⁶

A managing director can be appointed only if there is a power to that effect in the company's articles.³⁷⁷

The "substantial powers of management" that are conferred upon a managing director may be revoked or reduced or otherwise altered. Where, for example, his powers have arisen by virtue of an agreement with the company's Board, the latter may revoke or alter them. The service agreement of a managing director provided that he should exercise his powers in relation to the company's business and any of its subsidiaries as may be resolved by the directors. The directors resolved that he should confine his attention only to one subsidiary. It was held that the directors' action was competent and no action lay for breach of contract.³⁷⁸ A managing director, being an agent of the Board of directors, cannot exercise any power over and above those of the Board. He can exercise only such powers as have been delegated to him. A managing director commenced proceedings against the company's secretary to recover from him the money which he had withdrawn

376. *Lord Newark and Anderson v James Sutherland (Fife) Ltd*, 1941 SC 230, 238 (Scotland).

377. *Swire Enay J. Bushwick Proprietary Co Ltd v Fiske*, (1908) 1 Ch 145, 159; 94 LT 346.

378. *Harold Hainsworth & Co v Cudlipp*, (1955) 1 All ER 725; *Coddles v Harold Hainsworth & Co*, 1951 SC 27 (HL), Scotland.

from the company's bank account. He commenced the proceedings without any authorisation from the Board. The proceedings were struck out.³⁷⁹

Revocation of the appointment itself is something different. A managing director is entitled to compensation if his appointment is prematurely determined even if there is a power to that effect in the articles. Thus, where a managing director was appointed to hold office as long as he was a director, retained his qualification shares and worked efficiently, his dismissal while he still fulfilled these qualifications was held unjustified entitling him to damages.³⁸⁰ Similarly, where the termination is brought about by an alteration of the articles in a manner inconsistent with the terms of appointment, damages would have to be paid.³⁸¹ Where the appointment is not for a fixed period, removal at any time may entail no liability in damages. In one of the cases before the Court of Appeal,³⁸² the duration of appointment was not specified. The managing director was removed on a month's notice, and the directors' action was upheld by the company in general meeting. He sued for damages on the ground that the notice given to him was not reasonable. The articles contained a clause enabling the company to remove a managing director without notice. It was held that in view of this sweeping power, the requirement of reasonable notice could not be read into the contract.

The requirement of good faith or of "proper purpose" can be read even into an absolutely discretionary power. The decision of the Board of directors in removing a managing director can be challenged on the ground that they did so not in the interest of the company but to promote their own.³⁸³ While the appointment may require approval of the Central Government, the removal of a managing director does not require to be so approved. The managing director is an agent of the Board of directors. He cannot restrain a meeting of the Board called to consider his removal. The approval of his appointment by the Central Government does not militate against the Board of directors' power to remove him.³⁸⁴

Where his appointment is defective within his knowledge, for example, made by directors who had failed to acquire their qualification shares, no remuneration or compensation was payable; but if the company has

³⁷⁹ *Mitchell & Hobbs (UK) Ltd v Hill*, (1996) 2 BCLC 302 (QBD). Judicial proceedings can be launched only through Board authorised person. *CBS Gramophone Records and Tapes (India) Ltd v P.A. Narasimhan*, (1992) 73 Comp Cas 494 (Ker). It was a proceeding for dishonour of a cheque. *Suresh Coopers (P) Ltd v Dergik Bros*, (1997) 89 Comp Cas 564 (AP). An authorised representative's complaint was dismissed because of his default in appearing on the day of hearing.

³⁸⁰ *Nissen v Jones Nelson & Sons Ltd*, (1914) 2 KB 770 (CA).

³⁸¹ *Schindler v Northern Railways Cr Ltd*, (1961) 1 WLR 1034; *Southgate Foundry (1926) Ltd v Shadwell*, 1910 AC 211 (HL). It has been held by the Delhi High Court in *Srinivas Iyer v Delhi Flax Mills Co Ltd*, (1974) 44 Comp Cas 278 (Del), that where a person has been appointed managing director for a term of five years, but he ceases to be a director before the expiry of the term, the agreement also ceases to be operative.

³⁸² *Rao v Almond George (Mysore) Ltd*, 1962 Ch 637 (CA).

³⁸³ *Hindle v John Cotton Ltd*, (1919) 56 SLR 625 (IL).

³⁸⁴ *Purni Lal Gupta v CP Agarwal*, (1963) 53 Comp Cas 586 (All).

accepted his work, it must pay him reasonable remuneration on the principle of *quantum meruit*.³⁸⁵

A managing director, being a manager, is an employee of the company to that extent.³⁸⁶ The remuneration payable to him is taxable as salary. This has been so held by the Supreme Court in *Rao Pershad v CIT*.³⁸⁷ The court discussed at great length the distinction between a servant and an agent and concluded that the managing director is more like an agent than a servant, but this does not prevent him from entering into a contract of employment with the company.³⁸⁸ But he is not a clerk or a servant so as to be entitled to preferential payment.³⁸⁹ A managing director was held liable when the stock of the company diminished during his tenure and he was not able to give a satisfactory amount of the loss. He was also not excusable under Section 463 because he was not honest about the matter.³⁹⁰

Disqualifications [S. 196(3)].—The following persons cannot be appointed managing or whole-time directors or manager. (a) A person who is below the age of 21 years or has attained the age of 70 years. 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 motion has to indicate the justification for appointing such a person.³⁹¹ (b) A person who is an undischarged insolvent or has at any time been adjudged insolvent. (c) A person who suspends or has at any time suspended, paid debt to his creditors or makes or has made a composition with them. (d) A person who is or has been convicted by a court of an offence and sentenced to imprisonment for a period of more than six months.³⁹²

Where a person is already a managing director of another company he can be appointed only with the unanimous resolution of the Board of

385. *Croton-Ellis v Camaro Ltd.*, (1936) 2 KB 403 (CA) and see, Evans D. Marshall, 'Quantum Meruit & Managing Director' (1966) 27 Mod L Rev 608.

386. A managing director occupies the dual capacity of being a director as well as an employee of the company. He can be regarded as a principal employer for the purposes of the ESI Act, 1948, *ESI Corp v Ajay Engg Plt Ltd.*, (1998) 1 SCC 96; (1998) 1 Comp LJ 10. He is not a mere servant. He is also an agent of the company with capacity to bind the company in the sphere of management entrusted to him, *Happy Home Builders (Karnalik) P Ltd v Delta Enterprises*, (1994) 13 CLA 405 (Kar); *ESI Corp v Haryana Biogasal* (P) Ltd, (2001) 163 Comp Cas 292 (L&H). Directors involving remuneration were regarded as employees. (1992) 2 SCC 196; (1972) 42 Comp Cas 546.

387. *Ibid.* 56B-53. He is an officer of the company for tax purposes and, therefore, can be prosecuted for filing false particulars. *M R Pratap v VM Mudur Krishnam*, (1992) 3 SCC 264; (1992) 74 Comp Cas 430.

388. *Newspaper Proprietary Syndicate Ltd. v.* (1900) 2 Ch 349; 83 LT 341.

389. *T M Arugappan v Coimbatore Mungai Mills Ltd.*, (1982) 54 Comp Cas 5 (Odad). The mill was taken over by the Government of India.

390. *Srinath Srinivasan v Utsamaram & Painters Ltd.*, 2015 SCC OnLine Bom 3812; (2015) 192 Comp Cas 335, a director appointed before attaining 70 years not to cease as director on attaining 70 years. Special resolution not required to continue as director.

391. *Ramu Naray v Ravesh Naray*, (1995) 2 SCC 512; (1995) 83 Comp Cas 194, the High Court suspended the sentence, it was held that the conviction still stood and the disqualification made the appointment void.



directors. The Central Government may permit any person to be appointed managing director of more than two companies if the Government is satisfied that it is necessary that the companies should, for their proper working, function as a single unit and have a common managing director.

Overall maximum managerial remuneration: effect of inadequacy of profits [S. 197]

Regulation and control over directors' remuneration becomes necessary for several reasons, prominent among them being prevention of diversion of corporate funds for personal use and the impact which an unduly high executive reward has upon the rest of the society. Section 2(7B) says that remuneration means any money or its equivalent given or paid to any person for services rendered by him and includes perquisites as defined in the Income Tax Act, 1961. The total amount of remuneration payable by a public company to its directors, including managing director, whole-time director, and its manager for any financial year is not to exceed 11 per cent of the net profits of the company computed in the manner provided by Section 198. The remuneration of directors is not to be deducted from gross profits. The company in general meeting may with the approval of the Central Government pay in excess of 11 per cent subject to the provisions of Schedule V. With the approval of the company in general meeting remuneration payable to anyone MD, WT or manager may exceed 5 per cent and, if there is more than one in such category, it is not to exceed 10 per cent for all of them put together.

Remuneration payable to directors simpliciter is not to exceed one per cent of the net profits of the company, if there are any managerial personnel, otherwise three per cent. This percentage is exclusive of any fee payable for attending Board or Committee meetings under sub-section (5).

If, in any financial year, a company has no or inadequate profits, the company cannot pay anything to any category of directors except as provided in Schedule V. If the company is not able to comply with the provisions of the Schedule, it should take previous approval of the Central Government.

The remuneration payable to all the categories is to be determined in accordance with the provisions of the section either under the articles or by a resolution and, if the articles so require, by a special resolution passed by the company in general meeting. The remuneration payable to a director as so determined is to be inclusive of remuneration payable to him for services rendered by him in any other capacity. But remuneration for services is not to be included (a) where the services rendered are of a professional nature and (b) in the opinion of the Nomination and Remuneration Committee, if the company is covered under Section 178(1), or in the opinion of the Board of directors in other cases, the director possesses the requisite qualification for the practice of the profession.

A director may receive remuneration by way of fee for attending Board or Committee meetings or for any other purpose whatsoever as may be decided by the Board. The amount of such fee is not to exceed the prescribed

amount. Different fees for different classes of companies and fees for independent directors is to be such as may be prescribed.

A director or manager may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profits of the company or partly by one way and partly by the other.

An independent director is not to be entitled to any stock option. He may receive remuneration by way of fees provided under sub-section (5) [fee for attending Board meetings], reimbursement of expenses for participation in the Board and other meetings, and profit related commission as may be approved by the members.

If a director happens to receive excess remuneration, he has to refund the amount and till then he holds it in trust for the company. The company cannot waive recovery of the refundable amount unless permitted by the Central Government to do so.

Where the company is suffering from no profit or inadequate profit condition, it cannot increase remuneration of any person in any way whatsoever, except either in accordance with the Schedule or otherwise with the approval of the Central Government.

Every listed company has to disclose in the Board's report the ratio of remuneration of each director to the median employee's remuneration and such other details as may be prescribed.

Insurance premium against liability for default by managerial personnel [S. 197(13)]—Where any insurance is taken by a company on behalf of any managerial personnel [managing director, whole-time director, manager, chief executive officer, chief finance officer, company secretary] for indemnity against any liability for negligence, default, misfeasance, breach of duty, or breach of trust, for which they may be guilty in relation to the company, the premium on such policy is not to be taken as a part of the remuneration payable to him. Such premium will be treated as a part of the remuneration, if the personnel in question is found to be guilty.

Receipt of commission from holding or subsidiary company [S. 197(14)].—Any director who is in receipt of any commission from the company and who is either managing or whole-time director of the company, is not to be disqualified from receiving any remuneration or commission from the holding or subsidiary company subject to its disclosure by the company in the Board's report.

Penalty [S. 197(15)].—If any person contravenes the provisions of the section, he becomes punishable with fine of not less than Rs 1,00,000 but extending up to Rs 5,00,000.

Calculation of profits [S. 198]

In computing the net profits of the company in any financial year for the purposes of Section 197 (working out remuneration), (a) credit is to be given for the sums specified in Sub-section (2) (below) and credit is not to be given for those specified in Sub-section (3); and (b) sums specified

in Sub-section (4) (below) are to be deducted and those specified in Sub-section (5) are not to be deducted.

Credit has to be given for bounties and subsidies received from any Government, or any public authority constituted or authorised by any Government, unless otherwise directed by the Central Government.

In computing the net profits, credit is not to be given for the following sums: (a) profits by way of premium on shares or debentures of the company which are issued or sold by the company; (b) profits on sales by the company of forfeited shares; (c) profits of a capital nature including profits from the sale of undertaking, or any of the undertakings of the company or any part of it; (d) profits from the sale of any immovable property or fixed assets of a capital nature comprised in the undertaking or any part of the undertakings of the company. This would not be so where the business of the company consists, whether wholly or partly, of buying and selling any such property or assets. Where the amount for which any fixed asset is sold exceeds the written down value of the asset, credit has to be given for so much of the excess as is not higher than the difference between the original cost of that fixed asset and its written down value; (e) any change in the carrying amount of an asset or of a liability recognised in equity reserves including surplus in profit and loss account on measurement of the asset or the liability at fair value. [Sub-s (3)]

In making the computation of net profits, the following sums are to be deducted: (a) all the usual working charges; (b) directors' remuneration; (c) bonus or commission paid or payable to any member of the company, staff or to any engineer, technician or person employed or engaged by the company whether on a whole-time or part-time basis; (d) any tax notified by the Central Government Act as being in the nature of a tax on excess or abnormal profits; (e) any tax on business profits imposed for special reasons or in special circumstances and notified by the Central Government; (f) interest on debentures issued by the company; (g) interest on mortgages executed by the company and on loans and advances secured by a charge on its fixed or floating assets; (h) interest on unsecured loans and advances; (i) expenses on repairs, whether to movable or immovable property; (j) outgoings exclusive of contributions made under Section 181; (k) depreciation to the extent specified in Section 123; (l) excess of expenditure over income, which had arisen in computing the net profits in accordance with the section in any year which begins at or after commencement of the Act of 2013 insofar as such excess has not been deducted in any subsequent year preceding the year in respect of which the net profits have to be ascertained; (m) any compensation or damages to be paid in virtue of any legal liability including a liability arising from a breach of contract; (n) any sum paid by way of insurance against the risk of meeting any liability referred in the above clause; (o) debts considered as bad and written off or adjusted during the year of account. [S. 198(4)]

In making the computation of profits, the following sums are not to be deducted: (p) income tax and super tax payable by the company under the

Income Tax Act, 1961 or any other tax on the income of the company not falling under clauses (d) and (e) of Sub-section (4); (ii) any compensation, damages or payments made voluntarily, i.e. otherwise than in virtue of a liability such as referred to in Sub-section (4)(m); (iii) loss of a capital nature including loss on sale of the undertaking or any of the undertakings of the company or any part of it not including any excess of the written down value of any asset which is sold, discarded, demolished or destroyed over its sale proceeds or its scrap value; (iv) any change in the carrying amount of an asset or of a liability recognised in equity reserves including surplus in profit and loss account on measurement of the asset or liability at fair value.

Recovery of remuneration in certain cases [S. 199]

A company may be required to restate its financial statements due to fraud or non-compliance of any requirement under the Act. The company can recover from any past or present managing director, whole-time director, manager, chief executive officer (by whatever name called) who received during the relevant period remuneration, including the stock option, in excess of what would have been payable to him as per restatement of financial statements.

Central Government or company to fix limit with regard to remuneration [S. 200]

Irrespective of the provisions of the Act, the Central Government or the company, while granting approval under Section 196 or to any appointment or remuneration under Section 197 in the context of a company with no or inadequate profits, while fixing the remuneration, regard has to be had to the following: (i) the financial position of the company; (ii) the remuneration or commission drawn by the individual concerned in any other capacity; (iii) the remuneration or commission drawn by him from any other company; (iv) professional qualifications and experience of the individual concerned; (v) such other matters as may be prescribed.

Forms and procedure for certain applications [S. 201]

Every application made to the Central Government under Chapter 13 [Ss. 196–205] has to be in a prescribed form. Before an application is made to the Central Government under any of these sections, the company has to issue a general notice to its members indicating the nature of the application. Such notice has to be published at least once in a newspaper in the principal language of the district in which the registered office of the company is situate and circulating in that district and at least once in English in an English newspaper circulating in that district. Copies of the notices together with the company's certificate as to due publication have to be attached to the application.

Compensation for loss of office to managing, whole-time director or manager [S. 202]

A company may make payment to a managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office or as consideration for retirement from office or in connection with such loss or retirement. No such payment can be made in the following cases: (a) where a director resigns from his office as a result of reconstruction of the company or its amalgamation and he is reappointed in the new company; (b) where a director resigns from his office for any other reason; (c) where the office is vacated under Section 167(1); (d) where the company is being wound up which is due to default or negligence of the director concerned; (e) where the director has been guilty of fraud or breach of trust or of gross negligence or gross mismanagement of the affairs of the company or any holding or subsidiary company; (f) where the director instigated or took part directly or indirectly in bringing about the termination of his office.

The amount of payment cannot exceed the remuneration which he would have earned for the unexpired residue of his term or for three years whichever is shorter. The calculation has to be on the basis of the average remuneration actually earned during three years immediately preceding the date on which the office ceased or during the shorter period during which he was in office. No payment is to be made if the company comes to be wound up within 12 months of on the date of loss of office the assets of the company are not sufficient to repay to the shareholders the share capital including the premium, if any contributed by them.

The section does not prohibit the payment to managerial personnel of any remuneration for services rendered by any of them to the company in any other capacity.

Appointment of key managerial personnel: When compulsory [S. 203]

The definition of Key Managerial Personnel is in Section 2(51) and is as follows: "Key managerial personnel", in relation to a company, means (i) the chief executive officer or the managing director or the manager; (ii) the company secretary; (iii) the whole-time director; (iv) the chief financial officer; and (v) such other officer as may be prescribed.

Every company belonging to such class or classes of companies as may be prescribed is required to 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. An individual is not to be appointed or reappointed as the chairperson in pursuance of the articles of the company as well as the managing director or chief executive officer at the same time unless the articles provide otherwise and the company is not carrying on multiple businesses. Companies carrying on multiple businesses may appoint one or more chief executive officer for each such business as may be notified by the Central Government. Every whole-time key managerial personnel is to be

appointed by means of a resolution of the Board containing the terms and conditions of the appointment including remuneration. A whole-time key managerial personnel is not to hold office in more than one company except in its subsidiary company at the same time. This is not to disentitle him from being a director of any other company with permission of the Board. A company may appoint or employ a person as its managing director if he is the managing director or manager of one, but not more than one, other company and it is made or approved at a meeting of the Board by passing a resolution with the consent of all the directors present at the meeting and a specific notice was given to all the directors then in India. Vacancy, if any, in such office has to be filled by the Board at a meeting within six months.

Concavention of the section by the company makes it punishable with fine of not less than Rs 1,00,000 extending up to Rs 5,00,000. Every defaulting director and key managerial personnel is punishable with fine extending to Rs 50,000 and where the offence is of continuing nature, a fine extending to Rs 1000 for every day during which the default continues.

Manager

A "manager" means an individual who has the management of the whole or substantially the whole of the affairs of a company. He is subject to the control and superintendence and direction of the company's Board. A managing director is a part of the company's Board of directors and not subordinate to it. [S. 2(53)] A manager is subject to the control, superintendence and directions of the Board.

In *Gibson v Berfin*,³⁹³ BLACKBURN J defined "manager" "as a person who has the management of the whole of the affairs of the company; not an agent who is to do a particular thing, or a servant who is to obey orders, but a person who is entrusted with power to transact the whole of the affairs of the company".³⁹⁴ The word does not apply to a person who acts once or twice in a particular capacity, he must be in charge of all the affairs of the company. Accordingly, the manager of a branch of a bank does not come within the meaning of the word "manager".

A managing director, and a manager have this common feature that they have the management of the whole or substantially the whole of the affairs of the company. Yet there is an important difference between the position of a managing director and that of a manager. A managing director is a part of the company's Board of directors and not subordinate to it. He is not a servant of the company.³⁹⁵ A manager, on the other hand, being a paid executive of the company, is subject to the superintendence, control and directions of the Board of directors.

393. (1875) L.R. 11 Q.B. 329.

394. Adopted by SIRHINWAL J (afterwards C.J.) in *Bank Lal v Emperor*, AIR 1926 Lah 176 (21-43 IC 791).

395. *Newspaper Proprietary Syndicate Ltd. v. M.* (1900) 2 Ch 349; 83 LT 341 and *Ram Pershad v C.I.T.* (1972) 2 SCC 696. (1972) 12 Comp Cas 544.

The Act prohibits the appointment of any firm, body corporate or association as manager.²⁹⁶

A person cannot be appointed as manager if he is a manager or managing director in any other company. However, a person holding such office in only one other company may be appointed, provided the appointment is made or approved by a resolution passed at a meeting of the Board with the consent of the directors present at the meeting. Specific notice of the meeting and the resolution should have been given to all the directors then in India. But the Central Government may permit a person to be appointed manager of more than two companies where it is necessary that the companies should, for their proper working, function as a single unit and have a common manager.

The remuneration of a manager cannot exceed in the aggregate 5 per cent of the net profits. In other respects, the same restrictions apply as in the case of a managing director.

The procedure of appointment and requirement of approval are now the same as in the case of managing director. The same is true of any increase in remuneration. He cannot assign his office and can be appointed for a term of five years at a time.

Secretarial audit for bigger companies (S. 204)

Every listed company and a company belonging to such other class as may be prescribed has to annex with its Board's report made as required by Section 134(3) a secretarial audit report given by a company secretary in practice in such form as may be prescribed. The company has to give all facilities and assistance to the company secretary in practice for auditing the secretarial and related records. The Board's report made in terms of Section 134(3) has to explain in full any qualification or observation or other remarks made by the secretary in his report.

If the company, any of its officers and the company secretary in practice commits a default under the section, punishment is fine of not less than Rs 1,00,000 but extending up to Rs 5,00,000.

Loans to directors (S. 185)

Lending of money by a company to its directors is now strictly regulated by the Act. Indeed, in the following cases loans to directors are not allowed.

1. Loans to the directors of the company, or to the directors of its holding company or to any partner or relative of any director.
2. Loans to any firm in which such a director or his relative is a partner.
3. Loans to any private company of which any such director is a member or a director.
4. Loans to any body corporate at whose general meeting any such director or directors control twenty-five per cent of voting.

296. In other respects, e.g. qualification wise, remuneration wise, term of appointment wise, etc. his position is the same as that of managing director.

5. Loans to any company whose Board or other managers are accustomed to act in accordance with the instructions of the Board of directors, any director or directors of the lending company.

The section prohibits not only direct lending of money by a company to its directors but also giving of any guarantee for a loan taken by a director from any other person and providing of any security for any such loan. It also prohibits the providing of any guarantee or security for a loan given by a director to any person.³⁹⁷ A complaint that salary was paid to a director's wife in advance and that it amounted to a loan was rejected. It was not enough to show that the recipient was a director's wife. It had to be proved that she merited no salary for which advance payment could be made.³⁹⁸ Sale of a flat of the company to a director who paid half the price at once and the rest was to be paid in instalments was held to be not a loan.³⁹⁹

The section does not prohibit giving of any loan to a managing or whole-time director as a part of the conditions of service or extended by the company to all its employees pursuant to any scheme approved by the members by a resolution or by a company which in the ordinary course of its business provides loans or any loan made by a holding company to its wholly owned subsidiary or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company; or gives guarantees or securities for due payment of any loan with interest at a rate not less than bank rate declared by RBI. It is necessary under this clause that the money was used by the company for its principal business activity.

Guarantee Commission

It has been held that payment of guarantee commission to directors on their guarantees for the company's loans is not a part of the remuneration so as to require Government approval.⁴⁰⁰

Prohibition of assignment [S. 166(6)]

A director cannot assign his office in favour of anyone else. Any such assignment is void. The Supreme Court has distinguished "assignment" from "nomination" as well as from "appointment".⁴⁰¹

397. For any violation of the section complaint has to be filed within the period of limitation. The Calcutta High Court has held that a magistrate should not grant a *parte condonation* of the delay. The directors had already paid back the amount. Relief was granted under S. 463, *Mahindra Wire and Metal Products, m.*, (1983) 54 Comp Cas 104 (Cal). The precise to the sixth-section says that imprisonment shall not be awarded where the sum has been paid back.

398. *MK Electronics Components Ltd v Registrar of Companies*, (1986) 3 Comp LJ 28 (Mad).

399. *Predia Ardeshir Mehta v Union of India*, (1991) 70 Comp Cas 210 (Bom).

400. *Suresh Textile Benningo Ltd v Union of India*, (1984) 55 Comp Cas 492 (Del). As a result of this decision, the Department withdrew its circular expressing the opinion that such commission would be included in remuneration. Circular No 3 of 16-2-1994.

401. *Oriental Metal Pressing Works (P) Ltd v Bhaskar Krishnuk Thakur*, AIR 1961 SC 570; (1961) 31 Comp Cas 143.

A person formed a private company and transferred his business to it. He became the first managing director and had a right given to him by the articles to appoint a successor by his will. He died. His nominee assumed office. The other members challenged the appointment. The Bombay High Court held that the word "assignment" should mean "appointment" in this connection. But the Supreme Court expressed a different opinion. It said that "on a plain reading of the language used in the section, it does not seem possible to hold that the word 'assignment' in it can mean 'appointment'."

First, the section talks of "assignment of his office" by a director. The word "his" would indicate that the office contemplated was one held by the director at the time of assignment. An appointment to an office can be made only if the office is vacant. It is legitimate, therefore, to infer that by using the word "his", the legislature indicated that an appointment by a director to the office which he previously held but did not hold at the date of the appointment, was not to be included within the word "assignment".

Irregular appointment and validity of acts [S. 176]

Section 176 contains provisions for validation of acts of directors. The section says that acts done by a person as a director shall be valid notwithstanding the fact that his appointment was invalid by reason of any defect or disqualification or by reason of the fact that his appointment had become terminated by virtue of any provision of the Act or the company's articles. The provision does not cover acts which have been done after the defect in the appointment or holding of the office has already become known to the company.

The section operates to protect transactions with outsiders as well as members made by a company through its directors. One of the effects of the provision is that persons dealing with a company are entitled to presume that persons acting as directors are validly in office. An example is to be found in *Dinewon v African Consolidated Land & Trading Co.*⁴⁰²

Three persons purporting to act as directors made a call which was resisted by some shareholders on the ground that they were not validly in office. One of them, unknown to the others, had vacated his office by parting with his qualification shares, although he subsequently re-acquired his qualification shares and continued to act.

The court held that the provision covered not only the dealings between a company and outsiders but also with members. The call was valid.

The provision has been applied to the act of a person who ceased to be a director after taking over the company's secretaryship, although the fact could have been known from the company's public documents.⁴⁰³

402. (1898) : Ch 6: 77 LT 392 (CA). A parallel authority in India is *AJ Jaddo v Rambabu Giripuri*, AIR 1959 Cal 715, where sale of shares in the exercise of lien by de facto directors was held to be protected.

403. *British Asbestos Co Ltd v Buoyal*, (1908) 2 Ch 439, 444.

A defective or irregular appointment has been distinguished from a situation where there has been no appointment at all. The person purporting to act for the company is nothing but a usurper. This approach dominated the decision of the House of Lords in *Morris v Karsen*.⁴⁰⁴

A person had ceased to be a director. He sat with another, who had never been appointed, to hold a meeting and appointed still another person as a director. Then all three sat together to allot shares to their new appointee.

The obvious conclusion was that the new director-allottee, being a part of the Board, should have known that he was being taken in by persons who were themselves nothing but *de facto* directors. The allotment to him was also not valid for the same reason and also for the added reason that he participated in a meeting which conferred an allotment on him.⁴⁰⁵

Thus the section does not cover a case where there is total absence of authority or fraudulent usurpation of authority. Accordingly, the approval of a sale of assets by a director co-opted at a meeting by a person who had no authority and other directors were not even informed of the meeting was held to be of no use. The co-option and the co-optee's work both were held to be invalid.⁴⁰⁶

The section will also not cover a situation where an act done by the incompetent Board is such which even a competent Board could not have done. Thus where a person not so qualified, was appointed as a managing director, the provision in the section could not be used to cover up the fact that those who sat together to appoint him were themselves not properly in office. Even a regularly constituted Board could not have done that.⁴⁰⁷

Alternate director [S. 161]

If so authorised by the articles or by a resolution of the company, the Board of directors may appoint an officiating director if any director is absent for a period of three months or more from India. Such a director is called an "alternate director". He holds office only for the period for which the original director would have been in office. He vacates his office on the expiry of such period and also when the original director returns to India. The provisions relating to reappointment after rotational retirement apply to the original director and not to the alternate director. The provisions of Section 152 relating to filing of consent to act as director do not apply to an alternate director. Where there is a compelling need for an alternate director, the Board of directors can be compelled to make an appointment. An

404. 1945 AC 359, 476 (74 LT 355 (HL)).

405. Followed in *Grant v John Grant & Sons Ltd.* (1950) 82 CLR 1 (Aust).

406. *M MacBry v Drivers and Conductors Bus Service (P) Ltd.* (1991) 71 Comp Cas 136 (Man).

407. *Cromer-Elliott v Canopus Ltd.* (1936) 2 KB 403; (1936) 2 All ER 1046 (CA). The person so appointed having acted for some time was allowed to recover remuneration on quantum imminis. *Shashi Harish Shukla v Maharashtra Textiles Ltd.* AIR 1994 Bom 218. It was held that the acts of a director were valid, even though his appointment as additional director was questioned. The court, however, found the appointment to be also valid.

American company was holding 40 per cent interest in an Indian company. It appointed a director to watch its interests. Its appointee was not able to attend meetings of the Board and, therefore, requested the Board to accept his nominee as an alternate director, which was refused without proper consideration. That was characterised by the court as something wrong. His request should have been seriously considered keeping in mind the interests of the company and those of its shareholders.¹²⁴

Related party transactions [S. 188]

Related party [S. 2(76)].—The coverage of related party is as follows:

The 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 alongwith 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;
 - (ix) such other person as may be prescribed.

Definition of a relative [S. 2(77)]

“Relative”, with reference to any person, means any one who is related to another, if

- (i) they are members of a Hindu Undivided Family;
- (ii) they are husband and wife; or
- (iii) one person is related to the other in such manner as may be prescribed.

Any contract or arrangement with a related party in respect of the following matters can be entered into only 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. The matters covered are: (a) sale, purchase

124. *D Ross Parker v Pioneer Seeds Co Ltd*, (1989) 2 Comp LJ 89; (1989) 66 Comp Cas 363 (Del).

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) rendering or availing 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.

Any such transaction with a company having the paid-up share capital or prescribed amount or the value of the transaction in excess of the prescribed sum is to be entered into with the prior approval of the company by an ordinary resolution. No member of the company can vote on such resolution to approve any contract or arrangement which may be entered into by the company if such member is a related party. The section is not to apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on arm's length basis.

The Explanation to Sub-section (1) says that the expression "office or place of profit" means any office or place held by a director if he receives from the company anything by way of remuneration over and above to what he is entitled as a director by way of salary, fee commission, perquisites, any rent-free accommodation, or otherwise. Where any such office or place is held by an individual, other than a director, or by a firm, private company or other body corporate, it would be a place of profit if the individual or entity receives from the company the abovementioned benefits. An *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.

Justification for such transaction must be put in the knowledge of shareholders through Board's report. If such transaction is not approved as required nor ratified within three months, it becomes voidable at the option of the company and if a director or employee is involved in it, he has to indemnify the company for any loss incurred by it.

Any violation on the part of an employee or director makes him punishable in the case of a listed company with imprisonment for a term extending up to one year or fine of not less than Rs 25,000 but may go up to Rs 5,00,000. In the case of any other company, be punishable with fine not less than Rs 25,000 but extending up to Rs 5,00,000.

Contract of employment with managing or whole-time director

[S. 190]

Every company has to keep at its registered office a copy of the contract of service with the managing or whole-time director, if it is in writing and, if it is not in writing, a copy of the written memorandum setting out its terms. Such documents are open to inspection by any member of the company without payment of fee. This section is not applicable to private companies. The defaulting company is liable to penalty of Rs 25,000 and defaulting officer to penalty of Rs 5000.

Restriction on non-cash transactions involving directors [S. 192]

A company is not to enter into any arrangement by which a director of the company or its holding, subsidiary or associate company or a person connected with him is to acquire assets from the company for a consideration other than cash or the company is to acquire assets from such person or company for non-cash consideration. Such a transaction can be made with the prior approval by a resolution of the company in general meeting or by such resolution of the holding company, etc. The notice for general meeting of such approval has to include the particulars of the arrangement along-with the value of the assets involved in the transaction duly calculated by a registered valuer.

Any arrangement entered into by a company or its holding company in violation of the section is voidable at the option of the company. But where restitution of the value is no longer possible, it would be sufficient relief that the company has been indemnified by any other person for any loss or damage caused to it, or any rights have been acquired bona fide for value and without notice of the contravention of the provisions of the section by any other person.

Removal of managing director of Government company

A person was appointed the managing director of a Government company in accordance with its articles. The articles of such a company do not have the effect of a statute. Subsequently he was removed in accordance with the same articles. It was held that he was not entitled to any relief under Article 226 of the Constitution for enforcement of the contract of service.⁴⁰⁹

Chief Financial Officer [S. 2(19)]

It means a person appointed as the Chief Financial Officer of the company.

Secretary

Definition.—Section 2(24) provides that the expression "secretary" means a company secretary within the meaning of Section 2(1)(c), Company Secretaries Act, 1980 and includes any other individual possessing the prescribed qualification and appointed to perform the duties which may be performed by a secretary under this Act and any other ministerial or administrative duties. This transformation of the definition has been brought about by the amendment of 1988 which has also introduced the concept of a "secretary in whole-time practice" and defines it by saying that it means a secretary who shall be deemed to be in practice within the meaning of Section 2(2), Company Secretaries Act, 1980 and who is not in full-time employment. [S. 2(25)]

When appointment obligatory and who can be appointed.—Section 203 makes it obligatory for such class or classes of companies as may be prescribed to have a whole-time secretary.⁴¹⁰

409. *R.M. Varma v. State of UP*, (2015) 58 SCL 52 (All).

410. As to the power of the Institute of Company Secretaries to disqualify a qualified secretary,

No firm or body corporate can hold the office of a secretary, and no individual can be a secretary in more than one company at the same time.

Functions of Company Secretary [S. 205].—The functions of the company secretary are to include: (a) to report to the Board about compliance with the provisions of the Act, its rules 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.

For the purposes of the section, the expression "secretarial standards" means secretarial standards issued by the Institute of Company Secretaries and approved by the Central Government. The secretary has been given certain statutory powers also, like signing the annual returns. But under no circumstances can he discharge the functions of the Board or act on behalf of the company in matters of policy or take substantive steps which is not administrative or ministerial in nature. The Supreme Court has also added that as a secretary only, he would have no authority to bind the corporation by entering into contracts, or other commitments on its behalf.⁴¹¹

The section provides that the functions of a company secretary are to include: (a) to report to the Board about compliance with the provisions of the Act, rules made under it 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.

The *Explanation* appended to the section says that the expression "Secretarial standards" means, the standards issued by the Institute of Company Secretaries of India and approved by the Central Government.

Elevation of status of Secretary: Authority for contracts.—The fact that duties of administrative nature can also be assigned to a secretary is a legislative recognition of the fact that the secretary has become an important executive officer of the company.⁴¹² The courts have not lagged behind in this respect. The English Court of Appeal in its decision in *Premoria Developments (Gwiford) Ltd v Fidelis Furnishing Fabrics Ltd*⁴¹³ has declared

see, *Suresh Prakash Oberoi v Institute of Company Secretaries of India*, (1980) 60 Comp Cas 526 (Del). It can not reject an application for membership in a discriminatory manner. *Kalyan Kumar Mukherjee v Institute of Company Secretaries of India*, (1987) 62 Comp Cas 466 (Cal). Sub-s (1-A) added by the amendment of 1986 provides that the default in compliance with the provision will make the company and every officer or default punishable with a fine of Rs 500 for everyday. But it will be a defence to show that all reasonable steps to comply with the provision were taken or that the financial position of the company was such that it was beyond its capacity to engage a whole-time secretary. *State of Gujarat v Co-operative Investment P Ltd*, (1991) 71 Comp Cas 470 (Guj), since a person can discharge the duties of a secretary without joining the company as an employee, hence, there is no violation if he is an employee of some other company.

411. *Enkishiden Cotton Mills Co Ltd v Aluminium Corp of India Ltd*, (1971) 1 SCC 67.

412. The appointment should be by a resolution of the Board of directors and removal can also be by the appointing authority. The commencement and cessation of office should be reflected in the register of director required to be maintained under S. 333.

413. (1971) 2 OJS 711; (1971) 5 WLR 440 (C.A). In India rules as to qualifications and appointments of secretaries have been promulgated by the Companies (Appointment and Qualifications of Secretary) Rules, 1983. A company with a paid up share capital of not

that a modern secretary is not a mere clerk but an officer of the company with executive duties and responsibilities. He has authority to sign contracts connected with the administrative side of a company's affairs and has ostensible authority to enter into a wide range of contracts. In this respect his position has altered very materially since the previous century. The facts of the case were:

The plaintiff ran a car-on-hire business. The defendant company's secretary hired cars from the plaintiff ostensibly for the company's business, telling him that the cars were wanted to carry important customers of the company. He wrote on the company's paper ordering the cars, signing himself "Company Secretary". In fact, he used the cars himself and not for the company's purposes.

It was held that the secretary had ostensible authority to enter into contracts for hiring cars for which the company must pay. Lord DENNIS MR had to face arguments based on previous decisions. In one of them it was stated that "a company secretary fulfills a very humble role; and that he has no authority to make any contracts or representations on behalf of the company".⁴¹⁴ A statement from a case of 1887 was also cited.⁴¹⁵ "A secretary is a mere servant; his position is that he is to do what he is told, and

less than Rs 50 lakhs is required to have a whole-time secretary. Members of the Institute of Company Secretaries of India can be appointed as whole-time secretaries. Companies with a capital of less than Rs 50 lakhs can appoint any other person as their secretary, but he too must be qualified under the Act. Rule 4 prescribes the qualifications. It says that no individual is qualified unless he possesses any one or more of the following qualifications.

1. Membership of the Institute of Company Secretaries.
2. Pass in the intermediate examination of the Institute and licensed under S. 25, Company Secretaries Act, 1980.
3. Postgraduate degree in commerce or corporate secretarialhip granted by any University in India.
4. Degree in Law granted by any University.
5. Membership of the Institute of Chartered Accountants.
6. Membership of the Institute of Cost and Works Accountants of India constituted under the Act of 1959.
7. Postgraduate degree or diploma in managerial science granted by any University, or the Institutes of Management, Ahmedabad, Calcutta, Bangalore or Lucknow.
8. Postgraduate Diploma in company secretarialhip granted by the Institute of Commercial Practice under the Delhi Administration or Diploma in Corporate Laws and Management granted by the Indian Law Institute, New Delhi.
9. Postgraduate diploma in Company Law and secretarial practice granted by the University of Udaipur.
10. Membership of the Association of Secretaries and Managers, Cirknitte.

When a company's capital reaches the mark of Rs 50 lakhs, within one year it should appoint a qualified secretary. Published in G.S.R. No. 1105(E), dt. 29-11-1988, [1989] 65 Comp Cas (St) 243.

414. *Gibson v Lord Macclesfield in George Whitechurch Ltd v Cosgrave*, 1902 AC 117, 124 (HL).

415. *Barnell, Hough & Co v South London Tramways Co*, (1887) LR 18 QBD 815, 817; *George Whitechurch Ltd v Cosgrave*, 1902 AC 117 (HL). These decisions were supported in *Ridder v Great Fingall Consolidated*, 1906 AC 439; 95 LT 214 (HL).

one person can assume that he has any authority to represent anything at all ... " Replying to these arguments, his Lordship said:⁴¹⁶

But times have changed. 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. This appears not only in the modern Companies Act, but also by the role which he plays in the day-to-day business of companies. 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. So much so that he may be regarded as held out as having authority to do many things on behalf of the company. He is certainly entitled to sign contracts connected with the administrative side of a company's affairs, such as employing staff, and ordering cars, and so forth. All such matters now come within the ostensible authority of a company's secretary.

SALMON LJ was equally sure of this development in the position of the secretary:

Whatever the position of a company's secretary may have been in 1887, I am quite satisfied that it has altered a great deal from what it was then. At the end of the last century a company secretary still occupied a very humble position very little higher, if any, than that of a minor clerk. Today, not only has the status of a company secretary been much enhanced, but the state of affairs has been recognised by the statutes I think there can be no doubt that the secretary is the chief administrative officer of the company. As regards matters concerned with administration, the secretary has ostensible authority to sign contracts on behalf of the company. If a company is ordering cars so that its servants may go and meet foreign customers at airports, nothing is more natural than that the company should hire those cars through its secretary. The hiring is part of his administrative functions. Whether the secretary would have any authority to sign a contract relating to the commercial management of the company, for example, a contract for the sale or purchase of goods in which the company deals, does not arise for decision in the present case, but contracts such as the present fall within the ambit of administration.

Liability of Company for Secretary's acts.—A company was not held liable for the conduct of the secretary in trapping persons for taking shares in the company⁴¹⁷ and for issuing a forged share certificate.⁴¹⁸ But he is the proper authority for delivery of the certificates which have been properly prepared.⁴¹⁹ The confirmation of a contract by the secretary, which was

⁴¹⁶ (1971) 2 QB 711, 716.

⁴¹⁷ *Harrison, Boares & Co v South London Trolleyways Co*, (1887) LR 18 QBD 815.

⁴¹⁸ *Ibid*.

⁴¹⁹ *Charterley Sun & Co v Credulous, London & Co*, (1891) 18 R 602 (JL).

made by an unauthorised director, was held to be of no effect.⁴²⁰ He cannot borrow money on behalf of the company. Thus, where a director advanced a sum of money to the company on the request of the secretary, the company was held not liable. Though the transaction was confirmed at a meeting of the Board, that meeting was incompetent, there being no quorum when the interested director was not counted.⁴²¹ He has no authority for legal proceedings without instructions from responsible organs.⁴²² Similarly, without proper authority he cannot call meetings, or register transfer of shares⁴²³ or remove any shareholder's name from the register.⁴²⁴

Secretary is included in the list of officers as given in Section 2(30). Thus, he is an officer for all the purposes of the Act and suffers from the same disabilities as do the directors. The provisions relating to loans to directors, contracts with directors, register of directors, etc., will apply. In a case where the Board of directors delegated to the managing director their power of appointing and removing all officers, and a question arose whether the secretary of the company, being an "officer" would fall within the spell of the abovementioned power of removal. The Punjab and Haryana High Court held that this could not be so, for, otherwise, even directors being "officers", would be removable by the managing director. The court felt fortified in its view by the opening words of Section 2 which constitute a preamble to all the definitions, which are: "unless the context otherwise requires", and when the power of removal of officers is handed over to the managing director, the context requires that the "secretary" should be excluded from the scope of the word "officer" for this purpose.⁴²⁵

On the footing of an officer, the secretary would be accountable for any secret profit he might derive from his office. To the extent to which his position or authority permits him to deal with the company's money, property or transactions, he would also be regarded as a constructive trustee of the company in those respects.⁴²⁶ A secretary was held to be personally not liable for misapplication of the company's funds by someone else though he

420. *Neaglum & Co v Nethora, Lake and Wills Ltd.*, (1927) 1 KB 286; (1927) All ER Rep 97 (CA) aff'd 1928 AC 1; 128 LT 210 (HL).

421. *Chadron Trust v M. m.*, 1939 Ch 286 (CA).

422. *Osulder Co Ltd v Continental Tyre & Rubber Co Ltd.*, (1916) 2 AC 307 (HC); *Edington v Dumfries Steam Laundry Co.*, (1909) 11 SLT 15 (OI II).

423. *Zinofft Priorities Ltd. v. [1984] 1 WLR 1249 (CivD)*, where it was held that the act of a company's secretary in transferring the shares of the company personally to one C may not effective to make C a registered member because the secretary cannot act without the authority of the board of directors which at that time had ceased to exist because of the company's failure to hold successive general meetings.

424. *State of Wyoming Syndicate v. [1901] 2 Ch 421; Indo-China Steam Navigation Co. v. [1917] 2 Ch 101* and *China Mines Ltd v Anderson*, (1908) 22 TLR 27.

425. *Haryana Sevis Development Corps Ltd v JK Agarwal*, (1989) 66 Comp Cas 95 (P&H).

426. See, *Morjai Consult Tin Mining Co Ltd. v. McKay ex rel. [1975] 2 Ch D 1 (CA)*, where the view expressed was that when the secretary wrongfully acquired company property, he did so in his capacity as an officer of the company. However, he would now be described as a constructive trustee. For an indication of the modern view of the fiduciary position of the secretary, see, *New Zealand Netherlands Society "Oranje" inc v Keys*, (1973) 1 WLR 1126 (1973) 2 All ER 1222 (PC). For other cases, see, *Staniford Clothing Co. v. [1898] LR 14 Ch D 422; 42 LT 891 (CA)*; liability to account for improper remuneration in the company's

might have known about it. A director might have become liable in a parallel situation.⁴²⁷ There has also been a judicial observation to the effect that a company secretary owes no fiduciary duty to the company.⁴²⁸

Administrative officer.—The Calcutta High Court⁴²⁹ has held that the amendment of 1974 of 1956 Act which elevated the position of the secretary to that of an administrative officer, has not altered the basic position of the secretary to such an extent as to enable him to undertake serious litigation on behalf of the company without a decision of the company's Board. The court cited the following passage from HALSLEY'S *Laws of England*:

He (the secretary) has no power, without the resolution of the directors, to call a meeting of the company or to commence proceedings on behalf of the company, nor can he alter the register of members, but any such act may be ratified by the directors.⁴³⁰

After citing more extensively from HALSLEY'S *Laws of England*⁴³¹ the court suggested:

From the above summary it is quite clear that the secretary cannot usurp the functions and powers of the Board or the company, but due to the enormous growth of company activities he has been empowered to discharge various ministerial and administrative duties on behalf of the company which generally can be performed by an authorised agent. In due course of time the secretary has been given certain statutory powers, like signing the annual returns, etc. But under no circumstances can he discharge the functions of the Board or act on behalf of the company in matters of policy or substantive steps which is not administrative or ministerial in nature.

The court cited the following statements from a decision of the Supreme Court:

Ordinarily the functions of the secretary of the corporation would be ministerial and administrative. As a secretary only, he would have no authority to bind the corporation by entering into contracts or other commitments on its behalf.⁴³²

Transactions. *Morisk Consols Tin Mining Co Ltd v. McKay* case, (1875) 2 Ch D 1 (CA); *Gulfakdas Bhaidas*, re, ILR (1922) 17 Bom 672.

427. *Joint Stock Discount Co v. Roman*, (1846) 1 R & Eq (3d), 294.

428. *Brown v. Howell*, (1948) 2 ISCLC 97, 116-117 (Ch D).

429. *Mohan Lal Mittal v. Universal Wires Ltd*, (1983) 53 Comp Cas 36 (Cal). The secretary commenced a proceeding under ss. 397 and 399. But see, *N Karmawidjaja v. Gordon Mktg Co (Treasurer)* Ltd, (1990) 69 Comp Cas 205 (Ker), where the secretary who was managing the affairs of the company was held to be competent to verify the plaint of the company because he was acquainted with the facts and it was immaterial that his appointment was still not approved.

430. (Vol VII, 4th Edn) paras 546-47.

431. *Ibid.*

432. *Loekshamiran Cotton Mills Co Ltd v. Aluminium Corp of India Ltd*, (1971) 1 SCC 67.

Officer [S. 2(59)]

The word "officer" includes any director, manager, or key managerial personnel or any person in accordance with whose directions or instructions the Board of directors or any one or more of the directors is or are accustomed to act.

Officer who is in default [S. 2(60)]

There are many penal provisions in the Act. Almost all of them provide for punishment by way of fine or imprisonment of directors or other principal officers of the company. It is common with companies to grant positions merely for ceremonial purposes. Such persons may not be much concerned with the affairs of the company and, therefore, may not deserve to be punished. In order to ascertain those who really deserve to be punished, the Companies Acts have all along used the expression for all serious defaults "the officer who is in default". In actual practise, however, it was very difficult to find out who was incharge of a particular affair of a company in respect of which a default had been registered so as to hold him liable as an officer in default. Many cases failed for this reason.⁴⁵³ Section 2(60) is an attempt to meet this problem. The provisions is as follows:

"Officer who is in default", for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely:

- (i) whole-time director;
- (ii) key managerial personnel;
- (iii) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;
- (iv) any person who, under the immediate Authority of the Board of any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorizes, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;
- (v) any person in accordance with whose advice, directions or instructions the Board of directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;
- (vi) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation

⁴⁵³ *Secretary of State for Trade and Industry v. Liang*, (1996) 2 BCLC 324 (CA). *Kapreck International*, n. (1999) 2 BCLC 351 (CA). All the factors in the definition have to be considered. The individual concerned must have the status and functions of a director, so as to have openly exercised real influence on the corporate governance of the company. In this case the individual was acting as a director camouflaged as a secretary.

- in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;
- (ii) in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer.

It is common with companies to grant positions merely for ceremonial purposes. Such persons may not be much concerned with the affairs of the company and, therefore, may not deserve to be punished. In order to ascertain those who really deserve to be punished, the Companies Acts have all along for all serious defaults used the expression "the officer who is in default". In actual practice, however, it was very difficult to find out who was in charge of a particular affair of a company in respect of which a default had been registered so as to hold him liable as an officer in default. Many cases failed for this reason. Section 2(60), as, is an attempt to meet this problem.

The effect of the provision is that professional managers, like managing directors, managers, whole-time directors or secretaries, will be regarded as officers in default without any further inquiry.⁴³⁴ This category will also include those in accordance with whose directions or instructions the Board of directors is accustomed to act. For the rest it would have to be shown that they were under responsibility.⁴³⁵ The Board can specify who would be responsible for the observance of particular provisions. The consent of such a person should be taken. Such a person would then be held liable for the default in question without any further inquiry. Where there is no professional manager like managing or whole-time director or manager and the Board has not designated any person in the above manner, then all the directors will be held as officers in default.⁴³⁶

434. *Sabindra Narain v Registrar of Companies*, (1994) 81 Comp Cas 925 (Raj), other directors could be prosecuted only when there was no managing director, whole-time director or manager.

435. *K Chandravathy v CR Patel*, (2004) 118 Comp Cas 167 (Mad) no liability for default in respect of EPF contribution, the director had resigned before the default and even otherwise he was not under any responsibility for company's affairs. *Vista Television Network Ltd v Srinivas Venkateswaran*, (2005) 125 Comp Cas 815 (AP), if it was necessary that there should be specific unambiguous allegation against the director sought to be made liable for violation of copyright by the company as to the role played by him. *Krishna Kumar Bangar v Director General of Foreign Trade*, (2005) 133 Comp Cas 83 (Del), director not liable unless the Authority shows how and to what extent a particular person is liable under the company's arrangement. *Sabitha Rayavarapu v RBS Chinnabeswaramulu*, (2005) 10 SCC 561; (2006) 133 Comp Cas 690, no liability for dishonour of the company's cheque where it could not be shown that the director who was being prosecuted was incharge of the company's affairs. *SMS Pharmaceuticals Ltd v Narsi Bhujia*, (2007) 4 SCC 70; (2007) 136 Comp Cas 263, requirements of the NI Act for liability of director must be proved. *Lachman P. Moktar v Redington India Ltd*, (2006) 133 Comp Cas 855 (Mad), Form 32 filed in the office of ROC showed that the director sought to be prosecuted had resigned before the cheque was issued.

436. It has been laid down in an Australian case that on a complaint against a director of a company for knowingly and wilfully permitting the company to commit a breach of [a provision of the Companies Act] the prosecution must prove beyond reasonable doubt that the director knew of the acts constituting the breach and in the free exercise of his



A director was not allowed to be prosecuted for violation of the provisions relating to inter-corporate loans committed during the period before he joined as a director.⁴³⁷ A director was not allowed to be prosecuted for copyright violations where he had resigned before the violation. Form 32 in the ROC's records showed resignation much before the offence.⁴³⁸

A company is a person within the meaning of Sections 2(l)(m) and 27, Consumer Protection Act, 1986. The company is liable to be punished for dishonouring the decree of a consumer forum. A director of the company who was responsible for causing the disobedience was also liable to be prosecuted.⁴³⁹

Company's liability for officer's crimes

A question arose before the Supreme Court⁴⁴⁰ as to whether a company can be prosecuted for an offence which carries compulsory corporal punishment like imprisonment. It was contended on the basis of earlier authorities⁴⁴¹ that there could be no such prosecution. The Supreme Court doubted whether that was the effect of the decision and, therefore, the matter was referred to the Constitution Bench. The decision of the Constitution Bench is reported in *ANZ Grindlays Bank Ltd v Directorate of Enforcement*.⁴⁴² The Bench has been of the view that there is no immunity to companies merely because the offence entails mandatory imprisonment. The court can impose the sentence and ignore the corporal punishment.⁴⁴³ A company is not

will authorised or permitted them to be carried out. It is not necessary for the prosecution to prove that the directors knew that the acts were unlawful. *Mc v Slave*, (1986) 45 SASR 69 (SC). Officers who have not been designated can be prosecuted only by showing their connection with management and default on their part. *R Bhamaraj v HD Dutty*, (1992) 2 SCC 582; (1992) 75 Comp Cas 722. It must be alleged in the complaint that the director proceeded against was a director at the material time and knew of the default. *Registrar of Companies v Bipin Boker Nayak*, (1995) 83 Comp Cas 95 (Ori). A prosecution under the Insecticide Act, 1968 against a company secretary was not allowed to proceed because there was no allegation that the default was due to his neglect, or consent or connivance, *BB Nagpal v State of Haryana*, (1995) 83 Comp Cas 94 (P&H). Where show-cause notice was not given to the director sought to be prosecuted, the proceeding was quashed, *Shivalli Adityan v Registrar of Companies*, (1995) 83 Comp Cas 616 (Mad). *Raju Gupta v Stan*, (2001) 104 Comp Cas 26 (Del); a company and its directors could not escape from penal liability under S. 138, Negotiable Instruments Act, 1882 on the ground that winding up petition had been presented and was pending at the material time. *Orion Syntex Ltd v Besant Capital Ltd*, (2001) 104 Comp Cas 669 (Bom); dishonour of a cheque issued for repayment of loan made the directors *primum facie* liable because borrowing is their exclusive domain under S. 292. *MP Singh v State of Punjab*, (2006) 133 Comp Cas 17 (P&H), no liability for defective fertiliser of a director not shown to be incharge.

⁴³⁷ *Sita Prasad v Registrar of Companies*, (1997) 88 Comp Cas 420 (AP).

⁴³⁸ *Jayenthivel M Minoth v M Durairaj*, (2006) 132 Comp Cas 797 (Mad).

⁴³⁹ *Ravi Kapil v Consumer Disputes Resolution Commission*, (1997) 89 Comp Cas 471; (1997) 3 Comp LJ 174 (Del).

⁴⁴⁰ *ANZ Grindlays Bank Ltd v Directorate of Enforcement*, (2001) 6 SCC 531; (2005) 123 Comp Cas 1; (2005) 4 Comp LJ 464.

⁴⁴¹ *Coloni v Vellappa Textiles Ltd*, (2003) 11 SCC 405; (2003) 203 ITR 550. Reference was also made to *Balram Kompunni v Union of India*, (2003) 7 SCC 638.

⁴⁴² (2004) 6 SCC 531; (2005) 123 Comp Cas 1; (2005) 4 Comp LJ 464.

⁴⁴³ To the same effect, *Fidelity Industries Ltd v Smt*; (2006) 129 Comp Cas 561 (Mad).

immune from criminal liability. The plea that the company cannot possess the necessary criminal intent is not tenable as the criminal intent of persons guiding the company gets imputed to the company. Directors and other officers of the company cannot be prosecuted alone for the offence of dis-honour. Arraigning the company as an accused is a condition precedent for their prosecution.⁴⁴⁴

Sole selling agents

[See under Related Party Transactions, S. 188]

Compensation for loss of office

[See under Related Party Transactions, S. 188]

⁴⁴⁴ *Ananya Hindu v Gulfaffer Travels & Tours (P) Ltd.*, [2012] 5 S.C.C. 651.

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®, along with updates, articles, videos, blogs and a host of different resources.



The following cases from this chapter are available through EBC Explorer™:

- *Aberdeen Railway Ltd v Haikie Bros*, (1854) 1 Macq 461; (1843-61) All ER Rep 249 (HL)
- *Bhullar v Bhullar*; (2006) 2 BCAC 241 (CA)
- *Brady v Brady*, 1989 AC 755; (1988) 2 WLR 1309 (HL)
- *Charanjit Lal Choksi v Union of India*, AIR 1951 SC 41; 1950 SCR 369; (1951) 21 Comp Cas 33
- *Coleman v Myres*, (1977) 2 NZLR 225
- *Deloitte Huskies & Sells v National Mutual Life Nominees Ltd*, (1991) 5 NZ CLC 67
- *Industrial Development Consultants Ltd v Coyley*, (1972) 1 WLR 443
- *K Khadum v Astrix Technologies (P) Ltd*, (2016) 196 Comp Cas 461 (Kar)
- *Lee v Lee's Air Farming Ltd*, 1961 AC 12; (1960) 3 WLR 758 (PC)
- *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd*, (1971) 2 QB 711; (1971) 3 WLR 440; (1971) 3 All ER 16 (CA)
- *Smith v Poringal Mines Ltd*, (1906) 2 Ch 193
- *Sridhar Sundaramjan v Ultramarine & Pigments Ltd*, 2015 SCC OnLine Bom 3917; (2015) 192 Comp Cas 355
- *State Bank of Travancore v Kingston Computer (India) P Ltd*, (2011) 11 SCC 524; (2011) 4 SCC (Civ) 282; (2011) 163 Comp Cas 37
- *Sibrat Roy Sahara v Union of India*, (2014) 8 SCC 470; (2014) 3 SOC (Civ) 712
- *Vista Television Network Ltd v Gemini Television (P) Ltd*, (2005) 125 Comp Cas 815 (AP)



Chapter 11

Meetings

Annual general meeting [S. 96]

Every company is required to call at least one meeting of its shareholders each year. This meeting is known as the annual general meeting. The first annual general meeting of a company must be held within nine months from the date of closing of the first financial year, and then no meeting will be necessary for the year of incorporation. Thereafter one annual general meeting must be held every year. The gap between one meeting and the next should not be of more than 15 months. There is no provision in the Act for deferral of the first AGM.¹

If a company fails to hold this meeting two consequences will follow. Firstly, any member can apply to the Tribunal and the latter will order the calling of the meeting. An application can be made by any member under Section 97 of the Act.² The Tribunal can give any ancillary or consequential directions which it thinks expedient in relation to the calling and conducting of the meeting. A meeting held in pursuance of this order will be deemed an annual general meeting of the company.³ The CLB ordered a meeting to be called for carrying out non-controversial annual routine business and call an extraordinary general meeting, if necessary,

1. *TV Mathew v. Nutrikorn Agro Processing Co. Ltd.*, (2001) 21 LRR Comp Cas 1311 (Ker). A failure in this respect would invite consequences under the Act.

2. "It is clear that a member and not the company is competent to invoke the provisions of S. 97. A company cannot seek directions against itself." *Cauhanore Whole Body CT Scan & Research Centre (P) Ltd v SV Srinivasa*, (1999) 93 Comp Cas 99 (CLB).

3. S. 97(2). See, *Anuradha Mukherjee v. Fresh Industries Ltd.*, (1996) 4 Comp II 482 (C.I.B.), where a meeting was ordered to be held for each of the gap years. *Makeshi Sood v. Indob Industries Ltd.*, (1996) 23 CLA 178 (CLB), meeting ordered to be held with nominee of the financial institution to preside. *MV Fowler v. City Hospital (P) Ltd.*, (1995) 29 CLA 44 (CLB), the order of CLB for holding an AGM had to be kept in abeyance because a dispute about a substantial block of shares was pending before the High Court. The Company Law Board could not review its own orders. *National Textile Corps (LIP) Ltd v. Sunleshi Polyster Ltd.*, (1998) 28 CLA 236 (CLB), default in holding AGM is a condition precedent; no incidental order issued about any person to preside after ordering a meeting.

for facing the controversial matters.⁴ This power has been vested exclusively in the Tribunal. The court cannot exercise it even under its inherent powers.⁵

Secondly, the failure to call this meeting either generally or in pursuance of the order of the Tribunal is an offence punishable with fine.⁶ The penalty is imposed upon the company as well as every officer "who is in default". In *Sree Meenakshi Mills Co Ltd v Registrar of Joint Stock Companies*,⁷

A company was prosecuted for failure to call an annual general meeting. One general meeting was called in December 1934. This was adjourned to March, 1935 and then held. Subsequent meeting was held in February, 1936. The prosecution was for not holding a meeting in 1935. It was contended on behalf of the company that a meeting was held in that year.

But the court held that the meeting of March, 1935, was the adjourned meeting of 1934. "There should be one meeting per year and as many meetings as there are years." The company was accordingly convicted.

Similarly, in another case,⁸ for a failure to hold a meeting, it was held to be no defence that on account of a criminal case against the secretary of the company some important books were exhibited in the court and as they had not been released in time, no accounts could be prepared, and no meeting could be held.⁹ But in *Kasinoor Mai Bonthiya v State*,¹⁰

The accused and his brother were the only two members and directors of a private company. During the period when a meeting should have

⁴ *Tatah Electric Wire Co v TDP Cycles Ltd*, (1996) 29 CLA 126 (1998) 2 Comp LJ 350 (1999) 96 Comp Cas 415 (CLD). The time for holding the meeting had expired. Without the order of the CLB meeting held out of time would not have been valid. The special business proposed in the notice related to a transaction which had become the subject-matter of a litigation. The CLB, therefore, directed that that business should not be taken up at the meeting. *National Dairy Development Board v Indira Biotechnological Ltd*, (2002) 108 Comp Cas 909 (CLB), a meeting cannot be ordered just only to release defaulter from liability. Administrative difficulties were not accepted to be a ground for considering it to be impracticable to call a meeting.

⁵ *Manganniyakkam Maharakshaka Sammelana Mithi Ltd v Registrar of Companies*, (1972) 42 Comp Cas 622 (Mad); *Ashok Mathew Zekeria v Majestic Pictures and Losses (P) Ltd*, (1987) 62 Comp Cas 865 (Ker). The court cannot appoint a commissioner for calling or holding a meeting.

⁶ See, S. 99. The provision is applicable to private companies as well. *Registrar of Companies v JS Capital*, (1988) 63 Comp Cas 126 (Bom).

⁷ AIR 1938 Mad 640; (1938) 39 Cril J 917.

⁸ *Brahmbaria Loan Co Ltd*, re, AIR 1936 Cal 624; 15L IC 60. See also, *Banckendorff & Sons (P) Ltd v State*, (1967) 34 Comp LJ 92 (All).

⁹ See, *PSNSA Chellise & Co v Registrar of Companies*, (1966) 1 Comp L 17 (Mad); *Manganniyakkam Uduprakasika Sammelana Mithi Ltd v Registrar of Companies*, (1972) 42 Comp Cas 632 (Mad). The meeting must be brought to completion within the statutory period notwithstanding adjournments. *Debjyoti Kumar Karmani v Registrar of Companies*, (1988) 58 Comp Cas 293 (Cal). *Rajni Kavita Choudhury v Registrar of Companies*, (2003) 114 Comp Cas 631 (Cal) the factory and offices of the company were the victims of industrial unrest and out of reach of the shareholders and that was held to be a good defence for the default.

¹⁰ AIR 1951 Ajm 39.



been held his brother was lying seriously ill and the consequent failure to hold the meeting was not considered to be a wilful default.¹¹

Where a managing director has been pressing his colleagues to call the annual meeting but in vain, he could not, for the purposes of this section, be described to be an "officer in default".¹²

The Registrar has been given the power, for any special reason, to extend the time for holding an annual general meeting for a period of only three months. But the time for holding the first annual general meeting of a company is never extended.¹³

The meeting should be held during business hours, that is, between 9 am and 6 pm, on a day which is not a public holiday¹⁴ and at the registered office of the company or at any place within the town where the registered office is situated.¹⁵ The appointment of additional directors was held to be *prima facie* void where the meeting was held at a different place from the place specified in the notice. Individual notices were not given to members and the change of venue of the meeting was not notified.¹⁶

In the case of revival and rehabilitation of sick industrial companies this power is to be exercised by the National Company Law Tribunal.

Importance of annual general meeting.—Annual general meeting is an important institution for the protection of shareholders of a company. The ultimate control and destiny of a company should be in the hands of its shareholders. It is, therefore, desirable that the shareholders should come together once in a year to review the working of the company. This meeting affords that opportunity. It is at this meeting that some of the directors

11. It should be noted that the section requires the annual general meeting to be held "in addition to" any other meeting that may have been held in the year. Before the words "in addition to" were inserted, it was doubtful whether an extraordinary general meeting held in a year would exonerate the holding of the annual general meeting in the year. The Allahabad High Court had held in *Lachmi Narain v. Emperor*, AIR 1920 All 257, that an extraordinary meeting would amount to annual general meeting for the year. But the Bombay High Court had differed in *Emperor v. Nushabai Abdullahei Lala*, AIR 1925 Bom 194. See also, *India Nutments Ltd v. Registrar of Companies*, (1964) 1 Comp LJ 56.

12. *S.S. Jhunjhunwala v. State*, 1970 All WB 814.

13. Pursuant to S. 96(1)(c). See, *Dalmia Central (Bharat) Ltd v. Registrar of Joint Stock Companies*, AIR 1964 Mad 226. The power of extension cannot be exercised by the Central Government; *Ningamakkam Shanmukhi Sasothi Naidu Ltd v. Registrar of Companies*, (1972) 42 Comp Cas 632 (Mad). The Central Government also cannot examine aspects of validity; that is a matter for civil courts. *Raminder Kaur Jain v. Punjab Registered Iron and Steel Joint Stock Holders Assn.*, (1978) 48 Comp Cas 401 (P&H).

14. As so declared by the Central Government [Explanation to S. 96].

15. S. 96(2). The Central Government may exempt a company from this sub-section. See also, the previous. According to S. 2(8) "public holiday" means a public holiday within the meaning of the Negotiable Instruments Act, 1881: Precised that no day declared by the Central Government to be a public holiday shall be deemed to be such a holiday, in relation to any meeting, unless the declaration was notified before the issue of the notice convening the meeting. *Dikshu Rai D Desai v. R.P. Bhaisir*, (1985) 1 Comp LJ 36 (1986) 60 Comp Cas 14 (Del); a direction that the meeting may be simultaneously held at three different places was held to be valid. Postal limits can be considered as city limits for this purpose.

16. *Sakthi Bank Ltd v. K.S. Chodobhai*, (2000) 103 Comp Cas 167 (Del).

will retire and come up for re-election¹⁷ and the shareholders will be able to exercise real control by "refusing to re-elect a director of whose action and policy they disapprove".¹⁸ Again, auditors retire at this meeting enabling the shareholders to consider whether they should be re-appointed or replaced.¹⁹ Dividends are declared at this meeting. Chairman delivers a speech listing the advances of the company during the year. Directors have to present annual accounts for the consideration of the shareholders. A failure to present the accounts is a punishable offence.²⁰ The shareholders can ask any questions relating to the accounts or affairs of the company.

The business to be transacted at the meeting is generally provided for in the articles of the company and that is known as the ordinary business of the meeting. The meeting may take up any other business also and that will be known as special business.

Extraordinary general meeting [S. 100]

Clause 42 of Table F (Schedule 1) provides that all general meetings other than annual general meetings shall be known as extraordinary general meetings. The Board may, whenever it thinks fit, call an extraordinary general meeting. An extraordinary general meeting also becomes necessary on requisition, for Section 100(2) provides that on requisition of a given number of shareholders the directors must forthwith call a meeting.²¹ The requisition must be signed by holders of at least one-tenth paid-up capital having the right to vote on the matter of requisition.²² If the company has no share capital the requisition must be signed by as many members as have one-tenth of the total voting power.

The requisition must set out the matters for the consideration of which the meeting is to be called.²³ No other business can be done. For example, where certain shareholders requisitioned a meeting for the appointment of three new directors, and subsequently the Chairman wanted to add to the

17. S. 149.

18. *Coker JI in Shree & Sons v Shree*, (1925) 2 KB 113, 134 (CA).

19. S. 139.

20. Ss. 136, 137. Failure to lay accounts before the meeting does not invalidate the meeting. *Sampi Dhar & Others v Cricket Assn*, [1994] 80 Comp Cas 174 (Del).

21. Where the directors did not call a meeting because of irregularity in requisition notice and did not do so even after a rectified notice was given because of the pending contempt proceedings, the CLB ordered that they should call meeting on the dismissal of the contempt proceedings. See *Speritis 721 v Standard Distilleries & Breweries* [PI/16], [1997] 90 Comp Cas 1 (Mad).

22. Where a meeting was requisitioned by shareholders holding partly paid shares, the meeting and the appointment of directors made therat were held to be invalid. *Kuldip Singh Dhillon v Paragon Utility Finances (P) Ltd*, (1964) 41 Comp Cas 1075 (P&H). Signatures by the requisite number on a draft requisition prepared by one of them is good enough. *RK Sumduka v Kurniaju Bank Ltd*, (1995) 65 Comp Cas 649 (Kar).

23. S. 100(3). *Mahindra Apparils v Union of India*, (2002) 212 Comp Cas 294 (Del), the notice which the company served on the members in response to the requisition did not include all the items specified by the requisitioners. They went in for a writ. The court held that they had an alternative remedy under S. 96.

agenda the removal of a director also, the meeting was restrained from considering the matter.²⁴ Only such matters can be taken up at the meeting in respect of which the requisitionists possess the same voting strength as is required to requisition a meeting.

When a requisition is deposited at the registered office of the company the directors should, within 21 days, move to call a meeting and the meeting should actually be held within 45 days from the date of the requisition.²⁵ If the directors fail to do so, the requisitionists may themselves proceed to call the meeting²⁶ and claim the necessary expenses from the company. The company can indemnify itself out of the remuneration due to the directors in default.²⁷ The directors cannot refuse to call a meeting only on the ground that the resolution that the requisitionists propose to put would be contrary to the Act. That is a matter which can be considered by the court subsequently. The requisitionists wanted to add a clause to the articles that if a person had occupied the position of a director for six years, he should not seek re-election for three years. The court pointed out that such clause would be invalid under Section 164 as prescribing additional disqualifications, but even so directors should not refuse to respond to the requisition.²⁸ Where a meeting is requisitioned for the purpose of removing a bunch of directors, it has been held by the Supreme Court that it is not necessary for the requisitionists to state the reasons for removal.²⁹ A special notice of the resolution to remove a director has to be given. Where this was not done, it was held that though the meeting was valid, the resolution was not.³⁰ A meeting cannot be requisitioned for a declaration that the directors

24. *Bali v Metal Industries Ltd.*, 1957 SLT 124 (Scotland).

25. S. 100(4).

26. See, for example, *Rao Bahadur Adre Rathnayakunni v MRS Manickmuni Chettiar*, AIR 1951 Mad 542; 61 LW 172; (1951) 21 Comp Cas 93; also see, *Tiruvandur Mehandi Adhivari v Yercaud Electric Supply Co.*, AIR 1941 SInd 87. The board has been held to be justified in refusing to call a meeting when there is a stay order. *AD Chaudhury v Mysore Mills*, (1976) 46 Comp Cas 546 (Kant).

27. S. 100(6).

28. *Cricket Club of India v Madhav L Aptc.*, (1975) 45 Comp Cas 574 (Bom).

29. *LTC v Escorts Ltd.*, (1986) 1 SCC 264; (1986) 59 Comp Cas 548; (1986) 1 Comp LJ 31, referring Bom HC in (1984) 3 Comp LJ 387 where the High Court had held that if reasons are not stated the directors' right of making a representation against their removal would be defeated because there cannot be a worthwhile representation without knowledge of the reasons. The right of requisitioning a meeting or exercising minimal voting rights is not affected by the fact that a receiver in respect of a member's shares has been appointed as the management of the company is with the Government under the Industries (I&R) Act, 1951. *Balkrishna Dnyan v Saadashin Polymer Ltd.*, (1985) 2 SCC 167; (1985) 58 Comp Cas 563. Followed in *Fikayat Hussain v Panjab Orygony (India) Ltd.*, (1996) 87 Comp Cas 331 (CJ&); whether the requisitionists nor the company is required to give a statement of reasons. To the same effect, *Kerala Sirymamangala v Shri Ramaiah Motor Transport Ltd.*, (1998) 28 CLA 233; (1999) 98 Comp Cas 518 (CJ&); the company has not to comply with the requirement of explanatory statement.

30. *Queens Kuries and Louis (P) Ltd v Shreeji Juse*, (1993) 76 Comp Cas 428 (Ker). Followed in *Shreekrishna Sambhaji Bhavagri (P) Ltd v PR Pandya*, (1996) 86 Comp Cas 842 (P&H), notice not given to the director concerned and the proceedings became invalidated.



appointed at the preceding meeting were not validly elected and that the requisitionists should be appointed as directors in their place.³¹

It is not necessary that an extraordinary general meeting should be held at the registered office of the company. A resolution passed at a meeting held at any other place than the registered office would be equally valid.³²

The Karnataka High Court held that refusal on the part of the directors to call a meeting on requisition does not amount to any offence either under Section 100 or under Sections 448, 449 or 450. The requisitionists have their own alternative of calling a meeting by themselves under Section 99.³³ The requisitionists cannot approach the Tribunal under Section 96 for an order calling an extraordinary general meeting without first trying to call a meeting themselves.³⁴

Power of Tribunal to call meeting (S. 98)

Where the holding of a meeting, other than an annual general meeting, has for any reason become impracticable, the proper course for the company to follow is to apply to the Tribunal. In such cases the Tribunal can on its own motion or on the application of a director or a member order a meeting to be called and held in accordance with its directions. The word "impracticable" as construed in a reasonable way must naturally mean that it is not possible to hold a peaceful or useful meeting. "Impracticable" means impracticable from a reasonable point of view.³⁵ The Tribunal takes a commonsense view of the matter and orders a meeting if it would appear to a prudent man of business that the holding of a useful meeting has become impracticable. In *Hindustan Spg Mills Ltd v Lt General Madan*,³⁶

A person who was not holding the qualification shares of a director was appointed Chairman and some directors had transferred shares to him to enable him to fulfil the requirement. This was alleged, by a group of shareholders, to be invalid and was the subject-matter of a suit. It was held that it was impracticable to hold a meeting in these circumstances and the court could intervene.

31. *S. Srinivasan v Egmore Benefit Society Ltd*, (1992) 75 Comp Cas 198 (Mad). Where there was no proof of a requisitioned meeting being held at all, appointment of directors at the alleged meeting was held to be not good. *VG Balasubramanian v New Theatre Carnatic Talkies (P) Ltd*, (1993) 77 Comp Cas 324 (Mad).

32. *Metal Inds India Ltd v. (XIII)* 105 Comp Cas 939 (CLB).

33. *Anupulu P Hegde v Captain TS Gopala Krishna*, (1996) 3 Comp LJ 333; (1996) 23 CLA 142 (1996) 91 Comp Cas 312 (Karn). The requisition in this case was short of the mandatory requirement. *Anupulu & Hegde v Captain TS Gopala Krishna*, (1996) 3 Comp LJ 333; (1996) 23 Corrt LA 142; (1996) 91 Comp Cas 572 (Karn), directors' default, no offence. The requisitionists' reasonable expenses are to be reimbursed by the company which in its turn can receive indemnity from the defaulting directors.

34. *R. Mahadevan v AKMN Cylinders (P) Ltd*, (1998) 18 Comp Cas 532 (O.LH).

35. *Comins, Lucknow Division v Comins, Pratapgarh*, (1997) 43 CLW N 3072, AIR 1997 PC 240. Adopted by Bankerji J in *Malabar Tea Syndicate Ltd v. 55 CWN 553*. See also, *Cricket Club of India v Madras L Ape*, (1975) 45 Comp Cas 574 (Kern).

36. AIR 1953 Cal 355 56 CWN 396.

Similarly, in *Lothian Jute Mills Ltd. re*³⁷

There was a dispute between the shareholders of a company as to who were the lawful directors of the company entitled to call a meeting. It was held to be proper that the court should step in and call a meeting "the validity of which is beyond question".

The power of the tribunal was invoked to call a meeting where the company had no duly constituted Board of directors. A meeting was necessary for putting the company on rails by removing impediments which had arisen in the way of proper functioning.³⁸

In a decision on the power of the court, the Calcutta High Court³⁹ observed that the power "should be used sparingly with caution so that the court does not become either the shareholder or a director of the company trying to participate in the internecine squabbles of the company". The Board (now Tribunal) should interfere when it is fully satisfied that the application has been made *bona fide* to the larger interests of the company for removing a deadlock otherwise irremovable and that there is *prima facie* proof of the fact that a meeting called in the manner in which meetings are ordinarily called under the Act or articles would be invalid. The facts of the Calcutta case were:

The directors of a company had divided themselves into two groups each claiming that the others were not lawfully directors. But neither made an effort to requisition a meeting. An application was made to the court to order a meeting. But the court advised them that they should first requisition a meeting themselves to see what the other group would do. Until that is known the court cannot intervene.

In a two-member-director company, there was a petition for prevention of unfairly prejudicial conduct (oppression). For that reason, one director would not sit with the other at a meeting. Additional directors could not be appointed for carrying on the management. A meeting for appointment of additional directors was ordered to be held.⁴⁰

Before the amendment of 1974 [1956 Act] this power was exercised by the court. Subsequently it was vested in the Company Law Board. Now it

- 37. (1950) 56 CWN 644 (Cal). For other cases see, *Malhotra Tea Syndicate Ltd. re*, 55 CWN 1153; *Rai Krishna Mukeshmuni v Umu Sharmer Microcrete*, AIR 1947 All 361.
- 38. *Auruk Keur Pari v Republicain Flour, Oil and General Mills Co (P) Ltd.* (1997) 1 Comp LJ 147 (CLB).
- 39. *Rattenjee & Co Ltd. re*, (1968) 2 Comp LJ 155, 172; (1970) 40 Comp Cas 693 (Cal), where Mirza J reviewed all the leading Indian and English authorities on the subject and stated *Hoc huncirentis, principio in formis & right propositis;* (1970) 41 Comp Cas 494. The Company Law Board may also fix the agenda of the meeting. *Itajit Singh Lohar Trust Assn v Company Law Board*, (1996) 1 Comp LJ 187 (Cal).
- 40. *Sticky Fingers Restaurant Ltd. v.* (1993) 8 CLC 94 (Ch D). A meeting was ordered in parallel circumstances in *Pucci Dante v Requejo Ad.* (1999) 95 Comp Cas 586 (CLB); *Oriental Benefit & Deposit Society Ltd v Bharat Kumar K Shukla*, (2001) 103 Comp Cas 947 (Mys), where the holding or an AGM was restrained by an injunction, it was a question of fact whether the meeting itself was restrained or only the consideration of a particular transaction.



has been vested in the Tribunal. The power being of judicial nature, the Tribunal is likely to follow the above-stated principles.⁴¹

PROCEDURE AND REQUISITES OF VALID MEETING

Meeting should be called by proper authority

The first essential requisite of a valid meeting is that it should be called by a proper authority. Obviously the only proper authority is the Board of directors,⁴² except when the meeting has, in the event of default by the directors, been called by the requisitionists or by the Tribunal. Suppose, for example, that the meeting of the Board at which it is resolved to call a general meeting is not properly convened or constituted, will it render the general meeting also invalid? It was held in *Browne v La Trinidad*⁴³ that by reason of irregularity of the Board meeting the general meeting was not incapacitated from acting. But in *Harden v Philip*,⁴⁴

Certain directors held a meeting of the Board but they prevented some lawfully constituted directors from attending the meeting. A quorum was, however, present. It was held that as the meeting of the Board was unlawful, the notice convening the general meeting also became invalid. Directors have to exercise their discretion and have to fix the time and place or whether the meeting should be held at all.⁴⁵

Notice [S. 101]

The second requirement of a valid meeting is that a proper notice of the meeting should be given to the members. Notice should be given to every member of the company. Deliberate omission to give notice to a single member may invalidate the meeting,⁴⁶ although an accidental omission to give notice to, or non-receipt of it by, a member will not be fatal. [S. 101(4)] This is based upon the theory that the acts of a corporation are those of the major part of the corporators, corporately assembled. By "corporately assembled" it

41. There is no power to appoint an independent Chairman where the meeting is not called at the orders of CLB-Keshav Y Patel v Patel Engg Co Ltd, (1994) 79 Comp Cas 51 (Bom).
42. The natural corollary is that the Board of directors can also postpone a meeting. *John Chandy v Catholic System Bank Ltd*, (1995) 1 KLR 673.
43. (1897) 35 Ch D 1; 58 LT 137 (CA). The court does not have the power to give directions for the conduct of a meeting already called by the directors. *R Venkateswara v S Sampath*, (1973) 2 SCC 605; (1975) 45 Comp Cas 641.
44. (1880) 2 LR 23 Ch D 14; 48 LT 334; 31 WR 173 (CA).
45. See also, *NVK Nagayya Chelliah v Medius Rice Mills*, (1949) 1 MLJ 662, where all such cases were discussed and a meeting was held invalid, because the Board which resolved to call it was not properly present. Compare, *Buschek Proprietary Co Ltd v Fuke*, (1916) 1 Ch 148; 94 LT 398.
46. *Sarathi v Darley*, (1899) 2 TLR 789; *Musselwhite v CH Musselwhite & Son*, 1962 Ch 964; *Gajanan Narayan Patil v Gantakar Waman Patil*, (1990) 3 SCC 634; (1990) 49 Comp Cas 1, failure to give notice to nominees of public financial institutions who were co-opted directors, invalidated the meeting of the Board of directors of a cooperative society. *S R Rajendra Martin v Corkin Stock Exchange Ltd*, (1998) 69 Comp Cas 231 (Ker), a dispute as to "notice" as a matter for the jurisdiction of civil courts and not that of company courts. Another sub nomine case on the same point, (1990) 69 Comp Cas 254 (Ker).

It is meant that the meeting shall be one held upon notice which gives every corporator the opportunity of being present.⁴⁷ Secondly, notice should be in writing and must be given 21 days before the date of the meeting. "21 days" are to be computed from the date of receipt of the notice by members and the notice shall be deemed to have been received at the expiration of 48 hours from the time of posting.⁴⁸ *NVK Nagappa Chettiar v Madras Race Club*⁴⁹ is an illustration in point:

Notices were posted on October 16, for a meeting to be held on November 7. The notice was held to be short by one day as in computing the interval of 21 days the date of posting and date of meeting should be excluded.⁵⁰

Where notices were posted during a period of postal strike and decidedly would not have been served upon members, the court said that the strike was in itself an evidence of the fact that there would not be effective service and, therefore, the presumption of deemed service was ruled out.⁵¹

The gap should be of 21 clear and whole days.⁵² It has been held by the Madras High Court in *Self-Help Private Industrial Estates (P) Ltd, re*,⁵³ that all the members can, in the case of an annual meeting, voluntarily consent to a shorter notice either before or after the meeting. In the case of any other meeting the consent of the holders of 95 per cent of the paid-up share capital, or the consent of 95 per cent of the total strength of members, would be necessary. [S. 101(1)(Premiso)] Where a special resolution to shift the registered office was passed at a meeting of which shorter notice was given, the court ignored this fact as there was sufficient evidence of ratification by the requisite number.⁵⁴ The fact that one of the members is not traceable does not make the consent less unanimous.⁵⁵ Similarly, it was held in *Bailey, Hay*

47. *Mayo, etc of Slips of England v Mayo, etc of Manchester, etc v Governor and Company of Bank of England*, (1862) 21 QBD 141, 57 (3) QB 414 (CA).

48. S. 101. See, *Balwant Singh Sethi v Zairunn Singh*, (1988) 63 Comp Cas 310 (Bom), where notices were posted on August 31 and September 1 for a meeting to be held on September 21, and they were held to be not valid. *Sundaragopal Shiva Dikrapur Mugalsayam v Shree Renuka Singers Ltd*, (2002) JH Comp Cas 371 (Kan), notice served through courier and also received by members well before time, an application for stay order just three days before meeting, not allowed. S. 20 (Explanation) says that a courier means a person or agency which delivers that document and provides proof of its delivery.

49. (1949) 1 MLJ 662.

50. Where a member does not have any registered address in India or has not supplied to the company any address for giving of notices to him, the company may advertise the notice in a newspaper circulating in the neighbourhood of the company's registered office and it will be deemed to have been served on the member on the date of advertisement. [S. 20]

51. *Hedman v Trinity Estate Ltd*, (1969) BCAC 757 (Ch D).

52. *Pioneer Motors (P) Ltd v Municipal Council, Nagercoil*, AIR 1960 SC 684; *Aheraj Khalsa Dabash v Bharat Carbon & Ribbon Mfg Co Ltd*, (1973) 63 Comp Cas 197 (Del).

53. (1972) 42 Comp Cas 606 (Mkar).

54. *Parikh Engg & Body Building Co. re*, (1975) 45 Comp Cas 157 (Pat).

55. If the heirs of a deceased member do not supply their addresses, the service at the deceased member's address is sufficient. *Canara Bank Ltd v Thangal*, (1972) 42 Comp Cas 473 (Ker).



& Co Ltd, re,⁵⁶ that a notice of a resolution for voluntary winding up had become valid through acquiescence of the company's members, all of whom attended the meeting despite the fact that it was defective, being short by a day.⁵⁷ The Bombay High Court has been of the view that the requirement as to length of notice is merely directory and not mandatory. Where no prejudice whatsoever was caused to the member who complained of the notice being short by one day, the court refused to invalidate the meeting and its proceedings.⁵⁸ The shareholder who participated in the meeting, accepted dividend as well as directorship, was not allowed to question the validity of the meeting on account of short notice.⁵⁹

A notice of a meeting despatched under certificate of posting creates a presumption that it was served at the expiration of 48 hours.⁶⁰ The Company Law Board held in a case that notice of meeting under certificate of posting was not a good notice. The meeting was not valid. The company was directed to send notice by registered post.⁶¹ Certificates of posting are notoriously easily available. When relationships between the parties have become embittered and a specific request has been made on payment of cost that notice of Board meeting be sent by registered post, service through postal certificate could not be taken to be a conclusive proof of service.⁶²

A notice for an extraordinary general meeting was served by fax. This was held to be good service.⁶³

A private company's articles may contain its own special provisions as to duration of notice.⁶⁴

Contents of notice (Ss. 101–102)

Notice should specify the place and day and hour of the meeting and the meeting to be valid must be held at the place and time specified, except, perhaps, in a situation that arose in *Rao Balaji and MRS Rathnayakalani v MRS Manukarai Chettiar*.⁶⁵

On the failure of the directors of a company to call a meeting on a requisition, the requisitionists themselves sent a notice to all the members for a meeting to be held at the registered office of the company. But the managing director locked the premises of the registered office. It was held that a meeting held at some other place and the resolutions passed thereat were valid.

56. (1971) 1 WLR 1352.

57. Where only one member received notice late, though posted in time, meeting valid. *Calcutta Chemical Co. Ltd v Dhanan Chandra Roy*, (1965) 56 Comp Cas 275 (Cal).

58. *Shivkesh Hardev Singh v Mahakali Textiles Ltd*, AIR 1994 Bom 26.

59. *V Shanmugamandrum v Emerald Automobiles Ltd*, (2001) 119 Comp Cas 1206 (CLB).

60. *Chella Rajadeva Prasad v Asian Coffee Ltd*, (1959) 20 SCL 414 (AP).

61. *Shrinivas Karr v Thiviac Enterprises (P) Ltd*, (2004) 122 Comp Cas 944 (CLB).

62. *Sengul Krishnan v Vijay Kumar Choudhury*, (2003) 44 CLA 45 (CLB).

63. *PNC Telecom Pvt v Thimma*, (2004) 1 BCCLC 86 (CLD).

64. S. 170 and see, *Saxena Roma Vidyasagar and Publications (P) Ltd v. v. (1992) 73 Comp Cas 275 (Ker)*.

65. AIR 1951 Mad 542; (1951) 64 LW 172; (1951) 21 Comp Cas 93.

Again, the notice must contain a statement of the business to be transacted at the meeting. Section 102 puts businesses into two categories, namely:

- General business**—At the annual meeting the business of considering accounts and directors' report, the declaration of dividends, the appointment of directors and auditors and fixing their remuneration are regarded as general business.⁶⁶
- Special business.**—Any other business at an annual meeting and all business at extraordinary general meetings are regarded as special business.⁶⁷

Further issue of capital, being a special business, required to be mentioned in the notice. Not to have done so rendered the meeting, its notice and the further issue to be invalid.⁶⁸

Explanatory statement

If any special business is to be transacted at an annual meeting, a statement to that effect must be annexed to the notice calling the meeting. The statement must set out all the material facts concerning each item of the special business and should also disclose the interest of any director or other key managerial personnel in the matter.⁶⁹ "Notice must give a sufficiently full and frank disclosure to the shareholders of the facts upon which they are asked to vote." The purpose of the explanatory statement is that the members should be informed of the nature of the business to be transacted at the meeting.⁷⁰ Section 102 specially provides about the contents of the statement.

A statement setting out the following material facts concerning each item of special business to be transacted at the meeting has to be annexed to the notice calling the meeting; (i) the nature of concern or interest, financial or otherwise, if any, in respect of each items of (i) every director and manager, if any; (ii) every other key managerial personnel; and (iii) relatives of the persons mentioned in the above two clauses; (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 decisions on them.

Where any item of special business is to be transacted at a meeting relates to or affects any other company, it would have to be set out in the statement as to what is the extent of shareholding in that other company of

66. *Ramji Lal Bhasinwala v Baden Cables Ltd.*, 11.I.R 1954 Raj 135, 157.

67. *Martin Castelino v Alpha Omega Ship Management (P) Ltd.*, (2001) 124 Comp Cas 687 (C.L.B.), the agenda sent with the notice of the meeting did not contain the item of increase of share capital, the notice was held to be not proper.

68. *Claude-Lila Parulekar v Sohni Papers (P) Ltd.*, (2005) 11 SCC 73, (2005) 124 Comp Cas 685.

69. S. 102(1). Where the notice of a meeting is given by newspaper advertisement, the statement of material facts need not be annexed to it, but it should be mentioned that the same has been forwarded to the members. Apart from this exception the requirements of the section are mandatory. *V.G. Halasundaram v New Haven Ceramic Works (P) Ltd.*, (1945) 77 Comp Cas 124 (Mad).

70. *Kalji Nag v Quality Assurance Institute (Fazil) Ltd.*, (2000) 4 Comp JJ 385 (L.T.B.). The statement is a part of the notice. It cannot be read de hors of it.

every promoter, director, manager, if any, and of every other key managerial personnel if the extent of shareholding in the paid up capital is not less than 2 per cent.

Where any item of business refers to a document which is to be considered at the meeting, the notice has to specify the time and place where such document can be inspected.

The notice must be frank, clear and satisfactory. To take, for instance, *Narayanaiah Banshal v Maneckji Petit Mfg Co Ltd*⁷¹

A company had managing agents. It wanted to adopt a new set of articles changing the terms of their appointment. The notice convening a meeting of the shareholders for the purpose set out the proposed special resolutions, but did not give particulars of the important changes to be effected. Accordingly, the resolutions passed on the basis of this notice were held invalid.

Similarly in *Bimal Singh Kothari v Mair Mills Co Ltd*⁷²

It was held that where there is a large body of shareholders residing at great distances from the registered office of the company, it would not be fair to leave the proposed articles at the registered office and give the shareholders notice of that fact. Printed copies of the new articles should be sent with the notice. Where this is not done, the notice is not sufficient.

Where a notice calling a meeting stated that the object of the meeting was to adopt an agreement for the sale of one company's undertaking to another, but did not disclose that a substantial sum was payable to the directors of the selling company as compensation for loss of office, the court held that the notice did not fairly disclose the purpose for which the meeting was convened.⁷³ Where the shareholders' resolution became necessary for selling a unit of the company, the court said that material facts could comprise of the reasons for sale, whether sale would affect the interests of the company, to whom the sale was being effected, the consideration for it, how and by whom the consideration was assessed, whether directors had any interest in the transaction, whether all statutory clearances were obtained. Such material facts would help the shareholders to make a decision on the proposal.⁷⁴ The Supreme Court order restraining the company from the sale of its assets has been held to be a material fact. Non-disclosure of such material fact in the notice calling the meeting vitiated the resolution passed at the meeting. An agreement of sale entered into on the basis

71. (1991) 33 Bom LR 556. See also, *MR Goyal v Usha International Ltd*, (1997) 27 CLA 187 (Del), explanatory statement not found to be trick, complained minimal shareholder, no harm to his small holding.

72. AIR 1952 Cal 645 ILR (1956) 1 Cal 385; 56 CWN 361.

73. *Kale v Croydon Transport Co*, (1999) 1 Ch 358; 29 C 237; 671 Ch 222.

74. *Mendnica (9A) v Philips India Ltd*, (2000) 3 Comp LJ 129 (CLB).

of such resolution was not enforceable. No action lay for compensation for breach of the contract.²⁵

It was pointed out by their Lordships of the Judicial Committee in *Parasaram v Tata Industrial Bank Ltd.*²⁶ that a shareholder who by his conduct shows that he knew the real effect of the work to be transacted at a meeting cannot complain of the notice on the ground of insufficiency.²⁷

Benefits of non-disclosure [S. 102(4)].—Where as a result of non-disclosure or insufficient disclosure in any statement being made by a promoter, director, manager, if any, or other key managerial personnel, any benefit which accrues to such persons or their relatives, either directly or indirectly, he has to hold such benefit in trust for the company and be liable to compensate the company to the extent of the benefit received by him.

Penal consequences of default [S. 102(5)].—For any default in complying with the provisions of the section, every promoter, director or manager or other key personnel who is in default is punishable with fine extending to Rs 50,000 or five times the amount of benefit accruing to the person concerned whichever is more.

Quorum [S. 103]

Another requirement of a valid meeting is the presence of a quorum. Quorum means the minimum number of members that must be present at the meeting. It is generally for the articles to provide what number of

25. *Sunil Mills Ltd v Official Liquidator of Shri Ambien Mills Ltd.*, (1999) 1 Comp LJ 423 (Guj); *YS Spinners Ltd v Official Liquidator* (1999) 1 Comp LJ 442; (2000) 100 Comp Cas 547 (Guj).

26. (1927-28) 46 IA 274; A2B 1928 PC 180. See also, Miska J of the Odisha High Court in *Kalinga Tunes Ltd v Shant Prasad Jain*, (1964) 3 Comp LJ 117, 138 (Ori); *Swaragini Bhujeria v National Co.*, (1965) 1 Comp L 112 (Cal). The Rajasthan High Court held in *Seth Sankha Lal Zedka v Edward Mills Co.*, 1971 Tax LR 178 Raj; (1972) 42 Comp Cas 1, that where a notice proposed one person for managing directorship and the shareholders appointed another, it was good notice. The validity of a notice on account of inadequacy of time not allowed to be questioned by a transferee of shares when his transferee's right to question had become three-barred. *Joseph Michael v William Ruhle & Son Co Ltd.*, (1966) 59 Comp Cas 898 (Ker). A person whose interest in the company was 0.001 per cent was not permitted to question validity. *Cepni Das Gujari v Titagiri Papers Mills Co Ltd.*, (1986) 60 Comp Cas 920 (Cal).

27. See also, *European Home Products plc v. et al.*, 1988 PCLC 640, where the notice for reduction of share premium account carried an inaccuracy and the same was ignored by the court because no shareholder was apparently influenced by it. *Abrish Kaur v Lala Krishan Sugar Mills Ltd.*, (1970) 44 Comp Cas 393 (Del), the business of a meeting can be transacted even without a formal agenda. The same view was endorsed in *Suresh Chandra Maruwan v Louis P. Ltd.*, (1978) 48 Comp Cas 110 (P&H), every agenda has a residuary clause which permits consideration of any other matter with the permission of the Chairman. *Joginder Singh Palu v Timi Brami (P) Ltd.*, (1984) 56 Comp Cas 103 (Cyl), even if there are certain irregularities committed, it would not be a proper exercise of discretion or an application under S. 39, Rules 1 and 2 of CPC to restrain a company from acting on a resolution passed at a meeting irregularly convened or conducted. The company can rectify such matters. *Bentley-Stevens v Jones*, (1970) 1 WLR 638. Where the complaining shareholder was already aware of the facts, the meeting was not invalidated though the requisite particulars were not set out in the notice. *CR Priyendra Kumar v Parasawalkair Permanent Fund Ltd.*, (1995) 83 Comp Cas 150 (Mad).



CASE PILOT



CASE PILOT



CASE PILOT

members will constitute a quorum. But Section 103 provides that unless the articles provide for a large number, five members personally present in the case of a public company and two in the case of a private company shall be the quorum for a meeting. If within half an hour from the time of a meeting a quorum is not present the meeting will stand dissolved if it was called upon requisition. But in other cases the meeting is automatically adjourned to re-assemble on the same day in the next week.⁷⁸ And if at the re-assembled meeting also a quorum is not present within half an hour, as many members as are actually present shall constitute the quorum. The crucial problem in such a case is that if only one member turns up, will the meeting be valid, or, in other words, whether a meeting attended by only one member can be called a meeting at all. This was the question in *Sharp v Davies*.⁷⁹

There were several shareholders in a company. A meeting was called for the purpose of making a call. Only one shareholder attended the meeting. He, however, held the proxies of other shareholders. He took the chair and passed a resolution for making a call and then proposed and passed a vote of thanks. In giving judgment in the Court of Appeal, Lord Coleridge said: "The word 'meeting' *prima facie* means a coming together of more than one person: This was not a meeting within the meaning of the Act."

On the analogy of this case it may be said that even in the case of a meeting adjourned for want of a quorum, the attendance of one member only at the re-assembled meeting may not be enough. Moreover, the section also says that "the members actually present shall be a quorum". But exceptions will have to be admitted, particularly in a case like *East v Bentel Bros Ltd*.⁸⁰

Where all the preference shares in a company were held by one shareholder only, it was held that a meeting of preference shareholders attended by him only was proper.

Secondly, when the Tribunal calls a meeting under Section 98 it may be directed that one member of the company present in person or by proxy shall be deemed to constitute a meeting.⁸¹ This course was adopted in *J. Open Photographic Ltd, re*.⁸² In a company consisting of two members with

⁷⁸ Joint shareholders count for one member even if all of them are present.

⁷⁹ (1866) 2 QBD 210; 46 L.J.C.B. 104; 36 LT 186 (CA). An extraordinary general meeting called by the requisitionists was presided over by a person who was not a member and the minimum of two members were not present with him, it was not a valid meeting. *Bhadrakpur Simdhwari Beverages (P) Ltd v P.R. Pandya*, (1996) 80 Comp Cas 842 (P&H). *D.K. Chatterjee v Kapti Superstore (P) Ltd*, (2003) 134 Comp Cas 265 (CLB), a resolution passed without the requisite quorum is void *ipso facto*.

⁸⁰ (1911) 1 Ch 169; 80 LT Ch 123; 103 LT 826.

⁸¹ S. 98(1)(P)(xxviii). *Shukla Sandesh v Amalgamations* (1972), (2002) 105 Comp Cas 985 (CLB); such directions can be given only when CLB has itself ordered the holding of a meeting and not when a meeting is convened by the company itself. See also, an opinion expressed by Ashwin L. Shah in (1968) 1 Comp L 27 and the editor's reply. An order of this kind was made in *El Scoberry Ltd, re*, 1939 (1) 600 (1959) 3 W.L.R. 349.

⁸² 1989 HC(LC) 263 (Ch D).

51:49 holding, the majority shareholder was not able to remove the other from directorship because under the articles a meeting without the other attending was not possible. So the majority applied for a court (here it would be Tribunal) order that a meeting should be called at which the attendance of one would be the quorum. Since the majority shareholder had a statutory right to remove the other from directorship his right could not be vetoed by quorum requirements and, therefore, the court passed necessary orders. Further, it was held in *Hartley Baird Ltd, re*⁶³

Where a clause in the articles of a company provided that "no business shall be transacted at any general meeting, unless a quorum is present when the meeting proceeds to business ..." that the condition is sufficiently complied with if there is quorum present at the beginning of the meeting when it proceeds to business, and the subsequent departure of a member reducing the meeting below the number required for a quorum does not invalidate the proceedings at the meeting after his departure.

The authority of this statement has been to a certain extent undermined by *London Fiats Ltd, re*⁶⁴

A meeting was attended by two members. The Chairman was the majority shareholder. The other member proposed a name for appointment as liquidator. The Chairman moved an amendment and proposed himself. Thereupon the other member left. The Chairman by his majority votes confirmed his appointment.

The court refused to uphold the appointment on the ground that any further proceedings, after the other member had left, were a nullity. The decision is good inasmuch as it provided to the company an independent liquidator, but the reason advanced may lead to wrong results. "Should it be the law that minority shareholders, realising that they cannot defeat a resolution by the constitutional process of voting against it, should be able to frustrate the wishes of the majority by walking out of the meeting?"⁶⁵

A minority shareholder refused to attend a general meeting.⁶⁶ The meeting was inquorate without him and the resolution passed was invalid. He sought an order for convening of meeting to enable the invalidly passed resolution to be put before and passed by a properly constituted meeting. Following the principle of the earlier cases⁶⁷, the court came to the conclusion that a meeting would be ordered to be called. The section is procedural in nature. It is intended to enable a company business which needed to be conducted at a general meeting to be so conducted. But the court would not

⁶³ 1955 Ch 343; (1954) 3 WLR 964.

⁶⁴ (1967) 1 WLR 711; (1970) 1 Chmp LJ 28.

⁶⁵ Editor's note on the case in 1969 JBL 2301, see also, *H. S. Bowlers Ltd, re*, 1958 Ch 900; (1958) 3 WLR 549; (1966) 3 All ER 1 where the court upheld the removal of a director by a meeting attended by one member.

⁶⁶ *Vivienne Entertainment Holding Ltd v South Entertainment Ltd*, (2004) 2 BCSC 224 (C.J.D).

⁶⁷ *Weaven Rugs Ltd, re*, (2002) 1 BCSC 121; *Union Music Ltd v Wilson*, (2003) 1 BCSC 453.

allow the procedure to be used to override class rights or substantive rights conferred.⁸⁸

Where the meeting commenced about 1½ hours late because there was no quorum within half hour of the scheduled time, it was held that Section 174 (now S. 103) refers only to the presence of the quorum within half an hour and does not talk of the time at which the meeting should be called to order, a delay in the commencement of the meeting did not invalidate it.⁸⁹

Where the meeting is called by requisitionists under Section 100, it becomes cancelled if the quorum is not present. In the case of an adjourned meeting or of a change of day, time or place of meeting, the company has to give not less than three days notice to the members either individually or by publishing an advertisement in newspapers one in English and one in vernacular language which is in circulation at the place where the registered office of the company is situate. [S. 103(2)]

Chairman [S. 104]

For the proper conduct of business at a meeting a Chairman is necessary. His appointment is usually regulated by the articles of association. But if there is nothing in the articles "the members personally present at the meeting shall elect one of themselves to be the Chairman".

Power of adjournment and postponement.—The position and powers of a Chairman were explained by the Madras High Court in *Narayana Chettiar v. Kaleswara Mills*.⁹⁰

If the Chairman unjustly and without the consent of shareholders stops the meeting, it is perfectly within the powers of the meeting to elect another Chairman and conduct the remaining unfinished business.⁹¹

A Chairman by himself cannot postpone a meeting. The proper course to adopt is to hold the meeting and then adjourn it to a more convenient date. An adjournment will be within his competence in the case of a disorder but only for so long as he considers absolutely necessary and his decision should be communicated to the meeting at least to the extent to which it is possible for him to do so. If the Chairman adopts any other course, the members who can constitute a quorum may continue with the meeting and lawfully transact the announced business.⁹² Where the Chairman was

88. *Vectra Entertainment Holding Ltd v. South Entertainment Ltd*, (2010) 2 BCLC 224 (Ch D).

89. *Jenki Printing (P) Ltd v. Nadar Press Ltd*, (1937) 21B Comp Cas 546 (CLB).

90. AIR 1952 Mad 515, DLR 1952 Mad 218. Other powers and privileges of the Chairman will become apparent from the discussions on the procedure of voting. For further discussion on the Chairman's power to adjourn meetings, see, *John v. Rees*, (1969) 2 WLR 1294, noted 1969 [81] 2G; *Silk Suttee M/s. Lohia v. Edward Mills Co.*, (1972) 42 Comp Cas 1; 1971 Tax LR 178 (Raj).

91. *PNK Securities Management (P) Ltd v. United Western Bank Ltd*, (2002) 109 Comp Cas 500 (CLB), power and duty only to assure good conduct of meeting, no power to withdraw a resolution, the Chairman dissolving meeting, before business finished, members could proceed after alerting new Chairman.

92. These principles were laid down by the Supreme Court in *Chandrakant Khare v. Skandaraw Kalik*, (1988) 4 SCC 577, (1989) 65 Comp Cas 121, in connection with the meeting of a



a candidate for being appointed as managing director and, on finding that he wouldn't get majority support, dissolved the meeting and left the hall with his supporters, the appointment by the remaining members, being in quorum, of another person, as a managing director was held to be valid.⁹³

Contrary opinions have also been expressed. The Calcutta High Court in its decision in *United Bank of India v United India Credit and Development Co Ltd*⁹⁴ recognised a Chairman's right to make a *sine fide* adjournment but immediately added remarks from the authorities to the effect that if the intention and effect were to interrupt and procrastinate the business, such an adjournment would be illegal; if, on the contrary the intention and effects were to forward or facilitate it, and no injurious effects were produced, such an adjournment would be generally supported.⁹⁵

Fresh light has been thrown on this question by the decision of the Court of Appeal in *Bying v Royal Life Assn Ltd*.⁹⁶ A meeting was called for changing the company's memorandum for facilitating an amalgamation. A fairly large number of members wanted to oppose the move. The meeting became overcrowded. The venue proved too small. The members were seated in the adjoining rooms and a sound system was installed to enable them to hear and to participate. That system failed. Then there was a bewildering confusion and in that state of things the Chairman arranged for an alternative venue and resolved to adjourn the meeting to meet again in the afternoon at the new venue. There was opposition to this move. The meeting in the evening at the new venue was held to be invalid and the Chairman's adjournment of the morning meeting without taking a sense of the meeting was held to be not lawful. The court recognised that it is not necessary that all the members should be present in one room, but that if the members are seated in different rooms there should be an audio-visual link between all the rooms. In this case the system having failed, the gathering could not be constituted into a valid meeting except for the rudimentary purpose of adjourning itself.⁹⁷ Under the articles of the company the Chairman could adjourn a meeting only with the consent of the meeting. But even so the



municipal corporation, *Peerless General Finance & Investment Co Ltd v Esso Oil Ind*, (2006) 129 Comp Cas 353 (Cal), the right of meeting to adjourn by simple majority. See, Taggart, *Hornby's Martens Principles, Law and Practice* (2nd Edn); it has been observed in Chapter 10 on Adjournment that under the common law a meeting is deemed to be invested with the right to adjourn its proceeding at its own discretion. A meeting has the inherent power to adjourn where it is not possible to transact all the business without adjourning.

93. *Seth Shinde Mal Lodha v Edwin Mills Co*, (1972) 42 Comp Cas I; 1971 Tux LR 178 (Kanj).
 94. (1977) 47 Comp Cas 639 (Cal); Frank Shackleford, *Law and Practice of Meetings* (3rd Edn) 64; *Coleby v Burwell*, (1916) 2 Ch 523; *Daudat Sharma v Zaboor Ahmed Zaid*, 1960 3LW 486; AIR 1960 Raj 25; *Nation Dwelling Society v Sykes*, (1894) 3 Ch 159; *United Bank of India v United India Credit and Development Co Ltd*, (1977) 47 Comp Cas 689 (Cal); *Jackson v Hamlyn*, (1967) 2 WLR 704 applied.

95. Citing *John v Rees*, (1969) 2 WLR 1291; (1969) 2 All ER 174.

96. (1989) 1 WLR 768; 1989 BCAC 400 (CA).

97. Even in this respect the court had to face authorities like *Herben v Philip*, (1883) 1 A 25 Ch D 14; 46 LT 334; 31 WR 173, where a meeting was invalid by reason of omission to give notice to all members and the same was held to be not even capable of adjourning itself.

court was of the view that a residuary power of adjournment would survive because circumstances may develop, as they did in this case, where it is impossible to ascertain the view of the majority. Finally, the court came to the conclusion that the Chairman's power of adjournment was not fairly exercised. He failed to take into account the relevant factors, such as, member's attempts at *sine die* adjournment, their objections to the temporary adjournment and that there was no such urgency, the final date of merger being still off. The court said that for testing the reasonableness of the conduct of a Chairman, the same test is applicable which is generally applied in all cases of judicial review, namely, whether the Chairman reached a conclusion which no reasonable Chairman could have reached having regarded to the purpose of his power to adjourn.⁹⁸

Mixed nature of duty.—Further, it has been held in *Ram Namin v Ram Kishen*⁹⁹ that:

A Chairman who presides over a meeting of a company is neither wholly a ministerial officer nor wholly a judicial officer; his duties are of a mixed nature, and he is not liable to be mulcted in damages, if, acting bona fide according to the best of his judgment and without malice, he erroneously excludes a shareholder from voting and declares him to be ineligible as a director of the company. A shareholder who has been wrongfully refused the right of voting or of election as a director, cannot maintain an action of damages against the Chairman of the company.

Where a shareholder pledged his shares with a bank with voting rights and the bank lodged the documents with the company for the purpose of exercising voting rights, it was held that the Chairman had no power to examine validity of the documents.¹⁰⁰

Casting vote—In the case of a tie of votes, the Chairman can exercise a casting vote. This right can be exercised by the person who is occupying the chair. It is not necessary that he should be a regularly elected Chairman.¹⁰¹

Informal appointment.—The shareholders invited a person (claimant) to be the Chairman of the company but no resolution was passed appointing

Portuguese Consolidated Copper Mines Ltd. v. (1889) 12 Ch D 160 (CA), a Board meeting called on inadequate notice was held to be not capable of adjourning itself, the court also found in its support the New Zealand case of *Hether v. New Zealand Glass Co Ltd.* (1911) 21 NZ L.R. 129 (S.C.) where an indefinite meeting was held to be valid for approving the annual return and adjournment.

98. The following cases were cited as propounding the test of judicial review: *Associated Provincial Picture Houses Ltd v Wednesbury Corp.*, (1948) 1 K.B. 223 (C.A.) see further, *Second Consolidated Trust Ltd v Ceylon Amalgamated Tea & Rubber Estates Ltd.*, 160 E.L.J. 224, where too the Chairman had to act in taking account the relevant factors. *Peerless General Finance & Investment Co Ltd v Esso Oil Ltd.*, (2008) 129 Comp Cas 353 (C.A.), meeting to approve a scheme of amalgamation was adjourned frequently because the scheme was not likely to go through, adjournment on majority votes was held to be valid.

99. (1910) 10 IC 515.

100. *Soroptimist International (P) Ltd v. Jones, Tapley & Industries Ltd.*, 200541LC 1382 (K.L.J.).

101. *T.V. Presadeckleuren Nain v. Anandamandiram Hindus (P) Ltd.*, (2002) 110 Comp Cas 294 (C.I.D.).

him as such. The shareholders could not say that there was no appointment.¹⁰² It has been stated that the ratio of the decision is that where that which has been done informally could, but for an oversight, have been done formally and was assented to by 100 per cent of those who could have participated in the formal act, if the act had been carried out then it would be idle to insist upon formality as a precondition to the validity of the act which all those competent to effect it had agreed should be effected.¹⁰³

The right to vote is a part and parcel of shareholding. The two cannot be decoupled. But shareholders can enter into voting agreements. Such agreements do not have the effect of transfer of voting rights or isolating them from shares.¹⁰⁴

Appointment by court. The court also has the power to appoint an independent Chairman to preside over a meeting of a company. Such a Chairman is particularly necessary where there are factions among the shareholders and a peaceful meeting under the chairmanship of a person appointed by either faction is improbable.¹⁰⁵

Voting

The business of a meeting is done in the form of resolutions passed at the meeting. Shareholders have the right to discuss every proposed resolution and to move amendments. If an amendment is reasonably germane to a proposed resolution and is not in substance a negative of it, it must be admitted and put to the meeting. Accordingly, in *TII Vakil v Bombay Presidency Radio Club*,¹⁰⁶

Where at a meeting of a company the Chairman wrongfully ruled an amendment out of order, it was held that the subsequent proceedings relating to that particular motion were invalidated.

After a resolution has been discussed it is put to vote. Voting right means the right of a member of a company to vote in any meeting of the company or by means of postal ballot. [S. 2(93)] Every holder of equity shares has the right to vote.¹⁰⁷ Section 106 now clearly provides that a company cannot prohibit any member from exercising his voting right on the ground that he has not held his shares for any specified period before the meeting or on any other ground.¹⁰⁸ The only ground on which the right to vote may be

102. *Pear v Dale*, (2004) 2 BCLC 508 (Ch D). The court applied the principle enunciated in *Diamondic Ltd. v. (1969) 2 Ch 365 (1969) 2 WLR 134*.

103. *New City Egg Co. Ltd. v. (1944) 1 BCLC 757, 814*.

104. *Vodafone International Holdings BV v Union of India*, (2012) 6 SCC 613.

105. See, for example, *A Anandhulakshmi Ammal v Tijan's Bariles Asbestos & Paints Ltd.* AIR 1952 Mad 60; *Selvaraj v Mylspore HP Foun.* (1968) 1 Comp L 93 (Mad). Again, if such extraordinary circumstances the courts do not interfere in the conduct of meetings by appointing a Chairman. See, *Kishore Y Patel v Patel Egg Co Ltd.* (1994) 79 Comp Cas 53 (Bom). Courts also do not interfere with arrangements agreed to by shareholders. *Savadee Chemicals Ltd. v. Kothari Industrial Imps. Ltd.* (1995) 16 CLA 23 (Mad).

106. AIR 1945 Bom 425. See also, *Henderson v Bank of Australasia*, (1893) 18 45 Ch D 330 (C.A.).

107. S. 47.

108. See, for example, *A Anandhulakshmi Ammal v Hindustan Investment and Financial Trust*, AIR



excluded is non-payment of calls by a member or other sums due against a member or where the company has exercised the right of lien on his shares.¹⁰² Persons who are members on the last date for holding the meeting alone would be entitled to vote. Those who became members thereafter by virtue of a Government order were held to be not entitled to vote even at the postponed meeting.¹⁰³

A provision in the articles of a company introduced by an amendment to the effect that there would be full voting rights in respect of partly paid up shares also was held to be not permissible. It was in violation of the provisions of the Act.¹⁰⁴

Before the Amendment of 2000 [Act 1956] shares with differential voting rights were not permitted to be issued. Such voting rights existed up to the enactment of the 1956 Act. They were brought back by the amendment. Section 43 of 2013 Act provides that shares with differential voting rights means shares which are issued with differential rights in accordance with the provisions of the section.

The voting rights of preference shareholders are restricted by Section 47. A preference shareholder has the right to vote only on resolutions which directly affect the rights attached to his preference shares.

Informal agreements.—A formal resolution is, however, not the only way for a company to act through the general meeting of its shareholders. An agreement unanimously adopted by all the members is sufficient to express the corporate will. Where a meeting was attended by all the five shareholders of a company and two of them having half the voting power supported a resolution for voluntary winding up and the rest holding the other half abstained altogether from voting, the resolution was held to be the unanimous will of all the members.¹⁰⁵ BARRETT J said: "It is established law that a company is bound in a matter, intra vires the company, by the unanimous agreement of all its corporators."¹⁰⁶ He then quoted ASTOURT J as saying: "Where a transaction is intra vires the company and honest, the sanction of all the members of the company, however expressed, is sufficient to validate it." Explaining how the agreement was deemed to be unanimous when three out of five members did not vote, the court said: "Admittedly three of the five corporators did not vote in favour of the resolution, but they undoubtedly suffered it to be passed with knowledge of their power to stop it.... If corporators attend a meeting without protest,

102. Mac 927 where a provision in the articles of a company that only those shareholders would be entitled to vote whose names have been there on the register for two months before the date of the meeting was held to be in contravention of the Act. S. 182, however, does not apply to a private company which is not a subsidiary of a public company. Disproportionate voting rights have been terminated. S. 89.

103. S. 105(1).

104. CM Viskrutham v TV Mathew, (2002) 103 Comp Cas 159 (Ker).

J.L. Ajit Singh v DSS Enterprises (P) Ltd, (2009) 119 Comp Cas 597 (C.I.B.).

105. Bailey, May & Co Ltd, re, (1971) 1 WLR 1057; (1971) 3 All ER 693.

106. The learned judge cited *Ernest Egg Works Ltd. v. (1920) 1 Ch 466 (CA)* and *Parker & Cooper Ltd v. Reading*, 1926 Ch 975.

stand by without protest while their fellows purport to pass a resolution and permit all persons concerned to act for years on the basis that the resolution was duly passed and rule their conduct on the basis that the resolution is an established fact. It is idle for them to contend that they did not assent to the purported resolution."

Some more decisions have been delivered on the validity of informal agreements having the effect of resolutions. The statutory procedural requirements of a shareholders' resolution at a general meeting for the award of a long term contract was taken by the court to be waived where the sole shareholder consented to the agreement. The correct approach is to consider the purpose and underlying rationale of the formality in question. The sole shareholder had given the genuine consent to something which was within the company's powers. The prescribed procedure was intended to ensure that there was a proper opportunity for shareholders to consider the agreement.¹¹⁴ Where, however, certain additional requirements are prescribed, e.g., special notice of a resolution for removal of a director, it is doubtful whether such procedure can also be waived. Where a charge was created in favour of debenture holders but the receiver appointed by them could neither find the requisite shareholders' resolution for the creation of the charge, nor there was any evidence of the way in which the concerned group of shareholders had given its consent, the court said that the debenture could not be validated. But the company was not allowed to avoid the transaction because the debenture trustees had acted in good faith.¹¹⁵

By show of hands [S. 107]—In the first instance, voting on a resolution takes place by show of hands. On a show of hands, one member has one vote. A declaration by the Chairman on a show of hands that a resolution has or has not been carried is conclusive,¹¹⁶ except when a poll is demanded or when as held by the Calcutta High Court in *Dhakeswari Cotton Mills Ltd v Nil Kamal Chakravarty*:¹¹⁷

A declaration by the Chairman would be conclusive only if he does not find by his declaration the figures for or against the resolution. But where the Chairman finds the figures and erroneously in point of law holds that a resolution has been duly passed, the resolution cannot be said to have been passed according to law.

Voting by electronic means [S. 108].—The section provides that the Central Government may prescribe the class or classes of companies and

114. *Wright v Atlas Wright* (1999) 2 BCLC 301 (CA).

115. *Toronto Group Ltd. v.* (1995) 2 BCLC 605 (Ch D). S. 31 of the English (1985) Act validates transactions where the other party did not know of the directors' procedural lapses. The court considered the decisions in *Demile Ltd v Peter Heath* (2d, 1998 BCC 628).

116. S. 107. See, for example, *EDI Services United Mills. re*, AIR 1929 Bom. 38; S. 107 (voting by show of hands) does not apply to a company which does not carry on business for profit or prohibits payment of dividends to members. Such a company may have any provision in the articles on the point. [S. 263-A]

117. AIR 1937 Cal 645; 11 CWN 1137.

also the manner in which a member may exercise his right to vote by electronic means.

Poll [S. 109].—If there is a dissatisfaction about the result of voting by show of hands a poll can be demanded.¹¹⁸ Taking a poll means recording the number of votes cast for or against a resolution. The "voting right of a member on a poll shall be in proportion to his share of the paid-up equity capital of the company."¹¹⁹ Shares with disproportionate voting rights were not allowed to be issued. The Amendment of 2000 [Act of 1956] permitted shares with differential rights to be issued. Now under the 2013 Act this provision is contained in Section 43. But so long as a company does not have such shares, the regime of equality of voting rights would prevail. So is true of quoted companies in England.¹²⁰ A clause in the articles of a private company which gave three votes for each equity share to a director when a resolution was proposed for his removal as held valid.¹²¹ A poll may be ordered by the Chairman of his own motion and he will be bound to order a poll when it is demanded:-

1. in the case of a public company having a share capital, by any member or members present in person or by proxy and holding shares in the company (i) which confer a power to vote on the resolution not being less than one tenth of the total voting power in respect of the resolution or, or (ii) on which an aggregate sum of not less than Rs 5,00,000 has been paid; (higher amount may be prescribed);
2. in the case of any other company, by the holders of one-tenth of the total voting power in respect of the resolution.¹²²

The concept of "total voting power", in relation to any matter, means the number of votes which may be cast in regard to that matter on a poll at a meeting of a company if all its members or their proxies having a right to vote on that matter are present at the meeting and cast their votes [S. 2(89)].

When a poll is taken a member is free to split his votes for as well as against the same resolution. He has the right to distribute his votes in any manner he chooses.¹²³

118. A poll may be demanded even before the declaration of the result on a show of hands. A member who participated in voting by show of hands and did not object to the result or demand a poll, was not allowed to question the validity of the resolution. *Jeta Jacques Tariq Leleoni v J&J Printing Inks Ltd.* (1997) 58 Comp Cas 759 (Bom).

119. S. 47(1)(b).

120. See, Clive M. Schmidthoff, "The Issue of Securities in Great Britain" (1969) IBL 1.

121. *Rushill v Rushil*, (1968) 2 WLR 1057; (1969) 1 All ER 1002 (CA).

122. *Jeta Jacques Tariq Leleoni v J&J Printing Inks Ltd.* (1997) 58 Comp Cas 759 (Bom); the Chairman is not bound to hold a poll in every case.

123. Now expressly provided in S. 106. See also, the observations of the Calcutta High Court in *Mahallem v Fort Gresier Jute Mill Co.* AIR 1955 Cal 102, 58 CWN 715. The meeting is deemed to conclude upto that time. *Holmes v Arys*, (1958) 2 WLR 772 (CA); *Silver v Teti Concessions Ltd.*, (1913) 1 Ch 292; *Jackson v Hannon*, (1969) 2 WLR 709. A person, who was not then present may nevertheless vote on a poll. *Campbell v Mairi*, (1835-62) 4 All ER Rep 468; a breakdown of poll arrangement would require another election. *MK Shrimasai v VVS Subramanian Iyer*, (1932) 32 Comp Cas 147; AIR 1932 Mad 100.

A poll demanded for adjournment of the meeting or appointment of Chairman of the meeting has to be taken forthwith. [S. 109(3)] A poll demanded on any other matter has to be taken at such time, not being later than 48 hours from the time when the demand was made, as the Chairman of the meeting may direct. The Chairman has the power to regulate the manner in which the poll is to be taken. The result of the poll is deemed to be decision of the meeting on the resolution on which poll was taken.

The manner of taking a poll is to be decided by the Chairman.¹²⁴ The Chairman has to appoint such number of persons as he deems necessary, to scrutinise the poll process and votes given on the poll. They have to report their working to the Chairman in the manner prescribed by him. [S. 109(5)] The Chairman has the power to regulate the manner in which the poll is to be taken. [S. 109(6)] The result of the poll is deemed to be the decision of the meeting on the resolution on which the poll was taken. A declaration of the Chairman that a resolution has or has not been carried is *prima facie* evidence of the resolution. [S. 109(7)] The reason for this rule was explained in *Mahalizam v Fort Glaston Jute Mfg Co.*¹²⁵

The validity of a resolution declared passed by the Chairman at a poll was questioned on the ground that certain proxies were improperly rejected. The articles of association of the company provided that in such cases "the determination of the Chairman made in good faith shall be final". The court observed: "The Chairman by virtue of his position and the nature of his duties has to decide on the spot all emergent questions that arise at the meeting and it is not desirable to reduce the *prima facie* authority of his verdict Hence the burden of proof lies on the other party to show that the decision of the Chairman was wrong."

Where a poll was demanded on a valid basis but was not allowed by the Chairman, the CLB held that the business on the agenda for which poll was demanded and which was carried through by show of hands became invalid.¹²⁶

Voting by proxy [S. 105]

A member may vote either in person or by proxy. Articles may allow voting by proxy even on show of hands.¹²⁷ But unless the articles otherwise provide, a proxy shall not be allowed to vote except on a poll. The system of voting by proxy has become very popular because of the unwillingness and inability of shareholders to be personally present at meetings:

It is commonplace to observe that the modern shareholder is a kind of investor and does not think of himself as or like an owner. He hires his

124. S. IJR. Mehta Singh (M/s) v Jellindia Club Ltd. (1969) 1 Comp LJ 273 where the Chairman ordered open, not secret ballot.

125. AIR 1955 Cal 102; 58 CWN 715.

126. Nirmal Gupta v Chittor Nuric Joint Stock Co. Ltd. (1999) 98 Comp Cas 655 (CLB).

127. The English cases bearing on the subject of right to vote by proxy are: *Hawthorn Bridge Coal, Iron & Whgmn Co. vs.* (1879) LR 11 Ch D 109; 40 LT 363 (C.A); *Ridgedell Jms. vs.* (1893) 1 Ch 603; 58 LT 342; *Ernest v Loma Gold Mines Ltd.* (1897) 1 Ch D 275; 75 LT 317.

capital out to the managers, and they must run it for him; how they do it is their business, not his; and he always votes 'yes' on the proxy.

"A proxy is a person representative of a shareholder at a meeting of the company, who may be described as his agent to carry out a course which the shareholder has himself decided upon."¹²⁸ A proxy is not entitled to act contrary to the instructions of the shareholder in the matter. It is the relationship of principal and agent. Where the authorisation of the proxy appointed through power of attorney exceeded the voting rights of the shareholder, it was held that only the votes in excess were void.¹²⁹

A proxy does not have the right to speak. Proxy system is also not available where the company does not have share capital. Articles may provide otherwise. [S. 105(1) Proviso 2] The Central Government may prescribe a class or classes of companies where proxy system is not to be available. [S. 105(1) Proviso 3] Notice of meeting should indicate that proxy system is available. [S. 105(2)]

The instrument appointing a proxy must be in writing and signed by the shareholder, and should be deposited with the company 48 hours before the meeting. [S. 105(4)] If the articles of a company prescribe any longer period than is to be read as 48 hours, the Act requires proxy forms to be supplied to members along with the notice for the meeting. The forms should be in blank and should not carry any suggested names. It would be a misuse of privilege to influence voting that way.¹³⁰ A single proxy may act for many members but not exceeding 50 at a time and such number of shares as may be prescribed. [S. 105(1) Proviso 4]

"A proxy is always revocable. Even where by its terms it is made irrevocable, the law allows the stockholder to revoke it."¹³¹ Revocation is, of course, subject to the provisions of the articles. Generally it is provided that revocation must be received at the office of the company before the commencement of the meeting. Accordingly, where a revocation was communicated before the poll, but not before the meeting, it was held to be ineffective and the proxy's vote stood.¹³² Where, however, there is no provision in the articles, the power of revocation would be unfettered. And so in *Narayana Chelliar v Kalleswara Mills*.¹³³

A proxy had exercised his votes in the first poll of a meeting but the proxy was revoked before the final poll was held. In the absence of any

- 128. Lord HANWORTH MR in *Cousins v International Brick Co.* (1913) 2 Ch 91 (CA); cited with approval in *Narayana Chelliar v Kalleswara Mills*, AIR 1952 Mad 515; ILR 1952 Mad 214.
- 129. *Chadm Chemicals Ltd v Jay Rattan Kaneswaran*, (2006) 129 Comp Cas 643 (3om).
- 130. *Perf v London & North Western Ry Co.* (1907) 1 Ch 5 (CA); *Savoye Consolidated Trust Ltd v Ceylon Amalgamated Tea & Rubber Estates Ltd*, 169 LT 324.
- 131. *Cook on Stock Holders*, S. 600, cited by Jesse W. Liffenthal, "Corporate Voting & Public Policy" 10 Harv L Rev 425.
- 132. *Spiller v Mayo Development Co.* 1926 WN 78; *KP Chackhray v Federal Bank*, (1989) 2 Comp LJ 269; (1989) 66 Comp Cas 953 (Ker).
- 133. AIR 1952 Mad 515; ILR 1952 Mad 214. For further details, see, M.S. Srinivasan, "Proxies" (1955) 1 Comp 464.

provision in the articles, the revocation was held to be effective and the rejection of the revocation by the Chairman, was, therefore, untenable.

Proxy forms can be inspected by any member who has a right to vote at the meeting or on any resolution to be proposed at the meeting.¹³⁴

Resolution by postal ballot [S. 110]

The Amendment of 2000 introduced the provision for passing of resolutions by postal ballot and this has been continued under Section 110 of the 2013 Act. This facility has been extended to listed public companies and that too only in respect of a business which the Central Government declares by notification that it shall be conducted only by postal ballot. In such cases the company would have to pass the resolution by postal ballot instead of transacting the business in the general meeting of the company. The details of working the system are to be prescribed.

This system has not been made available for any business on which the directors or auditors have to be heard at the meeting.

If the resolution is assented to by the requisite majority, (depending upon the nature of the resolution) it shall be deemed to have been passed at a general meeting.

If anybody fraudulently defaces or destroys either the ballot paper as sent in by the shareholders or his identity, such person has been made punishable with imprisonment extending up to six months or with fine or with both.

Electronic mode.—Postal ballot would include voting by electronic mode.¹³⁵ Section 2(65) provides that postal ballot means voting by post or through any electronic mode.

Representation of President and Government at meetings [S. 112]

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 a representative at any meeting of the company or at any meeting of any class of members of the company. [S. 112(1)] A person so appointed is deemed to be member of such a company. He is entitled to exercise the same rights and powers, including the right to vote by proxy and postal ballot as the President or Governor could exercise as a member of the company.

Representation of companies and Government at meetings of companies and creditors [Ss. 112–113]

Where a company or a corporation is a member of another company, it may attend the meetings of the other company through a representative. The representative must be appointed by a resolution of the Board of

[134] S. 105(8). The High Court of Delhi has held in *Saudashri Polyester v. VK Patel*, (1989) 63 Comp Case 698, 697 that where a member filed two different proxy forms in favour of two different persons, the Registrar's order for production of the certified copies of the rival forms was valid.

[135] S. 110. Explanation.

directors or the other governing body. Where the Central Government or a State Government is a member, the President or the Governor of the State, as the case may be, has the power to appoint representatives to attend meetings of the company. The person nominated holds the position of a proxy.

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.

Resolutions

Kinds of resolution [S. 114].—Resolutions are of two kinds, namely:

1. Ordinary resolution, and
2. Special resolution.

A resolution is said to be ordinary when the votes cast in favour of it at a general meeting of a company exceed the votes, if any, cast against the resolution. In other words, it means a resolution passed by a simple majority of shareholders present and voting.

A special resolution, on the other hand, requires the support of three-fourth majority of shareholders present and entitled to vote at a meeting. The votes cast in favour of the resolution should not be less than three times the number of votes, if any, cast against the resolution. It is also necessary that the intention to propose the resolution as a special resolution should have been specified in the notice calling the general meeting and the notice itself should have been given in accordance with the provisions of the Act.¹³⁶ Questions have arisen whether it is necessary for the validity of a special resolution that it should be passed as notified to the members or whether it can be passed with amendments at the meeting. In a case of this kind,¹³⁷

A notice was circulated of the intention to propose at an extraordinary general meeting a special resolution to cancel the company's share premium account on the ground that the amount credited to the account had been lost. It was subsequently realised that the figure standing to the credit of the account also included a small amount arising from a recent issue which was definitely not lost. At the meeting the form of the resolution had to be altered so as to provide not that the account had been cancelled, but that it had been reduced to a certain amount.

The court did not confirm the resolution as it was not validly passed. The court laid stress upon the requirement of the section, "intention to propose the resolution as a special resolution", which has been taken to mean that the

¹³⁶ The requirements of the section are mandatory. Non-fulfilment would make the resolution ineffective. *Saf-Help Private Industrial Estates (P) Ltd. v. (1972) 42 Comp Cas 616 (Mad)*; followed in *PG Balasundaray v New Theatre Cometic Toltex (P) Ltd. (1993) 77 Comp Cas 324 (Mad)*.

¹³⁷ *Mengye Mercantile Holdings Ltd. re. (1980) 1 WLR 227.*

resolution passed at the meeting must be the same as that specified in the notice.¹²⁸ In principle, however, the court agreed that a need for amendment may genuinely arise and the same should be allowed within reasonable limits. Correction of grammatical or clerical errors is allowed. Where the need for an amendment of substantive nature is feared, the notice itself should carry a warning that the resolution shall be passed subject to such amendments as may be determined at the meeting. Thus an amendment of even a slight substance would invalidate the resolution.¹²⁹

A typed or printed copy of every special resolution must be registered with the Registrar within 30 days of its date. [S. 117(1)]

For a decision relating to almost every important matter affecting the constitution, administration and affairs of a company, the Act has prescribed the formality of a special resolution. The support of a three-fourth majority of shareholders being requisite for passing a special resolution, the requirement is able to take care and protect the interests of a substantial group of shareholders.¹³⁰

Resolutions requiring special notice [S. 115].—There may be a provision in the Act or Articles requiring special notice of any resolution. The notice of the intention to move such resolution has to be given to the company by such number of members who are holding not less than 1 per cent of the total voting power or holding shares on which such aggregate sum not exceeding Rs. 5,00,000, as may be prescribed has been paid. The company then has to give notice to the members in the prescribed manner. Such a resolution is called an ordinary resolution requiring special notice. This is necessary to enable the company to comply with its statutory obligation of informing the members of the resolution. This information has to be served on the members at least seven days before the meeting. Such notice is necessary, for example, for removing a director or an auditor or for proposing the appointment of a new director. Every member has a right to give a special notice of this kind relating to a proposed resolution, but he does not have the right to have the resolution included in the agenda of the meeting unless he is supported by as many members as can requisition a meeting [S. 100] or can ask for circulation [S. 111] of a member's resolution.¹³¹

128. In *Paxton's Company Law* it is categorically stated that such resolutions cannot be amended. Vol. 1, para 54-03 and in *Gower, PRINCIPLES OF MODERN COMPANY LAW* that the position should be the same as that of an ordinary resolution, namely, "unless the amendment so alters the nature of the business as to cause any member who had stayed away reasonably to wish he had not" (4th Edn) 545-46. See also, *Turlock v Lord Westbury*, (1902) 2 Ch 871.

129. See, *Prarie Duff & Co. Ltd. v. (1950) 1 WLR 1074, Dunnamic Ltd. v. (1969) 2 Ch 365; (1969) 2 WLR 136.*

130. A special resolution is required: to alter the memorandum [S. 13]; articles [S. 14]; to issue further shares without pre-emptive rights [S. 62]; to reduce share capital [S. 66]; to shift registered office from one State to another [S. 12]; to request the Government to appoint inspectors for investigation [S. 233]; to make loans or provide guarantees or security to other companies beyond a certain limit [S. 186]; to apply to the Tribunal for winding up [S. 271]; to wind up the company voluntarily [S. 304]; etc.

131. *Penley v Inland Waterways Asia Ltd.*, 1976 JIC 349; (1977) 1 All ER 209 (Ch D).

Resolution passed at adjourned meeting [S. 116]

Where a resolution is passed at an adjourned meeting of the company or at any class meeting of members or of Board of directors, it is treated as having been passed on the date on which it was in fact passed and not on any earlier date.

Circulation of members' resolutions [S. 111]

Where certain members of a company desire to propose a resolution at the company's meeting a requisition may be served on the company requiring it to give the members notice of the resolution.¹⁴² The requisitionists have to deposit at the registered office of the company two or more copies of the requisition signed by all of them. Where the requisition requires notice of a resolution to be given to the members, it must be deposited six weeks before the meeting, in any other case, two weeks before. They have also to deposit with the requisition a sum reasonably sufficient to meet the expenses of the requisition. When these requirements are complied with, the company becomes bound to notify the members of the intended resolution. The requisition may require the circulation of any statement with respect to the matter referred to in any proposed resolution of any business to be dealt with at the meeting. If, on the application of the company or any other aggrieved person, the Central Government is satisfied that the right is being abused to secure needless publicity for defamatory matter, it may relieve the company of the burden of this obligation. [S. 111(3)]

Where a copy of the requisition for circulation of a resolution has been deposited at the registered office of the company and thereafter an annual general meeting has been called on a date within six weeks, then even if the copy was not deposited within the requisite time, it would be taken to have been properly deposited. [S. 111(2)(Proviso)]

An order under sub-section (3) as to stopping the circulation of defamatory matter may also direct that the costs incurred by the company (in the proceedings, etc) shall be paid by requisitionists, even if they were not parties to the application. [Sub-s (4)]

Registration of resolutions and agreements [S. 117]

A copy of every resolution or any agreement relating to the matters specified below in sub-section (3) together with the explanatory statement required by Section 102, if any, which was annexed to the notice calling the meeting, has to be filed with the Registrar within 30 days of the passing of the resolution or making of the agreement. The manner of and fees for filing is to be prescribed. The time factor is further in the care of Section 400.

A copy of every resolution which has the effect of altering the articles and a copy of the agreement has to be embodied in or annexed to every copy of the articles issued after the alteration or making of the agreement.

142. Where the consenting shareholders did not sign as requisitionists and instead gave power to a single shareholder to represent them at the meeting, this was held to be not a sufficient compliance with S. 188. *Mahesh Kumar Jain v Union of India*, (1997) 90 Comp Cas 445 (Del).

Any failure in this respect makes the company punishable with fine not less than Rs 5,00,000 but may extend to Rs 25,00,000. Every defaulting officer, including liquidator, if any, is punishable with fine not less than Rs 1,00,000 extending up to Rs 5,00,000.

Following resolutions and agreements have to be registered with the Registrar of Companies:

- (a) special resolutions;
- (b) resolutions which have been agreed to by all the members of a company, but which, in the absence of such an agreement would have to be passed as special resolutions;
- (c) any resolution of the Board of directors of a company or an agreement executed by a company relating to the appointment of a managing director or variation of its terms;
- (d) resolutions or agreements which have been approved by all the members of a class of shareholders, but which would have otherwise required to be passed by a particular majority and resolutions or agreements which bind all the members of a class of shareholders though not agreed to by all those members;
- (e) resolutions passed by a company conferring power under Section 180(1)(x) and (c) upon its directors to sell or dispose of the whole or any part of the company's undertaking; or to borrow money beyond the limit of the paid-up capital and free reserves of the company; or to contribute to charities beyond fifty thousand rupees or five per cent of the average net profits;
- (f) resolutions requiring the company to be wound up voluntarily;
- (g) resolutions passed in pursuance of Section 179(3) [Powers of directors];
- (h) any other resolution or agreement as may be prescribed and placed under public domain.

Such resolutions or agreements must be filed with the Registrar within 30 days. The copy to be filed must be certified under the signature of an officer of the company.¹⁴³

Minutes of proceedings of general meetings, Board meetings, other meetings and resolutions passed by postal ballot [S. 118]

Every company has to keep a record of the proceedings of its general meetings and the meetings of its Board of directors. Such records have to be kept of all the proceedings of every general meeting and of all the proceedings of every meeting of the Board of directors or of every committee of the Board or any class of members or creditors. Within 30 days of every such meeting, entries of the proceedings must be made in the books kept

143. Public inspection of such resolutions has been limited to such resolutions relating mainly to strategic business matters. Such documents are no longer to be made available for public review or permitted to take copies. This has become necessary to protect business interests of companies, especially private companies. [Amendment of 2012]

for the purpose and their pages must be consecutively numbered. Pasting of loose-leaf papers or maintaining minutes in loose-leaves is not allowed. Proceedings have to be recorded in bound books and, therefore, they have to be handwritten. Typed sheets cannot be pasted.¹⁴⁴ These records are known as minutes. Each page of a minutes book which records proceedings of a Board meeting must be signed by the Chairman of the same meeting or the next succeeding meeting.¹⁴⁵ The new requirement as to this is that minutes must be prepared and signed in such manner as may be prescribed and kept adding the date on the last page of the record. In the case of a general meeting this is the responsibility of the Chairman of the same or of the next succeeding meeting.

The minutes of each meeting must contain a fair and correct summary of the proceedings of the meeting.¹⁴⁶ All appointments of officers made at any such meeting must be included in the minutes. In the case of a meeting of the Board of Directors or of a committee of the Board, the minutes must state the names of the directors present at the meeting and the names of directors dissenting from or not concurring in a resolution passed at the meeting. The Chairman may exclude from the minutes, matters which are defamatory, irrelevant or immaterial or which are detrimental to the interests of the company. The discretion of the Chairman in respect to the inclusion or exclusion of any such matter is absolute.

Minutes of the Board meeting are kept in order that shareholders of the company may know exactly what their directors have been doing, why it was done, and where it was done. If any alteration or addition is called for it should be done by resolution, not by clerical correction.¹⁴⁷

Minutes kept in accordance with the above provisions are evidence of proceedings recorded in them. Any such meeting of the proceedings¹⁴⁸ of which proper minutes have been maintained is presumed to have been



CASE PILOT

144. *Amit Kumar Mukherjee v Cheron Advertisement Services Ltd.*, 419821 52 Comp Cas 315 (Cal). The High Court of Delhi accepted evidence of loose-leaf forms, Edward Kreuter Successors (P) Ltd v KK Sud, (1968) 38 Comp Cas 507, but the Calcutta High Court did not accept pasted sheets as evidence, *Gluco Series (P) Ltd. vs.* (1987) 61 Comp Cas 227 (Cal). The Deptt of Co Affairs (DCA) has advised companies maintaining loose-leaves to observe appropriate safeguards against interpolation of leaves, serially numbering them, authentication and safe-custody and to bind them up periodically say in six months. Field officers have been advised not to take action against loose-leaf practice of keeping minutes.
145. It is not necessary that the Chairman who signs the minutes at the next meeting should have been present at the preceding meeting, *Karnataka Bank Ltd v A S Datta*, (1995) 2 KLJ 200; (1996) 79 Comp Cas 412, 426, citing *BISACULTRA ON THE LAW AND PRACTICE OF MEETINGS* (7th Edn) 83.
146. Any error in the minutes of an earlier meeting may be rectified by the Board of directors, *Gordon Pinchotte Ltd v Trident Investment & Portfolio Services (P) Ltd*, (1991) 79 Comp Cas 764; (1994) 1 Comp LJ 315 (CLJ). The court also noted that minutes constitute good evidence.
147. See, *Lord BAKER MR In County & Co. v. C.*, (1889) LR 42 Ch D 299, 226; 61 LR 601 (CA).
148. Thus in *Edward Kreuter Successors (P) Ltd v KK Sud*, (1968) 38 Comp Cas 502, a resolution recorded in the minutes book authorising the general manager to file a suit was held to be good evidence of his authority.

duly called and held. The proceedings at the meeting and the appointments of directors or of liquidators are deemed to be valid.¹⁴⁹ The presumption is rebuttable. Where a controversy is raised, evidence of conclusive nature to establish the points stated in the minute would become necessary. At the interlocutory stage, however, the trial court was held to be not justified in expressing doubts upon the genuineness of the minutes. He could not discard them at that stage.¹⁵⁰

Inspection of minutes book [S. 119].—The books containing minutes of the proceedings of any general meeting or of a resolution passed at a postal ballot have to be kept at the registered office of the company. They have to be open to inspection by any member without charge. Inspection can be only during business hours. It can also be subject to any reasonable restrictions as the company may impose through its articles or in general meeting. Not less than two hours on each business day must be allowed for inspectio. [S. 119(1)]

Every member is entitled to be furnished within seven working days after request for being furnished with a copy of any minutes. He has to pay such fee as may be prescribed. Without prejudice to this provision for penalty, the Tribunal may order an immediate inspection of the minutes books or direct that the copy required is to be forthwith sent to the person asking for it.

Circulation of advertisement [S. 118(9)].—No document purporting to be a report of the proceedings of any general meeting is to be circulated or advertised at the expense of the company unless it includes the matters required to be included by the section in the minutes of the proceedings of the meeting. [S. 118(9)]

Observance of secretarial standards.—Every company has to observe secretarial standards with respect to general and Board meetings specified

149. See, *Kerr v. John Mallard* (1941) 1.h. 552. No such presumption about an appointment was drawn where the minute book was not produced. *VG Jalarasudham v. New Theatre Ceramic Tiles* (P) Ltd. (1993) 77 Comp Cas 324 (Mad). Burden of proof would lie on those who allege that a particular record was not factually true. *B. Sircar & Co. v. Eminent Benefit Fund* (Id. (1992) 75 Comp Cas 198 (Mad)). The only way to prove that a particular resolution was passed is to produce the minutes book of the company which carries the record of the resolution in question. *Escorts Ltd v. Sri Auro*, (1991) 72 Comp Cas 493 (Del). Anybody challenging the validity of appointment of a director would have to dislodge the presumption of validity arising from recorded minutes. *CR Pragjyotishwar Kumar v. Purasawalkam Permanent Fund Ltd.* (1995) 83 Comp Cas 150 (Mad). Where a Chairman was appointed by the court to preside over a meeting because of a conflict between members, it was held that the minutes prepared and approved by him were to be accepted as authentic and not the minutes prepared by the secretary of the company. *Niraj Hussain v. Darjees Blenders*, (2000) 5 SCC 602, (2000) 37 CLA 411.

150. *P.M. Bhawales v. Chitteshwar & Co Ltd.* (1996) 87 Comp Cas 324 (1997) 25 CLA 275 (Bom). This presumption is not applicable to a meeting held on requisition. Where the records of such a meeting showed that two members were present, but evidence showed that only one was present, evidence prevailed over the presumption. *Bhakterpur Simbhuli Beverages P) Ltd v. P.R. Pasada*, (1946) 86 Comp Cas 612 (P&H).

by the Institute of Company Secretaries of India and approved as such by the Central Government. [S. 118(10)]

Default provisions [S. 118(11)]—Any default in complying with the provisions of the section makes the company liable to a penalty of Rs 25,000 and every defaulting officer is liable to a penalty of Rs 5000.

Liability for tampering with minutes [S. 118(12)]—If a person is found guilty of tampering with the minutes of the proceedings of a meeting, he is punishable with imprisonment for a term extending to two years and with fine which may extend to Rs 1,00,000.

Maintenance and inspection of documents in electronic form [S. 120]

Any document, record, register, minutes, etc, allowed to be kept by a company or allowed to be inspected or copies to be given to any person may be kept or inspected or copies given in electronic form in such form and manner as may be prescribed.

Report on AGM [S. 121]

Every listed public company has to prepare in the prescribed manner a report on each AGM including confirmation to the effect that the meeting was convened, held and conducted as per the provisions of the Act and rules made under it. [Sub-s (1)] The company has to file with the Registrar a copy of the report within 30 days of the conclusion of the AGM with prescribed fees or additional fees under Section 403 for any delay. [Sub-s (2)] Any failure to file such report even within the extended period under Section 403, makes the company punishable with fine of not less than Rs 1,00,000 but extending up to Rs 5,00,000. Every defaulting officer is punishable with fine of not less than Rs 25,000 but extending to Rs 1,00,000.

Applicability of provisions to one person companies [S. 122]

The provisions of Section 98 and Sections 100 to 111 are not to apply to one person companies. The ordinary businesses as mentioned under Section 102(2)(a) which a company, other than one person company is required to transact at its AGM is to be transacted in the case of one person company as provided in sub-section (3) below. [Sub-s (2)]

For the purposes of Section 114, any business which is required to be transacted at an AGM or other general meeting of the company by means of an ordinary or special resolution, in the case of one person company, it would be sufficient that the resolution is communicated to the company by the member and entered in the minutes book required to be maintained under Section 118 and signed and dated by the member. The date so mentioned is presumed to be the date of the meeting for all the purposes of the Act. [Sub-s (3)]

Where there is only one director on the Board of directors of a one person company, for any business to be transacted at a Board meeting, it would be

sufficient if the resolution is entered by the director in the minutes book of the company and signed and dated by him. The date so mentioned is presumed to be the date of the meeting for all the purposes of the Act. [Sub-s (4)]

Service of documents [S. 20]

The mode prescribed by Section 20 for service of documents by a company on its members is that a document may be served either personally or by sending it to him by post or by registered post or speed post or by courier or by delivery at his office address or by such electronic or other mode as may be prescribed. The letter should be sent to his registered address. If he has no registered address, any address given by him to the company for the purpose of communication may be used. Where post is used as the medium of communication, service shall be deemed to have been effected when a properly addressed and stamped letter of acceptance is posted.¹⁵¹ Where a member wants a service by registered post or under certificate of posting and he has paid to the company sufficient amount for the purpose, he must be served in the manner prescribed by him. In either case, the service shall be deemed to have been effected, in the case of a notice of a meeting, at the expiration of 48 hours from the date of posting, and, in any other case, when such a letter is likely to be delivered in the ordinary course of post. In the case of a member who has no registered address in India, nor has supplied any address for communication purposes, service shall be taken to have been effected if an advertisement is inserted in a newspaper circulating in the neighbourhood of the registered office of the company. In the case of joint holders, a document may be served on the first named holder. In the case of death or insolvency of a member, the same rules apply for service of documents upon his representatives. A member may request for delivery of any document by a particular mode for which he has to pay an amount as may be fixed by the company in general meeting.

Where certain documents were sent by the company to the shareholders by registered post but the post was not delivered to the addressee, the court said that the company was not absolved from its responsibility of delivering the documents to the shareholder.¹⁵² An entry in the local delivery book of the company showed receipt of notice by the PA of the director and noting by the PA that he had delivered the document to the wife of the director. Entries in the outward register of the company showed despatch of the notice to the director. There was no proof as to who despatched the notice and by what method. The court said that the entries were not sufficient to prove the fact of service of notice.¹⁵³ The court further said that a service by certificate of posting would not be reliable when the relations between the parties are already embittered. Such a method of posting may create a

¹⁵¹ National Breweries Ltd. v. (1991) 1 Cal. L.R. (N.O.) 44, service of notice by postal certificate as directed by the court, held good service.

¹⁵² *Felix Sales v. Reliance Industries Ltd.*, (1996) 35 C.L.A. 371 (Cal).

¹⁵³ *M S Madhavanand v. Kerala Kisanadi P Ltd.*, (2004) 9 SCC 211.

rebuttable presumption. If the addressee denies service, burden would be upon the sender to prove that the service was in fact effected.¹⁵⁴

Filing of documents with Registrar [S. 20(2)]

A document may be served on the 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. A member may request for delivery of any document through a particular mode for which he has to pay such fees as may be determined by the company in its annual general meeting. An Explanatory Note to the section provides that the term "courier" means a person or agency which delivers the document and provides proof of its delivery.

Authentication of documents, proceedings and contracts [S. 21]

A document or proceeding requiring authentication by a company or contracts made by or on behalf of a company may be signed by any key managerial personnel or an officer of the company duly authorised by the Board of directors for this purpose.

Service of documents on company [S. 20]

Documents can be served on a company or its officers by sending them to the registered office of the company by registered post or by speed post or by courier service or by leaving them at the registered office of the company. Where the securities are held in a depository, the records of the beneficial ownership may be served by such depository on the company by means of electronic mode or by delivery of floppies or discs.

The service of a High Court writ by posting it on the company's registered office address was held to be a good service.¹⁵⁵ Service of summons at the company's corporate office has been held to be a good service. There is no compulsory requirement that service in all cases should be at the registered office.¹⁵⁶

The service of notice on a company, for the purpose of filing a suit, by giving it to the office assistant of the company was held to be not a good service.¹⁵⁷

154. *S. Khemka v. Devcon Enterprises (P) Ltd.* (1998) 5 Comp 11258 (AP), a director who attended both the Board meeting and general meeting was not heard to say that he did not receive notice and was only orally informed by others.

155. *Addis Ltd v. Serim's Supplies Ltd.* (1964) 1 WLR 945; *TD Supplies (London) Ltd v. Jerry Cleaning Ltd.* (1952) 1 KB 42; *Indian Oil Gas Ltd v. Tarwan Seid.* (1999) 33 CLA 117 (Del); concurrent finding of good service by post, not interfered with in a writ petition.

156. *Neuraminic Syndetics Ltd v. Shunker Plastex.* (2005) 125 Comp Cas 919 (Del); CPC, Order 29, Rule 2.

157. *Nicco Corp Ltd v. Cetnor Vessels Ltd.* (1998) 92 Comp Cas 748 (Mad).

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online™ along with updates, articles, videos, blogs and a host of different resources.



The following cases from this chapter are available through EBC Explorer™:

- *And Kumar Mukherjee v Clarion Advertisement Services Ltd.*, (1982) 52 Comp Cas 315 (Cal)
- *IJC v Escorts Ltd.*, (1986) 1 SCC 264; (1986) 59 Comp Cas 548; (1986) 1 Comp LJ 91
- *Narayana Chettiar v Kalmotra Mills*, AIR 1952 Mad 515; ILR 1952 Mad 218; (1952) 1 MLJ 16
- *NVR Nagappa Chettiar v Madras Race Club*, (1949) 1 MLJ 662
- *Parsaram v Tata Industrial Bank Ltd.*, (1927-28) 55 IA 274; AIR 1928 PC 180
- *Ruttonjee & Co Ltd. re*, (1968) 2 Comp LJ 155, 172; (1970) 40 Comp Cas 491 (Cal)
- *Sree Meenakshi Mills Co Ltd v Registrar of Joint Stock Companies*, AIR 1998 Mad 640; (1998) 39 Cri LJ 907
- *Sundil Mills Ltd v Official Liquidator of Shri Ambica Mills Ltd*, (1999) 1 Comp LJ 423 (Guj)
- *United Bank of India v United India Credit and Development Co Ltd*, (1977) 47 Comp Cas 689 (Cal)
- *Vodafone International Holdings BV v Union of India*, (2012) 6 SCC 613
- *YS Spinners Ltd v Official Liquidator*, (1999) 1 Comp LJ 442; (2000) 100 Comp Cas 547 (Guj)





Chapter 12

Dividends, Accounts and Audit

DIVIDENDS

Dividend means the share of profit that falls to the share of each individual member of a company. It is that portion of the corporate profits which has been set aside and "declared by the company as liable to be distributed among the shareholders".¹ Almost all commercial corporate enterprises are undertaken with the view of making profits for their members. The profits of a company when distributed among its members are called "dividends". No special authority either in the memorandum or in the articles is necessary to enable a company to pay dividends. The power is implied. Dividend includes any interim dividend [S. 2(35)].

The payment of dividends is bound by two fundamental principles. The first is that dividends must never be paid out of capital. It is supplemented by the second that dividends shall be paid only out of profits. The Act allows dividends to be paid out of the following three sources:

1. profits of the company for the year for which dividends are to be paid;
2. undistributed profits of the previous financial years;²
3. moneys provided by the Central or a State Government for the payment of dividends in pursuance of a guarantee by the Government concerned. [S. 123]

Payment of dividends out of capital is a breach of trust and the company may require the directors to replace the capital.³ Thus in the well-known

1. *Chhajal Hassan Jan Banka P Gudarji v CIT*, AIR 1955 SC 74; (1955) 1 SCR 876, 882; (1955) 25 Comp Cas L.

2. Payment out of reserves has to be in accordance with the Companies (Declaration of Dividend out of Reserves) Rules, 1975. The restriction envisaged is that the rate shall not exceed the average of the rates at which dividend was declared in the preceding years or 10 per cent of the company's paid-up capital, whichever is less. The amount drawn from reserves should first be applied to set off losses of the year and the reserves must not be depleted to below 15 percent of the company's paid-up capital.

3. *R Mahadev Nayak v Popular Bank Ltd*, (1969) 39 Comp Cas 712; AIR 1970 Ker 131. They may recover indemnity from the shareholders who have received the dividends. *Merkani v Grant*, (1907) 1 QB 88 (CA).

*Ellicott case*⁴ certain had debts were credited to the accounts and the fictitious profits thus created were paid away as dividends. The directors were held liable. Explaining the reason Jessel MR said:

"The creditor has no debtor but that impalpable thing the corporation, which has no property except the assets of the business. The creditor, therefore, gives credit to that capital, gives credit to the company on the faith of the representation that the capital shall be applied only for the purposes of the business, and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders...."

Where dividend was paid in face of the auditor's qualified report, the payment was held to be wrong. The statutory requirements cannot be waived by shareholders' resolution in this respect. The recipient of such dividends were held to be constructive trustees for the amounts received by them.⁵

The law will not tolerate even an indirect attempt to pay back capital by way of dividends. Thus *Walters' Deed of Guarantee*, re⁶:

W guaranteed the payment of the preference dividends for a period of three years and the company agreed to pay him any sums that he might pay under the guarantee.

The agreement was held to be void and W could not recover the amounts paid by him in pursuance of the guarantee.

In such cases only that part of the agreement is void by which the company contracts to indemnify the guarantor. But, apart from this, a guarantee for the payment of dividends is valid.⁷

Payment to shareholder-executives.—Where the shareholders of a company were also working as its executives and their remuneration for bringing a contract to fruition was paid in circumstances in which dividend distribution would not have been justified, the directors were held to be not guilty of any breach of duty.⁸

Dividend fund

"As dividends can be declared only out of surplus earnings, there must be an exact method of determining whether surplus earnings for that purpose actually exist."⁹ But the Act provides no guidance. "There is nothing at all in the Act about how dividends are to be paid, nor how profits are to be reckoned; all that is left and very judiciously and properly left, to the commercial world. It is not a subject for an Act of Parliament to say how

4. *Exchange Banking Co. re*, (1882) 21 Ch D 519, 48 LT 26 (CA).

5. *Ciricland Wash plc v. 1991 BCLC 428 (CA); Precision Dippings Ltd v. Precision Dippings Mktg Ltd*, 1985 BCLC 385 (CA); *Bairdson v. Quirino Meat Processors plc*, (2000) 1 BCLC 549 (OMD), 5, 1983 Ch 321, 148 LT 473.

7. *Smith &other v. Colberg Co. re ex p. [agm]*, (1879) 18 12 Ch D 506, 41 LT 547; *Mendel et Cie Ltd. re*, [1915] 1 Ch 739.

8. *Murphyson v. European Strategic Bureau Ltd*, (1999) 2 BCLC 203 (Ch. Ct).

9. Sirati F (afterwards CI) in *CIT v. Standard Vacuum Oil Co*, AEB 1966 SC 1090; (1966) 1 Comp L 137, quoting from Fletcher, *ENCYCLOPEDIA OF CORPORATE LAW*, Vol 19, para 9257.

accounts are to be kept; what is to be put into a capital account, what into an income account, is left to men of business."¹⁰

The same truth is reflected by the following observations of RAMACHANDRA AVYAR CJ of the Madras High Court:¹¹

"Section 205 [1956 Act] of the Act only prescribes that dividend shall be paid out of profits of the company. It does not say further how those profits have to be ascertained. Profits of a year under the mercantile system of accounting only means the excess of receipts for the year over expenses and outgoings during the same year. It is not necessary that such excess should be in the form of cash in the till of the company. It will be open to a company to declare a dividend on the basis of its accounts ... where it is based on the estimated profit, which had not actually come in the form of cash to the company; it will be open to it to pay such dividends from out of other cash in their hands or perhaps even to borrow and pay them off. That will not amount to paying dividend out of capital."

Neither have the courts thought it fit to formulate any rigid rules. The judicial attitude is best reflected by the following observation of Lord MACNAUGHTEN in *Dowsey v Cory*:¹²

I do not think it desirable for any tribunal to do what Parliament has abstained from doing, i.e. to formulate rules for the guidance and embarrassment of businessmen in the conduct of business affairs.

"[T]he real question for determination, therefore, is whether there are profits available for distribution, and this is to be answered according to the circumstances of each particular case, the nature of the company, and the evidence of competent witnesses. There is no single definition of the word 'profits' which will fit all cases."¹³

Thus "dividend fund" is a fluid concept. The primary concern of the courts has been that the capital is maintained in the form of assets if not equal to the paid-up capital at least sufficient to go round the creditors.¹⁴ Once this is done, a complete latitude is given to businessmen to pay dividends in good faith so as to keep up their company's reputation.

"People put their money into a trading company to give them an income and the sudden stoppage of all dividends would send down the value of their shares to zero and possibly involve its ruin."¹⁵

10. *Lismer v Lee* & *Newmarket Asphalt Co.* (1898) LR 1 Ch D 1: (1896-98) All ER Rep 747 61 LT 31.

11. *C J Karpres v Amalgamated Commercial Traders*, (1964) 1 Comp L 339, 349; AIR 1964 Mad 519; (1964) 34 Comp Cas 308, relying upon *Mercantile Trading Co. v.* (1869) LR 4 Ch App 475; 21 LT 591.

12. 1901 AC 477; *National Bank of Wales* Ltd, *v.* (1899) 2 Ch 629; (1896-99) All ER Rep 715, the only case that was taken to the House of Lords on the matter of dividends, *supra* note.

13. *Barrow Linen Bond v Barrow Hammite Steel Co.* (1902) 1 Ch 368.

14. See *Lismer v Verner & Commercial Investment Trust Co.* (1891) 2 Ch 239.

15. *MacNaughten* 121 in *Dowsey v Cory*, 1901 AC 477.

Separate bank account for dividend and interim dividend [S. 123(3)].— The Board of directors of company may declare an interim dividend during any financial year out of the surplus in profits and loss account and out of the profits of the financial year in which such interim dividend is sought to be declared. The proviso to the sub-section adds this requirement that in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such dividend is not to be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years. The amount of dividend, including interim dividend has to be deposited in a scheduled bank in a separate account within five days from the date of declaration of dividend. [Sub-s (4)]

*Rule in "Lee v Neuchatel".—*The first specimen of this permissiveness is the rule laid down in *Lee v Neuchatel Asphalt Co.*¹⁶ The essence of this decision has been thus stated:¹⁷

"Suppose that a company has a ship costing £3,00,000 and though good for ten years will at the end of that time have to be broken up. There is, therefore, roughly an annual depreciation or wasting of capital to the extent of £30,000. The company need not, in law, make any allowance for this before declaring a dividend."

In that case, the fixed capital of the company was an asphalt deposit which was being reduced from day to day and so became a wasting asset. Dividend was proposed to be paid out of profits shown by the revenue account in a particular year. A shareholder objected, "It was decided that when assets of the company are in the nature of wasting character depreciated by the efflux of time or exhaustion of material, such as mines, patents or leaseholds, if, for the purpose of carrying on the business of the company and getting a profit the annual consumption of that capital is necessary, there is no obligation by law or statute to create a reserve fund out of revenue to recoup the wasting nature of the capital."¹⁸

LINDLEY LJ said: "The Companies Acts do not require capital to be made up if lost."

There was a storm of disapproval against this decision from business quarters.¹⁹ But even so the ruling was re-affirmed in *Bolton v Natal Land and Colonization Co.*²⁰ where the court held that a decline in the value of the

16. (1889) 1R 41 Ch D L (1886-90); All ER Rep 942; 61 LT 11.

17. H. Geitain, *COMPANY LAW* (1960) 189.

18. *Mullen v Mississippi Glass & Glass Co.* (1910) 77 NJ Eq 496, cited in *Frey, CASES AND MATERIALS ON CORPORATIONS AND PARTNERSHIPS* (1951) 796.

19. See, (1899) 5 LQR 221; (1899) 1L 353. Christie, "Wasting Assets and Dividends" (1900) 5 Jur Rev 220; Note "Effect of Depreciation, Depletion and Appreciation of Assets on Payment of Dividends" (1928) 28 Colum L Rev 231; For another comment, see, (1934) 43 Yale LJ 1336.

20. (1892) 2 Ch J21; 61 L Ch 281; 65 LT 780; 8 TLR 148.

land belonging to a company was not relevant to the calculation of dividend fund.²¹

In the next leading case, namely, *Verner v General & Commercial Investment Trust Co*,²² the rule was tightened only to this extent that "circulating capital" must be maintained out of revenue. The facts were:

A company had invested its capital to the extent of £6,00,000 in investments which had depreciated in value to the extent of £2,50,000. The income, however, left a balance of £23,000 after paying all the charges and expenses. The company proposed to pay a dividend.

The Court of Appeal allowed it. LINDLEY LJ said:

"Fixed capital may be sunk and lost, and yet the excess of current receipts over current payments may be divided, but floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law."²³

The distinction between "fixed" and "circulating" capital was explained in *Axonnia Soda Co Ltd v Chamberlain*.²⁴ Fixed capital is that which is invested in assets intended to be retained by the company more or less permanently and used in producing an income. Ordinary examples are buildings and mills, ships and land. Circulating capital is "a portion of the subscribed capital intended to be used by being temporarily parted with and circulated in business, in the form of money, goods or other assets, and which, or the proceeds of which, are intended to return to the company with an increment, and are intended to be used again and again, and to always return with some accretion." But this is not a permanent division. The emphasis is on the purpose for which the capital is used for the time being. Fixed capital may in course of time become floating capital and vice versa. Moreover, an item of assets which is, in the case of one company, a fixed capital may be circulating capital in the case of another company. Thus, for example, in *Bond v Barrimo Hematite Steel Co*,²⁵ FARWELL J held that "the money invested in the leasehold mines, furnaces and cottages was in this company (a smelting company) to be regarded as 'circulating capital', and, therefore, should be maintained, such items coming into the accounts before any profit could be said to be earned."

21. For a remarkable account of the development of dividend rules, see, Basil S. Yamey, "Aspects of the Law Relating to Company Dividends" (1940) 4 Mod LR 273.

22. (1894) 2 Ch 239.

23. *Verner v General & Commercial Investment Trust Co*, (1894) 2 Ch 239, 246. See also, *Kingston Cotton Mill Co (No. 2)*, re. (1896) 1 Ch 221, where depreciation of the mill property of a company was held not relevant to the calculation of the distributable profits.

24. (1918) 1 Ch 266; 119 LT 48 (C.A.).

25. (1902) 1 Ch 350.

But it is not necessary to make up losses of circulating capital incurred in previous years before paying dividends out of the current year's earnings.²⁶

Unrealised appreciation of assets.—Unrealised appreciation of the value of fixed assets was in practice distributed as dividends and was also sanctioned by court decisions. Thus in *Anthonia Soda Co Ltd v Chamberlain*:²⁷

A company's land and building stood at the value of £63,246. The directors in good faith appreciated the value to £83,788. The surplus thus created was used to wipe out a debit balance in the profit and loss account and the trading profits were declared as dividends.

It was held that the dividend was properly declared. Another illustration was *Lubbock v British Bank of South America*:²⁸

A company's undertaking at Brazil acquired at £500,000 was sold for £875,000. The company decided not to carry on a similar business. After deducting all expenses, a net surplus of £2,05,000 was allowed to be distributed as dividends.

The appreciated value should not be blindly or arbitrarily fixed. The directors must in good faith exercise an informed judgment. Further, appreciation in the value of an item of assets should not be taken in isolation. The assets as a whole must be considered. Thus, where certain promissory notes declared as bad debts were unexpectedly paid up in full, the court held that this accretion could not be deemed as profits without reference to the whole accounts taken fairly.²⁹ It is also necessary that the increase should not be due to temporary market fluctuations and the share capital will remain intact after the distribution.³⁰ This is known as the "net assets test". This has to be observed by public companies. Realised profits cannot be distributed if the amount of the net assets is less than the aggregate of called-up capital and undistributable reserves and the amount of the proposed distribution will not lower the amount of those assets to lower than that aggregate. Net assets means the aggregate of assets less the aggregate of liabilities.³¹

Profits gained on realisation or revaluation of assets is known as capital profit or capital gain. The position of law now is that such profits can be distributed by way of dividend only when it has been actually realised. The English Act of 1980 had to adopt this restriction because of EEC directives. The English Act of 1985 provides that whether or not a profit is a realised

26. *National Bank of Wales* (2d. m. (1899) 2 Ch 629; (1895-99) All E.R. Rep 712, affirmed sub nom. *Dacey v Cory*, 1901 AC 427.

27. (1918) 1 Ch 266, 118 LT 48 CA.

28. (1892) 2 Ch 198; (1891-94) All ER Rep Ext 1250, 47 LT 24.

29. *Foster v New Trinidad Lake Asphalt Co Ltd*, (1901) 1 Ch 206. Dividend is declared by the company in general meeting on the recommendation of directors. Distribution of profits or assets by the liquidator in the company's winding up is not a dividend. See, *ITD v Short Bros & Sons Ltd*, AIR 1967 SC 81; (1966) 1 Comp LJ 279; *Kankaria Lal Bhagatji v Official Liquidator*, (1965) 1 Comp LJ 210.

30. *Dimbula Valley (Ceylon) Tea Co Ltd v Lameir*, (1961) 1 Ch 353.

31. Undistributable reserves include share premium account, capital redemption reserve, unrealised profits and any other reserve which cannot be distributed.

profit is to be taken according to the generally accepted accounting principles prevailing at the moment.³²

The status of accounting standards is that of expert opinion on what is a true and fair view. Considering the evidential role of accounting standards, it has been held that while they are not conclusive and also not rigid rules, they are very strong evidence as to what is the proper standard which should be adopted.

Where assets have been revalued but not realised and by reason of the revaluation a greater amount has to be provided for depreciation, such excess can be treated as realised profit and, therefore, can be utilised for distribution.³³

Statutory provisions

Depreciation [S. 123(1)(a) and (2)].—Since the Amendment Act of 1960, (Act. 1956) and now Section 123 it has become obligatory to provide for depreciation as required by Section 123(2). Depreciation must be provided for the current year as well as for arrears since the amendment. This section says that depreciation is to be calculated at the rate specified in Schedule II. It is obligatory to provide for depreciation for the current year as well as for arrears. The previous years' losses³⁴ incurred must also be set off against the profits of any subsequent year or years before any dividend can be paid.³⁵ Depreciation has to be provided in accordance with the provisions of Schedule II.

Reserves.—A company may, before the declaration of any dividend in any financial year, transfer such percentage of profits for the year as it may consider appropriate to the reserves of the company. If there is deficiency in profits of a year, the reserve may be used for paying dividend in accordance with the prescribed rules. Only free reserves can be used for this purpose.³⁶ If this Act makes no provision for a particular kind of asset its depreciation may be worked out on a basis approved by the Central Government. Every company has the choice either to adopt the above method, or to work out depreciation "by dividing ninety-five per cent of the original cost of the depreciable asset by the specified period in respect of such asset".

32. Ss. 252-263, Sch. IV para 9, English Act, 1985.

33. Part II of Sch. VI, Companies Act, 1956 and Guidance Note on Treatment of Reserve created on Revaluation of Fixed Assets, Research Committee, ICAL, New Delhi, 1982. The Financial Accounting Standard Board of the US observed that realisation in the most precise sense means the process of converting non-cash resources and rights into money and is most precisely used in accounting and financial reporting to refer to sale of assets for cash or claims to cash. The related terms "realised" and "unrealised", therefore, identify revenue or gains or losses on assets sold and unsold respectively.

34. *Hastie v. Near Trinidad Lake Asphalt Co Ltd*, (1901) 1 Ch 206; *Suresia Steels (P) Ltd v. CTI*, (1999) 4 SCC 306, the term "loss" means an amount arrived at after taking into account the amount of depreciation.

35. As required under the Amendment of 2015.

36. Creation of reserves is in the discretion of the Board. Shareholders' approval is not necessary. *CST v. Oswal Wholen Mills Ltd*, (1981) 51 Comp Cas 753 (3&H); *Held Quinn Road (P) Ltd v. JBL Crest Realty SDN BHD*, (2006) 150 Comp Cas 99 (Del), before commencement of business there can be no profit and, therefore, no claim to dividend.

A company may due to inadequacy or absence of profits in any financial year, propose to declare a dividend out of the accumulated profits earned by it in previous years and transferred by the company to reserves. Such declaration can be made in accordance with prescribed rules. Dividend can be paid by the company out of its free reserves. No company is to declare a dividend unless carried over previous losses and depreciation not provided for in the previous years are set off against the profits of the company in the previous year.⁵⁷

For the purposes of sub-section (1)(ii), depreciation has to be provided in accordance with provisions of Schedule II.

The Act does not require any provision for depletion of a wasting asset. But "if any asset is sold, discarded, demolished or destroyed for any reason before depreciation for such asset has been provided for in full, the excess, if any of the written down value of such asset over its sale proceeds or its scrap value shall be written off in the financial year in which it is sold".⁵⁸

Unpaid dividend account [S. 124].—Where a declared dividend has not been paid or claimed within 30 days from the date of declaration to any shareholder entitled to payment, it has to be transferred to a special account to be opened in any scheduled bank to be called "Unpaid Dividend Account". This has to be effected within seven days from the expiry of the period of 30 days. The company has then to prepare a statement within 90 days containing the names, their last known addresses and the unpaid dividend to be paid to each person and place it on the website of the company, if any, and also on any other website approved by the Central Government for this purpose. The deposit has to be in such form, manner and with such particulars as may be prescribed. Delay or default in making the deposit entails interest at 12 per cent which would ensure to the benefit of the member in proportion to the amount which remained unpaid to them. The person entitled to the amount may apply to the company for payment to him. If the money remains unclaimed or unpaid for seven years, it has to be transferred along with accrued interest to the Investor Education and Protection Fund established under Section 125.⁵⁹ The company has to send a statement to the authority administering the Fund. The statement has to be in the prescribed form. The authority has to issue a receipt to the company as evidence of the transfer. All the shares in respect of which the amount remained unpaid have also to be transferred to the Fund along with a statement containing such details as may be prescribed. The real owner may claim them back from the Fund in accordance with the prescribed procedure and on submission of prescribed documents.

Failure on the part of the company under the section makes it liable to a fine of not less than Rs 5,00,000 but extending to Rs 25,00,000. Every

57. Added by the Amendment of 2005.

58. Sch. II gives the list of various assets with indication of their expected life.

59. No such transfer has to be made if the amount has been claimed at any time during 7 years. [Amendment of 2005].

defaulting officer has to pay a fine of not less than Rs 1,00,000 but extending to Rs 5,00,000.

Transfer of unpaid dividend to Investor Education and Protection Fund [S. 124]

Before the Companies (Amendment) Act, 1999 (w.e.f. 31-10-1998), [1956 Act] unpaid dividend remained in the company's unpaid dividend account for a period of three years and thereafter it was transferred to the general revenue account of the Government. The amendment changed this position. Section 124 incorporated the change. The money will remain in the company's account for seven years and will then be transferred to the newly conceived fund known as the Investor Education and Protection Fund.

Investor Education and Protection Fund [S. 125]

The Central Government has to establish a fund called the Investor Education and Protection Fund. The following amounts have to be credited to the Fund: (a) the amount given by the Central Government by way of grants after due appropriation made by Parliament by law for this purpose for being utilised for the purposes of the Fund; (b) donations given to the Fund by the Central Government, State Government, companies or other institutions for the purposes of the Fund; (c) the amount in the Unpaid Dividend Account as transferred to the Fund; (d) the amount in the general revenue account in the Central Government which had been transferred to that account under Section 205-A, Companies Act, 1956 before the Amendment of 1999 and remaining unpaid or unclaimed on the commencement of 2013 Act; (e) the amount lying in the Fund under Section 205-C of the 1956 Act; (f) the interest or other income received from investments made from the Fund; (g) the amount received under Section 38(4) [punishment for personation for acquisition of shares]; (h) application money received by companies for allotment of securities and due for refund; (i) matured deposits with companies other than banking companies; (j) matured debentures with companies; (k) interest accrued on the amounts referred to in clauses (h) to (j); (l) sale proceeds of fractional shares arising out of issuance of bonus shares, merger and amalgamation for seven or more years; (m) redemption amount of preference shares remaining unpaid or unclaimed for seven or more years; (n) such other amount as may be prescribed.

The amount referred to in clauses (h) to (l) is not to form part of the Fund unless it has remained unclaimed and unpaid for a period of seven years.

Utilisation of fund [S. 125(3)].—The Fund has to be utilised for the following purposes: (a) refund in respect of unclaimed dividends, matured deposits and debentures, application money due for refund and interest on it; (b) promotion of investors' education, awareness and protection; (c) distribution of disgorged amount among eligible and identifiable applicants for shares or debentures, shareholders, debenture holders or depositors

who have suffered losses due to wrong actions by any person, in accordance with the orders made by the court which had ordered disgorgement; (d) reimbursement of legal expenses incurred in pursuing class action suits under Sections 37 and 245 by members, debenture holders or depositors as may be sanctioned by the Tribunal; and (e) any other purposes incidental to the above items.

All this is subject to prescribed rules.

Persons whose amounts lying with the Fund under the preceding Act became transferred to the Fund are entitled to get refund out of the Fund in respect of such claims in accordance with rules made under the section. The disgorged amount refers to the amount received through disgorgement or disposal of securities.⁴⁰

Central Government to constitute Authority [S. 125(5)].—the Central Government has to constitute by notification, an authority for administration of the Fund consisting of a Chairman and such other members, not exceeding seven, and a chief executive officer, as the Central Government may appoint. The manner of administration of the Fund, appointment of chairperson, members and chief executive officer, holding of meetings of the authority are to be in accordance with the prescribed rules. The Central Government may provide to the authority such offices, officers, employees and other resources in accordance with prescribed rules. The authority has to administer the Fund and maintain separate accounts and other relevant records in relation to the Fund in the prescribed form after consultation with the Comptroller and Auditor General of India. It is competent for the authority to spend money out of the Fund for carrying out the objects of the Fund. The accounts of the Fund have to be audited by the Comptroller and Auditor General of India at intervals to be specified by him. The authority has to forward to the Central Government annually the audited accounts and audit report. The authority has to prepare in the prescribed form and at prescribed time for each financial year its annual report giving a full account of its activities during the financial year. A copy of it has to be forwarded to the Central Government which it has to lay before both Houses of Parliament along with the CAG report.

Payment to registered holders [S. 123(3)].—Dividend warrant should be sent to the registered holder of the shares or to his order or to his bankers. A dividend paid to the registered transferee of shares cannot be recovered back from him by the transferor even if the transfer has been subsequently struck off on a technical ground like inadequacy or non-cancellation of stamp.⁴¹ Such technical error should be pointed out to the transferee within

40. *Fragana Desai v National Stock Exchange of India Ltd.*, (2006) 132 Comp Cas 909 (Bom), writ petition to recover the amount awarded in arbitration against the Fund, not allowed. Proper remedy was to enforce the award. To the same effect, *Suresh T Paniki v Stock Exchange*, (2006) 132 Comp Cas 910 (Bom).

41. *Kothari Industrial Group Ltd v Union of India*, (1994) 81 Comp Cas 695; (1994) 1 Cheng LJ 178 (Mad).

good time (one year) so as to enable him to rectify, otherwise it would be too late.

Where an instrument of transfer of shares has been lodged with the company, but such transfer has not been registered by the company, the amount of dividend should be transferred to the "Unclaimed Dividend Account" unless the company is authorised by the registered holder to pay it to the transferee. The rights or bonus shares in respect of the shares under transfer must be kept by the company in abeyance until the matter is finally disposed of.⁴²

Declared dividend a statutory debt

Once a dividend is declared, it becomes a statutory debt from the company to its shareholders. As pointed out by the Supreme Court in *Bachr E Guzdar v CIT*,⁴³ "the shareholders' right of participation in the profits of the company exists independently of any declaration of dividend by the company. A declaration is necessary only for the enjoyment of profits. It will follow that once a declaration of dividend is made and it becomes payable, it will partake of the nature of a debt due from the company to the shareholder."⁴⁴ But a declaration of dividend subject to remittances from Pakistan or subject to some other condition precedent is not a declaration at all because it does not create an immediately payable debt.⁴⁵

A dividend which has been declared, but not paid nor credited, may be revoked with the consent of shareholders.⁴⁶ An interim declared dividend may be revoked before payment.⁴⁷

Interim dividend

The expression "interim dividend" had been defined by the Amendment Act, 2000 by providing that "dividend includes any interim dividend".⁴⁸ The declaration of an interim dividend does not create a debt against the company. Dividends can be declared only by a resolution of the shareholders in accordance with the directors' recommendation at a general meeting. But, if so permitted by the articles, the directors can declare an interim dividend between two meetings. "It does not create a debt enforceable against the company, for it is open to the directors to rescind the resolution before

42. Where the documents were rejected by the company, it could not be said that there was a pending application for transfer. There was nothing wrong in sending bonus shares and rights issue to the transferee. *Nagarkar v Lakshmi Vilas Bank Ltd.*, (1997) 50 Comp Cas 392 (1997) 26 CLA 308 (CLB).

43. AIR 1955 SC 74; (1955) 1 SCR 89; (1955) 25 Comp Cas 1.

44. The court relied upon *Smyth & Wyr & South Bridge Railway Co. v. LR* (1896) 1 Ch 559; *Kilner, re.* (1929) 2 Ch 121; *Govt of Assam v. Gauhati Amalgamated Commercial Traders (P) Ltd.*, (1965) 2 Comp LJ 272 (Mysl).

45. *Jhui Bagru v CIT*, (1970) 1 Comp LJ 195; (1970) 40 Comp Cas 780 (Cal).

46. *Kishinshah Chellaram v CIT*, AIR 1962 SC 390; (1962) 32 Comp Cas 1046.

47. *Kothari Textiles Ltd v CIT*, (1963) 33 Comp Cas 212; *Halsbury's Laws of England*, Vol 7 (9th Edn) 355-56.

48. S. 2(56) of 2013 Act retains the same definition.

payment.⁴⁹ Shareholders do not get any vested right under a directors' resolution declaring an interim dividend.⁵⁰

Mode of payment [S. 127]

In order to ensure prompt payment of dividend to shareholders, Section 127 imposes a penalty if a dividend has been declared and is not paid within thirty days from the date of declaration.⁵¹ The provision is sufficiently complied with if the dividend warrant is posted within the above time.

Dividend is to be paid in cash.⁵² Payment in respect of any share should be made to the registered holder or to his order or to his banker.

49. See, N. Netar, "Company Dividends: Whether to be declared only at the Annual General Meeting" (1965) 3 ILT 151. No debt arises until directors fix a date for payment. *Petei v ITC*, (1971) 2 All ER 504 (Ch D). See also, *Vizir Salmi Tobacco Co v CIT*, (1981) 4 SCC 435, 456, where it was held that mere recommendation of a dividend by director does not by itself have any effect unless approved by the general meeting. In case had arisen out of a taxation matter, the question being whether recommended dividend and a provision for it be regarded as having become a part of the company's reserves so as to be included in the company's capital computation. The Supreme Court answered the question in the negative. A Mr. Sircar expressed dissenting opinion on the ground that a recommended dividend is generally accepted by the shareholders and, therefore, setting aside a sum of money for payment of such dividend should be treated as a reserve. (1981) 4 SCC 469.
50. *CIT v Express Newspapers Ltd*, (1998) 3 SCC 86; (1998) 2 Comp LJ 23. The court was concerned with rebate or dividends under the IT Act, 1961.
51. The penalty is incurred by every director, provided he is knowingly a party to the default. Punishment is simple imprisonment which may extend to two years. Liability in terms of fine is also incurred. The fine is of one thousand rupees for every day during which the default continues. The proviso to the section says that no offence shall be deemed to have been committed within the meaning of the foregoing provision in the following cases, namely:
 - (i) where the dividend could not be paid by reason of the operation of any law;
 - (ii) where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with;
 - (iii) where there is a dispute regarding the right to receive the dividend;
 - (iv) where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder; or
 - (v) where, for any other reason, the failure to pay the dividend or to post the warrant within the period aforesaid was not due to any default on the part of the company.

See, *Narayan Prasad Gupta v Hirafat*, (1966) 2 Comp LJ 136 (All); on appeal to the Supreme Court, (1970) 2 Comp LJ 195. The offence is complete at the place of the registered office and, therefore, the courts there would have jurisdiction in the matter. *HV Jayaram v JCICL Ltd*, (2000) 2 SCC 202, AIR 2000 SC 577; (2000) 99 Comp Cas 341 overruling *Ramsey Laboratories Ltd v India Taxs*, (1997) 88 Comp Cas 349 (Raj). A complaint filed one year after the default was held to be time-barred. *NEPC India Ltd v Registrar of Companies*, (1999) 97 Comp Cas 500 (Mad). The company has to prove despite all the dividend warrant, *Nurek Agro Ltd v Ch Mohan Rao*, (2002) 109 Comp Cas 487 (AP); *Nudrik Agri Ltd v Ch Mahaveer Rao*, (2002) 109 Comp Cas 487 (AP). The burden is on the company to show that there was timely payment or transfer to the unpaid dividend account. 50. *Pharmaceuticals Ltd v Registrar of Companies*, (2002) 111 Comp Cas 805 (AP), delay became excusable when it was shown that the company's financial institution required it not to pay dividend unless overdues under loans were liquidated.

52. Dividend warrant should be sent by registered post. Registration is compulsory where the nature of the envelope, e.g., window envelope, is such that it reveals its contents.



The rate of dividend can be regulated, if the articles so permit, according to the amount paid up on each share where more amount has been paid up on some shares than on others.⁵³

Reserve fund (Free reserves)

Article 82 of Table B of Act 2013 [S. 123(Proviso)] empowers directors, before recommending any dividend, to set aside out of the profits any sum as a "reserve fund". Such fund is applicable at the discretion of directors for any purposes to which profits may be applied. It may be used to equalise dividends, or it may be invested in business or may be held in the form of other investments. When it is used in business it does not thereby become capitalised.⁵⁴

Even where there is no provision of this kind in the articles, a reserve may be created.⁵⁵

"Free reserves" means such reserves which as per the latest audited balance sheet are available for distribution as dividend. A proviso to this statement says that the following are not to be treated as free reserves: (i) any amount representing unrealised gains, nominal gains, or revaluation of assets, whether shown as a reserve or otherwise; (ii) any change in carrying amount to an asset or of a liability recognised in equity, including surplus in profits and loss account on measurement of the asset or liability at a fair value. [S. 2(43)]

Capitalisation of profits

A company may in general meeting, on the recommendation of the Board, resolve and convert into capital any sum standing to the credit of profit or loss account or reserve fund account or otherwise available for distribution. As a general rule only such funds can be capitalised as would be available for dividend distribution.⁵⁶

"It has been the generally accepted view of the law of this country that, if the surplus on capital accounts results from a valuation made in good faith by competent valuers, and is not likely to be liable to short term fluctuations, it may properly be capitalised."⁵⁷

When a distributable profit is capitalised, it is in essence a declaration of dividend combined with the application of that dividend on behalf of the shareholders entitled to participate in it in paying up shares to be allotted and issued to them in satisfaction of their rights of participation.⁵⁸

53. S. 51.

54. *Hume & Co Ltd, re*, (1904) 2 Ch 206; (1901-07) All ER Rep 635 (CA).

55. *Burland v Bank*, 1902 AC 82; 85 LT 553 (PC).

56. *Buckley Fin Dinibula Valley Ceylon Tea Co Ltd v Laming*, (1941) 1 Ch 353, noted 24 Mad LR 525.

57. *Ibid*, 372. See also, *J&C v Thornton, Kelly & Co Ltd*, (1957) 1 WLR 482; (1957) 1 All ER 650.

58. *Hill v Permanent Trustees Co of New South Wales Ltd*, 1930 AC 720 (PC).

The advantage to the company is two-fold. A self-financing of this kind helps the company to rid itself of market influences.⁵⁹ Secondly, it makes available capital to carry on a larger and more profitable business.⁶⁰

There must be a clear authority to capitalise profits in the company's articles, for, otherwise, a shareholder can insist upon payment in cash.⁶¹

It has been held by the Supreme Court in *Shri Gopal Paper Mills Co Ltd v CIT*⁶² that the shareholders become the owners of bonus shares from the date of resolution and not from the date on which certificates are issued. The Gujarat High Court has, on the other hand, held in *CIT v Chembur Kleshtakdars*⁶³ that bonus shares cannot be said to be acquired or held by a shareholder before they come into existence by allotment and issue. The above-mentioned Supreme Court decision was not cited before the court.

Bonus shares [S. 63]

If the articles so authorise, a company has the "power to convert its accumulated undivided profits into bonus shares".⁶⁴ "Directors may capitalise any profits and allot to the ordinary shareholders in respect of the net amount capitalised fully paid-up shares of the company."⁶⁵ The amount may also be used in paying up any amounts for the time being unpaid on any shares. The two other sources from which bonus shares may be financed are Share Premium Account, and Capital Redemption Reserve Account.⁶⁶

Issue of bonus shares is a bare machinery for capitalising profits. There is no distribution of profit among shareholders. Where a company used its development rebate fund for issuing bonus shares, there was no disbursement of money and the company remained entitled to development rebate.⁶⁷ In the words of the Supreme Court:⁶⁸

"Bonus share is an accretion. A bonus share is issued when the company capitalises its profits by transferring an amount equal to the face value of the share from its reserve in the nominal capital. In other words, the undistributed profit of the company is retained by the company under the head of capital against the issue of further shares to its shareholders. Bonus shares have, therefore, been described as a distribution of capitalised undivided profit. In the case of issue of bonus share there is

59. Paul P. Harbrecht, "The Modern Corporation", (1964) 64 Col LR 1410, 1415-16.

60. Viscount Evers in *IRC v Govindram*, (1921) 2 AC 171, 193 (JIL).

61. *Waer v Odessa Waterworks Co*, (1889) 42 Ch D 636.

62. (1970) 2 SCC 80.

63. (1974) 43 ITR 349, (1971) 44 Comp Cas 96 (Guj).

64. *Shri Gopal Paper Mills Co Ltd v CIT*, (1970) 2 SCC 80.

65. Viscount Evers in *IRC v Govindram*, (1921) 2 AC 171, 193 (JIL).

66. S. M. Sez, S. M. SEZ Guidelines, 1992 relating to issue of bonus shares. The Department of Company Affairs' advice to unlisted closely held public companies and private companies is that they should not provide for the issue of bonus shares out of revaluation reserves. *Satisch Chandram Senchalra v Empire Dentists Assn (P) Ltd*, (2001) 107 Comp Cas 98 (CLB), issue of bonus shares from revaluation reserves by a company which had adopted Table A of 1956 Act was held to be not valid.

67. *Husain Plywood Works Ltd v CIT*, (1998) 1 SCC 355; (1998) 1 Comp LJ 22.

68. *Standard Chartered Bank v Guindlai*, (2002) 6 SCC 422.



an increase in the capital of the company by transferring of an amount from its reserve to the capital account and thereby resulting in additional shares being issued to the shareholders. A bonus share is a property which comes into existence with an identity and value of its own and capable of being bought and sold as such.⁶⁹

No issue of bonus shares is to be made by capitalising reserve created by revaluation of assets. A company is not to capitalise its profits or reserves for the purpose of issuing fully paid-up bonus shares unless (a) it is authorised by its articles; (b) on the recommendation of the Board of directors, it has been authorised in the general meeting of the company; (c) it has not defaulted in payment of interest or principal in respect of fixed deposits or debt securities issued by it; (d) it has not defaulted in payment of statutory dues of employees, such as contribution to provident fund, gratuity and bonus; (e) the partly paid-up shares, if any, are made fully paid up; (f) it complies with other prescribed conditions. Bonus shares cannot be issued as a gift.⁷⁰

Decision to issue bonus shares against revaluation of assets has been held by the Supreme Court to be not valid.⁷¹

A resolution was passed at a meeting of the company for issue of bonus shares to equity shareholders. The directors were authorised to decide the date of issue. A shareholder transferred his shares after the meeting but before the date specified by the directors. It was held that he being no longer a shareholder at the date of the issue, he was not entitled to the bonus shares in respect of the shareholding which he had already transferred.⁷²

Right to dividend, rights and bonus shares to be in abeyance pending registration of transfer of shares [S. 126]

Where any instrument of transfer of shares has been delivered to the company for registration, the company has, pending registration, to transfer the dividend on such shares to the Unpaid Dividend Account unless the company has been authorised by the registered holder in writing to pay such dividend to the transferee specified in the instrument. Similarly any offer of rights shares and bonus shares has to be kept in abeyance.

Punishment for failure to distribute dividends [S. 127]

Where a dividend has been declared by a company but has not been paid or dividend warrants not posted within 30 days from the date of declaration

69. *CIT v Chintal Kulkarni*, (1974) 93 ITR 369; (1974) 44 Comp Cas 90 (Gu); Bezwada I explained the nature of bonus shares. As to the impact of bonus shares upon the value of shares, see, *Chandikant Mehta v TELCO*, (1985) 56 Comp Cas 130 (Hon); *Mihay Distilleries Ltd v CIT*, (2009) 1 SCC 256; *EddyStone Marine Insurance Co. re*, (1893) 3 Ch 9; 59 LT 363

70. *THE Plate Dealers Assoc (P) Ltd v British Chemica Semawika*, (2016) 10 SCC 1; (2016) 199 Comp Cas 205.

71. *Rajee Nag v Quality Assurance Institute (India) Ltd*, (2001) 105 Comp Cas 178 (KLR); *Pradip Kumar Chettriang v Bajaj Auto Ltd*, (2005) 59 KCL 572 (CLB), no right to bonus unless the claimant's name is present in the register of members.



to any entitled shareholder, every director who is knowingly a party to the default is punishable with imprisonment extending to two years and with fine not less than Rs 1000 for every continuing day of default. The company is liable to pay a simple interest at the rate of 16 per cent p.a. for the period of default. The *Proviso* says that no offence is deemed to be committed in the following cases: (a) where payment could not be made by reason of operation of law; (b) where a shareholder gave directions to the company as to payment and those could not have been complied with by the company and the shareholder was informed; (c) where there was a dispute regarding the right to receive the dividend; (d) where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder; (e) where, for any other reason, the failure was not due to any default on the part of the company.

ACCOUNTS

Books of account or accounting records [S. 128]

Section 128 requires every company to keep at its registered office proper books of account. Such accounts have to be made for the financial year which, in relation to a company or body corporate, means the period ending on March 31 every year. Where a company has been incorporated on or after the first day of January of a year, it means the period ending on 31st day of March of the following year, in respect of which the financial statement of the company or body corporate is made up. [S. 2(4)]

This sub-section carries two proviso. According to the *Proviso* one, on an application by a company or body corporate, which is required to follow a different financial year for consolidation of its accounts outside India, the Tribunal may allow any period as financial year, even if that period is not a year. The second *Proviso* says that a company or body corporate, in existence at the commencement of the Act, has to align its financial year within two years in accordance with the requirements of this sub-section.

Books of account include records maintained in respect of the following:

- (i) all sums of money received and expended by the company and the matter in respect of which the receipt and expenditure has taken place;
- (ii) all sales and purchase of goods by the company;
- (iii) all assets and liabilities of the company;
- (iv) the items of cost as may be prescribed under Section 143 in the case of a company which belongs to any class of companies specified under that section.

Turnover means the aggregate value of the realisation of amount made from the sale, supply or distribution of goods or on account of services rendered, or both, by the company, during a financial year.

A view of what constitutes proper books of account appears from the provisions of Section 358. The company should maintain such books of

account as are necessary to exhibit and explain the transactions and financial position of the business of the company, including books containing entries made from day to day, in sufficient detail, of all cash received and cash paid. Where the business of the company involves dealings in goods, the records should contain statements of the annual stock takings. Where the dealings are not by way of retailing of goods, a record should be maintained of all goods sold and purchased showing the goods, and the buyers and sellers of such goods in such sufficient details as to enable those goods and those buyers and sellers to be identified.⁷²

Such books may be kept either at the company's registered office or at any other place the Board of Directors may decide. Within seven days of any such decision, the address of that place must be sent to the Registrar.

Where a company has a branch office, such accounts relating to the branch business must be maintained there and at intervals of three months summarised accounts should be forwarded to the registered office. [S. 128(2)]

The company may keep such books of account or other relevant papers in electronic mode in the prescribed manner. [S. 128(1)]

True and fair view [S. 128]

Accounts must give a true and fair view of the state of affairs of the company.⁷³ "A balance sheet must not be a mere inventory. It is supposed to be a pictorial representation of the trading position of the company. To determine whether a statement is false, its effect upon an ordinary investor should be the test. Thus where loans given to an embryonic firm were described as 'other deposits', the accounts were held to be false."⁷⁴ That is why it is generally prescribed that proper books of account are not be deemed to be kept if there are not kept such books as are necessary to give a true and fair view of

72. S. 339 is in connection with liability in winding up and liability follows if such records are not available for the two-year period preceding winding up. The requirement becomes a matter of universal application because winding up may creep in unpredictably.

73. As to the meaning of "true and fair view" the general feeling is that the standards adopted by the accounting profession should be followed. It has been said that "although Statements of Standard Accounting Practice (SSAP) has no direct legal effect and is simply a rule of professional conduct for accountants, it is likely to have an indirect effect on the contour which English courts will give to the 'true and fair' concept because it represents an important statement of professional opinion about the standards which may reasonably be expected in accounts which are intended to be true and fair, and because readers of accounts can expect that they will conform to the standards set by the accounting profession". See K.P.E. Lasink and Edmund Gray, "Fair Accounting" (1989) JBL 235. For a study of further literature on the subject, see the joint opinion of Leonard Huffmeyer QC and Mary Arditti Accounting Standards (1984-85) 178-82 until a review of that opinion by Peter Bird, "What is a True and Fair View" (1980) JBL 461. For a study of "off balance sheet accounting", see, "Off-Balance Sheet Financing: An Accountant's View" (1985) JBL 398; *N. Narayanan v. SEBI*, (2013) 12 SCC 152 (2013) 178 Comp. Cas 390, a case of manipulated accounts of listed companies.

74. *Gupt & Legal Remembrancer of Legal Affairs, Bengal v. Akhil Bhushan Gohil*, ILR (1937) 1 Cal 328. For liability for false accounts, see, S. 448 and *PP Laski v. N. M. Mehta*, (1967) 37 Comp Cas 290; (1967) 2 Comp LJ 166 (Ker).

the state of affairs of the company and if they are not kept on accrual basis according to the double entry system of accounting.⁷⁵

Directors' fiduciary obligations would compel them to make full and frank disclosures so as to help those who are entitled to use the company's accounts for guidance in their decision-making. The mode and manner of disclosure must be such as would show the reality of the financial position and working results of the company. Disclosures should be clear and unambiguous and in accordance with fundamental accounting assumptions and the commonly accepted accounting policies.

It has been held under the EEC directives that the requirement of true and fair view was ensured by taking account of all elements (i.e., profits made, liabilities and losses incurred, charges, income) which actually related to the financial year in question.⁷⁶

Accrual Basis.—According to the guidance notes⁷⁷ there are two basic features of this system of accounting. First, revenue means revenue earned, whether received in cash for the time being or not; second, costs are incurred when they become payable whether actually paid or not. How these methods are to be applied by an enterprise constitutes its accounting policy namely, a method of accounting which reflects the truth so that those for whose information the accounts are meant are able to get a fair view of things. Hence, what is more important is the substance of the financial position of the company and not the forms and formats through which that substance is presented as a true and fair view. Forms and formats are only for guidance. That is why latitude is given to follow as nearly as may be possible under the circumstances of a particular enterprise, with only this obligation that any significant departure from the prescribed method under accounting policy should be disclosed. Schedule III itself requires disclosure of accounting policy in reference to some items. They are: policy regarding mode of valuation of stock and basis of valuation of investments.

Balance sheet of holding company.—See under "Holding company and subsidiary" dealt with in "Kinds of Company".

Preservation of account books [S. 128(5)]

Account books for the preceding eight years should be preserved in good condition. Under the SEBI (Registrars to Issue and Share Transfer Agents) Rules, 1993, the period prescribed for preservation of documents and records is that of three years. Documents relating to a public issue have been held to be a part of the records under the Act. The period of eight years would prevail over the period prescribed by SEBI.⁷⁸ Vouchers relevant to any entry in the books of account have also to be kept in good order.

75. Government companies have been exempted from the requirement of accrual system. GSR 339(E) dt 16-5-1989.

76. *Tomberger v Cörntner Powder Works GmbH* (1996) 2 BCLC 457 (EC).

77. ICAI Guidance Note on: Accrual Basis of Accounting.

78. *Rajesh Gupta v SEBI*, (2000) 39 CLA 82 (SAT).

Where an investigation has been ordered in respect of the company under Chapter XIV, the Central Government may direct that the books of account be kept for such longer period as it may deem fit.

Accounts to comply with accounting standards

"Accounting standards" means the standards of accounting or any addendum thereto for companies or class of companies referred to in Section 133. This section provides that the Central Government may prescribe the standards of accounting or any addendum to it, as recommended by the Institute of Chartered Accountants of India in consultation with and after examination of the recommendations made by the National Financial Reporting Authority. [S. 2(2) and S. 133 of the Act].

Right of inspection [S. 128(3)(4)]

Inspection by directors.—Every director has the right to inspect the books of account during business hours. In the case of financial information, if any, maintained outside the country, their copies have to be maintained and produced for inspection by any director subject to prescribed conditions. The inspection in respect of any subsidiary company can be done only by the person authorised by a resolution of the Board of directors. Where a director is carrying on a personal business of the same kind as that of the company so that if the accounts are thrown open before him, his interest in his personal business and his duty to the company will be in a sharp conflict, the question will be whether his statutory right should prevail over his duty to the company. In a case of this kind before the High Court of Delhi,⁷⁹ the court was of the opinion that the matter would have to be decided on a balance of equities. The court accordingly diluted the right of the director and ordered the inspection of only the following books: bank statements, accounts with banks, financial institutions and private parties from whom loans had been taken by the company, and the register of movable assets. Where the directors wanted to exercise their right of inspection accompanied by a chartered accountant, the CLB allowed it subject to the undertaking being given by the chartered accountant that he would not disclose the information to any person other than the directors.⁸⁰

Inspection by Registrar, etc.—Section 209-A was introduced into Act 1956 by the Amendment Act, 1974 and continued now in Section 207. Sub-section (1) provides that the books of account and other books and papers of every company shall be open to inspection during business hours by the Registrar or by any such officer as may be authorised by the Central Government. Such inspection can be made without giving previous notice to the company. The directors, officers and employees are required to produce before the inspector books of account, etc, which are in their control, and to furnish him with any other information that he may desire and also

79. *D. Ross Taylor v. Panzer Sea Co. Ltd.*, (1990) 68 Comp Cas 145 (Del).

80. *M.L. Thakral v. Krone Communications Ltd.*, (1996) 86 Comp Cas 643 (Del).

to give him reasonable assistance. The inspector may make copies or make marks of inspection.⁴¹

The Amendment of 2000 also conferred the right of inspection upon SEBI authorised officers. This right of inspection extends only to sections covered in Section 55-A. [now S. 24, 2013 Act]

The person making the inspection has been vested with the powers of a civil court under CPC in respect of the following matters—

1. the discovery and production of books of account and other documents at such place and time as may be prescribed by him;
2. summoning and enforcing the attendance of persons and examining them on oath;
3. inspection of any books, registers and other documents of the company at any place.

The inspector has to submit his report to the Central Government. Where the inspection is on behalf of SEBI, the report has to be submitted to SEBI. He will have the power of the Registrar under the Companies Act of making inquiries. A director who commits any default under the section and is convicted for it, shall vacate his office from the date of conviction and shall remain disqualified from directorship for five years.⁴²

The right of inspection under the section is limited to books of account and other books and papers. The inspectors cannot, under the guise of this right, undertake a roving inquiry into all the affairs of the company. It is different from an investigation of affairs under Section 210.⁴³

Inspection by members.—Members do not have the right of inspection.

Duty of compliance and penalty provision [S. 128(6)].—If the managing director, whole-time director, incharge of finance, the chief financial officer or any other person has been charged by the Board with the duty of complying with the provisions of the section contravenes such provisions, he will be punishable with imprisonment for a term extending to one year or with fine not less Rs 50,000 but extending up to Rs 5,00,000 or with both. The Supreme Court described it as a failure of corporate governance on the part of directors if they fail to exercise due care and diligence allowing thereby

81. Where irregularities were found by the Assistant Registrar, who granted time to the directors for rectification, he was not allowed to prosecute them one year after the expiry of the granted time. *State v S Sesham Prudha*, (1986) 60 Comp Cas 889 (Mad). Nobody should be prosecuted under the section unless he has been given an opportunity to explain his position. In this case, the notice to the director in question was delayed for more than six months and in the meantime the liquidator took the records into his custody. Prosecution was not allowed. *P Venkatakrishna Reddy v Registrar of Companies*, (1996) 35 Comp Cas 572 (Mad).
82. *Indra Prakash Kumar v Registrar of Companies*, (1985) 57 Comp Cas 662 (Cal). The court has jurisdiction to order inspection. *MKM Singh v Lake Palace Hotels Ltd*, (1987) 75 Comp Cas 905 (Raj). The default is also punishable with a fine of Rs 50,000.
83. *Karpalani v Director of Inspection, CLD*, (1994) 59 Comp Cas 814; (1994) 3 Comp LJ 225 (Ker); *Savada Chemicals Ltd v Kothuri Industrial Corp Ltd*, (1995) 18 CLA 29 (Mad), the inspector here wanted to find out the reasons why the company was not implementing a resolution and that was held to be beyond the scope of this power.

fabrication of figures and making false disclosures. They would be liable for such omissions and commissions.⁵⁴

Financial statement [S. 129]

The financial statement has to give true and fair view of the state of affairs of the company, comply with the accounting standards notified under Section 133 and has to be in the form or forms provided for different class or classes of companies in Schedule III. The terms contained in the financial statements have to be in accordance with the accounting standards. This section is not to apply to an insurance or banking company or any company engaged in the generation or supply of electricity or to any other class of companies for which a form of statement has been specified in or under the Act governing such class of companies. Financial statements are not to be treated as not disclosing a true and fair view of the state of affairs of the company, merely by reason of the fact that they do not disclose the following: (a) in the case of an insurance company, any matters which are not required to be disclosed by the Insurance Act, 1938 or the Insurance Regulatory and Development Authority Act, 1999; (b) in the case of a banking company, any matters which are not required to be disclosed by the Banking Regulation Act, 1949; (c) in the case of a company engaged in the generation or supply of electricity, any matters not required to be disclosed by the Electricity Act, 2003; (d) in the case of a company governed by any other law for the time being in force, any matters not required to be disclosed by that law. [S. 129(1)]

A balance sheet must not be a mere inventory. It is supposed to be a pictorial representation of trading position. To determine whether a statement is false, its effect upon an ordinary investor should be the test. Where loans given to an embryonic firm were described as "other deposits", the accounts were held to be false.⁵⁵

At every AGM of a company, the Board of directors have to lay before the meeting financial statement for the year. Where the company has one or more subsidiaries, it has also to prepare a consolidated financial statement of the company and its subsidiaries in the same form and manner as that of its own which has also to be laid before AGM. The company has also to attach with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or subsidiaries in the prescribed form. The Central Government may provide for consolidation of accounts of companies in such manner as may be prescribed. For the purposes of this sub-section, the word "subsidiary" is to include associate company and joint venture.

The provisions of the Act applicable to preparation, adoption and audit of the financial statements of a holding company are mutatis mutandis to apply to the consolidated financial statements.

⁵⁴ *N Narayanan v. SEBI*, (2013) 12 SCC 152; (2013) 128 Comp Cas 394, the case involved many SEBI violations.

⁵⁵ *Supt & Legal Remembrancer of Legal Affairs, Bengal v. Akhil Ranjan Guha*, I.L.R. (1997) 1 Cal 328.

Where the financial statement of a company does not comply with accounting standards, the company has to disclose in its statement the deviation, the reasons for such deviation and the financial effects, if any, arising out of such deviation. The Central Government can exempt any class or classes of companies from complying with the requirements of the section if it is considered necessary to grant such exemption in public interest. Any such exemption may be granted either unconditionally or subject to such conditions as may be specified in the notification. The Government can do so on its own motion or on an application by a class or classes of companies.

For the purpose of this section, except where the context otherwise requires, any reference to a financial statement is to include any notes annexed to or forming part of the statement, giving information required to be given and allowed to be given in the form of such notes under the Act.

Reopening of accounts on court's or Tribunal's order [S. 130]

A company is not to reopen its books of account and is not to recast its financial statements. Such a thing as that can be done only on an application which may be made by the Central Government, Income Tax Authorities, SEBI and any other statutory regulatory body or authority or any person concerned. An order of reopening would have to be made by a court of competent jurisdiction or the Tribunal on a finding that the relevant earlier accounts were prepared in a fraudulent manner or the affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of the financial statements.

The court or the Tribunal has to give notice to the authorities noted above and has to take into account their representations, if any, before passing any order. The accounts so revised or recast are thereafter taken to be final.

Voluntary revision of financial statements or Board's report [S. 131]

If it appears to the directors that the financial statements of the company or the Report of the Board do not comply with the provisions of Section 129 or 134, they may prepare revised financial statement or revised report in respect of any of the three preceding financial years. This can be done after obtaining approval of the Tribunal on an application made by the company in the prescribed form. A copy of the order of the Tribunal has to be filed with the Registrar. The Tribunal has to give notice to the Central Government and Income tax Authorities and to take into consideration the representation, if any, made by them. Such exercise cannot be repeated more than once in one financial year. Detailed reasons for revision have to be disclosed in the Board's report in the relevant financial year in which the revision is made.

Where copies of the previous financial statement or report have been sent out to members or delivered to the Registrar or laid before the company in general meeting, the revision must be confined to the correction in respect of which previous financial statement or report do not comply with Section 129 or 134 and to the making of any necessary consequential alteration.

The Central Government may make rules on the point and such rules may in particular (i) make different provisions according to which the previous statement or report are replaced or are supplemented by a document indicating the corrections to be made; (ii) make provisions relating to the function of company's auditors about the revised statement or report; (iii) require the directors to take prescribed steps.

Constitution of National Financial Reporting Authority [S. 132]

The Central Government has to constitute an authority known as National Financial Reporting Authority to provide for matters relating to accounting and auditing standards under the Act. The Authority has the following task to perform: (a) make recommendations to the Central Government on the formulation and laying down of accounting and auditing policies and standards for adoption by companies or class of companies or their auditors, (b) monitor and enforce compliance with accounting and auditing standards in the prescribed manner; (c) oversee the quality of service of the professions associated with ensuring compliance with such standards and suggest measures required for improvement in quality of services and such other related matters as may be prescribed; and (d) perform such other functions relating to first three clauses as may be prescribed. [S. 132(2)]

Constitution of authority [S. 132(3)].—The Authority has to consist of a chairperson who has to be a person of eminence and having expertise in accountancy, auditing, finance or law. He has to be appointed by the Central Government. The Authority has to consist of such other members not exceeding 15, consisting of part-time and full-time members as may be prescribed. The terms, conditions and manner of appointment are to be prescribed under rules. The chairperson and members have to make a declaration to the Central Government in the prescribed form regarding no conflict of interest or lack of independence in respect of his or their appointments. The chairperson and members who are in full-time employment with the Authority cannot be associated with any audit firm including related consultancy firms during the course of their appointment and two years after ceasing to hold such appointment.

Powers of authority [S. 132(4)]. The Authority is to have the following powers: (a) power to investigate, either suo motu or on a reference made to it by the Central Government for such class of bodies corporate or persons in the prescribed manner into the matters of professional or other misconduct committed by any member or firm of chartered accountants registered under the Chartered Accountants Act, 1949, or other institution or body is to initiate or continue any proceedings in such matters of misconduct where the National Financial Reporting Authority has initiated an investigation under this section; (b) same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters: (i) discovery and production of books of account and documents, at such place and at such time as may be specified by the National Financial Reporting Authority; (ii) summoning and enforcing the

attendance of persons and examining them on oath, (ii) inspection of any books, registers and other documents of any person referred to in clause (b) at any place; (iii) issuing commissions for examination of witnesses or documents; (c) where professional or other misconduct is proved, the power to make order for imposing penalty of not less than Rs 1,00,000 but extending to five times of the fees received in the case of individuals and not less than Rs 10,00,000 extending to ten times of the fees received, in case of firms; debarring the member or firm from engaging himself or itself from practice as member of the Institute of Chartered Accountants for a minimum period of six months or for such higher period not exceeding 10 years as may be decided by the Authority. For the purposes of this section the expression "professional or other misconduct" has the same meaning as is assigned to it in Section 22, Chartered Accountants Act, 1949. An appeal lies against any such order to the Appellate Authority under this section.

Appellate authority [S. 132(6)].—The Central Government has to constitute an Appellate Authority consisting of a chairperson and not more than two members to be appointed by the Central Government. The Appellate Authority has to hear appeals arising out of the orders of the National Financial Reporting Authority. The Government has to prescribe rules relating to qualifications of its members, the manner of selection, terms and conditions of their service, supporting staff, and procedure of hearing appeals and its places, form and manner of filing appeals, [S. 132(7)] and also fees for filing appeals. [S. 132(8)] The officer authorised by the Appellate Authority has to prepare in prescribed form and at prescribed time its annual report giving a full account of its activities and forward a copy to the Central Government for laying it before each House of Parliament. [S. 132(9)]

Administration of National Financial Reporting Authority [S. 132(10)–(15)].—The NFRA has to meet at prescribed times and places and has to observe prescribed rules of procedure in regard to transaction of business at its meetings in the prescribed manner. The Central Government may appoint a secretary and such other employee as it may consider necessary for the efficient performance of functions by NFRA under the Act. The terms and conditions of service of the secretary and employees are to be prescribed. The head office of NFRA is to be at New Delhi though it may meet at such other places in India as it may deem fit. It has to maintain such books of account and other books in relation to its accounts in such form and in such manner as the Central Government may, in consultation with CAG, may prescribe. Its accounts have to be audited by CAG at such intervals as may be specified by him. The accounts as so audited and certified together with the audit report have to be forwarded annually to the Central Government. NFRA has to prepare in the prescribed form and time for each financial year its annual report giving full account of its activities during the year and forward a copy to the Central Government. This report along with the CAG's report has to be laid before each House of Parliament.

Central Government to prescribe accounting standards [S. 133]

The Central Government may prescribe the standards of accounting or any further additions to them as recommended by the Institute of Chartered Accountants of India in consultation with and after examination of the recommendations made by the National Financial Reporting Authority.

Financial statement, Board's report, etc [S. 134]

The financial statement, including consolidated financial statement, if any, has to be approved by the Board of directors before they are signed on behalf of the Board. The signature has to be that of the chairperson of the company where he is so authorised by the Board or by two directors out of which one should be the managing director and the chief executive officer if he is a director in the company, the chief financial officer and the company secretary of the company where appointed. In the case of one person company, signature has to be of only one director. Only then they can be submitted to the auditor for his report. The auditor's report has to be attached to every financial statement. A report of the Board of Directors has to be attached to statements laid before the company in general meeting which is to include the following: (a) the extract of the annual return as provided under Section 92(3); (b) number of meetings of the Board; (c) Director's Responsibility Statement; (d) details in respect of frauds reported by auditors under S. 143(12) other than those which are reported to the Central Government; [Added by Amendment of 2015] (e) a statement on declaration given by independent directors under Section 149(6); (f) In the case of a company covered by Section 178(1) company's policy on directors' appointment and remuneration including criteria for determining qualifications, positive attributes, independence of a director and other matters provided under Section 178(3); (g) explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report and by the company secretary in practice in his secretarial audit report; (h) particulars of loans, guarantees or investments under Section 186; (i) particulars of contracts or arrangements with related parties referred to in Section 188(1) in the prescribed form; (j) the state of the company's affairs; (k) the amounts, if any, which it proposes to carry to any reserves; (l) the amount, if any, which it recommends should be paid by way dividend; (m) material changes and commitments, if any, affecting the financial position of the company which have occurred between the end of the financial year to which the financial statements relate and the date of the report; (n) the conservation of energy, technology absorption, foreign exchange earnings and outgo, in the prescribed manner; (o) a statement indicating development and implementation of a risk management policy for the company including identification of elements of risk, if any, which in the opinion of the Board may threaten existence of the company; (p) details about the policy developed and implemented by the company on corporate social responsibility initiative taken during the year; (q) in the case of a listed company and every other public company having such paid-up share capital

as may be prescribed, a statement indicating the manner in which formal annual evaluation has been made by the Board of its own performance and that of its committees and individual directors; (g) such other matters as may be prescribed.

The financial statement in relation to a company has to include the following: (i) balance sheet as at the end of the financial year; (ii) profit and loss account, or, in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;¹⁴ (iii) cash flow statement for the financial year; (iv) a statement of changes in equity, if applicable, and (v) any explanatory note annexed to, or forming part of the balance sheet or statement of changes. A proviso in the sub-section says that the financial statement of one person company, small company and dormant company may not include cash flow statement [S. 134(1)].

In the case of one person company, the report of the Board of directors to be attached to the financial statement means a report containing explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report. [S. 134(2)]

Directors' responsibility statement.—The Directors' Responsibility Statement referred to in sub-section (3)(c) has to state that (a) in the preparation of annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures; (b) the directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company; (c) directors had taken proper and sufficient care for maintenance of adequate accounting record in accordance with the provisions of the Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities; (d) the directors had prepared the annual accounts on a going concern basis; and (e) the directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively. [S. 134(3)]

Net worth (S. 2157). Net worth means the aggregate value of the paid-up share capital and all reserves created out of profits and securities premium account, after deducting the aggregate value of accumulated losses, deferred and miscellaneous expenditure not written off, as per the audited balance sheet. The concept does not include reserves created out of revaluation of assets, and write-back of depreciation and amalgamation.

Authentication.—The Board's report and its annexures are to be signed by the chairperson of the company if so authorised by the Board, otherwise they have to be signed by at least two directors one of whom to be the managing director or by a single director if there is only one director. [S. 134(4)]

Publication.—A signed copy of every financial statement, including consolidated financial statement, if any, is to be issued, circulated or published

14. Format of Balance Sheet and Profit and Loss Account are to be issued in Sch. III

along with a copy each of any notes annexed or forming part of such financial statement, the auditor's report and the Board's report. [S. 134(7)]

Penalty [S. 134(8)].—For any contravention the company becomes punishable with fine of not less than Rs 50,000 and extending to Rs 25,00,000. Every defaulting officer is punishable with imprisonment extending to three years or fine of not less than Rs 50,000 extending to Rs 5,00,000 or both.

Corporate social responsibility [S. 135]

Social Responsibility Committee.—Every company having net worth of Rs 500 crores or more, or turnover of Rs 1000 crores or more or a net profit of Rs 5 crores or more during any financial year is required to constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, of whom at least one should be an independent director. The Board has to disclose the composition of the Committee in its report.

Functions of Committee [S. 135(3)].—The Corporate Social Responsibility Committee has to (a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which is to indicate the activities to be undertaken by the company as specified in Schedule VII; (b) to recommend the amount of expenditure to be incurred on the indicated activities, and (c) to monitor the Corporate Social Responsibility Policy of the company from time to time.

The Board has to take into account the recommendations of the Committee and approve the suggested policy and report. It has also to disclose the contents of the policy in its report and also to place on the company's website in the prescribed manner. The Board has also to ensure that the activities as are included in the policy are undertaken by the company, in fact.

The Board of every company has to ensure that the company spends, in every financial year at least 2 per cent of the average net profits of the company made during the three immediately preceding financial years in pursuance of its CSR policy. It is required that for spending the earmarked CSR amount, the company should give preference to the local area and areas around the place where it operated. If the company fails to spend the requisite amount, the Board has to specify in its report reasons for not spending the amount.

For this purpose, the average net profits have to be calculated in accordance with the provisions of Section 198.

Right of members to copies of audited financial statement [S. 136]

A copy of the financial statements, including consolidated financial statement, if any, auditor's report and every other document required by law to be annexed to financial statement, which are to be laid before the company in general meeting, has to be sent to every member of the company, to every trustee for debenture holder and others entitled. This has to be done in not less than 21 days before the date of the general meeting. In the case of a listed company, it would be enough if the documents are made available for

inspection at the registered office during working hours for 21 days. Only a statement containing the salient features of the documents in the prescribed form is to be sent to members, etc. The Central Government may prescribe the manner of circulation of financial statements of companies having such net worth and turnover as may be prescribed. A listed company has to place its financial statements, etc, on its website maintained by or on behalf of the company. A company having one or more subsidiaries has to place separate audited accounts of each subsidiary on the website, but a copy would have to be sent to each member who asks for it.

Any default under the section makes the company liable to a penalty of Rs 25,000 and every defaulting officer liable to a penalty of Rs 5000.

Filing of accounts and penalty provisions [S. 137]

A financial statement in relation to a company includes the following:

- (i) a balance sheet as at the end of the financial year;
- (ii) a profit and loss account, or in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;
- (iii) cash flow statement for the financial year;
- (iv) a statement of changes in equity, if applicable; and
- (v) any explanatory note annexed to, or forming part of any document referred to in sub-clause (i) of sub-clause (iv).

A proviso to the sub-section says that the financial statement of one person company, small company and dormant company may not include cash flow statement. [S. 2(40)]

A copy of the financial statement, etc, as adopted by the company in general meeting has to be filed with the Registrar within 30 days of the AGM in accordance with the prescribed manner. Even where the requisite documents have not been adopted by the AGM, they have to be filed with the Registrar who is to record them as provisional till the duly adopted statements are filed with additional fees under Section 403. In the case of one person company, statement adopted by its member has to be filed within 180 days from the closure of the financial year.

In the case of one or more foreign subsidiaries which have not established a place of business in India, accounts of such companies have also to be attached to the financial statements. Where an AGM could not be held, the documents would have to be filed with the Registrar in the same manner as if the meeting was held but explaining the reasons why the meeting could not be held.

Penalty [S. 137(3)].—Failures involve punishment to the company with fine of Rs 1000 for everyday of default but not more than Rs 10,00,000 in all. Among officers to be punished are the managing director and chief financial officer and any other director who is charged by the Board with the responsibility of compliance and in the absence of any such director, all the directors of the company. They are punishable with imprisonment for

a term extending to six months or with fine of not less than Rs 1,00,000 but which may extend to Rs 5,00,000 or both.

The Act imposes a penalty if a default is made in filing the accounts with the Registrar within 30 days after an annual general meeting. "The company and every officer of the company who is in default" are punishable with fine.⁷⁷ "These provisions of the Act have been deliberately enacted to protect the shareholders and the general public and they impose a definite duty upon the directors. It is necessary that these duties should be properly carried out and it is necessary that when the directors fail to do so, the penalties provided for in the Act should be imposed. It was never intended that these sections should only be enforced in cases where fraud or dishonesty was suspected or proved."⁷⁸ This explanation of the policy of law was given by the Calcutta High Court in *Bhagirath v. Emperor*.⁷⁹

Certain directors of a company were prosecuted for failure to submit accounts within the prescribed time. They were convicted by the lower Court and on appeal they argued that they had no real control of the affairs; they were mere figureheads who did not know that the law had not been complied with.

Rejecting this contention, the court said: "It is perfectly clear that all the directors of a company are responsible to see that the duties imposed upon a company by the Companies Act are properly carried out. It is clearly the duty of all directors to see that annual returns and the copies of Balance Sheet and Profit and Loss Account are submitted. There is nothing on record to show that these directors made any attempt to see that these duties were carried out. The presumption of law is that these directors knew their duties."

The company is punishable *per se*, that is, by the mere fact of default. Thus where a company in default was acquitted on the ground that the circumstances were beyond its control, but the directors were convicted, the acquittal of the company was quashed.⁸⁰

After a long drawn out controversy between the High Courts, the Supreme Court had held in *State of AP v. Andhra Provincial Potteries Ltd*⁸¹ that if the annual meeting is not held, the obligation to file accounts did not arise and consequently no penalty was incurred. The court distinguished the case from its own decision in *State of Bombay v. Bandhug Ram Bhandari*,⁸² where in reference to the obligation to file annual returns it had been held



CASE PILOT

77. A person's position as a director and as an officer in default and whether he has any defence can be decided in the prosecution itself. *Bachay Baid v. State of WB*, (1992) 74 Comp Cas 809 (Cal). The DCA has advised companies to file their accounts latest by October 31. Circular of 22-9-1992.

78. See, for example, *Registrar of Companies v. Hingna Shri Timbers (P) Ltd*, (1979) 44 Comp Cas 154 (Del), where after stating this policy the court said that the offence cannot be dispensed of by warning under S. 3, Probation of Offenders Act.

79. AIR 1948 Cal 42.

80. *Registrar of Companies v. Suvaran Liners Ltd*, (1968) 63 Comp Cas 747 (Mad).

81. (1973) 2 SCC 796; (1973) 43 Comp Cas 514.

82. AIR 1961 SC 196; (1961) 1 SCR 801; (1961) 31 Comp Cas 1.

that the obligation is not excused by any default in calling the meeting. The difference between the two situations, as pointed out by the Supreme Court, is that while annual returns can be prepared independently of a meeting, the accounts have to be first laid before the meeting and then filed with the Registrar. Now the provision is that accounts have to be filed with the Registrar within 30 days from the latest day on or before which the annual meeting should have been held in accordance with the provisions of the Act. Thus accounts will have to be filed whether a meeting is held or not or whether the meeting does or does not adopt the accounts or is adjourned without adopting the balance sheet.⁹³

It has been held⁹⁴ that it would be no defence for a failure to file accounts that the "directors were not legally qualified under the articles of association to act as directors insomuch as they had no shares at all in the company or the requisite number of shares to qualify them as directors. A person who acts as a director cannot set up in answer to a penalty that he was not legally a director. He cannot protect himself from liability by saying "I am not a director *de jure*".⁹⁵ Similarly, it is no defence that the account books were seized by the police in connection with a criminal case⁹⁶ or that they were lying in a court.⁹⁷

The period of limitation for making a complaint, which is one year under Section 468(2)(b) CrPC, runs from the date on which the Registrar, in the usual course of things, comes to know of the default.⁹⁸ The Kerala High Court held that the offence is of a continuing nature and, therefore, every

93. *Registrar of Companies v Orissa Paper Products Ltd.*, (1988) 63 Comp Cas 460 (Ori).

94. *Tom Ram v Emperor*, AIR 1916 Lah 382; 34 IC 962. In this case the court cited and discussed the following cases: *Gibson v Barton*, (2675) LR 10 QB 329; *Catholic Life & Fire Assurance & Annuity Society* v. (1853) 48 LT 675 and *J.C. v Tyler and International Commercial Co.*, (1891) 2 QB 596; 45 LT 612 (C.A.), where it was said that penalty was not intended to be the equivalent for the omission to perform the duty, but as of such a nature that the company could by paying the penalty continue to neglect to perform the duty. See also, *Acharya Pal v Registrar of Companies*, (1965) 1 Comp L 101 (Ker).

95. Following further cases on the subject may be consulted: *V.K. Lakshminarayana Madhavar v Emperor*, AIR 1922 Mad 107; 198 IC 327; *Sudhir Das v Mahan Lal Saini*, AIR 1936 Cal 237; 162 IC 262; *Public Prosecutor v BVA Lucy Co Ltd*, (1951) 2 MLJ 482; AIR 1942 Mad 79; *Sundar Das v Emperor*, AIR 1929 Mad 83; *Chhawal Das v Emperor*, AIR 1914 Lah 125.

96. *Great India Steam Navigation Co Ltd v State*, (1967) 37 Comp Cas 155 (Cal).

97. *Ramkrishna & Sons (P) Ltd v State*, (1967) 2 Comp L 92 (All). For an enlightening view of the economic utility of disclosures, see, *Rita Kishore Dixen FoyleShiv Kumar Dalmia v Mangalore Manganese Industries (P) Ltd*, [1996] 86 Comp Cas 366; [1996] 7 Comp LJ 219 (MP). *Shree Hemavati Steel Rolling Mills v Registrar of Companies*, (1996) 2 Cal LJ 64, books of account seized by an investigating agency, failure to submit annual accounts not wilful, prosecution not warranted. *Anil Chellury v Registrar of Companies*, (1996) 24 103 542, dispute about access to books.

98. *Sukul Kumar Lohia v Registrar of Companies*, (1983) 50 Comp Cas 54 (Cal). The Assistant Registrar is also competent to file complaint. *Bhagirath Prasad Tewari v Registrar of Companies*, (1983) 53 Comp Cas 56 (Cal).

succeeding day of default would give start to a new period of limitation.⁹⁹ The Calcutta High Court had earlier differed. In its view there is only one offence and the period of limitation begins from the last day on which accounts should have been filed,¹⁰⁰ but now it has held that that decision is no longer a good law.¹⁰¹ According to the Kerala High Court the period of limitation starts running not from the date on which the accounts are filed but from the date on which the Registrar comes to know of the offence.¹⁰²

Waiver of penalty.—The tenor of the provisions relating to penalty shows that the statutory penalty is immediately payable without more on non-compliance. The ambit of the Registrar's discretion is clearly intended to be limited. He may decide not to recover the penalty in those exceptional cases where he considers that such a decision is conducive to achieve the broad object of the legislation of timely compliance of the specific task entrusted to him, namely the economic and efficient application and management of resources available for recovery of penalties. The schema of penalties has been held to be not violative of the Human Rights Convention because the penalties are of civil nature and not criminal and are also very modest. They are being imposed as sanctions for non-compliance with vital regulatory requirements to secure public interest.¹⁰³

Rectification of accounts

Where a company after filing original accounts, applied for permission to file revised accounts, the court said that companies are a creature of statute. Their existence and conduct is regulated by statute. There is no general inherent supervisory jurisdiction in the court in relation to the performance by the Registrar of Companies of his duties. There is at most a jurisdiction in the court to require the Registrar to comply with his statutory duties. The company was seeking the removal of extraneous material which the

99. *Sudarshan Chitr (India) Ltd v Registrar of Companies*, (1996) 39 Comp Cas 212 (Ker), and also *Shitali Ice Factory & Cold Storage (P) Ltd v Registrar of Companies*, (1988) 64 Comp Cas 113 (P&H). Other decisions to the same effect, *Bani Joseph v Registrar of Companies*, (1995) 1 KLT 14; *Orissa Coal Co v U Roy*, (1991) 1 Cal LJ 429.

100. *National Cotton Mills v Registrar of Companies*, 1982 CLT 1816 (1984) 55 Comp Cas 222 Overruling its own earlier decision in *Ajil Kumar Sekhar v Registrar of Companies*, (1979) 49 Comp Cas 909, 93 CWN 109. The preponderance of opinion is that the offence is of a continuing nature. *Registrar of Companies v Orissa Paper Products Ltd*, (1986) 63 Comp Cas 460 (Ori). For an explanation of the difference between a continuing and non-continuing offence, see, *CB Shandilya v President Food Inspector*, (1988) 63 Comp Cas 437 (Ker), and *v/s State of Bihar v Deukaran Mishra*, (1972) 2 SCC 696; 1972 SCC (Cri) 124.

101. *Laxmi Printing Works Ltd v Registrar of Companies*, (1991) 49 Comp Cas 442 (Cal). Since the default is visited by a day to day fine, this appears to be a continuing offence. The Division Bench of the Calcutta High Court, Madras High Court and Delhi High Court also supported this view. *Registrar of Companies v Premier Synthetics (P) Ltd*, (1997) 89 Comp Cas 232; (1997) 26 CLA 399 (Mad).

102. *Thomas Philip v Registrar of Companies*, (2006) 131 Comp Cas 842, 2006 CLC 975 (Ker).

103. *& for the application of Puri Trustee v Chief Executive and Registrar of Companies*, (2003) 2 HC 1.C 295 (QBD); *Rakesh Kumar v Registrar of Companies*, (1995) 62 Comp Cas 681 (P&H). *Jyeshtha & Mor v State of Gujarat*, (2000) 38 CLA 30; 2000 CEC 486 (Guj); the director in question had resigned before due date and form 32 had also been filed, he was not regarded as a person in default.

Registrar was not required by the statute to remove. For this purpose it was immaterial whether the extraneous material was contained in the body of the accounts or in the annexed papers. The court could not permit filing of revised accounts.¹⁰⁴

Internal audit (S. 138)

Prescribed class or classes of companies may be required to appoint an internal auditor. He has to be either a chartered accountant or a cost accountant or such other professional as may be decided by the Board. He has to conduct internal audit of the functions and activities of the company. The Central Government may make rules to prescribe the manner and intervals at which the internal audit is to be conducted and reported to the Board.

AUDIT

Appointment of auditors (S. 139)

Every company at its first AGM, has to appoint an individual or a firm as an auditor. Such appointee can hold office from the conclusion of the first AGM till the conclusion of its sixth AGM and afterwards till the conclusion of every sixth AGM. The manner and procedure of selection of auditors by the members of the company has to be according to what may be prescribed. The company has to place the matter relating to the appointment for ratification by members on every annual general meeting. It is necessary that written consent of the auditor is to be taken before he is appointed as such. A certificate has also to be taken from him that his appointment is in accordance with the prescribed rules. The certificate has also to indicate whether the auditor satisfies the criteria provided in Section 141 (qualifications of auditors). The company has to inform the auditor or the firm of the fact of appointment. The notice of such appointment has also to be sent to the Registrar within 15 days of the meeting in the prescribed manner. The Explanation appended to the section says that "appointment" is to include also reappointment.

Term of appointment (S. 139(2)).—A listed company or any other class or classes of companies as may be prescribed is not to appoint or reappoint an individual as an auditor for more than one term of five consecutive years and a firm of auditors for more than two terms of five consecutive years. An individual auditor who has completed his one term of five years is not to be eligible for reappointment in the same company for five years from the completion of his term. An audit firm which has a common partner or partners to another audit firm whose tenure has expired is also under the same disqualification. The requirement of this sub-section would have to be complied within three years from the date of commencement of the Act. The provisions of this sub-section are not to prejudice the right of the company to remove an auditor or that of the auditor to resign.

104. *A Company, re No 037466 of 2001), (2004); 1 W.L.R. 1357; 2004 EWHC 35 (Ch).*

Rotation of audit team officer [S. 139(3)].—The members of a company may resolve to provide that in the audit firm appointed by it, the auditing partner and his team is to be rotated at such intervals as may be resolved by members or that the audit is to be conducted by more than one auditor. The Central Government may by rules prescribe the manner in which the companies should rotate their auditors, under sub-section (2). For the purposes of the Chapter on auditors the word "firm" is to include limited liability partnership under the Limited Liability Partnership Act, 2008.

The first auditors of a company have to be appointed by the Board of directors within 30 days of registration of the company. If it fails to do so, it has to inform the members accordingly. The members will then at an extraordinary general meeting within 90 days appoint an auditor, who has to hold office till the conclusion of the first AGM. [S. 139(6)]

Auditor of Government company [S. 139(5)].—In the case of a Government company, the auditor is to be appointed by the Comptroller and Auditor General of India. A duly qualified auditor has to be appointed within 180 days from the commencement of the financial year. He has to hold office till the conclusion of the AGM. The first auditor is to be appointed by CAG within 60 days from the date of registration of the company. If CAG fails in this respect, the Board is to appoint the auditor within next 30 days and if the Board also fails to do so, it has to inform the members of the company who have to make the appointment within 60 days at an extraordinary general meeting. He will hold office till the conclusion of the first AGM.

Casual vacancy [S. 139(8)].—Any casual vacancy in the office of an auditor is to be filled by the Board of directors within 30 days. If such casual vacancy is caused by resignation of an auditor the appointment would have to be approved by the company in general meeting within three months of recommendation of the Board. He will hold office till the conclusion of the next AGM. Where the company's accounts have to be audited by CAG, the vacancy has to be filled by CAG within 30 days. If he fails to do so, the Board will fill the vacancy within the next 30 days.

Appointment of retiring auditor [S. 139(9)].—A retiring auditor may be reappointed at an AGM if he has not become disqualified, he has not informed the company of his unwillingness and a special resolution has not been passed at the meeting appointing another auditor or providing expressly that he is not to be reappointed. Where at any AGM, no auditor is appointed or reappointed, the existing auditor is to continue to be the auditor of the company.

Audit Committee [S. 139(11)].—Where the company is required to constitute an Audit Committee under Section 177, all appointments, including the filling of a casual vacancy, are to be made after taking into account the recommendations of such committee.

Removal and resignation of auditor [S. 140]

An auditor appointed under Section 139 may be removed from his office before the expiry of his term only by a special resolution after obtaining approval of the Central Government in the prescribed manner. The auditor has to be given a reasonable opportunity of being heard.¹⁰⁵ The auditor who has resigned has to file within 30 days from the date of resignation a statement in the prescribed form with the company and Registrar. In the case of companies coming under Section 139(5), [Govt Cos] the statement has to be filed with CAG indicating the reasons and other relevant facts with regard to his resignation. If he fails to comply with this requirement, he becomes punishable with fine for an amount not less than Rs 50,000 but may extend to Rs 5,00,000.

A special notice is required for a resolution at an AGM appointing as auditor a person other than the retiring auditor or providing expressly that a retiring auditor is not to be reappointed. This is not necessary where there has been completion of the term of 5 or 10 years, as the case may be. On receipt of a notice of resolution, the company has to forthwith send a copy to the retiring auditor. Where such notice is given and the retiring auditor makes a representation in writing to the company (not exceeding a reasonable length) and requests its notification to members of the company, the latter has to state in the notice of resolution that a representation has been received. A copy of the representation is to be sent to every member of the company. If the copy of the representation is not sent because it was received too late, or because of the company's default, the auditor may require the representation to be read at the meeting. This will not prejudice his right to make oral representation also. A copy of the representation which could not be sent to members, has to be filed with the Registrar. If an application is made to the Tribunal either by the company or any aggrieved person, and the Tribunal finds that the right is being unnecessarily abused, a copy of the representation need not be sent to the members nor read at the meeting.

Fraudulent conduct of auditor [S. 140(5)] — An application may be made to the Tribunal by the Central Government or by any person concerned or the Tribunal may act on its own motion and if it feels satisfied that the auditor of the company has, directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to the company or its directors or officers, it may order the company to change its auditor. If an application is made by the Central Government and the Tribunal is satisfied that any change of the auditor is required, it has, within 15 days, to make an order that he shall not function as an auditor and the Central Government may appoint another auditor in his place. Such auditor, whether individual or firm, becomes disqualified for five years and is also to be liable for the

105. *Basur Ram & Sons v Union of India*, (2004) 4 Comp LJ 55 (Del); the court is not likely to interfere without strong legal justification. *Basur Ram & Sons v Union of India*, (2002) 110 Comp Cas 38 (Jel), after approval of the Central Government, general body approval is necessary to make the removal effective.

Fraud under Section 447. In the case of firm, the liability is to be of the firm and that of every partner who acted in a fraudulent manner or abetted or colluded in fraud. For the purposes of the Chapter on auditors the word "auditor" includes a firm of auditors.

Eligibility, qualifications and disqualifications of auditors (S. 141)

A person is eligible for appointment as an auditor only if he is a chartered accountant. A firm whose majority of partners practising in India are qualified for appointment may be appointed by its firm name. Where a firm including a limited liability partnership is appointed as an auditor, only the partners who are chartered accountants would be authorised to act and sign on behalf of the firm.

Persons who are not eligible [S. 141(3)].—The following persons are not eligible for appointment: (i) a body corporate other than a limited liability partnership registered under the LLP Act, 2008; (ii) an officer or employee of the company; (iii) a person who is a partner, or who is in the employment of an officer or employee of the company; (iv) a person who, or his relative or partner (i) is holding any security or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company; a relative may hold security or interest in the company of the face value not exceeding one thousand rupees or such sums as may be prescribed; (ii) is indebted to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of such amount as may be prescribed; (iii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, for such sum as may be prescribed; (v) a person or a firm who, whether directly or indirectly, has business relationship with the company, or its subsidiary, or its holding or associate company or subsidiary of such holding company or associate company of such nature as may be prescribed; (vi) a person whose relative is a director or is in the employment of the company as a director or key managerial personnel; (vii) a person who is in full time employment elsewhere or a person or a partner of a firm holding employment as its auditor, if such person or partner is at the date of such appointment or reappointment holding appointment as auditor of more than 20 companies; (viii) a person who has been convicted by a court of an offence involving fraud and a period of 10 years has not elapsed from the date of such conviction; (ix) any person whose subsidiary or associate company or any other form of entity is engaged as on the date of appointment in consulting and specialised services as provided in Section 144 (auditors not to render certain services).

Vacation of office on disqualification [S. 141(4)].—Where any person appointed as an auditor of a company incurs any of the disqualifications mentioned in the section after his appointment, he has to vacate his office as auditor. Such vacation is deemed to be a casual vacancy in the office of the auditor.

Remuneration of auditors [S. 142]

The remuneration of auditors has to be fixed by the company in general meeting or in such manner as the general meeting may determine. The Board can fix the remuneration of the first auditor who is appointed by it. The remuneration so fixed is, in addition to the fee payable to an auditor to include the expenses, if any, incurred by him in connection with the audit of the company and any facility extended to him. It is not to include any remuneration paid to him for any other service rendered by him at the request of the company.

Powers and duties of auditors [S. 143]

Every auditor has the right of access to the books and accounts and vouchers of the company whether kept at the registered office or any other place. He may require from the officers any information he thinks necessary for the performance of his duties. The auditor has to inquire whether the loans and advances are properly secured, and their terms are not prejudicial to the company; whether the book-entry transactions are not prejudicial; whether the company is not an investment or a banking company and whether any securities have been sold by the company at a price less than that at which they were purchased; whether loans and advances have been shown as deposits, whether personal expenses have been charged to revenue account and whether cash has actually been received for shares shown to have been allotted for cash, and if no cash has been received, whether the position as stated in the books is correct. [S. 143(1)] The auditor of a company which is a holding company also has the right of access to the records of all its subsidiaries insofar as it relates to the consolidation of its financial statements with that of its subsidiaries.

The auditor has to submit a report to the members of the company. The report should state whether the accounts are kept in accordance with the provisions of the Act and whether they give a true and fair view of the state of affairs of the company.¹⁰⁶

Additional matters in auditor's report [S. 143(3)].—The auditor's report has also to state (a) whether he sought and obtained all the information and explanations which to the best of his knowledge and belief were necessary for his audit and, if not, what were the missing details and their effect on financial statements; (b) whether proper books of account were kept by the company and proper returns adequate for his audit were received from branches not visited by him; (c) whether a report on the accounts of a branch office audited by another auditor has been given to him and in what manner the report was prepared; (d) whether the company's balance sheet and profit and loss account were in agreement with the books of account; (e) whether the financial statements comply with the accounting standards; (f) observation or comments of the auditors on financial transactions had

106. *Thomas Gerrard & Sons v. M.*, 1968 Ch 455; (1967) 3 WLR 84, "the scheme of the Act is that director have to prepare accounts, auditor's must make a report to the members on the accounts; the report must contain statements on certain specified matters."

any adverse effect on functioning of the company; (g) whether any director is disqualified from being appointed as a director under Section 164(2); (h) any qualification, reservation or adverse remark relating to maintenance of accounts and other connected matters; (i) whether the company has functioning adequate internal financial controls system; (j) any other matters as may be prescribed.

Government companies [S. 143(5)].—In the case of a Government company, the auditor has to be appointed by the Comptroller and Auditor General of India under Section 139(5) or (7). He has to direct the auditor the manner in which the accounts of a Government company are required to be audited. The auditor has to submit his report to CAG. Within 60 days of the receipt of the report the CAG may get a supplementary audit to be conducted by a person or persons he may authorise and may seek additional information. The CAG may present his own comments upon the supplementary report or supplement it. Any such comments or supplement have to be sent by the company to every person entitled to copies of audited financial statements and are also to be placed before the AGM of the company along with the audit report. The CAG may conduct even a test audit. He can use for this purpose his statutory powers under Section 19-A, CAG's (Duties, Powers and Conditions of Service) Act, 1971.

Audit of branch office accounts [S. 143(8)].—Where a company has a branch office including foreign branch, its accounts will be audited either by the auditor appointed by the company or by any other qualified person. He has to submit his report to the company's auditor.

Auditing standards [S. 143(9)].—Every auditor has to comply with auditing standards. The Central Government may prescribe the standards of auditing as recommended by the Institute of Chartered Accountants in consultation with and after examining the recommendations of National Financial Reporting Authority. The auditor can be required to report on other matters also which may be specified in respect of such class or description of companies as may be specified by the Central Government in consultation with the National Financial Reporting Authority. [Sub-s (11)]

Where an auditor has a reason to believe that an offence involving fraud is being or has been committed against the company by any officer or employee, he has to report immediately the matter to the Central Government.

The provisions of the section are to apply mutatis mutandis to the cost accountant in practice conducting secretarial cost audit under Section 148 and the company secretary in practice conducting secretarial audit under Section 204. [Sub-s (14)]

His duty is not to confine himself merely to the task of verifying the arithmetical accuracy of the balance sheet, but to inquire into its substantial accuracy. Thus, where an auditor failed to verify the cash balance claimed by the management and the actual cash in hand turned out to be much less than was shown in the books, he was held to be guilty of neglect of duty.²⁷

27. *Govt of India v S N Das Gupta*, AIR 1986 Cal 414.

In matters of technical nature, for example, the valuation of stock-in-trade, the auditor may rely on a skilled person and was held not liable when he relied upon the manager of a cotton mill, unless there was suspicion of something wrong.¹⁰⁸

Secondly, the auditor must exercise reasonable care and skill in the discharge of his duty. The auditor "is a watchdog, but not a bloodhound."¹⁰⁹ "He is not an insurer." If the company owns securities the auditor should see that they are in proper custody. Thus, where the stock brokers of a company certified to its auditors that they were holding the company's securities when in fact they did not do so and the company suffered loss, the auditors were held guilty of negligence. They should have at once reported the matter to the shareholders.¹¹⁰ Similarly, where the auditors failed to ask of the directors as to why a selling agency commission paid to managing agents was not included in their remuneration¹¹¹ and where they confidentially told the directors that the securities were inadequate and told the shareholders only this that the value of the assets depended upon realisation, they were held liable.¹¹²

If they approve of accounts showing false income, they will be liable for the extra income tax that company had to pay, or for dividends paid on the basis of such accounts.¹¹³

Auditors are under no responsibility to persons other than shareholders unless they undertake any such duty under a contract with them, should they be misled by any error in the audited accounts.¹¹⁴ [Sub-s (12-13)]

Penal provision [S. 143(15)].—If any auditor, cost accountant or company secretary in practice does not comply with the provisions of sub-section (12), he is punishable with fine of not less than Rs 1,00,000 but extending to Rs 25,00,000.

Auditor not to render certain services [S. 144]

An auditor appointed under the Act can provide to the company only such other services as are approved by the Board of directors or the Audit Committee. He cannot render any of the following services whether rendered directly or indirectly to the company or its holding company or subsidiary company, namely, (a) accounting and bookkeeping services; (b) internal audit; (c) design and implementation of any financial information systems; (d) actuarial services; (e) investment advisory services; (f) investment banking services; (g) rendering of outsourced financial services; (h) management services; and (i) any other kind of services as may be prescribed.

108. *Kingsgate Cotton Mills Co (No. 2), re* (1891) 2 Ch 279; 74 LT 568 (CA).

109. *Leeds L.J. in Kingsgate Cotton Mills Co (No. 2), re*, (1896) 2 Ch 279; 74 LT 568 (CA).

110. *City Equitable Fire Insurance Co, re*, 1925 Ch 402; 173 LT 520 (CA).

111. *S. Generale v A.K. Jardine*, AIR 1967 Cal 133; (1957) 27 Comp Cas 129.

112. *London & General Bank (No. 2), re*, (1895) 2 Ch 673; (1895-99) All ER 953 (CA); 73 LT 301.

113. *Thomas Gerrard & Sons Ltd, re*, 1968 Ch 455; (1967) 3 WLR 84.

114. *Cayzer Industries plc v Dickman*, 1989 QB 653; (1989) 2 WLR 316 (CA).

An auditor or audit firm in performance of any non-audit services before commencement of the Act are required to comply with the provisions of the section before the close of the first financial year after the commencement.

The Explanation to the section provides that the terms "directly or indirectly" are to include rendering of services by the auditor (i) in the case of auditor being an individual, either himself or through his relative or any other person connected or associated with such individual or through any other entity, whatsoever in which such individual has significant influence or control or whose name or trade mark or brand is used by such individual; (ii) in the case of an auditor being a firm, either itself or through any of its partners or through its parent, subsidiary or associate entity, or through any other entity whatsoever, in which the firm or any partner of the firm has significant influence or control, or whose name or trade mark or brand is used by the firm or any of its partner.

Auditor to sign audit reports, etc [S. 145]

The person appointed as an auditor has to sign his report or sign or certify any other document of the company in accordance with the provisions of Section 141(2). The qualifications, observations or comments on financial transactions or matters in the auditor's report have to be read before the company in general meeting and is to be open to inspection by any member of the company.

Auditors to attend general meeting [S. 146]

All notices of and communications relating to any general meeting have to be forwarded to the auditor of the company. The auditor has either himself or through authorised representative, who should also be qualified as an auditor, has to attend any general meeting and is to be heard at it on any part of the business which concerns him as the auditor.

Punishment for contravention [S. 147]

Contravention of any of the provisions of Sections 139 to 146 makes the company punishable with a fine not to be less than Rs 25,000 but may extend to Rs 5,00,000. Every defaulting officer is punishable with imprisonment for a term extending to one year or fine of not less than Rs 10,000 but may extend to Rs 10,00,000 or with both.

If an auditor of a company contravenes any of the provisions of Section 139, Section 143, Section 144 or Section 145 he is punishable with fine of not less than Rs 25,000 but extending to Rs 5,00,000. If an auditor contravenes these provisions knowingly, or wilfully with the intention to deceive the company, its shareholders, creditors or tax authorities, he gets the more extensive punishment of imprisonment for a term extending up to one year and fine of an amount not less than Rs 1,00,000 but extending to Rs 25,00,000. The conviction of an auditor under this provision makes him liable to refund the remuneration received by him and to pay damages to the company, statutory bodies or authorities or any other person for any loss arising out of incorrect or misleading statements of particulars in his report.

The Central Government is required to specify by notification any statutory body or authority or an officer for ensuring prompt payment of damages to the company and others entitled to such claim. The body so constituted has, after payment of compensation to the claimant, to file a report with the Central Government in the prescribed manner.

In the case of an audit firm acting in a fraudulent manner, the liability is that of the partners and firm jointly and severally.

Auditors' duty of care

Position of auditors.—Explaining the position of auditors Chakravarti C) of the Calcutta High Court said:¹¹³

A joint stock company carries on business with capital furnished by persons who buy its shares. The owners of the capital are, however, not in direct control of its application which is left to the executive of the company. In those circumstances, some arrangement is obviously called for by which those who provide the capital know periodically what is being done with their money, how the affairs of the company stand and what the present value of their investment is. The Companies Act, therefore, provides for the employment of an auditor who is the servant of the shareholders and whose duty is to examine the affairs of the company on their behalf at the end of a year and report to them what he has found. That examination by an independent agency such as the auditor is practically the only safeguard which the shareholders have against the enterprise being carried on in an unbusiness like way or their money being misappropriated without their knowing anything about it. The Act provides the safeguard in two forms. It makes the duty of the auditor to give an expression of opinion on certain specified matters of a vital character and it makes him liable, along with the directors, for misfeasance, if he fails to perform his duties as required by law and the approved audit procedure.

Thus the auditors owe a number of duties to the company and its shareholders. The foremost among them is to check the accuracy of accounts but his duty is "not to confine himself merely to the task of verifying the arithmetical accuracy of the balance sheet, but to inquire into its substantial accuracy, and to ascertain that it was properly drawn up, so as to contain a true and correct representation of the state of the company's affairs".¹¹⁴ They should not act merely as mechanical adder-uppers and subtractors.¹¹⁵ Thus, where an auditor of a banking company failed to verify the cash balance claimed by the management and the actual cash in hand turned out to be

113. *Sury v SN Das Gupta*, (1955) 25 Comp Cas 412; AIR 1956 Cal 414, 60 CWN 124.

114. See, *Sterling Inc.] in Lord's Estate Building and Investment Co v Shepherd*, (1887) 12 36 Ch D 292, 602-57 LT 684. See also, *Ricard L, Lumière & General Bank, No 2, 16*, (1995) 2 CL 673, 692-73 LT 314; (1995) 47 A.I.R. 955 (CA).

115. See, *L. Donnison in Fawcett v Sterling Alizaj Ltd v Srishti Foundation (Pvt) Ltd*, (1956) 1 All ER 11, 23.

much less than was shown in the books, he was held guilty of neglect of duty.¹¹⁸ The court said:

A certificate from the management can obviously be no substitute for such verification. The whole object of an audit is an examination of what the management have done and if the statements of the very persons who constitute the management were to be accepted in all matters, even in matters capable of direct verification, an audit would be an idle farce.¹¹⁹

But in certain matters of technical nature, for example, valuation of stock-in-trade, the auditor will have to rely on some skilled person. Accordingly, an auditor could not be held guilty of breach of duty when, in the absence of suspicious circumstances, he relied for this purpose on the manager of a cotton mill.¹²⁰

Where the accountants assisted the directors in connection with the preparation of a circular for rights issue, they were held not liable to shareholders for statements made to the directors in respect of profit forecasts.¹²¹ An action against auditors for negligence could not succeed though the investor relied on the audited accounts and also on informal discussions with the auditors. There was insufficient evidence to show that the accountants had assumed any duty towards the particular investor.¹²²

Standard of care and skill. Secondly, it has always been the law that an auditor must exercise reasonable care and skill in the discharge of his duty.¹²³ Referring to this duty ROMER J said in *City Equitable Fire Insurance Co, re*:¹²⁴

... He must be honest, i.e., he must not certify what he does not believe to be true and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient. Where suspicion is aroused more care is obviously necessary, but, still an auditor is not bound to exercise more than reasonable care and skill even in a case of suspicion and he is perfectly justified in acting on the opinion of an expert where special knowledge is required.

In another case LOPES LJ said: "He (the auditor), is a watchdog, but not a bloodhound."¹²⁵ "He is not an insurer."¹²⁶

118. *Saty v SN Das Gupta*, (1966) 75 Comp Cas 413; AIR 1966 Cal 404; 41 CWN 12d.

119. Quoting ROMER J in *City Equitable Fire Insurance Co, re*, 1925 Ch 407; 133 LT 520 (CA).

120. *Kingston Cotton Mills Co (No. 2)*, re, (1896) 7 Ch 279; 74 LT 568 (CA); see, the judgment of LINDBAY LJ at pp 285-6; *Cloud Thomas Gerrard & Sons Ltd, re*, 1963 Ch 455; (1967) 5 WLR 84.

121. *Abbott v Strong*, (1998) 2 BCILC 420 (CH D).

122. *Electro Private Equity Partners v KPMG Peat Marwick*, 1998 PNLR 135.

123. QUINN (LAW) J in *Thomas Gerrard & Sons Ltd, re*, 1963 Ch 455; (1967) 5 WLR 84.

124. *City Equitable Fire Insurance Co, re*, 1925 Ch 407; 133 LT 520 (CA).

125. *Kingston Cotton Mills Co (No. 2)*, re, (1896) 7 Ch 279; 74 LT 568 (CA).

126. ROMER J in *City Equitable Fire Insurance Co, re*, 1925 Ch 407; 133 LT 520 (CA).

If the company owns securities the auditor should see that they are in proper custody. "He should not be content with a certificate that securities are in the possession of a particular company, firm or person unless the company, etc, is trustworthy, or is respectable and further is one that in the ordinary course of business keeps securities for its customers."¹²⁷ Thus, where the stockbrokers of a company certified to its auditors that they were holding the company's securities, when in fact they did not do so and the company suffered loss, the auditors were held guilty of negligence. They should have at once set the matter right or reported it to the shareholders.¹²⁸ Similarly, in a case before the Calcutta High Court¹²⁹

The auditor of a company found that the accounts presented by the directors showed that selling agency commission was paid to the managing agents in addition to their remuneration, but was not included in remuneration, nor was it shown as an item of expenditure, but was deducted from the sale proceeds of the goods sold by them.

CHAKRAVERTI CJ held that the auditor ought to have required the directors to explain why the selling agency commission was not included in remuneration and whether a special resolution had been passed to authorise the payment of a separate commission. "His failure to ask for such information betrays negligence in the performance of his duties."

An auditor is, however, not concerned with the policy of the company. In the words of LINCOLN LJ:¹³⁰

It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit....

On the facts of the case, however, the auditor was held guilty of breach of duty. He presented a confidential report to the directors calling their attention to the insufficiency of the securities on which the capital of the company was invested, and the difficulty of realising them. But his report to the shareholders merely stated that the value of the assets was dependent on realisation. As a result the shareholders were deceived as to the condition of the company and a dividend was declared out of the capital and not out of income. It was held that the auditor was guilty of misfeasance and was

¹²⁷ *Ibid.*

¹²⁸ City Equitable Fire Insurance Co. v. 1925 Ch 407; 135 LT 520 (CA), but the auditors were protected from liability under special provisions of the company's articles.

¹²⁹ S. Genesis v AK Jacobine, AIR 1957 Cal 33; (1957) 25 Comp Cas 314.

¹³⁰ London & General Bank, (No 2), m, (1876) 2 Ch 673; 73 LT 304; (1875-99) AD ER 953 (CA).

liable to make good the amount of dividend paid. But his liability does not end there. He would also be liable for the costs of recovering the extra tax, if any, which has been paid on the basis of the false accounts and also for any of the extra tax which is not recoverable.¹³¹

Duty to company and to third parties.—The traditional concept of auditors' duty has been that they owe their duty to the company and the company only. This concept was fortified by the judgment of Cardozo CJ in *Ultramarine Carriers v Touche*.¹³²

The defendants, a firm of public accountants, were employed by a company to prepare and certify a balance sheet of the company. The company, to the knowledge of the accountants, had borrowed large sums of money from banks and other lenders. They also knew that their certified balance sheet would be exhibited to other lenders to induce them to lend money. Accordingly, when the balance sheet was made up, it was shown to the plaintiffs, who, acting on the faith of it, lent and lost huge sums of money.

The court found that there was evidence of negligence by the defendants in making their report but held that this would not make them liable to the plaintiffs. Cardozo CJ said:

The defendants owed to their employer a duty imposed by law to make their certificate without fraud, and a duty growing out of contract to make it with the care and caution proper to their calling. Fraud includes pretence of knowledge when knowledge there is none. To creditors and investors to whom the employer exhibited the certificate, the defendants owed a like duty to make it without fraud. A different question develops when we ask whether they owed a duty to them to make it without negligence. If liability for negligence exists, a thoughtless slip or blunder: the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.

It means that nothing less than a fraudulent report will make an auditor liable to an outsider who has been deceived by it. Fraud must be proved in the terms of its definition as laid down by Lord Herschell in *Derry v Peek*.¹³³ A negligent misstatement is not the same thing as fraud. This has been pointed out by the court of appeal in *Candler v Cram, Chisholm & Co*.¹³⁴

The plaintiff, who desired to invest £2000 in a limited liability company, was put in touch with the company's accountants by the manager. The accountants knew that the plaintiff was a potential investor. They

131. *Thomas Gerald & Sons Ltd. v. 1968 (Ch) 488; (1969) 3 WLR 84.*

132. (1930) 235 NY Rep 120. Reported in *Tunstall and Seavy, Cases on Torts*, (1942) 757 and cited in *Candler v Cram, Chisholm & Co.* (1951) 2 KB 164.

133. (1889) 14 AC 337 (1 IL).

134. (1951) 2 KB 164; (1951) 1 All ER 426.

prepared and showed the accounts to the plaintiff and also talked with him. The plaintiff invested his money in the company. The accounts were carelessly prepared, contained numerous false statements and gave a wholly misleading picture of the state of the company, which was wound up within a year, the plaintiff losing the whole of his investment.

Even so it was held by a majority that the accountants were not liable to the plaintiff. Their Lordships said that a false statement, carelessly, as contrasted with fraudulently, made by one person to another, through acted on by that other to his detriment, was not actionable in the absence of any contractual or fiduciary relationship between the parties. Denning LJ in his dissenting opinion observed:

I think that the law would fail to serve the best interests of the community if it should hold that accountants and auditors owe a duty to no one but their client . . . The accountant, who certifies the accounts of his client, is always called on to express his personal opinion as to whether the accounts exhibit a true and correct view of his client's affairs; and he is required to do this, not so much for the satisfaction of his own client, but more for the guidance of shareholders, investors, revenue authorities, and others who have to rely on the accounts in serious matters of business. (Yet) the persons who are misled cannot complain because the accountants owe no duty to them. If such be the law, I think it is to be regretted, for it means that the accountant's certificate, which should be a safeguard, becomes a snare for those who rely on it. In my opinion accountants owe a duty of care not only to their clients, but also to those whom they know will rely on their accounts in the transactions for which those accounts are prepared.

The decision in *Coniller v Crane, Christmas & Co* has been overruled by the House of Lords in *Healey Byrne & Co Ltd v Heller & Partners Ltd*.¹³⁵

Here a firm of advertising agents had lost a huge sum of money by placing advertising orders for a company. They asked their bankers to inquire into the company's financial stability and their bankers made inquiries of the respondents, who were the company's bankers. The respondents gave favourable reference but stipulated that these were "without responsibility". In reliance on those references the appellants placed orders which resulted in the loss.

The bankers would have been held liable but for the express disclaimer of responsibility. Lord Morris explained the principle thus:

I consider that it should now be considered as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply his skill for the assistance of another person who relies upon such skill, a duty of care will arise. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment

¹³⁵ 1964 AC 465 (1963) 3 WLR 101.

or his skill or upon his ability to make a careful inquiry or a person takes upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.

There is a wind of change in the United States also. For example, it was observed in *Texas Tunneling Co v. City of Chattanooga*,¹³⁶ "that there have been significant changes in the American society during the thirty years that have elapsed since the decision in the *Ultramarine* case. The continued growth and expansion of industry, the growth of population, the urbanization of society, the growing complexity of business relations and the growing specialization of business functions all require more and more reliance in business transactions upon the representation of specialists."¹³⁷

The principle of the *Hedley Byrne* case has been followed by the Canadian Court in *Hay v. Bromford*¹³⁸ where an auditor, who issued a certificate without verification, was held liable to a person who was misled by the certificate.¹³⁹ A similar liability has been imposed upon an auditor who participated in the negotiations for the sale of a company's shares on the basis of the balance sheet audited and certified by him. The value thus determined turned out to be unreal because the balance sheet was not satisfactory. The court emphasised that if the auditor had not participated in the negotiations, the result would have been different.¹⁴⁰

Where an auditor is appointed to check the accounts of the Employees' Provident Fund maintained by a company, he owes his duty not merely to the company, but also to the beneficiaries of the fund and will be responsible to them for professional misconduct if he fails to report that the trustees have allowed irregular loans to the company out of the fund.¹⁴¹ If this were not so, the accountants and auditors could as well say: "You may inspect the accounts ... of X Company Ltd, but do not expect these documents to have been prepared with any degree of skill or care." "It is our view that

136. 204 F Supp 821 (1962) (S.D. Tenn 1962), reversed in 329 F 2d 402 (6th cir 1964). Borrowed from 1966 JAF 140.

137. See, Edwin J. Bradley, "Liability to Third Persons for Negligent Audit" (1966) JBL 190; Seavey, "Candler v Crane, Christmas & Co. Negligent Misrepresentation by Accountants" (1971) 67 TQR 466; "Accountants' Liabilities for False and Misleading Statements" (1967) 67 Colum L Rev 1037; Michael Dean, "Hedley Byrne and the Fاجر Business Man" (1968) 31 Mod LR 322 and 1967 JBL 359; R. Baxt, "The Modern Company Auditor: A Nineteenth Century Watchdog" (1970) 33 Mod LR 413 and "True and Fair Accounts—A Legal Anachronism" (1970) 14 Aus J 541.

138. (1972) 32 DLR (3d) 67 (Can) Socit Q. B. noted, Current Law, June, 1973.

139. All such cases have been analysed by R. Baxt, "The Liability of Accountants and Auditors for Negligent Statements in Company Accounts" (1973) 36 Mod LR 42. See further *Avenson v. Casson, Beckman, Ridley & Co*, 1977 AC 405; (1975) 3 WLR 815 and *Esso Petroleum Co Ltd v. Mardon*, 1976 QB 801; (1976) 2 WLR 583.

140. *Diamond Mfg Co (2d) v. Hamilton*, 1968 NJ21 Jr 71E, considered, R. Baxt, "Negligent Statement in Company Accounts" (1973) 36 Mod LR 47. A similar liability has been imposed in *Avenson v. Casson, Beckman, Ridley & Co*, 1977 AC 405; (1975) 3 WLR 815; (1975) 3 All ER 901.

141. *Federation of Chartered Accountants of India v. P.K. Mukherjee*, (1968) 2 Comp LJ 212. (1968) 38 Comp Cas 628.

the auditor or accountant owes a duty of care to the investor, creditor, and others to prepare proper audits or accounts.¹⁴²

A Civil Aviation Authority was refusing to renew the air travel company's licence due to unsatisfactory financial position unless certain confirmations were given by the auditors in their final report as to the finances of the company. The auditors submitted the requisite information to the Authority. The company collapsed. The accounts were negligently prepared. The Authority's claim against the auditors was allowed as they had assumed responsibility towards the Authority for exercising due care and caution in preparing the company's accounts.¹⁴³

Duty in connection with takeover. A three-point formula has been propounded by the Court of Appeal in England¹⁴⁴ on the auditor's duty to the investing public. The court said that in determining the auditor's duty of care to those relying on accounts audited by him, it must be shown that—

1. It was foreseeable that the persons relying on the accounts would suffer harm if the auditor was negligent.
2. The auditor and the user of the accounts stood in a relationship of sufficient proximity.
3. The circumstances made it just and reasonable to impose such a duty on the auditor.

One company was taking over another company. It relied upon the company's audited accounts and suffered loss because there was a negligent inaccuracy in the accounts. The plaintiff company was a shareholder of the other company and was also a potential investor. The court readily conceded that it was foreseeable that the shareholders of the company would suffer economic loss if the auditors were negligent in the matter of the company's accounts. Since they stand between the company and the shareholders and make their report to the shareholders, they owe a responsibility to the individual shareholders so as to put the auditors under a duty of care towards them and there was nothing to make it unfair or unreasonable to impose a duty of care on the auditors towards the investing shareholders of the company, but that there was no such duty towards the non-shareholders who relied on audited accounts to buy the shares of the company under takeover.

Stressing this point again in a subsequent case, Horwax J said:¹⁴⁵

The directors and financial advisers of the target company in a contested takeover bid owe no duty of care to a known takeover bidder regarding the accuracy of profit forecasts, financial statements and

142. For liability in respect of financial statements, see, *Korean Asian Bank Ltd v National Mutual Life Insurance Ltd*, (1991) 1 AC 187 (1990) 3 WLR 297 (1990) 3 All ER 404 (PC).

143. *Andrew v Kavvounis Freeman*, (1996) 2 BCLC 601 (CA).

144. *Cupra Industries plc v Dickson*, 1959 QB 653; (1989) 2 WLR 316 (CA), on appeal from *Cupra Industries plc v Dickson*, 1968 BCLC 387 (QB).

145. *Morgan Crucible Cupra v IBM General Bank Ltd*, 1991 Ch 295; (1991) 2 WLR 625 (1991) 1 All ER 148.

defence documents prepared for the purpose of contesting the bid since the reason such documents are prepared is to advise the shareholders of the target company whether to accept the bid and they are not meant for the guidance of bidders. Accordingly, there does not exist sufficient proximity between the directors and financial advisers of the target company and the bidder to give rise to a duty of care.

It was, therefore, held that the defendants did not owe any duty of care to the plaintiff to ensure that pre-bid financial statements and the profit forecast were accurate. At the time that the plaintiff announced the take-over bid for another company, the recently published financial statements of the company were its reports and accounts for the years 1984 and 1985 which had been audited by a firm of accountants and an unaudited interim statement for six months. These statements were cited in all the circulars sent to the shareholders for their guidance. Another circular forecast a 38 per cent increase in profits in the year up to 31 January 1986. This document included a letter from the accountants stating that it had been properly compiled in accordance with the company's accounting policies and a letter from the bank expressing the opinion that the forecast had been made after due and careful inquiry. On this basis the shareholders were advised not to accept the proposed bid. The plaintiff then increased the bid-amount and the same was recommended to the shareholders and accepted by them. Subsequently it was discovered that the accounting policy adopted in the pre-bid financial statement and the profit forecast were negligently misleading and had the effect of grossly overstating the profits and that the company was worthless at the time the bid was made with the result that if the plaintiff had known the true facts, it would never have made the bid, let alone increased it. But even so those who prepared the statements from the company's side for the guidance of its shareholders were held not liable to the plaintiff.¹⁴⁶

Where the audit partner of a firm of accountants expressly vouched for a set of accounts which his firm had audited, the firm would be liable in negligence if those accounts were defective. It was a known fact that the bid would not proceed unless this undertaking that the accounts were true and fair was given.¹⁴⁷

The duty of an auditor of a subsidiary company to its holding company was explained in *Baring plc v Cooper & Lybrand*.¹⁴⁸ The court was of the view that there is no legal principle that a holding company is not entitled to recover damages for loss in the value of its subsidiary resulting directly from a breach of duty owed to the company itself as distinct from the duty owed to the subsidiary. The auditors of the subsidiary are supposed to be

146. The court referred to *Capure Industries plc v Blackwell*, (1990) 2 AC 605, (1990) 2 WLR 368; 1990 BCLC 273 (ELL). For a further survey of cases on the subject of responsibility for financial statements, see, *Kuwait Asian Bank FC v National Mutual Life Insurance Co*, (1991) 1 AC 187; (1990) 3 WLR 297; (1990) 3 All ER 404 (PC).

147. *JOV (I) Ltd v RDI Binder Hamlyn*, 1996 BCLC 908.

148. (1997) 1 BCLC 427 (CA).

aware of the fact that their duty to see the true and fair aspect of the subsidiary's accounts and their report on it is the only basis on which the true and fair view of all the companies in the group (consolidated group accounts) would be ensured. Thus the holding company had the direct right of action against the subsidiary's auditors for their failure to detect a dealer's fraud.¹⁴⁹

Default in disclosing fraud.—The auditors of a company discovered that a senior employee had been defrauding the company at a grand scale and that he was in a position to go on doing so. The court said that in such a situation it would be the auditors' duty to report the matter to the company's management and not to postpone it till they submit their report.¹⁵⁰

Liability for fraudulent misrepresentation.—The liability for fraudulent misrepresentation was explained by Cardozo C.J. in these words:¹⁵¹

Accountants may, however, be liable to third parties even where there is lacking deliberate or active fraud. A representation certified as true to the knowledge of the accountants when knowledge there is none, a reckless misstatement, or an opinion based on grounds so flimsy as to lead to the conclusion that there was no genuine belief in its truth, are all sufficient upon which to base liability. A refusal to see the obvious, a failure to investigate the doubtful if sufficiently gross, may furnish evidence leading to an inference of fraud.¹⁵²

Accountants' lien

It has been held that an accountant, like a solicitor, is not entitled to exercise a lien over the books and documents of a registered company which are required to be kept at a particular place and made available for inspection. The expression "books of account" would include accounting records such as sale and purchase invoices, cheque books, pay in books and bank statements.¹⁵³

Audit of cost accounts [S. 148]

Certain companies engaged in production of goods or provision of services may be directed by the Central Government that particulars relating to utilisation of material or labour or other prescribed items of cost are also to be included in the books of account kept by such companies. They have to be prescribed by the Central Government. Cost items have also to be prescribed. If the order relates to any class of companies which are regulated under a special Act, the Central Government has to consult the Regulatory Body under that Act before issuing an order as to cost accounts. The Central

149. The court followed the principle laid down in *George Fischer (Great Britain) Ltd v Mahrni Construction Ltd*, (1958) 1 BCLC 261.

150. *Saxer Finance Ltd v KPMG*, (2000) 1 All ER 676 (CA); *Law Society v KPMG Peer Marwick*, (2000) 1 WLR 1921; (2000) 1 All ER 515.

151. *Ullmanns Corp v Tuchols*, (1931) 235 NY Rep 120.

152. For an account of such liability, see: Jon H. Holbrook, "Accountancy and Negligence" (1986) 7BL 120.

153. *DJK (CNC) Ltd v Gury Sargent & Co*, (1996) 1 BCLC 529 (Ch D).

Government may link its order to the prescribed net worth of the company or turnover. The audit has to be conducted by a cost accountant in practice. He has to be appointed by the Board with remuneration fixed by members. The auditor of the company cannot be given the task of cost audit. The cost accountant has to comply with cost auditing standards, which means standards as are issued by the Institute of Cost and Works Accountants of India (Act of 1959). This audit is in addition to the regular audit. The matters relating to regular auditors as to their duties, etc., are applicable to cost auditors also. The company has to give all assistance and facilities to the cost auditors for auditing the cost records of the company. He has to submit his report to the Board of directors. Within 30 days of receiving the report, its copy has to be furnished to the Central Government along with full information and explanation on every reservation or qualification contained in it. If the Government feels that some further information and explanation is necessary, it may call it, and the company has to furnish within the time permitted by the Government. The default, if any, in complying with the provisions of the section makes the company and every defaulting officer punishable under Section 147(1). The cost auditor in default is punishable under Section 147(2) to (4).

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online™, along with updates, articles, videos, blogs and a host of different resources.



The following cases from this chapter are available through EBC Explorer™:

- *Ilaamuram Prasad Gupta v Hirwai*, (1966) 2 Comp LJ 136 (All)
- *State of Bihar v Rundhut Ram Bhandari*, AER 1961 SC 186; (1961) 1 SCR 801; (1961) 31 Comp Cas I
- *Tin Plate Dealers Assn (P) Ltd v Satish Chandra Samanta*, (2016) 10 SCC 1; (2016) 199 Comp Cas 205
- *Wood v Odessa Waterworks Co*, (1889) 42 Ch D 696



Chapter 13

Borrowing, Lending, Investments and Contracts

BORROWING

A company cannot borrow money unless it is so authorised by its memorandum. In the case of a trading company, it is not, however, necessary that the objects clause of its memorandum should expressly authorise it to borrow. As borrowing is incidental to trading, such a company has implied power to borrow.¹ Other companies must have a borrowing power clearly specified in the memorandum.

Consequences of unauthorised borrowing

Borrowing without express or implied authority is *ultra vires*. The consequences of such a borrowing as worked out in various cases are as follows:

1. No loan.—In the first place, an *ultra vires* lender has no legal or equitable debt against the company. Consequently he cannot sue the company to recover his loan.² *Ultra vires* borrowings are forbidden on grounds of public policy. To allow such borrowing to be recovered would be an evasion of that policy.³

2. Injunction.—But if the money advanced to the company has not been spent, the lender may by means of an injunction restrain the company from parting with it.⁴

1. See, Memorandum of Association, Objects Clause, a/c, and Subscriptions Ltd (No 2), re, 1970 Ch 159; (1960) 2 WLR 791; (1969) 1 All ER 687; (1968) 2 Comp L 28 (CA).

2. This was so held in *Agarwal Pyramidal Kewali Building Society, A/c v Williamson*, (1869) LR 5 Ch App 309 and followed by the Madras High Court in *Madras Native Permanent Fund Ltd, re*, (1931) 60 MlJ 270, where at p. 273 the court said: "ultra vires loans are void and in truth have no existence. They do not create the relationship of creditor and debtor."

3. See, *Sinclair v Brongiarmi*, 1914 AC 368; 311 LT 1; 53 LJ Ch 465; 30 TLR 313.

4. The reason for this rule is that the loan is *ultra vires*, the company, therefore, does not become the owner of that money. The lender continues to be the owner and he has the right to take back the property as per.



CASE PILOT

3. Subrogation.—Where the money of an *ultra vires* lender has been used to pay off lawful debts of the company, he would be subrogated to the position of the debtor paid off and to that extent would have the right to recover his loan from the company.⁵ Subrogation is allowed for the simple reason that when a lawful debt has been paid off with an *ultra vires* loan, the total indebtedness of the company remains the same. By subrogating the *ultra vires* lender, the courts are able to protect him from loss, while the debt burden of the company is in no way increased.

But the subrogated creditor will not enjoy the priority of the original creditor. The best illustration is *Wrexham, Mold & Connah's Quay Railway Co Ltd*, re⁶:

A company had borrowed to the full extent of its powers by issuing three different series of debentures, A, B and C. A had priority over B and B over C. The company took a fresh *ultra vires* loan from the plaintiff to pay interest on A debentures. It was held that to the extent to which the plaintiff's money was used to pay off legal debts, he became a legal creditor, but he was not entitled to the priority of A debentures.

4. Identification and tracing.—Fourthly, as long as the money of the lender is in the hands of the company in its original form or its products are still capable of identification, he may claim that money or its products. But the problem is much more difficult when the lender's money and that of the company have become mixed up. There is only a common fund composed of the lender's money and the company's money, but no part of it is traceable as belonging to one or the other. In such a case the lender may perhaps be helpless. But in the winding up of the company he may claim *pari passu* distribution of the assets with the shareholders. This was done in the complicated case of *Sindur v Amalgamate*.⁷

A building society started banking business which was *ultra vires* the society. On its winding up the assets appeared to have been composed partly of the shareholders' money and partly of the depositors' money. But it was not possible to trace out which part of the mixed fund belonged to the shareholders or the creditors. Nor were the assets sufficient to pay both in full. It was, therefore, held that the entire remaining amount should be apportioned between the depositors and the shareholders in proportion to the amount paid by them, respectively. Nearest approach practicable to substantial justice would be done.

Regular borrowings

Where, on the other hand, the borrowing is within the powers of the company, the lender would not be prejudiced simply because its officers have applied the loan to unauthorised activities, provided that the lender

5. For an illustration of subrogation, see, *North Building Society v Linco*, (1889) LR 43 ChD 178. 6. (1899) 1 Ch D 440; 80 LT (30).

7. 2014 AC 398; 311 LT 1; 83 CJ Ch 465; 30 TLR 315.

had no knowledge of the intended misuse.⁸ Thus, for example, in *VKKST Firm v Oriental Investment Trust Ltd.*⁹

Under the authority of a company, its managing director borrowed large sums of money and misappropriated them. The company was nevertheless held liable.

But where a lender provides finance for a business which (within his knowledge) is not within the company's objects, the loan is ultra vires and the lenders cannot enforce the security.¹⁰

Another problem that may sometimes arise in this connection is where borrowing is within the company's power but it is beyond the powers of those managing the company. Whether the company would be liable in such a case was the question in *TR Pratt (Bombay) Ltd v ED Saseen & Co Ltd*.¹¹

There was no limit on borrowing for business in the memorandum of a company. But the directors could not borrow beyond the limit of the issued share capital of the company without the sanction of the general meeting. The directors borrowed money from the plaintiff beyond their powers.

It was held that "the money having been borrowed and used for the benefit of the principal either in paying its debts, or for its legitimate business, the company cannot repudiate its liability on the ground that the agent had no authority from the company to borrow. When these facts are established a claim on the footing of money had and received would be maintainable".

But in *Equity Insurance Co Ltd v Dinsmore & Co*.¹² It was held that "where the managing agent of a company who is not authorised to borrow, has borrowed money which is not necessary, neither bona fide, nor for the benefit of the company, the company is not liable for the amount borrowed".

The Companies Act, in Section 180(1)(c), provides that directors should not borrow beyond the paid-up capital of the company and its free reserves. Sub-section (5) further declares that such a loan shall not be valid, "unless the lender proves that he advanced the loan in good faith and without knowledge that the limit had been exceeded".

Where a loan has not been taken in the name of the company it will not be liable even though it may have benefited. An illustration in point is *Surya Baltic v Jaitly & Co*.¹³

8. *David Payne & Co Ltd, re*, (1994) 2 Ch 508 (CA).

9. AIR 1944 Mad 357.

10. *Indesatius Ltd (No 2)*, re, 1970 Ch 199; (1969) 2 WLR 793; (1969) 1 All ER 997; (1966) 2 Comp L 28 (CA).

11. AIR 1936 Bom 62. Followed in *Kumar Krishnam Reddy v SBI*, (1960) 50 Comp Cas 722 (Pun), where the company used the money. See also, *CX Sita Sanket Peacock v Kerala Financial Corp*, (1980) 50 Comp Cas 217 (Ker), where the act of mortgaging the assets of a company for the help of its sister concern, was held to be valid.

12. AIR 1940 Oudh 202.

13. AIR 1944 All 372.

P & Co were the managing agents of L & Co which was in liquidation. P was the manager. P borrowed a sum of money from J in his own name. In one letter to J he indicated that the loan was for a requirement of L & Co and that company had actually benefited. But it was held that there was no intention to bind L & Co. "The mere fact that the company had benefited was not in itself sufficient to bind the company."

Where a promissory note was executed on a paper the top of which bore the rubber stamp of the company and was signed "Joshi, Transferer", an intention to bind the company was held to be clear.¹⁴ But where a note was endorsed in this manner:

"Mitter and Sons,
Managing Agents,
Lister Antiseptic Co Ltd".¹⁵

It was held that the intention to involve the responsibility of the company was not clear from the endorsement.

MORTGAGES AND CHARGES

Registration of charges [S. 77]

The power to borrow includes the power to mortgage the company's assets or to create a charge upon them. A charge means an interest or lien created on the property or assets of the company or on any of its undertaking or both as security and includes a mortgage. [S. 2(16)] The reason is that lenders always insist on some security and the only security that a company can give is to charge its assets.¹⁶

It is the duty of every company creating a charge to register the particulars of the charge with the Registrar of Companies. A charge on the property or assets or any undertakings of the company whether tangible or otherwise, situated in or outside India and whether created in or outside India has to be registered. The instrument of charge, if any, has to be signed by the company and charge holder. The instrument of charge has to be in the prescribed form and has to be filed with the prescribed fee and within 30 days of its creation. The Registrar can permit for registration within the extended period of 300 days on payment of prescribed additional fee. If it is not even so registered, the company has to seek rectification of the register of charges. Any such subsequent registration is not to prejudice any rights acquired in respect of any property before the charge is

14. *Froes Chittagondha Steam Press v. Gajanan Industrial & Trading Co.*, AIR 1923 Bom 29.

15. *Siesef Meagntidai v. Lister Antiseptic Dressing Co Ltd*, AIR 1925 Cal 1302.

16. The expression "charge" includes a mortgage. Where the company defaulted in registering the charge, the court, at the instance of the chargee, compelled the company to comply with the requirement of registration. *ICICI Ltd v. Klein & Marshall Management Services & Exporters Ltd*, (2000) 4 Comp L.J. 411 (C.B.).

actually registered. The Registrar has to issue a certificate of registration in the prescribed form and manner both to the company and charge holder. [Sub-s (2)] without such certificate, the charge is not to be taken into account by the liquidators or any creditors. [S. 77(3)] The fact of non registration is not to prejudice any contract or obligation created by the charge for repayment of money secured under it. [S. 77(4)]

Application for registration by charge-holder [S. 78]

Where the company fails to register the charge, the charge-holder may apply to the Registrar for registration alongwith the instrument under which the charge is created. He has to do so within the prescribed time, form and manner. The Registrar has then to give notice to the company to enable it to show that whether the company has itself registered the charge or a sufficient cause why it could not be registered. Within 14 days the Registrar has to register the charge on payment of prescribed fee. Such applicant is entitled to recover from the company the fee or additional fee that he might have paid in connection with registration.

Constructive notice of charge [S. 80]

A person who acquires any property from the company which is subject to a registered charge is deemed to have notice of the charge from the date of its registration.

Registrar to keep register of charges in respect of every company [S. 81]

The Registrar has in respect of every company to keep a register containing particulars of the charge registered under the Act. The register has to be kept in the prescribed form and manner. Such register is open to inspection by any person on payment of prescribed fee for every inspection.

Company to report satisfaction of charge [S. 82]

The company has to give intimation to the Registrar in a prescribed form of the payment or satisfaction in full of any charge registered under the Act. This has to be done within 30 days from the date of payment or satisfaction. The Registrar has then to inform the charge-holder requiring him to show cause within the time specified but not exceeding 14 days, as to why the fact of payment and satisfaction as intimated to the Registrar should not be recorded. If no such cause is shown by the charge-holder the fact of payment, etc is to be recorded in the register and the company has to be informed accordingly. Such notice is not required to be given to the charge-holder if the intimation to the Registrar is in the prescribed form and also signed by the charge-holder. If the charge-holder shows some cause, the same has to be recorded in the register and the company is to be informed. This section does not affect the power of the Registrar under the succeeding Section 83 to make entries of satisfaction, etc in the register.

Power of Registrar to make entries of satisfaction and release without intimation from company [S. 83]

The Registrar may make entries of satisfaction, etc on receiving evidence that (i) the debt for which the charge was given has been paid or satisfied in whole or in part; or (ii) that a part of the property or undertaking charged has been released from the charge or has ceased to form a part of the company's property or undertaking. The Registrar may enter in the register a memorandum of satisfaction in whole or in part of the property or undertaking released from the charge, or has ceased to form part of the company's property or undertaking even if no intimation to that effect has been received by him from the company. Within 30 days of making such entry the Registrar has to inform the affected parties.

The advantage of registration is that the charge becomes binding on the company even in its winding up and also on every subsequent purchaser or incumbrancer of the property covered by the charge. [S. 80] The effect of non-registration is that the charge would be void against the liquidator and any creditor of the company. The lender would not have the benefit of the charge, although his loan stands and it shall become immediately repayable.¹⁷ Where the creditor failed to get his charge registered, the court said that he could not be regarded as a secured creditor. A mere statement of account could not be taken as a proof of the charge. The agreement of the SFC with the bank that the corporation should be treated as a secured creditor was held to be no proof of charge.¹⁸

It has been said that "the section makes void the security, not the debt, nor the cause of action, but the security, and not as against everybody, not as against the company grantor, but against the liquidator and against any

17. In many cases debenture holders could not enforce the security because of non-registration. See, for example, *Disham & Co. Bankers Ltd. v. AIR 1917 Odil 162*; *Krishna Ayyappa v. Nallayannan Pillai*, AIR 1921 PC 54; *Maheshwari Bros. v. Official Liquidators of Indira Spun Works Ltd.*, AIR 1922 All 119; *India Film Corp. Ltd. v. AIR 1929 Sind 100*; 181 IC 661; *Pacifit Roy v. DM Diesel*, AIR 1925 Cal 213; *Melton Finance Ltd. v. AIR 1968 Ch 323*; (1947) 3 WLR 151d; (1947) 3 All ER 843; *PTA Holdings Ltd. v. (1957) 1 WLR 1409*; *Calcutta National Bank v. Rangpuria Tea Co.*, AIR 1969 Cal 576. A court decree under which the property of a company may be attached is not a charge. *Sureshakant Motwani Sircar v. Kavani Bros (P) Ltd.*, (1965) 58 Comp Cas 121 (Bom); *Pragya Tools Ltd. v. Official Liquidator*, (1984) 56 Comp Cas 214 (Cal). Registration is necessary only when the company's properties are charged, and not those of a director who guaranteed the company's debts. The charge against the director's property was effective though the charge on the company's property was not registered. *Mahawati State Financial Corp. v. Muzl & Co (P) Ltd.*, (1993) 26 Comp Cas 168, 193 (Bom). As a consequence of winding up a creditor under an unregistered charge becomes an unsecured creditor. *Rajasthan Financial Corp. v. Official Liquidator*, ILR 1966 2 Ker 269; *India Bank v. Official Liquidator*, (1999) 5 SCC 401; AIR 1998 SC 2111, a preliminary decree passed on the basis of an unregistered charge not objected to, or an appeal filed by the official liquidator, the court could declare under S. 446 the decree to be void at the instance of the Official Liquidator.

18. *A.P. State Financial Corp. v. Muzl & Co (P) Ltd.*, (2005) 124 Comp Cas 813 (AP); *Rajasthan Financial Corp. v. Jagat Singh & Wug Mills Ltd.*, (2005) 13 SCC 765; (2006) 133 Comp Cas 1, no priority to the corporation holding unregistered charge. *Kerala Stein Financail Enterprises Ltd v. Official Liquidator*, (2006) 10 SCC 709; (2006) 133 Comp Cas 915 seems owed to the Govt Company, charge not registered, charge valid against liquidator and creditors.

creditor, and it leaves the security to stand as against the company while it is a going concern. It does not make the security binding on the liquidator as successor of the company.¹⁹

A charge on all the products, movable property and book debts of the company was held to be void because the prescribed particulars were not filed with the Registrar within time nor any extension of time was sought for the purpose.²⁰

The possessory lien of a warehouse keeper for his charges which included the power to sell the goods to realise the outstanding charges was held as not amounting to a charge on the goods so as to require registration.²¹ In a transaction for sale of goodwill and other rights to, the company, it promised to pay the price by instalments. This was held to be not a charge on the assets of the company so as to require registration.²²

An undertaking by a company with the backing of a resolution to create a charge on its assets was held to be not a present charge so as to require registration.²³

Rectification by Central Government of register of charges [S. 87]

By Section 87, the Central Government has been empowered to allow extension of time for filing the particulars of a charge. The grounds for seeking rectification have been thus stated in the section: The Central Government is satisfied that there has been, (a) omission to file with the Registrar the particulars of any charge created by a company or any charge subject to which any property has been acquired by a company or any modification of such charge; (b) the omission to register any charge within the time required under the Act or omission to give intimation to the Registrar of payment or satisfaction of any charge within the requisite time; or (c) the omission or misstatement of any particular with respect of any such charge or modification or with respect to any memorandum of satisfaction or other entry made in pursuance to the company's report as to satisfaction of charge [S. 82 or S. 83]. It is necessary that such omission was accidental or due to inadvertence or some other sufficient cause or it is not in the nature to prejudice the position of creditors or shareholders of the company or that on some other ground it is just and equitable to grant relief. This can be allowed on the application of the company, or any person interested. Relief can be allowed on such terms and conditions as may seem to the Central Government to be just and expedient. Time for registration can be extended or errors can be allowed to be rectified. The extension is not to prejudice any rights acquired in the property before the charge is actually registered. No extension was allowed where there was an unexplained delay of two

19. *Munnheir Building Co. re.* (1918) 1 Ch 642; 84 L Ch 443; 112 LT 619; (1914-15) All ER Rep 249. *per* Phillimore I cited with approval in *Smith v Bridgend Country Borough Council*, (2000) 1 BCLC 775 (CA).

20. *Deutsche Reckl v SP Kals*, (1998) 4 Bom CR 257; (1999) 98 Comp Cas 841.

21. *Hamlet International plc, re*, 1999 BCLC 906 (CA).

22. *MIA Hassim v Laminated Package (P) Ltd*, 2000 CLC 390 (AP).

23. *KCI Ltd v Officent Liquidator*, (2000) 100 Comp Cas 150 (CLB)

years and the only argument offered was that the creditor thought that the company must have obtained the registration.²⁴ Generally no extension is allowed once the company has gone into liquidation.²⁵ Accordingly, refusing the relief in *Dinsmore & Co. Bankers Ltd. v. re.*²⁶ the court cited with approval the following observation from *Spiral Globe Co. Ltd. v. re.*²⁷

Upon a winding up the rights of the whole body of creditors intervene and their position would be very much prejudiced if time for registration were unconditionally extended.

In *Radar Kishan Moti Lal Chamaria v. Ram Narain*,²⁸ an extension was allowed but with due safeguards to the rights acquired by certain persons prior to the actual registration. Similarly it was held in *Hentfaster Properties Ltd. (No. 2), v. re.*²⁹ that—

... notwithstanding that an action was proceeding in which the validity of the equitable charge was in issue, the Court would, in the exercise of its discretion, extend the time for registering particulars of the charge, ... where the risk of injustice to the company by extending the time of registration was far less than the risk of injustice to the charge-holder by refusing to extend the time.³⁰

Rectification of the register was ordered where the registration form happened to mention only the movable property whereas both movable and immovable were to be covered.³¹

A company availed credit facilities from a bank undertaking to offer the bank a charge on a block of assets after obtaining the consent of the first charge-holders' on those assets. It was held that the charge impliedly came into existence on the day the undertaking was given. The C.I.B. (now Central Government) ordered the charge to be registered within 30 days of the order.³²

24. *Reshma Estate (P) Ltd. v. re.* (1977) 47 Comp Cas 447 (Bom).

25. *Kulapuri Commercial Corp. Bank Ltd. v. Registrar of Companies*. (2013) 178 Comp Cas 235. charge in 1959, extension of time sought 2008, not allowed, petition of winding up filed in 1991, commenced from date of petition.

26. AIR 1957 Oudh 62.

27. (1902) 1 Ch 396. See also, *Elliottson Bros. Ltd. v. re.* (1906) 2 Ch 697. 25 LT 664 (CA) and *Chandulal Steamer Service Co. v. re.* (1955) 60 CLW 276; *Hentfaster Properties Ltd. (No. 2), v. re.* (1966) 1 WLR 948. (1966) 2 Comp L 246; *Kesi (Crescent) Ltd. v. re.* 1949 Ch 138; (1946) 2 All ER 1105.

28. AIR 1927 Oudh 303.

29. (1946) 1 WLR 923; (1946) 1 All ER 428; (1946) 2 Comp L 216.

30. *Pemexian J. I. v. re.* p 257; see also, *United Bank of India v. K.C. Malhotra & Sons*. (1966) 24 Comp L 255, where the Calcutta High Court held that where a company created a charge in 1954 which was registered and another charge in 1957 in favour of a bank, but was not registered, the former charge would survive against the liquidator of the company. Extension of time was refused where winding up was inevitable and not merely imminent. Administrators had concluded that rescue was not possible and creditors had finalised proposals for sale of assets towards winding up. *Victoria Licensing Estates Ltd. v. re.* 1963 Ch Ld; (1962) 3 WLR 964 and *Narmal Bhrought Transport Ltd. v. re.* 1969 (1) CLD 653; (1969) 3 WLR 656 (Ch D).

31. *Kesaria Tim Co. Ltd. v. re.* (1996) 11 Comp Cas 607 (CLB).

32. *Central Bank of India v. Sanji Textile Industries Ltd.* (1998) 28 CLA 62 (CLB).

Where the application for rectification was filed after a long lapse of about five years and there was also the imminence of liquidation, the CLB (now Central Government) refused extension as it would have defeated the interest of other creditors.³³ Where due to inadvertence, the particulars relating to immovable property covered by the charge were not included in the form and without that the security was not worthwhile and no objection was received from any quarter, rectification was allowed.³⁴ Where the memorandum of satisfaction signed both by the company and the lending bank happened to be filed due to oversight while the charge was still subsisting, rectification of the register for restoring the charge was allowed.³⁵

Rectification of the register was allowed where the particulars submitted for registration failed to disclose the correct registration number of the company. The registration number was a particular of the mortgagor and not that of the mortgage. The charge was validly registered.³⁶ A company assigned its interest in its immovable properties to another company but failed to register the assignment as a charge within the meaning of Section 125 (now S. 77). An application by the assignee company for extension of time was allowed by the CLB (now Central Government). The High Court refused to interfere in the matter.³⁷

The Central Government does not have the power to examine the validity of the charge.³⁸ It cannot order deletion of a charge which is already entered in the register. There is no power in this jurisdiction to require one creditor to deliver the original title deeds relating to the charge to another creditor.³⁹ A registration with a defective or incomplete form, (registration

33. *Rao Constructors v. Registrar of Companies*, (2000) 1 Comp LJ 215 (CLB); *Telcom Ltd v. Rao Constructors*, (2000) 29 CLT 14 (CLB). No rectification is allowed where the charge is not registrable in its inception. *ST Rail v. Registrar of Companies*, (1998) 91 Comp Cas 378 (CLB). In re guarantee for payment of consideration for shares was given by the transferee and he undertook not to retransfer shares till payment and there being, no commitment from the company, hence, there was no charge requiring registration.
34. *RK Nutrinsux (India) Ltd. v. Company Petition No. 310 (141) EKA* of 1999, decided on 15-11-1999 (C.A.).
35. *JPR Finance Industries Ltd. v. Company* 38 CLA 215 (CLB). Where the CLB condoned delay but also passed remarks on the merits of the transaction, the High Court directed the Registrar to proceed according to law in rectifying the register without taking any influence of other remarks. *Chowdhury Builders (P) Ltd v. Sanghi Bros (India) Ltd*, (2000) 1 Comp LJ 236.
36. *Gonee v. Advantage Health (IJO)* 24, (2008) 1 BCCL 661 (Ch D).
37. *Chunnilal Builders (P) Ltd v. Sanghi Bros (India) Ltd*, (2000) 37 CLA 341 (MP).
38. *Mangalore Chemicals & Fertilisers Ltd v. Company Law Board*, (2005) 126 Comp Cas 261 (Kazir). merits of charge or satisfaction of charge are not to be gone into, only sufficient cause for condonation of delay is to be seen. *Ingvassi Ind v. Oxfam*, (2004) 2 BCCL 61 (Ch D). deletion from the form of unnecessary information is not also within jurisdiction.
39. *Times Bank Ltd v. Shri Shridhar Parameswari Textiles Ltd*, (2008) 3X CLA 270 (CLB); *Sunlife Finance v. Asia Investment (P) Ltd*, (2002) 110 Comp Cas 713 (CLB). The CLB (now Central Government) was approached for a direction to the company to file particulars of charge. The company disputed the creation of a charge and also the grant of credit facility to it. Disputed matters not to be adjudicated upon under this jurisdiction.

form without directors' signatures) could not be accepted as a valid form in the exercise of this statutory power.⁴⁰

The power of rectification is limited to correcting mistakes of omission or commission in the entry of any particular or in a memorandum of satisfaction in the register. It does not extend to mistakes which are not on the register. The fact that an entry in the register indicated that further details could be found in another document, did not make that other document a part of the register. It is a restricted jurisdiction for rectification.⁴¹

Appeal against Registrar's order.—The order of the Central Government under Section 37 is appealable whether it extends the time or rejects the application. The appellate court can take into account fresh evidence, because it is not a rehearing but a fresh exercise of discretion. The words "just and equitable" confer the widest possible discretion on the court and this carries the issue even beyond the matters specified in the section. Imminence of winding up is only one factor and not the final thing. Accordingly, the failure of the bank's solicitor in breach of his duty in getting the charge registered and the promptitude of the bank in taking immediate action on discovering the omission, was held to be a justifiable cause for an extension.⁴²

Unregistered charge while company going concern.—However, while the company is a going concern, a charge or mortgage, even though not registered under the Act, is valid. This was held in *Aung Ban Zeya v CRMA Chettaiar Finc*,⁴³ where the High Court of Rangoon cited with approval the following observation from *Moralistic Building Co, re*:⁴⁴

"Of course the deed is not void to all intents and purposes. It is a perfectly good deed against the company as long as it is a going concern."

Thus the purchaser of the assets of a company which were under an unregistered mortgage was held bound by the mortgage.⁴⁵

Even in winding up, an unregistered charge has been allowed to stand where it was comprised in a decree and no objection was raised by the liquidator.⁴⁶

The Oudh High Court enforced an agreement to create a charge even though the company, after making the agreement but before executing the

40. *Cambra Bank v Premier Agro Civil Tech (P) Ltd*, (2006) 129 Comp Cas 581; (2004) 56 SCL 556 (C.T.K.).

41. *Augroup Ltd v Orient*, (2004) 120 Comp Cas 261; (2004) 1 WLR 451.

42. *Brenner Ltd, re*, 1988 BCLC 516 (Ch D). For further study, see, Gerard McCormack, "Extension of Times for Registration of Company Charges" (1986) JMC 282.

43. AIR 1927 Rang 298.

44. (1915) 1 Ch 643; 84 L Ch 441; 212 (C) 619; (1914-15) All ER Rep 249.

45. *Martiri Unnawakshama Rao v Pendegala Venkataswamy*, (1970) 40 Comp Cas 751; AIR 1970 AP 225.

46. *Presidency Industrial Bank v SI Industries*, AIR 1969 Bom 54 at p 89. A purchaser of property subject to an unregistered charge cannot say that he is also free from the charge; *Martiri Unnawakshama Rao v Pendegala Venkataswamy*, (1970) 40 Comp Cas 751; AIR 1970 AP 225.

charge, had gone into liquidation.⁴⁷ Referring to the section⁴⁸ the court said that it applies only when the charge is created by the company, and not when it arises by operation of law. The Bombay High Court, on the other hand, refused to order the specific enforcement of an agreement to create a charge after the commencement of winding up as that would amount to converting an unsecured creditor into a secured one.⁴⁹

Procedure of registration.—Registration is effected by filing with the Registrar particulars of the charge or mortgage. The Registrar shall give a certificate of registration which shall be endorsed by the company on every debenture or certificate or debenture stock. Registration can also be obtained by the creditor himself. All that has to be done is to file the particulars within the prescribed time. Accordingly, it was held by the Allahabad High Court in *Benares Bank Ltd v Bank of Bihar Ltd*⁵⁰ that the section was complied with when particulars of the charge were sent within 21 days (now 30 days), although the Registrar neglected to register it for two and a half years. Nothing done by the Registrar on his own account after proper documents have been filed can affect the validity of the charge.

Pledge.—A pledge of movable property does not require to be registered. Pledge is characterised by delivery of possession of the goods pledged to the creditor. Once the goods pass into the control of the creditor, the company does not enjoy a free use of them. This prevents the company from charging the goods over again. Hence no registration is necessary in such a case.⁵¹

Acquisition of property subject to charge [S. 79].—If a company acquires a property which is subject to a subsisting charge, such a charge must also be registered in the same manner as if it were a charge created by the company itself. Registration also becomes necessary when there is any modification in the terms and conditions or extent or operation of the charge. The registration must be effected within 30 days after the date of acquisition.

Series of debentures.—Where a charge is created by virtue of a series of debentures issued by a company which entitle the debenture-holders to a *pari passu* distribution of the assets charged, the application for registration will have to indicate the following particulars:

47. *Utkamichand v Pioneer Mills Ltd*, AIR 1927 Oudh 66.

48. S. 77 of 2013 Act.

49. *Mauskild Mahalibhai v Saraspur Mfg Co Ltd*, AIR 1927 Dnm 167.

50. AIR 1947 All 117. To the same effect, *SBI v Marayoor Rubber Industries (P) Ltd*, (1986) 60 Comp Cas 472 (P&H); *State Industrial and Investment Corp of Maharashtra Ltd v Maharashtra State Financial Corp.*, (1988) 64 Comp Cas 102 (Bom); *SBI v Depro Foods Ltd*, (1988) 64 Comp Cas 375 (P&H); *Sridharkanta Panicker v Kerala Financial Corp.*, (1980) 40 Comp Cas 317 (Ker); *N Balu Janardhanan v Official Liquidator*, (1993) 75 Comp Cas 490 (Mad), where the documents were filed within time, but actual registration was done some eight months later when a winding up petition was pending and the registration was held to be effective.

51. Registration is necessary for semi-possessory securities. For illustrations, see, *Raghukrishnan Chittur v Official Liquidator*, AIR 1943 Mad 173; *Co Ltn v Ranjit Roy*, AIR 1927 Cal 162; *Bank of Baroda v H B Shindeasam*, AIR 1926 Bom 427; 96 IC 417; *Tanujchand M Karwaria v Official Liquidator*, (1949) 2 MLJ 66.

- (g) the total amount secured by the whole series;
- (h) date of the resolution authorising the issue and the date of the deed;
- (i) a general description of the property charged; and
- (j) the names of the trustees, if any, for the debenture-holders.

A copy of the deed containing the charge has to be filed or, if there is no such deed, a copy of one of the debentures.

Payment of commissions, etc.—If any commission or allowance is paid to a person for subscribing or procuring subscription for debentures, the rate thereof must be indicated. However, an omission to comply with this minor detail will not affect the validity of the charge.

Certificate of registration.—The Registrar gives a certificate of registration which indicates the amount secured. The certificate is conclusive evidence that the requirements as to registration have been complied with and that the mortgage or charge is properly registered, even though the particulars put forward are incomplete and the entry on the Registrar's register is defective.⁵² Thus where a company demised its factory including chattels but in the application for registration the fact of chattels being included was not mentioned and the Registrar registered accordingly, it was held that the charge was nonetheless effective against the chattels.⁵³ The principle has been applied in other cases including where a wrong date was mentioned apparently to keep the application for registration within 21 days (now 30),⁵⁴ where the Registrar effected registration after the expiry of time without condoning the delay⁵⁵ and where the certificate was issued without putting the charge on the register.⁵⁶ In such cases the Registrar's decision is open to judicial review. Where the original proforma submitted for registration carried no date on it, the Registrar returned it for re-submission and then registered it from the earlier date, the Court of Appeal held that the Registrar's decision was open to judicial review.⁵⁷

But the rule will not allow a person to take the advantage of his own wrong. Thus where a banker's solicitor, having omitted to register a charge for quite a few months, ultimately got it registered under a wrong description, and winding up having followed within a few days, the court held

52. The certificate of registration was held to be effective even where no other record of registration was available. *Maharashtra State Financial Corp v Muzvi & Co (P) Ltd*, (1993) 76 Comp Cas 168 (Bom).
53. *Smt Arsin J in National Provincial & Union Bank of England Ltd v Churnley*, (1924) 1 KLR 401, 452; 130 LT 456. His Lordship relied upon *Yelland, Hanson & Birrell Ltd v*, (1901) 1 Ch 152 (CA).
54. *Eric Holmes (Property) Ltd v*, 1965 Ch 1052; (1965) 2 WLR 1290; (1966) 1 Comp LJ 19; *Mechanisations (Engineering) Ltd v*, 1966 Ch 20; (1965) 2 WLR 702; (1964) 3 All ER 940.
55. *Drs Raj v Panjab Financial Corp*, (1970) 10 Comp Cas 551 (P&H).
56. *Bank of Maharashtra v High Court of Mysore*, ILR 1973 Mys 577; (1973) 2 Mys LJ 71; 41973; 43 Comp Cas 505.
57. *R v Registrar of Companies, ex p Central Bank of India*, (1986) 1 All ER 105 (CA); *R v Registrar of Companies*, (1988) 2 All ER 79 (QBD).

that the certificate was not conclusive.⁵⁸ If a person intentionally abstains from mentioning a part of his security, he cannot rely on the conclusiveness of the certificate as against a person who has been misled by the partial registration.⁵⁹

A copy of the certificate has to be endorsed on every debenture. Any alteration in the terms and conditions of the charge must be intimated to the Registrar, otherwise the modification would be ineffective. [S. 79] In a case before the Madras High Court,⁶⁰ a company increased the rate of interest in consideration of the lender not enforcing the security for sometime, but did not inform the Registrar, it was held that the agreement had become void after the commencement of winding up, but that the increased interest already paid was not recoverable.⁶¹ The Registrar must again be intimated when the charge is satisfied or paid off.⁶² On the receipt of this intimation the Registrar informs the charge-holder and if he raises no objection, a memorandum of satisfaction is entered in the register of charges.⁶³ If any objection is raised, the Registrar records the same and informs the company accordingly. [S. 82] The Registrar may enter such a memorandum of satisfaction even when no such intimation has been received from the company provided he is satisfied on evidence that the charge has been paid off or the property has been cleared of it. But he must inform the company. [S. 83]

Register of charges

A register of charges has to be maintained both by the Registrar [S. 81] and the company. [S. 65] The Registrar has to keep in respect of each company a register containing the particulars of all the charges requiring registration. The company is under a duty to forward to the Registrar the necessary particulars in such form and on payment of such fee as may be prescribed. The Registrar's register has to show the particulars relating to the charge such as the date of a charge, the amount secured, the property covered and the persons entitled to the charge and if a property already under a charge has been purchased, the date of purchase. The same particulars have to be shown by the company's register. The instruments creating charges and the register of charges are open to the inspection of any creditor or member without fee and to any other person on payment of such fee as may be prescribed. [Ss. 81 and 85]

58. *Niru (CL) Ltd. v. 1971 Ch 442 (1969) 2 WLR 1380 (Ch D); Affirmed on appeal. Niru (CL) Ltd. v. 1970 3 WLR 158 (C.A.).*

59. An obiter observation of Atkin J. in *Charvelly case*, (1924) 1 KB 401, 434; 130 LT 465.

60. *Official Liquidator v. Bharatpur Princess Trust*, (1971) 41 Comp Cas 97H (Mad).

61. Rellying upon its own decision in *Tyssgrave v. Official Liquidator*, (1960) 20 Comp Cas 381.

62. S. 82. Satisfaction (payment of the debt) of the charge has to be brought on the Registrar's record within 30 days of payment. As a matter of practice, a letter of satisfaction from the charge-holder is filed. Where the bank delayed in giving to the company its letter and consequently the company also delayed filing of satisfaction, the C.B. condoned the delay on the part of the company because the company had relied on a circular of the Deposit of Company Affairs, State Bank of India, m., (1992) 73 Comp Cas 549 (C.B.).

63. S. 82. Where the Registrar entered the memorandum of satisfaction before the expiry of the time allowed to the charge-holder for stating his objection, the entry was struck down. See, *Welford Transport Ltd. v. SK Mandal*, (1980) 50 Comp Cas 603 (Gau).

Rights of chargee

Chargee's rights depend upon the terms and conditions agreed upon by the parties. To such express rights, a new kind of right by implication has been added by a decision of the English Court of Appeal.⁶⁴ A colonising company's progress of work, which was financed through a bank, was very slow so that the funds were exhausted and interest accumulated. The bank agreed to provide more money if the architects who were the cause of delay, were changed by a more respectable firm. That was accordingly done. The firm so removed sued the bank for the tort of inducing breach of contract. It was held that a charge-holder becomes so closely identified with the project that he gets the right to bring about suitable changes in the staff.

Intimation of appointment of receiver or manager [S. 84]

A person may obtain an order for appointment of a receiver or person to manage the property subjected to the charge. Alternatively, a person, having the power to do so under the charge, may appoint a receiver or a person to manage the property. He is required, within 30 days, to give notice of the appointment to the company and the Registrar along with a copy of the order or instrument. The Registrar has, on payment of the prescribed fees, to register the particulars of the receiver, person or instrument in the register of charges. [Sub-s (1)]

When a person so appointed ceases to hold the appointment, he has to give a notice of this fact to the company and Registrar. The latter has to register the notice. [S. 84(2)]

Company's register of charges [S. 85]

Every company has to keep at its registered office a register of charges in the prescribed form and manner. The register include all charges and floating charges affecting any property or assets of the company or any of its undertakings indicating in each case such particulars as may be prescribed. A copy of the instrument creating a charge has also to be kept at the registered office of the company with the register of charges. [S. 85(1)]

Inspection of register [S. 85(2)].—Members or creditors of the company without payment of any fees and any other person on payment of prescribed fees have the right of inspection during business hours of the register of charges and instrument of charges. The company may by a provision in its articles impose reasonable restrictions on the right of inspection.

Penalty provision [S. 86].—For any contravention of the provisions of this Chapter, [Chapter 6] the company is punishable with fine for an amount not less than Rs 1,00,000 but extending up to Rs 10,00,000. Every guilty officer is punishable with imprisonment for a term up to six months or with fine of not less than Rs 25,000 extending up to Rs 1,00,000, or with both.

64. *Edwin Hill & Partners v First National Finance Corp.*, 1969 3CLC 89 (CA).

Inter-corporate loans and Investments [S. 186]

The main and the most primary change is that the requirement of the Central Government approval has been dispensed with. Companies are now thus free from the shackles of control on inter-corporate loans and investments. The only control mechanism now is wholly internal. The Board of directors can invest or advance up to 60 per cent of their own decision and beyond that with the special resolution of the shareholders.

The new provisions of 2013 Act are as follows:

Unless otherwise prescribed a company has to make investment through not more than two layers of investment companies. This requirement is not to affect a company from acquiring any other company incorporated outside India if such other company has investment subsidiaries beyond two layers as per the law of that country. It also does not affect a subsidiary company from having any investment subsidiary for the purposes of meeting the requirements under any law or any rule or regulation framed under any law in force.

A company which is registered under Section 12, SEBI Act, 1992 and covered under such class or classes of companies as may be prescribed, is not to take inter-corporate loans or deposits exceeding the prescribed limit. Such company has to furnish in its financial statement the details of loans or deposits. [S. 186(6)]

A company can advance loans to other companies or invest in the securities of other companies up to 60 per cent of the paid-up share capital and free reserves or up to 100 per cent of free reserves, whichever is more. The transactions covered under the provision are: (a) loans to any body corporate; (b) guarantee or security for any loan given or taken by a body corporate; (c) acquiring, by way of subscription, purchase or otherwise the securities of any body corporate.

The notice of a meeting of shareholders called for the purpose of giving previous approval of loans and investment beyond 60 per cent must disclose clearly the specific limits, the particulars of the body corporate in which the investment is proposed to be made or loan or security or guarantee to be given, the purpose of the investment, etc specific sources of funding and other allied details.

The requirements of sub-sections (1) and (2) are not to apply to any loan made by a holding company to its wholly-owned subsidiary; any guarantee given on any security provided by a holding company in respect of loans made to its wholly owned subsidiary; or acquisition by a holding company, by way of subscription, purchases or otherwise, the securities of its wholly owned subsidiary.

A company which has defaulted in making payment of fixed deposits or interest due on them cannot, during the period of such default, make any loans, investments or provide any guarantee. [S. 186(8)]

The decision of the Board of directors must be at a meeting sanctioning the transaction by a resolution passed with the consent of all the directors present at the meeting and also prior approval of any such public financial

institution must be taken whose term loan with the company is subsisting.⁶⁵ Prior approval of a financial institution is not required where the 60 per cent limit is not to be exceeded and there are no defaults in payments toward the institution. [S. 186(3) & (4)]

The company has to disclose to the members in the financial statement the full particulars of the loan or guarantee given or investment made or security provided and the purpose of the transaction for which the recipient of the loan, etc is going to utilise it. [Sub-s (4)] A company which is registered under Section 12, SEBI Act, 1992 covered under such class or classes of companies as may be prescribed is not to take inter-corporate loans or deposits exceeding the prescribed limit. Such a company has to furnish in its financial statement the details of the loans or deposits. [S. 186(6)]

No loan is to be given at a rate of interest lower than the prevailing yield of one year, three years, five years or ten years Government Security closest to the tenor of the loan. [S. 186(7)]

Register of investments-loans [S. 186(9)(10)].—The company has to keep a register showing the particulars about investments, loans, guarantees and securities as may be prescribed and has to keep in the prescribed manner.

Under the 1956 Act [S. 372-A(5)], the following particulars were prescribed:

1. the name of the body corporate;
2. the amount, terms and purpose of the investment or loan or security or guarantee;
3. the date on which the investment or loan has been made;
4. the date on which a guarantee or security has been provided in connection with a loan.

The particulars had to be entered in the register chronologically within seven days of the making of loans or investment, etc.

This register has to be kept at the registered office of the company. It should be available for inspection to members who may also take extracts and may demand copies on such fee as may be prescribed.⁶⁶

Rule-making power.—The Central Government may prescribe regulations for the purposes of this section. [S. 186(12)]

Exceptions.—The provisions of the section do not apply in respect of the following transactions:⁶⁷

1. a banking company, insurance company or a housing finance company for transactions made in the ordinary course of business, a company established with the sole object of financing industrial enterprises or for providing infrastructural facilities;

65. *Phillips Carbon Black Ltd v Anil Kumar Poddar*, (2011) 163 Comp Cas 181 (Cal), the use of the word "may" does not undermine the right provided by the provision. Once an inspection or copies are demanded, it becomes mandatory for the company to comply with the demand.

66. S. 372-A(8).



2. any acquisition is made by a non-banking financial company whose principal business is acquisition of securities in respect of its investment and lending activities;
3. a company whose principal business is the acquisition of shares, stock, debentures or other securities;
4. acquisition of shares allotted under Section 62 (further issue).

Sub-section (8) exempts subscription of shares pursuant to Section 81(1)(i) (further issue of capital) from compliance with the provisions.

Penalty provisions [S. 186(13)].—If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than Rs 25,000 but which may extend to Rs 5 lakhs and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than Rs 25,000 but which may extend to Rs 1 lakh. [S. 186(13)]

Explanation.—For the purposes of this section,—

- (a) the expression "investment company" means a company whose principal business is the acquisition of shares, debentures or other securities;
- (b) the expression "infrastructure facilities" means the facilities specified in Schedule VI.

"Free reserves" means such reserves which, as per the latest audited balance sheet of a company, are available for distribution as dividend. But (i) any amount representing unrealised gains, nominal gains or revaluation of assets, whether shown as a reserve or otherwise, or (ii) any change in carrying amount of an asset or of a liability recognised in equity, including surplus in profit and loss account on measurement of the asset or the liability at fair value, is not to be treated as free reserves. [S. 2(43)]

Loans.—The expression "loan" includes debentures or any deposit of money made by one company with another company, except where the depositee company is a banking company.

Investments in own name [S. 187]

Section 187 requires that "all investments made by a company on its own behalf shall be made and held by it in its own name". Where a company advances money to another company by way of a loan to enable the borrowing company to make investment in its shares, that does not amount to investment in shares by the lending company in another company's name.⁶⁷

The section recognises a few exceptions also. Firstly, the section does not apply to investments made by a company whose principal business consists of buying and selling of shares or securities. Secondly, a company may hold shares in its subsidiary company in the name of one or more nominees if it is necessary to ensure the number of members from going below the statutory

67 *Hemangji Finance & Lending (P) Ltd v TN Mercantile Bank Ltd*, (1996) 86 Comp Cas 925 (CLB).

minimum. Thirdly, a company may deposit with its bankers, shares or securities for collection of dividends or to facilitate their transfer. If the transfer is not effected within six months, they shall be held back by the company in its own name. Fourthly, a company may transfer its shares or securities to another person as a security for a loan or the performance of an obligation.

A further exception has been added under the consequential amendment of the section by the Depositories Act, 1996. A company can hold investments in the name of a depositor when such investments are in the form of securities held by the company as a beneficial owner. All such exceptional transactions have to be entered in a register so as to enable their identification and the name in which they are held. The register has to be available for inspection by any member or debenture holder of the company without any charge during business hours subject to such reasonable restrictions as the company may by its articles or in general meeting impose. [S. 187(3)]

Punitive provisions [S. 187(4)].—If a company contravenes the provisions of the section, it becomes punishable with fine not less than Rs 25,000 but may extend to Rs 25,00,000. Every officer in default is to be punishable with imprisonment extending up to six months or with fine not less than Rs 25,000 but extending to Rs 1,00,000.

Form of contracts [S. 21]

The brief purpose of the section is to declare that contracts of a company can be made in the same manner in which they can be made by an individual whether they be written or oral. Accordingly, the section says that a written contract can be made on behalf of a company by any person acting under its authority, whether express or implied. An oral contract can also be made in the same manner. Where a debenture was signed not by the director of a company but by the person to whom the director had given his power of attorney, the company was not permitted to question the validity. Section 9(1), European Communities Act, 1972 presumes good faith in favour of a person dealing with a company and he is not bound to inquire either into the limitations on the powers of directors or the capacity of the company.⁶⁸ (New provisions in the 1989 Act [English] are in Ss. 35-A and 35-B).

No personal liability arises under contracts signed for the company. A clause in the contract providing for personal liability of the signatory would be ineffective unless both sides understand that the contract is being on the basis of personal liability.⁶⁹

Execution of deeds and use of seal [S. 22]

Formal deeds can be executed only through a power of attorney. Section 22(2) accordingly provides that a company may, by writing under its common seal, appoint any person as its attorney and he may, in the exercise of his power, execute deeds on behalf of the company in any place either

68. TCB Ltd v. Gray, 1986 Ch 621; (1986) 2 WLR 517 (Chd).

69. Montgomery Litho Ltd v. Maxwell, 2000 SC 56 (Scotland).

if outside India. Such a deed binds the company to the same effect as if it were under the company's common seal. The seal is a method of making a physical impression upon the documents of the company, of its name, etc. The seal can be used by the authority of the directors or of a committee of directors authorised by directors.⁷⁰ The directors may determine who shall sign any instrument to which the seal is affixed, otherwise such a document has to be signed by a director and by the secretary. A company transacting business in foreign countries may have in accordance with its articles its official seal in a foreign country, which is a facsimile of the company's common seal and should include the name of the place where it is to be used.

The requirement of common seal was dispensed with under Section 36-A(3), English Companies Act, 1985. Hence, it is no longer necessary for authenticating the company's formal documents. The Supreme Court held in a case against the company for specific performance that the absence of seal on the contract signed by the directors or absence of a formal resolution authorising the directors to enter into the contract, did not vitiate the contract.⁷¹

Section 22 comes into play when a person wants to enforce obligations against a company arising out of a contract and the company denies the contract or disputes its liability. The section cannot be used where the proceeding is by the company. The validity of the appointment of a person as an adviser of the company was not allowed to be questioned by the appointee because of the lack of any formality. The company had not denied its obligation under the appointment.⁷²

Authentication of documents and proceedings [S. 21]

Documents or proceedings which require to be authenticated by the company, may be signed by any key managerial personnel, or director, or manager, or secretary or by any other authorised officer of the company. Common seal would not be necessary in such a case. A representation signed on behalf of a company by a duly authorised agent acting within the scope of his authority or by an officer or employee of the company acting in the course of his duties in the business of the company constitutes a representation made by the company and signed by it.⁷³

A suit for recovery of insurance money was filed by the managing director of the claimant company. He could not produce any authentic document showing his authority to proceed on behalf of the company. The suit was not allowed.⁷⁴ A criminal complaint on behalf of the company which

70. *G Saldanha & Co v Rustomji Lala-Castigal Ltd*, AIR 1995 AP 95; memorandum of understanding signed about a debt by the MD of the company but not indicating that he was signing for and on behalf of company; he was also not authorised to affix company seal, company not bound.

71. *Prakharan Dhara v Maitri Nath Mitra*, (2006) 5 SCC 340; (2006) [3] Comp Cas 577.

72. *Societe de Eumenis Industrial Ltd v Radhakrishna Sulemani Kapoor*, A.R. 1999 Bom 1 NS.

73. *UHAF Ltd v European American Banking Corp*, 1984 QB 213; (1984) 2 WLR 508 (CA).

74. *JIF Horticultural Produce Mktg & Processing Corp Ltd v United India Insurance Co Ltd*, AIR 2000 HP 11; *Raghbir Paper Mills v Indian Security Press*, AIR 2000 Del 239; 2000 CLC 1438 (Del); no proof that the director who filed the suit was duly authorised.

was the payee of a cheque must be filed with the authority of the Board of directors or in accordance with the company's article or rules governing the management of the company's affairs. A complaint filed by the manager was held to be not competent because he had nothing to show his authority for institution of proceedings.⁷⁵ A writ petition filed with no material to show that the person signing the petition was authorised by the Board of directors was held to be not competent.⁷⁶ The decisions of the Supreme Court have laid emphasis upon two points: the power to file a suit on behalf of a company must flow from the Board of directors which should, if necessary, also provide for the power of delegation.⁷⁷ An improper document of authorisation is "nothing but a scrap of paper" such a defect is incurable. Proceedings which are instituted through a general power of attorney are not completely vitiated on account of a defect in the form. The defect was found to be curable. Steps were taken to rectify the defect. The matter should rest there.⁷⁸ On this point the Supreme Court has adopted a somewhat liberal attitude. A company's complaint was dismissed solely on the ground that authorisation of the person who signed the complaint was not filed or proved. The court said that procedural defects or irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a bantam bird of justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The court further said that an opportunity ought to have been provided to the company to place document containing authorisation on record and prove it in accordance with the law.⁷⁹

Bill of exchange and promissory note [S. 22]

In the case of legal persons, who cannot act by themselves, and who can act only through representatives, the mixle of authentication also becomes very important. The signature must be that of an authorised person and the name of the company has to be mentioned in such a manner as to make the intention to bind the company quite explicit. Section 22, Companies Act, 2013 declares:

A bill of exchange, hundi or promissory note shall be deemed to have been made, accepted, drawn or endorsed on behalf of a company if drawn, accepted, made or endorsed in the name of, or on behalf of, or on account of, the company by any person acting under its authority, express or implied. [Sub-s (1)]

75. *Meyyugum Lumbis Pmkash v Shimla Chartered Bank*, (2003) 115 Comp Cas 161 (AP).

76. *Klein & Marshall Manufacturers & Exporters Ltd v State of J&K*, (2000) 100 Comp Cas 183 (Kan).

77. *State Bank of Travancore v Kriegelun Computers (India) IP Ltd*, (2011) 11 SCC 524; (2011) 163 Comp Cas 57, no resolution was passed by the Board of directors for authorisation, *Mukul Shrinivas Akheri v Union of India*, (2011) 163 Comp Cas 107 (Gau).

78. *Deutsche Bank AG v Prithvi Information Solutions Ltd*, (2014) 1 ALD 298; (2014) 182 Comp Cas III, reversing single bench decision, *Deutsche Bank AG v Prithvi Information Solutions Ltd*, (2012) 171 Comp Cas 116 (AP).

79. *Haryana State Coop Supply and Marketing Federation Ltd v Jaypee Trebles*, (2014) 4 SCC 704; (2014) 2 SCC (Cr) 732.

Whether the person signing is actually authorised or not depends upon the arrangements of the company with its officers, as examined in the light of principles of the law of agency, but the mode of signature is an external matter. Where a promissory note was executed on a paper the top of which bore the rubber stamp of the company and was signed: "Joshi, Treasurer", an intention to bind the company was held to be clear.⁸⁰ But where a note was endorsed in this manner:

"Mitter & Sons,
Managing Agents,
Lister Antiseptic Co Ltd".

It was held that the intention to involve the responsibility of the company was not clear from the endorsement.⁸¹ Misdescription of the name of the company may not, however, affect the liability of the company. "A limited company has characteristics other than its name by reference to which it can be identified."⁸² Those signing, however, do incur personal liability when they misdescribe the name of the company.⁸³

Where cheques were drawn on behalf of a company without using the formal word "for" or "on behalf of", and were paid by the bank because the persons signing were duly authorised and the intention to operate the company's account was also clear, the bank was held to be discharged from its liability.⁸⁴

Where a promissory note was executed by the chief executive of the company for the money borrowed for the purposes of the company on which the company's seal was affixed, it was held that the new management of the company could not deny the execution of the note and was liable as a successor-in-interest.⁸⁵

A company may, by writing under its common seal, authorise any person, either generally or in respect of any specified matters, as its attorney to execute other deeds on its behalf in any place either in or outside India. [S. 22(2)] A deed signed by such an attorney on behalf of the company and under his seal is to bind the company and have the effect as if it were under its common seal. [S. 22(3)] The Amendment of 2015 has made use of common seal to be optional.

⁸⁰ *Punjab Chiraugula Singh Pujra v Gajanan Industrial & Traders Co*, AIR 1923 Bom 29. See also, *P Rangaswami Reddi v RK Reddi*, (1973) 43 Comp Cas 212 (Mad). *Kirloskar Sugar Mills Ltd v G Venkateswar Rao*, (2003) 114 Comp Cas 563 (AP), promissory note for borrowing money signed by the chief executive on behalf of the company made the company liable though the borrowing was not reflected by the company's account books.

⁸¹ *Sriyali Mangaldal v Lister Antiseptic Dressing Co Ltd*, AIR 1925 Cal 1062.

⁸² *Goldsmit (F) v Sicklesmere Ltd v Baxter*, (1970) 1 Ch 85: (1969) 3 WLR 522: (1970) 40 Comp Cas 809.

⁸³ *Hendrie v Anildevi*, The Times, June 16, 1973; 1973 New 13 n 37 and S. 147, Companies Act.

⁸⁴ *Bombay Mercantile Bank v Orid Industries Ltd*, AIR 1956 Bom 57: (1958) 57 Bom LR 1039: (1958) 25 Comp Cas 479: ILR 1958 Bom 1072; on appeal to the Supreme Court, *Orid Industries Ltd v Bombay Mercantile Bank Ltd*, AIR 1961 SC 992: (1961) 31 Comp Cas 185.

⁸⁵ *Kirloskar Sugar Mills Ltd v G Venkateswar Rao*, (2003) 114 Comp Cas 563 (AP).

Liability for dishonour

The company, every person who was in charge of the company's affairs at the time of the issue of the cheque and every other officer whose connivance or negligence brought about the debacle can be prosecuted under Section 138, Negotiable Instruments Act, 1881 for dishonour of the company's cheque.⁶⁶ A prosecution was not quashed although the director in question asserted that he was not participating in the company's affairs. He was however, exempted from personal attendance.⁶⁷ The managing director and secretary of the company are liable to be prosecuted by virtue of their office without any further proof.⁶⁸ A notice sent to the managing director, who was the signatory of the cheques, at the company's address was held to be good notice for prosecuting him.⁶⁹ A cheque was issued on behalf of the company by a director and the same director also issued notice to the bank not to pay the cheque. The court refused to consider the question at the initial stage that the director could not be prosecuted on facts.⁷⁰

66. *Avil Haul v Indian Acrylic Ltd.*, (2000) 1 SCC 1; 2001 SCC (Cri) 174; (2000) 99 Comp Cas 56. *SN Bregur v Klem & Marshall Mfg. (P) Ltd.*, (2004) 119 Comp Cas 238 (Mad), consent or connivance could not be inferred without any material. *National Small Industries Corp. Ltd v Harman Singh Thind*, (2010) 3 SCC 320; (2013) 154 Comp Cas 313, there would have to be specific requisite allegation against the director sought to be prosecuted. *R. v. Kishor Narasimha Prasani v. State of AP*, (2001) 1 ALD (Cri) 508; (2002) 1 All LT (Cri) 531; (2005) 124 Comp Cas 421, a director who had resigned before the cheque was issued, no liability.

67. *VK Jain v Union of India*, (2000) 1 SCC 709; (2000) 100 Comp Cas 427.

68. *SMS Pharmaceuticals Ltd v Nivedi Bhalla*, (2005) 8 SCC 89; (2005) 127 Comp Cas 563; *Pepsi Co India Holdings (P) Ltd v Food Inspector*, (2011) 1 SCC 176; (2011) 161 Comp Cas 19%, the complainant has to indicate in the complaint itself that the directors concerned were either in charge of or responsible to the company for its day to day management, or for conduct of its business. *Central Bank of India v Asian Global Int'l*, (2010) 11 SCC 209; (2010) 4 SCC (Civ) 416; (2011) 163 Comp Cas 398, such specific allegation has to be made against each individual. *Kavita Dangra v Director of Enforcement*, (2013) 182 Comp Cas 376 (Del), there should be specific mention of the precise role of a director in the management of the company's affairs. *Shillender Kuvsnik v SEBI*, (2014) 182 Comp Cas 680 (Del), there was proof of involvement in management of daily routine work and also taking part in policy making of agricultural projects.

69. *Edelweiss Capital Ltd v A Chittaranjan*, (1999) 5 SCC 495; 1999 SCC (Cri) 1034; (1999) 96 Comp Cas 573.

70. *C.R.E. Housing Ltd v Sunil Shinde Rover (P) Ltd*, (2006) 7 SCC 467; 2005 SCC (Cri) 1697; (2005) 127 Comp Cas 311.

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®; along with updates, articles, videos, blogs and a host of different resources.



The following cases from this chapter are available through EBC Explorer™:

- *Madras Native Permanent Forest Ltd. v. (1931) 60 MLJ 270*
- *Phillips Carbon Black Ltd v Anil Kumar Podder, (2011) 165 Comp Cas 181 (Cal)*



CASE PILOT



Chapter 14

Debentures

View of provisions of Section 71

The provisions of the 2013 Act about debentures are all contained in a single section which is Section 71. A view of these provisions has to be taken first.

A company may issue debentures with option to convert them to shares, either wholly or partly at the time of redemption. Such issue has to be approved by a special resolution passed at a general meeting. [S. 71(1)] Debentures with voting rights cannot be issued. [S. 71(2)] Secured debentures can be issued subject to such terms and conditions as may be prescribed. [S. 71(3)] The company has to create a debenture redemption reserve account out of the profits of the company available for payment of dividend. The amount credited to such account is not to be utilised by the company except for redemption of debentures. [S. 71(4)]

Where the members of public are to be invited by issuing a prospectus or where members of the public or company's own members exceeding 500 are to be invited, there it is compulsory that one or more debenture trustees be appointed. The conditions governing appointment of trustees have to be according to what may be prescribed. [S. 71(5)] The debenture trustee has to take steps to protect the interest of debenture holders. He has to redress their grievances according to such rules as may be prescribed. [S. 71(6)] A provision contained in a trust deed for securing the issue of debentures or in any contract with debenture holders secured by a trust deed is to be void to the extent to which it has the effect of exempting a trustee from liability for breach of trust or indemnifying him against such liability which arises by reason of his failure to show the requisite degree of care and due diligence. Regard has to be had to the provisions of the trust deed conferring on the trustee any power, authority or discretion. [S. 71(7)] The provision to the sub-section says that the liability of the debenture trustee is to be subject to such exemptions as may be agreed upon by a majority of debenture holders,

having not less than three-fourth in value of the total debentures at a meeting held for the purpose.

The company has to pay interest for redeeming debentures in accordance with the terms and conditions of their issue. [S. 71(6)]

Where at any time the debenture trustee comes to a conclusion that the assets of the company are insufficient or are likely to become insufficient to discharge the principal amount as and when it becomes due, he may file a petition before the Tribunal. The Tribunal has to hear the company and other interested persons. The Tribunal may then pass an order imposing such restrictions on the company in the matter of incurring further liabilities as the Tribunal may consider necessary in the interests of debenture holders. [S. 71(9)] Where the company fails to redeem debentures on their maturity or fails to pay interest when due, any debenture holder or debenture trustee may apply to the Tribunal. The Tribunal may, after hearing parties, pass an order directing the company to redeem the debenture forthwith on payment of due principal and interest. [S. 71(10)]

The officers who default in carrying out the orders of the Tribunal have to incur criminal penalty of imprisonment and fine. [S. 71(11)]

A contract with the company to take up and pay for any debentures of the company may be enforced by a decree of specific performance. [S. 71(12)]

Prescribing procedure [S. 71(13)].—The Central Government may prescribe procedure for securing the issue of debentures, the form of debenture trust deed, the procedure for debenture holders to inspect the trust deed and to obtain copies, quantum of debenture redemption reserve required to be created and other related matters.

Definition

Companies have frequently to borrow large sums of money. The loan requirement of a company may not, therefore, be met by a single lender. The loan may have to be split into several units. One very convenient method of doing so is to borrow by issuing debentures. Suppose, for example, the sum to be borrowed is one lakh rupees. It may be divided into one thousand units each of the value of hundred rupees. A lender may purchase as many units as he pleases. The company will certify the number of units he holds and that is the concept of a debenture. A debenture is, therefore, a certificate of loan issued by a company. It is a type of security.¹

The term "debenture" has, however, been found to be something very difficult to define. The Act in Section 2(60) contains only this definition: "Debenture includes debenture stock, bonds and any other instrument of a company evidencing a debt whether constituting a charge on the company's assets or not." Chitty J defined it in these words: "Debenture means a document which either creates a debt or acknowledges it, and any document

1. A company may issue debentures convertible into shares either fully (FCDs) or partly (PCDs). For rules and regulations to be observed in this conversion, see, S.E. BSE Guidelines for Disclosure and Investor Protection on issue of convertible and non-convertible debentures.

which fulfils either of these conditions is a debenture.² According to Tipham: "Debenture is a document given by a company as evidence of a debt to the holder usually arising out of a loan and most commonly secured by charge."³

As a matter of fact, the term does not have any precise legal meaning. The term as used in the modern commercial parlance is of extremely elastic character.⁴ Indeed no definition can help in all cases to know whether a particular document issued by a company is a debenture or not. "We must look at the substance of the instrument itself and without the assistance of any precise legal definition, form the best opinion we can whether the instrument is or is not a debenture."⁵ The Bombay High Court appears to have acted on this principle in deciding *Laxman Bhawaniji v Emperor*.⁶

The main business of a private company was to sell what were called "Patron Bonds" and to invest the money realised by the sale of those bonds. The form of the bond bore a serial number. It acknowledged a debt; it was one of a series; it bore the company's seal; it provided for the payment of interest by determining the lucky numbers. The court observed: "The main features which in our opinion tend conclusively to show that these 'Patron Bonds' are debentures are the acknowledgement of debt, the promise to return it, the fact that they form a series bearing consecutive numbers."

Usual features.—As it appears from the above case the usual features of a debenture are as follows:

In the first place, a debenture is usually in the form of a certificate issued under the seal of the company.⁷ Secondly, the certificate is generally an acknowledgement of indebtedness. In the striking words of Poulock MR:⁸

But whatever be the characteristics which you would expect to find in debentures, the root meaning of the word is indebtedness; that it does record an indebtedness.

2. In *Levy v Abercrombie Steel & Slab Co.* (1887) LR 37 Ch D 260, 264: 58 LT 218.

3. *Townes's Company Law* (12th Edn) 168. See also speech of Viscount Macclesfield in *Kingsbridge Estates Ltd v Byrne*, 1940 AC 613; (1940) 2 All ER 401, 109 LT Ch 200; 162 LT 388; 56 TLR 652 (HL), where all the important definitions have been considered. See also, *Vasai Jiri Madanlal Takirchand Devillinday v Changle*; *Singh Mills Ltd*; AIR 1958 Bom 491, 496 (1958) 60 Bom LR 254.

4. *Chief Controlling Revenue Authority v State Bank of Mysore*; AIR 1988 Kant 1; (1987) 3 Kant LJ 486; JLR 1987 KAR 2319 (1989) 65 Ceng Cas 427 (PB). A detailed discussion about the nature of a debenture is to be found in *Narenrao Kumar Malleshwari v Union of India*, 1990 Supp SCC 410; (1989) 2 Contap LJ 15.

5. *Chitty J.S. Levy v Abercrombie Steel & Slab Co.* (1887) 37 Ch D 260, 264: 58 LT 218, cited in *Laxman Bhawaniji v Emperor*, JLR 1945 Bom 363; AIR 1946 Bom 18; 223 IC 110.

6. Supra, S. 71(12) says that a contract to subscribe for the company's debentures may be specifically enforced.

7. The case of *British India Steam Navigation Co v I.R.C.* (1881) 7 C.I.D 165, however, shows that a seal is not necessary. There, a debenture certificate which was merely signed by two directors and did not bear the company's seal was held valid.

8. In *Levy v Austin Friars Investment Trust Ltd*, 1926 Ch 1, 123 LT 290 (CA).

"Further, a debenture usually provides for the payment of a specified principal sum at a specified date." But that is not essential. A company may issue perpetual debentures with no undertaking to pay. For Section 120 of 1956 Act provided that debentures are not invalid simply because "they are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long".⁹ Then again a debenture usually provides for payment of interest until the principal sum is paid back. But this again is not essential. Interest may be made payable subject to contingencies of uncertain nature.¹⁰

Thirdly, a debenture is as a rule one of a series, yet a single debenture is not uncommon. "There may be a single debenture issued to one man." Lastly, a debenture generally creates a charge on the undertaking of the company, or on some class of its assets or on some part of its profits. Again this is not an essential element. A debenture which creates no such charge is perfectly valid.¹¹

Floating charge

It is usual, though not essential, for debentures to create a charge on the company's assets. The charges which a company may create on its assets are of two kinds, namely:

1. Fixed charge, and
2. Floating charge.

The normal concept of a mortgage is that it is created on some definite or specific assets. Such a mortgage is suitable for property which is more or less fixed. But it is quite impracticable where the assets to be charged are of circulating or liquid nature. Such assets keep changing and a fresh charge would have to be created every time they were turned over in the course of business. This would hinder business. Hence there was the necessity of a charge which would not paralyse the company's business and, at the same time, give a safe security to the moneylender. In the words of Gower:¹²

The ingenuity of equity practitioners led to the evolution of an unusual but highly beneficial type of security known as the floating charge.

A simple illustration will explain this:

A company borrows money on the security of its stock in trade. The charge created, though present and immediate, will not, however, get fixed on the stock. Rather it will keep floating over the changing stock.

9. See also, *Knightsbridge Estates Ltd v Burns*, 1960 AD 619; [1960] 2 All ER 401; 109 L.J. Ch 230; 162 LT 368; 56 TLR 652 (HL).

10. *Tewson v Austin Fairs Management Trust Ltd*, 1976 Ch 1; 153 LT 790 (CA).

11. S. 7(12) provides that a contract with a company to take up and pay for any debentures in the company may be enforced by a decree for specific performance. This provision became necessary because of the well-known lending transactions are not so enforceable. *Seww Singh v Mukhu Singh*, 11 R (1936) 17 Lab 270; AIR 1936 Lab 722.

12. THE PRINCIPLES OF MONEY & COMPANY LAW (3rd Edn 1969) 78. See also, Robert R. Pennington, "The Genesis of the Floating Charge" (1960) 21 Mad LR 630.

in trade. And when the time comes for the lender to enforce his security he will do so by seizing whatever stock is then in the company's hands. When this happens, the floating charge becomes fixed or crystallised.

The validity of such a charge was clearly recognised in *Panama New Zealand & Australia Royal Mail Co, re*¹³:

A steamship company having power to do so issued mortgage debentures, charging the "undertaking and all sums of money arising therefrom", with repayment at a specified time of the money borrowed with interest in the meantime. Before the debentures became due the company was wound up. The debenture-holders wanted to enforce their security. The unsecured creditors disputed the validity of the charge on a fluid thing like the "undertaking of the company". But it was held that "the word 'undertaking' had reference to all the property of the company, not only which existed at the date of the debenture, but which might afterwards become property of the company. Debenture-holders, therefore, have a charge upon all the property of the company, past and future."



Thus, floating charge is a charge of ambulatory nature, floating with the property it is intended to cover. "It attaches to the subject charged in the varying conditions in which it happens to be from time to time."¹⁴ "It is a charge which floats like a cloud over the whole assets from time to time falling within a generic description ..."¹⁵ It does not get attached to any specific property until it crystallises. In the meantime the company can use the assets charged in the ordinary course of its business.

Characteristics of floating charge.—The chief characteristics of a floating charge which distinguish it from a fixed charge were explained with remarkable clarity by Romer J in *Yorkshire Woolcombers' Assn Ltd, re*¹⁶:

"A mortgage or charge by a company which contains the three following characteristics is a floating charge:

1. It should be a charge upon a class of assets both present and future.
2. The class of assets charged must be one which in the ordinary course of business of the company would be changing from time to time."¹⁷
3. It should be contemplated by the charge that until some step is taken by the mortgagee, the company shall have the right to use the assets comprised in the charge in the ordinary course of its business."

13 (1870) LR 5 Ch App 318; 22 LT 424

14 *Iated Manufacturin in Coal Stock and Other Securities Investment Co Ltd v Monin Railway Co Ltd*, 1897 AC 81, 86; 75 LT 553 (JSL).

15 Geover, *The Principles of Modern Company Law* (3rd Edn 1969) 78.

16 (1903) 2 Ch 286; 88 LT 811 (CA).

17 Where a charge was created on "fixed plant and machinery" which would have been a fixed charge, but since the company had no firmly fixed machinery, the charge was held to be in the nature of a floating charge. *SI Equipment (Glynneath) Ltd, re*, 1988 BCC 65 (Ch D). A construction company's trenching machine which was in use at the site, being one fixed item and not likely to change, a charge on it was held to be a fixed charge. *Cossell (Contractors) Ltd, re*, (1996) 1 BCCLC 407 (Ch D).

In *Birds Film Corp Ltd, re*,¹⁹ A film company borrowed a sum of money and declared a lien "on all our assets, including machinery, etc, now lying or that may be bought hereafter until repayment". This was held to be a floating charge as it covered assets, present and future, of extremely fluctuating nature and imposed no restriction on the use of them.

As against it, in *CD Jones & Co Ltd v Ranjil Roy*,²⁰ By a deed a company had charged all its machinery, stock in trade and moveable effects, present and future. The deed provided that the "properties shall be in the lender's possession" which was actually given to him. This was held to be no floating charge as it took away the company's right to use the assets charged in the ordinary course of its business.

If the assets are withdrawn from the business and transferred to the lender's possession, there is, indeed, nothing over which the charge is to float. It immediately gets fixed on those assets.²¹ A charge on book debts was held to be floating charge where the company had the right to collect the debts and use the proceeds in the ordinary course of its business. The charged book debts were not under the control of the chargee to make it a fixed charge.²² One distinguishing feature of a fixed charge from a floating charge is the degree of control over the property which the charge-holder exercises.²³

19. AIR 1939 Sind 100; 191 IC 681.

20. AIR 1927 Cal 782; 103 IC 648. Whether a charge is of one kind or the other does not depend upon the labels attached by the parties. A charge over funds lodged in a bank described by the parties as a fixed charge was found instead to operate as a floating charge. *ASRS Establishments Ltd, re*, (2003) 1 BCLC 727 (CA). A charge on premises described as a fixed charge was found in substance to be a floating charge. *Wisehart Ltd, re*, The Times, 15.7.1999 (CML), following *Royal Trust Bank plc v National Westminster Bank*, 1996 SCC 613.

21. The following two cases are further illustrations. One is *Bank of Baroda v H B Shrivastava*, AIR 1926 Bom 427; 96 IC 417. A company gave to a bank as security for loan all its liquid assets including stock in process present and future stored in a godown the keys of which were delivered to the bank. The goods could be taken out under the bank's supervision, but the company was to maintain the goods at a value of 33½ per cent above the amount due. This was held to be a mortgage of specific assets with a licence to the mortgagor to dispose them of in the course of its business subject to prescribed conditions. The other case is *Tuneklal M Karanjia v Official Liquidator*, (1919) 2 MLJ 66. A creditor was given possession of the mawables pledged to him and it was provided that as and when other properties were acquired, they would also stand pledged to him. The security was stated to be a continuing one. On default of payment, the lender had the right to sell. Though the debtor company was allowed to run its business, it was only run by the creditor as an agent under an irrevocable power of attorney. This was held to be no floating charge. The element of possession made it non-floating, wholly inconsistent with the concept of a floating charge. Looking at the degree of protection that a floating charge is capable of affording the Supreme Court enphasised in *Narayana Kumar Mukeshvri v Union of India*, 1990 Supp SCC 440; (1989) 2 Comp LJ 95 that it affords a real protection. It is not illusory or imaginary.

22. *Bernmark Investments Ltd, re*, (2003) 1 HC 1X 1353 (NVLCA); *Double S Printers Ltd, re*, (1999) 1 BCLC 220, here also the charge on book debts did not give the chargee the requisite degree of control over the charged items, the charge was a floating charge. To the same effect is *Aguera v ERC*, (2003) 2 AC 710; (2003) 3 WLR 484; (2003) 309 Comp Cas 194 (PC), a charge on book debts was held to be a floating charge though described in the terms of charge as fixed. The chargee company had complete control over the debts.

23. *Ibid*.

Whether a charge is fixed or floating, its identification is a two stage process. The first stage involves construction of the instrument of charge. This is necessary to gather the intention of the parties from the language used. The second stage is one of categorisation, a matter of law. This does not depend upon the intention of the parties. If the intention properly construed is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it.²³ To constitute a charge on book debts a fixed charge, it is sufficient to prohibit the company from realising debts itself, whether by assignment or collection. A restriction on disposition which nevertheless allows collection and free use of proceeds is inconsistent with the fixed nature of a charge.²⁴

In a subsequent case on the point, a charge which was described as a "specific charge", was created by a debenture which required that the book debts charged could not be disposed of prior to collection and that on collection the proceeds were to be paid into an account with the chargee bank. This was held to be a fixed charge regardless of the extent of the charger's contractual right to draw out sums equivalent to the amount paid in.²⁵ This decision was reversed by the House of Lords. The charge was held to be a floating charge.²⁶

Subsequent mortgages or charges.—A floating charge also leaves the company at liberty to create subsequent specific mortgages of the same assets and ranking in priority to the floating charge.²⁷ Even if the creditor who takes subsequent specific mortgage has knowledge of the floating charge, he may have priority.²⁸ The company, may, however, be prohibited from creating subsequent specific mortgages. In such a case a creditor who takes a subsequent specific mortgage with notice of the prohibition shall not have priority over the floating charge.²⁹ Registration of the charge with the Registrar amounts to constructive notice of the charge under Section 50, Companies Act.

The decision of the Andhra Pradesh High Court in *State of AP v Rajah Ram Janardhana*³⁰ is an illustration of the difference in the effects of a fixed and a floating charge.

23. *Richard Dale Agency v Commr of Inland Revenue*, (2005) 2 Comp LJ 345 (PC) (New Zealand CA).

24. *Spectrum Plus Ltd. v. re*, 2004 Ch 337; (2004) 3 WLR 503 (CA). For a study, see, Alan Berg, "Charges Over Book Debts: The Spectrum Case in the Court of Appeal" (2004) JDL 581.

25. *Spectrum Plus Ltd. v. re*, (2006) 2 AC 680; (2006) 3 WLR 58 (HL).

26. *Winden v Silkstone and Leigh Moor Civil Co Ltd*, (1885) LR 29 ChD 715; 53 LT 799; *Firburn, Lund and Puffin Works Co. v. re*, (1878) 1 & 10 Ch D 180, 99 LT 589 (CA); *Barox Co. v. re*, (1901) 1 Ch 326 (CA); *Narendra Kumar Mallickbari v. Union of India*, 1990 Supp 5CC 440; (1987) 2 Comp LJ 95, see, observations at p 137.

27. *Hawkins' Windsor Innkeepers Co. v. re*, (1879) LR 12 Ch D 707, 39 LT 659.

28. *English & Scottish Mineral Oil Investment Co v Brunton*, (1892) 2 QB 210, 67 101 406 (CA); *Wilson v Kellam*, (1910) 2 Ch 306, 103 LT 17; *Connally Bros Ltd. v. re*, (1912) 2 Ch 25; 106 LT 238 (CA); *Vallalur Sarey Steam Laundry Co Ltd. v. re*, (1903) 2 Ch 654, 89 LT 60.

29. AIR 1966 AP 233; (1966) 36 Comp Cas 950; (1965) 2 Comp LJ 222.

Certain mortgage debenture-holders had a specific charge on all the properties of a company. The company made a subsequent mortgage in favour of the State to secure a loan advanced under the State Aid to Industries Act. In the winding up of the company the question arose as to the priority between the two mortgages. Holding that the debenture-holders were entitled to priority in preference to the claims of the Government, the court said: "Where a particular property of the company is specifically charged in favour of the debenture-holders the company cannot dispose of it unencumbered by the charge without having obtained the consent of the holders of the charge. In the case of a debenture secured solely by a floating charge, the company may dispose of the property on which the charge exists unencumbered without consulting the holders of the charge until an event happens on which the floating charge, according to its terms, 'crystallises', i.e. becomes a fixed charge. Before crystallisation the company has a free hand to deal with and dispose of the property charged in the ordinary course of the business of the company."

Statutory restrictions.—Section 322 imposes an important condition for the validity of a floating charge. It provides that a floating charge created within twelve months immediately preceding the commencement of winding up shall be invalid, except in the following cases:

- (a) if the company immediately after the creation of the charge was solvent;
- (b) to the extent to which any cash was paid to the company under the charge.

*Eric Holmes (Property) Ltd. v.*³⁰ is an illustration of the utility of this provision:

A company created a charge in favour of a creditor who advanced £400 in cash at the time. Winding up having followed within a year, the charge was held to be void as a fraudulent preference over other creditors save to the extent of £400.

Further, if the debenture-holders seek to get their payment by enforcing the charge, the preferential payments as detailed in Section 327 shall have priority over them. Thus, in *JRC v Goldblatt*,³¹ it was held that a receiver would be personally liable if he pays debenture-holders with knowledge that there are unpaid preferential creditors.

Apart from this, there is another category of persons, as established by common law, which is not affected by the floating charge. Such persons include a landlord who has levied for rent due his distress before the crystallisation of the charge;³² a creditor who has obtained a decree and has got

30. 1965 Ch D92; (1965) 2 WLR 1260; (1966) 1 Comp LJ 19.

31. 1972 Ch 498; (1972) 2 WLR 953; (1972) 2 All ER 202.

32. *Roundsend Colliery Co. v.* (1892) 1 Ch 373, 75 LT 641 (CA).

certain goods of the company sold in the execution of the decree³³ or whom the company has paid to avoid an execution sale³⁴ or who has obtained an absolute (as opposed to a temporary or nisi) garnishee order attaching the property of the company,³⁵ provided all these things take place before crystallisation of the charge; and, a person who has supplied goods to the company under a hire purchase agreement, the goods being still his property.³⁶

Crystallisation of floating charge

Debentures generally contain an undertaking to pay the principal sum at a specified date with interest in the meantime. When the company makes a default or when it comes to be wound up, the debenture-holders should take steps to enforce their security by seizing the assets over which the charge was until then floating. When they do this the charge is said to crystallise. But even after the default the charge keeps floating until the debenture-holders intervene. This was laid down in *Gant Stock and Other Securities Investment Co Ltd v Manila Railway Co Ltd*.³⁷

A company issued debentures by which it undertook to pay the principal at a distant day and interest on fixed days half-yearly and charged by way of floating security all its property present and future. The company reserved the right in the course, and for the purpose of its business, to sell or otherwise deal with its property until the company made a default in payment of interest for three months after the same should have become due. After an instalment of interest had been due more than three months but before the debenture-holders had taken any steps to enforce their security, the company mortgaged its assets.

This mortgage was held to be valid because real crystallisation takes place not on default, but on intervention by debenture-holders after the default. Lord MACKAUCHEN observed: "It is of the essence of a floating charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. As long as he does not intervene the business will be carried on, not as of right, but by the sufferance of the debenture-holders and at their mercy."³⁸ Thus a floating charge crystallises when the company ceases to be a going concern, or when it comes to be wound up or when the charge-holders intervene on the happening of default³⁹ by giving notice to that effect.⁴⁰

33. *Standard Mfg Co v*, (1891) 1 Ch 627 (C.A.).

34. *Hedden & Dugard Ltd v Cutting Bros Ltd*, (1925) 1 KB 655.

35. *Evans v Euston Granite Quarries Ltd*, (1910) 2 KB 979 26 TLR 509 (C.A.).

36. *Morrison, Jones & Taylor Ltd v*, (1934) 1 Ch 50; 109 LT 222 (C.A.).

37. 1899 AC 81; 15 L.J. Chd (H. J. SW, M. Robbie and C. P. Gill), "Fixed and Floating Charges: A New Look at the Bank's Position" (1981) JML 95.

38. *Ibid.* 86-87.

39. See, J. Farra, "World Economic Stagnation puts the Floating Charge on Trial" 1 Co Law 83.

40. *Brightling Ltd v*, 1987 Ch 200 (1987) 2 WLR 194 (Ch D). the charge-holder gave notice before commencement of winding up, held, effective crystallisation for the purpose of defeating preferential payments except as provided in the Act.



CASE PILOT

In another case, where a demand and default took place in accordance with the terms and since this had happened before the appointment of the receiver, it was held that the charge had already become crystallised and was no longer floating at the time of the appointment and, therefore, the money in the company's banking account was to be handed over to the charge-holder.⁴¹

Debenture trust deed [5. 71(5-10)]

The company has to appoint one or more debenture trustees where prospectus is issued for issue of debentures or where members of public or company's own members exceeding 500 are invited to apply for the issue. In other cases, it is for the debenture holders themselves to appoint their trustee.

Where the debenture-holders do not have the time to look after their interest in the properties mortgaged or charged to them, they may appoint some of themselves as trustees for the supervision of their common interest. A trust deed is made under which some of them are appointed as trustees. Properties of the company are mortgaged or charged in the trustee in favour of the debenture-holders. The deed also contains provisions defining the rights of the debenture-holders and the company. The advantage of this arrangement is that it becomes the function of the trustees to watch the interest of debenture-holders. They are bound to act with the same degree of honesty, care and diligence as is required of all trustees. Any clause in the trust deed which exempts them from liability for breach of their duty as trustees or which indemnifies them against liability is void.⁴² Another advantage is that if and when the company makes a default, they can take action for enforcing the security on behalf of all the debenture-holders.⁴³

The rights of a debenture-holder were examined by SUJATA MANOHAR J of the Bombay High Court in *Narayanadas Trikamdas Toprani v Bombay Dyeing & Mfg Co Ltd*.⁴⁴

41. *Premamit Houses (Holdings) Ltd. v. re*, 1980 BCLC 563 (Ch D). See also, *Brightlife Ltd. v. The Times*, 9-8-1986, *Financial Times*, 13-8-1986, giving liberty to the charge-holder to convert by notice the floating charge into a fixed charge, and when that notice was given before winding up, the charge became a fixed mortgage. See, note "Automatic Crystallisation of Floating Charge" (1986) 18L 350.

42. S. 71(7). See also, the proviso which allows the trustees in certain circumstances to be released from liability. A debenture trust deed is not in itself a mortgage or a bond. It is only a document expressing the faith of the shareholders upon their chosen trustee and has, therefore, to be stamped as a deed only. *Chief Controlling Revenue Authority v. State Bank of Mysore*, AIR 1966 Kant L 1287; 5 Kant L 458; ILR 1987 KAR 2917 (1989) 67 Comp Cas 427 (ED), following *Mangalurjendro Civil Chkd Controlling Revenue Authority*, AIR 1974 Kant 60; (1974) 1 Kant 127 (HIS) and *United Bank of India Ltd v. Lehmann Sundaram & Co*, AIR 1965 SC 1391; (1965) 25 Comp Cas 471. A debenture trustee is not an officer of the company and, therefore, he is not entitled to relief under S. 46(i) against any apprehended proceedings for negligence, breach of trust, etc. *Cestini & Sons Executors & Trustees Co Ltd v. Magna Hand Temp Ltd*, (1997) 89 Comp Cas 40 (AP).

43. The Central Government has to prescribe rules for inspection and copies of trust deed in favour of debentureholders. [S. 71(10)]

44. (1996) 3 Comp L 179; (1996) 88 Bom LR 659; (1996) 64 Comp Cas 300.



A company proposed to issue a new series of debentures. Of the company's present debentures 96% were held by institutions, which permitted the new series; of the remaining 4% which were held by individuals, one questioned the validity of the proposal and wanted the Bombay High Court to stay it till he was able to examine the ratio between the assets and liabilities of the company. The company refused to permit him such access to its assets and stock registers.

The High Court agreed with the company in holding that he had no right to go beyond the declared accounts and allowed the company to go ahead with its debenture-issue subject only to this that if the aggrieved debenture-holder wanted payment, he should be paid out in cash. The court asserted that it can examine the motive of a petitioner like the present so as to see whether he is really concerned with the interests of the debenture-holders or has something up his sleeves. The court pointed out that the right of a debenture holder of inspecting the company's records is extremely limited. Under Section 118 [1956 Act] he can inspect the debenture-trust deed and obtain a copy of it. Under Section 163 [1956 Act] he could inspect and obtain copies of the register of members and of debenture-holders, annual reports and copies of certificates and documents annexed thereto. He might also have the right to copies of annual accounts. But he did not have the right of detailed inspection of the record and registers and books of account and no adverse inference could be drawn if the company did not permit it.⁴⁵

Supply of copies and inspection.—A copy of the deed should be available for inspection to members and debenture-holders. They are also entitled to get copies on payment of prescribed fees.

Appointment of debenture trustees and their duties [S. 71(5)]

Appointment of debenture trustees has to be made before making a debenture issue and the fact of the appointment and their consent to act as such has to be mentioned on the face of the prospectus or letters of offer.

Persons not qualified.—Following persons cannot be appointed as debenture trustees:

1. a beneficial holder of shares in the company;
2. a person who is beneficially entitled to the money which is to be paid by the company to the debenture trustee;

45. The Supreme Court took opportunity in *Nanavira Kumar Mahadevji v. Union of India*, 1990 Supp SCC 440 (1989) 2 Comp L 95 to explain the value of guidelines issued by the Government of India from time to time on company matters including in this case on the ways in which debenture-holders are to be protected by maintaining among other things the debt-equity ratio. The court may overlook deviations from guidelines if the deviation is justifiable keeping in mind the public interest sought to be served by the State. This is because guidelines by their very nature, do not fall into the category of legislation, decree, subordinate or ancillary. They have only an advisory role to play and non-adherence to or deviation from them is necessarily and implicitly permissible if the circumstances so warrant. See, Section N of the SEBI Guidelines for Disclosure and Investor Protection on Protection of Interest of Debenture-holders."

3. a person who has entered into a guarantee in respect of principal debts secured by debentures or interest thereon.

Functions.—The functions of debenture trustees are generally to protect the interests of holders of debentures, to bring about the creation of securities within the stipulated time and to redress grievances of debenture-holders.

Duties.—The particular duties are: (1) to ensure that the assets of the company issuing debentures and of the guarantors are sufficient to discharge the principal amount at all times; (2) to satisfy himself that the prospectus or the letter of offer does not contain anything inconsistent with the terms of the debentures or debenture trust deed; (3) to ensure that the company does not commit any breach of the covenants and provisions of the debenture trust deed; (4) to take reasonable steps against any breach of the covenants or terms of issue; (5) to take care to call meetings of debenture-holders as and when it is required to be held.⁴⁶

Petition to Tribunal. Where at any time the debenture trustee comes to the conclusion that the assets of the company are insufficient or are likely to become insufficient to discharge the principal amount as and when it becomes due, he should file a petition before the Tribunal. Which may hear the company or any other interested person. It may then impose restrictions on the company in the matter of incurring further liabilities to safeguard the interests of debenture-holders.⁴⁷

Responsibility of company to create security and debenture redemption reserve [S. 71(4)]

The company issuing debentures has to create a debenture redemption reserve. Adequate amounts have to be transferred to the fund every year from the profits of the company available for distribution till the debentures are redeemed. The amounts so credited cannot be used for any other purpose. The company is under a duty to go on paying interest and to redeem debentures in accordance with the terms and condition of the issue.

On failure of the company to do so, the debenture-holders or any one of them can apply to the Tribunal, which, after hearing the parties, may direct the company to pay off interest and principal amount and redeem the debentures. If the orders of the Tribunal are not carried out, the defaulting officers are liable to punishment by way of imprisonment and a fine.

Remedies of debenture-holders

The remedies of debenture-holders depend upon the terms of their agreement with the company. A debenture-holder who wishes to realise his security and get back his money may exercise remedies given by the debenture

46. These were the provisions of S. 1C-B of 1956 Act. Now they are likely to be prescribed under rules.

47. *Indian Overseas Bank v Essar Machine Works Ltd.* (2002) 112 Comp Cas 557 (C. J.), the company denied creation of the charge in favour of the bank. The matter was being examined by the Debt Recovery Tribunal. The C.I.B refused to adjudicate.

trust deed or resort to legal proceedings to enforce his rights.⁴⁸ If money due on a debenture is payable on demand the debtor company is entitled, once demand is made, to reasonable time to implement the mechanics of payment, but it is not entitled to any time to raise the money if it was not at hand. A demand under a debenture need not specify the amount due.⁴⁹ It is not necessary to allow time to the borrowing company to enable it to engage in a commercial transaction for the purpose of raising funds for redemption of debentures.⁵⁰ But one of the remedies which is always open to them as mortgagees under the Transfer of Property Act is to bring the property charged to sale.⁵¹

Receiver [S. 84].—Secondly, they may appoint a receiver to take charge of the assets subjected to the charge. If they do not have this power under the terms of their debentures they may have a receiver appointed by the court. In either case the fact of appointment must be brought to the notice of the Registrar within 30 days, whose duty is to enter the same in the register of charges.⁵² A similar notice has to be given by the receiver when he ceases to act.⁵³ When the receiver takes possession of the assets comprised in the charge, he has to maintain proper accounts of his receipts and payments and to submit an abstract with the Registrar once in every half year. If he is appointed under a debenture as an agent of the company, he is under a duty to keep full accounts of the company's affairs, i.e. fuller than abstracts of receipts and payments and to produce them to the company when required to do so.⁵⁴ The fact of the receiver's appointment should also be mentioned on every invoice, order for goods, or business letter issued on behalf of the company. Where a company which had gone into liquidation was facing an action and the receiver took over the responsibility of defending the company against the action, it was held that the court could order that any costs awarded to the plaintiff should be paid by the receiver and that such costs should be treated as expenses of receivership.⁵⁵

A receiver's primary duty is to bring about a situation in which the secured creditor would stand paid. He is entitled to sell the property like a mortgagee in the condition in which it is and without waiting for or effecting any increase in the value of the property. A receiver is not obliged before

48. *Lloyd's Bank plc v. Lumper*, 1999 BCC 507.

49. *Bank of Baroda v. Emperor*, 1985 Ch 335; (1987) 2 WLR 208 (Ch D).

50. *Lloyd's Bank plc v. Lumper*, 1999 BCC 507.

51. See, *Narain Singh & Co v. U.P. Oil Industries Ltd.*, (1964) 1 Comp LJ 225 (All), following *Parimathani Venkam Bruthmurus v. Andhra Bank Ltd.* AIR 1964 AP 555; *Guruji v. Khan Sabeb Alibari Kader*, AIR 1923 Nag 150.

52. S. 84. This he does on payment of the prescribed fee. The notice has to be given by the person who appoints or obtains appointment.

53. S. 84, Sub-s (3) imposes penalty upto Rs 500 for every day of default.

54. *Smiths Ltd v. Middleton*, (1979) 3 All ER 842. The court explained here the duty of the receiver to preserve the security in good faith for the benefit of his mortgagee as well as the company and other encumbrancers. Followed in *Dunlopine Novations Ltd v. First City Corp Ltd*, 1993 AC 295; (1993) 2 WLR 86; (1994) 1 Comp LJ 31 (PC).

55. *Alparwan v. Hyde*, (1956) 2 BCLC 144 (CA).

sale to spend money on repairs or to make the property more attractive before marketing it. He is free to proceed with an immediate sale of the mortgaged property.⁵⁶

Manager [S. 84].—When the receiver has taken possession of the company's assets, obviously they cannot be used by the company for business. Yet sometimes it may be necessary to carry on business for beneficial winding up. In such a case the debenture-holders may appoint a manager also or have him appointed under an order of the court. The above provisions relating to a receiver also apply to a manager.

It has been held that a receiver or manager is not an "officer" of the company for the purposes of the Companies Act, nor a "manager" of the company and consequently he cannot be subjected to public examination.⁵⁷ He functions as manager, not of the company, but of the assets subject to the charge, and not for the benefit of the company, but for the purpose of realising the security for the benefit of the charge-holders. He is an agent of the company for that purpose so that he may effectively deal with third parties. That is the whole purpose of his appointment and of powers which are conferred upon him.

Though misfeasance proceedings and public examination may not be available, he will definitely be liable for any breach of duty, for he is a trustee of the assets which he is appointed to realise.⁵⁸ Thus where he damaged the interest of a subsidiary of the company, the court ordered the Government to appoint an inspector to investigate the affairs of the company.⁵⁹ His contention that his conduct cannot be regarded as the affairs of the company was rejected. The court said:

"What the receiver and manager does may in a narrow sense be his affair, but it is also the affair of the company in the broad and natural meaning of the phrase, 'its affairs'. He acts in the name of the company—what he does may ruin its shareholders or leave them with some prospect of future recovery. Under clause (2) of the debenture it is the undertaking of the company which is confided to him and it is its business that he is managing and he is its agent and it is made responsible for his acts or defaults."

There is a clear authority for the proposition that where a receiver or manager is appointed by the court his function as manager confers a duty on him to preserve the goodwill and property of the company, both in the interests of the mortgagee and of the mortgagor.⁶⁰

56. *Silvan Properties Ltd v Royal Bank of Scotland*, (2011) 1 BCAC 352 (Ch D).

57. *B Johnson & Co (Builders) Ltd*, re, 1955 Ch 634; (1955) 3 WLR 269 (CA). A receiver was held to be not personally liable to the employees whose services he continued. *Loyland DAF Ltd* case, [1994] 4 All ER 200 (Ch D).

58. *Miss Shumbridge Co Ltd v Whitney*, 1912 AD 254; (1911-12) All ER Rep 344 (H1).

59. *JG v Board of Trade*, (1915) 2 QB 600; (1916) 3 WLR 262 (DC).

60. The same duty is cast upon a receiver of shares. *Hickey v Ronhemic*, (1988) 1 WLR 742; 1986 BCAC 656 (CA). *Wesminster Corp v Blaize*, 1950 Ch 442, dealing with company

A receiver's duty to provide accounts or other information to a debtor company is not restricted to his statutory obligations. The extent of the receiver's obligation to provide additional information is to be deducted from the nature of the receivership and a company's right to such information depends on the showing that the information is needed to enable the Board of directors to exercise its residual powers or to perform its duties. The right if any, which the company has to obtain information from the receiver is qualified by the receiver's primary responsibility to the debenture-holder so that he can withhold the information if he thinks that the disclosure would be contrary to the debenture-holder's interest.⁶¹

A receiver has a right to have the documents of the company produced from the custody of the company's solicitors and they cannot refuse on account of their lien because their lien is against the company and the receiver is a third person and not the company for this purpose.⁶²

The same should hold good when a receiver and manager is appointed by the debenture-holders.

Kinds of debenture

1. Redeemable debentures.—Debentures are generally redeemable. This means that on expiry of the term of the loan the company has the right to pay back the debenture-holders and have its properties released from the mortgage or charge. This is called redemption of debentures. Redeemed debentures can be re-issued. If there is no provision to the contrary in the articles, or in the conditions of the issue or if there is no resolution showing an intention to cancel the redeemed debentures, the company has the power to keep the debentures alive for the purpose of re-issue. The company may re-issue the same debentures or other debentures in their place. Upon such re-issue the person entitled to the debenture has the same rights and priorities as if the debentures had never been redeemed.

2. Convertible debentures [S. 71(1)].—A company may issue debentures with an option to convert them into shares, either wholly or partly at the time of redemption. Debentures with such option can be issued with the approval of a special resolution passed at a general meeting.

3. Perpetual debentures.—A debenture which contains no clause as to payment or which contains a clause that it shall not be paid back is known as a *perpetual or irredeemable debenture*. Section 120 of 1956 Act provided that a "condition contained in any debenture ... shall not be invalid by reason only that thereby, the debentures are made irredeemable, or redeemable

property in an unwarrented manner. *American Express International Banking Corp v Hurley*, (1985) 3 All ER 564, the bankers as debenture-holders controlling the actions of the receiver, held liable for the receiver's negligence.

61. *Gomby Holdings UK Ltd v Human*, (1986) 3 All ER 94 (Ch D); *Gomby Holdings UK Ltd v Minorities Finance Ltd*, (1988) 1 All ER 261, receiver's duty to return documents.

62. *Aceling Berjford Ltd, re*, (1989) 1 WLR 380 (Ch D).

only on the happening of a contingency, however remote, or on the expiration of a period, however long.⁶³

4. Debentures to registered holder and bearer debentures.—A company which has issued debentures will obviously maintain a register of its debenture-holders, as Section 88 provides that every company shall keep a register of the holders of its debentures. The name of the holder is placed both on the debenture certificate and on the company's register. Such a holder is known as the registered holder. He can transfer his debentures in the open market in just the same way as shares are transferred.⁶⁴ Transfer will have to be registered with the company. The transferee's title will be subject to all equities between the transferor and the company.⁶⁵ Registration of transfer can be avoided only by issuing debentures payable to bearer, as the company has not to maintain a register of such debenture-holders.⁶⁶ Such debentures are transferable, like negotiable instruments, by simple delivery and are called debentures payable to bearer. It has been held by the Calcutta High Court in *Calcutta Safe Deposit Co Ltd v Ranjif Mathuradas Sumpat*,⁶⁷ that a person to whom a bearer debenture is transferred becomes its holder and is as such entitled to recover the principal and interest when due. If the same is not paid to him, he can also apply for winding up and, if the petition is otherwise competent, the company cannot ask him to explain how he came by the debenture or why he did not collect the interest for a long time. The court pointed out that Section 118, Negotiable Instruments Act applies and, therefore, every holder of a bearer debenture is presumed to be a holder in due course unless the contrary is shown.⁶⁸ [Bearer debentures would seem to have been ruled out under 2013 Act]

Register of debenture-holders (S. 88)

A company issuing debentures has to maintain a register of debenture-holders in the prescribed form and manner:

1. the name, address and occupation of each debenture-holder; 2. the debentures held by each holder, showing numbers and the amount actually paid or deemed to be paid; 3. the date at which each person was entered as a debenture-holder; and 4. the date at which any person ceased to be a debenture-holder.

Index.—An index should be maintained which should enable the entries relating to a debenture-holder to be readily found. For the rest of the provisions, see under Register of Members.

63. There is no corresponding provision in 2013 Act. S. 71 authorises conversion of debentures into shares at the time of redemption. The tenor of provisions of S. 71 shows that such category of debentures is not permissible.

64. S. 3b.

65. *National Investment Co. v. C.* (1968) 1 R 3 Ch App 205, 18 I.T. 171.

66. There is no provision in 2013 Act corresponding to this and, therefore, it would seem that bearer securities have been ruled out.

67. (1971) 41 Comp Cas 1063 (Cal).

68. See, (1971) 41 Comp Cas 1063, 1070.

Shareholder compared with debenture-holder

In many respects debentures are similar to shares. In the words of Gower: "The company's securities fall into two classes which legal theory tries to keep rigidly separated but which in economic reality merge into each other. The first of these classes is described as shares; the second as debentures."⁶⁹ Some of the resemblances between the two are that both the shareholder and the debenture-holder have invested their money in the company; both get some return on the investment, although one gets it by way of dividend and the other by way of interest; perpetual or irredeemable debentures, like shares, are not generally paid back; debentures, like shares, are transferable; and where debentures carry a charge, the lot of debenture-holders, like that of shareholders depends upon the assets of the company. Moreover, redeemable preference shares and debentures have many common features. The company can pay back both such securities.⁷⁰ The position of the shareholder is undergoing serious transformation. 'Indeed, it may be questioned whether shareholders should remain in their present position as owners of the business or be converted into some form of creditors of the business.'⁷¹ There are suggestions to the effect that companies should issue participating debentures so as to provide the small saver with adequate return of interest plus a participation in the profits.⁷²

The following points of difference are, however, also quite apparent.

In the first place, the basic difference is that while a shareholder is a member of the company and enjoys all the rights of membership, a debenture-holder is simply a creditor of the company. A shareholder, for example, has the right to vote, whereas Section 71(2) declares that no company shall issue any debentures carrying voting rights at any meeting of the company, whether generally or in respect of particular classes of business.

Secondly, the debenture-holders are entitled to a fixed rate of interest which the company must pay whether there are profits or not. But they do not have any right to interfere with the business of the company unless, on the company's default, they step in to enforce their security. Shareholders, on the other hand, have the full right of control and the ultimate destiny of the company is in their hands. Of course, they are entitled to get dividends only out of profits, but the rate of dividend may be much higher than the rate of interest.

Thirdly, unless the debentures are perpetual, the company can pay back the debenture-holders but the shareholders cannot be paid back as long as the company is a going concern.⁷³

69. *The Principles of Modern Company Law* (3rd Edn. 1968) 343.

70. See Lord Sumner in *Scottish Insurance Corp Ltd v Wilsons & Cigars Coal Co Ltd*, 1949 AC 462 (HL).

71. R.S. Nock, "The Ford Foundation Workshop on Company Law" July 1970 (1970) 11 Journal of the Society of Public Teachers of Law 10.

72. 1976 JPL 2.

73. A company may, however, pay back redeemable preference shares [S. 80], or generally under a scheme involving reduction of capital.

Lastly, in the winding up, debenture-holders, being secured creditors, are paid in priority. Whereas shareholders are paid back only after all other claims have been satisfied.⁷⁴

Debenture with voting rights [S. 71(2)]

The sub-section provides that no company is to issue any debentures carrying any voting rights.

74. The provisions of the Act relating to transfer of shares, remedies against refusal to register a transfer, issue of certificates, etc are also applicable to debentures. See, Ss. 56, 58, 59, 78.

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®; along with updates, articles, videos, blogs and a host of different resources.

The following cases from this chapter are available through EBC Explorer™:

- *Gear Stock and Other Securities Investment Co Ltd v Manila Railway Co Ltd*, 1897 AC 81; 25 LT 553 (HL.)
- *Narayana Trikamalay Tepmani v Bamby Dyeing & Mfg Co Ltd*, (1986) 3 Comp L J 179; (1986) 88 Bom LR 649; (1990) 68 Comp Cas 300
- *Parsons New Zealand & Australia Royal Mail Co, re*, (1870) LR 5 Ch App 318; 22 LT 424



Chapter 15

Majority Powers and Minority Rights

"The protection of the minority shareholders within the domain of corporate activity constitutes one of the most difficult problems facing modern company law. The aim must be to strike a balance between the effective control of the company and the interests of the small individual shareholders."¹ Similarly, in the words of Palmer: "A proper balance of the rights of majority and minority shareholder's is essential for the smooth functioning of the company."² The modern Companies Acts, therefore, contain a large number of provisions for the protection of the interests of investors in companies. The aim of these provisions is to require those who control the affairs of a company to exercise their powers according to certain principles of natural justice and fair play.³

RULE IN "FOSS V HARBOTTLE"

The basic principle relating to the administration of the affairs of a company is that "the courts will not, in general, intervene at the instance of shareholders in matters of internal administration; and will not interfere with the management of a company by its directors so long as they are acting within the powers conferred on them under the articles of the company".⁴ "Nothing connected with the internal disputes between the shareholders is to be made the subject of an action by a shareholder."⁵ This rule was laid down as early as 1843 in the celebrated case of *Foss v Harbottle*.⁶



CASE PILDAT

1. N.A. Bastin, "Minority Protection in Company Law" (1968) JBL 320.

2. Clive M. Selwyn-Holmes and Corry (Eds.), *Palmer's Company Law* (20th Edn 1959) 692 on Majority and Minority Rights.

3. These principles are briefly summarised by K.W. Wedderburn, "Going the Whole Hogg v Cawthron Ltd" 1967 Ch 254; (1968) 31 Med L Rev (NOCL) 688. See also by the same writer, "Unreformed Company Law" (1969) 32 Med L Rev 563.

4. *Venkateswara Ayyar J in Kajakwundri Electric Supply Corps Ltd v A Nagashwara Rao*, AIR 1956 SC 213, 217; (1956) 26 Comp Cas 91.

5. *JAMES L in MacDrugall v Gardiner*, (1875) 1 Ch D 15; (1874-80) All ER Rep Ext 2248 (CA).
6. {1843} 2 Mart 461, 67 ER 189.

In this case the action was by two shareholders in a company against the directors charging them withconcerting and effecting various fraudulent and illegal transactions whereby the property of the company was misappropriated and wasted, and praying that the defendants might be decreed to make good to the company the losses. The action was rejected in respect of those transactions which a majority of the shareholders had the power to confirm. Briefly, the opinion of the court was this: "The conduct with which the defendants are charged is an injury not to the plaintiffs exclusively, it is an injury to the whole corporation. In such cases the rule is that the corporation should sue in its own name and in its corporate character. It is not a matter of course for any individual members of a corporation thus to assume to themselves the right of suing it, the name of the corporation. In law the corporation and the aggregate of members of the corporation are not the same thing for purposes like this."

The rule was applied in *MacDougall v Gardiner*,⁷ where Merlesea LJ stated it thus:

"In my opinion, if the thing complained of is a thing which, in substance, the majority of the company are entitled to do, or something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes."

The rule was restated in the following terms by Jenkins LJ in *Edwards v Halligan*:⁸

"The rule in *Fees v Herbutte* comes to no more than this. First, the proper plaintiff in respect of a wrong alleged to be done to a company is *prima facie* the company itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company by a simple majority of members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company is in favour of what has been done, then *creditorum quæstio*."

An illustration of the working of the rule is to be found in *VN Bhujkar v KM Shukla*.⁹

The directors of a company resolved to appoint a company as its managing agents. Some of the shareholders objected but the appointment was confirmed at two general meetings of the company. An action was then

7. (1975) 1 Ch D 13; (1874-80) All ER Rep Ext 2248 (CA); *PS Officers Inter Land Services P. Ltd v Family Ovensuply and Services Ltd*, (1992) 75 Corp Cas 553 (Bom); the advocate appearing for the company must have the authority of the board of directors or principal officer of the company and not merely the backing of majority shareholders.

8. (1950) 2 All ER 1364, 1056 (CA).

9. AIR 1921 Bom 243. (1931) 1 Corp Cas 454.

commenced by certain shareholders to restrain the managing agents from acting on the ground that the managing agents' company was a dummy company and it was against the company's interest to appoint them. The court ordered a general meeting to be held under the supervision of a Chairman appointed by it. The Chairman put up a resolution in the meeting to the effect: "whether the company is willing to maintain the suit and proceed with it." He reported that the resolution was lost. "Under these circumstances", the court held, "it is difficult to see how a few shareholders who represent a minority are entitled to maintain the suit and ask the Court to interfere on the question as to who should be the managing agents of the company."¹⁰

The briefest possible statement of the rule occurs in the observation of Cardozo J that for erring directors there may be absolution if all the shareholders are satisfied.¹¹ Two English cases *Hogg v Cramphorn Ltd*¹² and *Bainford v Bainford*¹³ bear witness to this absolving power of the majority of shareholders. In either case there was the disposal by the directors of the unissued capital of the company as a tactical move in a battle for control of the company. The court conceded that the power to allot shares was exercised for an improper motive and the directors were guilty of a misfeasance,¹⁴ but held that it is a common place in company law that the directors can by making a full and frank disclosure and calling together the general body of the shareholders, obtain absolution and forgiveness of their sins.¹⁵

A 50 per cent shareholder brought an action against a director to hold him liable for misappropriation of the company's assets. The court did not allow it. Such loss is recoverable only by the company. It is not recoverable by a shareholder because he does not suffer any distinct loss from that suffered by all the shareholders.¹⁶

10. See e.g., *Highland Bros Ltd v Simayor Singh & Wig Co Ltd*, AIR 1943 Cal 124; (1940) 72 Cal LJ 458; 195 SC 36 and *Hegarty v Dupont*, (1964) 1 WLR 843 (CA); *Nevens v Ind Coop & Co Ltd*, (1903) 1 Ch 84; 97 LT 572, where a shareholder was not allowed to maintain an action against directors' increasing their remuneration without the sanction of the general meeting. He must appeal to the general meeting.

11. *McCartless v Tuckwell*, 80 L Ed 121; 296 US 140, 157 (1935).

12. 1957 Cr 254 (1966) 31 Mod L Rev (NOT) 649.

13. 1970 Cr 212, (1969) 2 WLR 1107; (1969) 1 All ER 969 (CA).

14. (1969) 2 WLR 1107, see, *Rossati* L at p 114.

15. See, *Haskins* L at p 101, (1966) 2 WLR 1109. See, Cf. J.H. Thomson, "Share Issues and the Rule in *Foss v Harbottle*" (1975) Aust LJ 121; where a company accepted an order of the court, a few shareholders were not permitted to file an appeal on behalf of the company. *Bennett, Coleman & Co v Union of India*, 1977-47 Comp Cas 92 (Bom); *Rajendra Nath Datta v Shambhu Nath Mukherjee*, (1962) 52 Comp Cas 293; 85 CWN 1029, where the managing director was not permitted to challenge a transaction of the company in his personal capacity; *Virendra Coomia v Manuj Sankarlin*, (1996) 83 Comp Cas 917 Mad, no interference in Board managed company or its appointment of directors by directors or of executive directors, grievance, if any, should be sorted out under S. 392; *Bach v Sulitien*, (1958) 1 All ER 56, where the directors appropriated the assets of the company, action was allowed but no action was allowed in *Sauldene v Jensen*, 1956 Ch 566; (1956) 3 WLR 224 where the allegation was that the company's assets were sold at an undervalue.

16. *Ston v Blake* (No 2), (1998) 1 BCUC 573 (CA).



UNIVERSITY LIBRARY

EXCEPTIONS

The majority supremacy, however, does not prevail in all situations. The operative field of the rule in *Foss v Harbottle*¹⁷ extends to cases in which the corporations are competent to ratify managerial sins. But there are certain acts which no majority of shareholders can approve or affirm. In such cases each and every shareholder may sue to enforce obligations owed to the company. He brings the actions as a representative of the corporate interest. In the American literature a representative action of this kind is called the "derivative action".¹⁸ The relief goes to the company.¹⁹ Similarly, a shareholder may sue to recover *ultra vires* spent money from the company's officers responsible for the transaction.

1. Acts "*ultra vires*"

A shareholder is entitled to bring an action against the company and its officers in respect of matters which are *ultra vires* the company and which no majority of shareholders can sanction. The rule in *Foss v Harbottle* applies only as long as the company is acting within its powers. The facts of *Bharat Insurance Co Ltd v Kanthi Tyra Ltd*²⁰ provide a suitable illustration.



CASE PAPER

The plaintiff was a shareholder of the respondent company. One of the objects of the company was: "To advance money at interest on the security of land, houses, machinery and other property situated in India . . ." The plaintiff complained that "several investments have been made by the company without adequate security and contrary to the provisions of the memorandum and therefore prayed for a perpetual injunction to restrain it from making such investments".

The court observed as follows.

"The broad rule in such cases is no doubt that in all matters of internal management of a company, the company itself is the best judge of its affairs and the court should not interfere. But application of the assets of a company is not a matter of mere internal management. It is alleged that directors are acting *ultra vires* in their application of the funds of the company. Under these circumstances a single member can maintain a suit for a declaration as to the true construction of the article in question."

17. (1843) 2 Hare 412; 67 ER 389.

18. See, A. J. Boyle, "The Derivative Action in Company Law" (1969) 1BL 129.

19. For the right of the petitioning shareholder for indemnity, A. J. Boyle, "Indemnifying the Minority Shareholder" (1976) 1BL 19.

20. AIR 1935 Lalit 750; 191 I.C. 74. See also, *Niyagappa Chettiar v Madras Race Club*, (1949) 1 MLJ 662; ILR 1949 Mad 808. The action is for recovery of money in favour of the company where it has already been paid over. It must be shown that there was some reason why the company could not run. Where the independent shareholders of a company in a majority resolved that no recovery should be made of over payment to directors, the court attached importance to this fact and dismissed the minority shareholder's action. *Smith v Croft* (No 2), 1968 Ch 141; (1967) 3 WLR 405 (Ch D).

The plaintiff's own conduct in the circumstances must be proper. Since the minority shareholders' action in which the plaintiff shareholder sues on behalf of the company is a procedural device for the purpose of doing justice for the benefit of the company where it is controlled by miscreant directors or shareholders, the court is entitled to look at the conduct of the plaintiff to satisfy itself that the plaintiff is a proper person to bring the action. Thus, if the plaintiff's conduct was so tainted as to bar equitable relief or if there was an unacceptable delay in bringing the action, the plaintiff might well be held not to be a proper person to bring the action. In this case the action was by the wife, a minority shareholder, against the wrongdoings of her husband as a director. In a matrimonial proceeding between them she came to know of the improper profits made by the husband and such profits were even taken into consideration in preparing the award, it was held that she was not a proper plaintiff for a derivative action.²¹

Where it was proved that the funds of the company were diverted to extraneous purposes, it was held that the court had jurisdiction to pass an order for repayment to the company not only against the guilty members and directors but also against third persons who had knowingly received such money or improperly assisted the wrongful diversion.²²

2. Fraud on minority

The conduct of a majority of shareholders can also be impeached if it constitutes a "fraud on the minority". The meaning of this phrase is not very clear. But, speaking very briefly, it means a discriminatory action. Everard MR said in *Greenhalgh v Arderne Cinemas Ltd*²³ that "a special resolution would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and minority shareholders, so as to give to the former an advantage of which the latter were deprived".

The concept of "fraud on the minority" can best be understood with reference to the line of cases in which it has been developed and applied. The first important case seems to be *Menier v Hooper's Telegraph Works*.²⁴

Two companies A and B were in rivalry. The majority of the members of company A were also the members of company B. Company A had commenced an action against company B. At a meeting of company A, the majority passed a resolution to compromise the action in a manner favourable to company B and unfavourable to A. Thus they attempted to deprive the company of the benefits which could have been recovered from company B. Consequently, in an action by the minority, the resolution was held invalid. "It would be a shocking thing", the court observed, "if that could be done, because the majority have put something into their pockets at the expense of the minority."

21. *Narcombe v Narcombe*, (1965) 1 All ER 65 (CA).

22. *Lowe v Foley*, (1996) 1 BCLC 262 (Ch D).

23. 1951 Ch 286 (CA).

24. (1874) LR 9 Ch App 350; (1874-80) All ER Rep Ext 2032.

It follows that the court will interfere to protect the minority where the majority of a company propose to benefit themselves at the expense of the minority. The principle was again applied in *Cook v Deeks*.²⁵

Where the directors of a company holding three quarters of the capital obtained a contract in their own names to the exclusion of the company, Lord BUCKMASTER observed: "If, as their Lordships find on the facts, the contract in question was entered into under such circumstances that the directors could not retain the benefit of it for themselves, then it belonged in equity to the company and ought to have been dealt with as an asset of the company. Even supposing it to be not ultra vires of a company to make a present to its directors, it appears that directors holding majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority."

Secondly, just as majority cannot appropriate to themselves the property of the company, similarly they are not allowed to expropriate the interest of minority shareholders. *Brown v British Abrasive Wheel Co*²⁶ is a case of this kind:

A company was in great need of further capital. The majority representing 98 per cent of the shares, were willing to provide this capital if they could buy up the 2 per cent minority. Having failed to do this by agreement, they proposed to pass an article enabling them to purchase the minority shares compulsorily on certain terms. The plaintiff refused to surrender and brought an action to test the validity of the majority resolution. He succeeded. The question, in the view of the court, was whether the proposed new article was "for the benefit of the company as a whole". As it was neither just nor equitable, nor for the benefit of the company as a whole to purchase the shares of a minority compulsorily, the resolution was held void.

The decision, therefore, means to suggest that majority powers must be exercised in good faith for the benefit of the company as a whole. If they have not been so exercised there is a "fraud on the minority". The phrase "benefit of the company as a whole" seems to have been borrowed from the judgment of LINOLEY MK in *Alien v Gold Reefs of West Africa Ltd*,²⁷ where he said:

"The power of altering articles must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised ... bona fide for the benefit of the company as a whole"

25. (1916); 1 AC 552.

26. (1919); 1 Ch 291.

27. (1900) 1 Ch 656, 671 (CA). See further on this point, *Manuel Life Insurance Co of New York v Bank Organisation*, 1995 BCSC 11.

Now, what is meant by the phrase "the company as a whole"? Does it mean the company as distinct from the members or as the whole body of corporators? This question was raised in *Sidbottom v Kershaw, Leese & Co.*²⁸

The plaintiffs who were in minority in the defendant company carried on a competing business. The majority of the shares were held by the directors, who passed a special resolution altering the company's articles and introducing a power for the directors to require any shareholder who competed with the company's business to transfer his shares at their full value to nominees of the directors. The validity of this resolution was challenged on the ground that it was not for the benefit of the company as a whole. "If the company as a whole means the whole body of corporators and every individual corporator, and if one of them has detriment occasioned to him by the alteration, it cannot be for the benefit of the company as a whole."

The court rejected the suggestion and held that it was very much for the benefit of the company to get rid of the members who were in competing business, as such members have the unique opportunity of exploiting the company's business secrets against its very interest.

"Individual interest may be sacrificed to the economic exigencies of the enterprise and the judgment of directors as to this must prevail."²⁹

But in doing so no more damage should be done to the individual shareholder than is absolutely necessary for protecting the company's interest. The limits were exceeded in *Dafen, Timplate Co v Lancashire Steel Co* (1907) *Ltd*.³⁰

There was no power in the original articles of the defendant company for compulsory acquisition of a member's interest. A special resolution was passed altering articles and introducing a power enabling the majority of the shareholders to determine that the shares of any member may be offered for sale by the directors to such persons as they should think fit at the fair value to be fixed. The defendant company was formed with the object that all its shareholders were to take their timplates from the company. The plaintiff company refused to do so and the defendant company resolved to acquire the plaintiff company's shares. But it was held that the resolutions in conferring an unrestricted and unlimited power on the majority to expropriate any shareholder they might think proper at their will or pleasure went much further than was necessary for the protection of the company.

Hence, "the question in each case is whether the alteration is genuinely for the benefit of the company, or was the alteration made for the benefit of some section of the company".³¹ Now who shall be the ultimate judge

28 (1920) 1 Ch. 154; 122 LT 325 (CA).

29 Beck and Means, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) 277.

30 (1920) 2 Ch. 124; 123 LT 225.

31 See *Petrie's American Delicacy Co Ltd v Heulink*, (1959) 61 CLR 457, 461 (Aus.). The judgment in this case contains an elaborate discussion of cases on this subject. A decision of the High Court of Australia.

of the fact whether a particular line of action adopted by the majority is genuinely for the benefit of the company. Obviously the shareholders are the best judge. The courts cannot manage the affairs of the company for the shareholders. The only restraint upon the majority powers, therefore, is that whatever the majority may decide, they must do so in good faith as reasonable businessmen. This approach was initiated by SCOTTON LJ in *Shuttleworth v Cox Bros & Co (Maidenhead) Ltd*.³²

When persons, honestly endeavouring to decide what will be for the benefit of the company, decide upon a particular course then, provided, there are grounds on which reasonable businessmen would come to the same conclusion, it does not matter whether the Court would not come to the same decision. It is not the business of the courts to interfere or to manage the affairs of the company, this is for the shareholders and directors. The absence of any reasonable grounds for deciding that a certain course of action is conducive to the benefit of the company may be a ground for finding that the shareholders, with the best motives, have not considered the matters which they ought to have considered.

Finally, in *Greenhalgh v Astorine Cremers Ltd*,³³ EVERTSON MR explained the concept in the following words:

"In the first place, it is now plain that 'bona fide for the benefit of the company as a whole' means not two things but one thing. It means that the shareholder must proceed on what, in his honest opinion, is for the benefit of the company as a whole. Secondly, the phrase 'the company as a whole' does not ... mean the company as a commercial entity as distinct from the corporators. It means the corporators as a general body. That is to say, you may take the case of an individual hypothetical member and ask whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit. I think the thing can, in practice, be more accurately and precisely stated by looking at the converse and by saying that a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders so as to give the former an advantage of which the latter were deprived. When the cases are examined where the resolution has been successfully attacked, it is on that ground that it has fallen down."

Thus, the phrase "corporators as a general body" means both the present and future members of the company.³⁴

But all this is subject to the principle which still holds ground that the right to vote is the private property of a shareholder and, therefore, "a shareholder may vote as he pleases even when his interests are different from

32 (1927) 2 KB 9 (CA).

33 1951 Ch 266 (CA).

34. *Gunnan v National Assn of Mental Health*, (1971) 1 Ch 312, per McCARRY J at p 330. His Lordship also added that principles of natural justice are not applicable in this field.

or opposed to those of the company. Shareholders are not trustees for the company or for one another and the relations between them cannot be identified with relations between partners".³⁵ Shareholders often vote in their own selfish interest. They cannot always be required to have only the benefit of the company in view. For example, in *Jhajharia Bros Ltd v Sholepoor Spg & Wig Co Ltd*.³⁶

The plaintiffs Jhajharias were the managing and the sole selling agents of the defendant company. They also held minority interests in the company. The company dismissed them from both the offices. They owed certain sums to the company for which a good number of their shares were forfeited and allotted to the new managing agents. The new agents with the help of these votes combined with those of directors and some shareholders managed to pass a resolution for further increase of capital which was underwritten by them. They thus placed themselves in a position of safe majority. The court could find no ground to interfere. "There is no inherent wrong in that. A majority can increase its own majority, generally speaking, unless there be an element of expropriation or coercion. Proof of party feeling or animosity by itself would not be enough."

Thus, the fundamental question is as to who should control the company. From the administrative point of view the company is a collection of the members and, therefore, should be under their control. In the case of any conflict between the interest of the organisation and that of a member, the individual interest is sacrificed. But what often happens is that the majority tends to identify its own interest with that of the company and if the right to vote is their personal property they can use it to fortify their interests. In such cases the rule should be as suggested by Prof. Aharon Barak:³⁷

"It should be recognised that the shareholder, particularly one with a controlling interest, is not a 'stranger' to the company, but owes it a fiduciary duty and a duty of care, requiring him to act in good faith for the good of the company as a whole. If this approach were to be recognised then the power to ratify would be given only to 'independent' shareholders, i.e., to those who had not colluded in a breach of duty by the directors, and who were not subject to their control."³⁸

The present trend is towards a principle that any breach of duty which causes loss to the company should be regarded as a fraud on the minority. In an English case³⁹ the sale of a company's property below its natural market value was held to be a fraud. Welcoming this decision,⁴⁰ it has

35. See, *North-West Transportation Co v Beatty*, (1897) LR 12 AC 569; 57 LT 426 (PC); *Public Trustee v Rajeshwar Tyagi*, (1923) 43 Comp Cas 371; AIR 1972 Del 302.

36. AIR 1911 Cal 174; (1943) 22 Cal LJ 458; 195 SC 36.

37. "A Comparative Look at the Protection of Shareholders' Interests: Variations of the Deloitte Study" (1971), 9 ICLO 22.

38. *Ibid.* 34.

39. *Daniels v Daniels*, 1977 New T 938.

40. 1976 JBL 367.

been observed that "in view of the inactivity of the legislature in the area of minority protection, it is welcome that the courts have taken it upon themselves to extend that area and to enable minorities more frequently than before to have their grievances ventilated in court". It has been added in a subsequent case that an action should lie whenever directors are guilty of a breach of duty to the company (including their duty to exercise proper care) and as a result of that breach they obtain some benefit.⁴¹ Opinions have been expressed that action should be allowed under this category whenever the justice of the case demands and that the whole doctrine should be adapted to prevent a wrongdoing without a redress.⁴² For example, the test of benefit of the company as a whole will fail to apply where class rights are involved and, therefore, in such cases the only requirement could be that the minority should not be made the victim of fraud or oppression.⁴³

3. Acts requiring special majority

There are certain acts which can only be done by passing a special resolution at a general meeting of shareholders. Accordingly, if the majority purport to do any such act by passing only an ordinary resolution or without passing special resolution in the manner required by law, any member or members can bring an action to restrain the majority. Such actions were allowed in *Dhakeswari Cotton Mills Ltd v Nal Karmi Chaknawaty*⁴⁴ and *Nagappa Chettiar v Madras Race Club*.⁴⁵

4. Wrongdoers in control

Sometimes an obvious wrong may have been done to the company, but the controlling shareholders would not permit an action to be brought against the wrongdoer. In such cases, to safeguard the interest of the company, any member or members may bring an action in the name of the company.⁴⁶ This was recognised in *Foss v Harbottle*⁴⁷ itself:

"If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of these rights to which in their corporate character they were entitled, one cannot but think that the principle so forcefully laid down by Lord Cottenham in *Wellworth v Hotel*⁴⁸ and other cases would apply, and the claims of justice would be found superior to any

41. See, *Vinelott Jnr. Preferential Assurance Co Ltd v Neumann Industries Ltd*, (No 2), 1982 Ch 204; (1980) 3 WLR 543.

42. *Carouson (Kilner House) Ltd v Greater London Council*, (1982) 1 WLR 2(2), 11.

43. *Peter's American Delivery Co Ltd v Henfli*, (1937) 61 CLR 457 (Aust). For further developments in this aspect of shareholders' duty of proper exercise of their powers, see Robert Flannigan, "Fiduciary Duties of Shareholders and Directors" (2001) 18L 277.

44. AIR 1937 Cal 645; 173 IC 622; 41 CWN 1137.

45. (1949) 1 MLJ 662; ILR 1949 Mad 808.

46. *PP Singh v Metropolitan Council of Delhi*, AIR 1969 Del 295.

47. (1942) 2 IHC 461, 17 ER 182.

48. (1841) 4 Myle & Cr 635; 41 ER 236. See also, Marshall's *Voice Gear Co Ltd v Manning, Wardle & Co Ltd*, (1909) 1 Ch 267; 100 LT 65; Chanc. 9, *supra*.

difficulties arising out of technical rules respecting the mode in which corporations are required to sue."

The principle has now found a suitable illustration in the facts of *Class v Akin*,⁴⁹ a decision of the Ontario High Court:

A company was controlled equally by the two defendants and the two plaintiffs. An action arose alleging that the two defendants had fraudulently converted the company's assets to their own use. Allowing the action the court said: While the general principle was for the company itself to bring an action where it had an interest, it was appropriate for the two plaintiffs here to bring an action on behalf of the company since the two defendants controlled the company in the sense that they could prevent the company from taking action.

The word "control" for this purpose means majority control. But it has now been recognised that control can exist without majority power. It has been held that "control exists if it would be futile to call a general meeting because the wrongdoers would directly or indirectly exercise a decisive influence over the result. This exception to *Foss v Herbette* applies whenever the defendants are shown to be able by means of any manipulation of their position in the company to ensure that the action is not brought by the company".⁵⁰

It has been suggested that the principle should extend to this extent that "when a director is in breach of fiduciary duty, every shareholder may be regarded an authorised organ to bring the action".⁵¹

5. Individual membership rights

Lastly, every shareholder has, vested in him, certain personal rights against the company and his co-shareholders. A large number of such rights have been conferred upon shareholders by the Act itself, but they may also arise out of articles of association. Such rights are commonly known as "individual membership rights" and respecting them the rule of majority simply does not operate. In the words of Palmer, "if such a right is in question, a single shareholder can, on principle, defy a majority consisting of all the other shareholders".⁵² For example in *Nagappa Chettiar v Madras Race Club*,⁵³ the court observed: "A shareholder is entitled to enforce his individual rights against the company, such as his right to vote, the right

49. (1967) 65 D.L.R. (2d) 512 (Can); see also, *Safya Chetnaam Ram v Samudram Prasad Rajendra*, AIR 1950 FC 133; (1949-50) 1 L.P.C.R. 673; (1950) 20 Comp Cas 39 where [Sec. 4(1)] restates all the cases in which a shareholder can take steps to redress a wrong done to the company.

50. See, note on *Foss v Herbette*, (1981) 44 Mod. L. Rev. 202 reviewing the decision of VINCIGUERRA J in *Prudential Assurance Co. Ltd v Nigerian Industries Ltd*, (No 2), 1982 Ch 204; (1980) 3 WLR 543.

51. (1982) 2 WLR 31, 30. For a statement of principles and indemnity as to costs, see, *Wallwitzauer v Mair* (No 2), 1975 QB 379; (1975) 2 WLR 349 (C.A.).

52. *Palmer's Company Law* (20th Edn) 492.

53. (1949) 1 MLJ 662, 667; ILR 1949 Mad 808.

to have his vote recorded, or his right to stand as a director of a company at an election." *Pender v Lashington*⁵⁴ is another authority.

A shareholder who had the right to vote, but whose vote was rejected, brought an action to compel the directors to record his vote. JESSEL MR observed: "He is a member of the company and whether he votes with the majority or the minority he is entitled to have his vote recorded — an individual right in respect of which he has a right to sue. That has nothing to do with the question like that raised in *Foss v Harbottle* and that line of cases 'He has a right to say 'whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refuse to record my vote, I will institute legal proceedings against you to compel you'."⁵⁵

This principle was applied by the Kerala High Court in deciding *Joseph v Jay*.⁵⁶ At a meeting of a company it was proposed to elect some directors by separate elections. The plaintiff was a candidate and he contested the election, but was defeated. He was proposed as a candidate again to fill up the second vacancy. But the Chairman, on account of his previous defeat, disqualified him. In his action against this ruling, the court held that he was entitled to a declaration that the proceedings of the meeting as regards the election of directors were null and void. "An individual membership right implies that the individual shareholders can insist on strict observance of the legal rules, statutory provisions and the provisions in the memorandum and articles which cannot be waived by a bare majority of shareholder. Every shareholder can assert such a right in his own name."⁵⁷

Similarly, in *Kirws v Lloyd Property Ltd*.⁵⁸ A director refused to retire in accordance with the articles and invalidly continued in office. The plaintiff shareholder was held entitled to bring an action on the ground that "the individual rights of the plaintiff as a member have been invaded".⁵⁹

54 (1877) 18 447 (h) 1771.

55 (1877) 6 Ch D 70, 80-81.

56 His Lordship also observed at pp 75-76 that "it is no ground for rejecting a shareholder's vote that he has voted against the interest of the company. There is no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his votes from motives or promptings of what he considers his own individual interest." There is a useful list of such cases in *Patnaik's Company Law* (20th Edn 1989) 493-96.

57 (1941) 1 Comp LJ 315. Also see, *MK Srinivasan v WS Subramania Iyer*, (1932) 32 Comp Cas 147; AIR 1932 Mad 100.

58 Following articles on the subject may be consulted. "Minority Shareholders' Action—Rule in *Foss v Harbottle*", 1954 Camb LJ 39; A.J. Boyle, "Minority Shareholder in the Nineteenth Century" (1965) 26 Mod L Rev 317; K.W. Wedderburn, "Shareholders' Right and the Rule in *Foss v Harbottle*" (1957) Camb LJ 194 and (1958) Camb LJ 93; "Freezing out Minority Shareholders," 79 Int'l LR 360; "Acquisition of Minority Shares" (1960) 1 QSR 314; "A Liberal Approach to *Foss v Harbottle*" (1964) 27 Mod L Rev 603; G.R. Brethen, "Alteration of Articles and Protection of Minorities" (1970) JBL 163.

59 1965 VR 232 (Ausl); noted 311 Mad L Rev 78. See also, *Bear Trading Co Ltd v Gajanan Copal Rao Dixit*, (1972) 42 Comp Cas 48 (Bom).

60 1965 VR 252 (Ausl). However, Jai p 236. See, K.W. Wedderburn, "Shareholders' Control of Directors' Powers: A Judicial Innovation" (1967) 30 Mod L Rev 77, 78.

The plaintiff, in still another case, was allowed to assert that new articles adopted by the company by a resolution were not binding because when the resolution was being considered, the Chairman had wrongly rejected his right to propose an amendment.⁶¹

6. Oppression and mismanagement

Lastly, it has been stated by Sircar J of the Calcutta High Court in *Kanika Mukherji v. Kameshwar Dayal Dube*⁶² that the principle of the sections embodied in Companies Act which provide for prevention of oppression and mismanagement, is an exception to the rule in *Foss v. Harbottle* which lays down the sanctity of the majority rule.⁶³

61. *Rendevse v. Bank of Australasia*, (1890) LR 45 Ch D 330 (CA).

62. (1966) 1 Comp LJ (55) 20 CWN 236. A petition under these sections cannot be stayed under S. 10 CPC. *Ramak K Gohil v. WB Pharmaceuticals Plym Commercial Corp.* (1982) 1 Comp LJ 199; AIR 1982 Cal 94.

63. Ss. 241 to 246 of 2013 Act. This forms the subject-matter of the next chapter. The vulnerable position of the minority shareholder and how he can be protected by expanding the scope of the fiduciary responsibilities of majority shareholders has been explained in the recent American case, *Jones v. H.E. Ahmann & Co.* 81 Cal Rptr 592; 1 Cal 3d 93 (1969), and is commented upon in a note, "Jones v. Ahmann Spill: The Fiduciary Obligations of Majority Shareholder" (1970) 70 Colum L Rev 1079.

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®; along with updates, articles, videos, blogs and a host of different resources.



The following cases from this chapter are available through EBC Explorer™:

- *Herrnott, Colman & Co v. Union of India*, (1977) 47 Comp Cas 92 (Bom)
- *Bharti Insurance Co Ltd v. Kantharia Lal*, AIR 1995 Lah 792; 160 IC 24
- *Foss v. Harbottle*, (1843) 2 Flare 461; 67 ER 189



Prevention of Oppression and Mismanagement

In addition to the protection afforded to the minority by the exceptions to the rule of the supremacy of majority, the modern Companies Acts contain special provisions for prevention of oppression and mismanagement. The aim of such provisions, now contained in Chapter XVI, Companies Act, 2013, is to safeguard the interest of investors in companies and also to protect the public interest. The rights conferred on shareholders by this chapter are also known as qualified minority rights. The chapter provides for judicial as well as administrative remedies.¹

PREVENTION OF OPPRESSION

Who can apply [S. 244]

The first remedy in the hands of an oppressed minority is to move the Tribunal. Whenever "the affairs of a company are being conducted in a manner oppressive to any member or members or prejudicial to public interest", an application can be made to the Company Law Tribunal under Section 241. The requisite number of members who must sign the application is given in Section 244. Where the company is with a share capital, the application must be signed by at least 100 members of the company or by one-tenth of the total number of its members, whichever is less, or by any member or members holding one-tenth of the issued share capital of the company.² If the company is without share capital, the application has to

1. *M Krishnam Reddy v ACE Forge & Ltd.*, (2016) 199 Comp Cas 332 (Ker), civil court is the appropriate forum to decide on forged documents. Civil court is at liberty to take independent view of all aspects including limitation.

2. *TNK Govindraja Chetty & Co v Radri Mills (ABC) Ltd.*, (1998) 30 CLA 49 (P.W.D.) 3 Comp 17 32nd (C.L.B.), the percentage is to be taken on the basis of the position before the increase of capital which has been questioned and which has reduced the percentage of the petitioner. *Myru Narayana v Bombay Dyeing and Mfg Co Ltd.*, (2003) 116 Comp Cas 205 (C.L.B.), a portion of the holding was in violation of SEBI Takeover Code and without it, 10 per cent shareholding was not more than with the petitioner. *S Riamanippan v Tirupur Cotton Spg & Weaving Co Ltd.*, (2003) 116 Comp Cas 205 (C.L.B.).

be signed by one-fifth of the total number of its members.¹ Joint holders are considered as one member. [S. 244(1) *Explanation*]

However, the Tribunal may, on application, allow any member or members to sue "if in its opinion circumstances exist which make it just and equitable to do so".² A person applied to the company on payment of Rs 20 crores for 40 per cent shares in the company. The company in its balance-sheet showed the amount as "share application money pending allotment". The amount was used to fund company's projects. The company treated the investor as a shareholder or member. The court regarded him as a member under Section 41(2) of the 1956 Act [S. 2(55), 2013 Act] for the purpose of filing a petition for prevention of oppression. The court overlooked in the realities of the case the fact of no allotment or no entry in the register of members.³

Once the consent of the requisite number is obtained, the application may be made by one or more of them on behalf of and for the benefit of all of them.⁴ The term "consent" for this purpose means, as defined in Section 13, Contract Act, an agreement upon the same thing in the same sense. Accordingly, the Madras High Court⁵ rejected a petition because the consenting members were only told that their signatures were needed for requisitioning a meeting. The signatories must be told of the specific facts which are alleged to be as constituting an oppression. "There cannot be a

¹ *Hills Ltd.*, (2005) 226 Comp Cas 556 (CLB), a person holding less than 10 per cent cannot apply. *I. Chandrasekharappa v. K.L. Kapur*, (2005) 46 SCL 294 (CLB), a person who had disposed of his shares was not allowed to apply. *Asha Investments (P) Ltd. v. Gohar Tex Co. Ltd.*, (2005) 126 Comp Cas 603 (CLB) excess holding in violation of SEBI limits not qualified to apply.

² Thus being a statutory right, cannot be taken away by contrary provisions in the articles or by an arbitration clause. *Rare (P) Ltd.*, re, (1977) 47 Comp Cas 276 (Del); *UP Gaspa v. State General Finance (P) Ltd.*, (1977) 47 Comp Cas 279 (Del). All the consenting members together have to hold the requisite number and not every one of them individually. *Kuttiand Rukker Co. Ltd. v. KT Idrisyanarak*, (1992) 88 Comp Cas 434; (1993) 3 Comp LJ 39 (Ker). Consent through a general power of attorney is valid for this purpose. *P. Purnamayi Jayaram Singar Co. Ltd.*, (1994) 4 SCC 341; (1994) 81 Comp Cas 2. A petition cannot be filed by a general power of attorney. It must be specifically authorised. *Kiran M. Lalji v. Vikram Fashions (P) Ltd.*, (1994) 81 Comp Cas 566 (CLB); where a company was a member and aggrieved of oppression, an unauthorised elector was not allowed to proceed. He needed a decision of the company or its Board. Consent of members to a draft petition was not a good consent. There was nothing to show that the petition was based on the grounds noted in the draft. *KN Sankaranayanan v. Shree Consultation & Services (P) Ltd.*, (1994) 90 Comp Cas 558 (Mad). *Stringush Developers (P) Ltd. v. Peerless General Finance Investment Co. Ltd.*, (2013) 5 SCC 455; (2013) 178 Comp Cas 1, the requirement of 10 per cent shareholding can be fulfilled by obtaining consent of other shareholders. Consent can also be given through power of attorney. Consent need not be in writing, nor necessary to annex it to the petition. If the petitioning shareholders withdraw, the consenting shareholders can continue the petition.

³ S. 244(1), *precision*.

⁴ *Umesh Kumar Baugh v. IL & JS Transporters Network*, (2014) 182 Comp Cas 309 (Del)

⁵ S. 244(2). The requirement as to minimum shareholding is applicable only at the time of filing. The petition can continue even if after filing some shareholders cease to be members. *S. Venadhuja v. Venkateswara Sridhar Construction (P) Ltd.*, (1994) 80 Comp Cas 693 (Mad).

⁶ *MC Dhemissimi v. Sankhi Singas Ltd.*, (1980) 50 Comp Cas 154 (Mad).

blanket consent.¹¹ It has been held by the Supreme Court in *Rajahmundry Electric Supply Corps Ltd v A Nagashwara Rao*¹² that if some of the consenting members have, subsequent to the presentation of the application, withdrawn their consent, it would not affect the right of the applicant to proceed with the application.¹³ By holding that where a petition has been properly presented, it does not cease to be maintainable merely because three of the applicants have transferred their shares and ceased to be shareholders of the company. "The validity of the petition must be judged on the facts as they are at the time of its presentation. Neither the right of the applicant to proceed with the application, nor the jurisdiction of the court to dispose of it on its own merits, can be affected by events happening subsequent to the presentation."¹⁴

All the material facts should be set out in the petition itself. Allegations of fraud, *mala fide*, etc, must be supported with particulars. Supporting facts cannot be brought in subsequently.¹⁵

Similarly, in a petition against a transport company, the Madras High Court refused to take into account the subsequent conduct of the majority in disposing of all the buses of the company.¹⁶ "The petitioner is not entitled

8. The court considered Bengal Laxmi Cotton Mills Ltd, re, (1968) 36 Comp Cas 187 (Cal), and *Makhan Lal Khan v Amit Banerji Co Ltd*, (1953) 23 Comp Cas 100. For another case of consent by intercorporation, see, *Narinder Singh v Edmont Coni Public Welfare Assn*, (1983) 54 Comp Cas 350 (P&E). Consent to proceedings or, the general ground of mismanagement or oppression will not do. *Omnis India Ltd v Balbir Singh*, (1989) 2 Comp LJ 229; (1999) 66 Comp Cas 903 (Del); *KP Chittusian v Federal Bank*, (1987) 2 Comp LJ 267; (1989) 66 Comp Cas 952 (Ker). Consent taken without informing shareholders of the specific grounds so as to give them an opportunity for application of mind will render the petition invalid. See, *PS Namruti v Juiper Metals and Electricals Ltd*, (1996) 69 Comp Cas 761 (Raj). Preliminary issues relating to maintainability and procedural requirements under CPC and court rules should be decided in the context of the grounds raised. *Sonamshtra Cement and Chemical Industries Ltd v Essar Industries (P) Ltd*, (1990) 69 Comp Cas 372 (Guj).

9. AIR 1956 SC 215 (1956) 26 Comp Cas 91.

10. *Kilperr (P) Ltd v Shekhar Mehta*, (1987) 62 Comp Cas 517 (MP). the court also pointing out that the petition cannot be converted into one for winding up. The Punjab High Court has gone a little further in *Jagdish Chandra Mohan v New India Embroidery Mills*, (1964) 1 Comp LJ 291 by holding that even if the petitioning member disposes of his shares, the petition remains competent. *V Shanker v Scott Indian Concerns Ltd*, (1997) 24 CLA 54 (CLB), the petitioner not competent himself in shareholding, consents filed by him did not inspire confidence, petition not entertained.

11. Where the transferee was an already registered shareholder and, therefore, his petition was entertained, the removal of his name by the company subsequently from the register on the ground that the transfer deeds carried uncancelled stamps was held to be not a material fact and the petition remained competent. *Sayedulhaq Ali v Sumanand Nath Chattak*, (1995) 83 Comp Cas 504 (Cal).

12. *JS Offshore Inter Liner Services (P) Ltd v Bowring Offshore Sealifters and Services Ltd*, (1992) 25 Comp Cas 563 (Bom); *MM Dua v Indian Dairy and Allied Services (P) Ltd*, (1994) 80 Comp Cas 637 (CLB); *Keralia Siriyasamayana v Ammons Motor Transport Ltd*, (1998) 26 CLA 233; (1999) 98 Comp Cas 518 (CLB), matters of subsequent occurrence and amendment of pleadings. *Sukesh Chand Agarwal v Associated Limestone Ltd*, (1996) 29 CLA 190 (CLB), an amendment cannot be allowed to set up a new case which was not set out in the original petition. *Srikuri Ray v P K Majumdar*, (1998) 30 CLA 373 (CLB), burden of proof on the petitioner.

13. *CP Gnanasambandham v TN Transports (P) Ltd*, (1971) 41 Comp Cas 25 (Mad).

to take advantage of a circumstance that happened after the presentation of the petition."

Where a person has obtained a decree for rectification of his company's register of members so as to have his name entered in it, he may apply for relief under the section although the decree has not yet been enforced and the register does not show his name.¹⁴ Similarly, in *Bayswater Trading Co Ltd, re*,¹⁵ and again in *Jermyn Street Turkish Baths Ltd, re*,¹⁶ Section 2(1), (English) Companies Act, which provided for relief against oppression, was interpreted to include the representatives of a deceased shareholder.¹⁷ But it seems probable that a purchaser of shares who is not yet registered may not be allowed relief under the section against the oppression caused by the company's refusal to register his name.¹⁸ A person who was entitled to an allotment of shares against his application money was regarded as competent to apply though he had subsequently withdrawn his application money.¹⁹ The petition of a nominee shareholder was not struck out.²⁰ A trustee holder of shares whom the company was refusing to register was allowed to

14. *Stanwood (P) Ltd v. Kalpatra Mekan Sahi*, AIR 1968 Cal 1572; (1968) 1 Comp Lj 321; 72 CWN 601. See, *Rao I* (as he then was) at 529. Where a pledgee of shares was registered as shareholder and exercised membership rights, it was held that on the removal of his name from the register under an order of CLB, he ceased to be member for the purposes of a petition under the section. *Mallensure Finance and Investment Co v. Company Law Board*, (1994) 81 Comp Cas 66; AIR 1994 Mad 341.

15. [1920] 1 WLR 543; [1920] 40 Comp Cas 1196 (Ch D).

16. [1920] 1 WLR 1196; [1920] 3 All ER 52.

17. A similar view has been adopted under the Companies Act so as to enable the legal representatives to apply. See, *World Wide Agencies (P) Ltd v. Margaret*, (1990) 1 SCC 536; (1990) 67 Comp Cas 607; (1990) 1 Comp Lj 216, affirming *Margaret T Doss v. Worldwide Agencies (P) Ltd*, (1989) 66 Comp Cas 5 (Del). In the event of the death of one of the respondents, it is not necessary to bring his legal heirs on the record. *Rajender Nath Bhaskar v. Shashikar Shastri and others* (P) Ltd, (1990) 1 Comp Lj 351; (1990) 68 Comp Cas 256 (Del). A person who has become entitled to be a member has a right to apply. *Siri Balaji Visible Mills (P) Ltd v. Ashok Rendu*, (1990) 66 Comp Cas 654 (Ker); *Srikanta Datta Narasimha Mudiguri v. Venkateswaran Asst. Estates Enterprises (P) Ltd*, (1990) 58 Comp Cas 216; *N. Selvamurad Rao v. Venkateswara Lakshmi Namakkal Sastri*, (1988) 64 Comp Cas 492 (AP), share certificates issued. Rankey Singh Gupta v. Kurni Oil & Allied Industries Ltd, (2000) 123 Comp Cas 93 (Del), petitioner died, reliving after substitution of legal heirs, sufficient cause shown explaining delay in fulfilling, leniency should be shown. *K.S. Motilal v. K.S. Kesumur Ceramics (P) Ltd*, (2002) 125 Comp Cas 474 (CJ K), legal heirs entitled to be registered on probate or will, entitled to apply.

18. This view is expressed in *Grove's Principles of Modern Company Law* (3rd Edn 1969), 600. A person whose name has been struck off the register also cannot apply unless he gets the register rectified so as to include his name. *Celestial Kalidesh Niket v. Lakshmidutt Lalubhai Patel*, (1992) 47 Comp Cas 151 (Guj). See further, *Ellieck Nixon Ltd v. Bank of India*, (1985) 57 Comp Cas 331 (Bom), where the court held that a shareholder, who has transferred his shares to it the same has not been registered by the company, is entitled to petition and also that the right to petition can be delegated to an agent. A person whose name was there in the register and was unlawfully removed under unauthorised signatures was allowed to file petition, *Rushmi Sethi v. Thakur Farms (P) Ltd*, (1992) 3 Comp Lj 126; (1995) 82 Comp Cas 439 (CLB).

19. *Obanniyang Parde v. Basu Surgical & Medical Institute (P) Ltd*, (2005) 125 Comp Cas 626 (CJ B).

20. *Allisizing Ltd v. Brigadier Ltd*, (2004) 2 DCCLC 191 (Ch D).

file petition.²¹ The Bombay High Court did not allow a derivative action to be filed by a director of the company who was not its shareholder. A person whose name is not borne out by the company's register of members has no *locus standi* to say that a wrong has been done to his company. The court would not lift the veil of incorporation at his instance so as to enable him to show his beneficial interest in the company through a chain of inter-corporate investments.²² A member whose shares had been forfeited without any authority but whose name was still there in the register of members had *locus standi* to apply.²³ Even when the original petitioning member withdraws from the fray and does not want to continue the petition, he cannot compel dismissal of the petition. A representative action of this kind can still be considered on its merits. Any willing member may be substituted as a petitioner even if he is holding less than the requisite number of shares. Share qualification is relevant only to the time of filing and not to the continuance of the petition.²⁴

A person who was not a shareholder of the company but had a grievance about the value of shares at which they were being allotted, could file a civil suit. The value was fixed by a majority of the shareholders and was approved by the Reserve Bank under the Foreign Exchange Regulation Act, 1973. The court refused to interfere.²⁵

The meaning of "member" is to be understood in its widest import so as to include persons whose name though not borne out by register of members, they have an indefeasible right to shares. There was vesting of shares with the petitioner consequent upon schemes of amalgamation sanctioned by the court. It was held that there was no further act or deed necessary to entitle him to exercise his right of petition.²⁶

21. *SBI v Business Development Consultants Pvt Ltd*, (2005) 128 Comp Cas 557 (CLB).

22. *J.S.N (I) Ltd v Jawed Ali Malaudas Rajan Pillai*, (1994) 96 Comp Cas 371 (Bom); *Radhey Shyam Gupta v Kamal Oil & Allied Industries Ltd*, (2001) 103 Comp Cas 337 (Del), those persons whose names are borne by the register of members and annual returns as shareholders are prima facie entitled to file petition. *Shankar Sandesh v Amalgamation Ltd*, (2011) 104 Comp Cas 638 (CLB), shareholders of holding company cannot apply in respect of oppression, or mismanagement in a subsidiary. The subsidiary may be impleaded, if necessary. *Montefiori Knights P Ltd v Arora Hotels & Resorts P Ltd*, (2017) 201 Comp Cas 1 (NCLT), petitioner must be shareholder. Allegations of breach of fiduciary relationship and agreement are to be adjudicated by the civil court.

23. *N Kuberan v Monarch Steels (India) Ltd*, (2006) 130 Comp Cas 109 (CLB).

24. *LRMK Narayan v Phulbhadra Estate Ltd*, (1992) 74 Comp Cas 31 (Mad). The CLB could be approached even where the matter was pending before a High Court. Proceedings before CLB were not liable to be stayed for that reason. A representative of the petitioning group of shareholders was appointed by the CLB on the company's Board by way of interim relief and was authorised to function as an independent Chairman. *Munjalil Patel v Gokhaldh Investment Corp (P) Ltd*, (1993) 1 Comp 14 39 (1993) 92 Comp Cas 894 (CLB); *Sethi v Chetna India (P) Ltd*, (1992) 3 Comp L 49; (1995) 82 Comp Cas 563 (CLB).

25. *Girish Kapoor v Union of India*, (2006) 132 Comp Cas 344 (Del).

26. *Pawan Kumar Bedi v Jay Bee Properties (P) Ltd*, (2014) 157 Comp Cas 353 (CLB).

The Central Government also has the power to apply for relief under the section.²⁷ The Tribunal also has the discretionary power to permit a lesser number of members to proceed under the section.²⁸

The employees of a company, however much they may be treated like members, or are members also, cannot get any relief under this jurisdiction in their capacity as employees.²⁹

Once entertained, a petition under the section can be compromised or withdrawn, only with the sanction of the Tribunal. The compromise should be in the best interest of the company and its shareholders.³⁰

Pendency of civil proceedings

The applicant prayed for stay of the petition till disposal of civil proceedings between the parties. It was a family company. The subject-matter of the suit for partition of property among members of the family and that of relief against oppression and mismanagement were not substantially the same. Parties to the petition were also not parties to the suit. The order in the suit for maintenance of status quo in the suit did not have the effect of stalling proceedings for prevention of oppression.³¹

"This ingenious remedy has not only permitted redress of many abuses, but its mere availability has had a deterrent effect upon management."³²

27. S. 241(2). A secretary cannot present a petition by himself. He requires authority of the Board of Directors. *Moham Lal Mitti v. Chander Wires Ltd.*, (1983) 53 Comp. Cas. 36 (Cal); *Union of India v. CRB Xylophones P/Ltd.* L44, (2005) 28 Comp. Cas 796 (CLB) Central Government petition not entertained because no public interest was shown to be involved.

28. *Efficient Publicities (P) Ltd. v. re.* (1999) 1 Comp. L. 208 (CLB) where the permission was refused, because the alleged facts were not true. *Edwardglen Public Wines (Asia) Ltd. v. re.* (1990) 69 Comp. Cas 282 (CLB) a petition by a single member in a company without share capital rejected.

29. *Joker v. Science and Information Technology Ltd.* 1992 BCILC 264 (Ch L); *Alchemia Ltd. v. 1996 ICCC 964 (Ch D)*; *Froben v. Ascan*, 1998 All EB (D) 486.

30. *Kelly and Henderson (P) Ltd. v. re.* (1980) 50 Comp. Cas 606 (Bom), where the court refused to sanction a compromise which was tilted in favour of the person against whom the grievances were alleged. Following, *Syed Mohammad Ali v. R. Sundaramurthy*, (1968) 28 Comp. Cas 554; AIR 1968 Mad 587; *Jacob Claverine v. KK Chetan*, (1973) 47 Comp. Cas 235 (Mad); *Syed Kazim Exporters (P) Ltd. v. Nujat Oxygen and Analytical Gas Ltd.*, (1966) 60 Comp. Cas 984 (All), 990, where a decree was passed in terms of compromise. All the material facts affecting the matter must be disclosed in the petition itself. Allegations of fraud, mala fide, etc., if any, must be supported by particulars. *PS Offshore Land and Services (P) Ltd. v. Buniary Offshore Suppliers and Services Ltd.*, (1992) 75 Comp. Cas 533 (Bom). The CLB will not stand in the way of withdrawal if there is nothing against public or company's interests. *V. Sandaregan v. RR Spinning Mills Ltd.*, (1998) 30 CLA 35, (1998) 98 Comp. Cas 106 (CLB). A compromise cannot be recalled or altered because the CLB has no power to review its own decisions. An order also cannot be modified unless all the parties agree or it is established that the parties did not understand the nature and purport of the compromise (lack of consciousness and intent) or it was not voluntary. *Alicheff Jumai Al-Saleem v. Infa Saudi (Tracels) (P) Ltd.*, (1998) 93 Comp. Cas 151; (1998) 36 CLA 42 (CLB).

31. *Shivam Advisors (P) Ltd. v. Shri Rajesh Khadka*, 2013 SCC Online Bar 2804; (2014) 186 Comp. Cas 343.

32. George H. Hornstein, "The Future of Corporate Control" (1950) 63 Harv. L. Rev. 426; *Chhagan Singh v. Omega Exports* (99/2d, 2015 S.C.T. Online L 18 33); (2015) 192 Comp. Cas 597, petition for relief dismissed because the High Court had referred the matter to arbitration.

Money was invested by a foreign investor in the company. It was diverted to other companies. Other such companies were considered as necessary parties to the petition filed against the company. Interim order for audit of one of such companies was passed and also some directions were issued against two others.³³

Civil Procedure Code not applicable. An earlier petition was permitted to be withdrawn with liberty to file fresh petition. Unless specifically conferred, provisions of the Civil Procedure Code were not applicable in matters before the Company Law Board. It was therefore not necessary that a fresh petition could be filed only on a fresh cause of action. Theories of fresh cause of action not applicable to CLB. (now CLT).³⁴

Company itself cannot apply.—The company cannot by itself be an applicant for any relief under this jurisdiction.³⁵

Amendment of petition.—Amendment should be sought at the first available opportunity. An application for amendment at the stage of arguments was not entertained.³⁶ Amendment was not allowed at the belated stage when final hearing was commenced and respondent's arguments were being heard. The CLB felt that the application was filed with intent to delay proceedings.³⁷

Conditions of relief (S. 241)

There are certain preliminary conditions which must be satisfied to entitle a shareholder to some relief under the section.³⁸ These conditions are inbuilt in the language of the section itself.

Meaning of oppression.—The grounds on which an application can be made under Section 241 are: (i) that the affairs of the company are being conducted in a manner prejudicial or oppressive to a member or some members or in a manner which is prejudicial to the public interest or in a manner prejudicial to the interests of the company; (ii) a material change has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares or its membership (it being without share capital), or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members.

33. Jhongin Builders & Promoters (P) Ltd v CPV India Real Estate Ventures Ltd, (2015) 194 Comp Cas 483 (P&H).

34. Gurniraj Singh v Vesta Hospitality (P) Ltd, 2010 SCC OnLine Del 3537; (2014) 186 Comp Cas 202.

35. Uttingfilter (India) (P) Ltd v (Uttingfilter Group), (2012) 112 Comp Cas 93 (CLB).

36. Jagjeet Baldev Singh v Frick India Ltd, 2013 SCC OnLine P&H 26793; (2014) 186 Comp Cas 232 (P&H).

37. Arif Rahudur Singh v Frick India Ltd, 2013 SCC OnLine CLB 125; (2014) 186 Comp Cas 225.

38. For the meaning of the word "satisfaction", see, Prokless General Finance & Investment Co Ltd v Union of Ind. (1989) 1 Comp L 56 Cal (1991) 71 Comp Cas 301 (Cal).

If an oppression of this kind is established, the Tribunal will, "with a view to bringing to an end the matters complained of, make such an order as it thinks fit". Before this section was enacted the only effective remedy against oppression was a winding up order under the just and equitable clause. But this remedy was often worse than the disease.⁴¹ And now the Tribunal has been given the powers to impose upon the parties whatever solution it considers just and equitable in the circumstances. Thus, instead of forcing a sound business concern to winding up, an effort is made to salvage it.⁴²



CASE PILOT

The meaning of the term "oppression", as explained by Lord Cooper in the Scottish case of *Elder v Elder & Wilson Ltd.*⁴³ was cited with approval by Waziruddin J. (afterwards CJ) of the Supreme Court of India in *Shanti Prasad Jain v Kalinagi Tubes Ltd.*⁴⁴ "The essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to the company is entitled to rely." The complaining shareholder must be under a burden which is unjust or harsh or tyrannical.⁴⁵ "A persistent and persisting course of unjust conduct must be shown."⁴⁶ In the above-mentioned Scottish case the allegations were that the petitioners, who were two shareholders in a small family company, were removed by the majority from directorship and also from their employment as secretary and factory manager. The petition failed because they had not suffered as shareholders but in different capacities.

"The result of applications under Section 210⁴⁷ in different cases must depend on the particular facts of each case, the circumstances in which oppression may arise being so infinitely various that it is impossible to define them with precision."⁴⁸

39. The remedy was introduced in S. 210, English Companies Act, 1948, as a result of the recommendations of the Cohen Committee, 1945. The Committee had suggested, "The remedy of winding up to chancery oppression is worse than the disease because it generally means that the business of the company would pass into the hands of the trustee, who would ordinarily be the only available purchaser and the break up value of the assets may be small." See, SICHAJ in *Kishan Mulherji v Rameshwar Dhyal Dubey*, (1966) 1 Comp LJ 65, 77-79 CWN 296.

40. See, for example, *K.R.S. Nandyund Iyenger v T.A. Muni*, AIR 1963 Mad 336, 359.

41. 1752 SC 49 (Scotland).

42. (1965) 1 Comp LJ 193, 204 AIR 1965 SC 1536 (1965) 25 Comr Cas 261.

43. See, Lord Somers in *Scotsland Coop Wheatsheaf Society v Meyer*, 1959 A.C. 324; (1959) 3 W.L.R. 404 (H.L.). His Lordship said that the dictionary meaning of the term is "burdensome, harsh and wrongful." Referring to this Profuse Grewar says, "difficulty has been experienced in tracing the dichotomy from which he took it . . . it appears to be an adaptation of the SODEP's unjustly burdensome, harsh or merciless". *Painitress of MONRE COMPANY Law* (3rd Edn 1969) 632.

44. See, *H.R. Hermer Ltd. v. (1959) 1 WLR 62.*

45. Of the English Companies Act, 1948, on which S. 397, Indian Companies Act has been based. This section of the English Act was replaced by S. 439 of the 1985 English Act substituting the words "unfair prejudice" for the word "oppression".

46. *H.R. Hermer Ltd. v. (1956) 3 All ER 689; (1959) 1 WLR 62*, adopted by Waziruddin J. (afterwards CJ) in *Shanti Prasad Jain v Kalinagi Tubes Ltd.*, (1965) 1 Comp LJ 193, 204 AIR 1965 SC 1536 (1965) 25 Comr Cas 261. The judicial definitions have been collected by D. Prentice, "Protection of Minority Shareholders" (1952) Current Legal Problems 122, 137.

An attempt to force new and more risky objects upon an unwilling minority may in circumstances amount to oppression. This kind of situation developed in *Hindustan Coop Insurance Society Ltd.*, re.⁴⁷

The life insurance business of a company was acquired in 1956 by the Life Insurance Corporation of India on payment of compensation. The directors, who had the majority voting power, refused to distribute this amount among the shareholders. Rather they passed a special resolution changing the objects of the company and to utilise the compensation money for the new objects. This was held to be an "oppression". The court observed: "The majority exercised their authority wrongfully, in a manner burdensome, harsh and wrongful. They attempted to force the minority shareholders to invest their money in a different kind of business against their will. The minority had invested their money in a life insurance business with all its safeguards and statutory protections. But they were being forced to invest where there would be no such protections or safeguards."

Similarly, an attempt to deprive a member of his ordinary membership rights is an "oppression". This is shown by *Mahan Ltd Chandanail v Panjab Co Ltd*.⁴⁸

A public company doing forward contract business amended its articles of association under a statutory direction in such a manner as to deprive its non-trading members of their right to vote, to call meetings, to elect directors and to receive dividends. The court held that "the company in doing so trampled upon the valuable rights of such members by unjust exercise of its authority and power and it amounted to oppression within, Section 377". [now S. 241] "I cannot conceive of a worse oppression", said MAEJAN J "than the denial of a voting right to a shareholder . . . To take away the right of partaking in dividends is not merely oppressive but even confiscatory."

But as the amendments were in accordance with the requirements of an Act which provided that such companies should consist of only trading members, the court directed the company to purchase the shares of the complaining members to enable them to walk out of the company with such capital as they had invested.

A similar relief was allowed by the House of Lords in *Scottish Coop Wholesale Society v Meyer*.⁴⁹

The society created a subsidiary company to enable it to enter the rayon industry. Subsequently, when the need for the subsidiary ceased to exist, the society adopted a policy of running down its business which depressed the value of its shares.

47. AIR 1961 Cal 444; (1960) 65 CWN 68; (1961) 31 Comp Cas 194.

48. AIR 1961 Panj 485.

49. 1959 AC 324, 342; (1959) 3 WLR 424 (HL).

The two petitioners who were managing directors and minority shareholders in the subsidiary successfully pleaded "oppression". The court ordered the society to purchase the minority shares at the value at which they stood before the oppressive policy started.

Similarly, in *Hawker Ltd. v.*⁵⁰ the Court of Appeal allowed relief in circumstances where a majority controller persistently flouted the decisions of the Board, committed the company to new business without proper procedure and procured the appointment of dummy directors. Where the Chairman of a company, who owed his allegiance to a corporation which had underwritten the shares of the company, tried to oust the managing director of the company at a time when, as a result of the managing director's efforts, the company had brought up its factory and was only waiting for further loans to enter into production, that was held to be an "oppressive policy" which was also against public interest.⁵¹ "Public interest" in this connection means that the company should function for public good or for general welfare of the community and not in a manner detrimental to public good. There was sufficient evidence to show that if the company had gone into production, it would have earned foreign exchange for the country. Those who were causing delay must be held to be guilty of working against public as well as company's interests.⁵²

Suppressing notices of meetings to some of the members is an act of oppression towards them. Casual omissions may not be, but systematic elimination of notices to some of the members is a serious deprivation of their most important right.⁵³

Minor acts of mismanagement, however, are not to be regarded as oppression. As far as possible shareholders should try to resolve their differences by mutual readjustment. Moreover, the courts will not allow these special remedies to become a vexatious source of litigation. For example, in *Falita Rajya Lakshmi v. Indian Motor Co.*⁵⁴

The petitioner alleged that the Board of directors were guilty of certain acts detrimental to the minority of the shareholders. The allegations were that the income of the company was deliberately shown less by excessive expenditure; that passengers travelling without ticket on the company's buses were not checked; that petrol consumption was not properly checked; that second hand buses of the company have been

50. [1959] 1 WLR 62; (1959) 3 All ER 599.

51. *NR Martty v. Industrial Development Corp. of Orissa Ltd.*, (1977) 17 Comp Cas 389 (Ori).

52. *Vinayak M. Shah v. Vinay Developer P. Ltd.*, (2007) 201 Comp Cas 362 (NCLT); agreement between groups of foreign shareholders, rights created under it could not be whittled down by setting up a case under S. 241.

53. *Shriketan Pista Singh Chauhan v. Souvenir Singh & Gachhad*, (1996) 1 Comp L 72 (Ori); *Turab Sheikh v. Esmeral Metallo Chemicals (P) Ltd.*, (1995) 16 CLA 147; (1996) 37 Comp Cas 290 (CLB).

54. AIR 1962 Cal 122; (1962) 22 Comp Cas 207; *A. Ranjishwar Prasad v. Pressed Productions (P) Ltd.*, (2007) 135 Comp Cas 416 (CLB); the decision of directors to write off bad debts being a business decision, no infidelity, so was the decision of removing a director which caused no loss to the company.

disposed of at low cost; that dividends were being declared at too low a figure. It was held that even if each of these allegations were proved to the satisfaction of the court, there would have been no oppression.

The court further observed that "to attempt to get a majority by lawful means is not a fact or circumstance which justifies winding up of the company. If any authority is needed for that proposition, one need only refer to the Privy Council decision in *Ripon Press & Sugar Mills Co Ltd v Gopal Chatty*,⁵⁵ where Lord BLANESBURGH made this significant observation: "The fact that Venkata Rao had a preponderating voice in the company by reason of his owning or controlling a large number of shares was of itself no reason for winding up of the company."⁵⁶ An unreasonable refusal to accept a transfer or transmission of shares has been held sufficient to warrant an order under the section.⁵⁷ Refusal to allot shares under a rights issue to a

55. (1900-31) 58 IA 416; AIR 1932 PC 1; *Ishita Ghosh v JDS Technologies (P) Ltd*, 2014 SCC OnLine CLB 151; (2015) 168 Comp Cas 534 (CLB), allotment of shares resulting in reduction of percentage of shareholding of the petitioner. No interference. Minority shareholder to exit company. Majority shareholders were directed to buy shares at a fair value.

56. See also, for example, *Bellader Silk Ltd. re* (1965) 2 Comp LJ 30 where it was held that the petitioner was not entitled to relief under S. 210, English Companies Act, 1948 (corresponding to S. 397 of the Indian Act) (now S. 243) because the presentation of the petition in order to bring pressure to bear to achieve a collateral purpose was an abuse of the process of the court and on the facts the contributors had no tangible interest in a liquidation, with the consequence that a contributor would not be entitled to a winding up order on the just and equitable ground, and, thus S. 210(2)(b) [Ss. 459-461] of the Act of 1965 was inapplicable. *Jayesh Roshambhi v Vigyaneshwar Art Conditioning (P) Ltd*, (2015) 168 Comp Cas 461 (CLB), allotment of shares made with knowledge and consent of the petitioner who signed relevant forms, not to be set aside. Removal of director because of acting against interest of the company by entering into competing business, no opposition purchase of property in the name of director as authorised by company, payment made by the company by its cheques.

57. *Gyanalini v Puri Transport (P) Ltd*, (1955) 2 Comp LJ 234. See also, the decision of the Calcutta High Court in *Sahai Chandra Choudhury v Kengal Laxmi Cotton Mills Ltd*, (1966) 1 Comp LJ 45; (1966) 25 Comp Cas 187 (Cal); where Minus J observed: "The fact that the directors are accused of an offence or that investigation is being made or even if there was a conviction on a criminal complaint would be no ground for taking action under Ss. 397 and 398, [1956 Act]. These matters are entirely foreign to company law and administration and beyond the ambit of the jurisdiction the Company Court exercises... In the instant case there is no deadlock, the application as not one for winding up, nor is the company a private company. It is a public company in which outsiders held a substantial block of shares and so the principle, that lack of concurrence among the directors in a private company resulting in a deadlock is a ground for a winding up order on the just and equitable ground, cannot be applied herein where the special discretionary jurisdiction of the Court (now Tribunal) under [S. 291] has been invoked."

Another important decision is *Rights and Issues Investment Trust Ltd v Stylin Stores Ltd*, 1965 Ch 250; (1965) 1 Comp LJ 234, where PENNYCUICK J observed "...as there was no principle of law that prevented the members of a company from altering the voting rights attached to shares provided that the alteration was sanctioned by the members in accordance with the constitution of the company, in good faith and for the benefit of the company as a whole, the Court would not grant interlocutory injunction sought." This was a petition under S. 210, [English] Companies Act, 1948 [Ss. 459-461] of the Act of 1965.

See also, *New Standard Oil Co (P) Ltd, re*, (1964) 2 Comp LJ 184 (Cal); *Lumik Bros. Ltd re*, (1968) 1 WLR 1051; (1963) 2 ALL ER 692; (1956) 1 Comp LJ 20; *Muhim Bros (P) Ltd v Odentea Lading & Shipping Co*, (1970) 40 Comp Cas 119 (Cal), a catalogue of vague charges. The



CASE PILOT



CASE PILOT

particular shareholder in order to prevent him from becoming qualified to file a petition was held to be oppressive.⁵⁴ The removal of a director who had been there in the company for 20 years and denying him access to the company's premises just only to prevent him from having access to the company's records was held to be an oppressive conduct.⁵⁵ Shareholders' resolutions cannot be the subject of judicial review, but their findings and the conduct of the majority in passing them can be taken into account for deciding whether the conduct of affairs is in an oppressive manner.⁵⁶

"There must be an unfair abuse of the powers and impairment of confidence in the probity with which the company's affairs are being conducted as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic policy." "It is not lack of confidence between the shareholders *per se* that brings the section into play ... oppression involves at least an element of lack of probity or fair dealing in member in the matter of his proprietary right as a shareholder. Persons concerned with the management of the company's affairs must in connection therewith be guilty of fraud, misfeasance or misconduct towards the members. It does not include mere domestic disputes between directors and members or lack of confidence between one section of members and another section in the matter of policy or administration. Much less it covers mere private animosity between members and directors."⁵⁷ This statement has been cited with approval in *Kalinga Tribes Ltd v Shanti Prasad Jain*,⁵⁸ where MISA 1 of the Orissa High Court dismissed a petition under the section and his decision was affirmed by the Supreme Court in *Shanti Prasad Jain v Kalinga Tribes Ltd*.⁵⁹

A private company consisted of three groups of shareholders, the petitioner and the two respondents holding shares in equal proportion and with equal representation on the Board. They had agreed in writing to

shifting of the registered office of a company from Calcutta to Hyderabad at the instance of AP State Financial Coop who was not an oppressor. The company had its factory in Premod Kumar Mittal v Southern Sind Ltd. (1980) 50 Comp Cas 555 (Cal). *KG Registrar v Foreword Advertising and Mktg (P) Ltd.* (2002) 110 Comp Cas 734 (CLB), default in holding meetings and filing accounts, acts of opposition, etc. not available under other sections.

54. *Shri Ramdas Motor Transport Ltd v Kamali Suryanarayana*, (2002) 110 Comp Cas 193 (AP).

55. Ibid. Majority approval of such conduct is not a justification. These in control can be directed to furnish information to which the shareholders have a legitimate right.

56. Ibid. Fabricated resolutions would be oppressive and contrary to public interest. *Pushpa Kachch v Manoharan Iyengar* (22, (2002) 110 Comp Cas 364 (CLB), preferential allotment without general body approval of the public company; oppression.

57. See, *Kalinga Tribes Ltd v Shanti Prasad Jain*, (1961) 1 Comp LJ 117 (Orissa), where this statement of law has been cited by MISA 1 of the Orissa High Court, at pp 146-47 from *Scottish Comp Wholesales Society v Meyer*, 1959 AC 354; (1958) 3 WLR 401 (HL) and *HR Farmer Ltd. v. (1956) 3 All ER 666* (1959); 1 WLR 62, *Dreams Dreamers v Firebirds & Pinters (P) Ltd.* (1994) 79 Comp Cas 722; (1991) 1 RLJ 148, allegations bad, not proved; mere lack of confidence. *Dreams (P) Ltd v Glenview India Ltd.* (2003) 116 Comp Cas 341 (CLB), no proof was there of diversion of funds, not even when a new company was formed.

58. (1964) 1 Comp LJ 117 (Orissa).

59. (1965) 1 Comp LJ 193 AIR 1965 SC 1885 (1965) 35 Comp Cas 351. See also, *VM Rao v Rajeshwari Bal Krishnan*, (1986) 1 Comp LJ 1- (1987) 61 Comp Cas 20 (Mad).

maintain this equilibrium. But no such agreement was incorporated in the articles of the company. Subsequently, in order to obtain certain loan facilities, the company was converted into a public company and it was proposed to issue 39,000 more shares. Ordinarily, according to Section 51 [1956 Act]⁶¹ [now S. 62] such new shares should have been offered to the existing shareholders. But the majority of the shareholders consisting of the two respondents' groups passed a resolution to offer these shares to outsiders, which was accordingly done. The petitioners contended that the allottees were friends of the majority group and the allotment had been made purposely to them with the *malu fide* intention to increase their voting strength and to squeeze out the petitioners.

This, he contended, was oppression within the meaning of Section 397, [now S. 241]. He relied upon an observation in *Piercy v S Mills and Co Ltd*⁶² to the effect that "if shares were issued to the public with the immediate object of controlling the greater number of shares in the company and of obtaining the necessary statutory majority for passing a special resolution, then it will not be a valid *bona fide* exercise of the powers".⁶³ The question, therefore, was whether the resolution offering the shares to the outsiders was passed in good faith for the benefit of the company or merely to capture an absolute majority and to squeeze out the petitioner.

BARMAN J held that this conduct of the majority amounted to an act of oppression of the minority. But, on appeal, his judgment was reversed. Misra J of the Orissa High Court, who delivered the leading judgment, was of the opinion that "the private agreement between the parties to maintain the equilibrium was not binding on the company". "The fact that the affairs of the company were managed with holding of shares in equal proportion amongst the three groups for a period of four years by itself cannot create a right in favour of the petitioner that it must continue in the same manner even when the company becomes public. To compel the majority shareholders, in these circumstances, to offer the new shares only to the existing shareholders would, far from being an oppression of the minority, amount to depriving the majority of a right conferred upon them by Section 51 (1956 Act) [now S. 62] entitling them to direct free issue of shares. It would also not be compatible with the dynamic concept of industrial expansion. For

61. (1920) 1 Ch. 77 (Ch. D).

62. See also, *Hogg v Creaghorn Ltd*, 1967 Ch 254; (1968) 31 Mod L Rev (N.Y.) 458, *need* (1969)

30 Mod L Rev 77 and *Bunford v Bunford*, 1970 Ch 212; (1970) 2 WLR 1107 (CA) and further still *Clement v Clemens Bros Ltd*, (1971) 2 All ER 268 (Ch D). Increasing majority to 95 per cent by changing articles was held to be oppression in the circumstances, *Abbardi A Kruer v Kruker Chemicals (P) Ltd*, (1997) 98 Comp Cas 245 (CLB).

The act and policy of materially reducing the voting strength of the petitioners by making a new issue and allotting it to the controlling family was held to be an oppressive conduct; the company was in no need of further capital, *Fazil Sheikh v Esmer Metalic Chemicals (P) Ltd*, (1995)

16 CLA 147; (1996) 87 Comp Cas 290 (CLB); *Prison Education Inc v Prentice Hall of India (P) Ltd*, (2007) 136 Comp Cas 211 (CLB), increase of capital not for any *bona fide* reason, set aside; further issue, notice not sent at the correct address registered with the company, unfair and oppressive, grievance about non-recognition, cannot be made after a long period of time.

instance, the expansion scheme would require large capital in crores and any one of the groups may not be in a position to subscribe its proportionate shares as any one or both of the residual groups can do. The balance is bound to be disturbed and the equilibrium lost even if the affairs of the company would be conducted wholly *bona fide*.⁶⁶ The issue of rights shares has become a well-known technique for manipulating internal positions. When rights shares are issued simply for manipulative purposes, they can rightly be described, as has been done by a commentator, as "wrongful issues".⁶⁷ The courts have not been able to come to the rescue of the affected shareholder because they are often not able to isolate the manipulative intention from the ostensibly declared purpose of the "*bona fide* interest of the company". It has, therefore, been suggested that:

The question which arises is sometimes not a question of the interests of the company at all, but a question of what is fair as between different classes of shareholders. Where such a case arises some other test than that of interests of the company must be applied.⁶⁸

66. (1964) 1 Comp LJ 117, 134 (Or). Also see, B.H. McPherson, "Oppression of Minority Shareholders", Part I: Common Law Relief, 36 Australian Law Journal 404; Part II: Statutory Relief, at p. 427; K.S.N. Murthy, "Minority Protection under Company Law", (1964) 1 Comp LJ 113 (Journal Seminar); series of three lectures by Prof. Louis Lasser on "The Protection of Investors", delivered at the University of Witwatersrand, Johannesburg and published in (1963) LXXX South African Law Journal. They are entitled: "The Role of the Government", 59; "The Role of the Accountant" and "The Role of the Courts", 372; M.B. Rao, "Oppression of Minorities and Mismanagement" (1965) 2 Comp LJ 43 (Journal Seminar); S.R. Choudhury, "Freezeout Problems in Corporation Law", Current Problems of Corporate Law, Management and Practice, Indian Law Institute (1964) 273.
67. Susan J. Burridge, "Wrongful Rights Issues" (1981) 24 Mod L Rev 10. Where the capital of a private company was increased without any explanation whatsoever and also in violation of articles, the court agreed with the petitioner that the purpose was to increase numerical strength and to reduce the petitioner to minority and the court ordered the relief appropriate relief of requiring the new issue to be offered to existing shareholders. *Rashmi Sethi v. Chander Jain* (P) Ltd, (1992) 3 Comp LJ 89; (1995) 82 Comp Cas 565 (CLB); *Ashok V. Doshi* v. *Doshi Time Industries* (P) Ltd, (2001) 33 Comp Cas 306 (J.J.B.). Non-allotment of agreed shares to the petitioner in the joint venture company in the nature of a quasi-partnership in which the petitioner had made an equal contribution amounted to oppression. *K. Balasundaram v. G.K. Alloy Steels* (P) Ltd, (2001) 199 Comp Cas 99 (Mad); property of the company sold under director's decision, to meet dire financial needs, held, not necessary for general body approval, sale not fraudulent but there was undervaluation, directors directed to pay surcharge to compensate undervaluation.
68. See *ibid*, citing *Latalee C* in *Mills v. Mills*, (1938) 41 CLR 151, 164. Asking members to buy more shares is not oppression in itself, unless there was some oblique motive. *Jean Jacques Thru. Lalani v. SRA Printing Inds* (2d), (1997) 88 Comp Cas 759 (Bom) and then offering new shares to others on the members' failure to take them is also not oppression in itself. *Sureshwar Prasad Singh Gorakhpur v. Sangram Singh P. Gorakhpur*, (1996) 1 Comp LJ 72 (Guj). Offering new allotment to promoters at less premium and charging more premium from other members was not allowed to be questioned by those who participated in the process and took their proportion. *N. Jayar v. Investment Trust of India Ltd.* (1996) 85 Comp Cas 75 (Mad). All issues must be attended to, validity of rights issue and if certain investments were involved here. *Kreshna Patel v. Adafalal Industries Ltd.* (1995) 17 CLA 102 (Guj); *Shrikant Rao v. Gayet Ashram* (2d), (1998) 31 CLA 375 (Guj). Directors to decide on corporate needs of more capital and also matters of dividend distribution. *N. Simmank Rao v. Mancherial Cement Co* (P) Ltd, 2016 ACC OnLine CLB 30; (2016) 198 Comp Cas 1.



The Supreme Court has suggested a way out by providing compensation to the injured shareholder. The case before the court was *Needle Industries (India) Ltd v Needle Industries Newey (India) Holding Ltd*.⁵¹



The articles of a private company contained a clause that when the directors decided to increase the capital of the company by the issue of new shares the same should be offered to the shareholders proportionately and, if they failed to take, they may be offered to others in such manner as may be most beneficial to the company. The company was a wholly owned subsidiary of an English company. The Government of India adopted a policy of diluting foreign holdings. The company accordingly issued new shares to its employees and relatives reducing the foreign holding to 60 per cent. When Section 43-A came into operation, the company became a deemed public company because more than 25 per cent of its share capital was held by a body corporate. The company, however, chose to remain a private company for all other purposes. The leader of the Indian 40 per cent holding was the chief executive and the managing director of the company. The company was further required to reduce its foreign holding to 40 per cent. At this stage the English and Indian blocks developed a difference. The English block wanted that the 20 per cent reduction of their holding should be allotted to one of the Indian companies in which they had substantial interest. A meeting of the company's Board of directors, on the contrary, adopted the policy of issuing new rights shares to the existing members, which the English company would not be able to subscribe and thereby its holding would be reduced to 40 per cent. Under the resolution 16 days' time had to be given to the members to take their proportion. The letter offering its proportion to the holding company was sent only four days before the last date and it received the letter after the date for exercising the option had already expired. Similarly, the notice of the meeting of directors for completing the allotment was sent to them with so short a gap of time that they received it in England only on the day on which the meeting was being held in India. Neither was it able to exercise the option of buying its block of rights shares nor was it able to attend the crucial meeting of the Board. Its block of shares was allotted to Indian shareholders.

The holding company complained of oppression on these facts. But the court was not convinced that there was any such thing as a continuous policy of oppression. The ultimate purpose of the scheme was Indianisation to the extent of 60 per cent. This could be achieved either by buying the excess holding of the English company or by increasing the Indian shareholding. The latter course was adopted in the interests of the company as it would

authorised capital increased by allotment of 50 lakh shares to meet financial requirements, it was in contravention of articles, creating new majority. Allotment set aside, refund of money ordered.

⁵¹ 1981(3) SCC 333; (1981) 51 Comp Cas 743; *Vijay M Shah v Fly Industries Ltd*, (1996) 61 DLT 378; (2001) 103 Comp Cas 1063 (Del); matters of mismanagement in rights issue should be questioned under Ss. 392, 396 [now Ss. 201, 212].

make available to the company extra capital. The fact that proper notice was not given, no doubt, deprived the English company of its opportunity of participating in the rights issue. But the facts were such that even if proper notice was given, the English company could neither have subscribed for its proportion nor renounced it in anyone else. There was no right in the company's articles in favour of any member enabling him to renounce his rights shares in favour of others. In the case of a private company there simply cannot be the right of renouncing rights shares in favour of nominees because that would make it impossible for the company to restrict the number of members. The real loss suffered by the holding company was the loss in terms of the market value of the shares which fell to its share. The market value of the shares was much higher than their nominal value. The allotment was at nominal value. The loss of the holding company was the "unjust enrichment" of those to whom the block of rights shares was allotted which, but for the policy restriction, belonged to that company. The Supreme Court accordingly held that the Indian allottees of those shares must compensate the holding company to the extent to which the market value was in excess of the nominal value.⁷⁰

Dealing with the argument that the illegal nature of the Board meeting should itself be an indication of the repressive policy, CHANDRACHUD CJ said:⁷¹

"The question sometimes arises as to whether an action in contravention of law is *per se* oppressive. It is said, as was done by one of us, Bhatwani J in a decision of the Gujarat High Court⁷² that 'a resolution

70. Increasing capital without any need may amount to an oppressive technique. Where this was so, the CLB ordered the appointment of an Interim financial administrator in possession of the Board of directors. *RN Jain v Deccan Enterprises (P) Ltd.*, (1992) 75 Comp Cas 417 (AP); *Rashmi Seth v Chemcon India (P) Ltd.*, (1992) 3 Comp LJ 89; (1993) 52 Comp Cas 562 (CLB); rights issue allotted in violation of the company's articles, set aside. *Rashmi Seth v Tilson Farms (P) Ltd.*, (1992) 3 Comp LJ 126; (1992) 52 Comp Cas 404 (L.I.B.). increasing majority by fabrication, set aside. Where the company was in genuine need of more capital and the requirements of S. 81 (now S. 62) for excluding present shareholders were also satisfied, a complaint by the petitioning shareholder that his holding was thereby diminished was held to be not sustainable. *Stratford Industries Ltd v Mafnafal Services Ltd.*, (1992) 2 Comp LJ 115; (1994) 401 Comp L & Bus 264 (C.I.B.). Three warring members of a company were brothers, nobody was prepared to sell out, one of them made further issue of capital alighting the whole to himself thus increasing his majority, the CLB said that such an act was oppressive but because all of them were interlocked in a civil suit where the same issues were involved, it would not intervene. *Pinal Kisan Agency v Singlong Tea Co Ltd.*, (1995) 16 CLA 128 (C.I.B.). *Sheriar Sundram v Patelyanandji Ltd.*, (2002) 111 Comp Cas 257 (Mad). orders can be passed against a subsidiary company though the petition was only against the holding company.

71. *Needle Industries (India) Ltd v Nerdia Industries (Nandy Groups) Holding Ltd.*, (1991) 3 SCC 333, 367; (1981) 51 Comp Cas 742. The mere illegality of an act is not by itself an act of oppression. *Albert Securities Ltd v Regal Industries Ltd.*, (2000) 25 SCL 349; (2000) 37 CLA 250 (CLB). A conduct in breach of the principles of company law is not itself conclusive of unfair prejudice. *Anderson v Hogg*, 2000 SLT 634 (Scotland).

72. *Sheri Malati Lal Campusam v Sugan Jayabhai Collier & John Mills Ltd.*, (1964) 34 Comp Cas 777; (1964) 5 Guj LR 801; AIR 1965 Guj 96. Followed in *Krushikali Parikh v Maythil Industries Ltd.*, (1996) 17 CLA 102 (Guj) where a civil suit was allowed to test the validity of a Board resolution though it was oppressive to shareholders for which special jurisdiction of C.I.B.

passed by the directors may be perfectly legal and yet oppressive, and conversely a resolution which is in contravention of the law may be in the interests of the shareholders and the company".⁷³

Two English cases, namely, *Five Minute Car Wash Service Ltd.*, *re*,⁷⁴ and *Jermyn Street Turkish Baths Ltd.*, *re*,⁷⁵ have further narrowed down the scope of relief under the section. In *Five Minute Car Wash*, *re*, the catalogue of charges was (1) valid debts had not been paid, highly questionable debts had been paid; (2) the company failed to carry out its undertakings with petrol suppliers forcing them to refuse supplies to the company; (3) inefficient staff was being maintained; and (4) car washing machinery was ordered without testing. The court conceded that these charges showed that the majority shareholder was "unwise, inefficient and careless in the performance of his duties";⁷⁶ but these things did not establish that he was oppressive towards any particular members. In the *Turkish Baths* case the story was like this:

A private company consisted of only two shareholders holding equal shares. One of them transferred his shares to one Mrs P and the other died. The condition of the company was precarious. But Mrs P brought back the company on its feet through further investments for which some shares and a debenture were allotted to her. The personal representatives of the deceased shareholder alleged oppression on the following grounds: (1) allotment of shares was a breach of duty; (2) directors' remuneration was fixed by the Board and not by the shareholders as provided in the company's article; (3) notice of meetings was not given to the representatives; (4) excessive remuneration was paid to Mrs P; and (5) no dividends were ever declared.

Theoretically, these charges showed serious irregularities, but the court could not have ignored the practical side of Mrs P's successes. Commenting on the case D. Prentice observes:

"Mrs P had nursed the company from bankruptcy to comfortable profitability, she had devoted all her time to its affairs, and she had loaned capital to it at a time when the estate of L (the deceased shareholder) refused to do so. Its representatives also enjoyed the benefits of her efforts as the market value of their shares was thereby increased."⁷⁷

Where in the case of a private company the understanding was that parity of shareholding was to be maintained, it was held that the attempt of

is prescribed. *Jayantilal R Patelkumar v ICDS Ltd.*, AIR 1994 Kant 364. Right of shareholders to approach a civil court for the purpose of removing the Chairman of the company cannot be taken away by the fact that the matter also involves things in the nature of oppression and mismanagement for which there is special jurisdiction.

73. (1966) 1 WLR 745.

74. (1971) 1 WLR 1042; (1971) 3 All ER 184 (CA).

75. (1966) 1 WLR 245. (1966) 1 All ER 242, *an*. Birks' judgment at p 252. For criticism see H. Rajak, 'Oppression of Minority Shareholders' (1972) 35 Mod L Rev 156.

76. D. Prentice, 'Protection of Minority Shareholders. S. 210 of the Companies Act, 1948' (1952) CURRENT LEGAL PROBLEMS 124, 143.

one group to take over the company by increasing its shares would entitle the affected members to proceed under the Section 241 as also under Section 433 [now S. 271] for a winding up order.⁷⁷

Where one of the director-member was excluded from the new allotment, the Company Law Board ordered for proportionate allotment to him.⁷⁸ Transfer of shares within the same group without violation of any terms in the articles of association was held to be no oppression.⁷⁹ An allotment of shares to one group giving it time to pay application money and to the other group by using the amount lying with the company to their credit and refunding the balance amount without any demand was held to be not a bona fide exercise of power. The allotment was set aside.⁸⁰ Preference shareholders cannot complain of oppression by reason of allotment of shares to equity shareholders.⁸¹

Existence of alternative relief.—Where there were allegations of violation of foreign exchange regulations and improper accounting, the alternative relief of appointing inspectors under Section 209-A [now S. 207] was provided.⁸² In this case there was the further allegation that auditors were

77. *Mitskar Stoneware Pipes (P) Ltd v Raynder Nath Ghosh*, (1988) 63 Comp Cas 384 (Del); *Rajender Nank Bhisekar v Mitskar Stoneware Pipes (P) Ltd*, (1990) 1 Comp LJ 351, (1990) 68 Comp Cas 256 (Del); followed in *Margret T Dexel v Worldwide Agencies (P) Ltd*, (1991) 66 Comp Cas 5 (Del), on appeal to Supreme Court *World Wide Agencies (P) Ltd v Margret*, (1990) 1 SCC 536; (1990) 67 Comp Cas 607; (1990) 1 Comp LJ 278. An attempt to appoint one more director in the case of a private company without fulfilling the requirements of the company's articles which prescribed a special resolution was held to be oppressive at the minority shareholder. *VR Balasundararao v New Theatre Cinetic Talkies (P) Ltd*, (1993) 77 Comp Cas 324 (Mad); *Fusil Sulki v Eswara Metal Chemicals (P) Ltd*, (1995) 46 CLA 142; (1995) 97 Comp Cas 290 (CLB), inadequate notice of shareholders' meeting; *Allianz Securities Ltd v Regal Industries Ltd*, (2000) 37 CLA 250, impertinent notice of Board meeting when a director was abroad. *Dipak G Mehta v Anugra Chemicals (India) Ltd*, (1997) 99 Comp Cas 375 (CLB), further issue and allotment of shares for the benefit of a group of shareholders, held oppression. *Pratik M Patel v Univerworld Electrodes (P) Ltd*, (2003) 115 Comp Cas 377 (CLB), issues of further capital exclusively to the minority, oppressive, filing of winding up petition not a bar to a petition under S. 297. *Kshonish Chowdhury v Kero Rajendra Manufacturing Ltd*, (2002) 110 Comp Cas 411 (CLB), another case of manipulated increase of shareholding to the disadvantage of the minority group. *Sabai Chandubury v Mahabir Tea Estates (P) Ltd*, 2010 SCC OnLine CLB 26; (2011) 184 Comp Cas 50, increasing majority by issuing new shares to gain control was stayed by an interim order. The stay was partly lifted to enable the company to transfer property to the State Government for public purpose.
78. *Hillcrest Realty SDN BHD v Hotel Queen Road (P) Ltd*, (2006) 133 Comp Cas 242 (CLB). The allotment was otherwise valid because the company was in need of funds.
79. *Hillcrest Realty SDN BHD v Hotel Queen Road (P) Ltd*, (2006) 133 Comp Cas 742 (CLB); see also, *N Kalera v Monarch Steel (India) Ltd*, (2006) 130 Comp Cas 109 (CLB), persons wrongfully induced as directors restrained from acting as such.
80. *A Ramachandrarao v Fuzal Productions (P) Ltd*, (2007) 135 Comp Cas 416 (CLB).
81. *Hillcrest Realty SDN BHD v Hotel Queen Road (P) Ltd*, (2006) 133 Comp Cas 742 (CLB); *Akhbaria Housing and Infrastructure (P) Ltd v Pantheon Infrastructure (P) Ltd*, 2015 SCC OnLine Bom 6355; (2016) 197 Comp Cas 316, mere reduction of shareholding does not amount to oppression; sale or leasing restricted areas and allegation of rotation of funds also did not constitute oppression. There can be no interference in the day-to-day working of the company.
82. *Dixie (P) Ltd v Blockdriv India Ltd*, (2003) 116 Comp Cas 541 (CLB).



not appointed at the general meeting. No relief was allowed under these sections because this was a matter to be brought to the notice of the Central Government which alone could take care of it. The complaining shareholders-directors had not raised any objection at the meeting itself and the same auditors were reappointed at a subsequent meeting. It was further held in this case that the orders of investigation are not generally passed under these sections, particularly when it is the matter of a closely held company. Another matter which was directed to be referred to the Central Government was that of appointment of managing director in another company which had to be passed at a meeting of the Board, was dealt with by a resolution passed by circulation. An objection of over-drawing of remuneration by the managing director which should have been raised at the meeting itself was not so raised. No relief was allowed on this point under this jurisdiction.

Oppression of majority.—It should not, however, be supposed that these special remedies against oppression or mismanagement are available only to minorities. "In an appropriate case, if the court is satisfied about the acts of oppression or mismanagement, relief can be granted even if the application is made by a majority, who have been rendered completely ineffective by the wrongful acts of a minority group." A petition is not liable to be struck out as showing no reasonable cause of action just only because it is filed by a majority shareholder.⁸³ Accordingly, a relief under the section was allowed to a majority group by Mr. V. J. of the Calcutta High Court in *Sindri Iron Foundry (P) Ltd. v. n.*⁸⁴ The learned judge observed that "if the court finds that the company's interest is being seriously prejudiced by the activities of one or the other group of shareholders, that two different registered offices at two different addresses have been set up, that two rival Boards are holding meetings, that the company's business, property and assets have passed to the hands of unauthorised persons who have taken wrongful possession and who claim to be the shareholders and directors, there is no reason why the court should not make appropriate orders to put an end to such matters".

The same fact-situation was presented before a Bench of the Calcutta High Court in *Ramchankar Prasad v. Sindri Iron Foundry (P) Ltd.*⁸⁵ Referring to the argument that the right to apply under Section 397 or 398 must be confined to cases where the complaint is by a minority against the majority and not vice versa, Mr. V. J. said:

"Section 399 [now S. 244] is a code by itself as to the qualification necessary for application under Sections 399 and 398 [now S. 241]. I see no reason for holding that Section 399 was only aimed at finding the lower

83. *Baltic Real Estate Ltd (No 2), re*, 1993 BCLC 418 (Ch. D); *Baltic Real Estate Ltd (No 2), re*, 1993 BCLC 503 (Ch. D), the court adding that things like removing a director from office, which can be set right by using majority power, should better be accomplished at that level.

84. (1963) 60 CWN 116. See further, *Sebastien v. City Hospital (P) Ltd.* (1965) 57 Comp Cas 432 (Ker); *Shantilal Maneklal Patel v. Laxmi Film Laboratory & Studio (P) Ltd.* (1984) 56 Comp Cas 110 (Guj).

85. (1966) 1 Comp L.J. 310.

limit of qualification of any shareholder or group of shareholders complaining of oppression and mismanagement. If the Legislature has fixed a lower limit but an upper limit and if the object of the section be to prevent mischief, I see no reason why an upper limit should be implied so as to bring the section in line with the English section.⁶⁶ If the section is of a remedial nature, its proper construction should be to give the words their widest amplitude."

Referring to the argument that the majority could always call a meeting and put things in order by passing resolutions, the learned judge said:

"The facts in this case show very clearly, that there is no chance of redress in the domestic forum of the company. If a Board meeting was to be called, one group would contend that there were five directors, whereas the other group would urge that there were seven. If a meeting of the shareholders was to be convened, according to one group there would be only sixteen shareholders, while according to the other the number would exceed twenty-five.... There would be complete chaos and confusion...."⁶⁷

Even where the whole number of members is suffering, relief may be allowed to the complaining member because some members may suffer more than others may do. Where the complaint was on the basis of an unfairly low dividend and though all members may suffer alike, the court said that the word "interests" is a wider term than "rights" and that the members of a company may have varying interests though their right might be the same. A course of conduct may affect all the members equally and all may be prejudiced, yet some of them only may be prejudiced unfairly. Low dividends may cause extraordinary prejudice to some members only."⁶⁸

⁶⁶ S. 210, (English) Companies Act, 1968, appeared under the heading "Minorities", but the word "minority" is nowhere mentioned in the text of the section. Professor Gower's opinion, as expressly adopted in some cases, is that "the draftsman has rightly recognised that oppression may be exercised by those in control even though they lack in majority holding and that the section's funds protection in such cases". *Principles of Modern Company Law* (2nd Edn, 1969) 509. The relevant footnote cites the following authorities: Associated Text Industries Ltd. re, [1954] A.L.R. 73, H2 (Australia); Benjamin v. Elysium Investments (P) Ltd. (1960) 3 SA 467 (South Africa); HTR Finance Ltd. re, (1959) 1 WLR 62; All ER 689. It was, therefore, futile to have argued on the basis of the heading of the English section that relief was intended to be confined to minorities. Now ss. 438-461, (English) Act of 1965 use the expression "unfair prejudice".

⁶⁷ See also, *Aizat Hussain Ltd. re*, (1964) 68 CWN 163 (Cal) where it was observed that "it is against the principles of company law that the majority should carry on the management without any election as provided in the Act and the majority of the shareholders should be kept out of the management". *Cominsol Tinplate (P) Ltd. re*, (1992) 1 Comp LJ 61 (Cal), though it is unusual to ask the majority to sell itself to the minority, a petition by the majority is maintainable. See the contrary observation of the Delhi High Court in *Suresh Kumar Sanghi v Supreme Motors Ltd.* (1983) 54 Com. Cas 253 (Del).

⁶⁸ *Abley Leisure Ltd. re*, 1988 BCI.C 619 (Ct D), not following *A Company (No 6027) v* 1987, ex p. Glassop, re, (1948) 1 WLR 1068, where an amendment was not allowed to add the fact of low dividends to the petition. *Asmara Betelum Co (P) Ltd v MK Chemburkutty*, (1997) 86 Comp Cas 274; (1997) 25 CLA 166 (Mad), continuous losses and therefore no dividends.

In exceptional cases legitimate expectations might arise on the part of the petitioner outside the terms of formal agreements entered into between the parties.⁸³ An agreement to conduct the affairs of the company in a particular manner may be outside the articles. It will support a petition if the agreement is broken by those conducting the affairs of the company.⁸⁴

Even where majority shareholders are suffering at the hands of the minority, the courts are usually very reluctant in ordering the majority to sell out to the minority. Such an order may be passed only exceptionally.⁸⁵ Generally, the minority shareholders will be required to sell to the majority.⁸⁶

"Oppression qua members".—The complaining member must show that he is suffering from oppression in his capacity as member and not in any other capacity. For example, in *Lendie Bros. Ltd.*,⁸⁷ a minority shareholder of a private company was removed from his position as a working director. As an ordinary shareholder he would have gained nothing as the company had never paid any dividend, director's remuneration being the only return on investment. Yet he could not complain of it because he had suffered as a director and not as a member. This result has been criticised as being unrealistic.⁸⁸ Directorship is one of the privileges of membership. Any deprivation of this privilege is a kind of oppression as member.⁸⁹

minority's dissatisfaction, unsubstantiated allegations of financial propriety, further issue of shares for business needs and no ulterior motive, no relief under S. 397 [now S. 241].

88. *A Company* (2001) 5 of 1996, re, (1997) 2 BCCLC 1.

90. *Anderson v Hugg*, 2000 SLT 634 (Scotland).

91. *Deepak Lohia v Kauai Prop Develops (P) Ltd.*, (2003) 216 Comp Cas 189 (CLB), a private memorandum of agreement not enshrined in the company's articles not taken to be binding but could provide some help in moulding relief. Misappropriations had become irretrievably deep in be cured and, therefore, directions were issued for purchase of shares of majority group by minority group.

92. *Mohabir Prasad Jaimi v Bajrang Prasad Jaimi*, (1999) 2 Comp LJ 71 (Cal).

93. (1949) 1 WLR 1031 (1966) 2 All ER 692. (1966) 1 Comp Lj All. *Jaladhar Chatterjee v Power Tools & Appliances Co Ltd.*, (1994) 79 Comp Cas 505, low dividend which did not affect the value of the petitioner's shares, neither oppression nor mismanagement.

94. See, D. Prentice, "Protection of Minority Shareholders, S. 210 of the Companies Act, 1948", (1972) *Corporate Law*, Promissus 124, 131-22. *A Company, ex v Schwartz (No 2)*, re, 1989 BCCLC 427 (Ch D), where the total strength of the minority (father and son) shareholder was only 5.5 per cent, refusal of directorship was held to be not unfairly prejudicial because they had no vested right to be directors.

95. *Quinton v Esarri Hinge Co Ltd.*, (1996) 2 BCCLC 47 (Ch L), a shareholder-cum-director was summarily dismissed from production directorship without any justification. The majority shareholder was ordered to purchase his shares without any discount because of the minority shareholding. In the context of a small private company, the expectations of shareholders are not necessarily confined to the constitution of the company. *Kipesi (P) Ltd v Sheikh Mehrul*, (1996) 10 SCC 696; (1996) 87 Comp Cas 6th and *Vijay Krishan Jodha v Jadka Mates Co Ltd.*, (1996) 23 CLA 289 (CLB), partnership principles became applicable, breakdown of confidence and deadlock may make out a case for relief. See further, *Kanodia Sangnitrayya & Kumaras Motor Transport Ltd.*, (1996) 29 CLA 233; (1999) 98 Comp Cas 518 (CLB), selection of dealers for the company's products cannot be a cause of complaint in itself unless, Jawabritism could be shown due to other factors, which were not proved here. *Dalip Singh Sachar v Man Kauri Coal Carriers (P) Ltd.*, (2006) 130 Comp Cas

Removing a member from directorship is often a symbol of breakdown of relation of which the only possible solution is that one faction should move out of the company and the other should pay it out. It will then be a question not so much of deprivation from directorship or from any other place of profit as of which faction should move out and what shall be the procedure of valuation.⁹⁵ A member, however, will not be permitted to take advantage of his own misconduct first in inducing breakdown and then of forcing the other to buy him out.⁹⁶ The member who has lost directorship and, therefore, control to the extent that he has to seek the help of law, the legal choice would be to ask him to take to his satisfaction and move out. A minority member cannot be given the privilege of driving out the majority shareholder.⁹⁷ The only question will be that of regulating the valuation of shares.

In a small private company where the principles relating to quasi-partnership apply, there was an understanding for equal participation in management. The articles of the company stipulated quorum of three directors at Board meetings. A director was removed when one director had left and the meeting was without quorum. This was held to be an oppressive conduct towards the member-director.⁹⁸ Removal of managing director was sought to be made in a private company. On a notice by majority shareholder, the managing director convened an extraordinary general meeting. The managing director did not participate. The civil court did not grant an injunction to restrain meeting. The meeting became legal and valid. It was held to be not a case of oppression or mismanagement.⁹⁹

The questions of rights and interests of members as members can be made the subject-matter of a proceeding under the section and not matters

- 941 (CLB); only membership rights can be agitated, but where company is in essence a partnership, equal participation in management becomes a membership right. Removing director without justification (improved non-attendance of meetings), petition lies for relief. *Pension Education Inc v Prentice Hall of India (P) Ltd*, (2007) 136 Comp Cas 211 (CLB). Contractual rights cannot be agitated.
96. An apprehension on the part of a director that his distributorship of the company's products may likely to be terminated was held to be not a matter coming within the special jurisdiction for prevention of oppression. Even otherwise the court cannot interfere in the matter of appointment and termination of distributorship. *ML Thakral v Kruic Chemicals*; *1 Ad. (1996) 44 Comp Cas 648 (Kan)*.
97. *A Company*, (No 004475 of 1982), re, 1983 Ch 128; *A Company*, (No 007623 of 1984), re, 1986 BLCLC 362; *A Company*, (No 004377 of 1986), re, (1987) 2 WLR 102. For a view of some trends on the subject, see, H.W. Fox, "Compulsory Purchase of Shares in a Private Company Some Recent Developments" (1987) 102-236.
98. *A Chintang*, (No 166624 of 1986), re, (1988) 5 BLCLC 218; *Sympathetic Machine Tools (P) Ltd v Udit Suresh Rao*, (1994) 29 Comp Cas 868 (Kan); ousted from directorship, the court directed majority to buy out minority. *Tariq Sheikh v Esmerin Metalik Chemicals (P) Ltd*, (1995) 16 CLA 142; (1996) 27 Comp Cas 291 (CLB); direction to buy out minority shareholders at a price to be determined by accountants.
99. *Radi Nakk Galatra v Anilam (P) Ltd*, (2007) 135 Comp Cas 534 (CLB); *Rupali Kapoor v Greater & Co (P) Ltd*, (2013) 128 Comp Cas 28 (Bom); grievance to a member that he has been ousted as a working director or his remuneration has been reduced has nothing to do with his status as a shareholder.
100. *K P Ravindraiah Babu v K Venkateswamy & Co (P) Ltd*, (2015) 189 Comp Cas 620 (CLB).

arising out of commercial relations of a member with the company.¹⁰¹ Breaches of joint venture agreement as to investment in favour of one of the joint venturers was held to be not an oppression, the agreement being outside company relations.¹⁰² Commercial relations between the company and its members are not within the purview of the relevant provisions, they being not conferring any membership rights. Hence, breach of contract with a member committed by the majority shareholder of the company was held to be not an act of oppression.¹⁰³

Oppression in conduct of affairs.—The legitimate expectations with which a person joins a company as a member and denial of which may amount to oppression must relate to the affairs of the company. The expectation that shares would be allowed to be transferred in breach of agreement or articles has not been held to be a legitimate expectation. The compulsion that shares must be transferred within the framework of the articles is not an oppression.¹⁰⁴ Where the objects of the company were defeated by a high-handed majority by shifting from construction and hoteling to filmmaking, the court said that it was an act straight against the expectations of the shareholders in joining the company. It amounted to oppression. The court ordered the majority group to buy out the minority at a value which was fixed by the court by reference to the cost inflation index issued by the Central Government for computation of capital gains.¹⁰⁵

A petition involving complicated questions of facts relating to fraud and fabrication of documents was held to be maintainable.¹⁰⁶

Private agreement amongst members as to share transfers. A private agreement between members of a family as to share transfers which was not incorporated in the company articles was held to have no binding force on the company and members in their relations with the company.¹⁰⁷

101. *Anil Gupta v. Mirin Auto Industries (P) Ltd.*, (2003) 113 Comp Cas 63 (CLB), the subject-matter of the dispute was the termination of the petitioner's sole-selling agency.

102. *Charterex Petroleum (Guflim) (P) Ltd v. Haldia Petrochemicals Ltd.*, (2011) 10 SCC 466; (2011) 167 Comp Cas 373.

103. *Paribabu Patel (Auditor) Ltd v. A.P. AKSHI Umashankard Ltd.*, (2010) 6 SCC 719; (2010) 157 Comp Cas 30.

104. *Leeds United Holdings plc v. B.*, (1996) 2 BCLC 545 (Ch D).

105. *CN Shetty v. Hullock Hotel (P) Ltd.*, (1996) 67 Comp Cas 1 (AP); *DK Chatterji v. Biplab Superunics (P) Ltd.*, (2003) 114 Comp Cas 265 (CLB); payment shown in the account books to a proprietary concern whose business was taken over by the company was held to be not a siphoning of funds. In this case, the lenders were not able to prove that they had asked the company for converting their loans into equity. There could be no finding of oppression on that ground. *CN Shetty v. Hullock Hotel Ind.*, (2001) 134 Comp Cas 722 (AP); raising capital through allotment of shares excluding an equal shareholder and that too for an intend other purpose, oppressive. *Vikram Rakchi v. Sonia Khosla*, (2014) 15 SCC 80; (2014) 184 Comp Cas 392, rival shareholder groups were mired in disputes arising out of the main petition. The Supreme Court issued directions for disposal of the main petition pending which status quo was to be maintained.

106. *Gaurishankar Neelkanth Kalyani v. Salukhunu Neelkanth Kalyani*, (2014) 185 Comp Cas 200 (CLB).

107. *Puspha Patel v. Manu Mahadevi Hotels Ltd.*, (2006) 131 Comp Cas 42 (Del).

Facts must justify winding up.—The facts alleged in the petition must justify a winding up order under the "just and equitable" clause of Section 271.¹⁰⁸ The petitioner cannot seek the relief of an order of winding up in the same petition.¹⁰⁹ A need for an order of winding up can arise when there is a deadlock on account of more or less equal shareholding or when there is lack of probity or no hope or possibility of smooth and efficient running. Where there is not so, no remedy under Section 241 would be available. Events subsequent to the petition cannot be taken into account for this purpose.¹¹⁰

This link with desirability of winding up may prevent relief in some deserving cases. This is so because winding up on the "just and equitable" ground itself is beset with many technical requirements. For example, in *Bellador Silk Ltd. v.*,¹¹¹ the petition failed because the petitioner could not prove that there would be sufficient assets left with the company for distribution among shareholders after paying off the creditors.¹¹² The difficulty of obtaining a winding up order is shown by cases like *Weathbourne Galleries Ltd. v.*,¹¹³ where a director of a private company, which was very much like an incorporated partnership, was deprived by the majority of his directorship, thus making his existence in the company quite useless for him and even so the court finding it to be not just and equitable to wind up the company. The decision was, however, reversed by the House of Lords.

108. *Haemant Prasad Raygi v. Business Central* (1974) 21MLJ 422; (2001) 105 Comp Cas 493, the petitioner must make out a case of winding up on just and equitable ground. The High Court's view that the termination of directorship of the petitioner was not such a ground was upheld. Misappropriation of funds by directors may not permit the extreme remedy of winding up and so no relief under the category of oppression or mismanagement. *Malabar Express (P) Ltd. v. T.V. Chidambaram*, (1994) 79 Comp Cas 213 (Ker). The Supreme Court has emphasised that normally the winding up of the concerned company should not be ordered in the exercise of these powers. *Kalpeet (P) Ltd. v. Shakoor Mehroo*, (1996) 39 SCC 696; (1996) 57 Comp Cas 615. *Sankit Kumar v. Sudha Mills* (1974), 1991 AGHC 5230 (Mad); consideration of a winding up petition should be deferred till petition under Ss. 397-398 pending before CLB, but it is not a bar to winding up proceedings. *A.K. Puri v. Devi Doss Gopal Kishan Ltd.*, (1995) 17 CLA I; AIR 1995 J&K 24. *Vasantakar S. Trivedi v. Silver Langari Sanatan Gears (P) Ltd.*, 2014 SCC (Oriental CLB) 314; (2015) 186 Comp Cas 485, failure to specifically plead that there was oppression and winding up would unfairly prejudice the petitioning members, such established, petition not dismissed.

109. *DK Chatterji v. Repti Superettes (P) Ltd.*, (2009) 114 Comp Cas 265 (CJ, BI).

110. *Ashok Belani v. Co (P) Ltd. v. MK Chamborkar*, (1997) 88 Comp Cas 274; (1997) 25 CLA 146 (Mad).

111. (1965) 2 Comp LJ 30.

112. A situation of this kind is not likely to arise in India as S. 272(3) has dispensed with this requirement. The English Companies Act, 1985, has also dropped the requirement of desirability of winding up.

113. 1971 Ch 299; (1973) 2 WLR 619 (C.A); *Ruby General Hospital Ltd. v. Kamal Kumar Gupta*, (2006) 129 Comp Cas 1 (Cal); allegations of removal from directorship and alienation of shares alleging majority, not sufficient to justify winding up. A separate civil suit lies from wrongful removal from directorship. *Hirachandkai R. Patel v. Bhagirath Construction Co (P) Ltd.*, (2014) 185 Comp Cas 56 (CLB); whether it is desirable to order winding up on just and equitable ground is to be considered by the CLB (now Tribunal) after examining whether because winding up could be prejudicial to the interest of the petitioner, company and public; relief was denied because of denial of rights.



Unfair prejudice.—The requirement that facts must justify winding up on the just and equitable ground had made the remedy "virtually useless in practice".¹¹⁴ Accordingly, the requirement was dropped in England in 1980 and the amendment has been maintained through the Act of 1985. "The key concept is now 'unfair prejudice'. This expression has never caused practitioners or the courts any difficulty. 'Prejudice' denotes detriment of some kind, but because it must qualify as 'unfair' it must be a form of detriment which would strike a man of business as unjust and inequitable. The role of the non-controlling shareholder is that of an investor. No doubt the 'prejudice' will usually take the form of a diminution in the value of the petitioner's shareholding. A scenario which is clearly actionable under Section 459 [English Companies Act] through no devaluation of the petitioner's shareholding occurs in a history of unjustifiably low dividends without commercial reason."¹¹⁵

Deprivation of shareholders' legitimate expectations was regarded as unfair prejudice in *Sant & Harrison & Sons plc v.*¹¹⁶ The court said that it would usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him an opportunity to remove his capital upon reasonable terms. The House of Lords in *O'Neill v Phillips*¹¹⁷ have laid down this restriction upon the scope of the words "legitimate expectation" that this expression cannot be given the status of an independent rule. Such expectations must be founded somewhere. An unfounded expectation cannot support the plea of unfair prejudice. The only foundation which is possible is that there should be something in the articles or promises outside the articles to support the expectation. In this case the allegations were that the majority shareholder terminated the agreement for equal profit-sharing with the minority shareholder and also the agreement for allotment of more shares to the latter. The petition was not allowed because the majority shareholder had not given any such commitments. Their Lordships attached considerable importance to the fact that he had offered to purchase shares at a fair value.

It was held in the case of a quasi-partnership company that the summary removal of a director and his removal as an employee without any cause and with no offer to purchase his shares was an unfair prejudice to his position. The court ordered the purchase of his shares at a price to be calculated on the basis of the company as a going concern and multiple of earnings.¹¹⁸ The removal of a director on the exercise of majority power and also passing of a resolution authorising excess remuneration and rights issue were held to be unfairly prejudicial to the minority shareholder because he was

114. See, Ralph Instone, "Unfair Prejudice: An Interim Report" (1988) JBL 20.

115. *Ibid.* 21–22 citing R.A. Noble (Clothing) Ltd, 1983 BCCLC 273, 290–91 and *Bally Hotel Ventures Ltd v.* (1981) (Unreported).

116. (1995) 1 BCCLC 14, 19.

117. (1995) 97 Concp Cas 807; (1999) 1 WLR 1092.

118. *Parkinson v. Euromaritime Group Ltd*, 2000 All ER (D) 626.

being virtually forced to leave the company. The majority shareholder was ordered to buy him out at a fair value.¹¹⁹

The resources of a company were being used for the benefit of majority shareholder and her family to the exclusion of the minority shareholder. An administrator was appointed.¹²⁰

"Oppression" and "unfair prejudice", difference. -The Indian Companies Act still retains the expression "oppression". There is a difference between the two as to scope of possible relief. "Oppression" would require some kind of injury to the proprietary interest of the complaining shareholder. This explanation was offered in a case in which the company was running an agency. It became divided between two equally strong shareholder groups. The company, whose agency it was running, was dealing with only one group. It terminated the agency exercising its rights under the agreement and awarded the agency to that group. The other group was not allowed to complain of this as an act of oppression.¹²¹

Oppression of continuing nature. -The facts alleged must reveal an oppression of a continuing nature. Isolated acts of oppression will not do. This is apparent from the words of the section itself which says that the affairs of the company must be conducted in an oppressive "manner".¹²² This requirement would also prevent cognizance of past oppressive behaviour. For example, in *Raghunath Suntrap Mathur v Har Suntrap Mathur*,¹²³ M.H. Beg J observed that "whatever may have been the position in the past, the company was carrying on a profitable business, and, even if some bungling had taken place in the keeping of accounts in the past, it may not justify a winding up order where the company is a sound profit-making concern". Past acts are relevant if they constitute a continuing whole with the present facts or if the single past act complained of is capable of unleashing a continuing oppression.¹²⁴ Events subsequent to the date of the petition are also

119. *Regional Airports Ltd. v.* (1999) 2 BCLC 311 (Ch D); *S. Sangamithra v. Skymania Pictures & Hotels (P) Ltd.* (2012) 108 Comp Cas 880 (CLB), where shareholding was never equal between members, a complaint was not entertained because of unequal shareholding. *Neelakshi Kothi v. Niket Rubber (P) Ltd.* (2012) 108 Comp Cas 422 (CLB), converting a majority shareholder into a minority in a manner which is not necessary for mobilisation of funds for the company was held to be oppressive.

120. *Harindra Prasad Agarwal v. Associated Tuberol (India) Ltd.* 2014 SCC OnLine Del 3443; (2014) 168 Comp Cas 528.

121. *Pushkar Singh Puri v. Rishabh Kundan Sippy*, (2006) 131 Comp Cas 690 (Bom).

122. *Chellappan Petromines (India) (P) Ltd v. Haldia Petromines Ltd.* (2011) 10 SCC 466; (2011) 167 Comp Cas 373, one isolated incident of oppressive nature may not sustain a petition. A continuous and concerted action to cause prejudice to minority shareholders may be required. A Government corporation gave promises to the petitioner for majority shareholding provided that he brought in sufficient equity to the cash-starved corporation. He could not do so and therefore transfer of shares to others brought him down to minority. He could not complain.

123. (1970) 40 Comp Cas 282; (1970) 1 Comp LJ 35 (All); *Pilgrim Engineers (P) Ltd v. V.P. Chundru*, (1994) 79 Comp Cas 213 (Ker), post acts which had ceased to exist, petition rejected.

124. *Surinder Singh Randhawa v. Hindustan Fertilizers (P) Ltd.* (1969) 2 Comp LJ 204; AIR 1999 Del 32; (1990) 69 Comp Cas 728.

not to be taken into account.¹²⁵ The mere fact of business losses does not by itself show either oppression or mismanagement.¹²⁶ The fact of low rate of dividend even when there were high profits can be taken into account even if it is a subsequent event and has been brought on record by an amendment of the pleadings.¹²⁷

A single act of issuing additional capital can have a continuing effect and was held to be capable of constituting oppression. There can be no time bar for seeking relief in such cases. The issue had the effect of converting in the family company the majority in to minority. Though the petitioning group had a knowledge of the fact, directions were issued to the effect that control be handed over to them.¹²⁸ Termination of an agreement between a group of family companies about the use of family trade mark and logo by giving notice to one family company owned by a minority shareholder was held to be an act having far reaching consequences. It, therefore, amounted to an oppression of the minority shareholder.¹²⁹ Appointment and removal of directors by manipulating records and meetings without quorum was held as amounting to harsh and burdensome conduct of continuing nature. It lacked probity and good conduct.¹³⁰

Fairness of petitioner's conduct.—There should be fairness in the conduct of the petitioner. There can be factors which would disentitle him though the others might be in the wrong. Accordingly, where a reasonable offer is made to him before the petition is heard, the court will restrain further proceedings so as to maintain the status quo between the parties.¹³¹ The

125. *Asbeka & Ethnai Co/P, Ltd v MK Chendrakarik*, (1997) 88 Comp Cas 274; (1997) 25 CLA 145 {Mad}.

126. Ibid.

127. *Jer Rulor Rucasmunack v Glaxo Chemicals Ltd*, (2000) 2 Bom LR 55; (2001) 106 Comp Cas 25.

128. *Asok Kumar Dasgul v Panchsheri Textile Mfg & Trading Co (P) Ltd*, (2002) 110 Comp Cas 825 (CLB). In a subsequent litigation between the same parties, *Asok Kumar Dasgul v Panchsheri Textile Mfg & Trading Co (P) Ltd*, (2002) 110 Comp Cas 825 (CLB), order passed earlier was not modified because the party seeking modification had knowledge of the fact but suppressed it. *Pearson Education Inc v Pending Hall of India* (P) Ltd, (2007) 136 Comp Cas 211 (CLB), single act of issuing shares, continuing effect. *Doyaram Agarwal v Asok Industries* (P) Ltd, (2006) 130 Comp Cas 172 (CLB), transfer of shares and further issue of capital in violation of memorandum and articles of association, held to be oppressive.

129. *Vijay R Kirloskar v Kileshwar Patwardhan Ltd*, (2006) 130 Comp Cas 139 (CLB); *Najeeb M Doshi v Eshq Furtungs (P) Ltd*, (2005) 136 Comp Cas 75 (CLB), failure to discharge obligations under family settlement, petition maintainable.

130. *Naresh Mahru Mittal v Sangeeth Construction (P) Ltd*, (2013) 178 Comp Cas 188 (CLB).

131. *Alley Leisure Ltd*, n. 1999 HCA 1619 (Ch O). Where the minority shareholders who were complaining were given the offer to purchase shares of the majority and it was on their failure only that the shares were sold to outsiders which was not a violation of articles And hence there was no occasion for complaint. *Dinesh Chhunani v Firebrick & Refractories (P) Ltd*, (1994) 79 Comp Cas 722; (1991) 4 Kar LT 148. See also on this point *Yeshwanth Rao Sabu v Cruz-Bekerri Sabu Ltd*, (1993) 1 Cencip LJ 20 (1995) 89 Comp Cas 371 (CLB) and *Brenford Squash & Racquet Club Ltd*, n. (1996) 2 BCAC 184 (Ch O), where the majority controllers mixed up the affairs of two group companies and became indebted to one of them. They being not able to pay their debt had to sell their shares under the articles to other members. Thus, the minority group became entitled to buy their shares. As a general rule the court would be ready to strike out a petition where it annotated. In a serious

majority had offered a fair price for purchasing the complaining members' shares. Similarly, where the articles of the company prescribe a fair procedure of valuation to enable the aggrieved minority to move out, the court may not entertain a petition unless a fair trial is given to that procedure.¹⁵²

The following observation on the facts of case is worthy of being noted:

In this case, we have the spectacle of two distinguished directors who had themselves been participants in various acts of mismanagement alleged figuring with injured innocence as complainants before the court. This circumstance itself to a large extent demolishes the bona fides of the allegations put forward.¹⁵³

An 85-year-old minority shareholder who had not taken any interest in the company for the last four years, was not allowed to claim that he should be permitted to buy out the majority, which majority had offered him a fair price. It was held that it was an abuse of the process of the court for him to continue with the petition. There was no effective way available to him to prevent unfair treatment except that he should take a fair value of the shares and that whatever risk factor was there in working out a fair value was minimised because an independent accountant with the assistance of a solicitor was arranged for the purpose of valuation.¹⁵⁴

Where the minority group had control over the Board of directors, and using that power, started promoting the interests of a rival company, it was held that this showed lack of bona fides and, therefore, in a petition by the majority group, the latter were directed to buy out the minority group.¹⁵⁵

Position of non-party.—A company's property was sold. The purchaser mortgaged the property with a bank. The CLB set aside the sale. It had the power to do so despite pendency of proceedings before the civil court. But the fact of mortgage was not brought to the notice of CLB. The bank was therefore not a party before CLB. Thus, principles of natural justice were

abuse such as where there is some improper purpose behind it. The same applies where the respondent suffers prejudice by reason of the abuse. *A Company (No 002015 of 1996), re*, (1997) 2 BCLC 1 Ch D.

152. *A Company, re v Kishore, re*, 1989 BCCLC 365 (Ch D). A motivated petition to pressurise payment is liable to be rejected. *Pragjal Exports (P) Ltd v TV Chidambaram*, (1994) 79 Comp Cas 213 (Ker).

153. *U/ Thomas Vutton v Rukhmane Rubber Co Ltd*, (1984) 56 Comp Cas 294 (Ker). Another case where the conduct of the petitioner being not fair disentitled him to relief is *Silambu Dasu Narasimharao Wanniar v Sri Venkateswara Real Estates*, (1991) 72 Comp Cas 211 (Kant). *Amangamia jewellers Ltd v KRS Mani*, (2002) 111 Comp Cas 501 (Mad); the petitioner was himself a party to siphoning of funds and allowed to claim relief. *Amalgamations Ltd v Saankhi Sandarshani*, (2002) 111 Comp Cas 280 (Mad); the petitioner had acquiesced in decisions of which he was complaining. His motive was to exert pressure on company to give him a place of profit.

154. *A Company (No 00336 of 1995), re*, (1996) 2 BCLC 192 (Ch D). *RN Bhargava v Traders of India Ltd*, (2001) 104 Comp Cas 611 (CLB), both factions in management, both guilty of acts of oppression against each other, the company was ordered to be divided between them.

155. *Ultratherm (India) Ltd v Ultratherm GmbH*, (2002) 112 Comp Cas 99 (CLB). *Pulham Investments (P) Ltd v Dallas Estates (P) Ltd*, (2006) 152 Comp Cas 324 (CLB); a director who did not call meetings, or perform his duties under articles was not allowed to seek relief.

violated. The order of CLB was set aside and the matter was remanded to CLB for giving opportunity to the bank.¹³⁶

Effect of arbitration clause.—Where a dispute arose amongst members concerning the breach of an agreement between them and the agreement contained an arbitration clause, the Company Law Board (CLB) (now Tribunal) said that such disputes were to be referred to arbitration under Section 8, Arbitration and Conciliation Act.¹³⁷ There were companies of family of four brothers almost like partnerships. There was an award in the family arbitration. Family arrangements were arrived at in spite of the award. It was held that the arrangements prevailed over the award which was still not made a rule of the court. [Under 1940 Act] settlements had pre-eminence over the award.¹³⁸

A party was not allowed to seek reference to arbitration where it had already filed a full-fledged reply to the petition.¹³⁹ The arbitration clause was also held to be not applicable where all or some of the parties to the arbitration agreement and the subject-matter of the dispute as stated in the petition was not the same as that in the agreement.¹⁴⁰

PREVENTION OF MISMANAGEMENT (S. 241)

Section 241(1)(b) provides for relief in cases of mismanagement. For a petition under this section to succeed, it must be established that the affairs of the company are being conducted in a manner prejudicial to the interest of the company or public interest, or that, by reason of any change in the management or control of the company, it is likely that the affairs of the company will be conducted in that manner. If the Tribunal is so convinced, it may, with a view to bringing to an end or preventing the matter complained of or apprehended, make such order as it thinks fit. A very clear illustration of mismanagement contemplated by the section is *Rajahmundry Electric Supply Corps Ltd v A Nageshwara Rao*.¹⁴¹

A petition was brought against a company by certain shareholders on the ground of mismanagement by directors. The court found that the Vice-Chairman grossly mismanaged the affairs of the company and had drawn considerable amounts for his personal purposes, that large amounts were owing to the Government for charges for supply of electricity, that machinery was in a state of disrepair, that the directiariate had become greatly attenuated and "a powerful local junta was ruling the roost" and that the shareholders outside the group of the Chairman were



CASE PILOT

136. *SBI v P Narayanasamy*, 2010 SCC OnLine Mad 2842; (2011) 186 Comp Cas 269.

137. *Pintu Das Gupta v Madras Advertising (P) Ltd*, (2005) 114 Comp Cas 346 (CLB); *Vijay Sekhari v Union of India*, (2011) 163 Comp Cas 195 (Def), dispute as to shareholders' agreement, arbitration clause binding.

138. *Raju Sanghi v Western Indian Steel Motors Ltd*, (2012) 16 SCC (ref); (2010) 194 Comp Cas 486.

139. *VLS Timers Ltd v Senior Hotels Ltd*, (2002) 111 Comp Cas 403; (2001) 4 Comp LJ 321 (CLB).

140. *GT Purchit v SS Agarwal*, (2011) 163 Comp Cas 215 (CLB).

141. AIR 1956 SC 213; (1956) 26 Comp Cas 91.

powerless to set matters right. This was held to be sufficient evidence of mismanagement. The court accordingly appointed two administrators for the management of the company for a period of six months vesting in them all the powers of the directorate.

A similar management was provided to a company by the Calcutta High Court in *Richardson & Cruddas Ltd v Haridas Mundra*.¹⁴²

There should be present and continuing mismanagement. The charges of mismanagement in the past, even if proved, are not enough to establish an existing injury to the interest of the company or public interest.¹⁴³ Where directors preferred objects of their liking and made a huge allotment of shares for a consideration other than cash, this was held to be a mismanagement of affairs.¹⁴⁴ Misuse and misapplication of the company's finances by three brothers out of four who were operating the company was held sufficient to invite an order of CLB for readjustment of accounts so as to prevent extravagant use of funds outside the company's business and the shareholders' agreement.¹⁴⁵ Where the company was incurring losses and there were allegations of diversion of funds to sister concerns and banks were refusing funds, the CLB directed the willing faction to takeover the company and pay out the faction indulging in mismanagement.¹⁴⁶

¹⁴² (1979) 29 Comp Cas 549 (Cal). Where the group in power was conspiring to defraud members, mismanagement was held to be established. *Hemant D'Vale v RDI Print and Publishing* (1993) 2 Comp L J 113 (CLB). Where there were only two directors in a private company and one was keeping the other totally in the dark about the affairs of the company, mismanagement was held to have been established. *VG Balasundaram v New Theatre Coronet Telugu* (P) Ltd, (1995) 77 Comp Cas 324 (Mad). A State Government cannot take over the undertaking of a company on the ground that the company has been the victim of mismanagement. The provisions of the Companies Act are sufficient in themselves to remedy situations like that whether at the instance of the affected persons or State agencies. *KR Lakshmanan v State of TN*, (1996) 2 SCC 226 (1995) 86 Comp Cas 66.

¹⁴³ *RS Mathur v HS Mathur*, (1971) 1 Comp LJ 25 (All). Losses by themselves cannot support a plea of mismanagement, or that the directors are still drawing their salary or that they have called upon the petitioner to pay Rs 80,000 being the amount unpaid on his shares. *Chennalleswary Kulambhar v Mahindra & Mahindra (P) Ltd*, (1985) 57 Comp Cas 541 (Kan). Where a company had no records, registers, etc whatsoever, it was held to be a fit case for the appointment of an administrator. *Rajendra G. Chakravarti v Royal Banking Co (P) Ltd*, (1984) 56 Comp Cas 428 (Bom), where the newly appointed directors had not even taken charge, the petition was dismissed because it was too early to say as to how they would conduct themselves. *Salah Vizquambar v Amar Nath Motiwalla*, (1986) 59 Comp Cas 654 (All).

¹⁴⁴ *Akber Ali Razani v Konkan Chemicals (P) Ltd*, (1997) 88 Comp Cas 265 (CLB).

¹⁴⁵ *Murari Das v Bristol Grill (P) Ltd*, (1997) 90 Comp Cas 74. (1999) 3 Comp L J 52 (CLB). The advances out of the company's funds made by the Controller to his sister concerns were not regarded as mismanagement because of retroactively explanation and in detriment to the lending company. *Huron v SBI Ltd*, (1998) 30 CLA 21 (CLB). Where the complaint was based on misappropriation of funds and property of the company and it could be taken care of under S. 543 [now S. 340] by way of misfeasance proceedings, a separate petition under S. 246 [now S. 241] was considered to be not necessary. *Sanjeev Kumar Bhushan v Ghanshyam Das*, (1999) 34 CLA 370 (2001) 103 Comp Cas 447 (Del).

¹⁴⁶ *Ram Nath Gupta v Phad Infotech Ltd*, (2006) 129 Comp Cas 64. (2006) 5 Comp L J 129 (CLB); *Pearson Education Inc v Prentice Hall of India (P) Ltd*, (2007) 136 Comp Cas 211 (CLB); increasing remuneration proportionately to the profits of the company, no mismanagement.

Where interest free loans were granted to a sister concern without considering any benefit to the company, it was regarded as mismanagement; but business decision to transfer business to the sister concern was not interfered with. The uses in the new business venture was not regarded as mismanagement.¹⁴⁷

A probe into the affairs of a company for finding out the fact of mismanagement may include an inquiry into the company's subsidiaries.¹⁴⁸ Where a set of properly appointed directors were not permitted to join and function as directors, their complaint was taken to be indicative of a symptom of mismanagement and was accordingly entertained.¹⁴⁹

"Relief against mismanagement runs in favour of the company and not to any particular member or members."¹⁵⁰ Secondly, "It is not necessary for the court [now Tribunal] to find cause for winding up in cases of mismanagement in order to grant relief." Proof of prejudice to the public interest or to the interests of the company is enough. Thirdly, the section enables the court [now Tribunal] to take into consideration outside interests affected by corporate operations. Thus, the Calcutta High Court refused to order the winding up of a grossly mismanaged company and appointed special officers to manage it because the company was engaged in special industries necessary for the implementation of the country's plans.¹⁵¹

Powers of Tribunal [S. 242]

Powers of the Tribunal under Sections 241 and 242 are fairly wide.¹⁵² "In fact, the Tribunal may make any order for the regulation of the conduct of the company's affairs upon such terms and conditions as it may think fit."¹⁵³ The Tribunal has the power to do justice to the parties and can pass an order for the smooth conducting of business even in absence of finding of oppression and mismanagement. Apparently the only limitation seems to be the overall objective of the sections and, therefore, the order must be directed

147. Ishita Ghosh v JDS Technologies (P) Ltd, 2014 SCC OnLine CLB 151 (2015) 168 Comp Cas 53.

148. I/C v Haridas Mandir, (1966) 36 Comp Cas 471 (All); Rajrang Presad Jalan v Mahadev Prajapati Jalan, AIR 1999 Cal 156; Keystone Realtors (P) Ltd, re, (2013) 181 Comp Cas 525 (CLB).

149. Adu Samir Ltd v Indian Engg Systems Ltd, (1999) 35 CLA 224 (CLB).

150. See, Matthew J. Knut, *Franchise Bankruptcy in India* (1994) 294.

151. Richardson & Caudle Ltd v Floridas Mumtiz, (1959) 29 Comp Cas 549 (Cal); Polyflet Exports (P) Ltd v TV Chundran, (1994) 79 Comp Cas 215 (Ker). Where the working group would not come to terms, the court may hand over management to workers under sum total arrangement for competent guidance, Kripal Ispat Ltd v Dhan Singh Majilim, (1992) 20 ALR (Sum) 34 (Summary of Cases); Thakur Sambodhar & Co (P) Ltd v S S Thakur, (1996) 22 CLA 170 (Bom), proceedings before CLB (now Tribunal) are not to be stopped because of an appeal against dismissal of winding up petition.

152. The Tribunal has to be satisfied that the conditions of relief exists presently and not in reference to some possible conduct in the future. Peerless General Finance & Investment Co (I) Ltd v Union of India, (1949) 1 Comp L 156 (Cal) (1991) 71 Comp Cas 300 (Cal).

153. See, for example, Lord Krishna Sugar Mills Ltd v Ahuesh Kaur, (1971) 41 Comp Cas 210 (Del), where the court, having constituted an interim Board of management for a company, held that it had power under S. 402 [now S. 242] to give directions and instructions from time to time as to resolve the problems of the interim Board. See also, Ghalchand P Mehta v Company Law Board, (1974) 44 Comp Cas 123 (Del).

to bringing to an end the matters complained of.¹⁵⁴ The CLB can grant relief against a respondent who is no longer a member and such relief can possibly extend to requiring him to purchase the company's shares.¹⁵⁵ However, an attempt is made under Section 242 to define the powers of the Tribunal. This section provides that without prejudice to the generality of the powers of the CLB, any order under Section 241 may provide for:

- (a) The regulation of the conduct of the company's affairs in future. Thus, for example, in *Richardson and Gurdas Ltd v Haridas Mundra*,¹⁵⁶ the court appointed a special officer with an advisory board to the total exclusion of the shareholders of a company to function subject to the terms and conditions laid down in the order. In *Bennett, Colenatur & Co v Union of India*,¹⁵⁷ the Bombay High Court ordered a new article into the articles of association providing that all the shareholders' directors will retire every year and held that the clause was valid even if it was against the provisions of Section 255.¹⁵⁸
- (b) The purchase of the shares or interest of any members of the company by other members or by the company. This kind of relief was provided in *Mohini Lal Chaudhuri v Panjab Cr Ltd*,¹⁵⁹ and *HR Harrier Ltd, re.*¹⁶⁰ and also in *Suresh Kumar Singh v Supreme Motors Ltd*.¹⁶¹

154. *Rakesh Pramodkumar Patel v Surgi Auf Lifetime (P) Ltd*, (2017) SDC Online NCLT 1734; (2017) 201 Comp Cas 79.

155. *A Company, re.*, (1926) 2 All FR 253 (Cr D).

156. (1959) 29 Comp Cas 349 (Cal); *P. Muniappan Somayya v Myson Lighting Works (P) Ltd*, (2007) 136 Comp Cas 133 (CLB); interim relief by appointing independent Chairman not provided because of the company's financial weakness; adequate measures provided for ensuring proper management.

157. (1977) 47 Comp Cas 92 (Bom).

158. See also *Om Jatra Trl Cr Ltd v Gururaj Krishan Bhuvnich*, (1980) 50 Comp Cas 771 (CrD), where the Calcutta High Court appointed a Chairman to preside over the company's shareholders' as well as directors' meetings. *Chittist Irelinc (P) Ltd, re.*, (1948) 60 Comp Cas 572 (Cal) where a special officer was appointed pending the constitution of a new Board. The court may take over the management into its own hands or appoint a receiver or special officer to do so even if the directors who are in office enjoy majority support. *Ramji Kumar Sehgal v Jayati Trl Cr Ltd*, (1990) 67 Comp Cas 491 (Cal). The power of removing a director can be exercised only when it is established that he acted in a fraudulent manner or used his fiduciary position to the detriment of the company or its shareholders or in a manner prejudicial to public interest. In this case the only alleged irregularity was letting out of the company's premises in a manner not permitted by the articles. But that had been going on for 21 years to the full knowledge of the shareholders and also to the advantage of the company. The CLB directed the matter to be referred to a meeting of the shareholders. *Arjan S Kairi v Shri Madni Industrial Estates Ltd*, (1997) 1 Comp L 318 (CLB). In a situation of relentless oppression, the CLB reconstituted the Board of directors and directed it to hold meetings and allot shares to members from whom share money had been taken for further issue. *Smt Anupom Chakraborty (P) Ltd v Dipak C Mehta*, (1999) 4 Comp L 479 (Bom).

159. AIR 1961 Pesh 485; (1962) 32 Comp Cas 497; *PK Prakashan v Dale & Carrington Investments (P) Ltd*, (2002) 111 Comp Cas 425 (Ker), setting aside of all capital issues made after the initial allotment and consequential rectification of the register of members.

160. (1959) 1 WLR 42.

161. (1983) 54 Comp Cas 235 (Del). See also *Sukinder Singh Bindra v Hindustan Fisheries (P) Ltd*, (1988) 2 Comp L 216; AIR 1990 Del 32; (1990) 694 Comp Cas 738, where one group of shareholders was installed in power and directions were issued for taking over the shares of



where the group in actual control was given the opportunity to buy out the other at a value to be fixed by a judge.

- (c) In the case of a purchase by the company of its shares, the consequential reduction of its share capital;¹⁶²
- (d) Restriction on allotment or transfer of shares of the company;
- (e) The termination, setting aside or modification of an agreement between the company and any managerial personnel upon such terms and conditions as the Tribunal may consider just and equitable;
- (f) The termination, setting aside or modification of any agreement with any person, provided due notice has been given to him and his consent obtained;
- (g) Setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of application which would be deemed to be insolvency of an individual or a fraudulent preference;¹⁶³
- (h) Removal of the managing director, manager or any of the directors of the company;¹⁶⁴
- (i) Recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;
- (j) The manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager;

¹⁶²...the other block, it is unusual to ask the majority to sell itself to the minority. Ordinarily, it would be the other way round. *Yashvardhan Singh v. Gurbachan Sekhon Ltd.*, (1992) 1 Comp Li 20; (1995) 33 Comp Cas 371 (CLB). Direction to one faction to buy out the other and on their failure to do so, order of winding up. *Nilesh Satya Praswala Rao v. Vinayakamal Laxmi Narasimha Sastry*, (1991) 20 Comp Cas 303 (AP); *Felix Kanji v. Grotius Is. I. P. Ltd.*, (2013) 178 Comp Cas 26 (Bom). There is no compulsion to pass such buyout orders. *K N Venkatesh Adiga v. Venkatesh Adiga Fast Food (P) Ltd.*, 2011 SCC OnLine CLB 366 (2015) 189 Comp Cas 451, interim relief provided to applicant seeking appointment of administrator to oversee affairs of the company because there was deadlock paralysing operations of the company and leading to total erosion of its business, replacing Board of Directors, an administrator and committee of management provided. On appeal in the High Court, *NSR Castromony (Mineritist) LLC v. K N Venkatesh Adiga*, (2016) 189 Comp Cas 476 (Ker), replacement of Board of Directors was viewed as harsh, administrator was to participate in Board meetings and play advisory role.

¹⁶³ *Vijay Krishn Jaitka v. Jaitka Motor Co. Ltd.*, (1996) 23 CLA 289 (CLB), equitable in case of family funds griping company.

¹⁶⁴ Setting aside a transfer under this clause in *Rushan Lal Agarwal v. Slicoram Bhavn.*, (1980) 59 Comp Cas 743 (Pat), the Patna High Court held that there should be a net period of three months between the date of transfer and that of application. The court excluded the date of transfer in computing the period of three months.

¹⁶⁵ *Babul Kumar Agarwal v. Amrit Sponge and Power Ltd.*, 2013 SCC OnLine CLB 110; (2013) 183 Comp Cas 146, consent order permitted the petitioner to exit the company on fair valuation of his shares. The valuer was permitted by the High Court and CLB to furnish valuation report after obtaining requisite information and considering written and oral submission of parties. No infidelity was found in the valuer's report.

- (k) Appointment of such number of persons as directors who may be required by the Tribunal to report to it on such matters as the Tribunal may direct.
- (l) Imposition of costs as may be deemed fit by the Tribunal.
- (m) Any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.¹⁶⁵

In situations of irreconcilable disputes, the usual approach has been to order the rival groups to part ways in the interests of the company and those of the public financial institutions having large stakes in it. The Tribunal can direct the partition of the assets of even a listed company and reducing the capital of the company to that extent. The Tribunal did not cancel the allotment and purchase of shares by respondents, even though the same was proved to be an act of oppression against the minority, because it was not in the interest of the company to declare increase in authorised share capital as illegal.¹⁶⁶

If the CLB ordered any alteration of the memorandum or articles of the company, the company would not be at liberty to introduce any provision

165. See as an illustration, *Gajendra v. Mafatl Transport P. Ltd.*, (1965) 2 Comp LJ 234, a decision of the Andhra Pradesh High Court. The facts were that one of the directors died leaving behind a will bequeathing the shares in the company to his second wife and sons who were already the shareholders in the company and the petitioners. The directors on account of their private dispute with the petitioners, acted in a high-handed manner and unreasonably refused to transfer a part of the shares bequeathed under the will, while transferring some shares in favour of them as provided under the will. They made certain improper transfers also. The petitioners applied under ss. 297 and 298 [now S. 241] of the Companies Act for removal of one of the directors from the Board, and for the appointment of a committee of shareholders to manage the affairs of the company. But the court held that "proper order to make, in the circumstances, is to direct the directors to transfer the shares to the petitioners in accordance with the terms of the will". See also, *Jambu Kanta Rayavaria v. Edward Mills Co Ltd.*, (1970) 2 Comp LJ 43, where directions were issued regulating the conduct of directors. *Shree Srinivasa Ltd v. Standard Distilleries & Breweries (P) Ltd.*, [1997] 90 Comp Cas I (Mad), majority was reduced to minority, relief allowed. The CLB [now Tribunal] has power to exercise control over the implementation of its order. In *All India Steel Workers Employees Federation v. Shree Wallace & Co Ltd.*, (1997) 1 Comp LJ 301, 306, the directors of a company unanimously resolved to sell the company's undertaking because of financial crisis. Workers opposed it because of the seizure of the premises by Government agencies to investigate serious financial irregularities. The CLB was approached for sanctioning sale. The CLB appointed five minority directors to sit with others at a meeting for reviewing the proposal and to formulate specific recommendations. *MM Subramanyam v. Gulf Oilfins (P) Ltd.*, [2003] 115 Comp Cas 115 (CILB), meeting not held, shares allotted discriminatorily, CILB [now Tribunal] ordered proportional allotment to aggrieved shareholders and their induction back into the Board of directors. *Shri Ramadeo Mafatl Transport Ltd v. Karode Surendrajan*, (2002) 110 Comp Cas 793 (AP), the power is wide enough to allow relief even when the fact of oppression is not made out. *Bombay Cable Car Co (P) Ltd v. BM Jain & Sons Co (P) Ltd*, (2006) 194 Comp Cas 688 (Bom), sale of shares by one group to the other at valuation made by statutory orders, CLB order affirmed by the High Court, CLB became suo motu office, could set aside valuation of minority members. *Annu Dhamani v. Lakshmi Dhama*, 2014 SCC Online Del 6885; (2015) 188 Comp Cas 361, CLB not barred from entertaining an application to deal with allegations of forgery and fabrication of documents under applicable provisions of CrPC. 166. *Sangubhai Kerkhia Patel v. Karanji Remedies P. Ltd.*, (2017) 203 Comp Cas 5 (NCLAT).

inconsistent with the order. If the order sets aside or modifies any agreement with any managerial personnel, it will not give rise to any claim for damages or compensation for loss of office. Further any managerial personnel whose appointment was so set aside would not be capable of serving the company in any managerial capacity for a period of five years except with the leave of the Tribunal. The fact of an application for leave should be intimated to the Government so that it may get a reasonable opportunity of being heard.

The powers under these provisions are not affected by the existence of an arbitration clause. The Tribunal may, however, in its discretion refer the matter to arbitration in terms of the parties' agreement and exercise any powers only thereafter.¹⁶⁷ The Tribunal cannot make any such direction in respect of matters which are outside the scope of the arbitration clause.¹⁶⁸ There are authorities to the effect that the CLB, now Tribunal being a judicial authority, was bound under Section 8, Arbitration and Conciliation Act, 1996 to direct the parties to go in for arbitration within the framework of the arbitration agreement.¹⁶⁹

Where the shares of a private company were transferred and the method of valuation was under question, the court said that for the purpose of valuing the shares of a private company as a going concern when the company has high returns and little or no assets, the value of the company is the capitalised sum representing the future profits after making an allowance for risks.¹⁷⁰ The point emphasised was that the worth of the company as a whole must be calculated on the basis of the company as a going concern.¹⁷¹ The "maintainable level of profits" plays a dominant role as a method of evaluation of the company's net worth. The asset base is another method of valuation. The methodology would vary with the features and nature of the company's business. Where two groups worked together for decades and then fell apart, it was held that each group was entitled to have the proportionate worth of the business.¹⁷²

The Tribunal can itself do the valuation. In one such case the Tribunal took into account the financial position of the company and the petitioner's stake in it and fixed the value at which one should pay out the other and, if they failed to do so, the matter should be referred to the statutory auditors for appropriate valuation.¹⁷³

Relief can be provided by prescribing a better method of a valuation where the articles of the company provided for an arbitrary or artificial

167. *Courmar Singh Gill v SMC International* (1987) 62 Comp Cas 197 (Del).

168. *Khemdoshi Securities Ltd v Kotak Syg Ltd*, (1994) 49 Comp Cas 632 (CLB).

169. *Twentieth Century Finance Corp Ltd v RFB Lates Ltd*, (1999) 97 Comp Cas 636 (CLB); *Altak Lammerk Needles Ltd v Lammerk Industries Houdini GmbH*, (2006) 129 Comp Cas 109 (CLB); refusal to refer to arbitration grievances relating to rights and benefits under the Act and articles of association.

170. *Jharkhandi v Francis*, (1986) 2 All ER 738 (QBD).

171. Again emphasised in *Burd Precision Bellows Ltd*, re, 1986 Ch 658; (1986) 2 WTR 158 (CA).

172. *Rakha Spars (P) Ltd v Khemtilal Rakha*, (1993) 76 Comp Cas 545 (Kan).

173. *Solitaire Hotels (P) Ltd*, re, [1992] 3 Comp LJ 119 (CLB).

method of valuation.¹⁷⁴ Where some stratagem has been attempted, for example, by delaying tactics for suppressing the value of shares, relief may be provided against it by taking valuation at a time before the suppressing tactics began.¹⁷⁵ Relief may also be provided where the valuer is a person who is not likely to be wholly independent.¹⁷⁶ Where the 40 per cent holding of the complaining member was reduced by oppressing tactics to 4 per cent, the court directed that valuation should be on the basis of 40 per cent strength.¹⁷⁷

An order can be passed which is contrary to the provisions of the company's articles of association and may also modify contractual arrangements if it is just and equitable to do so in the circumstances of the case. The company concerned may also be directed to change its name.¹⁷⁸

The powers continue even after passing of an order till at least such time that its orders are implemented so as to put an end to the matters complained of. Regulation 44 of the CLB Regulations, 1991 was akin to Section 151 CPC. It conferred inherent powers on the CLB. The Board did not become *fineshies officia* after the passing of an order.

Interim relief [S. 242(4)].—This sub-section says that the Tribunal may, on the application of any party to a proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to be just and equitable. Allowing such relief in a case before it, the Delhi High Court held that the powers under the section are not limited by other provisions of the Act. The power of granting interim relief is incidental to the power of providing substantive relief. The width of the power is indicated by the words "any interim order which it thinks fit". In granting relief under the section, it is not necessary to require compliance with other mandatory requirements of the Act.¹⁷⁹

Compromise.—The parties can enter into a compromise and consent orders can be passed on that basis. The compromise was held to be binding on the parties. When they picked up a dispute again over valuation of shares, they were not permitted to question the validity of the compromise by saying that the petition was not maintainable at its initial stage.¹⁸⁰ Where the parties agreed among themselves in terms of their memorandum of

174. *A Company, re; CN 904577 of 1985*, (1987) 1 WLR 102. A similar approach was adopted in *Lloyd's Bank plc v Duker*, (1987) 1 WLR 1324; (1987) 2 All ER 193. Else out of a total of 999 shares, 571 fell to the share of the executors of the deceased shareholder. The court ordered all the shares to be sold in the open market giving the executors the right to purchase any or all because that way the real value of the shares which carried the controlling power would be better ascertained.

175. *A Company, re; INR 106834 of 1988*, (1988) 5 BCC 218; *A Company (No 06.1842 of 1986, re; 1987 BC 1, 562; McGuinness v Premier plc*, 1988 BC 1, 673.

176. *Bowtell & Co (Shropshire) Ltd, re*, 1989) 5 BCC 145.

177. *A Company, ex p Hartree, re*, 1989 BC 1, 283 (Ch. I).

178. *Pearson Education Inc v Prentice Hall India Ltd*, (2007) 236 Comp Cas 294 (Del).

179. *Sunjay Chabbir v DD Industries* (2013) 277 Comp Cas 99 (Del).

180. *R K French v Consulting Engg Services (India) Ltd*, (2012) 210 Comp Cas 492 (CLB).

understanding, it was held that the CLB had no power to enforce such agreement.¹⁸¹

Date of valuation.—The court has discretion to fix the date of valuation which may not necessarily correspond with the order under the section. It may correspond with the date of the petition.¹⁸²

The managerial personnel whose contract is set aside shall not be entitled to damages or compensation, nor capable of serving the company in any managerial capacity for a period of five years except with the leave of the Tribunal. [S. 243]

The powers under the section are not affected by the existence of an arbitration clause though the matter may be referred to arbitration pending further action. An agreement cannot arrogate to the arbitrator the question whether a winding up order should be made, which remains a matter for the Tribunal to decide in any subsequent proceedings. But the arbitrator can decide whether the complaint for an unfair prejudice is made out and whether it would be appropriate for winding up proceedings to take place, or whether the complainant should be limited to some lesser remedy. If the relief sought is of a kind which may affect other members who are not parties to the arbitration, there is no reason in principle why their views should not be canvassed by the arbitrators before deciding whether to make an award in those terms.

A certified copy of the order of Tribunal has to be filed with the Registrar within 30 days. The Tribunal can pass interim orders. Orders for alteration of memorandum or articles cannot be overruled by the company by making its own inconsistent changes. Such a thing as that can be done with leave of the Tribunal. Alterations ordered by the Tribunal have the same effect as if they have been made by the company itself. A certified copy of such alterations has to be filed with the Registrar.

Class action [S. 245]

The number of members or depositors who can apply to the Tribunal under the right of class action is given in sub-section (3) of this section. The grounds of action are specified in sub-section (1). If they are of opinion that the management or conduct of affairs of the company are being carried on in a manner prejudicial to the interests of the company or its members or depositors, they can file an application before the Tribunal on behalf of all of them for any of the following orders: (a) to restrain the company from committing an act which is ultra vires the articles or memorandum; (b) to restrain the company from committing breach of any provision of the company's memorandum or articles; (c) to declare a resolution altering the memorandum or articles as void if the resolution was passed in suppression of material facts or obtained by misstatement to members or depositors; (d) to

181. *Ramesh Chander Goyal v Hindustani Communications Ltd.*, (2006) 329 Comp Cas 297 (J.D.). the CLB also had no power to review its orders.

182. *Proffmann Trust (2d) SA v Gladstone*, (2000) 2 BCLC 516 (Ch U). The date of petition was ordered to be the date of valuation in this case.

restrain the company and its directors from acting on such resolution; (g) to restrain the company from doing an act which is contrary to the provisions of the Act or any other law for the time being in force; (h) to restrain the company from taking action contrary to any resolution passed by the members; (i) to claim damages or compensation or demand any other suitable action from or against (i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part; (ii) the auditor including auditing firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or (iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent or unlawful or wrongful act or conduct or any likely act or conduct on his part; (k) to seek any other remedy as the Tribunal may deem fit.

Where an audit firm is sought to be made liable, the firm as well as every partner involved in the wrongful act would be liable. [S. 245(2)]

Who can apply [S. 245(3)].—The requisite number of members for an application is as follows: (a) in the case of a company having a share capital, not less than 100 members or not less than such percentage of the total number of members as may be prescribed, whichever is less, or any member or members holding not less than such percentage of the issued share capital as may be prescribed. It is necessary that the applicants should have paid their calls and other dues to the company; (b) in the case of a company not having share capital, not less than one-fifth of the total number of its members. The requisite number of depositors is not to be less than 100 depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever is less, or any depositor/depositors to whom the company owes such percentage of the total deposits of the company as may be prescribed.

Factors to be considered by Tribunal [S. 245(4)].—In considering the application for relief under the section, the Tribunal has to take into account the following factors in particular: (a) whether the member or depositor is acting in good faith in making the application; (b) any evidence before it as to the involvement of any person other than directors or officers of the company on any of the matters provided in Section 245(1), clauses (a) to (f); (c) whether the cause of action is one which the member or depositor could pursue in his own right rather than through an order under the section; (d) any evidence before the Tribunal as to views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter before the Tribunal; (e) where the cause of action is an act or omission that is yet to occur and whether it could have been authorised by the company before it occurs or ratified by the company after its occurrence; (f) where the cause of action is an act or omission that has already occurred and whether it could be or likely to be ratified by the company. [S. 245(4)]

After an application has been submitted the Tribunal is to have regard of the following: (a) a public notice should be given on the admission of the

application to all the members or depositors of the class in such manner as may be prescribed; (b) all similar applications prevalent in any jurisdiction should be consolidated into a single application. The class members or depositors should be allowed to choose the lead applicant. If they cannot come to a consensus, the Tribunal gets the power to appoint a lead applicant who should be incharge of the proceedings from the applicant's side; (c) two class action applications for the same cause are not to be allowed; (d) the costs or expenses connected with the application for class action are to be defrayed by the company or any other person responsible for the oppressive act.

An order passed by the Tribunal has binding effect upon the company and on all members, depositors, and auditor, including audit firm or expert or consultant or advisor or any other person associated with the company. Where the application is found to be frivolous or vexatious, it has to be rejected for reasons to be recorded in writing. The applicant can be required to pay costs to the opposite party not exceeding Rs 1,00,000 as may be specified in the order.

Any person or group of persons representing the affected persons may be allowed to file an application under the section subject to compliance with the requirements of the section.

The section is not to apply to a banking company

Penal clause [S. 245(7)].—Any company which fails to comply with an order passed by the Tribunal under the section is punishable with fine of not less than Rs 5,00,000 but may extend to Rs 25,00,000. Every defaulting officer is punishable with imprisonment extending to three years and fine of not less than Rs 25,000 extending up to Rs 1,00,000.

Application of other sections.—The provisions of Sections 337 to 341 are to apply mutatis mutandis to an application made to the Tribunal under Section 241 or Section 245. [S. 246]

Section 337 provides penalty for frauds by officers, Section 338 creates liability where proper accounts are not kept. Section 339 imposes liability for fraudulent conduct of business. Section 340 provides for power of Tribunal to assess damages against delinquent directors, etc. Section 341 provides that liability under Sections 339 and 340 is to extend to partners or directors in firms or companies.

Limitation

For the purposes of relief under these sections, limitation period of three years applies from the date of cause of action. The cause of action in this case arose between 2009 and 2012. The petition was first filed in 2015 before CLB and then refiled in 2016. It was held to be barred on the date of first filing in 2015. Shareholding on the date of filing was 1.91 per cent. The petition did not fulfil the requirement of the section.¹⁸³

¹⁸³. *Praveen Shuklaayun v. Elan Professional Apparels (P) Ltd.*, 2016 SCC Online NCLT 85 (2016) 199 Comp Cas 528.

REGISTERED VALUERS

Valuation by registered valuers [S. 247]

For the purpose of the Act, it may become necessary to make valuation of any property, stocks, shares, debentures, securities or goodwill or any other assets or net worth of a company or its liabilities. The section requires that this should be done by a person having such qualifications and experience and registered as a valuer in such manner, on such terms and conditions as may be prescribed. He should be appointed by the audit committee, or in its absence, by the Board of directors of the company. The valuer so appointed has to (i) make an impartial, true and fair valuation of any assets which may be required to be valued; (ii) exercise due diligence while performing the functions as valuer; (iii) make the valuation in accordance with such rules as may be prescribed; (d) not undertake valuation of any assets on which he has a direct or indirect interest or becomes so interested at any time during or after valuation.

Penalty provision [S. 247(3)(4)].—A valuer who contravenes the provisions of the section or rules made under it, becomes punishable with fine of not less than Rs 25,000 but extending to Rs 1,00,000. If he makes the contravention with the intention to defraud the company or its members, he becomes punishable with imprisonment for a term extending to one year and fine of not less than Rs 1,00,000 extending to Rs 5,00,000. Such conviction makes him liable to refund to the company the remuneration received by him and also to pay any damages to the company or to any other person for loss arising out of incorrect or misleading statements of particulars made in his report.

In *Vadilal Chemicals Ltd v Vortex Ice Cream*,¹²⁴ the Tribunal stated that an independent observer appointed for sale of assets has no power of adjudication on the controversial issues that may come in the process of sale.



CASL PILOT

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®, along with updates, articles, videos, blogs and a host of different resources.



The following cases from this chapter are available through EBC Explorer™:

- *Akashdeep Housing and Infrastructure (P) Ltd v Panthorar Infrastructure (P) Ltd*, 2015 SCC OnLine Bom 6355; (2016) 197 Comp Cas 316
- *Bennett, Coleman & Co v Union of India*, (1977) 47 Comp Cas 92 (Bom)
- *Hansindubhai B Patel v Bhagirath Construction Co (P) Ltd*, (2014) 185 Comp Cas 58 (CLB)
- *Ishita Ghosh v JDS Technologies (P) Ltd*, 2014 SCC OnLine CLB 151; (2015) 185 Comp Cas 59 (CLB)
- *Jayesh Koshaehm v Vaghanshwar Air Conditioning (P) Ltd*, (2015) 188 Comp Cas 461 (CLB)
- *K Balasundaram v GK Alloy Steels (P) Ltd*, (2016) 199 Comp Cas 99 (Mad)
- *Needle Industries (India) Ltd v Needle Industries Norway (India) Holding Ltd*, (1991) 3 SCC 333 AIR 1981 SC 1298; (1981) 51 Comp Cas 243
- *Rajdhonlalry Electric Supply Corps Ltd v A Nagarkarao Rao*, AIR 1956 SC 213; (1956) 26 Comp Cas 91
- *Shanti Pressed Salt v Kalinga Tubes Ltd*, (1965) 1 Comp LJ 193; AIR 1965 SC 1535; (1965) 35 Comp Cas 351
- *Vadilal Chemicals Ltd v Vertex Ice Cream*, (2017) 2013 Comp Cas 103 (NCLT)



CASE PLOT

Chapter 17

Inspection, Inquiry and Investigations

Power of Investigation

National and individual savings constitute the chief source of capital formation in a democratic country, and is, therefore, vital to economic growth.¹ Incorporated enterprise is one of the methods of allocating and channelling limited capital resources.² The proper functioning, that is to say, a performance that will ensure adequate return on capital, is ultimately the best protection of those who provide capital.³ "Efficient functioning" can be assured by preventing corporate abuses and wrongs.

Corporate managements are today free from many of the former restraints. For example, the doctrine of *ultra vires* is no longer any significant check upon corporate spending.⁴ Again, the powers of management are vested in the Board to the total exclusion of shareholders.

The shareholder has become an investor, separated in time and understanding, insulated by distance and the proxy machinery from the business activities of the enterprise. The reality of the internal corporate structure has changed from democratic to bureaucratic.⁵

Hence the shareholder is no longer available as an adequate field of responsibility.⁶ "Due to great diffusion of stock, shareholders become

1. See Hsin-Kwang Wu, "An Economist Looks at S. 16 of the Securities Exchange Act, 1934" (1969) *Calumet L. Rev.* 25(1), 214.

2. *Ibid.*

3. Louis Loss, "The Fiduciary Concept as Applied to Trading by Corporate Insiders" (1970) 33 *Mod. J. Rev.* 36.

4. See, R.C. Beuthin, "The Ultra Vires Doctrine—An Obituary Notice" (1955) 83 *SATJ* 463; James William Hurst, "The Legitimacy of the Business Corporation in the Law of United States, 1780-1970" (1970) *Calumet L. Rev.* 33(2), 1318.

5. Abraham Chayes, "The Modern Corporation and the Rule of Law", in E.S. Mason (Ed.), *The Corporation and its Relation to Society* (1959) 25, 40. See also, J.A. Livingston, *The American Stockholder*, at p. 38, where the learned writer says: "The stockholders are investors, who for the most part, do not wish to be bothered except by dividends."

6. A.A. Berle, *The 20th Century Capitalist Revolution* (1954).

indifferent to voting and controlling.⁷ It is an "illusion that anything like an effective control of shareholders over the management of a big company can be re-established. The divorce between financial interest and power of management is a fact."⁸ "Further the shareholders are ill-equipped to challenge the wisdom and expertise of officers."⁹

Accordingly, any remedies against corporate abuses that have to depend for their effectiveness upon shareholder's initiative are not likely to be very successful. "The lawsuit against management is an uncertain road, open only in relatively extreme cases of perfidy and subject to heavy toll charges in the form of lawyer's fee."¹⁰ Remedies afforded by the exceptions to the rule in *Foss v Harbottle*¹¹ and Section 241 for prevention of oppression and mismanagement are beset with a variety of procedural and financial hurdles.¹²

"The reality of control can only be found in the action of public opinion and in the organised supervision exercised by Government agencies. Hence the importance of investigations."¹³

"There is no doubt that few shareholders have the means or ability to act against the management. It would furthermore be difficult for shareholders to find out the facts leading to the poor financial condition of their company. The Government thought it right to take power to step in where there was reason to suspect that the management may not have been acting in the interests of the shareholders . . . and to take steps for the protection of such interests (the Act) gives the exploratory power."¹⁴

Power to call for information, inspect books and conduct enquiries [S. 206]

Where on scrutiny of any document filed by a company or any information received by him, the Registrar feels that any further information, or explanation or documents are necessary, he may require the company by a written notice to furnish in writing such information or explanation or to produce such documents. He may specify in his notice a reasonable time for the purpose. It becomes the duty of the company and its officers to comply with the notice. The Registrar may extend time for compliance. If the matter relates to some past period, persons who were then working for the company may be called upon to give requisite information to the best of their knowledge.

7. Henry G. Manne, "The Higher Criticism of the Modern Corporation" (1962) 42 Colum L Rev 399; See also, Emerson and Labourn, *Shareholder Democracy* (1951).

8. O.K. Freund, "Company Law Reform" (1946) 9 Mod L Rev 235, 245.

9. A.A. Berle Jr. "Legal Problems of Economic Power" (1943) 60 Colum L Rev 4.

10. T.A. Livingston, *The American Stockholder*, quoted at p 1483 of (1958) 67 Yale LJ 1476. The problem of expenses and the possible solutions thereto are discussed in A.J. Boyle, "Adequately Paying the Minority Shareholder" (1976) JBL 18.

11. (1943) 21 Law 441; 67 ER 184.

12. Henry G. Manne, "The Higher Criticism of the Modern Corporation" (1962) Colum L Rev 399, 411.

13. O.K. Freund, "Company Law Reform" (1946) 9 Mod L Rev 235, 245.

14. *Muthurajah Jai Bahadur Chinnayya Iyer v Company Law Board*, AIR 1967 SC 295; (1966) 2 Comp L J 172; (1967) 36 Comp Cas 639.

If no information is furnished or information furnished seems to be inadequate or scrutiny of the documents furnished shows that an unsatisfactory state of affairs exists in the company, the Registrar may give another notice to the company requiring it to produce for inspection such further books of account, books, papers and explanations as may be required at the place and time specified in the notice. Reasons for issuing such notice must be recorded in writing.

If the Registrar finds on the basis of the information or on representation made to him that the business of the company is being carried on for a fraudulent or unlawful purpose or not in compliance with the Act or the grievances of investors are not being addressed, the Registrar may inform the company of the facts and seek its reply and may order an inquiry after giving the company a reasonable opportunity of being heard.

The Central Government may, if it is so satisfied that the circumstances warrant it, direct the Registrar or inspector appointed by it to carry out the requisite inquiry. When it appears that the business of the company was carried on for a fraudulent or unlawful purpose, every officer in default would be punishable for fraud in the manner as provided in Section 447. The Government can also order inspection of books and papers by an inspector appointed by it or to get it done by a statutory authority.¹⁵

Failure to comply with orders under the section makes the company and defaulting officers punishable with fine extending to Rs 1,00,000 and in the continuing default, an additional fine extending to Rs 500 for every day of default.

Conduct of Inspection and Inquiry [S. 207]

A duty has been imposed upon the directors and officers to produce books and papers and information demanded under the preceding section. Matters submitted for inspection may be copied and identification numbers may be put on them. The inspectors have the powers of a civil court under the Civil Procedure Code in respect of the following matters: (a) the discovery and production of books of account and other documents, at such place and time as may be specified by such Registrar or inspector making the inspection or inquiry; (b) summoning and enforcing the attendance of persons and examining them on oath; and (c) inspection of any books, registers and other documents of the company at any place.

Penalty and vacature of office [S. 207(4)]—Disobedience on the part of directors or officers makes them punishable with imprisonment extending to one year and fine of not less than Rs 25,000 and extending up to Rs 1,00,000. If a director or officer is convicted of an offence under the section, he has to

15. *Berium Chemicals Ltd v Company Law Board*, AIR 1967 SC 275= (1966) 2 Comp LJ 151, 162; (1966) 36 Comp Cas 639. *R Venkateswary Naidu v Enforcement Directorate*, AIR 1992 Mad 231. (1993) 79 Comp Cas 87 (Mad); a written petition was filed to find out whether a foreign company had acquired interest in a company without complying with foreign exchange regulations, the court said that it would have been to seek information from the company itself under S. 204, 1956 Act [now S. 206, 2013 Act].



vacate his office from the date of conviction. He becomes disqualified from holding an office in any company.

Report on inspection [S. 208]

After completing the inspection and inquiry under Sections 206 and 207, the Registrar or inspector has to submit a report in writing to the Central Government along with documents, if any. The report may include a recommendation that a further investigation into the affairs of the company is necessary. Reasons must be given in support of the recommendation.

Search and seizure [S. 209]

Whereupon information in his possession or otherwise, the Registrar or inspector has a reasonable ground to believe that books and papers of the company, or those relating to key managerial personnel or any director or auditor or company secretary, are likely to be destroyed, mutilated, altered, falsified or secreted, he may obtain an order from the Special Court for seizure of such books and papers. For this purpose he may, with requisite assistance, enter the places where such books, etc. are kept and conduct search at such places. Such documents may then be seized but before that the company should be allowed to make copies of or extracts from them at its own cost. Such documents have to be returned to the company latest by 180 days. They may be taken again if need arises. The Registrar or inspector can also take copies and extracts. The provisions of the Criminal Procedure Code, 1973, relating to search and seizures are to apply to every search and seizure under the section.

Investigation into affairs of company [S. 210]

"Efficient functioning of incorporated enterprises, that is, a performance that will ensure an adequate return on capital, is ultimately the best protection of those who provide capital." The elementary philosophy of the Companies Act is to trust the shareholders for assuring efficient performance. But for reasons more than one the shareholder has already receded to the background. *Firstly*, he is an investor who, for the most part, does not wish to be bothered except by dividends. *Secondly*, due to great diffusion of stock, shareholders become indifferent to voting and controlling. *Thirdly*, the shareholders are ill-equipped to challenge the wisdom and expertise of officers. *Fourthly*, "few shareholders have the means or ability to act against management."¹⁶

For these reasons, shareholder democracy has been a failure. "The reality of control can only be found in the action of public opinion and in the organised supervision exercised by Government agencies. Hence the importance of investigation."¹⁷

Section 210 accordingly provides: Where the Central Government is of opinion that it is necessary to investigate the affairs of a company because

16. *Bartin Chemicals Ltd v Company Law Board*, AIR 1967 SC 295, (1966) 2 Comp LJ 151, (1966) 36 Com L 659.

17. O.K. Freund, "Company Law Reform" (1946) 9 Mod L Rev 235, 245.

of the report of the Registrar or inspector under Section 208, or on the basis of the company's special resolution for investigation, or in public interest, an order of investigation may be passed. The Central Government has also to order investigation when an order is passed by a court or the Tribunal in any proceedings before it. One or more inspectors may be appointed who are to submit their report to the Central Government.

"Sections 210-229 provide for investigation of the affairs of a company."

There is no guidance in the Act as to who can seek the order of the court or Tribunal for this purpose. The Gujarat High Court held in *Alembic Glass Industries Ltd, re¹⁸* that the power of the court is not subject to the provisions of Sections 210 to 229:

The Legislature in its wisdom has not put any such condition before the court can make an order, though the court may in its wisdom expect *prima facie* proof of some of these conditions. While conferring jurisdiction on the court to direct the Central Government to appoint an inspector, the Legislature have not thought fit to circumscribe the discretion or jurisdiction in any manner. It would, therefore, be utterly inappropriate to curtail or circumscribe or fetter the jurisdiction of the court by reading into the section something which is not there.¹⁹

Even so it seems that the courts would insist upon "solid factual base for the appellant's suspicions, rather than a mere feeling that something is wrong".²⁰ The material placed before the court or tribunal must be such as to justify an order for deeper probe into the affairs of the company.²¹ In *Miles Aircraft Ltd, re, (No 2)²²*, a company, having suffered a loss of nearly one million pounds in a year, declared seven-and-a-half per cent dividend. This was held to be sufficient to warrant an order for investigation.²³ The Delhi High Court²⁴ has expressed the opinion that the person seeking an order must be able to show some manner of interest in the concern. It would not be correct to read the section as authorising any man in the street to seek an order for investigation. The court accordingly rejected the application of the landlord of the company who wanted investigation on the grounds that he had paid a sum of money to the managing director to induce him to vacate

18. (1972) 42 Comp Cas 63 (Guj).

19. D.A. Desai, at p 48. (1972) 42 Comp Cas 63 (Guj).

20. R.D. Fraser, "Administrative Power of Investigation into Companies" (1971) 54 Mod L Rev 260, 268. Observations on management audit report without any corroborative evidence cannot be taken up for seeking an order of investigation of the affairs of the company. *AP State Civil Supply Corp Ltd v Delta Oils & Fats Ltd*, (1999) 96 Comp Cas 913. (1997) 2 Colop (J) 146 (Ct By Rohinton Mardon v Hypocids (India) P Ltd, (2004) 3 Comp LJ 449; (2004) 121 Comp Cas 729 (CLB), investigation not to be ordered on mere suspicion. There was the allegation of substantial expenditure and siphoning of funds. But there was no conclusive evidence that this had in fact happened.

21. *AP State Civil Supply Corp Ltd v Delta Oils & Fats Ltd*, (1999) 96 Comp Cas 303; (1997) 2 Comp LJ 146 (T H).

22. 1948 Ch IRB (1948) 1 AJI ER 225; 1948 WFN 178.

23. Ibid. 260-61.

24. *V V Patel v AMC Surendra Ltd*, ILR (1979) 1 Del 473; (1980) 50 Comp Cas 127.

the premises and he misappropriated the money, or that he was using his political contacts for promoting business, or that he had misappropriated the money borrowed by the company from banks. Citing a passage from a decision of the House of Lords²⁵ the court said that the section should be so interpreted as to enable relief to be obtained only by some person whose rights have been affected by the manner in which the affairs of the company have been conducted or accounts maintained and has, therefore, a grievance in the eyes of law.²⁶

Investigation into company's affairs in other cases on Tribunal's order [S. 213]

1. *On members' application*.— "When members apply they must support their application by evidence and they may be asked to give security for costs of investigation."²⁷ The evidence must show "that the applicants have good reason for requiring the investigation". The Tribunal will give an opportunity to the parties of being heard. It may then declare that the affairs of the company ought to be investigated. On such declaration being made, the Central Government has to appoint one or more competent inspectors to investigate the affairs of the company and to submit a report thereon in such a manner as the Government may direct.

There was failure to list shares in the Stock Exchange and give notices to shareholders. There was also failure to comply with earlier orders of the court to furnish documents to the chartered accountant appointed by the court for formation of opinion regarding accounts. There was total non-co-operation because of the intention to hide relevant material. Conduct of

25. *Gauri v. Union of Post Office Workers*, 1978 AC 455 (1977) 3 WLR 500. See further, *Kamraenam Mutazulhaq Printing & Publishing Co.*, 16 (1983) 84 Comp Cas 520 (Ker); *P. Krishnaswami v. T.S.L. & Sons*, (1983) 56 Comp Cas 485 (Ker); *A. Sumithra v. Big Kvey Chit Fund P/L Ltd.*, (1983) 53 Comp Cas 493 (Ker).

26. No interim relief can be awarded in such orders. Such relief is in the nature of a stay-in-and-therefore can be allowed only when the court is required to make a final adjudication. An investigation is only a fact-finding mission. *Sivaji India Ltd. v. ICRAO*, (1995) 17 CLA 192 (AP). The power of the High Court and that of the Tribunal being concurrent, it has been held that the statutory remedy of approaching the Tribunal should be exercised before asking the High Court to exercise its discretionary power. The court has said that directors against whom there are allegations of mismanagement should be parties. *Safie Ummat v. Union of India*, (1999) 22 SCL 372 (Ker).

27. The power can be exercised by the Central Government after a proper preliminary enquiry. It cannot be exercised simply on the basis of allegations. *Ramdas Motor Transport Ltd. v. Tidi Adimayamma Reddy*, (1997) 5 SCC 446 (1997) 25 CLA 177 (1997) 90 Comp Cas 263. The party in this case had gone directly under writ jurisdiction which was not allowed. *Tidi Adimayamma Reddy v. Union of India*, (1997) 90 Comp Cas 376 (AP) affirmed in *Ramdas Motor Transport Ltd. v. Tidi Adimayamma Reddy*, (1997) 5 SCC 446. Thus, the power under the section can be exercised either through the Tribunal but not directly under writ jurisdiction. The jurisdiction cannot be diverted to the High Court even if some matters of public interest are involved. The Tribunal is competent for the purpose. The Tribunal's jurisdiction is of exclusive nature. Consumer Protection Jurisdictions are also excluded. *Chandrika Prasad Singh v. Beta India Ltd.*, (1997) 88 Comp Cas 81 (CLB). The conduct of the petitioning shareholder is not relevant to this power. The petitioner had made out a case for investigation, his conduct, good or bad was irrelevant.

business was also oppressive to members. A *prima facie* case having been made out, the court directed the Central Government to investigate into affairs of the company.²⁴

2. On discretion of Tribunal.—Section 213 lays down three cases in which the Tribunal can appoint inspectors on its own motion. The section empowers the Tribunal to ask the Government to act if there are circumstances suggesting the following:

(a) **Fraud, oppression or illegality.**—That the business of the company is being conducted with intent to defraud creditors, members or any other person, or for a fraudulent or unlawful purpose, or in a manner oppressive to certain members, or that the company was formed for any fraudulent or unlawful purpose. The Company Law Board (CLB) ordered under this clause, with a view to end oppression, the oppressing group of shareholders to purchase the shares of the complaining group.²⁵

(b) **Fraud, misfeasance or misconduct.**—That the persons concerned with the formation of the company or management of its affairs have been in connection therewith, guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members.²⁶

(c) **Inadequate information.**—That the members of the company have not been given all the information with respect to its affairs which they might reasonably expect including information as to commission payable to the managing director or manager.²⁷

The concepts emphasised by the provision are nothing new in company law. The phrase "intent to defraud creditors" has already been judicially construed under Section 542 [now S. 339] which imposes liability for fraudulent conduct of business.²⁸ The word "oppressive" has been construed in a number of cases under Section 397 [now S. 241] including the decision of the Supreme Court in *Shanti Prasad Jain v Kalinga Tubes Ltd*²⁹ and the same meaning is likely to be attached here.



28. *T Kumar v Shaji (Uttaranchal India) Ltd*, 2014 SCC Online Mad 12772; (2014) 186 Comp Cas 193 (Mad).
29. *Kaki Leather (P) Ltd v TNK Geetmalaia Chetna & Co*, (2002) 110 Comp Cas 974 (Mad). The Civil Procedure Code, being not wholly applicable, a compromise between the parties was held to be effective though not signed as required by CPC.
30. *Bieni Industries Ltd*, re, (1996) 23 CLA 245; (1997) 1 Comp LJ 156 (CLB), diversion of funds and project money, loss in collection of loans, payment of commission without justification, wasteful expenses, investigation ordered. *AP Civil Supplies Corp v Disha Oils & Fats Ltd*, (2007) 135 Comp Cas 177 (AP), statutory and management audit report showed irregularities causing loss to company and benefiting persons in management, Central Government directed to appoint inspectors for deep and elaborate investigation.
31. Where the allegations related to reservation in issues in favour of foreign investors and the same was approved by the shareholders and the Government bodies at various stages and all the approvals were obtained with total transparency, an order of investigation could not be made. *Chandrika Pressed Soda v Beta India Ltd*, (1997) 35 Comp Cas 81 (CLB).
32. See, *William C Leitch Bros Ltd*, re, (1952) 2 Ch 71 (ChD), *E Nagamuthu Pillai v Popular Bank Ltd*, AIR 1959 Ker 1211 (1960); 49 Comp Cas 685; *ILR* (1969) 1 Ker 340 and *Infrastructure Buildings Precision Ltd*, re, (1971) 1 WLR 1085; (1971) 3 All ER 568 (Ch. D).
33. (1965) 1 Comp LJ 193; *AJN* 1965 SC 1539; (1966) 56 Comp Cas 351.

Referring to the words "fraud, misfeasance or other misconduct" a learned commentator says: These seem to be words of very wide import; in *Selangor United Rubber Estates Ltd v Croftock*³⁴ Goff J held, withdrawing some of his dicta in an earlier case,³⁵ that "other misconduct" is not to be construed *cujusdem generis* with "fraud" and "misfeasance" and that the statutory wording quoted above does not include "moral turpitude". In view of this, it seems that [the] section ... [would] extend to what was called in *B Johnson & Co (Builders) Ltd, m.*³⁶ "common law negligence". The Board of Trade, however, are of opinion that this head does not include mere managerial inefficiency.³⁷

Observations in a management audit report which were not substantiated by any evidence could not be taken up for seeking an order of investigation.³⁸ Failure in finalisation of accounts for over five years has been held sufficient evidence for supporting an order of investigation.³⁹

The power is only to make a declaration that the affairs of the company ought to be investigated and not to direct an investigation.⁴⁰

Manner of exercising discretion.— "These grounds limit the jurisdiction of the Central Government."⁴¹ The Government (now Tribunal) does not have "a general discretion to go on a fishing expedition to find evidence". An order for investigation can be justified only if the circumstances exist which suggest an inference of the enumerated kind. Explaining the scope of the Government's power in *Barium Chemicals Ltd v Company Law Board, HUSSAINULLAH* (afterwards C) said:

"No doubt the formation of opinion is subjective ... (but) the existence of 'circumstances' is a condition fundamental to the making of an opinion, the existence of circumstances, if questioned, has to be proved at least *prima facie*. It is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness. The conclusion must relate to an intent to defraud, a fraudulent or unlawful purpose, fraud or misconduct or the withholding of information of a particular kind. We have to see whether the Chairman in his affidavit has shown the existence of circumstances leading to such tentative conclusions. If he has, his action cannot be questioned because the inference is to be drawn

34. (1967) 1 WLR 1168; (1967) 2 All ER 1255.

35. *SB4 Properties Ltd v Croftock*, (1967) 1 WLR 716 (Ch D).

36. 1955 Ch 634, 648 (1956) 3 WLR 249 (C.A); Lord HENSHED MR.

37. Minutes of Evidence to the Jenkins Committee, para 6940. The learned commentator is R.D. Fraser, "Administrative Power of Investigation into Companies" (1971) 44 Mod L Rev 260, 262.

38. *AP Star Civil Supply Corp v Delta Oils & Fats Ltd*, (1999) 96 Comp Cas 303; (1997) 2 Comp LJ 146 (CLB).

39. *Eswar Usha Corp v Richman Silks Ltd*, (1999) 21 SCL 137; (1999) 34 CLA 336 (CLB).

40. *Sofia Laxmi v Union of India*, (1972) 110 Comp Cas 710 (Ker).

41. *HUSSAINULLAH* (afterwards C) in *Barium Chemicals Ltd v Company Law Board*, All 1967 SC 295; (1966) 2 Comp LJ 151, 167; (1966) 16 Comp Cas 639.

42. (1966) 2 Comp LJ 151, 168.

subjectively and even if this Court would not have drawn a similar inference that fact would be irrelevant. But if the circumstances pointed out are such that no inference of the kind stated in Section 207(b) can at all be drawn the action would be ultra vires the Act and void."

The facts of the case were as follows:

The Secretary of the CLB issued an order on behalf of the Board under Section 237(l) [1956 Act] appointing four persons as inspectors to investigate the affairs of the appellant company. The order was challenged on several grounds. Two of the grounds were that the order was *ultra vires* and that the Board had acted on materials extraneous to the provision. The Chairman in his affidavit alleged that there was delay, bungling and faulty planning of the project entailing double expenditure, continuous losses resulting in one-third of the share capital being wiped out, shares being quoted at half their face value and severance of their connection by some eminent persons.

The Supreme Court held that these circumstances "cannot by themselves suggest an intent to defraud or fraudulent management . . . Mere bungling or faulty planning cannot constitute either misfeasance or misconduct".

Similarly, where the management of a company acquired the shares of its subsidiary of Rs 10 each at a premium of Rs 100 and offered them to the members in lieu of cash dividends and 99 per cent of them opted for the shares; made a loan of a huge sum to its subsidiary at 2 per cent, though it was not justified by commercial expediency; these were held to be not suggestive of fraud as to warrant an order of investigation.⁴³

In another case, the allegations that there had not been adequate and proper audit of accounts, as the auditor's reports were based on defective information and that the auditors were not independent, were held insufficient to found an order,⁴⁴ particularly when it appeared that knowledge of these facts was acquired after making the order. Similarly, where it was alleged that shares were sold for inadequate consideration, an order for investigation failed as it appeared that no prior effort had been made to ascertain the market value of the shares and to compare it with the value obtained by the company.⁴⁵ The court said: "The fact that one of the directors (though influential) was suspect is irrelevant." The statement of the Government that general meetings were not properly held, excess of application money was not refunded, refundable money placed in some other

43. *Nijjer Rao Cotton Mills v Company Law Board*, (1969) 2 Comp LJ 380 (MP); *Ashok Mktg Ltd v Union of India*, (1981) 51 Comp Cas 634 (Del), involving similar charges.

44. *New Central Jute Mills v Ministry of Finance*, ATR 1970 Cal 183; (1969) 2 Comp LJ 22; (1970) 40 Comp Cas 102.

45. *Rohit Industries v SD Agarwal*, (1969) 1 SDC 325; (1969) 29 Comp Cas 781; (1969) 2 Comp LJ 380. Loss of some share certificates in the office of the company and irregularity in issuing duplicates has been held not sufficient. *Chandul Singh Ghuman v Dr Reddy's Laboratories Ltd*, (1992) 25 CLA 214 (CLB).

bank, money not used for purposes stated in the prospectus were held to be making out a ground for investigation.⁴⁶

This line of cases shows that the courts have taken rather a strict view of the power conferred by the provisions. Explaining the reasons, Hegde J said:⁴⁷ "In interpreting Section 237(b) [now S. 213] we cannot ignore the adverse effect of the investigation on the company . . . We must also remember that the action in question is an inroad on the power of the company to carry on its trade or business and thereby an infringement of the fundamental rights guaranteed to its shareholders under Article 19(1)(g)." The court may not order an inquiry into the economic functioning of the company. In a case before the Delhi High Court⁴⁸ the alleged grounds were a successive fall in profits, directors' relatives were appointed to high positions and on high salaries, creation of a subsidiary company with mainly the directors' relatives and employees and loans to the subsidiary on which no interest had been realised. The court dismissed the petition with the remark that even if all these facts were supposed to be true, the truth was beating on the surface and, therefore, what was to be investigated? "An investigation is necessary to discover something which is not apparently visible to the naked eye."

But subject to these considerations the "order under Section 237(b) [now S. 213] is not justiciable when it is reasonably made *bona fide* even though the reasons given do not appeal to a court of law."⁴⁹ Thus, where the Central Government came to hold the opinion that the working results and the rates of dividend declared were incompatible, an order for investigation was held to be justified.⁵⁰

The Tribunal should not hold back from the court the circumstances which suggested the necessity for an investigation. An order cannot be

46. *Premier Plantations Ltd v M Ebhukimthy*, (2002) 110 Comp Cas 721 (Ker).

47. *Rokkay Industries v SD Agarwal*, (1969) 1 SCC 325; (1969) 39 Comp Cas 792; (1969) 1 Comp LJ 250.

48. *SL Vering Delhi Flour Mills Co Ltd*, (1975) 45 Comp Cas 35; (1975) 1 DLT 226.

49. See, *Ashok Birla Ltd v Union of India*, (1986) 1 Comp LJ 267 (Cal).

50. *Ibid*. See also, *New Central Jute Mills v Ministry of Finance*, (1964) 2 Comp LJ 152 (Cal); *Nazimuddin Barsoom v Marico Plastics Mfgg. AIR 1963 SC 29*; (1966) 38 Comp Cas 644; *Parikela Thru Co Ltd v. Ashoka Mfgg Ltd v Company Law Board*, (1958) 38 Comp Cas 519 (Cal). See also, *Nilwes Hotel Ltd v ETI, The Times*, 2-2-1978, cited 1978 IHL 179.

The appointment of inspectors puts the company's management under a cloud. Even so natural justice is not applicable⁵¹ since MR said that individual shareholders often in practice had little control over the company's affairs, the directors were often a self perpetuating hierarchy. The department's power to appoint inspectors should be seen as a substitute for inadequate shareholder control, and consequently courts should not fetter investigations that might be the only machinery available for keeping the public interest intact and seeing that corporate were properly conducted, even if this machinery might be slightly unfair to individuals. The court refused to review the Minister's decision on the grounds that, by refusing to state his reasons, the Minister must be assumed to have no good reasons. So long as the Minister acted in good faith, he need not disclose his reasons.

The duty of inspectors to act fairly should not be elaborated so as to turn a basically inquisitorial procedure into an accusatorial procedure.

upheld if the circumstances are not disclosed particularly where no privilege is claimed in respect of such materials.⁵¹ In one of the cases,⁵² an inspector, having been appointed on allegations of fraud, could not complete his work even after securing three extensions. He was then relieved by two new inspectors and the investigation was continued for nearly 15 months. When the order was challenged, the Government failed to disclose any facts on which they had proceeded. Their attitude was best described by Mitter J's words:

"The appellants closed and bolted the door. They drew the veil tightly around them, and they thought that the veil can neither be pierced nor lifted to see if materials exist which the statute requires as to be a precondition to the making of an order."

Where a Government corporation had majority in the company's Board of directors and, therefore, it could have carried out a special audit and adopted remedial measures, if necessary, an order of investigation into affairs was considered to be not necessary.⁵³

Security for payment of costs and expenses of investigation [S. 214].—The Central Government may require, before appointing inspectors, the applicant to give such security not exceeding Rs 25,000 as may be prescribed for payment of expenses of investigation. The security amount is to be refunded to the applicant if the investigation results in prosecution.

No firm, body corporate, or other association is to be appointed as an inspector. [S. 215]

Procedure and powers of inspectors [S. 217]

It is the duty of all officers and employees, past and present, including those of any other body corporate whose affairs are under investigation under Section 219 to preserve and to produce to the inspector all books and papers relating to the company and otherwise to give all assistance for investigation which they are reasonably able to give. If any such matter is requisite from any other body corporate the inspector can demand it. The inspector can examine such persons on oath and any other person with approval of the Central Government or that of Serious Fraud Investigation Office (SFIO) where the investigation is by such office under Section 212. For purposes of investigation, the inspector has the powers of a civil court under the Code of Civil Procedure, 1908 in respect of the following matters: (a) discovery and production of books of account and other documents at such place and time as required by him; (b) summoning and enforcing attendance of persons and examining them on oath; and (c) inspection of any books, registers and other documents of the company at any place.

51. *Govt of India v. Salu Jain Ltd.*, (1969) 1 Comp L 23; (1970) 40 Comp Cas 83; 73 CWN 446.

52. *Ministry of Finance v. Sehu Jain Ltd.*, (1970) 40 Comp Cas 83; 73 CWN 446.

53. *Punjab Agro Industries Corp v. Superior Genetics (India) Ltd.*, (2002) 106 Comp Cas 34th (CJ B).

Disobedience of orders is punishable. The defaulting officers and employees are punishable with imprisonment extending to one year and with fine of not less than Rs 25,000 extending up to Rs 1,00,000. In addition, the conviction for any offence under the section involves vacature of office from the date of conviction and the convicted person becomes disqualified from holding an office in any company. [S. 217(6)]

Notes of examination have to be taken in writing, read over to the person, signed by him and they become evidence against him. Failure to furnish requisite information, or produce books and papers, to appear before the inspector in person when required or to sign notes, makes the defaulter punishable with imprisonment for a term extending to six months and fine of not less than Rs 25,000 and extending up to Rs 1,00,000 and Rs 2000 for every day during which the default continues. [S. 217(8)]

For any investigation purposes, the inspector can, with prior approval of the Central Government, seek assistance from the Central Government or any State Government. For investigation purposes, the Central Government may enter into reciprocal arrangement with any foreign State. The section also indicates the procedure by which such reciprocal arrangement can be implemented, and how the evidence so obtained can be used. [S. 217(10-12)]

Some other provisions of incidental nature are also there. Section 218 protects employees from any action being taken against during the course of investigation without approval of the Tribunal. Section 219 enables the inspector with prior approval of the Central Government to conduct investigation into the affairs of related companies. Section 220 empowers the inspector to conduct searches and seizures as if he had the right to do so under the provisions of the Criminal Procedure Code, 1973. Under Section 221, the Tribunal can order freezing of assets of the company during inquiry and investigation whenever it feels that the assets may be made to disappear or disposed of and that will be to the prejudice of the company, its members, creditors and also public interest. Section 222 empowers the Tribunal to impose restrictions upon securities if it appears to be necessary for finding out the real facts.

The inspector may examine on oath any such person, and for this purpose require his personal attendance. If a person required to appear or produce books, makes a default, that is a punishable offence. Where an inspector finds that a person, whom he has no power to examine on oath, ought to be so examined the inspector may do so with the previous approval of the Central Government. Notes of any such examination are to be taken in writing and signed by the person examined and may be used in evidence against him.⁵⁴ A refusal to answer questions is also punishable. For example, in *Pergamon Press Ltd. v.*⁵⁵ the company was engaged in a litigation in a

54 See, *R v. Hains (Richards)*, (1971) 1 WLR 7252 (CCC), evidence admitted in criminal proceedings.

55 1971 Ch 398 (1971) 3 WLR 792. See also, *Armenian, re.* (1975) 3 All ER 441, where it was held that the report of inspector was *prima facie* evidence admissible for founding a winding up order. See further, *An Inquiry Under the Company Securities (Insider Dealing) Act, 1986, re.*, 1988 AC (Sect.) (1988) 2 WLR 33; 1988 BCDC 153 (HL). The House of Lords consider the

foreign country. Its officers felt that any information given by them might pass to the foreign party and adversely affect their case. So they refused to give any information unless an assurance was given to them that it would not be published without being shown to them. Even so they were held guilty of contempt.

In an English case,⁵⁶ an Inspector of Companies was not allowed to be questioned or cross-examined as to why he caused an examination of the company's books and what he considered to be the public interest that made it expedient that the company be wound up. The power is of subjective nature and its exercise could only be challenged on an allegation of bad faith or if the inspector could be shown to have taken into account extraneous material or had otherwise misdirected himself as to the nature of his power,⁵⁷ or has been shown to be making an unfair exercise of his power. The principle of bias does not apply to an investigation where the officers are exercising a policing function. The court's powers of review are, however, not limited to cases where it could be shown that the officers had not acted *bona fide*. The ground of unfairness does apply.⁵⁸

In reference to the report, it has been held in some English cases that it "being a statutory report made by persons in a statutory fact-finding capacity, the court must be entitled to look at it and act upon it, unless it is challenged on behalf of the company".⁵⁹

In still another English case,⁶⁰ in the course of his report, the inspector found that the sum of approximately £44,000 had been taken away from the resources of the company. The report also noted the manner of misappropriation and the officers involved. Relying upon an earlier decision⁶¹ the court held that the function of the inspector is to make an inquiry and report and not to come to a judicial decision and, therefore, it is not a proceeding of such a nature that prohibition can lie in respect of it either to the Board of Trade or to the inspector.

Where the report of an inspector was highly critical of the conduct of the Chairman and Chief Executive of the company and the latter challenged

privilege of a financial journalist not to disclose his sources of information about a take over, *R v Secy of State for Trade and Industry*, (1969) 1 WLR 525 (HL), refusal to publish the report was considered by the House of Lords as justified because publication would have prejudiced further proceedings on the matter. *London United Investments plc v. re*, 1992 Ch 576; (1992) 2 WLR 851; (1992) 2 All ER 842 (CA); the privilege against self-incrimination is not available in answering questions on which the inspector is seeking information. Also on the same point, *Redouque Investment Management Ltd v Maxwell*, 1993 Ch 1; (1992) 2 WLR 991 (CA).

⁵⁶ *Golden Chemical Products Ltd v. re*, 1976 1976 JBL 55

⁵⁷ See further, *London & County Securities Ltd v Nicholson*, (1960) 1 WLR 748; (1960) 3 All ER 36 (Ch D); question of privilege.

⁵⁸ *R v Secy of State for Trade, re*; *v Prestelco*, (1979) 124 SJ 63.

⁵⁹ *Travel and Holiday Clubs Ltd v. re*, (1967) 1 WLR 711 (Ch D). The report is an evidence only for the purpose of being used as a material for winding up or proceedings against persons commented upon. *Savings and Investment Bank Ltd v. Gas Investments (Netherlands) BV Co.*, (1994) 1 WLR 271 (Ch D).

⁶⁰ *584 Properties Ltd v. re*, (1967) 1 WLR 799 (Ch D).

⁶¹ *Croesnor and West End Anthemy Terminus Held Cr. Ltd v. re*, (1997) 76 ULR 537 (CA).

its fairness on the ground that the inspector had violated rules of natural justice by not giving him a chance of explaining matters before signing his report, the court allowed him no relief.⁶² The court pointed out that the report of the inspector is not evidence in the real sense of the word and, therefore, the persons hit by the report have every chance to disprove its contents. But without doing so they cannot ask the court not to act on it.

Establishment of Serious Fraud Investigation Office [S. 211]

The Central Government has to establish under 2013 Act an office called Serious Fraud Investigation Office to investigate frauds relating to companies. Till then the office established by the Central Government under the same name is to discharge functions under the Act. The office is to be headed by a director. It has to consist of the prescribed number of experts from the following fields to be appointed by the Central Government from amongst persons of ability, integrity and experience in (i) banking, (ii) corporate affairs, (iii) taxation, (iv) forensic audit, (v) capital market, (vi) information technology, (vii) law, or (viii) such other field as may be prescribed.

The Central Government has to appoint by notification a director of the office who has to be an officer not below the rank of a Joint Secretary to the Government of India having knowledge and experience in dealing with matters relating to corporate affairs. The Central Government is to appoint such experts and other officers and employees of the SFIO as it considers necessary for the effective discharge of its functions under the Act. The terms and conditions of service of director, experts and other officers and employees are to be such as may be prescribed.

Investigation into affairs of company by SFIO [S. 212]

Where the Central Government is of opinion that it is necessary for SFIO to investigate into the affairs of company (a) on receipt of a report of the Registrar or inspector under Section 208, (b) on intimation of a special resolution passed by a company to the effect that its affairs are required to be investigated, (c) in public interest, (d) on request from any department of the Central Government or a State Government, the Central Government may assign the investigation to SFIO. Its director may designate such number of inspectors as he may consider necessary for the purpose. Where any case has been assigned to SFIO, no other investigating agency of the Central Government or State Government is to investigate the same case for any offence under Companies Act. If an investigation has already been commenced, it should be stopped and all papers and findings are to be transferred to SFIO. The report has to be submitted within the period specified in the order. The officer designated for investigation is to have the powers of an inspector under Section 217. The company and its employees and officers have to cooperate with the inspector in providing the assistance, explanations and documents that he may require.⁶³

62 *Mazdoor v. Deptt of Trade & Industry*, 1974 (3) 523; (1974) 2 AIR EX 122 (CA).

63 *Parmeshwar Das Agarwal v. Additional Directors (Investigations)*, (2013) 149 Comp Cas 583 (Bom), court said to enter into factual controversies between groups of shareholders of a

It was held in *Sirair Hotels Ltd v Union of India*⁶⁴ that the evidence justified the ordering of an investigation since the allegations levelled constituted serious violations of various provisions under Companies Act, 1956, the 2013 Act and the Indian Penal Code, 1860. The ground on which investigation was found to be warranted was "public interest", within the meaning of provision of Section 212 of the 2013 Act. Therefore, the opinion formed by the Central Government, to order an investigation by the SFIO into the affairs of the company in public interest did not warrant any interference.

Right to bail of persons charged [S. 212(6-7)].—The various offences specified under the different sections of the Act which attract punishment for fraud under Section 447 are to be cognizable and the persons accused of any such offence is not to be released on his own bond unless the public prosecutor has been given the opportunity to oppose the application for bail and the court is satisfied that there are reasonable grounds for believing that he is not guilty of the offence and that he is not likely to commit any other offence while on bail. If the Special Court so directs, a person below the age of 16 years, or a women, sick or infirm may be released on bail. The Special Court is not to take cognizance of any offence except upon a complaint in writing made by the director; or by the SFIO investigating officer or any officer of the Central Government authorised by a general or a special order in writing.

Arresting guilty person [S. 212(8-10)].—Where a director, additional director or assistant director of the SFIO has, on the basis of material in his possession, reason to believe (to be recorded in writing) that a person has been guilty of an offence, he may arrest such person and, as soon as may be, inform him of the grounds of arrest. Immediately after arrest, he has to forward a copy of the order and material in his possession to SFIO. The person arrested has to be produced before a judicial Magistrate or a Metropolitan Magistrate within 24 hours exclusive of journey period from place of arrest to court.

Report of investigation [S. 212(11-17)].—The Central Government can demand an interim report. On completion of investigation, the report has to be submitted to the Central Government. The person concerned may get a copy of the report by making an application to the court. After examination, the Central Government may order prosecution of the persons involved in the fraud. The report is to be taken as one filed by a police officer under Section 173 CrPC. Other investigating agencies have to share their information with SFIO and vice versa.

private company even when there was a letter from a Member of Parliament on behalf of a rival group of shareholders to the Central Vigilance Commission. The Registrar did not recommend investigation without waiting for result of the pending litigation.

64. (2017) SCC OnLine Del 8024.

It may be a foundation of an investigation if anything objectionable or fraudulent in the conduct of the company's affairs is detected during the course of an inspection.⁴⁵

Protection of employees during investigation [S. 218]

Sometimes it may be found that during the course of an investigation of the affairs of a company or of other matters related to the company or any other body corporate or person under Section 210, 212, 213, or 219, or of the membership of the company, or ownership of securities or matters relating therewith, under Section 216, or during the course of any proceedings against any person, that an employee is proposed to be discharged or suspended, or punished by dismissal, reduction in rank, etc, or by change in the terms of his employment to his disadvantage, the approval of the Tribunal would have to be obtained. If the Tribunal has any objection to the proposed action, it should send a notice in writing to the company, etc. Where after application for approval, no objection is received within 30 days, the company, etc can proceed with the action. If there is dissatisfaction with the objections of the Tribunal, the company, etc can prefer an appeal to the Appellate Tribunal, whose decision is to be final and binding. Such decision is not to prejudice other applicable laws.

Investigation into affairs of related companies [S. 219]

An inspector may, with prior approval of the Central Government, investigate into the affairs of the following types of related companies if he considers it necessary for the task of his main investigation: (a) any company which has been company's subsidiary or holding company or a subsidiary of its holding company; (b) any company which has been managed by any person as managing director or as manager who was also the manager, or managing director of the company; (c) any body corporate whose Board of directors comprises nominees of the company or is accustomed to act in accordance with directions or instructions of the company or of any of its directors; (d) any person who has been the company's managing director or manager or employee. It is necessary that the inspector should consider that the results of his investigation are relevant to the main investigation.

Seizure of documents by Inspector [S. 220]

In the course of his investigation, if the inspector has reasonable grounds to believe that books and papers of the company are likely to be destroyed, mutilated, altered, falsified or secreted, he may, with requisite assistance, enter the place or places where such books, etc are kept and seize them. He has to allow the company to take out copies or extracts at its cost. He can keep them up to the conclusion of investigation and then return them to the company. Documents belonging to any other company, or body corporate, managing director or manager of such company can also be seized. The inspector may take copies and extracts before returning. The provisions of

45. *Seas Industries Ltd v Krishna II Raju*, (2011) 3 SCC 218, (2011) 162 Comp Cas 319.

the Criminal Procedure Code, 1973, relating to searches and seizures are to apply *mutatis mutandis* to every such search and seizure.

Freezing of assets on inquiry and investigation [S. 221]

Such order can be issued by the Tribunal if it appears to be necessary as a reference made to it by the Central Government or in connection with an inquiry or investigation, intn the affairs of a company, or on any complaint made by the requisite number of members as specified under Section 244 (right to apply for prevention of oppression or mismanagement), or a creditor to whom the company owes Rs 1,00,000, or any other person having a reasonable ground to do so. It has to be shown that there is a reasonable ground to believe that removal, transfer or disposal of funds, assets or properties of the company is likely to take place in a manner prejudicial to the interests of the company or its shareholders or creditors or public interest. The Tribunal may order that such transfer, etc, is not to take place during such period as may be specified in the order, but not exceeding three years. The Tribunal may however permit such transfer, etc subject to such restrictions or conditions as may be imposed. There is a default penalty and punishment.

Inspector's report [S. 223]

The inspector may submit an interim report if the Central Government so requires. At the conclusion of investigation, he has to submit his final report which has to be in writing or printing as directed. A copy of the report can be obtained by making an application to the Central Government. The report has to be authenticated by the seal of the company, if any, whose affairs have been investigated or by a certificate of the public officer having custody of the report as provided in Section 76, Evidence Act, 1872. The report is admissible in any legal proceeding as evidence as to its contents. This section is not to apply to a report of SFO, under Section 212.

If the report shows that any person has committed any offence for which he is criminally liable, the Government may prosecute him for the offence. Further, the Government may, on the basis of the report, apply to the court for the winding up of the company or make an application for an order under Section 241 for prevention of oppression and mismanagement.

Where it appears from the report that a fraud or misappropriation of property has been committed and the company is, therefore, entitled to bring an action for damages for the misconduct or for the recovery of any property which has been misapplied or wrongfully retained, the Central Government may itself bring proceedings for that purpose in the name of the company. In any such proceeding the report shall be admissible as evidence of the opinion of the inspector in relation to any matter contained in the report.⁶⁶

66. S. 246. The report has to be filed in proceedings initiated on its basis, but otherwise it is a privileged document. The court may order its production in a proceeding for production of privileged documents. *R v Secy of State for Trade and Industry, et al v Sudhir*, (1996) 1 WI R 1512 (1996) 2 BCLC 636 (Ch D).

The expenses of investigation are to be defrayed in the first instance by the Central Government. But the Government is entitled to be reimbursed by any person who has been convicted on a prosecution instituted in pursuance of the report or required to pay damages as a result of the report. The company in whose name proceedings are brought is also bound to reimburse the Government. Reimbursements can also be recovered from any managerial personnel dealt with by the report and from the applicants.⁶⁷

Action in terms of report [S. 224]

If the report shows that a person has been guilty of an offence for which he is criminally liable, the Central Government may prosecute him for the offence. The company and its employees would be duty bound to provide necessary help in the matter of prosecution. If the report shows that it would be expedient to wind up the company, the Central Government may file a petition for winding up on the just and equitable ground or under Section 241 for prevention of oppression or mismanagement or for both. If it appears to the Central Government from the report that proceedings ought to be brought in public interest by the company or any body corporate whose affairs have been investigated for recovery of damages in respect of fraud, misfeasance or other misconduct in the promotion, formation or management of the company or for recovery of any property of such company, the Central Government may itself bring proceedings for winding up in the name of the company, for which the company has to indemnify the Government for its costs.

Disgorgement of benefits obtained by director, etc [S. 224(5)].—Where the report discloses that a fraud has taken place in a company as a result of which a director, key managerial personnel, any officer of the company or any other person or entity, has taken undue advantage or benefit in any form whatsoever, the Central Government may file an application to the Tribunal for appropriate order for disgorgement of such benefit and also for holding the person concerned liable personally without any limitation of liability.

Investigation of ownership of company [S. 216]

Public interest may sometimes require the Central Government to know the persons who are financially interested in a company and who control its policy or materially influence it. For this reason, Section 216 provides that where there is good reason to do so, the Government may appoint one or more inspectors to investigate and report on the membership of the company and other matters relating to it. The Tribunal has been empowered, while dealing with any proceedings before it, to declare by an order that the affairs of the company ought to be investigated as regards the ownership for the purpose of determining as to who are or have been financially interested in the success or failure, whether real or apparent, of the company or able to control or materially influence the policy of the company. In such a

case, the Government becomes bound to appoint inspectors. Subject to the restrictions imposed by the Government, the inspector shall have the power to investigate any circumstances which suggest that there is some arrangement or understanding which, though not legally binding, has been or is likely to be observed by the company in practice.⁶⁶

Restrictions upon shares and debentures [S. 222]

Where it appears to the Tribunal in connection with any investigation under Section 216 (Investigation of ownership of company) or on a complaint made by any person, that there is a good reason to find out relevant facts about any securities which have been issued or are to be issued by the company and the Tribunal is of opinion that such facts cannot be found out unless certain necessary restrictions are imposed, the Tribunal may do so for a period not exceeding three years.⁶⁷

Earlier, this power was being exercised by the CLB. Section 250 of the 1956 Act had also spelled out the types of restrictions which may be imposed. Though they have not been retained in the present provision, restrictions are likely to be of the same kind.⁶⁸

Another power of the CLB under the section was that where as a result of any transfer of shares a change was likely to take place in the composition of the company's Board of directors, and if such change would be prejudicial to public interest, the CLB could restrain such change from taking place unless the change was confirmed by it and could direct that voting rights on those shares were not to be exercisable for any period not exceeding three years.⁶⁹

Where any transfer of shares involving any of the above changes is likely to take place, it may restrain the transfer for any period not exceeding three

66. S. 216(4); *Birla Corp Ltd v East India Investment Co (P) Ltd*, (2006) 133 Comp Cas 515; (2005) 4 CLIN 320, dealt of a shareholder, held to be not a ground of investigation, the application was based on unfounded apprehensions.

67. Any contravention of the order makes the company punishable with fine of not less than Rs 1,00,000 extending up to Rs 25,00,000. An officer in default is punishable with imprisonment up to 6 months or fine of Rs 25,000 extending up to Rs 500,000.

68. Such restrictions were:

(1) any transfer of those shares shall be void, (2) where they are proposed to be issued, they shall not be issued and the issue shall be void; (3) no voting rights shall be exercisable in respect of those shares; (4) no further shares shall be issued in the right of those shares; (5) except in liquidation, no payment shall be made of any sums due from the company on those shares whether in respect of dividend, capital or otherwise.

69. Where transfer of shares and changes in the composition of the Board of directors had already taken place and that too with the approval of the CLB, the preventive powers under the section were not exercisable. *Airconcrete Mfg and Finance Co (P) Ltd v Prakashji Services Ltd*, (1949) 3 Com LJ 425; (1949) 3 Comp LJ 423; (1949) 86 Comp Cas 291 (CLB). An investment in the shares of a company to the extent of only 10 per cent of the share capital of the company has been held to be not so substantial as can make prejudicial changes in the management and require an order of investigation for imposing restrictions on shares. *Palma Typhur v Assam Brook Ltd*, (1957) 88 Comp Cas 338; (1996) 3 Comp LJ 396 (CLB); *Mohd Zefer v Nohar Industrial Enterprises Ltd*, (1997) 42 D.R.J. 647; (1997) 76 D.L.T. 341 (1997) 4 Comp LJ 201; (1998) 28 CLA 251; (1998) 30 Comp Cas 717 (CLB).

years.⁷² A restriction of this kind is likely to have a telling effect upon the image of the company and prejudicing the interests of many individual and institutional investors who may not be a party to anything wrong. This fact has to be kept in mind before passing any restraint order. For example, no such order was passed in an English case in which an investor being called upon to give information about the nature of his interest in the company's shares, gave wrong information, but soon thereafter acknowledged and rectified his errors and also gave an undertaking that he would not dispose of his interest in the shares unless permitted.⁷³ A restraint order was held to be justified where the nominee shareholders did not attach any importance and gave no response to a notice under the section.⁷⁴ In another case arising in connection with the same group of companies,⁷⁵ HARMAN J explained the matter in these words:

"Although a company has a *prima facie* right to know who owns its shares, the Act makes it a matter for the discretion of the court whether or not a freezing order under the section should be imposed or continued. On the facts, the failure to release shares from the freezing order could have the effect of preventing a takeover bid from going ahead and this could prejudice those shareholders who wanted to accept the bid."

The CLB (now Tribunal) would refuse an order to vacate it, where it was sought not in the interests of the company but to enable the directors to defend their position.

As long as the order is in force, any pending transactions can be finalised only with leave.⁷⁶

An investigation may be initiated even when an application for prevention of oppression or mismanagement is pending or the company has passed a special resolution for voluntary winding up. Similarly, an investigation which is in progress will not be stopped or suspended by reason of the fact that an application for prevention of oppression or mismanagement has been made or a special resolution for winding up has been passed.

Position of legal advisers and bankers

On this point Section 227 provides as follows:

**Legal advisers and
bankers not to
disclose certain
information**

227. Nothing in this Chapter shall require the disclosure to the Tribunal or to the Central Government or to the Registrar or to an inspector appointed by the Central Government—

72. *Eckhauer Construction Co (19) Ltd v Blossom Breweries Ltd*, (1990) 95 Comp Cas 35 (CLB), producers restrained from transferring shares out of their promoters' quota till the final disposal of the petition.

73. *K v Secretary of State for Trade and Industry*, (1989) 1 WLR 525 (HL). A similar case is, *Riante Group plc v. re, 1989* BCLC 566 (Ch D) where the restraint order was vacated as soon as the correct information was provided.

74. *Riante Group plc (No 2) v. re, 1989* BCLC 771 (Ch D).

75. *Ibid.*

76. *Cross Group plc v. re, 1987* 1 WLR 1649; 1999 BCLC 140 (CA); *TR Technology Investment Trust v. re, 1988* BCLC 256 (Ch D).

- (i) by a legal adviser, of any privileged communication made to him in that capacity, except as respects the name and address of his client; or
- (ii) by the bankers of any company, body corporate, or other person, of any information as to the affairs of any of their customers, other than such company, body corporate, or person.

The effect of the provision is that legal advisers and bankers are not to disclose any privileged communication or information as to affairs of bank's customers.

Miscellaneous matters

Expenses of investigation are to be borne by the Central Government at the initial stage but the Government can seek reimbursement from any person who has been convicted or prosecuted or called upon to pay damages or restore the property of the company, the company in whose name the proceedings have been brought or persons dealt with in the report or applicant for investigation where the inspector was appointed under Section 213. [S. 225] An investigation can be initiated and it is not to be stopped only because an application has been made under Section 241 for prevention of oppression and mismanagement, or the company has passed a special resolution for voluntary winding up, or any other proceeding for winding up is pending before the Tribunal. In this last mentioned situation the inspector has to inform the Tribunal of pendency of investigation. The Tribunal may pass such order as it deems fit. [S. 226] Legal advisers and bankers are not to disclose any privileged communication or information as to affairs of bank's customers. [S. 227] The provisions as to investigation are to apply *mutatis mutandis* to inspection, inquiry or investigation in relation to foreign companies. [S. 228] Section 229 provides penalty for furnishing false statement, mutilation and destruction of documents.

Appeals against orders

The appeal system which had been brought about by an amendment of the preceding Act, has been maintained under the Act. The literature already generated under that system continues to be relevant. Hence, it is being retained.

The Amendment of 1988 (1956 Act) introduced a new section to provide about appeals. Since the Board had been taken out of the controlling hand of the State and made independent and its powers and functions were enlarged by conferring upon it jurisdiction in many company matters which was being exercised by the High Courts, an express provision as to appeals became necessary. Section 10-F provided that any person aggrieved by any decision or order of the CLB could file an appeal to the High Court on any question of law arising out of such order.⁷⁷ Thus, there could be no appeal

77. *Mehdi Zafar v Nohar Industrial Enterprises Ltd.*, (1997) 42 D.R.J. 642; (1997) 48 T.I.T. 341; (1997) 4 Comp. L.J. 201; (1998) 28 C.L.A. 251; (1998) 93 Comp. Cas. 717, where a question of law was neither raised before the CLB nor taken up by the CLB, it could not be said to be question arising out of CLB order. Another decision of the same kind, *Gordian Woodruffe & Co Ltd*

on a question of fact.⁷⁷ The Board had become the final authority so far as questions of fact were concerned. Since facts are discovered by appreciation of evidence and if the appreciation has gone wrong, factual matters can also be reopened on appeal.⁷⁸ A finding of fact which is based on no evidence or based on surmises, conjectures or assumptions, amounts to a finding without evidence. It becomes a question of law, and as such appealable.⁷⁹

In the exercise of its inherent powers, the CLB could take notice of subsequent events lest it may fail to do justice between the parties.⁸⁰

The phrase "arising out of" in Section 111-F would include questions of law arising out of facts found by the CLB.⁸¹ An order as to joinder of parties is a question of law and, therefore, appealable. Consent orders are appealable,⁸² if there is a doubt about genuineness of the consent.⁸³ A dispute as to shareholding pattern was resolved by the CLB under a consent order. There was no grievance as to the genuineness of the consent. The court did not interfere with the order in appeal.⁸⁴

Where in a petition for prevention of oppression and mismanagement, the finding of fact by the CLB was that the preliminary requirements were not satisfied, the court refused to interfere as it found that the finding was based on the evidence on record. The court said that the section did not permit investigation into a question of fact even where additional evidence

v Gardner Windhoff Ltd, (1999) 97 Comp Cas 382 (1998) 3 CTC 599 (Mad), where the court also added that it is a limited jurisdiction and, therefore, the appellate court cannot go into the validity of a transfer which requires consideration of evidence including examination of witnesses. Minerva Nacional Limitada v Secundino De Pimentel Industrial (P) Ltd, (2004) 6 Mah LJ 701. (2006) 6 Bus. CR 2 (2006) 6 AIR Bom R 606. (2007) 136 Comp Cas 290, appeal lies before Single Judge and not before a Division Bench.

78. Bhogalji Developers (P) Ltd v Reserve General Finance & Investment Co Ltd, (2003) 3 CTC LT 593; (2005) 128 Comp Cas 444; (2004) 51 SCL 204. Mithowadhi Engineers (P) Ltd v Mithowadhi, (2004) 122 Comp Cas 150; (2005) 58 SCL 301 (Mad); finding of fact that notices for the meeting were not issued and no shareholder was present, not disturbed in appeal. PPN Power Generating Co Ltd v PPN (Infrastructure) Co, 2005 CTC 1 (Mad); appellate court not to reassess facts. Relaji Enterprises (P) Ltd v S Relais Rao, (2006) 120 Comp Cas 97 (CLB); order of CLB in setting aside a transfer because of violation of articles was not allowed to be reviewed because there was no apparent error on record.

79. A finding of fact based upon proven facts is not a question of law. A finding that the requirement of S. 80 [now S. 46] for issuing duplicate share certificates was not satisfied was held to be a finding of fact. Shim Specifiers (Id) v Starstar Investments Ltd, (1997) 88 Comp Cas 47 (Mad). Meritability of a petition is not a pure question of law; it being mixed up with facts involved, a decision on its meritability was held to be not appealable. Saroj Gyanek v Narayan Print Binding Services and Trading (P) Ltd, (1991) 2 CTC 312; (1997) 91 Comp Cas 205. The question whether the notice of a meeting was late was not raised before the CLB and, therefore, not decided by it, could not be the subject-matter of appeal. Mad Zafar v Nasir Industrial Enterprises Ltd, (1997) 42 DLT 612; (1997) 68 DLT 340; (1997) 4 CTC 1J 201; (1998) 28 CTA 251; (1996) 93 Comp Cas 717.

80. Scientific Instruments Co Ltd v KF Chipli, (1999) 34 CLA 36 (All).

81. Rajendra Kumar Malhotra v Herberts Alchimie & Sons Ltd, (1998) 71 CLA 360; (1998) 2 Cal LT 13.

82. Nupur Mitra v Basukam (P) Ltd, (1999) 2 Cal LT 264; (1999) 35 CLA 97.

83. Pinkesh Timbers (P) Ltd v Sudipto Shringi, AIR 1995 All 320; 1995 All 111 1221.

84. Gillette International v S K Malhotra, (1998) 31 CLA 73; (1998) 1 Cal LT 271.

85. Subhash Mohan Dev v Santosh Mohan Dev, (2001) 24 Comp Cas 1015; 2000 CTC 1151 (Kan). An order on consent terms not appealable.

is tendered to question the finding of fact.⁸⁶ There can be no appeal on a finding of fact even if the appellate court might have differed.⁸⁷ The words "any decision or order" would include an order which does finally decide the rights of the parties. In a petition by a director who was taken to have vacated his office by reason of non-attendance, the new appointee in his place was not impleaded and without any information, to him an order was passed for the management of the company by the first directors. This order was held to be appealable. The order was set aside because it violated natural justice.⁸⁸

The appellate court can interfere in the order of the CLB only if the discretionary or inherent power has been exercised arbitrarily or capriciously or perversely, or where the CLB has ignored the settled principles of law in granting an interlocutory injunction. The court can also interfere with orders if it can come to the conclusion that the CLB has not exercised its power in granting an injunction in spite of the availability of facts established by overwhelming evidence to the *prima facie* extent or the material available on record justifies the grant of injunction and the refusal has caused failure of justice leading to irreparable injury to the party seeking the remedy.⁸⁹

The failure of the High Court to frame a substantial question of law to hear the appeal did not invalidate the order passed. The order was in the nature of an affirmation.⁹⁰ In case of interim or interlocutory order, it would become a matter of judicial discretion unless findings of CLB suffered from perversity or arbitrariness or based on irrelevant material or in disregard of relevant material, High Court's intervention on merits is not called for.⁹¹ Interference by CLB in excess of subject-matter of petition is liable to be set aside being on record or review.⁹²

The time for filing appeals has been fixed to be 60 days which are to be counted from the date of the communication of an order or decision to the appellant. The High Court has been empowered on sufficient cause to extend the time for a further period of 60 days.

The provisions of the Civil Procedure Code have to be followed to the extent applicable. Accordingly, the memorandum of appeal should be accompanied by a certified copy of the order appealed against or at least of the operative portion of the order.⁹³

86. *J.P. Sivanesan & Sons (Rampur) Ltd v Gudhar Sugars Ltd*, 2000 CLC 292 (MP).

87. *Cloud Mill Products v Idris Alsalif Pkhan*, (1999) 95 Comp Cas 368 (Guj). See also, *Bhavin v SRL* (P) Ltd, (1999) 18 DRJ 31; (1999) 77 DLT 113 (1999) 33 CLA 51, where the finding of fact was that a ground for an order of investigation was made out, the court refused to interfere. *T.G. Vetta Press v Sri Rama Rayalserma Alkies & Almond Chemicals Ltd*, (1999) 98 Comp Cas 506 (AP). No appeal was allowed against an order for appointment of an administrator. *C Sri Hari Rao v Sri Ram Das Motor Transport P Ltd*, (1999) 97 Comp Cas 626.

88. *Gharib Ram Sharma v Dyalit Ram Kashyap*, (1994) 80 Comp Cas 267 (Raj).

89. *PPN Power Generating (n) Ltd v PPIL (Mazdoor) Co*, 2005 CLC L (Mad).

90. *Tai Faii Dealers Assoc (P) Ltd v Smiti Chandra Banerji*, (2016) 10 SOC L (2016) 199 Comp Cas 215.

91. *Purushottam Mundhra v Ranjana Datta*, (2016) 1 SCC 237; (2015) 210 Comp Cas 392.

92. *St Mary's Hotel (P) Ltd v TO Alcros*, (2016) 10 SOC L (2016) 199 Comp Cas 203.

93. *Minohar Rajkumar Chhabria v Union of India*, (2009) 1 Cal LT 434; (2002) 110 Comp Cas 162.

An appeal would lie before the High Court where the registered office of the company is situate and not at the place where a decision of the CLB or any of its Benches was delivered.⁹⁴

Court [S. 2(29)]

Under this provision, court means.

- (i) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any district court or district courts subordinate to that High Court under sub-clause (ii);
- (ii) the district court, in cases where the Central Government has, by notification, empowered any district court to exercise all or any of the jurisdictions conferred upon the High Court, within the scope of its jurisdiction in respect of a company whose registered office is situate in the district;
- (iii) the Court of Session having jurisdiction to try any offence under the Act or under any previous company law;
- (iv) the Special Court established under Section 43B; [specify trials]
- (v) any Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction to try any offence under this Act or under any previous company law.

Powers of Securities and Exchange Board of India [S. 24]

24. (1) The provisions contained in this Chapter, Chapter IV and in Section 127 shall,—

- (i) insofar as they relate to—
 - (i) issue and transfer of securities; and
 - (ii) non-payment of dividend,

by listed companies or those companies which intend to get their securities listed on any recognised stock exchange in India, except as provided under this Act, be administered by the Securities and Exchange Board by making regulations in this behalf;

- (ii) in any other case, be administered by the Central Government.

Explanation.—For the removal of doubts, it is hereby declared that all powers relating to all other matters relating to prospectus, return of allotment, redemption of preference shares and any other matter specifically provided in this Act, shall be exercised by the Central Government, the Tribunal or the Registrar, as the case may be.

(2) The Securities and Exchange Board shall, in respect of matters specified in sub-section (1) and the matters delegated to it under proviso to sub-section (1) of Section 43B, exercise the powers conferred upon it under sub-sections (1), (2 A), (3) and (4) of Section 11, Sections 11-A, 11-B and 11-D of the Securities and Exchange Board of India Act, 1992 (15 of 1992).

94. *Stridewali Leathers (P) Ltd v. Bhanderpur Simkhadi Breweries (P) Ltd.* (1994) 1 SCC 34; (1994) 79 Comp Cas 139, reversing Delhi High Court in *Stridewali Leathers (P) Ltd v. Bhanderpur Simkhadi Breweries (P) Ltd.* (1994) 1 SCC 34; (1994) 79 Comp Cas 139.

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®; along with updates, articles, videos, blogs and a host of different resources.



The following cases from this chapter are available through EBC Explorer™:

- *Barium Chemicals Ltd v Company Law Board*, AIR 1967 SC 295; (1966) 2 Comp LJ 151, 167; (1966) 3h Crimp Cas 639
- *Shanti Prasad Jain v Kalinjar Tribes Ltd*, (1965) 1 Comp LJ 193; AIR 1965 SC 1535; (1965) 35 Crimp Cas 361



CASE PILOT

Chapter 18

Kinds of Company

Unlimited companies

One of the main purposes of the Companies Act is to confer upon the business community the privilege of trading with limited liability. A company limited by shares means a company having the liability of its members limited by the memorandum to the amount, if any, due on shares respectively held by them. [S. 2(22)] Yet the promoters of a company have the choice to form the company with unlimited liability. Section 3 provides that seven or more persons or where the company to be formed will be a private company, any two or more persons may form an incorporated company with or without limited liability. "The right of limited liability is desirable, but not a necessary adjunct to incorporation."¹ A company not having any limit on the liability of its members is termed an unlimited company. [S. 2(2)]

Companies with unlimited liability are rarely formed now. But such a company is definitely a suitable choice in cases where heavy liabilities are not likely to be incurred and the other advantages of separate corporate personality are desired.

An unlimited company must have articles of association stating the number of members with which the company is to be registered and if the company has a share capital, the amount of share capital with which it is to be registered.

The obvious disadvantage of an unlimited company is that its members are liable, like the partners of a firm, for all its trade debts without any limit. But this does not mean that the creditors of an unlimited company can directly sue the members. Even in this case, the creditors have, if the company fails to pay, to resort to winding up and the liquidator will call upon the members to contribute to the assets of the company so as to enable him to meet the debts and the expenses of winding up.

¹ Leonard W. Hearn, "British Business Corporation: Its Origin and Control" (1963-64) 13 Toronto Law Journal 134.

There are certain advantages also. For example, an unlimited company need not have any share capital. And if it has, it may increase or reduce its capital without any restriction. And, what is more, it may purchase its own shares, as Section 67 does not apply to the case of an unlimited company.

An unlimited company can get itself re-registered as a limited liability company under Section 18 of the Act. The conversion will not affect any debts, liabilities, obligations or contracts of the company existing at the time of conversion and such debts, etc. will become enforceable under Part IX of the Act.²

Guarantee companies

A company limited by guarantee means a company having the liability of its members limited by the memorandum to such amount as the members respectively undertake to contribute to the assets of the company in the event of its being wound up.

Where it is proposed to register a company with limited liability, the choice is to limit liability by shares or by guarantee. The liability of the members of a guarantee company is limited by a fixed sum which is specified in the memorandum and beyond which they cannot be called upon to contribute. The memorandum of a company limited by guarantee has to state that each member undertakes to contribute to the assets of the company in the event of its being wound up, for payment of the debts and liabilities of the company, such amount as may be required not exceeding a specified amount. Further, the articles of association of the company shall state the number of members with which the company is to be registered.³

It is not necessary for a guarantee company to have any share capital. But if it has share capital, it is subject to the same restrictions as to reductions as the capital of a company limited by shares.⁴ It does not also have the liberty to purchase its own shares. [S. 67]

Any provision in the memorandum or articles of the guarantee company or any resolution which purports to give to any person other than a member the right to participate in the divisible profits of the company shall be void. [S. 4(7)]

The Supreme Court has emphasised that the right of a guarantee company to refuse to accept the transfer by a member of his interest in the company is on a different footing than that of a company limited by shares. A guarantee company was running a stock exchange. The right of an existing member to transfer his interest to another person would involve the question of that person's admission to the membership of the organisation. Such membership may carry privileges much different from those of ordinary shareholders. The Supreme Court characterised the decision of the High

2. S. 180;

3. *Rajeev Kapoor v. Sandeep Ahluwalia*, (2006) 129 Comp Cas 370 (CLD), petition for prevention of oppression filed by reason of induction of new members in contravention of articles.

4. S. 66.

Court that the same principles were applicable as much to transfer of membership as to shares, as wrong. The matter was remitted for reconsideration.⁵

Private companies

A private company is a very suitable device for carrying on the business of family and small scale concerns, as the minimum number of members required to form a private company is only two.⁶ A private company is defined in Section 3(1)(b). It means a company which in its articles of association contains the following restrictions:

1. Minimum paid-up capital.—The company has a minimum paid-up capital of one lakh rupees or such higher amount as may be prescribed. [S. 2(6B)] [This requirement has now been deleted.]

2. Restriction on transferability of shares.—There must be some restriction on the right of its members to transfer their shares in the company. Any restriction which will enable the directors to maintain the maximum limit of 200 members will serve the purpose of the Act.⁷ This restriction is not necessary in the case of a private company not being limited by shares.⁸

3. Restriction on number of members.—The number of its members must be limited to 200, (except in the case of one person company). This number is exclusive of members who are or were in the employment of the company. Joint holders of shares are to be treated as a single member.

4. Prohibition on issue of prospectus.—The company must prohibit any invitation to the public to subscribe for any shares in or debentures of the company. The company should prohibit any invitation or acceptance of deposits from persons other than its members, directors or their relatives.

A private company is compulsorily required to have articles of association. They are necessary, if not for anything else, to embody the above restrictions. The Act of 2013 has made articles compulsory in all cases.

Advantages of a private company. The Act applies to private companies in all respects,⁹ except where they are expressly exempted from its operation. These exemptions are commonly known as the privileges or advantages of a private company.

It is by virtue of these exemptions that a private company has been described as "an incorporated partnership, combining the advantages of both elements — the privacy of partnership and the permanence and origin of the corporate constitution. Ordinary companies are like bees working

5. *Naranda Kumar Agarwal v. Sanji Malon*, (1995) 6 SCC 114; (1995) 10 CLA 137; (1995) 5 Centr. L.T. 34; (1996) 85 Comp Cas 172. The court noted the difference in the set of articles in Sch. I which are applicable to guarantee companies and companies limited by share.

6. S. 2(6B).

7. See, *Ramnath's Company Law* (20th Edn. 1999) 37.

8. S. 2(6).

9. Private companies are legal entities as much as public companies. They cannot be called a property of the joint Hindu family. *Vikas Jaiswal v. Nurmi Industries (P) Ltd.*, (2001) 103 Comp Cas 343 (AP).

in a glass-hive. Private companies can keep their affairs to themselves".¹⁰ Private companies exist with the sanction and encouragement of the legislature.¹¹ They enjoy the benediction of the legislature. Some of the advantages may be mentioned here:

1. *Subscription.*—The formation of a private company requires only a minimum of two subscribers to the memorandum of association. [S. 3] This, to a large extent, facilitates the formation and harmonious functioning of a private company and makes the choice of such a company most suitable for family or friendly concerns.

2. *Exemption from prospectus-provisions.* Public participation by issuing a prospectus is prohibited. [S. 2(68)(ii)] A private company is, therefore, exempt from all the requirements of the Act relating to prospectus. It can proceed to allot shares without having to wait for any such thing as a minimum subscription. It can commence business immediately on incorporation, as it has not to comply with the requirement of Section 11 as to commencement of business.

3. *Directors.*—Regarding the appointment of directors a private company is entitled to certain beneficial exemptions. For example, it is required to have only two directors. [S. 149] All its directors can be permanent life directors; the requirement of retirement by rotation does not apply. [S. 152] All the directors can be appointed en bloc by a single resolution. The special 14 days' notice required by Section 160 for the appointment of a new director in place of a retiring one does not apply to the case of a private company. No director of a public company can act as a director,¹² unless he has within 30 days of his first appointment signed and filed with the Registrar his consent in writing to act as such a director. This provision of the Act does not apply to a private company.¹³ Restriction as to remuneration also does not apply. [S. 197]

4. *Further issue of capital*—Under Section 62 a public company proposing to increase its subscribed capital by allotment of further shares, must, in certain cases, offer them to the existing members. But the section does not apply to a private company which is, therefore, free to allot new issues to outsiders. [S. 62]

5. *Disclosure of interest.*—Another important exemption is in connection with interested directors. As has already been seen, this section excludes an interested director from participating in voting at Board's proceedings. But, as a private company is exempted from the operation of this section, an interested director is under no obligation to retire from a meeting of the Board in which the subject-matter of his interest is discussed. He may participate in the proceeding and exercise his vote. [S. 188]

10. Edward Mansen, "The Evolution of the Private Company" (1910) 26 LQR 11.

11. See, Younkar J.J. in *Sax* v. Section, (1921) 2 I.C.H. 492; 125 I.L.T. 37.

12. Other than a director appointed after retirement by rotation. S. 152.

13. S. 152(5).

Conversion of private company into public company

1. Conversion by default. These privileges and exemptions can be enjoyed by a private company only as long as it does comply with the requirements of its definition as detailed in Section 2(68). "When a default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemptions conferred by or under the Act."¹⁴ The whole of the Act would then apply to the company as if it were not a private company.

2. Conversion by choice [S. 14].—Apart from the above provisions of the Act, a private company may of its own choice become a public company. It may at any time pass a special resolution deleting from its articles the requirements of Section 2(68) and then, from the date of alteration, it becomes a public company. Within 30 days issuing of prospectus and all other requirements of the Act should be complied with, such as, increasing the number of shareholders and directors to the statutory minimum.

Conversion of public company into private company [S. 14(1)]

A public company can also be converted into a private company. For this purpose it will be necessary to pass a special resolution by which the articles of the company shall be changed so as to include the requirements of a private company as prescribed in Section 2(68). But Section 14(1) provides that "no alteration made in the articles which has the effect of converting a public into a private company shall have effect unless such alteration has been approved by the Tribunal". The Tribunal is to make such order as it deems fit.

A copy of the alteration of articles along with the order of the Tribunal has to be filed with the Registrar of Companies within 15 days. Where the conversion was in the interest of the company because it caused no prejudice either to members or creditors, it was approved by the Tribunal. The company had complied with the provisions of Section 14 and also Rule 68 of the Tribunal Rules, 2016.¹⁵

The conversion of a company from private to public or vice versa, does not change the identity of the company.¹⁶

One person company [S. 3]

Section 2(62) defines one person company as meaning a company which has only one person as a member. Section 3(1)(c) provides for incorporating such a company by saying that a company may be formed for any lawful purpose by one person, where the company to be formed is to be one person company, that is to say, a private company. The memorandum of one person company has to state the name of some other person, with his prior written consent in the prescribed form, who will, in the event of death of the

14. S. 444.

15. *Imtiri Farm Ltd. v. n.* (2016) 199 Comp Cas 392 (NCLT).

16. *All India Reporter Ltd v. Kavachimam*, AIR 1961 Bom 292; *JLR* 1961 Bom 257 [legal proceedings instituted before conversion can continue], *Sulzer Oils and Fertilisers v. Bhandari Crossy-Exodus (P) Ltd.*, (1928) 48 Comp Cas 260 (P&H).



subscriber to the memorandum or his incapacity to contract, become the member of the company. A written consent of such person has to be filed with the Registrar at the time of incorporation of the company. Such person may withdraw his consent in the prescribed manner. The one person member of the company may at any time substitute such person with another person by giving notice in the prescribed manner. It is the duty of the member of one person company to inform the company of the change of the other person nominated by him by indicating in the memorandum or otherwise within such time and in such manner as may be prescribed. The company has then to inform the Registrar of any such change in the prescribed time and manner. Any such change is not to amount to an alteration of the memorandum.

Only one director is compulsory for such a company. [S. 149] The requirement of Section 149(3) that every company has to have at least one director who has stayed in India for a total period of not less than 182 days in previous calendar year would have to be complied with by one person himself or in the alternative he may have to keep another person as a director for such compliance. An individual who is a member is deemed to be the first director of the one person company till such time that subsequent director or directors are appointed in accordance with the provisions of the Act. In the case of one person company, small company and dormant company, the requirement as to meetings is deemed to have been complied with if at least one meeting of Board has been conducted in half a calendar year and the gap between two meetings is not less than 90 days. Provisions of Section 174 as to quorum are also not to apply.

Public company [S. 2(71)]

A public company means a company which is not a private company. The proviso attached to the sub-section says that a company which is a subsidiary of a company, not being a private company, is to be deemed a public company for the purposes of the Act even where such subsidiary company continues to be a private company in its articles.

Small company [S. 2(85)]

It means a company, other than a public company, (i) whose paid-up capital does not exceed Rs 50 lakhs or such higher amount, as may be prescribed, which is not to be more than, Rs 5 crores; or (ii) whose turnover as per its last profit and loss account does not exceed Rs 2 crores or such higher amount as may be prescribed which is not to be more than Rs 20 crores. The proviso to the sub-section says that it is not to apply to a holding company or a subsidiary company, a company registered under Section 8 (charitable companies), and a company or a body corporate governed by any special Act.

Foreign companies

A foreign company means a company incorporated outside India. But for the purpose of Section 379, it means a company, which, though incorporated

outside India, has a place of business in India, whether by itself or through an agent, physically or through electronic mode, and conducts any business activity in India in any other manner. [S. 2(42)] The meaning of the expression "place of business" has been judicially construed. The court considered the extent of business which has to be carried on to make "a place of business" for the purpose, in that case, to establish a sufficient presence within the jurisdiction for service of process.¹⁷ A Canadian railway company's four directors were in England who formed a London Committee for the purpose of raising loans for the construction of the railway in Canada. They were using the office of another company without rent and transacted no other business than that of raising loans. The Court of Appeal held that the defendants were carrying on their business in the office used by the London Committee and could therefore be properly served with a writ. In the pictorial words of BUCKLEY LJ:¹⁸

We have only to see whether the corporation is 'here': if it is, it can be served. The best test is to ascertain whether the business is carried on here and at a defined place. In the present case the company has a paramount, and also a subsidiary object: its paramount object is to make and run a railway in Canada, to do which a great many things must first happen: it has a subsidiary object, namely, the raising of money to carry out its paramount object. The raising of this loan capital is part of the company's business, and it is done here by a London Committee constituted of the directors resident in England.¹⁹

Similarly, where an overseas bank hired premises in England, had some staff there for the purpose of conducting external trade and financial relations, that was held to be a place of business, though no actual banking transaction was taken up there.²⁰ A company established no office in England, but enlisted 5000 residents in the UK as members of its Titan Business Club so as to enable them to earn by chain system. This was held to be sufficient to give jurisdiction to the English courts to entertain a petition for winding up a foreign company. The company's employees were restrained from remitting any funds to Germany.²¹ But where a foreign company posted a representative in India only for the purpose of eliciting orders from the company's customers, that was held to be not establishing a place of business in India. The court said that there should be a fixed and definite place where the business-like operations are carried on for a reasonably long period of time.²²

17. *A/S Dampfschiff "Hercules" v Grand Trunk Pacific Railway Co.* (1912) 1 KB 222.

18. *Ibid.* 223.

19. *South India Shipping Corp Ltd v Export Import Bank of Korea.* (1985) 1 WLR 585 (Ch D).

20. *Sennar Hansetische Versorgungsgesellschaft MHW L m.* (1992) 1 WLR 515; (1993) 2 BCLC 562.

The money could thus be captured for the purpose of paying back the contributors. *One Life Ltd v Sog.* (1996) 2 BCLC 606 (Ch D). *Defim International (S/I) Ltd. m.* (2000) 1 BCLC 71 (Ch D), asbestos found to be lottery, winding up ordered.

21. *H Johnson v Astrofiel Armadale.* (1989) 3 Comp LJ 5, 10 (Ker).

What has to be shown in every case is that the business which was carried on at the relevant location was the business of the company itself.²²

If a winding up order is passed, the court would get jurisdiction to restrain any act which would not be lawful. The court restrained recovery under a foreign decree from the company's business in England on a finding that the decree holder was not entitled to the sum awarded to him by a US court.²³ Where the principal liquidation of the company was in Australia but ancillary liquidation was to be in England and Wales, and the Australian law departed from the general *pari passu* principle, it was held that the *pari passu* principle being a mandatory provision, the English court had no jurisdiction in order transfer of assets to Australia, unless it could be assured that the distribution in Australia would be subject to the English *pari passu* principle.²⁴

Documents to be filed. A foreign company has to furnish to the Registrar the following documents²⁵ within 30 days [S. 380]

- (a) a certified copy of the charter, statutes or memorandum and articles or any instrument containing the constitution of the company. If the instrument is not in English language, a certified translation of it will have to be filed;
- (b) the full address of the registered or principal office of the company abroad;
- (c) a list of the directors and secretary of the company containing prescribed particulars. In the case of an individual director, his name in full, his usual residential address, his nationality of origin, his business, occupation and particulars of other directorships held by him should be given. If a body corporate is a director, its corporate name and registered or principal office; and the full name, address, nationality of origin, if different from the nationality, of each of its directors must be specified. If the secretary is an individual, his present name and his usual residential address should be indicated and in the case of a body corporate, its corporate name and registered or principal office;
- (d) the name and address or the names and addresses of one or more persons resident in India, authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company. Any document, etc, served on such a person shall be deemed to have been served on the company. Where-

22. *Mitchell plc v Williams Blair & Co LLC*, (2003) 2 BCLC 195 (Ch D).

23. *Mitchell v Carter*, (1997) 1 BCLC 673 (Ch D and CA).

24. *H/HI Casualty & General Insurance Ltd re. McMahon v McGinn*, (2005) 2 All ER 691 (Ch D).

25. A foreign company cannot be sued in India for a cause of action which has arisen wholly outside India even if it has a place of business in India. So held by the Bombay High Court in *Purpi Singh v Bank of America*, (1978) 46 Comp Cas 532 (Bom). Residence in India is not established by merely posting a representative hired for seeking orders. *P Johnson v Astrofile Associates*, (1989) 5 Comp L 5, 10 (Ker).

- no such person is designated the service may be left at the company's principal place of business;²⁶
- the full address of the office of the company in India which is to be deemed its principal place of business in India;²⁷
 - particulars of opening and closing of a place of business in India on earlier one or more occasions;
 - declaration that none of the directors of the company or authorised representatives in India has ever been convicted or debarred from formation of companies and management in India or abroad; and
 - any other information as may be prescribed.

When any change occurs in the above particulars the Registrar must be notified accordingly. [S. 380(3)]

Such documents have to be filed with the Registrar of the State where the principal place of business is situate. [S. 380]

If the company establishes any branch or branches of its business in India, no further information need be given, except that with the annual accounts the company should deliver three copies of a list of all its places of business in India and with reference to which the accounts are made out. [S. 381(3)]

Display of name, etc [S. 382].—A foreign company is further bound by the following obligations:

- The company shall conspicuously exhibit on the outside of every office or place of business its name and the country of incorporation in English characters and in the regional language.
- The name and the country of incorporation should also appear in English on all business letters, bill-heads and letter paper and on all notices and other official publications of the company. The statement must also indicate whether the liability of the members is limited.
- If the liability of members is limited, a notice of this fact must be stated in every prospectus, in all business letters, bill-heads, letter paper, notices, advertisements and other official publications in legible English characters; and to be conspicuously exhibited on the outside of every office, or place where it carries on business in India, in legible English characters and also in legible characters of the language or one of the languages in general use in the locality in which the office or place is situate.

A failure to comply with the above provisions does not affect the validity of any contract made by a foreign company, but "the company shall not

26. Service of notices of a writ on persons whose names were recorded in the Registrar's files was held to be sufficient though the company had closed its foreign branch and the employees had left for India. See, *Rome v. English National Bank*, (No. 2), (1989) 1 WLR 1211 (CA).

27. Where the writ to be served on the company was not addressed to the person named for service of the company, service was held to be ineffective in accordance with the legal requirements. But because the writ was posted to the right address and it was also served, the court, in its discretion, held the service to be good. *Brown & Hilton International Co*, (1992) 1 WLR 1065 (CA).

be entitled to bring any suit, claim any set-off, make any counter-claim or institute any legal proceeding in respect of any such contract until it has complied with all the provisions of the Act relating to foreign companies".²⁸ [S. 393]

Accounts of foreign company [S. 381].—The obligations of a foreign company in respect of accounts are almost the same as those of a company registered under the Indian Act.

Every foreign company has to, in every calendar year,

(a) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having annexed or attached thereto such documents as may be prescribed; and (b) deliver a copy of those documents to the Registrar.

The proviso says that the Central Government may, by notification, direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) shall not apply, or shall apply subject to such exceptions and modifications as may be specified in that notification. [S. 381(1)] If any such document is not in the English language, a certified translation in the English language has to be annexed. [S. 381(2)] Every foreign company shall send to the Registrar along with the documents required to be delivered to him under sub-section (1), a copy of a list in the prescribed form of all places of business established by the company in India as at the date with reference to which the balance sheet is made out. [S. 381(3)]

Service on foreign company [S. 383].—Any process, notice, or other document required to be served on a foreign company is deemed to be sufficiently served, if addressed to any person whose name and address have been delivered to the Registrar under Section 380 and left at, or sent by post to, the address which has been so delivered to the Registrar or by electronic mode.²⁹

Prospectus of foreign company [Ss. 387-391].—A foreign company may, even if it has no place of business in India, issue a prospectus offering shares or debentures for subscription. The prospectus shall have to comply with the provisions of the Act relating to prospectus. It has to be registered with the Registrar before it is issued. The liability for misstatements is also the same as in the case of a prospectus issued by an Indian company. In addition, however, to the general requirements of the Act, the prospectus of

28. If the Indian branch of a foreign company changes its objects, the court in whose jurisdiction its place of business is located will have jurisdiction to try shareholders' objections. *J.R. Paymaster v. British Burma Petroleum Co. Ltd.* [(1976) 46 Comp Cas 387 (Bom)].

29. *Kong v. Punjab National Bank* (No. 2), (1989) 1 W.L.R. 1221 (CA); service of notice or a writ on persons whose names were registered in the Registrar's file was held to be sufficient though the company had closed its foreign branch and employees had left for India. *Baccock v. Hellen International Co.* (1990) 1 W.L.R. 1066 (CA), where the writ to be served on the company was not addressed to the person named for service on the company, the service was held to be not effected in accordance with legal requirements. But because the writ was posted in the right address and was also served, the service was held to be good.

a foreign company has to contain particulars with respect to the following matters: [S. 387]

- (a) the instrument containing or defining the constitution of the company;
- (b) the provision of law under which the company was incorporated;
- (c) an address in India where the above instrument and the provisions of law may be inspected. If they are not in the English language, a certified English copy should be made available;
- (d) the date and the country of incorporation;
- (e) whether the company has established a place of business in India and, if so, the address of its principal office in India.²⁷

The prospectus has to state matters specified in Section 26.

The first three requirements are not to apply where the prospectus has been issued more than two years after the date at which the company became entitled to commence business. The provisions of Section 388 as to expert's consent and allotment are not to apply where the form of application has been issued for bona fide invitation to a person to enter into an underwriting agreement with respect to securities.

Expert's consent and allotment [S. 388].—Where the prospectus includes a statement made by an expert, his written consent must be annexed and it should not have been withdrawn up to the time of delivery of a copy to the Registrar. Where this is not so, all the persons concerned are to become bound by all the provisions of Sections 33 and 40 so far as applicable. The statement of an expert is deemed to have been included if it is contained in any report or memorandum appearing on the face of the prospectus or incorporated by reference issued with it.

Registration of prospectus [S. 389].—A copy of the prospectus has to be registered with the Registrar. This has to be done before its circulation or distribution. The copy to be filed has to be certified by the Chairman of the company and two other directors showing resolution of the managing body approving it. The copy has to include the expert's consent, if any, and such other documents as may be prescribed.

Offer of Indian Depository Receipts [S. 390].—“Indian Depository Receipt” means any instrument in the form of a depository receipt created

26. For income tax purposes, it has been held by the Calcutta High Court in *Hungerford Investment Trust Ltd v ITO*, (1976) 102 ITR 314; (1977) 47 Comp Cas 181, that a director functioning in India may be regarded as a principal officer. For purposes of liability in the host State as to when a foreign company is to be regarded as an instrumentality of the foreign State so as to require Government permission under S. 86, Civil Procedure Code before instituting proceedings, the court said that the Government should examine the question objectively and permit proceedings in civil matters of contractual or tortious nature. *W.H. Dresdner Sekuridien Rustock v New Central Jute Mills Co Ltd*, (1994) 1 S.L.C. 282; (1994) 1 Comp L. 138. All the activities of a Government company are not to be held as those of an instrumentality of the State. *Pimplana Mahanandhi Cotton Mill Employees v State of WB*, (1993) 2 Cal L.J. 276.



CASE PLOT

by a domestic depository in India and authorised by a company incorporated outside India making an issue of such depository receipts. [S. 2(48)]

The Central Government has been authorised by the section to make rules applicable for

- (a) the offer of Indian Depository Receipts;
- (b) the requirement of disclosures in prospectus or letter of offer issued in connection with Indian Depository Receipts;
- (c) the manner in which the Indian Depository Receipts shall be dealt with in a depository mode and by custodian and underwriters;
- (d) the manner of sale, transfer or transmission of Indian Depository Receipts,

by a company incorporated or to be incorporated outside India, whether the company has or has not established, or will or will not establish, any place of business in India.

Application of Sections 34 to 36 [S. 391].—The provision of Sections 34 to 36 are to apply to the issue of a prospectus by a foreign company as they apply to a company in India and also to the issue of Indian Depository Receipts by a foreign company.

The provisions relating to winding up as they are contained in Chapter XX are to apply mutatis mutandis to closure of the place of business of a foreign company in India as if it were a company incorporated in India.

Punishment for contravention [S. 392].—Any contravention is punishable with fine of not less than Rs 1,00,000, extending up to Rs 3,00,000. In the case of a continuing default, an additional fine extending up to Rs 50,000 for every day after the first default. Every officer of the company who is in default is punishable with imprisonment for a term extending up to six months or with fine of not less than Rs 25,000 but extending up to Rs 5,00,000 or with both.

Government companies

A Government company is thus defined in Section 2(45):

"For the purposes of this Act, Government company means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is the subsidiary of a company as thus defined."³¹

31. A Government company is not an extension of the State. It is as much bound by the law structure as any other company. See, *Bharat Aluminium Co Ltd v Special Area Development Authority*, (1981) 51 Comp Cas 364 (MP). *KM Thomas v Cochin Refineries Ltd*, (1985) 58 Comp Cas 48 (Ker). But a Government company is growingly being regarded as an instrumental of the State and as such amenable to civil jurisdiction even in the matter of its commercial bargains because it has to act fairly in trade matters also. See, *Mahabir Auto Stores v Indian Oil Corp*, (1990) 3 SCC 752; (1990) 69 Comp Cas 746, where the IOC



Takeover of the management of a company by the Central Government under the provisions of the Industries (Development and Regulation) Act, 1951 does not have the effect of converting the company into a Government company.³²

Following are the special provisions of the Act relating to Government companies: [Ss. 394–395]

"The auditor of a Government company shall be appointed or re-appointed by the Comptroller and Auditor General of India",³³ who will also have the power to direct the manner in which the accounts of the company shall be audited and give the auditor instructions in regard to any matter relating to the performance of his functions. The Comptroller and Auditor General is also given the power to conduct a supplementary or test audit of the company's accounts by such person or persons as he may authorise in this behalf, and to require information for the purpose of such audit. The auditor is required to submit a copy of his audit report to the Comptroller and Auditor General of India who shall have the right to comment upon or supplement the audit report. Any such comments or supplements shall be placed before the annual general meeting of the company along with the audit report. Where the Central Government is a member of a Government company, it is the duty of the Central Government to prepare an annual report on the working and affairs of the company. The report must be ready within three months of the company's annual general meeting before which the audit report is placed.

The report is to be laid before both Houses of Parliament together with a copy of the audit report and the comments, if any, of the Comptroller and Auditor General of India. Where, in addition to the Central Government, a State Government is also a member of the company, the State Government shall lay the same report before the State Legislature. But where the Central Government is not a member, every State Government which is a member

was prevented by means of a writ from controlling within project procedure an 18-year-old distributing agency. Shareholding to the extent of 50 per cent only would not make a Government company. The Government otherwise also had no control over the functioning of the company. Work against termination of employee's services not allowed. *T.M. Draviss v. Periyar Lubes (P) Ltd.*, (1994) 8 J Comp Cas 560 (Ker). *HALCO Employers' Union v. Union of India*, (2002) 2 SCC 393 (2002) 108 Comp Cas 193; no interference in the policy of disinvestment unless some illegality or malafides shown. Employees also cannot complain. In a subsequent ruling in the context of Hindustan Petroleum, the Supreme Court revised its approach to such cases and emphasised that Parliament must be taken into confidence. *Auer Alcohol Ltd v. SICOM Ltd.* (2006) 1 SCC 199; (2005) 126 Comp Cas 778, a fully owned State financial corporation was directed to take over a borrower company. The order was held to be valid though Government was thereby reduced to less than 50 per cent.

³² *Kadur Singh v. Union of India*, (1997) 99 Comp Cas 586 (Del); *Phoenix Metal Refineries Service Ltd v. Estate Officer*, (1996) 2 CHN 440 (Cal); a Government company (in this case ITDC) is within the category of Government for eviction under Public Premises (Eviction of Unauthorised Occupants) Act, 1971.

³³ Ss. 139, 143.



CASE FILES

shall have to prepare an annual report within the same time and then, as soon as may be, lay it before the State Legislature.³⁴

The provisions of the section (regarding annual report on Government Companies) are also to apply to a Government company in liquidation.

In the absence of any such exemption, the whole Act applies to Government companies.³⁵ The position is explained by the Calcutta High Court in its decision in *River Steam Navigation Co Ltd, re.*³⁶ The River Steam Navigation Co was incorporated in England and was carrying on river transport between Calcutta and Assam. Its business suffered a severe setback in the Indo-Pak conflict. The Government considered the service to be of strategic importance and, therefore, backed the company with financial assistance. The company also borrowed from its bankers. But even then it was not able to stand on its own feet. The Government, in order to assure the continuity of the service, acquired a majority of its shares. But even this massive backing was not equal to the debt burden of the company. Schemes of compromise and arrangement were then drawn up which were supported by all the parties concerned except one creditor who had applied for a winding up order. The company applied for the court's sanction to the schemes. P.B. Mehta [J] had to deal with a number of technical objections. When a majority of the shares of a foreign company are acquired by the Government, does it become a Government company? The learned judge found that the company, as it stood, satisfied the definitions both of a Government company, under Section 617 [1956 Act] and of a foreign company under Section 991 [1956 Act], so that it was, at the same time, a Government as well as a foreign company. Since this ruling would have created many absurdities, the court held that the company must be considered as a Government company.³⁷

The second technical objection related to the jurisdiction of the Calcutta High Court. The company was not registered in India. It had no registered office in India. It should, therefore, have no right to apply under Section 391 [now S. 230]. The court overruled this objection by holding that such a company falls within the definition of "unregistered company" under Section 582(1) [now S. 375], and Section 583(2) [now S. 375] provides that for the purpose of jurisdiction the company shall be deemed to be registered in the State where its principal place of business is situate. Explaining the same the learned judge said:

34. For an account of the restrictions on the functioning of a Government company, see, *Sunil Kumar Debnath v Mining & Allied Machinery Corp Ltd*, (1956) 58 Comp Cas 672 (1956) 1 Comp LJ 214 (Cal).

35. Thus, a Government company was held bound by the provisions of its articles according to which the President had the power to give a binding advice to the company. *CD Zelen v Union of India*, 1995 Supp (2) SCC 512; (1995) 94 Comp Cas 40. The court did not interfere in a business decision of the managing director in selecting a collateral arm because the presumption of good faith was borne out by the facts. See, (1967) 2 Comp L 106 (Cal).

36. The court pierced the veil of incorporation, for this purpose and finding that majority shares were in the hands of the State regarded the company as a Government company. See, (1967) 2 Comp LJ 106, 119.

"If a Government company is incorporated and registered outside India, such a Government company comes within the definition of an 'unregistered company' under Section 582(b) [now S. 375] and all the provisions of Part X consisting of Sections 582 to 590 [1956 Act] shall apply mutatis mutandis to such a Government company which do not militate against any special provisions for Government companies in Sections 617, 618, 619, 619-A and 620 of the Companies Act, 1956. [now Ss. 394-395]"

The next argument was that a Government company should not be permitted to float a scheme of compromise under Section 391 [now S. 230] and this for two reasons, firstly, that such schemes originated as an alternative to winding up and a Government company cannot be wound up by the court and secondly, the Government can at any time set at naught the jurisdiction of the court by a notification that Government companies are exempt from the operation of Section 391. [now S. 230] The court could not obviously approve of these objections. At the date of the scheme the Government had not issued any such notification and *minus* such exemptions the whole of the Companies Act is applicable to Government companies.

Referring to the argument that a Government company cannot be wound up, the learned judge said:

"When the Government engages in trading ventures and particularly as Government companies under the Company Law, it does not do so as a political State but it does so, in garb and essence, as a company. The Government company, therefore, is a class of company and is not to be placed on the same pedestal as a State or Government...."

A Government company may have to tide over certain difficulties as a trading institution under the Company Law or it may be required to be wound up for distribution of its assets in certain contingencies. There is, therefore, no justification for holding that a Government company because it is a Government company cannot work under a scheme in an appropriate context. To wind up a Government company or to work a Government company under a scheme is not to wind up the Government but a Government institution trading under the Company Law."

Continuing further, the learned judge added, that

"...to subscribe to the view that a Government company cannot be wound up or work under a scheme would mean that it is a kind of a perpetual company and once established can neither be extinguished nor work under an arrangement with its members and creditors."

Once the technical considerations were overcome, the only thing that the court had to consider was the fairness of the scheme and as to this it had no doubt:

"Balancing all the interests and considerations involved this is the picture which emerges. A large majority of the creditors, secured and unsecured, and the members want the scheme to be accepted. Public and

national interest, as well as the interest of the labour and staff demand that a scheme should be evolved to work out the equities between different groups. Except the solitary unsecured creditor, I.S. Desai & Co., every interest represented before me considers that liquidation on such facts will be highly detrimental and prejudicial to all concerned."

The Amendment Act, 1974 has enlarged the concept of "Government company" for the purposes of audit. Section 619-B was inserted for this purpose. [This has not been retained by 2013 Act] This section says that the provisions of Section 619 [now Ss. 139, 143] (which deals with audit of Government companies) shall apply to a company in which at least 51 per cent of the paid-up share capital is held by the following or any combination thereof:

1. the Central Government and one or more Government companies;
2. any State Government or Governments and one or more Government companies;
3. the Central Government, one or more State Governments and one or more Government companies;
4. the Central Government and one or more corporations owned or controlled by the Central Government;
5. the Central Government, one or more State Governments and one or more corporations owned or controlled by the Central Government;
6. one or more corporations owned or controlled by the Central Government or any State Government;⁴⁶
7. more than one Government company.

Downsizing employees.—The directors of a Government company decided to reduce the number of employees and applied the principle of "last come, first go". This was held to be not a violation of Article 14 or 16 of the Constitution.⁴⁷

Removal of the managing director in accordance with articles was held to be not questionable under writ jurisdiction. It belonged to the realm of contract.⁴⁸

Where it was not shown that the Government company was an instrumentality of the State, a writ petition for enforcement of labour rights was not allowed.⁴⁹ Such petition was allowed where the Government was

46. Corporations of this kind are included within the meaning of the expression "public financial institutions" of which the first list was given in S. 4-A of the 1956 Act but many more were added to the list by exercising the power conferred under the section. The disinvestment policy of a Government company cannot be questioned by employees even if it would have the effect of converting the company into a private sector company. The employees would remain the employees of the same company as before. *Southern Structural Staff Union v Southern Structural Engt. Ltd.* (1994) 61 Comp Cas 389 (Mad).

47. Irrigation Development Employees Assn v Govt of A.P. (2004) 55 SCL 491 (2005) 66 CLA 115 (AP).

48. *RM Verma v State of JH* (2005) 54 SCL 52 (2006) 129 Comp Cas 860 (All); *AS Gill v State of Punjab* (2006) 132 Comp Cas 299 (P&J).

49. *KV Thyssenkrupp v Mahindra Industrial and Technical Consultancy Organisation Ltd.* (2005) 129 Comp Cas 520 (Bom).

holding 61.8 per cent shares and rest were also with Government instrumentalities like LIC, UTI, GIC and nationalised banks. It seemed that the company was under a deep and pervasive control of the Government.⁴²

Holding company and subsidiary [S. 2(46) and (87)]

Section 2(46) provides that a holding company in relation to one or more other companies means a company of which such companies are subsidiary companies.

Where one company has control over another, it is called the holding company and the controlled company is the subsidiary. One company is said to have control over another within the meaning of Section 2(87) in the following cases: *Firstly*, where one company controls the composition of the Board of directors of the other. A company is said to control the composition of another company's Board if it has power of its own to appoint or to remove the majority of the directors and it is said to have this power when a person cannot be appointed to a directorship without its support, or if a person's appointment to directorship automatically follows upon his appointment as a director or a manager in the holding company, or if the directorship is held by an individual nominated by the holding company or any of its subsidiaries.⁴³ *Secondly*, where one company holds the majority of shares in another company, which it is deemed to have when it controls more than half the total voting power in the company. *Thirdly*, where the holding company's subsidiary has its own subsidiary, it becomes the subsidiary of the first mentioned company. Such class or classes of holding companies as may be prescribed are not to have layers of subsidiaries beyond such numbers as may be prescribed. The word "layer" in relation to a holding company means its subsidiary or subsidiaries.

As an example, the section contains this illustration:

Company "B" is a subsidiary of Company "A", and Company "C" is a subsidiary of Company "B". Company "C" is a subsidiary of Company "A". If Company "D" is a subsidiary of Company "C", Company "D" will be subsidiary of Company "B" and consequently also of Company "A" and so on.

The above conditions will be deemed to have been satisfied, even if the majority of shares are held or the power of appointment to directorship is exercisable by any person as a nominee of the holding company or as a nominee of any of its subsidiaries. But the section provides that in determining whether one company is a subsidiary of another, shares held or power exercisable in the following three cases shall be disregarded:

42. *Balmer Leamie & Co Ltd v Eartha Sarathi Sen Roy*, (2013) 178 Comp Cas 297.

43. *M Velayutham v Registrar of Companies*, (1981) 50 Comp Cas 33 (Ker). the fact that majority of the directors will remain on the Board only up to the next AGM is not material. The relationship of holding and subsidiary is established at least for the time being. See also, *Ornamental Industrial Investment Corp. Ltd v Union of India*, (1981) 51 Comp Cas 487 (Del), on the holding company's power of appointing directors.

- Where the shares are held or the power is exercisable by the company in a fiduciary capacity.
- Where the shares are held or the power is exercisable by any person by virtue of the provisions of any debentures or of a trust deed for securing any issue of such debentures.
- Where the shares are held or the power is exercisable by a lending company by way of security and only for purposes of a transaction entered into in the ordinary course of business.

Accounts of holding company.—Section 129(3) provides that where a company has one or more subsidiaries, it has to prepare a consolidated financial statement of the company and of all the subsidiaries in the same form and manner as that of its own which has also to be laid before the annual general meeting along with the laying of its financial statement. The company has also to attach a separate statement containing salient features of the financial statement of its subsidiary or subsidiaries in such form as may be prescribed. The Central Government may provide for consolidation of accounts of companies in such manner as may be prescribed. The Explanation to sub-section (3) of Section 129 clarifies that the word "subsidiary" is to include any associate company and joint venture. The provisions of Section 129 which are applicable to preparation, adoption and audit of financial statements of a holding company are to apply *mutatis mutandis* to consolidation of financial statements.⁴⁴

In ordinary cases, "majority shareholding" means holding more than half in nominal value of the equity share capital of a company. But where a company has preference shareholders who had, before the commencement of the Act of 1956 and, therefore, still have, "the same voting rights in all respects as the holders of equity shares", it will be necessary, for the purpose of becoming a majority shareholder, to exercise or control more than half of the total voting power of such a company.

Inspection of subsidiary's books of account [S. 128(3), proviso].—Section 128(3)(proviso) says that an inspection in respect of any subsidiary of the company is to be done by the person authorised in this behalf by a resolution of the Board of directors.

Investment in holding company [S. 19].—A subsidiary company is not allowed to acquire membership of its holding company. Consequently, "any allotment or transfer of shares in a company to its subsidiary shall be void". If the holding company is a guarantee or unlimited company, the above restriction will apply to whatever interest the subsidiary company has in it, whether it is in the form of shares or not. The prohibition also extends up to the nominees of the subsidiary company.

The prohibition does not apply to the case of a subsidiary company which already had shares in its holding company at the commencement of the Act

44. *KCP Ltd v KCP Employees Assn*, AIR 1969 Mad 370; 1B F.I.R. 52; 1969 1 ab IC 1310, a holding company and its subsidiaries may be regarded as one group for bonus purposes.

or before becoming a subsidiary of the holding company. The section also does not apply to the following cases:

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

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

A subsidiary can buy shares in its holding company where it is a part of a scheme of amalgamation sanctioned by the court⁴⁵ [now Tribunal].

Associate company [S. 2(6)]

An associate company, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company. The *Explanation* to the sub-section says that for its purposes significant influence means control of at least 20 per cent of the total share capital, or of business decisions under an agreement.

Prohibition of association or partnership exceeding certain number [S. 464]

When registration compulsory.—An important aim of the Companies Act is to eliminate the evils caused by large partnerships trading in unincorporated form. A business association consisting of a large number of members, unless incorporated as a company, leads to inevitable confusion and uncertainty concerning the rights and liabilities of members *inter se* and their relations with others. It is, therefore, necessary to provide that every business association having a certain number of members must be registered as a company, failing which it shall be regarded as an illegal association. Accordingly, Section 464 declares that no association or partnership consisting of more than the prescribed number which is not to exceed one hundred⁴⁶ shall be formed for the purpose of carrying on any business that has for its objects the acquisition of gain for itself or for its members, unless it is registered as a company under the Companies Act or is formed

45. *Himachal Telematics Ltd v Himachal Futurelink Communications Ltd*, (1996) 27 DRJ 476; (1996) 62 LMJ 138; (1996) 86 Comp Cas 325.

46. The word "person" would include a company or a corporate person also, though a company joining an association would count only as one person. The confusion caused by the earlier judicial opinion that the word "person" would include only individuals and not bodies of individuals was lifted by subsequent decisions. *Sewaji Kaprechand v Panaji Devi Ghandi*, AIR 1930 PC 503; 34 CWN 1102; *Shri Mangan Oil Industries (P) Ltd v Aliv Suryanarayanan Chettin*, (1963) 33 Comp Cas 635; (1963) 1 Comp L.J. 159 (Mad).

in pursuance of some other Indian law.⁴⁷ If it is not so registered, it becomes an illegal association. The conditions of illegality under the section are:

1. the membership of the association must be more than the prescribed number not exceeding 100;
2. the association must have been formed for the purpose of carrying on a business;
3. the object of the association must be to acquire profits (gain) for itself or for its members;⁴⁸ and
4. the association must not have been registered as a company under the Companies Act, nor must it have been formed in pursuance of some other Indian law.⁴⁹

Thus, for example, a stock exchange has been held to be not in the purview of the section as it is not formed for the purpose of carrying on any business much less a business which has for its objects the acquisition of gain.⁵⁰

The section, however, does not apply to a joint Hindu family carrying on business.⁵¹ Where a business is carried on by two or more joint Hindu families, in computing the number of members for the purposes of this section, minor members must be excluded.⁵²

Consequences of illegality.—Following are some of the consequences of illegality:

Firstly, every member of such an association shall be personally liable for all liabilities incurred in the business.⁵³ Apart from this unlimited personal liability, members are punishable with a fine which may extend up to one lakh rupees.⁵⁴

Secondly, the members of an illegal company cannot maintain an action in respect of any contract made by it. For example, the price of any goods sold by the association cannot be recovered.⁵⁵

47. This would also include associations recognised by Indian laws. *Uttaranchal Permanent Mutual Benefit Building Society, re.* (1961) 1 Ch 102.

48. The disabilities inflicted by the section are restricted to associations of commercial or business nature. Associations for charity, advancement of religion, education, research, literature or recreation clubs would be outside the scope of the section. *IRC v. Kannan Syndicate Ltd.*, (1920) 1 KB 596, on appeal (1921) 3 KB 258; *Anand v. City of Liverpool*, 1934 Ch 472 (C.J.D); *Tan Wang v. Bi Heim*, AIR 1932 Rang 167; (1933) 3 Comp Cas 112; *Doyal Singh v. Des Raj*, (1948) 1 Comp L.J. 100 (Pun).

49. These essential points have been explained by Moul J in *VV Raja v. S Dalmin*, AIR 1968 Bom. 542, 380; (1968) 1 Comp L.J. 224 (1969) 34 Comp Cas 572.

50. *VV Raja v. S Dalmin*, AIR 1968 Bom. 342, (1968) 1 Comp L.J. 226, (1968) 38 Comp Cas 572.

51. Members of a family carrying on business as partners would be covered by the section. *Syamal Roy v. Madhusudan Roy*, AIR 1958 Cal 381.

52. *Agarwal & Co v. CIT*, [1990] 77 ITR 10.

53. See, *Kumarapandi Chellai v. MSM Chumathambi Chettiar*, (1950) 2 MLJ 453; (1950) 20 Comp Cas 286; AIR 1951 Mad 291.

54. For the purpose of penalty whether the association should be illegal in its inception or whether those also would be covered who subsequently became so, on a crime committed becoming major, see, *Niraj Chandra Shrivastava v. Lalit Mohan Prasad Shrivastava*, I.L.R. (1928) 2 Cal 308; AIR 1939 Cal 187.

55. Not any other property can be recovered. *Jennings v. Hammond*, (1882) LR 9 QBD 225.

Thirdly, it cannot be wound up under the Act even under the provisions relating to winding up of unregistered companies.⁵⁶

Lastly, can there be a suit between members for partition or dissolution or taking of accounts of an illegal company? This question arose before the High Court of Allahabad in *Mewa Ram v Ram Copal*.⁵⁷

The suit was in respect of a partnership concerned with certain ginning factories. There were more than 20 partners and, therefore, the partnership was illegal. The plaintiff, claiming an eighth share in the partnership, brought an action for a declaration that the partnership was invalid and prayed for a refund of his subscription out of the proceeds realised by an auction sale of the factories or for a division of the properties of the factories.

The case was first heard by a Division Bench consisting of SULAIMAN J (afterwards CJ) and MUKHAMBANI J. The learned judges differed. SULAIMAN J was of the opinion that the prayer for a refund of the original subscription could not be granted because the plaintiff had been participating in the profits of the illegal partnership for several years. But he held that the plaintiff was entitled to a partition of the properties.

MUKHAMBANI J, on the other hand, held that the plaintiff was not entitled to any relief, because partition would involve realisation of the assets of the company and payment of its debts, the very things which would be done in a suit for dissolution of partnership or winding up of a company. The case was therefore referred to WALSH J who agreed with MUKHAMBANI J that a decree for partition would be in substance a direction for winding up or a decree for dissolution of accounts. He added that when such a precedent was once established there was nothing to prevent the formation of an unlimited number of such associations consisting of more than permitted number of persons carrying on trade for the purpose of gain, any one of the members of which could come to the court and ask for relief in a suit, in the nature of a winding up, for partition of the assets of the association. The result would be to give such associations under another guise the cloak of legality although the statute has forbidden it.

This opinion was followed in *Kumarakammi Chettiar v MSM Chinnathambi Chettiar*⁵⁸ where the court added that "it is well established that the consequence of the illegality of a partnership is that its members have no remedy against each other for contribution or apportionment in respect of partnership dealings and transactions".

The position was clarified by the Supreme Court in *Badrí Prasad v Nagarmal*.⁵⁹

56. Nor it can be sued, though individual members can be sued for anything received by them on behalf of the association. *Padstow Total Loss and Colission Assurance Assn. v. (1982) 20 Ch D 139; Greenberg v Cooperstein*, (1926) 1 Ch 657. By registration under the Act, the association can rid itself of disabilities. *Thimayya Appadilka, et. al.* (1984) LR 14 OBD 579.

57. II R (1926) 46 All 738.

58. [1951] 2 MLJ 430; [1950] 20 Comp Cas 266 AIR 1951 Mad 291

59. AIR 1959 SC 559; [1959] 29 Comp Cas 224.

The case arose out of a suit for recovering the contribution made to an illegal association⁶⁰ and also for accounts. It was contended that the objects of the association were not illegal and the same being dissolved, recovery should be allowed in the manner of realisation of the assets of a dissolved firm.

The court held that "such a claim is clearly untenable. The only course for the courts to pursue is to say that he is not entitled to any relief as the courts cannot adjudicate in respect of contracts which the law declares to be illegal."⁶¹

The partnership analogy was also rejected. "An unregistered firm is not illegal."⁶²

Individual members will be entitled to recover their subscriptions and to have the assets realised for this purpose. This would not advance illegality. It would rather terminate an illegal gathering and would also prevent grabbing of assets and subscriptions by the member in whose hands they per chance fall.⁶³

60 The association was illegal under S. 4(2), Rewa State Companies Act, 1995, parallel to the present S. 11 [now S. 464].

61 Relying upon *Singh Karpur Singh v. Puranji Dyalchand*, AIR 1920 PC 310; 34 CWN 1107.

62 The subscribers of a gift fund do not fall within the section because they do not constitute an association, *CK Mandir v. GK Meleswar*; AIR 1962 AP 406.

63 *Seth Bafna Present v. Seth Nitaymal*, AIR 1959 SC 559; (1959) 29 Comp Cas 229.

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online™; along with updates, articles, videos, blogs and a host of different resources.



The following cases from this chapter are available through EBC Explorer™:

- *BALCO Employees' Union v. Union of India*, (2002) 2 SCC 333; (2002) TII 8 Comp Cas 193
- *Hunger Ford Investment Trust Ltd v. ITC*, (1976) 102 ITR 314; (1977) 47 Comp Cas 181
- *KM Thomas v. Cochin Refineries Ltd*, (1985) 58 Comp Cas 46 (Ker)
- *Sulzer Oils and Fertilisers v. Bhanderi Cross-fields (P) Ltd*, (1978) 48 Comp Cas 260 (P&H)



CASE FILE

Chapter 19

Compromises, Arrangements and Amalgamations

Compromises and arrangements with members and creditors [S. 230]

A "compromise" presupposes the existence of a dispute, for, "there can be no compromise unless there is some dispute".¹

The dispute may then be resolved by drawing up a scheme of compromise. Even when there is a dispute, but the scheme is such that the members have to give up their rights entirely, it will not be a compromise or arrangement.² Surrender of rights without any compensation or any measure of accommodation on both sides cannot be regarded as a compromise. BOWEN LJ observed in a case:³

"Everybody will agree that a compromise or arrangement which has to be sanctioned by the court must be reasonable, and that no arrangement or compromise can be said to be reasonable in which you can get nothing and give up everything. A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it . . . It would be improper for the court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation. It is not that one person should be a victim, and that the rest of the body should feast upon his rights. Its object is to enable compromises to be made which are for the common benefit of the creditors, or a class of creditors as such."

1. See, *Smith v Valley Gold Ltd*, (1893) 1 Ch 477, 68 LT 602 (CA), where the word "compromise" appearing in a trust deed was given this meaning.

2. *NFU Development Trust Ltd, re*, (1972) 1 WLR 1544 (Ch D).

3. *Athens, New Orleans, Texas and Pacific Junction Railway Co, re*, (1891) 1 Ch 213, 64 LT 127, 7 TLR 171.

There is a significant difference between an arrangement which is confiscatory in nature and an arrangement which contemplates a gift. In the case of a gift, the donor may have no expectation of a return, but this does not mean that the subject-matter of a gift has been confiscated by the donee from the donor. It would be absurd to suggest that a gift has either resulted in, or is a consequence of, any confiscation or forfeiture. The legislature have not mentioned any requirement of a contract for consideration. The expression "give and take" implies a degree of voluntariness in the transactions and no more. Every transfer without consideration or recompense passing to the transferee, as in a gift, cannot automatically be declared confiscatory and therefore unacceptable under the section.⁴

But "arrangement" is a term of wider connotation. A re-arrangement of rights or of liabilities is possible without the existence of any dispute. Thus, where under a scheme each shareholder of a company had to transfer some of his shares to another company and some to its shareholders the court refused to uphold the scheme as there was no dispute which the scheme purported to resolve. But the Court of Appeal held that the word "arrangement" should not be taken to mean the same thing as a compromise.⁵

When a company has a dispute with a member or a class of members or with a creditor or a class of them, a scheme of compromise may be drawn up.

Where there is no dispute but even so there is need for re-adjusting the rights or liabilities of a member or a class of them or of a creditor or a class of them, the company may resort to a scheme of arrangement with them. Section 230 itself provides that "the expression 'arrangement' includes a reorganization of the share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by both those methods". The provisions of Section 230 show that a compromise or arrangement can be proposed between a company and its creditors or between a company and its members. Such a compromise would also cover any scheme of amalgamation or merger of one company with another.⁶

A company can enter into schemes even where no power has been specifically given by the memorandum of association because Chapter 5 of the Companies Act gives power to companies to apply for sanction of arrangement, compromise or amalgamation.⁷



CASE PILOT

4. *Vodafone Essex Mobile Services Ltd. v. (2010) 163 Comp Cas 319 (Dell)*, relying upon *NTU Development Trust Ltd. v. (1972) 1 WLR 1548 (Ch D)*.
5. *Guardian Assurance Co. v. (1977) 1 Ch 431; 316 LT 193 (CA)*. See also, *Mercantile Investors Ltd & General Trust Co v International Corp Mexico*, (1998) 14 Ch 484, 491; 681 TMB (CA).
6. *Miller H Mujulal v Majulal Industries Ltd*, (1997) 1 SCC 579; (1998) 87 Comp Cas 792.
7. *Amico Pesticides Ltd. v. (2001) 113 Comp Cas 463 (Boml. Dist. Trib. No. 174), re (2006) 131 Comp Cas 645 (Del)*, the scheme required alteration of the company's memorandum, the special provisions applicable to alteration need not be followed, sufficient powers in the court for this purpose. *KTM Jewellery Ltd. v. (2011) 163 Comp Cas 452*, slenderer scheme, not necessary that there should be specific power in the memorandum.

Sanction of Tribunal [S. 230]

Classification.—The company, or its liquidator (if it is in winding up), or any member or creditor may make an application to the Tribunal. An application can be made only by a member or creditor of the class which is affected by the compromise or arrangement proposed by the company.⁹ The company has to place different interests in separate classes. Classification of members or creditors in a scheme is necessary only when different members or creditors are affected differently under the scheme.¹⁰ Thus, where in a scheme of arrangement, persons with dissimilar interests were put in a single class the court (now Tribunal) refused to sanction the scheme¹¹ and said:

"It seems plain that we must give a meaning to the term 'class' as it will prevent the section being so worked as to result in confiscation and injustice and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

In a case before the Allahabad High Court, *Premier Motors (P) Ltd v Ashok Tandon*,¹² a scheme of compromise with the company's depositors placed all the depositors in one class, although the deposits of some of them had, and those of others had not, matured. M.H. Beg J found nothing wrong with the classification. He said:

"In the case before me, the interests of all the unsecured creditors irrespective of the time when their debts matured appear to be identical. The company alleges inability to pay any of its unsecured creditors according to contracts of the same kind with identically similar terms . . . The interests of every one of the whole of this class of creditors required a consideration of the question whether a scheme for repayment of all debts is not more advantageous to each one of them than to wind up the company."

8. An application was allowed to be made by two persons (one of whom was a managing director) who agreed to provide funds, the court telling the Official Liquidator of the company to treat them as members for the shares that they had agreed to buy and as creditors in place of those who were going to be paid off with their money. *Warravil Cycle Co (India) Ltd v A.K. Mishra*, U.R (1994) 1 Del 104, (1996) 94 Comp Cas 523. The winding up order was cancelled. *Warravil Cycle Co (India) Ltd v A.K. Mishra*, 1994 Comp Cas 219 (Del). An application by a person who was neither a shareholder nor a member was not allowed. His contention that he was a successor to his deceased mother's shares was also faulty because he had no good papers with him and he never tried to get the shares transmitted to his name. *N.K. Moijapetla v State of Jharkhand*, A.R 1994 Del 301; (1995) 16 CLA 295; (1999) 96 Comp Cas 49. The court also said that a petition under these sections cannot subsequently be converted into one under Ss. 397 and 398. *Rank Minasal Saig. m.*, (2004) 120 Comp Cas 340; I.L.R 2004 (K.A.H.) 106, a foreign company incorporated in India by registration with ROC, Delhi, but with principal place of business in Bangalore, that was deemed to be the place of registered office. The Karnataka High Court had jurisdiction.

9. *Imperial Cement Ltd. v. m.*, (2004) 122 Comp Cas 854; (2004) 2 Comp EJ 105 (All).

10. *Surendra Life Insurance Co v Doshi*, (1892) 2 Q.J. 573; 67 LT 346 (CA). Members whose shares are paid up in advance constitute a different class from those whose shares are not so paid up. See, *United President Assurance Co. re.* (1910) 2 Ch 477; 103 LT 531.

11. (1978) 41 Comp Cas 656 (All).



CASE PILOT

In a winding up, the interests of this whole class would have to be dealt with on the same footing. Hence, their interests are common irrespective of the time when their debts mature for repayment."

All the unsecured creditors do not always constitute a single class. Where fixed deposit holders, lenders of money, holders of bonds and suppliers of material were all herded in a single class without ascertaining what representation of these categories was there at the meeting, it was held that the requirements of the section were not satisfied and that a fresh attempt should be made to reclassify creditors and their consent obtained at separate meetings.¹²

It has been held that a wholly owned subsidiary is also a "class" for the purpose of a scheme of arrangement.¹³ A subsidiary company was a creditor. It could not be included in the class of other unsecured creditors. Its interest in supporting the scheme proposed by its holding company was not the same as that of other creditors.¹⁴ Where a meeting of only the affected class is called, others' meeting must also be held because even otherwise they can ask for a meeting.¹⁵ An unsecured creditor holding a decree has been held to be not a class different from other unsecured creditors. A creditor having only a one time transaction with the company is not a separate class of creditors.¹⁶ Creditors of a public institution, like UTI, holding public monies are not a separate class.¹⁷ A scheme proposed restructuring of debts of specified unsecured creditors. They were either banks or financial institutions. The classification was held to be proper. The other unsecured creditors could not say that they were being marginalized. The company had promised to them a separate scheme for their dues.¹⁸ The applicant has to disclose to the Tribunal on affidavit the following: (i) all material facts relating to the company such as the latest financial position, auditor's report, pendency of any investigation proceedings; (ii) reduction of share capital, if any, included in the scheme; (iii) any scheme of corporate debt restructuring consented to by not less than 75 per cent of the secured creditors in value, including (i) a creditor's responsibility statement; (ii) safeguards for

12. *D/I Saway v Jain Motors Ltd.*, (1994) 29 Comp Cas 27 (Mad); *SII v Alstom Power Boilers Ltd.*, (2009) 116 Comp Cas 1 (Bom); classification of creditors into unsecured and secured creditors, no further classification necessary. *Wajir Finance Ltd v Suman Metals Ltd*, (2002) 105 Comp Cas 549 (Bom); a creditor who was entitled only to rental of the machinery supplied on lease was not allowed to be treated as a separate class of creditors.

13. *Hellenic and General Tresr Ltd*, re, (1999) 1 WLR 123 (Ch D). The Supreme Court held in *Zidkheer J/ Majlisai v Majlisai Industries Ltd*, (1997) 1 SCX 577; (1996) 87 Comp Cas 792, that where the whole number of equity shareholders were allotted a unitary scheme it was not necessary to sub-divide them into classes and call separate meetings.

14. *Hindustan Development Corp Ltd v Shaw Walker & Co Ltd*, 2000 CLC 167; (2000) 38 CLA 97 (Cal); *SII v Engg Majdur Singh*, (2002) 109 Comp Cas 8 (Del), an identifiable group within a class can be regarded as a separate class.

15. *Model Financial Corp Ltd v A/P Mallesh Comp Glassy Bank Ltd*, (2013) 176 Comp Cas 264.

16. *Shivs Industries Ltd*, re, (2006) 131 Comp Cas 535 (Bom); *Pharmaceutical Products of India Ltd*, re, (2006) 131 Comp Cas 767 (Bom).

17. *Pharmaceutical Products of India Ltd*, re, (2006) 131 Comp Cas 747 (Bom).

18. *Ibid.*

protection of secured or unsecured creditors; (ii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test; (iii) where the company proposes to adopt corporate debt restructuring guidelines specified by RBI, a statement to that effect, (iv) a valuation report in respect of shares and property and all assets by a registered valuer.²⁹ [S. 230(2)]

Meetings.—If an application is properly made, the Tribunal may order a meeting of the class of creditors or members to be called, which shall be held and conducted in the manner directed by the Tribunal.³⁰ A single joint application by all companies involved in a scheme for convening of meetings and for sanction has been held to be permissible.³¹ While the company was in winding up, a scheme was propounded by a director of the company. There were objections by the workmen. The court said that Rule 67 of the Companies (Court) Rules, 1959, that summons are to be served ex parte, except where Rule 68 applies, that is, where the company itself did not propound the scheme, a copy of the summons has to be served on the company, or upon the liquidator if the company is in winding up. The court can then issue directions and no party is entitled to be heard.³²

Notice of meeting and disclosures.—A statement of the terms of the compromise or arrangement and its effects has to be sent with every notice calling the meeting. The power of the Tribunal being of judicial nature, it is necessary for its proper exercise that notice should be given to all the interested parties including the shareholders.³³ The statement should explain in particular any material interest of the directors, managing director, or manager of the company and the effect of the compromise on their interests insofar as that effect is different from the effect on like interests of other

29. *Model Financial Corp. Ltd v AP Mahindra Coop Urban Bank Ltd*, (2013) 176 Comp Cas 264, in every case, the Tribunal needs to know at least the general purpose of what is proposed under the scheme.

30. S. 230(1)(a) and (b). Where a scheme could not be approved by the members because there was no quorum at the meeting, the court refused to move further. *Suri and Nayar Ltd. v.* (1983) 54 Comp Cas 869 (Karn). In *Aminuddin V Patel v State of Gujarat*, (1993) 2 CLJ 11142; (1993) 2 Comp L & 1124; (1995) 83 Comp Cas 508, the court refused to stay prosecution of the manager of the company; he was not a director.

31. *Citramb Orchard Products Ltd. re*, (2004) 4 Kon Lj 63 2004 AIR Kapt R 2423; (2004) 120 Comp Cas 1.

32. *Gati Cargo Management Services v SBL Industries Ltd (No. 7)*, (2014) 282 Comp Cas 672.

33. *Hind Auto Industries Ltd v Premier Motors (P) Ltd*, (1969) 39 Comp Cas 137; (1959) 1 Comp L 258; AIR 1970 All 165. *Mirrechkhonk & Ahmedabad Mfg Co. re*, (1970) 40 Comp Cas 819 (Guj). Where the requisite meetings of shareholders and creditors was not called and the latest financial position of the company was not laid before the court, sanction to the proposed amalgamation was refused. *Bharat Synthetic Ltd v Bank of India*, (1995) 62 Comp Cas 437; (1995) 17 CLA 172 (Bom). An accidental omission or non-delivery of notice, just in the case of an ordinary meeting would not have the effect of invalidating the meeting. *Minamun Investments Ltd. v.* (1996) 87 Comp Cas 689; (1995) 1 CEIN 268. It was also held in this case that a person who objects to the scheme would have the right to inspect the company's register of members and also to get copies on payment of fee. The proper procedure of exercising this right would have to be followed.

persons.²⁴ Notice of the meeting has to be given to creditors and members of all classes accompanied by a statement disclosing details of the compromise or arrangement, and a copy of the valuation report explaining the effect of the scheme on creditors, directors, key managerial personnel, promoters, non-promoter members, debenture holders, debenture trustees. Such notice and other documents have also to be placed on the website of the company, if any, and, in the case of a listed company, sent to SEBI and stock exchange where the company is listed for placing on their website and also published in newspapers in such manner as may be prescribed. Where notice of the meeting is advertised, it has to include the time within which copies of the compromise, etc may be made available to concerned persons free of charge from the registered office of the company. [S. 230(3)] The notice has also to inform that voting can be through presence at the meeting or by proxy or by postal ballot, within one month from the date of receipt of notice. Any objection to the compromise or arrangement can be made only by persons holding not less than 10 per cent of the shareholding or having an outstanding debt amounting to not less than 5 per cent of the total outstanding debt as per the latest audited financial statement. [S. 230(4)] Such notice has also to be sent to the Central Government, Income-tax Authorities, RBI, SEBI, the Registrar, the respecting Stock Exchange, the Official Liquidator, Competition Commission of India, if necessary, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement. They have to be told that representation, if any, should be made within 30 days from the date of receipt of notice. Failing that, it will be presumed that they have no representation to make. [S. 230(5)]

"The extent of disclosure required must depend on the nature of the scheme." Thus, where certain information which was exempt from disclosure in the company's accounts was deliberately withheld, the court held that this was not fatal to the arrangement as the proposed compensation was fair and the disclosure of exempt information would have resulted in damage to all the shareholders.²⁵ But where proper information is not given, the Tribunal will refuse to sanction the scheme even if it has been approved by the requisite majority. Thus:²⁶

A circular sent to debentureholders stated that the scheme has been approved by the trustees, but failed to disclose that the trustees were the company's bankers and therefore interested in the scheme and that the assets had been revalued, but did not give the amount of revaluation, the court refused to sanction the scheme being based on inadequate disclosures.

24. *Chennai iCase Financing Ltd.*, 16 (2003) 115 Comp Cas 136 (Guj). An arrangement with debentureholders, notice need not mention bank recovery proceedings or winding up proceedings. Court's sanction would not have affected others. Duties of debenture trustees depend upon provisions of trust deed, adequacy of majority representation depends upon the provisions of the company's articles and terms of issue.

25. *National Bank Ltd. v. m.* (1966) 1 WLR 629; (1966) 1 All ER 1006 (C.J. U)

26. *Gurman, Long & Co. re.* 1934 Ch 635

If the notice calling the meeting is given by advertisement, the statement should be included in the advertisement or the advertisement should indicate the place at which or the manner in which copies of such a statement may be obtained.²⁷ When a member or creditor entitled to receive a copy applies for it, the company shall be bound to supply him one free of charge.

Every officer of the company is required to give notice to the company of such matters relating to himself as may be necessary for the purposes of the scheme.

Approval by three-fourth.—If the scheme is approved by a majority representing three-fourths in value of the creditors or members, as the case may be, it may then be sanctioned by the Tribunal.²⁸ This requirement has been held to be directory, not mandatory. Where a scheme was not approved by the appropriate majority of creditors at their meeting, but subsequently the creditors to the extent of requisite majority filed individual affidavits before the court, that was held to be a sufficient compliance with the statutory requirements.²⁹

27. *Pharmaceutical Products of India Ltd. v. (2006) 131 Comp Cas 747 (Bom)*, in a scheme with secured creditors, there was no mention of any scheme with unsecured creditors; held, not a failure to disclose material facts.
28. Where a composite scheme was rejected by the secured creditors and approved by the unsecured, it could not be said to have been approved by the creditors so as to meet the sanction. *Auto Steering India (P) Ltd. v. (1977) 47 Comp Cas 237 (Del.)* Where a joint-venture creditor, a public financial institution in this case, refused to approve the scheme and without it the statutory majority was not tested, the court could neither approve the scheme nor conduct an inquiry into the motives of the creditor. *MM Singh v. Singh Paper Ltd. (1961) 1 Comp L] 192 (P&H)*. The court could not accept a scheme when the company was being taken over under the Industries (DsR) Act, 1951. *Gujarat State Textile Corp v. New Jhengir Vakil Mills Co. (1985) 58 Comp Cas 768; (1983) 1 Guj 13. 7115; Mumukshuk v. Ahmedabad Mfg Co. v. (1985) 58 Comp Cas 729 (Guj)*; Power of court to substitute the sponsor. *Bisnisagar Dye Products Ltd. v. (1984) 55 Comp Cas 107 (Guj)*. Perfectly reasonable and fair scheme approved by the court in *Mita Investments (P) Ltd. v. (1990) 1 Comp L] 298 (Del.)*; *Indo-Continental Hotels and Resorts Ltd. v. (1990) 47 Comp Cas 93 (Raj)*; *Indo-Continental Hotels and Resorts Ltd. v. (1991) 44 Comp L] 243 (Raj)*. *Vijayan Engineers Ltd. v. (2002) 36 SCL 669; (2003) 115 Comp Cas 389 (All)*, only 10 per cent of the creditors filed affidavits to approve the scheme, the application of the company for sanction was dismissed. *Motors India Ltd. v. (2001) 103 Comp Cas 389 (Guj)*, the court refused to entertain an application, where the scheme was opposed by a majority of the creditors who sought winding up.
29. *SM Holding & Finance Ltd v. Mysore Machinery Manufacturers Ltd. (1993) 76 Comp Cas 432 (Kant)*. The approval was expedient also for the reason that it had become necessary to pull the company out of its stand stillness in the interest of workers and machinery. Where meetings of creditors and members were not held and the secured creditors of both the companies which were their respective banks objected justifiably that their claims would be prejudiced because liabilities of both companies exceeded their assets, the court refused sanction. *Hindustan Synthetics Ltd v. Bank of India. (1995) 82 Comp Cas 437; (1995) 17 CLA 152 (Bom)*. An approval by overwhelming majority is a symbol of the soundness of the scheme. The court would not interfere. It cannot substitute with its wisdom the collective wisdom of the shareholders. *Ciba Polymers Ltd. v. (1992) 70 Comp Cas 296 (Mad)*. Rejection by a sole secured creditor amounted to rejection by 100 per cent secured creditors, hence no approval. *Kumar Plastic Industries v. Riaz Enterprises (P) Ltd. (1991) 72 Comp Cas 61 (Del)*.



CASE PILOT



CASE PILOT

Tribunal's sanction imparts a binding touch to the scheme. It has to assure itself that the scheme is fair, just and reasonable and is not contrary to law and public interest. There was concurrent finding of fact by the courts below in disclosure of inspection proceedings against the company under Section 2109-A (accounts) [1956 Act], that the information supplied was sufficient. The Official Liquidator had also done his duty that the affairs of the company were not conducted in a manner prejudicial to its members' interest or those of the public at large. The court upheld the decision of the company judge who, after examining all the material facts, had sanctioned the scheme of amalgamation.³¹

A scheme proposed reconstruction of debts. The court said that as soon as the scheme was sanctioned, the original contract between the company and financial institutions would change radically. The contracting parties could not enforce the original contract. To this extent the provisions of the Companies Act and those of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and State Financial Corporation Act, 1951 are in direct conflict and inconsistent with each other. These Acts override the Companies Act. Recovery proceedings under Recovery of Debts Due to Banks and Financial Institutions Act, 1993 are not liable to be stayed under Section 391(6) [now S. 230] of the Companies Act.³²

Jurisdiction

The transferor company was under the jurisdiction of the principal seat of the High Court. The transferee company fell into the jurisdiction of a Bench of the High Court. It was held that separate applications must be filed at both the jurisdictions.³³

Duties and powers of Tribunal

The matters which the Tribunal has to consider in giving its sanction were thus explained by Astbury J in *Angle Continental Supply Co. re*:³⁴

"First, that the provisions of the statute have been complied with. Secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and, thirdly, that the arrangement is such as a man of business would reasonably approve."

31. *Sesa Industries Ltd v Krishna H Bajaj*, (2011) 3 SCC 218; (2011) 162 Comp Cas 119.

32. *Mahindra Denki Ltd v Siam Ltd*, AIR 2010 SCX 602 (Guj).

33. *Imperial Plyspine Ltd v Krishnan Spg & Wby Mills Ltd*, (2006) 130 Comp Cas 694; (2006) 67 SCL 338 (Raj).

34. (1922) 2 Ch 723, 736; 91 L Ch 723. See also, *Bengal Bank Ltd v Surish Chakravarty*, AIR 1952 Cal 133. The court could interfere only when the scheme was manifestly unfair or is adopted as a device to defraud some shareholders. *Munim Investments Ltd re*, (1996) 47 Comp Cas 689 (1995) 1 ICHN 368. Where the scheme was approved by the relevant parties, objections of persons other than shareholders were ignored. *Mohiba Masud Sejgal v M M Sejgal* (2008) 91 Comp Cas 132; (1997) 65 DLT 991.

Compliance with statutory provisions.—The first condition enables the Tribunal to decline its sanction to a scheme which is ultra vires or is otherwise not in compliance with the Act. Thus, where a scheme involved reduction of capital, the court refused to uphold it and allowed the application to stand over to enable the company to comply with the normal procedure of capital reduction.³⁴ But the Tribunal has the power to grant such sanction in the same proceedings. Section 230(12)(Explanation) clearly provides for removal of doubts that Section 66 is not to apply to reduction of share capital effected in an order under the section. Thus, in *Maneckchand and Ahmedabad Manufacturing Co. Ltd.*,³⁵ the Gujarat High Court accorded a separate sanction for reduction of capital and said:

"Section 230 provides a complete code of putting through a scheme of compromise and arrangement, which may even include reorganisation of share capital subject to the well-recognised exception that if reorganisation includes reduction, the proper procedure for effecting the same may be gone through."

In the opinion of the Calcutta High Court it is not necessary for the validity of a scheme of amalgamation that the company should have an express power of amalgamation in the memorandum. Sections 230 to 236 confer on every company a statutory power for the purpose.³⁶

Where the terms of a scheme provided for sale of the company's properties but they ran counter to the Reserve Bank orders of restraint on alienation and refund of deposits, the court sanctioned the scheme saying that its order could override such regulatory requirements.³⁷

In the case of listed company, consent of the stock exchange has to be obtained before presenting the scheme for sanction. One month before this,

34. Cooper, re. 1962 WN 199; 61 WR 314. See also, *Ousme Steam Navigation Co Ltd, re.* 1939 Ch 41. Minor irregularities are, however, ignored. See, *Parmer's Case* 1 AIC (1969) 669 M. (1970) 41 Comp Cas 819.

35. *Marybong and Kyei Tea Estate Ltd, re.* (1977) 47 Comp Cas 802 (Cal). Formerly by virtue of the provisions against monopolies in the Monopolies and Restrictive Trade Practices Act, 1969 permission of the MRTP Commission had to be taken. The MRTP Act has been repealed. Commission can now examine only this aspect whether the merger would be anti-competitive competition. *Mukundlalal General Kauwpar Union v. Hindustan Lever Ltd.* (1994) 81 Comp Cas 784 (MPDTC). The fact that the affected company's name would have to be changed was considered to be no obstruction because it could be done even afterwards in view of the fact that change of name does not affect the rights and liabilities of the company. *Hindustan Pufur's Ltd, re.* (1996) 3 Comp L 61 (Jui); *Nexgen India Ltd, re.* (1997) 88 Comp Cas 596. (1997) 25 CLA 224 (AP); *CVK Hotels Ltd, re.* (1997) 88 Comp Cas 596 (AP). It is not necessary that the transferee company should be converted into a public company before sanction because its membership was to increase after the transfer. Such formalities could be observed afterwards also. *Wingfield Ayre Services (P) Ltd and Hindustan Antipers P Ltd, re.* (1996) 36 Comp Cas 587 AJN 1446 AP 290; (1996) 2 All LT 309. Where alteration of objects was necessary, the court could sanction it. *Rangkulal Investments Ltd, re.* (1997) 89 Comp Cas 754; (1995) 1 Guj LR 308; *Gujarat Orgasins Ltd, re.* (1997) 89 Comp Cas 754 (Guj). Now the companies have a free hand in alteration of objects by just passing a special resolution. *Hindustan IPJ Ltd, re.* (2005) 128 Comp L 226; ILR 2 EIN KAR 4523, scheme sanctioned though no power in the memorandum or articles.

37. *Malinreshtha Apex Corp Ltd, re.* (2006) 124 Comp Cas 697 (Karn).

the scheme has to be filed before the stock exchange for its consent. Such filing is enough, because its approval is not a mandatory requirement.³⁸

An order of the Tribunal sanctioning a scheme has to provide for all or any of the following matters: (a) where the scheme provides for conversion of preference shares into equity shares, preference shareholders have to be given the option to either obtain arrears of dividend in cash or to accept equity shares equal to the value of dividend payable; (b) protection of any class of creditors; (c) if the compromise or arrangement results in variation of shareholders' rights, it has to be given effect to under Section 48 (this section deals with variation of shareholders' rights); (d) applications under Sick Industrial Companies (Special Provisions) Act, 1985 are to abate; (e) such other matters, including exit offer to dissenting shareholders, if any, as are in Tribunal's opinion necessary to effectively implement the terms of the scheme.

A scheme is not to be sanctioned by the Tribunal unless the company auditor's certificate has been filed which has to be to the effect that accounting treatment as used in the scheme is in conformity with the accounting standards prescribed under Section 139. [S. 230(7)]

Within 30 days the order of the Tribunal has to be filed with the Registrar.

The Tribunal may dispense with a meeting of creditors where the creditors having at least 90 per cent value agree and confirm by way of affidavit to the proposed scheme. [S. 230(9)] A scheme of buy-back of securities is not to be confirmed by the Tribunal unless it is in accordance with the provisions of Section 68. [S. 230(10)] A scheme of compromise or arrangement may include a takeover offer made in the prescribed manner. [S. 230(11)] In the case of a listed company, the scheme of takeover would have to comply with SEBI Takeover Regulations. In the case of unlisted companies, any person aggrieved may make an application to the Tribunal about aggrievement with the takeover bid and the Tribunal may pass appropriate orders. The provisions of Section 66 are not to apply to any reduction of share capital effected in pursuance to the order of the Tribunal under the section. [S. 230(12)]

bona fide exercise of majority power.—The second condition enables the Tribunal to see that the majority power has been exercised in good faith for the benefit of the class as a whole.³⁹ If it appears that "the majority was composed of persons who had not really the interest of that class at stake", the scheme may not be sanctioned.⁴⁰ Thus, majority approval obtained by improper inducements will be ineffective.⁴¹ It is not, however, necessary that the meeting should be attended by a majority of the total number of

38. *Companie Financière Saurier* (P) Ltd. v. (2005) 125 Comp Cas 289 (AP); *Companie Financière Saurier* (P) Ltd. re, (2006) 125 Comp Cas 289 (AP).

39. All majority powers are subject to this principle. See, *Lansbury MR in Africa v Gold Refs of West Africa Ltd.*, (1913) 1 Ch 696, 671 (CA).

40. *Brownell Jr Alabama, New Orleans, Texas and Pacific Lumber Company* v., (1892) 1 Ch 213, 244, 64 U.S. 120, 7 TLR 71.

41. *British American Nickel Corp v D'Israël*, 1927 AC 369, 126 LT 615 (PC); *Apurim / Parikh v Esso Computers* (I) Ltd, (2006) 129 Comp Cas 121 (Cup), statutory violations, scheme devised

members or creditors. It is enough that the requisite majority is obtained at the meeting.⁴²

Reasonableness of scheme.—The last condition enables the Tribunal to examine the reasonableness of the scheme. The scheme should be fair and equitable. The approval of the scheme by the statutory majority is a strong evidence of its reasonableness. If the scheme is otherwise fair, the Tribunal will not go into its commercial merits.⁴³ But if the scheme is illusory, the court may refuse its sanction, even if it has been approved by the requisite majority. A scheme of this kind was before the Allahabad High Court in *Premier Motors (P) Ltd v Ashok Tandon*.⁴⁴

Two companies had taken deposits from the public on 12 per cent interest. Most of the depositors were women and aged, of lower middle classes who had invested their life-long savings to make provision for their dependants. When the deposits began to mature, the depositors were told that the companies were running at a loss, one of them remaining out of business for two years. A scheme was drawn up which envisaged full payment to depositors at less interest but gave no date by which they would be fully repaid. At a meeting of depositors held under the court's order the scheme was approved by the statutory majority and the company petitioned for the court's sanction.

M.H. Beg J refused to sanction the scheme. The scheme was not only illusory but was also intended to hoodwink the poor depositors. Its aim was to evade contractual obligations as and when they arose. The majority approval was obtained on inadequate information. The learned judge said:

"As our law stands today, the initial duty of satisfying the court, that all relevant materials, including the latest financial position of the company and the latest auditors' reports and accounts of the company concerned have been placed before the court so as to enable it to judge where the interests of creditors lie, rests upon the supporters of the scheme. If the court cannot be satisfied that all relevant materials have been placed before the court, it could not be said that such material could be or was actually placed before the unsecured creditors on whose behalf decisions were taken by proxies . . . The material placed before the court actually implicates that a winding up in each of the two cases is more advantageous to the creditors than the illusory scheme put forward, only to gain time and to prevent further investigation into the why losses have occurred."

set for protecting the company's interests, but to cover up the misdeeds of promoters and directors, sanction refused.

42. *Bessemer Steel Co. re*, (1876) LR 1 Ch D 251.

43. *London Chartered Bank of Australia, m. v. (1999) 3 Ch 540 (9 LT 393). See also, Maxwanji J in *Doremi, Lang & Co. m. v. 1994 Ch 625, 581 v. Alstom Power Systems Ltd*, (2003) 116 Comp Cas 1 (Bom), no interference in commercial wisdom of shareholders and their management. *Sherp Industries Ltd. m. v. (2001) 131 Comp Cas 535 (Bom)*, a creditor holding a decree for principal and interest, could be paid only the principal keeping in mind payment to workers, scheme was held to be fair.*

44. (1971) 41 Comp Cas 656 (All).

Burden of proving unfairness.—Once a scheme has been approved of by a class, the burden of proving that it is unfair is on those who oppose it.⁴⁵ Where a scheme offered an option to the transferor company's shareholders either to accept shares in the transferee company, or in case of dissent, cash and the cash was less by about 24 per cent than the value of the shares offered, the court held that spot cash, though less, may still be fair, but it should not be less to that extent. Anything between 15 and 20 per cent less would have been fair.⁴⁶ A company which was carrying on two separate businesses, namely, tea broking and property dealing, devised a scheme for transferring the property business to a wholly owned subsidiary. The scheme was approved by all the affected quarters, but was opposed by the Company Law Board (CLB) on several grounds including this that the property was being transferred at a very nominal cost and this involved evasion of capital gains tax, stamp duty, etc, and that the scheme was also intended to avoid obtaining the sanction of the Urban Land Ceiling Authority which would have been necessary otherwise. The Calcutta High Court held that the company had the legal right to split its undertaking and nobody can be deprived of his legal rights merely because the exercise of it involves certain incidental consequences.⁴⁷

Disclosure of material facts.—The Act now specifically provides that the Tribunal shall not sanction any scheme unless it is satisfied that the company or the applicant has disclosed to it by affidavit or otherwise, all material facts relating to the company, such as its latest financial position,⁴⁸ the latest auditors' report, the pendency of any investigation proceedings, etc, and the like. Schemes involving cancellation of arrears of accumulated preference dividends,⁴⁹ or requiring debenture holders to accept shares in place of debentures,⁵⁰ or to accept as their debtor a company to which the assets of their company are transferred, have been approved under the section.⁵¹

Interest of creditors.—Even where notice to creditors is not required there is no special cause of concern because the Tribunal can, in the exercise

45. *Holders' Investment Trust Ltd. v. (1971) 1 WLR 585*. Technical viability of the scheme is for the companies' experts to consider. *Meghni Industries Ltd. v. (1998) 17 CLA 269* (1995) 84 Comp Cas 230 (Ker).

46. *Dena Bank Ltd. v. (1970) 46 Comp Cas 541* (Bom). See also, *United Bank of India v. United India Credit and Development Co Ltd. (1977) 47 Comp Cas 689* (Cal).

47. *AW Figgins & Co (I) Ltd. v. (1980) 501 Comp Cas 95* (Ker).

48. *Jaypee Cement Ltd. v. (2004) 122 Comp Cas 874* (2004); 2 Comp LJ 303 (All). The company filed its latest balance sheet and there was no change in the position of the company up to the date of hearing. *Deepak Leasing & Finance Ltd. v. Deepak Chit Fund (P) Ltd. (2005) 3 Comp LJ 51* (All). The court must be satisfied of the financial soundness of the companies involved.

49. *Bulimrau Glenlivit Distillery. v. (1976) 52 LDR 39* (Gau).

50. *Limpur Mining Co. v. (1980) 1 R 44 Ch D 402; 62 LT 493*.

51. *Brown Gasif Property Society. v. (1998) 8 WLN 80*. *Creditors of Bokaro Ltd v. Besftruck Ltd. (1998) 2 Bom LR 5*. A petition for compromise and arrangement was dismissed because the petitioners had not stated the relevant facts correctly and candidly either in the petition or in the affidavits. That alone showed that the scheme was not bona fide. *Gajendra Kumar Shukla and Mehta J/2 v. Ahmedabad Shree Ramkrishna Mills Co Ltd. (1996) 2 CCD 313*, bona fide scheme proposed by workers, referred to be considered by calling meetings.

of its discretionary power, refuse to sanction a scheme unless the interest of creditors is taken care of. The Tribunal may even call a meeting of the creditors for this purpose. In the instant case, however, no such order was considered necessary because it was the creditor company itself which was taking over the debtor company.⁵² The Tribunal does not have the power to prevent a secured creditor from enforcing his security. The Bombay High Court refused to issue an injunction to prevent a mortgagee from bringing the company's factory to sale or to resort to any legal proceeding for that purpose.⁵³

In a proposal for arrangement with secured creditors and specified unsecured creditors, it was held that other unsecured creditors were entitled to appear and present their objections.⁵⁴

No power to stay criminal proceedings.—There is no power in the court [now Tribunal] under these provisions to stay a criminal prosecution against the company and its directors and guarantors.⁵⁵

Advantages of Tribunal's sanction.—The court's sanction is advantageous from several points of view. In the first place the scheme becomes binding upon all the parties to it⁵⁶ including the shareholders, the company and creditors.⁵⁷ The word "creditor" includes all kinds of creditors and also the State to which some sales tax is due. If, for example, the scheme envisages the payment of four annas [25 paise] in the rupee "in full and final settlement" of the claim of every unsecured creditor, the State can also recover only one-fourth of the tax due. It cannot proceed to recover the entire amount due even if the final assessment was completed after the scheme was sanctioned.⁵⁸

52. *Union of India v. Asim Udyog Ltd.* (1978) 44 Comp Cas 359 (Del), and again in *Ausal Properties and Industries Ltd. v. I.R.* (1947) 1 Del 444, (1928) 48 Comp Cas 184 Del; *Sethna Computer Services Ltd. v. I.R.* (No. 2), (2014) 186 Comp Cas 475 (AP). meeting of unsecured creditors not necessary; their objections were not of any weight because there was nothing in the scheme against their interest.

53. *Sukumar Steel & Alloys Ltd. v. I.R.* (1981) 51 Comp Cas 266 (Bom). *LG Electronics System India Ltd. v. I.R.* (2003) 102 DLT 320; (2003) 116 Comp Cas 48. A secured creditor whose entire claim has been paid out, has no right to a notice or representation before the Tribunal to raise any objections.

54. *Pharmaceutical Products of India Ltd. v. I.R.* (2006) 131 Comp Cas 747 (Hon).

55. *Sharp Industries Ltd. v. I.R.* (2006) 131 Comp Cas 747 (Bom).

56. See, *Punjab National Bank Ltd. v. Shri Vikram Cotton Mills*, (1970) 1 SCC 60; (1970) 40 Comp Cas 927; *Delhi Flour Mills Co Ltd. v. Indira Handicraft Industries Ltd.* (1983) 26 Comp Cas 814; ILR 1980 Del 1142. A scheme sanctioned by the court became binding on the landlord of the premises of which the company was the lessee. *Ajit Kumar Rose v. State of A.H.* (1996) 20 CLA 222 (Cal).

57. But a managing director cannot take the benefit of it. Pending decrees against the company would be superseded, but not the one which was against the company and the managing director jointly. *R.K. Muthukrishna Satyanarayana Venkateswaran v. Somayenduram Mills Ltd.* (1973) 86 LW 446; AIR 1973 Mad 463; (1976) 46 Comp Cas 274. The effective date of the scheme is the date of the court's order. *CIT v. Sankalik Rubber Products*, (1968) 53 Comp Cas 174 (Cal); *Flex Industries Ltd. v. I.R.* (1989) 3 Comp LJ 28 (Del); *Mihlu Investments (P) Ltd. v. I.R.* (1990) 1 Comp LJ 295 (Del), schemes with all round approval.

58. *Sekaria Cotton Mills Ltd. v. A.F. Naik*, (1967) 37 Comp Cas 656 (Bom). The court has the power to stay pending civil and criminal proceedings if that be necessary for implementation of

Firstly, this way the majority of a class of members or creditors can bind the minority. Where one of the merging companies was at Bombay and the other in Gujarat and a director of the transferor company at Bombay did not raise any objection when the Bombay High Court granted its approval, he became bound and was precluded from raising any objection while the transferee company sought the approval of the Gujarat High Court.⁵⁹ Secondly, the company is rescued from its financial straits. The trouble and expense of winding up and of forming a new company are saved. Thirdly, the court sanctioning the scheme has the power to supervise its implementation.⁶⁰

An appeal can be preferred against the scheme to the Appellate Tribunal. The order of the court takes effect when a certified copy has been filed with the Registrar.⁶¹ This has to be done within 30 days.

Power of enforcement and supervision [S. 231]

The Tribunal which has sanctioned a scheme of compromise or arrangement has the power to supervise the carrying out of the scheme. The Tribunal may introduce any modifications necessary for the proper working of the scheme.⁶² The Tribunal can pass an order of modification by itself and need not wait for an application.⁶³ The court may order an extraordinary meeting of the shareholders of the company if it is necessary for constituting a new Board of directors for revival of the company. The exercise of this power would not be affected by the exclusive power of the court under Section 186 for calling an extraordinary general meeting. The shareholders did not raise any objections at the meeting. The meeting was held to be valid.⁶⁴ Where some members failed to execute instruments of transfer of

the scheme, *Hirish C. Ravalpur v. Jafferbhai Mehamatbhai Chokshi*, (1989) 65 Comp Cas 163 (Guj).

59. *Mafatlal Industries Ltd.*, *re*, 11995 17 CLA 249; (1995) 84 Comp Cas 250 (Guj). The scheme becomes universally binding from its effective date, namely, date of approval of the parties and not that of the sanction of the court. Where a creditor obtained a decree against the company he could not enforce it in the meantime. *Raghulal Desai v. Bank of Upper India Ltd.*, (1918-19) 46 IA 135; AIR 1919 PC 9; 23 CWN 697, relied on; approved by the Supreme Court in *Marshall Sons & Co (India) Ltd v. EPO*, (1997) 2 SCC 502; (1997) 66 Comp Cas 528.

S. 231.

60. S. 230(8). A copy of the order is also required to be annexed in every copy of the memorandum issued subsequent to the filing of the copy with the Registrar. S. 391(4) Sub s (S) is a penalty proviso. This power includes the fixing of a time-limit up to which proposals would be received. See, *Sidhpur Mills Co Ltd.*, *re*, (1980) 50 Comp Cas 7 (Guj).

61. S. 231(1)(b). See, *Punjab National Bank Ltd v. Stein Vahan Chhajilal Mills*, (1970) 1 SCC 60; (1970) 43 Comp Cas 927; *Mansukhlal v. M.V. Shastri*, (1970) 46 Comp Cas 279 (Guj).

62. *Ram Lal Awad v. Bank of Baroda*, 11 IC (1979) 2 Del 566; (1976) 46 Comp Cas 307; *Venilal v. Globe Motors Ltd.*, (1978) 46 Comp Cas 14 (Del.). The Tribunal cannot be called upon to modify a scheme which was never approved by it. *Narائن Lal Chaud v. Bharat Jali Mills Ltd.*, (1982) 53 Comp Cas 392 (Del).

63. *Sri Sami Vilas Press and Publications (P) Ltd.*, *re*, (1992) 73 Comp Cas 273 (Ker); *K. Meenakshi Amma v. Sreenath Vilas Press and Publications (P) Ltd.*, (1992) 73 Comp Cas 285 (Ker). A person who was not able to show himself to be a continuing member of the company was not allowed to raise any objections qua member. *Vayac Indian Pesticides (P) Ltd.*, *re*, (1994) 35 CLA 346 (Ker).



their shares under the scheme, the court appointed two officers of the transferee company to execute transfers on behalf of the defaulting shareholders.⁶⁵ If the Tribunal finds that the scheme cannot be worked satisfactorily, and the company is unable to pay its debts as per the scheme, it may make an order for compulsory winding up of the company. It will be an order for winding up under Section 273. The Tribunal may do so on its own motion or on the application of any person interested in the company's affairs.⁶⁶

"The effect of a scheme between a company and its creditors is that so long as it is carried out by the company by regular payments in terms of the scheme, a creditor who is bound by it cannot maintain a petition for winding up. But if the company commits a default there is a debt presently due and a petition for winding up can be sustained."⁶⁷ Thus, for example, in *New Kaiser-i-Hind Spg and Wng Co, re*⁶⁸

A and B, two groups of shareholders were contending for the control of a company. They agreed that A should transfer the controlling shares to B at a nominal value and B should provide finance for running the company's mills, and when the company stabilised, to execute a second mortgage in favour of A for debts. The scheme was confirmed at shareholders' and creditors' respective meetings and sanctioned by the court. Subsequently B failed to provide the necessary finance.

It was held that the inability to provide finance in terms of the scheme and the consequent inability of the company to carry on business at a profit makes the scheme unworkable and, therefore, winding up should follow.

Where a scheme for rehabilitation of a company was formulated by the Government and approved by the Supreme Court but the IDBI was raising objections in releasing funds to promoters, the Supreme Court directed the financial institution to implement the scheme and reminded it of its duty to ensure the economic growth of the country.⁶⁹ Sanction may be granted subject to modifications by the court as to phases of payment and insertion of default clauses.⁷⁰

There is no power in the Tribunal to examine validity of transactions such as whether the transfer of shares was in violation of an injunction of

65. *Birla of Baroda Ltd (No 3) v Mahindra Udyog Steel Co Ltd*, (1976) 60 Comp Cas 326; 1970 Comp LR 403.

66. S. 23(2)(i).

67. JK (Bomshay) (P) Ltd v New Kaiser-i-Hind Spg and Wng Co Ltd, AIR 1970 SC 3141, (1970) 40 Comp Cas 689; (1970) 1 Comp LJ 151. See also, *DSW Vendharasam v Gujarat Industries (P) Ltd*, (1977) 47 Comp Cas 352; 1977 Tax LR 2329 (Bom). Where payments were not made in accordance with the terms of the scheme, the court ordered payment of interest for the period of delay. *Mysore Electro Chemical Works Ltd v GK Parmashtry*, (1996) 86 Comp Cas 571 (Kant).

68. (1968) 2 Comp LJ 727; (1969) 38 Comp Cas 701 (Bom).

69. *Asian Paper Mills, Kurnool Union v Union of India*, (1997) 10 SCC 113; (1997) 89 Comp Cas 659.

70. *Sharp Industries Ltd, re*, (2006) 181 Comp Cas 515 (Bom); *USA Health (India) (P) Ltd v Infodrive Systems San Blvd*, (2010) 10 SCC 553; (2010) 159 Comp Cas 369; the Tribunal can examine the causes of the company's failure to pay.

the civil court. That would be in excess of jurisdiction.⁷¹ There is no power of scaling down the guarantor's liabilities.⁷²

Interests of employees and workers—The Tribunal cannot be called upon to sanction a scheme which is unworkable on the face of it.⁷³ Where a scheme demanded of the workers to waive their claim to compensation under the Industrial Disputes Act, and also notice money and gratuity, the proposal being unfair, the court refused an order for calling a meeting of the creditors for consideration of the scheme.⁷⁴ Where full care was taken of the interest of employees under a commitment by the transferee company that it would honour all the promises of the transferor company to its employees, the court said that the workmen's objections were liable to be overruled.⁷⁵ Where a scheme involved heavy sacrifices on the part of all including workers to restart a textile mill, the scheme was approved by all concerned and the court sanctioned it. It was not considered necessary that the sponsor should disclose the sources of his finance.⁷⁶ The Kerala High Court approved a scheme proposed by the workers of the company under which they were to take over the management. The members and creditors of the company had agreed to give them a chance.⁷⁷ While transferee company shall be liable for all the liabilities of transferor company including income tax, status of employees of the company is not a relevant matter for the court to adjudicate on. The powers of the courts in matters of mergers and amalgamation are merely supervisory in nature.⁷⁸

The mere fact that the company has not paid the claim of a former employee is not sufficient to show that the scheme is unworkable.⁷⁹

71. *National Organic Chemical Industries Ltd v Mihir H Majaria*, (2004) 12 SCC 336; (2004) 121 Comp Cas 529.

72. *Pharmaceutical Products of India Ltd*, re, (2006) 131 Comp Cas 247 (Bom).

73. As between the workers who prayed that the company should be handed over to them and a cooperative society which also made a similar prayer, the court preferred the former to cause the cooperative society to act where-withal and experience. *Rajiv Cotton Textiles v Official Liquidator*, (1992) 23 Comp Cas 14 (Kan).

74. *Krishnabunder Mills Co Ltd v Hindustan Lever Ltd*, 1994(1) 81 Comp Cas 754 (Bom); *Hindustan Lever Employees' Union v Hindustan Lever Ltd*, 1995 Supp 10 SCC 499; (1995) 63 Comp Cas 30.

75. *Hathibagh Mfg Co Ltd*, re, (1996) 46 Comp Cas 51 (Kan).

76. *Sir Tiles Works*, re, (1990) 50 Comp Cas 286 (Ker). The employees may refuse to go to the transferee company, but they cannot stand in the way of the scheme being sanctioned. *Bengal Tea Industries v Union of India*, (1988-89) 43 Cal WR 542 and *John IVyeth (India) Ltd*, re, (1998) 63 Comp Cas 233 (Bom). It was also pointed out in the above mentioned first scheme that as the creditors were given the same protection which they had in their debtor company they should not object. *Regd Engineers Food Comms v Raj Kumar Nirmal*, (1993) 1 Cal 11 89; (1995) 16 CLA 405; (1996) 1 CHN 115. members of the Committee of Management constituted by the court do not become court officers. The aim of the court should be to protect workers and not to obstruct development and growth. *Hindustan Lever Employees' Union v Hindustan Lever Ltd*, 1995 Supp 10 SCC 499; (1995) 63 Comp Cas 30; *All India Blue Star Employees' Federation v Blue Star*, 14, (2000) 37 CLA 157; reaffirmed, (2000) 27 SCJ 365 (Kan), the court did not find any prejudice to the rights of workers.

77. *Campton Hotels (P) Ltd*, re, (2017) 200 Comp Cas 16 (Raj).

78. *Chougule v New Kaiser-i-Hind Engg and Wkg Co*, (1968) 2 Comp 1125 (Bom).



CASE PILOT



CASE PILOT

Reconsideration of sanctioned scheme.—The Tribunal has the power to set aside a sanctioned scheme if the court's sanction was obtained by fraud. But no such drastic step was taken because the scheme had been acted on for over 10 years. The beneficiaries of the scheme were given the opportunity to reconsider the applicant's claim.⁶⁰ An English court held that it would not set aside a judgment obtained by fraud if satisfied that the result would have been the same even if the fraud had not been practised. The order in this case was based on wrong facts but even so it turned out to be the right decision in the light of the true facts.⁶¹ The Supreme Court set aside an approved scheme because legal requirements were not complied with. The sanction of the Tribunal is not an empty formality and, therefore, the Tribunal has to observe the proper procedure. In this case the provisions of the Act were not specified under which the scheme was formulated or vacant land of the company was proposed to be sold. Notice to the Central Government was not given, no other publicity was made, latest financial position and chances of revival were not considered.⁶²

Modification of sanctioned scheme—In the exercise of the power of modification of a scheme of arrangement, etc., the court cannot rewrite the scheme or introduce into it clauses that plainly did not exist. The court has to ensure that the basic nature of the arrangement remains the same. Modifications made should be necessary for workability of the scheme. The court did not allow prayer for transfer of "distribution network". The court cannot read into the scheme a binding obligation to ensure transfer and plead to go beyond mere modification of the scheme.⁶³

The matter came before the Division Bench of the High Court which approved decision of the Single Judge. The omission of any mention in the scheme of "distribution network" was not accidental and, therefore, it could not be introduced into the scheme through modification. Rejection of the prayer for winding up of the transferor company was also held to be proper.⁶⁴

Reconstruction, merger and amalgamation [S. 232]

Reconstruction.—"There is 'reconstruction' of a company when that company's business and undertaking are transferred to another company formed for that purpose, so that as regards the new company substantially the same business is carried on and the same persons are interested in it as in the case of the old company."⁶⁵ A reconstruction may become necessary for several purposes. A court (now Tribunal) may not, for example,

60. *Central Bank of India v. Ambala Scrubhut Enterprises Ltd.*, (1999) 3 Comp L 98 (Guj).

61. *Fletcher v. Royal Automobile Club Ltd.*, (2000) 1 BCAC 31 (CA).

62. *State of WB v. Pramod Kumar Sin*, (2003) 9 SCC 450; (2003) 114 Comp Cas 564.

63. *Real Lifestyle Bravkusing (P) Ltd v. Turner Asia Pacific Ventures Inc.*, 2013 SCC OnLine Del 775; (2014) 196 Comp Cas 160 (Del).

64. *Real Lifestyle Bravkusing (P) Ltd v. Turner Asia Pacific Ventures Inc. (No. 2)*, 2013 SCC OnLine Del 1043; (2014) 196 Comp Cas 177 (Del).

65. J.A. Hornby, *An Introduction to Company Law* (1997) 124.



CARE PILOT

sanction a radical change of objects. New objects can then be adopted only by the process of reconstruction.⁸⁶ A reconstruction may also become necessary to cause material alterations of the rights of a class of shareholders or creditors.⁸⁷

Amalgamation.—"Amalgamation occurs when two or more companies are joined to form a third entity or one is absorbed into or blended with another."⁸⁸ The effect is to wipe out the merging companies and to fuse them all into the new one created. The new company comes into existence having all the property, rights and powers and subject to all the duties and obligations, of both the constituent companies. Explaining the object of an amalgamation and the scheme of the statutory provisions, the Madras High Court observed in *WA Beardell & Co (P) Ltd, re*:⁸⁹

"The word 'amalgamation' has not been defined in the Act. The ordinary dictionary meaning of the expression is 'combination'. Judging from the context and from the marginal note of Section 294 which appears in Chapter V relating to arbitration, compromises, arrangements and reconstructions, the primary object of amalgamation of one company with another is to facilitate reconstruction of the amalgamating companies and this is a matter which is entirely left to the body of shareholders, (and) essentially an affair relating to the internal administration of the transferor company. The decision of the body of the shareholders ought not to be lightly interfered with."

86. *North of England Protecting & Indemnity Assn, re*, (1929) 45 TLR 296.

87. See, *Rank of India Ltd v Ahmedabad Jig & Casting Trust Co*, (1972) 12 Comp Cas 211 (Bom). Where the companies are situated in two different jurisdictions, the sanction of both the courts would be necessary to give to the scheme an all round binding efficacy. *Industrial Credit & Investment Corp of India v Financial and Management Services Ltd*, AIR 1996 Bom 205; (1998) 3 Bom CR 471, (1999) 3 Bom LR 677; (1999) 99 Comp Cas 241. The supervisory jurisdiction of the court was also stressed in this case. *Mugdha Dinkar Ltd v Sivaji Ltd*, AIR 2010 NOC 402 (Guj). On reconstruction of debts under a sanctioned scheme, the contract undergoes radical changes, only the altered contract can be enforced, course of recovery under the RBD Act are not interfered with.

88. *Sowmyajile v Hoya Prudhams & Co Ltd*, (1965) 24 Comp L 51. It is necessary that the transferee company should be in existence at the 'appointed day' though not at the time of the preparation of the scheme. *HCL Ltd, re*, (1994) 80 Comp Cas 223 (Del). It is not necessary that both companies should have common objects. *FMP Auto Industries Ltd, re*, (1991) 4 Bom LR 387; (1994) 83 Comp Cas 289. The court can authorise necessary alterations in the memorandum after inviting the CLB to state its objections, if any. *Bangalore Investments Ltd, re*, (1995) 15 CLA 280 (Guj); *Gavat Organics Ltd, re*, (1995) 16 CLA 280 (Guj).

89. (1968) 98 Comp Cas 197, 204 (Mad). See also *Rufaro Jute & Industries Ltd, re*, (1982) 50 Comp Cas 591 (Cal). Here a holding company absorbed its subsidiary and objections under S. 377 [now S. 232] were not sustained. The transferor company which is going to be amalgamated can be a foreign company. *Bunbury Gas Co (P) Ltd v Central Govt*, (1996) 3 Bom CR 312; (1997) 89 Comp Cas 195. The court followed the decision to the same effect in *Khandeshi Jigging Ltd, re*, (1977) 47 Comp Cas 503, 511 (Bom); *Banars Breads Ltd, re*, (2006) 132 Comp Cas 513 (All), in a scheme of amalgamation. The arbitration award directed convening of a meeting for approval of the scheme. Certain applications alleging oppression and mismanagement were pending before CLB. The court said that the petition for cancellation of the scheme could not be kept pending till CLB decisions.

Power of amalgamation.—There should be power in the company's memorandum to amalgamate. If it is not there it should be acquired by altering the memorandum.⁹¹ It is not necessary that the company adopting a scheme should be in financial difficulties or that it should not be an affluent company. The expression "any company liable to be wound up under this Act" does not mean a company which is insolvent, but any company registered under the Act, every such company being subject to the winding up provisions of the Act.⁹²

Forms of reconstruction and amalgamation.—A reconstruction or amalgamation may take any of the following forms:

1. By sale of shares.⁹³
2. By sale of undertaking.
3. By sale and dissolution. (See under winding up)
4. By a scheme of arrangement. (See under S. 230)

Sale of shares is the simplest process of amalgamation or takeover. Shares are sold and registered in the name of the purchasing company. The selling shareholders receive either compensation or shares in the acquiring company. The expression "arrangement" under these provisions would include the transfer of assets by a company without consultation by way of a gift.⁹⁴ If nine-tenths of the holders of a class have approved the terms, shares of the rest can be acquired under Sections 235 and 236.

The second method involves a sale of the whole of the undertaking of the transferor company as a going concern.⁹⁵

Section 232 applies to every scheme which involves transfer of the whole or any part of the undertaking or liability of a company to another company.⁹⁶ Section 230, therefore, applies and an application may be made to the Tribunal by any person entitled to move it under that section. The Tribunal may sanction the scheme and make necessary orders.⁹⁷ [S. 232(3)]

90. *Jari Krishna Lohia v. Hulungunwar Tea Co. Ltd.*, AIR 1949 Cal 312. (1970) 40 Comp Cas 458, 563. A separate petition in CLB for alteration of memorandum is not necessary. The CLB (now Tribunal) can be invited to express its objections in the same petition so that a single winding-up clearance can be provided for all matters. *PMP Asia Industries Ltd. vs.* (1994) 80 Comp Cas 289 (Bom).
91. *Khandeshwar Housing Ltd.*, 12, (1977) 17 Comp Cas 503 (Bom).
92. Allotment of shares on preferential basis to the holding company of the transferee company so as to retain the majority stake was held to be a fair basis of allotment of shares in the transferee company to the members of the transferor company. *Tata Oil Mills Co Ltd v. Hindustani Lever Ltd.*, (1974) 41 Comp Cas 754 (Bom).
93. *Indofirst East Asian Movie Services Ltd. vs.* (2011) 163 Comp Cas 119 (Ker).
94. Amalgamation by outright purchase of the transferor company by the transferee company is recognized by the Accounting Standards of the Institute of Chartered Accountants. A petition is maintainable for the approval of such a scheme. *SPS Pharma Ltd. vs.* (1997) 68 Comp Cas 774 (AP). *Turgoi Pure Drugs Ltd. vs.* (1997) 88 Comp Cas 731 (AP).
95. S. 232(1)(d) and (h). Amalgamation of a company dealing in shares with a transport company, there is no power to prevent it. *Fathul Huda Ltd. vs.* (1997) 24 CLA 37 (Cal).
96. The Tribunal can examine the bona fides of the person making an objection. Very unusually, the Tribunal permitted a transfer of shares which had already been registered in

Where an application has been made to the Tribunal under Section 230 for sanctioning a scheme of compromise or arrangement, it may be shown to the Tribunal that in essence the scheme involves reconstruction of the company or merger or amalgamation of two or more companies. The result would be that the whole or any part of the company's undertaking, property or liability is to be transferred to another company or is proposed to be divided among and transferred to two or more companies. The Tribunal may on the basis of such application, order a meeting of creditors or a class of them or of members or a class of them to be called and held according to the manner that the Tribunal may direct. The provisions of Section 230(3) to (6) are to apply in such meetings *mutatis mutandis*.

The merging companies or companies proposed to be divided have also to circulate the following for consideration of the meeting: (a) a draft of the proposed terms of the scheme drawn up and adopted by the directors of the emerging company; (b) confirmation that a copy of the draft scheme has been filed with the Registrar; (c) a report adopted by the directors of the merging companies explaining the effect of compromise on each class of shareholders, key managerial personnel, promoter and non-promoter shareholders, share exchange ratio laid down in particular and specifying any special valuation difficulties; (d) the report of the expert on valuation; (e) a supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company called for approving the scheme. [S. 231(2)]

If the Tribunal is satisfied that the requirements of the section have been complied with, it may sanction the scheme of compromise or arrangement or by a subsequent order make provision for the following matters: (a) transfer to the transferee company of the whole or any part of the undertaking, property or liability of the transferor company from a date to be fixed by the parties. The Tribunal may, for reasons to be recorded in writing, decide otherwise; (b) allotment or appropriation by the transferee company of any shares, debentures, policies or other like instruments in the company which under the compromise or arrangement are to be allotted or appropriated by that company to any other person; the transferee company is not to hold shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate company. Such shares have to be cancelled or extinguished;⁷⁶ (c) continuation by or against the transferee company of any legal proceedings pending by or against the transferor company on the date of transfer; (d) dissolution without winding up of any transferor company; (e) provision to be made for any persons who dissented from the scheme; (f) where share capital is held by any non-resident

be questioned when it was shown that the shareholder was given that position only for the purpose of using him to raise objections. *Piccadilly Radio plc, re*, 1989 BCLC 659 (Ch Ld). *New Vision Laser Centers (Kuwait) Ltd, re*, (2002) 111 Comp Cas 756 (Kuwait), merger of holding and subsidiary allowed. Powers under S. 391 not subordinate to Ss. 42 and 77.

⁷⁷ *Glyptone Cosmetic Industries Ltd, re*, (2006) 130 Comp Cas 334 (Guyana), transferee company undertaking to redeem all preference shares issued by transferor company as they fell due, scheme sanctioned.

shareholder under foreign direct investment norms or guidelines specified by the Central Government or in accordance with any law, the allotment of shares of the transferee company to such a shareholder has to be in the manner specified in the order; (g) transfer of employees of the transferor company to the transferee company; (h) where the transferor company is a listed company and the transferee is an unlisted company; (i) the transferee company is to remain an unlisted company till it becomes a listed company; (j) if the shareholders of the transferor company decide to opt out of the transferee company, provision has to be made for payment of the value of shares held by them and other benefits in accordance with a predetermined price formula or after a valuation made and arrangements under this provision may be made by the Tribunal; the amount of payment or valuation under this clause for any share is not to be less than what has been specified by SEBI under any of its regulations; (l) where the transferor company is dissolved, the fee, if any paid by the transferor company on its authorised capital is to be set off against any fee payable by the transferee company on its authorised capital subsequent to the amalgamation; (m) such incidental, consequential and supplemental matters as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out.

Any such scheme is not to be sanctioned unless there is a certificate of the company's auditor to the effect that the scheme is in conformity with the accounting standards prescribed under Section 133 [S. 232(3)].

Where an order passed under the section provides for the transfer of any property or liabilities, the effect of the order is that the property is to be transferred to the transferee company and liabilities transferred are to become liabilities of the transferee company. Any property which was subject to a charge may become free from it if the order so provides.

Companies in relation to which orders are passed have to file a certified copy of the order with the Registrar within 30 days of receipt of the certified copy. The scheme under the section has to clearly indicate the date from which it is to become effective and that will be the effective date of the scheme. Every company in relation to which the order is made is under duty, until the scheme is fully implemented, to file a statement with the Registrar in the prescribed form and at prescribed time every year indicating whether the scheme is being implemented in compliance with the orders of the Tribunal. The statement has to be certified by a chartered accountant, or a cost accountant or a company secretary in practice.

Default on the part of the transferor or transferee company in complying with the provisions makes it liable to pay fine of not less than Rs 1,00,000 extending to Rs 25,00,000. Every officer in default is liable to imprisonment for a term extending up to one year or with fine of not less than Rs 1,00,000 but may extend to Rs 3,00,000 or with both.

The Explanation appended to the section is to the following effect: (i) in a scheme involving a merger, transfer to an existing company is a merger by absorption; transfer to a new company, whether public or private, is a merger by formation of a new company; (ii) references to merging companies are in

relation to a merger by absorption, to transferor and transferee companies and in relation to a merger by formation of a new company, to the transferor companies; (ii) a scheme is said to involve a division, where under the scheme the undertaking, property and liabilities of the company are to be divided among and transferred to two or more companies each of which is either an existing company or a new company; (iii) property includes assets, rights and interests of every description and liabilities include debts and obligations of every description.

The order of the Tribunal can provide for matters like violation of Section 19 (subsidiary buying the shares of its holding) or Section 67 (a company buying its own shares) if such processes are involved in the scheme. The Tribunal can also order dissolution without winding up of the transferor company.⁹⁸ Section 232 confers wide powers on the Tribunal to be exercised for such purposes so that there are no obstructions to the implementation of a scheme.⁹⁹ The emerging company was allowed to use the amalgamation reserve for payment of dividends. The Regional Director had made no objection and the scheme was unanimously approved by the shareholders.¹⁰⁰

In an amalgamation of holding and subsidiary companies, the rights of members and creditors of the transferee (holding) company were not affected and there was going to be no new issue of shares by or reorganization of share capital of the transferor company, it was held that the transferee company need not file a separate application.¹⁰¹

Every company in relation to which the order is made has to file within 30 days a copy of the order with the Registrar for registration. [S. 232(5)]

Official reports:—The Gujarat High Court found in a case¹⁰² that the only purpose for which the transferor company was created was to facilitate the transfer of a building to the transferee company without attracting the capital gains tax and the dissolution of the transferor company was sought without winding up. The court refused to sanction the scheme. In another case where a similar report was submitted by the Official Liquidator, the court sanctioned the scheme but issued directions which formed part of the scheme which were that instruments of conveyance with payment of stamp duty must be executed, that unassignable rights would not be available to the assignee company, that the sanction would not excuse payment of overdue taxes and that the directors would not be absolved from their liability

98. S. 292(2)(d); CIT v Enimic Magnesite Corp., (1996) 9 SCJ Lmt. (1999) 96 Comp Cas 792.

99. Himarsh Telecommunications Ltd v Hemachal Futureistic Communications Ltd, (1996) 37 DRJ 476; (1996) 42 DLT 138; (1996) 76 Comp Cas 325. Welles Four Mills Co (P) Ltd. v. (1996) 23 Corp LA 104 (Bom); the court at the registered office of the company would not refuse sanction of amalgamation with a Bombay company when the court at Bombay has granted sanction. SPI v Alstom Power Boilers Ltd, (2000) 136 Comp Cas 1 (Bom); when a sick industrial company came out of sickness and there was a BIFR declaration to that effect, a scheme proposed thereafter did not require sanction of the BIFR.

100. Adishwar Trade Links (P) Ltd. v. (2013) 196 Comp Cas 67 (Guj).

101. Vinayak Housing Finance Ltd. v. (2006) 120 Comp Cas 205 (Kant).

102. Wico Polymer Ltd. v. (1977) 47 Comp Cas 592.

for violations of law, if any.¹⁰³ The Official Liquidator cannot question or object to the share exchange ratio. That is not the function of the official report.¹⁰⁴

The power of the Tribunal is discretionary. It has been expressly authorised to pay full attention to public interest. The expression "public interest", the court said, "takes its colour from the context in which it is used and will depend upon the object which the legislation wants to promote or the mischief which it seeks to suppress."¹⁰⁵ The philosophy behind taxes being to promote public interest, it cannot be said that a scheme which is designed to avoid taxes is not prejudicial to public interest.¹⁰⁶ The report of the Official Liquidator is necessary only when the court has to pass an order of dissolution. Amalgamation does not necessarily involve dissolution of the transferor company.¹⁰⁷ In other cases a report of the Registrar is sufficient.¹⁰⁸

103. *Kudu Plastics (P) Ltd, re*, 1992 MPLJ 671; (1993) 26 Comp Cas 426 (MP).

104. *Nutan Bhushan Ferro Alloys Ltd, re*, (1997) 39 Comp Cas 285 (AI); *Nutan Bhushan Ferro Alloys Ltd, re*, (1997) 39 Comp Cas 295 (AI). It was also held in this case that where in spite of wide publicity, no creditor objected, subsequent objections were not to be entertained. Even otherwise the creditors were getting a financially stronger company as their debtor.

105. The court cited *Sukit v Balaji v Kamleshwar Singh*, AIR 1962 SC 232; 1962 SCR 889, 924; *Bengal Jute Industries v Union of India*, (1988) 89 (3) Cal WR 542; *Himayang Investments Ltd, re*, (1996) 3 Comp LJ 315 (Del), merger of six sister companies carrying on the same business and operating from the same place.

106. Where an amalgamation was in the interest of the company as also of its creditors, the report of the Official Liquidator that the transferor company's tax liability was going to be reduced was ignored. Such matters are not within the function of the Official Liquidator's report. *Shankar Narayan Hotels (P) Ltd v Official Liquidator*, (1992) 34 Comp Cas 290 (Bant). A scheme was not permitted to be revised 12 years after the original order of merger just only because at that time no provision had been made for payment of taxes. *Union of India v Asia Utility (P) Ltd*, (1993) 28 Comp Cas 488 (Del). The transferor company would cease to be a taxpayer only when it ceases to exist. *Marshall Sons & Co (India) Ltd v ITO*, (1991) 3 Comp LJ 317; (1992) 24 Comp Cas 236 (Mad). The company ceases to exist from the date the scheme is sanctioned by the court or such other date as may be specified in the order. *Marshall Sons & Co (India) Ltd v ITA*, (1997) 2 SCC 302; (1997) 89 Comp Cas 528. The Supreme Court held that an income tax notice sent to the company after that date was not legally warranted.

107. *Mathew Philip v Malabar Plantations (India) Ltd*, (1994) 31 Comp Cas 55 (Ker) (EB), not approving on this point. *Official Liquidator v Madura Cn (P) Ltd*, 1976 KLT 542 and citing *Malabar Plantations India Ltd v Hartnax and Chisfield (India) Ltd*, (1985) 2 Comp LJ 439 (Ker), an example of amalgamation without dissolution; *General Radio and Appliances Co Ltd v M A Khader*, (1986) 2 SCC 656; (1986) 2 Comp LJ 249; (1986) 60 Comp Cas 1013 and *Sureshwar Industrial Syndicate Ltd v CIT*, 1990 Supp SCC 637, explaining the effect of amalgamation in general terms. But see, *Keith's Farm Mechanicines (P) Ltd v Official Liquidator*, (1996) 85 Comp Cas 146; AIR 1996 Nag 60, where it was held that an amalgamation being not possible without the dissolution of the transferor company, the report of the Official Liquidator becomes necessary in all cases.

108. *Marylong and Kyri Tax Estate Ltd, re*, (1977) 47 Comp Cas 802 (Cal). There is no requirement that income tax officer should be notified. In this case there was not even a suggestion that the scheme was intended for tax evasion. *Anand Crown and Son (P) Ltd, re*, (1996) 67 Comp Cas 266 (AP). The loss of company's paid-up capital and accumulation of liabilities four times to the remaining capital does not prevent amalgamation of such a company with a sound and healthy company. Public interest was also not compromised because the company took over all obligations. *Shree Sri Bala Castings (P) Ltd, re*, (1997) 27 CLA 72 (Bom).

Where the latest auditors' report is necessary for working out the exchange ratio, it would be the report which is available at the time of the application, namely report on the preceding year's accounts.¹⁰⁹

Fairness of exchange ratio [S. 232(3)(h)].—Two respectable firms of chartered accountants had stated that they had examined the accounts, annual reports, working and financial position of the two companies and also considered the net intrinsic value and came to the conclusion that the ratio of 5:2 was fair and reasonable. The court drew further support from the fact that the scheme of amalgamation had been widely advertised and unanimously approved by the meetings of the shareholders of the two companies and no objection at all had been raised by any of the shareholders or creditors.¹¹⁰

109 *All India Blue Star Employees' Federation v. Blue Star Ltd.*, (2000) 27 CLA 157, reaffirmed, (2003) 27 SCL 245 (Bom).

110 *AG Investment & Industrial Co. Ltd. v. Kesar Shastri Spg. & Mfg. Co. Ltd.*, (1912) 43 Comp Cas 145 (Bom). Non-disclosure of the valuation report is not sufficient to prevent sanction. S. 213(3)(h) does not require all the material facts to be disclosed. *Rambhairol Udyog Ltd. v.* (1977) 47 Comp Cas 503 (Bom). Thus, the trend of judicial opinion is to attach great weight to the approval by shareholders. Proceeding on this philosophy the Bombay High Court sanctioned a scheme despite the objection from the Government quaileers that the quoted company, which was taking over an unquoted company, had not made proper valuation of the shares of the latter company. See, *Purani Spg. & Wg. Mills Ltd. v.* (1980) 30 Comp Cas 514 (Bom). The Madras and AP High Courts followed the same principle in *Calcutta Cotton Mills Ltd. & Lakshmi Cotton Mills Co. Ltd. v.* (1980) 30 Comp Cas 623 (Mad); *Vijaya Utsav Cotton Trimming Ltd. v.* (1980) 511 Comp Cas 965 (AP); *Vasant Investment Corp. v. Official Liquidator*, (1981) 51 Comp Cas 20 (Bom), winding up stayed on sanctioning a scheme; *Indian Headwear Industries Ltd. v. SK Gupta*, (1981) 51 Comp Cas 51 (Del), power to call meetings; *Mehrab Choudhury v. Official Liquidator*, (1981) 51 Comp Cas 103 (Bom), power to make modifications for adjustment of tax claims; *Tata Oil Mills Co. Ltd. v. Hindustan Lever Ltd.*, (1994) 81 Comp Cas 754 (Bom); *Hindustan Lever Ltd. v.* (1994) 81 Comp Cas 751 (Bom), fixing the value of an asset by another group company was held to be just proper. Apart from this the valuation rate of share exchange ratio was found to be proper; *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.*, 1995 Supp (1) SCC 499; (1995) 53 Comp Cas 30, approval of valuation by more than 95 per cent of shareholders was not to be interfered with. It is a domestic affair of shareholders in a closely held private company. Another similar approval is to be seen in *Bharti Developments (P) Ltd. v.* (2013) 178 Comp Cas 251, approval of premium in a closely held private company. The court has jurisdiction in case recovery of taxes. See, *Syfard Ltd. v. STO*, (1981) 51 Comp Cas 561 (Del). Valuation of shares done by respectable firms of chartered accountants on the well-known methods of valuation was presumed to be fair, *Sintex Pharmaceuticals and Chemicals Ltd. v.* (1997) 88 Comp Cas 619 (AP); *Mihir H. Majmudar v. Majmudar Industries Ltd.*, (1997) 1 SCC 579; (1996) 87 Comp Cas 792. Where the ratio was worked out by taking into account the rise in the value of assets and there were no allegations of fraud or malafides against the valuer, the exchange ratio was held to be fair and reasonable. High valuation of the transferred company's assets for alleged purpose of piloting the public issue of the newly formed private company, was held not to be a manipulation of share prices at that stage. *Ajara Industries (P) Ltd. v.* (1996) 86 Comp Cas 457 (Guj). Private companies, intermingled affairs, share exchange ratio seemed reasonable and also approved by shareholders, *Mahindra Weavers (P) Ltd. v.* (1997) 24 CLA 11 (Guj). Valuation on net asset value basis accepted by both companies and their unanimous shareholders, valuation beyond question, *Jindal (India) Ltd. v. CMC Rollings (India) P. Ltd.*, (1996) 28 CLA 255; (1997) 49 DLT 363. *Anadolu Beverages & Foods Co. Ltd. v.* AIR 1999 Del 69; 1998 46 (2) 228; (1998) 93 Comp Cas 899; (1998) 74 DLT 276, share exchange ratio by experts, shareholders satisfied, no interference at the instance of Regional Director, *MM Scholz Ltd. v. Symutti Trading*

Calculation of share value by taking Net Asset Value (NAV) on the basis of book value can be accepted as a proper mode of valuation.¹¹¹ The date of valuation should be proximate to the date of petition. No balance sheet was in existence as of that date. The earlier balance sheet nearest to the date of petition should be taken into account.¹¹²

In another case, the exchange ratio was worked out by independent auditors, who had followed the proper methods and considered all the financial aspects. The calculation could not be questioned only because one of the auditors was the statutory auditor of the transferee company.¹¹³ Where the share-exchange ratio was approved by the requisite majority and no defect was pointed and it was worked out by three chartered accountants by adopting the three applicable methods, the court also approved it. The value of the shares of the transferee company was higher than that of the transferor company's shares. The transferee company also had a good market potential. The court refused to regard the scheme as unfair only because there was a fear in the minds of some shareholders that there would be a big reduction in dividend income.¹¹⁴

Where share-exchange ratio was found by the valuers to be fair and equitable and the shareholders of the transferor company also approved the scheme, it was held that the objecting shareholder could not seek direction to the company to provide details of calculation of the ratio.¹¹⁵ Where the shareholders have, in their commercial wisdom, accepted the share

¹¹¹ Investments Ltd, (1997) 40 DLT 53; frivolous objections by applicants who were not members, rejected, scheme approved.

¹¹² KMA Ltd v Unisys (India), (1996) 66 Comp Cas (2d) 1197 | Comp LJ 343 (Del).

¹¹³ Nikhil Rubber (P) Ltd, re, (2000) 108 Comp Cas 438 (CLB).

¹¹⁴ Asian Coffey Ltd, re, (2000) CLC 17 affirmed in *Vaidikamadai Kona Kan v Asian Coffey Ltd*, (2000) 3 Comp LJ 110, 119; *Srinivasayi Ltd v Anandavalli Finance Ltd*, (2003) 114 Comp Cas 55 (Mad), the scheme provided for issue of shares at a premium, valuation approved by experts and by requisite majority of shareholders. The scheme was sanctioned.

¹¹⁵ American Robotics Ltd, re, (2003) 2 CIC 673; (2006) 113 Comp Cas 114 (Mad). *Plus Atlantic Insurance Co* 149, re, (2003) 2 HC 1628 (Guj), no violation of human rights by reason of finitude of valuation done by an independent adjudicator. *Airavat Overseas (P) Ltd*, re, (2006) 125 Comp Cas 332 (Guj), amalgamation of two companies under the same management group, valuation by chartered accountants, objection of the Regional Director that separate valuation was not done, not substantial.

¹¹⁶ Chella Rajendra Prasad v Asian Coffey Ltd, (1999) 2 ALD 372; (2001) 106 Comp Cas 17; *Aja Quartz Ltd v Cymex Timer* (2d), (2003) 114 Comp Cas 21 (Guj), approval by both the transferor and transferee company, the court could not be called upon to say that the exchange ratio was prejudicial to their interests. *Cajarat Amritar Corp Ltd*, re, (2001) 104 Comp Cas 317 (Guj), valuation done by experts was not interfered with. *Plus Star Ltd*, re, (2000) 2 Bom CR 525 (2001) 104 Comp Cas 371; exchange ratio worked out by recognised firm of chartered accountants and assets were valued by a Government approved valuer, objection by Regional Director of Company Affairs was not accepted. *HK One (P) Ltd*, re, (2001) 104 Comp Cas 550 (Guj). *Cowalong Beach Hotels (India) Ltd*, re, (2002) 113 Comp Cas 17 (Mad), objection and amendment proposed by a shareholder defeated at the meeting, not material, inspection of accounts by ROC also not relevant to the scheme. *Alstom Power Boilers Ltd v SBI & TDBI*, (2002) 112 Comp Cas 671; (2003) 4 Bom CR 202, the court did not question the commercial wisdom of shareholders, objectors who did not attend meetings not entitled to raise objections before the court. Objections to classification should have been made after notice of meeting.

exchange ratio with open eyes, it would not be open to the Regional Director to raise objections.¹¹⁶

Notice to the Central Government has to be given at the stage of sanction and not at the stage of application for a direction for calling of a meeting.¹¹⁷ Notice to the Central Government, having been once given at the stage of sanction, is not required to be given at any subsequent stages, like the stage for an order of the dissolution of the transferor company.¹¹⁸

Some instances—Where at a meeting called by the court a scheme of amalgamation was approved by 648 shareholders holding 84,753 shares as against 11 shareholders holding only 48 shares and the dissenting shareholders did not at all appear at the hearing to present their objections, if any, the court accordingly observed:¹¹⁹

"If the opposition was legitimate and founded on some material ground, the court would have examined the scheme critically. After examining the scheme from the point of the petitioner, that is, the transferee company, it must be said, without the least fear of being contradicted, that the scheme of amalgamation, by which a huge sum of Rs 14.70 crores with its accumulated interest would be available to the petitioner both for its expansion as well as for its liquid finances, would undoubtedly be a scheme which is such as a man of business applying his commercial judgment, from his own narrow personal angle, would approve."

In another case¹²⁰ arising out of the same facts, the Bombay High Court restated the distinction between "compromise" and "arrangement". The court came to the conclusion that if a scheme of amalgamation involves variation of members' rights that amounts to reorganisation of capital making the sanction of the court necessary and where shares of a different nature, such as bonds convertible into shares, are proposed to be issued, that is definitely a reorganisation.

Where a scheme of amalgamation was approved by all the members of the transferee company but no formal meeting was held, the court said that all that was necessary was that the sanction should be put off till a meeting was held and the fact reported to the court.¹²¹

116. YR Textiles (P) Ltd. *re*, (2003) 127 Comp Cas 83 (Mad).

117. YLM Holdings (P) Ltd. *re*, (2003) 105 Comp Cas 249 (Del.).

118. Vizcaya Organics (P) Ltd. *v* Aurora Pigments Ltd., (1997) 78 Comp Cas 814; (1997) 3 Comp LJ 193 (Cal.).

119. Ahmedabad Mfg & Calico Printing Co. *v* Bank of India Ltd., (1972) 42 Comp Cas 493 (Guj). A lone shareholder holding microscopic minority interest objected to amalgamation, ruled out; an accidental omission to give him notice of the meeting was also not fatal. Mahnam Investments Ltd. *re*, (1996) 87 Comp Cas 689; (1995) 1 CHN 368.

120. Bank of India Ltd. *v* Ahmedabad Mfg & Calico Printing Co., (1972) 42 Comp Cas 211 (Guj). In Gauhati Spins Ltd. *re*, (1948) 7 Comp LJ 375; (1948) 29 Comp Cas 178 (MP) and Spring Spins Ltd. *re*, (1993) 2 Comp LJ 277 (MP), the court ignored the objection of the Central Government that the liability of its erstwhile company for violation of the Companies Act was going to be wiped out. The alleged liability was for breaches of Ss. 67 and 68.

121. Union Services (P) Ltd. *re*, (1975) 45 Comp Cas 46 (Mad). Sanction of a scheme enjoying all round approval, Hindustan Glass Balling South West (P) Ltd. *re*, (1999) 4 Comp LJ

Transferor company was to be dissolved without winding up. Changes in the memorandum and articles like altering share capital were contemplated to be made by ordinary resolution. Requisite fees was paid. The scheme was sanctioned.¹²²

There was a composite scheme between transferor and transferee companies with their shareholders. There was provision for extinguishment of shares held by minority shareholders of transferee company, paying cash in lieu of equity shares held by them. Minority shareholders raised objections. But they could not show any prejudice to their interest. The valuer was an expert in the field. He was the best judge as to the method of valuation. The court could not probe into his methodology. The objectors had not filed opinion of the independent valuer. The court refused to interfere in the valuation report.¹²³

Scheme for utilisation of premium.—Where the share premium was used to write off accumulated losses and payment of dividend to preference shareholders, it was held that it being against the provisions relating to utilisation of premium money, it became necessary that provisions relating to reduction of capital and a scheme of arrangement must be complied with for obtaining sanction of the court [now Tribunal]. The court found that the company's aggregate of assets was more than sufficient to meet liabilities. The reduction did not involve diminution of liability in respect of unpaid share capital. The scheme was reasonable and fair.¹²⁴

Vesting of rights and transfer of obligations [S. 232(3)].—All the rights and obligations of the amalgamated company become vested in the amalgamating company.¹²⁵ Transfer of ownership of assets to the final merged

122. Del. (1999) 81 DLT 155; (1999) 51 DLT 142. Amalgamation of two cement companies under a scheme which appeared to be just, fair and reasonable from the point of view of a prudent man of business, sanction granted, Rossi Cement Ltd. re. (2000) 1 ALD 65; (1999) 98 Comp Cas 835. Audited Bank Housing Finance Ltd. re. (2003) 3 ALD 654; (2004) 118 Comp Cas 295, amalgamation of 100 per cent banking subsidiary company with its holding with RBI approval sanctioned, holding company not required to call a separate meeting or to make a separate application for sanction.

123. Sigma Seja Industries (P) Ltd. re. (2015) 169 Comp Cas 447 (Gau), S. 117, 2013 Act was complied with.

124. Axtrix Laboratories Ltd v Mylin Laboratories Ltd, 2015 SCC OnLine Hyd 72; (2015) 191 Comp Cas 376. IDFC Ltd. re, 2015 SCC OnLine Mad 3981; (2015) 191 Comp Cas 469 (Mad); all round satisfactory scheme of arrangement and demerger.

125. IT & Es Lagg and Construction Co Ltd v Warline Power Co Ltd, (2013) 176 Comp Cas 136 (AP); Indian Seamless Enterprises Ltd. re, 2015 SCC OnLine Bom 6359; (2015) 193 Comp Cas 25. In a scheme of arrangement with shareholders, the company proposed to gift shares held by it in another company to its shareholders for reducing its securities premium account. This was held to be payment of dividend in kind which is prohibited. It was also a gift during pending income tax proceedings.

126. See, Nilkita Chemicals Ltd. re. (1997) 26 CLA 347 (MP), the court order provided that there would be no prejudice to the tax liability for capital gains and directors' liability for anything wrong and to the need for executing formal documents wherever necessary. United Breweries Ltd v Customs of Excise, (2001) 105 Comp Cas 71 (Bom), the shareholders of both the companies being the same, it did not mean that there was no transfer of ownership after amalgamation.



CASE PILOT



CASE PILOT



CASE PILOT

entity takes place on the date of merger.¹²⁶ A company taking over another was allowed to continue eviction proceedings. A formal transfer or substitution was not necessary. Where the transfer of property takes place in terms of an order, the right to continue the proceedings arises automatically. Where the whole undertaking is taken over, all the rights pass whether mentioned in a schedule or not.¹²⁷ The company which emerges from the amalgamation becomes the new tenant because the property rights which pass to the transferee company include tenancy rights also.¹²⁸ The supplier of electricity has to take the emerging company as its consumer and cannot say that there has been a transfer of the connection.¹²⁹ Where the premises held by the transferor company on lease and licence were found to be not transferable and were, therefore, not included in valuation, a failure to mention them in the particulars of the scheme was not fatal to the scheme.¹³⁰ Where the circumstances were such that the scheme of revival could not be implemented unless the tenants on the company's premises were evicted, the court passed necessary orders for the purpose.¹³¹

The transfer of assets of the transferor company to the transferee company takes place under a sanctioned scheme by virtue of the provisions of Section 232(I)(2), and, therefore, it does not fall in the definition of "conveyance" or "instrument" as defined in Section 2(14), Stamp Act, 1899. There is no liability to pay stamp duty.¹³² Where there was transfer of shares pursuant to a scheme of amalgamation, it was held that Section 108 (1956 Act) did not apply. Transfer of shares occurred automatically by operation of law.¹³³

126. *Sukhen H Pophale v Oriental Bus Co Ltd*, (2014) 4 SCC 452, brought about under General Insurance Business (Nationalisation) Act, 1972.

127. *L Midlick & Co v Banani Properties Pte Ltd*, (1989) 63 Comp Cas 678 (Cal).

128. *Telecoms India Ltd*, re, (1980) 52 Comp Cas 926 (Del). Where, however, care was not taken to comply with the State Rent Act and terms and conditions of the rent agreement were not maintained, the transfer of tenancy was ineffective. *Ambishil Shrikhil Enterprises Ltd v Rajeev Dagar*, (2014) 1 IICC 733 (2014) 182 Comp Cas 1 (Cal); rights of landlord remain the same as those under original tenancy. *General Radio and Appliances Co Ltd v M.A. Kindez*, (1986) 2 SCC 656; (1986) 2 Comp LJ 249. (1986) 111 Comp Cas 1313. The shareholders of one company cannot restrain another company from adopting a resolution for taking over the company. *Central Industrial Alliance Ltd v Premin Kavita Vilas*, (1985) 57 Comp Cas 12 (Bom). Where the scheme did not involve diminution of liability in respect of unpaid share capital, the procedure for reduction of capital had not to be followed. *HCL Ltd*, re, (1994) 80 Comp Cas 228 (Del).

129. *Gujarat Amul Milk Products Ltd v Gujarat Electricity Board*, (2002) 112 Comp Cas 188 (Guj).

130. *Tata Oil Mills Co Ltd v Hindustan Lever Ltd*, (1994) 81 Comp Cas 754 (Bom). The court held that since TCMCO was to be disbanded and it was a part of the Tata group, its trademarks which belonged to the group, would have to be given up by the transferee company by absorbing the products into its own marks system.

131. *Hindustan International (P) Ltd v Official Liquidator*, (1997) 27 CLA 224 (Kant).

132. *Master Inox Ltd v Registrar of Companies*, (2004) 3 CJEN 607; (2004) 1 Cal L 267 (2006) 120 Comp Cas 510.

133. *Adani Infrastructure Development Ltd v Bengal Tools Ltd*, (2016) 199 Comp Cas 312 (Cal); S. 108 (1956 Act) now S. 56 (2013 Act).

The vesting takes place from the effective date of the scheme which is either specified in the order of sanction or it is the date of approval of the scheme.¹³⁴

Reduction of capital in amalgamation.—Where a scheme of amalgamation involves the merger of two companies into a new company, and the merging companies are to be dissolved without winding up, the fact that the preference shareholders of the merging companies are to be paid back under the scheme does not amount to reduction of capital. This has been so held by the Madras High Court in *T Duraiyan v Winterfall Estates Ltd.*¹³⁵ The court pointed out "that the scheme of Sections 101 and 102 [now S. 66] of the Companies Act [1956] clearly envisaged reduction in capital in the context of an existing or continuing company, whereas in the present case, both companies had to go out of existence". The court further pointed out that the object of requiring sanction of the Tribunal for reduction of capital is to safeguard the interest of the creditors of the company. In the present case the new company had undertaken to pay all the debts of the merging companies and, therefore, the procedure for reduction of capital as laid down in Sections 100, 101 and 102 [1956 Act] [now S. 66] was not applicable.¹³⁶

There is no prohibition or legal impediment on reduction of share capital when it is a part of a scheme of amalgamation. The only thing is that the procedure required for reduction of capital has to be complied with. A similar procedure has to be observed where the reduction is that of the share premium account and the scheme is not covered by the permitted range of utilisation of such account. The shareholders and creditors had approved the scheme by requisite majority. The auditor's report was that the affairs of the company had not been conducted in a manner prejudicial to members' or public interest.¹³⁷

Increase of authorised share capital. Where the scheme of amalgamation involved an increase of the authorised capital of the transferee company,

134. *Bomay Gas Co (P) Ltd v Central Govt.*, (1996) 3 Bom. CR 212; (1997) 39 Comp Cas 195. *Gremi Silk Ltd v Gremi Overseas Ltd.*, (2003) 114 Comp Cas 92 (Cal); transfer of assets and liabilities in terms of the order in a conveyance in consideration of allotment of shares, liable to stamp duty except to the extent of exemption, if any. *Glyfame Carpip Industries Ltd. v.* (2006) 130 Comp Cas 334 (Tulu); the matter of stamp duty which was under final adjudication could not prevent sanction of the court. There could be no objection to retransfer of such assets from transferor to transferee company which had earlier been transferred to the transferee company by the transferee company under a court order. *MN Chhaya v PRS Meni.* (2005) 3 Bom Cr 497; (2006) 3 Mah L 29; (2005) J 27 Comp Cas 363; effective date as may be specified in the order of sanction or the date of sanction.

135. (1972) 42 Comp Cas 563 (Mad). The court can sanction reduction of capital also if there is a substantial compliance with the requirements of reduction. *Nuvapin Inds Ltd. v.* (1997) 48 Comp Cas 596; (1997) 25 CLA 224 (All).

136. See also, *Rossi Cement Ltd. v.* (2000) 1 All 110 65; (1999) 98 Comp Cas 835, scheme involving reduction of capital approved, confirming the resolution for reduction. *Jaypee Cement Ltd. v.* (2004) 122 Comp Cas 854; (2004) 7 Comp L 305 (All), a scheme of amalgamation of holding and subsidiary involved reduction of capital, but there was no outflow of cash to shareholders. Reduction was sanctioned along with the scheme.

137. *Comar Infscribe (P) Ltd. v.* ILR 2004 KAR 2489; (2004) 5 Kant L 393; (2004) 53 SCL 41.

the court said that the procedure prescribed for such increase would have to be observed without any exemption in this respect. The transferee company was bound to carry out the requirements of the scheme.¹³⁸

Change of name — There is no automatic change of name of the company involved in an amalgamation. Proceedings for change of name would have to be followed. A term in the scheme providing for change of name on the sanction of amalgamation was ordered to be deleted.¹³⁹ Where the name to be adopted by the amalgamated company was already on the record of the Registrar of Companies and majority of the shareholders had given approval to the scheme including the change of name, it was held that in the absence of any other objection to the change in name, it was not necessary to file an application under Section 13 for approval of name.¹⁴⁰

As for the stamp duty, the court said that levy is on the instrument, not on the transaction. There was an amalgamation of two companies situated in two States. It was sanctioned by the High Court. The court said that the orders sanctioning the scheme were independent instruments for purposes of stamp duty, though they related to the same scheme. The company in the State of Maharashtra was entitled to rebate under the Maharashtra Act in respect of the stamp duty paid on the scheme in the other State.¹⁴¹

Merger or amalgamation of certain companies [small and holding and subsidiary companies] [S. 233]

This provision is meant to facilitate a scheme of merger or amalgamation between two or more small companies or between a holding company and its wholly owned subsidiary or such other class or classes of companies as may be prescribed. The facility is subject to the following requirements: (a) a notice of the proposed scheme inviting objections, if any, from the Registrar and Official Liquidators of the places where the registered offices of the companies are situated or persons affected by the scheme within 30 days is issued by the transferor company or companies and the transferee company; (b) objections and rejections received are considered by the companies in their respective general meetings and the scheme is approved by holders of 90 per cent of the total number of shares; (c) each of the companies involved in the merger has filed a declaration of solvency, in the prescribed form, with

138. *Anmol Trading Co Ltd v Shailly Engg Plastics Ltd*, (2003) 113 Comp Cas 107 (Bom).

139. *Govind Rubber Ltd v Penn Tyres Ltd*, (1995) 83 Comp Cas 556 (Bom); *Penn Tyres Ltd*, re, (1995) 83 Comp Cas 536 (Bom); *Jaypee Cement Ltd*, re, (2004) 122 Comp Cas 354; (2004) 2 Comp LJ 105 (All). requirements of the Act inc change of name were all complied with. scheme sanctioned along with change of name. *Search Chew Industries Ltd*, re, (2005) 129 Comp Cas 471 (Guj); in a scheme of demerges, the transferee company's name and objects had to be changed. The court said that all approvals should be granted in a single window clearance.

140. *Mysore Cements Ltd*, re, (2009) 4 Kant LJ 388; (2009) 5 AIR Kant R 483; (2009) 150 Comp Cas 623; *Ministry of Company Affairs v Cavin Plastics & Chemicals (P) Ltd*, (2008) 14 CITC 273; (2008) 1 M.J. 625; (2008) 141 Comp Cas 475. since the scheme is sanctioned, it operates as a comprehensive clearance, no separate fees required to be paid to the Registrar.

141. *Chief Controller of Revenue Authority v Reliance Industries Ltd*, 2016 SCC OnLine Bom 1429; (2016) 198 Comp Cas 259 (PB).

the Registrar of the place where the registered office of the company is situated; (d) the scheme is approved by a majority representing nine-tenths in value of the creditors or class of them of respective companies at a meeting convened by the company by giving notice of 21 days along with the scheme to its creditors. The scheme may also be otherwise approved in writing by the requisite number. [S. 233(1)]

The transferee company has to file a copy of the scheme so approved with the Central Government, Registrar and the Official Liquidator of the place where the registered office of the company is situated. If the Registrar and Official Liquidator have no objections, the Central Government has to register the scheme and issue a confirmation letter to the companies. If they have any objections and suggestions, they should communicate the same to the Central Government within 30 days. No communication from their side will create a presumption that they have nothing to say against the scheme. If after receiving objections or suggestions, the Central Government is of opinion that the scheme is not in public interest or interest of creditors, it may file an application before the Tribunal within 60 days of receipt of the scheme stating its objections and requesting that the Tribunal may consider the scheme under Section 232. Any other person affected can also make such application. The Tribunal may confirm the scheme or order that it would have to be examined by following the procedure of Section 232. If the scheme is confirmed, a copy of the order has to be communicated to the Registrar having jurisdiction over the transferee company and persons concerned. The Registrar has to register the scheme and issue his confirmation to the companies. Such confirmation also has to be communicated to the Registrar where the transferor company or companies were situated. Registration of the scheme by the Central Government under sub-section (3) or by the Registrar under sub-section (2) is to have effect of dissolution of the transferor company without the process of winding up. Registration of the scheme is also to have the following effects: (a) transfer of the property or liabilities of the transferor company to the transferee company so that the property becomes the property of the transferee company and liabilities also become its liabilities; (b) the charges, if any, on the property of the transferor company are to be applicable and enforceable as if they were on the property of the transferee company; (c) legal proceedings by or against the transferor company pending before any court of law are to be continued by or against the transferee company; and where the scheme provides for purchase of shares held by dissenting shareholders or settlement of debt due to dissenting creditors, the amount becomes liability of the transferee creditor.

After the merger the transferee company is not directly or indirectly to hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company. Any such shares are to be extinguished or cancelled. The transferee company has to file an application with the Registrar along with the scheme registered, indicating the revised authorised capital and pay the prescribed fees due on

revised capital. The fees already paid on the transferor company's shares is to be set off. A company undergoing merger or amalgamation and coming under the section can make use of provisions of Section 232 for approval of its scheme. The Central Government can prescribe any method of merger or amalgamation.¹⁴²

Where a merger between a holding company and its subsidiary was in the interest of both companies and no prejudice was caused either to public interest or shareholder interest, the proposal was not allowed to be questioned on the ground of oppression.¹⁴³ Unwise, inefficient or careless conduct of a director cannot give rise to a claim for relief under this section.¹⁴⁴

Merger or amalgamation of company with foreign company [S. 234]

The provisions of Chapter 15 with Sections running from 230 to 240 are to apply *mutatis mutandis* to schemes of merger and amalgamations between companies registered under the Act and companies incorporated in jurisdiction of such countries as may be notified from time to time by the Central Government. The Central Government may make rules, in consultation with RBI in connection with mergers and amalgamations provided under the section. A foreign company may with the approval of RBI merge into a company registered under the Act or vice versa. The terms and conditions of such merger may provide for payment of consideration to shareholders of merging company in cash or in depository receipts, or partly in cash and partly in depository receipts as per the scheme to be drawn up for the purpose. The expression "foreign company" means any company or body corporate incorporated outside India whether having a place of business in India or not.

Amalgamation of banking companies

Section 44-A, Banking Regulation Act, 1949 is a complete, self-contained code on amalgamation of banking companies. Under Section 44-A, the power to grant approval to the scheme of merger of banking companies is with the Reserve Bank of India (instead of Tribunal) and the RBI is also empowered to determine market-value of shares of the objecting shareholder who voted against the scheme as well as to direct payment of the value of the shares to the dissenting shareholder.¹⁴⁵

Demerger

A scheme of sub-division of an enterprise into smaller units or splitting up the unit into more than one parts or separating one or more units

142. *Andhra Bank Housing Finance Ltd. vs. (2013) 176 Comp Cas 215 (Guj); Jindal Agro Processing P/Ltd. vs. (2013) 176 Comp Cas 215 (Guj); Reliance Jamnagar Infrastructure Ltd. vs. (2013) 176 Comp Cas 217 (Guj)*, in all these cases amalgamation was between the holding company and wholly owned subsidiary, scheme involved no prejudice to members' and creditors' interests, their meetings were dispensed.

143. *AMCO Batteries Ltd. vs. AIR 2010 NOC 609 (Kar).*

144. *Challenger Petroleum (India) P/Ltd v Haldia Petrochemicals Ltd. (2011) 10 SCC 466; (2011) 167 Comp Cas 373.*

145. *Bank of Madura Shareholders Welfare Assoc v RBI, (2001) 105 Comp Cas 663 (Mad).*

from the main enterprise and constituting them into separate units is called demerger. Some of the shareholders would be allotted shares in the demerged unit in exchange of their holding in the original unit. Fair exchange ratio becomes necessary in such schemes also. Same considerations apply as in the case of mergers.¹⁴⁶ The provisions of Section 391 (1956 Act) [now S. 230] were always considered to be a complete code permitting single window clearance of all the formal requirements of the Act. A single petition would serve the purpose of an amalgamation as well as that of demerger. Reduction of capital and also reorganisation of capital can be sanctioned as a part of a scheme.¹⁴⁷

In a scheme of amalgamation also involving demerger, the court said that consideration for transfer of undertaking need not be in any particular form. As long as consideration is not against public interest or illegal or inappropriate, the court is not to reject such consideration. Shareholders of the transferor company issued shares by holding company of transferee as consideration for transfer of undertaking. This was held to be not prohibited. The scheme was sanctioned. Companies would have to take care of tax implications.¹⁴⁸

In a scheme of demerger of cement unit of the company, creditors objected to the method of valuation. The valuer appointed by the court adopted the same method. Others like secured and unsecured creditors and equity shareholders approved the scheme. The scheme was sanctioned.¹⁴⁹

Power to acquire shares of shareholders dissenting from scheme or contract approved by majority [S. 235]

A company may propose a scheme or contract to another company for transfer of its shares or any class of shares. The company proposing is transferor company and the other is transferee company. Four months' time is available for approval of the proposal. It has to be accepted by shareholders with nine-tenth shareholding in value. Within two months of the expiry of four months the transferee can give a notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares. After service of such notice, the transferee company becomes entitled and also bound to acquire those shares on the terms on which under the scheme or contract, the shares of the approving shareholders are to be transferred to

146. *Ainablic Ltd v Dipak Kumar J Shah*, (2002) 112 Comp Cas 61; (2002) 4 Guj LR 3118. Such schemes are included in S. 232(3)(ii).

147. *Birla Texturings (P) Ltd. vs.* (2013) 176 Comp Cas 297 (Guj); *Asahi Sangyo Colors Ltd. vs.* 2014 SCC OnLine Guj 12794; (2016) 194 Comp Cas 450. reduction of capital of demerged company in form of utilisation of securities premium account was granted, compliance with income tax requirement directed, restructuring of share capital, scheme sanctioned.

148. *Thomas Cook Insurance Services India Ltd. vs.* 2015 SCC OnLine Bom 6095; (2016) 194 Comp Cas 390. *Ouster Textile Mills (P) Ltd. vs.* 2014 SCC OnLine Guj 11461; (2015) 194 Comp Cas 667 (Guj). consideration paid to company or to shareholders, makes no difference, accounting standards complied with, name changed according to 2013 Act requirement.

149. *SKS Legal & Pioneer I. M. vs.* (2014) 187 Comp Cas 2 (Bom).



CRAFT PILOT

the transferee company. This effect can be prevented by an application to the Tribunal by the dissenting shareholder within one month from the date of notice of acquisition and the Tribunal thought it fit to order otherwise. Where notice has been given and on an application made to the Tribunal and it has not made an order to the contrary, after expiry of one month from the date of notice or after a pending application has been disposed of, the transferee company has to send a copy of the notice to the transferor company for transfer of the shares. This notice should carry with it an instrument of transfer which has to be executed on behalf of the shareholders by any person appointed by the transferor company and also by the transferee company. The transferee company has to pay the amount or other consideration for the price payable for the shares which have been acquired. The transferor company has then (a) to register the transferee company as the holder of those shares and (b) within one month of the date of such registration the dissenting shareholder has to be informed. [S. 205(3)] The amount received has to be held in a separate bank account and then disbursed to shareholders within 60 days whose shares have been compulsorily acquired. For the purposes of the section, a dissenting shareholder means a shareholder who has not assented to the scheme or contract or refused to transfer shares.

Purchase of minority shareholding [S. 236]

When the shares of company have been acquired to the extent of 90 per cent or more, the acquirers have to notify the company of their intention to buy the remaining equity shares. The acquirers have to offer to the shareholders the price for their shares on the basis of valuation by a registered valuer in accordance with prescribed rules. Alternatively, the minority shareholders may offer to the majority shareholders to purchase their shareholding at a price to be determined in accordance with prescribed rules. The amount of consideration has to be deposited in bank account at the hands of the transferor company for one year to enable it to disburse the amount to the shareholders entitled to it. The transferor company has to act as the transfer agent for receiving and paying the price, for taking delivery of those shares for transferring it to acquirers. A defaulting shareholder's shares can be cancelled. The transferor company will transfer new certificates in their place. The transaction would be completed on payment made to the owner of the shares. In the case of deceased or non-existent shareholders whose representatives have not been brought on record their right to transfer the shares is to continue for three years from the date of acquisition. Where the majority shareholders have received a higher price they would share it with the minority whose shares have been compulsorily acquired. For the purposes of this section, the expression "acquirer" and "persons acting in concert" have the meaning as given to them under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. Where the acquirer defaults, the provisions of the section are to continue to apply though the minority shares of the minority have not been delisted and the

period of one year or the period specified in the regulations made under SEBI Act, 1992 has elapsed.

If any of the above schemes involve acquisition of the shares of one company by another company, it may do so by making an offer to the transferor company, so that the scheme or contract may be placed before the shareholders of the company.¹⁵⁰ The shareholders have the option to approve the offer within four months. Approval must be accorded by at least nine-tenths in value of the shares whose transfer is involved. This number must be exclusive of any shares already held by the transferee company or by its nominees or by its subsidiary. Once the approval by nine-tenth majority is accorded, the transferee company gets the right to acquire the shares of the dissenting shareholders, if any. Within two months, after the expiry of the above four months, the transferee company should give a notice to such shareholders that it desires to acquire their shares. Within one month from the date of the notice, the dissenting shareholders may apply to the Tribunal. But if no application is made, the transferee company gets the final right and also becomes bound to acquire those shares on the terms on which the shares of other shareholders are to be transferred.¹⁵¹

Fairness of takeover bids.—Section 235 confers a very wide discretion on the Tribunal to sanction or disallow the attempt to acquire.¹⁵² The two guiding principles are that the scheme should be fair and that onus lies to show its unfairness upon the dissenter.¹⁵³ The Tribunal will infer fairness from the very fact that the scheme has been approved by 90 per cent of the members.¹⁵⁴ But the burden to prove unfairness may be reversed where the court [now tribunal] finds that the take-over bidder and the accepting majority are the same parties. This was the position in *Bugle Press Ltd. v.*¹⁵⁵

Here the scheme of take-over was adopted to get rid of a minority. The 90 per cent majority formed a new company which made the offer and it was approved by them. They then attempted to acquire the minority interest in the terms of the scheme.

It was held that the burden of proving fairness lay on them and the mere fact that the compensation was fair was not sufficient to discharge the burden.

150. S. 395(1). See, *Bihari Mills Ltd. v.* (1985) 58 Comp Cas 6 (Del).

151. *Waste Recycling Group plc. v.* (2004) 1 BCLC 352 (Ch D), such compulsory acquisition is not violative of Human Rights and Fundamental Freedoms, 1992.

152. See, J.S. Rajak, "Minority Rights and the Take-over Bid" (1970) 87 SALJ 12; D.D. Prentiss, "Take-over Bid: The Compulsory Acquisition of Dissenting Shares" (1972) 35 MoE L Rev 73, considering *Curtiss Holdings Ltd. v.* (1971) 1 WLR 918, where differential treatment was given. Frank Woolridge, "Compulsory Acquisition of Shares on Takeover" (1980) 7 BL 300.

153. *Moore & Co Ltd. v.* (1933) 150 LT 374; *Bugle Press Ltd. v.* 1961 Ch 270; (1960) 3 WLR 456 (CA).

154. *Grierson, Oldham & Adams Ltd. v.* 1966 Ch 17, 32 (1967) 1 WLR 395. See also, the judgment of Maughan J in *Durman, Long & Co. v.* 1994 Ch 635, where at p 657 the learned judge said that the proposal must be "such that an intelligent and honest man, a member of the class concerned, and acting in respect of his interest, might reasonably approve".

155. [1961] Ch 270; (1960) 3 WLR 456; (1960) 3 All ER 751 (CA).

Similarly, an attempt to impose new liability on a minority without their consent would be foiled. A well-known authority is *Bisgord v Henderson's Investments Estates Ltd.*¹⁵⁶

A company had issued fully paid £1 shares. A scheme of reconstruction was approved by the requisite majority under which the company's undertaking was to be transferred to a new company. Each shareholder was to receive an equal number of shares in the new company but only 17 sh. 6d. credited as paid.

The court granted an injunction on the application of the minority shareholders as the scheme would have enabled the new company to extract more capital from holders of fully paid shares.

Take-over offer to be from single company.—It was held by the Privy Council in *Blue Metal Industries Ltd v RW Dilley*¹⁵⁷ that the power of acquisition can be exercised only when the offer of takeover is made by a single company. Lord Morris said:

"The significance of the 90% figure is, on this view, that once a company has become so nearly a total power or parent of another company as a shareholding of 90% would represent, it should not be prevented from converting the other company into a wholly owned subsidiary by so small a dissenting minority as 10% or less, but should be entitled to acquire the holding of that minority. Their Lordships consider it important to bear in mind that the statutory procedure is one that involves the acquisition by a private interest of the property of another — an exceptional interference with the rights of individual ownership. It leads almost inevitably to the consequence that the powers of the sector can only be invoked by a single company, for the objective is to allow a 90% owned subsidiary to be converted into a 100% subsidiary, that pre-supposes a single parent."

Adequacy of information.—Inadequacy of information may be another ground for the Tribunal to withhold its sanction. In one of the cases, however, the court refused to help a minority shareholder although it believed with him that the information given to him was too meagre.¹⁵⁸

Offering same terms to those whose shares are to be acquired.—Where the class of shares which are to be transferred are already held by the transferee company to a value greater than one-tenth of the aggregate of the values of all the shares in the company of such class, the transferee company will not get the right to acquire the shares of the dissenting shareholders unless the same terms are offered to all holders of the shares of that class and the holders who approve the scheme should be nine-tenths in value of the shares to be transferred (excluding those already held) and should also be three-fourths in number of the holders of those shares.

156. (1908) 1 Ch 743; 9-1 T & 19 (C.A.).

157. 1970 AC 827; (1969) 3 WLR 357 (PC).

158. *Executive Furniture Ltd.* n. 1945 Ch 220.

Notice of acquisition.—When, in pursuance of any scheme or contract of this kind, shares or shares of a class in a company have been transferred to another company or its nominee, and those shares together with other shares or any other shares of the same class are already held by the transferee company or its nominee company or its subsidiary to the extent of nine-tenths in value of the shares or the shares of that class, the transferee company is required to give a notice of the fact to the holders of the remaining shares who have not assented to the scheme. The notice must be given within one month from the date of the transfer, except when a notice has been given in pursuance of the scheme. Any such holder may, within three months from the giving of the notice to him, require the transferee company to acquire the shares in question. The transferee company then becomes entitled as well as bound to acquire those shares on the same terms on which the shares of approving shareholders were transferred or on such terms as the Tribunal may, on the application of the shareholder or transferee company, think fit to order.

Amalgamation in public interest [S. 237]

Where the Central Government is satisfied that an amalgamation of two or more companies is essential in public interest, then, the Government may by order notified in the Official Gazette provide for the amalgamation of those companies into a single company. The amalgamated company shall have such constitution, property, powers, rights, interests, authorities and privileges and shall be with such liabilities, duties and obligations as may be specified in the Government's order. The order may also contain consequential, incidental and supplementary provisions.

Every member or creditor of each of the companies before the amalgamation shall have, as nearly as may be, the same rights and interests in the amalgamated company as he had in the company of which he was originally a member or creditor. But if his rights in the amalgamated company are less than those, he shall be entitled to compensation. The Government may prescribe some authority for the assessment of compensation and it will be paid by the company resulting from the amalgamation.¹⁵⁹

Before making any order of amalgamation, the Central Government is required to send a copy of the proposed order in draft to each of the companies concerned. This is necessary to enable such companies to file their objections and suggestions. The period for filing objections shall be fixed by the Government, but should not be less than two months. The Government may modify the draft order in the light of any suggestions so received.

Copies of every such order have to be laid before both Houses of Parliament at the earliest convenience.

159. See, *Borair v SBI Ltd.*, (1998) 30 CT.A 21 (C.B), foreign collaborator holding 20 per cent as against 50 per cent Indian promoter, expansion of capital base for amalgamation, the promoter resolved for rights issue, collaborator preferred Government loans, promoter to reconsider his decision, amalgamation in national interest could be ordered.

Registration of offers of schemes involving transfer of shares [S. 238]

In an offer of a scheme or contract involving transfer of shares under Section 237, (a) the circular containing such offer and recommendation by directors to members to accept such offers is to be accompanied by such information in such manner as may be prescribed; (b) a statement by the transferee company disclosing the steps it has taken to ensure that necessary cash will be available should be made; and (c) every such circular has to be presented to the Registrar for registration and is not to be issued unless so registered.

The Registrar may refuse to register a statement for reasons to be recorded in writing if it does not contain the requisite information or which sets out information in a manner likely to give false impression. The Registrar has to communicate the refusal to the parties within 30 days. An appeal lies to the Tribunal against the order of refusal by the Registrar. A director who issues a circular which has not been presented for registration is liable to a fine between Rs 25,000 and Rs 5,00,000.

Preservation of books and papers of amalgamated company [S. 239]

Where a company has been amalgamated with another company under any of the above provisions of the Act, or whose shares have been acquired by another company, the books and papers of such a company shall not be disposed of without the prior permission of the Central Government. Before granting such permission, the Government may appoint a person to examine the books and papers for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation of or the management of the affairs of the company or its amalgamation or acquisition of its shares.

Liability for offences before merger [S. 240]

Liability in respect of offences committed by officers in default prior to merger, etc. is to continue after merger, etc also.

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online™; along with updates, articles, videos, blogs and a host of different resources.



The following cases from this chapter are available through EBC Explorer™:

- *Asahi Songtoon Colors Ltd. re.*, 2014 SCC OnLine Guj 12794; (2016) 194 Comp Cas 450
- *Astrix Laboratories Ltd v Mylan Laboratories Ltd.*, 2015 SCC OnLine Hyd 72; (2015) 191 Comp Cas 376
- *Auto Steering India (P) Ltd. re.*, (1977) 47 Comp Cas 257 (Del)
- *Fletcher v Royal Automobile Club Ltd.*, (2010) 1 BCLC 31 (C.A.)
- *Hindustan Lever Employees' Union v Hindustan Lever Ltd.*, 1995 Supp (1) SCC 499; (1995) 83 Comp Cas 30
- *Indian Seamless Enterprises Ltd. re.*, 2015 SCC OnLine Bom 6359; (2015) 193 Comp Cas 25
- *Mafatlal Industries Ltd. re.*, (1995) 17 CLA 249; (1995) 84 Comp Cas 230 (Guj)
- *Premier Movers (P) Ltd v Ashok Tandon*, (1971) 41 Comp Cas 656 (All)
- *SM Holding & Finance Ltd v Mysore Machinery Manufacturers Ltd.*, (1995) 78 Comp Cas 432 (Karn)
- *Tata Oil Mills Co Ltd v Hindustan Lever Ltd.*, (1994) 81 Comp Cas 754 (Bom)
- *United Breweries Ltd v Controller of Excise*, (2001) 105 Comp Cas 71 (Bom)
- *Vodafone Essar Mobile Services Ltd. re.*, (2011) 163 Comp Cas 119 (Del)



CASE PLOT

Chapter 20

Removal of Names of Companies from Register of Companies

Power of Registrar to remove name from Register of Companies [defunct companies] [S. 248]

There may be a reasonable cause for the Registrar to believe that (a) a company has failed to commence its business within one year of its incorporation,¹ or (c) the company is not carrying on any business for two immediately preceding financial years and has not applied under Section 455 for obtaining the status of a dormant company. In such a situation the Registrar has to send a notice to the company and all its directors telling them that he has the intention to remove the name of the company from the register. They are accordingly called upon to send their representations along with copies of relevant documents within 30 days from the date of notice.

Such removal can also be effected on the company's own application. For this purpose the company has first to extinguish all its liabilities. It has then to pass a special resolution or obtain the consent of 75 per cent members in terms of the paid up share capital. An application has then to be filed in the prescribed manner with Registrars of Companies for removing the name of the company on all or any of the grounds specified in sub-section (1). On receipt of such application the Registrar has to issue a public notice in the prescribed manner. Where the company is regulated under a special Act, approval of the regulatory body under that Act must be obtained and enclosed with the application. The section is not applicable to charitable companies registered under Section 8. The notice under the section has to be published in the prescribed manner and also in the Official Gazette for information of the general public. On the expiry of the time mentioned in the notice and if no cause to the contrary is shown by that time, the Registrar has to strike off the name of the company from the register. A notice of this fact has to be published in the Official Gazette. On the date of such publication, the company becomes disentitled.²

1. Clause (b) deleted by Amendment of 2015.

2. *Flouting Services Ltd v MV San Francisco*, (2016); 25 SCL 762 (Ctg), the capacity of the company ceases on becoming defunct. In this case, the date on which a suit was filed in the

Before passing such order, the Registrar has to satisfy himself that sufficient provision has been made for the realisation of all amounts due to the company and for payment or discharge of its liabilities and obligations within a reasonable time. If necessary, he should obtain undertakings from the managing director, directors or other persons who were in charge of management of the company. In addition, the assets of the company have to be made available for payment and discharge of all its liabilities and obligations even after the date of the order removing the name from the register. The liability, if any, of every director, manager or other officer who was exercising the power of management is to continue and may be entered as if the company had not been dissolved. The power of the Tribunal to wind up the company remains unaffected. The liability, if any, of the company's directors and of any person exercising the power of management remains the same as it was before the dissolution. But if there was no liability before dissolution there cannot be any after it. Thus, a member could not recover his membership security from the directors of a defunct company, because there would have been no personal liability in this respect even when the company was in existence.²

Directors are also not liable for their failure to maintain the routine of a company which to the knowledge of the Registrar is already defunct though actual striking off had been postponed for one reason or another.³ The court may order the winding up of the company without it being restored to the register.⁴

The name of the company was struck off the register on petition by chairman of the company, who made the petition under a bona fide belief that the company had no assets. Subsequently, there was acquisition of information about assets of the company. It was held that in such a situation the ex-chairman or any shareholder could apply for restoration of name. It could be just to do so either to claim assets of the company or to answer claims of third parties against the company. The Registrar was accordingly directed to restore name of the company.⁵

The name of a company was struck off at the Registrar's behest. Subsequently, an order was passed for restoration of name. But this order

name of the company, it had been struck off the Register as being defunct, the proceeding was held to be not valid. *Kishori Exports (P) Ltd v State of Gujarat*, (2006) 130 Comp Cas 457 (Guj). *Rishabh SA Investments LLC v Registrar of Companies, West Bengal*, (2017) 233 Comp Cas 64 (Cal); the order of the Registrar striking off the name of the company showing no business from incorporation was quashed on the ground that the company was operative and doing business at the relevant time.

3. *Krishna Patel v Kamalaparkar*, 1965 Comp LJ 233

4. *Cumtridec Cuffe Boom Assn Ltd v. C*, (1962) 1 All ER 112. An order of winding up may be passed without vacating the order of dissolution. *Seth Keshav Lal v Hukman Chander of Commerce Ltd*, (1966) 56 Comp Cas 251 (P&H); *Murang S'w'r (P) Ltd. re*, (1970) 41 Comp Cas 29; (1970) 1 Comp LJ 46 (Ker).

5. *Calculating and Business Machines (P) Ltd v State of Bihar*, (1983) 54 Comp Cas 100 (Pat). See also, *Narmada Chintamany v Mohan Accidents Claims Tribunal*, (1998) 58 Comp Cas 899 (Gud); Directors held not personally liable.

6. *Veluri Chandra Sekhara Jawedan Rao v Sri Raja Rajeshwari Poor Mills Ltd*, (2016) 198 Comp Cas 325 (T & AT).

was recalled on finding that the restoration petition was filed by a person who was not qualified to do so and there was no notice to shareholders and creditors. This was held to be proper. The company could not later complain that it was aggrieved by the fact of striking off.⁷

Restrictions on making application under Section 248 [S. 249].—An application under Section 248(2) on behalf of a company for removal of its name is not to be made if during the previous three months the company (i) has changed its name or shifted its registered office from one State to another; (ii) has made a disposal for value of property or rights held by it immediately before its trade ceased, or the company has been otherwise carrying on business for the disposal for gain in the normal course of trading or otherwise carrying on business; (iii) has engaged in any other activity except the one which is necessary or expedient for the purpose of making an application under Section 248 or deciding whether to do so or concluding the affairs of the company or complying with any statutory requirements; (iv) has made an application to the Tribunal for sanctioning of a compromise or arrangement and the matter has not been finally concluded; or (v) is being wound up under Chapter 20 whether voluntarily or by the Tribunal.

Where a company was defendant in a case pending before a civil court, its name was directed to be restored because no justice would have been possible with nobody as defendant in the case.⁸

Filing of an application by a company in violation of these provisions is punishable with fine extending to Rs 1,00,000. Such an application has to be withdrawn by the company or rejected by the Registrar as soon as contravention of the restrictions are brought to his notice.

Effect of company notified as dissolved [S. 250]

Where a company becomes dissolved under Section 248, it has to cease to operate as a company from the date of notice of dissolution. Its certificate of registration is deemed to be cancelled except for the purpose of realising the amount due to it and for payment or discharge of its liabilities or obligations.

Fraudulent application for removal of name [S. 251]

Where it is found that an application has been made by the company with the object of evading its liabilities or with the intention of deceiving its creditors or to defraud any other person, the persons in charge of the company incur liability even if the company has been notified as dissolved. They become jointly and severally liable to any person who incurred loss or damage as a result of the company being notified as dissolved. They are also punishable for fraud in the manner provided in Section 447. The Registrar may also recommend prosecution of the persons responsible for filing fraudulent application.

7. *Meghdoot Services Ltd v Registrar of Companies*, 2016 SCC OnLine Cal 9179; (2016) 199 Comp Cas 519 (Cal).

8. *M A Paranjape v Registrar of Companies*, (2015) 192 Comp Cas 380 (Del).

Appeal to Tribunal and restoration [S. 252]

Any person aggrieved by the order of dissolution under Section 248 may file an appeal to the Tribunal. The period available is three years from the date of the order. If the Tribunal is of opinion that the removal of name was not justified because no applicable ground was there, it may order restoration of the name of the company in the Register of Companies. Before making any such order the Tribunal has to give a reasonable opportunity of being heard, and to make representations to the Registrar, the company and all the persons concerned.

If the Registrar is satisfied that the name of the company happened to be struck off either inadvertently or on the basis of incorrect information furnished by the company or its directors and therefore it deserves to be brought back to the register, he can make an application to the Tribunal within three years from the date of the order of striking off for an order of restoration. The company has to file a copy of the Tribunal's order of restoration with the Registrar within 30 days of the date of order. The Registrar will then put back the name on the register and issue a fresh certificate of incorporation.

If the company, or any member or creditor or workman feels aggrieved by the fact of the striking off, any of them may make an application to the Tribunal before the expiry of 20 years from the date of publication of striking off in the Official Gazette. If the Tribunal is satisfied that the company was at the time carrying on its business or was in operation or otherwise it is just that the company's name be brought back to the register, the Tribunal may order the company to be restored to the register. The Tribunal may also by its order give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had never been struck off from the Register. [S. 252(3)] Accordingly, in *Bhogilal v Registrar of Joint Stock Companies*,⁹ The creditor of a defunct company filed a petition for restoration of its name. The petitioner alleged that he had obtained a decree against the company a day before the publication of the notification. The directors of the company on being asked by the Registrar misinformed him that the company was not in operation. It was also found that the entire share capital of the company was not called up and that the uncalled capital was sufficient to satisfy the decree. Holding that it was just and equitable to restore the name of the company to the register, the court observed: "No steps were taken to discharge the liability which the company owed to the petitioner. The effect of the order of removal would be to make it difficult for the petitioner to obtain the fruits of his decree. Had the Registrar known that the company was actually defending a suit, it is extremely unlikely that

9. AIR 1954 MP 70; *Vijaywada Chamber of Commerce and Industry v Registrar of Non-Trading Companies*, (2001) 122 Comp Cas 796 (A.P.), the company was actually functioning, only its securities had been delayed. The striking off was set aside.

he would have ordered the name of the company to be removed from the register."¹⁰

Thus the provision relating to restoration "seems primarily intended for companies which were active at the moment of their mortal wound".¹¹ But discovery of outstanding assets of the company is, of course, one of the reasons why restoration is sought. That is why a period of twenty years is allowed. The company may have unknown assets which do not come to light until many years after the company has been struck off and so dissolved.

A contingent or prospective creditor is entitled to a petition for restoration.¹² An income tax officer is a creditor for this purpose and can apply for restoration. So is a person entitled to claim damages under the Fatal Accidents Act.¹³ The company which has been struck off may itself apply for restoration, though the court would not order restoration unless there is sufficient evidence of likely benefit to creditors or members.¹⁴

An officer of the company who was instrumental in getting the company struck off was held to have *locus standi*. He was not aggrieved when he activated the process of striking off. He could become aggrieved subsequently. The Act requires the applicant to be aggrieved at the time of his application.¹⁵

Restoration operates retrospectively.¹⁶ It produces "as you were position".¹⁷ An illustration of retrospective operation is *Burco Ltd, re*.¹⁸

A company, in ignorance of the fact that it has been struck off the register, created a legal charge on two of its properties. On an application by the company the court restored it to the register and gave the order retrospective effect so as to validate the charges and their registration.

10. Following authorities were cited in the case: *Dulay Assurance Society, re*, (1867) 1 B. & C. Ch. 479; 56 LT 477; *Carpenter's Patent Devil Boat Lowering & Detaching Gear Co, re*, (1888) 1 Meg. 26. See also, *Umeshhai v Monshwar*, AIR 1959 MH 346. Where a person had a claim against the company for personal injuries but the company was dissolved before the period of limitation for his claim expired, it was held that the company ought to be put back to the register. *Winkdale Ltd, re*, (1991) 1 WLR 279 (CA).
11. *Tel Holdings, (Clydon) Ltd, re*, [1969] 3 WLR 606. The court has power to pass an order of restoration subject to certain conditions. See, *Purushomilass v Registrar of Companies*, (1996) 60 Comp Cas 154 (Bom); *Humber Gas Co (P) Ltd v Central Govt*, (1997) 99 Comp Cas 195; (1996) 3 Bom CR 312, transfer of assets by company after struck off becomes valid if it is subsequently restored.
12. *Harvest Lane Motor Bodies Co, re*, (1969) 39 Comp Cas 961.
13. *ITD (Companies Circle), re*, (1970) 1 Comp L 46.
14. *Arlestone M & Co Ltd, re*, (1951) 2 All ER 898; *Tipl Holdings, (Clydon) Ltd, re*, (1969) 3 WLR 606; *Rai Sohak UN Mandal's Estate, re*, AIR 1959 Cal 493; (1960) 30 Comp Cas 172. A person who inherits the rights of a creditor or member may apply but not a person who acquires such rights. *New Timbiqui Gold Mines, re*, (1961) 2 WLR 344; *Baywater Trading Co Ltd, re*, (1970) 1 WLR 343; (1970) 40 Comp Cas 1196 (Ch D).
15. *Coch v Unimed Suni AG*, 20001 BCC 372 (Scotland).
16. *Lindsay Bowmen Ltd, re*, (1949) 1 WLR 1443; (1969) 3 All ER 601. All that is necessary is that they should be creditors at the time of striking off. *Age Estate Agencies Ltd, re*, 1986 BCLC 346.
17. *Burbury Gas Co (P) Ltd v Central Govt*, (1997) 99 Comp Cas 195 (1996) 3 Bom CR 312.
18. (1971) 2 WLR 999.

The effects of restoration have been thus stated in a case:²¹

It is clear from the section that on the restoration of a company back to the register after its being struck off the consequence is as though it had never been struck off the register. The company will be deemed to have had its existence although. Another consequence is that the rights of all parties would be as though there had been no cessation or interruption in the existence of the company on account of the striking off and the subsequent restoration.

Section 248(8) also preserves the power of the Tribunal to wind up a company the name of which has been struck off the register. This is so because striking off is different from winding up. In winding up the assets of the company are applied in payment of its debts. "But, if the name of a company is struck off the register, its undisputed property is not appropriated towards its liabilities. It vests in the Crown as bona vacantia."²² Thus the liability of the directors of a wound up private company to pay outstanding income tax under Section 179, Income Tax Act, 1961 will not arise if the company is merely struck off. The Department may apply for restoration.²³

Simplified exit scheme

A simplified exit scheme was introduced by the Central Government.²⁴

REVIVAL AND REHABILITATION OF SICK COMPANIES²⁵

19. *Pazhivippe Chettiar v South Indian Planting and Industrial Co Ltd*, AIR 1953 TC 161. Rights and liabilities of the company remain the same as before as if there had been no interruption in the life of the company. *Purushothamdas v Registrar of Companies*, (1981) 63 Comp Cas 154 (Bom); *Lakshman Chettiar v SJ Planting Co*, (1953) 23 Comp Cas 246.
20. *Yeshwant Raghunath Bhole v ITD*, (1974) 44 Comp Cas 290 (Kant), citing Gower, *Principles of Modern Company Law* (3rd Edn 1969) 652 and *U.N. Mandai's Estate (P) Ltd*, re, AIR 1959 Cal 493; (1960) 30 Comp Cas 172.
21. *Yeshwant Raghunath Bhole v ITD*, (1974) 44 Comp Cas 293, citing Gower, *Principles of Modern Company Law* (3rd Edn 1969) 652 and *U.N. Mandai's Estate (P) Ltd*, re, AIR 1959 Cal 493; (1960) 30 Comp Cas 172.
22. A case under the scheme, *Khusali Ejorts (P) Ltd v State of Gujarat*, (2006) 130 Comp Cas 457 (Guj). A pending criminal case against a company for its failure to increase capital was quashed because it was no use prosecuting a company which had ceased to exist under the scheme. After decision to strike off the name of the company a notification to that effect had been published and after that the company had become dissolved. *Gummilli Anjan v Grammudi Casing (I) Ltd*, (2007) 75 SCJ 139, (2007) 136 Comp Cas 81 (CJL), newspaper publication for striking off had yet to be made. The process of striking off was not complete, company not dissolved, directed to accept transmission. *Rishabh Mitra IT Services (P) Ltd v Registrar of Companies*, 2015 SCC OnLine Ker 17756, (2015) 92 Comp Cas 189, Registrar refused to consider the company's application under the Fast Track Exit Scheme on the ground that its properties were encumbered. Company had paid off its dues. But it was not able to create charge on property as it was defunct. Creditors stated that dues were paid. Registrar was directed to consider the company's application. Prosecution for failure to file annual return was stayed.
23. The matter of sick companies, their liquidation or revival, is now to be dealt with under the Insolvency and Bankruptcy Code, 2016. The case on this matter before the Karnataka High Court was *AK Mutha v Karnataka State Financial Corp*, (2016) 198 Comp Cas 286 (Kant), proceedings had to be under the Companies Act, 2013. [S. 253]



Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®; along with updates, articles, videos, blogs and a host of different resources.

The following case from this chapter is available through EBC Explorer™:

- * *AS Mohite v Karnataka State Financial Corp., (2016) 198 Comp Cas 286 (Kar)*



CASE PILOT

Chapter 21

Winding Up

Winding up is the second method of putting an end to the life of a company. In the words of Professor Gower: "[W]inding 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."¹ Winding up of a company differs from the insolvency of an individual inasmuch as a company cannot be made insolvent under the insolvency laws. Moreover, a perfectly solvent company may be wound up.

The company is not dissolved immediately at the commencement of winding up. Its corporate status and powers continue.² "Winding up precedes dissolution."³

Types of winding up [S. 270]

The Act provides only for one kind of winding up:

1. Compulsory winding up under the order of the Tribunal.
2. Voluntary winding up, which itself is of two kinds, namely:
(a) Members' voluntary winding up, and (b) Creditors' voluntary winding up. [These two types of winding up have been abolished.]

1. *The Principles of Modern Company Law* (Oxford, 1968) 642.

2. Company remains a taxpayer until dissolved by order of court. *Official Liquidator v. Commer*, (1992) 73 Comp Cas 366 (Mad). Where the contention was that there was no use winding up the company because all the assets of the company had already been sold, the court ordered winding up. *Syndicate Bank v. Promicell (P) Ltd*, (1981) 51 Comp Cas 5 (Kant).

3. *BACHAWAT* in *Pierce Leslie & Co Ltd v. Vitol Clarkdean Wayshire*, AIR 1967 SC 843; (1969) 3 SCR 203. The order of winding up does not change the character of the company as an industrial concern for the purposes of the State Financial Corporations Act, 1951. *International Czech Builders Ltd v. Karnataka State Financial Corp.*, (1994) 81 Comp Cas 19 (Kant).

WINDING UP BY TRIBUNAL

Grounds of winding up by Tribunal [S. 271]

A company may be wound up at an order of the Tribunal. This is also called compulsory winding up. The cases in which a company may be wound up are given in Section 271. They are as follows:

Section 271 empowers the Tribunal in its discretion to order the winding up of a company in the following cases:

(a) If the company has resolved by a special resolution that it be wound up by the Tribunal. (b) If the company has acted against the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality. (c) If the Tribunal is of opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent or unlawful purpose or persons concerned in its formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in those connections and that it is proper that the company be wound up. This clause can be activated by an application by the Registrar or by any other person authorised by the Central Government by notification. (d) If the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years. (e) If the Tribunal is of opinion that it is just and equitable that the company should be wound up.

1. Special resolution [S. 271(1)(b)]

If the company has, by special resolutions, resolved that it be wound up by the Tribunal.⁴ The Tribunal is, however, not bound to order winding up simply because the company has so resolved. The power is discretionary and may not be exercised where winding up would be opposed to the public or company's interests.

2. Acts against sovereignty

If the company has acted against the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.⁵

4. S. 271(1)(b). Where the company itself was the petitioner and the financial position of the company was sound, the court ordered winding up in public interest. *Boniley Metropolitan Transport Corporation Ltd v Employees*, [1991] 71 Comp Cas 47 Bom. The company's right to apply for winding up cannot be taken away by the fact that the company applied for closure under S. 25-Q, Industrial Disputes Act and its application was dismissed, even if winding up may lead to closure of business.

5. For notes on these concepts including that of morality, see notes under S. 23, Contract Act in Avtar Singh's Law of Contracts and Specific Relief under the heading of Public Policy, and also under the heading of winding up on the "just and equitable" under the sub-heading "(v) Fraudulent Purpose" and "Public Interest".

3. Fraudulent conduct of affairs

The Tribunal is of opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent⁶ or unlawful purpose⁷ or persons concerned in its formation or management of its affairs have been guilty of fraud, misfeasance or misconduct⁸ in those connections and that it is proper that the company be wound up. This clause can be activated by an application by the Registrar or by any other person authorised by the Central Government by notification.

4. Default in filing financial statements

If the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years.

5. Just and equitable

The last ground on which the Tribunal can order the winding up of a company is when "it is of opinion that it is just and equitable that the company should be wound up". This gives the Tribunal a very wide discretionary power to order winding up whenever it appears to be desirable. The Tribunal may give due weight to the interest of the company, its employees, creditors and shareholders and general public interest should also be considered.⁹ Though the Tribunal is not bound to construe this clause (*eiusdem generis*) as only covering grounds of a like nature with those specified in clauses 1 to 6, yet it will require grounds of a like magnitude before acting under the clause.¹⁰ For a long period *eiusdem generis* dominated interpretations of the just and equitable provision. But the rule has been entirely abandoned and the words are to be treated as conferring a discretionary power which is of the widest character and the Tribunal are left to work out for themselves the principles on which such orders should be granted.¹¹ There must be a really strong ground for liquidating a company. Moreover, the Tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioner and he is acting unreasonably in seeking to have the company wound up, instead of pursuing that other remedy.¹²

6. For the concept of "fraudulent purpose" see notes under the "Just and Equitable" under the sub-headings "Fraudulent purpose".

7. For this concept see notes on *Invalidity of Agreements under S. 21, Contract Act, 1872* in *After Singh's Law of Contracts and Specific Relief*.

8. For explanation of these three concepts, see S. 339 dealing with fraudulent conduct of business; S. 340 for misfeasance.

9. See, for example, *Verrumchinnem Sethiah v. Bodly Venkatesubbiah*, AIR 1949 Mad 625; *CIV Industries & Recording Co. Ltd. v. AIR 1942 Bom 731*; (1942) 12 Comp Cas 215.

10. *Crusoe v. Nath Singh Oil Co. Ltd.*, (1921) 59 IC 524.

11. D.J. McPherson, "Winding up on the Just and Equitable Ground" (1964) 27 MLR 298. Followed in *Jivabhai Marghabhai Patel v. Extrusion Processors (P) Ltd.*, (1966) 2 Comp LJ 74 (Bom).

12. S. 273. See, *Jivabhai Marghabhai Patel v. Extrusion Processors (P) Ltd.*, (1966) 2 Comp LJ 76 (Bom), where though the petition was allowed, the Bombay High Court explained this principle. *Loknath Guptha v. Creditly (P) Ltd.*, (1968) 38 Comp Cas 599; (1968) 1 Comp LJ 283.

The role of the tribunal discretion is to consider all the affected interests and not merely those of creditors.¹³

It is not desirable nor possible to categorise facts that render it just and equitable to wind up a company. "The tendency to create categories or headings is wrong; the general words of the sub-section should remain general and not be reduced to the sum of particular instances."¹⁴ But the circumstances in which the courts have in the past dissolved companies on this ground can be resolved into general categories. And they are as follows:

(i) *Deadlock.* Firstly, when there is a deadlock in the management of a company, it is just and equitable to order winding up. The well-known illustration is *Yenidje Tobacco Co Ltd*, *till¹⁵*:

W and R, who traded separately as cigarette manufacturers, agreed to amalgamate their business and formed a private limited company of which they were the shareholders and the only directors. They had equal voting rights and, therefore, the articles provided that any dispute would be resolved by arbitration, but one of them dissented from the award. Both then became so hostile that neither of them would speak to the other except through the secretary. Thus there was a complete deadlock and consequently the company was ordered to be wound up although its business was flourishing.¹⁶

"But the 'just and equitable' clause should not be invoked in cases where the only difficulty is the difference of view between the majority directorate and those representing the minority."¹⁷ The Madras High Court observed on the facts of a case that "where nine or ten directors belonging to different

— where despite serious allegations, the court refused this remedy because the alternative remedies were not exhausted. Winding up being a remedy of last resort, compelling circumstances would be needed for the power to be exercised. *Davalat Mahkamah Limited v Smiltoke Hotels (P) Ltd*, [1993] 76 Comp Cas 716 (Bom), a tourism company not ordered to be wound up because inspite of difficulties it was at the threshold of continuing business operations.

13. *Kundoo Mangalji v Ghaerenia Tex Co (P) Ltd*, (2005) 60 (SC) 1, 449 (Guj), the company was in the process of removal and employment of hundreds of workers was at stake.

14. D.D. Prentice, "Winding Up on the Just and Equitable Ground: The Partnership Analogy," (1992) 89 LQR 107, 108, quoting *Local Waterworks in Eshkol v Westbourne Gullane Ltd*, [1973] AC 360, (1972) 2 WLR 1289 (E.C.).

15. (1916) 2 Ch 926.

16. Expressly approved by the Privy Council in *Zoch v Joint Minerals Ltd*, 1924 AC 293; 1924 All ER Rep 200 (PC); applied *Drews & Colett Ltd* (1914) 14 Ch 692; (1925) 5 Comp Cas 467; *Lumsdene Bros*, (2d n., 1946) 1 WLR 1051 (1946); 2 All ER 692; (1946) 1 Comp LJ 341 (Ch D); *Expanded Plastics Ltd*, re, (1966) 1 WLR 514; (1966) 2 Comp LJ 111. Considered: *Jambhai Marghabhai Patel v Ekstrom Paints (P) Ltd*, (1984) 2 Comp LJ 75 (Bom). See also, *Rukmani Prasad v Hind Ovens (P) Ltd*, (1970) 1 Comp LJ 213 where the Calcutta High Court held that if a company can be described as a partnership in the guise of a private company, there is no escape from the proposition that the grounds provided for the dissolution of a partnership shall apply. *Chez Kien How v Gowliwadi Trading (P) Ltd*, (1993) 1 SCR 486 (Mal), the only two directors could not agree with each other and could not override each other either and the dispute between them as to who was the majority shareholder was the deadlock between them as to the management of the company.

17. *Venkateswararao Siviah v Rody Venkatasubbiah*, AIR 1949 Mad 475.

communities unanimously and solidly take one view as against the minority of three holding another view and the company has been earning profits and has accumulated a goodwill, the mere incompatibility of good relations between the rival factions in the directorate is not sufficient for ordering winding up".¹⁸ Similarly, the Calcutta High Court held that "winding up cannot be ordered on the ground of friction and disputes between directors; the scramble for power is at the bottom of it all".¹⁹ The courts, however, do not insist on a paralysing deadlock. Indeed, it has been said that "the authorities show that there need not be a deadlock".²⁰ A justifiable lack of confidence resting on a lack of probity in the conduct of a company's affairs is sufficient to found a winding up order.²¹

The allegation in a private company that there was a loss of mutual trust and confidence among shareholders particularly about apportionment in construction activity and accounting was held to be not a ground for winding up of the company.²²

(ii) *Loss of substratum*.—Secondly, it is just and equitable to wind up a company when its main object has failed to materialise or it has lost its substratum. A good illustration is *German Date Coffee Co. re*:²³

A company was formed for the purpose of manufacturing coffee from dates under a patent which was to be granted by the Government of Germany and also for working other patents of similar kind. The German patent was never granted and the company embarked upon other patents. But, on the petition of a shareholder, it was held that "the substratum of the company had failed, and it was impossible to carry out the objects for which it was formed; and, therefore, it was just and equitable that the company should be wound up".²⁴

18. *Ebd.* *Vasant Holiday Homes (P) Ltd v. Mehta V Prakhu*, (2003) 116 Comp Cas 172 (Bom), where disputes amongst directors had affected their rights and the company was also running at a loss, this was held to be not sufficient to establish a right to seek a winding up order which is a remedy of the last resort. *Cochin Mafller Estates & Industries Ltd v PV Abdul Khader*, (2005) 114 Comp Cas 777; (2003) 2 XLJ 1, company not shown to be commercially insolvent, 0.02 per cent shareholder could have sought his redressal elsewhere.

19. A.N. Ray J (as he then was) in *Hind Overseas (P) Ltd, re*, (1968) 2 Comp LJ 95, where the learned Judge makes an exhaustive review of all English and Indian authorities.

20. See, *Jagubhai Murgulalji Patel v. Extraction Processes (P) Ltd*, (1966) 2 Comp LJ 74 (Bom).

21. *Louis Salter or Durmawane in Luck v John Blackwood* 724, 1924 AC 786; 1924 All ER Rep 200 (PC); *Bisalat Mauritius Ltd v Bisalat DB Telecom (P) Ltd*, (2013) JBL Comp Cas 417 (Bom), deadlock, because of which the company was losing substratum, irretrievable breakdown between major shareholders, no workable scheme could be propounded.

22. *Layek v. Brick Bond Builders (P) Ltd*, (2006) 133 Comp Cas 583 (Ker); *Rameshbhai Ramnatul Patel v. Shree Bansidhar (P) Ltd*, (2006) 133 Comp Cas 590 (Guj), alleged mismanagement and loss of substratum, petition based on anti-fide intention and vengeance, not a proper ground.

23. (1882) LR 23 Ch D 166.

24. See also, *Haven Gold Mining Co. re*, (1882) LR 20 Ch D 151, where a company failed to acquire gold mines it was formed to work.

Similarly, where a company's business had come to a standstill owing to a banker having seized and sold all its assets in the execution of a decree,²⁵ and where the company's main business of supplying electricity in a particular area was taken over by the State and the company had put the compensation money in fixed deposits and did no business for 17 long years, although it had a long list of objects,²⁶ winding up was ordered in either case.²⁷ Where after the filing of the petition on the ground of loss of the main business, the company had embarked upon other subsidiary objects mentioned in its memorandum, the court ordered winding up, because subsequent developments, cannot be taken into account.²⁸

However, a temporary difficulty which does not knock out the company's bottom should not be permitted to become a ground for liquidation. For example, in *Steam Navigation Co, re*,²⁹

A steamship company was incorporated with the principal object of acquiring a firm's business of plying steamers. This business was acquired, but very soon afterwards grave differences arose between the company and the firm. As a result the company had to return seven out of nine steamers acquired from the firm. Subsequently losses were also incurred, yet an application for winding up on the ground of failure of substratum was rejected, as the original objects had not become impossible to attain. The company had bought other steamers and there was nothing to prevent further purchases.³⁰

Thus, it is a question of fact in each case whether the substratum of the company is gone or not. In *Seth Mohan Lal v. Grain Chambers Ltd.*,³¹ SIRH [later CJ] of the Supreme Court observed:

The substratum of a company can be said to have disappeared only when the object for which it was incorporated has substantially failed, or when it is impossible to carry on the business of the company except at a loss, or the existing and possible assets are insufficient to meet the existing liabilities.

25. *Dunlop Products Ltd v. Rameshwarlal*, AIR 1954 Cal 195; *S Sanderson v. Pigeon Oil Filter Industries (P) Ltd.*, (1993) 76 Comp Cas 33 (Mad), a complete failure. *Chua Kien How v. Ucos-weslk Trading (P) Ltd.*, (1993) 1 SCR 486 Malaysia, the place which the company wanted to develop as its restaurant was lost. It disappeared with restaurant staff which showed that it had no intention to carry on the restaurant business in general nor had done anything in the last six months to secure any premises.

26. *A. Ramachandran v. Narayana Electrical Corp Ltd.*, (1972) 42 Comp Cas 182 (AP).

27. See also, *Lewung Yuhung v. Cireka Commercial Bank Ltd.*, (1960) 64 CWN 328; (1961) 31 Comp Cas 45.

28. *Rajiv Nagesh Dasgupta v. British Burma Petroleum Co Ltd.*, (1972) 42 Comp Cas 197 (Bom).
29. (1941) 70 Bom L.R. 107.

30. See also, *Martinillini v. Bengal Steamship Co*, AIR 1920 Cal 722, 39 IC 542; *J.L.R.* (1920) 47 Cal 654; *Hulaturpat Jidder Lalji Radway Co Ltd v. Union of India*, AIR 1954 Cal 499; (1954) 24 Comp Cas 507.

31. AIR 1968 SC 772 (1968) Comp I, 275, 285. (1968) 36 Comp Cas 540. See also, *Bilesri Jukaravil, re*, AIR 1962 Bom 133; (1962) 32 Comp Cas 215.

In that case owing to a long drawn out litigation the business of a company had come to a standstill and a part of its business was banned by legislation, S.I.A.B J (later C.J) held that "we cannot on that ground direct that the company be wound up. The company could always restart business with assets it possessed."³² Similarly, in a case before the Calcutta High Court:³³

By reason of the acquisition of its assets, a club could not carry on its normal activities.

The court refused a winding up order on the petition of a creditor as it appeared that other club activities were going on. Even where a company had lost its business through nationalisation, the court refused an order on the ground that negotiations for compensation could be better conducted by the directors than by the liquidator.³⁴ Where the railway business of a company was taken over by the Central Government and with the compensation money and in accordance with its memorandum the company started the business of transporting goods, the Registrar's petition to have it wound up on the ground of loss of substratum was rejected. The Calcutta High Court advised the Registrar that he should have taken into consideration the facts that the company had no creditors, that the shareholders had expressed the intention that the business should be continued and that the company had at its disposal an enormous amount of capital.³⁵ Where, on the other hand, a substantial minority of shareholders was opposed to the employment of the compensation money to other objects, the court ordered winding up so as to enable the shareholders to walk away with the compensation money which may fall to their share.³⁶

32. *Ibid.* 286. See also, Lord Carnes LJ in *Suburban Hotel Co. re*, (1866-67) LR 2 Ch App 732, 750. See also, *Virendra Singh Modaliq Bhandari v Nandlal & Sons Ltd.*, (1940) 50 Comp Cas 54 (MP), where the company being insolvent, its directors were busy transferring property to themselves without proper valuation. The court ordered winding up on the ground of loss of substratum: *Bombay Gas Co Ltd v Hindustan Mercantile Bank Ltd.*, (1967) 50 Comp Cas 202 (Bom), receiving compensation on merger. See also, *Syndicate Bank v Printersall (P) Ltd.*, (1981) 51 Comp Cas 5 (Karn), nobody left to take interest in the company.

33. *Bengal Flying Club re*, (1945) 2 Comp LJ 213 (1947) 71 CWN 39; *Mridula Bhakar v Ishwar Industries Ltd.*, (1985) 51 Comp Cas 442 (Del), the court refused winding up order only on account of family disputes.

34. *Eastern Negriani Co Ltd. re*, (1949) 19 Comp Cas 46 (Ch D). See also, *Bukharpur Bihar Light Railway Co Ltd v Union of India*, AIR 1954 Cal 499; (1954) 24 Comp Cas 200; *Lokenath Gupta v Creditis (P) Ltd.*, (1966) 38 Comp Cas 399; (1968) 1 Comp LJ 250, where the court also pointed out that "mere mismanagement or misconduct or even misappropriation on the part of directors is no ground for winding up"; *George v Adinathram Rubber*, AIR 1968 SC 772. The mere sale of a company's main plantations does not amount to knocking out the substratum. *Adinath Industrial Co Ltd v A John Autokupper*, (1965) 57 Comp Cas 717 (Ker).

35. *KG Ananthkrishna v Furhurt Kuthera Malathy Co Ltd.*, (1978) 46 Comp Cas 211 (Ker). Winding up being a remedy of last resort was refused where the company was of socio-economic importance (tourism) and was picking up from its debts. *Dankit Mahimai Lalitha v Solitaire Hotels (P) Ltd.*, (1993) 76 Comp Cas 215 (Bom).

36. *Nageswara Krishna Prasad v Andhra Bank Ltd.*, (1980) 53 Comp Cas 73 (AP). Where a company was being operated in total violation of the provisions of the Companies Act, it was ordered to be wound up; *Harkamal Rajah v Sovereign Dairy Industries Ltd.*, (1999) 32 CLA 335 (Mad); *Bharat Steel Tubes Ltd. re*, (2003) 70 DRJ 483; (2003) 106 DLT 672; (2004) 118 Comp Cas 64, recommendation of the Board of Industrial and Financial Reconstruction that the

'There was deadlock between the main shareholders. A complete lack of faith and probity had resulted in irretrievable breakdown between major shareholders. Liabilities of the company far exceeded its assets. The scheme propounded was unrealistic, speculative and unworkable. A case of winding up of the company for loss of substratum under the just and equitable ground had become established. The company was accordingly ordered to be wound up.'³⁷

The Tribunal saw loss of substratum in the following set of facts: A telecommunications company was in the nature of quasi-partnership between a foreign company and other companies. Majority of the shares in the foreign company were held by the Government of United Arab Emirates. Telecommunication licences were cancelled by the Supreme Court. This caused loss of substratum. Investigation and proceedings against the company and its officials showed that the substratum could not be revived even if the criminal proceedings resulted in the acquittal of all the accused. There was a complete lack of trust between majority shareholders and deadlock in management. Existing and probable assets of the company were insufficient to meet existing liabilities. The scheme proposed was vague and bereft of material particulars. Winding up of the company on just and equitable ground was considered to be proper.³⁸

(iii) *Losses*.—Thirdly, it is considered just and equitable to wind up a company when it cannot carry on business except at losses. It will be needless, indeed, for a company to carry on business when there is no hope of achieving the object of trading at a profit.³⁹ But a mere apprehension on the part of some shareholders that the assets of the company will be frittered away and that loss instead of gain will result has been held to be no ground.⁴⁰ Similarly, the Bombay High Court observed in *Shah Steamship Navigation Co. re*⁴¹ that "the court will not be justified in making a winding up order merely on the ground that the company has made losses; and is likely to make further losses."

(iv) *Oppression of minority*.—Fourthly, it is just and equitable to wind up a company where the principal shareholders have adopted an aggressive or oppressive or squeezing policy towards the minority. The decision of

company be wound up because it was not capable of being revived, given due consideration as showing loss of substratum. *A Roma Coal v Omnitrade Antwerp Electronics Ltd.* (2003) 4 ALD 278; (2004) 108 Comp Cas 154 (AP); recommendation of BIFR not binding on court; it is only a basis for continuation of proceedings, rest of the proceedings have to be in accordance with the Companies Act.

37. *Erisalat Mauritius Ltd v Erisalat DB Telecom* (1995) 199 Comp Cas 304 (Roor).

38. *Maystar Infotech (P) Ltd v Erisalat Mauritius Ltd*, 2010 SCC OnLine Bom 460, (2014) 185 Comp Cas 165.

39. A winding up on this ground was ordered in *Barkhani Enterprises v Hirji Milk Ltd*, AIR 1955 Bom 355. See also, *Bristol Joint Stock Bank, m. (1890) LR 44 Ch D 703* 59 (L) Ch 136; *Davis & Co Ltd v Brunswick Australia Ltd*, (1936) 1 All ER 299 (PC); *Registrar of Companies v M.R. Hins (P) Ltd*, (1977) 47 Comp Cas 314 (ML), where the whole of the capital had been wiped out in losses, the Registrar's petition succeeded.

40. See, *Mahadev Shastri Phalakchik Savary Ltd*, 16 (1912) 15 All 111 193.

41. (1901) 10 Bom LR 107.

the Madras High Court in *R Sabapathi Rao v Sabapathi Press Ltd.*⁴² is an illustration in point. The court observed:

Where the directors of a company were able to exercise a dominating influence on the management of the company and the managing director was able to outvote the minority of the shareholders and retain the profits of the business between members of the family and there were several complaints that the shareholders did not receive a copy of the balance-sheet, nor was the auditor's report read at the general meeting, dividends were not regularly paid and the rate was diminishing, that constituted sufficient ground for winding up.

Similarly, where more than seventy per cent of a company's funds were being used for objects wholly removed from anything within the memorandum and 93 per cent of the shareholders wished to dissociate themselves from the new objects, the company was ordered to be wound up.⁴³ In *Loch v John Blackwood Ltd.*,⁴⁴ the Privy Council ordered the winding up of a company because the managing director refused to hold meetings or to pay dividends, perhaps, with a view to squeezing out the minority by purchasing their shares at an undervalue.

(v) *Fraudulent purpose.* It is just and equitable to wind up a company if it has been conceived and brought forth in fraud or for illegal purposes. Thus in *Universal Mutual Aid & Poor Houses Assn v AD Thappa Naidu*⁴⁵ the Madras High Court observed:

Where the main object of a company is the conduct of a lottery, the mere fact that some of its objects were philanthropic will not prevent the company from being ordered to be wound up as being one formed for an illegal purpose.

But "the mere fact of there having been a fraud in promotion, or fraudulent misrepresentation in the prospectus, will not be sufficient to found a winding up order, for the majority of shareholders may waive the fraud".⁴⁶ Similarly, a fraud against third parties would not provide a ground for winding up.⁴⁷

(vi) *Incorporated or quasi-partnership.*—It has been observed that "there is little in common between the giant corporation and the family or one-man company. To apply the same legal requirements to such different

42. AIR 1925 Mad 489. See also, *Sabapathi Press Ltd v K Sabapathi Rao*, AIR 1950 Mad 240.

43. *Turish Freed v*, 1972 VR 445; Current Law, Sept. 1972, D 20.

44. 1924 AC 783; 1924 All ER Rep 200 (PC).

45. AIR 1933 Mad 16; (1932) 36 LW 610.

46. *Oriental Navigation Co v Bhawan Agarwala*, AIR 1922 Cal 365; 69 IC 241; *S Palaniswami v Tirupur Cotton Spg & Weaving Mills Ltd.* (2003) II 4 Comp Cas 298 (Madh) allegations of fraud in sale of the company's assets and issue of further capital, the court said that the CLB could have been approached for remedy against such conduct. Winding up is not ordered unless an equally effective alternative remedy is exhausted.

47. *Hulun Gold Mining Co v*, (1882) 1 LR 20 Ch D 151.



organisations is productive of inconvenience and injustice."⁴⁸ In order to avoid such "inconvenience and injustice" the Act treats them differently in several respects. But even in matters in which the Act treats them alike, the courts have had to distinguish them. One such matter is the interpretation of the "just and equitable" clause in reference to the winding up of a small private company. The principle that seems to emerge from a long line of cases culminating in the House of Lords' decision in *Ebrahim v Westbourne Galleries Ltd.*,⁴⁹ is that where a private company is in essence or substance a partnership, it may be ordered to be wound up under the just and equitable clause as interpreted in accordance with the partnership principles.⁵⁰ The underlying mutual duties and rights of co-partners survive even when they become co-members. As Lord Wilberforce observed:⁵¹

There is room in company law for recognition of the fact that behind the company, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not strictly submerged in the company structure.

Yenidje Tobacco Co Ltd.,⁵² is itself an application of the partnership principles, for the company in that case was ordered to be wound up not merely because of the deadlock between the two member-directors, but because they had forfeited mutual confidence beyond repair.

According to Lord Wilberforce,⁵³ a private company can be treated as an incorporated partnership if it possesses one or probably more of the following elements:

- (i) An association formed or continued on the basis of a personal relationship, involving mutual confidence—this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there must be sleeping members) of the shareholders shall participate in the conduct of the business; and (iii) restriction on the transfer of the members' interest in the company so that if confidence is lost, or one

48. R.S. Neck, *The Ford Foundation Workshop on Company Law*, July 1967 (1970); 21 *The Journal of the Society of Public Teachers of Law* 1, 7.

49. 1973 AC 360; (1972) 2 WLR 1289 (HL).

50. The decision has provoked a lot of favourable academic discussion. See, in particular, M.R. Chesterman, "The 'Just and Equitable' Winding up of Small Private Companies" (1973) 36 *Mord LR* 127; (1973) *Principle, "Winding Up on the Just and Equitable Ground: The Partnership Analogy"*; (1973) 89 LQR 100; "Minority Shareholder's Oppression" (1973) 89 LQR 339; N.A. Bustillo, "Minority Protection in Private Companies" (1973) *New LJ* 472; Trebillock, "A New Concern for the Minority Shareholder" (1973) 17 *McCall LJ* 306; I.H. Leigh, "Just and Equitable Winding Up" (1972) 88 LQR 468; Kenneth Polak, "Companies Winding Up on Just and Equitable Ground" (1972) *Comp LJ* 225.

51. *Ebrahim v Westbourne Galleries Ltd.* 1973 AC 360; (1972) 2 WLR 1289 (HL), adopted by the Supreme Court in *Breit's Industries (India) Ltd v Neelam Industries Newey India Holding Ltd.* (1981) 3 SC 613, 626; (1981) 51 *Comp Cas* 243.

52. (1946) 2 Ch 426.

53. *Ebrahim v Westbourne Galleries Ltd.* 1973 AC 360; (1972) 2 WLR 1289 (HL).

member is removed from management, he cannot take out his stake and go elsewhere.⁵⁴

"To this there might be also added the characteristics that the company's profits will be distributed in the form of salaries rather than 'the financially extravagant method of paying dividends'."⁵⁵ In *Atul Drug House Ltd.*,⁵⁶ the Gujarat High Court suggested that the partnership analogy will apply only when a private company is a domestic concern. The court accordingly refused to apply the analogy to a private company whose shares were held by two different families. The decision seems to be somewhat unreal, for even a partnership may consist of different families.⁵⁷ A Division Bench of the Calcutta High Court in *Ragunath Prasad Shunjhunwala v Hind Overseas (P) Ltd.*,⁵⁸ ordered the winding up of a private company consisting of two groups. The court found that the original idea was to start a partnership venture. This was shown by their correspondence and a banking account opened by them. The shareholding of the two groups was not equal, but it was clear that the members of one group were functioning as working partners and those of the other as financial. But on appeal to the Supreme Court this decision was reversed.⁵⁹ The court laid emphasis upon the fact that the Ebrahimji principle would apply when the company is in substance a partnership. In this case, on the other hand, the idea of forming a partnership was abandoned at the very initial stage. The concern came into existence directly as a company. It had divergent interests in it and not merely the interests of a family or two. The exclusion from directorship in such cases cannot be a proper ground for putting the company to an end.

Once it is proved that a private company is analogous to partnership, it may be ordered to be wound up when there is an abuse of power or breach of good faith which partners owe to each other.⁶⁰ Breach of articles will be

54. The articles of the company must carry provisions which speak of the parties' intention to maintain a structure of relations analogous to those of a partnership. *Cadzellar Dixit v Utkal Flour Mills (P) Ltd.* (1988) 2 Comp Cas 65 (Ori). A whimsical conduct cannot be permitted to be used as a ground for winding a company. *BVSS Muniz v Kowtho Business Syndicate (P) Ltd.* (1989) 65 Comp Cas 305 (AP).

55. D.D. Prentice, "Winding Up on the Just and Equitable Ground: The Partnership Analogy" (1973) 49 LQR 107, 114. The in-quote is from *Purushottamji Neshkarji v Cellars* (1971, re, 1973) Ch 799; (1971) 2 WLR 618 (CA). Where a company was in the nature of a partnership and was formed on the basis that a certain person would be a director, his removal from his position as a director was held to be a ground for winding up. *S. Sandurji v Plastic-fibre Industries (P) Ltd.* (1992) 76 Comp Cas 38 (Mad). The company was otherwise also in a state of hopelessness. The court distinguished the matter from *G. Kasturi & N. Marali*, (1942) 74 Comp Cas 661 (Mar), it was a family dispute between the directors and editors of the "Hindu" which had wider public representation.

56. (1971) 41 Comp Cas 352 (Guj). The principle of this case was applied in *Kum. Sardhu v Naraya Sugar Mills Ltd.*, (1988) 91 Comp Cas 146 (All).

57. Re-affirmed. *Narminil Md Shukr v Atul Drug Houses Ltd.*, (1977) 47 Comp Cas 236 (Guj).

58. (1971) 41 Comp Cas 308 (Cal). Overruling the decision of A.N. Ray J (as he then was), (1971) 41 Comp Cas 279. The learned judge reviews all the English authorities at pp. 293-303. See also, *Plan-Haus Ltd. v. A.* (1970) 1 WLR 592, 596-97.

59. *Hind Overseas (P) Ltd v B.P. Jayaraman*, (1976) 3 SCC 259; (1976) 2 SCR 226; (1976) 46 Comp Cas 91.

60. See, 1 *Murley, On Partnership* (13th Edn. 1971) 588-89.



CASE PILOT

sufficient to lead to a dissolution. For example, in *American Pioneer Leather Co, re*⁶¹

The articles of a small private company, consisting of only three members two of whom were directors, provided that any member willing to withdraw would offer his interest to the other members and in the event of their refusal to purchase, would be entitled to have the company wound up. The company was accordingly ordered to be wound up when the other members refused to purchase the shares of the petitioner.

Partners have the right to participate in the management of business. If this right is denied to any director of an incorporated partnership, it would afford a ground for dissolution.⁶² Entitlement to management participation in a small private company is an obligation so basic that if it is broken, the association must be dissolved. Three shareholders of a company had an equal holding with power to nominate directors. One of them sought to change his nominee which was not accepted by the others. It was held to be just and equitable to dissolve the company.⁶³

Where the conduct of those in control is in accordance with the company's articles, the court would be slow to interfere. *Carlisher Cooper & Sons Ltd, re*⁶⁴ is an illustration of a situation of this kind, though after the decision of the House of Lords in *Ebrahim v Westbourne Galleries Ltd*,⁶⁵ it seems to have lost its authority. The facts were:

Half of the capital of a private company belonged to a father and the other half to his two elder sons. His three younger sons were employed in the company. The father died bequeathing his shares equally between his younger sons. The senior ones not only refused to accept the juniors as members, but also removed them from the company's employment and refused to supply them with copies of the company's accounts.

Even so it was held that the circumstances did not warrant an order for dissolution. "The conduct complained of... was in all respects in accordance with the company's articles and was not shown to be *contra fide*".⁶⁶

This decision was adversely commented upon by the House of Lords in *Ebrahim v Westbourne Galleries Ltd*.⁶⁷ It failed to take account of the fact that co-partners can have rights, expectations and obligations apart from articles and "which are not necessarily merged in the company structure". Secondly, there are circumstances in which even the exercise of legal rights

61. (1918) 1 Ch 556, 318 LT 495.

62. *Davis & Collett Ltd, re*, [1935] Ch 693, (1935) 5 Compl Cas 160; *Zivity Properties Ltd, re*, [1994] 1 WLR 1289 (ChD), where not only there was exclusion from directorship, the member was kept deprived of any information about the vital matters of the company, which was founded on their mutual trust.

63. *A & BC Cleaning Gdns, re*, (1975) 1 WLR 579.

64. 1937 Ch 392.

65. 1973 AC 360; (1972) 2 WLR 1289 (HL).

66. K.R. Chesterman, "Just and Equitable Winding Up" (1973) 26 Mod L.R. 135.

67. 1973 AC 360; (1972) 2 WLR 1289 (HL).



as laid down in the articles may amount to breach of faith, for it may go "outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company".⁶⁸ "Articles are not the whole story; if something done in accordance therewith infringes some extraneous agreement or understanding between the parties of the quasi-partnership company, it may provide grounds for a winding up."⁶⁹ The recognition of this fact is the chief contribution of the decision of the House of Lords in *Westbourne Galleries Ltd, re*.⁷⁰ Even before this, PLOWMAN J in *Lundie Bros Ltd, re*, ordered the winding up of a private company when a member was removed from his post as a working director. *Westbourne Galleries Ltd, re*,⁷¹ again presented the same kind of story before PROWMAN J:

E and N started business together as dealers in Persian and other carpets. N provided the greater part of the capital. Subsequently they incorporated a private company, holding equal shares. Still subsequently, N's son joined the company taking equal number of shares both from E and N. All the three were wholetime directors. They received remuneration as directors rather than dividends as members. N did not treat E as his equal. E complained that N imported carpets from Persia and sold them to the company at artificially high prices and that the company was paying for his antique business. N and his son, acting as majority shareholders, removed E from directorship. Thus his investment became useless as he could neither transfer it nor receive any dividends on it.

Even so PROWMAN J held that he was not entitled to any relief against oppression, because he had suffered as a director and not as a member. The learned judge, however, held that the conduct of the majority in excluding him from participation in the management only because he was perpetually complaining was an abuse of power and a breach of good faith, which entitled him to a winding up order. The Court of Appeal reversed that aspect of the decision but the House of Lords restored it. Lord WITHEFORD, who delivered the leading speech, was of the opinion that the principles in this area should be developed as part of company law and not that of partnership law. Such principles may be parallel to those of partnership law and may be applied to private companies possessing partnership features.⁷²

68. *Wonduler Textiles Pty Ltd, re*, 1951 VLR 459.

69. M.R. Chesterton, (1973) 36 Mod LR 105.

70. 1973 AC 360; (1972) 2 WLR 1299 (314).

71. (1920) 1 WLR 1378. See, SS Rajakumar v Perfect Castings Ltd, (1968) 38 Comp Cas 187 (Mad), where the court refused to order winding up when a director was removed from office even though the members of the small private company had orally agreed that the company would function as a partnership.

72. Serious disputes between members making it impossible for business to be carried on could have the same effect. R.P. Shah v Engineers' Enterprises (P) Ltd, (1977) 47 Comp Cas 294 (Bom). Henry E. Markson, "Winding Up: The Partnership Analogy", (1978) New Law Journal 115. See also, A & BC Chirwing Gari, m. (1975) 1 WLR 529, 590-91, breach of agreement. Where the relations registered an irretrievable breakdown, the court ordered winding up giving the option to one party group to buy out the other. Krishan Lal Ahuja

Following this case, the Delhi High Court pointed out that what matters is not whether a member has been expelled or not, but whether there has been breach of mutual understanding. Thus where the understanding was that parity of shareholding was to be maintained, it was held that an attempt by one group to take-over the company by increasing its shares would enable the court to exercise its powers.⁷³ In a subsequent case the same High Court summarised that it is the settled legal position that the partnership principle for winding up a company would be applicable only in cases where the deadlock is complete and irresolvable under its constitution. Those who take advantage of a corporate body must be held bound by the provisions of the Act and the averments that a limited company should be treated as a quasi partnership should not be easily accepted. Once the partnership principle is rejected, the petitioner has to prove almost the same grounds for succeeding in the petition. Sections 397 and 398 must be treated as an alternative and effective remedy. Wherever an alternate remedy is available to a party, the just and equitable clause cannot be resorted to casually.⁷⁴

Public interest.—Winding up can also be ordered under this section when public interest demands it. A type of conduct which comes in conflict with public interest is indicated in a Court of Appeal decision in England.⁷⁵ The company in question had no proper records; it pretended to be an impartial adviser in matters of investment when, in fact, it was only a share-vending company; the American companies in which the clients were advised to invest their moneys were such whose shares could not be easily traded and the company was also violating its investment agreement.

v Sunesh Kumar Ahuja, (1983) 53 Comp Cas 611 (Del), Mohit Palms (P) Ltd v Harish Patel, (1982) 2 DLT 150; (1993) 54 Comp Cas 856, where also the court found no evidence of mutual co-operation between family members. *S Sundaresan v East-v-Fibre Industries (P) Ltd*, (1993) 76 Comp Cas 39 (Mad), amount of a £100m of a private company to breach of understanding, held a good ground. This would not be so where the company is a big one, *G Kasturi v N Murali*, (1992) 71 Comp Cas 611 (Mad). Providing directorship to the daughter of the deceased managing director of the company, not wrong in the circumstances, *Anilsh K Shah v Testemex (P) Ltd*, (1995) 17 CLA 5; AIR 1995 Mad 62; (1995) 82 Comp Cas 514.

73. *Bharat Stoneware Pipes (P) Ltd v Rajinder Nath Bhaskar*, (1988) 63 Comp Cas 184 (Del). Above all, the matter being entirely in the discretion of the court, an order may be passed where neither the one group of shareholders nor the other have been guilty of any prejudicial conduct, if it is otherwise in the fitness of things. A Company, re. (*No 1007 of 1987*), (1988) 1 WLR 2068. See, the Supreme Court decisions in *ICICI Ltd v Shriram Agencies*, (1995), 4 SCC 165; (1996), 86 Comp Cas 255, where the factors governing the grant of leave to secured creditors have been recounted. See, *Kiran Sudhi v Sureya Sugar Mills Ltd*, (1998) 91 Comp Cas 146 (All), where none of the just and equitable grounds were available.

74. *Egness Holdings (P) Ltd v Edna Park Hold (P) Ltd*, (2013) 134 DLR 91; (2015) 176 Comp Cas 118; *Vinod Krishna Khanna v Amritsar Sandeshi Textile Corp (P) Ltd*, 2015 SCC OnLine P&H 19901; (2016) 195 Comp Cas 469, a company was running and flourishing, disputed questions of fact not to be adjudicated in summary jurisdiction, not just and equitable to order winding up.

75. *Walm F. Jacob & Co Ltd v. TCSB* TCCD 346 (CA).



The court was of the view that public interest demanded winding up of a company which was wasting the capital resources of the country. It was not material that the company had already suspended its business, because, if the company was permitted to remain alive, it may again start befooling small investors.⁷⁶ Where the company's business was unlawful because of lack of authorisation under the Financial Services Act, 1986 (English) and there was no evidence of the possibility of grant of such authorisation in the future, the court ordered winding up.⁷⁷ Another company was ordered to be wound up in public interest because the company posed danger to the investing public and was also technically insolvent.⁷⁸ In another case, winding up was found to be desirable because of many undesirable practices such as false invoicing.⁷⁹

The sanction of winding up being too severe was not inflicted on a company which had committed inadvertent breaches of Air Traffic Licensing Regulations. The court said that even deliberate breaches might not have justified the extreme penalty of winding up.⁸⁰

An order of winding up may be refused when it would operate against public interest. Where a company was running profitably and had a muster-roll of 700 workers who opposed winding up, a creditor's petition for winding up was rejected.⁸¹

Whether a petition is based on insolvency or on the just and equitable ground, there is a requirement that a creditor should be petitioning by pursuing his private interest attributable to his status as a creditor. This requirement has to be satisfied if the petition is not to be an abuse of the process. The desire on the part of the creditor essentially collateral to his status as such to achieve a public interest in bringing about winding up of a company which had appropriated public funds for private gain, is not an alternative justification. The court found that the principal motive of the creditor's petition was not protection of public interest. There could be discerned within the petition a sufficient private interest as a contingent or prospective creditor in having the company wound up. The assertion in the petition of public interest reasons for winding up did not render the proceedings as a whole an abuse of process.⁸²

Existence of alternative remedy.—The remedy of winding up is a remedy of last resort. It may not be allowed where an equally effective alternative

76. Another example of the same kind, *A Company*, re. (No. 091951 of 1987), 1988 BCLC 362 (Ch D).

77. *Market Wizard Systems Ltd*, re. (1996) 2 BCLC 282 (Ch D).

78. Secy of State for Trade and Industry v *Metric Components plc*, 17-2-2000, Paterson's COMPANY LAW, June 2000, 5.

79. *Millennium Advanced Technology Ltd*, re. (2004) 1 WLR 2177 (2005) 123 Comp Cas 170 (Ch D).

80. *A Company*, re. (No. 5669 of 1998), (2000) 1 BCLC 427 (Ch D), affirmed by the Court of Appeal in *Tata Yarzi (UK) Ltd*, re., March 2001 (T.A.).

81. *Manjulabai v Jayant Vitamins Ltd*, (1991) 71 Comp Cas 443 (MP).

82. *Millennium Advanced Technology Ltd*, re. (2004) 1 WLR 2177 (2005) 123 Comp Cas 170 (Ch D).

remedy is available. Allegations of misuse of funds, fraudulent transactions, removal of a director under a forged resignation, failure to supply essential documents to shareholders, increase in remuneration of directors without general body approval, illegal allotments of shares, could have been taken care of by a petition under Section 241 against mismanagement of the company's affairs. A petition for winding up was not entertained.³³

Winding up was not allowed where a scheme of reconstruction was sanctioned by the court. Objections of the Regional Director and Official Liquidator were taken care of by the petitioner. Claims of secured creditors were settled. The scheme was approved by unsecured creditors and shareholders. Revival of the company was necessary in the interest of its workers. A claims committee was formed to take care of workers' claims. The scheme was fair and reasonable and not opposed to public interest.³⁴

An order of winding up was sought against a company on just and equitable ground. In order to avoid winding up, the company offered to purchase the petitioning member's shares. This offer was accepted. Shares were valued by an auditor. The company felt that a very high value was put upon shares and the same was not acceptable to it. The Supreme Court held that the company was bound by its offer. Failing this the petition was to be advertised.³⁵

Advertisement of petition

A petition is not normally to be advertised on its *ex parte* admission. The company in this case was a working and running concern. The advertisement of the petition on its admission might seriously prejudice the goodwill of the company and its day to day working. The *ex parte* order was set aside. The matter was remitted for fresh consideration.³⁶

Who can apply [S. 272]

An application to the Tribunal for the winding up of a company is made by a petition.³⁷ A petition may be presented by any one of the following:

33. *M. Malan Jabe v Heritage Foods India Ltd.*, (2002) 106 Comp Cas 771 (AP); *K. Mukte Babu v Heritage Foods India Ltd.*, (2003) 5 ALD 400; (2007) 106 Comp Cas 798, internal squabbles among directors, not a ground for winding up. It could have been resolved through other forums. The petitioner must show that he had exhausted other remedies or that the other remedies would not have been helpful. *Yashoda Hospital v Jagannath Bhattachar*, (2003) 113 Comp Cas 343 (Raj), need for resorting to alternative mechanism emphasised.

K Venkateswara Rao v Phoenix Share & Stockbrokers (P) Ltd., (2003) 115 Comp Cas 814 (Bom), no proof of allegations of lack of probity, etc. *Ramendhir Anandmal Patel v Shree Dasasidhar IPI Ltd.*, (2005) 58 SC 396; (2005) 127 Comp Cas 806 (Guj), alternative remedy for prevention of oppression available; *Jagdamba Polymers Ltd v M/s. Sarl. Co.*, (2016) 129 Comp Cas 163 (MP), the company disputed the debt and the petitioner had other remedies.

34. *Dhar Cement Ltd C (in Liquidation), re.*, 2014 SCC OnLine MP 1396; (2014) 187 Comp Cas 366.

35. *Bugti Synthetic (P) Ltd v Hameem Prajat Rajya*, (2015) 15 SCC 444.

36. *Mansukhi Dhai Industries Ltd v Shakti Agencies*, (2006) 123 Comp Cas 525 (Raj).

37. A petition can be filed through a special power of attorney and not through a general power. *Santosh Khasfaldas & Bros (P) Ltd v Jayabhai Suresh Shah*, (1993) 77 Comp Cas 253 (Bom).

1. Petition by company [S. 272(1)(a)].—The company may itself present a petition for winding up. Petition by the company will be particularly necessary when the only ground for winding up is that the company has passed a special resolution to that effect. There must be a valid resolution to enable the company to take this step. Thus, where a judge passed an order for winding up on the ground that the majority of the shareholders at a meeting were in favour of winding up, it was held that that was not, in the absence of a valid special resolution, a sufficient ground for compulsory winding up.⁸⁸ Again, the petition must be presented by the company itself. Where, for example, in *Patiala Bankrupt Co., re.*⁸⁹

An application for winding up of a company was made by the managing director of the company. Rejecting the petition the court said, "the petition by the company must have behind it the decision of the general meeting. The managing director or directors cannot constitute the company for the purpose."

Where a winding up petition was filed on behalf of the company by a person who was not authorised by the Board of directors, the petition was held to be incompetent.⁹⁰

2. Creditor's petition [S. 272(1)(b)].—A creditor may apply for winding up.⁹¹ A creditor who is proceeding against the company on the ground of the company's inability to pay its debts has to proceed under the Insolvency and Bankruptcy Code, 2016. His petition under the Companies Act is not going to be entertained. A creditor's petition can be entertained under this section only if it is based upon any of the grounds now available under the section. The word "creditor" includes a secured creditor, debenture-holder⁹² and a trustee for debenture-holders.⁹³ Accordingly "a secured creditor is as much entitled as of right to file a petition as an unsecured creditor".⁹⁴ "Winding up is equally good whether it is obtained by a secured creditor or an unsecured creditor."⁹⁵ It is not even necessary for a secured creditor to apply that he should give up his security.⁹⁶ But where a petition is brought

88. *Creditor Nangalwala Co v Bhawarao Agarkar*, ATR 1922 Cal 365: 69 IC 241.

89. AIR 1953 Pepsu 195.

90. *BGC India Ltd v Zinc Products & Co (P) Ltd*, (1996) 86 Comp Cas 358 (Pat).

91. A joint petition by several creditors paying single court fee has been held to be valid. *AV Krishnam v Kurnool Leasing & Commercial Corp*, I.R. 1949 KAR 738c (1949) 2 Kant LJ 145; (1949) 86 Comp Cas 764.

92. For the right of the debenture-holder, see *Nuctumulus T Sunmuni v Bentley Dyeing and Mfg Co Ltd*, (1986) 3 Comp LJ 179 (Bom).

93. *Neustadt Trustee Co Ltd v Moscow Globin Ltd*, (2013) 181 Comp Cas 223 (Mad).

94. *Karnatak Vegetable Oils & Refineries Ltd v Andhra Industrial Investment Corp Ltd*, (1952) 2 MLJ 467; (1954) 24 Comp Cas 249, AIR 1955 Mad 582.

95. *Jessai M R in Moor v Anglo-India Bank*, (1879) LR 10 Ch D 651. Where a part of the claim of the secured creditor was satisfied out of the sale proceeds of the security (goods pledged), he was allowed to file a petition, being still a creditor. *Vysya Bank Ltd v Universal Investment Trust Ltd*, (1930) 1 Comp LJ 353 (Del);

96. *India Electric Works, re*, (1949) 2 Comp LJ 169.

by a contingent or prospective creditor, it shall not be admitted unless the leave of the Tribunal is obtained for its admission. Such leave is not to be granted unless the Tribunal is satisfied that there is a *prima facie case* for winding up the company and reasonable security for costs has been given.⁷⁷ The Calcutta High Court observed that a creditor would not ordinarily be heard to urge that winding up order should be made because the substratum of the company was gone, not for the reason that he was technically and as a matter of law barred from taking that ground at all, but for the reason that it was not proper ground for the creditor to urge except in very special circumstances.⁷⁸ Sometimes a creditor's petition is opposed by other creditors. In such cases the Tribunal may ascertain the wishes of the majority of the creditors. But their opinion does not bind it. The question will ultimately depend upon the state of the company. If the company is commercially insolvent and the object of trading at a profit cannot be attained, winding up order would follow as a matter of course (*ex debito iustifie*).⁷⁹

A creditor who is pursuing his ordinary remedy of a civil suit for the enforcement of his claim can also make the same claim as a ground for winding up. The [now Tribunal] may order the stay of his suit but cannot disqualify him on that ground.⁸⁰ The pendency of an application filed by the creditor before the Debt Recovery Tribunal (DRT) did not affect the jurisdiction of the court [now Tribunal] to admit the creditor's petition for winding up.⁸¹

A foreign creditor can also apply for winding up. A company did not pay its foreign commission agent. He asked for winding up. The company's defence that Reserve Bank permission was necessary did not appeal to the court. It was a part of the company's duty to make necessary arrangements.⁸² A foreign arbitration award can be a good ground for winding up when it has been declared by the competent jurisdiction to be enforceable in India under Section 49, Arbitration and Conciliation Act, 1996.⁸³ A

77 S. 272(6). Where a contingent creditor's petition, filed after obtaining leave was dismissed on a technical ground, he was allowed to proceed again without having to obtain a fresh leave. *Pioneer Tidwell Industries (P) Ltd v SH Resins Ltd.*, (1990) 1 Comp L 310 (Cal).

78 *Brigal Flying Club, m.*, (1966) 2 Comp L 213, following *Bukharpur Adhir Light Railway Co Ltd v Union of India*, AIR 1954 Cal 499; (1954) 24 Comp Cas 507. A shareholder of a private company, who broke out from the only other shareholder, was incidentally a lender to the company also and filed a creditor's petition for winding up on the ground of breakdown of relations and the same was not allowed. *A Company (No 093023 of 1957)*, re, 1988 ICL 11262 (Ct OJ).

79 *Ibid*. This ruling of the Calcutta High Court is opposed to that of the Madras High Court in *Kurnool Vegetable Oil & Refining Ltd v Madras Industrial Investment Corp Ltd*, (1954) 2 MIL 467; AIR 1955 Mad 58c which followed the English authority of *Moor v Anglo-Iranian Bank*, (1879) LR 10 Ch D 681.

80 *Central Bank of India v Sikkim Mining Industries*, (1977) 47 Comp Cas 1 (Pun); *Vivat Hire Purchase & Leasing Ltd v Pulse Power Com (P) Ltd*, (2006) 129 Comp Cas 345 (Mad), Civil suit for recovery, no bar.

81 *Virel Filaments Ltd v Julius Jindal Steel Ltd*, (2003) 113 Comp Cas 85, (2004) 4 Comp L 44 (Bom).

82 *Parasmati Ltd v Aluminaux Cables and Conductors Ltd (P) Ltd*, (1983) 53 Comp Cas 714 (Cal).

83 *Marine World Shipping Corp v Jindal Exports (P) Ltd*, (2004) 122 Comp Cas 397 (Delhi); *Vineyak Oil & Fats (P) Ltd v Andre (Cayman Islands) Trading Co Ltd*, 2005 CLC 588 (Cal), a

guarantor is a prospective creditor and has a right to apply for winding up.¹⁰⁴ An individual note holder holding beneficially through a depository was held to be a creditor for the purpose of filing a petition.¹⁰⁵ The court [now Tribunal] also added that "securities" for the purposes of the Act need not only be those which are marketable in India.

Where the claim of a creditor is enforceable at the time of the petition, it does not matter if it ceases to be enforceable by the time of the order.¹⁰⁶ Where existence of the debt is acknowledged by the debtor by electronic means (e-mail), it would be an effective acknowledgment for extending the period of limitation. The requirement Section 18, Limitation Act, 1963 that it should be signed by the debtor would be deemed to be satisfied by the force of the statutory provision.¹⁰⁷

An unpaid worker is not a creditor for this purpose. The union of workers has also no locus standi to file a petition because there are alternative remedies under industrial laws.¹⁰⁸

An unregistered firm, being not competent to file a suit, was not allowed to file a petition unless the partners also joined it.¹⁰⁹ The Karnataka High Court held differently. To the extent to which a company is indebted to its worker or employee for wages or salary, he has a right to apply and his petition can be entertained. Such a petition is as much subject to the discretion of the court [now Tribunal] as any other petition. This has nothing to do with the ranking of workers' claims under Section 326.¹¹⁰

A petition by erstwhile directors of the company for recovery of their dues was held to be not maintainable.¹¹¹

¹⁰⁴ *Asian Vinaquide Salgados Karimjee Foods (P) Ltd.*, re. (1985) 58 Comp Cas 126 (Ctg).

¹⁰⁵ *Paper Steel Ltd v Gramberry Emerging Market Fund*, (2003) 110 Comp Cas 2d8 (Ctg).

¹⁰⁶ *Dinesh Chandra Rajew v New Kailash Cinema (P) Ltd*, (1987) 62 Comp Cas 828; (1985) 28 DLT 310; *Amrit Pratap Singh v Orissa Sewak Ltd*, (2002) 112 Comp Cas 701 (Del); time-barred debt, petition not allowed. *Associated Journals Ltd v Mysore Paper Mills Ltd*, (2001) 6 SCC 197, (2006) 132 Comp Cas 470; some errors in the supporting affidavit were allowed to be corrected, nothing wrong.

¹⁰⁷ *Sudarshan Cargo (P) Ltd v Technoc Engg (P) Ltd*, (2014) 182 Comp Cas 71 (Ker).

¹⁰⁸ *Mumbai Labour Union v Indo French Time Industries Ltd*, (2002) 110 Comp Cas 408; (2002) 3 Bom LR 2011 (2002) 2 Mah LJ 404. Also to the same effect, *Kittayalwar Sandilal Parmar v Sevalia Cement Works*, (2005) 60 SCL J96 (All).

¹⁰⁹ *Feb Paints (P) Ltd v Universal Lime Industries*, (2007) 143 I.L.J. 94; (2002) 110 Comp Cas 429; *Eccent Travel Service v ASM Shipping Ltd*, (2003) 5 Muh LJ 281; (2004) 2 Ben CR 226 (2004) 118 Comp Cas 209. The petitioning creditor was paid off by the company and he was seeking withdrawal of his petition when another creditor applied that he be substituted for continuation of the petition. The court has to see whether such creditor had the right to file a petition if he had done so originally. In this case the company admitted his claim, the court allowed substitution.

¹¹⁰ *Avtuk Mahajan v Knives India (P) Ltd*, ILR 2014 KAR 4066-2004 CLC 3642 (2005) 60 SCL 598; *PK Passi v NEPC India Ltd*, (2006) 130 Comp Cas 176 (Mad). Arrears of salary not a debt, remedy under Industrial Disputes Act; *Vireo Gopal Singh v Jaipur Udyog*, (2006) 130 Comp Cas 617 (Raj).

¹¹¹ *Goyal Krishna Sharma v Shakti General Finance & Investments Ltd*, (2005) 125 Comp Cas 96 (Raj). To the same effect, *Argyn Sen Abeer Chakraborty v Interim Information Technologies*

Where the petition is to be filed through an agent, he must be specifically authorised for the purposes of petition. A general authorisation for suits and proceedings against the company is not going to be sufficient. A power of attorney which was not bearing any date or place of execution was held to be invalid.¹¹² Where a petition was filed by a power of attorney holder more than 11 years after the disappearance of the person who granted the power, the petition was held to be incompetent unless the attorney proved that his grantor was still alive.¹¹³

3. Contributory's petition.—On the commencement of the winding up of a company, its shareholders are called contributories.¹¹⁴ Any contributory or contributories may present a petition for winding up.¹¹⁵ It is requisite that the shares in respect of which the petitioner is contributory were originally allotted to him or he has been the registered holder for at least 6 months during the 18 months immediately before the commencement of the winding up, or the shares have devolved on him through the death of a former holder. In a case on the point:¹¹⁶

A transfer had been executed, stamped and dated in June 1967; the company did not register it until October 1968. A petition presented by the shareholder in December 1968 for winding up was held inadmissible as she had not held her shares for six months as required by the Act.

But where a company had been ordered to allot shares and had failed to do so, it was held that the person in whose favour the order had been made was qualified to apply.¹¹⁷

¹¹² *Indus (P) Ltd v H.R. (2006) 2 Del 458*; (2006) 125 DLT 379; (2006) 133 Comp Cas 49. Apart from being regarded as creditors, workers have no locus standi. There was acknowledgement by managing director by e-mail. Liquidation started from the date of e-mail.

¹¹³ *Ram C. Sohanlal v Parag Pens & Casting Systems Ltd.* (2006) 133 Comp Cas 286 (MP).

¹¹⁴ S. 273 *Niranjan Kumar Agarwal v Dineshwar Kumar Ahmi*, (1996) 62 DLT 395, the court will not go into inquiring whether the petitioner was shareholder to a certain extent. *Srichandla Bhai v Eastern Linkers (P) Ltd.* (1995) 60 DLT 497, established shareholding through legal decisions, cannot be reopened. *Anil Arora v Amra Aluminium & Alited Works (P) Ltd.* (2006) 132 Comp Cas 221 (AI), on the death of the contributory his son was substituted. It was not necessary that he should have been holding shares for a particular length of time.

¹¹⁵ S. 272(2)(x). Where a joint petition was filed by a contributory and a creditor, only the latter petition was taken up; contributory-director was not able to establish a cause by the fact that he was removed from membership. *J.P. Gupta v Standard Diesel Works (P) Ltd.* (1987) 62 Comp Cas 36 (Del).

¹¹⁶ *Guptapuri (Id. re)* (1998) 1 WIJR 519 (K.A.). *Ramak Holliday Hawes (P) Ltd v Madan P Pratinidhi*, (2003) 116 Comp Cas 172 (Bom), where this requirement was not proved by the contributory who petitioned for winding up. *Munshi R Patel v Official Liquidator*, (2003) 114 Comp Cas 642 (Guj), claim for advocate's fee filed after six years, not entertained. *Oilco Controls Oulu (P) Ltd v Sezen Trent Water Purification (P) Ltd.* (2006) 3 Bom CR 119. (2006) 131 Comp Cas 501, transferee company in amalgamation whose name does not appear in the register of members of the transferor company is not contributory by operation of law.

¹¹⁷ *Patent Steam Engine Co. re* (1876) L.R. 8 Ch D 464.

A question in this connection used to concern the courts in the past. Suppose, there is a contributory holding fully paid-up shares so that his liability is nil. Similarly, suppose, the company has no or insufficient assets so that the contributors will get no return of capital in the winding up. In such circumstances, a contributory's petition would be rejected. The rule was that "if he presents a petition, he must allege and prove, at least to the extent of a *prima facie* case, that there are assets of such amount as that in the winding up he will have a tangible interest".¹¹⁸ The rule was followed by some High Courts in India also.¹¹⁹ But now there is a clear provision in the Act which declares that "a contributory shall be entitled to present a petition for winding up, 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". [S. 272(3)] Hence, at present, "want of assets may be an element in determining whether the petition is *bona fide*, but, except to that extent, it will not be a relevant consideration for determining whether winding up should be ordered or not".¹²⁰

A shareholder filed a petition for a winding up order on the ground that he had been misled by representations in the company's prospectus. The court returned his petition with the remark that an alternative remedy was available to him under Section 62 [now S. 35] of the Act.¹²¹

4. All or any of the persons specified in the foregoing three clauses.

5. Registrar's petition [S. 272(1)(e) and (4)].—The Registrar of Companies is also entitled to present a petition for winding up on any of the grounds of winding up by the Tribunal, except the second, namely, that the company has passed a special resolution. But he shall not present a petition on the ground of the company's inability to pay its debts "unless it appears to him either from the financial condition of the company as disclosed in its balance-sheet¹²² or from the report of an inspector under Section 210.

118 Buckley Cosmetics Acts (9th Edn) 221. For English authorities, see, *Petent Artificial Stone Co Ltd*, *re*, (1884) 54 I.J.Ch. 330; 55 ER 606; *Lanarkshire Brick & Tile Co. Ltd*, *re*, (1865) L.R. 34 1; Ch. 33; *Riva Club Woking* *Co. Ltd*, (1879) 1.R. 11 Ch. D 56 (CA); *Dowmud Fwd Co. Ltd*, (1879) 1.R. 13 Ch. D 400; 41 LT 717 (CA); *Iron Colliery Co. Ltd*, (1882) 1.R. 20 Ch. D 442. For a criticism of this rule see, *Gwyneth Pitt*, "Winding Up on the Just and Equitable Ground" (1977) New Law Journal 619 discussing *Chesterfield Catering Co Ltd*, *re*, (1975) 3 All ER 294, where the petition of the executors of the deceased shareholder was rejected only on the ground that there would be no surplus assets, though the company which ran a club was for all intents and purposes dead and though the executors stated that he was not able to administer the estate unless the affairs of the moribund company were settled out.

119 See, for example, *Rhenish Bank v Rajpal Rai Sandhu*, AIR 1950 EP 326; *Imperial Oil Sons & General Mills Ltd v Ram Chaud*, AIR 1916 Lah 78(2).

120 For authorities see, *Sri Narsaja Textile Mills Ltd v SV Angadi Chitran*, (1954) 1 M.L.J. 668; *Orme Industries & Recording Co Ltd*, *re*, AIR 1942 Bom 231; (1942) 12 Comp Cas 215.

121 *Prashant Kausik Ahmed Shah v Rankin Polychem Ltd*, (2008) 100 Comp Cas 170; AIR 1996 Bom 205.

122 Such condition was evident in *Registrar of Companies v Newtown Trading & Finance (P) Ltd*, (1978) 48 Comp Cas 402 (Guj).

In all cases, however, the Registrar has to obtain sanction of the Central Government in the presentation of a petition and the latter shall not grant the sanction unless the company has been afforded an opportunity to make its representation, if any.¹²³

6. Central Government's petition.—The Central Government is also authorised by the Act, in certain cases, to present a petition for winding up. Section 224 enables the Government to petition for winding up where it appears from the report of inspectors appointed to investigate the affairs of a company under Section 206 that the business of the company has been conducted for fraudulent or unlawful purposes as explained in sub-clauses (i) and (ii) of clause (b) of Section 213. The Government may authorise any person to act on its behalf for the purpose. [S. 272(f)]

7. Central Government or State Government's petition [S. 272(f)(g)].—If a case falls under Section 272(c) (anti-national acts), the Central Government or the State Government may apply to the Tribunal for winding up of a company.

Employee's Petition.—Outstanding or unpaid wages or salary of a workman or an employee is a "debt" to be paid by the company. Employee or erstwhile employee of company is creditor of the company in respect of his unpaid emoluments and can file a petition.¹²⁴

Filing of copy with Registrar [S. 272(7)].—A copy of the petition under the section has to be filed with the Registrar who has to submit his views to the Tribunal within 60 days of the receipt of such petition.

Arbitration agreement.—An agreement cannot accredit to the arbitrator the question whether a winding up order should be made, which remains a matter for the Tribunal in any subsequent proceedings.¹²⁵ But the arbitrator can decide whether the complaint for an unfair prejudice is made out and whether it would be appropriate for winding up proceedings to take place or whether the complainant should be limited to some lesser remedy. If the relief sought is of a kind which may affect other members who are not parties to the arbitration, there is no reason in principle why their views should not be canvassed by the arbitrators before deciding whether to make an award in those terms.¹²⁶

123. S. 439(a). It has been held by the Calcutta High Court in *Standard Braids Ltd. v. w. (1980)* 50 Comp Cas 75 (Cal.) that the petition must be presented within three years from the date of sanction, otherwise it would become time-barred. S. 187, Limitation Act 1963 applicable.

124. *Jonathan Allen v. Zetim Developers P. Ltd.*, 2015 SCC Online MP 7423; (2015) 192 Comp Cas 501.

125. *Empty Sugars & Chemicals Ltd v. Patnaipur Coating Tawers Ltd.*, 2014 SCC Online AP 106; (2014) 187 Comp Cas 28 (A.D.), application to refer dispute to arbitration cannot be entertained. An unwilling party cannot be compelled to submit to jurisdiction of arbitration.

126. *Pulham Football Club (1992) Ltd v Richards*, 2012 Ch 223; 2011 EWCA Civ 855 (C.A.).



Powers of Tribunal (S. 273)

After hearing a winding up petition,¹²⁷ the Tribunal may (a) dismiss it with or without costs;¹²⁸ or (b) make any interim order¹²⁹ as it thinks fit; or (c) appoint a provisional liquidator of the company till a winding up order; or (d) make an order for winding up with or without costs,¹³⁰ or (e) any other order it thinks fit.¹³¹ The Tribunal can also issue a conditional order of winding up.

Where an important member-cum-director of a company died and his fellow member, being his father, made no provision for the widow of his son, the court ordered in a petition for winding up that the widow be made a director on the same basis as her husband was.¹³²

Before appointing a provisional liquidator, the company should be given by notice a reasonable opportunity to make its representation. Such notice can be dispensed with only for special reasons to be recorded in writing. The Tribunal is not to refuse a winding up order on the ground that the assets of the company have been mortgaged for an amount equal to or in excess of those assets or that the company has no assets.

An order under the section has to be made within 90 days from the date of petition. Where a petition is presented on the ground of winding up being just and equitable, the Tribunal may refuse to make an order if it is of

127. The Supreme Court held by a majority in *National Textile Workers' Union v PW Ramakrishnan*, (1993) 1 SCC 228, (1983) 53 Comp Cas 154 that the workers have a right to be heard and file appeals. They may not be served with a notice to appear, but they may appear of their own motion. The court would be very slow to order winding up and would explore all possible avenues of keeping the company alive, where winding up would throw a large number of workers out of employment. *Indish Turpinette & Resin Co v Pioneer Consolidated Co of India Ltd*, (1986) 64 Comp Cas 169 (Del). Disputes about ownership may also be examined if they are not纠缠ed up with the propriety of exclusion from management that they can not be isolated. *A Company*, re, re p, SP, 1989 BCILC 579 (CD).
128. See, *A Company* (No 0967980 of 1995), re, (1996) 2 BCILC 48 (Ch D), a solicitor who filed a petition without belief that the company was unable to pay its debts, was ordered to pay the whole of wasted costs incurred by the company. *Central Bank of India v McLeans Ltd*, (1977) 47 Comp Cas 306 (Bom), where many adjournments were allowed. *National Transport and General Ct P Ltd*, re, (1990) 69 Comp Cas 791 (P&H) where an order staying proceedings was withdrawn because it was being abused.
129. Which would necessarily include the appointment of a receiver. *S&T v Poddar Mills Ltd*, AIR 1989 Bom 215; (1989) 2 Comp LJ 189 (Bom).
130. The court may pull off proceedings but no such order was made only on the ground that a petition under ss. 377 and 388 was pending for prevention of oppression and mismanagement. *AK Puri v Devi Dass Gopal Kirloskar Ltd*, (1995) 17 CLA 1; AIR 1995 J&K 34. The company sought an adjournment of the petition presented by the Secretary of State in public interest. The company wanted to adduce fresh evidence. The court granted it on strict conditions as respects. *A Company*, re (W) 19445 of 1995, (1998) 1 BCILC 94.
131. Exercising this power in the case of a family private company (father and two sons) where a son died and his shares were transmitted to his widow's name who neither received any dividend nor was given remuneration by making her a member of the Board of directors, the court, on her petition for winding up, directed that she should be made a director in her husband's position and given like remuneration. *Anilika K Shah v Fostexco*, (1995) 17 CLA 5, AIR 1995 Mad 17; (1995) 82 Comp Cas 516; *Alter India Ltd v Bharti Telecom Ltd*, (2001) 109 Comp Cas 6 (P&H), order of sale of the company's assets in the interest of all unclaimed even before an order of winding up was passed.
132. *Anilika K Shah v Fostexco (P) Ltd*, (1995) 17 CLA 5; AIR 1995 Mad 67.

opinion that some other remedy is available to the petitioners and they are acting unreasonably in seeking a winding up order instead of pursuing the other remedy.

In a case before the Orissa High Court,¹³³ a company could not pay its creditors for over two years in spite of statutory notices, the reasons being that the business had suffered closure on account of adverse circumstances. The company was, however, making sincere efforts, to revive itself. The court ordered winding up but stayed the operation of the order for six months to enable the company to pay the petitioner, if it could, failing which the order would come into force. In a similar case before the Calcutta High Court,¹³⁴ keeping in view the improving industrial climate in the State and the future prospects of the company, winding up was stayed, enabling the company to pay the decreed debt by instalments and to relapse to winding up in case of default. The court may conduct an inquiry into the solvency of the company before ordering admission and advertisement of the petition.¹³⁵

The court passed a decree in favour of the creditor on consent terms, the managing director guaranteeing the payment. It was not a fraudulent preference within the meaning of Section 531 [now S. 328]. Neither the company nor the managing director could pay. The creditor could proceed against the managing director.¹³⁶

Where the allegations made by the petitioners regarding the policy of low dividends and high directors' remuneration constituted a conduct of the three companies' affairs that was unfairly prejudicial to the non-director shareholders, the court said that by far the most likely form of relief they would obtain from the court would be an order that the respondents purchase the petitioners' shares in the companies. The making of a winding up order on a contributories' petition invoking the just and equitable ground was a remedy of last resort. Since the court would set a fair price for the petitioners' shares.¹³⁷

While passing a winding up order, the Tribunal may direct that workers' grievances should be redressed.¹³⁸

133. *Mirihil Dharamchand (P) Ltd v B Parunik Mines (P) Ltd*, (1978) 48 Comp Cas 494 (Ori).

134. *Unique Carburettor & Safety Co. re*, (1978) 48 Comp Cas 599 (Cal). See also, *Bawley/Metropolitan Transport Corp. Ltd v Engineers*, (1990) 69 Comp Cas 465 (Bom); winding up order against a public utility company refused. *Maharashtra General Kisan Union v Hindustani Lever Ltd*, (1994) 81 Comp Cas 794 (MRTPC); *Misrikil Bhurma Chandi (P) Ltd v B Parunik Mines (P) Ltd*, (1978) 48 Comp Cas 494 (Ori).

135. *Air Wings (P) Ltd v Victoria Air Cargo*, (1995) 17 CLA Ltd AIR 1995 Kant 59. Advertisement is compulsory, where two petitions are pending both must be advertised. An order without advertisement is liable to be set aside. *Falcon Gulf Ceramics Ltd v Industrial Designs Kharadi, Alik DMM Raj 320*, (1996) 86 Comp Cas 207. The court postponed order of advertisement and allowed time to company to raise funds. *Kursatuk Trust and Commercial Corp. Ltd v Laiithy Hullu*, (1995) 83 Comp Cas 127 (Kant); *NEPC Agro Fund Ltd v Hindustani Thompson Associates Ltd*, (2012) 131 Comp Cas 169 (Mad); the court appointed a chartered accountant for ascertaining the amount due to the petitioning creditors.

136. *Pratiksha Jindal Kapoor v Nitish Lalit Birooh*, (2002) 111 Comp Cas 177 (Bom).

137. *A Company (No 004 615 of 1990), re*, (1997) 1 BCLC 479 (Ch D).

138. *Maharashtra State Financial Corp v Orby Industries Ltd*, (1999) 1 Comp LJ 388 (Bom).

A winding up petition is maintainable only in the Tribunal having jurisdiction over the place where the registered office of the company is situated.¹³⁹ Where the agreement provided for jurisdiction at California courts and the courts there had jurisdiction otherwise, other courts became excluded.¹⁴⁰

Commencement of winding up [S. 357]

Winding up commences not from the date of the order, it shall be deemed to commence from the time of the presentation of the petition.¹⁴¹ But where, before the presentation of the petition, a resolution has been passed by the company for winding up, the winding up shall be deemed to have commenced at the time of the passing of the resolution.¹⁴² In any other case winding up by the Tribunal is deemed to commence from the date of filing of the petition. Where there were more than one petitions, winding up was deemed to have commenced from the date of the earliest of the creditor's petition. All proceedings taken before the order of the Tribunal are deemed to have been validly taken unless the Tribunal orders otherwise on proof of fraud or mistake. The agreement to sell the company's property executed after that date became void.¹⁴³ The principle of relation back does not apply to the passing to the Tribunal the custody of the company's property. Such custody is reckoned from its actual date.¹⁴⁴ The process of winding up takes effect from the date of the order.¹⁴⁵

Rescission of order

The court had power under Section 443 of 1956 Act [now S. 273] to rescind any of its orders including a winding up order. A company was wound up by mistake caused by similarity of names. The company was allowed to seek rescission of the order and removal of the order from the Registrar's Register of Companies.¹⁴⁶ In a similar earlier case where a wrong address was mentioned by the petitioner company and a winding up order was passed against a company which was completely unaware of the proceedings, the order was set aside, but the company's action against the petitioning

¹³⁹ *Ami Cold Turns Reinoders v. Ruengta Projects Ltd.*, (2004) 56 SCL 42 (Raj).

¹⁴⁰ *Tokogenous Fiber Star Ltd v. Suffin Software Ltd.*, (2004) 119 Comp Cas 929 (Mad).

¹⁴¹ S. 46(2). *MCC Finance Ltd v. Kamalji Gundale*, (2008) 127 Comp Cas 85 (Mad); where two petitions were filed one by a creditor and the other by the Reserve Bank, it was held that winding up commenced from the date of the first petition though the petition was dismissed.

¹⁴² Vesting of property in the Tribunal, however, does not relate back.

¹⁴³ *YS Spinners Ltd v. Official Liquidator*, (2000) 100 Comp Cas 542 (Del).

¹⁴⁴ *Aravinda Plywood Ltd v. Rajasthan State Industrial and Investment Corp Ltd*, (1991) 72 Comp Cas 5; (1990) 1 Comp L 222 (Del).

¹⁴⁵ *Vasanth Samanta v. Official Liquidator*, (2003) 214 Comp Cas 747 (Mad).

¹⁴⁶ *Cafnes (I) Ltd v. (1989) 1 All ER 485; 1969 BCAC 299 (CLD)*. The exercise of this power would depend upon circumstances. *GT Swamy v. Godlark Agencies*, (1990) 66 Comp Cas 819; (1989) 1 Comp L 233 (Kant), following *Sudarsan Chitr India Ltd v. O Subramaniam Pillai*, (1984) 4 SCL 657; (1985) 58 Comp Cas 633 (SC). A winding up order was readily recalled where the debt of the petitioning creditor was paid off and no other creditor either asked for winding up or opposed the recalling of the order. *GT Swamy v. Godlark Agencies*, (1990) 69 Comp Cas 819; (1989) 1 Comp L 212 (Kant).



CASE PILOT

company for compensation for loss caused was not allowed. The court said, after reviewing a number of cases on the neighbourhood principle, that there was no duty owed to a litigant to give his correct address.¹⁴⁷ Where the merits of the case became ignored because the company's application for amendment of its pleadings was not allowed, the order of winding up was set aside.¹⁴⁸ The order of winding up was also revoked where the company paid off the petitioner and efforts were on for revival of the company.¹⁴⁹

The court could revoke the order of admission of a petition where there was an extraordinary situation like abuse of the process, but not when the company was asking for it on the ground of a bona fide dispute. That could be taken up at the hearing.¹⁵⁰

Stay of proceedings before order [S. 442, 1956 Act] [now S. 443]

Even before any order was made by the court, the company, any creditor or contributory could ask the court that proceedings against the company pending before the Supreme Court or any High Court should be stayed or those pending before any other court should be restrained, the court could pass an order as it thought fit. The power of the court was extensive and covered all kinds of proceedings, whether of civil, criminal or revenue nature. But it could be used only in circumstances of real need.¹⁵¹ The proceedings of secured creditors pending before the Bombay High Court were ordered to be transferred to the Gujarat High Court, where a winding up petition was pending, this being necessary for the court to salvage the company after getting a complete view of its affairs.¹⁵² The power under this section was effective up to the winding up order. Thereafter Section 446 took over the matter. The court did not have the power under the section to stay proceedings before the DRI.¹⁵³ The company's application for stay of a creditor's suit was not allowed though he had also filed an appeal against the dismissal of his winding up petition.¹⁵⁴

147. The cases surveyed included, *Dowgidas v Stevenson*, 1932 AC 512 (HL); *Ains v Merlin London Borough Council*, 1979 AC 728, 751; (1977) 2 WLR 1024 (HL); *Penitentiary Disinfection Fund v Sir Juddon Parkinson & Co Ltd*, 1985 AC 210 (1984) 3 WLR 953 (H.L.). *Home Office v Essex Select Bus Co Ltd*, 1970 AC 1004, 1026; (1970) 2 WLR 1140 (HL); *Leigh & Silcock Ltd v Almendariz Shipping Co Ltd*, 1986 AC 785, 815; (1986) 2 WLR 902 (1986) 2 All ER 145 (HL); *Yuen Kwan Yen v Attorney General of Hong Kong*, 1988 AC 175; (1987) 1 WLR 776.

148. *Indian Express Newspapers (Iam) Ltd v Hindustani Chemicals India Ltd*, (1999) 20 SCL 333 (Bom).

149. *Suresh Chandra Cements & Chemicals Ltd v Power Mak Industries*, (2000) 1 Comp Cas 123 (AP).

150. *Sree Aravalli Steel (P) Ltd v Duryav Steel Rolling Mills Ltd*, (1992) 73 Comp Cas 607 (Mad).

151. *Official Liquidator v Dharti Dharmi P. Ltd*, (1977) 2 SMC 164; (1977) 47 Comp Cas 420; *Koraput (Foothills) m*, (1932) 2 Ch 196; *J Burrows (Leeds) Ltd*, re, (1962) 1 WLR 5177 (1962) 2 All ER 882 (Ch D), proceedings before a magistrate restrained.

152. *Shree Vallabh Glass Works Ltd v JCICL Ltd*, (1987) 3 SMC 94; (1987) 62 Comp Cas 101.

153. Constituted under the Recovery of Debts due to Banks and Financial Institutions Act, 1993. *Allahabad Bank v Canara Bank*, (2000) 4 SC 1406 (2000) 318 Comp Cas 61. Criminal proceedings cannot also be stayed, *Bombay Leasing Co (P) Ltd v Gossal (India) Ltd*, (2001) 103 Comp Cas 666 (Bom).

154. *Ranway Laboratories Ltd v Heath Electronics & Allied Industries (P) Ltd*, (2003) 114 Comp Cas 628 (HP); *Baramaga Jute Factory Ltd v Lekini Nempani*, (2006) 112 Comp Cas 155 (Cal), company registered outside India, workers seeking removal of company and sought stay

Company liquidators and their appointments [S. 275]

"Company liquidator", according to Section 2(23), insofar as it relates to winding up of a company, means a person appointed by (i) the Tribunal in case of winding up by the Tribunal, (ii) by the company or creditors in case of voluntary winding up, as a company liquidator from a panel of professionals maintained by the Central Government under Section 275(2).

The Tribunal at the time of passing a winding up order has to appoint an Official Liquidator or a liquidator from the panel maintained under Section 275(2). The provisional liquidator or the company liquidator has to be appointed from a panel maintained by the Central Government consisting of the names of chartered accountants, advocates, company secretaries, cost accountants or firm or bodies corporate having such chartered accountants, etc and such other professionals as may be notified by the Central Government or from a firm or body corporate of persons having a combination of such professionals as may be prescribed and having at least 10 years' experience in company matters.

The Tribunal can limit the powers of provisional liquidator either at the time of appointment or subsequently. The Central Government can remove the name of a person from the panel by reason of misconduct, fraud, misfeasance, breach of duties or professional misconduct. The affected person has to be given a reasonable opportunity of being heard.

The terms and conditions of appointment and fee payable is to be specified by the Tribunal on the basis of task required to be performed, experience, qualification of the person and size of the company. The person appointed has to make a declaration if there is any conflict of interest or lack of independence. He has to maintain such position throughout the term of his appointment. The Tribunal while passing a winding up order may appoint the already appointed provisional liquidator as company liquidator.

The business of a *nidhi* company came to a standstill. It was unable to collect any more deposits, nor able to pay back the existing deposits. A straight away order of winding up would have caused panic among depositors. The court (now Tribunal) appointed a provisional liquidator without formally ordering winding up thinking that he would effectively realise assets for paying back depositors.¹⁵⁵

of winding up, matter to be considered by the company judge. *Modi Rubber Ltd v Mahua Cements Ltd*, (2006) 131I Comp Cas 32 (All); appeal against winding up order, reference to HIFB after order, winding up order put in abeyance till proceedings before SICA authorities pending.

¹⁵⁵ *SJ Maysi Finance Ltd v RG Jayaramkali*, (2000) 37 CLA 170 (Ker). Provisional liquidator was not appointed where the company was trading profitably. *Siva Azurundil Steel (P) Ltd v Trichy Steel Rolling Mills Ltd*, (1992) 73 Comp Cas 607 (Mad). Additional provisional liquidator was not appointed because he would have been a needless burden on resources, BCCI (S.A.), re, 1992 BCAC 579 (Ch D). Provisional liquidator was refused where in a group of family enterprises due care was taken of the interest of the widow of one member of the family who was a managing director in one company and director in others by giving her parallel positions in the companies on the same remuneration, *Anisha K Shri v Tosekar (P) Ltd*, (1995) 17 CLA 5, AIR 1995 Mad 67; (1995) 32 Comp Cas 514.

The object of appointment of provisional liquidator is protection and preservation of the company's assets. But the power is not limited to that contingency alone. The Tribunal may make an appointment in any proper case.¹⁵⁶

The Tribunal can appoint the official receiver as a provisional liquidator in respect of a company that is already in the process of voluntary winding up if such an appointment is necessary to ensure that a full investigation is carried out of the company's affairs in order to protect the public. The official receiver has wider reach than voluntary liquidators when it comes to matters of investigation.¹⁵⁷

Consequences of winding up order [S. 277]

Intimation to company liquidator, provisional liquidator and Registrar. When the Tribunal makes an order for appointment of provisional liquidator or an order for winding up, within seven days it has to intimate this fact to the company liquidator, provisional liquidator and Registrar. The Registrar has to make an endorsement in his records relating to the company to that effect and notify the fact in the Official Gazette. In the case of a listed company, the stock exchange where securities of the company were being dealt with has also to be informed. Secondly, winding up order is deemed to be a notice of discharge to the officers and employees of the company, except when the business is continued. [S. 277(3)]¹⁵⁸ Thirdly, the order operates in favour of all the creditors and all the contributories of the company. [S. 278]¹⁵⁹ Lastly, no suit or legal proceeding can be commenced against the company except with the leave of the Tribunal and subject to such terms as the Tribunal may impose. [S. 279] Similarly, pending suits

156. *Punjab Investment & Lending Co (P) Ltd v Petrov Mechanical Industries (P) Ltd*, (2000) 23 SCL 220 (Bom).

157. *A Company* (No 01/02/03 of 24/9/96), *w*, (1997) 2 HCJ 121 (39).

158. The employment being conditional on the continued existence of the company, it ceases when the company is wound up. *TN Ferrier Ltd*, *re*, 1927 Ch 352; *National Transport and General Co (P) Ltd*, *re*, (1940) 61 Comp Cas 711 (P&G); directors exercising the power of issuing further capital was held to be a nullity so that the allottees of such shares could not be regarded as contributories. *Mehjub Chand Gohil v Official Liquidator*, (1981) 53 Comp Cas 103 (Raj). Business continued by order, no appeal. Liability to compensate employees may remain because this is not discharge due to unavoidable circumstances within the meaning of S. 25-JFF, Industrial Disputes Act, 1947. *A Shoumugham v Official Liquidator*, (1992) 75 Comp Cas 161 (Mad), not agreeing with *Baini Central Bank Employees Union v Official Liquidator*, (1968) 51 Comp Cas 274; (1945) 2 Comp L 110 (Ker) where winding up order was held to be an unavoidable circumstance. *Tatlik Lubhas Asni v Official Liquidator*, (2003) 126 Comp Cas 469; (2005) 38 SCL 452 (Guj); duty to vacate company's premises on automatic termination of employment.

159. The company can immediately recover its dues from its debtors. *Official Liquidator v Bhagwan Singh*, (2014) 45 SCL 635 (Raj); decree in favour of O.L against person indebted to the company. *Mysore Tools Ltd v Document Hardware Mfgs*, (2005) 128 Comp Cas 376 (Kant); recovery of amount due on invoices. *Sensitic Filaments Corp v Suman Marine Products (P) Ltd*, (2006) 32 Comp Cas 461 (Del); the company was taken over by a State Financial Corp., the debt was admitted liability, the company ordered to be wound up because of inability to pay debts, the corporation restrained from charging assets or dealing with them otherwise.

cannot be further proceeded with except with similar leave. "The object of winding up provisions is to put all unsecured creditors upon an equality and pay them *pari passu*, and to prevent the assets of the company from being trifled away in vexatious litigation." The Tribunal in granting leave considers all the circumstances of the case and decides as to whether leave to sue should or should not be granted so that the assets may be preserved for the benefit of the creditors. [S. 279]

The Supreme Court held in *SV Kenderker v VM Deshpande*¹⁶⁰ that the Income Tax Officer can commence assessment proceedings without leave of the court. The Madras High Court refused leave to a worker for filing a suit in a labour court as that would waste the time of the liquidator.¹⁶¹ A secured creditor was allowed to pursue his suit for realisation of the security. Its transfer to the winding up court was considered to be not necessary, such transfers being not necessary in all cases.¹⁶²

Within three weeks from the date of the order, the company liquidator has to make an application to the Tribunal for constitution of a winding up committee to assist and monitor the progress of liquidation proceedings. The committee has to comprise of the following: (i) Official Liquidator attached to the Tribunal, (ii) nominee of secured creditors, and (iii) a professional nominated by the Tribunal. [S. 277(4)] The company liquidator is the convener of meetings of the winding up committee which has to monitor and assist the liquidation proceedings in the following areas of liquidation functions: (i) taking over assets; (ii) examination of the statement of affairs; (iii) recovery of property, cash or any other assets of the company including benefits derived from them; (iv) review of audit reports and accounts of the company; (v) sale of assets; (vi) finalisation of the list of creditors and contributories; (vii) compromise, abandonment and settlement of claims; (viii) payment of dividends, if any; and (ix) any other functions as the Tribunal may direct from time to time.

The winding up order in India of a foreign company [registered in UK] was held to have effect only upon the company's business dealings in India.¹⁶³

The company liquidator has to place before the Tribunal a report along-with the minutes of the meetings of the committee on monthly basis duly signed by members till the final report for dissolution of the company is submitted before the Tribunal. The company liquidator has to prepare the draft final report for consideration and approval of the winding up committee. The final report so approved has to be submitted before the Tribunal for passing of a dissolution order.

Stay of suits, etc, on winding up order [S. 279]

When a winding up order has been passed or provisional liquidator appointed no suit or legal proceeding can be commenced by or against the

160. (1972) 1 SCC 436; (1972) 42 Comp Cas 168.

161. *R Chidambaram v Garrison Denkiya & Co*, (1970) 43 Comp Cas 500 (Mad).

162. *Central Bank of India v Electro Engg Co*, (1994) 4 SC 129 (1994) 81 Comp Cas 13.

163. *Benzinger Iron Factory Ltd v Laxmi Neelam Tirupati*, 2005 CLC 500 (Ker).

company except by leave of the Tribunal and subject to such terms as the Tribunal may impose.¹⁶⁴ If a suit or proceeding is pending at the date of the order, it shall not be proceeded with except with the leave of the Tribunal.¹⁶⁵ The suit is taken to be filed from the date of leave and not from the date of original filing.¹⁶⁶ This is necessary for the purpose of preserving the limited assets of the company in the best way for distribution among all the persons who have claims on them.¹⁶⁷ The object of winding up provisions is to put all unsecured creditors upon an equality and pay them *pari passu*,¹⁶⁸ and to prevent the assets of the company from being frittered away in vexatious litigation.¹⁶⁹ Leave can be obtained even after institution of a suit. It is not necessary for filing a suit.¹⁷⁰

The expression "legal proceedings" in the section means only those proceedings which have a bearing on the assets of a company in winding up or some relationship with the issues in winding up. It does not mean each and every civil proceeding which has no bearing on the winding up proceeding or criminal offences where the company was liable to be prosecuted.¹⁷¹

The Tribunal in granting leave considers all the circumstances of the case and decides as to whether leave to sue the company should not be granted so that the assets of the company may be preserved for the benefit of the creditors.¹⁷² For example, the attachment of the property of a company in

¹⁶⁴ The provision is mandatory and also applies to attachment proceedings. *Tanubhai Salal v. Nihal Isak Ltd.*, (1972) 42 Comp Cas 588 (Khar).

¹⁶⁵ See, *G.S. Selly & Sons v. YCNP & I. Mills Co. Ltd.*, (1970) 1 Comp LJ 184 (Mys). Once a leave is granted, no further leave for execution of decree will be necessary. *Shri Ram Sanin Shastri v. Bank of India*, (1990) 69 Comp Cas 344 (P&H). See also, *Bareja Knitting Factories Ltd v. Sunetika Trading Co.*, (1990) 69 Comp Cas 512 (P&H), and for proof of goods delivered *K.P. Devaraj v. Official Liquidator*, (1977) 2 KLT 86, managing director issued cheques which bounced, but under S. 138, Negotiable Instruments Act, 1881 cannot be stayed and transferred to company credit. *Erkay Industries Ltd v. State of Maharashtra*, (1990) 130 Bom LR 158, where the company is in winding up, the provisions of Ss. 138 in 142, Negotiable Instruments Act, 1881 w.r.t. liability of the company for dishonoured cheques cannot take precedence over the provisions of the Companies Act. *Hukker Nair v. SBI*, (2006) 4 SCC 457; (2006) 131 Comp Cas 119, as long as the stay is effective, there is no question of limitation, a party can apply at any time for leave to continue the proceeding.

¹⁶⁶ *Surendra Lal v. UCO Bank*, (2005) 131 SCC 351, (2005) 129 Comp Cas 259 (SC).

¹⁶⁷ The amount realized by a creditor during the pendency of winding up has to be repaid to the liquidator. *Bombay Custom Egg Co. Ltd. v.*, (1954) 58 Comp Cas 75 (Bom).

¹⁶⁸ *Harkins & Sterns v. Chemical Vessels Fabricators*, (1989) 65 Comp Cas 816 (P&H); following *Jasini Trading Co. (P) Ltd v. Esso (I) and (II)*, (1990) 50 Comp Cas 801 (Kerl). *Vasanthi Ammasu v. Official Liquidator*, (2002) 134 Comp Cas 747 (Mad), proceedings without leave are of no effect, execution of an arbitrator's award requires leave. Leave granted by the Registrar of the court is of no effect. It has to be that of the Tribunal.

¹⁶⁹ *Fazil Hussain Khaja v. Tuhaimi Skifstar Bhd.*, (2012) 15 ROC 655; (2014) 182 Comp Cas Bd.

¹⁷⁰ *Iron Exchange Finance (I) Ltd v. Park Indus Steel Co. Ltd.*, (2001) 103 Comp Cas 666 (Khar). *Rajendra Steel Ltd. vs.*, (2006) 132 Comp Cas 510 (All), directors can be prosecuted for dishonour of the company's cheques under S. 138, Negotiable Instruments Act. On the facts however leave was granted. *Comder Patel Andri (P) Ltd v. Hirala Finance Ltd.*, (2006) 103 Comp Cas 435; (2006) 2 CLT 501, criminal liability for dishonour not affected.

¹⁷¹ *Sureshkumar v. Bank of Calcutta Ltd.*, (1950) 55 CWN 532. For instances of cases on the subject see, *Pulghat Warrier Bank v. Padmanabhan*, AIR 1951 Mad 318; *Javaid Lal v. Badru Nahradas*, AIR 1971 Guj 322. *Motahid Mansukhbhai v. Saraspur Migr. I. & J.*, AIR 1977 Bom 167; *Ramsey v. Official Liquidators*, AIR 1929 All 457; *Hakambari v. Rashavissen*, AIR 1925

winding up effected on behalf of the Provident Fund Commissioner has been held to be ineffective.¹⁷² Similarly, property attached in execution of decree obtained before, but actually sold after winding up order without leave of the court, [now Tribunal] the sale being void, the liquidator was allowed to recover the sale proceeds.¹⁷³ A interpleader suit by a person indebted to the company for an order whether he should pay to the company or to the other claimant, has been held to be a proceeding for which sanction of the Tribunal is necessary.¹⁷⁴ The Kerala High Court held that eviction proceedings are not covered by the expressions used by the section. They are completely unrelated to winding up and, therefore, leave is not necessary.¹⁷⁵ Where the property was with the company under hire-purchase and the ownership had not passed to it, the owner was allowed to withdraw the property.¹⁷⁶ There are, however, rulings to the effect that leave of the court may be necessary where proceedings are for the eviction of a tenant.¹⁷⁷ Where the debt of a company was guaranteed by the managing director, and the action was against both the company and the managing director, it was held that the action could go on against the managing director, but as against the company, leave was necessary.¹⁷⁸ Where the company is bound by an agreement to refer a dispute to arbitration, the Tribunal would have the discretion to say whether the matter should be decided by arbitration or otherwise.¹⁷⁹ A secured creditor being outside winding up, his proceedings to enforce his security are not affected.¹⁸⁰

172. *Cal 906: South Indian Mills Co Ltd v Sharad Mundul*, AIR 1917 Mad 260; *Ramji Lal Singh v Benares Bank Ltd*, AIR 1941 All 154; *Sundar Chaudhury & Sonerjee v Krishnamchandra Nath*, AIR 1949 Cal 685. Leave may be obtained before or after the institution of proceedings, *Vijaya Bank Ltd v Official Liquidator*, (1998) 84 Comp Cas 495 (Bom).

173. *Ananta Mills Ltd v City Deputy Collector*, (1972) 42 Comp Cas 476 (Guj).

174. *R. Ranganathan v Venkateswar Trading Chit Funds*, (1976) 46 Comp Cas 637 (Mad); *RBI v JVG Finance Ltd*, (2006) 140 Comp Cas 316 (Del), the company's property was sold under a suit filed before the Bombay High Court after winding up order sale without leave of the court, the purchaser was directed to deliver possession to the official liquidator.

175. *Thengal Electronics (P) Ltd v Muzz Continuations & Mktg (P) Ltd*, (1980) 50 Comp Cas 1 (Del). See also, *United India General Finance (P) Ltd, re*, (1980) 50 Comp Cas 847 (Del).

176. *Joshi Traders Co/Pt Ltd v Esau Ismail Sait*, (1980) 50 Comp Cas 301 (Ker); *Harkins Ltd Shriram v Chemical Vessels Fabricators*, (1980) 65 Comp Cas 506 (P&H).

177. *General Lease Financing Ltd v Official Liquidator*, (2004) 122 Comp Cas 433 (Guj).

178. *Nirmala R Datta v Khushboo Egg and Wig Mills Ltd*, (1992) 2 SCC 322; (1992) 74 Comp Cas 1; *Fazlulhaq Distilleries (P) Ltd v Salim Yihir*, AIR 1992 All 227; (1993) 76 Comp Cas 127; *Sivakumar Babu v Official Liquidator*, (2006) 130 Comp Cas 592 (Raj), company being no longer in need of tenanted premises, was directed to handover premises to the landlord.

179. *Ramnath Amritalal v ESI Corp*, (1981) 51 Comp Cas 1 (Guj).

180. *Murari Ltd v BG Shirke & Co*, (1981) 51 Comp Cas 11 (P&H). See also, *Timber /I/9 Ltd, re*, (1961) 51 Comp Cas 18 (P&H), arbitration proceeding transferred to winding up court.

181. *Maksdupur Refrigeration Industries, re*, (1977) 47 Comp Cas 67 (Pat). No stay may be allowed where it is demanded as a part of defying tactics. *Official Liquidator v Bharti Dhan (P) Ltd*, (1977) 2 SCC 166; (1977) 47 Comp Cas 430. The Tribunal may in its discretion require even a secured creditor to pass through leave particularly where there are complications like joint possessory claims of others; *Central Corps of India Ltd v Kadlakrishna Mills Ltd*, (1993) 76 Comp Cas 637 (Mad); or where proceedings instituted at an inconvenient place. *Central Bank of India v Elmil Eggs Co*, (1994) 4 SCC 159; (1994) 81 Comp Cas 33. The court ordered the transfer of proceedings to Bhopal which was set aside by the SC on appeal. *Central*

A secured creditor has the right to proceed against the company or the guarantor of the company's debts or against both. [Such a creditor has now to proceed under the IB Code.] The Supreme Court held that it was not proper to order that the guarantor should be proceeded against first instead of the company, their liability being co-equal.¹⁸¹ A creditor who obtains a court decree for recovery and attaches property does not become a secured creditor.¹⁸²

The Supreme Court held in *SV Kandekur v VM Deshpande*¹⁸³ that an Income Tax Officer can commence assessment proceedings without leave.¹⁸⁴ But leave would be necessary for effecting recovering even of the amount of tax deducted by the company at source, which was still lying with the company.¹⁸⁵ Where a sum of money is due to the company, the payer cannot deduct tax at source without leave.¹⁸⁶ If any suit or proceeding is pending in any court that may be transferred to and disposed of by the winding up court.¹⁸⁷ The provision, however, does not apply to appeals and cases pending before the Supreme Court or a High Court.¹⁸⁸ The Madras High Court refused to grant permission to a worker to file his claim before a labour court, for that would waste the time of the liquidator in having to defend suits at so many places.¹⁸⁹ The Calcutta High Court faced a case in which 23 suits were filed by DCSD on behalf of the Union of India. It ordered their transfer to the winding up court. The balance of convenience lay in bringing all those chronic type of cases before the winding up court.¹⁹⁰

Bank of India v *Estate Engg Co.*, (1994) 4 SCC 39; (1994) 81 Comp Cas 13. A secured creditor was permitted to continue the realisation proceedings in another High Court subject to the condition that he would pay workmen's dues after realisation. *JCCL Ltd v Hyderabad District Coop Central Bank*, (1995) 16 CLA 227 (AP). *Khalid Muchtar v Raybagh Fisheries Ltd*, (2003) 114 Comp Cas 70 (All), the proceedings for recovery against a guarantor of the company, being not a part of the company's winding up, were allowed, leave was not necessary.

181. *Ramkrishna Muni v SBI*, (2006) 4 SCC 457; (2006) 131 Comp Cas 119.

182. *Kerala State Financial Enterprises Ltd v Official Liquidator*, (2006) 10 SCC 709; (2006) 133 Comp Cas 915.

183. (1972) 1 SCC 438 (1972) 42 Comp Cas 15B.

184. *Overselling Colaba Land & Mills Co Ltd, re*, (1968) 58 Comp Cas 26; (1968) 67 ITR 399 (Bom.).

185. *IIO v Official Liquidator*, (1981) 51 Comp Cas 174; (1981) 12H ITR 228; 1981 Tax LR 369 (Del). The court cannot conduct public audit in assessment proceedings. *State of Kerala v Pothi Central Bank*, (1987) 62 Comp Cas 702 (Ker).

186. *Haryana Slum v Maruti Ltd*, (1992) 73 Comp Cas 653 (P&H).

187. S. 279(2). If a suit pending in another court is concluded without leave of the winding up court and a decree is passed, it is voidable at the option of the liquidator. See *Hingoli Devi v Dhananjay Mills* (Pt) Ltd, (1971) 1 Comp LJ 71 (Pat). Also see, *Punjab National Bank v Panjab Finance* (Pt) Ltd, (1973) 43 Comp Cas 480 (P&H).

188. S. 279(2) and *Sur Panjab Finance (Pt) Ltd v Malhar Singh*, (1975) 1h Comp Cas 254 (P&H).

189. *& Chidambaramnath v Cenon Director & Co*, (1973) 43 Comp Cas 580 (Mad). Consent decree against a company can be challenged only by the company itself and not by a shareholder or director personally. *Vikram Kumar v Pearl Cycle Industries Ltd*, (1983) 54 Comp Cas 77 (Del). Leave was refused where the claim against the company was waived and that against the guarantor was time-barred. *Syndicate Bank v Pauchkula Mohi* (1993) 57 Comp Cas 472 (P&H).

190. *United Provinces Commercial Corp. re*, (1983) 53 Comp Cas 441 (Cal). *Lak Vilas Urban Coop Bank Ltd v Lok Vikas Finance Corp Ltd*, (2003) 114 Comp Cas 356, secured

Where a State Financial Corporation wanted to stay outside winding up and applied for permission to dispose of the company's assets held by it by way of security, the Supreme Court said:

"that realisation and distribution of proceeds are to take place only, in association with the liquidator and under supervision of the company court. The Debt Recovery Tribunal and the District Court under the State Financial Corporation Act is to issue notice to the official liquidator while ordering sale of properties of the debtor company. Otherwise the secured creditors can approach company court."¹⁹¹

The creditor standing outside winding up has to submit a valuation report to the Tribunal before disposing of the property.¹⁹² The Tribunal would not confirm the sale without such report.

Even for proceeding under Section 13, Securitisation etc. Act, prior permission of the court [now Tribunal] was held to be necessary.¹⁹³

It would not be necessary to obtain sanction for prosecuting the company's officers under the Employees' Provident Fund Act.¹⁹⁴ Leave would be necessary for prosecuting the company under section for violating rules relating to acceptance of deposits.¹⁹⁵ The Tribunal can have even criminal matters transferred before it.¹⁹⁶ The Tribunal has to dispose of such leave application within 60 days. This section is not to apply in proceedings pending before the Supreme Court or High Court.

Permission was granted to an occupant of land belonging to the company in liquidation to prove his right in court of law. It was held that such

creditor's application to remain outside winding up for sale of assets, other creditors and contributors not likely to be affected, sale of assets permitted subject to certain conditions and also subject to confirmation. *Sivasak Agro Poly Products Ltd v Disco Electronics Ltd*, (2003) 114 Comp Cas 398 (Del), sale by the secured creditor (corporation not affected by the restrain order or appointment of provisional liquidator in winding up proceedings to which it was not a party).

191. *Rajasthan Financial Corp v Official Liquidator*, (2005) 9 SCC 190; (2005) 125 Comp Cas 387.

192. *AP State Financial Corp v Professional Grade Components Ltd*, (2004) 1 An LT 370; (2005) 125 Comp Cas 345, 365.

193. *SBI v Relic Steel Ltd*, (2004) 122 Comp Cas 440 (Guj); *Held Rajahmundry International v Indian Overseas Bank*, (2004) 5 ALD 317; (2005) 124 Comp Cas 431; *Official Liquidator v Allahabad Bank*, (2003) 4 SCC 361, (2003) 177 Comp Cas 426, CLB could not interfere in the process of recovery under DRT. The official liquidator can approach DRT.

194. *Mandalay & Amritadat M/s Co Ltd, re*, (1983) 53 Comp Cas 519 (Guj).

195. *BN Chikermane v Shantaram Benefit (P) Ltd*, 1962 CrI.H 517, (1982) 1 Guj LR 111; (1983) 53 Comp Cases 519. The managing director against whom an arrest warrant had been issued by a District Forum, in connection with a company offence was held entitled to seek his protection under S. 446. *Nirupamkutty v Official Liquidator*, (1998) 30 CLA 146 (Ker).

196. *Khanda Fans (India) (P) Ltd, re*, (1983) 53 Comp Cas 858 (R&H). Leave was not granted where tenants instead of vacating, as ordered, were trying to involve the liquidator into litigation. *United Provinces Commercial Corp, re*, (1986) 39 Comp Cas 362 (Cal). Execution proceedings against company require leave. *A.R. v State Udyog (P) Ltd*, (1984) 55 Comp Cas 187; (1995) 145 ITK 501 (O-H). Leave not necessary for executing a decree obtained with leave. *Janta Works (P) Ltd, re*, (1964) 56 Comp Cas 229 (Boen).



CASE PILOT

permission did not amount to decreeing the suit or allowing proceedings to be initiated. Grant of leave is not adjudication of the matter.¹⁵⁷

Jurisdiction of Tribunal [S. 280]

The Tribunal has jurisdiction to entertain or dispose of:

- any suit or proceeding by or against the company;¹⁵⁸
- any claim made by or against the company including those by or against its branches;¹⁵⁹
- any application made for compromise or arrangement with creditors under Section 233 [merger, amalgamation];
- any scheme submitted under Section 262 [recovery of sick companies];
- any question of priorities or any question whatsoever, whether of law or fact, which may relate to assets, business, actions, rights,

157. *Extra Steel and Lime Co Ltd (in liquidation) v Aminul Ali*, 2013 SCC OnLine Cal 13192 (2014) 157 Comp Cas 393.

158. See, *Official Liquidator v Kevain SRR*, (1990) 67 Comp Cas 577 (Kerj. claim against the company for compensation for loss caused by an employee's conduct. See also, *Marihi Ltd v HM Thacker and Amalcoiles Corp*, (1990) 69 Comp Cas 59 (P&E), where entries in the books of the company showing the respondent to be indebted to the company, affirmed by officers on oath and not controverted by the respondent were held to be good evidence of the impropriety. Summary eviction proceedings against trespassers on the company's premises were allowed, *Fashiq Dew Jhankhundata v Official Liquidator*, (1995) 1 Cal L 447. Squatters were not allowed to claim possession by adverse title, the official liquidator is deemed to be in possession, *Yogmaya Glass v Official Liquidator*, (1993) 1 Cal L 485.

159. A claim for goods supplied can be so decided. *Star Page Works Ltd v Official Liquidator*, (1977) 47 Comp Cas 30 (Guj). Whether a person in occupation of the company's premises is a trespasser and, if so, liable to be evicted, can be decided under S. 446. *Polyether Updhiya v Sri Sri Union Gostl Inc*, (1990) 67 Comp Cas 394 (Cal). Insolvency matters pending before special tribunals can be left to be decided by such tribunals. *SP Bhagat v Raygan Electricty Steel Co*, (1991) 34 Comp Cas 807. (1954) 2 PLR 106; *Deutsche Bank v SP Kahn*, 1991 Mah 15 728. (1992) 3 Comp Cas 573, court compelled to pass orders against guarantor of the company's debts, *MS Fashions Ltd v Bank of Credit and Commerce International Ltd*, 1993 Ch 425; (1993) 3 WLR 220; (1990) 3 All ER 769 (CA) leave to proceed against the debtor where the guarantor could not pay the whole amount due, *Kent Carbon Co Ltd v Ray Kruger Goei*, (1993) 2 PLR 581, eviction with leave of court, execution of decree not allowed to be resisted on the grounds reported by the Kent Controller, *UCO Bank v Conest Pwdr's Ltd*, (1996) 23 CLA 256 (Cal), recovery proceedings before Debt Recovery Tribunal have to be transferred to the winding up court. The company court can pass necessary orders for transfer or otherwise after considering all the interests which the section is designed to safeguard. See, *Meyer Syntex Ltd v Panjab & Sind Bank*, (1997) 27 CLA 216; (1999) 96 Comp Cas 974. (1997) 67 DLT 836. A Bombay based secured creditor was allowed to continue his proceedings in Bombay though the company was being wound up in AP ICLY Ltd v Hyderabad District Coop Central Bank, (1997) 27 CLA 244 (AP). After the winding up order, the assets of the company become vested in the company court and, therefore, the court's permission is necessary for initiating proceedings under the Debts Recovery Act. The permission can also be taken after initiation of proceedings. *Industrial Finance Corp of India v Sama Fikra Ltd*, (1998) 29 CLA 362 (P&I). *State Bank of Hyderabad v Harkar Mihir Singh H*, (2008) 14 SCC 551; (2003) 114 Comp Cas 44, Debt Recovery Tribunal directed the liquidator to cooperate with the Commissioner appointed by it in the matter of recovery of a bank loan, no leave necessary. *Bank of Nova Scotia v RGC Transmission Ltd*, (2009) 56 DLT 24; (2009) 101 DLT 54; (2003) 114 Comp Cas 764, case before Debt Recovery Tribunal, no interference.

entitlements, privileges, benefits, duties, responsibilities, obligations, or waive in the course of the winding up.²⁰⁰

This jurisdiction is to come into play whether the suit or proceeding in question has been instituted or is instituted, or the claim or question has arisen or arises or such application has been made or such scheme has been submitted before or after the order of winding up of the company is made.²⁰¹

Debt Recovery Tribunal

After coming into force of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the establishment of the Debts Recovery Tribunal (DRT) and in view of the clear provisions of Sections 17, 18 and 34 of that Act, neither it is necessary to apply for leave to prosecute the suits transferred to DRT in terms of Section 279, Companies Act nor it is open to the company court to transfer the suit to itself for trial in winding up proceedings in terms of Section 279 of that Act.²⁰² A winding up petition is maintainable even if a recovery suit against the company has been filed before the DRT.²⁰³

Appointment of Company liquidator [S. 275]

As soon as the winding up order is passed, Section 275 comes into play for appointment of a company liquidator.

200. S. 280. The existing court is subject to the jurisdiction of the winding up court. *Fazil Chand Gajra v. Tavar Finance (P) Ltd.*, (1981) 51 Comp Cas 67; (1980) 19 DLT 482. The period of limitation for the purposes of S. 446 begins to run from the date of the order or the appointment of the provisional liquidator. *R.P. Uthaiyan v. Wundine Jupiter (P) Ltd.*, AIR 1989 Ker 41; (1989) 65 Comp Cas 178; (1988) 2 KLT 636; *Mazari J.M. v. Parry & Co Ltd.*, (1990) 66 Comp Cas 309; (1989) 3 Comp LJ 384; (1990) 92 PLR 470 (Delhi); *Mirza Lal v. P.R. Sudarkasan.*, (1990) 69 Comp Cas 5 (P&H). The proper mode of realisation of the security by a secured creditor can be prescribed by the court at the application of the official liquidator. *Suskum Overseas Marketing (P) Ltd. v. Registrar of Companies.*, (1990) 1 Comp L 295 (Delhi); *C. Narayanan Kurup v. Official Liquidator.*, AIR 1999 Ker 778, proceedings against the promoter and subsequently managing director commenced before consumer forum stayed for disposal by company court. *RTC Tyres (India) Ltd. v. Kastha Auto Parts.*, (1997) 2 KLT 705; AIR 1998 Ker 1471, the official liquidator can only enforce those claims which are not barred at the commencement of winding up proceedings. *Anand Finance (P) Ltd. v. Anant Deshmukh Kalantri.*, (1996) 11 DLT 305; (1997) 90 Comp Cas 350, payment order under S. 446(2) [now S. 279] has the effect of a decree. It can be enforced by filing a certified copy before the proper officer.

201. In *West Hills Realty P Ltd v. Neelkumar Realtors Tower P Ltd.*, (2017) 200 Comp Cas 179 (Karn), the Bombay High Court considered the Notification dated 7-12-2016, stated that all petitions under S. 433(6) pending before the High Courts which have not been served on the Respondents shall be transferred to the appropriate Bench of the National Company Law Tribunal. It was held that all pending petitions that have already been served on the Respondents is to be dealt by the High Court where it is pending. Also *Anil Kumar Pukkar v. Prime Events Ltd.*, (2017) 200 Comp Cas 64 (NCLT), Gazette Notification dated 1-6-2017.

202. *Rishas Industries Ltd (in Liquidation).* re, (2001) 103 Comp Cas 383 (Pat); *Avi Export (India) Ltd v. Industrial Finance Corp of India Ltd.*, (2006) 133 Comp Cas 736 (P&H), company court cannot stay proceedings before DRT, sale of property would be subject to prior prior claim for workers' dues.

203. *Bank of Nitro Scotia v. RPL Transmission Ltd.*, (2005) 79 DRJ 214; I.L.R. (2004) 2 Del 533; (2006) 133 Comp Cas 172.



CASE PILOT

Provisional Liquidator [S. 275].—The Tribunal may also appoint a provisional liquidator after a petition is presented but before making a winding up order. Before making such appointment, the Tribunal should give reasonable opportunity to the company to make its representation.

The appointment of a provisional liquidator is made before the order of winding up. Supposing that an order of winding up is not ultimately passed, such an appointment even then would be capable of causing a great damage to the company. It may put others on their guard and shake up their confidence in the company. Therefore, that part of the proceedings in which the need for the appointment is debated should better be conducted in camera. But as soon as the proceedings cross that sensitive stage, they should be brought back to the open Tribunal.²⁰⁴ The power of the Tribunal is discretionary and is generally exercised when liquidation is more or less certain.²⁰⁵ The precautions which have to be observed were pictorially stated by ROMILLY MR in the following words:²⁰⁶

Where there is no opposition to the winding up, I appoint a provisional liquidator as a matter of course on the presentation of the petition. But where there is an opposition to it, I never do, because I might paralyse all the affairs of the company and afterwards refuse to make a winding up order at all.

Where the company's assets are in danger of being diverted or misappropriated,²⁰⁷ or where the company was in a state of non functioning and the debts were accumulating,²⁰⁸ a provisional liquidator can be justifiably appointed, but not where a winding up petition is nothing but a part of the family struggle for power.²⁰⁹

The powers of the provisional liquidator are the same as those of the official liquidator unless restricted by the Tribunal appointing him.²¹⁰ It becomes the duty of the Official Liquidator to conduct the proceedings in winding up the company and perform such duties as the court may impose. The acts of a liquidator shall be valid notwithstanding any defect in his appointment or qualifications that may afterwards be discovered.

An application was made for appointment of a provisional liquidator during pendency of winding up proceedings. There was transfer of assets of the company which was prejudicial to the interest of its creditors and workmen. The State wanted revival of the company. The company had huge properties which if properly managed would ensure chance of revival.

204. *Rendum and New Rich Investment Services Ltd. v.*, 1968 ECLC 226 (CLD).

205. *Hightield Commodities Ltd. v.*, (1965) 1 WLR 149.

206. Reproduced in *Kuñish Parasai Mishra v. Melwin Laboratory (P) Ltd.*, (1960) 1 Comp L 29; (1960) 63 Comp Cas 813.

207. *Pizyam Singh v. Bhadrak Transport Co. Ltd.*, (1963) 11 Comp Cas 89; (1963) 1 Comp L 17 (Punjab); *Dashrath Andherkar Patel v. Gitanjali Hotels (P) Ltd.*, (1993) 2 Bom CR 440; (1994) 61 Comp Cas 406. *Nanmo UK Ltd. v.*, (2003) 2 BCUC 75 (Ch U), assets not in danger, no appointment made.

208. *Reanton & Co Engineers Ltd. v.*, (1998) 63 Comp Cas 299 (Ker)

209. *Mritotsav Bhadrak Jashan Industries Ltd.*, (1995) 58 Comp Cas 442 (Del).

210. *K Subramanyam Rao v. Muthrekk Computers*, (2004) 51 SCJ 723 (AP).

Appointment of provisional liquidator was considered to be not proper. The company could not be given a free hand. The Official Liquidator was appointed as special officer with direction to make inventory of all books of account and to pay monthly visit. Symbolic possession was to be taken over by the special officer. But such possession was not to prejudice present management to take lawful steps for revival.²¹¹

Company Liquidator [S. 2(23)].—“Company liquidator”, insofar as it relates to the winding up of a company, means a person appointed by (a) the Tribunal in the case of winding up by the Tribunal, (b) by the company or creditors in the case of voluntary winding up, as a company liquidator from a panel of professionals maintained by the Central Government under Section 275(2).

Direction for filing statement of affairs [S. 274]

Where a petition for winding up is filed before the Tribunal by any other person than the company, if the Tribunal is satisfied that a *prima facie* case for winding up is made out, it has to direct the company to file its objections along with a statement of its affairs within 30 days in the prescribed form and manner. The period of 30 days may be extended because of pressing circumstances. The Tribunal may require the petitioner to deposit a reasonable security for costs as a precondition to issue directions to the company. The company which fails to submit the statement loses the right to oppose the petition and responsible persons become liable to punishment.²¹² The directors and other officers of the company have to submit within 30 days of the winding up order at the cost of the company the books of account of the company completed and audited up to the date of the order to the liquidator specified by the Tribunal in its order.

The present requirement as to contents of the statement is that they have to be prescribed. Under the 1956 Act [S. 454] the requirement was that the statement had to show the assets of the company, its debts and liabilities, its creditors, secured and otherwise, its debtors and amounts due from them and any other information that might be prescribed.²¹³

211. *Opaloy India Ltd v Maftron Coats Ltd*, 2012 SCC Online Cal 7145, (2014) 286 Comp Cas 460.

212. Sub-s (4) provides for penalty. The complaint has to be filed before the special court by the Registrar provisional liquidator or company liquidator or any person authorised by the Tribunal. The offence is of continuing nature. *Official Liquidator v Ravindra Kumar Surana*, (2011) 169 Comp Cas 275 (Raj).

213. *Official Liquidator v Jayashankar Das*, (1968) 2 Comp LJ 12. Where the director who was sought to be prosecuted was not in office at the relevant date, the court said that it was the duty of the official liquidator to lay before the court some material which would show that he was in a position to make the statement. That was not done. The complaint was discharged. *Official Liquidator v Kugnali Krishna Kumar*, (1993) 3 An LT 542, (1997) 89 Comp Cas 672. The time-limit applies only to persons who were the directors of the company at the relevant date. It does not apply when ex-directors are being called upon to submit the statement. *Official Liquidator v Koganti Krishna Kumar*, (1993) 3 An LT 542; (1997) 89 Comp Cas 572. See, *Registrar of Companies v Orissa Chlorine Refinery Co*, (1969) 36 Comp Cas 205 (Jdt), the seizure of books by the vigilance police was held to be an extenuating circumstance in imposing penalty upon guilty officers. Where winding up followed

Removal and replacement of liquidator [S. 276]

The Tribunal can remove the liquidator on any of the following grounds:

- (a) misconduct;
- (b) fraud or misfeasance;
- (c) professional incompetence or failure to exercise due care and diligence in use of powers on performance of functions;
- (d) inability to act as provisional liquidator or as company



CASE PILOT

about 10 years after the directors had lawfully retired and had no books to prepare the statement that was held to be a sufficient cause justifying the default. *Official Liquidator of Astro Synthetic and Chemicals Ltd v Mahendra Kumar Jain*, (2015) 168 Comp Cas 205 (Raj), not having access to records amounts to reasonable excuse. Director acquitted of charges. *Official Liquidator v K K Nayi*, (1973) 45 Comp Cas 278 (Ker), some books being available the statement should be prepared out of them to the extent possible. *Official Liquidator v S Nihal Singh*, (1977) 47 Comp Cas 254 (Del). Persons who have retired from directorship more than a year before the commencement of winding up can be ordered to submit the statement. *Official Liquidator v B K Modi*, (2007) 2 ALJ 183 (All) Officer includes director. *Sipco Agencies (P) Ltd v Gurjat Singh*, (1978) 48 Comp Cas 301 (Del), so also those who have resigned. *Registrar of Companies v Ether Investment Trust* (2d, (1978) 48 Comp Cas 579 (Tulu); *Lakshmi Narayan Arora v Registrar of Companies*, (1980) 50 Comp Cas 536 (Pun), not allowed to be demanded from a person who retired some eight years before winding up, though the court agreed that he was within the range of persons who could be called upon to prepare the statement. *Devinder Kishore Mehta v Official Liquidator*, (1979) 16 DLT 150; (1980) 50 Comp Cas 699, a person ousted from management some eight years before. The prosecution has to prove that the officer in question was in a position to prepare the statement but did not do so. Where the books were with the Revenue Authorities and though they had returned some of them to the official liquidator, he did not inform the directors. The benefit of doubt was given to them. *Official Liquidator v Indira Kachua*, (1989) 54 Comp Cas 644 (Ker). A director cannot defend himself by showing that he was only a nominal director. *Kothari (Madras) Ltd v Mylne's Tobacco Development Co Ltd*, (1955) 57 Comp Cas 690 (Kant); *Official Liquidator v Mirajee Jayantilal Telw*, (1984) 56 Comp Cas 340 (Guj), the position of absentee director. *Globe Associates (P) Ltd, re*, (1967) 61 Comp Cas 874 (Del), the default in filing the statement is of continuing nature and, therefore, the offence is not wiped out by the expiry of any period of limitation. The directors are under a statutory duty to submit the statement without any notice and therefore failure can attract penalty proceedings straightforwardly on failure. *Official Liquidator v Yed Pankush Gupta*, (1990) 83 Comp Cas 675 (P&J). Where the directors sought to be prosecuted showed that the assets of the company had already been taken over by a financial corporation and already sold, this was a reasonable excuse for not being able to file the statement. *Official Liquidator v Surjeet Singh*, (1995) 7 PLR 447. Theft of account books for which first information report had been launched was held to be a good excuse. *Tharunta Shikhi Cement Works v Anil Sami*, (1994) 2 Panj LR 303. *Official Liquidator v Rajendra A Simha*, (2002) 108 Comp Cas 559 (Guj), the director who had to file the statement showed that records were not available and the company's banks caused delay in furnishing accounts. This was held to be a reasonable excuse. The fine imposed upon the director was reduced. S. 276(4) provides that reasonable expenses may be allowed to the person called upon to submit the statement. *Dilip Sisodia v Official Liquidator*, (2004) 118 Comp Cas 212 (Raj); any inquiries and objections by director called upon to file the statement could be considered at the trial for their default. *Official Liquidator v S Bhattacharjee*, (2016) 133 Comp Cas 5 (AP); liability for failure to file notice of extension of time. *S Bhattacharjee v Official Liquidator*, (2006) 133 Comp Cas 34 (AP), appeal to ODIS against the decision of the single judge was held to be not maintainable. *J S Gurbir v Millennium Health Institute and Diagnostics (P) Ltd*, (2016) 183 Comp Cas 21 (Del), failure to file complete statement or affidavit, money due to the company could not be recovered because of incomplete statement, liability of the person who was director at the relevant time, which means time of appointment of provisional liquidator or order of winding up. Director who resigned before such time, not liable to be prosecuted. It was not material that the company had not accepted his resignation.

liquidator. This can be done on the basis of a reasonable cause shown and for reasons to be recorded in writing.

The Tribunal may assign the work on death, resignation or removal of the liquidator to another company liquidator for reasons to be recorded in writing. Where because of the default of the liquidator the company has suffered any loss or damage, the Tribunal may order recovery from the liquidator. Before passing any such order the liquidator must be given an opportunity of being heard.

Report of company liquidator [S. 281]

The liquidator has to submit within 60 days of the winding up order a report containing the following particulars: (a) nature and details of assets of the company including their location and value, cash balance in hand and in the bank and negotiable securities obtaining the value from registered valuers; (b) amount of capital issued, subscribed and paid up; (c) existing and contingent liabilities including names, addresses and occupations of creditors, the amount of secured and unsecured debts, particulars of the securities given, their value and dates; (d) debts due to the company and names, addresses and occupations of debtors and the amount likely to be realised; (e) guarantees extended by the company; (f) list of contributories and dues payable by them and details of unpaid calls; (g) details of trademarks and intellectual properties owned by the company; (h) details of subsisting contracts, joint ventures and collaborations; (i) details of holding and subsidiary companies; (j) details of legal cases filed by or against the company; (k) any other information which the Tribunal may direct or the liquidator may consider necessary to include.

The liquidator has to include in his report the manner in which the company was promoted and whether any fraud has been committed by any person in its promotion or formation or by any officer since formation. He has also to report on viability of business of the company and the steps which are necessary for maximisation of the value of company's assets.

Any creditor or contributory of the company describing himself to be as such in writing can inspect the report on payment of prescribed fee.

Directions of Tribunal on report of company liquidator [S. 282]

After considering the report of the company liquidator, the Tribunal has to fix a time-limit within which the entire proceedings have to be completed and the company dissolved. The Tribunal may revise the time-limit where after taking into account the views of affected persons, it feels that it would not be advantageous or economical to let the proceedings go on for the period originally fixed. The Tribunal may, after hearing parties, order sale of the company as a going concern, or its assets or any part of them. The Tribunal may appoint a sale committee comprising of creditors, promoters and officers of the company to assist the liquidator in the matter of sale. Where a report is received from the Central Government, liquidator or any person that a fraud has been committed in respect of the company, the Tribunal may without obstructing the process of winding up, order

investigation and direct the liquidator to file a criminal complaint against persons involved in the fraud. The Tribunal may order for steps and measures as may be necessary to protect, preserve and enhance the value of assets of the company.

Custody of company's property [S. 283]

The company liquidator, including the provisional liquidator, on receiving an order of the Tribunal has to take into his custody or under his control all the property,²¹⁴ effects and actionable claims²¹⁵ to which the company is or appears to be entitled. The property is supposed to be in the deemed custody of the Tribunal. The company liquidator has to take such steps and measures, as may be necessary, to protect and preserve the properties of the company. On an application by the company liquidator or otherwise also, the Tribunal can require any contributory who is on the list of contributors, and any trustee, receiver, banker, agent, officer or other employee to pay, deliver, surrender or transfer forthwith, to the company liquidator any money, property, or books and papers in his custody or under his control in which the company is or appears to be entitled. Machinery taken on lease is not the company's property. It is the lessor's property and he has the right to take it away before or during winding up.²¹⁶ A lease became determined under a clause in lease deed that it would be terminated on winding up. It was held that the purchaser of assets in court auction sale had no automatic right to seek renewal. But in the interest of workers, the court ordered renewal in favour of the purchaser not at original rates but at the currently prevailing rates.²¹⁷ Property taken on hire-purchase is not the property of the company till the last instalment of the hire money is paid.²¹⁸ A plot of land was allotted to a company for which it did not pay the whole price. The amount already paid was forfeited. The permissive possession given to the company was held to have created no right or interest in favour of the company. The liquidator had no right to deal with the property.²¹⁹

- 214. *Robins Industries Ltd v Official Liquidator*, (2005) 128 Comp Cas 421 (Pat), eviction of tenant and recovery of the company's property; *Laxmibhai Nimbaji v Official Liquidator*, (2005) 41 SC 724 (Guj), property on which the company had lease rights; *Sri Venkateswara Industries Ltd v Supt of Central Excise & Customs*, (2005) 60 SCL 311 (AP), recovery of goods seized by the Customs.
- 215. *Maheshwarji Proteins Ltd. Et al.* (2004) 1 Comp LJ 479; (2004) 4 BIC 487; (2004) 52 SC 339 (MP), bank directed to pay FDR proceeds to the liquidator even if they were attached in a labour dispute; *Gas Authority of India Ltd v Official Liquidator*, (2004) 3 Bom CR 540; (2005) 128 Comp Cas 691; (2004) 26 SCL 204, invalidation of bank guarantee in favour of the company.
- 216. *Forecast Industries India v Credit Capital Finance Corp Ltd*, (1997) 89 Comp Cas 670 (J&H).
- 217. *Perr of Calcutta v Eclan Tie-up (P) Ltd*, (2006) 4 SCC 763; (2006) 131 Comp Cas 369; *Perr of Kollam v Official Liquidator*, (2006) 130 Comp Cas 595 (Gau).
- 218. *Model Financial Corp Ltd v Mexican International Ltd*, (2000) 2 Comp LJ 229 (AP).
- 219. *APFI Corp Ltd v Trans Asia Leikki Semiconductors Ltd*, (2014) 14 SCC 716; *Janak Specific Family Trust v Official Liquidator*, (2016) 199 Comp Cas 584 (Guj); the Official Liquidator was informed that the property which he had seized was personal and private. He was directed to handover possession of the property. *Tech Inova (P) Ltd v*



The Official Liquidator under the 1956 Act had appointed a security agency to take care of the company's property. There was theft of items while the security agency was deployed in premises of the company in liquidation. There was no satisfactory explanation as to how and when assets went missing. The court said that the main task of any security agency is to ensure that assets of the company are not pilfered. The security agency was held liable to pay for missing assets.²²⁰

Where in case of a company under liquidation the DRT exercised its power under Section 19(1B)(c), Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and appointed a Commissioner for preparation of an inventory of properties of the company in liquidation, prior permission of the Company Judge was held to be not necessary.²²¹

Promoters, Directors, etc, to cooperate [S. 284]

Promoters, directors, officers and employees who have been in employment of the company or have been acting or associated with the company have to extend full cooperation to the company liquidator to enable him to discharge his functions and duties. Failure on the part of any person without reasonable cause makes him punishable with imprisonment up to six months or fine extending to Rs 50,000 or with both.

Settlement of list of contributors, application of assets [S. 285]

After passing of winding up order, the Tribunal has to settle the list of contributors. It can cause rectification of the register of members where it is necessary for the purpose. The Tribunal has to cause the assets of the company to be applied for discharge of its liabilities. The Tribunal may dispense with settling the list of contributors where it would not be necessary to make calls on them or to adjust their rights. The Tribunal has to distinguish between those who are contributors in their own right and those who are representatives being liable for debts of others. While settling the list, the Tribunal has to include every person who is or has been a member, who is liable to contribute to assets of the company an amount sufficient for payment of the debts and liabilities and costs, charges and expenses of winding up and for adjustment of contributors' rights among themselves. All this is subject to the following conditions: (a) a person who has been a member but ceased to be so for the preceding one year or more before commencement of winding up is not liable to contribute; (b) a past member is not to be liable for debts and liabilities incurred after he ceased to be member; (c) a past member is not liable to contribute unless the Tribunal feels that the present members are not able to make contributions due from them; (d) where the company is limited by shares, no member can be required to

Assam Power & Electronics Ltd., (2016) 1 SCC 704, (2015) 192 Comp Cas 68; in an auction-sale of company's assets, it was the duty of the Company Court to disclose valuation report to the company's creditors. The auction-sale was set aside by the Division Bench in appeal.

²²⁰ *International Ceramics Ltd.*, re, 2013 SCC OnLine (Del) 221; (2014) 186 Comp Cas 396 (Del).

²²¹ *State Bank of Hyderabad v. Peninsular Petroleum Ltd.*, (2008) 19 SCC 551; (2003) 114 Comp Cas 66.

pay more than the full value of shares; (e) in the case of a company limited by guarantee, no member can be required to pay more than his guaranteed amount.

Obligations of Directors and managers with unlimited liability [S. 286]

In the case of a limited liability company, any director or manager, whose liability is unlimited, would be liable, in addition to the liability as a member, as if he were a member of an unlimited company. Any such person is not liable to make any further contribution if he ceased to hold office one year before the debt or liability in question was incurred or after he ceased to hold office. Even otherwise, he is not to be called upon to contribute unless the Tribunal deems it necessary in order to satisfy the debts and liabilities of the company, cost, charges and expenses.

Advisory Committee [S. 287]

The Tribunal may constitute an advisory committee to advise the Company Liquidator and to report to the Tribunal on matters which it may direct. The committee is not to consist of more than 12 members. They should be from among the creditors and contributories and other suitable persons according to the requirements of the company. The liquidator has to call a meeting of creditors and members in order to enable the Tribunal to select persons to be members. The committee is to have the power of inspecting the books of account and other documents, assets and properties of the company at a reasonable time. The Tribunal has to fix the procedure to be followed by the committee. Its meetings have to be chaired by the liquidator.

Submission of periodical reports to Tribunal [S. 288]

The company liquidator has to make periodical reports to the Tribunal, at least at the end of every quarter, about the progress of winding up.

Powers and duties of company liquidator [S. 290]

The section has abolished the distinction between powers which could be exercised with sanction and those without such sanction. Now subject to directions of the Tribunal, the company Liquidator can exercise following powers:

- (a) to carry on the business of the company so far as may be necessary for the beneficial winding up of the company;²²²
- (b) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other, and for that purpose, to use, when necessary, the company's seal;

222. This has been held to include the power to ratify acts which, when in being, the company would have had power to perform. Submissions for the arrest of a ship on behalf of a company which was without directors at the time, were ratified by the liquidator. The ratification was held to be binding. *Alexander Ward & Co v Samsung Navigation Co*, (1975) 1 WLR 673 HL.

(c) to sell the immovable and moveable property and actionable claims of the company; he may make the sale by public auction or by private contract and shall have the power to transfer the whole in one lot or in parcels;²²¹

221. *Industrial Finance Corp v Official Liquidator*, (1993) 3 SCC 40; (1993) 27 Comp Cas 305; (1993) 3 Comp LJ 137, instructions of court as to sale; *United Bank of India v Bharat Electrical Industries Ltd*, (1993) 26 Comp Cas 317 (Cal), confirmation of sale at a low price as against the original reserve price; *N Panik Jayaraman v Golden Filins (P) Ltd*, (1993) 28 Comp Cas 455 (Mad), confirmation of court necessity even when the sale was with the approval of the court; *Venkatesh Singh Bhundari v Nandlal Bhundari & Sons (P) Ltd*, (1995) 12 CLA 226 (MP), the official liquidator could lease out the premises of the company only with the approval of the court. Limitation for setting aside sale is three years and a director has no locus standi to apply for setting aside, only the liquidator can apply; *ICICI v Official Liquidator*, 1994 Supp (2) SCC 721, AIR 1994 SC 167, court supervision of terms of auction by official liquidator; *Syndicate Bank v Field Star Cycle Industries (P) Ltd*, (1995) 33 Comp Cas 587 (Kan), for court confirmation of sale, the petitioning creditor must be notified; *Narayanaswami Nickel v Neelam Handi Textile Mills*, (1998) 2 SCC 673; AIR 1998 SC 1788, sale by auction not confirmed, bidder's earnest money forfeited, balance allowed to be refunded; *AP State Financial Corp v Negarmala Paper Mills Ltd*, (1997) 89 Comp Cas 557 (AP), advertisement for sale without indicating the advantageous features of the property, readvertisement ordered; *Jukul M Kapilal v Bank of India*, (1994) 1 Ban Cr 315 (Ori); 66 Comp Cas 515, a guarantor of a company's debts was held to have locus standi to challenge the validity of sale of assets by the receiver though the sale was with court's sanction. In facts, however, he was not allowed to do so because he participated in the proceedings throughout from the appointment of the receiver till actual sale; *Ayala Holdings Ltd*, (No 2), re, (1996) 2 RCLC 467 (Ch D), a creditor of the company has the right to question the validity of an assignment of assets made by the liquidator. The assignment was set aside because the liquidator had failed to endeavour to negotiate better terms with other persons interested in the matter and proceeded with the assignment even after an objection had been made. The liquidator was also removed and the matter of renegotiations was left to the new liquidator; *Utt Pardesh Ltd v SBI*, (1996) 85 Comp Cas 503 (Bom), property under lease is heritable and remains under the company's right even during winding up. In this case the lease carried the right of assignment also. The assignment made by the liquidator was held to be valid; *Nani Gangal Peur v T Prasad Singh*, (1995) 3 SCC 579; (1995) 2 Comp LJ 408, *Lira (P) Ltd (2) v Official Liquidator*, (No 2), (2000) 6 SCC 82; (1996) 85 Comp Cas 792, duty of the liquidator to realise proper value and power of the court to set aside if the price realised is not natural; *Jointsons Exports India v Jitstone Electronics Ltd*, (1996) 22 CLA 239; (1995) 34 DIRJ 637, ILR (1996) 1 Del 292; AIR 1996 Del 105, company court had inherent power to recall an order for sale of property which was obtained by misrepresentation; *Bengal Pottery Ltd*, re, (1996) 1 CSM 71, 1996 AJDC 2490; (1996) 1 CWN 71, unless a sale is confirmed, the court retains the discretion to order a fresh auction, the successful bidder in an unconfirmed sale acquires no vested right; *Orissa Bally*, re, (1996) 2 XLT 864, even in the absence of fraud or irregularity, it is open to the company judge to exercise his discretion in cases where the court comes to the conclusion, that there is every possibility of getting higher price; *Sabujnand Cotton Traders v Official Liquidator*, (2000) 26 SCC 313 (Del), resale ordered after new advertisement; *AP State Financial Corp v Auges Röder (P) Industries*, (2000) 1 Comp L 125 (AP), the secured creditor directed to keep the liquidator about sale process; *Allahabad Bank v ARC Holdings Ltd*, (2001) 1 SCC 736; 2001 CLC 1780, one more chance given to the company to be sold as a going concern; *Durga Mfg Co (P) Ltd v Union Bank of India*, (2000) 6 SCC 65; (2000) 38 CLA 206, sale set aside, resale ordered, there was proof of underbidding; *Union Bank of India v Official Liquidator*, (2000) 5 SCC 274; (2000) 101 Comp Cas 317, court as the custodian of the company's interests exercises protective discretion; *Allahabad Bank v Bengal Paper Mills Co Ltd*, (1999) 4 SCC 383; (1999) 96 Comp Cas 604, recovery of property already sold ordered, and direction for resale; *Aliphudur Bank v Bengal Paper Mills Co Ltd*, (1999) 4 SCC 383; (1999) 96 Comp Cas 604, confirmed sale set aside; *Bharati Windlens Ltd*,

- (d) to sell whole or the undertaking of the company as a going concern;
- (e) to raise on the security of the assets of the company any money requisite;
- (f) to institute or defend any suit, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company;²²⁴

re, AIR 2001 AJ 18; 2001 AD L 187, earnest money of auction purchaser of the company's property, allowed to be forfeited on default in payment even of the instalment. His defence that the property was under encroachments was not allowed because he had purchased the property after due inspection on as it is basis. *Byomti Ajaigayul v Telugu Telecom & Management Consultant (P) Ltd*, (2003) 114 Comp Cas 37 (AP), confirmed sale set aside because of a subsequent higher bid. The court said that the highest price available must be accepted at any stage of the proceedings. *Wintecu Yarn Ind v Purush Wireless Systems* 124 (2006) 129 Comp Cas 41 (P&J), offer of the intervenor was only marginally higher, no reason to disturb sale, workers have no right to be associated in the process of sale, fraud in sale could not be inferred from the fact that sister concerns of the purchaser also participates in the auction. *Karlik Service Station v APSS Industrial Deep Corpn Ltd*, AIR 2010 NOC 198 (AP), the official liquidator distributed undated tenders and received bids for sale of property even before notification was published, not fair, nor proper breach of duty in getting best market price. *Prahlad Gada v Central Board of India*, (2013) 2 SCC 301, (2013) 126 Comp Cas 101, the official liquidator has to be informed of the sale of assets by a secured creditor so as to enable him, to observe the process of valuation. *Shivlalke Aramitries CPI Ltd v Official Liquidator of Global Axis Industries Ltd*, (2011) 6 SCC 207 (2011) 6 Comp Cas 396. The highest bid was accepted by the Company Judge. An intervenor's offer of much higher amount was accepted by the Superior Court. The court said that the interest of creditors is of paramount consideration. The previous successful bidders who had deposited their bid amount were awarded compensation. Which was to be paid by the final bidder to the extent of the sum specified. *DDA v Skipper Construction*, (2013) 11 SCC 609, court sale of premises of a company in winding up ordered and sale to: Israel Embassy, confirmed, an auction sale, consideration: money was deposited in court. *JCFI Bank Ltd v Abraham & Co*, (2016) 199 Comp Cas 594 (SC), sale of mortgaged property, upset price fixed on the basis of the report of valuation officer, borrowers were party to proceedings before the Debt Recovery Tribunal, borrowers were not able to bring any buyers, the bank bought out properties at a price above the upset price by Rs 10,000. The Supreme Court on appeal upheld the transaction. *A/ Rustamani International Exchange v Official Liquidator*, 2016 SCC OnLine Mad 9986; (2016) 199 Comp Cas 603, claims by or against company can be decided, but not those involving third party like auction-purchaser: auction-purchaser is not a debtor or creditor of the company, forfeiture of deposit justified as the purchaser did not pay balance price. *Alok Kumar Krishnalal Patel v Construction Works Mills Ltd*, 2013 SCC OnLine Del 1322 (2014) 382 Comp Cas 582, transfer of leasehold rights acquired by perpetual or permanent lease deeds from the original lessor for valuable consideration. The liquidator transferred the rights realising a fund to enable him to pay contributors and creditors. The court said whether there was violation of lease rights was to be considered in separate proceedings. *Durgangan Traders v Official Liquidator of Mukundra Mill Ltd*, 2012 SCC OnLine Guj 5292; (2014) 196 Comp Cas 407, sale of property of the company was confirmed with direction to the purchaser to pay the balance consideration within the set time-frame, but he failed to pay further amounts. He was held not entitled to pay the balance and seek conveyance of the property. *Silvium Associates v Oshon Trade Ltd (in liquidation)*, 2014 SCC OnLine Ker 28413; (2014) 2 KLR 691, original sale by auction which was confirmed, was not allowed to be cancelled in favour of a subsequent bidder who was ready to offer higher value.

224. In computing the period of limitation for suits on behalf of the company, the period from the date of the commencement of winding up to the date in the order and one year from the date of such order is excluded [S. 178]. The extension is available only for suits on behalf of the company and not on behalf of secured creditors. *Skifager India P Ltd v Klich Nixon Ltd*, (1977) 47 Comp Cas 79 (Bom).



CASE PILOT



CASE PILOT



CASE PILOT



CASE PILOT

- (g) to invite and settle claims of creditors, employees or any other claimant and distribute sale proceeds in accordance with priorities provided in the Act;
- (h) to inspect the records and returns of the company or the files of the Registrar or any other Authority;
- (i) to prove and claim in the insolvency of any contributory for any balance against his estate and to receive dividends in the insolvency;
- (j) to draw, accept and endorse any negotiable instruments on behalf of the company with the same effect as if done in the course of business;
- (k) to take out, in his official name, letters of administration to any deceased contributory and to do, in his official name, any other act necessary for obtaining payment of any money due from a contributory or his estate;
- (l) to obtain any professional assistance from any person or appoint any professional in discharge of his duties;²²
- (m) to take all such actions, or sign any paper etc as may be necessary for winding up of the company, for distribution of assets and in discharge of his duties and obligations and functions as company liquidator;²³
- (n) to apply to the Tribunal for such orders or directions as may be necessary for winding up of the company.

In the exercise of these powers the liquidator is subject to overall control of the Tribunal.

When the properties of the company under liquidation are being sold, there has to be a proper auction and a fair one. It must fetch the maximum price. Care has to be taken of statutory dues, dues of workmen and creditors. The sale has its own public character. In any case, the assets cannot be allowed to be sold for a song.²⁴ Where prices of property substantially

225. Official Liquidator, being a principal officer of the company can be called upon to file income-tax returns. *Ujj v Official Liquidator*, (1977) 47 Comp Cas 54 (AI); S. 459 contains provisions for legal assistance to liquidator. It says that the liquidator may, with the sanction of the court, appoint an advocate, attorney or pleader entitled to appear before the court to assist him in the performance of his duties. He should better have the fees and charges of the liquidator fixed by the court while sanctioning the appointment. See, *Segnald Edward Negus v Official Liquidator*, (1989) 65 Comp Cas 443; (1989) 2 Cadiz LJ 170, 175 (Bom).

226. *Official Liquidator v R Vijayakumar*, 2013 SCC OnLine Mad 8166 (2014) 184 Comp Cas 62 (Mad), permission was given to the debtor of the company offering it to settle claim for lesser amount than due by sacrificing interest at the cost of creditors. The High Court did not accept such scheme. Courts are primarily concerned with the interest of creditors.

227. *Manoj J Naik & Associates v Official Liquidator*, (2015) 3 SCC 112; (2015) 188 Comp Cas 323. *D Kali Seddy v Aurosteering Auto Firms Ltd*, 2014 SCC OnLine Hyd 597; (2015) 189 Comp Cas 135, sale of land by auction by Liquidator, approved by court, the government could not prove any restriction on assignment. *Hindustani Urban Infrastructure Ltd v Cowlam*, (2015) 3 SCC 766; (2015) 189 Comp Cas 299, sale of assets of company by Official Liquidator, the purchaser offered bid amount inclusive of all statutory taxes, could not be made liable to pay sales tax, etc. *Cowlam v Hindustani Urban Infrastructure Ltd*, (2015) 3 SCC 746; (2015) 189 Comp Cas 283 (SC). Official Liquidator selling goods of the company in its winding up proceedings, he becomes a dealer, liable to pay sales tax, not the purchaser.



CASE PLOT

increased in four month's time, the court cancelled its earlier order of sale. It is duty of the court to see that the property fetches best price.²²⁸ The Supreme Court did not approve this. The original order of confirmation was allowed to stand.²²⁹

Where sale was effected without considering objections of the company and its shareholders, it was also without proper publicity or fixing minimum reserve price and there was failure to disclose variation report, it was held that the auction process had become vitiated. The sale was set aside.²³⁰

Professional assistance to company liquidator [S. 291]

The company liquidator may, with the sanction of the Tribunal, appoint one or more chartered accountants or company secretaries or cost accountants or legal practitioners as may be necessary to assist him in the performance of his duties and functions. Such appointee has to disclose the interest, if any, he has in the company or his lack of independence.

Exercise and Control of Company Liquidator's Powers [S. 292]

The exercise of all the above powers is subject to the control of the Tribunal and any creditor or contributory may apply to it with respect to the exercise of any power.²³¹ The liquidator may also apply to the Tribunal for directions in relation to any particular matter arising in the winding up.²³² He should have regard to any directions which may be given by resolutions of creditors or contributories. And for this purpose he may summon general meetings of the creditors or contributories, or by the Advisory Committee. He shall, however, be bound to summon such meetings as the creditors or contributories may by resolution direct or when one-tenth in value of the creditors or contributories request him to do so. A person aggrieved by an act or decision of the liquidator may apply to the Tribunal which may provide necessary relief.

The role of the liquidator is not limited to participation at the stage of disbursement. He has a role to play even in the conduct of sale of assets by a secured creditor. Notice of sale must be given to him. He has to see whether

228. *Indira Pranin (P) Ltd v Ballesham Greens (P) Ltd*, 2014 90CC Online Guj 14377 (2015) 192 Comp Cas 228.

229. *Voice Procon P Ltd v Ballesham Greens P Ltd*, (2013) 10 SOC 94; (2015) 192 Comp Cas 285.

230. *Yash Investment India (P) Ltd v Ascent Power & Electricals Ltd*, (2016) 1 90CC 704 (2015) 192 Comp Cas 69. In an auction-sale of the company's property by auction, the court considered it to be necessary that reserve price should have been fixed.

231. Tenancy rights are not a property of the company for the purposes of winding up. The company remains a tenant until its dissolution. *Nirmala R Dugar v Khimdesh Engg and Weld Mfrs Ltd*, (1992) 25L C 377 (1992) 74 Comp Cas L. An application can be made by a creditor or contributory but not by a person who, for example, says that he was denied an opportunity to purchase the property of the company. *Mehowali v Murli*, (2000) 2 BCAC 556 (CA).

232. S. 292. *Renu Pipes Ltd v Industrial Finance Corp of India*, (2002) 108 Comp Cas 385 (AI), the property of the company is vested in the Tribunal and not in the liquidator. The liquidator can be directed to take possession of property and to organise its sale. The liquidator may even be directed to undertake private negotiations for sale.

proper value is being realised for the company's assets.²³³ In a case before the Supreme Court the highest bid was accepted by the Company Judge. An intervenor's offer of a much higher amount was accepted by the Supreme Court, which went by the principle that the interests of creditors are of paramount importance. The previous successful bidders who had deposited their bid amounts were awarded. Compensation which was to be paid by the final bidder to the extent of the sum specified.²³⁴

Adjustment of rights of contributors [S. 297]

The Tribunal has the power to adjust the rights of contributors among themselves and distribute any surplus among the persons who are entitled to it.

Books to be kept by company liquidator [S. 293]

The company liquidator has to keep proper books in such manner as may be prescribed. He has to make entries or minutes of proceedings at meetings and of such other matters as may be prescribed. Any creditor or contributory can inspect any such books personally or through an agent. The exercise of this right is subject to control of the Tribunal.

Audit of company liquidator's accounts [S. 294]

The company liquidator has to maintain proper and regular books of account and accounts of receipts and payments made by him in the prescribed form. He has to present his accounts at least twice in a year to the Tribunal, verified by a declaration in the prescribed form. The Tribunal has to get them audited. The liquidator may have to submit further vouchers and information as the Tribunal may require for audit purposes. The liquidator has to file a copy of the audited accounts with the Tribunal and one with the Registrar. This will be open to inspection by any creditor, contributory or person interested. Where such accounts relate to a Government Company, the liquidator has to forward a copy to the Central Government, if it is a member, to a member State Government or to both where both Governments are members. A summary version of the audited accounts has to be sent to every creditor and contributory.

Power of Tribunal to make calls [S. 296]

The Tribunal may make calls on all or any of the contributors to the extent of their liability for payment of money which is necessary to clear the debts and liabilities of the company and meet the expenses of winding up and for adjustment of rights of contributors among themselves. After adjustment of the rights of contributors, the Tribunal has to distribute the surplus money among persons entitled to it [S. 297]. Where the assets

233 *Purni Gada v Central Bank of India*, (2014) 2 SCC 101; (2013) 176 Comp Cas 101; *Official Liquidator v Allahabad Bank*, (2013) 4 SCC 361; (2013) 177 Comp Cas 426; liquidator could not interfere in the process of recovery under DRT. The liquidator can approach DRT.

234 *Shradha Armantra (P) Ltd v Official Liquidator of Global Asia Industries Ltd*, (2011) 6 SCC 207; (2011) 6 Comp Cas 396.

of the company are not sufficient to satisfy its liabilities, the Tribunal can divert the assets to the extent necessary for payment of costs, charges and expenses of winding up in such order of priority *inter se* as Tribunal may think just and proper. [S. 298]

Power to summon persons suspected to have property of company [S. 299]

The Tribunal can summon the following persons before it: any officer of the company or person known or suspected to have in his possession any property or books or papers of the company or any person capable of giving information concerning the promotion, formation, trade, dealings, property, books or papers or affairs of the company. The Tribunal may examine such person on oath, reduce his answers to writing requiring him to sign them. He may be directed to produce whatever material he has with him. If he claims any lien on the items, the Tribunal will have to decide all such questions without prejudice to the rights of lien. The Tribunal may require the liquidator to file before it a report in respect of debts or properties of the company in possession of other persons. An indebted person may be ordered to pay to the liquidator. Persons in possession of property may be ordered to deliver it to the liquidator. Where a person summoned fails to appear without a reasonable cause, the Tribunal may impose an appropriate cost. Orders under the section are executable in the manner as if they were a civil court decree. A person who delivers up may be discharged from his liability.

Arrest of person trying to leave India or abscond [S. 301]

If the Tribunal is satisfied that a contributory or a person having property, etc of the company in his possession is about to leave India or otherwise to abscond or is about to remove or conceal the property for avoiding liability, the Tribunal may cause him to be detained until such time as may be ordered and his books etc and items of movable property be seized and safely kept until such time as may be ordered.

Payment of debt by contributory and right of set-off [S. 295]

Where, apart from his liability as a shareholder, any other money is due from a contributory to the company, the court may order him to pay the same. Suppose the company also owes some money to such a contributory. Does he have the right to claim that the two debts should be mutually set-off? Not in all cases, but a limited right to set-off is given by the Act in the following cases:

1. In the case of an unlimited company, a contributory may set-off his debt against any money due to him from the company on any independent dealing or contract with the company. But no set-off is allowed for any money due to him as a member of the company in respect of any dividend or profit.

2. If, in the case of a limited company, there is any director, or manager whose liability is unlimited, he shall have the same right of set-off, as is described in point (1) above.
3. In the case of any company, whether limited or unlimited, when all the creditors have been paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by set-off against any subsequent call. This is the one case where set-off is allowed for money due on a call.

Where a director was found liable to contribute to the assets of the company, he was not allowed to set-off that liability against any debt owed to him by the company.²⁵

Power to order examination of Promoters, Directors [S. 300]

Where the Official Liquidator has made a report to the Tribunal stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company, or by any officer of the company since its formation, the Tribunal may direct that the person or officer may appear before it and be publicly examined.²⁶ Examination shall relate to the promotion or formation of the company, or to the conduct of its business or the person's conduct and dealings as an officer. The necessary conditions for exercising the power to order public examination are: (1) that the company liquidator has made a further report; (2) that such report contains a finding of fraud; (3) the finding of fraud must be against the person whose examination is sought; (4) the individual must be one who has taken part in the promotion or formation of the company or who has been an officer of the company.²⁷

Thus even where the report of the company liquidator contains allegations of fraud, such as over-borrowing by the company on forged documents, the Tribunal will not order the examination of an officer unless the

25. *Anglo-Persian Oil Co. Ltd. v. re.* (1882) 21 Ch D 192 followed in *Munson v. Smith*, (1997) 2 BCLC 161 (CA).

26. A receiver appointed by debenture-holders is an officer for this purpose and can be examined. *Hirold Kalyanvishji Sethi v. Gendarwal Mills Ltd.*, (1975) 2 SCC 515; (1976) 46 Comp Cas 142. The SEB, taking over an electricity supply company also collected its outstanding bills. The SEB was directed by the court to hand over the amount to the liquidator of the company. *Baras Electric Light & Power Co. v. U.P. SEB*, (1963) 53 Comp Cas 597 (Cal). The tenancy rights of the company taken over by the Board were held to have become vested in the Board. Where the whole undertaking has not been taken over, nor the company wants to remain in business, tenancy would have to be surrendered to the landlord. *Basindra Bhawandas Sethna v. Official Liquidator*, (1980) 4 SCC 269; (1985) 51 Comp Cas 702. For another case on delivery of property see *Indubir Kapoor v. Salwan Singh*, (1982) 52 Comp Cas 768 (Del); *Casterbridge Properties Ltd. v. Jezee v. Official Receiver*, (2004) 1 BCLC 96 (CA); no order was granted where there was no proper question to be put to the examinee. But an order of examination was passed under the section because the questions to be asked could be identified at the examination. An appeal against the order was dismissed.

27. See, *Buckley, Contractors' Acts* (3rd Edn) 65. Adopted by the Calcutta High Court in *Lahore Valley Ten Co. Ltd. v. AIR* 1965 Cal 392; (1964) 68 CWN 908. See also, the Supreme Court decision in *Official Liquidator v. K. Muthra Naik*, AIR 1965 SC 654; (1965) 1 Comp L 161.

report attributes to him some specific acts of fraud.²³⁸ If the allegations are of specific nature, it will not be necessary for the liquidator to offer any proof. A public examination would not have been necessary if proofs were already available. There could have been a direct action in that case. In a Delhi case,²³⁹ the allegations were that no receipts had been obtained for certain payments, that certain others were not at all shown in books of account and that there were also overpayments. It was held that these allegations were sufficiently specific to justify an order of public examination of the managing director. Where a director was not charged with fraud in the liquidator's report, but he filed an affidavit assuming responsibility for the act constituting the fraud, the court ordered him to stand public examination.²⁴⁰

"Public examination under the provisions of the Act does not amount to accusation and is not prohibited under Article 20(3) of the Constitution of India."²⁴¹

The company liquidator has to take part in the examination. The Tribunal may put such questions to the person examined as it thinks fit. The examination shall be on oath and he shall answer all questions as the Tribunal may put or allow to be put to him. However, he should be given the opportunity to be heard and present his objections, if any, before any order for his examination is made.²⁴² He may apply to the Tribunal to be exculpated from any charges made or suggested against him. If he does so the Official Liquidator shall appear on the hearing of the application and call the Tribunal attention to relevant matters.

Dissolution of company [S. 302]

When the affairs of the company have been completely wound up, the liquidator has to make an application to the Tribunal for dissolution of the company. If the Tribunal is of opinion that it is just and reasonable in the circumstances of the case to order dissolution, it may pass an order of dissolution from the date of the order. In a case where dues of creditors were paid with the amount realised from sale of assets of the company. There was no fund or asset for realisation. The company in liquidation was ordered to be wound up.²⁴³ The liquidator has to file a copy of the order with the Registrar

238. *Official Liquidator v CV Raman*, (1966) 2 Comp LJ 24 (Mad); *Official Liquidator v T S Sudarshan*, (2003) 116 Comp Cas 88 (Mad), an order of examination was considered not necessary where the directors had not controverted the report of the liquidator.

239. *Sukh Dayal v Liberty Finance* (1980) 50 Comp Cas 329 (Del).

240. *Central Tipperah Tea Co Ltd*, re, (1966) 2 Comp LJ 87 (Cal); Following *George Steppling*, ex p, 1896 AC 146 and *Lohar Valley Tea Co*, re, (1964) 68 CWN 938. See also, *Gatesvillianasam CJ* in *K Joseph Augustin v M A Nambiaran*, AIR 1964 SC 1552 at p 1557 (1965) 34 Comp Cas 546.

241. *Narayanan Kuzmar v MP Misry*, AIR 1961 SC 29; (1960) 30 Comp Cas 644. Followed: *Official Liquidator v CV Raman*, (1966) 2 Comp LJ 124 (Mad) and *Official Liquidator v Hanjis Mandir*, (1970) 2 Comp LJ 46.

242. See, *Lohar Valley Tea Co*, re, (1964) 68 CWN 938.

243. *Electrocon Circuits Ltd (In Liquidation)*, re, 2015 SCC OnLine Raj 4792; (2015) 191 Comp Cas 262

within 30 days. The Registrar has to record the fact of dissolution in the register relating to the company.

The role of company liquidator is not limited to participation at the stage of disbursement. He has a role to play even in the conduct of sale. Notice of sale to him is necessary.²⁴³

Default on the part of the company liquidator in filing a copy with the Registrar is punishable with fine extending to Rs 5000 for every day of default.

Appeals from orders made before commencement of Act [S. 303]

This section proceeds as follows to protect right of appeal against an order made under the preceding 1956 Act.

303. Nothing in this Chapter shall affect the operation or enforcement of any order made by any Court in any proceedings for the winding up of a company immediately before the commencement of this Act and an appeal against such order shall be filed before such authority competent to hear such appeals before such commencement.

*Appeals from
orders made before
commencement of
Act*

Position of liquidator: Duties and liability

In a winding up by the court, the liquidator is an officer of the court, and not an agent of the parties concerned.²⁴⁴ In a voluntary winding up, he is not an officer of the court. He owes his appointment to the company in general meeting. In any case, the duties of liquidators of both kind are more or less of the same nature. In the conduct of winding up they have to perform basically the same functions. They have to take into their custody the property of the company;²⁴⁵ to keep proper books for recording proceedings at meetings; [S. 293] to have their accounts audited; [S. 294] to call meetings of committees of inspection; [S. 287] to call meetings of members and creditors. [Ss. 316, 318] They are to keep the moneys received by them as such in a special account in any Scheduled Bank to be entitled "the Liquidation A/C of ...". The court may, however, permit a liquidator to open any other account and to operate the same as directed for beneficial winding up. He should not hold the money for more than 10 days in his hands because he has then to pay interest @12 per cent and incidental expenses and also take the risk of losing office. The bank in which such an account is opened

244 *Pravin Gain v Central Bank of India*, (2011) 2 SCC 101; (2013) 176 Comp Cas 101.

245 *Ralls & Sons Ltd. (No 2)*, re, 1970 Ch 576, 586; (1971) 2 WLR 100.

246 S. 283. He can get the orders of a magistrate under this section to recover possession of the company's property. A landlord seized the godown of the company. The goods disappeared from the godown. The landlord was ordered to pay to the liquidator the value of the goods lost. *Dalbir Singh v Sakau Industries (P) Ltd.*, (1983) 51 Comp Cas 359 (Cal). Where a property has been delivered by way of security the liquidator can demand from the security holder the surplus proceeds of the property. *Mahanashini SEB v Official Liquidator*, (1982) 1 SCC 358; (1983) 53 Comp Cas 248; *India Electronic Works Ltd. v.*, re, (1993) 55 Comp Cas 373 (Cal). Where the property of the company was in the nature of shares in another company and that other company made a rights issue without offering its proportion to the company, the liquidator can proceed to enforce the company's due. *V. Radhabrahm v P K Ramakrishnan*, (1994) 111 W Ld; (1995) 78 Comp Cas 694; (1995) 17 CLA 63 (Mad).

becomes liable if through negligence any loss takes place to the liquidation account. [S. 350]

The liability of a liquidator for breach of his duties involves the application of agency principles. Functionally, the liquidator is an agent of the company and not a trustee for shareholders or creditors. An individual shareholder or creditor cannot sue him for damages for delaying payments unless it is due to some deliberate misconduct towards a particular person. The proper remedy is to seek an order of the court in reference to his conduct.²⁴⁷ Where, however, the failure to perform a statutory duty causes loss to an individual claimant, the liquidator may be held liable to him. For example, where the liquidator failed to contact a creditor whose name appeared in the books and the company was dissolved without paying him, the liquidator was held liable for his loss. The creditor could not submit his claim because he did not come to know of the winding up. The general advertisement inserted by the liquidator was considered by the court to be not sufficient.²⁴⁸

About the standard of care which the liquidator is expected to use, there is this comment by MAUCHAM J:²⁴⁹ "[O]bservations of the learned judges²⁵⁰ certainly do not encourage the proposition that the liquidator is a mere agent liable only if negligence of a gross kind is established. I should hesitate a long while before deciding that a voluntary liquidator is personally liable, if notwithstanding every care on his part he admits a claim which is ill-founded. The statutory duties cast upon him involve the getting in of the property and applying such property in satisfaction of the liabilities pari passu, and subject thereto the distribution of the balance among the members.... The Winding-up Rules recognise that the liquidator, who has to examine every proof of debt lodged with him and the grounds of the debt, may be wrong. . . The claim of the creditor may be based upon disputable matters of fact, as well as difficult questions of law. Moreover the duty of getting in the property of the company cannot be an absolute duty, since such property may be irrecoverable. I do not therefore accept the view that the liquidator in the matter of admitting proof is practically in the same position as an insurer so that, in any event, and under all circumstances, he is liable if a debt is subsequently shown to have been wrongly admitted.

On the other hand I think there can be no doubt that, in the circumstances of the case, a high standard of care and diligence is required from a liquidator in a voluntary winding up. He is of course paid for his services; he is able to obtain wherever it is expedient the assistance of solicitors and counsel; and, which is a most important consideration, he is entitled, in every case of serious doubt or difficulty in relation to the performance of his statutory duties, to submit the matter to the Court, and to obtain its guidance."²⁵¹

247 *Kennards v Scott*, (1891) 1 Ch 712; *id* *ET* 125.

248 *Polsford v Decimus*, (1903) 2 Ch 625.

249 *In Home & Colonial Insurance Co Ltd v. m.*, (1950) 1 Ch 109, 124-25.

250 *In Windsor States Coal Co (1891)* *1d*, *re*, (1929) 2 Ch 51; 100 LT ED (Civ), where negligence on the part of the liquidator was clearly established.

Applying these principles to the facts of the case, the court held the liquidator to be liable because he had admitted and paid a very big claim without proper precautions and legal advice. The company had entered into an agreement for re-insuring marine risks with another company. The liquidator paid a large sum of money to that other company which he supposed to be due under the agreement but which subsequently turned out to be void. The dissolution was annulled on that ground. The liquidator was not allowed to recover back the payment from the other company and, therefore, he was held personally liable for the company's loss. He did not fulfil his duty of investigating the claim. He did not take legal advice. The articles of a company cannot give any protection to a liquidator. They do not constitute any contract between him and the company.

Visit eboexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®, along with updates, articles, videos, blogs and a host of different resources.



SCC Online® Business Law Legal Research

The following cases from this chapter are available through EBC Explorer™:

- *Al Rishamani International Exchange v Official Liquidator*, 2016 SCC OnLine Mad 9988; (2016) 199 Comp Cas 603
- *DDA v Skipper Construction*, (2013) 11 SCC 609
- *Devganga Traders v Official Liquidator of Mahendra Mill Ltd*, 2012 SCC OnLine Guj 52K2; (2014) 186 Comp Cas 407
- *Ebrahimji v Westbourne Galleries Ltd*, 1973 AC 360; (1972) 2 WLR 1289; (1972) 2 All ER 492 (HL)
- *Empty Sugars & Chemicals Ltd v Jalswarpur Cooling Tinsery Ltd*, 2014 SCC OnLine AP 106; (2014) 187 Comp Cas 28 (AP)
- *ICICI Bank Ltd v Ahurabum & Co*, (2016) 199 Comp Cas 594 (SC)
- *Jasak Specific Family Trust v Official Liquidator*, (2016) 199 Comp Cas 584 (Guj)
- *Official Liquidator of Asup Synthetic and Chemicals Ltd v Mahendra Kumar Jain*, (2015) 188 Comp Cas 205 (Raj)
- *Official Liquidator v R Vijayakumar*, 2013 SCC OnLine Mad 806; (2014) 184 Comp Cas 62 (Mad)



CASE PILOT

- *R Selvapathi Rao v Selvapathi Press Ltd*, AIR 1925 Mad 489
- *Rajgopal Prasad Jnangjhanwala v Hind Overseas (P) Ltd*, (1971) 41 Comp Cas 308 (Cal)
- *Rajasthan Financial Corp v Official Liquidator*, (2005) 6 SCC 190; (2005) 128 Comp Cas 387
- *Vijay Krishan Khanra v Anandpur Sandeshi Textile Corp (P) Ltd*, 2015 SCC OnLine P&H 19901; (2016) 195 Comp Cas 469
- *West Hills Realty P Ltd v Neelkamal Jewellers Tower P Ltd*, (2017) 200 Comp Cas 179 (Bom)
- *YS Spinners Ltd v Official Liquidator*, (2000) 100 Comp Cas 547 (Guj)

Provisions Applicable to Every Mode of Winding Up

Whether a winding up is by the Tribunal or voluntary, in many respects it is conducted in accordance with uniform rules. The Act contains a number of provisions applicable to every mode of winding up.¹

One of the foremost duties of a liquidator is to get in the company's assets for the purpose of satisfying its debts and liabilities. If any property of the company is in the custody of some person, the liquidator can, through an application to the Tribunal, recover possession of that property.² An important asset which is available for winding up is the uncalled capital, if any, of the company.

Contributors [S. 2(26)]

To realise the uncalled residue of the company's capital, the liquidator has to call upon the shareholders, who are then called contributors, to pay the unpaid balance. A "contributor" means a person liable to contribute to the assets of a company in the event of winding up and includes the holders of any shares which are fully paid up".³ [S. (26)] The liability extends to an amount which would be sufficient for payment of the company's debts and liabilities and the costs, charges and expenses of winding up and for adjustment of the rights of contributors among themselves. The extent of each member's liability is to pay the unpaid amount on his shares. In the case of a guarantee company, apart from the guarantee amount, if a member is a shareholder also, he would be liable to pay the unpaid amount on his shares. Where any sum is owing by the company to a member in his capacity as a member such as dividend, it will not give him the rank of a creditor as against other unpaid creditors [even if they are members] of the company. [S. 285]

1. Chapter XX, Part III, Ss. 324-58.

2. See, powers of the Tribunal in "Compulsory Winding Up", [S. 468].

3. The liability of the fully paid shareholder is nil. He is placed on the list for the purpose of distribution of assets and for other procedural purposes. *State Estate v R P Seth Hemani Kalyanam*, (1970) 1 SCC 426; (1970) 40 Comp Cas 1116.

The liability of a member of a company to be included in the list of contributors is not *ex contractu*, that is, it does not arise by virtue of his contract to take shares. His liability is *ex lege* which means that it arises by reason of the fact that his name appears on the register of members of the company. It is, therefore, no answer for the contributory against the claims of the company to say that, although his name appears on the register, he is not liable because the allotment to him was void.⁴ The total absence of a contract is, however, different from the contract being violable. Where shares were allotted to a person without any application from him, the liquidator was not permitted to place his name in the list of contributors.⁵

It should, however, be noted that "a contributory is not liable to pay one farthing of the uncalled share money until the Tribunal has made such an order and a call notice has then been served upon the contributory in accordance with the Tribunal's order".⁶ The Tribunal will authorise a call to be made only when it is satisfied that the financial condition of the company is such that a call is necessary to discharge the liabilities of the company.⁷ In the case of voluntary winding up a call can be made by the liquidator without sanction of the Tribunal.

But once a call has been made, the liability of the contributory to pay it becomes a statutory debt. A new liability to pay the unpaid balance commences. It is settled in a long course of decisions that the members of a company in liquidation are liable in respect of unpaid calls even though the calls were made by the company before it went into liquidation and the suit of the company for its realization had become barred by time.⁸

If a person's name is not included in the list, he can call upon the liquidator to make good the default and if the liquidator does not do so within 14 days, the Tribunal can under Section 353 issue necessary directions. A

4 See, *B. Lakshmi Narasa Reddi v. Official Receiver*, AIR 1951 Mad 890; *Sonam Das Kamaljeet v. Birla Engineers & Contractors Ltd.*, (1949) 14 Comp Cas 163; AIR 1944 Pat 226; *Persinsen Life Assurance Co Ltd. v. AIR 1936 Bom 24*. In this case a contributory's defense that out of 250 shares shown against his name in the company's register, 200 shares were held by him as nominee of one of the directors, was rejected. See also, *Hokin Brothers v. Official Liquidator of Peshawar Bank Ltd.*, AIR 1915 Lah 320; *Saviesundaram Pillai v. Official Liquidator*, (1967) 2 Comp LJ 257 (Mad).

5 *Mannalalra Shah v. Official Liquidator*, (1977) 42 Comp Cas 356 (Del).

6 See, *Sonardia Coal Co Ltd. v. AIR 1930 All 617 S. 426*; it provides that the section shall not invalidate any provision in a policy of insurance or other contract under which the liability of the individual member on the policy or contract is restricted or only the funds of the company are made liable.

7 S. 296. See, *Mohd Akbar Abdulla Eszabkay v. Associated Banking Corps of India*, AIR 1950 Bom 386.

8 *Pokhar Mal v. Flour & Oil Mills Co Ltd.*, AIR 1934 Lah 1015. See also, *East Bengal Sugar Mills Ltd. v. AIR 1941 Cal 143; PP Ramnathdas v. T. M. Maneklal*, AIR 1941 Mad 565; *L. Gopal v. Vishwanath Baburao Saraf*, AIR 1956 Nag 204; (1956) 26 Comp Cas 245; *Pidukkottai Ceramics Ltd. v. Sebin*, AIR 1956 Mad 448; *SP Subbush v. Peria Kuruppan Chettiar*, (1967) 1 Comp LJ 168. The liquidator cannot claim interest from the date of the company's time-barred call, but only from the date of the court's order. *SP Subbiah v. Peria Kuruppan Chettiar*, (1967) 1 Comp LJ 168.

notice given six years before the date of application to the court could not be acted upon.⁹

If a contributory dies during winding up, his liability automatically falls on his legal representatives.¹⁰ Where a contributory dies before his name is entered in the list of contributories and an order is made by the Tribunal for payment of the balance, such balance is recoverable from his legal representatives and heirs. But in such a case, the proper procedure for the company or liquidator to enforce payment is to adopt proceedings for administration of the estate of the deceased and not seek an order for payment personally against the representative.¹¹ Where a contributory is adjudged insolvent, his assignee in insolvency shall take his place. Where the contributory is a company which is ordered to be wound up, its liquidator shall become the contributory.

Settling the list of contributories, liability of past members, application of assets (S. 285)

As soon as possible after passing an order of winding up, the Tribunal has to settle the list of contributories. The Tribunal may, if necessary for this purpose, rectify the register of members. The Tribunal has also to cause the assets of the company to be applied for discharge of its liabilities. [S. 285(1)]

In settling the list, the Tribunal has to distinguish between those who are contributories in their own right and those who are representatives of and liable for debts of others. Every person has to be included who is or has been a (past) member and who is liable to contribute to assets for requisite payments and for rights of contributories as between themselves.

Liability of past members.—Such liability is subject to the following:

1. A past member is not liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up.
2. A past member is not liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member. In other words, his liability is only for the liabilities incurred up to the date of his membership.
3. No past member is liable to contribute unless it appears to the Tribunal that the present members are unable to satisfy the contribution. The primary liability is that of the present shareholders to pay the unpaid balance. They should be required to pay in the first place and on their default the past members become liable to pay.

*In Pars Ram Brij Kishore v Jagraon Trading Syndicate Ltd.*¹²

The liquidator of a company called upon the defendant to pay the uncalled amount on his shares. His shares had been forfeited before

9. *Gulmohar Bhargava v Official Liquidator*, (1972) 45 Comp Cas 419 (Del).

10. *Sumitra Kaur v Sitamukhi Sigar Works Ltd.* AIR 1936 Pat 287.

11. See, *British India Banking & Industrial Corp. Ltd v Shiva Chedumburiah*, AIR 1964 Bom 469, *P.K. Krishnaswami, re*, AIR 1948 Mad 162 (1947) 61 LW 659.

12. AIR 1936 Lah 226

the winding up and, therefore, he was a past member. But the existing members had not been called upon to contribute to the full extent of the unpaid amount of their share money. It was held "that in the circumstances a past member could not be liable to contribute till liability of present members was exhausted".

A person whose shares have been forfeited is also liable as a past member, provided the liquidation commences within one year of the date of forfeiture and the above conditions are fulfilled.¹³

In the case of a company limited by shares, no contribution is to be required from any person exceeding the amount, if any, unpaid on his shares for which he was liable as a member. In the case of a guarantee company, the liability of a member is limited to the amount of his guarantee. If such company has a share capital and a member is holding some shares, he would be liable to pay the full value of shares as if the company were limited by shares.

Officers with unlimited liability [S. 286]

There may be in the case of a limited liability company, any director or manager whose liability is unlimited by virtue of any provision in the Act. Any such managerial personnel is liable, in the winding up of the company, in addition to his liability as a shareholder, "to make further contribution as if he were a member of an unlimited company". The liability attaches to both present and past officers. But a past officer is not liable if he ceased to be an officer for a year or more before the commencement of the winding up, or for a debt incurred after he ceased to be an officer. Subject to any provision in the articles of the company, such person is not to be liable to make any further contribution unless the Tribunal deems it necessary to require the contribution in order to satisfy the debts and liabilities and costs, charges and expenses of winding up.

Set-off [S. 295]

A debtor of the company may set off for any amount which is due to him from the company. The right applies where the cross-claims are mutual. The counter-claims must exist between the same parties in the same right. Set off was allowed to a landlord from whom refund of security was demanded because he had deposited the security money with interest and the company was not able to refund his deposit.¹⁴ Neither a joint claim can be set-off against individual liability, nor a set-off is allowed where it would result in a preference of one creditor over another. A director who was liable to make good the company's losses was not allowed to claim set-off against the money which was due to him from the company.¹⁵ Set-off cannot be

13. *Mirza Ali Mumtaz Nizamji, re*, AIR 1924 Mad 723.

14. *CRA Capital Markets Ltd v Bindu Devi Salveya*, (2006) 132 Comm Cas 788 (Del).

15. *Mimsun v Smita*, (1997) 2 BCLC J61 (CA); *Bank of Credit and Commerce International SA v No 8*, (1996) 2 BCLC 254 (CA).

allowed for a claim which is already time-barred.¹⁶ Set-off was not allowed in respect of the claim of the creditor against the holding company.¹⁷

Payment of liabilities [S. 324]

Debts of all description to be admitted to proof.—An important duty of the liquidator is to pay off the company's liabilities. All persons who are entitled to receive money from the company have the right to claim their respective amounts from the liquidator. Indeed, Section 325 declares so clearly that "in every winding up... all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages shall be admissible to proof against the company or for some reason may not bear a certain value." A just estimate shall have to be made, so far as possible, of the value of such debts or claims as are subject to any contingency, or may sound only in damages, or for some other reason may not bear a certain value.

Where the company in liquidation is insolvent, insolvency rules will apply and only such claims shall be provable against the company as are provable against an insolvent person.¹⁸ According to the present law of insolvency, demands in the nature of unliquidated damages arising other than by reason of a contract or breach of trust¹⁹ and debts and liabilities which are incapable of being fairly estimated²⁰ a claim for damages for misrepresentation in purchase of shares²¹ are not provable in insolvency. One of the principles of insolvency laws, as stated in Section 46, Provincial Insolvency Act, 1920, is that where there have been mutual dealings between a debtor and the insolvent, only the net amount due after giving him the set-off can be recovered from the debtor. The same will be the position of a debtor of an insolvent company notwithstanding Section 237 which provides for preferential payments.²² All these rules are to apply to debts provable, valuation of annuities, future and contingent liabilities and the respective rights of secured and unsecured creditors. [S. 325(1)]

16. *Morwadi Lalgog Ltd v Blue Star Ltd*, (1999) 95 Comp Cas 108 (P&H).

17. *MCC Finance Ltd v RBI*, (2002) 110 Comp Cas 645 (Mad).

18. S. 325. See, *Gujarat Electricity Board v Rejatkar Naranshi Mills Co Ltd*, (1974) 44 Comp Cas 127 (Guj). All claimants are put on equality and are entitled to pro rata payment including the liquidator for his rett. *Sri Chaitanya V Gopinath Mehta Ltd*, (1967) 42 Comp Cas 635 (Ker.). Claims have to be filed before the liquidator and not consumer forum even if the cause of action was such that if the company had been a going concern, a consumer forum would have had jurisdiction. *Sudarshan Chitr (India) Ltd v Official Liquidator*, (1992) 1 Comp LJ 39 (Mad).

19. S. 46(1), Presidency-Towns Insolvency Act and S. 34(1), Provincial Insolvency Act.

20. S. 46(4), Presidency-Towns Insolvency Act and S. 34(1), Provincial Insolvency Act. *Scion v British and Commonwealth Holdings plc*, (1996) 2 BCLC 207 (CA), claim for damages for misrepresentation and breach of contract.

21. *Sudex v British & Commonwealth Holdings plc*, (1997) 2 BCLC 501 (JIL).

22. Expressly so laid down by the Supreme Court in *Official Liquidator v V Lakshmi Kirby*, (1981) 3 SCC 32; (1981) 51 Comp Cas 596; *Textile Labour Areas v Official Liquidator*, (2001) 118 Comp Cas 103 (Guj), realisations treat company's insolvency, first distribution proportionately among workers and creditors. *Canara Bank v Mopeds India Ltd*, (2001) 102 Comp Cas 812 (AP), creditor could not appeal against the liquidator's division of amount due to workmen, but if the workmen appealed, the creditor could intervene.

A decree-holder is not a secured creditor. Even the judgment of the Supreme Court in favour of a claimant does not have the effect of creating a security. A security has to be created by the parties or under an Act and registered with the ROC. Otherwise, a decree-holder ranks as an ordinary creditor and, therefore, cannot claim any priority. There was no general or particular lien also.²²

A secured creditor need not come in the winding up. He has the right to realise his security, but he shall be liable to pay the expenses incurred by the liquidator for the preservation of the security before its realisation by the creditor.²³ However, he has the option of relinquishing his security and to prove the amount due to him as if he were an unsecured creditor. Under this scheme a secured creditor was able to rule out all other claims including claims of workmen. This has now been changed. Changes were introduced by the Amendment Act of 1985. They have been retained by the present section. Workers' claims have been equated with those of secured creditors by providing that the security of every creditor shall be subject to a pari passu charge in favour of workmen. If the secured creditor enforces his security, the liquidator will have the power to represent the workmen to enforce the charge deemed in their favour. The section says that workmen's dues as equated with those of secured creditors shall be paid in priority to all other debts.²⁴ If the assets are not sufficient to meet them they shall abate.



CASE PILDIT

22. ONGC v Official Liquidator, [2006] 2 Comp LJ 81; [2006] 102 Comp Cas 579 (Guj).

23. *Near Sangameshi Mills of Akheriabad Ltd.*, re, [1985] 58 Comp Cas 86 (Guj). Followed in *Punjab United Forge Ltd v Punjab Financial Corp.*, (1995) 46 Comp Cas 660 (P&H), claim for contribution towards salaries of watch and ward. *Trusonure Oxide Glass Mfg Co Ltd.*, re, [1997] 88 Comp Cas 179 (Ker), where the secured creditor realised 1.5 crore rupees less than what was being offered by other bidders and though such offers were received after the completion of the sale, the gap being too big, the sale was set aside in the interest of other creditors. *Kurnalakhi Smt Industrial Investment and Development Corp Ltd v Interworld Transport Technology Systems*, AIR 1998 Kant 196, sale order orders of BIFR would also require leave of court. The State Financial Corporation have also to make their contribution towards the costs of preservation of their security but not required to make its contribution to the expenses of winding up order including those of advertisement of the petition. *BIFR v Aditya Paper Mills Ltd.*, [2000] 1 Comp LJ 289, [1999] 98 Comp Cas 282 (P&H). *Durgadeo Forgings IP Ltd v Punjab Financial Corp.*, [2000] 1 Comp LJ 52 (P&H), corporation required to pay monthly sums for salary of watch and ward, the creditor would be entitled to indemnity from sale proceeds for such contributions. *Accurace Inc Punjab Ltd v Punjab Wireless Systems*, [2001] 1 Comp LJ 59 (P&H). *ICICI Bank Ltd v Skymoni Steel Tubes Ltd.*, [2003] 126 Comp Cas 545 (Kant). Under the State Financial Corp Act, the corporation, as a secured creditor, can dispose of its security outside winding up but has to bring the amount into the winding up court, because distribution has to be in accordance with the provisions of Ss. 529-A and 530. The corporation has to notify its claim to the liquidator. *Sukhman Steel Tubes Engineers' Assn.*, re, [2005] 126 Comp Cas 522 (Kant); *SK Bhargava v Official Liquidator*, [2006] 65 SCL 360, [2005] 128 Comp Cas 143 (Raj), the bank a secured creditor, obtained a decree from BIFR entered into settlement with debtor company and asked the liquidator to pay. The latter refused because it was not in the interest of shareholders, creditors and employees. *Dixyn Chemicals Ltd.*, re, [2005] 127 Comp Cas 650 (Bom), the effect of a BIFR decree in favour of a bank and a financial institution is that the liquidator is not to dispose of the assets and has to wait for orders of the winding up court.

24. *Indian Bank v VS Perumal Raju*, [1992] 26 Comp Cas 287 (1992) 1 Comp LJ 527 (Mad), non payment to workers. *SEI v Pyle Mills Ltd.*, [1992] 21 Comp Cas 710 (Bom), workers

in equal proportion. The concept of workmen's dues for the purposes of Section 327 has also been made more broad-based. Preferential payments listed in Section 327 are now subject to the new provisions.²⁵

The Tribunal is the custodian of the property of the company on behalf of secured and unsecured creditors and workmen. It is the obligation of the company liquidator to associate workmen in the process of sale of assets.

are not a necessary party to the proceeding. All the securities which remained unrealised at the time of the amendment would become subject to the workmen's deemed charge. UCO Bank v Official Liquidator, (1994) 5 SCC 1; (1994) 81 Comp Cas 780. These are decisions to the effect that by virtue of the overriding effect under the State Financial Corporations Act, a corporation can enforce its security without the intervention of the winding up court. *Bonhom Egg Corp v Aripayamfle & Chemicals Ltd*, (1994) 81 Comp Cas 872 (Raj). Execution of decree would also require leave of the court. *Industrial Finance Corp of India v Century Metals Ltd*, (1992) 73 Comp Cas 630 (Del). It has been held that by virtue of S. 29, State Financial Corporations Act, 1951 which gives a direct power of sale of the industrial concern, the right of the corporation cannot be defeated or subjected to S. 529-A. *S S Chabheri v Karm Financial Corp*, (1995) 82 Comp Cas 1 (Ker); *SBF v Spinter Tales and Contractors Ltd*, (1995) 82 Comp Cas 290 (Raj), a portion of the proceeds to be earmarked for payment of workers; *Maharashtra State Financial Corp v Official Liquidator*, (1995) 82 Comp Cas 342 (Bom).

26. See, *Giovanni Biniy Brighton & Co, re*, (1990) 67 Comp Cas 411; (1990) 1 Comp LJ 102, 108 (Ker), showing overriding effect of the section. *Pearless Plywood v Rajasthan State Industrial & Investment Corp Ltd*, (1991) 22 Comp Cas 5; (1990) 1 Comp LJ 222 (Del); *Gundal Bhagwati v Shri Sujan Mills Ltd*, (1989) 65 Comp Cas 480 (MP). Claim to interest ceases to run from the date of winding up unless surplus is available after meeting claims of workmen and other creditors. *Thyra Financial Corp v FNB Auto Ancillary (Bhilai) Ltd*, (1990) 81 Comp Cas 568 (Del). Since the property of the company is deemed to be in the custody of the official liquidator, a secured creditor can recover possession of such property only with the order of the court. *Indian Textiles v Gujarat State Financial Corp*, (1994) 81 Comp Cas 599 (Bom). Where assets of the company were insufficient to meet all the claims, the sale proceeds in the hands of the corporation were ordered to be made available for discharge of other just payable claims. The court said that financial corporations could not use S. 29, State Financial Corporations Act, 1951 for defeating the claims of other secured creditors. *AP State Financial Corp v Electrothermit (P) Ltd*, (1996) 86 Comp Cas 482 (AP). The Gujarat High Court has differed from the view that workers become secured creditors, see, *Gujarat State Financial Corp v Official Liquidator*, (1996) 87 Comp Cas 633 (Guj); *Pearless General Finance & Investment Co Ltd v Majestic Apparel (P) Ltd*, (1997) 24 CLA 44 (Del); *Polyalfine Industries Ltd v Konark Plastics Mfg Co Ltd*, (1998) 28 CLA 266 (Bom); *National Textiles Corp Ltd v Textile Workers' Union*, (1995) 1 CHN 522 (Cal); advance of loans after takeover of management under IDRA, 1951, does not enable the Government to supersede the preferential status of employees in the matters of payment of claims. *UCO Bank v Official Liquidator*, (1994) 5 SCC 1; (1994) 81 Comp Cas 780. Workers secured creditors alongwith other security-holders. The non-priority clause in S. 29, State Financial Corporations Act, 1951 would have to yield before that of S. 529-A. Companies Act, 1956 because it was brought in by an amendment of 1965 and being later in time would prevail over the earlier in time. *AP State Financial Corp v Official Liquidator*, (2000) 7 SOC 291; (2001) 38 CLA 315. The court said that the object of the new section was to protect workmen in respect of their dues. *International Mach Kunders Ltd v Karnataka State Financial Corp*, (2003) 10 SOC 482; (2003) 114 Comp Cas 611, directions sought from the court for working out proper proportion of the claim of the secured creditor and non-priority charge in favour of workers. *KTC Tyres (India) Ltd, re*, (2002) 180 CTR 52; (2003) 111 Comp Cas 185 (Ker); tax claims of all variety come subsequent to the priority of secured creditors and workmen's dues. *Indian Metal & Chemicals Ltd v Official Liquidator*; (2002) 108 Comp Cas 401 (All); workmen cannot be paid in priority to secured creditors.

They have the right to be treated *pari passu* with the claims of secured creditors.²⁵

Participation by the secured creditor in proceedings for sale of the company's assets by the Tribunal for facilitating realisation of assets does not amount to relinquishing the security. Relinquishment requires a positive act. There is no right in workers to claim distribution of entire sale proceeds in payment of their claims in priority to all other claims. The court [now Tribunal] directed *pari passu* distribution between workers and the secured creditor.²⁶ The provision for overriding preferential payments to bring about *pari passu* participation of workers with secured creditors does not have the effect of obliterating creditors' *inter se* priorities. Such priorities are governed by the Transfer of Property Act, 1881. The first charge holder has priority over the next such holder.²⁷ A receiver appointed by a secured creditor is responsible to him only and not to the company and other creditors. A secured creditor is responsible to see that the company's property is not wasted.²⁸

In the matter of payment of interest in the post winding up period, it was held that a secured creditor was entitled to the contractual rate of interest for post winding up period if surplus is available before distribution among unsecured creditors.²⁹

Where the secured creditor gave up his security, it was held that the proceeds were to be distributed *pro rata* under Section 326.³⁰

When the list of claimants is settled, the company liquidator may start making payments out of the available assets of the company.

Preferential payments [S. 327]

The first payments to be made are called "preferential payments". They have to be paid in priority to all other debts. Such payments are listed below:

- (a) All revenues, taxes, cesses and rates due to the Central or a State Government or to a local authority. The amount should have become due and payable within 12 months before the winding up.³¹

27. *Project Wireless Systems Ltd v Indira Chambers Bank*, (2005) 126 Comp Cas 554 (P&I); *ESI Corp v Official Liquidator*, (2006) 127 Comp Cas 672 (C.I.L.), sums deducted from employees' wages for contribution, company mortgaged property, realisation from the security to be either kept in separate account to enable the liquidator to pay the ESI portion first, otherwise the procedure under Ss. 529 A and 530 to be followed.

28. *Cultural Steel Tubes Engineers Union v Official Liquidator*, (2005) 131 Comp Cas 410 (Civ).

29. *ICICI Bank Ltd v SIDCO Leathers Ltd*, (2006) 10 SCC 432 (2006) 131 Comp Cas 451.

30. *International Lease Ltd v First National Trustee Co Ltd*, (2013) 2 WLR 466 (Ch D); *Kingfisher Airlines Ltd v SBI*, 2013 SCC Online Kat 9894; (2014) 186 Comp Cas 239, a secured creditor bank could stand outside winding up to enforce security interest and could also simultaneously apply for winding up. Company Court could not exercise jurisdiction over mortgaged property whether before or after winding up order. Now such cases go in the Insolvency and Bankruptcy Code, 2016.

31. *LYER Farris (P) Ltd v Official Liquidator*, (2014) 187 Comp Cas 400 (C & AP).

32. *IFCI Ltd v SIDCO Leathers Ltd*, (2006) 131 Comp Cas 429 (All), the Companies Act prevails over the insolvency legislation.

33. The State is not entitled to preference in respect of any other claims, for example, the cost of machinery supplied. *Union of India v JR Ray & Sons*, AIR 1962 Punj 520 at charges inc.



- (b) All wages or salary of any employee, in respect of services rendered to the company and due for a period of four months only within 12 months before the winding up and any compensation payable to any workman under Chapter V-A of the Industrial Disputes Act, 1947. The amount is not to exceed such sum as may be prescribed in the case of any one claimant;³²
- (c) All secured holiday remuneration becoming payable to any employee on the termination of his employment before, or by the effect of the winding up;
- (d) All amounts due in respect of contributions payable during the 12 months before the winding up under the Employees' State Insurance Act, 1948 or any other law;³³

services rendered. *Kerala Water Transport Corps. v. (1967) 37 Comp Cas 536 (Ker)*; *IDC of Orissa Ltd v. Sri Radha Industries (1986) 132 Comp Cas 875 (Ori)*, dues under mining lease, claim to be raised in accordance with the normal procedure of winding up. There is no preference for previous years' arrears. *STO v. Official Liquidator, (1968) 39 Comp Cas 430 (All)*. Petallics are not preferential claims unless they are part of the tax due. *STO v. Rajputra Narayan Mills Ltd, (1978) 44 Comp Cas 65 (Guj)*. The winding up is deemed to commence for this purpose from the date of the appointment of the first provisional liquidator, or if no such appointment was made, from the date of winding up order. In the case of voluntary liquidation, the relevant time means the date of the passing of the special resolution for winding up. S. 530(9)(c). Tax becomes due for this purpose when it is assessed and demanded. *Brevoda Board & Paper Mills Ltd v. ITD, (1976) 102 ITR 153; (1976) 46 Comp Cas 25 (Guj)*. It has been held by the Andhra Pradesh High Court in *ITD v. Official Liquidator, (1982) 134 ITR 132* (1979) 48 Comp Cas 11 (Ker), that interest due on unpaid taxes can not be claimed as a preferential payment. A special order of the court would be necessary because ordinarily interest cannot be claimed from a company after the commencement of winding up. *Official Liquidator v. ITD, (1978) 48 Comp Cas 59 (Ker)*; *ITD v. Official Liquidator, (1985) 58 Comp Cas 390 (Ker)*; *Rajputra Narayan Mills Co Ltd v. STO, (1991) 3 SCC 283; (1991) 71 Comp Cas 149*, relevant period of 12 months. The decision in *Imperial Oil Refining (P) Ltd v. Income Tax Deptt, (1979) 49 Comp Cas 58; AIR 1979 Ker 23* was approved by the Supreme Court in *Imperial Oil Refining (P) Ltd v. ITD, (1996) 6 SCC 363* (1996) 96 Comp Cas 555 at 564, where it was observed that on a total view of the provisions, the IT Deptt is treated as a secured creditor and the amount set aside by the Official Liquidator is marked off as outside the area of winding up proceedings and jurisdiction of the winding up court. But the company court can decide the matter as to the validity of the claim and its protected amount, see, *CIT v. Official Liquidator, (1974) 44 Comp Cas 445 (Raj)*; *K. Ramachandran Rao v. Kabels Cables Ltd, (2004) 118 Comp Cas 122 (AP)*, an auction purchaser of the company's property was not allowed to seek directions to the liquidator that he should be required to pay taxes due in respect of the property of which he was aware when he purchased the property. *Anchor Health & Beauty Care Ltd v. Municipal Corp of Greater Mumbai, (2006) 132 Comp Cas 689 (Karn)*, auction purchaser is liable to pay property tax only from the date of purchase. Tax prior to sale to be claimed from the liquidator.

34. Provided that where a claimant is a labourer in a husbandry who has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such a sum, or a part thereof, as the court may decide to be due under the contract, proportionate to the time of service. S. 530(2) Amounts payable under the Act on the closure of an undertaking are also entitled to preference. See, *R. Srinivasan v. Official Liquidator, AIR 1946 AP 226; (1967) 37 Comp Cas 544*. The amount presently prescribed by notification w.e.f. 1-3-1997 is Rs 20,000 per claimant.
35. This does not apply when the company is being wound up voluntarily merely for the purpose of reconstruction or amalgamation with another company. S. 530(1)(d). Official

- (e) All amounts due in respect of any compensation or liability for compensation under the Workmen's Compensation Act, 1923 in respect of death or disablement of any employee of the company.³⁶
- (f) All sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees, maintained by the company.³⁷
- (g) The expenses of any investigation held in pursuance of Section 210 or 213 insofar as they are payable by the company.

After retaining sums necessary for meeting the costs and expenses of winding up,³⁸ the above debts have to be discharged forthwith so far as assets are sufficient to meet them.³⁹ Section 320 provides that the assets of

³⁶ *Liquidator v JTO*, (1979) 44 Comp Cas 244 (Raj); *National Condensin (P) Ltd. re*, (1979) 44 Comp Cas 216 (Del).

³⁷ S. 326 also has no application in the above cited case and also when the company has, under such a contract with insurers as is mentioned in S. 21, Workmen's Compensation Act, 1923, rights capable of being transferred to and vested in the workmen, S. 530(1)(d).

³⁸ *Regd Provident Fund Comm v Official Liquidator*, (1968) 2 Comp LJ 15 (Agr); *SA Khindrajit v State of Haryana* (1991) 1.1 PLR 313; duty to pay dues under Employees' Provident Fund and Miscellaneous Provisions Act, 1952.

³⁹ S. 426 empowers the court, where the assets are insufficient, to order payment out of the assets for costs, charges and expenses of winding up in such priority as the court thinks just. In the case of a voluntary winding up, S. 520 provides that subject to the claims of secured creditors, it is up to the costs of winding up shall be paid in priority to all other claims. The Calcutta High Court has held in *Shashi (Delhi) Sanitarywear Light Rainsay Co v LTD*, (1988) 63 Comp Cas 627 (Cal) that the court cannot under these sections interfere with assessment proceedings, except that it may hear an appeal after assessment. *Ramnath Dangi Brothers & Co. re*, (1990) 57 Comp Cas 441; (1990) 1 Comp LJ 107 (Ker). capital gains tax on the company's property mortgaged to others is not an expense of winding up. Debts incurred and rents paid for the purposes of winding up are expenses of winding up and are payable in priority to all other claims. *Sanitary Serial Assn. v* (1991) 7 LCH 289; *Massey re*, (1970) LR 1 EQ 267; improperly incurred expenses do not enjoy this priority. *Linde Maths Ltd. v*, 1949 IR 37 C 46 (Ch D), rent incurred for premises needlessly retained. *Parhene Clothing Ltd. re*, 1993 Ch 388 (Ch D), priority of expenses of liquidation over preferential creditors and floating charge holders. *Mullicki Singh v Indian Overseas Bank*, (1996) 86 Comp Cas 130 (P&H), even a secured creditor might be ordered to pay costs when the company was not in a position to meet the watch and ward expenses for protecting the property. *Grey Metal Ltd. re*, (2000) 1 WLR 570; tax liability was incurred as a result of proper performance of the provisional liquidator's duties, the liability was held to be an expense properly incurred. The company continued trading during provisional liquidation. Other similar decisions are, *Tesko Finance (UK) plc re*, (2000) 1 BCAC 683 (CA) on appeal from (1999) 2 BCAC 777 (Ch D). The amount of interest accruing on loans during the period of winding up has been held to be not an expense of winding up, *Kohr v ITC sub nomine Tesko Finance (UK) plc*, 1999 STC 922 (Ch D).

⁴⁰ S. 322(4). The House of Lords in *Burnier v Talbot*, (2004) 2 AC 299, (2004) 2 WLR 582, (2004) 129 Comp Cas 756 (HL), held that when a company was both in receivership and liquidation, the company's assets were comprised in two quite separate funds namely, proceeds of free assets and those of assets comprised in the floating charge. Each fund has to bear the costs of its own administration and neither being required to bear the costs of administering the other and that, accordingly, none of the costs and expenses of winding up the company were payable out of the assets subject to the floating charge until the whole of the principal and interest therein has been paid. *Buchler v Talbot*, (2004) 2 AC 298 (2004) 2 WLR 582, (2004) 129 Comp Cas 756 (HL), assets not sufficient to meet costs and expenses

the company shall be applied in satisfaction of its liabilities *pari passu*. The remaining assets have to be distributed among the members according to their rights and interests in the company unless the articles provide otherwise.⁴¹ Where the liquidator carries on business for beneficial winding up, the taxes that become due on the profits are expenses of winding up.⁴² The fee payable to a chartered accountant for preparing the statement of affairs is also an expense of winding up.⁴³ The preferential claims rank equally among themselves and have to be paid in full. But when the assets are insufficient to meet them, they shall abate in equal proportion.⁴⁴ By virtue of the provision in Section 178, Income Tax Act, 1961, the income tax authorities have been claiming preference over other preferential payments. But the courts have always held that there is nothing in the Income Tax Act which interferes with or abrogates the provisions for priority of debts laid down in Section 530(1)(a), Companies Act, 1956.⁴⁵ [now S. 327(f)(a)]

Official Liquidator alone is competent to adjudicate upon dues of workmen. An order passed by the authority under the Payment of Gratuity Act, 1972 was held to be without jurisdiction. It was accordingly set aside.⁴⁶ Claims of workers and secured creditors have overriding effect over any claims under the land ceiling law. Land which is in the custody of the Company Court at the commencement of winding up, can be used in accordance with preferences under the Companies Act.⁴⁷ Where during the post winding up the liquidator uses premises under licence for business purposes, the licence fee was equal to expenses of liquidation and therefore held payable in preference.⁴⁸ Capital gains tax payable by company on sale of assets was

of winding up. Proceeds of the crystallised floating charge not allowed to be used for meeting costs and expenses. For involvement of contract labour, see *Mining And Allied Machinery Coopn Ltd (in liquidation) v Official Liquidator*, 2014 SCC OnLine Cal 21366; (2015) 189 Comp Cas 84.

40. Rule 200 of the Companies (Court) Rules provides that payment up to Rs 500 can be made to the legal heirs of a deceased member without succession certificate. *Minal Steel Re-Rolling & Allied Industries Ltd, re*, (1999) 11 CLA 44 (Ker).
41. *M.B. Agarwal v Official Liquidator*, (1973) 43 Comp Cas 423 (Ker).
42. *Ballygunj Enterprises Ltd, re*, (1970) 2 All ER 155 (CA). But when business is not continued there is no question of any business expenditure. Even salaries to staff would not fall in that category. Money earned from fixed deposits would also not be income from business. *Vrindavan Laxmi Sugar Mills Ltd v CTCI*, 1991 Supp (2) SCC 551; (1991) 22 Comp Cas 741.
43. S. 520(3)(d). Where the assets of the company available for payment of general creditors are insufficient to meet them, the preferential payments will have priority over the claims of other security-holders under any floating charge created by the company and be paid accordingly out of any property covered by the charge.
44. See, for example, *Bimdu Board & Paper Mills Ltd v ITO*, (1974) 102 ITR 153; (1996) 44 Comp Cas 25 (Del); *ITD v Official Liquidator*; (1981) 51 Comp Cas 121; (1981) 128 ITR 228; (98) Tax LR 369 (Del); *ITD v Official Liquidator*, (1957) 63 ITR 831; (1967) 37 Comp Cas 114 (Mys). Contrary views have been expressed in *ITC v Official Liquidator*, (1975) 102 ITR 476; (1976) 46 Comp Cas 46 (AP); *Steel Sons (P) Ltd v Registrar of Companies*, CP No 14 of 1969 (Ker). The provision of S. 178, Income Tax Act is that when the ITO informs the O. L. the amount of taxes due from the company, the latter must keep in his hands an amount equal to that.
45. *Official Liquidator v N Prabhakar*, (2015) 189 Comp Cas 412 (T & A).
46. *Official Liquidator v SBI*, (2015) 191 Comp Cas 101 (Guj).
47. *Furnenza Furnishings (P) Ltd, re, Bank of New York Mellon v Official Liquidator of Zenith Infotech Ltd*, 2015 SCC OnLine Ban 6277; (2015) 192 Comp Cas 321.



CASE PILOT

held to be not expenses of liquidation. They could not be paid in priority to claims of workmen and secured creditors.⁵³

Provisions of a Sales Tax Act creating charge on the property of the dealer for recovery of tax dues have been held subject to the provisions of the Companies Act as to priority of payments. Assets of the company were sold free of encumbrance. Sales Tax Department was not allowed to claim any priority over proceeds.⁵⁴

The Official Liquidator has no power to ascertain and adjudicate claims of secured creditors who were permitted to stand outside liquidation proceedings.⁵⁵ Assigning to him the task of ascertaining and adjudicating claims of secured creditors is not permissible. If the Official Liquidator has grievance regarding claims of such secured creditors, civil proceedings should be initiated.⁵⁶

Preferential payments to rank pari passu with workers' dues

Workmen's dues have priority over all other dues, even over decrees. There was a Supreme Court order to the official liquidator to pay the dues of ONGC in priority over all other creditors. The workmen sought review of this order. The court said that the order was to be read subject to overriding preferential charge in favour of workmen.⁵⁷ The sale has to be subject to the protection of *pari passu* charge of workmen's dues. The sale was conducted by a State Financial Corpn.⁵⁸ Workmen's dues do not take priority over secured creditors. Their rights rank *pari passu* with those of secured creditors.⁵⁹ The Debt Recovery Tribunal is competent to adjudicate workers' claims.⁶⁰



CASE PILOT

49. *CIT v RTC Tyres India Ltd.*, (2014) 185 Comp Cas 17 (SC).
50. *Comint (Assessment) v Official Liquidator*, (2014) 185 Comp Cas 21 (Ker).
51. *Birla Corp Ltd v Mahatir Prasad Sharuru*, 2014 SCC Online Civil 12448; (2014) 185 Comp Cas 43; pension fund dues of employee, company given opportunity to pay dues with interest in instalments.
52. *Laxmi Fibres Ltd v AP Industrial Development Corp Ltd*, (2015) 16 SCC 464; (2015) 192 Comp Cas 84.
53. *Textile Labour Assn v Official Liquidator*, (2004) 7 SCC 741; (2004) 120 Comp Cas 505; 2004 CLC 741; (2004) 2 Comp 14 419; *KV Krishnamurthy Pillai v Indian Overseas Bank*, AIR 2011 Ker 26; position in favour of workmen arises when the company is in winding up or any proceeding for winding up is pending. *ONGC Ltd v Official Liquidator*, (2015) 5 SCC 310; (2014) 185 Comp Cas 405; undertaking given before the Supreme Court by the company to make its properties available for discharge of liability to ONGC for gas supplied, the earlier order was reviewed, the order did not create an enforceable charge, no charge was registered, ONGC was not a secured creditor, not entitled to claim priority over secured creditors and workmen.
54. *Steel Contracts (P) Ltd v Tari Cements (P) Ltd*, (2003) 129 Comp Cas 918 (Orissa).
55. *Allahabadi Bank v Canara Bank*, (2001) 4 SCC 406; (2000) 101 Comp Cas 164; *Jindal Powdery UMT Spinel Pvt Ltd*, AIR 2011 Jharkhand 49; statutory priority given to workmen in respect of their dues does not oust secured creditors in the matter of preference of payments. *Jitendra Nath Singh v Official Liquidator*, (2013) 1 SCC 462; (2012) 175 Comp Cas 251; overriding effect is available to the extent of workmen's dues and as between secured creditors themselves.
56. *Pundurang Kesler Gorakdas v Paper and Pulp Contractors Ltd*, 2006 CJL 97 (Bomby).

It is true that Section 530 [now S. 327] provides for preferential payments, but the provision cannot in any way detract from full effect being given to Section 529 [now S. 325] and in fact the only way in which these two sections can be reconciled is by reading them together so as to provide that whenever any creditor seeks to prove his debt, the rule enacted in Section 46, Provincial Insolvency Act would apply and only that amount which is ultimately found due from him at the foot of the account in respect of mutual dealings should be recoverable from him and not that the amount due from him should be recovered fully while the amount due to him should rank in payment after the preferential payments. We find that the same view has been taken by the English courts on the interpretation of the corresponding provisions of the English Companies Act, 1948, and since our Companies Act is modelled largely on the English Companies Act, we do not see any reason why we should take a different view, particularly when that view appears to be fair and just.⁵⁶

Where the guarantor claimed to be the beneficial owner of the money held by the insolvent, set-off in respect of such money was not allowed. The court said: "The right to set-off mutual debts and credits is confined within narrow limits, particularly by the requirement of mutuality, because the effect of a set-off is to prefer one creditor over the general body of creditors. The requirement of mutuality cannot be satisfied unless a person's beneficial interest in a bank account in the insolvent bank can be established without any further inquiry. Things were not that clear in this case."⁵⁷

Deposits on trust. The property divisible among creditors does not include the property held by the company in trust. In a case before the Madras High Court⁵⁸ a sum of Rs 40,000 was given to a company for the specific purpose of depositing it with a mill and thereby to secure an agency of the mill. A sum of Rs 30,000 was, in fact, so deposited. The company went

56. The learned judge cited from Gore-Browne, *Corporate Law* (4th edn) a statement to the effect that: "Indeed, all claims provable in the winding up may be subject to set off, provided that there is mutuality". Observations of the House of Lords in *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd*, 1972 AC 785 (1972) 2 WLR 453 (HL) are also to the same effect. English law on the subject is now to be found in the Insolvency Act 1986, S. 323, R. 49X. See, *Bank of Credit and Commerce International SA (No 2)*, re, (1994) 3 All ER 565 (Ch D) where the deposits of a third person were lying in the bank and he charged them as a security for the amount due from the principal debtor, the latter was not allowed a set off for the amount of such deposits, the arrangement imposed no personal liability on the third party depositor. Accordingly, where the guarantor accepted liability as principal debtor, deposit amount lying with them was taken to have reduced his liability *pro tanto*; *MS Fashions Ltd v Bank of Credit and Commerce International SA*, 1993 Ch 425; (1993) 3 All ER 769 (CA).

57. *Bank of Credit and Commerce International SA v Al Saad*, (1997) 1 BCLC 457 (CA). Money lying in an ordinary banking account has not been given the status of a deposit in trust. The account holder can rank as an unsecured creditor of the insolvent company. Payment to the account holders was recovered back as fraudulent preference. *Exchange Travel Holdings Ltd (No 3)*, re, (1996) 2 BCLC 524 (Ch L). Money of the participants in a holiday participation scheme which was a part of the general fund was held to be not a tenementary. *Holiday Primitives (Europe) Ltd*, re, (1996) 2 BCLC 416 (Ch L).

58. *Mausohn & Co (P) Ltd*, re, (1973) 43 Comp Cas 244 (Mad).



CIAL PUDR

into liquidation and, therefore, the agency did not materialise. The deposit was refunded by the mill to the company. The court held that the deposit being in the nature of a constructive trust was refundable to the depositor. The court distinguished the case from the decision of the Supreme Court in *Seth Jassa Ram Patelchand v Om Narain Tankha*,⁵⁹ where a sum of money deposited by a person with a company to obtain its agency was held to be not a deposit on trust because it was not earmarked for any special purpose and the company had the liberty to put it to any use. Similarly, where vehicles are purchased on hire-purchase finance basis, they belong to the financier and he is entitled to their sale proceeds as though they were held in trust for him.⁶⁰ Margin money deposited in a bank for the purpose of securing a bank guarantee and letter of credit has been held to be trust deposit refundable to the depositor outside of the bank's winding up.⁶¹ Subscription money for shares etc in the hands of the company is also in the same category.⁶² Security deposit made by a tenant⁶³ was held to be not in the nature of a trust deposit.

Employees' Provident Fund is held by the company in trust. The amount is payable out of the sale proceeds of the company's securities by a secured creditor.⁶⁴

The corpus of loans given by a workers' cooperative to the employer company in winding up out of the fund constituted from deductions from wages was held to be a trust property. It could not be included in the assets of the company. The workers' credit society could make a preferential claim.⁶⁵

Employees' Provident Fund.—Employees' Provident Fund is maintained by the employer under a statutory duty. The Provident Fund Authorities could effect recovery from the employer without the permission of the BIFR.⁶⁶

Recovery of employees' dues.—Suspension of legal proceedings does not bar grant of interim relief to workmen pending writ petition against the award of a labour court.⁶⁷

59. AIR 1967 SC 1162; (1967) 37 Comp Cas 204.

60. *Official Liquidator v Chittorji of Patan*, (1970) 38 Comp Cas 884 (Mad); The amount deducted from employees' wages for their co-operative society is in the same category. *Hindustani Sug & Wag Mills Co Ltd v Crop Credit Society Ltd*, (1976) 46 Comp Cas I (Guj); *Eastern Capital Textiles Ltd. re*, 1939 ECIL 37, (Ch D), money belonging to clients held by the company in trust for investment purposes.

61. *RBI v Bank of Credit & Commerce International (Overseas) Ltd (No 2)*, (1993) 78 Comp Cas 217 (Bom); following the Supreme Court decision in *Shanti Prasad Jain v Director of Enforcement*, AIR 1962 SC 1764; (1963) 2 SCR 297 (1963) 33 Comp Cas 221.

62. *RBI v Bank of Credit & Commerce International (Overseas) Ltd (No 2)*, (1993) 78 Comp Cas 230 (Bom).

63. *Nimesh K Thakker v Official Liquidator*, (1991) 70 Comp Cas 257 (Bom); the deposit did not carry any terms showing hallmark of trust.

64. *Central Bank of India v Recovery Mandalar*, (1996) 87 Comp Cas 284; (1996) 23 CLA 162 (Guj).

65. *Nalco Hills Engineers Crop Credit Society Ltd v Official Liquidator*, (2001) 104 Comp Cas 436 (Guj).

66. *Satyendra Vehicles Ltd v Compt. CPT*, (2002) 108 Comp Cas 406 (AP).

67. *Midental Jatin Ltd v KM Jatin*, (2003) 115 Comp Cas 184 (Del).

Scheme for payment of employees.—A large surplus was available with Official Liquidator. Dues of 120 workmen were permitted to be settled in terms of a scheme extending benefit of voluntary retirement accepted by similarly situated workmen prior to the winding up order with 8 per cent interest. The scheme was approved.⁶⁸

Donations.—Donations were received by a charitable company during the period of winding up but before its final dissolution. The liquidator sought court directions as to whether the amount could be used for paying off the creditors. The court said that donations took effect according to their terms. There was no indication in their terms that they were meant to be used only for charitable purposes.⁶⁹

General creditors and shareholders.—Next the liquidator has to pay the general creditors of the company.⁷⁰ The surplus, if any, is then used to pay back the shareholders in accordance with their rights. Preference shareholders are paid first. Where the articles provide that in the event of winding up the preference shareholders would be entitled to their arrears of dividend, whether earned, declared or not, it has been held by the Delhi High Court, that this would enable them to claim their arrears even if the company never commenced business or made any profits.⁷¹ Dividends paid to members are not their income, but refund of capital. This will be so even if the dividends include some profits earned by the liquidator. This well-known principle of English Law has now been ratified by the Supreme Court in *CIT v MV Murugappan*.⁷² Shanti J (later C) laid down that payments made by the liquidator after the commencement of winding up are not dividends, but return of capital, from whatever source they may be made. This principle applies to the earnings of the whole of the financial year in which winding up commences. The learned judge quoted the following observation of Pollock MR in *JKC v George Barret*:⁷³

... [I]t is a misapprehension, after the liquidator has assumed his duties, to continue the distinction between surplus profits and capital.

Company Liquidation Dividend and Undistributed Assets Account

[S. 352]

Dividends payable to any creditor may remain unpaid or assets refundable to any contributary may remain undistributed. If they remain in the hands of the company liquidator for more than six months, he has forthwith

68. *Gost of Karmatka v NGET Ltd.*, (2016) 198 Comp Cas 252.

69. *AKMS (Multiple Sciences Research) Ltd. v.*, (1997) 1 B.L.C. 357 (C.J.D.)

70. Where the general creditor was the landlord of the company, his arrears of rent were paid after deducting the company's security deposit with him. *Mahan Pyari Selfi v Official Liquidator*, (1993) 71 Comp Cas 77 (Del).

71. *Globe Motors Ltd v Globe United Engg & Foundry Co Ltd.*, (1975) 15 Comp Cas 429 (Del). In all the matters relating to winding up the court has the supplementary power under S. 557 to call meetings of creditors and contributaries to ascertain their wishes and prescribe the manner of conducting the meeting.

72. (1970) 2 SCC 145; (1970) 40 Comp Cas 994.

73. (1924) 2 KB 52, 63 (CA).

to deposit it into a separate special account to be known as the Company Liquidation Dividend and Undistributed Assets Account maintained in a schedule bank. On the dissolution of the company, the company liquidator has to pay into this account any money representing unpaid dividends and undistributed assets in his hands at the date of dissolution. He has to furnish to the Registrar details about the nature of payment in a prescribed form, stating the names and last known addresses of the persons entitled to claim the amount and other particulars as may be prescribed. The bank has to give him a deposit receipt which is an effectual discharge of the company liquidator of his responsibility. In the case of voluntary winding up, the company liquidator has, while filing a statement under Section 348(1) (Information as to Pending Liquidations) has to deposit such amounts within 14 days of filing the statement with the Registrar in the Liquidation Dividend and Undistributed Assets Account. A claim to any portion of such money can be filed with the Registrar, who may pay the amount if satisfied with the claim as to entitlement of such claimant. The Registrar has to settle the claim within 60 days. If he is not doing so, he must give reasons for it. [S. 352(6)]

If the money remains in the account unclaimed for a period of 15 years, it has to be transferred in the general revenue account of the Central Government. Any claim for such money would then be termed as an order for refund of revenue. [S. 352(7)] If the liquidator does not deposit the money into the account, he has to pay 12 per cent p.a. interest on the amount so retained, and also pay such penalty as may be determined by the Registrar. The Central Government may in a proper case remit the interest in whole or in part. The liquidator would also be liable to pay any expenses occasioned by his default. Where the winding up is by the Tribunal, the liquidator would also be liable to have all or such part of his remuneration, as the Tribunal may consider just and proper to be disallowed. He can also be removed by the Tribunal from his office.

Liquidator to make returns, etc [S. 353]

If there is any failure on the part of the company liquidator of filing any returns, account or other document or in giving any notice which he is required by law to give and he fails to make good the default within 14 days of receiving notice from an entitled party, the Registrar may make an order specifying the time within which the default must be made good. The order may provide that all costs of the application and incidental to it are to be borne by the company liquidator.

Meetings to ascertain wishes of creditors or contributors [S. 354]

In all matters relating to the winding up of a company, the Tribunal may (a) have regard to wishes of creditors or contributors as proved by sufficient evidence; (b) if it considers necessary to ascertain such wishes to call meetings of creditors or contributors, it may do so and to be held in accordance with its directions; (c) to appoint any person to act as chairman of any such meeting and to report the result to the Tribunal. In ascertaining

such wishes regard is to be had to the value of each debt of the creditor and also to the number of votes cast by each contributory.

Section 355 indicates the court, tribunal or person before whom an affidavit can be sworn.

Power of Tribunal to declare dissolution to be void [S. 356]

Where any company has been dissolved, the Tribunal may, at any time within two years, make an order declaring the dissolution to be void. Such order can be passed on the application of any person who appears to the Tribunal to be interested, or of the company liquidator. The person who applied for such order is under duty to file a copy of the order with the Registrar within 30 days or any time extended by the Tribunal. The default in this respect is punishable.

OFFICIAL LIQUIDATORS

Appointment of Official Liquidator [S. 359]

For the purposes of the Act for winding up by Tribunal, the Central Government has to appoint Official Liquidators, Joint Deputy or Assistant Official Liquidators. The number of such appointments is to depend upon the requirements of the situation. They are to be the whole-time officers of the Central Government. Their salary has to be paid by the Central Government.

Powers and functions of Official Liquidator [S. 360]

The official liquidator has to exercise such powers and to perform such duties as the Central Government may prescribe. Such functions may include those of the company liquidators under the Act and conduct of inquiries and investigations, in matters arising out of winding up proceedings.

Summary procedure for liquidation [S. 361]

Where a company is to be wound up under the Act, has assets of book value not exceeding one crore rupees and belongs to a class or classes as may be prescribed, the Central Government may order it to be wound up by the summary procedure. Where any such order is made, the Central Government has to appoint the Official Liquidator as the liquidator of the company. He has forthwith to take into his custody or control all the assets, effects and actionable claims to which the company is or appears to be entitled. Within 30 days of his appointment he has to submit a report to the Central Government in such manner and form as may be prescribed including a report as to whether in his opinion whether any fraud has been committed in the promotion or formation or management of affairs of the company. In case the report is positive, the Central Government may direct further investigation into the affairs of the company asking the report to be submitted within specified time. The Central Government has then to order whether there will be full procedure winding up or summary procedure.

Sale of assets and recovery of debts due to company [S. 362]

The official liquidator has expeditiously to dispose of the company's assets within 60 days of his appointment. He has to serve a notice within 30 days of his appointment calling upon the debtors of the company and contributories to deposit with him the amount payable to the company. Where a debtor defaults the official liquidator may make an application to the Central Government on which the Central Government may pass necessary orders. The amount received has to be deposited by the Official Liquidator in accordance with the provisions of Section 349 (payments into public account of India).

Settlement of creditors' claims by Official Liquidator [S. 363]

The Official Liquidator, within 30 days of his appointment, has to call upon the creditors to prove their claims in such manner as may be prescribed, within 30 days of receipt of notice. The Official Liquidator has to prepare a list of claims of creditors in the prescribed manner. Each creditor has to be communicated of the claims accepted or rejected alongwith reasons for the same in writing.

Appeal by creditor [S. 364]

An aggrieved creditor may file an appeal before the Central Government within 30 days of the decision. The Central Government calls the report from the Official Liquidator and decides either to dismiss the appeal or modify the decision of the Official Liquidator. The latter has to make payment to the creditor whose claim has been accepted. The Government may refer a matter to the Tribunal, if necessary.

Order of dissolution of company [S. 365]

The Official Liquidator, on being satisfied that the affairs of the company have been finally wound up, submits his final report to the Government. If there was a reference to the Tribunal, the report has to be submitted to the Central Government and Tribunal. The Central Government or the Tribunal is then to order that the company be dissolved. The Registrar has then to strike off the name of the company from the Register and publish a notification to that effect.

ANTECEDENT AND OTHER TRANSACTIONS**Fraudulent preference [S. 328]**

The power under the section is to be exercised by the Tribunal.

The expression "fraudulent preference" is borrowed from the law of insolvency. According to that law any transfer of property or payment made by a person who is unable to pay his debts in favour of a creditor with a view to giving him a preference over other creditors is regarded as fraudulent preference, if within three months an insolvency petition is presented against him and he is adjudicated insolvent, the transaction becomes invalid. Any

such transaction entered into by a company within six months before the commencement of its winding up is deemed a fraudulent preference of its creditors and invalid accordingly.²⁴

The statement in Section 328 is now somewhat different from that in insolvency laws. When a company has given preference to a person who is one of the creditors of the company or a surety or a guarantor for any of the debts or other liabilities of the company and the company does anything which has the effect of putting that person into a position which, in the event of the company going into liquidation will be better than the position he would have been in if that thing had not been done prior to six months of making the winding up application and if the Tribunal is satisfied that such transaction is a fraudulent preference, it may order restoring the creditor to his original position before the preference was given. The Tribunal may declare the transaction to be invalid and restore the original position whether it involves transfer of property movable or immovable, or any delivery of goods, payment, execution made against the company. If the property is comprised in a lease to the company, vesting would be subject to terms and conditions of the lease. [S. 328(2)]

The facts of *Eric Holmes (Property) Ltd, re*,²⁵ furnish a suitable illustration:

A company carried on the business of purchasing land and erecting buildings thereon. R, a shareholder, provided finance for the purpose. In each case the company promised to hold the title deeds to his order and to execute a formal charge on demand. When the company became unable to pay its debts, R, had the charges formally executed and registered. Winding up followed within two months.

The liquidator applied for a declaration that the charges were void on the ground of fraudulent preference. PERREAUWEX J considered the authorities and said that the principle may perhaps be restated in these terms:

Where a creditor making an advance takes from the debtor a promise to execute a charge at the request of the creditor, the court will in the absence of any other circumstances, readily infer that the purpose of the parties... was to give the creditor the right to be preferred at request. Such an arrangement although for value, is fraudulent and unenforceable.

24. As to jurisdiction see, *Barclays Bank plc v Norman*, 1993 BCLC 680 (Ch D). Here the holding company was in winding up in London and its US based subsidiary was sold to pay a local bank. There was the question arise as to jurisdiction for proceedings for fraudulent preference. The court said that normally the foreign court would be convenient but proceedings there would be restrained if they would be vexatious or oppressive to one party or the other. *Official Liquidator v REL* (2004) 118 Comp Cas 27 (Guj), transfer of flats by the company to creditor in adjustment of his claims against the company. The price charged was below the cost of acquisition. The company also made some additional cash payment, to their creditors, the company expressed inability stating that it would take five years to clear their dues. The transaction was within a period of six months hence the petition, held fraudulent preference.

25. 1960 Ca 1052; (1965) 2 WLR 1260; (1966) 1 Comp L 19

A creditor of this kind who does not have the security executed and registered commits a fraud on the other creditors by giving them the impression that the company's property is free from encumbrances.⁷⁶

But where a company under pressure of litigation and threat of attachment of its properties, makes payment to a creditor, the same cannot be regarded as a fraudulent preference, provided, of course, the money is really due. This has been held by the Andhra Pradesh High Court in *Official Liquidator v. Venkateswaran*.⁷⁷

A Motor Transport Co was sued for a debt and attachment before judgment of its buses. The court passed a compromise decree under which three of the company's buses were given to the creditor. A few days later the company went into liquidation.

The liquidator claimed that the transaction was a fraudulent preference. Rejecting his stand CHANORA REDDY CJ said: "If a debtor prefers one creditor to another on account of pressure that is put upon him, the payment cannot be regarded as a fraudulent preference ... Persons in charge of the management thought that it is profitable to discharge the debts by allotting some of the buses to the creditors."⁷⁸

Thus, it appears that whether a transaction is a "fraudulent preference" or not does not depend on its result but on the "intention" of the debtor. The words "with a view to giving him a preference" mean "with the intention of giving preference".⁷⁹ In the words of PENNYCUICK J in *ELE Holdings Ltd, re*⁸⁰ There is no fraudulent preference when a debtor's dominant intention is to benefit himself rather than to confer an advantage on his creditor. The facts were:

A bank took a deposit of title deeds to secure a company's overdraft, but failed to register the deposit as a charge under the Companies Act. Subsequently when the company got into financial straits and when one creditor had served a statutory notice and another obtained a judgment against the company, the bank got the company to execute a legal charge without either exercising any pressure on the company or promising to increase its overdraft.

Winding up having followed within less than six months, it was held that though the charge was void for want of registration, there had been no fraudulent preference, since the dominant intention of the company in effecting the legal charge was not to prefer the bank to other creditors but to

76. See Buckler J in *Jackson & Bassford Ltd, re*, (1908) 2 Ch 462, 477, 479; 95 LT 292.

77 (1966) 1 Comp LJ 243 (AP).

78. Ibid, 246. See also, *Jayaraman Gari v. Popular Bank Ltd*, (1946) 2 Comp LJ 36 (Ker)

79. See, Crisp, n. (1956) 1 WLR 728 (CA) and *Pennycuick J in Eric Holmes (Property) Ltd, re*, 1965 Ch 1352, (1966) 2 WLR 1260, (1966) 1 Comp LJ 19, 20. See also, *Tanukumar M Karuppu v. Official Liquidator*, AIR 1952 Mad 595.

80 (1967) 1 WLR 1409; noted 1968 JBL 154

benefit the company by keeping on good terms with the bank in the hope of keeping the company a going concern.⁸¹

Payment to directors with knowledge of the company's financial state created the presumption of preference. The directors were not able to justify the payment. They had to pay back the company's loss.⁸² Where a security was provided to a creditor at a time when the company was in insolvent circumstances and the directors were unable to rebut the desire to prefer, they were held to be guilty of committing fraudulent preference.⁸³

Where payments were made to directors to enable them to clear their loan accounts shortly before the company ceased trading, it was held to be preference over other creditors whose claims were also then due for payment. The court said that in considering whether the creditor of an insolvent company has received preference, the court has to consider the state of mind of the director at the time of the payment so as to see whether there was an overriding intention to prefer one particular creditor.⁸⁴

The recipient of a fraudulent preference becomes a constructive trustee towards the company for the benefits received and is, as such, bound to restore them to the company.⁸⁵

Section 331 provides that if the property was comprised in a charge or mortgage and it goes into the hands of a fraudulently preferred person, the latter would be personally liable as a surety to the extent of the interest of the security-holder.

Further, any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void. [S. 330]

Avoidance of voluntary transfer [S. 329]

The power under the section has been vested in the Tribunal.

A transfer of immovable or movable property or any delivery of goods made by a company within a period of one year before the presentation of

81. An orally created charge may be valid and may not be fraudulent preference. *Sushil Piasand v Official Liquidator*, (1984) 56 Comp Cas 52 (Del). Where the machinery of the company had been pledged before winding up in the ordinary course of business, no fraudulent preference. *Official Liquidator v V Viswanathan*, (1984) 56 Comp Cas 426 (Kant); *Minimix Enterprises v Kishor Talpade*, (1992) 54 Comp Cas 89; (1992) 1 Comp L 288 (Bom) where also payment was made under a compromise to save the company from execution of a decree. The liquidator has to prove that the transferor and the transferee joined hands to defraud creditors. It is not enough to show that the company was under some financial straits. Some kind of conspiracy between the company and the transferee has to be shown. Liquidator has to prove this fact. *Meridi Ltd v Lazmi Intel Timers*, (1998) 91 Comp Cas 632 (P&E); *Hindustan Development Corps Ltd v Shree Waliram & Co Ltd*, (2001) 107 Comp Cas 30 (Cal); payment directed to be made by court, not a case of fraudulent preference.

82. *Exchange Travel Holdings Ltd* (No 4), re, 1999 BCC 291 (CA); *Katz v Mr Nally (Secretary of Prefecturist)*, 1999 BCC 291 (CA).

83. *Transworld Trading Ltd*, re, 1999 BPIR 626 (Ch D); *Mills v Eddo Ltd*, 1999 BPIR 391 (Ch D).

84. *WPS v Circle Jewellers Ltd*, (1998) 2 BCC 147 28 (Ch D); *Brown D Pearson Contractors Ltd*, re, (1999) BCC 31 (Ch D).

85. *Casper Group Services Ltd*, re, 1989 BCC 145 (Ch D) where, however, the recipient of a sum of money by way of remuneration, being a minor, no recovery was allowed.

a winding up petition or the passing of a resolution for voluntary winding up, is void against the liquidator.⁸⁶ But the following transactions are protected from the operation of this rule:

1. a transfer or delivery of property made in the ordinary course of the business of the company; and
2. a transfer or delivery of property in favour of a purchaser or encumbrancer in good faith and for valuable consideration.⁸⁷

Where money was collected from members by means of a false prospectus and payments were made out of that money lying in the company's banking account and a validation order was sought for such payments, the court refused to pass such order. Even if the company is perfectly solvent, the winding up petition being presented on the ground of public interest, the court cannot sanction a payment to be made at the cost of members. The ultimate end of the payment, in the event of winding up would be preference of the beneficiary of the payment over others.⁸⁸

The payment into the bank account of the company which was overdrawn was held to be a disposition of the company's property in favour of the bank. The payment was void unless sanctioned by the court. Payment to the bank as a creditor in full at the cost of other creditors, like customs, was not for the benefit of creditors as a whole. The evidence produced showed that the bank was attempting to gain a personal advantage by the transaction in question.⁸⁹

About the payment of long standing arrears of rent due under a lease which was made to obtain the lessor's permission for assignment of the lease, the court said that it could not be regarded as made in the ordinary course of business. It was a disposal of a part of the company's assets.⁹⁰ The shares of a company were sold, before it went into insolvent liquidation, at an undervalue. The court said that the person who acquired the shares was to account for the unpaid value together with interest on it.⁹¹

The sale of the company's mortgaged property to the mortgagee and hypothecated property to the hypothecatee were held to be not so unusual

⁸⁶ It is up to the discretion of the liquidator to accept or not. An income tax officer's direction could not prevail in the matter. *KN Nirmalji Iyer v CIT*, (1993) 78 Comp Cas 156 (Ker).

⁸⁷ See, *Sabujeshi Rao v Shriyash Pras Co Ltd*, AIR 1930 Mad. 1012. In this case a winding up petition was presented against a company in 1922 and the order was passed in 1922. During this period the company contracted to purchase certain goods and actually took delivery of them. As the goods were purchased in good faith in the ordinary course of business the transaction was confirmed. *Sugar Properties (Densley Woods) Ltd v. 1949 BCCL* 146 (Ch D), where it is emphasised that the exceptions enable the court to protect the transactions of the company which might be for the benefit of those who are interested in the company's property. *Manuk Enterprises v Kishan Tulsi*, (1992) 24 Comp Cas 89 (1992) 1 Comp 11 288 (Hon). transfer of leasedhold premises for payment of price of goods, valid, following *N Srikanthi Iyer v Difzmi Jassuer*, AIR 1966 SC 1.

⁸⁸ *A Company v. (Mu 407130 of 2000)*, (2000) 1 BCCL 525 (Ch D).

⁸⁹ *Rose v AIB Group (UK) plc*, [2003] 1 WLR 2992 (Ch D); *12m Construction Co. v. (2004) 2 BCCL 374*; (2004) 120 Comp Cas 163.

⁹⁰ *Countrywide Banking Corp Ltd v Dean*, (1998) 1 BCLC 306.

⁹¹ *Philips v British Dolphin Bell Marine Ltd*, (1999) 1 BCCL 714 (CA).

transactions as to be hit by the section. The transaction was necessary in good faith in the interest of the company and was also made before the commencement of winding up.⁹² An agreement between company and its employees for transfer of quarters to them was not validated. Employees were not allowed to sue for specific performance. The directors were aware of the company's financial condition. Employees were allowed to seek refund of their advance.⁹³

Avoidance of transfer of shares and disposition of property [S.334]

In the case of voluntary winding up, any transfer of shares in the company and any alteration in the status of the members of the company, made after the commencement of winding up, is void. But a transfer made to, or with the sanction of the liquidator is valid. In the case of winding up by the Tribunal, any disposition of the company's property, and transfer of shares, or alteration in the status of its members made after the commencement of the winding up is void, except when the Tribunal orders otherwise. The sanction of the Tribunal may be obtained either before or after the transfer is made. Complete discretion has been given to the Tribunal to do whatever it may think just in a matter of this kind.⁹⁴ Similarly, in the last mentioned case any attachment, distress or execution put in force without leave of the Tribunal, against the estate or effects of the company or any sale held of any property or effects of the company shall be void.⁹⁵ The court refused to validate the transfer of the company's leasehold interest for a price so small

92. *Official Liquidator v APSE Corp. Ltd.*, (2000) 2 Comp 1471 (AIJ). *Prcept Advertising Ltd v M Savinram*, (2003) 10 SCC 94. (2003) 114 Comp Cas 602, orders of avoidance of transfer and dispossessions and other incidental orders as to lease etc.

93. *VR Mumtaz v Myson Krishan Lih*, (2006) 133 Comp Cas 468 (Kant).

94. See *Bir Chand v John Bros*, AIR 1934 All 161; 1934 All J 196; *Transport Corps of India Ltd v Haryana State Industrial Development Corp*, AIR 1991 Patl 225; (1992) 74 Comp Cas 800, transfer of shares which was the result of a compromise not allowed to be enforced after the commencement of winding up. *JCICL Vardar Farms Agric Ltd v Nejumah Infotables Ltd*, (2005) 127 Comp Cas 1 (Mad), loan transaction before the date of winding up petition, the company defaulted in payment. The bank disposed of the mortgaged property before the date of winding up order: lender being fine, transaction validated. *JCICL Ltd v Ahmedabad Agg & Calif Printing Co Ltd*, (2004) 9 SCC 747 (2005) 123 Comp Cas 132, application for validation of transactions four years after commencement of winding up, not allowed. In the meantime the company had gone into insatiable sickness, wound up as such, the liquidator was holding prior rights. *RBI v Crystal Credit Corp Ltd*, (2006) 132 Comp Cas 263 (Del), a bona fide purchaser of property applied for confirmation, the property fetched good price, no infirmity in procedure, sale confirmed. *Carware Marine Industries Ltd*, 78, 2015 SCC Online Bom 6044; (2015) 192 Comp Cas 204 (Bom), an agreement was entered into by the company during pendency of its reference before HFL, company's shares were pledged in the ordinary course of business and in company's interest, not fraudulent or invalid transfer.

95. S. 335. For the effect of winding up on a floating charge see S. 534. See also, *Nizamia Mills Ltd v. C*, (1986) 59 Comp Cas 301 (Guj), where the operation of the section was stayed in the interest of the company. *Tiruvannamalai Rayars Ltd v Registrar of Companies*, (1968) 64 Comp Cas 819; (1969) 1 Comp 1, 77 (Ker). The court ordered the assets to be disposed of in the interest of getting financial support from financial institutions. *Ruski Bank & Investments P Ltd v Official Liquidator*, (2001) 106 Comp Cas 828 (Guj), a sale made in violation of Supreme Orders was avoided.



that it would not have helped the company in any way.⁹⁵ The court did not interfere where the transfer of some of the properties of the company to its subsidiary was made in the interest of business expediency and as a part of a scheme of restructuring. The sole objecting creditor was not able to show any prejudice to the creditors' interests.⁹⁶

The payment of a dishonoured cheque does not come within the catch of the section. The section cannot be used to ward off liability under Section 126, Negotiable Instruments Act, 1881.⁹⁷

Avoidance of attachments, executions, etc [S. 335]

The provision applies to companies which are being wound up by the Tribunal. Any attachment, distress or execution, put in force, against the effects or estate of the company, or any sale held of any of the properties or effects of the company, without leave of the Tribunal, after commencement of winding up, can be avoided. The guarantor of a company's bank loans has been allowed to invoke the jurisdiction of the court [now Tribunal] under this section.⁹⁸

One of the effects of the doctrine of relation back of the winding up order is shown by *Rajalaxmi Narankhali Mills Co Ltd v New Quality Bobbin Works*.⁹⁹ A creditor filed a suit against a company to recover a sum of money due to him and on the same day got some shares of the company attached. Then a winding up petition was presented against the company. After this, but before the winding up order, a consent decree was passed and the attached

95. *Bengali Food Products (P) Ltd v Official Liquidator*, (1998) 94 Comp Cas 762 (All); *Bengali Food Products (P) Ltd v Official Liquidator*, (1998) 94 Comp Cas 762 (All).

96. *K & Co v Aruna Sugars & Enterprises Ltd*, AIR 1999 Mad 45.

97. *Okay Industries Ltd v State of Maharashtra*, (1999) 9 Comp LJ 491 (Bom); affirmed by the Supreme Court in *Parkaj Mehra v State of Maharashtra*, (2000) 2 SCC 756; (2000) 100 Comp Cas 437 and followed in *Stephen Aronia v Jindal Teesepac Ltd*, (2007) 28 SCJ 171 (Del).

98. *K S Skrapur v State Bank of Mysore*, (1986) 63 Comp Cas 135 (Kant). A secured creditor would also be within the catch of the section if he has to execute his remedies through the court process. Leave of the court would then be necessary. *Gujarat State Financial Corp v Official Liquidator*, (1996) 97 Comp Cas 658 (Guj). The provisions of the Limitation Act are not applicable to an application for setting aside a transaction under the section. *Tatyasaheb Ugale Glass Mfg Co Ltd vs*, (1997) 88 Comp Cas 179 (Ker). *Kerala State Financial Enterprises Ltd v Official Liquidator*, (2006) 133 Comp Cas 912, 915 (Ker), mortgage in favour of the company was not registered with ROC, the creditor was treated as unsecured, attachment order prior to commencement of winding up but within retrospective period, stayed, attachment does not create a charge, not a case of recovery of tax or duty, dues of Government company covered by the Companies Act, recovery proceedings not allowed.

99. (1971) 43 Comp Cas 101 (Guj). See also, *State Industrial and Investment Corp of Maharashtra Ltd v Maharashtra State Financial Corp*, (1968) 64 Comp Cas 102 (Bom). The section does not apply to a secured creditor realising the security by disposing of the assets. *Anyanguly Plywood Ltd v Rajarhat State Industrial and Investment Corp Ltd*, (1991) 72 Comp Cas 3x (1992) 1 Comp LJ 222 (Kant), distinguishing *Mysore Surgical Cotton (P) Ltd v Karnataka State Financial Corp*, (1988) 1 Comp LJ 61 (Kant). The liquidator was not allowed in question a decree obtained by a secured creditor for recovery by sale of mortgaged property and hypothecated goods. *Hindustan Forest Co (P) Ltd v Ultra Commercial Bank*, (1994) 79 Comp Cas 669 (P&H).



shares were sold in the execution of the decree. Then came the winding up order. The liquidator applied for a declaration that the sale was void and for recovery of the sale proceeds. Under Section 335 any attachment or sale of a company's property after the commencement of winding up without the sanction of the court is void and under Section 357 winding up by the Tribunal is deemed to commence at the time of the presentation of the petition. Thus, the court had no choice but to hold that the sale, having taken place after the presentation of the petition, was void and the liquidator was entitled to recover the sale proceeds. It was not necessary for him to bring a civil suit for this purpose. The winding up court had sufficient power under Section 446(2) to entertain the summons.

Disclaimer of onerous property [S. 333]

The liquidator may abandon onerous properties belonging to the company. Following kinds of properties are regarded as onerous for purposes of Section 333:

1. land of any tenure, burdened with onerous covenants;
2. shares or stock in companies;
3. any other property which is unsaleable or is not readily saleable by reason of the fact that it requires the possessor of the property to perform certain onerous acts or pay a sum of money;
4. unprofitable contracts.

The company liquidator may with the leave of the Tribunal disclaim any such property. It is the duty of the Tribunal to help the company liquidator to get rid of "onerous and burdensome contracts" whenever it is necessary to safeguard in full the interests of the body of creditors and the shareholders of the company.¹⁰¹ Thus in *Raka Corps (P) Ltd. re*,¹⁰²

A company in winding up was called upon to pay Rs 46,052 being the amount of the first call on equity shares held by it in a company. The liquidator asked for time to enable himself to examine the position. He found that the financial position of the company in which the shares were held was not sound and there was no prospect of getting any return on the investment.

He, therefore, applied for leave to disclaim the shares. He was opposed on the ground that by asking for time he had adopted the transaction. The court, finding that the burdensome shares would only hamper the course of the liquidator, granted leave to disclaim.

101. *WB Smali (Advisors) Development Corps Ltd v Official Liquidator*, (2006) 133 Comp Cas 712 (Cal), disclaimer of 99 year lease. It is the duty of the court to hear all parties including the cestuique of the leasehold right.

102. (1969) 1 Comp LJ 220; (1968) 39 Comp Cas 329 (Mad). The court did not permit leasehold premises to be disclaimed. The asset in question was of high value to the company. *Union Bank of India v Official Liquidator*, (1990) 3 Comp LJ 414 (SC). The court may by order vest the property in any person having legitimate claim to such property. *Shiv Chaitanya Ltd v Official Liquidator*, AIR 1994 Cal 90.

The term "contract" in this section has been held not to include "lease".¹⁰³ The outstanding contracts do not *ipso facto* become inoperative on the commencement of winding up. They remain binding unless disclaimed or rescinded as allowed by the section.¹⁰⁴ The contract may be rescinded on such terms as to payment by or to either party of damages for non-performance or otherwise as the Tribunal considers just and proper. Any damages so becoming payable to any person may be proved by him as a debt in winding up. [S. 333(5)]

Any person can make an application to the Tribunal who either claims any interest in the disclaimed property or is under any liability not discharged by the disclaimer. The Tribunal may hear him and then make an order for vesting of the property in the person entitled to it and delivery of possession to him by way of compensation on such terms as the Tribunal considers just and proper. The property will then vest in him without any conveyance or assignment for the purpose.

A waste management licence under the Environment Protection Act, 1990 (UK) for management and disposal of wastes has been held to be a disclaimable property. The court said that the licence remains in force until the Authority revokes it or accepts its surrender. This factor does not preclude disclaimer. The court also found that there was a market in which people were prepared to pay for the transfer of the licence.¹⁰⁵ On dissolution of the company the licence would cease to exist and not vest in the Crown as *bona vacantia*.¹⁰⁶

The disclaimer should be in writing signed by the liquidator. It has to be made within 12 months after the commencement of the winding up or such extended period as the Tribunal may allow. Where, however, the liquidator does not come to know of the existence of an onerous property within one month of the commencement of the winding up, the above period of 12 months shall begin to run from the date of his knowledge. [S. 333(1) *Priveo*]

The disclaimer determines in respect of the property disclaimed, the rights, interests and liabilities of the company. [S. 333(2)] It releases the company and the property from liability. But it does not affect the rights or liabilities of any other person in respect of that property. The Tribunal may, before granting the disclaimer, require notices to be given to persons interested in the property. [S. 333(3)] The landlord of the premises who is affected by the disclaimer becomes a creditor for his loss of rent etc.¹⁰⁷

103. *ABC Courier and Pegg Cr Ltd, re*, (No 5), (1970) 40 Comp Cas 452.

104. *Southern Automotive Corporation (P) Ltd, re*, AIR 1960 Mad 223; (1961) 20 Comp Cas 119. For the effects of disclaimer in favour of the purchaser on the rights in property see, *Capital Private Properties plc v Worthgate Ltd*, (2000) 1 BCLC 647 (Ch D).

105. *Celtic Extraction Ltd, re*, (1999) 4 All ER 636 (CA); *Celtic Extraction Ltd, re*, (1999) 4 All ER 684 (CA); on appeal from *Mineral Resources Ltd, re*, (1999) 1 All ER 746; applied in, *Stevy v Dairywise Farms Ltd* (No 2), (2000) 1 BCLC 632 (Ch D).

106. *Wimbold Building Ltd* (No 1 & 2), (1999) 2 BCLC 541 (Ch D).

107. *Park Air Services plc, re*, (1998) 1 BCLC 547 (Ch D); affirmed by the House of Lords in, *Park Air Services plc, re*, (2000) 2 AC 172; (1999) 2 WLR 396 (HL), as to how the landlord's loss is to be calculated. *Christyline Metal Holdings Ltd v Kinsman*, (1996) 1 BCLC 547 (Ch D); *Hounslow Ltd v Barbara Allenborough Associates Ltd*, (1998) 2 BCLC 234 (IL).

Sometimes a person interested in any such property may have required the liquidator to decide whether he will or will not disclaim the property. In such a case the liquidator should, within 28 days or such extended period as may be allowed by the Tribunal, give notice to the applicant that he intends to apply to the Tribunal for leave to disclaim. If he does not do so, he shall not be entitled to disclaim the property and where the property is a contract which he has not disclaimed within the above time he shall be deemed to have adopted it. [S. 333(e)]

The landlord sought orders for payment of rent, future rent and delivery of possession of premises. The liquidator pleaded that sophisticated equipment of the company was lying in the premises and shifting it would cause depreciation in value to the detriment of creditors and workmen. But the liquidator neither made any inventory of the property, nor tried to sell it off. The premises was being used only for storage of goods and not for any business. The liquidator was directed to disclaim the tenancy and move to some other premises.¹⁰¹

An owner is entitled to arrears of rent from date of possession of property by Official Liquidator till date of disclaimer.¹⁰²

PROCEEDINGS AGAINST DELINQUENT OFFICERS

Liability for fraudulent conduct of business [S. 339]

The power under the section has been vested in the Tribunal.

Sometimes it may appear in the course of winding up that the business of the company has been carried on with intent to defraud creditors of the company or any other persons or for any fraudulent purpose. In such a case the Tribunal, on the application of the company liquidator or any creditor or contributary of the company, may declare that the persons who were parties to such business shall be personally responsible for such debts of the company as the Tribunal may direct. A well-known illustration is *William C Leitch Bros Ltd (No 2)*, re¹⁰³.

One A transferred his business to a company promoted by himself. He took shares and debentures for the price, the latter creating a charge upon the company's assets. The company came to be indebted up to £6500 for goods supplied and was unable to pay. Even so A, the managing director, ordered goods worth £6000 on credit, which became subject to the charge. The company became insolvent and A received payments in lieu of the charge. The court held him liable to pay £3000 to the liquidator. WILLIAM MAUGHAM J said: "If a company continues to carry on business and to incur debt at a time when there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payment of

¹⁰¹ *Khalidwala Aggarwal v Purwana Paging Services Ltd*, (2004) 121 Comp Cas 631-2004 CLC 906 (P&I).

¹⁰² *Narindri Dinesh Shingle v NGLET Ltd*, 2016 SCC Online Kar HOS2: 2016-198 Comp Cas 299.

¹⁰³ 1930 Ch 261: 148 LT 308.

those debts, it is in general a proper inference that the company is carrying on business with intent to defraud creditors."

This statement has been cited with approval by the Kerala High Court in *Nagendra Prabhu v. Pimpri Bank*.¹¹¹ The court added:

Although the section leaves the court with a discretion to make a declaration of liability in relation to "all or any of the debts or other liability of the company", the order would in general be limited to the amount of the debts of those creditors who have been defrauded. Thus, there must be some nexus between the fraudulent trading or purpose and the extent of liability.

Further, this liability arises only when the company is in winding up and for offences committed before or during winding up.¹¹² "Fraudulent trading connotes real dishonesty—according to current notions of fair trading among commercial men, real moral blame."¹¹³ In this respect it is different from "fraudulent preference" which does not require moral turpitude. In *Patrick & Lyon Ltd. re*,¹¹⁴ a company remained in business only to save certain debentures which otherwise would have become invalid. The court held that this did not amount to an intention to defraud creditors. Similarly, no responsibility comes under the section to an auditor or the secretary of the company for mere failure to report.¹¹⁵ The same is the position of a person who only provides finance.¹¹⁶ The directors of a company persuaded a wealthy investor to join as a director and to provide investment capital. But he failed to provide sufficient funds to enable the company to avoid going into insolvent liquidation. It was held that the directors were not liable for payments made up to the time that they had the genuine belief that he would be providing funds.¹¹⁷ Where a fraud was committed upon a single creditor in a single transaction, it was held that the section was not attracted. A solitary instance could not be taken to mean that the business was being carried on to defraud creditors. Officers guilty of filing false purchase tax returns have been held liable. Lord DENNING MR

111. ILR (1969) 1 Ker 340; AIR 1970 Ker 120.

112. *R v. Bainbridge*, (1969) 1 WLR 615 (CA) and the House of Lords in *D/P/P v. Schildkamp*, (1999) 3 AC 1641 (HL). See also, "Criminal Liability for Fraudulent Trading" (1999) [8] 302. *Hypnos Carbons Ltd v. IC Relia*, (2001) 103 Comp Cas 422 (HDL) mere failure on the part of the directors-suspects to initiate legal steps against the debtors would not bring the case within the ambit of S. 339 of the Act.

113. *Mauritius Jair, Patrick & Lyon Ltd. re*, 1933 Ch 786; 140 LT 231.

114. *Ibid*.

115. *Marlstone Buildings Provisions Ltd. re*, (1971) 1 WLR 1085; (1971) 3 All ER 363 (Ch D), though in view of the extended meaning given to the position of the secretary in *Panorama Developments (Luton) Ltd v. Edeleis Furnishing Fabrics Ltd.*, (1971) 2 QBD 211; (1971) 3 WLR 440 (CA), the case may not seem to be a good law.

116. *Marlstone Buildings Provisions Ltd. re*, (1971) 1 WLR 1085; (1971) 3 All ER 363 (Ch D). *Official Liquidator v. Satish Chand Patel*, (2007) 125 Comp Cas 467 (Kash), commercial officer appointed for taking care of books of account and bank transactions, etc., was held to be not an officer for the purposes of the section. There were also no specific allegations.

117. *Rufus v. Ganner*, (2004) 2 BCLC 119 (Ch D).

said:¹¹⁸ "The section is deliberately framed in wide terms so as to enable the court to bring fraudulent persons to book."¹¹⁹ The basis of decisions under the section has recently been explained in an Australian case in the following words:¹²⁰

There is nothing wrong in the fact that directors incur credit at a time when, to their knowledge, the company is not liable to meet all its liabilities as they fall due. What is manifestly wrong is if directors allow a company to incur credit at a time when the business is being carried on in such circumstances that it is clear that the company will never be able to satisfy its creditors. However, there is nothing wrong to say that directors who genuinely believe that the clouds may roll away and the sunshine of prosperity will shine upon them again and disperse the fog of their depression are not entitled to incur credit to help them to get over the bad time.¹²¹

Where a person who takes part in the management of a company's affairs obtains credit or further credit for the company when he knows that there is no reason for thinking that funds will become available to pay the debt when it becomes due or shortly thereafter, he may be found guilty of the offence of carrying on the company's affairs with intent to defraud creditors. It is not necessary for the prosecution to prove that there was no reasonable prospect of the company's creditors ever receiving payment of their debts.¹²² Heavy withdrawals of money by directors from the company's account under pretended loans knowing fully well that the company was in losses and would not be able to pay its creditors would be sufficient to charge them with liability even if they were only nominal directors and not in charge of the company's affairs.¹²³

¹¹⁸ *Cyprus Distribution Ltd.*, re, 1967 Ch 989 (CA). *Bank of Credit & Commerce International SA* (No. 73), re, *Morris v. Bank of India*, (2004) 2 BCDC 279 (Ch D); the Chief Manager had knowledge or at least suspicion that the transactions were being entered into for a fraudulent purpose yet he turned a blind eye to them and regarded them as a matter of routine. This knowledge was attributed to the bank. The court applied the principles in *Productivity Consortium Ltd* (No. 2), re, 1989 BCDC 520. *Bank of Credit & Commerce International SA*, re, *Morris v. SBI*, (2004) 2 BCDC 236 (Ch D); the State Bank remained protected from liability because there were asserting circumstances like guarantees by BCCL for loans advanced. *Official Liquidator v. Riziq Mohan Co-operative Ltd*, (2007) 125 Comp Cas 547 (Raj no cogent material and specific allegation against the director).

¹¹⁹ All such recent cases have been considered by Nigel J. Macassey, *Responsibility for Fraudulent Trading*, (1970) New L 822. R. Williams, *Liability for Reckless Trading by Companies: The South African Experience*, 33 B.L.Q. 664.

¹²⁰ *White & Ormond (Pty) Ltd.*, re, [Unreported] noted, 1926 JBL 225, J.L. Marcus, *Corporate Insolvency and the Law*.

¹²¹ See also, *Srimukh Director Cr. Ltd v. Aji Singh*, (1979) 48 Comp Cas 460 (P&I), where it was held that the liability survives the death of the director concerned, though his legal representatives will be bound to pay only out of the director's estate.

¹²² *R v. Dontham*, 1984 QB 475, (1984) 2 WLR 815 (CA). In a subsequent case the Court of Appeal pointed out that it is not necessary to bring in the names of any creditors who might have been affected by fraudulent conduct of business. *R v. Keay*, 1988 BCDC 217, 1988 QB 645; (1988) 2 WLR 975 (CA).

¹²³ *Official Liquidator v. Ram Sourcing*, (1997) 66 Comp Cas 569; AIR 1997 All 72; *Sizumoni Steel*

Where the declaration of liability under Section 339 or 340 is against a firm or a body corporate, Section 341 gives the power to the court that it may make a similar declaration against any person who is a partner in that firm or a director in that body corporate.

Proceedings were allowed to be instituted in an English court though the fraud in question was practised in a cross-country banking transaction through electronic media. Excepting for crediting the money in a New York bank account, everything else was done in England and the fraudster and his victims were both in England.¹²⁴

In the hearing of an application under the section the official or company liquidator may himself give evidence or call witnesses. Where the Tribunal makes a declaration of liability, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration. In particular the direction may make a provision for the following two modes of securing recovery against the declared liability: (a) provisions may be made for making the liability of any such person a charge on any debt or obligation due from the company to him, or any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him or any person on his behalf, or any person claiming as an assignee from the person liable or any person acting on his behalf; (b) any such further order may be made as may be necessary for the purpose of enforcing any charge imposed in the direction. (S. 339(2))

Persons who are found guilty under the section are liable to be proceeded against under Section 447 [Punishment for fraud]. (S. 339(3)) The section remains applicable even if the person concerned may be punishable under any other law. The Explanation to the section explains the concept of "assignee" and also that of an "officer" which includes any person in accordance with whose directions or instructions the directors of the company have been accustomed to act.

Falsification of books [S. 336]

If any officer or contributory of a company has, with intent to defraud or deceive any person, destroyed, mutilated, altered, falsified or secreted any books, papers or securities of the company, he is punishable with imprisonment and fine. A person who is privy to such acts is also punishable. There is similar penalty for making any false or fraudulent entry in any book or register or document of the company.¹²⁵

This type of offence has been included under Section 330(1)(d), in points enumerated under it.

¹²⁴ *Tibes Ltd v A. Marmill*, ILR 2002 KAR 387; (2002) 106 Comp Cas 364. a person who was caught in his male bable was appointed after the company was placed before the BISR, no transactions taking place since then till the date of winding up order. The court (Bank Tribunal) said he could not be held guilty of misfeasance.

¹²⁵ *R v Smith*, (1996) 2 BCL C 109 (CA).

¹²⁶ *PP Sieke v M. Marlow*, (1987) 37 Comp Cas 790 (1987); 2 Comp LJ 146 (Kwl)

Frauds by officers [S. 337]

The section provides a penalty for any of the following acts done by any officer of a company which subsequently goes into liquidation:

1. Where he has, by fraud or false pretences, induced any person to give credit to the company.
2. Where he has, with intent to defraud creditors of the company, made any gift or transfer of any property of the company or has created a charge on, or caused the levying of any execution against any property of the company.
3. Where he has, with intent to defraud creditors of the company, concealed or removed any property of the company within two months before, or since the date of any judgment for payment against the company.

Liability where proper accounts not kept [S. 338]

If it is shown in the case of a company being wound up that proper books of account were not kept by the company throughout the period of two years immediately preceding the commencement of the winding up, or the period between the incorporation of the company and the commencement of winding up whichever is shorter, every officer of the company who is in default will be liable unless he shows that he acted honestly and that in the circumstances in which the business of the company was carried on, the default was excusable. Where the auditor who audited the accounts of the company merely stated that at the time the books of account were made available to him the accounts were not complete. There was nothing in the statement of the auditor to show that such books of account were incomplete throughout for a period of two years immediately preceding the commencement of winding up. It was held that in the absence of any averment or evidence no case under Section 338 could be made out.¹²⁶

Sub-section (2) provides that proper books of account are deemed to be not kept: (a) where such books of account as are necessary to exhibit and explain the transactions and financial position of the business including books containing entries made from day to day in sufficient detail of all cash received and paid; and (b) where the business of the company has involved dealings in goods, there have not been kept statements in sufficient detail relating to annual stock takings and of all goods sold and purchased showing the goods and buyers and sellers so as to enable identification of such goods and parties involved. These details need not include goods sold by way of ordinary trade.

Offences by officers [S. 336]

Section 336 contains a long list of offences for which officers of a company in winding up are made punishable with imprisonment or fine. Following offences are covered by the section:

¹²⁶ Hyline Carbons Ltd v JC Blazin, (2001) 103 Comp Cas 422 (HP).

**Offences by
officers of companies
in liquidation**

336. (1) If any person, who is or has been an officer of a company which, at the time of the commission of the alleged offence, is being wound up, whether by the Tribunal or voluntarily, or which is subsequently ordered to be wound up by the Tribunal or which subsequently passes a resolution for voluntary winding-up, —

- (a) does not, to the best of his knowledge and belief, fully and truly disclose to the Company Liquidator all the property, movable and immovable, of the company, and how and to whom and for what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the ordinary course of the business of the company;¹²⁷
- (b) does not deliver up to the Company Liquidator, or as he directs, all such part of the movable and immovable property of the company as is in his custody or under his control and which he is required by law to deliver up;
- (c) does not deliver up to the Company Liquidator, or as he directs, all such books and papers of the company as are in his custody or under his control and which he is required by law to deliver up;
- (d) within the twelve months immediately before the commencement of the winding-up or at any time thereafter,—
 - (i) conceals any part of the property of the company to the value of one thousand rupees or more, or conceals any debt due to or from the company;
 - (ii) fraudulently removes any part of the property of the company to the value of one thousand rupees or more;
 - (iii) conceals, destroys, mutilates or falsifies, or is privy to the concealment, destruction, mutilation or falsification of, any book or paper affecting or relating to, the property or affairs of the company;
 - (iv) makes, or is privy to the making of, any false entry in any book or paper affecting or relating to, the property or affairs of the company;
 - (v) fraudulently parts with, alters or makes any omission in, or is privy to the fraudulent parting with, altering or making of any omission in, any book or paper affecting or relating to the property or affairs of the company;
 - (vi) by any false representation or other fraud, obtains on credit, for or on behalf of the company, any property which the company does not subsequently pay for;
 - (vii) under the false pretence that the company is carrying on its business, obtains on credit, for or on behalf of the company, any property which the company does not subsequently pay for; or
 - (viii) pawns, pledges or disposes of any property of the company which has been obtained on credit and has not been paid for, unless such pawning, pledging or disposing of the property is in the ordinary course of business of the company;
 - (e) makes any material omission in any statement relating to the affairs of the company;
 - (f) knowing or believing that a false debt has been proved by any person under the winding-up, fails for a period of one month to inform the Company Liquidator thereof;

127. See, *Official Liquidator v PC Ltd Co.*, (1990) 51 Comp Cas 175 (Bom), where the three officers in charge were not able to account for the money when they had sent to the main office of the company and they were ordered to pay.

- (g) after the commencement of the winding-up, prevents the production of any book or paper affecting or relating to the property or affairs of the company;
- (h) after the commencement of the winding-up or at any meeting of the creditors of the company within the twelve months next before the commencement of the winding-up, attempts to account for any part of the property of the company by fictitious losses or expenses; or
- (i) is guilty of any false representation or fraud for the purpose of obtaining the consent of the creditors of the company or any of them, to an agreement with reference to the affairs of the company or to the winding-up.

He shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees:

Provided that it shall be a good defence if the accused proves that he had no intent to defraud or to conceal the true state of affairs of the company or to defeat the law.

(2) Where any person pawns, pledges or disposes of any property in circumstances which amount to an offence under sub-clause (viii) of clause (i) of sub-section (1), every person who takes in pawn or pledge or otherwise receives the property, knowing it to be pawned, pledged, or disposed of in such circumstances as aforesaid, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine which shall not be less than three lakh rupees but which may extend to five lakh rupees.

Explanation.—For the purposes of this section, the expression "officer" includes any person in accordance with whose directions or instructions the directors of the company have been accustomed to act.

Directors owe a continuing duty to produce to the liquidator all the books, property and assets of the company. They have not to wait for this purpose for a request from the liquidator. This duty of cooperation further extends on a continuing basis to passing on to the liquidator any information relating to the company.¹²⁸

Penalty for frauds by officers [S. 337]

If any person, being at the time of the commission of the alleged offence an officer of a company which is subsequently ordered to be wound up by the Tribunal or which subsequently passes a resolution for voluntary winding-up,—(a) has, by false pretences or by means of any other fraud, induced any person to give credit to the company; (b) with intent to defraud creditors of the company or any other person, has made or caused to be made any gift or transfer of, or charge on, or has caused or connived at the levying of any execution against, the property of the company; or (c) with intent to defraud creditors of the company, has concealed or removed any part of the property of the company since the date of any unsatisfied judgment or order for payment of money obtained against the company or within two months before that date, he is punishable with imprisonment for a term which is not less than one year but which may extend to three

128. *R v McCrae*, (2000) 2 ECLC 438 (CA).

years and with fine which is not less than Rs 1 lakh but may extend to Rs 3 lakhs.

Misfeasance proceedings [S. 340]

Power of Tribunal to assess damages against delinquent directors.—Section 340 empowers the Tribunal to assess damages and requires the delinquent officer to pay the amount to the company. Permitting the company's claims to become time-barred by sheer inaction¹²⁹ and transferring from the company's account, while it was in a state of insolvency, to a creditor's account with a view to relieving the director in question from his guarantee for the debt amounting to fraudulent preference, have been held to be misfeasance and the directors in question were accordingly compelled to make good the company's loss.¹³⁰ This power of the Tribunal comes into play when, in the course of winding up, it appears that any person who has taken part in the promotion or formation of the company or any past or present director or manager, liquidator or officer of the company has misappropriated or retained or become liable for any money or property of the company or has been guilty of misfeasance or breach of trust in relation to the company.¹³¹ The company liquidator, or any creditor or contributory may apply to the Tribunal for action against the delinquent officer.¹³² The Tribunal shall examine his conduct.¹³³ If he is found guilty he may be required to repay or restore the money or property of the company or to contribute such sum to the assets of the company by way of compensation as the Tribunal thinks just. The jurisdiction under Section 468 to secure delivery of property to the liquidator is exercisable "at any time after making a winding up order" and is not barred by any length of time. Thus where a company's agent received money without authority in 1956, the court ordered its delivery to the company in 1964, the company having gone into liquidation in 1959.¹³⁴

The misfeasance proceedings against officers of the company are capable of covering the full range of duties owed by a director to his company and are not restricted to ethical or fiduciary duties.¹³⁵

129. *Smart Advertising Co (T) Ltd v. Bawali K. Munchalal*, (1999) 65 Comp Cas 42 (T.M.H.).

130. *West Morris Steelworks Ltd v. Dholi*, 1968 BCCLC 25C (CA). The proceedings are of quasi-criminal nature. They are not affected by the fact that the person proceeded against may be liable for any offence which may be brought to the surface by the proceeding. *Chemical Chemicals & Fertilisers Ltd v. M C Chromium*, (1993) 77 Comp Cas L 18 (Kant).

131. *Parus Raymonds Drapery & Fineuse Co Ltd, et al.* (2006) 131 Comp Cas 634 (All), prima facie proof of fraudulent conduct of business in violation of the provisions of the Act, sufficient ground to maintain application, erstwhile directors to be proceeded against.

132. This application is filed by the liquidator or the relevant party in his own name and not in company's name and therefore the benefit of the additional period of limitation under S. 458-A is not available. *B. Niranjan Mines (P) Ltd v. Bijoyendra Purnak*, (1994) 80 Comp Cas 227 (Oriz). The A.P. High Court allowed the benefit of extended period under S. 458-A because the proceedings are in essence for the benefit of the company. *Official Liquidator v. T J Sunny*, (1992) 75 Comp Cas 543 (AI).

133. The liquidator has only to prove a prima facie case. *Pt. Tendulkar v. Cypris! Liquidator*, (1967) 37 Comp Cas 792 (Mys).

134. *Rhami Traders Ltd v. Sardar Singh*, (1969) 38 Comp Cas 567 (R&H).

135. *Wishwan Shringi & Distributors Ltd, et al.* (2000) 2 BCCLC 593 (Ch D).

An application under this section has to be made within five years from the date of the order of winding up or of the first appointment of the company liquidator or of the alleged offence, whichever is longer.¹³⁶ The period of five years begins to run from the date of the first appointment of the company liquidator. Time does not start afresh every time a new liquidator is appointed.¹³⁷ To this, the period of one year has to be added under Section 358.¹³⁸

There is no such distinct wrongful act known to law as "misfeasance". The section does not create any new right or offence, but only provides a summary and cheap remedy for enforcing such rights as are otherwise enforceable by law. There are two conditions of liability under the section, i.e. an act in the nature of breach of trust, and an act which results in loss to the company.¹³⁹ The act may be that of commission or omission. Gross negligence on the part of a director which gives opportunity to others to misappropriate would be misfeasance.¹⁴⁰ Misfeasance was held to be inferable where large sums of money were withdrawn by the director at a time when the company was grinding in losses.¹⁴¹ Where the money of the company was lent to a third party in contravention of the company's objects, both the directors (one of them through legal representative since deceased), were responsible for it and were held to be jointly and severally liable to replace the company's money.¹⁴² No liability arose under the section for the sums which were refundable from Income Tax Department, but having not been claimed within time became time-barred because the director in question had sent several reminders to Income Tax Department for refund and subsequently all the records and papers were handed over to the liquidator. Similarly, no liability arose for the sums due to the company from certain parties because the company had itself written off those claims as bad debts and also for stock spoiled and destroyed and written off by the company.¹⁴³ Mere vague and general accusations will not be sufficient to found a liability.

136. Jaipur Vidya Vyayashal v Shyam Sunder Lal Patodia, AIR 1970 Raj 91.

137. Punjab Commerce Bank Ltd v Ram Narain Virkunni, (1973) 43 Comp Cas 323 (P&J).

138. Comsat Narain Patel v Official Liquidator, (2001) 133 Comp Cas 843 (Raj).

139. Official Liquidator v Shambhu Nath Sisodia, (1973) 43 Comp Cas 107 (Cal). The burden of proof is on the applicant liquidator. *Sankal Chitr Patel & Timinlalji (P) Ltd v Narinder Kumar Sharma*, (1994) 79 Comp Cas 25 P&H, where the liquidator could not even name any creditor remaining unpaid. *Chamotei Chemicals & Fertilisers Ltd v AIC Cherian*, (1993) 77 Comp Cas 1 (Kant), bona fide decisions of directors are not questionable. *Official Liquidator v Gafelchand Chhatralia*, (2003) 114 Comp Cas 454 (Guj), a mere error or mistake in accounting practice, no loss to company shown, creditors and depositors alleged to be misled by suppression of losses and enhancing the value of assets, held, no misfeasance.

140. *Official Liquidator v Arvind Kumar*, (1976) 46 Comp Cas 572 (Del); *Official Liquidator v Vishnu Kumar Prakash*, (2001) 103 Comp Cas 1026 (Raj); it is not necessary to fix liability under S. 543 that a director should be a shareholder or that he should have actually participated in the management.

141. *Official Liquidator v Ravi Sagar*, (1997) 88 Comp Cas 569, AIR 1997 All 72; *MDA Investment Management Ltd. v. (2004) 1 HC (C) 212*, diversion of consideration received on sale of company's business which money would otherwise have been available to meet the creditors' claims.

142. *Babulal Chintamani Motwani v Official Liquidator*, (1996) 56 Comp Cas 580 (Mad).

143. *Ibid*.

under the section. The Karnataka High Court¹⁴³ refused to entertain a proceeding against the managing director on general accusations like this that there was unaccounted cash balance, that proper books of account were not maintained and that the stock-in-trade was in the possession of a bank and its sale was delayed.

There must be specific allegation against each director or officer along-with a quantification of loss. Mere allegations against former directors were held not sufficient for maintaining an application under the section.¹⁴⁴

It is a misfeasance on the part of directors to make gifts of the company's property for no proper trading purpose. Disposal of the plant and machinery of the company without any justification was also held to be misfeasance. The directors were required to pay the sum(s) involved with interest.¹⁴⁵ Where no steps were taken by the directors to enforce the company's claims and consequently they became time-barred, the directors were held liable to compensate the company for its loss with interest at 12 per cent from the date of winding up till payment.¹⁴⁶

Failure to take proper care of assets and consequential loss to the company is a ground for misfeasance proceedings. But where the assets were in the possession of a bank for over seven years and with the liquidator for two years, the directors could not be held to be guilty of improper care of assets.¹⁴⁷ The directors were held liable for the loss of the company's diamonds while on a foreign trip without insurance cover. A person who was working as a shadow director was not excused. There were circumstances of gross negligence.¹⁴⁸

Nominee directors (nominated by a financial institution in this case) can also be held liable depending upon the role which they played in the conduct of affairs, i.e., whether they performed their statutory duties in good faith.¹⁴⁹ They were not permitted to defend themselves against liability just by saying

143. *Official Liquidator v RC Masihur*, (1990) 50 Comp Cas 502 (Karn); *Hypnic Carbons Ltd v JC Bhuria*, (2001) 103 Comp Cas 422 (UP), allegation of misappropriation of furniture belonging to the company but no specific evidence as to which item was in possession and control of a particular director was given, no case was made out for fastening liability. *Official Liquidator v Chintubhai Khilchand*, (2003) 114 Comp Cas 277 (Guj). It is necessary for official liquidator to make specific allegation against each director or officer, mere allegation against former directors is not sufficient.

144. *Official Liquidator v Chintubhai Khilchand*, (2003) 114 Comp Cas 277 (Guj); *Zamka Asia and General Industries (P) Ltd v Indra Mohan Puri*, (2005) 124 Comp Cas 422 (Del); *Official Liquidator v R.B. Singare*, (2006) 132 Comp Cas 249 (Bom); allegation of mismanagement relating to travel and legal expenses, custody of stocks, remuneration, etc but no allegation of fraud or breach of trust and no specific allegation and positive evidence. *Sigma Book Shop v Kishoreji Exporters (P) Ltd*, (2007) 135 Comp Cas 275 (Ker), no allegation that the director in question had personally misappropriated the security, saving inquiry not to be ordered.

145. *Barton Mfg Co Ltd v. m.*, (1994) 1 BCLC 740 (Ch Ld), gratuitous payments were made to one of the directors and his wife.

146. *Expo Xpres (P) Ltd v Jay Gopal Angrish*, (1999) 97 Comp Cas 913; (1998) 5 Comp L J 438 (P&H); *Karikh Finance (P) Ltd v Kultar Singh Randh*, (1995) 98 Comp Cas 131 (P&H).

147. *Official Liquidator v DP Gupta*, (1995) 98 Comp Cas 59 (Ra).

148. *Samson Jinx (Thengons) Ltd v. m.*, 2000 BCC 275.

149. *A Stock & Co v Delip Kumar Chakrabarti*, (1995) 87 Comp Cas 139 (Guj).

that they only knew that the directors were withdrawing heavy amounts from the company free of interest. The company was led to financial starvation and heavy losses. Their silence gave rise to an inference of complicity.¹⁵¹

The principles relating to misfeasance proceedings were restated by the Supreme Court in *Official Liquidator v PA Tendolkar*.¹⁵² While the proceedings were pending before the Mysore High Court, the chairman of the Board and another director died. Bsc J laid down that the liability would devolve upon the legal representatives, but would be "confined to the assets or estate left by the deceased in the hands of the successors".¹⁵³ Referring to the position taken by one of the directors, Bsc J said:

A director may be shown to be so placed and to have been so closely associated personally with the management of the company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of the company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the company even superficially. If he does so he could be held liable for dereliction of duties undertaken by him and compelled to make good the losses incurred by the company due to his neglect even if he is not shown to be guilty of participating in the commission of fraud. It is enough if his negligence is of such a character as to enable frauds to be committed and losses thereby incurred by the company.

The Karnataka High Court¹⁵⁴ stated that though liability for misfeasance will survive the death of the officer, it is necessary that it should have been ascertained during his lifetime, so that he was in a position to defend himself. His legal representatives are not likely to be acquainted with his conduct in the company and, therefore, they cannot be put on the defensive.¹⁵⁵

Non-joinder of the legal heirs of a deceased director does not affect the proceedings against the others. Where the company fails to bring the



CASE PLOT



CASE PLOT

151. *Official Liquidator v Rose Swami*, (1997) 88 Comp Cas 569; AIR 1997 All 22. It was not necessary to implead the legal heirs of a legal heir who had also died, there being other legal heirs to recover.

152. (1973) 1 RCC 602; (1973) 43 Comp Cas 382; and again in *Official Liquidator v Pardessarkhi Simha*, (1983) 1 SCC 538; (1983) 53 Comp Cas 165.

153. The Calcutta High Court did not allow substitution of legal heirs in place of a delinquent director upon his death. *Pardessarkhi Simha v Official Liquidator*, (1976) 46 Comp Cas 556 (Cal). No decree can be passed against a deceased director until his representatives are brought on record. *Modart Transporters Ltd v Ingalemi Achita*, (1977) 42 Comp Cas 302 (P&H). *Renu Castings (P) Ltd v MM Sundaresan*, (2003) 114 Comp Cas 541 (Kant), a director accused other directors of misfeasance, held, the other directors would have to be given the right to cross-examine him.

154. *Official Liquidator v Magamiaji Hiraichand Shahi*, (1980) 50 Comp Cas 262 (Kant).

155. Proceedings against legal representatives were not allowed for this reason in *Chemundi Chemicals & Fertilizers Ltd v MC Chariya*, (1993) 77 Comp Cas 1 (Kant), following *Jowline v Official Liquidator*, (1979) 49 Comp Cas 170 (Ker). But the proceedings do not abate by reason of death. *NS Rajapapni v Official Liquidator*, (1993) 78 Comp Cas 667 (Mad). Legal heirs were not allowed to be impleaded seven years after the death of the director, being out of time. *Official Liquidator v Tars Jethmal Lalvani*, AIR 1994 Bom 74.

representatives of the deceased director on record, the surviving director cannot claim to be relieved of his liability, the liability being joint and several.¹⁵⁶

The section does not give the Tribunal power to fine a director for misconduct. It also does not apply to cases in which the claim is for simple contract debt, or is an ordinary claim for unliquidated damages.¹⁵⁷

The conduct of a receiver or manager appointed by debenture-holders cannot be examined under the section,¹⁵⁸ he being not an officer of the company. An auditor is an officer for this purpose. Thus, an auditor was held liable under the section for certifying false accounts whereby dividends were paid out of capital.¹⁵⁹ A liquidator who had negligently admitted claims was held liable under the section.¹⁶⁰ A liquidator who continued trading on behalf of the company without obtaining sanction of the court in of the committee and increased the deficiency of the company towards creditors was held liable in misfeasance.¹⁶¹ The Kerala High Court held that an official liquidator cannot be proceeded against under the section.¹⁶²

Liability of partners and directors of body corporate [S. 341].—The power under the section has been vested in the Tribunal. Where the declaration of liability is against a firm or a body corporate, the Tribunal may further declare that any partner in that firm or director in that body corporate shall also be liable.

Prosecution of delinquent officers and members [S. 342]

Section 342 provides that if it appears to the Tribunal, in the course of a compulsory winding up, that any past or present officer or member of the company has been guilty of any offence in relation to the company, the Tribunal may direct the company liquidator either himself to prosecute the offender or to refer the matter to the Registrar. The Registrar may, if he thinks fit, refer the matter to the Central Government for further investigation. If

156. *Rababini Chandni Mody v. Official Liquidator, Allus Import & Export Co (P) Ltd.*, (1996) 86 Comp Cas 580 Mad. Legal heirs who are not brought on record could not be held liable. Even otherwise the plaintiff was thirty years old and all the creditors had been paid in full. *Official Liquidator v. Yaro Jethmal Lalji Patel*, (1997) 98 Comp Cas 834 (Rum).
157. *P. K. Tulsidas v. Official Liquidator*, (1982) 37 Comp Cas 392 (Mad); *B. Johnson & Co. (Bridgford) Ltd. re*, 1955 Ch 634. (1955) 3 WLR 769 (CA).
158. *Supreme Bank of India Ltd. re*, (1982) 37 Comp Cas 392 (Mad); *B. Johnson & Co. re*, (1955) Ch 634 (CA).
159. *Kingston Cotton Mills Co (No 2) Ltd. re*, (1974) 2 Ch 279, 74 LT 566 (CA).
160. *Hans B. Colgate Insurance Co Ltd. re*, (1970) 1 Ch 102; *National Sugar Mills Ltd. re*, (1978) 43 Comp Cas 339 (Cal), managing director held liable for misappropriations. It is not necessary for his liability to arise that the loss should be exactly calculated beforehand or that there should be shortfall in assets as against liabilities. *Official Liquidator v. Jagjivan Singh Kohli*, (1978) 43 Comp Cas 257 (Del). Misfeasance proceedings cannot be taken against sales agent of the company: *Voluntary Liquidator v. Relfuz Singh*, (1978) 43 Comp Cas 427 (Del). Liability survives the death of the director concerned and passes on to his legal representatives though they will be liable to pay only out of the estate of the deceased director. *HFC Ultra (India) Ltd. re*, (1978) 43 Comp Cas 648 (Cal).
161. *Centralfest Engg Ltd. re*, 2000 (1) ISCC 727.
162. *I.K. Prakash v. S.M. Amerald Millat*, AIR 1997 Ker 347.

the Registrar finds that the case is not one in which proceedings ought to be taken by him, he shall inform the liquidator accordingly. The company liquidator may then with the sanction of the Tribunal himself take proceedings against the offender. Where the company liquidator does not make any report to the Registrar, but an offence appears to the Tribunal to have been committed, it may direct the company liquidator to make such a report. Before any such report is made, the person accused must be given a reasonable opportunity of making a statement in writing to the Registrar and being heard on the matter.

This power can be exercised by the Tribunal in the case of a voluntary winding up under parallel circumstances and procedure. [S. 342(4)]

It is the duty of the company liquidator and of every person who is or has been an officer and agent of the company to give all assistance in connection with the prosecution which he is reasonably able to give. The word "agent" is to include any banker or legal adviser and any person employed by the company as an auditor. Neglect of this duty attracts a fine of not less than Rs 25,000 extending up to Rs 1,00,000.

The power can be exercised by the Tribunal *suo motu* or on the application of any person interested.

Wrongful withholding of property [S. 452]

If an officer¹⁶³ wrongfully obtains possession of a company's property including cash, or, being already in possession, wrongfully refuses to deliver it to the company, or misappropriates a complaint can be made by the company or by any creditor or contributory. The court can award punishment in terms of the section¹⁶⁴ and can also order the officer in possession to deliver the property to the company or refund, within a time to be fixed by it, any such property or cash, the benefits that have been derived from such property or cash, and in default, to undergo imprisonment for a term which may extend to two years. A Bat was allotted to an officer. He refused to vacate it on retirement. It was held that he was not entitled to the protection of tenancy laws and could be ordered under Section 630 to vacate the premises of the company.¹⁶⁵ Proceedings can be launched

163. The word "Officer" has been held to include the president of the company. *M. Gopalakrishnan v. Laxmi India Ltd.*, (1995) 83 Comp Cas 551 (Mad). *Fruitfullness Rajaram Mokte v. Durgabhai Haribhai Patel*, (1996) 1 Guj CD 564; (1996) 87 Comp Cas 557 (Guj), two remedies for evicting S. 630 and also *Homabay Rents, Hotel and Lodging House Rates Control Act, 1917*.

164. Punishment is with fine not less than Rs 1,00,000 extending up to Rs 5,00,000

165. *Krishna Actor Bhaludia v. Cal Train Express*, (1986) 59 Comp Cas 477 (Hon). Proceedings were allowed when the premises in the possession of the company were under a tenancy and the employee surrendered the possession directly to the landlord. *Akend Lalvadia v. Mukesh Kumar Marasi*, (1994) 29 Comp Cas 336 (Bom), or where the employee purchased the tenanted premises from the landlord. *Keananandji Gopal Krishna Neer v. Prakash Chander Jumaji*, (1994) 41 Comp Cas 104 (Bom). Proceedings against a director not allowed where the withholding was by the company. *MK Chundrakant v. Karanji*, (1999) 80 Comp Cas 307 (Mad). Proceedings against a dismissed employee cannot be stopped because of reference under the Industrial Disputes Act, 1947. *Anthony (R) v. Remesgar Power Co. Ltd.*, (1996) 72 TLR 631; 1996 LLR 152 (All). *Bishen Singh v. State of U.P.*, (2006) 132 Comp Cas 387 (All). Liability to vacate on retirement. *Thirumur Venkata Krishna Rao v. KLP Sugar &*

against heirs of an officer or employee who has died and whose heirs are withholding the property.¹⁶⁶ Such people who refuse to hand over vacant possession cause hardship to the company and also to the successive allottees without having any right to cling to possession. A retired officer was refusing to vacate premises at Cochin. A complaint before a Magistrate at Calcutta, where the company had its registered office, was held to be competent.¹⁶⁷ A subsequent decision of the same High Court went against this proposition. The complaint in the court where the company had its headquarters was quashed because the premises in question were situated elsewhere.¹⁶⁸

Where the ingredients for attracting the application of Section 630 are made out, the right of the company to the possession of the property becomes established. There is then no scope for exercising any mercy power in favour of the employee.¹⁶⁹ An employee to whom a flat was given for a

¹⁶⁶ *Industries Corps Ltd.* (1936) 133 Comp Cas 422 (AP). termination of employment due to participation in illegal strike, liability to vacate premises

¹⁶⁷ *Ashish Vinodkumar Jain v. Cox and Kings (India) Ltd.* (1995) 3 SCC 732. (1995) 17 CLA 90; (1995) 64 Comp Cas 76. "Officer" includes employees also and also both present and past. *Ganik Patel Vakil Ltd v. Damodarji Gujashindeji Hiriyamal*, (1991) 2 SCC 142; (1991) 71 Comp Cas 403; *Togesh Kumar Kamlesh Shah v. Gujarat Steel Tubes*, (1993) 2 Guj LH 1039. *Lalita Joshi v. Bhatiyani Gas Co Ltd*, (2003) 6 SCC 107; (2003) 141 Comp Cas 515, the legal heirs of deceased employee who were in possession only through the employee and who were refusing to vacate were held liable to be prosecuted.

¹⁶⁸ *TS Shyamal v. J Thomas & Co*, (1985) 57 Comp Cas 148 (Cal). The Bombay High Court has disagreed with it and did not permit proceeding at Bombay for a property which was being wrongfully withheld at Jamshedpur. *Hiral Ghosh v. Amarendra Nath Saha*, (1985) 1 Ban CP 480 (1991) 70 Comp Cas 224. The default is an offence of continuing nature. *Anju Kumar Jais v. State of WB*, (1990) 68 Comp Cas 482 (Cal); the High Court of Delhi did not allow proceedings to be launched there (company's headquarters) for a withholding committed in the Punjab (company's factory). *Ramesh G. Bharat v. JM Malik*, (1994) 79 Comp Cas 44 (Del). *TAV Nirmal Chellia v. Drei Films (P) Ltd*, (1993) 76 Comp Cas 475 (Mad). The proceeding under the section is of criminal nature, it cannot be stayed under an order of a civil court. *S. Polenkovampi v. Sri Janardhan Milk Ltd*, (1993) 76 Comp Cas 323 (Mad); *Tenneco Ltd v. Ram Doyal*, (1995) 75 Comp Cas 518 (Del).

¹⁶⁹ *Pijay Kapoor v. Guest Keen Williams* (2d), (1995) 82 Comp Cas 339 (Cal). A Bombay decision has also been to the same effect. See *ibid*.

¹⁷⁰ *Amritpal Purnil Panthi v. Pushkarlal Rajaram Mehta*, (1998) 91 Comp Cas 676; (1997) 26 CLA 102 (Guj). It is very difficult for an employee to establish that he was put into the premises as a tenant. *Prabhuji Dev Rajaram Mehta v. Popatbhai Haribhai Patel*, (1996) 1 Gu Comp Cas 564; (1996) 87 Comp Cas 357 (Guj). *Khusi Chand v. OCM LM*, (1998) 92 Comp Cas 680, (1997) 27 CLA 304 (P&H). The accused person can be given the benefit of doubt because it is a criminal matter. A conviction under the section was set aside because the company did nothing to initiate prosecution for two years during which the employee was constantly asserting that he was a tenant. *Chharsingh Nathsingh Vaghela v. State of Gujarat*, (1996) 2 Guj LR 1425; (1996) 29 CLA 430 (Guj). *Isha Iyer v. Fiduciary Enclave*, (2003) 104 Comp Cas 718 (Cal). An order can be passed against an employee under S. 630(2) for restoring the property even before the mag. state trying the case under S. 630(1) formally disposes the criminal case against him. *Lalit Jaisi v. Bhatiyani Gas Co Ltd*, (2003) 6 SCC 107; (2003) 114 Comp Cas 515. The court directed the officer or employee to deliver or refund the property within the fixed period but the order was not complied with, the court awarded a sentence of two years. Earlier to this in *Lalit Jaisi v. Bhatiyani Gas Co Ltd*, (2002) 7 SCC 27; (2002) 112 Comp Cas 1 on the question whether a past officer or employee or his legal heir would be included, the matter was referred to a larger Bench.

specified period was held bound to return it at the expiry of that period irrespective of the fact that the period did not correspond with his retirement.¹⁷⁰ A director was required to return the company's property and documents on his ceasing to be a director by reason of failure to attend meetings. He had filed a civil suit questioning the validity of the proceedings by which his office became vacated. The court did not go into the merits of the matter in a proceeding under Section 630.¹⁷¹

A complaint under this section is maintainable against the legal heirs of the deceased employee or officer for retrieval of the company's property wrongfully withheld by them after the demise of the employee concerned.¹⁷² However, the family members of the employee living with him while he was alive cannot be prosecuted.¹⁷³

The machinery of this section will not be available where there is a bona fide dispute between an employee and the company as to the title or rights to the property.¹⁷⁴

170. Tariq Razi Azmi v Tata Hydro Electric Supply Co. (2000) 5 Bom CR 211.

171. K Radhakrishnan v Thirumangai Alphalals and Sons Ltd. (1999) 97 Comp Cas 608 (Mad); Manik Rubber Ltd v JK Manattukulum, (2000) 9 SCC 542; (2002) 104 Comp Cas 1. Once the allegations made in the complaint make out an offence of which cognizance had been taken, an application cannot be filed under S. 245, Criminal Procedure Code. Merely pendency of a civil proceeding would not be a ground for quashing the criminal proceedings.

172. Gejra Gears Ltd v Ashanti, (2001) 103 Comp Cas 489 (MP). Simrik Shanti Services Ltd v Meenja S Agarwala, (2005) 5 SCC 301. (2005) 125 Comp Cas 477. (2005) 4 Comp L 417, possession of the company's flat with legal heirs, they could not retain it because grounds raised by them were not found to be tenable.

173. JK (Bombay) Ltd v Bhushri Motah Mishra, (2001) 2 SCC 710; AIR 2001 SC 649 (2001) 104 Comp Cas 424; Lalit Jaisu v Jamshed Gas Co Ltd, (2003) 6 SCC 107; (2003) 114 Comp Cas 515.

174. Damodar Das Jain v Krishan Chandra Chakrabarti, (1985) 57 Comp Cas 115 (Bom). Where an ex-officer continuously assured the company that he would vacate within the period of limitation, it was held to be a sufficient extension of time. ER Herminia v Ashok Rai, (1984) 55 Comp Cas 61 (Del); Comind T Jeglum v Sirajuddin S Kaz, (1988) 56 Comp Cas 329 (Bom), power not excluded by rent laws. "Property" includes both movable and immovable. The offence is of continuing nature. Hence, no period of limitation. Begumau v Jaipur Idyng Ltd, (1987) 1 Comp Cas 744 (Del), order for vacation of quarters and punishment for withholding possession; Baldeo Krishna Suri v Shipping Corp of India Ltd, (1987) 4 SCC 361; 1987 SCC (Cri) 750; (1988) 63 Comp Cas 1, the provision is applicable to past employees. The purpose of the provision is to enable the company to get quick delivery of property from defaulting employees. Atul Mathur v Atul Kulkari, (1989) 4 SCC 514; 1989 SCC (Cri) 761; (1989) 5 Comp L 127, 151; (1990) 48 Comp Cas 384. It is not necessary that the property should belong to the company. PV George v Jaynes Engg Co (P) Ltd, (1990) 2 Comp L 62 (Mad). The section examines the employee's conduct. Narayana K v JV Srinivasan, (1988) 2 Comp L 181 (Mad). Disputes of civil nature cannot be examined by the court under this section. Damodar Das Jain v Krishan Chandra Chakrabarti, (1986) 4 SCC 531; 1991 SCC (Cri) 420; (1990) 67 Comp Cas 364. mere denial of the company's right is not a dispute. Atul Mathur, noted above, mere fact that an employee has questioned the validity of his removal under the Industrial Disputes Act, 1947 does not postpone the remedy of the company. PV George v Jaynes Engg Co (P) Ltd, (1990) 2 Comp L 62 (Mad) the period of limitation for proceedings under the section is to be found in S. 46A(2)(c), Criminal Procedure Code, 1973. ER Herminia v Ashok Rai, (1984) 55 Comp Cas 61 (Del); Ganesh Ray v State of Jharkhand, (2004) 55 SCL 662 (Jhar), challenge to termination before Labour Court immaterial. It was held to be not a bona fide dispute that the managing director had agreed to sell the flat to the employee but the board of directors refused. There was no agreement to sell. Jidhar Hotels Co Ltd v Bhushri Moreshwar Karia, (1994)

The offence is of continuing nature. It continues till the possession is surrendered. Till then every day gives a new period of limitation.¹⁷³

The provision as to prosecution under the section has been described by the Supreme Court to be not strictly speaking a penal provision.¹⁷⁴

Annulment of dissolution [5. 356]

After a company has been dissolved in pursuance of any of the provisions of the Act, it is open to the Tribunal to declare the dissolution to have been void. This can be done only within two years of the dissolution and on an application by the company liquidator or any other person who appears to the Tribunal to be interested. A person entitled to claim damages for negligence from the company is a person "interested" for this purpose, but not his lawyer.¹⁷⁵ The Tribunal's order may be subject to such terms as it thinks fit to impose. Any proceedings may then be taken as might have been taken if the company had not been dissolved.

- 173 Comp Cas 132 (Bom). It was also held to be not a bona fide dispute that the employee was claiming himself to be tenant without there being any signs and symbols of tenancy. *Ternion Ltd v Arun Kumar Sharma*, (1991) 73 Comp Cas 282 (Del), or that he was claiming himself to be a part owner only on the ground that rent deduction from salary was stopped from date of his promotion. *Airfreight Ltd v K Karkhade*, (1995) 2 Mah LJ 17; (1995) 4 Bom CR 109. Remedy under the section was not allowed where the employee was found to be a direct tenant of the owner of the premises. *VM Sheth v State of Maharashtra*, (1995) 5 SCC 267; 1995 SCC (Cri) 1077. The court cannot go into the merits of the dispute as to the rights of the employee over the property. *Mines & Bullock v Hindustan Petroleum Corp.*, (1996) 24 CLA 1211 (Bom). The employer's defence that the company had orally agreed to sell the flat to him could not be considered in the summary jurisdiction under S. 63(1). *Jilly Durga M v Godfricks Group Ltd*, (1999) 97 Comp Cas 690; (1998) 28 CLA 335 (Cal). Conversion of the employee is not a condition to the order of handing over possession to the company. *Metal Box (India) Ltd v State of WB*, (1996) 26 CLA 359; (1999) 3 LLJ 1349 (Cal); *Airfreight Ltd v K Karkhade*, (1995) 2 Mah LJ 17; (1995) 4 Bom CR 109; any claim of the employee in titre superior title should be determined only after taking evidence. *Abbasali Vinodkumar Jain v Cox & Kings (India) Ltd*, (1995) 40 Comp Cas 1 (Bom); legal heirs affected by section. *DCM Ltd v Lt Governor*, (1998) 71 DLT 70; approval of closure of mill and settlement with workers, does not convert the workers into statutory tenant, receiver directed to get quarters vacated. *Petlad Bulankhadi Mills Co Ltd v State of Gujarat*, (1999) 97 Comp Cas 900; (1998) 2 Guj CD 1213, continuing offence no period of limitation. *Meenath Balchandani v Forbes Sothes Complete Co Ltd*, (1996) 2 Mah LJ 332; subsequent sale of the premises by the company is not a factor, the court has to see whether offence constituted at the time of complaint. *Jugdish Chandra Nijhawan v SK Sung*, (1999) 1 SCC 114; (1999) 95 Comp Cas 45; (1999) 11 LLJ 295, the agreement had certain requirements for eviction of the employee-tenant, whether they were fulfilled was viewed by the Supreme Court as a dispute of civil nature. *Mohit Zameei Hussain v Lakshmi Comms*, (2000) 1 Comp LJ 338 (MP); the fact that the removal of the employee is under challenge under the Industrial Disputes Act, 1947, is not a ground for withholding order of eviction. *JR (Blewley) Ltd v Bharti Maths Minira*, (2001) 2 SCC 780; AIR 2001 SC 649; (2001) 104 Comp Cas 424, the legal heirs of a deceased employee can be proceeded against but not other members of the family.
- 174 *Ganesh Patel Vakil Ltd v Durdayal Gurushindeo Hirwani*, (1991) 2 SCC 341; (1991) 71 Comp Cas 403; *TNV Nenjappa Chettiar v Devi Fibre (P) Ltd*, (1993) 76 Comp Cas 825 (Mad); *Karanamandal Gopal Krishna Nair v Prakash Chander Juszta*, (1994) 61 Comp Cas 104 (Bom).
- 175 *Shakti Shanti Services Ltd v Magenta & Agarwals*, (2001) 5 SCC 401; (2001) 125 LLJ 477 (2001); 4 Comp LJ 417; on appeal from 2004 CLC 1438 Bom, wrongful possession of the family members of the managing director was not established.
- 176 *Northampton Swimming Pool Ltd, re*, (1968) 1 WLR 1693.

The person on whose application the order is passed should within thirty days or such further time as the Tribunal may allow, file a certified copy of the order with the Registrar. Default is punishable with Rs 10,000 for every day of default.

Disposal of books [S. 347]

The section lays down the manner in which the books and papers of a dissolved company shall be disposed of. It says that when the affairs have been completely wound up and the company is about to be dissolved, the books and papers shall be disposed of in the following manner:

- When the winding up is by the Tribunal, in such manner as the Tribunal may direct.
- In the case of members' winding up, in such manner as the company by special resolution directs.

If the books and papers were committed to the custody of the company, or the liquidator or any other person, no liability will come to it or him after the expiry of five years if he is not able to produce them. In other words, he is accountable only up to five years.

The Central Government may make rules in the behalf, which may prevent destruction of books and papers for such period as it thinks proper. The rules may enable any creditor or contributory to make a representation to the Government in this matter and appeal to the Tribunal against the Government order.

Any contravention of the rules or of any Government order entails punishment up to six months of imprisonment or fine up to Rs 50,000 or both.

Winding up of unregistered company [S. 375]

The expression includes any partnership firm, limited liability partnership, or society or cooperative society, association or company consisting of more than seven members¹⁷⁸ at the time of the petition, but does not include:

- a railway company incorporated by an Act of Parliament or other Indian law or any Act of the Parliament of United Kingdom;
- a company registered under the Companies Act; and
- a company registered under any previous company law, excepting those having registered office in Burma, Aden or Pakistan before their separation from India.

¹⁷⁸ A certificate from the Registrar of Firms that the firm had seven members on its record was held to be a sufficient proof of this requirement despite allegations that the firm had only five members. *Makhan Singh Drunder Pal Singh v. Sejn Oil Mills*, (1999) 76 Comp Cas 190 (P&H), here it could not be shown that the partnership had seven or more members, a petition for order of winding up not sustained. *R Saroja Rani v. Shakti Beneficial Corp.*, (1988) 50 Comp Cas 193 (Kant). The right to apply for winding up accrued from the date of dissolution of the partnership. Under Art. 132, Limitation Act, 1963, only three years would be available from that date. In this case the petition was late by a year. *Malini Ray v. Hotel Dwaraka*, (1997) 90 Comp Cas 279; (1994) 1 An LT 36

It has been held that "the word 'association' has to be understood in its general sense and not with reference to the provisions in Section 11 of the Act". Thus, construed, there would be no bar to the winding up of the Ex-servicemen's Rehabilitation Association, registered under the Societies Registration Act, as an unregistered company, though its membership was more than that of 20 persons.¹⁷⁵ Save as stated above, an unregistered company includes any partnership, limited liability partnership, society, cooperative society, association or company consisting of more than seven members [at the time when the petition for winding up the partnership, association or company, as the case may be, is presented before the Tribunal].

A partnership firm which was not registered under the Partnership Act, 1932 was allowed to be wound up under this jurisdiction. The bar of Section 69, Partnership Act was not applicable because a petition for winding up is not a suit nor it is an action based on contract.¹⁷⁶

Such a company can be wound up under the Act and with some exceptions all the provisions of the Act relating to winding up are applicable.¹⁷⁷ Such a company can be wound up only by the Tribunal, not voluntarily.¹⁷⁸ The company may be wound up in the following circumstances:

- (a) if the company has been dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up;¹⁷⁹
- (b) if the company is unable to pay its debts;
- (c) if the Tribunal is of the opinion that it is just and equitable to wind up the company.¹⁸⁰ [S. 375(3)]

175. *Compture Timber Industries v. Miners Supper Ex. Servicemen's Rehabilitation Assn.*, (1988) 6 Comp Cas 733 (Kant). Under S. 665, English Act of 1985 it has been held that an international society consisting of States as members was not liable to be wound up as an unregistered company. *International Tin Council*, re, (1987) 1 All ER 891 (Ch D); followed in *Mahindra Watson & Co Ltd v International Tin Council*, 1989 Ch 253; (1988) 3 All ER 257 (CA).

181. *Suresh Balaji Smids v. Comptumine-Polyers India Ltd.* (2002) 114 Comp Cas 193 (Cal).

182. The jurisdiction of the company court [now Tribunal] to order the winding up of an unregistered company cannot be ousted either by the dissolution of the firm by the partners or under an arbitration clause. *MV Purushottampradana v. MV Ganesh Prasad*, (1999) 35 CLA 318 (Ker).

183. Proceedings under this section are not in the nature of a civil suit and, therefore, not affected by S. 34, Arbitration Act. See, *M. Virendra Ran v. M. Jaireshwar Ran*, (1988) 44 Comp Cas 167 (Kant). Where the dispute was about profits and capital of the firm, a petition for winding up was not allowed. The parties were already locked up in a civil suit for accounts and partition of family assets. *KN Crunna Ran v. K.L. Shanta Ran and Sons*, 2000 CLC 109, (2001) 103 Comp Cas 306 (Kant). Registered partnerships are not excluded from the definition of unregistered company. *Polaroid India Ltd v. New Nirmal Co (Nir 2)*, (2001) 105 Comp Cas 683; (2001) 2 Bom CR 657; petition for winding up is not a "suit" for the purposes of S. 69(2), Partnership Act, 1932 which bars the institution of a suit to enforce a right arising from a contract by a firm against any third party. *Suresh Balaji Smids v. Comptumine-Polyers India Ltd.* (2002) 114 Comp Cas 193 (Cal).

184. This clause will cover cases where the partnership firm has already been dissolved; clauses (b) and (c) apply to cases where the firm is subsisting. *Malini Ran v. Hindu Mandir*, (1997) 90 Comp Cas 174; (1998) 1 All LT 26.

185. *KN Esary Ravi v. K.H. Sham Ram and Sons*, 2000 CLC 408; (2001) 103 Comp Cas 306 (Kant). The dispute regarding profit between partners of a firm is not a sufficient ground for winding up under S. 375 of the Act.

The company is said to be unable to pay its debts in the following cases:

- (a) where a creditor to whom the company is indebted for more than Rs 1,00,000 has served a notice, but the company has not settled with him for three weeks;
- (b) if any case has been filed against a member for a debt due from the company or from the member in his character as member, and the company has not within 10 days settled the demand or procured the case to be stayed or indemnified the member against the sum due and the expenses etc;
- (c) if any execution or other process issued on a decree, or order of any court or Tribunal against the company or any member has been returned unsatisfied in whole or in part;
- (d) if it is otherwise proved to the satisfaction of the Tribunal that the company is unable to pay its debts. [S. 375(4)]

Winding up of foreign companies [S. 376].—Where a foreign company, having had a place of business in India, has ceased to carry on its business, it may be ordered to be wound up as an unregistered company even if it has already been dissolved in its mother country.¹⁸⁵

Provisions additional, not derogatory [S. 377].—Provisions relating to winding up of unregistered companies are to be additional to and not in derogation of the other provisions relating to winding up of companies by the Tribunal or Official Liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by the Tribunal or Official Liquidator in winding up of companies formed and registered under the Act. An unregistered company is not to be treated as a company under the Act except and to the extent provided in these applicable sections.

Section 378 makes it clear that nothing in these sections is to affect the operation of any enactment which provides for any partnership firm, limited liability partnership, society, cooperative society or association or company which is being wound up under these provisions. Reference to any provisions of the 1936 Act in the applicable enactment is to be construed reference corresponding provisions, if any, of the 2013 Act.

These provisions do not exclude the operation of the Partnership Act relating to dissolution even if the firm in question is likely to fall in the definition of an "unregistered company".¹⁸⁶

185. See *Rajan Nagindas Deolu v British Burma Petroleum Co Ltd*, (1972) 42 Comp Cas 397 (Bom); *JRC v Highland Engg* / W. 1975 513 202 1976 [BL 5]; *RBI v Bank of Credit & Commerce International (Oman) Ltd* (No 1), (1993) 28 Comp Cas 307 (Bom); *RBI v Bank of Credit & Commerce International (Oman) Ltd* (No 2), (1993) 28 Comp Cas 230 (Bom).

186. *Vasurkar v Shrivirav*, (1977) 4 SCC 9; (1977) 47 Comp Cas 666; *GP Gurajalal v MTR Associates*, (1984) 19 Comp Cas 359 (Kanty Naikveet Enterprises (P) Ltd v TN Ravalayugam), 1985, 38 Comp Cas 217 (Kant); *Durgadas Dalmajirubhadrab v Bhilai Aluminium Co*, (1984) 24 Comp Cas 727 (Cal). The provisions of the Act relating to stay or restraint of proceedings are not applicable and on the passing of a winding up order suits or legal proceedings become stayed unless permitted by the court [Ss. 372-73]. Stay of proceedings against the

Period of limitation [S. 358]

In computing the period of limitation for the purposes of the claims of a company in winding up by the Tribunal the period from the date of the petition to the date of the order of winding up (both inclusive) and the period of one year immediately following the winding up order is to be excluded. Thus, the company in winding up has the benefit of an additional period covering the time from the commencement of the proceeding to the date of the order and one more year from the date of the order.¹⁸⁷ Where leave of the court had to be obtained for filing the company's claim, the time lost in obtaining the leave, the period between the date of petition and winding up order was excluded and one more year was added.¹⁸⁸ The claim of the company should be alive at the time of the winding up petition.¹⁸⁹ If the company's claim is alive on the date of the petition for winding up, the right to sue accrues to the official liquidator on order of winding up. Three years time plus one more year would be available.¹⁹⁰ Where the company's debt had already become time-barred before presentation of the winding up petition it could not be revived under the section.¹⁹¹

Article 137 of the Limitation Act, 1963 applies to proceedings under Section 279. The period of limitation commences for the purposes of that section from the date of the winding up order or appointment of a provisional liquidator.¹⁹²

company does not extinguish the liability of individuals, neither does it operate as a stay of proceedings against them. *Venkata Rao v. Sri. Clementine Lyngdoh*, (1997) 38 Comp Cas 143 (Karn).

187. See, *Official Liquidator v. Makan* I.J., (1978) 48 Comp Cas 271 (P&H); *Official Liquidator v. Pashupathi Purji*, (1978) 48 Comp Cas 385 (Del); *Kazmaraka Steel & Wire Products v. Kalmour Rolling Shakers & Engg Works*, (2002) 1 SCC 76; (2002) 112 Comp Cas 606 (Karn). This provision has been brought in to enable the official liquidator to file a claim on behalf of the company, which was legally enforceable on the date of winding up, after excluding the period under S. 458-A so that the company or its shareholders would not suffer any loss. *Japash Paschad Chaitanya Mangal Bhandar Chitrakoot (P) Ltd.*, (1981) 51 Comp Cas 201 (Del); *Pashupathi Purji v. Official Liquidator*, (1994) 56 Comp Cas 86 (Del). The period of limitation depends upon the nature of the proceedings. *Official Liquidator v. Southern Steels (P) Ltd.* (1998) 63 Comp Cas 244 (Mad).

188. *Sudarsan Chitr (India) Ltd v. Hira Ghoshia*, (1992) 23 Comp Cas 381 (Ker); *Sudarsan Chitr (India) Ltd v. Madhava Navayuktika Chetna*, (1997) 38 Comp Cas 72; (1993) 5 Comp 17 96 (Ker).

189. *Kazmaraka Steel and Wire Products Ltd v. Kalmour Rolling Shakers and Engg Works (P) Ltd* (1992) 78 Comp Cas 96 (Karn). The starting point depends upon the right of the company and the nature of its claim to which is added the benefit of the section. *Bharat and Crompton Engg Ltd v. Official Liquidator*, AIR 1995 Mad 20; (1995) 82 Comp Cas 27.

190. *Glen Trawling and Chit Funds (India) (P) Ltd v. Zakir Hussain*, (1991) 71 Comp Cas 270 (Karn). Followed in *Glen Trawling and Chit Funds (India) (P) Ltd v. SH Lohani*, (1982) 52 Comp Cas 340 (Karn); *United Hire Purchase & Land Finance (P) Ltd v. Kartar Singh*, (1996) 87 Comp Cas 246 (P&H).

191. *Kazmaraka Steel & Wire Products v. Kalmour Rolling Shakers & Engg Works*, (2002) 1 SCC 76 (2002) 112 Comp Cas 606; *Shivamoni Steel Tubes Ltd v. Eversource Steel Plant*, (2006) 132 Comp Cas 684 (Karn).

192. See, *K.P. Vinayakar v. Whidom Jupiter Chile (P) Ltd*, AIR 1969 Ker 41; (1989) 65 Comp Cas 178. Winding up order passed on 20-12-1972 and a claim was filed on 28-2-1979 and the same was held to be within time. The period between the filing of the petition and the

Abuse of legal process

It is a settled principle of law that a petition for winding up cannot be permitted to be used as an ordinary mode of recovery of claims and counterclaims. The jurisdiction of the company court while entertaining and deciding the company petition was a limited one and the company court normally was reluctant to go into disputed questions of facts requiring detailed evidence and investigation and more so when such claims were based upon the alleged breach of terms of an agreement.

Information as to pending liquidations [S. 348]

If the winding up of a company is not completed within one year of commencement, the company liquidator has to prepare a statement in the prescribed form containing the prescribed particulars and duly audited by a person who is qualified to be a company auditor. The statement must be filed within two months of the expiry of the first year and thereafter each year. If the winding up is by the Tribunal, it should be filed in the Tribunal (a copy with the Registrar), and in the case of voluntary winding up, with the Registrar. Auditing of the statement is not necessary where the liquidator has to get his accounts audited under Section 294. In the case of the liquidation of a Government company, a copy has to be sent to the Central Government or States which are its members. Creditors and contributories are entitled to copies and inspection on prescribed fee. Any default by the company liquidator in complying with the requirements and any person falsely claiming himself to be a creditor or contributory, are punishable.

Any person stating himself to be a creditor or contributory in writing shall have the right of inspecting the documents and a person falsely claiming to be so is liable to punishment under Section 182, Indian Penal Code, 1860.

Company liquidator's miscellaneous powers [S. 343]

The powers specified below may be exercised by the company liquidator with the sanction of the Tribunal where the winding up is by the Tribunal or with the sanction of a special resolution where the winding up is voluntary:

1. The payment of a class or classes of creditors in full;
2. Compromise or arrangement with creditors, the word "creditors" for this purpose including persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages, against the company or whereby the company may be rendered liable;
3. Compromising any call, or liability to call, debt and any claim, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or alleged to subsist between the company and a contributory .

winding up order was excluded, and one more year was added. For other decisions to the same effect, see, *Maruti Jio v. Parry & Co Ltd*, (1969) 66 Comp Cas 319; (1989) 3 Comp LJ 384 (P&H) and *New Kemlin Routhways (P) Ltd v. KK Narai*, (1988) 3 Comp LJ 35; (1989) 66 Comp Cas 715 (Ker).

or alleged contributory or other debtor or person apprehending liability to the company; settling all questions relating to or affecting the assets of the company or its winding up; he may do so on such terms as may be mutually agreeable and take any security for the discharge of the call, debt, liability or claim and give a complete discharge for the same.

In the case of winding up by the Tribunal, the Supreme Court is empowered to make rules in respect of the exercise by the liquidator of any of the above powers and then the power shall be exercisable subject to such conditions, restrictions and limitations as may be specified in those rules.¹⁹³

In the case of voluntary winding up, the exercise of the above powers shall be subject to the control of the Tribunal and for this purpose any contributory or creditor may apply to the Tribunal.¹⁹⁴

This section will not authorise any compromise to be imposed upon any unwilling creditors which is quite possible under Section 230.¹⁹⁵ The sanction of a special resolution or that of the Tribunal is necessary for the sanctity of the transaction.¹⁹⁶ The power of the liquidator is very wide. The Tribunal will act with great caution before putting upon a transaction the stamp of its approval.¹⁹⁷

Statement that company is in liquidation [S. 344]

When a company is in winding up either voluntarily or by the Tribunal, all its invoices, orders for goods or business letters shall contain a statement that the company is being wound up, failing which the defaulting officer, company liquidator, receiver or manager is liable to a fine not less than Rs 50,000 extending up to Rs 5,00,000.

Books and papers to be evidence [S. 345]

Where a company is being wound up, all the books and papers of the company shall, as between the contributors of the company, be *prima facie* evidence of the truth of all matters purporting to be stated in them.

A *prima facie* evidence creates only a presumption of truth, and thereby shifts the burden to the contributory to disprove the inference of truth.¹⁹⁸

Inspection of books and papers [S. 346]

Subject to the restrictions contained in the applicable Rules, after an order of winding up by the Tribunal, creditors and contributors have the right to inspect the books and papers of the company. The Tribunal may allow inspection if the right is not going to be abused¹⁹⁹ and even to a person who

193. S. 546(1-A).

194. S. 343.

195. *Albert Life Assurance Co. v. (1871) LR 6 Ch App 381.*

196. *Liquidator v. Celmid Singh*, ILR (1921) 4 Lah 238, but compare with *Cyclambers' Coop Supply Co. v. others*, (1908) 1 KB 477 (1X).

197. *Bank of Hindustan, China & Jayee Ltd. v. Eastern Financial Assn. Ltd.*, (1909) 20 ILM 1A 15 (PC).

198. *Great Northern Salt & Chemical Works, re*, (1889) LR 49 Ch D 472; *Borengas Oil Refining Co. v. (1887) LR 36 Ch D 702; Keser Singh v. Official Liquidators*, AIR 1937 Lah 61.

199. *People's Bank of Northern India, re*, AIR 1937 Lah 82.

is facing misfeasance proceedings.²⁰⁰ A provision for secrecy in the Articles may not prevent inspection²⁰¹ except where the winding up is for purposes of reconstruction.²⁰²

Nothing contained in the section is to exclude or restrict any rights conferred by any law on (a) the Central Government or a State Government; (b) its any authority or officer; or (c) any person acting under the authority of any such Government or any such authority or officer.

"Book and paper and book or paper of a company include books of account, deeds, vouchers, writings, documents, minutes, and registers maintained on paper or in electronic form." [S. 2(12)]

Enforcement of duty of company liquidator to make returns, etc

[S. 353]

The company liquidator has to deliver or file some documents in the performance of his functions and also to give notices, etc. This section provides the procedure consequent upon a default. It says that if the company liquidator does not make good the default within 14 days after the service on him of a notice, the Tribunal may make an order directing the company liquidator to make good the default within such time as may be specified in the order. An application for this purpose may be made by any creditor or contributory or the Registrar. The order of the Tribunal may provide that all costs of and incidental to the application shall be borne by the company liquidator.

Meetings to ascertain wishes of creditors or contributories [S. 354]

This section empowers the Tribunal in all matters relating to winding up to have regard to the wishes of creditors or contributories and for this purpose to call their meetings and appoint a person as the chairman of a meeting. The Tribunal may give due weight to the value of a creditor's debt, and the number of votes that may be cast by each contributory.

Courts or persons before whom affidavits may be sworn [S. 355]

Affidavits required by the Act may be sworn in India before any court or the Tribunal, judge or person lawfully authorised to take and receive affidavits and, in any other country, either before any court, judge or person lawfully authorised to take or receive affidavits in that country or before any Indian diplomatic or consular officer. All courts, judges, justices, commissioners and person acting judicially in India are required to take judicial notice of the seal, stamp or signature, of the functionaries described above in reference to affidavits or other documents to be used for the purposes of the Companies Act.²⁰³

200. *Sitamini Reddy v Bellary Spg & Wey Co (P) Ltd.* (1985) 57 Comp Cas 626: (1985) 2 Comp L 205 (Karn).

201. *London & Yorkshire Bank Ltd v Couper*, (1885) 15 QBD 7 (DC).

202. *Glamorganshire Banking Co. re*, (1884) T.R. 28 Ch D 620.

203. *KK Ray (P) Ltd, re*, (1967) 1 Comp L 216: (1967) 37 Comp Cas 737 (Cal); an affidavit sworn before a notary in a foreign country accepted though it would not have been evidence under Indian laws.

COMPANIES AUTHORISED TO BE REGISTERED**Companies capable of being registered [S. 366]**

Following types of company have been recognised for the purposes of registration and re-registration under the Act:

For this purpose the word "company" includes any partnership firm, limited liability partnership, cooperative society, or any other business entity formed under any other law for the time being in force which applies for registration under the present Act. Any company formed before or after commencement of the present Act in pursuance of any Act of Parliament (other than the Companies Act) or of any other law for the time being in force, or being otherwise duly constituted according to law, and consisting of seven or more members, can apply for registration as a type of company allowed under the Act. Such registration is not to be held invalid only for the reason that formation of the company has been made for the purpose of winding it up.

A company registered under any of the preceding Companies Act cannot be registered under this section. A company already registered with limited liability of its members cannot be registered as a guarantee company or unlimited company. A company can be registered under this section as a company limited by shares only if it has a permanent paid-up or nominal share capital of fixed amount divided into shares of fixed amount or held any transferable stock or divided and held in one way and partly in the other and formed on the principle of having for its members the holders of those shares or that stock, and no other persons. A company is not allowed to be registered under this section unless it has obtained the assent of a meeting of a majority of its members who are present in person or by proxy. Where the company is with limited liability, the consent of three-fourth of its members has to be taken. Where the company is to be limited by guarantee, the requisite guarantee undertaking has to be taken from its members so as comply with the requirements of a guarantee company.

In computing the majority required for the above purposes, when a poll is demanded, regard is to be had to the number of votes to which each member is entitled according to regulations of the company.

Vesting of property [S. 368]

This section provides that on registration under this part, all property, movable and immovable (including actionable claims) belonging to the company at the date of its registration pass to and vest in the company. A partnership was converted into a private limited company. One of the effects was that the property of the partnership became vested in the company on registration. Copyrights of the partnership also became vested in the company. No separate transfer was necessary for this purpose. An assignment deed was not necessary.²⁰⁴

²⁰⁴ LKS Gold Prince v LKS Gold House (P) Ltd, (2004) 122 Com Cas 896 (Mad).

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®; along with updates, articles, videos, blogs and a host of different resources.



The following cases from this chapter are available through EBC Explorer™:

- *Birla Corpus Ltd v Minalpur Prejud Shurria*, 2014 SCC OnLine Cal 12448: (2014) 185 Comp Cas 43
- *Gizware Marine Industries Ltd. v. I*, 2015 SCC OnLine Bom 6094: (2015) 192 Comp Cas 204 (Bom)
- *Kingfisher Airlines Ltd v SRI*, 2013 SCC OnLine Kar 8894: (2014) 186 Comp Cas 239
- *Mining and Allied Machinery Corps Ltd (in liquidation) v Official Liquidator*, 2014 SCC OnLine Cal 21566: (2015) 189 Comp Cas 84
- *Nandini Dinesh Shinde v NGLEP Ltd*, 2016 SCC OnLine Kar 8052: (2016) 198 Comp Cas 299
- *New Swadeshi Mills of Ahmedabad Ltd. re*, (1985) 58 Comp Cas 86 (Guj)
- *Official Liquidator v Mayanlal Hirachand Shuk*, (1980) 50 Comp Cas 762 (Kant)
- *Official Liquidator v P A Tendolkar*, (1979) 1 SCC 602: (1979) 43 Comp Cas 382
- *Pankaj Mehra v State of Maharashtra*, (2000) 2 SCC 756: (2000) 100 Comp Cas 417
- *Seth Jassa Ram Intekhandi v Om Narain Tamkha*, AIR 1967 SC 1162: (1967) 37 Comp Cas 204





Chapter 23

Miscellaneous

REGISTRATION OFFICES, OFFICERS AND FEES

Registration offices [S. 396]

The Central Government can open registration offices at places it thinks fit. The Government may appoint Registrars, Additional, Joint Deputy and Assistant Registrars and may make regulations as to their duties, fix their salaries; authorise making of seals for authentication of documents.

The Central Government may direct seal or seals to be prepared for authentication of documents required for or connected with, registration of companies.

Inspection, production, and evidence of documents kept by the Registrar [S. 399]

The section confers upon the members of the public the right of inspection by electronic means of documents filed with the Registrar. The inspection shall be in accordance with the rules. The right extends to any documents kept by the Registrar, being documents filed or registered by him in pursuance of the Companies Act or making a record of any fact required or authorised to be recorded or registered in pursuance of the Act. The right of inspection can be exercised on payment of prescribed fees. [S. 399(1)]

The Registrar can also be asked on payment of prescribed fee to give a certified copy of a company's certificate of incorporation or a copy or extract of any other document or any part thereof. [S. 399(1)(b)]

The prospectus of a company and other papers and documents filed along with it can be inspected within 14 days of the date of the publication of the prospectus and at other times with the permission of the Central Government. Documents in connection with the prospectus which have to be registered under Section 88 can be inspected within 14 days of the date of publication and at other times with the permission of the Central Government.

A process for production of any document by the Registrar has to issue from any court or Tribunal. The process should bear a statement on its face that it is issued with the leave of the court or Tribunal.

Certified copies issued by the Registrar are admissible in evidence in all legal proceedings as of equal validity with the original document.

Documents which have to be filed or registered within a fixed period of time, may be registered after the expiry of that period on payment of additional prescribed fees.

The Act permits filing of documents in micro films, facsimile copies of documents, computer printouts and documents on computer media.

The Registrar is an administrative officer and not a court or an adjudicating Authority. He is bound to follow guidelines and instructions provided by Government circulars. Where two civil factions in a company filed two different returns, it was the Registrar's duty to take both of them to the company's file in accordance with Government guidelines and not to accept one and reject the other.¹

Application of Information Technology Act [S. 402]

All the provisions of the Information Technology Act, 2000 relating to electronic records, including the manner in which the electronic records are to be filed are to apply to records in electronic form, save to the extent of any inconsistency with the Companies Act.

The Central Government has been authorised to make rules for implementing the facility of filing requisite documents in electronic form.

Filing and inspection through electronic form [S. 398]

The Central Government has been authorised to make Rules for bringing about the facility of filing requisite documents in an electronic form and also that of inspection of document in electronic form. Sections 398, 401, and 402, have been inserted in the Act, 2013 for this purpose. Section 398 runs as follows:

398. (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 (21 of 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

*Provisions
relating to filing
of applications,
documents,
inspection, etc., in
electronic form*



CASE PILOT

1. *S.R. Bhattacharya v Union of India*, 11998(91) Comp Cas 37 (Del).

- 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, prospectus, 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 pecuniary penalties or demands or payment of fees or contravention of any of the provisions of this Act or punishment therefor.

(2) The Central Government may, by notification, frame a scheme to carry out the provisions of sub-section (1) through the electronic form.

Power of Central Government to direct companies to furnish information or statistics [S. 405]

The Central Government can require companies generally, or any class of them or any company to furnish information or statistics on any matter in connection with its constitution or working and within a time that may be specified in the order. Such an order has to be published in the Official Gazette. It may be addressed to companies generally, or a class of them. The date of publication is the date of demand. When the order is on an individual company, it should be served on the company in the manner laid down in Section 20. For ascertaining the correctness and completeness of the particulars furnished, the Government may demand more information and require the production of relevant records or documents. The Government may even constitute an inquiry by a named person. There is a punishment for submitting wrong or incomplete information. An information can also be demanded from an officer of the company but he cannot be punished unless the court is convinced that he was in a position to comply with the order. The provision is applicable to foreign companies carrying on business in India.

Fee for filing, etc [S. 403]

Any document, required to be submitted, filed, registered or recorded, or any fact or information required or authorised to be registered under this Act, is to be submitted, etc, within the time prescribed by the relevant

provision on payment of such fee as may be prescribed. In case of delay, it can also be submitted on payment of additional fee.²

Section 404 provides that all such fee as is collected under the Act shall be paid into the public account of India in the Reserve Bank.

NATIONAL COMPANY LAW TRIBUNAL AND APPELLATE TRIBUNAL

Section 407 is a list of definitions.

Definitions

407. In this Chapter, unless the context otherwise requires:

- (i) "Chairperson" means the Chairperson of the Appellate Tribunal;
- (ii) "Judicial Member" means a member of the Tribunal or the Appellate Tribunal appointed as such and includes the President or the Chairperson, as the case may be;
- (iii) "Member" means a member, whether judicial or technical of the Tribunal or the Appellate Tribunal and includes the President or the Chairperson, as the case may be;
- (iv) "President" means the President of the Tribunal;
- (v) "Technical Member" means a member of the Tribunal or the Appellate Tribunal appointed as such.

Court [S. 2(29)]

Under this provision "court" means: (i) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which any jurisdiction has been conferred on any District Court or District Courts subordinate to the High Court under sub-clause (ii); (ii) the District Court, in cases where the Central Government has by notification empowered any District Court to exercise all or any of the jurisdictions conferred upon the High Court within the scope of its jurisdiction in respect of a company whose registered office is situate in the District; (iii) the Court of Session having jurisdiction to try any offence under the Act or under any previous company law; (iv) any Special Court established under Section 435 (speedy trials); (v) any Metropolitan Magistrate or Judicial Magistrate of the First Class having jurisdiction to try any offence under the present or previous Act.

Constitution of National Company Law Tribunal [S. 408]

The Central Government has to establish a Tribunal to be known as the National Company Law Tribunal. It has to consist of a President and such number of judicial and technical members as may be deemed necessary. They are to exercise and discharge such powers and functions as may be conferred on the Tribunal. Section 409 talks of qualifications. The President has to be a person who is or has been a judge of a High Court for five years.

2. When a document filed by a company is defective, the Registrar is empowered by Regulation 17 of the Companies Regulations, 1956 to bring the defect to the notice of the company giving it 15 days' time to rectify the defect. If the company still fails to do so, the Registrar will take the defective document on record without prejudice to his powers to take action. Press Note No 12/92 of 12-12-1992.

A judicial member has to fulfil the qualification of a High Court Judge, or District Judge for five years or an advocate of 10 years' standing. A technical member has to fulfil any one of the following: (a) a member for 15 years of the Indian Corporate Law Service, Indian Legal Service, out of which at least three years to be in the pay scale of Joint Secretary to the Government of India or equivalent or above; (b) chartered accountant in practice for 15 years; (c) cost accountant in practice for 15 years; (d) company secretary of 15 years' practice; (e) a person of proven ability, integrity, having special knowledge and experience of 15 years in law, industrial finance, industrial management or administration, industrial reconstruction, investment, accountancy, labour matters, or such other disciplines related to management, conduct of affairs, revival, rehabilitation and winding up of companies; (f) five years' standing as presiding officer of a labour court, Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947.

Constitution of Appellate Tribunal [S. 410]

The Central Government has to establish an Appellate Tribunal to be known as the Company Law Appellate Tribunal. It has to consist of a chairperson and judicial and technical members not exceeding 11. It has to hear appeals against the orders of the Tribunal. Section 411 provides for qualifications. The Chairman has to be a judge of the Supreme Court or Chief Justice of a High Court. A judicial member has to be a person who is sitting or retired judge of High Court or Judicial Member of the Tribunal for five years. A technical member has to possess the same qualification as is stated in the constitution of the Tribunal.

Selection of members [S. 412]

The President of the Tribunal and chairperson and judicial members of the Appellate Tribunal have to be appointed with consultation of the Chief Justice of India. The members of the Tribunal and technical members of the Appellate Tribunal have to be appointed on the recommendation of a selection committee consisting of: (a) Chief Justice of India or his nominee—Chairperson; (b) Senior Judge of the Supreme Court, or Chief Justice of a High Court—members; (c) Secretary in the Ministry of Corporate Affairs—member; (d) Secretary in the Ministry of Law and Justice—member; (e) Secretary in the Department of Financial Services in the Ministry of Finance—member.

Term of office [S. 413]

The President and every member of the Tribunal is to hold office for a term of five years from the date on which he enters upon his office. He shall be eligible for re-appointment for another term of five years. The age of retirement of the President is 67 years and that of members 65 years. Fifty years is the eligible age for appointment. They are also eligible for re-appointment. Chairperson is to hold office up to 20 years and members 67 years.

Salary, terms, etc [S. 414]

Salary, terms and conditions of service have to be prescribed under the rules. After appointment, the terms etc cannot be varied to the prejudice of appointees.

In the case of a casual vacancy in the office of the President or chairperson, or in his inability to act, the senior most member is to act until new appointment. [S. 415] Resignation has to be submitted to the Central Government. After resignation, one has to continue to work up to three months or until the new appointee takes over. [S. 416]

Removal of members [S. 417]

The Central Government may carry out the removal of any of the incumbents after consultation with Chief Justice of India in the following cases: (a) has been adjudged an insolvent; (b) has been convicted for an offence which, in the opinion of the Central Government, involves moral turpitude; (c) has become physically or mentally incapable of acting as such President, etc; (d) has acquired such financial or other interest as is likely to affect prejudicially his functions as such incumbent; (e) has so abused his position as to render his continuance in office prejudicial to public interest. Excepting for the ground (i), removal on any other ground would require reasonable opportunity of being heard.

A removal can also be effected by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a judge of the Supreme Court. The incumbent in question must be informed of the charges against him and given a reasonable opportunity of being heard. The incumbent may be suspended during the period of inquiry.

Section 418 deals with staff of the Appellate Tribunal and Tribunal. Section 419 provides for Benches of Tribunal.

418. (1) The Central Government shall, in consultation with the Tribunal and the Appellate Tribunal, provide the Tribunal and the Appellate Tribunal, as the case may be, with such officers and other employees as may be necessary for the exercise of the powers and discharge of the functions of the Tribunal and the Appellate Tribunal.

(2) The officers and other employees of the Tribunal and the Appellate Tribunal shall discharge their functions under the general superintendence and control of the President, or as the case may be, the Chairperson, or any other Member to whom powers for exercising such superintendence and control are delegated by him.

(3) The salaries and allowances and other conditions of service of the officers and other employees of the Tribunal and the Appellate Tribunal shall be such as may be prescribed.

419. (1) There shall be constituted such number of Benches of the Tribunal, as may, by notification, be specified by the Central Government.

(2) The Principal Bench of the Tribunal shall be at New Delhi which shall be presided over by the President of the Tribunal.

(3) The powers of the Tribunal shall be exercisable by Benches consisting of two Members out of whom one shall be a Judicial Member and the other shall be a Technical Member.

Provided that it shall be competent for the Members of the Tribunal authorised in this behalf to function as a Bench consisting of a single judicial Member and exercise the powers of the Tribunal in respect of such class of cases or such matters pertaining to such class of cases, as the President may, by general or special order, specify:

Provided further that if at any stage of the hearing of any such case or matter, it appears to the Member that the case or matter is of such a nature that it might be heard by a Bench consisting of two Members, the case or matter may be transferred by the President, or, as the case may be, referred to him for transfer, to such Bench as the President may deem fit.

(4) The Central Government shall, by notification, establish such number of benches of the Tribunal, as it may consider necessary, to exercise the jurisdiction, powers and authority of the Adjudicating Authority conferred on such Tribunal by or under Part II of the Insolvency and Bankruptcy Code, 2016.

(5) If the Members of a Bench differ in opinion on any point or points, it shall be decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President for hearing on such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it.

Orders of Tribunal [S. 420]

The Tribunal has to give reasonable opportunity to the parties of being heard. It may then pass appropriate orders. Within two years from the date of the order the Tribunal may rectify mistakes in its orders. No amendment can be made to an order against which an appeal has been preferred. The Tribunal has to send a copy of its order to the parties concerned.

Appeal from orders of Tribunal [S. 421]

Any person aggrieved of an order of the Tribunal may appeal to the Appellate Tribunal. Consent orders cannot be appealed against. An appeal has to be filed within 45 days from the date a copy of the order is made available to the person aggrieved. It has to be in prescribed form and on payment of prescribed fees. A further 45 days may be allowed if there is a sufficient cause to show that the appellant was prevented from filing the appeal within time. Parties to the appeal have to be given reasonable opportunity of being heard. The Appellate Tribunal may then pass such orders as it thinks fit confirming, modifying or setting aside the order appealed against. A copy of every order has to be sent to parties to the appeal.

Expeditious disposal by Tribunal and Appellate Tribunal [S. 422]

Every application has to be dealt with and disposed off as expeditiously as possible. Every effort should be made to dispose off within three months. Where such disposal is not made, reasons for it should be recorded in writing. The President or the Chairman may after looking at the reasons, allow a further period for disposal not exceeding 90 days.

Appeals to Supreme Court [S. 423]

Any person aggrieved of an order of the Appellate Tribunal may file an appeal to the Supreme Court within 60 days from the date of receipt of the order. An appeal lies only on a question of law arising out of the order. The period may be extended by another set of 60 days on a sufficient cause.

Procedure before Tribunal and Appellate Tribunal [S. 424]

These Tribunals are not bound by the procedure laid down by the Civil Procedure Code, 1908. They are to be guided by the principle of natural justice. They have also the power to regulate their own procedure. In respect of the following matters they have the powers of civil court as vested by the Civil Procedure Code: (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavits; (d) subject to the provisions of Sections 123 and 124, Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office; (e) issuing commissions for the examination of witnesses or documents; (f) dismissing a representation for default or deciding it *ex parte*; (g) setting aside any order of dismissal of any representation for default or any order passed by it *ex parte*; and (h) any other matter which may be prescribed.

Orders of Tribunals are enforceable in the manner of a court decree. In the case of a company, the order will be sent for enforcement to the court in whose local limits the office of the company is situated. In the case of individual order has to be sent to the court in whose local limits the individual resides, or carries on business or professionally works for gain.

Proceedings before them are deemed to be judicial proceedings within the meaning of Sections 193 and 223 for the purposes of Section 194 CrPC. Tribunals are deemed to be civil courts for the purposes of Section 195 and Chapter 26 CrPC, 1973. The Tribunals have the power to punish those who commit contempt of Tribunals. [S. 425] Under Section 426 they have a limited power of delegation of their powers. By virtue of the provision of Section 427 the President, members and officers are deemed to be public servants. They are not to be held liable for any action taken in good faith. [S. 428] Section 429 confers upon them the power to seek assistance of Chief Metropolitan Magistrates. Section 430 provides that to the extent of powers vested in the Tribunals, no civil court is to have any jurisdiction. Section 431 provides that any vacancy in the Tribunals is not to invalidate any acts or proceedings. Section 432 gives the parties the right to legal representation. As far as limitation is concerned, Section 433 provides that the provisions of the Limitation Act, 1963 are, as far as may be, to apply to proceedings or appeals before the Tribunals.

Jurisdiction of civil courts [S. 430]

Jurisdiction of civil courts and its scope is not ousted unless it is barred by a statute, impliedly or expressly. A suit was instituted alleging irregularities

in the administration of a company. An injunction was sought against the directors from transferring company's property. Some questions raised before the court involved civil rights. It was held that the civil court had jurisdiction to that extent.⁴

Section 430 provides that no civil court is to have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force. No injunction is to be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force by the Tribunal or Appellate Tribunal.

SPECIAL COURTS

Establishment of Special Courts [S. 435]

The Central Government may, for the purposes of providing speedy trial of offences under the Act, establish or designate as many Special Courts as may be necessary. Such court has to consist of a Single Judge. He has to be appointed by the Central Government with concurrence of the High Court Chief Justice within whose jurisdiction the judge to be appointed would be working. The qualification for appointment is holding the office of a Sessions Judge or Additional Sessions Judge.

Offences triable by Special Courts [S. 436].—All offences under the Act are to be triable only by the Special Court established for the area in which the registered office of the company is situated. If there are more than one court in the area, the jurisdiction will be of the court as may be designated by the High Court. Where the accused person is forwarded to a Magistrate under Section 167(2)(2A) CrPC, the Magistrate may order his detention for 15 days in the whole if he is a Judicial Magistrate and seven days if Executive Magistrate. Even before completion of such detention period, the Magistrate may forward him to the Special Court. The same magisterial powers can be exercised by the Special Court. Cognizance can be taken by Special Court on the basis of police report or complaint without being committed for trial. The Special Court may try in a summary way any offence which is punishable with imprisonment for a term not exceeding three years, but sentence can be passed only up to one year. A regular full trial may be ordered at any subsequent stage if it appears to be necessary.

The amendment of Section 435 read with Section 436 provides that Special Courts may now try offences punishable with imprisonment for two years or more. All other offences are to be tried by a Metropolitan Magistrate or a Judicial Magistrate of the First Class.

Appeal and revision [S. 437]. The High Court is to exercise such powers in accordance with the provisions of Chapters 29 and 30 CrPC.

4. *Kishan K Shah v Dilipkumar K Shah*, 2013 SCC OnLine Guj 2001; (2013) 185 Congr Cas 108.

Application of CrPC.—Criminal Procedure Code is to apply to proceedings before Special Courts, which are to be deemed as Courts of Session. The persons conducting the proceedings are to be regarded as public prosecutors [S. 438].

Mediation and conciliation panel [S. 442]

The Central Government has to maintain a panel of experts to be called as the Mediation and Conciliation Panel. It has to consist of prescribed number of experts and of prescribed qualifications. Its function is to bring about mediation between parties during pendency of any proceeding before the Central Government or Tribunals. Any party to a proceeding may apply to the Central Government or Tribunals in prescribed form, on payment of prescribed fee, for referring the matter to the panel. The matter may then be referred to one or more experts from the panel. The Central Government or the concerned Tribunal can itself *sua iuris* refer a matter to such number of experts as it may consider necessary. The fee and other terms and conditions of the panel of experts are to be prescribed. The experts have to follow the prescribed procedure and dispose off the matter within three months. They have to forward their recommendation to the referring Tribunal.

Appointment of company prosecutors [S. 443]

The Central Government has to appoint company prosecutors for conduct of prosecutions arising out of the Act. Persons so appointed are to have all the powers and privileges conferred by the Code on Public Prosecutors appointed under Section 24 CrPC.

Appeal against acquittal [S. 444]

The Central Government may direct any company prosecutor or authorise any other person either by name or by virtue of his office, to present an appeal from an order of acquittal passed by any court, other than a High Court. An appeal so presented is deemed to have been validly presented to the appellate court.

Compensation for accusation without reasonable cause [S. 445]

The provisions of Section 250 CrPC are to apply *mutatis mutandis* to compensation for accusation without reasonable cause before the Special Court or the Court of Session.

Application of fines [S. 446]

The court imposing any fine may direct that the whole or any part of it is to be applied towards payment of costs of proceedings or towards payment of a reward to the person on whose information the proceedings were instituted.

MISCELLANEOUS

Punishment for fraud [S. 447]

Any person who is found guilty of fraud is to be punishable with imprisonment for a term which is not to be less than six months but which may extend to 10 years and is also to be liable to fine which is not to be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud. Where the fraud in question involves public interest, the term of imprisonment is not to be less than three years. The term fraud in relation to the affairs of a company or any body corporate includes any act, omission, concealment of any fact, or abuse of position committed by any person or any other person with connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss. Wrongful gain means the gain by unlawful means of property to which the person gaining is not lawfully entitled. Wrongful loss means the loss by unlawful means of property to which the person losing is legally entitled.

Section 448 provides punishment for false statements; Section 449, punishment for false evidence; Section 450, punishment where no specific penalty or punishment is provided; Section 451, punishment for repeated default; Section 452, punishment for wrongful withholding of property (considered elsewhere); Section 453, punishment for improper use of "limited" or "private limited".

Adjudication of penalties [S. 454]

The Central Government may appoint the prescribed number of officers of the Central Government, not below the rank of Registrar, as adjudicating officers for adjudging penalties under the Act. The adjudicating officer may by an order impose penalty on the company and its defaulting officer stating non-compliance or default under the Act. He has to give a reasonable opportunity to be heard to the company or the person in default. Any person aggrieved of such order may appeal to the Regional Director within 60 days of receiving the order. Regional Director has to hear parties and give his decision confirming, modifying or setting aside the order. Failure to pay the penalty amount on the part of the company makes it punishable with fine of not less than Rs 25,000 but extending to Rs 5,00,000. An officer in such default becomes punishable with imprisonment up to six months or with fine of not less than Rs 25,000 but extending up to Rs 1,00,000, or both.

Dormant company [S. 455]

Where a company formed and registered under the Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in the prescribed manner for obtaining the status of a dormant company. An "inactive company" means a company

which has not been carrying on any business or operation, or has not made significant accounting transaction during the last two financial years, or has not filed any financial statements and annual returns in that period. "Significant accounting transaction" means any transaction other than the following: (i) payment of fee to the Registrar; (ii) payments made to fulfil requirements of the Act or any other law; (iii) allotment of shares to fulfil the statutory requirement; (iv) payments for maintenance of its office and records.

The Registrar may consider the position of the company and allow it the status of a dormant company by issuing a certificate to that effect. The Registrar has to maintain a register of dormant companies. A company which has not filed financial statements or annual returns for two years, the Registrar has to issue a notice and enter the name of the company in the register of dormant companies. Such company is required to have the prescribed minimum number of directors, file prescribed documents and pay the annual prescribed fee to retain its dormant status in the register. It may become an active company on an application accompanied by prescribed documents and fees. The Registrar has to strike off the name of the dormant company from the register of dormant companies which fail to comply with requirements of the section.

OFFENCES

Cognizance of offences under the Act [S. 439]

Any violations of the Act which constitute an offence are cognizable only on a complaint by the Registrar, Government or a shareholder of the company. The only exceptions specified in the section are a prosecution of delinquent officers and members of a company under Section 341 or that by SEBI under Section 212. In such cases a complaint can be filed by any person who is interested in the winding up of the company. The word "shareholder" would include a person who has purchased the shares of a company and has applied to the company for registering him as a shareholder.⁵ SEBI can file a complaint about transfer of securities and non-payment of dividend.

The bar of the section does not apply to a prosecution by the company of any of its officers. For the purposes of this provision, a liquidator of a company shall not be deemed to be an officer of the company.

Where a complaint is made by the Registrar or by a representative of the Central Government, then, notwithstanding anything contained in the Criminal Procedure Code, the personal attendance of the complainant in the court shall not be necessary, unless the court for reasons to be recorded in writing requires personal attendance.

⁵ *Federal Bank Ltd v Sunita Devi Rath*, (1997) 88 Comp Cas 323 (Raj). A complainant, who did not aver in his complaint that he was a shareholder until later conceived that an order of CLB in his favour was stayed by the High Court, had to face dismissal. *V.M. Mod. v State of Gujarat*, (1997) 86 Comp Cas 671; (1997) 3 Comp LJ 244 (Guj); *SC Bhupinder v PC Wadhwan*, (1998) 30 CLA 135 (P&H).

A complaint was allowed to be filed at the place of the transaction. The court was of the view that trade in securities was a country-wide phenomenon. The policy behind the penalty provisions would be defeated if a complaint against a company could lie only at the place of its registered office.⁶

Composition of certain offences [S. 441]

The provision became for compounding necessary because the concept of an "officer who is in default" was so defined that a director who is there only ceremonially and who may have no control or grip over the affairs of or even contact with, the company, is also likely to be covered. Such a person may have to pay the price for being merely a director though he may not be responsible for the default in question. Now the facility of compounding an offence has been given so that anyone can get rid of the default by paying composition money and save himself from the torture of a punishment by way of fine.⁷ The provision does not apply to offences which are punishable with imprisonment only or with imprisonment and fine. Where the amount of fine does not exceed Rs. 3,00,000 it can be compounded by the Regional Director and, in other cases, by the Central Government. Quite obviously, the compromised amount of fine cannot exceed the amount which would have been otherwise leviable. Where the default has been made good by paying additional fee under Section 403, the amount of such fee can go towards reduction of the fine money which the compromise may bring about.

Where an offence has been repeated within a period of three years from the date of the last similar offence, it cannot be compromised. Where an offence was compounded and three years thereafter has been repeated, the repeated offence should be taken to be the first offence.

Regional Directors have to work under the supervision and control of the Central Government. An application for composition has to be presented to the Registrar who will forward it to the Regional Director or the Central Government, as the case may be. The fact that an offence has been compounded must be brought to the notice of the Registrar within seven days whether the compounding was before or after the institution of any prosecution. After the compounding of an offence, prosecution proceedings for

6. *Rashmi Laboratories Ltd v Indra Kala*, (1997) 84 Comp Cas 348 (Raj).

7. Failure to deliver debenture certificates within the time delimited by S. 113 or even within the extended time has been held to be a compoundable offence. *Vikram Tyres Ltd. v. (1995) 17 CLA 100*. (1995) 83 Comp Cas 210 (CLB); it was compounded on payment of Rs. 5000. *JJK Industries Ltd v Amritpal V/sunami*, (2012) 3 SCC 755; AIR 2012 SC 1079; it could not be held that sanctioning of a compromise scheme under S. 391 amounts automatically to compounding of the offence under S. 138, KI Act. It would require consent of the complainant. *VI-S Finance Ltd v Union of India*, (2013) 6 SCC 274 (2013) 128 Comp Cas 348; prior permission of criminal court not necessary before compounding. CLB could proceed to compound a compoundable offence either before or after institution of prosecution whereas a criminal court can exercise only after institution of prosecution. The case was on the point whether the offence of default under S. 211 of the 1966 Act corresponding to S. 129 of the 2012 Act was compoundable. The court found it to be compoundable because imprisonment was not compulsory. Same is the position under S. 129(7).

the same cannot be launched. Where the compounding was done after a prosecution had already been taken up, the composition should be brought to the notice of the Registrar who will inform the court in which the prosecution is pending and thereafter the court shall discharge the company or the officer in question.

While dealing with an application for compounding an offence which arises out of default in filing documents etc. with the Registrar, the defaulting company or officer may be ordered to file the documents on payment of additional fee leviable under Section 403 within a specified time.⁸ An employee of the company or officer so ordered will have to suffer a penalty for his default in complying with the order which may extend to an imprisonment for six months or fine up to Rs 1,00,000 or with both.

An offence which is punishable with fine or imprisonment or both can be compounded only with the permission of the court in accordance with the provisions of the Criminal Procedure Code. An offence which is punishable with imprisonment only or with imprisonment and fine cannot be compounded.⁹

Penalty for false statements [S. 448]

Many statements have to be prepared under the Act relating to the affairs of the company. The section requires that statements which are required by the Companies Act to be prepared should not carry any particular which is false in a material respect. Hence, if any person makes a statement which he knows to be false in any material particular or which omits any particular knowing it to be material and, if no punishment is otherwise provided in the Act in that respect, he is punishable under Section 447. A prosecution under this section for the offence of fabrication of a document coming under Section 39 was allowed.¹⁰ The court said that the period of limitation for a complaint begins from the date on which the complainant acquired knowledge of the commission of the offence and not the date on which the documents (annual accounts in this case) were filed in the office of the Registrar.¹¹

8. An application for compounding was rejected where the company had not made good the default yet. *General Produce Co Ltd. re.* (1994) 31 Comp Cas 570 (CLB).

9. See, Circular No 5/93 of 28-4-1993 issued by DCA as to matters connected with this power. A default of technical nature (misdescription of a head or account; deposits being described as secured loans) was allowed to be compounded at a nominal fine of Rs 100 for the company and Rs 10 for secretary and each director. The compounding power of the CLB was not affected by the pending appeal in the High Court for quashing of proceedings. *Usha India Ltd. re.* (1996) 38 Comp Cas 581 (CLB). For procedural guidance see, *Rehme Industries Ltd. re.* (1997) 39 Comp Cas 62. Permission of the court under the Criminal Procedure Code is not required for compounding under the section. *Hoffland Finance Ltd. re.* (1997) 50 Comp Cas 38. (1997) 3 Comp L J 341 (CLB). *Rivish Polymers Ltd. re.* 2004 CLC 1628 (CLB) prosecution after eight years, compounding allowed because there was no chance of adverse consequences in any way whatsoever.

10. *G Kuri Kumar & Sons v. Muni Krishnam*, (2005) 127 Comp Cas 683 (A.P).

11. *Thomas Philip v. Registrar of Companies*, (2006) 131 Comp Cas 842; 2005 CLC 925 (Ker).

The Government appointed a special judge for trial of offences punishable under the Companies Act. The Government order was held to be not quashable by a court exercising jurisdiction under Section 482 CrPC.¹²

Penalty for false evidence [S. 449]

Intentionally giving false evidence in any examination upon oath or solemn affirmation authorised under the Act or in any affidavit, deposition or solemn affirmation, in or about the winding up of any company under the Act or otherwise in or about any matter arising under the Act, is punishable with imprisonment for a term not less than three years, extending up to seven years and shall also be punishable with a fine which may extend to Rs 10,00,000.

Punishment where no specific penalty provided [S. 450]

Any default in complying with the regulatory requirements of the Act is generally punishable under a penalty provision in the section itself. But even so there are many sections which prescribe one thing or the other but which do not carry any penalty provision. This section is intended to deal with such contraventions. This section also applies to defaults in complying with the conditions, restrictions etc, subject to which an approval was granted. The penalty provided is fine extending up to Rs 10,000 and, in the case of a continuing default, Rs 1000 for every day of default. The Karnataka High Court held that for directors' failure to call a meeting on a requisition received by them, Section 469(i) gives an alternative remedy to requisitionists to call a meeting by themselves and therefore directors' failure would not attract Section 629-A.¹³ [now S. 450]

Power to alter Schedules [S. 467]

The section authorises the Government to alter schedules. The Government cannot widen or constrict the scope of the Act or its policy.¹⁴ No alteration in Table F of Schedule 1 is to apply to any company registered before the date of such alteration. Such alterations have to be laid before both Houses of Parliament.

Power of Central Government to make Rules [S. 469]

The Central Government has the power to make rules in respect of all the matters which have to be prescribed by it and generally to carry out the purposes of the Act. The rules so promulgated may provide that contraventions will be punishable with a fine extending up to Rs 5000 and in case of a continuing default, with a fine extending up to Rs 500 for every day of default. Rules framed in the exercise of this power have to be laid before each House of Parliament while it is in session for a total period of 30 days. At the end of the session during which the 30-day period is completed, the

12. *G Kuri Kumar Reddy v Mumtiz Krishna*, (2005) 127 Comp Cas 653 (AP).

13. *Anandie R Hegde v Captain TS Gopala Krishna*, (1996) 3 Comp L 333; (1996) 23 CLA 142; (1998) 91 Comp Cas 312 (Kant).

14. *JK Industries Ltd v Registrar of Companies*, (1997) 27 CLA 195 (Cal).

rules become effective either as originally framed or subject to any modifications or annulment, made by the Parliament. Anything already done on the basis of the original rules will not be prejudiced by any such modification or annulment.¹⁵ The same requirement of Parliamentary approval for Regulations made by SEBI has been prescribed in sub-section (4).

Power of Central Government to make Rules relating to winding up [S. 468]

The Central Government is required to make rules providing for all matters relating to the winding up of companies which are to be prescribed under the Act and may also make rules on matters as may be prescribed.

The Central Government is also empowered to make rules, consistent with the Civil Procedure Code, 1908 on the following matters: (1) as to mode of proceedings to be had for winding up a company by the Tribunal; (2) for the voluntary winding up of companies, whether by members or by creditors; (3) for the holding of meetings of creditors and members in connection with proceedings under Section 220 (compromise and arrangements); (4) for giving effect to the provisions of the Act for reduction of capital; (5) generally for all applications to be made to the Tribunal under the provisions of this Act; (6) holding and conducting of meetings to ascertain the wishes of creditors and contributors; (7) the settling of the list of contributors and rectification of the register of members where required and collecting and applying the assets; (8) the payment, delivery, conveyance, surrender, or transfer of money, property, books or papers to the liquidator; (9) the making of calls; and (10) the fixing of time within which debts and claims shall be proved.¹⁶

Annual report on working of Act [S. 461]

The Central Government is under a duty to cause a general annual report on the working and administration of the Companies Act to be prepared and laid before both Houses of Parliament within one year of the close of the year to which the report relates.

Condoning of delays in certain cases [S. 460]

A number of provisions of the Act prescribe a time-limit for filing of applications. This section gives power to the Central Government to condone the delay in filing an application. Reasons for condoning delays must be recorded in writing. A similar power of condonation exists in reference to delays in filing documents with the Registrar. Here again reasons for condonation have to be recorded in writing.

15. See, the Companies (Central Government General Rules and Forms), 1956. See further the Central Government's power to alter Schedules as conferred by S. 441 and to lay down Forms and Rules as conferred by S. 441-B.

16. S. 459 empowers the Central Government or the Tribunal, to accord a pardon in certain cases specified in the section subject to certain conditions and payment of prescribed fee.

Delegation by Central Government of its powers [S. 458]

The Central Government is empowered by this section to delegate any of its functions or powers to such authority or officer as may be specified in the notification. The delegation can be subject to such conditions, restrictions and limitations as may be specified in the notification.

The powers and functions which cannot be delegated under this section are those conferred by or mentioned in the following sections:

Section 2(29) [Jurisdiction of courts]; Section 62 [Further issue of capital]; Sections 210 and 213 [Investigation of affairs]; Sections 223 to 225 [Powers after investigation of affairs]; Section 216 [Investigation of ownership of company]; Section 237 [Amalgamation in public interest]; Section 237 [Right to apply under Section 241]; Section 241 [Right of Central Government to apply under Section 241]; Section 275 [Appointment of Official Liquidator]; Section 396 [Registration offices]; Section 461 [Annual report by Central Government]; Section 467 [Power to alter Schedules]; and Section 469 [Power of Central Government to make rules].

Protection of acts done in good faith [S. 456]

Acts done by the Government or any officer of the Government or any other person in pursuance of the Act and in good faith cannot be the subject-matter of any prosecution or other legal proceeding. The same protection is available in respect of the publication by or under the authority of the Government or such Government officer of any report, paper or proceedings.

Protection of employees during investigation [S. 218]

The section provides for protection of employees during investigation by an inspector and pendency of proceedings before Tribunal against any person concerned in the conduct and management of the affairs of a company.

Non-disclosure of information in certain cases [S. 457]

The Registrar, any officer of the Government or any other person is not compellable to disclose to any court, tribunal or other authority as to whence he got any information which led the Central Government to direct a special audit or an investigation and which is material in that connection.

Penalty for improper use of "Limited" or "private Limited" [S. 453]

A fine extending up to Rs 500 and also extending up to Rs 2000 for every day of default is leviable when the words "Limited" or "private Limited" are used without proper authorisation for anybody's trade or business.

Undefined words and expressions [S. 2(95)]

The words and expressions used in the Act but not defined are to have the meaning assigned to them in the Securities Contracts (Regulation) Act, 1956; or Securities and Exchange Board of India Act, 1992; or the Depositories Act, 1996.

Visit ebcexplorer.com to access cases referred to in the book through EBC Explorer™ on SCC Online®; along with updates, articles, videos, blogs and a host of different resources.



The following case from this chapter is available through EBC Explorer™:

- *SR Bhattacharya v Union of India*, (1998) 91 Comp Cas 37 (Del)



CASE PILOT

Subject Index

Abridged prospectus, meaning of, 107
Accountants' lien, 450
Accounting standards, 421, 427
 meaning of, 421
Accounts, 403, 418
 accounting records, 418
 accounting standards, 421
 accrual basis, 420
 audit of, 434
 authentication of, 428
 balance sheet, 420
 holding company, of, 420
 boards report, signature, 427
 books of, 418
 preservation, 420
 compliance, duty of, 421
 directors responsibility statement, 428
 double entry, 420
 duty of compliance with accounting, 422
 fair picture, to present, 419
 filing of, 430
 financial statements, 427
 group accounts, 450, 594
 holding company, of, 420, 594
 inspection, 421
 directors' by, 421
 members' by, 422
 registrar' by, 421
 right of, 421
 liquidators, 497
 members' right to copies, 429
 preservation of, 420
 publication of statements, 428
 rectification of, 433
 responsibility statement of directors, 428
 signature upon, 427

Accounts (contd.)
 true and fair view, 419
 waiver of penalty, 433
Acquired property, ultra vires, 70
Acquisition, notice of, 635
Acquisition of shares of dissenting shareholders, 631
Action
 Central Government, by,
 against company, 540
 change of company's name, effect of, 53
 company, by or against, 496
 derivative, 495
 fraud on minority, to restrain, 499
 injunction, 498
 minority shareholder's, 495, 499, 509
 order under Sections 242 and 241, 537
 reduction of capital, against, 231
 representative, 495, 509
 scheme of arrangement, 599
 stay of, after presentation of petition of winding up, 671
 rescission of order, 671
Acts, ultra vires, 498
Additional Directors, 273
Administrative officer, 360
Advance reservation of name, 53
Advantages of incorporation, 4
 capacity for suits, 11
 finances, 13
 independent existence, 5
 limited liability, 8
 perpetual succession, 9
 professional management, 12
 separate property, 10
 transferable shares, 11

- Advertisement, circulation of, 397
 Advertisement of prospectus, 112
 Advisors, 570
 Advisory Committee, 688
 Affidavit, 38
 Agent, 21, 22
 acts of, protection for outsiders, 98
 director, for company, 255
 personal right and liability
 of contracting, 43
 proposed company, for contract
 with, 43
 sole-selling, 364
 trusts, 72
 ultra vires transactions, liability
 for warranty of authority, 70
 AGM, report on, 398
 Agreement
 articles of association, how far, 62
 incorporation of company
 with, made before, 41
 informal, among members,
 without voting, 386
 memorandum, how far, 62
 Agreement amongst shareholders, 65
 Agreements, informal, 386
 Allotment of securities, 141
 Allotment of shares, 141
 absolute and unconditional, 145
 communication of, 145
 conditional, 145
 delay in, 145
 general principles, 144
 memorandum unnecessary
 to subscriber, 198
 minimum subscription, 141
 notice of, sent by post, 145
 over-subscribed prospectus, 144
 private company, in, 580
 proper authority, by, 144
 reasonable time, within, 145
 return as to, 386
 return of, 142
 statutory restrictions, 141
 stock exchange quotation, 142
 Alteration, 545
 articles of association, 87
 capital, 229
 fraud on minority, 90, 499
 liability of members, increasing, 90
 Alteration (contd.)
 name clause, 55
 objects clause, 74
 procedure of, 74
 registered office clause, 60
 schedule, power to, 767
 substantive limits, 74
 Alteration of memorandum and articles
 to be noted on every copy, 87
 Alternate director, 352
 Alternative relief, existence of, 526, 661
 Amalgamation, 616
 banking companies, of, 630
 power of, 617
 preservation of books, 636
 public interest, in, 635
 reduction of capital in, 627
 Annual general meeting, 367
 business of, 377
 extension of time, 369
 first meeting, 367
 importance of, 369
 justification for not holding, 366
 Annual list of members, 219
 evidentiary value of, 221
 Annual report, 748, 769
 Annual returns, 219
 duty to file, enforcement of, 221
 evidentiary value, 221
 Annual rotation, 268
 Annulment of dissolution, 742
 Antecedent, 718
 Apparent authority
 agents, acts outside, of, 102
 Appeal, 571, 714
 Appellate Tribunal, to, 171
 condonation of delay in filing, 173
 creditor, by, 718
 orders against, 571
 refusal to accept transfer of
 shares, against, 160
 Appellate Tribunal, 756
 constitution of, 757
 Application forms, 107
 Application for shares, 141
 Appointment
 auditors, 434
 chairman of meeting, 382
 directors, 263
 liquidators, 697

- Appointment (contd.)
 manager, 348
 sole selling agents, 344
- Arbitration
 articles, provision for, 86
- Arbitration agreement, 42, 668
- Arbitration clause, effect of, 537
- Arm's length transaction, 354
- Arrangement, 599
 scheme of, 599
- Articles, 79
- Articles in relation to memorandum, 80
- Articles of association, 79
 alteration of, 86
 breach of contract, 90
 CLB order of, 538
 company's benefit, 90
 contract of service, breach of, 90
 members, increasing liability of, 90
 memorandum, conditions of, 87
 special resolution, by, 86
 statutory power, 86
- binding force, 82
 company in relation to members, 83
 members inter se, 84
 members to company, 83
 outsiders, in relation to, 83
 outsider, who is, 83
- constructive notice of, 90
 reform of, 91
- contents of, 80
- contract, as, 82
- form and signature, 80
- fraud on minority, 499
- Assignment
 prohibition of office by directors, 350
- Associate company, 595
 meaning of, 595
- Attachments, avoidance of, 724
- Auction-purchaser, 690
- Auction-sale, 697
- Audit, 403, 434
 accounts of company, 434
 cost accounts of, 450
- Audit committee, 294, 435
 directors, of, 298
- Auditing standards, 439
- Audit of cost accounts, 450
- Auditors, 434
 appointment of, 434
- Auditors (contd.)
 Central Government, by, 434
 first auditors, 434
 special resolution, by, 435
 audit reports, to sign, 441
 disqualified persons, 437
 duties, 438
 care of, 440
 company, to, 440
 fraud, delay in disclosing, liability, 450
 position, 442
 standard of care, 443
 take-over, in connection with, 449
 third parties, to, 445
- duty of care, 442
- duty to company, 445
- fraudulent conduct of, 436
- general meeting, to attend, 441
- liability, for fraud, 450
- lien of, 450
- negligence, 443
- persons disqualified from being, 437
- powers and duties of, 436
- qualification, 437
- reappointment, 434
- removal, 436
- remuneration of, 438
- report of, 438
 services, not to render certain, 440
- Audit team of firm, rotation of, 435
- Authentication, 428
- Balance sheet, 210
 default in filing with Registrar, 431
 publication of statement, 428
 true and fair view, to give, 419
- Banking company
 consisting of more than ten
 members to be registered, 579
- Banking Regulation Act, 1949, 423, 630
- Bankrupt
 company cannot be, 647
- Bank transfer, 176
- Beneficial interest in shares, declaration of, 215
- Beneficial owners
 register of, demat form, 212
- Binding force of memorandum and articles, 82
 members of company, on, 82
 outsiders, in relation to, 83
- 'B' List of contributors, 701

- Board incompetent, 290
 Board, meaning of, 254
 meaning of, 254
 Board's report, 424, 427
 revision of, 429
 Bonus shares, 416
 gift, as, 417
 Books and papers, evidence as, 748
 Books, disposal of, 743
 Books, falsification of, 730
 Borrowing, 453
 unauthorised, consequences of, 450
 Borrowing powers, 453
 delegation of, 291
 directors', 291
 exceeding, effect of, 453
 regular, 454
 Bouncing of cheques
 brokerage, 191
 director's liability for, 264
 Branch office accounts, audit of, 439
 Breach of warranty of authority, 70
 Broadcasting Act, 1996, 12
 Bubbles Act, 1720, 3
 Business, fraudulent conduct of, 29
 Buy-back of shares, 249
 10 per cent, up to, exemption
 from formalities, 250
 Capital Redemption Reserves Account, 251
 declaration of solvency, 250
 destruction of securities bought back, 251
 further issue, 251
 penalty provisions, 251
 prohibition in certain cases, 252
 register of bought back shares, 251
 return of, 251
 Bye-laws, 79
- Calls on shares, 204
 amount of, 205
 bona fide in interest of company, 206
 date of, 205
 directors' trustees, as to, 205
 forfeiture for non-payment of, 207
 liquidator by, 201
 payment in kind, 206
 resolution of board, by, 204
 statutory liability to pay, 204
 time of payment, 205
 uniform basis, 206
- Capacity of company to sue and be sued, 11
 Capital, 223
 alternation of, 229
 buy-back of shares, 249
 derivative, 224
 further issues of, 236
 directors' discretion in and judicial control, 237
 duty in, 237
 employee stock option, 242
 excluding operation of S. 81, 238
 freezing out, 242
 pre-emptive rights, 236
 rights shares, 236
 when not applicable, 238
 hybrid, 225
 kinds of, 224
 power to convert loans into, 243
 preference shares, 225
 cumulative, 225
 irredeemable, 228
 non-cumulative, 225
 ordinary compared with, 226
 participating, 226
 redeemable, 228
 redemption of, 228
 purchasing own shares, 245
 buy-back, 249
 exceptions, 246
 illegal financing, consequences of, 247
 private companies, exemption of, 249
 redeemable preference shares, 228
 reduction of, 230
 duties of court, 231
 interest of creditors, 231
 interest of shareholders, 232
 liability after, 235
 reserve, 224
 share, 223
 variation of rights, 243
 Capitalisation of profits, 415
 Capital Redemption Reserves Account, transfer of money, 251
 Casting vote, 384
 Central Government, 22, 49, 58, 217,
 265, 412, 421, 427, 45, 586, 46
 authority to constitute, 412
 delegation by its powers, 269
 power of to direct companies to furnish information or statistics, 755

- Central Government (contd.)
 power of, to make rules, 267
 power of, to make rules relating to winding up, 268
- Central Government's petition, 668
- Certificate of incorporation, 39
 conclusive evidence of compliance requirements, 39
 judicial review, 41
- Certificate of shares, 147
 duplicate, 150
 effect of, 149
 object of, 149
 payment, estoppel as to, 150
 title, estoppel as to, 149
- Chairperson, meeting of, 296
- Change of name, 55
- Change of registered office situation, 57, 104
- Charge, 456
 acquisition of property subject to, 463
 company to report satisfaction of, 457
 constructive notice of, 457
 rectification by Central Government of register of, 459
 registrar to keep register of, in respect of every company, 457
 registration of, 456
- Charge-holder
 application for registration by, 457
- Charitable contribution, 296
- Cheques, bouncing of, liability for, 264
- Circulation of members' resolution, 394
- Circulation, passing of resolution by, 335
- Citizen, company as, 33
 domicile, 34
 nationality, 34
 residence, 34
- Class action, 545
- Classification, 60:
- Co-directors' defaults, liability for, 322
- Cognizance, offence of, 764
- Cohen Committee, 73
- Concurrence of winding up, 671
 tribunal, by, 671
- Commission
 payment of, 464
 underwriting, 390
- Committee, functions of, 429
- Companies Act, 1956, 3
- Companies Act, 1985, 27
- Companies Act, 2006, 60
- Companies (Amendment) Act, 1985, 296
- Companies (Amendment) Act, 1996, 74
- Companies and Government at meetings, representation of, 391
- Companies capable of being registered, 750
- Companies, removal of names of
 appeal to tribunal and restoration, 642
 fraudulent application for removal of name, 641
 restrictions on making application, 641
- Company, 577
 administrator, 594
 amendment of petition, 515
 associate, meaning of, 595
 Company Act, 2013
 Civil Procedure Code not applicable, 515
 company's property, 536
 position of non-party, 536
- definition of, 1
- dissolution of, 696
- employee's petition, 668
- evolution of, 3
- formation of, 37
- guarantee, meaning of, 578
- investigation into affairs of, 554
- jurisdiction of civil court, 760
- kinds of, 577
- liability of, 120
- limitation for petition, 547
- managing director
 removal of, 590
- member
 meaning of, 515
- modification of sanctioned scheme, 615
- name of, struck off the register, 640
- pendency of civil proceedings, 514
- private, 579
 meaning, 579
- public, 582
 meaning of, 582
- punishment, 132
- quasi-partnership, 283
- scheme for payment of employees, 715
- scheme of amalgamation, 631
- shareholder for benefit of, 12
- sick, 644
- small, 582
- unlimited, 577
- winding up by Tribunal, exlvi
- winding up, order of, 662

- Company courts.** 574
 service of documents on, 400
- Company Law Board.** 267
 appeal, 571
 Board meetings, 332
 directors abstaining from, 322
 minutes of, 336
 notice of, 332
 proceedings, 335
 quorum at, 334
- Company Liquidation Dividend.** 715
- Company liquidator.** 683
- Company prosecutors.** appointment of, 762
- Company Secretaries Act, 1980.** 355
- Company:** service of documents on, 400
- Company's property.** custody of, 686
- Compensation.** 121
 misrepresentation, for, 181
- Competition by directors.** 304
- Composition of offences.** 765
- Compromise.** 591
- Compromises, arrangements and amalgamations.** 599
 acquisition of shares, 631
 amalgamation, 616
 reduction of capital in, 627
 arrangements, 599
 banking companies, amalgamation, ut, 630
 bona fide exercise of majority power, 608
 Central Government, notice to, 624
 compromises, 599
 court, compliance with statutes, 607
 duties, 606
 reasonableness to assume, 609
 powers, 606
 sanction, 601
 advantage, 611
 supervision, 612
 creditor's interest, 610
 employees, interest, 614
 enforcement, power of, 612
 forms of, 617
 material facts, disclosure, 610
 name, change of, 628
 notice, Central Government to, 624
 obligations, transfer of, 625
 official reports, 620
 preservation of books, 636
 reasonableness, 609
 reconstruction, 615
- Compromises, arrangements and amalgamations (contd.)**
 reduction of capital, 627
 reports, official, 620
 sanctioned scheme, reconsideration of, 615
 share capital, increase of, 627
 take-over, 634
 acquisition of minority interest, 633
 fairness, 633
 offer, single company, 634
 workers' interest, 614
 unfairness, burden of proving, 610
 vesting of rights, 625
- Compulsory winding up.** 648
- Condonation of delay in filing appeals.** 173
- Conflict of interests.** 325
- Consent, withdrawal of.** 122
- Constitution of India.** 33, 592
 Article 19(1)(f), 34
 Article 19(1)(g), 34
 Article 14 ut 16, violation of, 392
- Constructive notice of charge.** 457
- Constructive notice of memorandum and articles.** 90
 charges of, 456
 statutory reform of, 91
- Consumer Protection Act, 1986.** 363
- Contents of articles.** 80
- Contents of prospectus.** 109
- Contracts.** 453
- Contracts, form of.** 420
- Contracts, ultra vires,** 71
- Contributors.** 701, 716
 adjustment of rights of, 693
 meetings to ascertain wishes, 719
 meetings to ascertain wishes of creditors etc, 716
 petition of winding up, by, 666
 settlement of list of, 687
 settling list of, 703
- Contributory, meaning of.** 701
- Convertible debentures.** 491
- Corporate body, directors as organs of.** 260
- Corporate control, trading in.** 305
- Corporate form, nature of.** 4
- Corporate information, misuse of.** 310
- Corporate personality.** 1
- Corporate social responsibility.** 429

- Corporation**, 253
 meaning of, 253
- Cost accounts**, audit of, 450
- Court**, 756
 appointment by, 385
 meaning of, 756
- Courts, company**, 574
- Creditors**
 petition of, for winding up, 663
 secured petition by, 663
- Creditor's petition**, 663
- Criminal complaint**, 71
- Criminal liability**
 acting as director after disqualification, 275
 annual general meeting, failure to hold, 267
 buy-back of shares, in, 248, 252
 misrepresentation in prospectus, for, 129
 offences in winding up, 731
 personation for acquisition of shares, 194
- Cumulative voting**, 272
- Damages for deceit in prospectus**, 117
- Data Bank**, maintenance of, 367
- Dead lock**, 291, 650
 Board of Directors, 291
 winding up on ground, 650
- Debenture**
 kinds of, 491
 convertible, 491
 perpetual, 491
 redeemable, 491
- Debenture holder**, 488
 register of, 492
 remedies of, 489
 series of, 463
 shareholder compared with, 493
- Debentures**, 477
 characteristics floating charge of, 481
 crystallisation, of, 485
 definition, 476
 floating charges, 480
 nomination of, 201
 trust deed, 486
 voting rights, with, 494
- Debentures, series of**, 463
- Debenture trust deed**, 486
- Debenture trustees**, 486, 487
 appointment of, 487
 duties of, 487
- Debt Recovery Tribunal**, 681, 690
 liquidator, appointment of, 681
- Debts**, 718
 member not liable, 204
 proof of, 705
 sale of assets and recovery of,
 due to company, 718
 set-off, 704
- Deceit**
 prospectus, action for, in, 117
- Defamation**
 circulation of members' resolution, 394
 representation by directors, 280
- Defects in appointment of not to**
 invalidate actions taken, 206
- Definition of company**, 1
 evolution, 3
- Defunct company**, 639
 effect of, 639
 restoration, 642
- Deity**, 206
- Delegated authority of acting director**, 98
- Delegate**, duty not to, 322
- Delegation**
 Central Government by, its powers, of, 769
 powers by directors, 322
 provision in articles, effects of, 96, 97
- Delegatus non-potest delegare**, 322
- Delinquent officers**, proceedings against, 727
- Demerger**, 630
- Depository scheme**, 182
 meaning of, 182
- Depository system**, in transfer of shares, 182
- Depreciation**, 409
 provisions for, 409
 schedule of, 409
- Derivative**, 224
- Director Identification Number**, 274
 company to inform Registrar of, 275
 director to intimate, 274
 obligation to indicate, 275
 prohibition, 274
- Director**, 253, 540
 additional, 273
 agents for company, 255
 allotment of shares by, 144
 alternate, 352
 annual rotation, 269
 appointment, 265
 additional directors, 273

Director (cont'd.)

- annual general meeting at, 268
- annual rotation, 269
 - fresh, 270
 - reappointments, 270
- Board of Directors, 273
- casual vacancies, 273
- cumulative voting, 272
- first, how appointed, 268
- nomination by, 271
- proportional representation by, 272
- right to increase number, 271
- tribunal, 274
- voting system of, 272
- appointment of, 267
- assignment, prohibition of, 350
- audit committee, of, 293
- bouncing of cheques, liability for, 264
- business opportunities, 299
 - cessation of directorship, in, 313
 - diversion of, 299
 - personal use of, 302
- company's business diverted to, 320
- compensation for loss of office, 364
- competition by, 304
- contributions to political parties, power of, 296
- control transfer of, by, 305
- definition, 253
- delegation of powers by, 97, 291
- derivates, securities, 224
- disqualifications, 275, 342
 - private companies may adopt additional, 277
 - stock exchange companies, 277
- duties of, 297
 - attendance at meetings, 322
 - care, diligence and skill, of, 312
 - care, duty of, 312
 - negligence, liability for, 312
 - non-executive director, of, 317
 - standard, 314
 - delegate, not to, 322
 - liability for co-directors' defaults, 322
 - disclosure of interest, 325
 - good faith, 298
 - business opportunities, as to, 299
 - competition by, 304
 - corporate information, 310
 - insider trading, 310
 - non-executive director of, 317

Director (cont'd.)

- personal profits, 302
- trading in control, 305
- personal attendance, 322
 - negligence by non-attendance, 322
- examination of, 695
- fiduciary position of, 298
- first director, 268
- guarantee commitment, 350
- identity number, 274
- independent, 265
- insider trading, 310
 - outsider by, 311
 - SIRI guidelines, 310
- interest, disclosure of, 325
 - accountability for profit, 329
 - board aware, 328
 - consequences of default, 330
 - effect upon transaction, 329
 - exception, 330
 - nominee directors' duty, 318
 - what constitutes, 327
- irregular appointment, 351
- liability
 - bouncing of cheques, for, 264
 - breach of trust, for, 298
 - cheques, bouncing of, for, 264
 - co-directors, for acts of, 322
 - misrepresentation in prospectus, 117
 - negligence, 312
 - nominee directors, 318
 - non-disclosure in prospectus, for, 129
 - personal profit, for, 299
 - secret profits, for, 299, 302
 - special protection, 316
 - tax, for, 331
 - ultra vires acts, for, 70
- liability for negligence, 312
- loans to, 349
- loss of office, compensation for, 347
- meetings at, 331
 - duty to attend, 322
 - minutes of meetings, 336
 - notice of, 332
 - proceedings, 335
 - quorum, 334
- minimum number of, 253, 265
- negligence, liability for, 312
- nominated, 318
 - nominee, liability of, 318
 - Voting by, 335
- non-executive director, liability, 317

- Director (contd.)**
- non-executive, position of, 317
 - organs of company, as, 260
 - permanent, 269
 - personal liability of organ, 263
 - personal profits, accountability, 299
 - political parties, contributions to, 296
 - positions of, 254
 - powers of, 285
 - audit committee, 293
 - board, 285
 - dead lock, 291
 - delegation of, 291
 - exercisable at board meetings, 291
 - general meeting approval, when necessary, 292
 - nulla fide, 289
 - rectification of entries in register of members, 170
 - residuary, 291
 - restrictions on, 291
 - shareholders' intervention, 289
 - statutory provisions, 291
 - vested in board, 284
 - proceedings against, delinquent, 727
 - qualifications, 275
 - cum cum, 334
 - registers of, 336
 - directors, 336
 - directors' shareholdings, 336
 - removal, 279
 - Company Law Tribunal, by, 284
 - shareholders by, 279
 - remuneration, 343
 - guarantee commission, 350
 - resignation, 284
 - SERI Insider Trading Regulations, 310
 - special statutory protection, 318
 - statutory formulation of duties, 297
 - trustees as, 256
 - for whom, 258
 - of institution, 260
 - variation of office by, 277
 - automatic operation, 279
 - validity of acts, 351
 - whole-time, 339
- Directors' inspection by**, 421
- Directors' power of rectification of entries**, 170
- Disadvantages of incorporation**, 13
 - citizen, company not, 33
 - expense, 33
- Disadvantages of incorporation (contd.)**
- formality, 33
 - lifting veil, 13
 - personal liability, 27
- Disclaimer**, 725
- Disclosure**
- directors' interest, 325
- Dividend**
- Central Government approval, 169
 - forfeited shares reissued, 217
 - issue of shares at, 189
- Dishonour of cheque**, 265
- Disposal of books**
- winding up after, 743
- Disqualification**
- auditors' of, 437
 - manager, of, 348
 - managing director, of, 339
 - whole-time director, 339
- Dissolution, annulment of**, 742
- Dissolution of company**
- compulsory winding up, after, 648
 - defunct companies, of, 639
 - striking off register, 639
- Dissolution of company, order of**, 718
- Distribute dividends, punishment for failure to**, 417
- Dividend**, 215, 409
 - appreciation of assets, 408
 - unrealised, 408
 - depreciation, 409
 - dividend fund, 404
 - interim, 413
- Investor Education and Protection Fund**, 411
 - transfer of unpaid dividend to, 411
- Lee v Nechalele*, rule in, 406
- meaning of, 406
- mode of payment, 414
 - registered shareholder, to, 412
- separate bank account, 406
- statutory debt, 413
- statutory provisions, 409
- unpaid dividend account, 410
- unrealised appreciation of assets, 408
- Dividend fund**, 404
- Documents**, 753
 - fee for filing, 755
 - filing and inspection through electronic form, 754

- Documents (contd.)**
- inspection, production, and evidence of, 753
 - Domicile**, of company, 34
 - Donation**, 715
 - Document conspiracy**, 763
 - Downsizing employees**, 592
 - Duplicate certificate**, 150
 - Duplicate share certificate**, 150
- Effect of memorandum and articles**, 82
- Ejusdem generis rule**, 649
- construction of just and equitable clause, 649
- Electricity Act**, 2003, 423
- Electronic form, maintenance and inspection of documents in**, 596
- Electronic means, voting by**, 367
- Employee**
- protection of, 769
 - stock option scheme, 242
 - wages, priority, 714
- Employee during investigation**, protection of, 566
- Employee's Provident Fund**, 714
- Employees' stock option**, meaning of, 242
- Enemy status**, 16
- Enforcement**
- appeals of, 697
- English Company Law Revision Committee**, 73
- Entrenchment**, provisions of, 79
- Equity share capital**, 224
- European Communities Act**, 1972, 45
- Evidence**
- certificate of incorporation, conclusive, 39
 - certificate of registration of charges, 464
- Evaluation of company**, 3
- Executions, avoidance of**, 724
- Expert**
- mistatement contained in report of, 123
 - statement of, 122
- Expropriation**, 503
- company's property, by majority, 503
 - members' property, by majority, 506
- Extension**
- time for holding general meeting, of, 367
- Extraordinary general meeting**, 370
- Fabrication of records**, 157
- False evidence, penalty for**, 267
- False particulars, punishment for**, 38
- False representation**, 123
- False statement**
- accounts in, 446
 - penalty for, 716
 - prospectus in, 123
 - civil liability, 120
 - criminal liability, 129
- Family arrangements**, 537
- Fictitious person**
- allotment of shares to, 194
- Fiduciary position**
- directors of, 798
 - further issue of capital, in, 236
 - promoters of, 137
- Finances**
- access to money market, for, 13
- Financial statements**, 423, 424, 427
- default in filing, 549
 - publication of, 428
 - revision of, 424
- Fines, application, fine money of**, 762
- First directors**, 268
- First general meeting**, 367, 369
- Fixed charge**, 481
- Floating charge**, 480
- characteristics of, 481
 - charges, subsequent, 483
 - crystallisation of, 485
 - fixed charge, and, 481
 - memorandum of satisfaction, 465
 - mortgages, subsequent, 483
 - nature of, 479
 - priority of preferential payments over, 484, 706
 - statutory provisions, 481
 - winding up within 12 months, effect, 481
- Foreign company**, 582
- accounts, 586
 - carrying on business in India, filing of particulars, 583
 - documents, filing of, 584
 - merger or amalgamation of company with, 630
 - prospectus of, 586
 - service on, 586
- Foreign investors**, 234

- Foreign register of members, 213
 Forfeiture, 210
 Forfeiture of shares, 207
 calls, non-payment of, 209
 good faith, 210
 liability after, 210
 notice precedent to, 209
 resolution of, 210
 right after, 210
 Forged documents, 509
 Forged transfer
 shares of, 179
 Forgery, 95, 157
 transfer of shares, in, 179
 Forgery in transit, 179
 Formality and expense, 33
 Form and signature of articles, 30
 Formation of company, 33, 37
Foss v Harbottle, rule in, 495
 acts, ultra vires, 498
 exceptions to, 498
 fraud on minority, 499
 individual membership rights, 505
 oppression and mismanagement, 507
 special majority, acts requiring, 504
 wrongdoers in control, 504
 Fraud
 fraudulent preference, 718
 fraudulent trading, 728
 investigation of affairs, request for, 554
 minority, out, 493
 minority shareholders, on, 90
 prospectus, in, 117
 punishment for, 763
 Fraudulent conduct of business, 26
 Fraudulently inducing
 investment of money, 192
 penalty for, 194
 Fraudulent misstatement, 117
 Fraudulent preference, 718
 Fraudulent purpose, 655
 Fraudulent trading, 728
 Freezing out techniques, 242
 Fund, utilisation of, 411
 Global depository receipt, 146
 Good faith
 protection of acts done in, 769
 Government companies, 21, 430, 588
 auditor of, 435
 meaning of, 586
 Government of India, 24
 Gower, 647
 Guarantee company, 573
 meaning of, 573
 High Court, 322
 History of company law, 3
 Holding and subsidiary companies, 28
 Holding company, 593
 insolvent subsidiary, 31
 investment in, 594
 multinational subsidiary of, 30
 Hybrids, 225
 securities as, 225
 Identification and tracing, 454
 Identify number, direction of, 274
 Implied powers
 borrow, to, 463
 Incorporated partnership, winding up of, 655
 Incorporation
 certificate of, 39
 judicial review, of, 41
 Increase
 capital, 220, 296
 Independent corporate existence
 company of, 4
 Independent directors, 265
 manner of election of, 267
 Index of beneficial owners, 272
 demat form holders, of, 212
 India, 21
 Indian Depository Receipt, 597
 offer of, foreign company by, 587
 Individual membership rights, 505
 Indoor management, 92
 acting director, delegated authority of, 98
 apparent authority, 99
 acts outside, 102
 articles, knowledge of, 98
 authority, scope of, 100
 delegation of powers, provision
 in articles, 97
 exceptions, to, 94
 forgery, 95

- In-door management (contd.)
 knowledge of irregularity, 94
 memorandum, in relation to, 62
 ostensible position, director of, 99
 representation through articles, 96
 suspicion of irregularity, 95
- Informal agreements, 386
- Informal appointment, 384
- Information
 Central Government to get, power of, 255
 non-disclosure, 269
 pending liquidation, as to, 347
- Information, inspect books and conduct enquiries
 power to call for, 552
- Information memorandum, 112
- Information Technology Act, 2000
 application of, 754
- Injunction, 69, 453
- Injunctions to restrain
 name, use of, misleading, 49
 spending of ultra vires
 borrowed money, 454
 ultra vires act, 453
- Inquiry, 551
 freezing of assets in, and investigation, 567
- Insolvency of company
 subsidiary of, 31
- Insolvent subsidiary, liability for, 31
- Inspection, 551
 accounts, of, 421
 books, 748
 documents kept by registrar, 753
 papers, 746
 register of members, 212
- Inspection and inquiry, conduct of, 553
- Inspection, report on, 554
- Inspector, seizure of documents by, 566
- Inspectors, procedure and powers of, 561
- Inspector's report, 567
- Insurance Regulatory and Development Authority Act, 1999, 423
- Intellectual property, 310
- Interested director, meaning of, 385
- Interim dividend, 413
- Interim relief, 544
- Internal audit, 434
- Investigation, 551
 affairs, grounds of, 556
- Investigation (contd.)
 affairs of company by SFO, into, 564
 affairs of company, into, 554
 affairs of related companies, into, 566
 bankers, position of, 570
 debentures in company, 569
 discretionary provisions, 556
 fraud, 557
 illegality, 557
 inadequate of information, 557
 misconduct, 557
 misfeasance, 557
 discretion, manner of exercising, 568
 freezing of assets on inquiry and, 567
 inspectors, powers of, 561
 legal advisors, position of, 570
 members' application, on, 556
 ownership of company, of, 568
 power of, 551, 552
 report, 556, 565
 restrictions on shares, 569
 security for payment of costs and expenses of, 561
 seizure of documents, 566
- Investments, 453, 467
 company's name, in, 469
 documents, authentication, 471
 free reserves, 469
 other companies, in, 467
 exceptions, 468
 own name, 469
 register of, 468
- Investor Education and Protection Fund, 411
 transfer of unpaid dividend to, 411
- Irredeemable preference shares, 238
- Irregularity, effect of
 calls, 204
 forfeiture, 208
- Irregularity, suspicion of, 95
- Issue of shares at discount, 189
- Issue of shares at premium, 192
- Issue of shares without knowledge, 122
- Joint Stock Companies Act, 1844, 3
- Judicial Member
 meaning of, 756
- Judicial review, 41
- Jurisdiction
 company courts, of, 574
 offences cognizance, 764

- jurisdiction of tribunal, 680
 Knowledge of irregularity, 94
 Legal advisers and bankers, position of, 570
 Legal proceedings
 company's capacity for, 11
 Lending, 453
 Liability
 contributors of, 201
 members, of, 204
 past members, 703
 promoters, 137
 Liability of company, 120
 Liability of members, increasing, 90
 Liens
 loss of, 218
 on shares, 217
 priority of, 218
 sale of shares, under, 219
 time-barred debt, 219
 Lifting of veil, 13
 grounds of, 13
 agency, 21
 character, for determining, 16
 fraud, to prevent, 19
 Government companies, 21
 improper conduct, 19
 revenue, for benefit of, 17
 trust, 24
 no functioning autonomy, 24
 statutory provisions, under, 27
 fraudulent conduct, 28
 holding company, 28
 misdescription of name, 28
 multinational subsidiary of, 30
 subsidiary company, 26
 Insolvent, 31
 multinational, of, 30
 subsidiary establishments, 32
 Limitation of actions, 746
 calls in winding up, for, 701
 petition for winding up, 663
 Limited, 53
 liability company, 9
 venture capital companies, of, 55
 when it may be dispensed with, 74
 Limited liability, protection of, 27
 Liquidation
 pending, information as to, 747
 summary procedure for, 717
 Liquidator, 681
 appointment of, 681
 books to be kept by company, 693
 directions of tribunal on report of company, 685
 disclaimer, power to, 725
 duties of, 697
 returns to make, enforcement of, 749
 exercise and control of company, power to, 692
 make returns, to, 716
 miscellaneous powers, 747
 official, 717
 position, 697
 powers and duties of company, 688
 powers of
 miscellaneous, 747
 professional assistance to company, 692
 removal and replacement of, 684
 report to company, 685
 Listed companies
 pre-emptive clauses as to transferability of shares, 158
 List of contributors, 687
 liquidator must settle, 687
 rectification of, 687
 rights, adjustment of, 687
 Loans
 directors, to, 349
 inter-corporate, 467
 power to convert into capital, 243
 purchasing own shares, for, 245
 Loss of office
 directors, compensation for, 347
 sole selling agents, compensation for, 347
 Lost capital
 power to cancel, 230
 Lost share certificate
 duplicate certificate, 150
 Main objects, 67
 memorandum, in, 60, 67
 rule of construction, 67
 statement of, 60
 winding up, on failure of, 651
 Majority, oppression of, 527
 Majority powers, 495

- Majority-rule.** 495
 fraud, 499
 individual rights, 505
 limitations on, 497
 arts. *ultra vires*, 498
 fraud, 499
- Majority shareholding,** meaning of, 394
- Manager.** 348, 490
 incoring of, 349
- Managing director,** 339
 compulsory when, 347
 disqualifications, 275
- Mandamus.** 22
- Mediation and conciliation panel,** 762
- Meeting**
- companies and government,**
 representation of, 391
 - president and government,**
 representation of, 391
- Meetings,** 603
- adjournment,** 382
 - chairman's power,** 382
 - quorum, for want of,** 379
 - annual general,** 367
 - attendance and voting at,** 385
 - importance of,** 369
 - Board of Directors,** 331
 - chairman,** 382
 - appointment by CLB,** 385
 - casting vote,** 384
 - commencement, delay in,** 382
 - Company Law Board,** power to call, 372
 - conduct of,** 374
 - delay in commencement,** 382
 - directors,** 331
 - extraordinary, general,** 370
 - mixed nature of duty,** 384
 - notice of,** 374
 - contents of,** 376
 - general business,** 377
 - special business,** 377
 - poll,** 388
 - procedure,** 374
 - proper authority, to be called by,** 374
 - proxy,** 389
 - quorum,** 379
 - one person, when,** 380
 - registration of,** 394
 - representation of companies and governments,** 391
 - requisites,** 374
- Meetings (contd.)**
- resolutions,** 392
 - amendments,** 392
 - circulation of members,** 394
 - kinds of,** 392
 - postal ballot by,** 391
 - electronic mode,** 391
 - valid, procedure and requisites,** 374
 - voting,** 385
 - informal agreements, without,** 386
 - poll,** 388
 - proxy,** 389
 - show of hands, by,** 367
- Members**
- allotment by,** 199
 - alphabetical index, of,** 212
 - annual list of,** 219
 - articles of association, bound by,** 82
 - censuring to be,** 204
 - company, as,** 204
 - definition of,** 197
 - disqualified persons,** 202
 - documents, service on,** 400
 - how to become,** 198
 - investigation of affairs, request for,** 559
 - liability of past,** 204
 - meaning of,** 197, 756
 - minor,** 202
 - nominations by,** 201
 - partnership, as,** 203
 - prevention of oppression, petition by,** 509
 - qualification shares, holding of,** 199
 - register of,** 212
 - service of documents on,** 400
 - signatories of memorandum,** 196
 - trade unions, as,** 203
 - transfer, by,** 199
 - transmission, by,** 199
 - shares under nomination,** 201
 - variation of rights,** 249
 - who can be,** 197
 - who may be,** 202
 - company as,** 203
 - minor as,** 202
 - others disqualified,** 203
 - partnership, as,** 203
 - trade unions,** 203
 - winding up petitions, by,** 666
- Members, increasing liability of,** 90
- Members, inspection by,** 422

- Memorandum and articles.**
 binding force of, 82
 members in relation to company.
 binding on, 82
- Memorandum and articles, effect of,** 82
- Memorandum, articles in relation to,** 80
- Memorandum of association,** 49
 alteration of
 capital clause, 227
 mismanagement, 537
 name clause, 55
 objects clause, 74
 procedure of, 74
 registered office clause, 56
 articles of association, relation to, 82
 capital clause, 76
 constructive notice of, 90
 liability clause, 75
 name clause, 49
 objects clause, 60
 why objects, 61
 registered office clause, 56
 registration of, 37
 subscribers to, 76
- Merger,** 630
 liability for offences before, 636
- Minimum subscription,** 141
 allotment voidable, 141
 prospectus, specified in, 141
- Minor,** 202
- Minority**
 acquisition of shares of, 631
 fraud on, 499
 oppression of, 654
 prevention of oppression of, 509
- Minority rights,** 496
- Minority shareholders, protection of,** 495
- Minority shareholding, purchase of,** 632
- Minutes**
 directors' meeting, 336, 395
 shareholders, meetings, 395
- Minutes book, inspection of,** 397
- Miscellaneous matters,** 753
- Misdescription of name,** 28
- Misfeasance**
 directors liability, 734
- Misfeasance proceedings,** 734
- Mismanagement,** 537
 prevention of, 537
- Misrepresentation,** 113, 123
 change of circumstances, 125
 compensation for, 183
 fact, relating to, 118
 facts and not of law, of, 125
 liability for fraudulent, 490
 remedies for, 113
 compensation under Section 35, 113
 damages for deceit, 113
 rescission for, 114, 123
 affirmation, by, 114
 commencement of winding up, by, 115
 unreasonable delay, by, 115
- Mortgage or pledge of shares,** 164
- Mortgages,** 456
 register of, 464
 registration of, 456
 shares of, 463
- Multinational, subsidiary of,** 50
- Name of company,** 49
 alteration of, 55
 limited, licence to drop, 53
 misdescription of, 28
 publication of, 59
 reduced, 235
 reservation of, 53
 use of word limited, 53
 venture capital companies, of, 55
- National Company Law Tribunal,** 756
 constitution of, 756
- National Financial Reporting Authority**
 administration of, 426
 constitution of, 425
- Nationality,** 38
 company, of, 38
- Nature of corporate form,** 4
 advantages of, 4
- Negligence**
 auditors, of, 443
 directors, of, 312, 322
- Negotiable instruments,** 474
 bill of exchange, 472
 dishonour of cheque, liability for, 474
 promissory note, 472
 signature, made of, 473
- Net worth,** 428
- New Zealand Companies Act, 1993,** 312, 716
- Nominated directors,** 271

Nomination and Remuneration Committee, 295
 Nomination, appointment by, 271
 Nomination of shares and debentures, 201
 transmission of, 199
 Nominee director, 318
 liability of, 318
 position and liability of, 330
 Non-disclosure of information in certain cases, 269
 Notice, 392, 639
 acquisition of, 635
 allotment of shares of, 147
 board, 304
 meetings, 374
 notice-receipt, 374
 omission to give, 374
 registered office, situation of, 56
 special, 397
 removal, for auditor of, 436
 Numbering of shares, 147

Objects of company, 60
 alteration of, 74
 incidental objects, 63
 main, 67
 necessary, why, 61
 powers and, 60, 64
 unlawful, 61
 why, 61
 Offence, 731, 764
 cognizance of, 764
 composition of, 765
 officers, by, 731
 Offence, cognizance of, 321
 Offer of sale of shares, 111
 Officer in default, 361
 Officers, (fraud by, 731
 Official Liquidator, 687
 appointment of, 717
 powers and functions of, 717
 settlement of creditors' claims by, 718
 Official reports, 626
 One person companies, applicability of provisions to, 398
 One person company, 26, 334, 37
 meaning of, 581
 Onerous property, disclaimer of, 725

Oppression, 509, 515
 compromise, 544
 conduct of affairs, in, 531
 continuing nature of, 534
 fairness of petitioner's conduct, 535
 majority, 527
 measuring of, 515
 powers, 539
 Central Government, 527
 Company Law Board, 540
 members of, 540
 qua members, 529
 remedy against, 516
 prevention of, 509
 relief, conditions of, 515
 single act, by, 535
 transfer for, 531
 unfair prejudice and, 534
 valuation of shares, date of, 545
 who can apply, 515
 winding up, unfair prejudice, 533
 facts must justify, 532
 Oppression and mismanagement, 502, 509
 prevention of, 509
 Option in securities, meaning of, 243
 Orders
 enforcement of, 697
 Ordinary resolution, 392
 Ordinary shares, 228
 Outsider, 83
 Outsiders, binding in relation to, 83

Partnership, 73, 203
 company and, 4
 Partnership Act, 45
 Past members, liability of, 703
 Patent, 12
 Payment of liabilities, 706
 Penalties, adjudication of, 763
 Penalty, 429, 766
 false evidence, for, 767
 false statements, for, 766
 no specific penalty, 767
 Perpetual debentures, 491
 Perpetual succession, 9
 Personal liability of directors, 69
 Personal right and liability of contracting agent, 43
 Placement without prospectus, 115

- Poll, 389
 Postal ballot, 391
 electronic mode, 391
 resolution by, 391
 Power of investigation, 551
 Powers of directors, 285
 Powers of SEBI, 574
 Pre-emptive clauses on transfer
 listed companies, in, 160
 Pre-emptive right of shareholders, 158, 236
 Preference share capital, 225
 cumulative, 225
 meaning of, 225
 non-cumulative, 225
 ordinary, compared with, 228
 Preference shares
 participating, 203
 Preferential payments, 708
 Pre-incorporation contracts, 41
 acquisition of shares before, 41
 company not to be sued on, 41
 company not to sue on, 42
 personal liability of agents, 43
 ratification of, 42
 Specific Relief Act, 1963, 42
 statutory reform, 45
 Preliminary expenses, 141
 Premium
 issue of shares at, 192
 Securities Premium Account, 192
 Preservation of books, 636
 President
 meaning of, 756
 President and Government at
 meetings, representation of, 391
 Prevention of mismanagement, 537
 Prevention of oppression, 549
 Principle of last come, first go, 592
 Principle of res judicata, 21
 Principle of unlimited liability, 3
 Principles of natural justice, 495
 Private company, 108, 37
 advantages of, 579
 allotment of shares in, 580
 articles, restrictions in, 579
 capital, further issue of, 580
 commencement of business, 580
 conversion into public company, 581
 chnice, by, 581
 Private company (cont'd.)
 default, by, 581
 conversion of public company into, 581
 definition, 579
 directors, number of, 581
 exemption from prospectus provision, 580
 meaning of, 579
 members, maximum number, 579
 prospectus, prohibition on issue
 of, exemption from, 580
 provisions, 580
 public company into private
 company, conversion of, 581
 transfer of shares, power to refuse, 579
 when becomes public company, 581
 Private placement, 146
 Proceedings, stay
 before winding up, 672
 Production of documents
 kept by registrar, 753
 Professional management
 companies privileged with, 13
 Profits
 capitalisation of, 435
 Prohibition of assignment, 350
 office of directors, of, 350
 Promoters, 135
 definition, 135
 duty, 137
 fiduciary position, 137
 importance of, 135
 liability, 137
 persons acting in professional capacity, 136
 position, 137
 Prospectus, 107
 advertisement of, 112
 application forms not to be
 issued without, 107
 buyers in secondary market, 119
 change of circumstances, 125
 civil liability, 113
 company, liability of, 129
 consent, withdrawal of, 122
 contents of, 109
 criminal liability, 129
 damages for fraud, 132
 deceit, damages for, 113
 seemed, 108
 definition, 107
 delivery of copy to Registrar, 111

- Prospectus (contd.)**
- deposit, acceptance and repayment of, 130
 - disclosures to be made, 116
 - true and fair view must give, 116
 - false representation, 123
 - filing of copy with registrar, 110
 - golden rule, 116
 - ignorance, untrue statement, 122
 - information memorandum, 112
 - invitation for deposit, 132
 - issue, without knowledge, 122
 - matters to be stated, 109
 - meaning of, 107
 - misrepresentation in
 - compensation, 121
 - over-subscribed, 144
 - penalty for contravention, 111
 - placement without, 115
 - reasonable ground for belief, 122
 - red herring, 113
 - registration of, 587
 - registration of, by Registrar, 111
 - remedies for misrepresentation
 - debit, damages for, 117
 - direct allottees, remedy of, 118
 - misrepresentation
 - defences to, 122
 - reliance and inducement, 126
 - rescission of allotment, 123
 - RBM, vesting of powers in, Section 55-A, 110
 - reports, 110
 - Section 26, 128
 - liability under, 128
 - shelf, 112
 - statement of expert, 122
 - statement of independent expert, 110
 - true and fair view of company's position, 116
 - variation in terms of contract or objects stated in, 111
- Protection of employees during investigation, 566**
- Provisional liquidator, 682**
- Proxy, 389**
- Publication, 428**
- Public company, 19, 108, 37, 581**
- conversion of, into private company, 581
 - meaning of, 582
- Public documents, 90**
- Public interest, 600**
- Public offer and private placement, 108**
- Public trustees**
- beneficial interest, declaration of, 215
- Qualification shares, 199**
- Quasi-partnership, 665**
- Quorum**
- meetings of company, at, 379
 - directors, 336
- Ratification of pre-incorporation contract, 42**
- Receiver, 489**
- Rectification**
- director's power of entries, 170
 - mortgages and charges, of, 456
 - register of members, of, 162, 459
- Rectification of register of members, 162**
- directors' power of, 170
- Redeemable debentures, 491**
- Redeemable preference shares, 205**
- Red herring prospectus, 113**
- Reduction of capital, 230**
- "and reduced" addition of, to company's name, 235
 - cancellation of unissued shares, 230, 231
 - capital in excess of needs, 231
 - creditors' interest, 231
 - duties of court, 231
 - shareholder's interest, 232
- Registered office of company, 36**
- change of, 55
 - approval, Central Government, of, 55
 - name of company to be painted at, 53
 - service of notices, 56
 - situation, notice of, 57
- Registered valuers, 549**
- Register of beneficial owners**
- demat form holding of, 212
 - index of, 212
- Register of charges, 465**
- Register of companies, 639**
- removal of names of companies from, 639
- Register of directors, 336**
- Register of members, 212**
- beneficial owners, of, demat form, 212
 - closure of, 214
 - demat shareholding, in case of, 213
 - foreign, 213

- Register of members (contd.)
 magnetic form, in, 214
 place of keeping, 213
prima facie evidence, 214
 rectification, 162
 directors' power of, 170
 right of inspection, 213
- Registrar
 documents kept with, 753
 filing of documents with, 400
 inspection by, 421
 service of documents on, 400
- Registrar of Companies, 268
- Registrar, power of, 639
 remove name from register of companies, to, 639
- Registrar's petition, 667
- Registration
 certificate of, 464
 charges and mortgages, of, 456
 company, of, 37
 offences, 731
 offices, 753
 procedure for, 460
 special resolutions, of, 394
 transfer of shares, of, 177
- Registration and incorporation, 37
 procedure of, 37
- Registration of charges, 456
 acquisition of property
 subject to charge, 463
 appeal against registrar's order of extension of time, 462
 certificate of registration, 464
 chargee, rights of, 466
 commissions, payment of, 464
 debentures, series of, 463
 extension of time, 459
 pledge, 463
 rectification of register, 459
 unregistered, effects, 462
 register of charges, 465
 procedure of, 463
- Registration officer, 753
- Registration offices, 753
- Regular borrowings, 454
- Remedies for misrepresentation, 113
 compensation under Section 35, 113
 damages for deceit, 113
- Removal
 auditors, of, 436
 directors, of, 279
 fraudulent application for removal of name, 641, 642
 name of companies, of, 639
 restrictions on making application, 641
- Remuneration
 manager, 348
- Reorganisation of capital
 alteration of capital, by, 229
- Report, 110
 action in terms of, 568
 ACIM, no, 395
 auditor, by, 438
 inspection, on, 554
 Inspector, 567
- Reports, official, 620
- Requisition
 shareholders for meeting, by, 374
- Rescission for misrepresentation, 114, 123
 affirmation, by, 114
 commencement of winding up, by, 115
 unreasonable delay, by, 115
- Reserve capital, 224
- Reserve fund, 415
- Reserves, 409
- Residence, company of, 34
- Resignation
 auditors, by, 436
 directors, by, 284
- Resolutions, 392
 kinds of, 392
 minutes of, 395
 ordinary, 392
 registration of, 394
 special, 392
- Restraining access to market, 197
- Restrictions on transfer, 152
- Returns
 filing and inspection through electronic form, 754
- Right of inspection, 421
- Right to form associations, 4
- Right to Information Act, 2005, 24
- Right to trade, 3
- Rotation of directors, 269
- Rule of construction, 67
- Rule of law, 3

Rules, Central Government
power to make, 767

Satisfaction, memorandum of, 465
Schedules, power to alter, 767
Scheme, reasonableness of, 609
Seal of company
use in execution of deeds, 470
Search and seizure, 554
SEBI Act, 1992, 110
SEBI (Insider Trading) Regulations, 1992, 310
SEBI Takeover Code, 172
Secretarial audit for bigger companies, 349
Secretarial standards, meaning of, 306
Secretarial standards, observance of, 397
Secretary, 355
administrative officer, 360
company's liability for acts of, 356
definition, 355
meaning of, 355
obligatory, when appointment, 355
officer, as, 360
position, 357
qualifications, 355
status, elevation of, 356
Secured creditor in winding up
right to apply, 663
Securities, 141
allotment of, 141
Securities and Exchange Board of India, 574
insider dealing, guidelines on, 311
powers of, 574
vesting of powers in, Section 24, 130
Securities Contracts (Regulation) Act, 1956, 110
Securities market, unfair trade
practices in, 178
Separate property, company of, 10
Serious Fraud Investigation Office,
establishment of, 564
Service of documents, 400
company, on, 400
members, on, 399
register, on, 400
Set off, 204
Share certificate, 147
articles of association, how far contract, 84
ceasing to be, 204
definition, 197
duplicate, 150

Share certificate (contd.)
effect of, 149
estoppel raised by, 149
fictitious person, 194
how to become, 198
liability of past, 203
liability of present, 204
members' right to, 145
minimum number of, 76
minor, 202
object of, 149
prima facie evidence of title, 149
register of, 213
foreign members of, 213
place of keeping, 213
prima facie evidence, 214
certification, 162
right of inspection, 213
shareholders, 197
subscribers of memorandum, 196
variation of rights, 243
voting rights, 785
Shareholders, agreement amongst, 85
Share premium account, 192
Shares
allotment of, 141
restrictions on, 141
return as to, 188
annual returns, 221
beneficial interest in, declaration of, 215
bonus, 416
calls on, 204
certificate of, 147
duplicate, 150
compensation for delay, 162
derivatives, 224
discount, issue of, 189
dividends on, 403
duplicate certificate, 150
equity, 224
estoppel as to title, 149
fictitious person, in name of, 194
forfeiture of, 209
funds of company not to be used for
purchasing own shares, 245
hybrids, 225
inadequacy of reasons, 154
irrelevant considerations, 154
kinds of, 224
lien on, 217
mala fide, 154

- Shares (contd.)**
- mortgage of, 184
 - nature of, 185
 - nomination of, 201
 - numbering of, 147
 - ordinary, 224
 - payment estoppel as to, 150
 - personation, 194
 - pledge of, 184
 - preference, 225
 - premium issue at, 192
 - purchase by company its own, 245
 - buy-back, 249
 - consequences of illegal purchase, 247
 - exceptions, 246
 - exemption of, financial assistance from private companies, 249
 - qualification, 199
 - redeemable preference, 228
 - restriction on extent of holding, 173
 - restrictions on transfer, 152
 - return as to allotment of, 188
 - stock exchange shares to be dealt in on, 142
 - surrender of, 211
 - sweat equity, 189
 - transferable shares, 11
 - transfer of, 151
 - appeal against refusal to accept, 171
 - civil remedy, not barred, 173
 - pre-emptive clauses, 158
 - refusal, remedy against, 160
 - restriction on, 152
 - extent of shareholding, on, 173
 - strict construction of, 155
 - right to refuse, 153, 160
 - transmission, 199
 - trust, held on
 - beneficial interest, declaration of, 215
 - underwriting commission, 190
- Shares and debentures, restrictions upon, 569**
- Shelf prospectus, 112**
- Sick companies, 644**
- revival and rehabilitation of, 644
- Simplified exit scheme, 644**
- Small company, 562**
- Small shareholder, meaning of, 253**
- Social Responsibility Committee, 429**
- Sole selling agents, 364**
- compensation for loss of office, 364
- Sovereignty, acts against, 648**
- Special Courts, 761**
- appeal against acquittal, 762
 - appeal and revision, 761
 - application of fines, 762
 - compensation for arraignment, 762
 - establishment of, 761
 - mediation and conciliation panel, 762
 - offences triable by, 761
- Special majority, 504**
- Special resolution**
- alteration of articles, for, 86
 - change of name, 55
 - copy to be sent to registrar, 395
 - memorandum, alteration, 25
 - reduction of capital, 230
 - when necessary, 392
 - winding up by court, for, 648
- Specific enforcement of agreement for sale of shares, 163**
- Specific Relief Act, 1963, 42**
- Stakeholders Relationship Committee, 295**
- Statistics, power of Central Government to make, 755**
- Stay of proceedings in winding up before, order, 672**
- Stock exchange companies**
- additional disqualification for directors, 277
- Stock exchange, shares to be dealt in, 142**
- Stock holding corporation**
- magistic form, 264
- Subrogation, 454**
- Subscriber**
- member/holder of association to, 76
 - minimum number of, 76
- Subscription, 580**
- Subsidiary company, 593**
- account of, 593
 - definition of, 593
 - insolvent, liability for, 31
 - multinational, liability for, 30
- Subsidiary establishments, 32**
- Substratum, loss of, ground for winding up, 651**
- Suits, company's capacity for, 11**
- Suspicion of irregularity, 95**
- Sweat equity shares, 189**

- Tax liability, 381
 directors of, 381
- Technical member, meaning of, 256
- Theory of legal fiction, 6
- Time-barred debt, 219
- Torts, ultra vires, 72
- Total voting power
 concept of, 388
- Trade union, 203
- Transactions, fraudulent and illegal, 496
- Transferable shares, 11
 appeal against refusal, 160
 condonation of delay in filing, 173
- blank transfers, 176
- condonation of delay, 173
- dealing, 178
- depository scheme, 182
- depository system in, 178, 182
- duty of company to register, 150
- forgery in, 179
- power to refuse, 160, 161
 absolute, interference in, 156
 good faith to be exercised in, 153
 reasons for, 154
- pre-emptive clauses
 listed companies and pre-
 emptive clauses, 160
 transfer contravening, 156
- priority between transferees, 183
- private agreement amongst members, 531
- procedure of, 74
- refusal, statutory remedy against, 160
- restrictions on, 152
 strict construction of, 155
- scope of judicial interference, 156
- Securities Contracts (Regulation)
 Act, refusal under, 144
- specific enforcement of agreement, 183
- Transfer contravening S. 56, 177
- transferee and transferor,
 relationship between, 180
- unfair trade practice, in, 178
- unfettered power, 156
- when can Company Law Board compel, 521
- Transferee and transferor, 180
- Transferees, priority between, 183
- Transfer of shares, 151
 private companies, application
 of Section 111, 152
- Transferor and transferee, 180
- Transfer, procedure of, 173
- Tribunal, 717
 duties and powers of, 606
 power of, to declare dissolution
 to be void, 717
 power of, to make calls, 695
 sanction of, 601
 submission of periodical reports to, 688
- Tribunal, jurisdiction of, 680
- Tribunal, powers of, 539, 669
- Tribunal to call meeting, power of, 372
- Trust deed, debenture, 486
- Trust, deposits on, 713
- Trustee, 21
- Trustees at institution, 260
- Turnover, meaning of, 416
- Ultra vires, 62
 acquired property, 70
 borrowing, 70, 453
 charitable contribution, 64
 consequences, 69
 contracts, 71
 directors, personal liabilities of, 69
 injunction to restrain, 69
 property, 70
 lots, 72
 warranty of authority, breach of, 70
- contract's, 71
- directors' liability for, 69
- main objects, rule of construction, 67
- personal liability of directors, for, 69
- powers of company, 64
- parts, 72
- Ultra vires acts, 498
- Uncalled capital, 224
- Underwriting Committee, 190
- Undistributed Assets Account, 715
- Unfairness, burden of proving, 610
- Unfair prejudice, 539
 oppression and, 534
- Unfair trade practices, 178
 securities market, in, 179
- Unlimited companies, 577
- Unlimited liability, officers with, 204
- Unpaid dividend account, 410
- Unregistered company, 743
 foreign company as, 745
- Untrue statement, ignorance of, 122

Utilisation of fund, 411

Valuation, 545

date of, 545

registered valuers, by, 548

Venture capital companies, 55

Vesting of powers in SICBI, Section 24, by, 130

Voluntary transfer, avoidance of, 721

Voluntary winding up

conduct of, 697

liquidator

duty and liability, 697

position of, 697

winding up, report on progress of, 697

Vote, 385

declaration of chairman, 382

electronic means, by, 387

informal agreements without, 396

poll, by, 388

proxy, by, 389

revocation, 390

right to, 385

show of hands, by, 387

Waiver of penalty, 433

Winding up, 647

commencement of, 671

provisions applicable to every mode
of, 701

tribunal, by

advertisement of petition, 662

types of, 647

voluntary

winding up, report on progress of, 697

Winding up by court

decreed debt

annulment of, 742

set off, 704

Winding up by tribunal, 648

acts against sovereignty, 648

arrest of absconding contributory, 694

Central Government's petition, 668

commencement of, 671

company's petition, 663

contingent creditor may petition, 664

contributors' petition, 666

courts, powers of, 649

creditor's petition, 663

deadlock, 650

Winding up by tribunal (contd.)

decreed debt, 670

dissolution, 696

financial statements, default in filing, 649

fraudulent conduct of affairs, 649

grounds of, 648

business, not commenced, 671

inability to pay debts

decreed debt, 670

incorporated or quasi-partnership, 655

just and equitable, 649

deadlock in management, 650

fraudulent purpose, 655

losses, perpetual, 654

oppression, 654

partnership, quasi or incorporated, 655

public interest, 660

substratum, loss of, 651

winding up, ground of, 649

loss of substratum, 651

main object gone, 651

power to order, 695

public examination, 695

public interest, 660

registrar's petition, 667

remedy, alternative, existence of, 661

rescission of order, 671

set off, 696

settlement of list of contributors, 687

special resolution, 648

stay of proceedings, 672

who can apply, 662

Winding up, conduct of, 701

above of legal process, 747

annulment of dissolution, 742

antecedent transactions, 718

attachments, avoidance, 724

avoidance of voluntary transfer, 721

disclaimer, 725

executions, avoidance of, 724

fraudulent preference, 718

transfer of shares, 723

ascertain wishes, 664

assessment of damages, 734

contributors, 710

deposits on trust, 713

disposal of books, 743

donations, 715

employees' dues, recovery of, 714

Employees' Provident Fund, 714

foreign companies, 745

Winding up, conduct at (wind.)
 fraudulent conduct of business, 727
 offences by officers, 731
 prosecution of delinquent officers, 738
general creditors and shareholders, 715
liabilities, payment of, 705
misdemeanour proceedings, 704
past members, liability of, 710
preferential payments, 208
proceedings against delinquent officers, 738
 falsification of books, 730
 frauds, 731
 set off, 704

Winding up order, 674
 consequences of, 674
 stay of suits, on, 675

Withdrawal of consent, 122

Words and phrases

- "abridged prospectus", 107
- "agents", 254
- "agreed in writing", 197
- "after", 74
- "alteration", 74
- "alternate director", 352
- "amalgamation", 616
- "annual return", 219
- "appointment", 351
- "arm's length transaction", 354
- "arrangement", 600, 617
- "articles", 79
- "assignment", 351
- "branch office", 32
- "chairperson", 736
- "company", 2, 595
- "company liquidator", 683
- "compromise", 599
- "contributory", 201
- "control", 266
- "corporations", 3
- "corporations as general body", 502
- "derivative", 224
- "employees' stock option", 242
- "expert", 110
- "false representation", 123
- "fraud", 117
- "fraud, misfeasance or other misconduct", 558
- "fraud on minority", 499
- "fraudulent preference", 718

Words and phrases (contd.)

- "free reserves", 415
- "give and take", 591
- "hybrid", 225
- "impracticable", 372
- "Indian Depository Receipt", 597
- "intent to defraud creditors", 557
- "interested director", 333
- "interim dividend", 413
- "issued", 109
- "judicial member", 756
- "layer", 595
- "legal proceedings", 676
- "limited", 45
- "majority shareholding", 594
- "manager", 348
- "member", 83, 197, 256
- "office or place of profit", 354
- "officer", 361, 713
- "oppression", 516
- "option in securities", 243
- "paid up share capital", 221
- "place of business", 583
- "preference share capital", 225
- "president", 756
- "private limited", 45
- "promoter", 135, 109
- "prospectus", 107
- "public", 109
- "public interest", 621
- "red herring", 113
- "relative", 353
- "relevant debentures", 339
- "relevant shares", 338
- "secretarial standards", 356
- "secretary", 355
- "securities", 224
- "share capital paid up", 224
- "shareholder", 197, 264
- "shares", 185
- "subsidiary", 423, 594
- "technical member", 756
- "ultra", 62
- "unnecessary delay", 167
- "vires", 62
- "warranted by terms of incorporation", 42
- "wholetime director", 340

Working organ, personal liability of, 263

Wrongdoers in control, 514

Wrongful withholding of property, 730

List of articles available through EBC Explorer™:

1. Afra Afsharipour, "Corporate Governance and the Indian Private Equity Model" (2015) 27 NLSJ Rev 17
2. Aravind Venugopal and Suditi Surana, "Non-Compete Obligations in Share-Purchase Transactions—Recent Developments" (2017) PL (CL) March 77
3. Bhavna Pattnaik, "The Case of Darius Kavasmaneck V Charda Chemicals: A Missed Opportunity in the Jurisprudence of Derivative Actions?" (2016) NLS Bus L Rev 127
4. Daisy Chawla, Kumardeep and Aripita Karmakar, "Vacation of Office of Director—An Upshot from Disqualification of Directors U/S 164(2) of the Companies Act, 2013" (22-6-2017) Singh & Associates
5. Dharmika Dharmapala and Vikramaditya S. Khanna, "The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013" (28-11-2016) CESifo Working Paper Series No. 6200
6. Harpreet Kaur, "Promoters and Corporate Governance under the Companies Act, 2013 and Allied Acts in India" (2015-16) 3 J NLU 53
7. Harshad Patalkar, "The Loss of Industrial Character under the Sick Industrial Companies (Special Provisions) Act, 1985: Addressing the Jurisdictional Conundrum" (2016) 9 NUJS L Rev 41
8. Kumardeep, "Comprehensive Analysis of Strike Off under Companies Act, 2013" (27-6-2017) Singh & Associates
9. Dr Mamata Biswal, "Prevailing Multiple Jurisdiction to a Complex Jurisdiction under the Companies Act, 2013" (2017) 2 SCC J-19
10. Srinivas Raman, "Regulating Reverse Mergers in India" (2017) 3 HNLU SB 10



List of videos available through EBC Explorer™:

1. "Companies Act 2013 (Chapter 4): Memorandum & Articles of Association"
2. "Company Act 2013—Key Highlights"
3. "Companies Amendment Act 2017 & Restoration of Struck off Companies"
4. "Corporate Restructuring—Mergers & Acquisitions"
5. Kamlesh S. Vikamsey, CA, "Overview of Companies Act 2013"
6. "Practice Alert Discussion on an Update Programme on Companies Act 2013"
7. "Secretarial Audit under the Companies Act, 2013"



$$\epsilon^{\alpha\beta}$$

The current edition of *Company Law* by Dr. Avtar Singh, a highly acclaimed and recommended book on the subject, has been thoroughly revised and updated in the light of recent significant legislative changes.

The book presents a thorough study of all the new concepts and changes made in Company Law since 2013, including topics such as requirement of minimum share capital, related party transactions, Audit Committees, clause 49 of the Listing Agreement etc. This book has also been updated with special resolutions, use of common seal, class action suits, shareholders rights, provisions for corporate social responsibility etc.

The notable features of this book are:

- Gives in-depth understanding of Companies Act, 2013 along with all its amendments.
- Updated with the discussion on two latest amendments post 2013 Act, one in 2015 and another in 2017.
- Topic wise arrangement of matter, explaining the various aspects of company law with the help of Indian and foreign case laws.
- Includes a note on the highlights of the Companies Act, 2013 by Khaitan & Co., Mumbai, to give a practitioner's view of the new Companies Act.

Includes additional learning resources on www.ebcexplorer.com:



- Access to important case law as indicated by Case Pilot™.
- Discussion Forum™ provides a platform outside classroom to post comments, discuss and explore ideas.
- SCC Online® Blog to stay updated on recent happenings of the legal world.

This work will be immensely useful for all legal practitioners, law students, company secretaries, chartered accountants, who are required to have knowledge of the company law in their profession. This book is also a must read for company executives, researchers, academicians and students of CS, CA, MBA and other professional courses.