

Unit 2: FORMATION OF A COMPANY [13 lectures]

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4. Incorporation Stage – Meaning, Contents,
5. Forms of Memorandum of Association & Articles of Association and its alteration, Distinction between Memorandum of Association and Articles of Association,
6. Doctrines of constructive notice and Indoor management,
7. Meaning & contents of Prospectus, Types,
8. Misstatement in prospectus and its consequences

2.1. Formation of a company other than one person company [Section 3]

A company may be formed for a lawful purpose by—

- a. Seven or more person where the company to be formed as public limited company.
- b. Two or more person where the company is to be formed as a private company.

May subscribe their name to the memorandum and may comply with the requirements of this Act

The company formed under the section may be formed aseither:

1. A company limited by shares
2. A company limited by guarantee
3. An unlimited company.

Member severally liable [Section 3A]

If the number of members of a company is reduced below seven in case of public company and below two in case of private company and carries on the company for a period more than six months every person who is the member of the company carries on the business beyond those six months then such person shall be severally liable for the payment of the whole debt of the company and may be sued for the same.

2.1.1. Formation of one person company [Section 3]

For company which are to be formed as one person company is to be formed as private company. The memorandum of one person company shall indicate the name of the other person with his written consent in the prescribed form INC 3, INC 4, INC 32 who gives a consent that on the subscriber's death or his incapacity to enter into the contract shall be becoming the member of the company and the written consent of such person shall be filed with the Registrar at the time of incorporation of the One person company along with the memorandum of association.

The proviso of the section states that such person may withdraw his consent and the member of the one-person company may withdraw his name by giving a notice. Any change in the name of the member shall be informed to the Registrar in the prescribed manner. Any change in the name of the member shall not change the memorandum.

Rules for formation of One Person Company [Rule 3 , 4 , 7A of the Companies (Incorporation Rules)2014

1. Only a natural person who is an Indian Citizen and the resident in India shall be eligible to become as a member of the one-person company.
2. A member of one person company is not eligible to become the nominee of more than a one person company.
3. Where a natural person who is a member in one person company and who is also a member in any other company at the same time is required to meet the eligibility criteria as per point one within a period of one hundred and eighty days.
4. No minor is eligible to become the or nominee in one person company or can hold share with beneficial interest.
5. Such company cannot be incorporated as section 8 company and such company and such company cannot carry out non financial investment activities.

Nomination Rule for one person company[Rule 4]

1. The subscriber to the memorandum of the one-person company shall nominate a person after obtaining prior written consent of such person who after the death of the subscriber shall become the member of that one person company.
2. The name of the person nominated as member of the one person company shall be filed with the Registrar of the company.
3. The person nominated as subscriber or member of the one person company may withdraw his consent by given by giving a notice and shall intimate in writing the written consent.
4. The company shall file with the Registrar the written consent of withdrawal within thirty days.
5. If the one person company or any officer of such company contravenes any of the provisions every person shall be liable with a fine which may extend to five thousand rupees and a further fine of rupees five hundred rupees during each day of the offence continues.

2.1.2. Incorporation of a company [Section 7] and Rule 38 [Simplified Proforma for Incorporating Company Electronically (SPICe)]

The following steps are required to be followed for incorporation of the company.

1. Company shall file with the Registrar within whose jurisdiction the registered office of a company is proposed to be situated, the following documents are required to be filed:
 - a. The memorandum and articles of association of the company duly signed by the subscribers to the memorandum
 - b. Rule 38 specifies that the application for incorporation of a company shall be in Form No. INC-32 (SPICe) along with e-Memorandum of association (e-MOA) in Form No. INC-33 and e-Articles of Association (e-AOA) in Form No. INC-34.
 - c. A declaration in the prescribed form No INC 8 of the Companies (Incorporation) Rules, 2014 is to be signed by an advocate, chartered accountant, cost accountant or a company secretary in practice who is engaged in the formation of the company and all such person as defined as director, manager and secretary of the company is required to sign the registration document. The declaration must contain all the particulars of the directors including the name of the first director and the consent to act as the director in such form and manner as required.
 - d. A declaration is to be signed by the subscribers to the memorandum and the first director of the company is required to make a declaration that he is not found to be guilty of fraud or misfeasance or breach of duty under any provision of the Act.

- e. An application for allotment of director identification number upto three directors are made, including reservation of name, incorporation of company and an application is to be made in Form No. 32(SPICe) with the Registrar within whose jurisdiction the registered office of the company is proposed to be situated.
- f. The promoter or applicant of the proposed company shall prepare Memorandum of Association (e-MOA) in Form No. INC-33 and Articles of Association (e-AOA) in Form No. INC-32 (SPICe)
- g. The subscriber and witness shall affix their digital signature to the e-MOA and e-AOA.
- h. The registrar on examining the Form No.INC.32 (SPICe) if finds that if any application or document is defective and incomplete, he shall ask the applicant to remove the defect and resubmit the e-forms within fifteen days.
- i. If after resubmission there is still any defect then the Registrar shall give another fifteen days for resubmission
- j. The certificate of incorporation shall be issued by the Registrar in Form No. INC11.
- k. After receiving the certificate of incorporation, the Registrar shall allot to the company a corporate identification number which shall be the distinct identity of the company.
- l. If any person furnishes a false or incorrect identity, he shall be liable by the action of fraud under section 447.
- m. The Tribunal has the power to pass order as it deems fit where there is any material suppression of facts or information
- n. Before passing such order the company shall be given a reasonable opportunity to be heard. The Tribunal shall take into consideration the transaction entered into by the company.

Section 9 of the Act 2013, states that after receiving the certificate of incorporation the subscribers to the memorandum who are capable to exercising all the functions of an incorporated company under this Act and having perpetual succession with the power to acquire, hold, dispose of the property both movable, immovable, tangible, intangible and to be sued.

Section 11 of the Act 2013, states that the company having share capital shall not commence any of its business or exercise any borrowing power unless:

- a. declaration is filed by a director of the company and verified the value of the shares and the paid up capital and
- b. the company has filed with the Registrar the verification as to the registered office of the company.

2.1.3. Steps in Formation of Company

Step 1: Filing the proposed name of the company for approval to the registrar

1. INC 1 a person can apply for the proposed name of the company
2. The application to be made in Form No INC 1 along with proper fees
3. The application is to be made to the register for reservation of the name
4. The Registrar shall reserve the name for a period of 20 days
5. In case of a reservation of name or for change of its name by an existing company, the registrar may reserve the name for a period of 60 days from the date of approval
6. The reserved name shall be cancelled if it is found that the name was applied by furnishing wrong information
7. The person shall be punishable for a fine of wrong information by 1 lakh rupees

Step 2: Obtain Digital Signature

- Digital Signature Certificate for the Managing Director or Director or Manager or Secretary of the Company is required to be obtained from a licensed authority..
- At least one signature of the director is to be obtained for filing any E-Forms like INC 1. certifying authority means a person who has been granted the authority to issue a digital signature certificate
- Every individual intending to be appointed as director shall make an application in form No DIR 3 to the Central Government.
- Every director of the proposed company must obtain DIN before application is made for the name of the company in INC1
- After receiving the DIN the director must intimate to the company his DIN number
- DIN has to be obtained with the help of the documents: PAN, Address proof, photo, current occupation, qualification, email address, contact number and verified signature

Step 3: Drafting of Memorandum of Association

MOA must be signed by each subscriber, along with address, description and occupation in the presence of one witness.

MOA must contain the following information:

1. Name of the company either ending with 'Limited' or 'Private limited'
2. State in which the registered office of the company is situated
3. Amount of share capital of the company
4. In case of the One person company the name of the person in the event of death of the subscriber.
5. The MOA shall be in respective form in the TABLE A,B,C,D, and E of Schedule I

Step 4: Articles of Association of Company

- AOA is the document explains the internal management of the company
- The provisions of the articles may be altered on certain cases or on special resolution
- The articles shall be provided in Table F, G, H, I and J of Schedule -I

Step 5: Registered Office of the company

- Within 30 days of incorporation of the company and thereafter the registered office must be capable of receiving and acknowledging all communications and notices as addressed.
- The company must furnish to the Registrar verification of the registered office within a period of 30 days of its incorporation in such manner as may be prescribed.

- Every company must paint its name and address of its registered office and keep the same painted outside every office or place in which its business is carried on.
- In all business letters, billheads, letter papers and in all notices the company will have to print its name, address of its registered office and the Corporate identity number along with email address, website address. Telephone number etc.
- An application is to be filed with the registrar within whose jurisdiction the registered office of a company is to be situated in Form No INC 2 for one person company and form no INC 7 for other than one person company.

Step 6: Certificate of incorporation

- For Certificate of Incorporation the company has to inform to the Registrar in Form No INC 11 to the effect that the proposed company is incorporated under the Act.
- After allotment of Certificate of information the Registrar shall allot a CIN (Corporate Identification Number) which indicates the identity of the company and is included in the certificate

2.1.4. Director Identification Number

- Unique identification number allotted to a person who is a director of a company
- It is a mandatory requirement for all existing and prospective directors.
- DIN is allotted only by Central Government
- DIN is allotted once in a life time and even on resignation of a director the DIN will not be cancelled.
- Only a single DIN is required for an individual irrespective of number of directorship held by him in different companies.
- For obtaining DIN DIR-3 has to be filled by a director.

2.1.5. Meaning of a Promoter[Section 2(69)]

A promoter means a person

1. Who has been named and identified as promoter in the prospectus or is identified by the company while filing the annual return.
2. Who has control over the affairs of the company, directly or indirectly whether as shareholder, director,
3. In accordance with whose advice, directions or instructions the Board of directors Of the company is accustomed to act.

2.1.6. Functions of a promoter

The promoter performs the following functions:

1. To conceive an idea regarding formation of a company.
2. To decide the requisite number of person who would be signing the memorandum and articles of a company and who would be acting as the first director of the company.
3. To decide about the name of the company, the location of the registered office, the amount of share capital, the bankers and auditors of the company etc.
4. To get the memorandum and articles of association printed and drafted.
5. To arrange the minimum subscription of capital.

2.1.7. Legal position of a promoter

A promoter of a company stands to be in a fiduciary position with the company
Fiduciary position stands to mean that

1. A promoter cannot be allowed to make a secret profit from the affairs of the company
2. A promoter is not allowed to enter into any contract in his own name for and behalf of the company.

2.1.8. Memorandum of Association [Section 4]

The memorandum of association of a company shall state the following:

1. If the company is a public limited, the word” Limited” is to be added and if the company is a private limited the word” private limited” is to be added at the end of the name of the company.
2. **Situation Clause:**The memorandum must state where the registered office of the company is situated. Every company must have a registered office domiciled at the place where the statutory registers of the company is to be kept.

As per section 12 of the Act 2013, the company shall furnish to the Registrar verification of its register office within a period of thirty days within a period of thirty days.

Every company shall:

- a. Paint or affix its name, address of its registered office and keep the same painted or affixed on the outside of every office or the place where the business is been carried.
 - b. Having its name engraved in legible characters on it seal
 - c. Gets its name engraved in legible character on its seal
 - d. Gets its name, address of it registered office and the corporate identity number along with the telephone number, fax number, email etc. available on all business letters, bill boards etc.
 - e. Having its name printed on hundis, promissory notes, bills of exchange, and such other documents as may be prescribed.
3. **Object Clause:** The object for which the company is to be incorporated. The object of the company shall contain:
 - i. The main objects to be pursued on incorporation
 - ii. Objects incidental or ancillary to the attainment of the main object
 - iii. Other object of the company
 4. **Liability Clause:** The liabilities of the member of the company whether limited and unlimited and must state
 - a. The total liability of the shareholders in the company limited by shares and the liability for the unpaid shares of the company.
 - b. In case of a company limited by guarantee the amount that would be contributed by each member of the company in case of winding up and if the person ceases to be member of the company all debts and liabilities of the company is to be paid of before he ceases to be a member.
 - c. All the costs, charges and expenses of the winding up of the company.
 5. **Share Capital clause:**In case of a company having a share capital the memorandum of association must state
 - a. The amount of share capital with which the company is to be registered and the division of shares of a fixed amount and the number of shares that are to be issued.
 - b. The number of shares that each subscriber to the memorandum intends to hold.

6. In case of one person company the name of the person who in the event of death of the subscribers shall become the member of the company.

7. **Name Clause:** The memorandum contains a name clause which states that the name of the company must not be identical with or resembles with any existing name of the company and the name must not be undesirable in the opinion of the company.

The name of the company must not contain any impression that is similar or having any connection with the Central Government or State Government or any Local authority or anybody constituted by the Central Government or the State Government under any law for the time in force.

A person may make an application with prescribed form for the reservation of the name of the company containing the following

- a. The name of the proposed company or
- b. The name to which the company proposes to change its name.

The Registrar may on the information as received may preserve the name of the company for a period of twenty one days from the date of approval or such period as may be stated.

In case of an application for reservation of name or for change of an existing name of the company the Registrar may reserve the name of the company for a period of sixty days from the date of approval.

- c. If the company has not incorporated the reserved name the proposed name is to be cancelled and the person shall be liable to a penalty of rupees one lakh. If the company has been incorporated the Registrar may after giving the company an opportunity to be being heard-
 - i. May change the name of the company within a period of three months after passing an ordinary resolution.
 - ii. Take action for striking the name of the company from the registrar
 - iii. Make a petition for winding up of the company.

d. Forms of Memorandum

Sl.No	Table	Form
1	Table A	MOA of a company limited by shares
2	Table B	MOA of a company limited by guarantee and not having share capital
3	Table C	MOA of a company limited by guarantee and having share capital
4	Table D	MOA of an unlimited company and not having share capital
5	Table E	MOA of an unlimited company and having share capital

2.1.9. Alteration of Memorandum [Section 13]

The company shall in relation with the alteration of its memorandum file with the Registrar-

- a. A special resolution passed by the company
- b. The approval of the Central Government if the alteration involves any change in the name of the company.

1. A company may by a special resolution and after complying with the procedure as specified may alter the provisions of the memorandum

a. **Change of the name:** The name of the company may be changed at any time by passing a special resolution at the general meeting of the company and with the written approval of the Central Government. But no approval of the Central Government is required if the change of name involves only the addition or deletion of the word “private”.

Section 13(1) of the Companies Act 2013, states that if in the opinion of the Central Government if the name is identical with or too nearly resembles the name of the any other company then the company may change the name within three months from the date of issue of such direction after passing a ordinary resolution the name is to be changed. But in case of the application by the registered proprietor of a Trade Mark 1999, the name can be changed within a period of six months from the date of issue of such direction after adopting a ordinary resolution. The changed name shall be made applicable within fifteen days from the date of such change and all changes shall be made in the certificate of incorporation. If the company does not comply with any of the provisions of the section the company shall be punishable with a fine of rupees one thousand for each day during which the default continues and every officer shall be punishable with a fine of rupees not less than five thousand rupees and which may extend to one lakh rupees.

Rule 29 of the Companies (Incorporation) Rules 2014 states that the change of name shall not be allowed to a company which has not filed annual return or financial statements due for filing with the Registrar or which has failed to repay matured deposits or debentures or interest.

An application has to be filed in Form No. INC 24. Along with a fee for change in the name of the company and a new certificate of incorporation in Form No. INC 25. Shall be issued to the company consequent upon change of name.

b. **Change or alteration of the situation clause :**

Section 13(7) of the Companies Act 2013, states that for transfer of the registered office of a company from one state to another a certified copy order of the order of the Central Government approving the alteration shall be filed with the Registrar of each state within specified time.

Rule 30 of the Companies (Incorporation) Rules 2014, states that an application can be to the Registrar for change of the registered office from one state government or union territory to another, and shall be filed with the Central Government in Form No. INC .23 along with necessary fees and shall be accompanied by the following documents, namely—

1. A copy of memorandum of association with proposed alteration
2. A copy of the minutes of the general meeting at which the resolution authorising such alteration was passed
3. A copy of the Board Resolution is to be filed.

Along with the application the list of creditors and debenture holders including their name and address and their respective amount due is required to be filed. The list of creditors is required to be signed by the company

secretary if any and not less than two directors of the company one of whom shall be managing director where there is one.

The company shall not more than thirty days before the date of application in Form No. INC 23.—

- a. Advertise in the Form No. 26 in a vernacular newspaper and in an English newspaper having the widest circulation.
- b. The copy of the newspaper shall be served to the Securities Exchange Board Of India in case the company is a listed company.
- c. Where no objection has been received from the associated persons the application has to be passed within fifteen days.
- d. The order passed by the Central Government confirming the alteration may include the order as it thinks.
- e. The whole process shall get completed if there are no pending cases in against of the company.

c. **Change of the capital clause:**

Section 61 of the Act 2013, states that, a limited company having share capital if authorised by the articles may alter its memorandum after a general meeting in order to:

1. Increase the authorised share capital as it thinks fit
2. Divide its share capital into share of the larger amount.
3. Convert its fully paid up share into stock and reconvert the stock into fully paid up share of any denomination.
4. Subdivide the shares into shares of smaller amount in such manner so that after subdivision the proportion between the amount paid and the amount unpaid remains same.
5. Cancel the shares by passing the resolution and diminish the amount of share capital. But the cancellation of the shares shall not lead to reduction of share capital.

As per section 64 of the Companies Act 2013 notice is to be given by the company to the Registrar for alteration of the share capital, increasing of the authorised share capital, or for redemption of the preference share capital in Form No. SH7 and as per Rule 15 of the Companies (Share Capital and Debentures) Rule 2014.

- d. **Change of the object clause:** As per section 13(8) of the Act 2013 states that when a company has raised money from public through prospectus and there is any unutilised money shall not change the object clause unless a special resolution has been obtained and the details of such has been published in the newspaper having a wide circulation at the place where the registered office of the company has been situated. The dissenting shareholders shall be given an opportunity to exit. Section 13(9) states that Registrar shall register any alteration of the memorandum with respect to the object clause within a period of thirty days from the date of filing of the special resolution.

Rule 32 of the of the Companies (Incorporation Rules) 2014 states that any resolution passed by special resolution through postal ballot for alteration of the object clause shall contain the following particulars:

1. The total money received

2. The total money utilised for the objects stated in the prospectus.
3. The unutilised amount of money raised through prospectus
4. The particulars of the alteration or change in the object clause
5. The amount proposed to be utilised for the new object
6. Estimated change on the financial statement of the company on account of such proposed alteration.
7. The place from where the interested person may obtain the copy of the proposed alteration.

The notice shall be published in the website of the company.

2.1.10. Documents Required for MOA Amendment

The necessary documents for MOA amendment include:

- **Revised MOA:** A copy of the Memorandum of Association reflecting the proposed changes.
- **Certified Copy of Special Resolution:** A certified copy of the resolution passed at the Extraordinary General Meeting (EGM) approving the MOA amendments.
- **Explanatory Statement:** A document providing explanations and justifications for the proposed changes, distributed to members along with the EGM notice.
- **EGM Notice:** A formal notice sent to all company members, announcing the EGM and detailing the agenda, including the proposed MOA amendments.
- **Form MGT-14:** A form submitted to the Registrar of Companies and the above documents officially registers the special resolution and amendments.

2.1.11 Common Procedure for MOA Amendment

Amending the Memorandum of Association (MOA) involves a structured legal process as outlined by The Companies Act, which applies to all companies. Here's a detailed breakdown of the necessary steps:

Step 1: Preparing for the Amendment

Board Resolution: Initiate the process by drafting a board resolution that outlines the intent to amend the MOA. This resolution should clearly state the sections of the MOA to be altered and justify each proposed change. The board of directors must approve this resolution, signifying the company's internal agreement to proceed with the amendments.

Step 2: Drafting the Special Resolution

Resolution Content: The special resolution should be meticulously drafted to include all proposed amendments to the MOA. It must be comprehensive, detailing the exact changes in clauses such as the Object Clause, Name Clause, Capital Clause, etc., as required.

Legal Compliance: Ensure the resolution complies with the relevant sections of the Companies Act that govern MOA amendments. Legal advice may be sought to guarantee adherence to all statutory requirements.

Step 3: Notice of General Meeting

Meeting Notice: A formal notice of the general meeting must be issued to all company shareholders, directors, and auditors. This notice should include the meeting's agenda, date, time, and venue, with a clear mention of the special resolution to alter the MOA.

Advance Notice: The Companies Act mandates a minimum notice period (typically 21 days unless otherwise agreed by all members for a shorter period), which must be strictly followed to ensure the meeting's legality.

Step 4: Conducting the Extraordinary General Meeting (EGM)

Meeting Proceedings: Present the proposed MOA amendments to the members for discussion during the general meeting. It's crucial to address any concerns or questions raised by the members regarding the amendments.

Voting on the Resolution: The special resolution for amending the MOA requires approval by a three-fourths majority of the members present and voting. The voting process should be conducted transparently, adhering to the company's articles of association and the Companies Act.

Step 5: Regulatory Compliance and Filings

Form MGT-14: Post-approval, file Form MGT-14 with the Registrar of Companies (RoC) within the prescribed timeframe (usually 30 days from the resolution's passing). This form serves to register the special resolution with the RoC.

Supporting Documents: Along with Form MGT-14, submit a certified copy of the special resolution, a copy of the altered MOA, and the explanatory statement provided to members along with the meeting notice.

Filing Fee: Ensure the correct filing fee is paid, based on the company's authorised capital and the RoC's fee schedule.

Step 6: Registrar's Approval and Finalization

RoC Review: The Registrar of Companies will review the submitted documents for compliance with the Companies Act and the company's articles. The RoC may seek additional information or clarifications.

Approval and Effectiveness: Once satisfied, the RoC will register the amendment, and the changes to the MOA will take effect from the date of registration. The RoC will issue a confirmation, usually in the form of an updated certificate of incorporation reflecting the amended MOA.

Step 7: Updating Company Records and Notification

Record Updates: After the RoC's approval, update all company records, including statutory registers and internal documents, to reflect the MOA amendments.

Stakeholder Notification: Inform all relevant stakeholders, including shareholders, creditors, banks, and other financial institutions, of the MOA changes to ensure transparency and maintain trust.

2.1.11. Articles [Section 5]

The articles of a company shall contain the regulations for management of the company:

Articles usually contain provisions relating to the following matters:

1. Share capital including sub division thereof, rights of various shareholders, the relationship of these rights, payment of commission, sharecertificate;
2. Lien on shares
3. Calls on shares
4. Transfer of shares
5. Forfeiture of shares
6. Surrender of shares
7. Conversion of shares into stock
8. Share warrants
9. Alteration of capital

10. General meeting and proceeding thereat
11. Voting rights of members, voting by poll, proxies
12. Directors, including first directors for life, their appointment, remuneration, qualifications, powers and proceedings of Board of directors meeting;
13. Dividend and reserve;
14. Borrowing powers
15. Winding up

The articles must contain all the provisions that are required for the company and must not hamper the company.

2.1.12. Forms of Articles

The articles of a company shall be in respect of the respective forms:

Sl .No	Table	Forms
1	Table F	AOA of a company limited by shares
2	Table G	AOA of a company limited by guarantee and having share capital
3	Table H	AOA of a company limited by guarantee and not having share capital
4	Table I	AOA of an unlimited company and having share capital
5	Table J	AOA of an unlimited company and not having share capital

2.1.13. Alteration of Articles [Section 14]

Section 14 of the Act 2013, states that a company may alter its articles having the effect of-

- a. Conversion of a private company into a public company
- b. Conversion of a public company into a private company

In case of conversion of a private company to a public company from the date of alteration of the status of the company the company ceases to be a private company and the articles of the company is to be altered.

In case of a conversion of a public company into a private company the conversion shall take effect with the approval of the Tribunal.

Every alteration shall be filed with the Registrar together with the printed copy of the altered articles within fifteen days in such manner as prescribed by the Law.

Restrictions on the powers of alteration:

1. The alteration must not be inconsistent with any provisions of the Companies Act 2013:
2. Articles may impose stricter provisions than that are provided in the law. {Entrenchment provisions of the articles}: Section 5(3) The articles may contain the provisions of entrenchment which means specified provisions of the articles may be altered only if special resolution is passed. Entrenchment provision may cause certain amendments either impossible or difficult.
3. The alteration must be bonafide for the company as a whole: The alteration must not be bad and it must not inflict at the hardship of individual member.

4. The alteration must not constitute a fraud on the minority by a majority: If the alteration is not for the benefit of the company as a whole but for majority of shareholders then the alteration would be bad.

2.1.14. Alteration of Articles and memorandum to be noted in every copy :[Section 15]

Every alteration made in the memorandum and articles of the company shall be noted in every copy of the memorandum and articles of the company and if a company makes any default in complying with the provisions of the Act and the sections , the company and every officer of the company shall be penalised with an amount of one thousand rupees for every copy of the memorandum and the articles issued without alteration.

2.1.15. Effect of Memorandum and Articles [Section 10]

The memorandum and articles when registered bind the company and the members and the members observe all the provisions of the memorandum and the articles. All monies payable by any member to the company under the memorandum or articles shall be debt due from him to the company.

2.1.16. Copies of the memorandum and the articles to be given to members[Section 17] and Rule 34 of the Companies Incorporation Rule 2014

A company shall on being so requested by a member may within seven days may make the following documents available namely:

- a. The memorandum
- b. The articles and
- c. Every agreement and every resolution as referred in section 117 that is all the resolutions and agreements that are filed with the registrar.

If a company fails to comply with the provisions of the Act every officer of the company who is in default shall be liable for each default and with a penalty of one thousand rupees for each day till the default continues or rupees one lakh which ever is less.

{Officer 2(59)}

Officer include any director, manager, or key managerial personnel or any person in accordance to whose direction the Board is accustomed to act.

{Officer in default 2(60)}

Means the person who under the provisions of the Act shall be liable to a penalty or punishment by way of imprisonment, fine or in other way. The following persons may be considered as officer in default:

- a. Whole time director
- b. Key managerial personnel
- c. Where there are no key managerial personnel such director as specified by the Board.
- d. Any person on whose directions the Board is accustomed to act.
- e. Any person who under the authority of the Board or any key managerial personnel is charged with the responsibility including maintenance, filing or distribution of accounts or records or any other activity which may cause default for the same

2.1.17. Comparison between Memorandum and articles of association

1. Memorandum and Articles their relationship

Memorandum defines the company's objects and the various powers it possess; the articles determine how the powers are to be exercised. The articles of the company are subordinate and controlled by the memorandum of association which contains the general constitution of the company.

In Ashbury v. Watson – Articles beyond the memorandum are ultra vires. The memorandum and articles are to be read together only to remove an ambiguity or uncertainty. If the memorandum is perfectly clear, a doubt as to its meaning cannot be raised by reference to the articles; in such case the articles are simply inconsistent with the memorandum and are disregarded.

2. Memorandum and Articles their distinction

1. The memorandum contains the fundamental conditions for which the company is formed. These are the conditions for the benefit of all stakeholders. The articles of association are the internal regulations of the company, they only regulate the relationship between company and the shareholders and amongst the members themselves.
2. Memorandum specifies the area beyond which the activities of the companies cannot go. Articles provides regulations inside the company.
3. Memorandum of association can be altered only under certain circumstances and in the manner provided under the Act. Articles can be altered by the members by passing a special resolution.
4. Memorandum of association cannot include any clause contrary to the provisions of the Companies Act. The articles of association are subsidiary both to the Companies Act and the memorandum of association.
5. Acts done beyond the scope of the memorandum are ultravires and thus absolutely void. They cannot be ratified. But the acts beyond the articles can be ratified by the shareholders provided the relevant provisions are not beyond the memorandum.

2.1.18. Doctrine of Ultra Vires

A company which owns its incorporation to statutory authority cannot effectively do anything beyond the powers expressly or implicitly beyond the statute or memorandum. Any act beyond such powers shall be inactive or ineffective even if it is agreed by all the members. This rule is said as Doctrine of ultra vires.

The word “*ultra*” means beyond and “*vires*” means powers. It means beyond the powers of company. The powers of the company are essentially derived from statute and memorandum of association.

In the case of *Ashbury Rly. Carriage & Iron Company V. Riche*, the object of the doctrine is explained by Lord Justice as follows:

- a. To protect the investors of the company so that they may know the objects in which their money is to be employed and
- b. To protect the creditors by ensuring that the company funds, to which they must look for payment are not dispatched in unauthorised activities.

Implied Powers of the doctrine

As made out in the doctrine of ultra vires the powers exercisable by a company are to be confined to the objects specified in the memorandum. Every company possess certain powers by virtue of its being incorporated body such as the power to appoint and act through agents, and where it is a trading company a power to borrow and give security for the purpose of its business and also power to sell.

Powers which are not implied

1. Acquire any business similar to company's own.
2. Entering into agreement with other persons or companies for carrying on business in partnership or for sharing profit, joint adventure or arrangement.
3. Taking shares in other companies having similar objects
4. Promoting other companies and helping them financially
5. Power to sell and dispose of the whole undertaking

Effects of ultravires transactions

1. **Void ab initio**: Ultra vires transactions are void ab initio. The company is not bound by these acts and even the company cannot be sued or be sued.
2. **Injunction**: In case a company is about to undertake a ultra vires act the members can get an order of injunction from the court restraining the company from going ahead with the ultra vires acts.
3. **Personal liability of the directors**: It is the duty of directors to ensure that the corporate capital is used only for the legitimate business of the company and if such capital is diverted into other different purposes the company directors shall be liable.
4. **Acquisition of the property that is ultra vires**: Where a company's money has been used ultra vires to acquire some property the company's right over such property is held secured. The company will be the right party to protect such property against damage by third persons. It is because though the property has been acquired for some ultra vires objects, it represents the money of the company.
5. **Directors personally liable to the third party**: In case of ultra vires acts the directors and other officers shall be personally liable.

2.1.19. Doctrine of Constructive notice

As per section 399 of the Companies Act 2013 when the memorandum and articles of association gets registered with the Registrar of Companies, these became public documents and these are available for inspection to any person on the payment of prescribed fees. The office of the Registrar is a public office and documents registered there are open and accessible to the public at large. Therefore, any person who contemplates entering into a contract with the company has the means of ascertaining and is thus presumed to know the powers of the company and the extent to which they have been delegated to the directors.

Every person dealing with the company is presumed to have read these documents and understood them in their true prescriptive. This is known as "doctrine of constructive notice" even if the party dealing with the company is presumed to have read these documents and understood it. If a person enters into a contract which is beyond the powers of the company as defined in the memorandum or outside the limit set on the authority of the directors

as per the memorandum or articles he cannot as a general rule acquire any rights under the contract against the company.

In a Madras case, the articles required that all documents should be signed by the managing director, secretary, and the working director on behalf of the company. Deed of mortgage was executed by the secretary and the working director only. The court held that no claim would lie under such a deed. The learned judge observed that the mortgage should have consulted the articles before the deed was executed. Therefore, even though the mortgagee may have acted in good faith and the money borrowed applied for the purpose of the of the company, the mortgage was nevertheless invalid. The facts that we have narrated were that of Kota Venkataswamy v. Chinta Ramamurthy.

2.1.20. Doctrine of Indoor Management

The rule of constructive notice proved too inconvenient for the business transaction, particularly where the directors or other officers of the company were empowered under the articles to exercise certain powers subject only to certain prior approval or sanctions of the shareholders. Whether those sanctions and approval has actually been obtained or not could not be ascertained because the investors, vendors, creditors and other outsiders could not dare ask the directors in so many words about those sanctions having been obtained or to produce the relevant resolutions.

The case of Royal British Bank v. Turquand case were that the directors of a company were authorised by the articles to borrow on bonds such sums of money as should from time to time, by a resolution of the company in general meeting be authorised to borrowed.

The doctrine of constructive notice throws a burden on people entering into contracts with a company by making a presumption that they would have read the company's memorandum and articles even though they might not have actually read them. The doctrine of indoor management on the other hand allows all those who deal with the company to assume that the provisions of the articles have been observed by the officers of the company. In other words the persons dealing with the company are not bound to inquire into the regularity of the internal proceedings.

The doctrine of indoor management thus seeks to protect the outsider whereas the doctrine of constructive notice seeks to protect the company from outsider.

Exceptions to the doctrine:

1. **Where the outsider has the knowledge of irregularity:** The rule does not protect any person who has actual or even an implied notice of the lack of authority of the person acting on behalf of the company. Thus, a person knowingly fully well that the directors do not have the authority to make the transaction but still enters into it cannot seek protection under the rule of indoor management.
2. **No knowledge of articles:** The rule cannot be invoked in favour of a person who did not consult the memorandum and the articles and thus did not rely on them.
3. **Forgery:** The rule of indoor management does not extend to transaction involving forgery or otherwise void or illegal ab initio. In the case of

forgery, it is not that there is absence of free consent but there is no consent at all. The person whose signature have been forged is not even aware of the transaction and so the question of his consent being free or otherwise does not arise. Since there is no consent at all there is no transaction. There is no title to the contract. Therefore, the person gets no rights at all.

4. **Negligence**: The doctrine of indoor management in no way rewards those who behave negligently. Thus, where an officer of a company does something which shall not ordinarily be within his powers, the person dealing with him must make proper enquiries and satisfy himself as to the officer's authority. If he fails to make an enquiry he is estopped from relying on the rule.
5. **Others**: The doctrine of indoor management does not apply where the question is in regard to the existence of an agency.

The Doctrine is also not applicable where a precondition is required to be fulfilled before the company itself can exercise its particular power.

2.1.20. Prospectus

Sec 2(70) of the Companies Act 2013 defines "Prospectus" as any circular, advertisement, or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate and it includes red herring prospectus u/s 32 or shelf prospectus as per sec 31 and sec 2(71) specifies that as prospectus can be issued by public co, but the minimum limit of paid up capital of Rs 5lakh has been omitted in Companies Act 2015. But a private company is prohibited from inviting the public to subscribe to their shares. Promoters as per sec 2(69) plays an important role in framing/ drafting the prospectus and his name must be written in the annual return as specified 92. Out of the many contents that is to be stated in the prospectus, sec 26(1) of the Act read with companies (Prospectus and Allotment of Securities) Rules 2014, specified some of the important particulars:-

1. The date relating to opening and closing of the issue
2. The object of the issue
3. The means of finance
4. The summary of the project appraisal report
5. The interim use of funds, if any
6. Details of underwriters of the issue
7. Procedure and time schedule for allotment and issue of securities.
8. Consent of directors, auditors, bankers to the issue and expert opinion.

Sec 26(1) of the Act states that every prospectus shall be issued on the date of publication and it must be signed by every director and the document must also be provided to the registrar for registration. Within 90 days from the date of the document sent for registration, the prospectus must be issued. The prospectus of the public company shall include a statement given by the expert who is not associated with formation and incorporation of the company.

As per Sec 31 of the Act, a shelf prospectus is issued for more than one public issue. Such are submitted at the stage of first offer of securities. This shall not be exceeding more than one year as period of validity. An information memorandum is required to be filled

containing all material facts relating to the changes in the financial position between first, second and succeeding offer. A company u/s 32, may issue red herring prospectus. 3 days prior to the public issue of subscription of shares but it does not include key details of issue such as price and number of shares to offer.

Misstatement in prospectus

When a prospectus is issued, circulated or distributed contains any statement which is untrue or misleading. Every person who is a director or has authorized himself to act as director either immediately or on a later date, or has authorized to issue the securities and is an expert can be made liable to pay compensation to every person who has sustained the loss or damage. If it is found that prospectus has been issued with the object of defrauding the applicants for the securities then company or any other person as stated above and shall be held to be personally responsible without any limitation of liability for any of the losses suffered by any person. Sec 35 of the Companies Act provides for civil liability for misstatement in prospectus. u/s 36 those person liable to pay compensation include the directors of the company at the time of the issue of the prospectus and promoters among others, to every person, who has sustained the loss or damage. As per section 447, Punishment for fraud under Chapter XXIX (Miscellaneous) of the Companies Act 2013, if a person is found to be guilty of fraud shall be punishable with imprisonment for a term which shall not be less than 6 month but it may also extend to 10 years and shall also be liable for a fine which shall not be less than the amount of fraud or, which may extend to 3 times the amount of fraud involved.

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