4th Edition

THE COMPANIES ACT, 1994
The Companies (Foreign Interest) Act, 1918
The Undesirable Companies Act, 1958
THE PARTNERSHIP ACT, 1932

Dhar on

Company Law & Partnership

Nirmalendhu Dhar

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About the Book

Publisher	✪	*Rafiqul Islam* *ReMiSi* Publishers 36, Purana Paltan, Dhaka-1000. **e-mail** : remisi@proshikanet.com
First Edition	✪	August 1, 1998
Second Edition	✪	November 30, 2000
Third Edition	✪	August 1, 2004
Fourth Edition	✪	January 1, 2008
Pages	✪	492
Printer	✪	The Good Luck Printers 13, Naya Paltan Dhaka-1000
Copyright	✪	Reserved by the Author
Price	✪	Taka 500.00 (Five Hundred) only

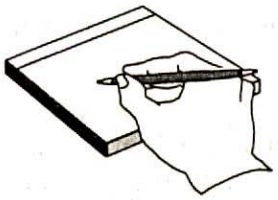
I S B N : 984 - 708 - 002 - x

"Pita Swarga Pita Dharma Pitahi Paramantapa"

Dedicated
to the sacred memory
of my departed father

Dr. B. K. Dhar

In lieu of preface



The book exhaustively deals with the Companies Act and its related subjects. Recent decisions of the Superior Court have been incorporated in this edition, particularly the principles and propositions laid down by the Honurable Judges under proper heading to cater day-to-day needs of and provide answer to the problems on the subject.

Both first, second and third editions of the book were exhausted shortly after its publication which bears eloquent testimony to its quality and popularity. I hope that the edition of this book will be similarly popular just like the preceding edition.

In publishing the book I have been greatly benefited and helped by Mr. A.K.M. Nasim, Mr. Zafrul Hasan Advocates.

Suggestion for improvement is always welcome.

(Nirmalendu Dhar)
1st January, 2008

Preface in the Third Edition

The book exhaustively deals with the Companies Act and its related subjects. Recent decisions of the Superior Court have been incorporated in this edition. particularly the principles and propositions laid down by the Honurable Judges under proper heading to cater day-to-day needs of and provide answer to the problems on the subject.

Both the first and second edition of the book were exhausted shortly after its publication which bear eloquent testimony to its quality and popularity. I hope that the edition of this book will be similarly popular just like the preceding edition.

Suggestions for improvement are always welcome.

(Nirmalendu Dhar)

Preface in the Second Edition

The second edition of the book "*Company Law and Partnership*" has been fully revised and updated. The first edition of the book came out in August. 1998. All the prints of the edition have been sold out a few moths ago

and I was informed that photostat of the book were being sold out in the market. Yet I did not make hurry in preparing the second edition.

After publication of the first edition no change in the statute has been made, but many important decisions of the superior Courts have come out. Considering the needs of the concerned persons I have thoroughly revised the book and incorporated the up-to-date case laws. It is hoped that the book would be found useful to all concerned.

I wish to thank my senior Mr. Md. Abdur Razaque Khan Advocate, Mr. Md. Asaduzzaman Bar- at- law for their advice rendered in preparation of the second edition.

(Nirmalendu Dhar)

Preface in the First Edition

It is with great pleasure I am placing the book on the Company Laws [mainly *the Companies Act, 1994* and other cognate laws on the subject with the *Partnership Act, 1932*] in English before the readers.

The present book is a commentated one. I have tried to incorporate all relevant uptodate judicial decisions on the subject in concise manner. Since enough decisions of our superior courts are not available I did not hesitate to incorporate foreign decisions in the book.

I do not claim to be original in the writings. I have depended on some authorities like C.R. Datta, A Ramaiya, Suryanarayan. I am indebted to them.

I must inform the learned readers of the fact that the Gazette published by the Government in the name of "Authentic English Text" in pursuance of section 403 of the Companies Act, 1994 caused much delay in publishing the book as the said so-called "Authentic Text" contained thousands of mistakes and the Government Gazette required correction.

To err is human. Inspite of all cautions and care there remains a chance of errors and omissions. I earnestly request the learned readers to give valuable suggestions for future improvement of the book.

I shall feel guilty if I do not thank Advocate Md. Giasuddin, Advocate Md. Nesar Ahmed, Advocate Md. Abdul Quddus, Advocate Md. Ibrahim, and Advocate Md. Shams-ud-Doha for their untiring scrutiny and assistance for helping me in publication of the book.

I shall feel remunerated if the style and presentation meet the requirements of the readers.

(Nirmalendu Dhar)

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THE COMPANIES ACT, 1994

(ACT XVIII OF 1994)

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COMPARATIVE TABLE

OF THE SECTIONS OF THE COMPANIES ACT, 1994
WITH THE SECTIONS OF THE COMPANIES ACT, 19913

Section of The Companies Act, 1994	Section of The Companies Act, 1913	Section of The Companies Act, 1994	Section of The Companies Act, 1913	Section of The Companies Act, 1994	Section of The Companies Act, 1913
1	1	33		65	61
2	2	34	31	66	62
3	3	35	31A	67	63
4	4	36	32	68	64
5	5	37	33	69	65
6	6	38	34	70	66
7	7	39		71	66A
8	8	40	35	72	67
9	9	41	36	73	68
10	10	42	37	74	69
11	11	43	38	75	70
12	12	44	39	76	71
13	13	45	40	77	72
14	14	46	43	78	73
15	15	47	44	79	74
16	16	48	45	80	75
17	17	49	46	81	76
18	18	50	47	82	76
19	19	51	48	83	77
20	20	52	49	84	78
21	20A	53	50	85	79
22	21	54	51	86	80
23	22	55	52	87	81
24	23	56	53	88	82
25	24	57		89	83
26	25	58	54A	90	83A
27	25A	59	55	91	83B
28	26	60	56	92	84
29	27	61	57	93	
30	28	62	58	94	
31	29	63	59	95	
32	30	64	60	96	

Comparative Table contd....

Section of The Companies Act, 1994	Section of The Companies Act, 1913	Section of The Companies Act, 1994	Section of The Companies Act, 1913	Section of The Companies Act, 1994	Section of The Companies Act, 1913
97..	 85	132	.. ..91C	167	.. 116
98..	86	133	.. ..91D	168	.. 117
99..	.. .. .86A	134	.. .92(1)	169	.. 118
100	.. ..	135	.. .. ..	170	.. 119
101.	.. .. 86B	136	.. .. ..	171	.. 120
102.	.. . .86C	137	.. .. ..	172	.. 121
103.	.. .. 86D	138	92	173	.. 122
104.	.. ....86E	139	.. ..	174	.. 123
105.	.. . .86F	140	.. ..	175	.. 124
106.	.. . .86G	141	98	176	.. 125
107.	.. .. 86H	142	.. 98A	177	.. 126
108.	.. .. 86 I	143	.. .. ..	178	.. 127
109.	.. ..	144	99	179	.. 128
110	.. ..	145	. ..100	180	.. 129
111	.. ..	146	. .. ..	181	.. 130
112	.. ..	147	.. .. ..	182	.. .. .
113	.. ..	148	.. .101	183	.. 131
114	.. ..	149	.. .102	184	.131A
115	.. .. .87	150	.. .103	185	.. 132
116	.. .87A	151	.. .104	186	.132A
117	.. .. 87B	152	.. .105	187	.. .. .
118	.. . 87BB	153	. .105A	188	132A
119	.. ....87C	154	...105B	189	.. 133
120	.. .. 87D	155	.. 105C	190	.. 134
121	.. .. 87E	156	.. .106	191	.. 135
122	.. . 87F	157	.. .107	192	.. 136
123	.. . 87G	158	.. .108	193	.. 137
124	.. .. 87H	159	. . .109	194	.. .. ..
125	.. . 87 I	160	.. 109A	195	.. 138
126	88	161	. ..110	196	.. 139
127	 89	162	. .. 111	197	.. 140
128	 90	163	.. 112	198	.. .. .
129	91	164	.. . 113	199	.. ..
130	. . .91A	165	.. . 114	200	.. 140
131	.. . 91B	166	.. .115	201	.. .. ..

Comparative Table contd....

Section of The Companies Act, 1994	Section of The Companies Act, 1913	Section of The Companies Act, 1994	Section of The Companies Act, 1913	Section of The Companies Act, 1994	Section of The Companies Act, 1913
202		237	158	272	189
203	141A	238	159	273	190
204		239	160	274	191
205		240	161	275	192
206		241	162	276	193
207	142	242	163	277	194
208	143	243	164	278	195
209		244	165	279	196
210	144	245	166	280	197
211		246	167	281	198
212		247	168	282	199
213	145	248	169	283	200
214	145(3)	249	170	284	201
215		250	171	285	202
216		251	171A	286	203
217	145(4)	252	172	287	204
218		253	173	288	205
219	145(5)	254	174	289	206
220	146	255	175	290	207
221		256	176	291	208
222	147	257	177	292	208A
223	148	258	177A	293	208B
224	149	259	177B	294	208C
225	150	260	178	295	208D
226	151	261		296	208E
227	152	262	179	297	209
228	153	263	180	298	209A
229	153A	264	181	299	209B
230	153B	265	182	300	209C
231	154	266	183	301	209D
232		267	184	302	209E
233		268	185	303	209F
234	155	269	186	304	209G
235	156	270	187	305	209H
236	157	271	188	306	210

Comparative Table contd....

Section of The Companies Act, 1994	Section of The Companies Act, 1913
307	211
308	
309	213
310	214
311	215
312	216
313	217
314	218
315	220
316	221
317	222
318	223
319	224
320	225
321	226
322	227
323	228
324	229
325	230
326	
327	231
328	232
329	233
330	234
331	235
332	236
333	237
334	238
335	238A
336	239
337	240
338	241
339	242
340	243
341	244
342	244A
343	244B
344	245
345	246
346	247
347	248
348	249
349	249A
350	249B
351	250
352	251
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354	253
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356	255
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360	259
361	260
362	261
363	262
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365	264
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374	273
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376	275
377	276
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382	
383	
384	
385	
386	
387	
388	277A
389	277B
390	277C
391	277D
392	277E
393	278
394	279
395	280
396	281
397	282
398	282A
399	282B
400	283
401	288
402	
403	
404	

THE COMPANIES ACT, 1994

[Act XVIII of 1994]

September 12, 1994.

An Act to consolidate and amend the law relating to companies and certain other associations.

WHEREAS it is expedient to consolidate and amend the law relating to companies and certain other associations;

It is hereby enacted as follows :

PART-I

PRELIMINARY

1. Short title and commencement.- (1) This Act may be called the Companies Act, 1994.

(2) It shall come into force on such date as the Government may, by notification in the Official Gazette, appoint.[1]

Notes/Comments/Precedents

Company : Company according to Justice Lindley is "An association of members, the shares of which are transferable".

A Company is an artificial person created by law with perpetual succession and common seal. The law by which a company is formed and guided and regulated in Bangladesh is the Companies Act, 1994.

History of Company Law : The Companies Act, 1994 has been passed consolidating and amending the laws relating to companies and other associations. The present Act is based on the structure of the Companies Act, 1913. In fact the Companies Act, 1994 is a recast of the Companies Act, 1913.

Statutory company legislation in the sub-continent starts actually from 1850 with the passing of the first statutory law viz. the British Companies Act in that year. Following the said law a comprehensive Companies Act was passed in 1866 which was again recast in 1888. Thereafter several amendments were made and ultimately the Indian Companies Act, 1913 was passed consolidating the laws relating to companies and associations. British company legislation, virtually started as early as in the ***11th centuries***. During the *11th-15th centuries* a joint trade tendency developed in the United Kingdom. For securing monopoly in respect of particular trade or commodity of members an association of merchants called *Merchant Guild* was formed and it obtained charters from the Crown. Members of the Guild would do trade individually on their own accounts. This form of trading gradually developed into a *joint account trading*. It was of two kinds viz., ***commenda*** or ***societas.***

1. The Act came into force with effect from the 1st of January, 1995 vide Gazette Notification dated November 30, 1994 [SRO No. 333-Aain / 94].

The concept of limited liability developed from the ***commenda*** and concept of partnership developed from the ***societas.*** Under the ***commenda*** the financier acted as sleeping partner. He left money to another for trading, got a share of the profit and in case of loss his liability was limited to the extent of the invested money. Under the ***societas*** members themselves actively took part in trading, but with limited liability.

Certain merchants for trading overseas were conferred in the ***14th-15th century*** with some privileges granted by the Royal Charter. They first adopted the word ***'company'.*** The Royal Charters became common in the ***16th*** and ***17th century***, granting monopoly of trade to members of the company and governmental power over the territory to the company. These companies were called trading companies. The East India Company, the Levant Company etc. are the instances of such company. The members of the company at that time traded either separately with own funds or jointly with members of the company. Gradually members gave up separate trading and diverted their stock to the joint trading. The concept of joint-stock grew up, the members started trading on a joint account with the said joint fund or stock. After each voyage, the profits along with the capital were re-divided among the members. In 1653, a permanent subscribed fund was introduced and thus there came into existence a permanent joint stock of the East India Company. In 1692, private trading by the members of the company was prohibited. The term ***joint stock compan***y was used at that time in relation to such a company to distinguish it from a "*regulated company*" whose members had the freedom to trade separately.

A special Act of Parliament allowed formation of another type of company in the ***18th century,*** but incorporation by Charter proved too costly. Men of business began to recognise the advantages, derivable from cooperation raising of funds for the purpose of large and speculative undertakings by means of contributions from a number of small capitalists ready and willing to cooperate, and on the other hand, of minimising the risk by spreading the liability. The difficulty was how to secure these advantages without securing a Charter or an Act of Parliament. Businessmen devised a new form of partnership which possessed the advantages as nearly as was possible of a chartered company, and in particular had shares of fixed amount freely transferable by the holders. The outcome of these commercial needs was the appearance of the unincorporated company with a permanent stock, freely transferable, and the linear ancestor of the ordinary registered company registered under Company Laws. The law insisted upon treating them as ordinary partnership. But inspite of this, they continued to be formed in increasing numbers until the fraudulent promoter appeared on the scene. The legislature found it necessary to intervene, and passed the *Bubble Act* in 1720 prohibiting the formation of joint stock companies except by Royal Charter, but the *Act* was proved ineffective for its expression in unambiguous terms and that is why it was to be repealed in 1825. The Crown was empowered in future to provide in grants of charters that the members of the corporation should be individually liable under this Act, the principle of limited liability was introduced in the case of chartered companies. In 1834, the Trading Companies Act made provision for incorporation and conferred upon companies the right to sue and to be sued in their names. Registration of all companies was made compulsory in 1844.

During the British regime the first Companies Act for the Indian sub-continent was passed in 1850. Following the British Act of 1862, a comprehensive Act was passed in 1866, which was recast in 1882. Between passing of the Indian Companies Act, 1913 the Act was amended by as many as five amending Acts in 1887, 1891, 1895, 1900 and 1910. In 1913 a consolidating Act, based mainly on the English Act of 1908, namely the Indian Companies Act, 1913 (Act VII of 1913) was passed. The Act was amended in 1914, 1915, 1920 1926 1930 and 1932. Major amendment was made in the Act in 1936. Thereafter the law was amended in 1937, 1938, 1940, 1941, 1945 and 1946. During the Pakistan regime the law continued to remain in force with amendment in the name only. The word "India" in the name of the Act was omitted and thus the name of the law was changed into the companies Act, 1913. Some amendments in the Act were made in 1961, 1966 & 1968. After liberation of Bangladesh The Companies Act, 1913 remained in force.

The Companies Act, 1994 : In 1977 the law Reforms Committee in order to remove the lacunae in the law and to meet the surge of problems especially with regard to foreign investments suggested re-enactment of the company laws. On the basis the said recommendation the present Act has been enacted.

The object of passing of the Companies Act, 1994, as stated in the statement of objects and reasons, is to ensure the accountability in the workings of the board of directors, to preserve the rights to the minority shareholders, to safeguard the interests of the investors, to open the affairs of the company of the public to specify the relationship between the holding company and subsidiary company, to remove the disparity between the companies in the private and public sector, to make the formation & dissolution of companies in easier and to looser the governmental control over the affairs of management of the company. The Companies Act , 1994 was passed by the Parliament and published in Bangladesh Gazette Extraordinary dated September 12, 1994 and came into force with effect from the 1st day of January, 1995.

2. Definitions.– (1) In this Act unless there is anything repugnant in the subject or context,–

(a) "financial year" means in relation to any body corporate, the period in respect of which any profit and loss account of the body corporate laid before it in annual general meeting is made up, whether that period is a year or not :

Provided that in relation to an insurance company, "financial year" shall mean the calendar year.

Notes/Comments/Precedents

Financial Year : The definition of financial year is a new one in the Companies Act. It has been defined for the first time in this Act. In relation to an Insurance Company the financial year is the calendar year. In case of a company "financial year" may mean calendar year or any other period of 12 months, or less or more. The definition of financial year is important in relation to sections 81, 119, 145, 183, and 185-187 of this Act.

(b) "the Court" means the Court having jurisdiction under this Act;

Notes/Comments/Precedents

Company Court- Jurisdiction : Matters decided under the Companies Act are not under the Constitutional jurisdiction of the High Court Division but under a special statutory jurisdiction conferred upon the High Court Division by the Companies Act itself *[Uttara Jute Fibres Industries Vs. Ashraf Jute Mills (1992) 44 DLR 452.]*

Cases under Companies Act- Special Statutory jurisdiction : Matters decided under the Companies Act in the High Court by a Single Bench are not disposed of in exercise of its ordinary civil jurisdiction..... Cases under the Companies Act are decided by way of special statutory jurisdiction conferred upon the Court by the Act itself *[Dhaka Jute Mills Ltd. Vs. Satish Chandra Banik(1967) 19 DLR 735.]* The Company Court has a special company jurisdiction and that jurisdiction has to be found from specific provisions of the Act. *[Abdul Muhit and others Vs Social Investment Bank Limited (SIBL) and others (2002) 54 DLR 306].*

Unless jurisdiction is provided in the Companies Act he petitioners cannot come to the High Court for violation of any provision of the Act. This court does not have any general, plenary or residuary

jurisdiction to deal with other matters and questions arising under the Companies Act. *[Abdul Muhit and others Vs. Social Investment Bank Limited (SIBL) and others (2002) 54 DLR 309].*

Power of Court : When the court is required to appreciate the contentions of the parties through the pleadings and the documents only, it is all the more necessary to consider each and every circumstance that is necessary before forming any opinion of a *prima facie* case. *[Mrs. Jayanthi R. Padukone v. I.C.D.S. Ltd., (1995) 1 Comp. L.J. 178.]*

District Court : The District Court is the principal civil court of the district, According to section 3 of the Civil Courts Act, 1887 civil courts of districts are classified into (i) the Court of the District Judge, (ii) the Court of Additional District Judge, (iii) the Court of Subordinate Judge and (v) the Court of Assistant Judge. The Court of the District Judge being the principal Court of the district is the District Court under the Companies Act, 1994. According to section 3 of the Act the District Courts have jurisdiction over matters which have been expressly made subject to the jurisdiction of such courts by notification in the official gazette.

(c) "**Officer**" means a director, managing agent, manager, secretary or any other officer of a company and also includes –

(i) where the managing agent is a firm, any partner in the firm ;

(ii) where the managing agent is a body corporate, any director or manager of the body corporate ; and

(iii) where the secretary is a body corporate ;

Provided that, except for the purposes of sections 331, 332 and 333 the term "officer" shall not include an auditor;

Notes/Comments/Precedents

Officer : Persons who are regularly employed as part of their business or occupation in conducting the affairs of the company may be officers of the company. The term is very wide. It includes a director, manager, secretary, assistant secretary, agents of branches and manager or a secretary which is a limited company. An officer of the company will include any person in accordance with whose directions or instructions any director is accustomed to act. Auditors are treated as 'officers' only for the purposes of sections 331, 332 and 333 of the Act.

(d) "**company**" means a company formed and registered under this Act or an existing company ;

Notes/Comments/Precedents

Company : The dictionary meaning of company is 'assembly' i.e. gathering of a number of persons together. However, the company laws enacted for the regulation of such associations formed for the purpose of business devised a method of incorporation of the association and thus it defines company to be a 'company formed and registered under the Companies Act.

A company, in its ordinary and non-technical sense, means a body of individuals associated for a common objective, which may be a business for profit or some charitable purpose, accordingly, the word is employed to represent associations formed to carry on some business not for profit or to promote art, science, education or some charitable purpose. All such associations may not be incorporated according to the law of the land.

Company-its characteristics- Legal Personality : Any being recognised by law capable of rights and duties or obligations is a person. *'Persons'* are of two types viz., (i) natural persons, and (ii) artificial persons. Natural persons are human beings of different degrees of capacity, and sometimes acting for themselves and some times through agents or as agents. Artificial persons are such as are created and devised by human laws for the purposes of society and government which are called Corporations. Such artificial persons, known as Corporations, possess similar rights and owe similar obligations as natural persons but have no physical or natural existence. Though not a human being, a company can act like an individual i.e., it can purchase and sell goods, hold property, file and defend suit and other litigations, incur debts, lend money etc. The law in creating legal persons, always does so by personifying some real thing. The legal person known as the company, for example, is formed by the personification of shares-holders.

As soon as a company is formed and registered under the Companies Act, it attains the status of a person. It is then treated as an artificial person and possesses similar rights and owe similar obligations as natural persons.

Company-its characteristics- Perpetual succession : Members of a company may come and go but a company goes for ever. A member may die, may become an insolvent, he may withdraw from the company or transfer his shares to any other person, yet the life of the company does not come to an end.

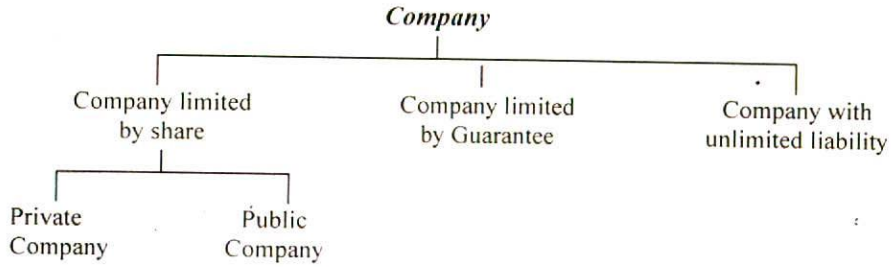
Company- a different personality : The company is at law a different person altogether from the subscribers to the memorandum. The leading case on the point is **Solomon Vs. Solomon Company Ltd.** The facts of the said case in short is that Mr. Avon Solomon, an owner of a Boot and Shoe manufacturing business, converted his own business into limited liability Company under the Companies Act, 1862. The Memorandum of Association contained the names of subscribers- Solomon, the appellant, his wife, a daughter and four sons, each of them subscribing one share. The Company named Avon Solomon & Co, Ltd., was incorporated on July 20, 1892. The appellant, Solomon sold his business to the Company named Avon Solomon & Co, Ltd., was incorporated on July 20, 1892. The appellant, Solomon sold his business to the Company for a £10,000 in debentures and £20,000 in full paid-up shares. Solomon was appointed the managing director of the company. Because of depression in Shoe business, Solomon borrowed money on the security of the debentures and lent it to the Company. Thereafter the Company was wound up by the Court and the assets of the Company were not enough to pay the debentures in full leaving nothing for unsecured creditors. The Liquidator of the company claimed that the company was entitled to be indemnified by Solomon against the company's unsecured liabilities on the ground that the company was "mere nominee and agents" of Solomon. The Trial Judge made the declaration in favour of the Company. Solomon filed an appeal to the Court of Appeal; The Court of appeal agreed with the Trial Judges and dismissed the appeal. Solomon appealed to the House of Lords. The House of Lords allowed the appeal and reversed the order of the Court of Appeal.

The principles of law decided in the said case are that (i) The Company is at law a different person altogether from the subscribers to the memorandum, and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the Company is not in law the agent of the subscribers or trustee for them. Nor are subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act. (ii) A Company has an artificial existence quite apart from the motives or conducts of individual Co-partners, once a Company legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and the motives of those who took part in the promotion of the Company are absolutely irrelevant in discussing what those rights and liabilities are. The true intent and meaning of the Act is to be gathered from the Act itself.

Classification of Companies : Mainly there are three kinds of companies as per the Companies Act, 1994 viz., (1) Company limited by shares, (2) Company limited by guarantee and (3) Company with unlimited liability.

Of the aforesaid kinds of companies, the company limited by shares again may be divided into two classes viz., (1) Private companies and (2) Public Companies.

Diagrammatically the classification of companies may be shown as follows :



Company limited by shares are those in which the capital is of fixed amount divided into number of shares and in which the liability of the members do not exceed the face value of his share.

Company limited by Guarantee are those companies in which each member guarantees to contribute to the assets of the company, a sum not exceeding a specified amount, in case the company is wound up during his membership or within a year after conclusion of this membership.

Company with unlimited liability are those companies where the liability of the members are not limited. The members of this type of company are not immune from personal liability of different acts.

Companies limited by shares are of two types viz., (i) ***Private company*** and (ii) ***Public company.*** A Private company is a company which by its articles of association restricts the right of transfer of the share, limits the number of members to fifty and prohibits invitation to the public to subscribe to the shares or debentures of the company. Public Company on the other hand is a company which can be formed by at least seven persons as members and the membership is open to the public.

Criminal offence and Companies Act : The framers of the law did not exclude the operation of the Code of Criminal Procedure except for limited purposes, namely, that an offence under the Companies Act will not be non-cognizable. A Company registered under the Companies Act, 1994 and existing company registered under the provisions of the Companies Act is a corporate body.

If a procedure is provided in any special or local enactment for the trial of the offence under that Act, that procedure is to be observed. If however, there is no such procedure for the investigation, inquiry and trial of an offence, then the one laid down in the Code of Criminal Procedure is to be observed *[Muhammad Azhar Hossain Vs. District Cricket Association, Lahore (1969) 21 DLR (WP) 204.]*

(e) "district Court" means the principal Civil Court of original jurisdiction in a district, but does not include the High Court Division, in the exercise of its ordinary civil jurisdiction ;

Notes/Comments/Precedents

District Court : The District Court as defined here is the principal civil court of original jurisdiction in a district. According to section 3 of the Civil Courts Act, 1887 civil courts of a district are classified into- (i) the Court of the District Judge, (ii) the Court of Additional District Judge, (iii) the Court of Subordinate Judge and (v) the Court of Assistant Judge.

According to Section 18 of the said Act as regards the jurisdiction of these Courts it has been provided that "Save as otherwise provided by any enactment for the time being in force, the jurisdiction of a District Judge or Subordinate Judge extends, subject to the provisions of section 15 of the Code of Civil Procedure 1908 to all original suits for the time being cognizable by Civil Courts".

So the court of the District Judge being the principal court of the district is the District Court under clause (e) of section 2 the Companies Act, 1994. According to section 3 of the Act the District Courts have jurisdiction over matters which have been expressly made subject to the jurisdiction of such Courts by notification in the official gazette.

(f) "**debenture**" includes debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of company or not;

Notes/Comments/Precedents

Debenture : A debenture is a document by which a company acknowledges the debt to the holder thereof under certain terms and conditions contained therein. Debenture, thus is an acknowledgment of a debt by a company. It is a form of bond given by the company with a view to borrow money form the public. When a company desires to borrow any sum, generally for a long term, it invites the general public subscribe it.

According to Palmer "In modern commercial usage a debenture is an investment issued by the company normally, but not necessarily called on the face of it is called debenture".

Debentures may be made payable after a fixed time, or there need not be any fixed time within which the company will be bound to repay the debt off.

The definition of debenture, however, is wider than the usual meaning in two respects- (i) it includes any security and (ii) any instrument without creating a charge may be a debenture.

In *Rayner's case* it was held that securities in its broad commercial sense include shares. Debenture is the description of an instrument. Debenture Stock is the description of a debt secured by an instrument. It is a document which creates or acknowledges a debt. *In Campbells case [(1876) Ch. 470]* it has been *held* that debentures may be issued at a discount. *In Lemon Vs. Austin Friars & Trust (1962) Ch. 108* it has been held to be a scheme under which debentures so issued give to the holders an immediate right to exchange them at its nominal value for shares is void as it may involve issuing shares at a discount.

(g) **"schedule"** means a schedule to this Act;

(h) **"prescribed"** means as respects the provisions of this Act relating to the winding up of companies, prescribed by rules made by the Supreme Court and, as respect the other provisions of this Act, prescribed by the Government;

(i) **"director"** includes any person occupying the position of a director, by whatever name called ;

Notes/Comments/Precedents

Director : Since the company is an artificial person it cannot act without a natural person. Usually the persons by whom a company acts and carries on its business and over whom the supreme authority in the control and management of the company vest are directors of the company.

Director– agents of the company : Director includes any person occupying the position of a director. Directors are agents for the company in carrying out the business of the company. If a director makes a contract on behalf of the company, it is the company which is liable on it.

Director– trustee of the company : A director of a company is a trustee in respect of the fund of the company which is under his control and the chairman who exercise effective control of the fund of the company which is vested in the board of directors is also in the position of a trustee *[Md. Yameen and another Vs. K. A. Bashar and others (1986) BLD (AD) 305.]* But, nevertheless, "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." Thus, directors are trustees of the company's funds, money and property and they must deal with these with utmost faith and for the benefit of the shareholders. They will be liable for any dealings with the company's property which is inconsistent with their powers or contrary to the company's rights. But even then there is a difference between directors and trustees. The primary duty of the trustees is to preserve the property. But directors have to carry on business and this involves risk.

(j) **"public company"** means a company incorporated under this Act or under any law at any time in force before commencement of this Act and which is not a private company;

Notes/Comments/Precedents

Public Company : A public company as simply defined in 2 (1)(r) is a company which is not a private company i.e. all the companies other than private companies incorporated or registered under the Companies Act, 1994 or former Companies Acts are public companies.

Public and private companies- distinguished : A private and a public company differs from each other on the following points :

Private Company	Public Company
A private company cannot have more than 50 members	The maximum number of members in case of public company is not limited. It can have any number of members.
A private company can be formed by two persons only.	A public company cannot be formed except by at least seven persons.
A private company must have in its articles restriction on the rights of transfer of shares.	A public company need not have in its articles such restriction on the rights of transfer of shares.
A private company must prohibit any invitation to the public to subscribe for its shares or debentures.	A public company has no obligation to prohibit invitation to the public to subscribe for its shares or debentures.
A private company is not bound to issue or file a prospectus or statement in lieu of prospectus.	A public company is not bound to issue or file a prospectus or statement in lieu of prospectus.
The minimum number of Directors of a Private company is two.	The minimum number of Directors of a Public company is three.
A private company can commence business as soon as it is registered.	A public company can commence business only after obtaining certificate for commencement of business from the Registrar of Joint Stock Companies

(k) "private company" means a company which by its articles-

(i) restricts the right to transfer its shares, if any ;

(ii) prohibits any invitation to the public to subscribe for its shares or debentures, if any ;

(iii) limits the number of its members to fifty not including persons who are in its employment ;

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this definition be treated as a single member;

Notes/Comments/Precedents

Private Company : A private company as defined in section 2 (1)(q) means a company, which by its articles (i) restricts the right to transfer its shares, (ii) prohibits any invitation to the public to subscribe for its shares or debentures and (iii) limits the number of its members to fifty not including persons who are in its employment ;

Status of private company : Status of a private limited company legally is the same as that of partnership- Grounds for dissolving a private limited Company are same as those of partnership: Domestic company formed with members of a family-Its dissolution can be brought about, like that of private company *[Ladli Prasad Jaiswai vs. The Karnal Distillery Co. Ltd. (1965) 17 DLR (SC) 52.]*

Private company- separate juristic person : *Held-* Private company is a separate juristic person unlike partnership firm- As part of public policy the growth of companies is being encouraged in various private sectors to get certain advantages and benefits in the economic sphere of the national life *[Rahimuddin Ahmed vs. Bengal Waterways Ltd. (1977) 29 DLR 95.]*

Commencement of business : As soon as a private company or a company having share capital is incorporated it can commence business and exercise its various powers, but a public company having share capital has to obtain a certificate to commence business from the Registrar before it can commence business or exercise its borrowing powers.

Dissolution of Partnership and winding up of private company : In considering the desirability of dissolution of a partnership the issue to be mainly considered is as to whether the partners of the firm were unable to carry on the business of the firm and consequently whether the firm itself can carry on the business or not. In considering the issue as to whether a company should be wound up or not the matter is to be decided according to the conditions laid down in section 162 of the Companies Act, 1913 (corresponding to section 241 of the Companies Act, 1994). A company comes under the mischief of a winding up proceeding if the company either fails to comply with any statutory or legal obligations or if the company is unable to pay its debts. Difference and disputes between the share-holders and directors as such cannot be only ground for winding up of a company *[Rahimuddin Ahmed vs. Bengal Waterways Ltd. (1977) 29 DLR 95.]*

(l) "managing director" means a director who, by virtue of an agreement with the company or of a resolution passed by the company in its general meeting or by its directors or by virtue of its memorandum or articles of association, is entrusted with the substantial powers of management which would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called ;

Provided that the powers to do administrative acts of a routine nature when so authorised by the directors such as the powers 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 cheque on the account of the company in any bank or to draw and endorse negotiable instrument or to sign any certificate of share or to direct registration of transfer of any shares shall not be deemed to be included within substantial powers of management,

Provided further that a managing director of a company shall exercise his powers subject to the superintendence, control and direction of the directors.

Notes/Comments/Precedents

Managing Director : The managing director occupies the supreme position and virtually he is the pivot of the company and would manage the whole affairs of the company, yet before enactment of the Companies Act, 1994 the term was not defined in the previous Act. The definition of 'managing director' has been introduced for the first time in the Companies Act, 1994.

A Managing Director is an individual having substantial powers of management which he exercises under agreement, memorandum, articles or resolutions of general meeting or Board. The powers are exercised subject to the superintendence, control and direction of the board. The *sinequanon* of one's being a Managing director is that he must be a director of the company.

Managing Director- removal of : Where it was found that the resolutions removing the managing director from the office were *ultra vires*, it was held that a declaration to that effect could not be granted as it was open to the company to remove him at any time by passing a valid resolution *[Sardar Golab Singh Vs. Punjab Zamindara Bank Ltd. AIR 1940 Lah 243.]*

Term of office of Managing Director : The Companies Act, 1994 provides that no public company or a private company which is a subsidiary to a public company shall, appoint or employ any person as its managing director for a term not exceeding five years at a time. But re-appointment or extension can be made on the basis of five years' tenures on each occasion.

Contended that the petitioner's status as Managing Director in respondent No. 5, RPC Limited is clearly different from the definition of Managing Director as enunciated in section 2(m) of the Companies Act, 1994. Although the petitioner by virtue of Clause 76(b)(3) of the Articles of Association of RPC Ltd has voting right in the Board of Director nevertheless this does not make him a director of the Company as defined in section 91(i)(a) of the Companies Act, 1994 for him to come under the definition of Managing Directors as defined in section 2(m) of the Companies Act, 1994. Hence Held : the Company Law is not applicable in respect of the petitioner. *[Abdus Sabur (Md) vs Rural Electrification Board (Spl. Original) [2005] 502]*

(m) "banking company" means a bank company as defined in section 5(9) of the Bank Companies Act, 1991 (Act No. 14 of 1991) ;

Notes/Comments/Precedents

Definition of Banking Company : The definition of 'Banking Company's as given in Act XIV of 1991 is as follows "banking company" means any company which transacts the business of banking in Bangladesh and includes a new bank and a specialised bank :

Explanation : Any company which is engaged in the manufacture of goods or carries on any trade and which accepts deposits of money from the public merely for the purpose of financing its business as such manufacturer or trader shall not be deemed to transact the business of banking within the meaning of this clause."

(n) **"existing company"** means a company formed and registered under any law relating to companies in force at any time before the commencement of this Act.

Notes/Comments/Precedents

Existing Company : An existing company means a company which was registered or formed under any of the previous Acts and is still in existence. Thus a company registered under the provisions of the Companies Act, 1913 or even under the Companies Act, 1882 which is still functioning is an *existing company*. A defunct company is not however, regarded as an existing company.

(o) **"insurance company"** means a company that carries on the business of insurance either solely or in common with any other business or businesses:

Notes/Comments/Precedents

Definition of insurance company : The definition of *'insurance company'* as given in the Insurance Act, 1938 is as follows" insurance company" means any insurer being a company, association or partnership which may be wound up under the Companies Act, 1994 or to which the Partnership Act, 1932 applies".

(p) **"manager"** means an individual who, subject to superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs and business of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, and whether under a contract of service or not ;

Notes/Comments/Precedents

Manager : Managers, according to the meaning of the definition are the persons managing the whole or ubstantially whole affairs of the company, but subject to the control and directions of the board of directors. Thus the manager of a company is an individual in charge of the business of the company. As such in an Indian decision it has been held that mere heads of the departments cannot be deemed to be the managers.

(q) **"managing agent"** means a person, firm or company by whatever name called, who or which is entitled to the management of the whole affairs and business of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement.

Notes/Comments/Precedents

Managing agent– powers and obligations: From the definition of managing agent, it is quite clear that the managing agent is entrusted with the management of the company by virtue of an agreement which is the basis of the agency and that the managing agent may be free of all control of the directors. There are however, some restrictions imposed upon the appointment of the managing agent.

Both the appointment and removal of the managing agent must be approved in the general meeting. In case the appointment of a managing agent is made before the issuance of prospectus or where the prospectus contains the term of appointment the above provision shall not apply in that case. The managing agent is however, removable at any time by resolution passed in the general meeting.

(r) **"registrar"** means a Registrar or any other officer, by whatever designation, performing under this Act the duty of registration of companies;

(s) **"share"** means, a share in the capital of the company, and includes stock except when a distinction between stock and shares is expressed or implied.

Notes/Comments/Precedents

Shares : A definite portion of the capital of a company is called a Share. It is personal property. The ownership of a share entitles the owner to receive a proportionate part of the profits of the company and to take part in the management in accordance with the articles of association. The mode in which shares may be transferred is regulated by the articles. A share is regarded as the interest of the shareholder in the company measured, for the purpose of liability and dividend, by a sum of money, but consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with the provisions of the Companies Act, Memorandum and Articles of Association and made up of various rights. Shares may be converted by a limited company into stock.

(t) **"secretary"** means any individual possessing the prescribed qualifications appointed to perform the duties which may be performed by a secretary under this Act and any other ministerial or administrative duties; and

(u) **"articles"** means the articles of association of a company including, so far as they apply to the company, the regulations contained in the Schedule I to this Act :

Provided that the articles of association of a company framed under any law relating to companies at any time in force before the commencement of this Act shall, so far as they are not inconsistent with the provisions of this Act, be deemed to be the articles of association of that company framed in accordance with the provisions of this Act ;

Notes/Comments/Precedents

Articles of Association– Scope of : Articles of Association is a document of the company providing for its regulation of internal management. It lays down the regulations for achievement of the object of the company as per its memorandum as to carry out those objects. The articles of association constitute a contract between the company in the one hand and the share-holders individually on the other, and also between the members *inter se*. Articles are subordinate to and are controlled by the memorandum of association of the company.

The Articles of a company bind the company and its shareholders as if these had been accepted by each of them. These also bind the shareholders of the company, both existing or future.

Articles of Association- the magna carta of the company: Although articles of association of a company play a part subsidiary to the memorandum of association, it has been held that the Articles of Association of the company is its *magna carta*. It is a business document and hence to be construed strictly. The articles provide for the regulation for internal management of the company of which each shareholder attributed with notice. It is a business document and is to be interpreted strictly *[S.S. Rajkumar Vs. Perfect Castings Ltd. 38 Comp. Cas.187=(1968) 1 Com. L.J. 41.]*

Articles– Functions of the Directors : Persons dealing with Directors or Managing Directors of a Company are not called upon to enquire whether the Directors have been validly appointed or whether there is a specific resolution authorising them to do a particular act, if it is clear from the Articles of Association of the Company that they could have been authorised to do the said act *[M/S. P.K. Basak & Co., Ltd. Vs. M/s. Gossery & Co. Ltd. (1957) 9 DLR 1.]*

Alteration of articles : Articles of association of any company may be altered by special resolution under section 20 of the Companies Act, 1994, but alteration with a view to deceive the minority share-holders *held*- alteration of articles is not permissible.

When majority share-holders passed a special resolution altering the articles so as to enable nine-tenth of the shareholders to buy out any other shareholder- *Held* that the alteration was void and it was a fraud on the minority *[Brown Vs. Abrasive Wheel Co. (1919) 1 Ch. 290.]*

(x) **"memorandum"** means the memorandum of a company as originally framed or as altered in pursuance of the provisions of this Act ;

Notes/Comments/Precedents

Memorandum : The Memorandum of Association is the primary constitution of the company. It contains the conditions upon which a company is granted incorporation. It may be termed as the charter of the company. Memorandum limits the activities which the company can undertake. As Lord Cairns L.C. remarked, "The Memorandum is, as it were, the area beyond which the action of a company cannot go ; inside that area the shareholders may make such regulations for their own government as they think fit" *[Ashbury Vs. Riche, L.R. 7 H.L. 653.]*

The term Memorandum of Association includes the original memorandum as registered or as altered from time to time. In the case of a company limited by shares it must contain the name of the company with "limited" as the last word, the address of the company's registered office, objects of the company, a statement that the liability of the company's members is limited though the liability of the directors may be made unlimited and the amount of share capital with which the company proposes to be registered and division thereof of a fixed amount. Each of the subscribers to the memorandum must write opposite his name the number of shares he would take. A minor cannot be a subscriber to the memorandum as he cannot enter into a contract.

On registration of a memorandum there comes to exist a covenant between the company and its members casting an obligation of solemnly observing the provisions of the same.

Memorandum -what to be stated in : The Memorandum of Association contains the fundamental provisions of the company's constitution. Inclusion of the following six clauses in a memorandum is mandatory, such as (i) the name, (ii) the Registered office, (iii) the objects, (iv) the limited liability, (v) the capital and (vi) the association clause. Besides these obligatory clauses the company may include additional clauses in the memorandum which could likewise may be contained in the articles of association.

Memorandum and Articles : The Memorandum of Association is generally accompanied by the 'Articles of Association'. The Articles of Association of company is subordinate to and controlled by the Memorandum of Association. Articles of Association cannot provide for anything contrary to the powers and objects setforth in the Memorandum.

Memorandum and Articles– difference of : Memorandum and Articles of Association differs on the following points :

Memorandum of Association	Articles of Association
1. The Memorandum of Association contains the conditions upon which a company is granted incorporation.	1. Articles of Association contain the internal regulations for the internal administration of the company
2. Memorandum limits the activities which the company can undertake.	2. The Articles setforth the rules or by-laws wherewith those activities can best be carried out from the very birth of the company till its death.
3. The Memorandum of Association is as unalterable document except in so far as is provided by the Section 12 of the Companies Act.	3. Articles of Association can be changed as many times as the shareholders may choose by special resolution
4. A company must provide itself with its Memorandum of Association which are usually framed in a statutory way.	4. A company may provide itself with its Articles of Association by fully adopting 'Schedule I' of the Act.

(2) For the purposes of this Act, a company shall subject to the provisions of sub-section (4), be deemed to be a subsidiary of another, if–

(a) that other controls the composition of its Board of Directors of the first mentioned company; or

(b) the first mentioned company, being an existing company, has before the commencement of this Act, issued preference shares the holders of which have the same voting rights in all respects as the holders of equity shares and that the other company exercise or control more than half of the total voting power of the first mentioned company; or

(c) the first mentioned company is not a subsidiary within the meaning of clause (b), but that other company holds more than half in nominal value of its equity share capital; or

(d) the first mentioned company is a subsidiary of a third company which is that other's subsidiary.

(3) For the purpose of sub-section (2), the composition of a company's Board of Directors shall be deemed to be controlled by another company if, that other company, by the exercise of some power exercisable by it at its discretion without the consent or concurrence of any other person, can appoint or remove the holders of all or a majority of the directors, and for the purposes of this sub-section that other company shall be deemed to have power to appoint to directorship with respect to which any of the following conditions is satisfied, that is to say–

(a) that power of appointment cannot be exercised except in favour of an individual;

(b) that an individual appointment thereto follows necessarily from his appointment as director, managing agent, secretary or manager of, or to any other office of employment in, that other company; or

(c) that the directorship is held by an individual nominated by that other company or a subsidiary thereof.

(4) In determining whether one company is a subsidiary of another the following conditions shall be applicable namely: –

(a) any shares held or power exercisable by that other company in a fiduciary capacity shall be treated as not held or exercisable by it,

(b) subject to the provisions of clauses (c) and (d) any shares held or power exercisable shall be deemed to be the shares held or power exercisable by that other company, if-

(i) the shares are held or the power is exercisable by a person as a nominee and on behalf of that other company, but this clause shall not apply to the holding of such shares or to the exercise of such powers by such person where that other company is concerned in a fiduciary capacity :

(ii) the shares are held or the power is exercisable by a subsidiary of that other company or by a nominee of such subsidiary, but this clause shall not apply to the holding of such shares or to the exercise of such powers by the subsidiary or by its nominee where the subsidiary is concerned in a fiduciary capacity :

(c) Any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned company or of a trust deed for securing any issue of such debentures shall disregarded ;

(d) if any shares are held or power is exercisable, not being held or exercisable as mentioned in clause (c),–

(i) by that other company or by its subsidiary or by a nominee of that other or its subsidiary, as the case may be, and

(ii) the ordinary business of that other company or as the case may be of its subsidiary includes the lending of money and such shares are held or the power is exercisable by way of security of the loan then such power shall not be treated as being held or exercisable by such company or its nominee.

(5) For the purposes of this Act, a company shall be deemed to be the holding company of another if, and only if, that other is its subsidiary.

3. Jurisdiction of the Court.– (1) The Court having jurisdiction under this Act shall be the High Court Division:

Provided that the Government may by notification in the official Gazette and subject to such restrictions and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction by this Act conferred upon the Court, and in that case such District Court shall as regards the jurisdiction so conferred, be the court in respect of all companies having their registered office in the district.

Explanation : For the purposes determining the jurisdiction of District Court in case of winding up of the expression "registered office" means the place where the registered office of the company, during the six months immediately preceding the presentation of the petitions of winding up was situated.

(2) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court.

Notes/Comments/Precedents

Company Court-Jurisdiction : Matters decided under the Companies Act are not under the Constitutional jurisdiction of the High Court Division but under a special statutory jurisdiction conferred upon the High Court Division by the Companies Act itself *[Uttara Jute Fibres Industries Vs. Ashraf Jute Mills (1992) 44 DLR 452.]*

In accordance with provisions of Section 3 of the Companies Act an application relating to a company having its registered office in mofussil should be made in the original side of the High Court. Sub-section (3) of section 3 will have no application where the objection to jurisdiction is taken at the very commencement of the proceeding or at proper time *[8 P L R (Dac) 639.]*

Held- Section 3 only gives certain jurisdiction to the High Court in resolution of disputes under the Companies Act under its Original Jurisdiction. Section 9 of the C.P.Code has expressly provided that civil disputes should be tried by civil courts unless the jurisdiction is expressly or impliedly barred *[Md. Shamsuzzaman Khan Vs. M.S. Islam (1976) 28 DLR 101.]*

When a company may voluntarily wound up the company's existence would continue for the purpose of winding up and not for any other purpose *[8 P L R (Dac.) 639.]*

Where the Registrar fails to discharge his duties, section 3 does not bar the jurisdiction of the High Court to interfere under the Constitution.

Cases under Companies Act- Special Statutory jurisdiction : Matters decided under the Companies Act in the High Court by a Single Bench are not disposed of in exercise of its ordinary

civil jurisdiction..... Cases under the Companies Act are decided by way of special statutory jurisdiction conferred upon the Court by the Act itself *[Dhaka Jute Mills Ltd. Vs. Satish Chandra Banik(1967) 19 DLR 735.]*

Writ jurisdiction and Company Law : There is no remedy provided in the Companies Act for making the Registrar of Joint Stock Companies discharge his duties properly. Therefore writ can always be maintained against the Registrar where he has not acted in accordance with law.

If a certificate of incorporation is illegally granted it can always be challenged by an appropriate proceeding.

Ordinarily Court in exercise of their writ jurisdiction will not interfere in cases where such statutory remedies are provided. *[Mohammad Idrish Vs. East Pakistan Timber Merchants Group. [(1968 20 DLR (SC) 355.]*

High Court- trial of criminal cases : Provisions made under section 3 of the Companies Act conferring powers on the High Court to try offences under the Companies Act did not empower the High Court in general to try criminal offences committed under the Companies Act as a Court of first instance except where an offence is committed in a case under the company law directly being dealt with by the Court *[A.G Maline Vs. The State (1967) 19 DLR 382.]*

When jurisdiction of the Civil Courts cannot be ousted : The respondent No.1 had started a company in the name of M/S Abdul Jabbar and Company Limited with its head office at Khulna to carry on business in the export and import of jute. He was the Managing Director and had absolute power with regard to its administration and management, under Articles of Association. On the 10th February, 1964 he was placed under detention under the East Bengal Public Safety Ordinance. During the period of his detention the respondent No. 3 manufactured a resignation letter which purported to have been written by the respondent No. 1 resigning from the post of Managing Director and on the last thereof reconstitute the Company, and changed its name of *M/S Chalna Fibre Company Limited.* for depriving the respondent No. 1 of his rightful control of the Company.

After his release from detention, the respondent No. 1 filed a suit in the Court of a Munsiff at Khulna praying for the following- (a) That a decree be passed declaring that the plaintiff is still the Managing Director. (b) That a decree be passed that the reconstitution of M/S A Jabbar and Company Limited is illegal and inoperative and not binding upon the plaintiff. ***Held-*** There is no provisions in the Companies Act under which the plaintiff could seek the reliefs he claimed in the suit.

The suit is not hit by the provisions of section 3 of the Companies Act, it is a civil suit and is therefore, under section 9 of the Code of Civil Procedure, triable by a Civil Court unless its cognizance was expressly or impliedly barred *[Messers. Chalna Fibre Company Ltd. Vs. A Jabbar (1968) 20 DLR (SC) 335.]*

Applicability of provisions of order 11 : Order XI, rule 2 of the Code of Civil Procedure applies only in the case f a suit. The proceeding under section 43 of the Companies Act, 1994 is a special proceeding under a statutory jurisdiction and is not a proceeding in the nature of a suit as contemplated under section 9 of the Code of Civil Procedure. Therefore, the provisions of Order XI, rule 2 of the Code of Civil Procedure has no manner of application in the facts and circumstances of the resent case. The Court below has rightly passed the impugned order to the effect that the suit is not barred by any law and the same shall proceed in accordance with the law. *[Dhaka Stock Exchange Ltd. and others Vs Motiur Rahman 7 BLC 2002 150]*

PART- II
CONSTITUTION AND INCORPORATION

4. Prohibition of partnerships exceeding certain number.– (1) No company, association or partnership consisting of more than ten person shall be formed for the purpose of carrying on the business of banking unless it is registered as a company under this Act or is formed by or under any other Act of Parliament.

(2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof unless it is registered as a company under this Act or is formed by or under any other Act of Parliament.

(3) This section shall not apply to joint family carrying on joint family business or trade.

Provided that for the purpose of this section, in computing the number of persons of a partnership, association or company comprising two or more joint families, minor members of such families shall be excluded.

(4) Every member of a company, association or partnership carrying on business in contravention of this section shall be personally liable for all liabilities incurred in such business.

(5) Any person who is a member of a company, association or partnership formed in contravention of this section shall be punishable with a fine not exceeding five thousand taka.

Notes/Comments/Precedents

Object of the section : This section has been enacted to redress a public mischief arising from large trade undertakings being carried on by large fluctuating bodies making it difficult for persons to deal with such fluctuating bodies *[Smith Vs. Anderson (1880) 15 Ch. D 247.]*

Applicability of Section : Section 4 on it true construction governs not only the formation of the company, association or partnership but also rules in continuance. An association formed for trading may be perfectly legal at its formation if the original members be not more than ten in number in the case of a banking business and twenty in other business, but if the number increases later on and exceeds the maximum allowable the association becomes an illegal one, if no registration is in effect. So also even a company, association or partnership which was already formed before the Companies Act came into force would come within Section 4(2) and would be rendered illegal if after the Companies Act came into force, there have been several changes caused by deaths, giving rise at the time of each death to a new partnership *[Nibaran Chandra Shaha Vs. Lalit Mohan Brindaban Shaha. AIR 1939 Cal.]*

Partnership- when illegal : Where persons exceeding 20 in number calling themselves as partners of four different unregistered firm, enter into a partnership to carry on business and each person is individually entitled to the benefit of the contracts, the partnership is illegal under section 4(2)

although the persons represented themselves to be partners of unregistered firms. For the word "person" in section 4 denotes individuals and does not include bodies of individuals whether corporate or not *[Senaji Kapurchand Vs. Pannaji Devichand, AIR 1930 P.C. 300.]*

Member of illegal partnership cannot sue for dissolution : A member of an illegal partnership cannot sue for its dissolution of for the taking of its accounts. It's members have no remedy against each other for contribution or apportionment in respect of partnership dealings and transactions. The partner cannot ask for a partnership and partition of the properties of a partnership left after discharging all its liabilities. The Court will not permit what cannot be lawfully done directly to be done indirectly *[S.N.T. Kumaraswami Chettiar Vs. M.S.M. Chinnathami Chettiar, AIR 1951 Mad. 2911.]*

Validity of actions taken before Incorporation and Registration of a Company : Actions taken before incorporation and registration of a company are valid when ratified after incorporation and registration. *[Capital Tower Ltd. Vs Mirpur Mazar Cooperative Market Society Ltd. And others 9 MLR (AD) 141].*

MEMORANDUM OF ASSOCIATION

5. Mode of forming incorporated company.– Any seven or more person or, where the company to be formed will be a private company, any two or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration form an incorporated company, with or without limited liability, that is to say, either–

(a) a company limited by shares that is to say, a company having the liability of its member limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them ; or

(b) a company limited by guarantee, that is to say, a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up; or

(c) an unlimited company, that is to say, a company having no limit on the liability of its members.

Notes/Comments/Precedents

The formation of the company : The mode of forming a company is very simple. After having decided on the kind of company most suitable for their purposes, the promoters will prepare, or ask their advisers to prepare, the constitutional documents of the company viz., the memorandum of association and the articles of association (if there are to be any). These documents, together with certain other documents which likewise require registration and the Registrar of Joint Stock companies registers the same. On issuance of certificate of registration by the Registrar and from the date mentioned therein the company comes into existence as a legal person commence business at once but if it is formed as public company it has to satisfy further requirements before it is granted a certificate authorising it to commence business.

The Memorandum of Association : The Memorandum of Association is generally accompanied by the 'Articles of Association'. The Articles of Association of company is subordinate to and controlled by the Memorandum of Association. The Memorandum of Association contains the conditions upon which a company is granted incorporation It limits the activities which the company can undertake. Lord Cairns L.C. remarked, "The Memorandum is, as it were, the area beyond which the action of a company cannot go; inside that area the shareholders may make such regulations for their own government as they think fit." *[Ashbury Vs. Riche, L.R. 7 H.L. 653.]*

A company must provide itself with its Memorandum of Association which are usually framed in a statutory way. The Memorandum of Association is as unalterable document except in so far as is provided by the Section 12 of the Companies Act where it is stated that it can be altered by special resolution, confirmation by the court and registration with the Registrar.

Memorandum and articles of association : The constitution of the company is contained in two documents- the memorandum of association and the articles of association. This division of the constitutional documents was first adopted by the Joint Stock Companies Act, 1856. Before that Act the constitution of the English company was contained in one document, viz., the deed of settlement. The system of the uniform constitution is still in use in many Continental company laws. In the U.S.A also the legislature provide for the division of the constitutional documents similar to that applying to companies in the U.K.

6. Memorandum of company limited by shares.– In the case of a company limited by shares.-

(a) the memorandum shall state–
  (i) the name of the company, with "limited" as the last word in its name;
  (ii) the address of the registered office ;
  (iii) the objects of the company, and, except in the case of trading companies, the territories to which they extend;
  (iv) that the liability of the members is limited;
  (v) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount;

(b) each subscriber of the memorandum shall take at least one share;

(c) each subscriber shall write opposite to his name the number of shares he takes.

Notes/Comments/Precedents

The memorandum of association : The memorandum is a document of great importance in relation to the company. It must be printed and divided into paragraphs consecutively and it must state the objects of the company. Accordingly, it has to contain the following clauses viz.-(i) The Name Clause (ii) The Registered Office Clause (ii) The Association Clause.

The document has to be subscribed, in the case of a public company, by at least seven persons, and in the case of the private company by at least two.

Conditions required to be stated in memorandum : Only those provisions are regarded as conditions that are required by Section 13 to be stated in the Memorandum of Association. Any other thing stated in the memorandum can be altered by passing special resolution *[Venkataraman Vs. The Coimbatore Mercantile Bank, AIR 1924 Mad. 126.]*

Alteration of memorandum : Clauses other than conditions may be altered generally by special resolutions, as if they are contained in the Articles. A clause in the memorandum regarding the right of dividend of class of share-holders may be altered by special resolution *[Rampuria Cotton Mills Ltd. Re, A (1959) 253 63 CWN 11.]*

7. Memorandum of company limited by guarantee.– In the case of a company limited by guarantee-

(a) the memorandum shall state-

(i) the name of the company, with "limited" as the last word in its name :

(ii) the address of the registerèd office :

(iii) the objects of the company, and except in the case of trading companies, the territories to which they extend;

(iv) that the liability of the members is limited;

(v) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount:

(b) if the company has a share capital–

(i) the memorandum shall also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount ;

(ii) each subscriber of the memorandum shall take at least one share;

(iii) each subscriber shall write opposite to his name the number of shares he takes.

8. Memorandum of unlimited company.– In the case of an unlimited company–

(a) the memorandum shall state–

(i) the name of the company;

(ii) the address of the registered office of the company;

(iii) the object of the company, and except in the case trading companies, the territories to which they extend;

(b) if the company has a share capital–

(i) each subscriber of the memorandum shall take at least one share;

(ii) each subscriber shall write opposite to his name the number of shares he takes.

9. Printing and signature of memorandum.– The memorandum of every company shall-

(a) be printed ;

(b) be divided into paragraphs numbered consecutively ; and

(c) be signed by each subscriber, who shall add his address and description in the presence of at least two witnesses who shall attest the signature.

Notes/Comments/Precedents

Signing the Articles of Association and Memorandum of Association by its promoter shareholders : Registration of a company which is not legally formed by the Board of investment is illegal. The opportunity of infrastructure development facilities involving national importance should not be given to a party having no financial and technical capacities. Public authorities are expected to discharge their duties fairly and transparently. The infrastructure development facilities should be given on BOT policy. Selection of competent party should be made through competitive bidding process. *[SSA Bangladesh Ltd. and another Vs. Engineer Mahmudul Islam and others 9 MLR (AD)8].*

10. Restriction on alteration of memorandum.– (1) A company shall not alter the conditions contained in its memorandum except in the case and the mode and to the extent for which express provisions is made in the Act.

(2) Only those provisions which by any other specific provision contained in this Act, are required to be stated in the memorandum of the company concerned, shall be deemed to be the conditions contained in its memorandum.

(3) Other provisions contained in the memorandum, including those relating to the appointment of a director, managing agent or manager may be altered in the same manner as the articles of the company, but if there is any express provision in this Act permitting the alteration of such provisions in any other manner, they may also be altered in such other manner.

(4) All reference to the articles of a company in this Act shall be construed as including references to the other provisions contained in its memorandum as referred to in sub-section (3).

Notes/Comments/Precedents

Changes of clauses other than conditions : The clauses other than conditions may be altered generally by special resolution, as if they are contained in the Articles. A clause in the Memorandum regarding the right to dividend of a class of share-holders may be altered by special resolution *[Rampuria Cotton Mills Ltd. In re A I R 1959 Cal 253 63 CWN 11 (1959) 29 Comp. Cas. 85.]*

11. Name of company and change of name.– (1) A company shall not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling the name that there is likelihood of

using the name to deceive, except where the company in existence is in the course of being dissolved and signifies its written consent in such manner as the Registrar requires.

(2) If a company, through inadvertence or otherwise, is without the consent referred to in sub section (1), registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling the name that there is likelihood of using the name to deceive, the first mentioned company shall, on the direction of the Registrar, change its name within a period of one hundred and twenty days.

(3) If a company makes a default in complying with the direction made under sub-section (2), the company shall be punishable with fine of five hundred taka for every day during which the default continues and every officer who is in default shall be punishable with fine of one hundred taka for everyday during which the default continues.

(4) Except with the previous consent in writing of the Government, no company shall be registered by a name which is declared by the Government by notification in the official Gazette, as undesirable:

Provided that nothing in this in this sub-section shall apply to companies registered before the commencement to this Act.

(5) No company shall be registered by a name containing in any form the name or any abbreviation of the name of the United Nations or of any subsidiary body set up by the United Nations or of the World Health organisation unless the company has obtained the previous authorisation in writing of the Secretary General in the case of the United Nations or the subsidiary body as aforesaid or of the Director General of the World Health Organisation in the case of that Organisation.

(6) Any company may, by special resolution and subject to the approval of the Registrar signified in writing, change its name.

(7) Where a company changes its name, the Registrar shall enter the new name on the register in place of the former name, and shall issue a certificate of incorporation in its new name to meet the circumstances of the case and on the issue of such a certificate, the change of name shall be complete.

(8) The change of name shall not change any right or obligations of the company, or render defective any legal proceedings by or against the company ; and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

(9) A company may, on payment of such fee as may be prescribed, apply to the Registrar for information whether any company is registered or proposed to be registered by a name specified in the application and the Registrar shall furnish the required information within a period of thirty days from the date of receipt of the application.

Notes/Comments/Precedents

Registration of Company in identical names : Section 11 of the Companies Act provides that a company shall not be registered by a name identical with that by which a company in existence is already registered so nearly resembling that name as to be calculated to deceive *[Shafiqul Haider Vs. M. Al-Amin and another (1987) 39 DLR (AD) 103.]*

Change of name : Change of name of a company while keeping its identity is possible only under section 11 of the Companies Act after following the prescribed procedure for the purpose *[M.M.Ispahani Ltd. Vs. S.Q.Ahman and Co. (1968) 20 D L R (S C) 173.]*

The change of name can take place on compliance with the provisions of the Companies Act provided it is not prohibited by any other statute *[Surendra Vs. Indian Air Lines Corporation AIR 1966 Cal 272.]*

12. Alteration of memorandum.– (1) Subject to the provision of this Act, a Company may, by special resolution, alter the provision of its memorandum with respect to the objects of the company, so far as may be required to enable it–

(a) to carry on its business more economically or more efficiently; or

(b) to attain its main purpose by new or improved means; or

(c) to enlarge or change the local area of its operations; or

(d) to carry on some business which, under existing circumstance, may conveniently or advantageously be combined with the business of the company; or

(e) to restrict or abandon any of the objects specified in the memorandum; or

(f) to sell or dispose of the whole or any part of the undertaking of the company; or

(g) to amalgamate with any other company or body of persons.

(2) The alteration shall not take effect until and except in so far as it is confirmed by the Court on petition.

(3) Before confirming the alteration, the Court must be satisfied–

(a) that sufficient notice has been given to every holder of debentures of the company, and to any person or class of person, whose interest will, in the option of the court, be affected by the alteration, and

(b) that, with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in a manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has been determined, or has been secured to the satisfaction of the Court ;

Provided that the Court may, in the case of any person or class, for special reasons, dispense with the notice required by this section.

Notes/Comments/Precedents

Conditions-only those that are required to be stated in memorandum : Only those provisions are regarded as conditions that are required by Sections 6, 7 & 8 to be stated in the Memorandum of Association. Any other thing stated in the memorandum can be altered by passing special resolution *[Venkataraman Vs. The Coimbatore Mercantile Bank, AIR 1924 Mad. 126.]*

Alteration of memorandum : Clauses other than conditions may be altered generally by special resolutions, as if they are contained in the Articles. A clause in the memorandum regarding the right of dividend of class of share holders may be altered by special resolution *[Rampuria cotton Mills Ltd. Re. A (1959) 253 = 63 C W N 11.]*

Change of the registered office : Change of the registered office of the company not permissible without High Court's sanction.

Notice of any change cannot be effected by collateral document *[Sakhawat Hossain Vs. Chittaranjan Cotton Mills Ltd. (1962) 14 DLR 407.]*

" Main Purpose"-explained : The word "Main Purpose" used in clause (b) of sub-section (1) of section 12 is more restricted than "object" and consequently the alteration must be one to carry out main purpose of the company although that object may be described in the memorandum as a main object *[Govt. Stock Investment Co. (1891) 1 Ch. 649..]*

13. Power of the Court when confirming alteration.– The court may make an order confirming the alteration either wholly or in part, and on such terms and conditions, as it thinks fit, and may make such order as to costs as it thinks proper.

14. Exercise of discretion by Court.– The Court shall, in exercising its direction under section 12 and 13, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interest of dissenting members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangements;

Provided that no part of the share capital of the company may be expended in any such purchase.

15. Procedure on confirmation of the alteration.– A certified copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall be filed by the company with the Registrar within ninety days from the date of the order or within such time as may be extended by the court; and the Registrar shall register the same, and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of this Act, with respect to the alteration and the confirmation thereof, have been complied with, and henceforth the memorandum so altered shall be the memorandum of the company.

Notes/Comments/Precedents

Failure to file altered memorandum : Altered memorandum of association granted by the High Court to be filed with the Registrar of Joint Stock Companies within the time specified in section 15..... Further time may be granted under the proviso to section 16.... When all these not availed of - *Held :* the alteration of memorandum becomes void *[In the matter of Union Bank Ltd.(1969) 21 DLR 135.]*

Condonation of delay in filing Court's order : As the petitioner could not file the order dated 15-5-04 of the High Court Division before the Registrar of Joint Stock Companies within the 30 days as stipulated in section 15 of the Companies Act owing to inadvertence and lack of knowledge the application was allowed with a direction to file the certified copy of the order in question before the Registrar within 30 days from date. *[Patwary and Sons Flour Mills Ltd vs Registrar of Joint Stock Companies (Civil) [2005] 313]*

16. Effect of failure to register within extended time.– No such alteration shall have any operation until registration thereof has been duly effected in accordance with provisions of section 15, and if such registration is not effected within the period specified in that section such alteration and the order of the Court confirming the alteration, and all proceedings connected therewith shall, at the expiration of the period specified under that section become absolutely null and void:

Provided that the Court may, on sufficient cause shown, revive the order on application made within a further period of thirty days after the said period.

Notes/Comments/Precedents

Registration of alteration : Under Section 16 the alteration has to be registered within ninety days. Where for that purpose the copy of the order of memorandum of alteration is not filed within three months, the court has, of course, the power to extend time for filing the same, but once the period of three months has expired, the proceedings would become void under Section 19(2) and the court cannot thereafter extend the time. The only procedure open thereafter is to apply to the court for reviving the order *[Shiv Prakash Janakrai S. Co. Vs. Registrar of Companies, (1963) 2 Comp. L.J. 228 (Punjab).]*

Condonation of delay in filing Court's order : As the petitioner could not file the order dated 15-5-04 of the High Court Division before the Registrar of Joint Stock Companies within the 30 days as stipulated in section 15 of the Companies Act owing to inadvertence and lack of knowledge the application was allowed with a direction to file the certified copy of the order in question before the Registrar within 30 days from date. *[Patwary and Sons Flour Mills Ltd vs Registrar of Joint Stock Companies (Civil) [2005] 313]*

ARTICLES OF ASSOCIATION

17. Registration of articles.– (1) A Company limited by guarantee and an unlimited company shall, and a company limited by shares may, have an articles of association wherein provision shall be made for regulating the affairs of the company; and the articles shall be signed by the subscribers of the memorandum and be registered together with the memorandum.

(2) Articles of association may adopt all or any of the regulations contained in Schedule I, and shall in any event be deemed to contain regulations identical with or to the same effect as regulation 56, 66, 71, 78, 79, 80, 81, 82, 95, 97,105, 108, 112, 113, 114, 115 and 116 contained in that Schedule:

Provided that regulations 78, 79, 80, 81 and 82 shall not be deemed to be included in the articles of any private company except a private company which is the subsidiary company of a public company:

Provided further that regulation 108 shall be deemed to require that a statement of the reasons why of the whole amount of any item of expenditure which may in fairness be distributed over several years, only a portion thereof is charged against the income of the year, shall be shown in the profit and loss account, unless the company in general meeting shall determine otherwise.

(3) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital, shall state the amount of share capital with which the company propose to be registered.

(4) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles shall state the number of members with which the company proposes to be registered; and on the basis of such number the Registrar shall determine the fees payable on registration.

Notes/Comments/Precedents

Articles of Association- binding effect of : Every member of a company as well as the company itself is bound by the terms of the articles of association and as such its registration is necessary. Public companies limited by shares, although may run without articles, but in practice always do have their own articles.

Articles when to be registered : If articles of any company are not registered, then section 18 of the Act would apply *[Prayan Prasad Vs. Gaya Bank and Traders Association Ltd. (1931) 1 Comp. Cas. 85.]*

Articles- inclusion of illegal term : Where the articles of association of the company prevented members in participating the annual general meeting- *Held* that the same to be void and illegal *[P. C. Arvindhan Vs. M. A. Kesavan 1973 Tax L R 1844]*. The articles of a company limited by guarantee and having no share capital giving power to the managing committee to expel a member was held to be void and illegal *[Gaiman Vs. National Association of Mental Health (1971) 41 Comp. Cas 927.]*

Signing the Articles of Association and Memorandum of Association by its promoter shareholders: Registration of a company which is not legally formed by the Board of investment is illegal. The opportunity of infrastructure development facilities involving national importance should not be given to a party having no financial and technical capacities. Public authorities are expected to discharge their duties fairly and transparently. The infrastructure development facilities should be given on BOT policy. Selection of competent party should be made through competitive bidding process. *[SSA Bangladesh Ltd. and another Vs. Engineer Mahmudul Islam and others 9 MLR (AD) 8].*

18. Application of Schedule 1.- In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or,

if articles are registered, in so far as the articles do not exclude or modify the regulations in Schedule 1, those regulations shall, so far as applicable be the regulations of the company in the same manner and to the same extent as if they were contained in the duly registered articles.

Notes/Comments/Precedents

Application of Schedule 1 : Section 18 of the Companies Act 1994 provides that a company may or may not have registered articles of association. If articles of association of any company do not incorporate matters enumerated in schedule 1 they would be operative unless these are specifically excluded.

Articles- alteration of : Article making special resolution to alter articles incapable of being passed if a particular share-holder objects- Validity-*Held* : provision as to voting rights in the articles which has the effect of making a special resolution to alter the articles incapable of being passed if a particular share-holder objects is not a provision depriving the company of the power to alter its articles *[Faith Vs. Bushell, (1969) 2 Comp. LJ 139.]*

An intention to exclude the applicability of the regulation of the company : The respondent company is limited by shares and was registered after the commencement of the Indian Companies Act, 1913: the company has adopted special Articles of Association, but there is no article which excludes or modifies, Regulation 94 of Table A (Table A schedule 1 in companies Act, 1994) and by the operation of Section 18 of the Act that Regulation must be deemed to apply in the same manner and to the same extent as if it was contained in the registered articles of the company. *Held* that because the Company has not incorporated Regulation 94 of the Table A in its Articles of Association, an intention to exclude the applicability of the regulation to the company cannot be inferred regulation 94 of Table A is not expressly excluded by the Articles of the Company: that is common ground. It is not excluded by implication for it is not inconsistent with any other express provision in the Memorandum of the articles of the association. It, therefore, follows that Regulation 94 must be deemed to be incorporated in the Articles of Association of the Company *[Mohan Lal Vs. Grain Chambers, Muzaffarnagar A.I.R. 1968 SC 772= 38 Comp. Cas 543= 68(1) Comp. LJ 275.]*

Where company does not have articles : A company may not have any Articles. In such cases Table A (Corresponding to Schedule 1 in the Companies Act, 1994) will be applicable. If such a company has Articles it can exclude or modify Table A then the regulations of Table A will apply if they are not inconsistent with the company's articles *[Naresh Sanyal Vs. Raman' Kanta Roy AIR 1949 Cal 360.]*

Words used in the articles when ambiguous : Where the words used in a clause are ambiguous, all relevant clauses of the articles should be considered and attempt should be made to reconcile them and adopt such construction as would avoid conflict *[Shiv Onkan Moheswari Vs. Bansidhar Jagamath A 1956 Bom 190 = 26 comp. Cas. 148.]*

Remuneration paid to directors when not provided for in the articles : *Held*- it could not be said that without modifying or amending the articles of association, remuneration could not be paid to the directors *[Sagar Automotive P. Ltd. Vs. Commission of Income Tax (MP) (1984) 2 Comp. L.J. 252.]*

19. Form and signature of articles.– Articles shall-

(a) be printed ;

(b) be divided into paragraphs numbered consecutively ;

(c) be signed by each subscriber of the memorandum, who shall add his address and description in the presence of at least two witness who shall attest the signature.

Notes/Comments/Precedents

Registered article- where not properly stamped : Where not properly stamped Articles of Association registered and also acted upon, they would be effective *[Kunj Kishore Vs. Buldeo Mills. (1914) 36 All 416.]*

Signing the Articles of Association and Memorandum of Association by its promoter shareholders : Registration of a company which is not legally formed by the Board of investment is illegal. The opportunity of infrastructure development facilities involving national importance should not be given to a party having no financial and technical capacities. Public authorities are expected to discharge their duties fairly and transparently. The infrastructure development facilities should be given on BOT policy. Selection of competent party should be made through competitive bidding process. *[SSA Bangladesh Ltd. and another Vs. Engineer Mahmudul Islam and others 9 MLR (AD)8].*

20 Alteration of articles by special resolution.– Subject to the provision of this Act and to the conditions contained in its memorandum, a company may by special resolution alter, exclude from or add to its articles; and any alteration, exclusion or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration exclusion or addition by special resolution.

Notes/Comments/Precedents

Alteration of articles : Section 20 of the Companies Act 1994 provides that a company may by special resolution alter or add to its articles ; and any alteration or addition so made shall be as valid as if the same was originally contained in the articles.

A company is entitled to alter its articles, but it should be *bonafide* and in the interest of the company, Fraud cannot be practiced on the minority in the name of alteration of articles. In *Brown Vs. British Abrasive wheel Co. (1919) 1 Ch. 290* the majority of shareholders passed a special resolution altering the Articles so as to enable nine-tenths of the shareholders to buy out any other shareholder. It was held that the alteration was void as it was a fraud on the minority. But in some cases the majority can even alter the Articles so as to be able to exclude the minority where this is done bonafide for the benefit of the company. Thus, in *Sidebottom Vs. Kershaw, Leese & Co.* the Articles were altered in such way that the directors could require any shareholder who was competing with the company to transfer his shares at their full value. It was held that the alteration was valid as it was for the benefit of the company as a whole. Similarly a company cannot justify a breach of contract by altering its Articles *[(1920) 1 Ch. 154.]*

Alteration- refusal of registration : The Registrar may refuse to register an alteration of articles which introduces an illegal object *[Pioneer Mutual Benefit & Friend in need Society Ltd. Vs. Assistant. Registrar of Joint Stock Companies A (1933) Mad. 129.]*

Injunction : If the alteration is not *ultravires* the Act or memorandum or unlawful, the court will not issue an injunction, at the suit of shareholders or persons affected merely on the ground that such alteration will cause a breach of contract for which the company may have to pay damages *[Southern Foundries Ltd. Vs. Shirlaw (1940) A.C. 701.]*

21. Effect of alteration in memorandum or articles.– Notwithstanding anything in the memorandum or articles of a company, no member of the company shall be bound by an alteration, made in the memorandum or articles after the date on which he becomes, member, if and so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alternation is made, or in any way increases his liability as at that date to contribute to the share capital of, or otherwise to pay money to the company.

Notes/Comments/Precedents

Members bound by valid alteration : When there is valid alteration then all the members would be bound by it whether they vote in favour or against it *[Hari Chandra Joga Deva Vs. Hindustan Co-operative Insurance Society Ltd. AIR 1925 Cal 690.]*

GENERAL PROVISIONS

22. Effect of memorandum and articles.- (1) 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 each member and contained a covenant on the part of each member, his heirs and legal representatives, to observe all the provisions of the memorandum and of the articles subject to the provisions of this Act.

(2) All money payable by any member to company under the memorandum or articles shall be a debt due from him to the company.

Notes/Comments/Precedents

Memorandum and Articles– effect of : The memorandum of association and articles of association of a company is mandatory. A member is bound by them and the company cannot act in violation thereof *[Hemlata Saha Vs. Standmed Pvt. Ltd. AIR 1965 Cal 436 = (1964) 2 Comp L.J. 75.]*

Articles– not a contract between company and outsider : As between the company and an outsider that is a person who is not a share-holder, the articles do not in any circumstances constitute a contract *[Maj Gen. Shanta Shamsher Jang Bahadur Vs. Kamani Brothers Pvt. Ltd. (1959) 29 Comp. Cas 501.]*, but the articles constitute a contract between each member and the company and regulate their rights *inter se [Hickman Vs. Kent Ronney sheep Breeders' Association (1914) All ER Rep. 900.]*

23. Registration of memorandum and articles.– (1) The memorandum and articles if any shall be filed with the Registrar who if satisfied that the requirements of this Act have been complied with shall retain and register them within thirty days from the date of their receipt and in the event of refusal he shall communicate the grounds thereof within ten days after that period to the company.

(2) Any person to being aggrieved by a refusal of the Registrar under sub-section (1) may make an appeal to the Government within thirty days of the receipt of the refusal order.

(3) The petition of appeal shall be accompanied by a treasury chalan showing of a fee of two hundred fifty taka to be credited under the head of account specified in this behalf.

(4) The decision of the Government in an appeal under this section shall be final.

Notes/Comments/Precedents

Registration of Memorandum : The Registrar must register the company if the legal formalities have been complied with *[T V Krishna Vs. Andhra Prabha Pvt. Ltd. A 1960 A.P. 123.]*

Writ : It has been decided that against an improper refusal by the Registrar to register a company a Writ in the nature of Mandamus will lie *[R. Vs. Registrar of Companies (1914) 3 K.B. 1161.]*

24. Effect of registration.– (1) On the registration of the memorandum of a company, the Registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited.

(2) From the date of incorporation mentioned in the certificate of incorporation the subscribers of the memorandum together with such other persons as may from time to time become members of the company shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

Notes/Comments/Precedents

Incorporation– effect of : As soon as a company is incorporated under section 23 and certified under section 24 conclusive evidence is that a new company has been formed *[M.M. Ispahani Ltd. Vs. S.A. Rahman 20 DLR (1968) S.C. 173.]*

In *Solomon Vs. Solomon* it has been decided that from the date of incorporation a company has perpetual existence until it is dissolved by liquidation or struck-out of the register *[Solomon Vs. Solomon & Co. Ltd. 1897 A.C. 22.]*

The company, from the date of incorporation becomes a legal person, and there comes into existence a binding contract between the company and its members as evidenced by the Memorandum and Articles of Association *[Harinagar Sugar Mills Ltd. Vs. S.S. Jhunjhunwla. AIR 1961 SC 1969.]*

Certificate- when ineffective : Certificate granted by Registrar is ineffective in law when it is obtained fraudulently *[Messers. Chalna Fibre Company Ltd. Vs. A Jabbar (1968) 20 DLR (SC) 335.]*

25. Conclusiveness of certificate of incorporation.– (1) A certificate of incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with and that the association is a company authorised is a company authorised to be registered and duly registered under this Act.

(2) A declaration by an advocate entitled to appear before the High Court Division, who is engaged in the formation of a company or by a person named in the articles as a director, manager or secretary of the company, of compliance with all or any of the said requirements shall be filed with the Registrar and the Registrar may accept such a declaration as sufficient evidence of compliance.

Notes/Comments/Precedents

Certificate– Proof of compliance of requirement : The certificate of incorporation is conclusive evidence that all requirements with regard to registration have been complied with *[T V Krishna Vs. Andhra Prabha (p) Ltd. AIR 1960 AP 123 (1960) 30 Comp Cas.437 (A.P.).]*

Certificate- When not conclusive : *Held* that the certificate of incorporation is not conclusive where the company formed was for unlawful objects *[Performing High Society Ltd. Re. (1922) 2 K.B. 433.]*

26. Copies of memorandum and articles to be given to members.– (1) Every member of a company may request for a copy of the memorandum, and also for a copy of the articles, if any, and if such request is made in writing along with a fee of Taka fifty or such less fee as may fixed by the company, the company shall, within fourteen days from the date of such request, send the copy to that member.

(2) If a company makes default in complying with the requirements of this section, it shall be liable for each offence to a fine not exceeding two hundred Taka and every officer of the company who is knowingly and wilfully in default shall be liable to a like penalty.

Notes/Comments/Precedents

Memorandum : The minutes approved by the court is conclusive of capital of the company from date its being of registered. It will form part of the memorandum of the company *[Ladies Dress Association Vs. Pulbrook (1900) 2 QB 376.]*

27. Alteration of memorandum of articles to be noted in every copy.– (1) Where an alteration is made in the memorandum or articles of a company, every copy of the memorandum or articles issued after the date of the alteration shall be in accordance with the alteration.

(2) If, where any such alteration has been made, the company at any time after the date of the alteration, issues any copies of the memorandum or articles which are not in accordance with the alteration, it shall be liable to a fine not exceeding one hundred taka for each copy so issued, and every officer of the company who is knowingly and wilfully in default shall also be liable to a like penalty.

ASSOCIATION NOT FOR PROFIT

28. Power to dispense with Limited in name of charitable and other companies.– (1) Where it is proved to the satisfaction of the Government that an association capable of being formed as a limited company has been or is about to be formed for promoting commerce, art, science, religion, charity, or any other useful object, and applies or intends to apply its profits, if any, or other income in promoting its objects and to prohibit the payment of any dividend to its members the Government may, by licence with approval of one of its Secretaries, direct that the association be registered as a company with limited liability, without the addition of the word "Limited" to its name, and the association may be registered accordingly.

(2) A licence by the Government under this section may be granted on such conditions and subject to such restrictions as the Government thinks fit and those conditions and restrictions shall be binding on the association and shall, if the Government so directs be inserted in the memorandum and articles or in one of those documents.

(3) The association shall, on registration enjoy all the privileges of limited companies, and be subject to all their obligations except those of using the word "Limited" as any part of its name, and of publishing its name, or of sending lists of members to the Registrar.

(4) A licence under this section may at any time be cancelled by the Government and upon cancellation the Registrar shall enter the word "Limited" at the end of the name of the association upon the register, and the association shall cease to enjoy the exemptions and privileges granted by this section.

Provided that before a licence is so cancelled, the Government shall give to the association a notice in writing of its intention and the grounds thereof and shall afford the association an opportunity of submitting a representation in opposition to the cancellation.

Notes/Comments/Precedents

Limited or Private Ltd. *:* The word 'Limited' or 'Private Limited' must be used as the last word of the public or private companies respectively. But the government may, however, by licence exempt the use of the word 'Limited' or 'private limited' after names of companies formed for the purpose of promoting commerce, art, science, religion, charity or other useful objects and are not profit making organisations.

COMPANIES LIMITED BY GUARANTEE

29. Provision as to companies limited by Guarantee.– (1) In the case of a company limited by guarantee and not having a share capital and registered

after the commencement of this Act, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2) For the purpose of this section and the other provisions of this Act relating to the memorandum of a company limited by guarantee, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered after the commencement of this Act purporting to divide the undertaking of the company into shares or interests shall be treated as a provision for a share capital notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.

Notes/Comments/Precedents

Juristic Personality of company limited by guarantee : In the case where Mandal is a company limited by guarantee registered under a licence under section 26 of the companies Act, 1913 (corresponding to section 28 of the companies Act, 1994). Held that it is a corporation and, therefore, a juristic person and a distinct legal entity. This is a well established proposition from the decision of the Judicial committee of the House of Lords in *Solomon Vs. Solomon and company Ltd. (1897) AC 22 (H.L.)* Ref: *[Akhil Deshastha Rigvedi Brahman Madhyawarti Mandal Vs. Joint Charity Commissioner, Moharastra (1973) 43 Comp. Cas 361.]*

The articles of a company limited by guarantee and having no share capital giving power to the managing committee to expel a member was held to be void and illegal *[Gaiman Vs. National Association of Mental Health (1971) 41 Comp. Cas 927.]*

PART-III

SHARE CAPITAL, REGISTRATION OF UNLIMITED COMPANY AS LIMITED AND UNLIMITED LIABILITY OF DIRECTORS DISTRIBUTION OF SHARE CAPITAL

30. Nature of Share.– (1) The Shares or other interest of any member in a company shall be deemed to be movable property and shall be transferable in manner provided by the articles of the company.

(2) Each share in a company having a share capital shall be distinguished by the appropriate number.

Notes/Comments/Precedents

Capital : The worth of a company is capital. It is the main factor in the constitution of a company. The individual portion of a joint stock company's capital owned by a shareholder is called a share and the full amount of share capital which is stated in a company's memorandum and with which the company is registered is called nominal capital or registered capital or authorised capital.

Share : Share means a share in the capital of the company and includes stock except when a distinction between stock and shares is express are implied *[clause (v) section 2.]*

A share is an expression of proprietary relationship between a shareholder and the company *[Commissioner of Income Tax Vs. Associated Industrial Co. (1969) 2 Comp LJ. 19 = 39 Comp. Cas. 401.]*

Share- Moveable property- Freely alienable : Share is a movable property, with all attributes of such property *[L.I.C. of India Vs. Escorts Ltd. AIR 1986 SC 1370 = 1986 (59) Com. Cas 548.]* It is well established that a share in a company is an item of property freely alienable in the absence of express restrictions under the articles *[Swaledale Cleaners Ltd. In re. (1969) 1 All ER. 1132.]* When a mortgagor failed to pay the mortgage debt within time the mortgagee has implied authority to sell the shares *[Stubbs Vs. salatter) (1910) 1 Ch. 632.]*

31. Certificate of shares or stock.– A certificate, under the common seal of the company, specifying any shares or stock held by any member, shall be prima facie evidence of the title of the member to the shares or stock therein specified.

Notes/Comments/Precedents

Presumption as to certificate : *Certificate of shares with the seal of the company- presumption whether rebuttable. Held* that it is rebuttable *[New Moukhooshi Tea Co. Ltd. In re. AIR 1967 Cal 196.]*

Certificate obtained under forged signature: Where signatures on the certificate are forged, it would not bind the company *[Rubey Vs. Great Fingall Consolidated (1906) AC 439.]*

32. Definition of Member.– (1) Every subscriber of the memorandum of company shall be deemed to have agreed to become a member of the company and on its registration shall be entered as a member in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.

Notes/Comments/Precedents

Member- who is : The definition of 'member' includes the subscribers of the memorandum of a company and every other persons who agree in writing to become a member of a company and whose name is entered in its register of *members [Lalithamba Bai Vs. Harrisons Malayalam Ltd. (1988) 2 comp. LJ 41.]* The test of membership of a company is whether the name of the person appears on the register of members of a company *[Prafulla Kumar Routh Vs. Orient Engineering (1986) 60 Comp. Cas 65.]*. A subscriber to the memorandum is not a member until his name appears on the register of members *[Collector Insurance Co. A 1948 Oudh 197.]*

33. Membership of holding company.– (1) Except in the case mentioned in this section, a body corporate cannot be a member of a company which is its holding company and any allotment or transfer of shares in a company to its subsidiary shall be void.

(2) Nothing in this section shall apply, namely-

(a) where the subsidiary is the legal representative of a deceased member of the holding company; or

(b) where the subsidiary is concerned as trustee unless the holding company or a subsidiary thereof is beneficially interested under the trust and is not so interested only by way of security for the purposes of a transaction entered into by it in the ordinary course of business which includes the lending of money.

(3) This section shall not prevent a subsidiary from continuing to be a member of its holding company if it was a member thereof either at the commencement of this Act or before becoming a subsidiary of the holding company, but except in the cases referred to in sub-section (2), the subsidiary shall have no right to vote at meeting of the holding company or of any class of members thereof.

(4) Subject to sub-section (2), sub-sections (1) and (3) shall apply in relation to a nominee for a body corporate which is a subsidiary, as if reference in the said sub-sections (1) and (3) to such a body corporate and a subsidiary included reference to a nominee for it.

(5) In relation to a holding company which is either a company limited by guarantee or an unlimited company, the reference in this section to shares shall, whether or not the company has a share capital be construed as including a reference to the interest of its members as such, whatever the form of that interest.

Notes/Comments/Precedents

Object of the section : This is a new section. It has been introduced in the Companies Act, 1994 in order to maintain the separate operational identity of a holding company and its subsidiary and to preserve the control of the respective shareholders over them.

Whether affairs of holding company include affairs of subsidiary : *Held* that the affairs of the holding company do not include the affairs of its subsidiary company *[Hugerford Investment Trust Ltd. Vs. Turner Morrison & Co. Ltd. (1972) 1 Cal 286.]*

Nominee of subsidiary : The term subsidiary includes a nominee of the subsidiary. Legal representative include the heirs and persons who in law represent the estate of the deceased person *[Dinamoni Vs. Elhadut Khan 8 CWN 843.]*

34. Register of members.- (1) Every company shall keep in one or more books of register of its members, and enter therein the following particulars:-

(i) the name and addresses, and the occupations, if any, of the members;

(ii) in the case of company having a share capital, a statement of the share held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member.

(iii) the date at which each person was entered in the register as a member;

(iv) the date at which any person ceased to be a member.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding one hundred taka for everyday during which the default continues and every officer of the company who knowingly and wilfully authorises or permits the default shall also be liable to a like penalty.

Notes/Comments/Precedents

Register of members : Section 34 of the Companies Act, 1994 enjoins upon every company to keep a register of its members ordinarily at its registered office which must contain the particulars prescribed in the said section.

It is only a *prima-facie* evidence of all its contents required or authorised to be contained therein, including that of Membership.

Provision as to registration of transfer of share : Similar provisions as to discretion of the Company to register the transfer of fully paid up share are contained in section 38 of the Companies Act 1994 and section 34(7) of the Companies Act 1913. Discretion to refuse registration of transfer of share aims at securing the interest of the Company as well as of its share holders. When the shares of public limited Company are being traded in the Stock Exchange with their listing in the public notice, the registration of the shares so transferred can not be refused. *[Giasuddin Ahmed Vs. Green Delta Insurance Co. Ltd. And another 56 DLR (AD) (2004) 31=9 MLR (AD) 2004]*

35. Index of members of company.- (1) Every company having more than fifty members shall, unless the register of members is in such a form as to constitute in itself an index, keep an index of the names of the members of the company and

shall within fourteen days after the date on which any alteration is made in the register of members make any necessary alteration in the index.

(2) The index, which may be in the form of a card index shall in respect of each member contain a sufficient indication to enable the account of that member to be readily found.

(3) If default is made in complying with the section the company shall be to a fine not exceeding five hundred taka and every officer of the company who is knowingly and wilfully in default shall be liable to a like penalty.

Notes/Comments/Precedents

Keeping of Index of Members : If the register of members is not in such form as to constitute in itself an index, every company having more than 50 members must keep an index of the names of its members, and must within 14 days note in the index any change made in the register of members. Default results in fine which may extend upto Tk. 500.00

36. Annual list of members and summary.– (1) Every company having a share capital shall within eighteen months from its incorporation, and thereafter once at least in every year make a list of all persons who, on the day of the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or in the case of the first return of the incorporation of the company.

(2) The following shall be stated in the list namely–

(a) the names, addressees, nationality and occupation of all past and present members;

(b) the number of shares held by each of the existing members at the date of return specifying the shares transferred since the date of last return or, in the case of first return, since the date of incorporation, by persons who are still members and by persons who have ceased to be members respectively and also the dates of registration of such transfer; and

(c) a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash and specifying the following:-

(1) the amount of the share capital of the company, and the number of the shares into which it is divided;

(2) the number of shares taken from the commencement of the company upto the date of the return;

(3) the amount called up on each share ;

(4) the total amount of calls received ;

(5) the total amount of calls unpaid ;

(6) the total amount of the sums, if any, paid by way of commission in respect of any shares or debentures, or allowed by way of discount, in respect of any share or debentures, since the date of the last return or so much thereof as has not been written off at the date of the return;

(7) the total number of shares forfeited;

(8) the total amount of shares or stock for which shares warrants are outstanding at the date of the last return,

(9) the total amount of share-warrants issued and surrendered respectively since the date of the last return;

(10) the latest date on which the general meeting should have been held and whether it was actually so held;

(11) the number of shares or amount of stock comprised in each share-warrant;

(12) the names and addresses of the persons who at the date of return are the directors of the company and of the persons, if any, who at the said date are the managers or managing agents or auditors of the company, and the changes in the personnel of the directors, managers or managing agents since the last return together with the dates on which they took place; and

(13) the total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the Registrar under this Act.

(3) The above list and summary shall be contained in a separate part of the register of members, and shall be completed within twenty-one days after the day of the first or only ordinary general meeting in the year; and the company shall within that period file with the Registrar a copy signed by two directors, including the managing director, or where there is no managing director, by a director, and managing agent or manager or secretary of the company together with a certificate from such persons that the list and summary state the facts as they stood on the day aforesaid.

(4) A private company shall send with the annual return required by sub-section (1) a certificate signed by a director or other officer of the company that the company has not, since the date of the last return or in the case of a first return, since the date of the incorporation of the company, issued any invitation to the public to subscribe for any shares or debentures of the company, and where the annual return discloses the fact that the number of members of the company exceeds fifty, also a certificate so signed that the excess consists wholly of persons who under sub-clause (ii) of clause (g) of sub-section (1) of section 2 are not to be included in reckoning the number of fifty.

(5) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding two hundred taka for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

Notes/Comments/Precedents

Filing of return : Every company having a share capital shall file with the Registrar of Joint Stock companies an annual return within 18 months from the date of its incorporation and once every year.

Registrars authority to withhold acceptance of annual return : There is no authority for the proposition that the Registrar can withhold acceptance of an annual return submitted by a company under section 32 of the Companies Act. 1913 [Corresponding section 36 of the Companies Act. 1994] until it satisfies the Registrar that its annual general meeting was held within the statutory period *[Bangladesh Chemical Industries Corporation Vs. Registrar, Joint Stock Companies and another (1986) 38 DLR 356.]*

37. Trust not to be entered on register.– No notice of any trust, expressed, implied or constructive, shall be entered on the register, or be receivable by the Registrar.

Notes/Comments/Precedents

Object : The objects of the section are to relieve the company from taking notice of equitable interests in shares and to preclude persons claiming equitable interest in shares from converting the company into a trustee *[R. Balaraman Vs. Buckingham and Carnatic Co. Ltd. (1969) 1 Comp LJ 81.]*

38. Transfer of shares.– (1) An applications for the registration of the transfer of shares in a company may be made either by the transferor or the transferee, provided where such application is made by the transferor no registration shall in case of partly paid shares be effected unless the company gives notice of the application to the transferee, and subject to provisions of sub-section (7) the company shall, unless objection is made by the transferee two weeks from the date of receipt of the notice, enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for registration was made by the transferee.

(2) For the purpose of sub-section (1) notice to the transferee shall be deemed to have been duly given if despatched by prepaid post to the transferee at the address given in the instrument of transfer and shall be deemed to have been delivered in the ordinary course of post.

(3) It shall not be lawful for the company to register a transfer of share in or debentures of the company unless the proper instrument of transfer duly stamped and executed by the transfer and the transferee has been delivered to the company along with the scrip:

Provided that, where it is proved to the satisfaction of the directors of the company that an instrument of transferee signed by the transferor and transferor has

been lost, the company may, if the directors think fit, on an application in writing made by the transferee and bearing the stamp required by an instrument of transferor, register the transfer on such terms as to indemnity as the directors may think fit.

(4) If a company refuses to register the transfer of any shares or debentures, the company, shall, within one month from the date on which the instrument of transfer was lodged with the company, send to the transferee and the transferor notice of the refusal.

(5) If default is made in complying with sub-section (4) of this section, the company shall be liable to a fine not exceeding one hundred taka for everyday during which the default continues and every director, manager, secretary or other officer who is knowingly a party to the default shall, be liable to a like penalty.

(6) Nothing in sub-section (3) shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law.

(7) Nothing in this section shall prejudice any power of the company under its articles or refuse to register the transfer of any shares.

Notes/Comments/Precedents

Transfer of shares- registration : The prohibition against transfer of shares without complying with the provisions contained in this section is emphasized by the negative language used therein. The section clearly lays down that a company shall not register a transfer of shares in the company unless a proper instrument of transfer duly stamped and executed has been delivered to the company *[Mannalal Khetan Vs. Kedar Nath Khetan (1977) 47 Comp. Cas 185 (SC) = AIR 1977 SC 536.]* In the said case it has been held that the provision of this section is mandatory but Allahabad High Court opined in *Moheshwari Khetan Sugar Mills (Pvt.) Ltd. Vs Ishwari Khetan Sugar Mills AIR 1965 All 135* that the section is not mandatory as it does not prescribe the consequences or does not lay down penalty for non compliance.

Transfer- validity of : In order to be a valid and complete transfer of share for the company to register in its register of members the instrument of transfer must be executed both by the transferor and the transferee, the instrument of transfer must be duly stamped and such instrument is delivered to the company along with the scripts. *[Ahsan Karim Jinnah Vs Meghna Insurance Company Limited & others 52 DLR 2000 (HCD) 160].*

If it is made to appear to the Court that the annual general meeting or meetings were not held in accordance with the directions made by its earlier order the Court shall have competence to order for holding such meeting or meetings afresh. *[Tahmid Ahmed Vs Jalaluddin Jaffar Ali Hussain52 DLR 2000 (HCD) 141]*

Transfer of shares-requirement for registration : A person who is on the register of member is treated as the owner of the share. The company is supposed to deal with the shareholders only those who are on the register. The title to get on the register consists in the possession of a certificate, together with a transfer signed by the registered holder.

Instrument of Transfer of shares- affixing stamp : There is no time limit or any consequential obligation if stamp is not affixed with instrument of transfer. There is no penal provision either stamp may be paid even after submission of the instrument to the company. *[Shoib Vs. Uttara Bank Ltd. (1991) 43 DLR 329]*

Blank Transfer : Shares are usually transferred in blank when a share holder borrows money on their security, for example, by mortgaging the shares by the deposit of title deeds. Should the mortgagor makes default in payment of the account the mortgagees or the other holder of the shares certificate and blank transfer for the time being has applied power to fill up the blanks in the instrument and so to make himself registered by the company in ordinary way. The deposit of share certificate and blank transfer by way of mortgage create equitable mortgage but these do not create a legal mortgage, so that it does not invest the mortgagee with the ownership of the shares, as until the transfer is Registrar as a holder of shares.

Blank Transfer- recognition of :In case of a blank transfer, the company is not bound to recognise the transfer until the transfer form duly filled in is submitted and his name is registered. Where a blank transfer is involved a right may arise between the transfer and the transferee *interse*. When a transfer is registered it relates back to the time when the transfer was made *[Howrah Trading Co. Ltd. Vs. C.I.T. AIR 1959 S.C. 775 = 29Comp. Case 282.]*

Transfer -when complete: Transfer of shares is complete when duly executed and stamped transfer deed is delivered to the company irrespective of the fact whether the company registers it or not *[K.N. Narayanan vs. ITO (1984) 55 Com. Cas. 182.]*

Transfer of share- when valid and completed : Where requisite adhesive stamps on instrument of transfer have not been affixed and cancelled as required by section 2(11) and 12 of the Stamp Act, the instrument can not be accepted as duly stamped within the meaning of section 38(3) of the Companies Act, 1994. In that case it would not be permissible in law for the company to register such transfer and the transfer, if made, would be illegal.*[Ahsan Karim Jinnah Vs Meghna Insurance Company Limited & others. (2000) 52 DLR 160.* = 20 BLD (HCD) (2000) 114*]*

Rectification of Share register of the Company : *Held* -When the identity of the actual petitioner is in serious doubt and since the allegations of fraud forgery and fabrication in respect of the different resolutions and decisions of the Board of Directors of the respondent-company have been raised, involving complicated questions of disputed facts of serious nature, enquiring further examination of evidence in details which is not possible in this forum, the instant petition is liable to be dismissed.. *[M. Islamvs. Al-Rajhi Hospital (Pvt.) Limited & Ors. 11 BLT 2003 (HCD) 474].*

Where share certificate was not delivered : In the absence of any definite statement from the respondent about the delivery of the share certificate and in view of the documents on record admitting that the share certificate was not delivered to the company or to respondent No. 2, it cannot be accepted that the share certificate was in fact handed over to the company or to respondent No. 2. The application for rectification of the share of the respondent was rightly allowed by the company Judge deciding it on factual determination. *[Abu Taher Vs Nur Muhammad and others 7 BLC 2002 (AD) 38].*

Provision for refusing registration of transfer of share- validity : A company in its article may provide the board of directors with the power to refuse registration of transfer of any shares. *[Giasuddin Ahmed Vs Green Delta Insurance Company Limited and another 52 DLR (2000) 41]*

Jurisdiction-Power scrutiny: Companies Act gives the Court a wide discretion to scrutinise any fraud, error or undue influence or misrepresentation in the matter of transfer of any share and grant relief commensurating with he appropriate possible relief. *[Ahmed Impex (Private) Ltd. & others Vs. Moqbul Ahmed and others (2004) 56 DLR (AD) 92].*

39. Certification of transfer.–(1) The certification by a company of any instrument of transfer of shares in or debentures of, the company, shall be taken as a representation by the company to any person acting on the faith of the certification

that there have been produced to the company such documents as on the face of them show a *prima facie* title to the shares or debentures in the transferor named in the instrument of transfer, but not as a representation that the transferor has complete title to the shares or debentures.

(2) Where any person acts on the faith of an erroneous certification made by a company negligently, the company shall be under the same liability to him as if the certification had been made fraudulently.

(3) For the purposes of this section–

(a) an instrument of transfer shall be deemed to be certificated if it bears the words "certificate lodged" or words to the like effect;

(b) the certification of an instrument of transfer shall be deemed to be made by a company, if–

(i) the person issuing the certificated instrument is a person authorised to issue such instruments of transfer on the company's behalf; and

(ii) the certification is signed by any officer or servant of the company or any other person, authorised to certificate transfers on the company's behalf, or if a body corporate has been so authorised by any officer or servant of that body corporate;

(c) a certificate shall be deemed to be signed by any person if it purports to be authenticated by his signature, unless it is shown that the signature was placed there neither by himself nor by any person authorised to use the signature for the purpose of certificating transfer on the company's behalf.

Notes/Comments/Precedents

Certification : Certification means a statement by the company that certain documents have been delivered to the company for the purpose of transfer of shares. It is a kind of receipt. It is a representation by the company to any person acting on the faith of such certificate that documents to show a *prima facie* title to the shares or debentures in the transferor's name in the instrument of transfer have been produced to the company *[Longman Vs. Bath Electric Tramways Co. (1905) 1 Ch. 646.]*

Certificates returned to transfer : Where the company returns the share certificates after certification and the transferor pledges them, then in that case the pledgee cannot bring an action against the company. *[Longman Vs. Bath Electric Tramways Co. (1905) 1 Ch. 646.]*

40. Transfer by legal representative.– A transfer of the share or other interest of a deceased member of the a company made by his legal representative shall, although the legal representative is not himself a member, be as valid, as if he had been a member at the time of the execution of the instrument of transfer.

Notes/Comments/Precedents

Transfer by legal representative : The Act expressly provides that a transfer of the share or other interest of a deceased member by his legal representative, although the legal representative is not a member of the company, is as valid as if he were a member at the time of executing the transfer.

The legal representative of deceased member although he himself is not a member, may transfer the shares by executing deed of transfer.

Position of deceased member : A deceased member remains a member so long as his name remains on the register and the company has no knowledge of his death *[Bowling and welby's Contract (1895) 1 Ch. 663.]*

Transfer by Lunàtic : In *New York Security Trust Co. Vs. Keyser (1901) 1 Ch. 666* it has been decided that so far as lunatic's shares are concerned, the same cannot be transferred without an order of the court.

41. Inspection of register of members.– (1) The register of members commencing from the date of the registration of the company and where section 35 applies also the index of members shall be kept at the registered office of the company, and such register and index shall, except when closed under the provisions of this Act, shall during business hours subject to such reasonable restrictions, as the company in general meeting impose, so that not less than two hours in each day be allowed for inspection, be kept open to the inspection of any member free of cost and to the inspection of any other person on payment of one hundred taka or such less sum as the company may prescribe for each inspection, and any such member or other person may make extract there from.

(2) Any member or other person may require a copy of the register or of any part thereof, or of the list and summary required by this Act or any part thereof, on payment of five taka for every hundred words or fractional part thereof required to be copied and the company shall cause any copy so required by any person to be sent to that person within a period of ten days commencing on the day next after the day on which the requirement is received by the company.

Explanation : For the purpose of this sub-section in reckoning the ten working days, the non working days and days on which the transfer books of the company remain closed shall be excluded.

(3) If any inspection required under this section is refused or if any copy required under this section is not sent within the proper period the company and every officer of the company who is in default shall be liable in respect of each offence to a fine not exceeding one hundred taka and to a further fine not exceeding one hundred taka for everyday during which the refusal or default continues, and the Court may by an order compel an immediate inspection of the register and index or direct that copies required shall be sent to he persons requiring them.

Notes/Comments/Precedents

Keeping of register– supply of copy : The register of members and register of index if applicable etc. must be kept at the registered office of the company. These must during the business hours, be kept open for inspection at least for two hours by the members free of charges. Other persons other than members are also entitled to inspect the books on payment of one hundred Taka or such less sum as the company may fix. The register is treated as public document. Persons irrespective of members and non-members are entitled to obtain copy of the register or any part of the same on payment of certain fees.

The company may, however, keep the registers closed for not exceeding 45 days a year with prior notice in the newspaper (section 42).

Inspection and photostat copies : In an Indian decision held that if the inspection of the documents could be granted by the court, there is no reason why the persons who were permitted to take the inspection cannot have photostat copies of the same. The persons who take inspection can also take notes and even make copies of the same *[J.P. Palkiwala Vs. V.P. Palkiwala (1984) 3 Comp. L.J. 322.]*

42. Power to close register.- A company may, on giving seven day's previous notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate close the register of members for any time or times not exceeding in the whole forty-five days in each year but not exceeding thirty days at a time.

43. Power of Court to rectify register.– (1) If-

(a) the name of any person is without sufficient cause entered in or omitted from the register of members of a company; or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having become, or ceased to be, a member,

the person aggrieved or any member of the company, or the company, may apply to the Court for rectification of the register.

(2) The Court may either refuse the application or may order rectification, of the register and payments by the company of any damages sustained by any party aggrieved and may also make such order as costs as it, may consider proper.

(3) On any application under this section, the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in, or omitted from, the register, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand and generally may decide any question necessary or expedient to be decided for rectification of the register and may also decide any issue involving any question of law.

Notes/Comments/Precedents

Right to apply for rectification : section 43 merely gives to the persons mentioned therein the right to apply to the Court for rectification of the register of members where the name of a person is fraudulently or without sufficient cause entered in or omitted from that register.

Rectification of Register : The section gives the Court wide discretion to decide any matter relating to the rectification of a register of members of a company but such power would not mean to empower the Court to consider and decide each and every difference or dispute between the members of a company. *[Abdur Rashid Chowdhury vs CA Hamid and Co Ltd and others (Original) [2006] 148]*

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Rectification of Register : The provision of section 43 of the Act (corresponding to sec. 38 of the Companies Act, 1913) relating to rectification of a register of members are very wide and give the Judge wide discretion in the matter. The wide terms of sub-section (3) of the section are not to be limited by the terms of sub-sections (1) and (2) thereof, and the Court can grant appropriate relief and prevent harassment to parties in any case irrespective of any finding of fraud, error, mistake or default on the part of the company *[7 P L R (Dac.) 159.]*

Rectification of Share Register of Company- Instrument of transfer of shares to be duly stamped- As provided under sub-section (3) of section 38 of the Companies Act, 1994, instrument of transfer of shares must be signed by both the transferor and the transferee and it must also be duly stamped. Otherwise the transfer will not be valid. *[Ahsan Karim Jinnah Vs. Meghna Insurance Company Ltd. & others 6 MLR 2001 (HC) 149].*

Powers of Court to rectify register : The jurisdiction conferred on company court under section 38 is very wide and unlimited though it is a discretion to grant or refuse such relief. It was not found that the Company Judge has acted illegally in allowing such relief under section 43 of the Companies Act (corresponding to sec. 38 of the Companies Act, 1913) in the facts of the present case. Section 43 of our Companies Act is equivalent to section 155 of Indian Companies Act. In section 155 of the Indian Act, "the name of any person is fraudulently inserted or omitted" has been omitted ; whereas in section 43 of the Companies Act (corresponding to sec. 38 of the Companies Act, 1913). it has been retained. Thus the scope of section 43 of the Act is very wide and the Company judge has rightly passed the order of rectification of share registers of the Companies *[Haque Brothers Vs. Shamsul Haque 39 DLR 290.]*

Power of the Company Court to rectify the Register of Members of a Company : Under section 43 of the Companies Act 1994 the Company Court has vide power to rectify the Register of Members of the Company following transfer of shares. As provided under article 40 of the Articles of Association the Council of the Dhaka Stock Exchange has to decide the question of rectification of the Register within two months of lodging the transfer documents with the Exchange and when refused the parties shall be given notice thereof. It is not permissible to keep the matter hanging for long time. The Limitation Act, 1908 doe not apply to company matter. There is option for the party to go for civil suit when question of fact requiring detailed evidence is involved but that does not bar the jurisdiction of the Company Court in the matter. *[Matiur Rahan (Md). Vs. Dhaka Stock Exchange Ltd. And another 4 MLR 1999 (HCD) 193].*

Section's wide power intended to give relief in simple case- Court's discretion where the case is not a simple one : In a proceeding under section 43 (corresponding to sec. 38 of the Companies Act, 1913) a petitioner is not entitled to relief *ex-debito justiciae* and the Court has discretion to refuse

remedy if the matter is not a simple one *[United Planters & Traders Ltd. & ors. Vs. Md. Mosharrof Hossain Khan (1982) 34 D.L.R. 345 = 1983 BLD 149.]*

Rectification- whether suit is barred : Although section 43 of the Companies Act (corresponding to sec. 38 of the Companies Act, 1913) empowers the Company Court to rectify share register, it is well-settled that a suit is not bared thereby, especially when detailed evidence is to be taken to settle issue of fact. *[Afruz Miah Vs. Al-Haj Md. Siraj Miah (1991) 43 DLR (AD) 89.]*

Court's Jurisdiction : Court is to decide the question of domicile of the company for ascertaining its own jurisdiction to deal with the matter under the section *[Sakhawat Hossain Vs. Chittaranjan Cotton Mills, Ltd. (1962) 14 D L.R. 407.]*

Members of the Board of Directors whose registered office is situate in Bangladesh but who are residents and nationals of India cannot function in Bangladesh on behalf of the Company *[Sudhangshu Shekhar Dey. Vs. M/s. Anath Bandhu (1976) 28 DLR 313 .]*

Ostensible owner- right of voting : The question whether, during the hearing of such application, the ostensible owner of a share whose name is borne on the register of members may or may not vote at a general meeting of the company can neither be necessary nor expedient to be decided for the rectification of the register, the sole function of the Court called upon to decide an application of that nature being whether the register should or should not, after inquiry, be rectified in the manner sought *[(1955) P L R (Lah.) 111 .]*

Company to be sued in its Name : Proceeding under section 43 of the Companies Act (corresponding to sec. 38 of the Companies Act, 1913) is a special proceeding before the Original side of the High Court Division *[Monzurur Rahman Vs. Monzurur Rahman, (1981) 33 D.L.R. 49.]*

A corporation or a registered company should be sued in its corporate name and not in the names of its agents or servants. But where allegations casting aspersion of improper conduct upon the members of the Executive Committee of a Company have been made in the plaint so as to afford them an opportunity to meet the same in order to forestall a likely argument that these allegations made behind their back merit little consideration, it can not be said that they have been improperly impleaded *[A. Ahad Vs. S.M Anwaruddin (1966) 18 D.L.R. 109.]*

Directors- neither necessary nor proper parties : To an applications to the Court for rectification of the register of company's members under section 38 of the companies Act, 1913 (corresponding to section 43 of the companies Act, 1994) the Directors are neither necessary nor proper parties.

A corporation or a registered company should be sued in its corporate name and not in the names of its agents or servants.

But where allegations casting aspersion of improper conduct upon the members of the Executive Committee of a Company have been made in the plaint so as to afford them an opportunity to meet the same in order to forestall a likely argument that these allegations made behind their back merit little consideration, it can not be said that they have been improperly impleaded *[A. Ahad Vs. S.M Anwaruddin (1966) 18 D.L.R. 109 .]*

Court under sec. 43 not bound by the obligations of sec. 38 : The obligation with is imposed on a company is not obligatory on the Court while administering the provision of sec. 43 (corresponding to sec. 38 of the Companies Act, 1913). Sub-section (2) of section 43 provides that the Court may either refuse the application or may order rectification of the share-register. The power of the Court under section 38 is wider than the obligation of the company under section 38 (corresponding to sec. 34 of the Companies Act, 1913). The obligation of a company under section 34 (corresponding sec. 38 of the company Act, 1994) cannot be used as restriction upon the power of the court under section 38 (corresponding to section 43 of the companies Act, 1994) *[Sudhangshu Shekhar Vs. Anath Bandhu (1976) 28 DLR 31 .]*

Application for entering respondent's name in the Share Register of the Company: Respondent filed a petition before the learned Company Judge who directed the appellant to produce the document for inspection by the respondent. As against this order the appellant preferred a Letters Patent appeal. ***Held-*** No final order was passed on the prayer of the respondent to rectify the Share Register. The direction for production of the document for inspection is nothing but a preliminary step for deciding the main issue of rectifying the Share Register. In that view of the matter taking the provision of section 38 of the Companies Act, 1913 (corresponding to section 43 of the companies Act, 1994) the appeal is incompetent; a mere direction to produce documents for inspection cannot be regarded as a question of law for which the right of appeal is contemplated in section 38 of the Companies Act, (corresponding to section 43 of the companies Act, 1994) *[People Tobacco Co., Ltd., Vs. Mahmud Nurul Huda (1969) 21 DLR 186 .]*

Petitioner while an Indian citizen purchased shares of a Pakistani Company and subsequently he become a Pakistani citizen. He is entitled to have his name entered in the Share Register of the Company *[Sirajuddin A. Kadder Vs. Chittaranjan Cotton Mill. (1968) 20 DLR 196.]*

Application with two prayers : Two prayers- one of winding up of the company under section 162 of the Companies Act, 1913 (corresponding to section 241 of the Companies Act, 1994) and another for rectification of the share-register under section. 38 of the Companies Act ,1913 (corresponding to section 43 of the Companies Act, 1994) in the same application made before the Company Judge, cannot be entertained *[Ellal Textile Mills Ltd. Vs. Md. Abdul Awal 38 DLR (AD) 26 (1985) BLD (AD) 230.]*

Prayer for rectification of share-register : This section gives unlimited jurisdiction to the Court as to rectification of the register though there is a discretion as to whether it out to be exercised under the circumstances of the particular case. It is well settled that where winding up order had intervened whereby rights of creditors were made paramount, application for rectification must be refused. *[Ellal Textile Mills Ltd. Vs. Md. Abdul Awal 38 DLR (AD) 26 (1985) BLD (AD) 330.]*

Appeal–Appeal lies only against judgment and orders made under section 43, 228 and 285 : Appeals from judgments and orders passed under the Act are governed by sections 43, 228 and 285 (corresponding to sections 38, 153 (7) and 202 of the Companies Act, 1913). The Companies Act provides a complete code of procedure governing appeals and it has precluded appeals from judgment and orders made under the Act except those made under sections 43, 228 and 285. (corresponding to sections 38, 153 (7) and 202 of the Companies Act, 1913) *[Jabed Ali Vs. Sultan Ahmed (1974) 26 DLR 196 - Suruj Mia Vs. The Pioneer Bank Ltd., (1968) 20 DLR 1206.]*

Appeal- question of law : Section 43 of the Act requires, in order to make an appeal against the order of the Court competent, that the Court is to direct an issue to be tried in which any question of law may be raised. If, however, the Court does not direct an issue to be tried by formally raising the same, though, in fact, a question of law has been decided the person aggrieved by the said order of the Court cannot be allowed to suffer by denying him the right of appeal under section 43 of the Act (corresponding to sec. 38 of the Companies Act, 1913) because of the failure on the part of the Court to follow the proper course contemplated in law *[Jabed Ali Vs. Sultan Ahmed (1974) 26 DLR 196.]*

A public limited company, whether is precluded from applying divergent guardsticks in issuing letter of allotment of shares and share certificates : Held- A public limited company is precluded from applying two divergent guardsticks in the matter of issuance of letter of allotment of shares and issuance of share-certificates inasmuch as the result in both the transfers are same *[Investment Corporation of Bangladesh Vs. Bata Shoe Co. Ltd (1991) 11 BLD (HCD) 319.]*

Legal disability- making of application during : Section 6 of the Limitation Act does not bring an application under section 38 of the Companies Act, 1913 (corresponding to section 43 of the Companies Act, 1994) within its ambit.

Section 43 of the Companies Act is restricted to a suit or proceeding to be instituted or application to be made, by a person suffering from any legal disability, such as minority, insanity or idiocracy, in which case the period of limitation, as prescribed in the schedule of the Act, will start after the disability cease *[Tamizul Hoque and another Vs. Shamsul Hoque and others (1991) 11 BLD (AD) 176 43 DLR (AD) 34]*

As the report submitted before the learned Company Judge showing respondent held only 10 shares where the record showed that the respondent and his wife held 2510 and 1810 shares respectively for which the learned Company Judge in exercise of power under section 38(3) of the Companies Act, 1913 (corresponding to sec. 43 of the Companies Act, 1994) rightly directed the Company to rectify the share register of the Company showing proper share holding and also directed to hold annual general meeting under another Chairman. *[Industrial Development Company Ltd. Vs. Sukhendu Shekhar Mukherjee and another [2 B L C (AD) (1997) 117.]*

Providing appellate forum : The rule making power of the Supreme Court does not extend to providing an appellate forum from the decision of a single Company Judge of the High Court division acting under section 38 of the Companies Act, 1913 (corresponding to sec. 43 of the Companies Act, 1994) *[Moqbul Ahmed and another Vs. Ahmed Impex (Pvt) Ltd. and others 1 BLD (AD) 1996) 121]*

Decision of the single Company Judge- Appeal lies to the Appellate Division : while a single Company Judge of the High Court Division is exercising the power under section 38 of the Companies Act, 1913 (corresponding to sec. 43 of the Companies Act, 1994) an appeal from its decision has to be taken by way of leave to the Appellate Division under Article 104(1) of the Constitution but the grounds of such appeal will be in accordance with the Article 103(1) of the Constitution. The Division Bench exceeded its jurisdiction in entertaining an appeal against the entire judgment of the learned Company Judge without regard to the proviso to section 38(3) of the Companies Act, 1913 (corresponding to sec. 43 of the Companies Act, 1994) and decided the fact wrongly for which the impugned judgment is *non est*, having been passed completely without jurisdiction, a classic case of *coram non judice [Moqbul Ahmed and another Vs. Ahmed Impex (Pvt) Ltd. and others 1 B L C (AD) (1996) 121]*

Section 38(3) of the Companies Act 1913 (corresponding to sec. 43 of the Companies Act, 1994) confers power on the Court for deciding any question relating to the title of any person who is a party to the application *[Industrial Development Company Ltd. Vs. Sukhendu Shekhar Mukherjee and another [2 B L C (AD) (1997) 117.]*

Refusal of injunction : Under Order 39 rules 1 & 2 C.P.C while the learned Single Judge entered into certain matters, which dealt with the issues raised in the proceeding under section 38 of the Companies Act, 1913. Whether the expression of certain views as to the legality and validity of transfer of share by a Foreign company to another Company as to whose legality had been challenged-Observations made while disposing of the interlocutory matter were not strictly necessary for the disposal of the injunction matter and such observations shall have no binding effect *[Shamsul Huda and others Vs. Alauddin and Taiwa Textile Mills Ltd. and others B C R(1987) (AD) 28.]*

A company in its article may provide the board of directors with the power to refuse registration of transfer of any shares : In the instant case we have quoted Article 37 of the Articles of Association of the company which provides the board of directors with the power to refuse registration of any transfer of any share without assigning any reason and this includes transfer to an existing share holder. While this power exists, it must be exercised with judicial discretion. *[Giasuddin Ahmed Vs Green Delta Insurance Company Limited and another (2000) 52 DLR 41.]*

"Discretion" did not mean a bare affirmation or negation of a proposal, it implied just and proper consideration of the proposal in the facts and circumstances : In the exercise of the discretion the directors had to act or the paramount interest of the company and for the general interest of the shareholders because the directors were in a fiduciary position both towards the company and

towards every share holder. The directors were therefore required to act bonafide and not arbitrarily and not for any collateral purpose. The discretion of the directors had to be tested as the opinion of fair and sensible men in the interest of the company. *[Giasuddin Ahmed Vs Green Delta Insurance Company Limited and another. (2000) 52 DLR 41.]*

Registers -When may be rectified : If the name of persons is entered in or omitted from the register of members or default is made or unnecessary delay takes place in noting on the register of the fact of any person having become a member or having ceased to be a member, an application may be made to the court for rectification of the register *[Imperial chemical Industries Ltd. (1936) 2 All E.R. 463.]*

Who can apply : The aggrieved person or any member of the company or the company itself may make an application to the court for rectification of the register. A person who claims to have become a member but whose name has not been entered in the register of member may make the application *[N.K. Agarwal Vs. Hanuman Mills Ltd. (1973) 71 A-LJ. 518.]*

Rectification Membership Register- Courts Jurisdiction : The Jurisdiction of the Company Court is sufficiently wide to resolve the question or rectification of the register of members. *[Md. Matiour Rahman vs. Dhaka Stock Exchange Ltd. 51 DLR (1999) 530.]*

Application- Maintainable : The application under section 43 of the Companies Act for the rectification of the Members Register is held to be not maintainable as the said matter has bot been earlier referred to the Arbitration Tribunal as provided in section 12 of the Ordinance and/or as stipulated in Article 66 of the Articles of Association of the Chambers of Commerce *[Ibrahim Cotton Mills Ltd. and others vs. Chittagong Chamber of Commerce and Industry and others 51 DLR (1999) 538.]*

Applicability of provisions of order 11 : Order XI, rule 2 of the Code of Civil Procedure applies only in the case f a suit. The proceeding under section 43 of the Companies Act, 1994 is a special proceeding under a statutory jurisdiction and is not a proceeding in the nature of a suit as contemplated under section 9 of the Code of Civil Procedure. Therefore, the provisions of Order XI, rule 2 of the Code of Civil Procedure has no manner of application in the facts and circumstances of the resent case. The Court below has rightly passed the impugned order to the effect that the suit is not barred by any law and the same shall proceed in accordance with the law. *[Dhaka Stock Exchange Ltd. and others Vs Motiur Rahman 7 BLC 2002 150]*

Specific Performance of Contract : The equitable title would pass to the respondents No. 2 to 4 if the petitioner's success in the suit for specific performance of contract would inevitably result in an order transferring the shares to respondents No. 2 to 4. In the facts of the instant case, there being no certainty that any civil Court would order transfer of the shares in question by granting specific performance of contract, order of rectification cannot be given at this stage. The petitioner would always be at liberty to move the High Court Division under section 43 of the Companies Act, should such necessity arise in the future. *[Industrial Promotion and Development Company of Bangladesh Ltd vs Meghna PET Industries Ltd (Civil)[2005] 456]*

Rectification of Share Register-evidence required : It appears that the present application for rectification of the share register is not a simple one for adjudication in summary manner and need be adjudicated upon after taking expert advice as to the signatures appearing in the original documents, copy of which have been annexed with the affidavit-in-opposition, and should not be decided in this summary proceeding under section 43 of the Companies Act. *[Nurun Nahar Zaman vs Sea Pearl Lines Ltd (Civil) [2006] 111]*

44. Notice to Registrar for rectification of register.

– In the case of a company required by this Act to file a list of its member with Registrar, the Court when making an order for rectification of the register shall by its order, direct notice of the rectification to be filed with the Registrar within 15 days from the date of completion of the order.

45. Register to be evidence.– The register of members shall be *prima facie* evidence of any matter by this Act directed or authorised to be inserted therein.

Notes/Comments/Precedents

Share-holders Register, its evidentiary value : Under section 40 of the Companies Act 1913 (corresponding to section 45 of the companies Act, 1994) the register of members shall be *prima facie* evidence on any matters by the Companies Act directed or authorised to be inserted therein *[Shamsul Huda Vs. Alauddin & Taiwa Textile Mills Ltd. (1984) 36 DLR 316.]*

46. Issue of share warrants to bearer.– (1) A company limited by shares if so authorised by its articles, may, with respect to any fully paid-up shares, or to stock, issue under its common seal a warrant stating that the bearers of the warrant is entitled to the shares or stock therein specified and may provide by coupons or otherwise for the payment of the future dividends on the shares or stock included in the warrants, in the Act as share-warrant.

(2) Nothing in this section shall apply to a private company.

Notes/Comments/Precedents

Issue of warrants to bearer : The warrants to bearer become negotiable instrument and registration of transfer is not necessary as they are transferred by delivery only *[Shern Vs. R. (1896) 1 Ch. 211.]*

47. Effect of share-warrant.– A share-warrant-shall entitle bearer thereof to the shares or stock therein specified, and the shares or stock may be transferred by delivery of the warrant.

Notes/Comments/Precedents

Share warrants to bearer- effect of : The share warrant holders are not members of the company, but they become members on surrendering the same to the company. But the articles may confer on them all or any of the rights as a members *[Webb, Hale and Co. Vs Alexandaria Water Co. (1905) 93 LT 339.]*

48. Registration of name of bearer of share-warrant.– The bearer of a share-warrant shall subject to the articles of the company, be entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members; and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register the name of a bearer of a share warrant in respect of the shares or stock therein specified without the warrant being surrendered and cancelled.

49. Position of bearer of share-warrant.– The bearer of a share-warrant may, if the articles of the company so provide be deemed to be a member of the company within the meaning of this Act, either to the full extent or for any purpose

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defined in the articles except that he shall not be qualified in respect of the shares or stock specified in the warrant for being a director or manager of the company, in cases where such a qualification is required by the articles.

50. Entries in register when share-warrant issued.– (1) On the issue of share warrant, the company shall strike out of its register of members the name of the member then entered therein as holding the shares of stock specified in the warrant, as if he had ceased to be a member and shall enter in the Register the following particulars namely :–

(i) the fact of the issue of the warrant ;

(ii) a statement of the shares or stock included in the warrant, distinguishing each share by its number ; and

(iii) the date of issue of the warrant.

(2) if a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding two hundred taka for every day during which the default continues and every officer of the company who knowingly and wilfully continues or permits the default shall also be liable to a like penalty.

51. Surrender of Share warrant.– Until the warrant is surrendered, the above particulars shall be deemed to the particulars required by this Act to be entered in the register of members, and on the surrender, the date of the surrender shall be entered as if it were the date at which a person ceased to be a member.

52. Power of company to arrange for different amounts being paid on share.– A company, if so authorised by its articles, may do any one or more of the following things, namely–

(i) make arrangements on the issue of share for a difference between the shareholders in the amounts and times of payment of calls on their shares ;

(ii) accept from any member who assents thereto 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 ;

(iii) pay dividend in proportion to the amount paid-up on each share where a larger amount is paid-up on some shares than on others.

Notes/Comments/Precedents

Payment of call made in advance : Where call amount is paid by a share holder in advance he becomes a creditor of the company and is entitled to interest *[Lock Vs. Queensland Investment and Land Mortgage Co Ltd. (1896) A.C. 461.]*

53. Power of company limited by shares to alter its share capital.– (1) A Company limited by shares if so authorised by its articles, may alter the conditions of its memorandum as follows that is to say it may–

(a) increase its share capital by the issue of new shares of such amount as it thinks expedient ;

(b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares ;

(c) convert all or any of its paid-up shares into stock and reconvert that stock into paid-up shares of any denomination.

(d) sub-divide its shares, or any of them into shares of smaller amount than is fixed by the memorandum, so that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the shares from which the reduced share is derived ;

(e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the share so cancelled.

(2) The powers conferred by this section can only be exercised by the company in its general meeting.

(3) A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of the other provisions of the Act.

(4) The company shall file with Registrar notice of the exercise of any power referred to in clause (d) or clause (e), of sub-section (1) within fifteen days from the exercise thereof.

54. Notice to Register for consolidation of shares-capital, conversion of shares into stock etc.– (1) Where a company having a share capital has consolidated and divided its share capital into shares of larger amount than its existing shares or converted any of the shares into stock or reconverted stock into shares, it shall within fifteen days of the consolidation and division, conversion or re-conversion, file notice with Registrar of the same, specifying the share consolidated and divided, or converted, or the stock re-converted.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding two hundred taka for everyday during which the default continues, and every officer of the company ,who knowingly and willfully, authorises or permits the default shall also be liable to the like penalty.

55. Effect of conversion of share into stock.– Where a company having a share capital has converted any of its shares into stock, and filed notice of the conversion with the Registrar all the provisions of this Act which are applicable to shares only shall cease as to so much of the share capital as is converted into stock; and the register of members of the company, and the list of members to be filed with Registrar, shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares hereinbefore required by this Act.

Notes/Comments/Precedents

Conversion of Share into Stock : The conversion of fully paid shares into stock may be effected by resolution of the company in general meeting, if articles of the company authorise such conversion. If there is no such provision in the articles the company, may alter the articles by special resolution.

Stock : Stock is the aggregate of fully paid up shares legally consolidated and position of which aggregate may be transferred or split up into fractions of any amount without regard to the original nominal amount of shares *[Morrice Vs. Aylmer (1975) L.R. 7 H.L. 717.]*

Partly paid up shares : Where shares have been fully paid up they may be converted into stock. The issue of partly paid up stock is invalid *[Home and Foreign Investment Co. (1912) 1 Ch. 72.]*

Shares & Stock- distinction of : (a) Shares may be fully or partly paid up. But stocks must be fully paid up. (b) Shares can be issued and transferred only in terms of complete and indivisible units of the capital, e.g., a capital of Tk. 100000 can be divided into 1000 Tk. 100/- shares, or 200 Tk. 500/- shares, or 100 Tk. 100/- shares, and so on. And a share cannot be bought and sold in fractions. If it is of Tk. 500 half of it cannot be sold for Tk. 250. But stocks may be issued and transferred in terms of any amount., (c) Shares are distinctively numbered. But stocks have no such numbers.

Conversion- effect of : On conversion stock is expressed in terms of money and is easily transferable in units, that is fractionally dealt with *[Morrice Vs. Aylmer (1978) L.R.J. HL 717.]*

56. Notice of increase of share capital or of members.– (1) Where a company having a share capital, whether its shares have or have not been converted into stock, has increased its share capital beyond the registered capital, has increased the number of its members beyond the registered number, it shall file with the Registrar, in the case of an increase of share capital, within fifteen days after the passing of the resolution authorising the increase and in the case of an increase of members within fifteen days after the increase was resolved on or took place, notice of the increase of capital or members, and the Registrar shall records the increase.

(2) The notice under sub section (1) shall include particulars of the classes of shares, affected and the conditions, if any, subject to which the new shares are to be issued.

(3) If a company makes a default in complying with the requirements of this section, it shall be liable to a fine not exceeding two hundred taka for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to a like penalty.

Notes/Comments/Precedents

Increase in share capital : The increase of the share capital and allotment of shares as has been held in case of *V.M Rao Vs. Rajeshwari Rama Krishna (1987) 61 Com. Cas 20* as matters of internal management of the company. As such it is not a matter in respect of which section 233 can be invoked.

Company–till winding up remain as a company : Notwithstanding that a company goes into liquidation the liquidator is to work for winding up of the company and carries on business to that extent for the purpose of liquidation and as such the company, until it is wound up, continues to remain as a company within the meaning of the companies Act and, therefore, a "person for the purpose of Income Tax Act and an assessee liable to be taxed for his total income of the previous year" *[The commissioner of Income Tax, Dacca Zone, Dhaka Vs Chowdhury Ramzan Ali and another 4 (1982) 2 BCR 278.]*

57. Application of premiums received on issues of shares.– (1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares, shall be transferred to an account, to be called "the share premium account", and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the share premium account were paid-up share capital of the company.

(2) The share premium account may be applied by the company–

(a) in paying up unissued shares of the company to be issued to member of the company as fully paid bonus shares ;

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

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

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

(3) Where the company has, before the commencement of this Act issued any shares at a premium this section shall apply as if the shares had been issued after the commencement of this Act :

Provided that any part of the premiums which has been so applied that its does not at the commencement of this Act form an identifiable part of the company's reserves within the meaning of Schedule XI shall be disregarded in determining the sum to be included in the share premium account.

Notes/Comments/Precedents

Issue of shares at Premium : Where the company has issued shares at premium then a sum equal to the amount of the premium is required to be transferred to share premium account *[Head (Henry) & Co. Ltd. Vs. Ropner Holdings Ltd. (1951) All ER 994.]*

Differential Premium– Charging of : The Law does not contain prohibition against charging differential premium. The amount or value which the acquirer of shares may pay in excess of the par value for acquiring shares depends upon the contract between the company and the acquirer of shares *[Commissioner of Income Tax Vs. Standard Vacuum Oil Co. AIR 1966 S.C. 1393.]*

Distribution of Premium as dividend : *Held* that the premium which had already been distributed could not be invested with the character of capital in the hands of the distributing company *[Bharat Fire and General Insurance Co. Ltd. Vs. Commissioner of Income Tax AIR 1964 S.C. 1800 (1964) 34 Com. Cas. 683.]*

REDUCTION OF SHARE CAPITAL

58. Restriction on purchase by company or loans by Company for purchase of its own shares.– (1) No company limited by shares shall have power to buy its own shares or the shares of a public company of which it is a subsidiary company, unless the consequent reduction of capital is effected and sanctioned in the manner provided by sections 59 to 70.

(2) No company limited by shares other than private company or a subsidiary company of a public company, shall give whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company:

Provided that nothing in this section shall, where the lending of money is part of the ordinary business of a company, be taken to prohibit the lending of money by the company in the ordinary course of its business.

(3) If a company acts in contravention of this section, the company, and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding five thousand taka.

(4) Nothing in this section shall affect the right of a company to redeem any shares issued under section 154.

Notes/Comments/Precedents

Purchase of own share by the Company : Any company limited by shares and having a share capital cannot buy its own shares, unless the consequent reduction of capital is effected and sanctioned in pursuance of sections 59-70.

Effect of Sale enforcing lien : A sale by a company in enforcement of its lien should not be considered to be as usual transaction in the sense that it puts the purchaser on any particular enquiry *[Unity Company Pvt. Ltd. Vs. Diamond Sugar Mills (1970) 2 Comp L.J 64.]*

59. Reduction of share capital.– (1) Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular the company may, as part of this general power-

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid-up;

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets;

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company;

(d) so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act called a resolution for reducing share capital.

Notes/Comments/Precedents

Reduction capital- Importance : Reduction of share capital is, of course, an alteration of capital. But this alteration is so important and is of such potential danger to creditors that it is strictly controlled by the Act is section 59 and the requirements of which are for more stringent than those of section 53 of the companies Act, 1994.

Procedure of reduction : A Company having a share capital may reduce the share capital if- (i) there is authority in the articles (ii) a special resolution is passed and (iii) such reduction is confirmed by the Court. *[Dexine Patent Packaging and Rubber Co. (1903) W.N. 82.]* Where no one objects the Court, in the exercise of its discretion, should confirm the reduction of share capital *[William Jones and Sons, Re (1969) 2 Comp. LJ. 99.]*

Duty of Court : The company is empowered to determine the extent, mode and incidence of the reduction. While confirming the resolution for reduction of capital it is the duty of the court to protect the interest of minority shareholders and creditors *[Panruti Industrial Co. (P) Ltd. In Re AIR 1960 Mad. 53.]*

Obtaining approval of Court : *Held*–A mistake, either clerical or other in the Memorandum and Articles can be amended by altering the Memorndum or Articles. Court's approval has to be obtained if perticular amendment equires such approval. *[Tropical Homes Limited Vs. Registrar of Joint Stock Companies (1996) 48 DLR 576]*

60. Application to Court for confirming order.– Where a company has passed a resolution for reducing share capital it shall apply by petition to the Court for an order confirming the reduction.

Notes/Comments/Precedents

The need for reducing capital may arise in various ways, for example trading losses, heavy capital expenses, and assets of reduced or doubtful value. As a result, the original capital may either have become lost, or a company may find that it has more resources that it can profitably employ. In either case, the need may arise to adjust the relation between capital and assets.

Held : Where the proposed resolution reducing the paid-up capital is not likely to prejudice the interest of share-holder or its creditors. On the contrary, if such reduction is not confirmed it may mis-represent the paid-up share capital of the company when such special resolution appears to be fair and bonafide and accordingly, the application for confirmation of the reduction of share capital is allowed. *[Uttara Himghar Limited 6 BLC (2001) 173 8 BLT (HCD) 331].*

61. Addition to name of company of "and reduced".– On and from the passing by a company of a resolution for reducing share capital, or where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any share holder of any paid-up share capital, then on and from the making of the order by the Court confirming by the reduction, the company shall add to its name, until such date as the Court may fix, the words "and reduced" as the last words in its name and those words, shall until that date be deemed to be part of the name of the company:

Provided that where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court may, if it thinks expedient dispense altogether with the addition of words "and reduced".

Notes/Comments/Precedents

Addition of word 'and reduced' : In famous *Caldwell Vs. Caldwell & Co.* case it has been held that if the court is satisfied that the creditor's interest have been secured, it may confirm the reduction. It may impose terms and condition for such confirmation, including a direction that the words "and reduced" should be added after the name of the company for a certain period of time and that the company should publish the reasons for such reduction.

The court may confirm the reduction of capital notwithstanding that thereby the voting powers would be affected *[Caldwell Vs. Caldwell and Co. (1916) W.N 70]*

Power of Court- Discretionary : The power of the court under this section is discretionary and the court may impose conditions while confirming reduction of capital *[In Re Fore Street Warehouse Co. Ltd. (1888) 59 LT 214]*

62. Objections by creditors and settlement of list of objecting creditors.– (1) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital, or the payment to any share holder of liability in respect of unpaid share capital or the payment to any share holder of any paid-up share capital, without permission of the Court and in any other case if the Court so permits every creditor of the company, who at the date fixed by the Court is entitled to any debt or claim which if that date were the commencement of the winding up of the company would be admissible in proof against the company shall be entitled to object to the reduction.

(2) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may issue notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or to be excluded from the right of objecting to the reduction; and after consideration such claims the Court shall finalise the list.

Notes/Comments/Precedents

Reduction involving diminution of liability : Where reduction involves diminution of liability in respect of unpaid share capital or payment of paid up share capital, every creditor shall be entitled to object to the reduction. A creditor need not make an application. If any such creditor objects, the Court may direct the company to secure the amount of the debt.

63. Power to dispense with consent of creditor on security being given for his debt.– Where a creditor entered on the list of creditors whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of the creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct the following amount that is to say-

(i) if the company admits the full amount of his debt or claim or though not admitting it is willing to provide for it then the full amount of the debt or claim;

(ii) if the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then as amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

64. Order confirming reduction.– The Court, if satisfied, with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either consent to the reduction has been obtained or his debt or claim has been discharged or has been determined or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

Notes/Comments/Precedents

Reduction of Capital- Confirmation by Court : *Held* that the need for reducing capital may arise, as held in the *Indian Press (Indore) Limited. In re: (1987) 2 Comp. L.J. 61 (M.P.),* in various ways, for example, trading losses, heavy capital expenses, and assets of reduced or doubtful value. As a result, the original capital may either have become lost, or a Company may find that it has more resources than it can profitable employ. In either case, the need may arise to adjust the relation between capital and assets.

Held further, that the company has the right to determine the extent, the mode and incidence of the reduction of its capital. But the Court before it proceeds to confirm the reduction of capital must see that interests of the minority and that of the creditors are adequately protected and there is no unfairness to it, even though it is a domestic matter of the Company.

Power of Court-object : The power of confirming or refusing to confirm the special resolution of a company reduce its capital is conferred on the Court in order or enable it to protect the interest of persons who dissented or even of persons who did not appear, except on the argument and hearing of the petition.

65. Registration of order and minutes of reduction.– (1) The Registrar shall, on production to him, register the following documents, namely:

(a) the certified copy of the order of the Court confirming the reduction of the share capital of a company.

(b) a copy of the minutes approved by the Court, showing the following:

(i) the amount of the reduced share capital;

(ii) the number of shares into which it is to be divided;

(iii) the nominal value of each such share;

(iv) the amount, if any, at the date of registration, deemed to be paid up on each such share.

(2) On the registration under sub-section (1), and not before, the resolution for reducing share capital as confirmed by the order so registered shall take effect.

(3) Notice of the registration shall be published in such a manner as the Court may direct.

(4) The Registrar shall certify under his hand the registration of the order and minutes, and his certificate shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute.

66. Minutes to form part of memorandum.– (1) The minutes when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally contained therein and it shall be embodied in every copy of the memorandum issued after its registration.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding one hundred taka for each copy in respect of which default is made, and every officer of the company who knowingly and willfully authorises or permits the default shall be liable to a like penalty.

Notes/Comments/Precedents

The minute on registration shall become a part of the memorandum of the company substituting the old conditions in it and any alteration of such minute will be treated as alteration of the memorandum.

67. Liability of members in respect of reduced shares.– (1) A member of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference, if any, between the amount paid, or, as the case may be, the reduced amount, if any, which is to be deemed to have been paid, on the share and the amount of the share as fixed by the minutes:

Provided that, if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is by reasons of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of this Act or with respect to winding up by the Court, to pay the amount of his debt or claim, then:

(i) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commended to be wound up on the day before that registration; and

(ii) if the company is wound up, the Court on the application of any such creditor and proof of his ignorance as aforesaid may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding up.

(2) Nothing in this section shall affect the rights of the contributories among themselves.

Notes/Comments/Precedents

Object : The object behind prescribing the procedure to give notice to the creditors is that the members of the company may not unilaterally act to the detriment of the creditors behind their back. If such procedures were not prescribed, the court might, unaware of all the facts, be persuaded by the members to confirm the resolution and that may cause serious prejudice to the creditors. But such a situation is likely to arise. In such a petition the court would be better in a position to have all the relevant facts and circumstances before it and it would be the court which would direct purchase of shares of the members by the company *[Cosmo Steel Pvt. Vs. Joyram Das Gupta(1978) 48 Comp. Cas. 312 (SC) - AIR 1978 SC 375.]*

68. Penalty on concealment of name of creditor.– If any officer of the company wilfully conceals the name of any creditor entitled to object to the reduction or wilfully misrepresents the nature or amount of the debt or claims of any creditor, or if any officer of the company abets, any such concealment or misrepresentation as aforesaid every such officer shall be punishable with imprisonment which may extend to two years, or with fine, or with both.

69. Publication of reasons for reduction.– In any case of reduction of share capital, the Court may require the company to publish, as the Court directs, the reasons for reduction or such other information in regard thereto as the Court may think expedient with a view to giving proper information to the public, and, if the Court think fit, also causes which led to the reduction.

70. Increase and reduction of share capital of a company limited by guarantee.– A Company limited by guarantee and registered after the commencement of this Act, may, if it has a share capital and is so authorised by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Act.

VARIATION OF SHAREHOLDERSÆ RIGHTS

71. Rights of holders of special classes of shares.– (1) If in the case of a company, the share capital of which is divided into different classes of shares, provision is made by the memorandum or articles authorising the variation of the rights attached to any such class of shares in the company, subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than ten per cent of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the Court to have the variation cancelled, and where any such application is made, the variation shall not have effect unless and until it is confirmed by the Court.

(2) An application under sub-section (1) must be made within fourteen days after the date on which the consent was given or the resolution was passed, as the case may be, under that sub-section and may be made on behalf of the shareholders entitled to make the application by such one or more of their numbers as they may appoint in writing for the purpose.

(3) On any such application, the Court after hearing the applicant and any other persons who apply to the Court to be heard and appear to the Court to be interested in the application, may, if it is satisfied having regard to all the circumstances of the case that the variation would unfairly prejudice the share-holders of the class represented by the applicant, disallow the variation and shall, if not so satisfied, confirm the variation.

(4) The decision of the Court on any such application shall be final.

(5) The company shall, within fifteen days after the service on the company of any order made on any such application, forward a copy of the order to the Registrar, and if default is made in complying with this provision, the company shall be liable to a fine not exceeding two hundred taka and every officer of the company who is knowingly and wilfully in default shall be liable to a like penalty.

(6) The expression "variation" in this section includes "abrogation" and the expression "varied" shall be construed accordingly.

Notes/Comments/Precedents

Variation of class rights : Where the share capital of a company is divided into different classes of shares, the rights attached to the shares of any class may be varied with the consent of the holders of the issued shares of that class. This section empowers the dissenting shareholders to apply to the court for cancellation of the variation. If the holders of 10% of the issued shares of that class who had not assented or did not vote in favour of the special resolution, if apply to the Court, the variation will not be effective until the Court confirms the same.

The company has no power to vary rights of holders of special class of shareholders unless Memorandum or Articles of association of the company confer such a power or terms of issue so warrant *[British India Corporation Vs. Shanti Narain (1935) Comp. Cas. 161 (All).]*

REGISTRATION OF UNLIMITED COMPANY AS LIMITED

72. Registration of unlimited company as limited.– (1) Subject to the provisions of this section, any company registered as unlimited may register under this Act as limited and any company registered before the commencement of this Act as a limited company may re-register under this Act, but the registration of an unlimited company as a limited company shall not affect any debts, liabilities, obligations or contracts incurred or entered into by, to, with or on behalf of, the company before the registration, and those debts, liabilities, obligations and contracts may be enforced in manner provided by part VIII of this Act in the case of a company registered in pursuance of that Part.

(2) On registration in pursuance of this section, the Registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company; but, save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act.

Notes/Comments/Precedents

Where unlimited company registered with limited liability : Where an unlimited company is registered with limited liability then no contributory would be liable to contribute more than the amount of shares in case the company is wound up *[Lethbridge Vs. Adams- Exparte International Life Assurance Society (1872) LR 13 Esq 547.]*

73. Power of unlimited company to provide for reserve share capital on re-registration.– (1) An unlimited company having a share capital may, by its resolution for registrations as a limited company in pursuance of this Act, do either or both of the following things, namely:-

(a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the amount by which its capital is so increased shall be

capable of being called up except in the event and for the purpose of the company being wound up:

(b) provided that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purpose of the company being wound up.

(2) the portion of the share capital increased or specified under sub-section (1) shall be called the reserved share capital.

Notes/Comments/Precedents

Reserve- meaning of : As per the definition in Webster's Dictionary the word 'reserve' means to keep for future use or enjoyment to store up for sometime or again to refrain from enjoying at once, to keep back or hold over to a later time or place for future treatment to retain reserve for certain purposes *[Commissioner of Income Tax Vs. Century Spinning & Weaving Co. Ltd. AIR 1953 SC 501.]*

RESERVE CAPITAL OF LIMITED COMPANY

74. Reserve Capital of Limited company.– A limited company may by special resolution, determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon the portion of its share capital shall not be capable of being called up except in the event and for the purposes aforesaid and such portion shall be called reserved share capital.

Notes/Comments/Precedents

Reserve capital -Effect of : Where the company creates reserve capital it cannot afterwards be unreserved. It can only be cancelled in the event of reduction of capital *[In Re Midland Railway Carriage and Wagon Company (1907) W N 175]*

Effect : After the special resolution is passed such capital cannot be changed by the company. Reserve capital cannot be turned into ordinary capital without leave of the court and it cannot be dealt with by the directors. The reserve capital cannot be cancelled by a reduction of capital *[Bartlett Vs. May Fair Property Co. Ltd. (1895) All E.R. Rep 738 1898 2 Ch. 28.]*

UNLIMITED LIABILITY OF DIRECTORS

75. Limited company may have directors with unlimited liability.– (1) In a limited company the liability of the directors or of any director may, if so provided by the memorandum, be unlimited.

(2) In a limited company in which the liability of any director is unlimited, the directors of the company, if any, and the member, who proposes a person for election or appointment to the office of director, shall add to that proposal a

statement that the liability of the person holding that office will be unlimited and the promoter, and officers of the company or one of them shall, before the person accepts the office or acts therein, given him notice in writing that his liability will be unlimited.

(3) If any director or proposer makes default in adding a statement as required by sub-section (1), or if any promoter or officer of the company makes default in giving a notice as required by this sub-section, they shall be liable to a fine not exceeding five thousand taka and shall also be liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person elected or appointed shall not be affected by the default.

Notes/Comments/Precedents

Unlimited liability : The liability of the directors or any of them may be made by the company's memorandum unlimited, though the liability of the members remain limited.

Disconnection of director's phone due to company's arrear : Where the company was in arrears director's personal telephone was not allowed to be disconnected *[Kalilash Prasad Modi Vs. Chief G.M. Orissa Telecommunication AIR 1964 Orissa 98]*

76. Special resolution of limited company making liability of directors unlimited.– (1) A limited company, if so authorised by its articles may, by special resolution, alter its memorandum so as to render unlimited the liability of its directors or of any director.

(2) Upon the passing of any special resolution under sub-section(1), the provisions thereof shall be valid as if they had been originally contained in the memorandum.

PART IV
MANAGEMENT AND ADMINISTRATION
OFFICE AND NAME

77. Registered office of company.– (1) A company shall as from the day on which it begins to carry on business, or as from the twenty-eight day after the date of its incorporation, whichever is earlier, have a registered office to which all communications and notices may be addressed.

(2) Notice of the situation of the registered office and of any change therein shall be given within twenty-eight days after the date of the incorporation of the company or of the change, as the case may be, to the Registrar who shall record the same.

(3) The inclusion in the annual return of a company of the statement as to the address of its registered office shall not be taken to satisfy the obligation imposed by this section.

(4) If a company carries on business without complying with the requirements of this section, it shall be liable to a fine not exceeding two hundred taka for every day during which it so carries on business.

Notes/Comments/Precedents

The Act provides that every company must have a registered office either form the day it carries on business or within 28 days of its incorporation. The memorandum of every company must mention where the registered office is situated. The Act provides that every company must have a registered office either from the day it carries on business or within 28 days of its incorporation.

The address of the registered office is to be displayed along with the name outside every office or place of business of every company and also in all business letters, bill of parcels, letter papers, invoice, notices and all official publication.

Transfer of a registered office of a Company from one sovereign state to another– No provisions in the Act : The Companies Act does not provide for the transference of the of the registered office of a company governed by the provisions of the Companies Act from one country to another. All that the Companies Act permits is the movement of the registered office of the company within the same sovereign State from Province to Province or District to District. If the removal of the registered office is from the jurisdiction of one High Court to the jurisdiction of another, within the same country, the company has to obtain permission from the High Court within whose jurisdiction the registered office was situate *[Sakhawat Hossain Vs. Chittaranjan Cotton Mills Ltd. (1962) 14 DLR 407.]*

Registered office- significance : All registers including that of members, directors, books of accounts etc. are kept in the registered office of the company. The situation of the registered office of the company determines domicile of the company *[Daimler Co. Ltd. Vs. Continental Tyre & Rubber Co. Ltd. (1916) 2 A.C. 307.]* Service at a place other then the registered office is insufficient even though the company carries on business at that place *[Pearks, Gunston Tee Ltd. Vs. Richardson (1902) 1 KB 91.]*

78. Publication of name by a limited company.– Every limited company–

(a) shall paint or affix, and keep painted or affixed, in letters easily legible and in Bengali or English characters, its name in a conspicuous position on the front side of every office or place in which its business is carried on:

(b) shall have its name engraven in legible characters on its seal:

(c) shall have its name mentioned in legible Bengali or English characters in all bill-heads, letter, papers and in notices, advertisements and other official publications of the company, and in all bills of exchange, hundis, promissory notes, endorsements, cheques and order for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels; invoices, receipts and letters of credit of the company.

Notes/Comments/Precedents

Name of Company-Where should be kept : The name and address of registered office of the company be painted or affixed outside the office and not necessarily be kept outside boundary of the building where registered office is located *[Dr. H.L. Batliwala & Co. Vs. Emperor (1941) 11 Comp. Cas. 154.]*

Using Ltd. instead of Limited : By using abbreviation "Ltd." instead of "Limited" in no way makes the name of the company incorrect *[Banque de Indochine Vs. Euroseas Finance Co. Ltd. (1981) 3 All E.R. 198.]*

Liability of Person to be sued : On a construction of the provisions of section 78 of the Act it does not appeal to the law that the expression 'person' used in Order 30, Rule 10 CPC must be construed as excluding the case of a company carrying on business in a name and style other than its own. A limited company carrying on business in the assumed name cannot be excluded from operation of the above rule. The 'person' as defined in the General Clauses Act, includes a company *[Rejendra Prasad Oil Mills Vs. Smt. Chunni Devi (1968) 2 Comp LJ. 137 = AIR 1969 All 1.]*

79. Penalties for non-publication of name.– (1) If a limited company makes default in complying with the provisions of section 78 (a), it shall be liable to a fine not exceeding five hundred taka for everyday during which the default continues and every officer of the company, who knowingly and wilfully authorises or permits the default, shall be liable to a like penalty.

(2) If any officer of a limited company, or any person on its behalf-

(a) uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not engraven as required by section 78(b): or

(b) issues or authorises the issue of any bill-head, letter, paper, notice, advertisement or other official publication of the company, or signs or

authorises to be signed on behalf of the company any bill of exchange, hundi, promissory note, endorsement, cheque or order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt or letter of credit of the company, wherein its name is not mentioned as required by section 78 (c):

He shall be liable to a fine not exceeding one thousand taka, and shall further be personally liable to the holder of any such bill, hundi, promissory note, cheque or order for the amount thereof, unless the same is duly paid by the company.

80. Publication of authorised as well as subscribed and paid-up capital.– (1) Where any notice, advertisement or other official publication of a company contains a statement of the amount of the authorised capital of the company, such notice, advertisement or other official publication shall also contain a statement in an equally prominent position and in equally conspicuous characters of the amount of the capital which has been subscribed and the amount paid-up.

(2) Any company which makes default in complying with the requirement of this section and every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five thousand taka.

Notes/Comments/Precedents

Object of section : Provision in this section has been made so that a company may not mislead the public by showing an impressive figure as authorised capital but having very little paid up capital.

MEETING AND PROCEEDINGS

81. Annual general meeting.– (1) Every company shall in each year of the Gregorian calendar hold in addition to any other meetings a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it; and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next:

Provided that a company may hold its first annual general meeting within a period of not more than eighteen months from the date of its incorporation; and if such general meeting is held within that period, it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation or in the following year:

Provided further that the Registrar may, on an application made by a company within thirty days from the date of expiry of the period specified for holding the annual general meeting as aforesaid, extend the time within which any annual general meeting not being the first annual general meeting shall be held, by a period

not exceeding ninety days or not exceeding the 31st December of the calendar year in relation to which the annual general meeting is required to be held, whichever is earlier.

(2) If a company defaults in complying with the provisions of sub-section (1), the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company and give such ancillary or consequential direction as the Court thinks expedient in relation to the calling holding and conducting of the meeting.

Notes/Comments/Precedents

Meetings of the company : The powers devolving upon the Board of Directors and also of the members are exercised through the medium of meetings.

The following three kinds of meetings may be held in connection with joint stock companies, viz., (i) Annual General Meeting (ii) Statutory Meeting and (iii) Extraordinary General Meeting.

1. Annual General Meeting : A general meeting of every company shall be held within eighteen months from the date of its incorporation and thereafter once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting. The failure to hold these meeting, as provided, would make every officer of the company knowingly a party thereto, liable to be fined to the extent of Tk. 10000.00 and in case of such default the court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.

At the general meeting the report of the company's affairs and the Final Accounts and Balance Sheet duly certified is generally to be laid down before the meeting. The Chairman usually introduces the report. He then moves the adoption of the report and is seconded by one of the Directors present. The report is then open to the meeting for discussion and every member present has a right to offer his remarks and criticism on it. the members may also call for any information they may desire but the Directors are bound to give only such information as they think best in the interests of the company. If the members are dissatisfied with the report, they can oppose the adoption of it, if they succeed, the would amount to a vote of censure on the Directors. If the report be carried, the resolution for dividend (if any) to be paid, would be moved by one of the Directors. The Chairman of a company can, unless otherwise provided for by the Articles, adjourn the meeting for a good cause by leaving the chair. If, however, the Articles require the adjustment to be decided upon by a majority, the Chairman must consult the meeting on the question of the adjournment, failing which the meeting can elect its own Chairman and proceeded with the business.

2. Statutory Meeting : Every company limited by shares and every company limited by guarantee and having a share capital within a period of not less than one month nor more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called the statutory meeting. At the statutory meeting the statutory report, which has to be sent to every member ten days before the meeting and which has to be certified by at least two Directors is to be considered. A copy of the report has also to be filed with the Registrar. At this meeting any of the members present shall be at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not ; but no resolution, of which notice has not been given in accordance with the Articles, may be passed.

3. Extraordinary Meeting : The Directors may call an extraordinary general meeting, whenever they consider it desirable. Further, the Directors of the company, which has a share capital shall, on the

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requisition of the holders of not less than one-tenth of the issued share capital of the company, on which all calls or other sums due have been paid, forthwith proceed to call an extraordinary general meeting of the company. The requisition must state the objects of the meeting and must be signed by the requisitionists. If the Directors do not proceed within twenty-one days from the date of the requisition being so deposited to cause a meeting to be called, the requisitionists or a majority of them in value may themselves call a meeting within three months of the date of the deposit of the requisition. If at this meeting any resolution is passed which requires confirmation at another meeting, the Directors shall forthwith call a further extraordinary general meeting for the purpose of considering the resolution and, if they fail to do so within seven days from the date of passing of the first resolution, the requisitionists may themselves call the meeting.

An extraordinary resolution is a resolution which has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy, at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

Section 87 of the Companies Act, lays down that a special resolution is a resolution passed in the manner required for the passing of an extraordinary resolution and at a general meeting of which not less than 21 days' notice specifying the intention to propose the resolution as a special resolution has been duly given : provided that if all the members entitled to attend and vote at any such meeting to agree, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one days' notice has been given.

Special resolutions are necessary when- (i) the Articles of the company are to be altered, or (ii) where the Memorandum has to be altered; or (iii) to alter the name of company with the consent of local government ; or (iv) for effecting the reduction in the capital of the company ; or (v) for sub-division of same.

AGM- Directors' obligatory : It is the duty of the Board of Directors to call an annual general meeting after the close of the financial year and discharge functions imposed on them by the provisions of the Act. The balance sheet and profit and loss account have to be placed before it. The non-compliance with the provisions of these sections is penal *[State of Bihar Vs. Lingers Private Ltd. (1969) 1 Comp. L.J 362 = AIR 1964 Cal 192.]* Directors must hold meetings of the company even though the accounts are not ready *[Brahmanberia Loan Co. ILR 61 Cal 408 A 1934 Cal 624.]*. In case even when the company is not functioning it is obligatory upon the directors to call the annual general meeting*[Madan Gopal Dey Vs. West Bengal (1968) 2 comp. L.J 22.]*

Time gap between two meetings : The section lays down in clear and unambiguous terms that the time gap between the annual general meeting of a company and the next, shall in no case, exceed fifteen months. The power to extend the above period has been given to the Registrar of companies by the second proviso to the said section if there be special reason for such extension but then even the Registrar's power of extension has been restricted to a period not exceeding three months *[B.K. Karmani Vs. Asstt. Registrar of Companies (1985) 58 Comp. Cas. 293.]*

Time- Extension due to adjournment : Notwithstanding adjournment of an annual general meeting of a company by appropriate resolution, the meeting must be completed within the statutory period of fifteen months *[B.K. Karmani Vs. Asstt. Registrar of Companies (1985) 58 Comp. Cas 293.]*

Holding general meeting- means actual holding of meeting : The words "after the holding of the last preceding general meeting"- mean actual holding of the meeting- Condonation of delay by the High Court's direction means a new schedule for holding such a meeting starts. *[Bangladesh Chemical Industries Corporation Vs. Registrar, Joint Stock Company (1987) 39 DLR 1 BLD (1986) HCD 311.]*

High Court Division's jurisdiction to give direction to hold Annual General Meeting of company: High Court division is empowered under section 81(2) and 85(3) of the Companies Act, 1994 to give directions to hold annual general meetings where such meetings could not be held as per schedule and as to the manner of conducting such meetings. Service of Notice upon each and every director of the Board Meeting is mandatorily required under section 95 of the Companies Act failure of which vitiates the proceedings necessitating fresh meeting in accordance with law. *[Jalaluddin Jaffar Ali Husein Vs. Tahmid Ahmed 6 MLR 2001 (HC) 53]*

Company Court's Duty to set right and correct the affairs of a company : It is true that inaccuracies or omissions in the balance sheet and profit and loss accounts should not be gone into by the Company Court while disposing of applications under sections 79(3) and 76 (3) of the companies Act, 1913 (corresponding to section 85 and 81 of the Companies Act, 1994 respectively) in as much as that the court shall be reluctant and slow to prove but nevertheless when requirements of law of the Companies Act and the articles of the company have been given a go by, this court should not hesitate to set right and correct the affairs of the company *[Alpha Shipping (Pvt.) Ltd. & others Vs. Ghyasuddin Ahmed. BCR (198[7] (HCD) 31.]*

High Court's power in allowing Annual General Meeting : High Court Division can in exercise of its powers under section. 79(3) .of the Companies Act. 1913 (corresponding to section 85 of the Companies Act, 1994) allow an annual general meeting of a company to be held within 15 months from the date of the previous annual general meeting *[Monipur Tea Co., Ltd. Vs. Ahmedur Rahman (1975) 27 DLR 490.]*

Annual general meeting-when no default : As there was no willful default on the part of the Bank and/or its Directors or Managers/Officers concerned in not holding the 20th Annual General Meeting within time and to protect the interest of the share holders the application for holding Annual General Meeting after condonation of delay was allowed permitting the Bank to hold it within four months from date excepting the Agenda No. 4 relating to the Election of Directors. *[Sk Abul Hassan vs City Bank Ltd and others (Statutory Original) [2005] 48[7]]*

Court, whether empowered to condone delay in holding Annual General Meeting – Held : The Court is empowered to condone the delay in holding the Annual General Meeting of a company where it could not be held duly within the statutory period as contemplated in Sub-section (1) of Section 76 .of the Companies Act. 1913 (corresponding to section 81 of the Companies Act, 1994) of the Act. Where it is impracticable in holding the Annual General Meeting by the Company or its member, the Court can hold or direct the holding of the General Meeting under Sub-section (3) of S. 79 of the Companies Act. 1913 (corresponding to section 85 of the Companies Act, 1994) *[(1993) 13 BLD (HCD) 569.]*

Law does not authorise the Registrar to act as a mini-court : If the Registrar is of the opinion that any company violated the provision of section 76(1) of the Companies Act. 1913 (corresponding to section 81 of the Companies Act, 1994), he can initiate appropriate legal proceedings *[Bangladesh Chemical Industries Corporation Vs. Registrar, Joint Stock Company (1987) 39 DLR 1=BLD (1986) HCD 311.]*

Not more than 15 months – meaning of : Words "not more than 15 months after holding of the last preceding general meeting"- to be interpreted in two different ways. When a company does not hold its first annual meeting within 18 months of incorporation and thereafter fails to hold its successive annual general meetings, the computation of time will be along the lines contended by the Registrar *[BCIC Vs. Registrar, Joint Stock Companies 39 (198[7])DLR 1=BLD (1986) (HCD) 311).]*

Obligation to hold next general meeting – when starts from : When the company has actually held its last preceding general meeting within the extended time granted by the High Court Division. the legal obligation to hold the next general meeting will start from the date when the meeting was

held within time granted by the High Court Division*[Bangladesh Chemical Industries Corporation Vs. Registrar, Joint Stock Company (1987) 39 DLR 1=BLD (1986) HCD 311.]*

High Court cannot take cognizance of the offences : Some members of respondent (a registered Association) filed an application direct to the High Court alleging that the respondent Association had failed to call the general meeting of members for three years and before, committed an offence under section 76(2) of the Companies Act, 1913 (corresponding to section 81 of the Companies Act, 1994). The said Association had also not maintained the books of accounts as required under section 130 of the Act, 1993 (corresponding to section 181 of the companies Act, 1994).

It was contended that since the High Court has to determine the question of default, it alone could take cognizance of the offence under section 76(2).of the Companies Act, 1913 (corresponding to section 81 of the Companies Act, 1994). ***Held :*** The application made direct to the High Court for taking penal action was untenable and misconceived. The High Court would have jurisdiction to try the accused if the case is committed to the High Court under section 194(1) Cr. P.C., or if proceedings are started on an application of the Advocate- general under section 195(2) Cr. P.C. or are transferred to it under section 526 Cr. P.C. *[Muhammad Azhar Hussain Vs. District Cricket Association, (1969) 21 DLR (WP) 204.]*

Condonation of delay-on ground of non preparation of balance sheet : ..... the adjourned general meeting could not be held as the balance sheet, profit and loss account was not ready to be laid before the company in the annual general meeting as required under article 172 of the Articles of Association of the company or even after the time was extended by the Registrar of Joint Stock Companies under he proviso to section 131(1) of the Companies Act, 1913. In the mean time more than fifteen months elapsed since the holding of the proceeding annual general meeting making it impracticable to hold the adjourned meeting making it impracticable to hold the general meeting or lay the balance sheet- delay in holding the general meting condoned. *[Bengal Steel Works Ltd. Vs. Registrar of Joint Stock Companies and Firms (1996) 48 DLR 101].*

If it is made to appear to the Court that the annual general meting or meetings were not held in accordance with the directions made by its earlier order the Court shall have competence to order for holding such meeting or meetings afresh. *[Fahmid Ahmed Vs Jalaluddin Jaffar Ali Hussain. (2000) 52 DLR 141]*

Omission of notifying a director : The omission of notifying a director about the holding of a board meeting invalidates the proceedings and such meeting of directors cannot be said to have been duly convened in the absence of service of notice. *[Fahmid Ahmed Vs Jalaluddin Jaffar Ali Hussain (2000) 52 DLR 141]*

82. Penalty for default in complying with section 81.– If default is made in holding a meeting of the company in accordance with sub-section (1) of section 81, or in complying with any directions of the Court under sub-section (2) thereof, the company and every officer of the company who is in default, shall be punishable with fine which may extend to ten thousand taka and in case of a continuing default, with a further fine which may extend to two hundred fifty taka for every day after the first day during which such default continues.

Notes/Comments/Precedents

Offence under section 82 and 183(5) – distinct & separate : The offence under section 82 of the Act, as decided in an Indian case, is a distinct offence from the offence under section 183(5) of the

Act, and hence the conviction under section 82 of the Act does not bar the conviction under section 183(5) of the Act, and the principle of section 26 of the General Clauses Act cannot apply is that case *[Sevaram Pasari Vs. Registrar of Companies AIR 1964 Orissa 14 = (1964) 64 Comp. Cas 31.]*

Notice of Statutory Meeting : The notice of meeting must specify the meeting as statutory meeting, otherwise the meeting will not be termed as Statutory Meeting *[Gardener Vs. Iredate (1912) 1 Ch. 700.]*

In an Indian case it has been held that a Private Limited Company is not obliged to forward a statutory report and the jurisdiction of the court cannot be invoked in case of non-forwarding such a report by a private limited company for its winding up *[S.R. Subrammaniam Vs. Drivers and Conductors Bus Service Pvt. Ltd. (1978) 48 Comp. Cas 672 Mad.]*

83. Statutory meeting and statutory report of company.– (1) Every company limited by shares, and every company limited by guarantee and having a share capital shall, within a period of not less than one month and not more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company; in this Act such meeting is referred to as "the statutory meeting".

(2) The Board of Directors shall, in accordance with the other provision of this Act, prepare a report, in this Act referred to as "statutory report" and shall at least 21 days before the day on which the statutory meeting is to be held, forward the report to every member of the company:

Provided that if the report is forwarded later than the time as is required above, it shall notwithstanding that fact, be deemed to have been duly forwarded if any member entitled to attend and vote at the meeting does not object to such forwarding.

(3) The statutory reports shall set out the following namely–

(a) the total number of shares allotted, distinguishing the shares allotted as fully or partly paid-up, otherwise than in cash, and stating in the case of shares partly paid-up, the extent to which they are so paid up, and in either case, the consideration for which they have been allotted;

(b) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid;

(c) showing under separate proper headings–

(i) an abstract of receipts of the company and of the payments made there out up to a date within seven days prior to the date of the report;

(ii) the receipts of the company from the shares and debentures and other sources, the payments made there out and particulars of the concerning balance remaining in hand;

(iii) any commission or discount paid or to be paid on the issue or sale of shares or debentures, and

(iv) an account or estimate of the preliminary expenses of the company;

(d) the names, addresses and occupations of the directors of the company and of its auditors; and also, if there be any, of its managing agent, manager and secretary, and the change, if any which have occurred in such names, addresses in and occupations since the date of the incorporation of the company;

(e) the particulars of any contract which, or the modification or the proposed modification of which, is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification of such contract;

(f) the extent, if any to which each underwriting contract, if any, has not been carried out, and the reasons therefor;

(g) the arrears, if any, due on calls from every director, from managing agent, every partner of the managing agent, every firm in which the managing agent is a partner, and where the managing agent is a private company, every director thereof;

(h) the particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares or debentures to any director, or to the managing agent, any partner of the managing agent, any firm in which the managing agent is a partner and, where the managing agent is a private company, to any director thereof.

(4) The statutory report shall be certified as correct by not less than two directors of the company, one of whom shall be the managing director where there is one.

(5) After the statutory report has been certified as required by sub-section (4), the Board of Directors the company shall, in so far as the report relates to the shares allotted by the company, the cash received in respect of such shares allotted by the company, the cash received in respect of such shares and the receipts and payments of the company, get it certified as correct by the auditors of the company.

(6) The Board of Director shall cause a copy of the statutory report certified as is required by this section to be delivered to the Registrar for registration forthwith, after copies thereof have been sent to the members of the company.

(7) The Board of Directors shall prepare a list showing the names, addresses and occupations of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the statutory meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(8) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not; but no resolution may be passed of which notice has not been given in accordance with the provisions of this Act.

(9) The meeting may adjourn from time to time, and at any adjourned meeting, any resolution of which notice has been given in accordance with the provisions of this Act, whether before or after the former meeting, may be passed; and the adjourned meeting shall have the same powers as an original meeting.

(10) If a petition is presented to the Court in the manner provided by Part V for winding up of the company on the ground of default in filing the statutory report or in holding the statutory meeting the Court may, instead of directing that the company be wound up, give directions for the presentation of the report or for holding the meeting or make such other order as may be just.

(11) If default is made in complying with the provisions of this section, every director or other office of the company who is in default shall be punishable with fine which may extended to five thousand taka.

(12) Nothing in this section shall apply to a private company.

84. Calling of extraordinary general meeting on requisition.– (1) Notwithstanding anything contained in the articles, the directors of a company which has a share capital shall, on the requisition of the holders of not less than one tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to call an extraordinary general meeting of the company, and in the case of a company not having a share capital the directors thereof shall call such meeting on the requisition of such members as have, on the date of submitting the requisition, not less than one tenth of the total voting power in relation to the issues on which the meeting is called.

(2) The requisition must state the objects of the meeting and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3) If the directors do not, within twenty one days from the date of deposit of the requisition proceed duly to call a meeting on a day not later than forty-five days from the date of the deposit of the requisition, then the requisitionists, or a majority of them in value, may themselves call the meeting, but any meeting so called shall be held within three months from the date of the deposit of the requisition.

(4) Any meeting called under this section by the requisitionists shall be called in the same manner, as nearly as possible, as that in which meetings are to be called by directors.

(5) Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to call a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company, out of any sums due or to become due from the company by way of fees or other remuneration for their services to such of the directors as were in default.

Notes/Comments/Precedents

Requisition- Number of requisitionist : A single member is competent to requisition and call meeting if he is qualified to do so *[S. Varadaranjan Vs. Venkateswara Solvent Extractions Pvt. Ltd. (1994) 80 Comp. Cas. 693 (Mad).]*

Time-extension due to adjournment : Notwithstanding adjournments of an annual general meeting of a company by appropriate resolutions, the meeting must be completed within the statutory period of fifteen months *[B.K. Karmani Vs. Asstt. Registrar of Companies (1985) 58 Comp. Cas 293.]*

85. Provisions as to meeting and votes.– (1) The following provisions shall have effect with respect to meeting of a company notwithstanding any provisions made in the articles of association of the company in this behalf:

(a) an annual general meeting may be called by fourteen days notice in writing, and a meeting other than an annual general meeting or a meeting for the passing of a special resolution may be called by twenty one dayÆs notice in writing:

Provided that a meeting may be called by shorter notice than aforesaid, if it is so agreed in writing-

(i) in the case of an annual general meeting, by all the members entitled to attend and vote thereat; and

(ii) in the case of any other meeting by the members of the company holding, if the company has a share capital not less than 95 percent of such part of the paid-up share capital of the company as gives a right to vote at the meeting, or, having if the company has no share capital, not less than 95 percent of the total voting power exercisable at the meeting;

(b) notice of the meeting of a company with the statement of the business to be transacted at the meeting shall be served on every member in the manner in which notices are required to be served by Schedule 1; but accidental omission to give notice to, or the non-receipt of notice by, any members shall not invalidate the proceedings at any meeting;

(c) five members present in person or by proxy, or the chairman of the meeting, or any member or members holding not less than one-tenth of the issued capital which carries voting rights shall be entitled to demand a poll:

Provided that in the case of a private company, if not more than seven members are personally present, one member, and if more than seven members are personally present, two members, shall be entitled to demand a poll:

(d) an instrument appointing a proxy, if in the form set out in regulation 68 of Schedule I, shall not be questioned on the ground that if fails to comply with any special requirements specified for such instruments by the articles; and

(e) any shareholder whose name is entered in the register of shareholders of the company shall enjoy the same rights and be subject to the same liabilities as all other shareholders of the same class.

(2) The following provisions shall have effect in so far as the articles of the company do not make other provision in this behalf:-

(a) two or more members holding not less than one-tenth of the total share capital paid-up or, if the company has not a share, capital, not less than five percent in number of the members of the company may call a meeting.

(b) in the case of a private company whose number of members does not exceed six, two members and if such number exceeds six, three members, and in the case of any other company, five members personally present shall be a quorum;

(c) any member elected by the members present at a meeting may be chairman thereof.

(d) in the case of company originally having a share capital, every member shall have one vote in respect of each share or each hundred taka of stock held by him, and in any other case, every member shall have one vote;

(e) on a poll, votes may be given either personally or by proxy;

(f) the instrument appointing a proxy shall be in writing under the hand or the appointor or of his attorney duly authorised in writing or if the appointor is a corporation or a company, either under seal or under the hands of an officer or an attorney duly authorised:

Provided that the appointment of proxy shall not be allowed in case of companies formed under section 28 and a proxy may or may not be a member of the company.

(3) If for any reason it is impracticable to call a meeting of a company in any manner in which meeting of that company may be called or to conduct the meeting of the company in a manner prescribed by the articles or this Act the Court may either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such a manner as the Court thinks fit, and where any such order is given the Court may give such ancillary or consequential directions as it thinks expedient and any meeting called, held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted.

Notes/Comments/Precedents

High Court's power in allowing Annual General Meeting : High Court Division can in exercise of its powers under section. 79(3) of the Companies Act. 1913 (corresponding to section 85 of the Companies Act, 1994) allow an annual general meeting of a company to be held within 15 months from the date of the previous annual general meeting *[Monipur Tea Co., Ltd. Vs. Ahmedur Rahman (1975) 27 DLR 490.]*

High Court division is empowered under section 81(2) and 85(3) of the Companies Act, 1994 to give directions to hold annual general meetings where such meetings could not be held as per schedule and as to the manner of conducting such meetings. Service of Notice upon each and every director of the Board Meeting is mandatorily required under section 95 of the Companies Act failure of which vitiates the proceedings necessitating fresh meeting in accordance with law. *[Jalaluddin Jaffar Ali Husein Vs. Tahmid Ahmed 6 MLR 2001 (HC) 53]*

Court has power to direct holding of annual meeting suomotu : The legislature recognised that there may be circumstances in which the holding of the Annual General Meeting could not be held within the prescribed period. The legislature has therefore bestowed on the Court the power to direct that such a meeting of the Company be called, held and conducted in such a manner as the Court thinks fit. In this, the Court can act not only on an application of any director of the Company or a even of any member of the Company but also *suo motu.*

In directing the holding of such a meeting the court is to look to the general interest of the public and not to any individual consideration *[Ahmed Hossain Vs. Syedur Rahman (1966) 18 DLR 506.]*

Direction to hold meeting : If for any reason it is impracticable to call, hold and conduct a meeting on the happening of any circumstance the Court being satisfied to that effect to call a meeting in the manner such a meeting is to be called, could pass an order for holding the meetings to be conducted by a neutral Chairman even in the absence of an application. *[United Commercial Bank Ltd. Vs Jahangir Alam Khan and others (2004) 56 DLR (AD) 76].*

Annual general meeting-when no default : As there was no willful default on the part of the Bank and/or its Directors or Managers/Officers concerned in not holding the 20th Annual General Meeting within time and to protect the interest of the share holders the application for holding Annual General Meeting after condonation of delay was allowed permitting the Bank to hold it within four months from date excepting the Agenda No. 4 relating to the Election of Directors. *[Sk Abul Hassan vs City Bank Ltd and others (Statutory Original) [2005] 487]*

Misconduct and misdoings : *Held-* Misconduct and misdoings do not fall under 79 (3).of the Companies Act. 1913 (corresponding to section 85 of the Companies Act, 1994). The main ground opposing the holding of the meeting appertains to the alleged malafides and the alleged misdoings of

the President. The Court while adjudicating on application filed under section 79(3).of the Companies Act. 1913 (corresponding to section 85 of the Companies Act, 1994) is not required to adjudicate on these allegations *[Ahmed Hossain Vs. Syedur Rahman (1966) 18 DLR 506.]*

Powers conferred under sections 79(3) read with section 76(3) of the Companies Act, 1913 (corresponding to sec. 85 & 81 of the Companies Act, 1994) to call a general annual meeting, are exercisable by the court in the circumstances stated therein. The Court may intervene by directing the holding of a meeting but exercise such powers sparingly in order to ensure neutrality and not seemed to have involved itself in the affairs of the Company.....There remains no doubt about the powers of the Court to call a meeting of the Company when invoked by a share-holder or director of the company under section 79(3) of the Companies Act, 1913 (corresponding to sec. 85 of the Companies Act, 1994) *Ghyasuddin Ahmed Vs. QN Faruque (1986) 38 DLR (AD) 296=(1986) BLD (AD) 311.]*

Member filing of application : A member of a company which has separate legal entity is entitled to apply to the Court under sec. 79(3)of the Companies Act. 1913 (corresponding to section 85 of the Companies Act, 1994). for calling an annual general meeting *[A.S.A. Nur Vs. Registrar of Joint Stock Company (1981) 33 DLR (AD) 315.]*

When the Court may direct the calling of a Company's meeting : Having regard to the powers conferred under section 79(3) of the Companies Act, 1913 (corresponding to section 85 of the companies Act, 1994) the Court may order a meeting of the Company in any of the circumstances mentioned therein, namely. (a) If for any reason it is impracticable to call a meeting of the company ; (b) If for any reason it is impracticable to hold a meeting; *[Ghyasuddin Ahmed Vs. QN Faruque 38 (1986) DLR (AD) 296=(1986) BLD (AD) 311.]*

Failure to hold AGM for years : In view of the candid submission of the learned Advocate for the petitioner that there is no such allegation against the Annual General Meetings for the years 1997 onwards, it would not be proper to allow this petition and to hold meetings for the years 1987 to 1996. That may put into turmoil the meetings held for the subsequent years, which could create more problems than it would solve. *[Momtaz Begum vs Trimar and Marlinz Ltd and others (Civil)[2005] 277]*

Agenda of meeting of Board of Directors- circulation not mandatory : Every agenda of a company has a residuary clause 'to consider any other matter with the permission of the chairman'. The section makes specific provision for issuance of agenda for general meeting, but no provision has been made for issuance of an agenda for the meeting of the Board of Directors *[Suresh Chardra Marwaha Vs Lauls Private Ltd. and others (1978) 48 Comp. Cas. 110 (Punjab).]*

Agenda- form of : An agenda should be clear and explicit and in a summary form. It should enable the members to ascertain what matters will be discussed, and, if circulated beforehand, give them an opportunity for forming some opinion as to the course which they will adopt at the meeting. A properly drawn up agenda prevents many questions being put to the Chair, considerably shortens a meeting and helps to get the sense of the meeting in an intelligent and expeditious manner. Further, a well-arranged agenda prevents much confusion and irrigation through members speaking on insufficient facts. It is generally advisable to consult the Chairman of the meeting in preparing the agenda. A notice must be open, clear, satisfactory and free from trickiness. If they do not firmly disclose the purpose for which the meeting is convened, such meeting is invalid *[Kaya Vs. Crovdon Tramways, (1898) 1 Ch. 258].*

Company cannot curtail notice period by making provisions in the Articles- Held : By the provisions in the Articles of Association the Company, cannot curtail the notice period as required by the Act *[Re: Hector Whaling Ltd. (1937) 7 Comp. Cas. 22.].*

The omission of notifying a director about the holding of a board meeting invalidates the proceedings and such meeting of directors cannot be said to have been duly convened in the absence of service of notice. *[Tahmid Ahmed Vs Jalaluddin Jaffar Ali Hussain. (2000) 52 DLR 41]*

Omission of notifying a director : The omission of notifying a director about the holding of a board meeting invalidates the proceedings and such meeting of directors cannot be said to have been duly convened in the absence of service of notice. *[Tahmid Ahmed Vs Jalaluddin Jaffar Ali Hussain 52 DLR 2000 (HCD) 141]*

86. Representation of companies at meetings of other companies of which they are members.– A company which is a member of another company may, by resolution of the directors, authorise any of its official or any other person to act as its representative at any meeting of that other company, and the person so authorised shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of that other company.

Notes/Comments/Precedents

Right of voting : The right of a person to vote as the representative of a company in a meeting depends essentially on the question whether he has been validly appointed or not and not upon the evidence produced by him in support of that authority. And so far as the evidence is concerned it is meant only to satisfy the chairman that that person is the one duly authorised so that he may be in a position to admit the vote cast by such a representation, which is done by simple production of the copy of the resolution of the company *[Nand Prasad Vs. Arjun Prasad (1959) 29 Comp. Cas. (522.]*

87. Extraordinary and special resolution.– (1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three fourths of such members entitled to vote as are present in person or by proxy, where proxies are allowed, at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

(2) A resolution shall be a special resolution when it has been passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one day's notice specifying the intention to propose the resolution as a special resolution has been duly given :

Provided that, if all the members entitled to attend and vote at any such meeting so agree, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one day's notice has been given.

(3) At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed a declaration of the chairman on a show of hands that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(4) At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed a poll may be demanded.

(5) Where a poll is demanded, the poll may be in accordance with the articles, be taken in such manner as the chairman may direct; and if the chairman so directs it be taken at the meeting at which it is demanded.

(6) Where a poll is demanded in accordance with this section, in computing the majority on the poll, reference shall be had to the number of votes to which each member is entitled by the articles of the company or under this Act.

(7) For the purposes of this section, notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner prescribed by the articles or under this Act.

Notes/Comments/Precedents

The purpose of special resolution : The purpose of special resolution is to ensure that every important matter is decided after due deliberation and with the consent of a large body of share-holders present at the meeting.

Appointment of Director –notice not specifying : *Held* that for want of proper or sufficient notice or other defect in procedure a special resolution is not effective *[V.G Balasundaram Vs New Theatres Carnatic Talkies Pvt. Ltd. (1993) Comp. Cas. 324 (mad).]*

Notice: Twenty one clear days : Twenty one clear days- ***Held***-taken to be exclusive of day of posting and day of receipt *[(1956) PLR (Lah.) 1407.]*

Partial illegality : A provision in the constitution of a company which provides for unanimity in every meeting of the shareholders is only partially illegal.

Partial illegality consists in the fact that while it is not open to the company, in the case of a special resolution under sections 20 and 81 of the Companies Act, 1913 (corresponding to sec.20 & 87 of the Companies Act, 1994) aiming at changing its Articles, to impose unanimity, or for the matter of that, to place any further restriction than in provided by section 81 of the Companies Act, 1913 (corresponding to sec. 87 of the Companies Act, 1994), making unanimity the basis of decision in other matters, would not be illegal.

An Article which provided that every question submitted to a meeting shall be deemed to have been decided only if such decision is unanimous, in so far as it applied to special and extraordinary resolution, offended against section 81 of the Companies Act, 1913 (corresponding to sec. 87 of the Companies Act, 1994) and was illegal, but it would not be illegal in respect of ordinary resolutions. The whole Article was not void. Nor would the Article be void because the requirement of unanimity might lead to a deadlock and thus interfere with the object and working of the company. *[1956 PLR (Lah.) 1407.]*

88. Registration and copies of special and extraordinary resolution.– (1) A copy of every special and extraordinary resolution shall, within fifteen days from the passing thereof, be printed or typewritten and duly certified under the signature of an officer of the company and filed with the Registrar who shall record the same.

(2) Where articles have been registered, a copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the date of the resolution.

(3) Where articles have not been registered, a copy of every special resolution shall be forwarded in print to any member at his request, on payment of fifty taka or such less sum as the company may direct.

(4) If a company makes default in so filing with the Registrar copy of a special or extraordinary resolution it shall be liable to a fine not exceeding one hundred take for every day during which the default continues.

(5) If a company makes default in embodying in complying with the provisions of sub-section (2) or (3), it shall be liable to a fine not exceeding fifty taka for each copy in respect of which default is made.

(6) Every officer of a company, who knowingly and wilfully authorise or permits any default by the company in complying with the requirements of this section, shall be liable to the like penalty as is imposed by this section on the company for that default.

Notes/Comments/Precedents

Recording resolution-Registrar's discretion : The Registrar of Joint-Stock Companies has in the matter of recording resolutions or amendments of the Articles of Association, a certain amount of discretion, the extent of which will depend upon the nature of each case *[Monsel & Co. Vs. Registrar of Joint Stock Company. (1956) 8 DLR 202= 5 PLR (Dac.) 389.]*

89. Minutes of proceedings of general meeting and of its directors.– (1) Every company shall cause minutes of all proceedings of general meeting and meetings of its directors to be entered in books kept for that purpose.

(2) Any such minute, if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting shall be evidence of the proceedings.

(3) Until the contrary is proved-

(a) a general meeting of the company or a meeting of its directors, in respect of the proceedings of which minutes have been made, shall be deemed to have been duly called and held: and

(b) the proceedings of such meeting shall be deemed to have been held as described in the minutes and the appointments of directors or liquidators at such meeting shall be deemed to be valid:

(4) The books containing the minutes of proceedings of any general meeting of a company shall be kept at the registered office of the company and shall during

business hours subject to such reasonable restrictions as the company may by its article or in general meeting impose so that not less than two hours in each day be allowed for inspection be open to the inspection of any member without charge.

(5) Any member shall at any time after fourteen days from the meeting, be entitled to be furnished within seven days after he has made a request in that behalf to the company with a copy of any minutes referred to in subsection (4) at a charge not exceeding ten taka for every hundred words.

(6) If any inspection required under sub-section (4) is refused, or if any copy required under sub-section (5), is not furnished within the time specified in sub-section (5), the company and every officer of the company who is knowingly and wilfully in default or who authorises or permits default shall be liable in respect of each offence to a fine not exceeding taka one hundred and to a further fine not exceeding one hundred taka for every day during which the default continues.

(7) In the case of any such refusal or default the Registrar may by order compel an immediate inspection of the books in respect of all proceedings of general meeting or direct that the copies required shall be sent to the person requiring them.

Notes/Comments/Precedents

Minutes- evidence of proceedings : The minutes of a meeting required to be kept under section 89 of the Companies Act are evidence of the proceeding recorded therein *[Tata Oil Mills Ltd. Vs. Hindustan Lever Ltd. (1994) 3 Comp. L.J 46 (Bom).]*

Minute book– evidentiary value of : The minute book in which proceedings of the meetings are recorded is considered to be an evidence. It cannot be rejected on the ground that half of it was lying blank, if it is proved that it has been kept in regular course of business *[Edward Keventer Successors Pvt. Ltd. New Delhi Vs. Kishan Kumar (1968) 38 Comp. Cas 507.]*

Proceedings of meeting : Under section. 83 (2) of the Companies Act, 1913 (corresponding to sec.89 of the Companies Act, 1994) all proceedings of Annual General Meeting or of the Board of Directors as evidenced in the minutes are to be treated as duly conducted and any contention to the contrary by a party shall have to be established by that party *[Shamsul Huda Vs. Alauddin & Taiwa Textile Mills Ltd. (1984) 36 DLR 316.]*

Application for copies of the proceedings of the meetings of the company made not at the company's Registered Office at Dacca but at its Head Office at Pabna- Held : Application not properly made and hence no offence under section 88(6) of the Companies Act, 1913 (corresponding to section 89 of the Companies Act, 1994) committed *[Moyejuddin Vs. State (1976) 28 D.L.R. 46.]*

Meeting of Directors : The provision of law that until the contrary is proved a meeting of the Directors of a company shall be deemed to have been duly called will be of no avail without the foundation of minutes of the meeting which is yet to be produced. *[Md. Mohibul Ahsan vs. Ittefaq Group of Publications Ltd. (1998) 50 DLR (AD) 138.]*

DIRECTORS

90. Directors obligatory.– (1) Every public company and a private company which is a subsidiary of a public company shall have at least three directors.

(2) Every private company other than a private company mentioned in sub-section (1) shall have at least two directors.;

(3) Only a natural person may be appointed a director.

Notes/Comments/Precedents

Number of directors : Section 90 provides that every public company must have at least three directors and every private company whether it is a subsidiary of a public company or not must have at least two directors.

Subject to this requirement of minimum number of directors, the articles of a company may and usually do, fix the minimum and maximum number for the Board.

Minimum number- mandatory provision : Where the number of directors fell below the minimum, the business transacted thereafter is invalid as the provisions with regard to minimum directors is mandatory *[Re: Alma Spinning Co. (1880) 16 (Ch.D. 681.]*

91. Appointment of directors.– (1) Notwithstanding anything contained in the articles of a company -

(a) the subscribers of the memorandum shall be deemed to be the directors of the company until the first directors are appointed.

(b) the directors of the company shall be elected by the members from among their number in general meeting; and

(c) any casual vacancy occurring among the directors may be filled in by the other directors but the person be appointed shall be a person qualified to be elected a director under clause (b) and shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last appointed a director.

(2) Notwithstanding anything contained in the articles of company other than a private company not less than one third of the whole number of directors shall be persons whose period of office is liable to determination at any time by retirement of directors in rotation.

Notes/Comments/Precedents

Appointment of Directors : Generally the first directors of a company are appointed by the articles of association. But if the articles do not provide for such appointment, the subscribers to the memorandum shall be deemed to be the directors of the company until the first directors shall have been appointed. Subsequently directors are appointed by the share holders in general meeting with proper notice. In *John Morley Building Co. Vs. Barras (1891) 2 Ch. 386* it has been *held* that the power given to the subscribers remain in force notwithstanding the first general meeting after the incorporation has been held without any directors being appointed at that meeting.

Contended that the petitioner's status as Managing Director in respondent No. 5, RPC Limited is clearly different from the definition of Managing Director as enunciated in section 2(m) of the Companies Act, 1994. Although the petitioner by virtue of Clause 76(b)(3) of the Articles of Association of RPC Ltd has voting right in the Board of Director nevertheless this does not make him a director of the Company as defined in section 91(i)(a) of the Companies Act, 1994 for him to come under the definition of Managing Directors as defined in section 2(m) of the Companies Act, 1994. Hence Held : the Company Law is not applicable in respect of the petitioner. *[Abdus Sabur (Md) vs Rural Electrification Board (Spl. Original) [2005] 502]*

Recommendation : Under the garb of recommendation board of Directors cannot reject the candidature of any person for the election to the office of the director of the Bank.

The word "recommended" means power of the Board to point out defects, if any, in the candidature of a person for the office of director for consideration in the Annual General Meeting to avoid complications in such meeting and not the power to reject any candidature on the ground of defect real or fanciful. *[ASF Rahman and another Vs A M Agha Yousuf and others 52 DLR (2000) (AD) 127 : 20 BLD 2000 (AD) 205].*

92. Restrictions on appointment or advertisement of director.– (1)

A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company or in relation to any intended company or in any statement in lieu of prospectus filed by or on behalf of a company, unless before the registration of the articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, he has by himself or by his agent authorised in writing-

(a) signed and filed with the Registrar a consent in writing to act as such director ; and

(b) in the case of companies having a share capital-

(i) signed the memorandum for a number of shares not less than his qualification shares; or

(ii) taken from the company and paid or agreed to pay for his qualification shares; or

(iii) signed and filed with the Registrar a contract in writing to take from the company and pay for his qualification shares; or

(iv) made and filed with the Registrar an affidavit to the effect that a number of shares not less than his qualifications share are registered in his name.

(2) On the application for registration of the memorandum and articles, if any, of a company, the applicant shall file with the Registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding two thousand taka:

Provided that nothing in this section shall apply to the appointment of the chief executive, by whatever name called, of any insurance company or a banking company as a director of that company if the article; thereof provides for such appointment.

Notes/Comments/Precedents

Additional qualification- not prohibited : There is nothing in the policy of the Companies Act or in its language which prohibits additional or different qualifications for directorship apart from the holding of shares *[The Saraswathi Vilasun Shanmughanandha Nidhi Ltd. Vs V.S. Daivasigamani Mudhaliar AIR 1951 Mad 520.]*

93. Consent of candidate for directorship.– (1) Every person, proposed as a candidate for the office of a director shall sign, and file with the company, his consent in writing to act as a director, if appointed.

(2) A person shall not act as a director of the company unless he has, within thirty days of his appointment, signed and filed with the Registrar his consent in writing to act as such director.

Notes/Comments/Precedents

Provision directory- not mandatory : Considering the section as a whole and bearing in mind the object of the legislature and magnitude of the mischief intended to the avoided it must be held that the section is clearly directory and not mandatory *[Laljibhai C. Kapadia Vs. Lalji B. Desai AIR 1972 Bom 276.]*

94. Disqualifications of directors.– (1) A person shall not be capable of being appointed director of a company, if–

(a) he has been found to be of unsound mind by a competent court and the finding is in force; or

(b) he is an undischarged insolvent ; or

(c) he has applied to be adjudicated as an insolvent and his application is pending; or

(d) he has not paid any call in respect of shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call; or

(e) he is a minor.

(2) A company may in its articles provide additional grounds for disqualification of a director.

Notes/Comments/Precedents

Failure to pay : The failure to pay the amount within six months from the date on which he is required to pay the amount on allotment of fully paid up shares does not entail vacation of his office for disqualification under the Act *[Ramjilal Baiswala Vs. Baiton Cables Ltd. ILR (1964) 14 Raj 135.]*

95. Notice of meetings.– Notice of every meeting of the Board of Directors of a company shall be given in writing to every director for the time being in Bangladesh and at his address in Bangladesh.

Notes/Comments/Precedents

Issuance of notice : Companies 95 of Act of course makes it obligatory to issue a notice in writing to every director. Such requirement does not appear to extend the obligation to give fresh notice for an adjourned meeting for transaction of the unfinished business of the last meeting. Business to be transacted in the adjourned meeting also appear to be notified in the notice dated 08.04.99. It is difficult to say on the agenda decisions taken could not validly be taken. Such meeting and the decisions taken therefore cannot be said to be invalid for violation of any law or the article of the company. Even reelection of the three directors in question in the same meeting also cannot invalidate the whole proceedings of the board meeting. *[Mr. S.. Khan & Ors. Vs. Integrated Service Ltd. & Ors. 10 BLT 2002 (HCD)130].*

Written notice to all the Directors necessary for valid meeting- Civil Court to interfere in case of meeting held properly : For holding a valid meeting of the Board of Directors written notice must be given to all the members of the board of directors. If anyone is left out the resolution taken in that meeting becomes invalid..... In all companies either private or public for holding a board meeting a written notice shall be given to every director and Civil Court may not interfere when there is a valid meetings. When there is prima facie and invalid resolution the civil Court can interfere. The respondents are restrained by an order of temporary injunction from acting on the alleged resolution of Board of Directors. [*Ittefaq Group of Publications Limited & others vs Arab Bangladesh Bank Limited & others (1998) 50 D.L.R. 597.]*

Decisions of meetings- Court's interference : The Courts are generally reluctant to interfere with the decisions taken at company meetings unless there is almost a manifest breach of the Articles or the Statute, because it is the company and not the Court which is responsible for its management. *[Md. Mohibul Ahsan vs. Ittefaq Group of Publications Ltd. (1998) 50 DLR (AD) 138= (1998) 18 BLD (AD) 207]*

Temporary Injunction : The courts are generally reluctant to interfere with the decisions taken at company meetings unless there is almost a manifest breach of the Articles or the statute, because it is the company and not the Court which is responsible for its management. *[Mohammad Mohibul Ahsan (Shawan) & Ors. Vs. Ittefaq Group of Publications Ltd.* 7 BLT 1999 (AD) *14].*

Fresh notice for adjourned meeting- if required : Since the adjourned meeting of the Board of Directors of a Company schedule to transact the unfinished business of the previous meeting no notice as to such adjourned meeting is necessary as contemplated by section 95 of the Companies Act, 1994. *[S.I. Khan and others Vs. Integrated Services Ltd. And others 7 MLR 2002 (HC) 56].*

96. Meeting of Board.– In the case of every company a meeting of its Board of Directors shall be held at least once in every three months and at least four such meetings shall be held in every year.

97. Qualification of Director.– (1) Without prejudice to the restrictions imposed by section 92, it shall be the duty of every director to hold qualification share to be specified in the articles and, if he is not already qualified, he shall obtain his qualification within sixty days after his appointment, or such shorter time as may be fixed by the articles.

(2). If, after the expiration of the period mentioned in sub-section (1) any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding two hundred taka for every day between the expiration of the said period and the last day on which it is proved that he acted as a director (both days inclusive).

Notes/Comments/Precedents

Time for acquiring qualifications : A person who has been appointed a director may acquire qualification shares at any time within two months after his appointment as a director. The articles of a company cannot provide that a person must hold the qualification shares before his appointment or the director should obtain qualification shares within a period shorter than two months. Any such provision in the articles will be void. The qualification shares must, however, be held in his own name *[Channel Collieries Trust Ltd. Vs. Dover Light Railway Co. (1914) 2 Ch. 506.]*

Bearer of Share warrant : The bearer of a share warrant shall not be deemed to be a holder of the shares specified in the warrant for the purpose of qualification shares *[Holmes Vs. Keyes 28 Comp. Cas. 419 = (1958) 2 All E.R. 129.]*

98. Validity of act of director.– The acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification:

Provided that nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such director has been shown to be invalid.

Notes/Comments/Precedents

Acts of Directors : The modern practice is to confer on the directors of a joint stock company the rights to exercise all the company's powers except such as those that the general law expressly provides must be exercised in general meeting.

Validity of acts of a person as a director : This section validates the acts of the directors in certain circumstances. *[Sunder Lal Jain Vs. Sandeep Paper Mills (1995) 1 Comp. L.J. 356.]* The section confers validity upon the acts done by a person as a director, notwithstanding that it may afterwards be discovered that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision in the Act or in the articles *[M. Moorthy Vs. Drivers and Conductors Bus Service P. Ltd. (1991) 71 Comp. Cas 136.]*. It has however, been held in the case that this section will have no application where there had been a usurption of the office of director or managing director.

99. Ineligibility of bankrupt to act as director.– (1) If any person being an undischarged insolvent acts as director or managing agent or manager of any company, he shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding five thousand taka or to both.

(2) In this section the expression "company" includes a company incorporated outside Bangladesh which has an established place of business within Bangladesh.

Notes/Comments/Precedents

Company as licensed stock-holder of steel. delivering G.P. sheets to Director on production of permit issued by statutory authority- Transaction not within mischief of sections : The combined effect of the two provisions of sections 86F and 86 (i)clause (h) of the Companies Act, 1913 (corresponding to sec. 105 & 98 of the Companies Act, 1994) is that in the circumstances specified in the section, a director of a company, automatically loses his position as such and this is plainly reasonable inasmuch as a contract once entered upon attracts sanctions and may involve the company in penalties authoritically should the company attempt to escape the obligation incurred under it. But in a case like this the Court will have to see that there was in actual fact an entry into a contract for the sale, purchases or supply of goods or materials with the company. The expression "contract for sale" must be understood within the definitions contained in the relevant laws, namely the Contract Act, 1872 and the Sale of Goods Act, 1930. *[Shaikh Maqbool Elahi Vs. Khan Abdul Rahman (1960) 12 D.L.R. (S C) 181.]*

100. Prohibition on assignment of office by director.– Any assignment of his office made after the commencement of this Act by any director is void and shall be of no effect.

Notes/Comments/Precedents

Appointment to an office- Can only be made if office is vacant : *Held*-This section talks of "assignment of his office" by a director. The word "his" would indicate that the office contemplated was one held by the directors 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 indicate that. An appointment by a director to the office which he previously held but did not hold at date of the appointment was not to be included within the word "assignment". Again, there can be no doubt that the section was intended to render void a transfer of his office by a director for, if the section had intended only to avoid an appointment by a director or his successor, it would have clearly said so and would "assignment" to have the meaning of "appointment then it would have to be given both the meanings of "transfer" and "appointment" in the section. This is what the High Court did. That would produce a curious result. Transfer and appointment are clearly entirely different things. Even apart from considerations arising from the law of conveyance, which the High Court was unable to entertain in connection with transfer of an office, a transfer from its very nature inevitably imports the passing of a thing from one to another; a transfer without the passing of the thing transferred, even when that thing is an office, cannot be conceived. An "appointment", on the other putting in of someone in a vacancy. The acts constituting a transfer and a appointment are therefore wholly dissimilar. Would be an unusual statute which by the use of a single word intended to prohibit if at the same time two wholly different acts. Held that construction leading to such a result is permissible *[Oriental Metal Products Works (P) Ltd. Vs. B.K. Thakur, AIR 1961 Supreme Court 573 : 31 Comp. Cas 143.]*

101. Appointment and terms and office of alternate directors.– (1) The Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint an alternate director, to act for a director hereinafter in this section called the original director during his absence for a continuous period of not less than three months from Bangladesh.

(2) An alternate director appointed under sub-section (1) shall not hold office as such for a period longer than that permissible to the original director in whose place he has been appointed and shall vacate the office, immediately after he receives information that the original director has returned to Bangladesh.

(3) If the term of office of the original director is determined before he so returns to Bangladesh any provision for automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternative, director.

Notes/Comments/Precedents

Alternate Director : By virtue of section 101 of the Companies Act an Alternate Director in place of a Director absent from Bangladesh for three months or more, may be appointed, if so authorised by the articles of association or resolution passed by the company in a general meeting. The alternate director shall not hold office for a period longer than that permissible to the original director and shall vacate office when the original director returns to Bangladesh.

102. Avoidance of provisions relieving liability of directors.– Save as provided in this section, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, hereafter in this section referred to as the said provision, for exempting any director, manager or officer of the company or any person, whether an officer of the company or not, employed by the company as auditor from, or for indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void;

Provided that–

(a) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while the said provision was in force before the commencement of this Act; and

(b) a company may, in pursuance of the said provision indemnify any such director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted, or in connection with any application under section 396 of this Act in which relief is granted to him by the Court.

Notes/Comments/Precedents

Indemnity Clause : Where there is a indemnity clause not only must a director guilty of negligence but he must know that he is committing a breach of duty or recklessly careless in the matter *[In Re: City Equitable Fire Insurance Co. (1925) 1 Ch. 407.]*

103. Loan of Director.– (1) No company, hereinafter in this section referred to as the lending company, shall make any loan or give any guarantee or provide any security in connection with a loan made by a third party to–

(a) any director of the lending company;

(b) any firm in which any director of the lending company is a partner;

(c) any private company of which any director of the lending company is a director or member ; or

(d) any public company, the managing agent, manager or director where of it is accustomed to act in accordance with the directions or instructions of any director of the lending company:

Provided that nothing in this section shall apply to the making of a loan or giving or any guarantee or providing any security by a lending company, if-

(i) such company is a banking company or a private company not being a subsidiary of a public company, or if such company as a holding company makes the loan or gives the guarantee or provide the security to its subsidiary; and

(ii) the loan is sanctioned by the Board of Directors of any company and approved by the general meeting and, in the balance sheet, there is a specific mention of the loan, guarantee or security, as the case may be:

Provided further that, in no case the total amount of the loan shall exceed 50% of the paid up value of the shares held by such director in his own name.

(2) In the event of any contravention of sub-section (1), every person who is a party to such contravention including in particular any person to whom a loan is made or on whose behalf a guarantee is given to or security provided shall be punishable with the fine which extend to five thousand taka or simple imprisonment for six months in lieu of fine and shall be liable jointly and severally to the lending company for the repayment of such loan or for making good any sum which the lending company may be called up to pay under the guarantee given or security provided by the lending company.

(3) This section shall apply to any transaction represented by a book debt which was from its inception in the nature of a loan or an advance.

Notes/Comments/Precedents

Liability of past Director : The past Director is liable for the money owed by him to the company, but the company, alone is entitled to sue him for the same *[Jaipur Vastra Vyapar Sangh Ltd. Vs. Shyam Sunder Lal Patodia (1970) 1 Comp. LJ 327 = AIR 1970 Raj 91]*

104. Director not to hold office of profit.– No director or firm of which such director is a partner of private company of which such director is a Director shall, without the consent of the company in general meeting, hold any office of profit under the company except that of a managing director or manager or a legal or technical adviser or a banker.

Explanation : For the purposes of this section, the office of managing agent shall not be deemed to be an office of profit under the company.

Notes/Comments/Precedents

Technical Advisor without technical qualification : Held that any person cannot be appointed to any job and called a technical advisor to defeat the provision of this section.

A technical advisor appointed by the company must have technical qualifications and hence if a director, having no such technical qualifications is appointed as a technical advisor, his appointment cannot be held valid *[Madura Hindu Permanent Fund Ltd Vs. Govt. of India (1977) 47 Comp Cas. 318 (Mad).]*

105. Sanction of Directors necessary for certain contracts.– Except with the consent of the directors, a director of the company, or the firm of which he is a partner or any partner of such firm, or the private company of which he is a member or director, shall not enter into any contract for the sale, purchase or supply of goods and materials with the company.

106. Removal of directors.– (1) The company may by extraordinary resolution remove any share-holder director before the expiration of his period of office and may by ordinary resolution appoint another person in his stead and the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected director.

(2) A director so removed shall not be re-appointed a director by the Board of Directors.

Notes/Comments/Precedents

Specific provision for the removal of a Director : In view of the specific provision for the removal of the Director under the Companies Act and in view of fact that section 41 of the Banking Companies Ordinance, 1962 does not expressly make any provision for removal of Director of a Banking Company, Bangladesh Bank does not have any power to remove the Director of a Bank *[(Khondker Mahtabuddin Ahmed Vs. Bangladesh Bank and others (1994) 14 BLD (HCD) 365.]*

Banking Company Ordinance and the Companies Act : Section 2 of the Banking Companies Ordinance makes it crystal clear that unless "expressly provided" in the ordinance, the provision of the ordinance shall be in addition to and in derogation of the Companies Act. Section 2 of the Banking Companies Ordinance is the governing section for interpretation of any section of the said Ordinance. It makes it crystal clear that unless 'expressly provided' in the Ordinance, the provision of the Ordinance shall be in addition to and not in derogation of the Companies Act,

1913. Section 86G of the Companies Act. 1913 (corresponding to section 106 of the Companies Act. 1994) makes specific provision for the removal of a Director. In view of the provision for the removal of a Director under the Companies Act. 1913 and in view of the fact that Section 41 of the Banking Companies Ordinance. 1962 does not expressly make any provision for removal of the Director of a Banking Company, Bangladesh Bank cannot be said to have been invested with any power for removal of the Director of a Bank *[Khondker Mahtabuddin Ahmed Vs. Bangladesh Bank and others (1994) 14 BLD (HCD) 365.]*

107. Restrictions on powers of directors.- The Directors of a public company or of a subsidiary company of a public company shall not, except with the consent of the company concerned in general meeting–

(a) sell or dispose of the undertaking of the company; and

(b) remit any debt due by a director.

Notes/Comments/Precedents

Undertaking – meaning of : The term undertaking means a business unit or enterprise in which a company may engage in gainful occupation. Each factory or manufacturing unit of a company is an undertaking. A company may have several undertakings.....*[Re: Copper Vs. Union of India A I R 1970 SC. 564.]*

108. Vacation of office of director.– (1) The office of a director shall be vacant, if-

(a) he fails to obtain within the time specified in section 97 (1) or at any time thereafter ceases to hold, the qualification-shares, if any, necessary for his appointment; or

(b) he is found to be of unsound mind by a competent court; or

(c) he is adjudged an insolvent; or

(d) he fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made; or

(e) he or any firm of which he is a partner or any private company of which he is a director, without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker; or

(f) he absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months, whichever is the longer, without leave of absent from the Board of Director; or

(g) he or any firm of which is he a partner or any private company of which he is a director accepts a loan or guarantee from the company in contravention of section 103; or

(h) he acts in contravention of section 105.

(2) A company may provide by its articles that the office of director shall be vacated on grounds additional to those specified in sub-section (1).

Notes/Comments/Precedents

Applicability of Section: This section applies to both public and private companies. A private company which is not a subsidiary of a public company may by its articles provide that the office of a director shall be vacated on any grounds in addition to those mentioned in this section. A private company may also provide by its articles as to how a director shall vacate his office *[Coal Products Ltd. Vs. Ram Autar Jalan (1968) Comp. LJ 311.]*

Director without disclosing his interest– if enters into contract : A director, who is interested in a contract entered into by or on behalf of the company, should disclose the nature of his interest at a meeting of the board of directors. If he fails to do so, he ceases to be a director. *[Kuldip Singh Dhillon Vs. Paragon Utility Financiers Ltd. (1988) 64 Comp. Cas. 19.]*

Resignation of Directors– Where there is no provision in articles : In the absence of any provision in the articles the ordinary rule of common law as regards resignation by an officer or agent must be followed, namely, intimation by notice given either to the company or the board and acceptance of the same by them *[Glossop Vs. Glossop (1907) 2 Ch. 370.]*

109. Restriction on Managing Director.– No public company and no private company which is a subsidiary of public company shall, after the commencement of this Act, appoint any person as managing director, if he is a managing director or manager of an other company.

Provided that no appointment under this section shall be made without the consent of the company in a general meeting.

(2) Notwithstanding anything contained in sub-section (1) the Government may, by order, permit any person to be appointed as a 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.

Notes/Comments/Precedents

Applicability : The section is not applicable to private companies, other than the private companies, which are subsidiary to public companies.

Managing Director–removal of : Where it was found that the resolutions removing the managing director from the office were *ultra vires*, it was held that a declaration to that effect could not be granted as it was open to the company to remove him at any time by passing a valid resolution *[Sardar Golab Singh Vs. Punjab Zamindara Bank Ltd. AIR 1940 Lah 243.]*

110. Managing director not to be appointed for more than five years at a time.– (1) No company shall, after the commencement of this Act, appoint or employ any individual as its managing director for a term exceeding five years at a time.

(2) Any individual holding, at the commencement of this Act, the office of the managing director in a company shall, unless his term expires earlier, be deemed to have vacated his office immediately on the expiry of five years from the commencement of this Act.

(3) Nothing contained in sub-section (1) shall be deemed to prohibit the re-employment or the extension of the term of office of any person as managing director for a further period not exceeding five years on each occasion.

Provided that no such re-appointment, re-employment or extension of term of office shall be made without the consent of the company in general meeting.

Notes/Comments/Precedents

Term of office of Managing Director : This section provides that no public company or a private company which is a subsidiary to a public company shall, appoint or employ any person as its managing director for a term not exceeding five years at a time. But re-appointment or extension can be made on the basis of five years' tenures on each occasion.

COMPENSATION FOR LOSS OF OFFICE

111. Compensation for loss of office not permissible to managing or whole time directors or directors who are managers.– Payment may be made by a company, except in the cases specified in sub-section (3) and subject to the limit specified in sub-section (4), to a managing director, or a director holding the office of manager or in the whole time employment of the company, by way of compensation for loss of office, or as consideration for retirement from office, or in connection with such loss of retirement.

(2) No payment mentioned in sub-section (1) shall be made by the company to any other director.

(3) No payment shall be made to a managing or other director in pursuance of sub-section (1) in the following cases, namely:-

(a) where the director resigns his office in view of the reconstruction of the company, or of its amalgamation with any other body corporate or bodies corporate, and is appointed as the managing director, managing agent, manager or other officer of the reconstructed company or of the body corporate resulting from the amalgamation;

(b) where the director resigns his office otherwise than on the reconstruction of the company or its amalgamation as aforesaid.

(c) where the office of the director is vacated by virtue of any of the provision of this Act;

(d) where the company is being wound up, whether by or subject to the supervision of the Court or voluntarily, provided the winding up was due to the negligence, or default of the director;

(e) where the director has been guilty of fraud or breach of trust in relation to, or of gross negligence in, or gross mismanagement of, the conduct of the affairs of the company or any subsidiary or holding company thereof;

(f) where the director has instigated, or has taken part directly or indirectly in bringing about, the termination of his office.

(4) Any payment made to a managing or other director in pursuance of sub-section (1) shall not exceed the remuneration which he would have earned if he had been in office for the unexpired residue of his term or for three years, whichever is shorter, and such remuneration shall be calculated on the basis of-

(a) the average remuneration received by him during the period of three years immediately preceding the date on which he ceased to hold that office; and

(b) where he held that office for a period of less than three years, the average remuneration received by him during the period for which he held the office:

Provided that no such payment shall be made to the director in the event of the commencement of the winding up of the company, whether before, or at any time within twelve months after, the date on which he ceased to hold office, if the assets of the company on the winding up after deducting the expenses thereof, are not sufficient to repay to the share holders the share capital including the premiums, if any, contributed by them.

(5) Nothing in this section shall be deemed to prohibit the payment to a managing director, or a director holding the office of manager, of any remuneration for service rendered by him to the company in any other capacity.

112. Payment to director, etc. for loss of office, etc. in connection with transfer of undertaking or property.– (1) No Director of a company shall, in connection with the transfer of the whole or any part of any undertaking or property of the company, receive any payment, by way of compensation for loss of office, or as consideration for retirement from office, or in connection with such loss or retirement from the transferee of such undertaking or property or from any other person, unless particulars with respect to the payment proposed be to be made by such transferee or person, including the amount thereof, have been disclosed to the members of the company and the proposal has been approved by the company in general meeting.

(2) Where a director of a company receives payment of any amount in contravention of sub-section (1), the amount shall be deemed to have been received by him in trust for the company.

(3) Sub-sections (1), and (2) shall not affect in any manner the operation of section 111.

Notes/Comments/Precedents

Compensation from the fund of the Company : If a company or its undertaking or any part of its property has been transferred or is to be transferred to another, Section 112 states that no director may receive any payment by way of compensation for loss of office or of consideration for retirement from the company. But such compensation may be received from the transferee, if the members of the transferor company have been told of the particulars of the payment to be made, and they approve of such payment in general meeting. Since payments are made to the directors to go quietly and make room on the Board for the representatives of the transferees, it is provided that no payment of compensation should be made to any directors out of the funds of the company. Where a director receives any payment in contravention of the above provision, the amount so received shall be deemed to have been received by him in trust for the company.

Power of directors to revoke appointment of managing director : Where the articles empowered the directors to appoint managing director for such period as they deem fit and to revoke such appointment, the plaintiff was held to be entitled to damages *[Nelson Vs. James Nelson & Sons Ltd. (1914) 2 KB 770.]*

113. Payment to director for loss of office etc. in connection with transfer of shares.– (1) Where in connection with the transfer to any persons of all or any of the shares in a company, being a transfer resulting from–

(i) an offer made to the general body of shareholders;

(ii) an offer by or on behalf of some other body corporate with a view to the company becoming a subsidiary of such body corporate or a subsidiary of its holding company;

(iii) an offer made by or on behalf of an individual with a view to his obtaining the right to exercise, or control the exercise of, not less than one-third of the total voting power at any general meeting of the company; or

(iv) any other offer which is conditional on acceptance to a given extent;

and as a result of such transfer a director of the company losses his office or retires therefrom, he shall not receive any payment by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement from the company of the transferee or from any other person.

Provided that on fulfillment of the requirements of the other provisions of this section, such director may receive such payment from the said transferee or other person.

(2) In the case referred to the proviso to sub-section (1), it shall be the duty of the director concerned to take all reasonable steps to secure that particulars with respect to the payment proposed to be made by the transferee or other person including the amount thereof are included in or sent with the notice required to be sent under section 112(2) to shareholders.

(3) If-

(a) any such director fails to take reasonable step in pursuance of subsection (2); or

(b) any person who has been properly required by any such director to include the particulars referred to in sub-section (2), in such notice or to send them with such notice.

He shall be punishable with fine which may extend to five hundred taka.

(4) For the purpose of approving any payment referred to in the proviso to sub-section (1), the company shall call a meeting of the shareholders who were such holders on the date of the offer referred to that sub-section and also of the holders of the shares of the same class, in this meeting the person making the said offer or his nominee, and if the offer is a company the nominee of such company or of any of its subsidiary shall not be called; and if the payment is approved in the meeting the director shall be entitle to receive it.

(5) If, at a meeting called for the purpose of approving any payment as required by sub-section (4), a quorum is not present and, after the meeting has been adjourned to a later date, a quorum is again not present, the payment shall, for the purpose of that sub-section, be deemed to have been approved.

(6) If-

(a) the concerned director fails to comply with the requirements of subsection (2); or

(b) the said director receives the payment referred to in the proviso to sub-section (1), before it is approved under sub-section (4);

the payment shall be deemed to have been received by him in trust for any persons who have sold their shares as a result of the aforesaid offer, and the expenses incurred by him in distributing that sum amongst those persons shall be borne by him.

Notes/Comments/Precedents

No director of a company can receive any such payment from the company, or except as stated hereafter, from the transferees of the shares or from any other person in connection with the transfer to any persons of all or any of the shares in the company. The section will be attracted if the transfer of shares results from :- (a) an offer made to the general body of shareholders ; or (b) an offer made by or on behalf of some other body corporate with a view to the company becoming a subsidiary of such body corporate or a subsidiary of its holding company ; or (c) an offer made by and on behalf of

an individual with a view to his obtaining the right to exercise, or control the exercise of, not less than one-third of the total voting power at any general meeting of the company, or (d) any other offer which is conditional on acceptance to a given extent.

Wrongful dismissal of managing director– award of damages : The managing director was appointed by the Board under a service contract for a specified period. The articles provided that if he ceases to hold the office of director he shall *ipso facto* and immediately cease to be the managing director. The company adopted new articles empowering another company to remove any director of the company and also providing that the appointment of managing director should terminate automatically if he ceased to be a director. The other company exercised its power to remove the managing director. The dismissal of the managing director in terms of new article was held wrongful and damages awarded *[Southern Foundaries Ltd. v. Shirlaw, (1940) AC 701.]*

114. Provisions supplementary to section 111, 112 and 113.– (1) Where in proceedings for the recovery of any payment as having, by virtue of sub-section (2) of section 112 or sub-section (4) or section 113 been received by any person in trust, it is proved that-

(a) the payment was made in pursuance of any arrangement entered into as part of the agreement for the transfer in question, or within one year before, or within two years after, that agreement or the offer leading thereto; and

(b) the company or any person to whom the transfer was made previous to that arrangement.

The payment shall be deemed, except on so far as the contrary is shown, to be on one to which that provision applies.

(2) If, in connection with any such transfer as is mentioned in section 112 or in section 113-

(a) the price to be paid to a director of the company whose office is to be abolished or who is to retire from office, for any shares in the company held by him is in excess of the price which could, at the time, have been obtained by other holders of the like shares; or

(b) any valuable consideration is given to any such director.

The excess or the money value of the consideration, as the case may be shall; for the purposes of that section, be deemed to have been a payment, made to him by way of compensation for loss of office, or as consideration for retirement from office, or in connection with such loss or retirement.

(3) References in sections 111, 112 and 113 to payments made to any director of a company by way of compensation for loss of office, or as consideration for retirement from office, or in connection with such loss or retirement, do not include any bonafide payment by way of damages for breach of contract or by way of pension in respect of past services, and for the purposes of this sub-section, the expression "pension" includes any superannuation allowance, superannuation gratuity or similar payment.

(4) Nothing in section 112 and 113 shall be taken to prejudice the operation of any rule of law requiring disclosure to be made with respect to any such payments as are therein mentioned or with respect to any other like payments made or to be made to the directors of a company.

Notes/Comments/Precedents

Compensation payable to be disclosed : *Held-* The payment of compensation should not only be disclosed in the explanatory statement but the same has to be approved by the general meeting *[Kaye v. Croydon Tramways Co., (1898) 1 Ch. 358.]*

Director's liability : Where on account of breach of duty on the part of director the company suffers loss, then the director is liable to reimburse the company to the extent of loss suffered *[Smart Advertising Co. (P) Ltd. Vs. Ramesh K. Nanchahal, (1989) 65 Comp. Cas. 92.]*

115. Register of directors, managers and managing agents.– (1) Every company shall keep at its registered office a register of its directors, manager and managing agents containing with respect to each of them the following particulars, that is to say–

(a) in the case of an individual, his present name in full, any former name or surname in full, his usual residential address, his nationality and, if that nationality is not the nationality of origin his, nationality of origin and his business, occupation, if any, and if he holds any other directorship or directorships the particulars of such directorship or directorships;

(b) in the case of a body corporate its corporate name and registered or principal office, and the full name, address and nationality of each of its directors; and

(c) in the case of a firm, the full name, address and nationality of each partner, and the date on which each became a partner.

(2) The company shall within the periods specified below send to the Registrar a return in the prescribed form containing the particulars specified in the said register and a notification in the prescribed form of any change among its directors, managers or managing agents or in any of the particulars contained in the registerû

(a) in the case of the particulars specified in sub-section (1), within a period of fourteen days from the appointment of the first directors of the company;

(b) in the case of any change in such particulars, within a period of fourteen days from the day change takes place.

(3) The register to be kept under this section shall, during business hours and subject to such reasonable restrictions as the company may by its articles or in general meeting impose so that not less than two hours in each day be allowed for

inspection, be open to the inspection of any member of the company without charge and of any person on payment of ten taka or such less sum as the company may impose for each inspection.

(4) If any inspection required under this section is refused or if defaults is made in complying with sub-section (1) or sub-section (2) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of five hundred taka.

(5) In the case of any such refusal, the Court, on application made by the person to whom inspection has been refused and upon notice to the company, may, by order, direct an immediate inspection of the register.

Notes/Comments/Precedents

This section requires every company to keep at its registered office a register of its Directors, Managers and Managing Agents as specified therein. The register is to be kept open for inspection by the members or any other person. Default in compliance with the section will render the company and its every officer who is in default to pay a fine upto Tk 500.00 for each default.

MANAGING AGENT

116. Duration of appointment of managing agent.– (1) No managing agent shall, after, the commencement of this Act, be appointed to hold office for a term of more than ten years at a time and no managing agent shall hold office for more than twenty years.

(2) Notwithstanding anything to the contrary contained in the articles of a company or in any agreement with the company, a managing agent of a company appointed before the commencement of this Act shall not continue to hold office after the expiry of ten years from such commencement unless than reappointed thereto.

(3) A managing agent whose office is terminated by virtue of the provisions of sub-section (2) shall, upon such termination, be entitled to a charge upon the assets of the company by way of indemnity for all liabilities or obligations property incurred by the managing agent on behalf of the company subject to existing charges and encumbrances, if any.

(4) The termination of the office of a managing agent by virtue of the provisions of sub-section (2) shall not take effect until all moneys payable to the managing agent for loans made to or remuneration due up to date of such termination from the company are paid.

(5) Nothing in this section shall apply to a private company which is not the subsidiary company of a public company.

117. Conditions applicable to managing agents.– Notwithstanding anything to the contrary contained in the articles of the company or in any agreement with the company–

(a) a company may, by resolution passed at a general meeting of which notice has been given to the managing agent in the same manner as to members of the company, remove a managing agent if he is convicted of an offence in relation to the affairs of the company and the offence is non-bailable within the meaning of the provisions of the code of Criminal Procedure, 1898 (Act V of 1898):

Provided that where the managing agent is a firm or company an offence committed by a member of such firm or a director or an officer holding a general power of attorney from such company shall be deemed to be an offence committed by such firm or company:

Provided further that a managing agent shall not be liable to be removed under the provisions thereof if the offending member, director or officer as aforesaid is expelled or dismissed by the managing agent within thirty days from the date of his conviction or if his conviction is set aside, on appeal;

(b) the office of a Managing agent shall be deemed to be vacant if he is adjudged insolvent;

(c) a transfer of his office by a managing agent shall be void unless approved by the company in general meeting:

Provided that where a managing agent is a firm, a change in the partners thereof shall not be deemed to operate as a transfer of the office of managing agent, so long as one of the original partners shall continue to be a partner of the managing agent's firm;

(d) a charge or assignment of his remuneration or any part thereof effected by a managing agent shall be void as against the company:

(e) if a company is wound up either by the Court or voluntarily, any contract of management made with a managing agent shall be thereupon determined without prejudice, however, to the right of the managing agent to recover any moneys recoverable by the managing agent from the company:

Provided that where the Court finds that the winding up is due to the negligence or default of the managing agent himself, the managing agent shall not be entitled to receive any compensation for the premature termination of his contract of management; and

(f) the appointment of a managing agent, the removal of managing agent and variation of a managing agents contract of management shall not be valid unless approved by the company by a resolution at a general meeting of the company notwithstanding anything to the contrary in section 104:

Provided that nothing herein contained shall apply to the appointment of a company's first managing agent made prior to the issue of the prospectus or statement in lieu of prospectus where the terms of the appointment of such managing agent are setforth therein.

Notes/Comments/Precedents

Transfer of interest of original partners to new-comers when will not be considered as transfer of the interest of the Managing Agent's office : Proviso to section 87B(c) of the Companies Act, 1913 (corresponding to section 117 of the Companies Act, 1994) simply means that when Managing Agency happens to be a firm, transfer of the interest of the original partners to new-comers shall not be considered as a transfer of the office of the Managing Agent so long as at least one of the original partners continue to be a partner of the Managing Agent's firm and there is no approval by the members of the managing agency by the Managing Agent's firm *[The Eastend Agencies Vs. Alhaj Mofizuddin. (1968) 20 D.L.R. 1056.]*

118. Investigation of managing agents, etc.- (1) If the Government has reason to believe that the managing agent of a public company–

(a) has, in connection with the conduct or management of the affairs of the company, been guilty of fraud, misfeasance or breach of trust: or

(b) has been conducting the affairs of the company for a fraudulent or unlawful purpose; or

(c) has so conducted or managed the affairs of the company as to deprive the shareholders thereof of a reasonable return on their investment;

The Government may, after giving the managing agent an opportunity of being heard, appoint an investigator to enquire into the affairs of the company and to report on the conduct of the managing agent in such a manner and within such period as the Government may direct.

Explanation : The shareholders of a company shall be deemed to have been deprived of a reasonable return on their investment if, having regard to enterprises similarly placed, the company is unable to or does not declare any or an adequate dividend for a continuous period of three years.

(2) The investigator appointed under sub-section (1)-

(a) may, at any time, for the purpose of making any enquiry which he considers necessary, enter the premises of the company or the office, of the managing agent and may call for and inspect the books of accounts or documents in the possession of the company or managing agent and may seal or take into custody any books of accounts or documents for so long as may be necessary;

(b) shall have the same powers as are vested in a Court when trying a suit under the Code of Civil procedure, 1908 (Act V of 1908), in respect of the following matters, namely:-

(i) summoning and enforcing the attendance of any director or officer of the company or of the managing agent and examining him on oath or affirmation;

(ii) compelling the production of any books of accounts or documents; and

(iii) issuing commissions for the examination of witnesses;

(3) Any proceeding before the investigator shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Penal Code (Act XLV of 1860).

(4) If the Government, after considering the report submitted under sub-section (1), is of opinion that it is necessary to do so in the interest of the efficient management of the affairs of the company, the Government may, without prejudice to any other action that may be taken under this Act or any other law, by order in writing-

(a) modify the terms of the managing agent's agreement of management with the company ;

(b) require the managing agent to carry out such changes in the management or accounting procedures, within such time, as may be specified in the order ;

(c) remove from office the managing agent or the director of the company nominated by the managing agent, or both the managing agent or the director so nominated:

Provided that before taking any action under this sub-section, the managing agent shall be given an opportunity of presenting his case as to the proposed action.

(5) A managing agent or director removed from office under sub-section (4), shall not be entitled to or be paid any compensation or damages for loss or termination of office.

(6) A managing agent of a company who is removed from office under subsection (4) shall not be appointed to such office of that company until after the expiration of a period of five years from the date of such removal.

(7) Where the managing agent removed from office under sub-section (4) is a firm or a company, no partner of such firm and no director or officer holding a general power of attorney from such company shall hold the office of a director or any other office connected with the conduct or management of the affairs of the company of which it was managing agent, until after the expiration of a period of five years from the date of such removal.

(8) Where the managing agent of a company is removed from office under sub-section (4), the Government may by order in writing, appoint an Administrator, hereinafter referred to as the Administrator, to manage the affairs of the company subject to such terms and conditions as may be specified in the order.

(9) The Administrator shall receive such remuneration as the Government may determine.

(10) The management of the affairs of the company shall, on and from the date of appointment of the Administrator, vest in him.

(11) Where it appears to the Administrator that any purchase, sales or agency contract has been entered into, or any employment given to benefit the managing agent or his nominees and to the detriment of the interest of the general shareholders, the Administrator may, with the previous approval in writing of the Government, terminate such contract or employment.

(12) No person shall be entitled to or be paid any compensation or damages for the termination of any contract or employment under sub-section (11).

(13) If at any time it appears to the Government that the purpose of the order appointing the Administrator has been fulfilled, it may permit the company to appoint another person to the office of managing agent, and on the appointment of new managing agent, the Administrator shall cease to hold office.

(14) Save as provided in sub-section (15), no suit, prosecution or other legal proceeding shall lie against the Administrator personally for anything which is in good faith done or intended to be done by him in pursuance of this section or of any rules made there under, and anything so done shall be deemed to have been done by the company.

(15) Any person aggrieved by any order of the Government under subsection (4) or of the Administrator under sub-section (11) may, within sixty days from the date of the order, appeal against such order to the High Court Division.

(16) If any person fails, without reasonable cause, to furnish any books of accounts or documents called for under clause (a) of sub-section (2) or to comply with any order under clause (a) or clause (b) of sub-section (4) or contravenes the provisions of sub-section(6) or sub-section (7) the Government may, by order in writing, direct that such person shall pay by way of penalty a sum which may extend to ten thousand taka, and in the case of a continuing failure or contravention, a further sum which may extend to one thousand taka for every day after the first day during which the failure or contravention continues.

(17) The Government may, by notification in the official Gazette, direct that any power conferred upon it by this section shall, subject to such conditions, if any, as may be specified in the direction, be exercisable also by such person or authority as may be so specified.

(18) The Government may, by notification in the official Gazette, make rules to carry out the purpose of this section.

(19) The provisions of this section shall have effect notwithstanding anything contained in any other provision of this Act or any other law, contract, or the memorandum or articles of a company.

Notes/Comments/Precedents

Board's power to appoint managing agent : In view of the provision of section 87B(f) of the Companies Act, 1913 (corresponding to section 118 of the Companies Act, 1994) the Board of Directors has authority to appoint a new firm of partners to continue the work of managing agents only by way of temporary arrangement.

Under the law of partnership every partner may act on behalf of the firm so as to bind the firm unless otherwise provided in the partnership deed *[The Eastend Agencies Vs. Alhaj Mofizuddin. (1968) 20 D.L.R. 1056.]*

119. Remuneration of managing agent.– (1) Where a company appoints a managing agent, it shall, in the documents of appoint specify the following –

(a) the remuneration of the managing agent which shall be a sum based on fixed percentage of the net annual profits of the company; and

(b) a minimum payment, in the case of absence or inadequacy of profits, together with office allowance.

(2) Any stipulation for remuneration additional to, or in any form other than, the remuneration specified in sub-section (1) shall not be binding on the company unless sanctioned by a special resolution of the company.

(3) For the purpose of this section 'net profit's means the profits of the company calculated after allowing for all the usual working charges, interest on loans and advances, repairs and outgoing, depreciation, bounties or subsidies received from Government or from a public statutory body profits by way of premium on shares sold, profits on sale proceeds of forfeited shares, or profits from the sale of the whole or part of the undertaking of the company, but without any deduction in respect of income-tax or super-tax, or any other tax or duty on income or for expenditure by way of interest on debentures or otherwise on capital account or on account of any sum which may be set aside in each year out of the profits for reserve or any other special fund.

(4) This section shall not apply to a private company except a private company which is the subsidiary company of a public company or to any company whose principal business is the business of insurance.

120. Loans to managing agents.– (1) No company shall make to a managing agent of the company or to any partner of the firm, if the managing agent is a firm, or to any member of director of the private company if the managing

agent is a private company, any loan out of moneys of the company or guarantee any loan made to a managing agent.

(2) Nothing contained in this section shall apply to any credit held by a managing agent in current account maintained by the company with the managing agent for the purpose of the business of the company:

Provided that the Board of Directors may specify the limit of such credit.

(3) In the event of any contravention of sub-section (1) any director of the company who is a party to the making of the loan or giving of the guarantee shall be punishable with fine which may extend to five thousand taka and, if default is made in repayment of the loan or discharging the guarantee, shall be liable jointly and severally for the amount unpaid.

(4) Nothing in this section shall apply to a private company except a private company which is the subsidiary of a public company.

(5) Except with the consent of three-fourths of the directors present and entitled to vote on the resolution, a managing agent of the company, or the firm of which he is a partner, or any partner of such firm or, if the managing agent is a private company, a member or director thereof, shall not enter into any contract for the sale, purchase or supply of goods and materials with the company.

121. Loans to or by companies under the same management.– (1) No company incorporated under this Act which is under the management of a managing agent shall make any loan to or guarantee any loan made to any company under management of the same managing agent:

Provided that nothing herein contained shall apply to loans made or guarantees given by a company to or on behalf of a company under its own management or loans made by or to a company to or by a subsidiary thereof or to guarantees given by a company on behalf of a subsidiary thereof.

(2) In the event of any contravention of the provisions of this section, any director or officer of the company making the loan or giving the guarantee, who is knowingly and wilfully in default, shall be liable to a fine not exceeding five thousand taka and shall jointly and severally be liable for any loss incurred by the company in respect of such loan or guarantee.

Notes/Comments/Precedents

Loan and deposit : It is to be stated that there can be no controversy that in a transaction of a deposit of money or a loan, a relationship of a debtor and creditor must come in existence. The terms *deposit* and *loan* may not be mutually exclusive, but nonetheless, in each case what must be considered is the intention of the parties and the circumstances. *[Durga Prasad Mandela & others Vs. The Registrar of Companies (1986) 1 Comp. LJ 275.]*

122. Purchase by company of shares of company under same managing agent.– A company other than an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not purchase shares or debentures of any company under management by the same managing agent, unless the purchase has been previously approved by a unanimous decision of the Board of Directors of the purchasing company.

123. Restriction on managing agent's powers of management.– A managing agent shall not exercise, in respect of any company of which he is a managing agent, a power to issue debentures or, except with the authority of the directors and within the limits fixed by them, a power to invest the funds of the company and any delegation of any such powers by a company to a managing agent shall be void.

124. Managing agent not to engage in business competing with the business of managed company.– A managing agent shall not on his own account engage in any business which is of the same nature as and directly competes with the business carried on by a company under his management or by a subsidiary company of such company.

125. Limit on number of directors appointed by managing agent.– Notwithstanding anything contained in the articles of a company other than a private company, the directors appointed by the managing agent shall not exceed in number one-third of the whole number of directors.

CONTRACTS

126. Validity of written and unwritten contracts.– (1) Contracts on behalf of a company may be made as follows, that is to say–

(i) any written contract which, if made between individuals, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged; and

(ii) any contract which, if made between individuals, would by law be valid although made by parole only and not reduced into writing, may be made by parole on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

(2) All contract made according to this section shall be effectual in laws and shall bind the company and its successors and all other parties thereto, their heirs, or legal representatives, as the case may be.

Notes/Comments/Precedents

Form of contract : As long as the proposed contract is *intravires*, a company can, in general, enter into a contract in the same form as an individual.

No special requirement : This section puts a company in the same status as that of an individual. Any person properly authorised by the company may enter into a contract. And contracts may be entered into between two companies on a holiday *[Rollswin Investment Ltd. Vs. Chromolit (1970) 2 All E.R. 673.]*

Directors' power : Where a contract is *intraviers* the company but *ultravires* the directors, the company may be liable and may ratify it. So long as the act done by the directors is not inconsistent with the memorandum and articles, an outsider is entitled to assume that the directors have acted properly *[Royal British Bank Vs. Turquand (1956) 6 E. & B 327.]*

Contract before formation of company : A company cannot be bound by a contract entered into on its behalf before the company was formed nor could a company be brought into existence with the liability to enter into a contract with a third party the terms of which have been arranged before the company was formed *[Rajkumar Potdar Vs. Sholapur Spinning and Wearving Co. Ltd. (1934) 4 Comp Cas 481].*

The contract purported to be made by the company and signed on its behalf by a future director the contract was a nullity as the company was not in existence at that time *[Newborne Vs. Sensolid (G.B.) Ltd. (1954) 24 Comp. Cas. 159.]*

Ultimate ratification of invalid contract-effect : A contract which is *ultravires* the company cannot be enforced against the company even through all the members agree to purport to ratify it *[Ashbury Railway Carriage Co. Vs. Riche (1875) 7 H.L. 653.]*

127. Bills of exchange and promissory note.– A bill of exchange, hundi or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a company if made, drawn, accepted or endorsed in the name of, or on behalf or on account of, the company by any person acting under its authority, express or implied.

Notes/Comments/Precedents

Company liable for all acts done by the directors: A company is liable for all acts done by its directors even though unauthorised by it provided such acts are within the apparent authority of the directors and not *ultravires* of the company *[Ram Baran Singh Vs. Mufassil Bank Ltd. AIR 1925 All 206.]*

Promissory note signed by Managing Director : *Held–* Where the promissory note was signed by the managing director, the company is bound by the promissory note *[Chapmen Vs. Smethurst (1909) 1 K.B. 927.]*

Duty of third party : A third party dealing with an agent of a company cannot rely upon apparent authority but is bound to acquaint himself with the memorandum and articles *[Mercantile Bank Vs. Chartered Bank of India (1937) 1 All E.R. 231.]*

128. Execution of deeds.– A company may, by writing under its common seal empower any person, either generally or in respect of any specified matters, as its attorney to execute deeds on its behalf in any place, either in or outside Bangladesh; and every deed signed by such attorney, on behalf of the company and under his seal, where sealing is required, shall bind the company and have the same effect as if it were under its common seal.

Notes/Comments/Precedents

Where document under seal necessary : Where the articles of a company provided that certain types of agreement would be executed under the common seal of the company, a lease agreement executed by the Managing Director without common seal is not binding on the company *[Rajendra Nath Datta Vs. Shibendra Nath Mukherjee (1982) 52 Comp. Cas. 293.]* But if a document under seal is not necessary then a mere defect in the manner of affixing seal will not render the document invalid *[Dehradun Mussooric Electric Tramway Co. Ltd. Vs. Jagmandar Das (1931) 1 Comp. Cas. 227.]*

129. Power of company to have official seal for use abroad.– (1) A company whose objects require or comprise the transaction of business beyond the limits of Bangladesh may, if authorised by its articles, have for use in any territory, district or place not situated in Bangladesh, an official seal which shall be a facsimile of the common seal of the company with the addition on its face of the name of every territory, district of place where it is to be used.

(2) A company having such an official seal may, by writing under its common seal, authorise any person appointed for the purpose in any territory, district or place not situated in Bangladesh to affix the same to any deed or other document to which the company is party in that territory, district or place and such person shall be the agent for purpose of using the said seal.

(3) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period, if any, mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(4) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and also the territory, district or place of affixing the same.

(5) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

Notes/Comments/Precedents

Official seal–use abroad : The official seal of the company can be used outside Bangladesh if the articles of association of a company authorise such use. Where a company has any business at a place

outside Bangladesh a *facsimile* of the common seal may be kept there and the seal should contain the name of the place where the seal would be used. A person properly authorised to use the seal can only use it. He must sign his name, put the name of the place and the date and the fact that he has been authorised to do so by the specified resolution.

Fraudulent affixation of seal : Where the seal has been affixed fraudulently and signature were forged the rule of indoor management did not apply *[Royal British Bank Vs. Turquand (1856) 6 E & B 327.]*

130. Disclosure of interest by director in respect of contract etc.–

(1) Every director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company shall disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exist, or, in any other case, at the first meeting of the directors after the acquisition of his interest or the making of the contract or arrangement.

Provided that a general notice that a director is a director or a member of any specified company or of any specified firm, and is to be regarded as interested in any subsequent transaction with such firm or company, shall as regards any such transaction be sufficient disclosure within the meaning of this sub-section and after such general notice, it shall not be necessary to give any special notice relating to any particular transaction with such firm or company.

(2) Every director who contravenes the provisions of sub-section (1) liable to a fine not exceeding five thousand taka.

(3) A register shall be kept by the company in which shall be entered particulars of all contracts or arrangements to which sub-section (1) applies, and which shall be open to inspection by any member of the company at the registered office of the company during business hours.

(4) Every officer of the company who knowingly and wilfully acts in contravention of the provisions of sub-section (2) shall be liable to a fine not exceeding one thousand taka.

Notes/Comments/Precedents

Director interested : The interest or concern spoken of by this section cannot be merely sentimental interest or ideological concern. Therefore, a relationship of friendliness with the Directors who are interested in contract or arrangement or even the mere fact of a lawyer-client relationship with such directors shall not disqualify a person from acting as a Director on the ground of his being an "interested" Director. *[Needle Industries (India) Ltd. Vs. Needle Industries Newly (India) Holdings Ltd., AIR 1981-SC 1298.]*

Director's duty to disclose his interest : It is the duty of every director of a company, who is or may be interested directly or indirectly in any contract or arrangement entered or that may be entered into by or on behalf of the company, shall disclose the nature of his interest at a meeting of the Board. The disclosure should be made at the earliest possible stage. Such disclosure can be made by a letter stating the names of the companies in which the director is interested and as such he only for the

financial year in which it is given and therefore it should be renewed in the fact month of every year, where necessary. It is the duty of the director to see that such notice is placed before the first Board meeting and unless this is done the notice will have no effect. This section is in addition to any rule of law restricting a director from having any interest in any contract with the company.

Director's liability : Directors are like trustees in the exercise of their directorial powers and duties. A director must disclose the nature of his interest, if any, in any contract or arrangement entered or proposed to be entered into by the company at a meeting of the Board of directors. Default in compliance of the provision is punishable with fine.

Time for disclosure : The time for discharging the liability for disclosure of interests by the director is the first meeting of the Board held after a person holding the office of a director becomes concerned or interested in the contract of arrangement *[M.O. Varghese Vs. Thomas Stephen and Co. Ltd. and others (1970) 40 Comp. Cas. 1131 = AIR 1971 Ker 223.]*

Contract by relative of director : A director cannot be said to be in any way directly or indirectly interested in a contract within the meaning of the section, merely on the ground that such contract has been entered into by his relative with the company. The expression 'concerned or interested in a contract' signifies involvement of the director in the contract by personal interest or by duty which might come into conflict with the interest of the company which the director is bound to protect *[Ramijlal Baiswala Vs. Baiton cables Ltd. ILR (1964) Raj 135.]*

131. Prohibition of voting by interested director.– (1) No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested, nor shall his presence count for the purpose of forming a quorum at the time of any such vote, and if he does so vote, his vote shall not be counted:

Provided that the directors or any of them may vote on any contract of indemnity against any loss which they or any one or more of them may suffer by reason of becoming or being sureties or surety for the company.

(2) Every director who contravenes the provision of sub-section (1) shall be liable to a fine not exceeding five thousand taka.

(3) This section shall not apply to a private company:

Provided that where a private company is a subsidiary company of a public company, this section shall apply to all contracts or arrangement made on behalf of the subsidiary company with any person other than the holding company.

Notes/Comments/Precedents

The provisions of this section is in accordance with the principles of law that an agent cannot put himself in a position where his duty and his interest conflict. It is provided in this section that an interested director must not participate in the discussion or exercise his vote on the particular contract or arrangement. In *Firestone Tyre and Rubber Co. Vs. Synthetics and Chemicals Ltd. and others (1971) 41 comp. Cas 277)* it has been held that if such a director does vote, his vote shall be void, nor will his presence count for quorum.

Interest : The interest or concern cannot be merely sentimental interest or ideological concern. A relationship of friendliness with the directors who are interested in contract or arrangement for even the mere fact of a lawyer client relationship with such directors will not disqualify a person from acting as a director on the ground of his being an interested director *[Needle Industries (India) Ltd. Vs. Needles Industries Newly (India) Holdings Ltd. A. 1981 S.C. 1298 = 51 Comp. Cas. 743.]*

132. Disclosure to members in case of contract appointing a manager.- (1) Where a company enters into a contract for the appointment of a manager or managing agent of the company in which contract any director of the company is directly or indirectly concerned or interested, or varies any such existing contract, the company shall, within twenty-one days from the date of entering into the contract or the varying of the contract, send an abstract of the terms of such contract or variation, as the case may be, together with a memorandum clearly indicating the nature of the interest of the director in such contract, or in such variation, to every member; and the contract shall be open to inspection of any member at the registered office of the company.

(2) If a company makes default in complying with the requirements of sub-section (1), it shall be liable to a fine not exceeding five thousand taka; and every officer of the company, who is knowingly and wilfully in default, shall be liable to the like penalty.

133. Contracts by agents of company in which company is undisclosed principal.- (1) Every manager or other agent of a company other than a private company, not being the subsidiary company of a public company, who enters into a contract for or on behalf of the company in which contract the company is an undisclosed principal shall, at the time of entering into the contract, make memorandum in writing of the terms of the contract, and specify therein the person with whom it has been made.

(2) Every such manager or other agent shall forthwith deliver the memorandum aforesaid to the registered office of company and send copies to the directors, and such memorandum shall be filed in the office of the company and laid before the directors at the next directors meeting.

(3) If any such manager or other agent makes default in complying with the requirements of this section-

(a) the contract shall, at the option of the company, be void as against the company; and

(b) such manager or other agent shall be liable to a fine not exceeding five hundred taka.

PROSPECTUS

134. Dating of prospectus.- A prospectus issued by or on behalf of a company or in relation to an intended company shall be dated, and that date shall, unless the contrary is proved, be taken as the date of publication of the prospectus.

Notes/Comments/Precedents

Definition of prospectus : The word 'Prospectus' means any document by which capital is offered to the public and upon the basis of which the applicant has actually subscribed. It is a circular issued by the promoters or the directors of a Company to induce the public to subscribe for share.

Prospectus- invitation to public : In order to be a prospectus, a document must be an invitation to make an offer to at least one member of the public to subscribe for shares or debentures. But the term issue is not satisfied by a single private communication *[Nash. Vs. Lynde (1929) A.C. 158.]*

Issued -meaning of : The word issued means issued to the public. Even an offer to a single person may be an offer to the public *[In Re South of England Natural Gas Co. (1911) 1 Ch. 573.]*

135. Matters to be stated and reports to be set out in prospectus.- (1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of a company shall state the matters and set out the reports specified in parts I and II respectively of scheduled III; and the said Parts I and II shall have effect subject to the provisions contained in Part III of the said schedule.

(2) Where an applicant for shares in or debentures of a company is required to accept a condition which has the effect of waiving the compliance with any of the requirements of this section, or which purports to effect him with notice of any contract document of matter not specifically referred to in the prospectus, such condition shall be void.

(3) No person shall issue any form of application for shares in or debentures of a company, unless the form is accompanied by a prospectus which complies with the requirements of this section:

Provided that this sub-section shall not apply if it is shown that the form of application was issued either-

(a) in connection with a bonafide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures; or

(b) in relation to shares or debentures which were not offered to the public.

(4) If any person act in contravention of the provisions of sub-section (3), he shall be punishable with fine which may extend to five thousand taka.

(5) A director or other person responsible for the prospectus shall not incur any liability by reason of any non compliance with, or contravention of, any of the requirements of this section, if-

(a) as regards any matter not disclosed, he proves that he had no knowledge thereof; or

(b) he proves that the non-compliance or contravention arose from an honest mistake of the fact on his part; or

(c) the non-compliance or contravention was in respect of matters which in the opinion of the court dealing with the case, were immaterial or was otherwise such as ought, in the opinion of the court, having regard to all the circumstances of the case, reasonable to be excused :

Provided that no director or other person shall incur any liability in respect of the failure to include in a prospectus a statement with respect to the matters specified in clause 18 of Part I of Schedule III, unless it is proved that he had knowledge of the matters not disclosed.

(6) This section shall not apply-

(a) to the issue to existing members or debentures holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debenture will or will not have the right to renounce in favour of other persons: or

(b) to the issue of a prospectus or form of application relating to shares or debentures which are, or are to be, in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a recognised stock exchange;

but subject as aforesaid this section shall apply to a prospectus or a form of application, whether issued on or with reference to the formation of a company or subsequently.

(7) Nothing in this section shall limit or diminish any liability which any person may incur under any other law or under this Act apart from this section.

Notes/Comments/Precedents

Need for Prospectus : When a company has been registered and has received its certificate of incorporation, it is ready for "flotation", that is to say, it wishes to raise capital sufficient to commence business and to carry it on satisfactorily.

When a private company is formed, the necessary capital is obtained from friends and relatives of the promoters by private arrangements, and the public at large cannot be invited to subscribe to its share capital. But when a public company is formed, it is almost invariably the intention of the promoters to raise the greater part of the capital from the general public. For that purpose an invitation in the form of a prospectus is issued to the public to subscribe to the capital of the company.

True, there are public companies which have never invited the public to subscribe to their share capital, for they were floated to take other advantages of incorporation not available to private companies, e.g., to have unlimited number of members, to confer unrestricted right to transfer shares on the members, to issue share warrants, etc. Nevertheless, by far the largest number of public companies raise their capital in the first instance by issuing shares to optimistic members of the general public, who hope to benefit by investing their money in a rapidly developing enterprise. They repeat this process as many times as it require in the course of their existence, so that the first issue of shares may well follow by other latter issues as the business expands and new capital is needed. For this purpose public companies normally issue prospectus although there are other methods of public offers of shares or debentures.

It is essential that a prospectus should contain a full, accurate and fair picture of the financial position of the company and the prospects of its earning profits in the future so that before applying for any share or debentures the prospective shareholders or debenture-holders may know the risk that they would be incurring or advantages that they would have.

136. Expert to be unconnected with formation or management of company.- A prospectus inviting persons to subscribe for shares in or debentures of a company shall not include a statement purporting to be made by an expert, unless the expert is a person who is not, and has not been, engaged or interested in the formation or promotion, or in the management of the company.

137. Expert's consent to issue of prospectus containing statement by him.- A prospectus inviting persons to subscribe for shares in or debentures of a company and including a statement purporting to be made by an expert may be issued, if :

(a) he has given his written consent to the issue thereof, with the statement included in the form and context in which it is included, and has not withdrawn such consent before the delivery of a copy of the prospectus for registration; and

(b) another statement that he has given and has not withdrawn his consent as aforesaid appears in the prospectus.

Notes/Comments/Precedents

Inclusion of Consent of expert–object of : A statement of an expert cannot be included in the prospectus without his written consent and this fact should be mentioned in the prospectus. The prospectus cannot be issued if the consent of the expert is withdrawn subsequently.

This is a wholesome rule intended to protect an intending investor by making the expert a party to the issue of the prospectus and making him liable for untrue statements. If the prospectus is based upon the report of an expert which contains false statements of facts of a person who applied for share relaying on the report may rescind the contract unless the directors has clearly warned the public that they did not vouch for the accuracy of the report *[Mair Vs. Rio Grande Rubber Estates (1913) A.C. 853.]*

138. Registration of prospectus.- (1) No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless, on or before the date of its publication, there has been delivered to the Registrar for registration a copy thereof signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing.

(2) The copy of the prospectus delivered to the Registrar for registration under of sub-section (1) shall have endorsed thereon or attached thereto-

(a) any consent to the issue to the prospectus required by section 137 from any person as an expert; and

(b) in the case of a prospectus issued generally, also:

(i) a copy of every contract specified in clause 16 of part of a Schedule III or in the case of a contract not reduced into writing a memorandum giving full particulars thereof; and

(ii) where the persons making any report required by Part II of that schedule have made therein, or have, without giving the reasons, indicated therein, any such adjustments as are mentioned in clause 32 of Part II of the Schedule, a written statement signed by those persons setting out the adjustments and giving the reasons therefor.

(3) Every prospectus to which sub-section (1) applies shall, on the face of it-

(a) state that a copy has been delivered for registration as required by this section ; and

(b) specify any document required by this section to be endorsed on or attached to the copy so delivered; and

(c) a list of statements included in the prospectus.

(4) The Registrar shall not register a prospectus unless the requirements of section 134, 135, 136 and 137 and sub-section (1), (2) and (3) of this section have been complied with and the prospectus is accompanied by the consent in writing of the person, if any, named therein as the auditor, legal adviser, attorney, solicitor, banker or broker of the company or intended company, to act in that capacity.

(5) No prospectus shall be issued more than ninety days after the date on which a copy thereof is delivered for registration; and if a prospectus is so issued, it shall be deemed to be a prospectus a copy of which has not been delivered under this section to the Registrar.

(6) If a prospectus is issued without a copy thereof being delivered under this section to the Registrar or without the copy so delivered having been endorsed thereon or attached thereto the required consent or documents, the company, and every person who is knowingly and willingly a party to the issue of the prospectus, shall be punishable with fine which may extend to five thousand taka.

Notes/Comments/Precedents

Prospectus issued before registration : The prospectus issued before registration- held: illegal */R. Vs. Tyler (1981) 2 QB. 588./*

139. Penalty for contravention of section 136 and 137.- (1) If any prospectus is issued in contravention of sections 136 or 137, the company and every person, who is knowingly a party to the issue thereof, shall be punishable with fine which may extend to five thousand taka.

(2) For the purposes of this section and section 136 and 137, the expression "expert" includes an engineer, a valuer, an accountant and any other person whose profession gives authority to a statement made by him.

140. Allotment of shares and debentures to be dealt in on stock exchange.- (1) Where a prospectus, whether issued generally or not, states that an application has been, or will be, made for permission for the shares or debentures offered thereby to be dealt in one or more recognised stock exchanges, such prospectus shall state the name of the stock exchange or, as the case may be, each such stock exchange, and any allotment made on an application in pursuance of the prospectus shall be void, if the permission has not been applied for before the tenth day after the first issue of the prospectus, or where such permission has been applied for before issue of prospectus, if the permission has not been granted by the stock exchange or each such stock exchange, as the case may by, within six weeks after the date of the closing of the subscription.

(2) Where the permission referred to in sub-section (1) has not been applied for or, such permission having been applied for, has not been granted as specified in this sub-section, the company shall repay without interest all moneys received from applicants in pursuance of the prospectus, and if any such money is not repaid within thirty days after the tenth day or as the case may be, the six weeks as specified in that sub-section, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five percent above the bank rate:

Provided that a director shall not be liable if he proves that the default in the payment of the money was not due to any misconduct or negligence on his part.

(3) All moneys received as subscription for the allotment of shares or debentures shall be kept in a separate bank account and shall be repaid within the time and the manner specified in sub-section (2) and if default is made in complying with this sub-section, the company and every officer of the company who is knowingly and wilfully in default shall be punishable with fine not exceeding five thousand taka.

(4) Where an applicant for shares or debentures is required to accept a condition which has the effect of waiving compliance with any requirement of this section shall be void.

(5) For the purposes of this section, permission shall not be deemed to be refused if it is intimated that the application for it will be given further consideration.

(6) The other provisions of this section shall have effect-

(a) in relation to any shares or debentures agreed to be taken by a person underwriting an offer thereof by a prospectus, as if he had applied thereof in pursuance of the prospectus;

(b) in relation to prospectus offering shares for sale, with the following modifications, namely:-

(i) references in the said other provision to sale shall be substituted for references to allotment;

(ii) the persons by whom the offer is made, and not the company, shall be liable under sub-section (2), to repay money received from applicants, and references to the company's liability under that subsection shall be construed accordingly; and

(iii) for the reference in sub-section (3) to "the company" and "every officer of the company who is knowingly and wilfully in default," there shall be substituted a reference to "any person by or through whom the offer is made" and who is knowingly and wilfully guilty or, wilfully, authorises, or permits, the defaults" respectively.

(7) No prospectus shall state that application has been made for permission for the shares or debentures offered there by for being dealt in an stock exchange, unless it is a recognised stock exchange.

141. Obligations of companies where no prospectus issued.- (1) A company having a share capital which does not issue a prospectus on or with reference to its formation, on which has issued such a prospectus but has not proceeded to allot any of its shares or debentures offered to the public for subscription shall not allot any of its shares or debentures unless within three days after the first allotment of either shares or debentures, there has been delivered to the Registrar for registration a statement in lieu of prospectus, signed by every person who is named therein as a director or proposed director of the company or his agent authorised in writing in the form and containing the particulars set out in part I of Schedule IV and, in the cases mentioned in Part II of that Schedule, setting out the reports specified therein, and the said Part I and II shall have effect subject to the provisions contained in Part III of that Schedule.

(2) Every statement in lieu of prospectus delivered under sub-section (1) shall, where the persons making any such report as specified that sub-section have made therein, or have without giving the reasons indicated therein, any such adjustments as are mentioned in Part III of the Schedule IV have endorsed thereon or attached thereto a written statement signed by those person, setting out the adjustment and giving the reasons thereof.

(3) This section shall not apply to a private company.

(4) If a company acts in contravention of sub-section (1) or (2) the company and every director of the company who knowingly and wilfully authorise: or permits the contravention, shall be punishable with fine which may extend to five thousand taka.

(5) Where a statement in lieu of prospectus delivered to the Registrar under sub-section (1) includes any untrue statement, any person who authorised or permitted the delivery of the statement in lieu of prospectus for registration shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend five thousand

taka or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did up to the time of the delivery for registration of the statement in lieu of prospectus believe, that the statement was true.

(6) for the purposes of this section-

(a) a statement included in a statement in lieu of prospectus shall be deemed to be untrue, if it is misleading in the form and context in which it is included; and

(b) where the omission from a statement in lieu of prospectus of any matter is calculated to mislead, the statement in lieu of prospectus shall be deemed, in respect to such omission, to be a statement in lieu of prospectus containing an untrue statement.

(7) For the purposes of sub-section (5) and clause (a) of sub-section (6) the expression "included", when used with reference to a statement in lieu of prospectus, means included in the statement in lieu to prospectus itself or contained in any report or memorandum appearing on the face thereof or by reference incorporated therein, or issued therewith.

Notes/Comments/Precedents

Recision of contract : It has been held in an English decision that the common law remedy of damages for deceit and the equitable remedy of recession naturally apply in exactly the same way as in the case of prospectus.

If a person applying for shares inspects the statement in lieu of prospectus, the statement becomes the basis of the contract between him and the company, and if it contains a false statement, he has a right to rescind it.

142. Document containing offer of shares or debentures for sale to be deemed a prospectus.- (1) where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes be deemed to be a prospectus issued by the company, and all enactments and rules of law as to the contents of prospectus and as to liability in respect of statements in and omissions from prospectus, or otherwise relating to prospectus, shall apply and have effect accordingly as if the shares or debentures had been offered to the public for subscription and as if the persons accepting the offer in respect of any shares or debentures were subscribers for those shares or debentures but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of misstatements contained in the document or otherwise in respect thereof.

(2) For the purposes of this Act, it shall, unless the contrary is proved, be evidence that an allotment or an agreement to allot shares or debentures was made with a view to the shares or debentures being offered for sale to the public if it is shown-

(a) that an offer of the shares or debentures or of any of them for sale to the public was made within one hundred and eighty days, after the allotment or agreement to allot; or

(b) that at the date when the offer was made, the whole consideration to be received by the company in respect of the shares or debentures had not been so received.

(3) In case of the document, mentioned in sub-section (1), section 135 shall have effect as if it required a prospectus to state, in addition to the matters required by that section to be stated, in a prospectus-

(a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates; and

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

(4) Section 138 shall apply to the person or persons making the offer mentioned in sub-section (1) as though they were person named in a prospectus as directors or proposed directors of a company.

(5) Where the persons making an offer mentioned in sub-section (1) is a company or firm, it shall be sufficient if the document referred in sub-section (1) is signed on behalf of the company or firm by two directors of the company or by not less then one-half of the partners in the firm, as the case may be, and any such director or partner may sign by his agent authorised in writing.

143. Interpretation of provisions relating to prospectus.- (1) For the purposes of the provisions relating to prospectus-

(a) a statement included in a prospectus shall be deemed to be untrue, if the statement is misleading in the form and context in which it is included; and

(b) where the omission from a prospectus or any matter is calculated to mislead, the prospectus shall be deemed, in respect of such omission to be a prospectus containing untrue statement.

(2) For the purposes of section 145, 146 and clause (a) of sub-section (1) of this section, the expression "Included" when used with reference to a prospectus, means included in the prospectus itself or contained in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith.

Notes/Comments/Precedents

Calculated- meaning of : The word 'calculated' suggests design, forethought or intention to accomplish a purpose. 'Calculated' primarily means to compute mathematically, but when applied to human action it is used in the sense of to intend, to design to plan or to adapt, to achieve a purpose *[Rattan Singh Vs. Maga Transport Co. Ltd. (1959) 19 Comp. Cas 165.]*

144. Restriction on alteration of terms of prospectus or statement in lieu of prospectus.- A company shall not, at any time, vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus, except with the approval of, or except under an authority given by the company in general meeting.

145. Civil liability for misstatement in prospectus.- (1) Subject to the provisions of this section where a prospectus invites members of the public to subscribe for shares in or debentures of a company, the following persons shall be liable to pay compensation to every person who subscribes for any shares or debentures on the faith of the prospectus for any loss or damage he may have sustained by reason of any untrue statement included therein, that is to say–

(a) every person who is a director of the company at the time of the issue of the prospectus;

(b) every person who has authorised himself to be named and is named in the prospectus either as a director, or as having agreed to become a director, either immediately or after an interval of some time;

(c) every person who is a promoter of the company; and

(d) every person who has authorised the issue of the prospectus:

Provided that where, under section 138, the consent of a person is required to the issue of a prospectus and he has given that consent, or where the consent of a person named in a prospectus is required and he has given that consent, he shall not, by reason of having given such consent, be liable under this sub-section as a person who has, as referred to in clause (d), authorised the issue of the prospectus, except in respect of an untrue statement, if any, which is included in accordance with section 137 with the consent or under the authority of a person purporting to be an expert.

(2) No person shall be liable under sub-section (1), if he proves–

(a) that, having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or

(b) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or

(c) that, after the issue of the prospectus and before allotment, thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent to the prospectus and gave reasonable public notice of the withdrawal and of the reason therefor; or

(d) that–

(i) as regards every untrue statement, not purporting to be made on the authority of an expert or of a public official documents or statement, he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement was true; and

(ii) as regards every untrue statement purporting to be a statement 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 and 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 person had given the consent required by section 137 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; and

(iii) as regards every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of that statement, or correct copy of or a correct and fair extract from, the document:

Provided that this sub-section shall not apply in the case of a person liable by reason of his having given a consent required of him by section 137 as a person who has authorised the issue of the prospectus in respect of an untrue statement purporting to be made by him as an expert.

(3) A person who, would, under sub-section (1) be liable by reason of his having given consent required of him by section 137 as a person who has authorised the issue of a prospectus in respect of an untrue statement purporting to be made by him as an expert, shall not be so liable, if he proves–

(a) that having given his consent under section 137 to the issue of the prospectus, he withdrew if in writing before delivery of a copy of the prospectus for registration; or

(b) that, after delivery of a copy of the prospectus for registration and before allotment thereunder, he, on becoming aware of the untrue statement, withdrew his consent in writing and gave reasonable public notice of the withdrawal and of the reason therefore; or

(c) that he was competent to make the statement and that he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, believe, that the statement was true.

(4) Where–

(a) the prospectus specifies the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issued thereof; or

(b) the consent of a person is required under section 137 to the issue of the prospectus and he either has not given that consent or has withdrawn it before issue of the prospectus :

The directors of the company excluding those without whose knowledge or consent the prospectus was issued and every other person who authorised the issue thereof, shall be liable to indemnify the person referred to in clause (a) or clause (b), as the case may be, against all damages, costs and expenses to which he may be made liable by reason of his name having been interested in the prospectus or of the inclusion therein of a statement purporting to be made by him as an expert, as the case may be, or in defending himself in any suit or legal proceeding brought against him in respect thereof:

Provided that a person shall not for the purposes of this sub-section be deemed to have authorised the issue of a prospectus by reason only of his having given the consent required by section 137.

(5) Every person who, becomes liable to make any payment by virtue of this section may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the former person was, and the later person was not, guilty of fraudulent misrepresentation.

(6) For the purposes of this section-

(a) the expression "promoter" means a promoter who was a party to the preparation of the prospectus or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company; and

(b) the expression "expert" has the same meaning as in section 139.

Notes/Comments/Precedents

What to be proved : An allottee must prove that- (i) the misrepresentation was of fact, (ii) it was in respect of material fact, (iii) he acted on the misrepresentation and (iv) he has suffered damages in consequence. He may not be able to show that it was a sole fact relied upon. It will be sufficient if he shows that the misrepresentation is one of the facts relied upon by the allottee. What is a material statement of fact will depend upon the circumstances of each case *[Ross V's Estates Investment Co. (1868) 3 Ch. App. 682.]*

Misrepresentation – Public Interest litigation : *Held-* It is true, if a subscriber wants to take an action, it is open to him to take such action; but that does not mean that any other person who is not interested in this company at all can ever come forward and say that the statements contained in the prospectus are false, and that they are void, and that a future investor might be duped and that he might suffer and therefore, the company should be restrained from acting in any particular manner *[Kisan Mehta Vs. Universal Luggage Manufacturing Co. Ltd. (1988) 2 Comp. LJ 136 (Bom).]*

Personal Liability of Promoter – Continuance : The personal liability of the promoter to third parties for all contracts made on behalf of the intended company continues, until, their consent, the company takes over this liability. The mere fact of constitution and registration does not discharge the promoter *[D.R. Patel Vs. A.S. Dimellow (1961) M.P. LJ. 315.]*

146. Penalty for untrue statement in prospectus.– (1) Where a prospectus issued after the commencement of this Act includes any untrue statement, every person who authorised the issue of the prospectus shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to give thousand taka or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did, up to the time of the issue of the prospectus, believe that the statement was true.

(2) A person shall not be deemed for the purposes of this section to have authorised the issue of a prospectus by reason only of his having given–

(a) the consent required by section 137 to the inclusion therein of statement purporting to be made by him as an expert; or

(b) the consent required by sub-section (4) of section 138.

147. Penalty for fraudulently inducing persons to invest money.- Any person who either by knowingly or recklessly making any statement, promise or forecast which is false, deceptive or misleading, or by any dishonest concealment of material facts, induces or attempts to induce another person to enter into, or to offer to enter into–

(a) any agreement for, or with a view to acquiring, disposing of, subscribing for, or underwriting shares or debentures; or

(b) any agreement, the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of shares or debentures, or by reference to fluctuations in the value of shares or debentures ;

shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to fifteen thousand taka or with both.

Notes/Comments/Precedents

Scope : Section 147 of the Companies Act, 1994 provides a heavy penalty for fraudulently inducing persons to invest money in a company.

Suppression of fact : In *M.K. Sreenivasan AIR (1944) Mad 410* it has been held that where the prospectus suppressed the facts about transfer of concerns to the company, persons responsible were liable for criminal conspiracy.

Negligence whether means Recklessly : The tern must be left to bear its full meaning and be construed as covering also the case of where there is a high degree of negligence without dishonesty *[R. Vs. Bates (1952) 2 All E.R. 842]*

148. Restrictions to allotment.- (1) No allotment shall be made of any share capital of a company offered to the public for subscription unless the following amount and at least 5% of that amount have been paid in cash to the company, namely–

(a) the amount stated in the prospectus as the minimum amount which in the opinion of the directors, must be raised by the issue of share capital in order to provide for the matters specified in sub-section (2); or

(b) if any part of the minimum amount is to be defrayed in any other manner, the balance of the minimum amount after deducting the amount required to be so defrayed.

(2) The matters for which provision for the raising of a minimum amount of share capital must be made by the directors are the following namely-

(a) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;

(b) any preliminary expenses payable by the company and any commission so payable to any person in consideration of this agreeing to subscribe for or of his procuring or agreeing to procure subscriptions for any shares in the company;

(c) the repayment of any moneys borrowed by the company in respect of the foregoing matters; and

(d) working capital.

(3) The amount referred to in sub-section (1) as the amount stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as the minimum subscription.

(4) All moneys received from applicants for shares shall be deposited and kept in a scheduled bank as defined in the Bangladesh bank Order, 1972 (PO No.127 of 1972), until returned in accordance with the provisions of sub-section (7) or until the certificate to commence business is obtained under section 150(2).

(5) In the event of any contravention of the provisions of sub-section (4) every promoter, director or other person knowingly responsible for such contravention shall be liable to a fine not exceeding five thousand taka.

(6) The amount payable on application on each share shall not be less than five percent of the nominal amount of the share.

(7) If the conditions aforesaid have not been complied within a period not exceeding one hundred and eighty days after the first issue of the prospectus, or within forty days from the closing date of subscription-list as specified in the prospectus, whichever is earlier, all moneys received from applicants for shares or debentures shall be forthwith repaid to them without interest, and if any such money is not so repaid within the aforesaid period, the directors of the company, shall be jointly and severally liable to repay that money with interest at the rate of five percent above the bank rate after expiry of the aforesaid period.

(8) No allotment shall be made of any shares in, or debentures of, a company in pursuance of a prospectus issued and no proceedings shall be taken on applications made in pursuance of a prospectus so issued, until the beginning of the eighth day after that on which the prospectus is first so issued or such later time, if any as may be specified in the prospectus.

Provided that where, after a prospectus is first issued, a public notice is given by some person responsible under section 145 for the prospectus which has the effect of excluding, limiting or diminishing his responsibility, no allotment shall be made until the beginning of the eight day after that on which such public notice is first given.

(9) An application for shares in, or debentures of, a company, which is made in pursuance of a prospectus issued shall not be revocable until after the expiration of the eighth day after the time of the opening of the subscription list, or the giving, before the expiry of the said eighth day by some person responsible under section 145 for the prospectus, of a public notice having the effect under that section of excluding, limiting or diminishing the responsibility of the person giving it.

(10) Where an applicant for shares or debentures is required to accept condition which has the effect of waiving compliance with any requirement of this section shall be void.

(11) This section, except sub-section (6) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

(12) In the case of the first allotment of share capital payable in cash of any company which does not issue any invitation to the public to subscribe for its shares, on allotment shall be made unless the minimum subscription, that is to say–

(a) the amount, if any fixed by the memorandum or articles and named in the prospectus or in the statement in lieu of prospectus as the minimum subscription upon which the director may proceed to allotment; or

(b) if no amount is so fixed and named, the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash;

has been subscribed and an amount not less than five percent of the nominal amount of each share payable in cash has been paid to and received by the company.

(13) Sub-section (12) shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act.

Notes/Comments/Precedents

Allotment : It means and implies a division of the share capital into definite shares of a particular value or of different classes and assignment of such shares to different persons. It does not include re-issue of forfeited shares and therefore filing of a return of re-allotment of such shares with the Registrar is not necessary *[Calcutta Stock Exchange A 1957 Cal 438.]*

Application of money : The money payable on application for each share shall not be less than 5% of the nominal value of the share. All money received form applicants for shares shall be deposited and kept deposited in a scheduled bank until the certificate to commence business is obtained; or where the certificate of commencement has been received until the entire amount payable on applications for shares in respect of the minimum subscription has been received.

149. Effect of irregular allotment.– (1) An allotment made by a company to an applicant in contravention of the provision of section 141 or section 148 shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later or, in any case where the company is not required to hold a statutory meeting or where the allotment is made after the holding of the statutory meeting, within one month after the date of the allotment and not later, and shall be so voidable notwithstanding that the company is in the course of being wound up.

(2) If any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions of section 141 or section 148 with respect to allotment, he shall be liable to compensate the company and the allottee for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby:

Provided that proceedings to recover any such loss, damages or costs shall not be commenced after the expiration of two years from the date of the allotment.

Notes/Comments/Precedents

Irregular allotment–ratification : An irregular allotment of shares can be ratified subsequently by the shareholders of the company at a general meeting *[Bamford V's. Bamford (1969) 39 Comp. Cas 369.]*

150. Restrictions or commencement of Business.- (1) A company shall not commence any business or exercise any borrowing powers unless-

(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and

(b) every director of the company has, out of the shares taken or contracted to be taken by him, paid in cash on each of the shares:

(i) where the shares are offered for public subscription, an amount equal to the amount to be paid on application for shares by the members of the public; or

(ii) where the shares are not offered, an amount payable in cash by the director on such share;

(c) there has been filed with the Registrar a duly verified declaration by the secretary or one of the directors in the prescribed form, that the aforesaid conditions have been complied with; and

(d) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the Registrar a statement in lieu of prospectus.

(2) The Registrar shall, on the filing of a duly verified declaration, in accordance with the provisions of sub-section (1) certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled:

Provided that is the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, the Registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3) Any contract made by a company before that date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares, and debentures or the receipt of any money payable on application for shares or debentures.

(5) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding one thousand taka for every day during which the contravention continues.

(6) Nothing in this section shall apply to a private company, or to a company which does not issue a prospectus inviting the public to subscribe for its shares, and the provisions of this section in so far as they relate to shares, shall not apply to a company limited by guarantee and not having a share capital.

Notes/Comments/Precedents

Commencement of business : As soon as a private company or a company having share capital is incorporated it can commence business and exercise its various powers, but a public company having share capital has to obtain a certificate to commence business from the Registrar before it can commence business or exercise its borrowing powers.

Directions as to Restrictions : The direction in section 150(1)(a) of the Act that shares to an amount not less than in the whole than the minimum subscription should be allotted and be held subject to the payment of the whole amount thereof in cash is imperative. The condition laid down therein will not be complied with in a case where the company allots shares in lieu of debts payable by the company for the purpose of subscription of minimum shares *[Malabar Iron and Steel works Ltd. Vs Registrar of Companies, Kerala (1965) 2 Comp L.J. 143 (Kerala).]*

Contracts prior to issuance of certificate : After incorporation but before obtaining the certificate of commencement of business, if a contract is entered into by the company such contract can be enforced against the company only if the company gets the certificate of commencement and is entitled to commence business but without any further act *[Otto Electrical Manufacturing Co. Ltd. (1906) 2. Ch. 390.]*

151. Return as to allotment.– (1) Where a company having a share capital makes any allotment of its shares, the company shall, within sixty days thereafter, file with Registrar the following documents, namely:–

(a) a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the name, address, nationality and other descriptions of the allottees, and the amount, if any, paid or due and payable on each share ; and

(b) in the case of shares allotted as fully or partly paid up otherwise than in cash, the copies of the following agreements duly stamped and verified in the prescribed manner ; namely:-

(i) vendor's agreement, that is the agreement which constitutes the title of the allottee to the allotment; and

(ii) the contract of sale or service or other consideration respect of which the allotment was made;

(c) the number and nominal value of the allotted shares referred to in clause (b); and

(d) the deed of sale of any immovable property, if the consideration in for allotment of shares referred to in clause (b) is sought to be paid by the allottee by way of transfer of such property.

(2) Where a contract mentioned in sub-section (1) is not reduced to writing the company shall, within one month after the allotment, file with the Registrar the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing, and these particulars shall be deemed to be an instrument within the meaning of the Stamp Act, 1899 (II of 1899) and the Registrar may, as a condition of filing the particulars, require that the stamp duty payable thereon be adjudicated under section 31 of that Act.

(3) If the Registrar is satisfied that in the circumstances of any particular case the period of sixty days specified in sub-sections (1) and (2) for compliance with the requirements of this section is inadequate, he may, on an application made by the

company before expiry of the sixty days, extend that period as he thinks fit, and if he does so, the provisions of sub-section (1) and (2) shall have effect in that particular case as if for the extended period allowed by Registrar specified in those sub-sections.

(4) If a company defaults in complying with the requirements of this section, every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding one thousand taka for every day during which the default continues:

Provided that, in case of default in filling with the Registrar within the time specified in sub-sections (1) and (2) any document required to be filed by this section, the company or any person liable for the default may apply to the Court, for relief, and the Court, if satisfied that the omission to file the document was accidental or due to inadvertence or that on other grounds it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such a period as the Court may think proper.

Notes/Comments/Precedents

Scope : The term "Allotment" means the appropriation out of previously unappropriated capital of a company of a certain number of shares to a person. The re-issue of forfeited share is not allotment in the above sense and hence no question of filing any return in respect of such shares arises *[Shree Gopal Jalan and Co. Vs. Calcutta Stock Exchange Association Ltd. AIR 1964 S.C. 250 =(1963) 33 Comp. Cas. 862.]*

Vender's agreement filing whether necessary : Filing of the vendor's agreement to the Registrar of Joint Stock Companies-not necessary where bonus accrued to the share-holders are not paid in cash but adjusted by issue of shares of the like amount to the share-holders *[Landole and Margan Pakistan Ltd. Petitioner, (1970) 22 D.L.R 723.]*

Condonation of Delay : Delay in filing return of the allotment of shares to the Registrar within the time prescribed due to *bona fide* mistake and inadvertence without having any ulterior motive may be condoned and time may be extended by the High Court for filing such returns *[Anwar Jute Baling Limited, (1969) 21 D.L.R. 413.]*

Return of allotment of shares was filed with the Registrar of Joint Stock Companies in due time-Subsequent detection of mistake in the return in regard to the number of shares does not nullify the fact of filing the return in due time. *[Landole and Margan Pakistan Ltd. Petitioner, (1970) 22 D.L.R 723.]*

It is contended on behalf of the petitioner that the delay was unintentional and if the delay is not condoned, the share-holders of the Company will be seriously prejudiced. Accordingly, the delay in filing the return of the allotment of certain bonus shares as has been passed by the Annual General meetings held on 20-12-84, 28-6-89, 27-3-94 and 25-4-96 is condoned and the said application is allowed. *[National Tea Company Ltd. Vs. Registrar of Joint Stock Companies. 5 BLC (2000) 98]*

Makes an Allotment of it's shares : The proper construction of the expression "makes an allotment of its share" is by limited it to the case of creating of new shares and issue of new shares out of the share capital of the company and offered to the public for subscription, and not exceeding it to include the case of a share reissued after forfeiture *[In Re Calcutta Stock Exchange Association Ltd. AIR 1957 Cal 438 = (1957) 27 Comp. Cas. 559 = 61 CWN 448.]*

Non Filing of Return : It has been held that non filing of return of allotment of shares with the Registrar of the Companies will not render allotment bad *[Govind Pritem Das Malkani Vs. Amarendra Nath Sircar (1980) 50 Com. Cas. 219.]*

COMMISSIONS AND DISCOUNTS

152. Restrictions of payment of commissions, discounts, etc.– (1) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscription, whether absolutely or conditionally for any shares in the company, if–

(a) the payment of the commission is authorised by the articles and the commission paid or agreed to be paid does not exceed the amount or rate so authorised; and

(b) if the amount of rate of percentage of the commission paid or agreed to be paid is–

(i) in the case of shares offered to the public for subscription, disclosed in the prospectus; and

(ii) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the Registrar and, where a circular or notice, not being a prospectus inviting subscription for the shares is issued, also disclosed in that circular or notice.

(2) Save as provided in sub-section (1) and section 153, no company shall allot any of its shares or apply any of its moneys either directly or indirectly in payment of any commission, discount or allowances, to any person in consideration of his subscribing or agreeing to subscribe whether absolutely or conditionally, for any shares of the company for procuring or agreeing to procure subscriptions whether absolutely or conditionally, for any shares in the company, and the shares shall not be so allotted or the money shall not be so applied by adding to the purchase-money of any property acquired by the company or the contract price of any work to be executed for the company or the money to be paid out of the nominal purchase money or contract price, or otherwise.

(3) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay and a vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section.

Notes/Comments/Precedents

Scope : Sub section (1) of section 152 of the Act is both an enabling and restrictive provision. It enables the company to pay commission on shares and debentures, but restricts and regulates the

quantum of the commission. The payment of commission on shares and debentures might proceed from any source, capital moneys or profit but it is to be restricted upto a certain percentage being different in the case of shares and debentures *[Madanlal Fakirchand Dudhediya Vs. Shree Changdeo Sugar Mills Ltd. Bombay A. 1962 SC 1543 32 Comp. Cas 604]*

Commission : The word 'commission' is not restricted to payment of money out of capital only, it includes payment from profit also *[Madanlal Fakirchand Dudhediya Vs. Shree Changdeo Sugar Mills Ltd. Bombay A. 1962 SC 1543 32 Comp. Cas 604.]*

Underwriting : An underwriter is a person who agrees with the company, in consideration of a commission payable to him, that all or a particular number of the company's shares are not taken up by the public, he will make up the deficiency and make up the total number of shares underwritten by him. It follows that underwriting is in the nature of an insurance against the possibility of inadequate subscription *[Nani Gopal Lahiri Vs. Uttar Pradesh (1965) 35 Comp. Cas. 30.]*

Contract of underwriting–enforceability : The contract of underwriting is enforceable against the executors of the decreased underwriter *[Warner Engineering Co. Vs. Brennan (1913) 30 TLR 191.]*

153. Power to issues share at a discount.– (1) Subject to the provisions of this section, it shall be lawful for a company to issue at a discount shares in the company of a class already issued:

Provided that-

(a) the issue of the shares at a discount must be authorised by resolution passed in general meeting of the company and must be sanctioned by the Court;

(b) the resolution must specify the maximum rate of discount, not exceedingly ten percent in any case, at which shares are to be issued;

(c) not less than one year must at the date of issue have elapsed since the date on which he company was entitled to commence business;

(d) the shares to be issued at a discount must be issued within six months after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow.

(2) Every prospectus relating to the issue of the shares and every balance sheet issued by the company subsequently to the issue must contain particulars of the discount allowed on the issue of the shares or of so much of that discount as has not been written off at the date of the issue of the document in question.

(3) If a company defaults in complying with sub-section (2) the company and also every officer of the company who is in default shall be liable to a fine not exceeding five hundred taka.

Notes/Comments/Precedents

Issue of shares on discount : A company may issue shares at a discount provided it satisfied the conditions set forth in section 153. This section applies only to shares and not on debentures which are not part of the share capital.

Issue of shares in exchange of debentures : The issue of shares in exchange or conversion of debentures would be held to be illegal unless conditions of section complied with..... *[Trustees Corporation (India) Ltd. Vs. Commissioner of Income Tax AIR 1930 P.C. 151]*

Forfeiture–found to be invalid : Sale of forfeited shares for recovery of the balance amount is not issue of the shares at a discount as the company received the full face value from the original allottee and the second purchaser. The right of forfeiture is provided in the articles which provisions have to be followed in forfeiting the shares and the shareholder must be informed of the exact amount he is required to for call, interest and expenses. A slight defect in the notice will invalidate it and would be fatal for the forfeiture *[Public Passenger Service Ltd Vs. M.A. Khader, A 1966 S C 489 36 Comp. Cas. 1]*

154. Issue of redeemable preference shares.– (1) Subject to the provisions of this section, a company limited by shares may, if so authorised by its articles, issue preference shares which are, or at the option of the company are to be or liable to be redeemed:

Provided that-

(a) no such shares shall be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption or out of sale proceeds of any property of the company.

(b) no such shares shall be redeemed unless they are fully paid;

(c) where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall, out of profits which would otherwise have been available for dividend, be transferred to a reserve fund, to be called "the capital redemption reserve fund" a sum equal to the amount applied in redeeming the shares, and the provisions of this Act relating to the reduction of the shares capital of a company shall, except as provided in this section, apply if the capital redemption reserve fund were paid up share capital of the company;

(d) where any such shares are redeemed out of the proceeds of a fresh issue, the premium, if payable on redemption, must be provided for out of the profits of the company before the shares are redeemed.

(2) In every balance-sheet of a company which has issued redeemable preference shares the following shall be included, namely:-

(a) a statement specifying what part of the issued capital of the company consists of such shares; and

(b) the date on or before which those shares are, or are to be, liable to be, redeemed or where no definite date is fixed for redemption, the period of notice to be given for redemption.

(3) Subject to the provisions of this section, the redemption of preference shares may be effected on such terms and in such manner as may be provided by the articles of the company.

(4) Where in pursuance of this section a company has redeemed or is about to redeem any preference shares, it shall have power to issue shares up to the nominal amount of the shares redeemed or to be redeemed, as if those had never been

issued, and accordingly the share capital of the company shall not, for the purpose of calculating the fees payable under section 384, be deemed to be increased by the issue of shares in pursuance of this sub-section:

Provided that, where new shares are issued before the redemption of the old shares, the new shares shall not, so far as they relate to stamp duty, be deemed to have been issued in pursuance of this sub-section, unless the old shares are redeemed within one month after the issue of the new shares.

(5) Notwithstanding anything in the other provisions of this section, where redeemable preference shares deemed, under sub-section (4), to have never been issued are, or are to be, redeemed for the purpose of allotting them as fully paid up bonus shares to the members of the company, the redemption reserve fund may be applied by the company up to the nominal value of the new shares referred to in sub-section (1) (c) for such redemption.

(6) If a company defaults in complying with any of the provisions of this section, the company and also every officer of the company who is in defaults shall be liable to a fine not exceeding two thousand taka.

Notes/Comments/Precedents

Preference shares : A preference share is that part of the share capital which fulfills both the following requirements : (a) it carries preferential right in respect of dividends at a fixed amount or rate, i.e., the dividend payable on it is fixed at a certain figure, and (b) it also carries preferential right in regard to repayment of capital on winding up or otherwise. But this right to receive the capital back in priority to the equity shareholders is said to be exhaustive i.e., it implies that there is no right to receive anything more, and, therefore, if it is desired that the preference shares should also participate in the surplus assets, this right must be expressly given to them.

In simple terms, preference share capital must have priority both as regards dividends and capital. In addition preference share may be given a right to participate in surplus profits and in surplus assets on winding up.

A Participating Preference Share is one which is entitled to a preferential dividend at a fixed rate with a right to participate further in the profits either along with or after payment of a certain rate of dividend on equity shares. For example, it may be provided that the preference shares shall be entitled of participate *pari passu* with the equity shares after a dividend of a fixed percentage, say of 12, has been paid on the equity shares. The priority as to dividend out of distributable profit in this example would be : first, the fixed preference dividend, say 9%, then the 12% dividend on the equity shares, and finally the surplus would be divided between equity and preference shareholders *pari passu*. The right of preference shares to participate further in the distribution of the available profits must be given in the memorandum or articles of association or in the terms of issue.

Where right is given to preference shares to participate in the surplus assets, the preference shareholders will be entitled to participate in the distribution of all assets which remain after paying creditors, costs and arrears of the preference dividend, and after repaying all paid-up preference and equity capital.

Participation in surplus capital : If the articles or terms of issue of preference shares do not allow participation in surplus capital, the onus is on preference share-holders to prove that they are entitled to share in the surplus on winding up of the company *[John Smith's Tadcaster Brewery Co. Ltd., Re (1952) 2 All E.R. 751]*

Shares– Classes of dividends : It is well settled that it is not necessary that equal rights and privileges should be attached to all shares, some may be preferential either as to capital or as to dividend or as to both and where preferential dividend of a specified amount is attached to shares, the holders of such shares are limited to these fixed dividends and not entitled to participate in profits to any greater extent. It would be seen, therefore, that there must be at least two classes of dividends governing to two such classes of shares in which one class is given a preferential treatment over the other and the rate of dividends once being fixed to be preferentially paid to such a class of shareholders, those shareholders are not entitled to participate in the profits to any extent more than that which is fixed *[Bihar State Financial Corporation Vs. Commissioner, Income Tax (1976) 46 Comp. Cas 155]*

155. Further issue of capital.– (1) Where the directors decided to increase the subscribed capital of the company by issue of further shares within the limit of the authorised capital-

(a) such further shares shall be offered to the members in proportion, as nearly as circumstances admit, to the capital paid up on the existing shares held by such member, irrespective of class, at the date of the offer;

(b) such offer shall be made by notice specifying the number of shares offered and specifying the time limit, not being less than fifteen days from the date of the offer, within which the offer if not accepted will be deemed to have been declined;

(c) after the expiry of the time specified in the notice aforesaid, or on receipt of earlier intimation from the members of whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they may think most beneficial to the company.

(2) Notwithstanding anything contained in sub-section (1), the further shares aforesaid may be offered to any person whether or not those person include the persons referred to in clause (a) of that sub-section in a manner whatsoever.

Notes/Comments/Precedents

Scope of Section : The section is intended to cover a case where the directors decide to increase the capital by issuing further shares within the authorised limit, for it is only within that limit that the directors can decide to issue further shares, unless they are precluded from doing even that by the regulations of the company. Therefore, the section becomes applicable only when the directors decide to increase capital within the authorised limit by the issue of further shares *[Nananal Zaver Vs. Boambay Life Assurance Co. Ltd. A. 1950 SC. 172]*

Increasing issued capital : Section 155 of the Companies Act, 1994 provides for further issue of capital. The purpose of increasing the issued capital may be to bring the company more into line with the true worth of the undertaking. Sometimes the increase in the issued capital may cause immediate fall in the market value of the shares. Fall in the market price many give investors a good opportunity to buy the company's shares at low price.

156. Statement in balance sheet as to commissions and discounts.– Where a company has paid any sums by way of commission in respect of any shares or debentures or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed or so much thereof as has not been written off, shall be stated in every balance sheet of the company until the whole amount thereof has been written off.

PAYMENT OF INTEREST OUT OF CAPITAL

157. Power of company to pay interest out of capital in certain cases.– Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or building or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up for the period and subject to the conditions and restrictions in this section mentioned and may charge the same to capital as part of the cost of construction of the work or building or the provision of plant:

Provided that–

(a) no such payment shall be made unless the same is authorised by the articles or by special resolution;

(b) no such payment whether authorised by the articles or by special resolution, shall be made without the previous sanction of the government; and such sanction shall be conclusive evidence for the purposes of this section that the shares of the company in respect of which such sanction is given have been issued for a purpose specified in this section;

(c) before sanctioning any such payment the government may, at the expense of the company, appoint a person to inquire and report to the Government as to the circumstance of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry;

(d) the payment shall be made only for such period and may be determined by the Government, and such period shall in no case extend beyond the close of the half-year next after the half-year during which the works or buildings have been actually completed or the plant provided;

(e) the rate of interest shall in no case exceed four percent per annum or such lower rate as the Government, may, by notification in the official Gazette, prescribe;

(f) the payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid;

(g) the accounts of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate.

Notes/Comments/Precedents

Scope : The general rule is that dividends can be paid only out of profits and must not be paid out of capital. An exception to this provision, however, constituted by section 157 of the Companies Act, 1994.

Payment of interest out of capital : Interest on paid up share capital may be paid out of capital of the company under certain conditions. The payment of interest by the company must be *bonafide* and in the interest of the company *[Lock Vs. Queensland Investment and Land Mortgage Co. (1896) A.C. 461]*

Dividend : Dividend actually mean the profit of business which are divided among the share-holders proportionately to their shares. In *Lamplough Vs. Kent Water (1903) 1 Ch.575 it has been held that* "The dividend means the sum paid and received as the quotient forming the share of the divisible sum payable to the recipient."

Dividends are paid out of profits of the year or any other undistributed properties. There is nothing in the Act to forbid the distribution of dividend of profits of any description.

Dividends must not be paid out of capitals, i.e the company must not under the guise of paying dividend return to the shareholders any part of the moneys subscribed on the shares. Thus the payment of interests to the shareholders before any profits have been realised, out of capital or borrowed moneys is ultra vires.

Is has been held in *Lee Vs. Neuchatel Asphle Co. (1889) 41 Ch. D 1* it has been held that the profits of a company are, the credit balance of a profit and loss account properly prepared. They are the excess of receipts over expenses on revenue account. As to what expenses are properly chargeable to capital and what to revenue, it is necessarily impossible to lay down any general rule. In many cases it may be for the shareholders to determine this for themselves, provided the determination be honest and within legal limits.

The Articles of Association of a company usually provide for the payment of interim dividends by the directors if they think proper. The provision in this regard has been made in the Schedule 1 to this Act wherein it has been stated that ....The company in general meeting may declare dividends, but no dividends shall exceed the amount recommended by the directors. When a dividend is declared, it shall be paid within two months from the date of its declaration, that the directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by he profits of the company, that no dividend shall be paid otherwise than out of profits of the year or any other undistributed profits, that all dividends shall be declared and paid according to the amounts paid on the shares; but if and so long as nothing is paid upon any of the shares in the company, dividends may be declared and paid according to the nominal value of the shares.

CERTIFICATES OF SHARES, ETC.

158. Limitation of time for issue of certificate.– (1) Every company shall, within ninety days after the allotment of any of its shares, debentures or debenture-stock, and within ninety days after the registration of transfer of any such shares, debentures or debenture-stock complete and have ready for delivery the

certificates of all shares, debentures, and the debenture-stock allotted or transferred, unless the conditions of issue of the shares, debentures or debenture stock otherwise provide.

(2) If default is made in complying with the requirements of this section, the company, and also every officer of the company who is knowingly a party to the default, shall be liable to a fine not exceeding five hundred taka for everyday during which the default continues.

Notes/Comments/Precedents

Issue of certificate : Where shares have been allotted to an applicant or where a valid transfer of shares by a shareholder to another person has been lodged with the company, the company must have ready for delivery, within 90 days after the allotment and after application for registration of transfer, a certificate evidencing the title of the allottee or transferee to the shares allotted or transferred.

Delivery of certificate–company's obligation for : Sub-section (1) of section 158 nowhere provides for delivery of the certificate of shares but joins the company to have the same ready for delivery. It follows that no obligation has been imposed upon the company to deliver the certificate of shares *[In the matter of Asiatic Oxygen Ltd. AIR 1972 Cal 50.]*

Default in delivery of share certificate : *Quashing of proceeding for such default-* It is not the complainant's case that his share certificates were not made ready within time. Once the share certificates are completed and made ready within time, the liability of the accused persons ends. the law does not provide that the certificates are to be made ready for delivery to the complainant. Non delivery of the share certificates is not an offence and the proceeding is liable to be quashed *[Muhammadullah Vs. Makbul Ahmed 44 DLR (1992) 107.]*

Incorrect certificate– Effect of : A certificate of shares, which is issued without authority or which is forged, is not a document on which the company may be made liable *[Ruben Vs. Great Fingall Consolidated Co. (1906) A.C. 439.]*

INFORMATION AS TO MORTGAGES, CHARGES, ETC.

159. Certain mortgages and charges to be void if not registered.–

(1) Every mortgage or charge created after the commencement of this Act by a company and being either–

(a) a mortgage or charge for the purpose of securing any issue of debentures; or

(b) a mortgage or charge on uncalled share capital of the company ; or

(c) a mortgage or charge on any immovable property wherever situated, or any interest therein ; or

(d) a mortgage or charge on any book debts or the company ; or

(e) a mortgage or charge, not being a pledge on any moveable property of the company except stock-in-trade ; or

(f) a floating charge on the undertaking,

shall so far as any property of the company, security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument, if any, by which the mortgage or charge is created or evidence or a copy thereof verified in the prescribed manner are filed with the Registrar for registration in a manner required by this Act within twenty-one days after the date of its creation; put any contract or obligation for repayment of the money thereby secured shall not be prejudiced; and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable.

Provided that-

(i) in the case a mortgage or charge created out of Bangladesh, but comprising solely property situate outside Bangladesh the said twenty one days shall be counted by excluding the period which would be necessary to receive the instrument in Bangladesh in due course had it been posted with due diligence; and

(ii) where the mortgage or charge is created in Bangladesh comprises property outside Bangladesh the instrument creating or purporting to create the mortgage or charge or a copy thereof verified in the prescribed manner may be filed for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and

(iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts; and

(iv) the holding of debentures entitling the holder of a charge on immovable property shall not be deemed to be an interest in immovable property.

(2) Where any mortgage or charge on any property of a company required to be registered under this section has been so registered, any person acquiring such property or any part thereof, or any share or interest therein, shall be deemed to have notice of the said mortgage or charge as from the date of such registration.

Notes/Comments/Precedents

Words 'created' means 'registered' under the Registration Act : *Held* that the words 'created' used in the section means "registered" under the Registration Act. The petitioner, a limited company,

executed a mortgage in respect of certain premises belonging to it in favour of an Insurance Company. The deed of mortgage was executed on 13.7.61 and was duly registered under the Registration Act on 2.9.61 and thereafter on 12.9.61 it was submitted to the respondent, Registrar, Joint Stock Companies for registration under section 109 of the Companies Act, 1913 (corresponding to section 159 of the Companies Act, 1994) but the respondent refused registration on the ground that the deed had been submitted more than 21 days after its creation, as, in the opinion of the respondent, the time of 21 days mentioned in section 109 of the Companies Act, 1913 (corresponding to section 159 of the Companies Act, 1994) will run from the date of the execution, that being the date according to the respondent on which it was created and not from the date of its registration.

On behalf of the petitioner it was submitted that registration of the documents being compulsory in the present case under section 59 of the Transfer of Property Act the mortgage could not be said to have been 'created' until the document of mortgage had been registered. ***Held:*** The word "created" used in relation to a mortgage or charge in section 109 of the Companies Act, 1913 (corresponding to section 159 of the Companies Act, 1994) means "registered" under the provision of the Registration Act. The mortgage mentioned in that does not come into existence until the deed of mortgage is registered *[Messes Green & White Ltd. Vs. Registrar, Joint Stock Companies, E. Pakistan (1963) 15 D.L.R. 492.]*

Extension of time: Extension of time for registration made where failure to register was through inadvertence and such omission caused no prejudice to the members of the Company or its creditors *[Aqua Culture Farms Vs. Registrar, Joint Stock Companies 42 DLR 43.]*

Registration of charges : For the purpose of enabling a person who intends to deal with a company as secured creditor to know whether the company has already encumbered its property, section 159 of the companies Act, 1994 requires a company to file within the Registrar complete particulars together with the instrument, if any, creating or evidencing charge etc. Any mortgage, charge, pledge which does not fall within the specified provisions does not require registration.

The registration may be effected by the company or the creditor in whose favour the charge has been created or any person interested in the charge.

Floating charge : A floating charge has the effect of creating an immediate charge on the property or undertaking leaving the company to deal with the property in the ordinary course of business and subject to the limitations imposed by the instrument creating the charge. The word undertaking may mean the entire company or organisation *[Rustam Cavasjee Cooper Vs. Union of India A 1970 S.C. 564]*

The right created under a floating charge is, no doubt, a right *in presenti*, but the security in respect of which the right is created becomes crystalised when the future event takes place *[Krishna Deva Bhargava Vs. Official Liquidator AIR. 1963 All 101.]*

Specific and Floating charge– Distinguished : A specific charge is distinguishable from a floating charge. While a specific charge fastens on ascertained or definite property capable of being ascertained and defined, a floating charge is ambulatory and shifting in its nature and floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp. The liability under the floating charge is contingent and when the contingency arises, the charge is crystalised and then becomes a specific charge.

160. Registration of charge on properties acquired subject to charge.-

(1) Where a company registered in Bangladesh acquires any property which is subject to a charge on any such kind as would, if it had been created by the company, after the acquisition of the property, have been required to be registered

under this Part, the company shall cause the prescribed particulars of the charge, together with a copy certified in the prescribed manner to be a correct copy of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the Registrar for registration in a manner required by this Act within twenty-one days after the date on which the acquisition is completed:

Provided that, if the property is situated and the charge was created outside Bangladesh the said twenty-one days shall be counted by excluding the period which would be necessary to receive the instrument in Bangladesh in due course of post had it been despatched with due diligence.

(2) If a company defaults in complying with the provisions of this section the company and also every officer of the company, who is knowingly and wilfully in default, shall be liable to a fine not exceeding one thousand taka.

Notes/Comments/Precedents

Registration of charges : Section 160 requires particulars similar to those requires under section 159, to be filed, relating to any property acquired by the company which is subject to a charge of any one of the kinds mentioned above within twenty one days of acquisition of the property.

Registration– Validity of change : *Held* The failure to deliver the particulars of the charge to the Registrar for registration will not invalidate the charge *[T.R. Tyagarajon Vs. Official Liquidator (1959) 2 M.L.J 224]*

161. Particulars in case of series of debentures entitling holders *pari passu*.– (1) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debentures-holders of that series are entitled *pari passu* is created by a company, it shall be sufficient for the compliance of section 159 if there are filed with the Registrar with in twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following:–

(a) the total amount secured by the whole series;

(b) the dates of the resolutions authorising the issue of the series and the date of the covering deed, if any, by which the security is created or defined;

(c) a general description of the property charged;

(d) the names of the trustees, if any, for the debenture-holders; and

(e) the deed or a copy thereof verified in the prescribed manner containing the charge or if there is no such deed one of the debentures of the series:

Provided that, where more than one issue is made of debentures in the series, there shall be filed with the Registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

(2) The Registrar shall register the particulars and the deeds filed under sub section (1).

Notes/Comments/Precedents

Debenture– registration of : The registration of particulars of series of debentures issued validly are not only protected under the section but also debenture issued irregularly. *[Re: Fire- proof Doors Ltd., (1916) 2 Ch. 142.]*

Where debentures void– no money payable : Where the debenture was void, no money becomes payable and the guarantor stands released *[Heald v. Oconner (1971) 2 All. ER 1105.]*

Debentures– Charge created on present immovable property– effect of non-registration : *Held–* the debentures would be ineffective so far as they sought to create a charge on present immovable properties *[Krishna Deva Bhargava v. Official Liquidator AIR 1962 All. 131 = (1962) 32 Comp. Cas. 925].*

Priority : When debenture-holders of the same series rank equally, if a debenture-holder gets a judgment it will be for the benefit of all the debenture-holders *[Bowen Vs Brecon Railway Co. (1867) L.R. 3 Eq. 541]*

162. Particulars in case of commission, etc. on debentures.– Where any commission, allowance or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or for procuring or agreeing to procure subscriptions, whether absolutely or conditionally for any such debentures, the particulars required to be filed for registration under sections 159 and 161 shall include particulars as to the amount or rate percent of the commission, discount or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued:

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this provision be treated as the issue of debentures at a discount.

163. Registers of mortgages and charges.– (1) The Registrar shall keep, with respect to each company, a register in the prescribed form of all mortgages and charges created by the company after the commencement of this Act and requiring registration under section 159 and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or the persons entitled to the charge.

(2) After making the entry required by sub-section (1) the Registrar shall return the instrument, if any, or the verified copy thereof, as the case may be, filed in accordance with the provisions of section 159 or 161 to the person filling the same.

(3) The register kept in pursuance of this section shall be open to inspection by any person on payment of the fee, as specified in Schedule II.

164. Index to register of mortgages and charges.– The Registrar shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the mortgages and charges registered with him under this Act.

165. Certificate of registration.– The Registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of section 159, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of sections 159 to 163 as to registration have been complied with.

Notes/Comments/Precedents

Certificate of registration– conclusive proof : A certificate of registration of a change under section 165 of the companies Act must be considered to be conclusive evidence that all requirements as to registration have been complied with. Section 165 does not raise a presumption. In provides for conclusiveness *[Moharastra State Financial Corporation Vs. Masvi and Co. Pvt. Ltd. (1993) 2 Comp. L.J. 64 (Bom).]*

166. Endorsement of certificate of registration on debentures or certificate of debenture-stock.– The company shall cause a copy of every certificate of registration, given under section 165 to be endorsed on every debenture or certificate of debenture-stock which is issued by the company, and the payment of which is secured by the mortgages or charge so registered :

Provided that nothing in this section shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture-stock issued by the company before the mortgage or charge was created.

Notes/Comments/Precedents

Transfer of entire share– Position of Director : The petitioner ceased to be a Chairman as well as Director of the Company owing to his transfer of his entire shares on 20.12.95. *[A U Ahmed Vs. Bangladesh 1 BLC (1996) 337.]*

167. Duty of company and right of interested party as regards registration.– (1) Every company to file with the Registrar for registration the prescribed particulars of every mortgage or charge created by the company and of the issues of debentures of a series, requiring registration under section 159, and registration of any such mortgage or charge may be also effected on the application of any person interested therein.

(2) Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the Registrar on the registration.

(3) Whenever the terms of conditions or extent or operation of any mortgage or charge registered under this section are modified it shall be the duty of the company to send to the Registrar the particulars of such modification and the provisions of this section as to registration of the mortgage or charge shall apply to such modification of the mortgage or charge as aforesaid.

Notes/Comments/Precedents

Mortgage or charge created by a company to be registered : Every mortgage or charge created by a company should be registered with the Registrar of Companies and thus registration under Registration Act is essential to create a charge on the assets of a company *[Official Liquidator Vs. Sh. Krishna Deo, (1959) 29 Comp. Cas. 476 (All).]*

Unregistered mortgage- void as against a subsequent registered encumbrance : An unregistered mortgage is void as against a subsequent registered encumbrances even though the latter had express notice of the prior mortgagee at the time when he took his security *[Monolithic Building Co. In Re (1915) 1 Ch. 643.]*

168. Copy of instrument creating mortgage or charge to be kept at registered office.– Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under section 159 to be kept at the registered office of the company:

Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient.

169. Registration of appointment of receiver.– (1) If any person obtains an order for the appointment of a receiver of the property of a company, or appoints such a receiver under any powers contained in any instrument, he shall, within fifteen days from the date of the order or of the appointment under the powers contained in the instrument, file notice of the fact with the Registrar and the Registrar, shall on payment of the prescribed fee, enter the fact in the register of mortgages and charges.

(2) If any person makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding two hundred taka for everyday during which the default continues.

Notes/Comments/Precedents

Position of official liquidator and receiver–distinction : The position of an Official Liquidator and that of a Receiver appointed by the Court is analogous in certain respects but it is distinguishable. A receiver is appointed by the Court and is removable by the Court. The Court has also an option to appoint the personnel of the receiver. There is no specific provision in the Companies Act for the removal of the Official Liquidator by the Court *[Indo-Burma Work Products (P) Ltd., in re. AIR. 1968 Cal 198.]*

Appointment of Receiver by Court : Where the assets of a company are in jeopardy, the Court will readily appoint a receiver to preserve the assets *[New Port Construction Co. (1948) 1 All E.R. 365].*

Where security is in jeopardy a receiver and a manager may be appointed even through the security has not yet crystalised *[In Re. Victoria Steamboat (1897) 1 Ch. 158]*

Apart from jeopardy a receiver will not be appointed until there has been default in payment of principal or interest *[Bissil Vs. Breadford Tramways Co. (1891) W.N. 51]*

170. Filling of accounts of Receivers.– (1) A receiver referred to in section 169 of any property who has taken possession shall for every financial year during such possession and also on ceasing to act as receiver, file with the Registrar an abstract in the prescribed form of his receipts and payment during the period to which the abstract relates and shall also, on ceasing to act as receiver, file with the Registrar, notice to that effect and the Registrar shall enter the notice in the register of mortgages and charges.

(2) Where a receiver of the property of a company has been appointed, every invoice, order for goods, or business letter issued by or on behalf of the company, or the receiver of the company, being a document on or in which the name of the company appears, shall contain a statement that a receiver has been appointed.

(3) For every default in complying with the requirements of this section, the company, and also every officer or receiver as the case may be of the company, who knowingly and wilfully authorises or permits the default, shall be liable to a fine not exceeding five hundred taka.

171. Rectification of register of mortgages.– (1) If the Court is satisfied that–

(a) the omission to register a mortgage or charge within the time required by section 159, or the omission or mis-statement of any particular with respect to any such mortgage or charge, or the omission to give intimation to the Registrar of the payment or satisfaction of a debt for which the mortgage or charge was created, was accidental or due to inadvertence or to some other sufficient cause, or

(b) the omission is not of a nature to prejudice the position of creditors or share-holders of the company, or

(c) on other grounds it is just and equitable to grant relief the court may, on the application of the company or any person interested and on such terms and conditions as seen to the court just and expedient, order that the time for registration be extended or, as the case may be, that the omission or mis-statement be rectified, and may make such order as to the costs to be paid to the applicant as it thinks fit.

(2) Where the Court extends the time for the registration of a mortgage, or charge, the order shall not prejudice any right, as acquired in respect of the property concerned prior to the time when the mortgage, or charge is actually registered.

Notes/Comments/Precedents

Failure to register through inadvertence : Extension of time for registration made where failure to register was through inadvertence and such omission caused no prejudice to the members of the Company or its creditors *[Aqua Culture Farms Vs. Registrar, Joint Stock Companies (1990) 42 DLR 43.]*

Rectification after liquidation : If before registration pursuant to an order of rectification, a winding up intervenes, the charge, even if registered, will not be effective as against the general body of creditors *[Anglo-Oriental Carpet Mfg. Co. (1903) 1 Ch. 914]*

Omission due to inadvertence : *Held–* Where the omission to register the charge is due to inadvertence and not to prejudice the position of credit or relief prayed for can be granted *[In Re. Punjab Club (1933) 3 Comp. Cas 116 (Lahore)]*

172. Registration of Satisfaction of mortgages and charges.– (1) The company shall give intimation to the Registrar of the payment of satisfaction of any mortgage or charge required to be registered under section 159 within twenty-one days from the date of the payment or satisfaction thereof.

(2) The Registrar shall, on receipt on such intimation, cause a notice to be sent to the mortgagee, calling upon him to show cause, within a time, not exceeding fourteen days, to be fixed by such notice, why the payment or satisfaction of the charge or mortgage should not be recorded.

(3) The Registrar shall, if no cause is shown, order that a memorandum of satisfaction be entered on the register and shall, if required, furnish the company with a copy thereof.

(4) Where cause is shown, the Registrar shall record a note to the effect in the register, and shall inform the company that he has done so.

Notes/Comments/Precedents

Payment or satisfaction – if means part payment or part satisfaction: Under section 121(1) of the Companies Act, 1913 (corresponding to sec. 172 of the Companies Act, 1994) it is the duty of the company to intimate to the Registrar the payment or satisfaction of any charge or mortgage created by the company and requiring registration under section 109 of the Companies Act, 1913 (corresponding to sec. 159 of the Companies Act, 1994).

"Payment or satisfaction" in the context means full payment or full satisfaction and not part payment or part satisfaction *[7 PLR (Dac.) 122.]*

Company's duty : It is the primary duty of the company to intimate the Registrar within twenty one days of where there occur any payment of satisfaction in full or in part of, or any change in the charge registered with the Registrar. The Registrar must on receipt of such intimation from the company, cause a notice to be sent to the holder of the charge calling upon him to show cause within the time specified in the notice, why payment or satisfaction should not be recorded. If cause is not shown, a memorandum of satisfaction will be entered and in case any cause is shown, the Registrar shall record a note to that effect in the register of changes, and inform the company accordingly.

Registrar–not to register within notice period : Registrar is required to follow the principles of natural justice. Section 172 of the Companies Act does not authorise the Registrar to enter satisfaction of charge within the period allowed to the holder of the charge to show cause *[Welford Transport (Eastern) India Ltd. Vs. S.K. Mondal (1980) 50 Comp. Cas. 600]*

173. Penalties.– (1) If any company makes default in filing with the Registrar for registration the particulars-

(a) of any mortgage or charge created by the company ; or

(b) of the payment or satisfaction of a debt in respect of which a mortgage or charge has been registered under section 159 or section 160 ; or

(c) of the issue of debentures of a series;

requiring registration with the Registrar under the foregoing provisions of this Act, then unless the registration has been effected on the application of some other person, the company, and also every officer of the company or other person who is knowingly a party to the default, shall, on conviction be liable to a fine not exceeding one thousand taka for everyday during which the default continues.

(2) Subject as aforesaid, if any company makes default in complying with any of the requirements of this Act as to the registration with the Registrar of any mortgage or charge created by the company, the company, and also every officer of the company, who is knowingly and wilfully a party to the default, shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding two thousand taka.

(3) If any person knowingly and wilfully authorises or permits the delivery ofany debenture or certificate of debenture-stock requiring registration with the Registrar under the foregoing provisions of this Act the certificate of registration being endorsed upon it as required by section 166, he shall, without prejudice to any other liability, be liable of conviction to a fine not exceeding two thousand taka.

Notes/Comments/Precedents

Willful default : Where the directors instructed the Secretary to register the charge and the secretary omitted to do so, it was held that the directors were not knowingly and willfully guilty of default or guilty of authorising or permitting the omission *[Borugh of Hackney Newspaper Co. (1876) 3 Ch.D. 669]*

Charge– When not registered : A charge which is not registered is void against all the creditors of the company irrespective of the date on which there is debts accrued *[Sathgram Coal Co. Ltd. In Re (1936) 40 CWN 1171.]*

174. Company's register of mortgages.– (1) Every company shall keep register of mortgages and enter therein all mortgage and charges specifically affecting property of the company and all floating charges on the undertaking or on any

property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge and, except in the case of securities to bearer, the names of the mortgagees or persons entitled thereto.

(2) If any director, manager or other officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding two thousand taka.

Notes/Comments/Precedents

Maintenance of register of mortgages : The Register of Mortgages is to be maintained by the Company and is to be posted upto date. The Company has no right to refuse registration and the application made by the transferee to Court for rectification of the register of mortgages was legally maintainable *[Basant Company v. Benars Cotton and Silk Mills Ltd. (1964) 34 Comp. Cas. 394 (All).]*

175. Right to inspect copies of instruments creating mortgages and charges and company's register of mortgages.– (1) The copies kept at the registered office of the company in pursuance of section 168 of instruments creating any mortgage or charge requiring registration under this Act with the Registrar and register of mortgages kept in pursuance of section 174, shall kept be open at all reasonable times to the inspections of any creditor or member of the company without fee, and the register of mortgages shall also be kept open to the inspection of any other person on payment of such fee, not exceeding ten taka for each inspection, as the company may prescribe.

(2) If inspection of the said copies or register is refused the company shall be liable to a fine not exceeding one hundred taka for the first day and to a further fine not exceeding fifty taka for everyday during which the refusal continues, and every officer of the company, who knowingly authorises or permits the refusal, shall incur the like penalty, and in addition to the above penalty, the Court may by order compel an immediate inspection of the copies or register.

Notes/Comments/Precedents

Inspection –Application for : The person who has been refused inspection may make an application to the Court for an order asking the company to grant inspection to him. Upon winding up of the company the register of charges cannot be inspected without order of the Court *[Somerset vs. Land Securities Co. (1897) W.N. 29.]*

176. Right to inspect register of debenture-holders and to have copies of trust deeds.– (1) A company shall keep open every register of the debenture holders for the inspection its debenture-holders and share-holders and every such holder may require a copy of the register or part thereof on payment of fees specified in Schedule II:

Provided that–

(a) the register shall not be inspected during such period or periods not exceeding in the whole thirty days in any year, as may be specified in the articles; and

(b) subject to such reasonable restrictions as may be imposed by the general meeting, the register shall be kept open for inspection for at least two hours in a day during the permissible period.

(2) A copy of any trust-deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment, in the case of a printed trust deed, of the sum of ten taka or such less sum as may be fixed by the company, or where the trust-deed is not printed, the fees specified in schedule-II.

(3) If inspection is refused or a copy is refused or not forwarded, the company shall be liable to a fine not exceeding one hundred taka for the first and to a further fine not exceeding fifty taka for every day subsequently during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall incur the like penalty; and the Court may by order compel an immediate inspection of the register.

Notes/Comments/Precedents

Copy of trust deed to be supplied to the debenture holder : When debentures are issued for public subscription, involving a considerable number of debenture holders, the most common and convenient form securing them is to execute a trust deed conveying the property of the company to trustees and declaring a trust in favour of the debenture holders, charging the property of the company. This deed contains elaborate provisions for the benefit of the debenture holders and the company until the security becomes enforceable by the trustees. A copy of any trust deed in respect of debentures should be given to any debenture holder on payment of specified fees. It is also to be open for inspection by any debenture holder or share holder.

If the company refuses to supply a copy of the trust deed or allow inspection it will make the company and very officer in default liable to a fine which may extend to Tk. 100 for the first day and further sum of Tk. 50 for everyday's default.

DEBENTURE AND FLOATING CHARGES

177. Perpetual debentures.– A condition contained in any debenture or in any deed for securing any debentures, whether issued or executed before or after the passing of this Act shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however, remote, or on the expiration of a period however long.

Notes/Comments/Precedents

Perpetual mortgage : A perpetual mortgage in the nature of debenture issued by the company is valid under the section even through as a mortgage it will be invalid under the Transfer of Property Act as it is a clog on the equity of redemption *[Knightsbridge Estates Trust Ltd. Vs. Byrne (1940) A.C. 613=(1940) 2 All E.R. 401.]*

Debentures–date of maturity : This section does not validate the debentures if terms other than those relating to the date of its maturity constitute a clog on the equity of redemption *[In Re Rainbow Syndicate (1910) W.N. 178.]*

Principal amount when payable : The principal amount of the debentures becomes payable on winding up of the company on whatever terms the debentures may have been issued *[Wallace Vs. Universal Automatic Co. (1894) 2 Ch. 547]*

178. Power to re-issue redeemed debentures-in certain cases.–

(1) Where either before or after the commencement of this Act, a company has redeemed any debenture previously issued, the company shall have right, and shall be deemed to have/had the right, to keep the debentures alive for the purposes of re-issue, unless-

(a) the articles of the conditions of issue expressly otherwise provides; or

(b) the debentures have been redeemed in pursuance of any obligation on the company so to do, not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns.

(2) In the exercise of the right under sub-section (1) the company shall have power, and shall be deemed always to have power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place.

(3) Upon such re-issue, the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

(4) Where with the object of keeping debentures alive for the purpose of re-issue they have, either before or after the commencement of this Act, been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

(5) Where a company has, either before or after the commencement of this Act, deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debt whilst the debentures remained so deposited.

(6) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to, or deemed to have been possessed by a company, whether the re-issue or issue was made before or after the

commencement of this Act, shall be treated as the issue of a new debenture for the purposes of stamp duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued:

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp-duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp-duty and penalty.

(7) Nothing in this section shall prejudice any power to re-issue debenture in place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same.

Notes/Comments/Precedents

Rights of re–issued debenture–holder : The company cannot re-issue debentures different in terms from those which have been redeemed *[Autofagasta (Chili) & Bolivia Rly's Trust Deed (1939)Ch. 732=(1939)9 Comp Cas. 313.]*

179. Specific performance of contract to subscribe for debentures.- A contract with a company to take up and pay for any debentures of the company may be enforced by a decree for specific performance.

Notes/Comments/Precedents

Scope: This section provides that specific performance of a contract to give debentures may be enforced by an order of the Court against the company and that the company may specifically enforce against any one a contract to take up and pay for any debentures. A debenture issued in an irregular manner may be treated as enforced as agreement to issue a debenture.

Forfeiture : Where the debenture-holder failed to pay installment and the company declaring the debenture is aforesaid as forfeited, then the company is precluded from recovering calls due on debentures *[Kuala Pahi Rubber Estates Vs. Mowbray (1914) W.N. 321.]*

180. Payments of certain debts out of assets subject to floating charges in priority to claims under the Charge.– (1) Where either a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge, then if the company is not at the time in course of being wound up, the debts, which in every winding up are under the provisions of Part-V relating to preferential payments are to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or the other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2) The periods of time mentioned in the said provisions of Part-V shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(3) Any payments made under this section shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors.

BALANCE–SHEET, STATEMENTS, BOOKS ETC.

181. Books to be kept by company and penalty for not keeping them.– (1) Every company shall keep proper books of account with respect to–

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;

(b) all sales and purchases of goods by the company;

(c) the assets and liabilities of the company; and

(d) in the case of a company engaged in production, distribution, marketing, transportation, processing, manufacturing, milling, extraction and mining activities, such particulars relating to utilisation of material, labour and other items of overhead cost.

(2) For the purpose of sub-section (1), proper books of account shall not be deemed to be kept with respect to the matters specified therein if there are not kept such books as are necessary to give a true and fair view of the state of the affairs of the company and to explain its transactions.

(3) The books of account shall be kept at the registered office of the company and shall at all times be open to inspection by directors during business hours:

Provided that all or any of the books of account may, for a period not exceeding six months, be kept at such other place in Bangladesh as the Board of Directors so decide and when the Board of Directors so decides, the company shall within seven days of the decision, file with the Registrar a notice in writing giving the full address of that other place.

(4) Where a company has a branch office, whether in or outside Bangladesh, the company shall be deemed to have complied with the provisions of sub-section (i), if proper books of account relating to the transactions effected at the branch office are kept at that office and proper summarised returns, made up to date at intervals of not more than three months, are sent by the branch office to the company at its registered office or the other place referred to in sub-section (3).

(5) The books of account of every company relating to a period of not less than twelve years immediately proceeding the current year together with vouchers relevant to any entry in such books of account shall be preserved in good order:

Provided that in the case of a company incorporated less than twelve years before the current year, the book of account for the entire period preceding the year together with the vouchers relevant to any entry in such books of account shall be so preserved.

(6) If any of the persons referred to in sub-section (7) fails to take all reasonable steps to secure compliance by the company with the requirements of this section or has, by his own willful act, been the cause of any default by the company thereunder, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five thousand taka or with both.

(7) The persons referred to in sub-section (6) are the following, namely:-

(a) where the company has a managing agent, managing director executive director, general manager or manager, such managing agent, managing director, executive director, general manager or manager and all officers but excluding the bankers, auditors and legal advisers;

(b) where such managing agent is a firm, every partner in the firm;

(c) where such managing agent is a body corporate, every director of such body corporate;

(d) where the company has neither a managing agent nor managing director nor executive director nor general manager nor manager, every director of the company.

Notes/Comments/Precedents

Scope of the section : This section requires every company to keep compulsorily at its registered office proper books of accounts. The object of keeping proper records relating to utilization of material, labour and other items of overhead cost as envisaged in clause(d) is for making the efficiency of the audit possible. Where a company has branch office either in or outside Bangladesh the books of account relating to transactions effected at that office must be kept at that office and proper summarised returns sent to the head office at intervals not more than three months. The books of accounts must be true and give fair view and explain its transactions.

Duty to maintain books : *Held–* Every Company must maintain books of accounts, which are to be kept open for inspection by the Registrar without any provisions for intimation and that at the end of the financial year, balance sheet and profit and loss account are to be prepared and laid before the General Meeting *[Bhay Nagar Vegetabe Products Ltd. Vs. The Directors (1977) 47 Comp. Cas.. 128.]*

182. Inspection of books of account, etc. of companies.– 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 such other Government officer as may be authorised by the Government in this behalf.

(2) It shall be the duty of every director or other officer of the company to produce to the person making inspection under sub-section (1), in this section

referred to the inspecting person, all such books of account and other books and other papers of the company in his custody or control and to furnish him with any statement, information or explanation relating to the affairs of the company as the inspecting person may require of him within such time and at such place as he may specify.

(3) It shall also be the duty of every director and other officer of the company to give to the inspecting person all assistance in connection with the inspection which the company may be reasonably expected to give.

(4) The inspecting person may, during the course of inspection-

(i) make or cause to be made copies of books of account and other books; and

(ii) place or cause to be placed any marks of identification thereon in token of the inspection having been made.

(5) Notwithstanding anything contained in any other law for the time being in force or any contract to the contrary, inspecting person shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908), while trying a suit, in respect of the following matters, namely.–

(i) the discovery and production of books of account and other documents, at such place and such time as may be specified by such person;

(ii) summoning and enforcing the attendance of persons and examining them on oath:

(iii) inspection of any books, registers and other documents of the company at any place.

(6) Where an inspection of the books of account and other books and papers of the company has been made under this sections, the inspecting person shall make a report to the Government.

(7) The inspecting person under this section shall have all the powers that a Registrar has under this Act in relation to the making inquiries.

(8) If default is made in complying with the provisions of this section, every officer of the company who is in default shall be punishable with imprisonment for a term not exceeding one year and also with a fine not exceeding ten thousand taka.

(9) Where a director or any other officer of a company has been convicted of an offence under this section, he shall, and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office he shall be disqualified for holding such office in any company for a period of five years from such date.

Notes/Comments/Precedents

Inspection of books of accounts : This section provides that the books of accounts and other books and papers of every company shall be open to inspection during business hours by the Registrar or

any other authorised officer. No notice will be required for such inspection, This section further cast duty upon directors, officers and employees of the company to produce relevant books and papers in his custody to the inspecting officer and to furnish with any statement, information or explanation relating to the affairs of the company and to give assistance in connection with the inspection which the company may be reasonably expected to give.

The person making the inspection make or cause to be made copies of books and place marks of identification over there. The inspecting person shall have the power of inspection as envisaged in Civil Court Act, and he shall make a report to the government. Default on the part of any officer in compliance with the section has been made punishable with imprisonment for a term not exceeding one year and he will also be liable to a fine not exceeding ten thousand Taka. Further penalty as imposed in the section is that if a director or any other officer of company in convicted for such offence, he shall be deemed to have vacated his office and further he will be disqualified for holding such offices in any company for a period of five years from such date.

Inspection of books : The scope of inspection of books as has been held in an Indian decision that the books of accounts and other papers under section 182 of the Act has its limits and has to be distinguished from the investigation of the company's affairs under section 195 of the Act *[C.I' Karuppunvi Vs. Jt. Director of Inspection (1986) 59 Comp Cas. 814.]*

Offence under this section–not continuing offence : The offence under this section is not a continuing offence and hence if cannot be taken that the offence was committed on a particular date on which if was committed and not subsequent to the same and the period of limitation will have to be calculated from the date of the commission of the offence *[State Vs. S. Seshan Lal Pandia (1986) 60 Comp Cas. 889.]*

183. Annual balance sheet.– (1) The Board of Directors of every company shall, at every annual general meeting held in pursuance of section 81, lay before the company a balance sheet together with the profit and loss account or in the case of a company not trading for profit an income and expenditure account of the period specified in sub-section (2) of this section.

(2) The said profit and loss account or the income and expenditure account shall be prepared for the following period, namely:–

(a) in the case of the first annual general meeting for the period beginning with the date of incorporation of the company and ending on a date which is within nine months preceding the date of the meeting; and

(b) in the case of any subsequent annual general meeting, for the period beginning with the date immediately after last account and ending on a date which isû

(i) a date within nine months preceding such meeting; or

(ii) in the case of a company carrying or business or having interest outside Bangladesh, a date within twelve months, preceding the date of such meeting ; or

(iii) in a case where an extension of time has been granted for holding the meeting under section 81, a date within the said nine or twelve months, as the case may be, preceding the date of holding such meeting under that section.

Provided that date the Registrar may, on an application being made to less before the expiry of the said nine or twelve months, extend the period by a period not exceeding three months.

(3) The balance sheet and the profit and loss account or income and account shall be caused to be audited by the auditor of the company as in this Act provided, and the auditor's report shall be attached thereto or there shall be inserted at the foot thereof a reference to the report and the report shall be read before the company in general meeting and shall be person to inspection by any member of the company.

(4) The period to which the account aforesaid relates is referred to in this Act as a "financial year" and it may be less or more than a calendar year, but shall not exceed fifteen months:

Provided that it may extend to eighteen months where special permission had been granted in that behalf by the Registrar.

(5) If any person, being a director of a company, defaults in taking all reasonable steps to comply with the provisions of this section, then he shall, in respect of each such offence, be punishable with fine which may extend to five thousand taka.

(6) There shall be kept at the registered office of the company a copy of the balance sheet including profit and loss account or income and expenditure, as the case may be, and the director's report for inspection of the members and other categories of persons as are entitled thereto for a period of at least fourteen days before the general meeting of the company.

Notes/Comments/Precedents

Scope : All that section 183 (corresponding to sec. 131 of the Companies Act, 1913) lays down is that at the annual general meeting the accounts of the Company is to be submitted and such accounts must be made upto a date not more then nine months previous to the date of the meeting, that is to say, whenever the meeting is held within the time specified in section 82 (corresponding to sec. 76 of the Companies Act, 1913), that is, within 18 months from the date of first incorporation or with 15 months from the date of previous Annual General Meeting, the accounts must be made up as near a date of the meeting as practicable and the account in any case must cover a period up to a date not earlier than the date of the meeting *[The Eastend Agencies Vs. Alhaj Mafizuddin, (1968) 20 DLR 1056.]*

No authority for the proposition that the Registrar can withhold acceptance of an annual return submitted by a company under section 32 of the Companies Act, 1913 (corresponding to sec. 36 of the Companies Act, 1994) until it satisfies the Registrar that its annual general meeting was held within the scheduled period.

Registrar has no option but to accept the filing made by the company : In case of company's violating provisions of S.76(1) (corresponding to sec. 81 of the Companies Act, 1994) he can initiate appropriate proceeding *[Bangladesh Chemical Industries Corporation Vs. Registrar, Joint Stock Companies 38 DLR 356.]*

Compulsory disclosure through statements of accounts is a method of providing information to shareholders about the financial affairs of companies. The Act makes it obligatory for companies to

maintain books of accounts and to make available to their members essential information contained therein. It is necessary, therefore, for persons responsible either for their preparation or reporting thereon to be familiar with the provisions relating to accounts and audit. Failure on the part of officials responsible for preparation or reporting the accounts shall render them liable for penalties.

Where the director of a company fail to call the annual general meeting and are charged therefore, they cannot rely on their own default in answer to the charge. A conviction under Section 183 of the Act is sustainable and for the conviction it is not necessary that the commission of the offence has been willful *[Registrar of Companies, Orissa Vs. Radhika Prasad Nanda and another, (1978) 48 Comp. Cas. 243 (Orissa.]*

Balance–sheet and accounts of company when finalised: The balance-sheet and accounts of the company are in a sense only finalised after the seal of approval of the shareholders is obtained *[Commissioner of Income-Tax Vs. National Industrial Corporation, (1982) 52 Comp. Cas. 535.]*

Balance–sheet admitting indebtedness: The approval by the Board of Directors of the Company and signing thereof by two Directors of the Company is sufficient acknowledgment. *[In re: Bharatpur Oil Mills (P) Ltd. (1968) 1 Comp. L.J. 1 (Raj).]*

184. Boards report.– (1) There shall be attached to every balance sheet laid before a company in general meeting a report by its Board of Directors, with respect to.–

(a) the state of the company's affairs;

(b) the amount, if any, which the Board proposes to carry to any reserve in such balance sheet;

(c) the amount, if any, which the Board recommends should be paid by way of dividend;

(d) material changes and commitments, if any, affecting the financial position of the company which have occurred between the end to the financial year of the company of which the balance sheet related and the date of the report.

(2) The Board's report shall, so far as is material for the appreciation of the state of company's affairs by its members, deal with any changes which have occurred during the financial year:–

(a) in the nature of the company's business;

(b) in the company's subsidiaries or in the nature of the business carried on by them; and

(c) generally in the classes of business in which the company has an interest.

(3) The Board shall also be bound to give the fullest information and explanations in its report aforesaid on every reservation, qualification or adverse remark contained in the auditor's report.

(4) The Boards report and any addendum thereto shall be signed by its Chairman if he is authorised in that behalf by the Board, and where he is not so authorised &,

shall be signed by such number of director as are required to sign the balance sheet and the profit and loss account or the income and expenditure account, of the company by virtue of sub-section (1) and (2) of section 189.

(5) If any person, being a director of a company, fails to take all reasonable steps to comply with the provisions of sub-section (1) to (3) or being the chairman signs the Boards report otherwise than in conformity with the provisions of sub-section (4), he shall, in respect of each offence, be liable to fine which may extend to five thousand taka.

Notes/Comments/Precedents

Mandatory provisions of section : While allegedly adopting the balance-sheet and the profit and loss accounts, has ignored the mandatory requirements of section 131A of the Companies Act, 1913 (corresponding to section 184 of the Companies Act, 1994) which requires that the directors are to make out and attach to the balance sheet and the director's report and that if it is not done the directors may be liable to penal action. *[Alpha Shipping (Pvt.) Ltd. & others Vs. Ghyasuddin Ahmed, 1987 BCR (HCD) 31.]*

Balance Sheet : Balance sheet is a statement of the company's assets and liabilities as at the end of the financial year. Unlike the profit and loss account which deals with a course of events during a period of time, the balance sheet describes a state of affairs as at a particular point of time. In practice it is its interpretation that the layman finds particularly difficult. The vital information is there only for those who are qualified to extract it. As was observed in *Legal Remembrance Vs. Akhil Bandhu (1937) 1 Cal. 328.* "A balance sheet is a pictorial representation of the trading position of a company easily appreciated not by ignorant people, but persons who are reasonably able to understand commercial expressions and commercial conditions." A balance sheet must contain a statement of the property and assets as well as of the capital and liabilities showing how the value of the fixed assets have been arrived at ; it must give full and truthful information as to the company's position.

Dividend : Dividend actually mean the profit of business which are divided among the share-holders proportionately to their shares. In *Lamplough Vs. Kent Water (1903) 1 Ch.575 it has been held that* "The dividend means the sum paid and received as the quotient forming the share of the divisible sum payable to the recipient."

Dividends are paid out of profits of the year or any other undistributed properties. There is nothing in the Act to forbid the distribution of dividend of profits of any description.

Dividends must not be paid out of capitals, i.e. the company must not under the guise of paying dividend return to the shareholders any part of the moneys subscribed on the shares. Thus the payment of interests to the shareholders before any profits have been realised, out of capital or borrowed moneys is ultra vires.

Is has been held in *Lee Vs. Neuchatel Asphle Co. (1889) 41 Ch. D 1* it has been held that the profits of a company are, the credit balance of a profit and loss account properly prepared. They are the excess of receipts over expenses on revenue account. As to what expenses are properly chargeable to capital and what to revenue, it is necessarily impossible to lay down any general rule. In many cases it may be for the shareholders to determine this for themselves, provided the determination be honest and within legal limits.

The Articles of Association of a company usually provide for the payment of interim dividends by the directors if they think proper. The provision in this regard has been made in the Schedule 1 to this Act wherein it has been stated that ....The company in general meeting may declare dividends, but no dividends shall exceed the amount recommended by the directors. When a dividend is declared, it

shall be paid within two months from the date of its declaration, that the directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by he profits of the company, that no dividend shall be paid otherwise than out of profits of the year or any other undistributed profits, that all dividends shall be declared and paid according to the amounts paid on the shares; but if and so long as nothing is paid upon any of the shares in the company, dividends may be declared and paid according to the nominal value of the shares.

185. Form and contents of balance sheet and profit and loss accounts.– (1) The balance sheet of a company shall contain a summary of the property and assets and of the capital and liabilities of the company giving a true and fair view of affairs as at the end of the financial year, and it shall, subject to the provisions of this section be in the form set out in Part-I of Schedule XI or as near thereto as circumstance admit or in such other form as may be approved by the Government either generally or in any particular case; and in preparing the balance sheet due regard shall be had, as far as may be, to the general instructions for preparation of balance sheet under the heading "Notes" at the end of the Part:

Provided that nothing contained in this sub-section shall apply to any insurance or banking company or any company engaged in the generation or supply of electricity or to any other class of company for which a form of balance sheet has been specified in or under the law governing such class of company.

(2) Every profit and loss account of a company shall give a true and fair view of the profit and or loss of the company for the financial year and shall, subject as aforesaid, comply with the requirements of Part II of Schedule XI so far as applicable thereto:

Provided that nothing contained in this sub-section shall apply to any insurance or banking company or any company engaged in the generation or supply or electricity or to any other class of company for which a form of profit and loss account has been specified in or under the law governing such class of company.

(3) The Government may, by notification in the official Gazette, exempt any class of companies from the requirements of Schedule XI if, in its opinion, it is necessary to grant the exemption in the public interest; and any such exemption may be granted either unconditionally or subject to such conditions as may be specified in the notification.

(4) The Government may, on the application or with the consent of the Board of Directors of the company, by order, modify in relation to that company of the requirement of this Act as to the matters to be stated in the balance-sheet or profit and loss account for the purpose of adopting them to the circumstances of the company;

(5) The balance sheet and the profit and loss account of a company shall not 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-

(i) in the case of an insurance company, any matters which are not required to be disclosed by the Insurance Act, 1938 ((IV of 1938);

(ii) in the case of a banking company, any matters which are not required to be disclosed by ব্যাংক কোম্পানী আইন, ১৯৯১ (১৯৯১ সনের ১৪ নং আইন);

(iii) in the case of a company engaged in the generation of supply of electricity, any matters which are not required to be disclosed by the Electricity Act, 1910 (IX of 1910);

(iv) in the case of a company governed by any other law for the time being in force, any matters which are not require to be disclosed by such law;

(v) in the case of any company, any matters which are not required to be disclosed by virtue of the provisions contained in Schedule XI or by virtue of the notification issued under sub-section (3) or an order issued under sub-section (4).

(6) For the purposes of this section, except where the context otherwise requires any reference to balance-sheet or to profit and loss account shall include any notes hereon or documents annexed thereto, giving information required by this Act and allowed by this Act to be given in the form of such notes or documents.

(7) If any such person as is referred to in sub-section (7) of section 181 fails to take all reasonable steps to secure compliance by the company, as regards any accounts laid before the company in general meeting with this section and with the other requirements of this Act as to in the accounts, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five thousand taka or with both:

Provided that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully.

Notes/Comments/Precedents

Balance sheet and profit and loss account : **A** balance sheet is pictorial representation of the trading position of the company easily appreciated not by ignorant people, but persons who are reasonably able to understand commercial expressions and commercial conditions *[Legal Remembrancer Vs. Akhil Bandhu (1937) 1 Cal 328.]* This is why the section*provides that* every profit and loss account of a company shall give a true and fair view of the profit and or loss of the company for the financial year.

Entry in the balance sheet– acknowledgement : An entry in the balance sheet showing a debt owed to the creditor amounts to an acknowledgement of liability unless it is shown that it was made clearly without intending to admit the existence of debtor and creditor relationship or that the authentication is colourable and vitiated for some satisfactory reason *[Babulal Rukmanand Vs. Liquidator, Bharatpur Oil Mills Ltd. A I R (1968) Raj. 214.]*

186. Balance sheet of holding company to include certain particulars as to its subsidiaries.– (1) There shall be attached to the balance sheet of a holding company having a subsidiary or subsidiaries at the end of the financial year as at which the holding company's balance sheet is made out, the following documents in respect of such subsidiary or each such subsidiary, as the case may be-

(a) a copy of the balance sheet of the subsidiary;

(b) a copy of its profit and loss account;

(c) a copy of the report of its Bard of Directors;

(d) a copy of the report of its auditors;

(e) a statement of the holding company's interest in the subsidiary as specified in sub-section (6);

(f) the statement referred to in sub-section (8), if any; and

(g) the report referred to in sub-section (9), if any.

(2) The balance sheet referred to the clause (a) of sub-section (i) shall be made out in accordance with the requirement of this Act as at the end of the financial year of the subsidiary next before the day as at which the holding company's balance sheet is made out.

(3) The profit and loss account and the reports of the Board of directors and of the auditors, referred to in clause (b), (c) and (d) of sub-section (1) shall be made out in accordance with the requirement of this Act for the financial year of the subsidiary referred to in sub-section (2).

(4) The financial year aforesaid of the subsidiary shall not end on a day which the holding company's financial year ends by more than six months.

(5) Where the financial year of subsidiary is shorter in duration than that of its holding company, references to the financial year of the subsidiary in sub-sections (2), (3) and (4) shall be construed as reference to two or more financial years of the subsidiary the duration of which, in the aggregate is not less than the duration of the holding company's financial year.

(6) The statement referred to in clause (e) of sub-section (1) shall specify–

(a) the extent of the holding company's interest in the subsidiary at the end of the financial year or at the end of the last of the financial years of the subsidiary;

(b) the net aggregate amount, so far as it concerns members of the holding company and is not dealt with in the company's accounts, of the subsidiary's profits after deducting its losses or vice-versa-

(i) for the financial year or years of the subsidiary as aforesaid; and

(ii) for the previous financial years of the subsidiary since it became the holding company's subsidiary;

(c) the net aggregate amount of the profits of the subsidiary after deducting its losses or vice-versa–

(i) for the financial year or years of the subsidiary as aforesaid; and

(ii) for the previous financial years of the subsidiary since it became the holding company's subsidiary;

so far as those profits are dealt with, or provision is made for those losses, in the company's accounts.

(7) Clauses (b) and (c) of sub-section (6) shall apply only to profits and losses of the subsidiary which may properly be treated in the holding company's accounts as revenue profits or losses; and profits or losses attributable to any other of its subsidiaries shall not, for that or any other purpose, be treated as aforesaid so far as they are profits or losses for the period before the date of or as from which the shares were acquired by the company or any of its subsidiaries, except that they may in a proper case be so treated where-

(a) the holding company is itself the subsidiary of another body corporate; and

(b) the shares were acquires from that body corporate or a subsidiary of this.

Explanation : For the purpose of determining whether any profits or losses are to be treated as profits or losses for the said period, the profits or loss for any financial year of the subsidiary may, if it isn't practicable to apportion it with reasonable accuracy by reference to the facts, be treated as accruing from day to day during that year and be apportioned accordingly.

(8) Where the financial year or years of a subsidiary referred to in sub-section (5) do not coincide with the financial year of the holding company, a statement containing information on the following matters shall also to be attached to the balance sheet of the holding company:

(a) whether there has been any changes and, if so what change took place in the holding company's interest in the subsidiary between the end of the financial year or of the last of the financial years of the subsidiary and the end of the holding company's financial year;

(b) details of any material change, which have occurred between the end of the financial year or of the last of the financial years of the subsidiary and the end of the holding company's financial year in respect of-

(i) the subsidiary's company's fixed assets;

(ii) its investments;

(iii) the moneys lent by it;

(iv) the moneys borrowed by it for any purpose other than that of meeting current liabilities.

(9) If, for any reason, the Board of Directors of the holding company is unable to obtain information of any of the matters requires to be specified by sub-section (7), a report in writing to that effect shall be attached to the balance sheet of the holding company.

(10) The document referred to in clause (e), (f) and (g) of sub-section (1) shall be signed by the persons by whom the balance sheet of the holding company is required to be signed.

(11) The Government may on the application or with the consent of the board of Directors of the company, direct that in relation to any subsidiary, the provisions of this section shall not apply, or shall apply only to such extent as may be specified in the direction.

(12) If any such person as is referred to in sub-section (7) of section 181 fails, to take all reasonable steps to comply with the provisions of this section, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand taka, or with both:

Provided that in any proceedings against any person in respect of an offence under this section, it shall be a defence to prove that a competent and reliable person was charged with the duty of seeing that the provisions of this section were complied with and that he was in a position to discharge that duty:

Provided further that no person shall be sentenced to imprisonment for any such offence unless it was committed wilfully.

187. Financial year of holding company and subsidiary.– (1) Where it appears to the Government that it is desirable for a holding company or a holding company's subsidiary to extent its financial year so that the subsidiary's financial year may end with that of the holding company, and for that purpose to postpone the submission of the relevant account to a general meeting, the Government may, on the application or with the consent of the Board of Directors of the company whose financial year is to be extended, direct that in the case of that company, the submission of accounts to a general meeting, the holding of a general meeting or the making of an annual return, shall not be required to be submitted or made earlier than the dates specified in the direction notwithstanding anything to the contrary in this Act or in any other law for the time being in force.

(2) The Government shall, on the application of the Board of Directors of a holding company or a holding company's subsidiary, exercise the powers conferred on it by sub-section (1), if it is necessary to do in order to secure that the end of the financial year of the

subsidiary does not precede the end of holding company's financial year by more than six months, where that is not the case at the commencement of this Act or at the date on which the relationship of holding company and subsidiary comes into existence where that date is later than the commencement of this Act.

Notes/Comments/Precedents

Financial year : The period for which the profit and loss account of a company relates is known as 'financial year'. The financial year of the subsidiary company may end on the same day on which the holding company's year ends. The duration of a year is however, sme for both the companies. On application or with the consent of the Board of Directors of the company whose financial year is to be extended, the Government may, extend the financial year of the applicant company so that the financial year of subsidiary company ends with end of financial year of the holding company.

188. Rights of holding company's representatives and members.– (1) A holding company may, by resolution, authorise its representatives named in the resolution to inspect the books of account kept by any of its subsidiaries, and the books of account of any such subsidiary shall be open to inspection by those representatives at any time during business hours.

(2) The rights conferred by section 195 upon members of a company may be exercised, in respect of any subsidiary, by such representative of the holding company as if they alone were members of the subsidiary.

Notes/Comments/Precedents

Holding Company may inspect books of accounts of subsidiaries : A Holding company has a right to inspect the books of accounts of its subsidiary comapny. According to this section a holding company may by resolution at a general meeting appoint and authorise its representatives to inspect such books.

189. Authentication of balance sheet, profit and loss account, etc.– (1) Save as provided by sub-section (2), every balance sheet, and every profit and loss account or income and expenditure account shall be signed on behalf of the Board of Directors-

(i) in the case of banking company, by the manager, or managing agent, if any, and, where there are more than three directors of the company, by at least three of those directors or, where there are not more than three directors, by all the directors;

(ii) in the case of any other company, by its managing agent, manager or secretary, if any, and by not less than two directors of the company one of whom shall be the managing director where there is one.

(2) When the total number of directors of the company for the time being in Bangladesh is less than the number of directors whose signatures are required by sub-section (1), then the balance sheet, and profit and loss account or the income

and expenditure account shall be signed by all the directors for the time being in Bangladesh, or if there is only one director for the time being in Bangladesh, by such director but in a such case, there shall be attached to the balance sheet, and the profit and loss account or the income and expenditure account a statement signed by such director or directors explaining the reason for non-compliance with the provisions of sub-section (1).

(3) The balance sheet and the profit and loss account or income and expenditure account shall be approved by the Board of Directors before they are signed on behalf of the Board in accordance with the provisions of this section and before they are submitted to the auditors for their report thereon.

(4) If any copy of a balance sheet or profit and loss account or income and expenditure account, which has not been signed as required by sub-sections (1) and (2), is issued, circulated or published or if any copy of a balance sheet is issued, circulated or published without there being annexed or attached hereto, as the case may be, a copy of that account, any accounts, reports or statements which, by virtue of section 186 are required to be attached to the balance sheet, the auditors report, and the BoardÆs report referred to in section 185 or if any default is made in complying with other requirement of this section, the company and 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 may extend to two thousand taka or with both.

Notes/Comments/Precedents

Authentication of balance sheet and profit and loss account : Except in the case of a banking company, the balance sheet and profit and loss account of a company must be signed on behalf of the Board of Directors by two directors and countersigned by the manager, or secretary, if any. If the company has a managing director, he should be one of the signing directors. The balance sheet and profit and loss account must be approved by the Board before they are submitted to the auditors.

Balance Sheet signed by directors– Evidence of admission : Balance sheet bearing signatures of the directors can be used as admissions made by them and proved against them under section 21 of the Evidence Act. *[Janvani Press Ltd. In re., (1969) 1 Comp. LJ 327]*

190. Copy of balance-sheet, etc. to be filed with Registrar.– (1) After the balance sheet and profit and loss account or the income and expenditure account, as the case may be, have been laid before a company at an annual general meeting as aforesaid, there shall be filed with the Registrar, within thirty days from the date on which the balance sheet and the profit and loss accounts were so laid, or where the annual general meeting of a company for any year has not been held, there shall be filed with the Registrar within thirty days from the last day on which that meeting should have been held in accordance with the provisions of this Act three copies of the balance-sheet, and of the profit and loss account or the income and expenditure account, as the case may be signed by the managing director,

managing agent, manager or secretary of the company or if there be none of these, by a director of the company, together with three copies of all documents which are required by this Act to be annexed or attached to such balance-sheet or profit and loss account or income and expenditure account:

Provide that in the case of a private company, copies of the balance-sheet and copies or the profit and loss account shall be field with the Registrar separately:

Provided further that, in the case of a private company which is not an subsidiary of a public company, no person other than a member of the company shall be entitled to inspect or to obtain copies of the profit and loss account of that company.

(2) If the annual general meeting of a company before which a balance-sheet is laid as aforesaid does not adopt the balance-sheet or, if the annual general meting of a company for any year has not been held, a statement of that fact and of the reasons therefor shall be annexed to the balance-sheet and to the copies thereof required to be filed with the Registrar.

(3) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding one hundred taka for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

Notes/Comments/Precedents

Object of the Section : The object of the section is to protect the interest of the general public and particularly to safeguard those of the share holders and creditors of the company by making it obligatory on the company or its directors to file copies of the balance-sheet to enable the shareholders and creditors apart from the general public to know how the affairs of the company are being carried on and what exactly the assets and liabilities of the company are and how the company in faring in the business which is being carried on by it. The underlying object of public policy will be defeated, if default has been committed by the company and its directors in filing the copies of the balance-sheet. Therefore, the offence under this section cannot be held to be merely a technical offence.

In *Madan Gopal Vs. the State A I R 1968 Cal 79* it has been held that the (i) hold the annual general meeting, (ii) lay before the meeting balance sheet and profit and loss accountand (iii) filed the same with the Registrar.

Obligation of the Company : Three copies of balance-sheet, etc., are required to be filed with the Registrar. Section 190 of the Companies Act requires every company to file with the Registrar within thirty days from the date on which the balance sheet and profit and loss account were laid before the company at an annual general meeting, three copies of its balance sheet and profit and loss account signed by the managing director, manager or secretary of the company, or if there be none of these by a director of the company together with three copies of all documents which are required by the Act to be annexed or attached thereto.

Complaint made direct to High Court : *Complaint for offences under section 82(2) (corresponding to sec. 76(2) of the Companies Act, 1913) made direct to the High Court- Held that* High Court cannot take cognizance of the offences. Some members of respondent (a registered Association) field

an application direct to the High Court alleging that the respondent Association had failed to call the general meeting of members for three years and before, committed an offence under section 82(2)of the Companies Act, 1994 (corresponding to sec. 76(2) of the Companies Act, 1913). the said Association had also not maintained the books of accounts as required under section 181 of the Act (corresponding to sec. 130 of the Companies Act, 1913).

It was contended that since the High Court has to determine the question of default, it alone could take cognizance of the offence under section 76(2) of the Act, 1913 (corresponding to sec. 82(2) of the Companies Act, 1994). *Held* : The application made direct to the High Court for taking penal action was untenable and misconceived. The High Court would have jurisdiction to try the accused if the case is committed to the High Court under section 194(1) Cr. P.C., or if proceedings are started on an application of the Advocate- general under section 195(2) Cr. P.C. or are transferred to it under section 526 Cr. P.C. *[Mohammed Azhar Hossain Vs. district Cricket Association, (1969) 21 DLR (WP) 204.]*

191. Rights of members to copies of account and report.– (1) A copy of every balance sheet, including the profit and loss account, the auditors report or the income and expenditure account and every other document required by law to be annexed or attached, as the case may be, to the balance sheet which is to be laid before a company in general meeting shall, not less than fourteen days before the date of the meeting, be sent free of charge, to every member of the company, to every holder of debentures issued by the company, not being debentures which *ex-facie* are payable to the bearer thereof, to every trustee for the holders of any debentures issued by the company, whether such holder or trustee is or is not entitled to have notices of the general meeting of the company sent to him, and to all persons other than such members, holders or trustees, being persons so entitled:

Provided that:

(a) in the case of a company not having a share capital, this sub-section shall not require the sending of a copy of the document aforesaid to a member, or holder of debentures, of the company who is not entitled to have notices of general meeting of the company sent to him;

(b) this sub-section shall not require a copy of the document aforesaid to be sent-

(i) to a member, or holder of debentures, of the company who is not entitled to have notices of general meetings of the company sent to him and of whose address the company is unaware;

(ii) to more than one of the joint holders of any shares or debentures none of whom is entitled to have such notices sent to him; or

(iii) in the case of joint holders of any shares or debentures some of whom are and some of whom are not entitled to have such notices sent to them, to those who are not entitled; and

(c) if the copies of the documents aforesaid are sent less than fourteen days before the date of the meeting, they shall, notwithstanding that fact, be deemed to have been duly sent to the members entitled to vote at the meeting if they do not raise any objection to such sending.

(2) Any member or holder of debentures of a company, whether he is or is not entitled to have copies of the company's balance sheet sent to him, shall, on demand, be entitled to be furnished without charge, and any person from whom the company has accepted a sum of money by way of deposit shall, on demand accompanied by he payment of fee of ten taka, be entitled to be furnished, with a copy of the last balance sheet of the company and of every document required, by law to be annexed or attached thereto, including the profit and loss account and the auditor's report and such documents shall be delivered to him within seven days from such demand.

(3) If default is made in complying with sub-sections (1) and (2), the company, and also every officer of the company who is in default, shall be punishable with fine which may extend to five hundred taka.

(4) If, when a person makes a demand for a copy of any document with which he is entitled to be furnished by virtue of sub-section (2), default is made in complying with the demand within seven days after the making thereof, the company, and also every officer of the company who is in default, shall be punishable with fine which may extend to five hundred taka, unless it is proved that the person had already made a demand for and been furnished with a copy of the document; and in case of such default, the Court, apart from imposing the penalty, may also, by order, direct that the copy demanded shall forthwith be furnished to the person concerned.

(5) Sub-sections (1) to (4) shall not apply in relation to a balance sheet of a private company laid before it before the commencement of this Act, and in such a case the right of any person to have sent to him or to be furnished with a copy of the balance sheet, and the liability of the company in respect of a failure to satisfy that right, shall be the same as they would have been if this Act be had not been passed.

Notes/Comments/Precedents

Obligation to supply copies of balance sheet etc :This section provides that not less than 14 days before the date of meeting, every company (public as well as private) must send a copy of the balance sheet together with the profit and loss account, Auditors report and Board's report to (i) every member of the company, (ii) every registered debenture-holder, (iii) every trustee for debenture-holders, (iv) every of holder or trustee other than the members. These documents need be sent free of charge. If the company fails or refuse to supply the papers provided in the section, the company and the officer in default shall be liable to fine of Tk. 500.00.

STATEMENT TO BE PUBLISHED BY BANKING AND CERTAIN OTHER COMPANIES

192. Certain companies to publish statement in schedule.– (1) Every company being a limited banking company or an insurance company or a deposit, provident or benefit society shall, before it commences business, and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement hereinafter referred to as the said statement in the form as in Schedule XII, or as near thereto as circumstances will admit.

(2) A copy of the said statement together with a copy of the last audited balance sheet laid before the members of the company shall be displayed and, until the display of the next following statement, kept displayed in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on.

(3) Every member and every credit to of the company shall be entitled to a copy of the said statement on payment of a sum not exceeding five taka.

(4) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding one hundred taka for everyday during which the default continues; and, also every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

(5) This section shall not apply to a life insurance company or provident insurance society, to which the provisions of the Insurance Act, 1938 (IV of 1938), or any other insurance law for the time being in force as to the annual statement to be made by such company or society apply with or without modifications, if the company or society complies with those provisions.

Notes/Comments/Precedents

Obligationof Bank company and Insurance company : It is obligatory upon a limited Banking Company and an Insurance company, before it commences business and also on the first Monday in the month of February and August every year to make a statement in form as set forth in Schedule XII of this Act or in the from near thereto. A copy the said statement together with a copy of the last audited balance sheet laid before the annual general meeting must be displayed in a conspicuous place in the company's registered and branch office or in the place of business. Any member or creditor of such company are entitled, on payment of five Taka to have a copy of such statement. This provision is not applicable to a life insurance company or provident insurance society to which provisions as to annual accounts of the Insurance Act, 1938 apply. The default in compliance with the statement makes a company and all defaulting officers liable to fine of Tk. 100.00 for every day's default.

INVESTIGATION BY THE REGISTRAR

193. Power of Registrar to call for information or explanation.– (1) Where the Registrar, on perusal of any document which a company is required to submit to him under the provisions of this Act, or on receipt of a written objection against any such documents from any member of the company, is of opinion that any information explanation is necessary in order that such document may afford full particulars of the matter to which it purports to relate, he may, by a written order, call on the company to furnish in writing such information or explanation or to produce such books or papers, as may be required by him within such time as he may specify in his order.

(2) On the receipt of an order under sub-section (1), it shall be the duty of all persons who are or have been officer of the company to furnish such information or explanation (1) to the best of their power.

(3) If any such person refses or neglects to furnish any such information or explanation, he shall be liable to a fine not exceeding five hundred taka in respect of each offence, and the Court may, on the application of the Registrar and upon notice to the company, make an order on the company for production of such document as in its opinion may reasonably be required by the Registrar for his investigation and allow the Registrar inspection thereof on such terms and conditions as it thinks fit.

(4) On receipt of such information or explanation the Registrar may annex, the same to the original document submitted to him, and any additional document so annexed by the Registrar shall be subject to the like provisions as to inspection and the taking of copies as the original documents are subject.

(5) If such information or explanation or additional document is not furnished within the time specified by the Court or the Registrar, or if after perusal of such information or explanation or additional document; the Registrar is of opinion that the document in question discloses an unsatisfactory state of affairs, or that, it does not disclose a full, fair, and true, statement of the matters to which it purports to relate, the Registrar may direct the company to correct the documents in the manner directed by him or may report in writing the circumstances of the case to the government.

(6) If it is represented to the Registrar on materials placed before him by any member, contributory, creditor or any other person interested that the business of a company is being carried on in fraud of its members, creditors or persons dealing with the company or for a fraudulent purpose, that the affairs of the company are not being managed in accordance with the provisions of this Act, he may, after giving the company an opportunity of being heard, by a written order, call on the company for information or explanation on matters specified in the order or require

the company to produce any document within such time as he may specify in the order and the provisions of sub-sections (2), (3) and (5) of this section shall apply to such order.

(7) If upon investigation, the Registrar is satisfied that any representation on which he has taken action under sub-section (6) is false, frivolous or vexatious, he shall disclose the identity of the informant to the company.

(8) The provisions of this section shall apply *mutatis mutandis* to documents which a liquidator is required to file under this Act.

Notes/Comments/Precedents

Object : The object of this section is to enable the government to remedy things even at the outset *[Coimbatore Spinning and Weaving Co. Ltd. Vs. M. S. Srinivasan AIR 1959 Mad. 229=(1959) 29 Comp. Cas. 97].*

Section 193 states that where, on perusal any document filed with him, the Registrar is of opinion that any information or explanation is necessary with respect to any matter to which such document purports to relate, he may, by a written order, ask the company to supply it in writing within a specified time. On receipt of this order from the Registrar, the company and every officer of the company, past or present, must furnish such information or explanation. If no information is supplied or it is inadequate, the Registrar may by another order call upon the company to produce before him such books as he considers necessary. It shall be the duty of the company and every officer of the company to produce such books and papers.

Powers of Registrar : While exercising powers u/s 193 of the Act the Registrar is not required to record any finding, nor has he to be satisfied that the representations are true. To exercise the powers it is enough if the Registrar is of opinion that the affairs of the company are being carried on in the manner specified in sub section (6). The word 'opinion' does not denote the same state of mind as is indicated by the word 'finding' or the word 'satisfaction' *[Coimbatore Spinning and Weaving Co. Ltd. Vs. M.S. Srinivasan AIR 1959 Mad. 229 =(1959) 29 Comp. Cas 27.]*

Where, upon information in his possession or otherwise, the Registrar has reasonable ground to believe that books and papers of, or relating to, any company or other body corporate, may be destroyed, mutilated, altered, falsified or secreted, the Registrar may apply to the Magistrate of the First Class having jurisdiction for an order for the seizure of books and papers. The Magistrate may, by order, authorise the Registrar to enter the place or places where the books and papers are kept, search the places and seize such books and papers as he considers necessary. The Registrar may take copies and then within 30 days of the seizure return the books and papers to the persons from whose custody he took them and inform the Magistrate accordingly. The search will be made under the Code of Criminal Procedure, 1898.

Members' right to inspect documents : It is right of the members of public to inspect the documents and obtain certified copies from the office of the Registrar and such right cannot be held back on the ground that the Registrar has not accepted/approved the returns filed with the Registrar. *[City Bank Limited Vs. Registrar, Joint Stock Companies and others 6 BLC (2001) 479].*

194. Seizure of documents by Registrar.– (1) Where, upon any information, the Registrar has reasonable ground to believe that books and papers of or relating to any company or other body corporate or any managing agent or managing director or manager of such company or other body corporate, or any

associate of such managing agent or managing director or manager may be destroyed, mutilated, falsified or secreted the Registrar may make an application to the Magistrate of the first class having jurisdiction for an order for the seizure of such books and papers.

(2) After considering the application and hearing the Registrar, if necessary, the Magistrate may, by order, authorise the Registrar-

(a) to enter, with such assistance as may be required, the place or places where such books and papers are kept;

(b) to search that place or those places in the manner specified in the order;

(c) to seize such books and papers as he considers necessary.

(3) The Registrar shall return the books and papers seized under this section as soon as may be, and in any case not later than the thirtieth day, after such seizure, to the company, or the other body corporate, or as the case may be, to the managing agent or the associate of such managing agent or managing director or the manager or the associate of such managing agent or managing director or manager or any other person, from whose custody or power they were seized, and shall inform the Magistrate of such return:

Provided that the Registrar may, before returning such books and papers as aforesaid, take copies of, or extracts from, them or place identification marks on them or any part thereof or deal with them in such other manner as he considers necessary.

(4) Save as otherwise provided in this section, every search or seizure made under this section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898) relating to search or seizure, made under that Code.

Notes/Comments/Precedents

Scope of the section : This section corresponds with section 103 of the Code of Criminal Procedure (Act V of 1898).

INSPECTION AND AUDIT

195. Investigation of affairs of company by inspectors.– The Government may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Government may direct-

(a) in the case of a company having a share capital, on the application of members holding not less than one-tenth of the shares issued;

(b) in the case of a company not having a share capital, on the application of not less than one-fifth in number of the person on the company's register of members;

(c) in the case of any other company, on a report by the Registrar under section 193(5).

Notes/Comments/Precedents

Object : The companies Act, 1994 affords some protection to shareholders and creditors of a company by giving powers to the government in certain circumstances to investigate into the affairs of a company. Following such investigation the government may take action in appropriate cases whereby any person, guilty of a criminal offence may be prosecuted, or to petition for the winding up.

196. Application for inspection to be supported by evidence.– An application by members of the company under section 195 shall be supported by such evidence as the Government may require for the purpose of showing that the applicants have good reason for requiring the investigation; and the Government may also, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.

197. Inspection of books and examination of officers.– Without prejudice to its powers under section 195, the Government-

(a) shall appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Government may direct, if the company, by a special resolution or, the Court, by an order, declares that the affairs of the company ought to be investigated by an inspector appointed by the Government; and

(b) may do so if, in the opinion of the Government, there are circumstances suggesting-

(i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive of any of its members, or that the company was formed for any fraudulent or unlawful purpose; or

(ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or

(iii) that the members of the company have not been given all he informations with respect to its affairs which they might reasonably expect.

198. Firm, body corporate or association not to be appointed inspector.– No firm, body corporate or other association shall be appointed an inspector under section 195 or section 197.

199. Powers of inspectors to carry investigation into affairs of related companies or of managing agent or associate.– (1) If any inspector appointed under section 195 or 197 to investigate the affairs of a company thinks it necessary, for the purposes of his investigation, to investigate also the affairs of–

(a) any other body corporate which is, or was at any relevant time the company's subsidiary or holding company's or a subsidiary of its holding company, or a holding company of its subsidiary.

(b) any other body corporate which is or has at any relevant time been managed-

(i) by any person as managing agent, or as managing director or as manager, who is, or was at the relevant time, either the managing agent or the managing director or the manager of the company; or

(ii) by any person who is, or was at the relevant time, an associate of the managing agent ; or

(iii) by any person of whom the managing agent is, or was at the relevant time, as associate; or

(c) any other body corporate which is, or was at any relevant time, managed by the company or whose Board of Directors comprises of nominees of the company or is accustomed to act in accordance with the directions of-

(i) the company, or

(ii) any of the directors of the company, or

(iii) any company whose directorship is held by the employee or nominees of those having the control and management of the first mentioned company; or

(d) any person, who is, or was at any relevant time, the company's managing agent, managing director or manager or an associate of such managing agent, then the inspector shall, subject to the provision of sub-section (2), have power to investigate and shall report on the affairs of the other body corporate, the managing agent, managing director, manager or associate of the managing agent, as far as he thinks that the results of his investigation thereof are relevant to the investigation of the affairs of the first-mentioned company.

(2) In the case of any body corporate or person referred to in clause (b) (ii), (iii), (c) or (d) of sub-section (1), the inspector shall not exercise his affairs without first having obtained the prior approval of the government thereto:

Provided that before according approval under this sub-section, the Government shall give the body corporate or person a reasonable opportunity to show cause as to why such approval shall not be accorded.

200. Production of documents and evidence.– (1) It shall be the duty of all officers and employees and agents of the company, and where the company is or was managed by a managing agent, of all officer and employees and agent of the managing agent, and where the affairs of any other body corporate or of a managing agent or of an associate of a managing agent are investigated by virtue of section 199, of all officers and employees and agents of such body corporate, managing agent or associate, and where such managing agent or associate is or was a firm, of all partners in the firm-

(a) to preserve and to produce to the inspector or any person authorised by him in this behalf with the previous approval of the government, all books and papers of, or relating to, the company or, as the case may be, of or relating to the other body corporate, managing agent or associate which are in their custody or powers; and

(b) otherwise to give to the inspector all assistance in connection with the investigation which they are reasonably able to give.

(2) The inspector may, with the previous approval of the Government, require any body corporate other than a body corporate referred to in sub-section (1) to furnish such information, or produce such books and papers before him or any person authorised by him in this behalf with the previous approval of the Government as he may consider necessary, if the furnishing of such information or the production of such books and papers is relevant or necessary for the purposes of his investigation.

(3) The inspector may keep in his custody any books and papers produced under sub-section (1) or (2) for six months and thereafter shall return the same to the company, body corporate, firm or individual by whom or on whose behalf the books and papers are produced:

Provided that the inspector may again call for the books and papers if they were needed again:

Provided further that if certified copies of the books and papers produced under sub-section (2), are furnished to the inspector, he shall return those books and papers to the body corporate concerned.

(4) An inspector may examine on oath any of the persons referred to in sub-section (1) or with the previous approval of the Government, any other person, in

relation to the affairs of the company, other body corporate, managing agent or associate, as the case may be, and may administer an oath accordingly and for that purpose may require any of those persons to appear before him personally.

(5) If any person fails without reasonable cause or refuses–

(a) to produce to an inspector or any person authorised by him in this behalf with the previous approval of the Government any book or paper which it is his duty under sub-section (1) or (2) to produce; or

(b) to furnish any information which it is his duty under sub-section (2) to furnish; or

(c) to appear before the inspector personally when required to do so under sub-section (4) or to answer any question which is put to him by the inspector in pursuance to that sub-section; or

(d) to sign the notes of any examination referred to in sub-section (6), he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five thousand taka,

(6) Notes of any examination under sub-section (4) shall be taken down in writing and shall be read over to, or by, and signed by, the person examined, and may thereafter be used in evidence against him.

(7) In this section–

(a) the expression "officers" in relation to any company or other body corporate, includes any trustee for the debenture holders of such company or body corporate;

(b) the expression "agent" in relation to any company, other body corporate or person, means, any one acting or purporting to act for or on behalf of such company, body corporate or person, and includes the bankers, and legal advisers or, and persons employed as auditors by such company, body corporate or person; and

(c) any reference to officers and employees, agents or partners shall be construed as a reference to past as well as present officers and other employees, agent or partners, as the case may be.

Notes/Comments/Precedents

Principles of natural justice to be followed : *Held-* where the Inspector does not follow the principle of natural justice in making his enquiries, questioning and giving report, if the report is challenged or the conduct of the enquiry is questioned, the only relief which the Court can give is a declaration that the rules of natural justice have not been followed. The Court cannot set aside the inspector's report or declare any part of the report as void *[Maxwell Vs. Department of Trade and Industry (1974) 2 All E.R. 122.]*

201. Seizure of document by inspectors.– (1) Where in the course of investigation under section 195 or section 197, the inspector has reasonable ground to believe that the books and papers of, or relating to, any company or other body corporate or any managing agent or managing director or manager of such company or other body corporate, or any associate of such managing agent may be distorted, mutilated, altered, falsified or secreted, the inspector may make an application to the Magistrate of the First Class having jurisdiction for an order for the seizure of such books and papers.

(2) After considering the application and hearing the inspector, if necessary, the Magistrate may by order authorise the inspector-

(a) to enter, with such assistance as may be required the place or places where such book and papers are kept;

(b) to search that place or those places in the manner specified in the order; and

(c) to seize books and papers he considers necessary for purposes of his investigation.

(3) The inspector may keep in his custody the books and papers seized under this section for such period not later than the conclusion of the investigation as he considers necessary and thereafter shall return the same to the company or the other body corporate or, as the case may be, to the managing agent or the associate of such managing agent or the managing director or the manager or any other person from whose custody or power they were seized and shall inform the Magistrate of such return:

Provided the inspector may, before returning such books and papers as aforesaid, place identification marks on them or any part thereof.

(4) Save as otherwise provided in this section, every search or seize made under this section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898) relating to search or seizure made under the Code.

Notes/Comments/Precedents

Search and seizure of documents : Section 201 of the Act empowers the inspector to have the book s and papers seized and search any place by moving the First Class Magistrate, where he apprehends that these may be altered, falsified or secreted. He may keep such documents in his custody for a period not beyond the date of conclusion of the investigation. Before returning the documents seized he may place mark of identification on the same.

Legal position of a decree when one of the judgment-debtors is adjudged insolvent by a foreign Court : Decree passed against several defendants is joint and several. When a decree I money suit is passed against the principal and the agent as well who furnished performance guarantee, the defendant agent is equally liable for the decree. A letter from the Administrator of a foreign Court as to the principal defendant adjudged a bankrupt is not sufficient to strike out the execution proceeding.

Section 201 of the Companies Act, 1994 has no manner of application in such a case. Unless proved by following a special procedure laid down in the Evidence Act, a judgment of a court of foreign country is not admissible in evidence. *[Birds Bangladesh Agencies Ltd. Vs. Sadharan Bima Corporation and another 7 MLR 2002 (HC) 128].*

Order open to judicial review : Where the magistrate after considering the application and hearing the inspector passes order of search, the said order to Magistrate is open to judicial review under the constitution *[Indian Express (Madurai) Ltd. Vs. Chief Presidency Magistrate (1974) 44 Comp. Cas. 106 (Mad.)=(1979) 2 Mad L.J. 469.]*

202. Inspector's report.– (1) Inspectors may, and if so directed by the Government shall, make interim reports to the Government, and on the conclusion of the investigation, shall make a final report to the Government: and any such report shall be written or printed, as the Government may direct.

(2) The Government–

(a) shall forward a copy of the final report to the company at its registered office, and also to any other body corporate, managing agent, or associate if dealt with in the report by virtue of section 199;

(b) may, if it thinks fit, furnish a copy thereof, on request and on payment of the prescribed fee, to any person–

(i) who is a member of the company or other body corporate including a managing agent or associate of a managing agent where such managing agent or associate is a body corporate dealt with in the report by virtue of section 199;

(ii) who is a partner in the firm, where such managing agent or associate is a firm;

(iii) whose interest as a creditor of the company, other body corporate, managing agent or associate aforesaid appears to the Government to be affected;

(c) shall, where the inspectors are appointed under clause (a) or (b) of section 195, furnish at the request of the applicants for the investigation a copy of the report of them;

(d) shall, where the inspectors are appointed under clause (a) of section 197 in pursuance of and order of the Court, furnish a copy of the report to the Court; and

(e) may also cause the report to be published.

203. Prosecution.– (1) If, from any report made under section 202 it appears to the Government that any person has, in relation to the company or in relation to any other body corporate, managing agent, or associate of other body corporate, managing agent, or associate of a managing agent whose affairs have been investigated by virtue of section 199, been guilty of any offence for which he is

criminally liable, the Government may prosecute such person for the offence, and it shall be the duty of all officers and employees and agents of the company, body corporate, managing agent or associate, as the case may be, other than the accused in the proceeding, to give the Government all assistance in connection with the prosecution which they are reasonably able to give.

(2) Sub-section (7) of section 200 shall apply for the purpose of this section as it applies for the purposes of that section.

Notes/Comments/Precedents

Prosecution–alleged act of embezzlement : There is nothing in Section 203 or other provisions of the Act to point to the conclusion that no prosecution can be launched or no report can be made to the police is respect of an alleged act of embezzlement or malfeasance by an individual connected with a Company *[Indian Express (Madurai) Ltd. Vs. Chief Presidency Magistrate (1974) 44 Comp Cas 106 (Mad. =(1979) 2 Mad L.J. 469.]*

204. Application for winding up of company or an order in that behalf.– If any such company or other body corporate or any such managing agent, or associate, being a body corporate, as is mentioned in section 199, is liable to be wound up under this Act, and it appears to the Government from any such report as aforesaid that it is expedient so to do by reasons of any such circumstances as are referred to in sub-clause (1) or (ii) of clause (b) of section 197, the Government may, unless the company, body corporate, managing agent or associate is already being wound up by the Court, cause to be presented to the Court by the Registrar;

(a) a petition for the winding up of the company, body corporate, managing agent, or associate on the ground that it is just and equitable that it should be wound up;

(b) an application for an order under section 233;

(c) both a petition and an application as aforesaid.

Notes/Comments/Precedents

Application during pendency of proceeding : *Held–* The intention of the legislature as discernible from section 204 of the Companies Act seems to be that where the Court is already seized of the matter, at the instance of a party, the government should refrain from taking the initiative. Even where it appears to the government from the report of the investigating inspectors that it is expedient to move the Court for winding up of the company on the ground that it is just and equitable to wind it up, or that an application for an order be made, then also it must stay its hands from doing so if proceedings for winding up of the company are already being taken up by the Court *[Mool Chand Vs. Jagannath Gupta & Co. AIR. 1979 S.C. 1038]*

205. Proceedings for recovery of damages or property.– (1) If from any report made under section 201 it appears to the Government that proceedings

ought, in the public interest, to be brought by the company or any body corporate whose affairs have been invested in pursuance of clause (a), (b) or (c) of section 199:

(a) for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation, or the management of the affairs, or such company or body corporate; or

(b) for the recovery of any property of such company, or body corporate, which has been misapplied or wrongfully retained:
the Government may itself bring proceedings for such purpose in the name of such company or body corporate.

(2) The Government shall indemnify such company or body corporate against any costs or expenses incurred by it in, or in connection with any proceedings brought by virtue of sub-section (1), if such proceedings is found to be frivolous.

206. Expenses of investigation.– (1) The expenses of and incidental to an investigation by an inspector appointed by the Government under section 195 or 197 shall be defrayed in the first instance by the Government; but the following persons shall, to the extent mentioned below, be liable to reimburse the Government in respect of expenses of such investigation:

(a) any person who is convicted on a prosecution instituted in pursuance of section 203, and who is ordered to pay damages or restore any property in the proceeding brought by virtue of section 205, may, in the same proceedings be ordered to pay the said expenses to such extent as may be specified by the Court convicting such person, or ordering him to pay such damages or restore such property, as the case may be;

(b) in any company or body corporate in whose name proceeding are brought under section 205 (1) shall be liable to pay the cost of the investigation but not exceeding the amount or value of any sums or property recovered by it as a result of the proceedings; and

(c) unless, as a result of the investigation, a prosecution instituted in pursuance of section 203-

(i) any company, body corporate, managing agent, associate, managing director or manager dealt with by report of the inspector shall be liable to reimburse the government in respect of the whole expenses, unless and except in so far as the Government otherwise directs; and

(ii) the application for the investigation, where the inspector was appointed under clause (i) and (ii) of the section 195, shall be liable to such extent, if any, as the Government may direct.

(2) Any amount for which a company or body corporate is liable by virtue of clause (b) of sub-section (1) shall be a first charge on the sums or property mentioned in that clause.

(3) The amount of expenses in respect of which any company, body corporate, managing agent, associate, managing director or manager is liable under sub-clause (i) of clause (c) of sub-section (1) to reimburse the Government, shall be recoverable from that company, body corporate, managing agent, associate, managing director or manager, as an arrear of land revenue.

(4) For the purposes of this section, any costs or expenses incurred by the Government in or in connection with proceedings brought by virtue of section 205 including expenses incurred by virtue of sub-section (2) thereof shall be treated as expenses of the investigation giving rise to the proceedings.

(5) Any liability to reimburse the Government imposed by clauses (a) and (b) of sub-section (1) shall, subject to satisfaction of the right of the government to reimbursement, be a liability also to indemnify all persons against liability under clause (c) of that sub-section.

(6) Any such liability imposed by clause (a) of subsection (1) shall, subject to the right of the Government as to reimbursement be a liability also to indemnify all persons against liability under clause (b) of the said sub-section.

(7) Any person liable under the clause (a) or (b) or (c) of sub-section (1) shall be entitled to contribution from any other persons liable under the same clause or clauses as the case may be, according to the amount of their respective liabilities thereunder.

(8) In so far as the expenses to be defrayed by the Government under this section are not recovered thereunder, they shall be paid out of moneys provided by Parliament.

207. Power of company to appoint inspectors.– (1) A company may, by a special resolution, appoint inspectors to investigate its affairs.

(2) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the Government, except that, instead of reporting to the government, they shall report in such manner and to such persons as the company in general meeting may direct.

(3) All persons who are or were officers of the company shall incur the like penalties in case of refusal to produce any book or document required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the Government.

208. Report of the Inspector to the evidence.– A copy of the report of any inspector appointed under this Act authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspector in relation to any matter contained in the report.

209. Saving for legal adviser and bankers.– Nothing in sections 193 to 206 shall require the disclosure to the Registrar or to the Government or to any inspector appointed by the Government-

(a) by a legal adviser, of any privileged communication made to him in that capacity, except in respect the name and address of his client; or

(b) by the bankers of any company, other body corporate, managing agent, or associate of the managing agent or managing director or manager referred to the sections in aforesaid, as such banker, of any information as to the affairs of any of there customers.

Notes/Comments/Precedents

Privileged communication : Provisions of sections 193–206 of the Companies Act do not require the disclosure to the Registrar or to the Government by a legal Advisor or a Banker. It has been held in *Minter Vs Priest 1930 A.C. 558* that any communication between a solicitor and his client or a person who is communicating with the solicitor professionally with a view to becoming his client for the purpose of giving or receiving professionally legal advice is privileged unless it be made in furtherance of some crime or fraud.

210. Appointment and remuneration of auditors.– (1) Every company shall, at each annual general meeting appoint an auditor or auditors to hold office from the conclusion of that meeting until the next annual general meeting and shall, within seven days of the appointment, give intimation thereof to every auditor so appointed:

Provided that no person can be appointed auditor of any company unless his written consent has been obtained prior to such appointment or re-appointment.

(2) Every auditor appointed under sub-section (1), shall, within thirty days of the receipt from the company of the intimation of his appointment, inform the Registrar in writing that he has accepted, or refused to accept, the appointment.

(3) At any annual general meeting a retiring auditor, by whatsoever authority appointed, shall be re-appointed, unless-

(a) he is not qualified for re-appointment; or

(b) he has given the company notice in writing of his unwillingness to be re-appointed: or

(c) a resolution has been passed at that meeting appointing somebody else instead of him or providing expressly that he shall not be re-appointed:

Provided that for the purpose of passing a resolution under clause (c), a notice thereof shall in accordance with section 211 be issued prior to the meeting, and such resolution cannot be passed except on the ground of death, incapacity or dishonesty or disqualification of the retiring auditor,

(4) if an appointment of an auditor is not made at an annual general meeting, the Government may appoint a person to fill the vacancy.

(5) The company shall, within seven days of the Governments power under sub-section (4) becoming exercisable, give notice of that fact to the Government; and, if a company fails to give such notice, the company, and also every officer of the company who is in default, shall be punishable with fine which may extend to one thousand taka.

(6) The first auditor or auditors of a company shall be appointed by the Board of Directors within one month of the date of Registration of the company, and the auditor or auditors so appointed shall hold office until the conclusion of the first annual general meeting:

Provided that–

(a) the company may, at a general meeting remove any such auditor or all or any of such auditors and appoint in his or their place any other person or persons who have been nominated for appointment by any member of the company, and or of whose nomination notice has been given to the members of the company not less than fourteen days before the date of the meeting; and

(b) if the Board of Directors fails to exercise its powers under this sub-section, the company in a general meeting, may appoint the first auditor or auditors.

(7) The Board may fill any casual vacancy in the office of any auditor, but while any such vacancy continues, the remaining auditor or auditors, if any, may act:

Provided that where such vacancy is caused by the resignation of an auditor, the vacancy shall only be filled by the company in general meeting.

(8) Any auditor appointed in a casual vacancy shall hold office until the conclusion of the next annual general meeting.

(9) Except as provided in the process pursuant to sub-section (7), any auditor appointed under this section may be removed from office before the expiry of his term only by a special resolution of the company in the general meeting.

(10) The remuneration of the auditors of a company–

(a) in the case of an auditor appointed by the Board or the Government, shall be fixed by he Board or the Government respectively: and

(b) subject to clause (a), shall be fixed by the company in the general meeting or in such manner as the company in the general meeting may determine.

(11) For the purposes of sub-section (10), any sums paid by the company in respect of the auditors expenses shall be deemed to be included in the expression "remuneration".

Notes/Comments/Precedents

Managing Director– power to appoint auditor : *Held-* Although the managing director has power to manage and run the affairs of the company but in view of the provisions under section 144(7) read with section 131(3) of the Companies Act, 1913 (corresponding to sections 210 and 183 respectively of the Companies Act, 1994) regarding the appointment of auditors for the purpose of auditing of the accounts and drawing up of the balance sheets and profit and loss accounts, the managing director has no power to appoint the first auditors of the company since the provision of section 144(7) of the Companies Act, 1913 (corresponding to sections 210 of the Companies Act, 1994) entitle the Board to appoint the first auditors. *[Alpha Shipping (Pvt.) Ltd. & others Vs. Ghyasuddin Ahmed, 1987 BCR (HCD) 31.]*

Need for audit : A company carries on business with capital furnished by persons who are not in control of the application of the money so supplied by them. They would, therefore, like to see that their investments are safe. For this purpose the accounts must be checked and audited by a duly qualified person who is not connected either with the company or with any officer or an employee of the company. The articles of association of companies usually provide for the appointment of auditors and a periodical audit of accounts. But the Companies Act makes it compulsory for every company to appoint qualified auditors to make a systematic examination of books and records of the company, in order to ascertain or verify, and to report upon, the facts regarding its financial operations and the results thereof. An audit of accounts is conducted with twofold purposes: (1) detection and prevention of errors ; and (2) detection and prevention of fraud.

The auditor is under a clear duty towards the beneficiaries "to probe into the transactions" and to report on their true character. the legal position of the auditor is the audit is intended for the protection of the shareholders and the auditor is expected to examine the accounts maintained by the Directors with a view to inform the shareholders of the true financial position of the Company. The Directors occupy a fiduciary position in relation to the shareholders and in auditing the accounts maintained by the Directors the auditor acts in the interest of the shareholders who are in the position of beneficiaries.

Appointment of Auditors- for past : The provisions of appointing auditors in the General Meeting is for prospective auditing of a Company. When the minority shareholders apply under section 233 of the Companies Act, the Court has inherent power to make alternative arrangement for appointment of auditors for past years as well *[Md. Faruk Vs. Abdul Hamid and ors. (1998) 18 BLD (AD) 236.]*

The provisions of appointing auditors in the Annual General Meeting is for prospective auditing of a Company when the minority share-holders apply under section 233 of the Company Act, the Court has inherent powers to make alternative arrangements for appointment of Auditors for past years, if no auditing has taken place.*[Md. Faruk Vs. Abdul Hamid and ors. 51 DLR (1999) 48.]*

211. Provisions as to resolutions for appointing or removing auditors.– (1) Special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed.

(2) On receipt of such notice the company shall forthwith send a copy thereof to the retiring auditor,

(3) where such notice is given and the retiring auditor makes with respect thereto representation in writing to the company and requests their notification to members

of the company, the company shall, unless the representations are received by it too late for it to do so-

(a) in any notice of the resolution given to members of the company, state the fact of the representation having been made; and

(b) send a copy of the representation to every member of the company to whom notice of the meeting is sent, whether before or after the receipt of the representation by the company, and if a copy of the representation, is not sent as aforesaid because they were received too late or because of the company's default, the auditor may, without prejudice to his right to be heard orally, require that the presentation shall be read out at the meeting.

Provided that copies of the representations need not be sent out and the representations need not be read out at the meeting, if, on the application either of the company or of any other person who claims to be aggrieved, the court is satisfied that the rights conferred by this sub-section are being abused to secure needless publicity for defamatory matter; and the Court may order the company's costs on such an application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application.

(4) Sub-sections (2) and (3) shall apply to a resolution to remove the first auditors or any of them under sub-section (6) of section 210 or to the removal of any auditor or auditors under sub-section (8) of that section, as they apply in relation to a resolution that a retiring auditor shall not be re-appointed.

Notes/Comments/Precedents

Special notice : Special notice is required for a resolution in the annual general meeting for appointment of a person other than a retiring auditor or providing that a retiring auditor shall not be appointed on receipt of the notice the company must send a copy to the retiring

It may perhaps occur that an auditor reacts sharply to the copy of the special notice of the resolution to appoint someone in his place or to remove him, and makes a statement in his own defence which is highly defamatory of some other person. Section 221 provides for this situation, stating that copies of the representation need not be sent out, nor need the representation be read out, if the company or any aggrieved person applies to the court and the court thinks that the auditor is abusing his rights to secure needless publicity for defamatory matter. Moreover, the court may order that the company's costs on such an application shall be paid by the auditor.

212. Qualification and disqualification of auditors.– (1) No person shall be appointed an auditor of any company unless he is "chartered accountant" within the meaning of the Bangladesh Chartered Accountants Order, 1973, (P.O.No. 2 of 1973):

Provided that a firm whereof all the partners practicing in Bangladesh are qualified for appointment as aforesaid may be appointed by its firm name to be

auditor of company in which case any of the auditors so practicing may act in the name of the firm.

(2) None of the following persons shall be qualified for appointment as auditor of a company namely-

(a) an officer or employee of the company;

(b) a person who is a partner, or who is in the employment of an officer or employee of the company;

(c) a persons who is indebted to the company for an amount exceeding one thousand taka, or who has given any guarantee or provided any security in connection with the indebtedness of any third person to the company for an amount exceeding one thousand taka:

(d) a person who is a director or member of a private company, or a partner of a firm, which is the managing agent of the company;

(e) a person who is a director, or the holder of shares exceeding five percent in nominal value of the subscribed capital, of any body corporate which is the managing agent of the company.

Provided that where any shares held by a person as nominee or trustee for any third person and in which the holder has no beneficial interest such shares shall be excluded in computing the extent of the subscribed capital for the purpose of this clause.

Explanation - For the purposes of this sub-section the word "officer" or "employee" shall not in include an auditor.

(3) A person shall not be qualified for appointment as an auditor of a company, if-

(a) he, according to sub-section (2), is disqualified for appointment as auditor of any other body corporate which is that company's subsidiary or holding company or a subsidiary of that company's holding company;

(b) he would be disqualified for such appointment, had the said body corporate been a company.

(4) If an auditor becomes subject, after his appointment to any of the disqualification's specified in sub-sections (2) and (3), he shall be deemed to have vacated his office as such.

213. Powers and duties of auditors.– (1) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, whether kept at the head office of the company or elsewhere and shall

be entitled to require from the officers of the company such information and explanation as the auditor may think necessary for the performance of his duties as auditor.

(2) Without prejudice to the provisions of sub-section (1), the auditor shall, in particular inquire into following namely:

(a) Whether loans and advances made by he company on the basis of security have been properly secured and whether the terms on which they have been made are not prejudicial to the interests of the company or its members;

(b) Whether transactions of the company which are represented merely as book-entries are prejudicial to the interests of the company;

(c) where the company is not an investment company or a banking company, whether so much of the assets of the company as consist of shares, debentures and other securities, have been sold at a price less than at which they were purchased by the company;

(d) whether loans and advances made by the company have been shown as deposits;

(e) whether personal expenses have been charged to revenue account;

(f) where it is stated in the books and paper of the company that any shares have been allotted for cash, whether cash has actually been received in respect of such allotment, and if no cash has actually been so received, whether the position as stated in the account books and the balance sheet is correct, regular and not misleading.

(3) The auditor shall make a report to be presented in the annual general meeting of the company on the accounts examined by him, and on every balance sheet and profit and loss account and on every other document declared by this act to be part of or annexed to the balance sheet or profit and loss accounts which are laid before the company in general meeting during his tenure of office and the report shall state whether, in his opinion and to the best of his information and according to the explanation given to him, the said accounts give the information required by this Act in the manner so required and give a true and fair view-

(a) in the case of the balance sheet, of the state of the company's affairs as at the end of its financial year;

(b) in the case of the profit and loss account, of the profit or loss for its financial year.

(4) The auditors report shall also state-

(a) whether he has obtained all the information and explanation which to the best of his knowledge and belief were necessary for the purposes of his audit;

(b) whether, in his opinion, proper books of account as required by law have been kept by the company so far as appears from his examination of those books and proper returns adequate for the purposes of his audit have been received from branches not visited by him;

(c) whether the company's balance sheet and profit and loss account dealt with by the report are in agreement with the books of account and returns.

(5) Where any of the matters referred to in clauses (a) and (b) of sub-section (3) or in clauses (a), (b) and (c) of sub-section (4) are answered in the negative or with a qualification, the auditor's report shall state the reason for the answer.

(6) The Government may, by general or special order, direct that in the case of such class or description of companies as may be specified in the order, the auditors report shall also include a statement on such matters as may be specified therein.

(7) The accounts of a company shall not be deemed as not having been and the auditors report shall not state that those accounts have not been, properly drawn up on the ground merely that the company has not disclosed certain matters, if–

(a) those matters are such as the company is not required to disclose by virtue of any provision contained in this Act or any other law for the time being in force; and

(b) those provisions are specified in the balance sheet and profit and loss account of the company.

Notes/Comments/Precedents

Auditor's duty : An auditors business is to ascertain and state the true financial position of the company at the time of the audit *[In Re London & General Bank (1895) 2 Ch. 673.]*

An auditor must be honest and must exercise reasonable skill and care, otherwise he may be sued for damages. In the above case Lord Lindley, L.J. observed that "An auditor, however is not bound to do more than exercise reasonable care and skill in making enquiries and investigations. He is not an insurer."

Working papers : It is not unusual for an auditor though not as part of his duties under the Act to carry out accountancy work in preparing accounts to be presented to the members and also to carry out other work such as agreeing the tax liability of the company with Income Tax Authorities. The working papers necessary for preparing these accounts are regarded as the property of the auditor but the correspondence with third parties when he is acting as agent of the company belong to the company.*[Chantrey Martin & Co. Vs. Martin (1953) 2 Q B 286.]*

Auditor' right of access to books of accounts : In order to make a report the auditors have a right to access at all times to the books off accounts and vouchers and are entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of their duties. Failure to ask for necessary information and explanation from directors betrays negligence in performance of their duties *[Ganeshan Vs A.K. Josselyne AIR. 1957 Cal 33]*

Audit close accounts : In absence of fraud or mistake in connection with the audit, the auditing of a company's accounts closes the accounts as between the shareholders and the Board of directors. But it does not preclude the company from calling upon its agent for rendering accounts *[Ramchand Vs. Imperial Oil Co. 42 I C 375.]*

Auditors' opinion : A report obtained by a company from an auditor on the interpretation of one of the clauses of the company's articles of association involving the duty of directors in administering its affairs is a report obtained on behalf of all the shareholders and is not privileged document, if the report was asked for before the commencement of legal proceedings by certain shareholders against the company.*[W. Dennis & Sons Ltd. Vs. West Norfolk (1943) 1 Ch. 230.]*

214. Audit of accounts of branch office of company.– (1) Where a company has a branch office, the accounts of that office shall, be audited by the company's auditors at their option, or where, the branch office is situated in a country outside Bangladesh, the accounts of the office shall be audited either by the company's auditor or by a person duly qualified to act as an auditor of the accounts of the branch office in accordance with the laws of that country, if so decided by the shareholders in a general meeting.

(2) Where the accounts of any branch office are audited by a person other than the company's auditor, the company's auditor-

(a) shall be entitled to visit the branch, office, if he deems it necessary to do so for the performance of his duties as auditor; and

(b) shall have a right of access at all time to the books and accounts and vouchers of the company maintained at the branch office;

Provided that in the case of a banking company having a branch office outside Bangladesh, it shall be sufficient if the auditor is allowed access to such copies of, and extracts from the books and accounts of the branch as have been transmitted to the principal office of the company in Bangladesh.

215. Signature of audit report, etc.– Only the person appointed as auditor of the company, or where a firm is so appointed in pursuance of the proviso to sub-section(1) of section 212, only a partner in the firm practicing in Bangladesh shall put his signature on the auditor's report, or any other documents required of the company by law to be signed or authenticated by the auditor.

216. Reading and inspection of auditor's report.– The auditors report shall be read before the company in a general meeting and shall be open to inspection by any member of the company.

217. Right of auditor to attend general meeting.– All notices of and other communications relating to any general meeting of a company which any member of the company is entitled to have sent to him shall also be forwarded to the auditor of the company, and the auditor shall be entitled to attend any general meeting and to be heard at any general meeting which he attends on any part of the business which concerns him as auditor.

218. Penalty for non- compliance with section 211 to 217.– If default is made by a company in complying with any of the provisions contained in section 211 to 217, the company, and also every officer of the company who is in default, shall be punishable with a fine with which may extend to one thousand taka.

219. Penalty for non-compliance by auditor with section 213 and 215.– If any auditors report is made or any document of the company is signed or authenticated otherwise than in conformity with the requirement of sections 213 and 215, the auditor concerned, and any other person, who signs the report or signs or authenticates the document, shall if the default is willful, be punishable with a fine which may extend to one thousand taka.

220. Audit of certain matters by Cost and Management Accounts.– (1) where in the opinion of the Government, it is necessary to do in relation to any company required under clause (d) of sub-section (1) of section 181 to include in its books of accounts the particular referred to therein the Government may, by order direct that an audit of cost accounts of the company shall be conducted in such a manner as may be specified in the order by an auditor who shall be a "cost and management accountant" within the meaning of the Cost and Management Accounts Ordinance, 1977 (LIII of 1977).

(2) An audit conducted by an auditor under this section shall be in addition to an audit conducted by an auditor appointed under section 210.

(3) The provisions relating to audit of a company specified in this Act mutatis mutandis, and so far as they are applicable, apply to an audit conducted under this section.

221. Right of preference shareholders and debenture holders as to receipts and inspection of reports, etc.– (1) Holders of preference shares, debenture holders of a company shall have the same right to receive and inspect the balance sheets and profit and loss account of the company and the reports of the auditors and other report as is possessed by the holders of ordinary shares in the company.

(2) This section shall not apply to a private company, nor to a company registered before the commencement of this Act:

Provided that in the case of any public company whether registered before or after the commencement of this Act, the trustees for holders of debentures shall have the right conferred by sub-section (1).

CARRYING ON BUSINESS WITH LESS THAN THE LEGAL MINIMUM OF MEMBERS

222. Liability for carrying on business with fewer than seven or, in the case of a private company, two member.– If at any time the number of members of a company is reduced, in the case of a private company, below two or, in the case of any other company, below seven and it carries on business for more than six months, while the number is so reduced every person who is a member of the company during the time that it so carries on business during that periods and is cognisant of the fact that it is carrying on business with fewer than two members or seven members, as the case may be, shall be individually liable for the payment of the whole debts of the company contracted during that time and may be sued for the same without joinder in the suit of any other member.

Notes/Comments/Precedents

Minimum number– provision mandatory : Where the number of directors fell below the minimum the business transacted thereafter is invalid as the provision with regard to the minimum number of a company is mandatory *[In re., Alma Spinning Co. (1880) 16 Ch.D. 681].*

SERVICE AND AUTHENTICATION OF DOCUMENTS

223. Service of documents on company.– A document may by served on a company by leaving it at, or sending it by post to, the registered office of the company.

Notes/Comments/Precedents

Document : The expression "document" includes summons, notices, requisition, order and other legal processes and registers whether issued, sent or kept in pursuance of this or any other Act or otherwise *[Harendra Nath Ghosal Vs. Superfoam Pvt Ltd. (1992) 74 Comp Cas 740 Cal.]*

Service mode of : A summons has to be served by registered post or personally on the secretary, Directors or Principal officer of the company and inspite of due diligence if this cannot be done, then only it can be left at the registered office *[Shalimar Rope Works Ltd. Vs. Abdul Hossain A 1980 SC. 1163.]*

Service when office closed : If the office was closed at the time wherein the postal peon was alleged to have tendered the summons at the said office then there could definitely be nobody either to accept or to refuse the tender. In that view, the presumption of service must be held to have been duly rebutted by this very strong circumstances negativating valid tender and refused of the summons through postal authorities *[Harenda Nath Ghosal Vs. Superfoam Pvt. Ltd. (1992) 74 Comp Cas 740 Cal.]*

224. Service of documents on Registrar.– A document may be served on the Registrar by sending it to him by post, or delivering it to him, or by leaving it for him, at his office.

225. Authentication of documents.– A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorised officer of the company, and need not be under its common seal.

Notes/Comments/Precedents

Verification of pleadings : Under order XXIX Rule 1 of the Code of Civil Procedure the pleadings may be signed and verified on behalf of the corporation by the secretary or by any Director or even the company can authorise anybody in this behalf *[Calico Printers Association Ltd. Vs. A. A.. Karim & Bros. (1931) 1 Comp Cas 58.]*

SCHEDULES AND RULES AS TO PRESCRIBED MATTERS.

226. Application and alteration of schedules and power to make rules as to prescribed matters.– (1) The forms specified in Schedules VI to XII or forms as near thereto as circumstances admit shall be used in all matters to which those forms refer.

(2) The government may alter any of the Schedules except Schedule II.

(3) Any alteration made under sub-section (2) shall be published in the official Gazette, and on such publication the Schedules so altered shall have effect as if enacted in this Act, but no alteration, made by the Government in Schedule I, shall affect any company registered before the alteration as respects that company or any portion of that Schedule.

(4) In addition to the powers herein before conferred by this section, the Government may make rules providing for all or any matters which by this Act are to be prescribed by its authority.

(5) Every such rule shall be published in the official Gazette, and on such publication shall have effect as if enacted in this Act.

Notes/Comments/Precedents

Arbitration clause : The Companies Act does not make the government the authority to prescribe the appellate forum and the Government has also framed no rules as far as the appellate forum is concerned *[Moqbul Ahmed and another Vs. Ahmed Impex (Pvt) Ltd. and others 1 BCL (AD) (1996) 121.]*

ARBITRATION AND COMPROMISE

227. Power of companies to refer matters to arbitration.– A company may by written agreement, refer to arbitration, in accordance with the Arbitration Act, 1940 (X of 1940), on existing or future difference between itself and any other company or person.

(2) Companies may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves or by their directors or other managing body.

(3) The provisions of the Arbitration Act, 1940 (X of 1940), shall apply to all arbitrations between companies and persons in pursuance of this Act.

Notes/Comments/Precedents

Arbitration clause "that the dispute referred to arbitrators shall be subject to the rule of conciliation and arbitration of the International Chamber of Commerce" -not violative of section 152 of the Companies Act, 1913 (corresponding to sec. 227 of the Companies Act, 1994) although section 152 of the Companies Act, 1913 (corresponding to sec. 228 of the Companies Act, 1994) provides that all arbitrations shall be subject to the Arbitration Act, 1940 *[G. M Pfaff A G Vs. Sartaj Engineering Ltd. (1970) 22 DLR (WP) 331.]*

Company not being a financial institution cannot take money as a loan and give interest there on. : Held that the agreements providing payment of Taka 10,000.00 per month to the petitioner is illegal. This is not the case of the petitioner that the respondent Company issued debentures at a fixed premium. Further, the petitioner has failed to make out a case that it is just and equitable that the respondent No. 1 Company should he wound up. Under the aforesaid facts and circumstances of the case and the evidence on record I am inclined to hold that the respondent company did not take any loan from the petitioner, and the question of default in making the payment does not arise. The application for winding up of the respondent Company is accordingly, rejected. *[AKM Abdul Latif Vs Banani Metal Limited and others. (2000) 52 DLR 62 = 7 BLT (AD) 258]*

228. Power to compromise with creditors and members.– (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors, or of members as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall if sanctioned by the Court be binding on all the creditors or the class of creditors, on or all the members or class of members, as the case may be, and also on the company, or in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3) An order made under sub-section (2) shall have no effect until a certified copy of the order has been filed with the Registrar, and copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(4) If a company makes default in complying with sub-section (3), the company and also every officer of the company, who is knowingly and wilfully in default, shall be liable to a fine not exceeding fifty taka for each copy in respect of which the default is made.

(5) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against a company on such terms as it thinks fit and proper until the application is finally disposed of.

(6) In this section, the expression "company" means any company liable to be wound up under this Act and the expression "arrangement" includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into share different classes or by both, those methods and, for the purposes of this section unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors.

(7) An appeal shall lie from any order made by the Court exercising original jurisdiction under this section to the authority authorised to hear appeals from the decision of the Court.

Notes/Comments/Precedents

Modification of scheme of arrangement under the Act : Where a scheme which is not of the kind mentioned in sec. 153A or 153B of the Companies Act, 1913 (corresponding to sec. 229 and 230 of the Companies Act, 1994) is sanctioned otherwise than in the course of a winding up, the Court sanctioning the scheme has no further *seisin* of the scheme and has no jurisdiction or power as the Company Court to entertain any application for modifying the scheme, and this jurisdiction cannot be conferred on the Court even by providing in the scheme for reservations of powers to the Court to entertain such subsequent applications.

Any application for the modification of scheme sanctioned under section 153 of the Companies Act, 1913 (corresponding to sec. 228 of the Companies Act, 1994) must be treated in the same manner as if it is a fresh application for sanction of a scheme under section 153 of the Companies Act, 1913 (corresponding to sec. 228 of the Companies Act, 1994) and all the requirements of the section must be duly satisfied before such modification can be sanctioned *[6 PLR (Dac.) 1055.]*

An application for sanctioning of a scheme of arrangement under section 153 of the Companies Act, 1913 (corresponding to sec. 228 of the Companies Act, 1994) in the High Court at Dhaka in respect of a company having its registered office in Calcutta cannot be entertained by the High Court at Dhaka which has no jurisdiction to pass any orders on the application. *[53 CWN (1 DR) 85 ; In the matter of Noakhali Union Bank, (1950) 2 DLR 181 : 54 CWN (2 DR) 201.]*

Such a company is not a company within section 2 and, therefore, not a company to which section 153 of the Companies Act, 1913 (corresponding to sec. 228 of the Companies Act, 1994) applies. Also the High Court of Dhaka being a Court of a Dominion in which the registered office of the company is not registered is not a court within the definition of section 2 read with section 3 and it is, therefore, not a Court which can exercise power under section 153 of the Companies Act, 1913 (corresponding to sec. 228 of the Companies Act, 1994).

But where a petitioner for sanctioning of a scheme of arrangement under section 153 of the Companies Act, 1913 (corresponding to sec. 228 of the Companies Act, 1994) has previously been presented in the Court of the country where the company is registered, the Court in the other Dominion has jurisdiction to pass orders of ancillary nature *[53 CWN (1 DR) 85 ; In the matter of Noakhali Union Bank, (1950) 2 DLR 181 ; 54 CWN (2 DR) 201.]*

Proceeding u/s 228- whether winding up : A proceeding under section 153 of the Companies Act, 1913 (corresponding to sec. 228 of the Companies Act, 1994) cannot properly be regarded as a winding-up *[53 CWN (1 DR) 85 ; In the matter of Noakhali Union Bank, (1950) 2 DLR 181 ; 54 CWN (2 DR) 201.]*

"liable to be wound up" & "include" : The expression "liable to be wound up" used in sub-section (6) of section 153 of the Companies Act, 1913 (corresponding to sec. 228 of the Companies Act, 1994) means "exposed to the contingency of being wound up". The Court which can deal with an application for winding up of an unregistered company can also entertain an application under section 153 in respect of such company.

The word "include" in sub-section (6) of section 153 of the Companies Act, 1913 (corresponding to sec. 228 of the Companies Act, 1994) embraces other kinds of re-organisations than those mentioned in that sub-section and the description is only explanatory and not exhaustive *[Gopal Das Chowdhury Vs. Commissioner of Income Tax (Agriculture) (1955) 7 DLR 325.]*

Appeals from judgments and orders passed under the Act : The Companies Act provides a complete code of procedure governing appeals and it has precluded appeals from judgment and orders made under the Act except those made under sections 38, 153 (7) and 202 of the Act, 1913 (corresponding to sections 43, 228. 285 of the Companies Act, 1994 respectively). *[Jabed Ali Vs. Sultan Ahmed (1974) 26 DLR 196 = Suruj Mia Vs. The Pioneer Bank Ltd., (1968) 20 DLR 1206]*

229. Provisions for facilitating arrangements and compromises.–

(1) Where an application is made to the Court under section 228 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the court that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies to the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking and the property of any company concerned in the scheme, in this section referred to as a transferor company, is to be transferred to another company in this section referred to as the transferee company, the Court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters:

(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

(b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(d) the dissolution, without winding up, of any transferor company;

(e) the provision to be made for any person who, within such time and in such manner as the Court directs, dissents from the compromise or arrangement;

(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall by virtue of the order, be transferred to and vest in, and those liabilities shall by virtue of the order, transferred to and become the liabilities of the transferee company, and in the case of any property, if the order so directs, it shall be freed from any charge which is, by virtue of the compromise or arrangement to cease to have effect.

(3) Where an order is made under this section, every company in relation to which the order is made shall cause a certified copy thereof to be delivered to the Registrar for registration within fourteen days after the completion of the order, and if, default is made in complying with the sub-section, the company and also every officer of the company who is knowingly and wilfully in default, shall be liable to a fine not exceeding two hundred taka.

(4) In this section, the expression "property" includes property, rights and powers of every description, and the expression "liabilities" includes duties.

(5) Notwithstanding the provisions of sub-section (6) of section 228, the expression "company" in this section does not include any company other than a company within the meaning of this Act.

Notes/Comments/Precedents

Vesting property : An order under this section will be sufficient to vest properties and liabilities in the transferee company without execution of any further document. If the Court so directs, the properties may vest free of charge, which charge under the scheme would cease to have effect. But an order transferring the property, rights and liabilities of a company to the transferee company does not automatically transfer contracts of personal service *[Nokes Vs Doncaster Amalgamated Collieries Ltd. (1940) 3 All E.R. 549]*

Amalgamation & merger : The following principles governing the amalgamation of and merger of the companies emerge: (i) The scheme satisfies the requirements of law. (ii) The Court should see that the shareholders, who may be effected by the scheme have been fairly represented. (iii) The

scheme is passed by the majority of the share-holders in value. (iv) Scheme should be in the interest of the share-holders of the transferor and the transferee company. (v) Sanction should be given to such a workable scheme which a man of business would reasonably approve. (vi) The Court may impose conditions and modify the scheme, if so required. (viii) Sanction should be given to a bona fide scheme which is fair as a whole, to all concerned. (viii) The scheme should not only be in the interest of the share-holders of the companies but also in public interest. *[Chittagong Cement Clinker Grinding Co. Ltd. Vs. Joint Stock Companies and Firms 11 BLT 2003 (HCD) 81].*

Effect of Scheme : Once the scheme is sanctioned and a certified copy of the scheme is filed with the Registrar, it has a statutory force and cannot be varied by act of the parties *[Pramila Devi Vs. Peoples Bank 43 CWN 205=A 1938 P.C. 284]*

230. Power to acquire shares of shareholders dissenting from schemes of contract approved by majority.–

(1) Where-

(a) a scheme or contract involves the transfer of shares or any class of shares in a company, in this section referred to as the transferor company, to another company, whether a company within the meaning of this Act or not, in this section referred to as the transferee company; and

(b) within one hundred and twenty days after the making of the offer in that behalf by the transferee company, the offer has been approved by the holders of not less than three-fourths in value of the shares affected, the transferee company may, at anytime within sixty days after the expiration of the said one hundred and twenty days, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares.

(2) Where such a notice is given under sub-section (1), the transferee company, shall unless on an application made by the dissenting shareholder within thirty days from the date on which the notice was given the Court thinks fit to order otherwise; be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving share holders are to be transferred to the transferee company.

(3) Where a notice has been given by the transferee company under sub-section (1) and the Court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given, or, if an application to the Court by the dissenting shareholder in then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferors company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(4) Any sums received by the transferor company under this section shall be paid in to a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(5) In this section, the expression "dissenting shareholder" includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.

CONVERSION OF PRIVATE COMPANY INTO PUBLIC COMPANY AND VICE-VERSA

231. Conversion of private company into public company.– (1) If a company being a private company, having at least seven members alters its articles in such manner that they no longer include the provisions which, under clause (q) of sub-section (1) of section 2 of this Act, are required to be included in the articles of a company in order to constitute it a private company, the company-

(a) shall as on the date of the alteration case to be a private company; and

(b) shall within a period of this thirty days after the said date, file with the Registrar either a prospectus or a statement in lieu of prospectus containing the particulars set out in Part I and the reports specified in Part II of Schedule IV and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule.

(2) If default is made in complying with sub-section (1) the company, and also every officer of the company who is in default, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand taka, or with both.

(3) Where any prospectus or statement in lieu of prospectus filed under this section includes any untrue statement, any person who authorised the filing of such prospectus or statement shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand taka, or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, that the statement was true.

(4) for the purposes of this section-

(a) a statement included in a prospectus or a statement in lieu of prospectus shall be deemed to be untrue if its is misleading in the form and context in which it is included; or

(b) where the omission from prospectus or a statement in lieu of prospectus of any matter is calculated to mislead, the prospectus or statement in lieu of prospectus shall be deemed, in respect of such omission, to be a prospectus or a statement in lieu of prospectus in which an untrue statement is included.

(5) For the purposes of sub-section (3) and clause (a) of sub-section (4) the expression "included" when used with reference to a prospectus or statement in lieu of prospectus, means included in the prospectus or statement in lieu of prospectus, itself or contained in any report or memorandum appearing on the face thereof, or by reference incorporated therein.

232. Amendment of articles for conversion of a public company into private company.– (1) A public company, having not more than fifty members at the time of conversion, may be converted into a private one by passing a special resolution altering its articles so as to exclude provisions, if any, in the articles of association applicable to public company and include therein provisions applicable to a private company.

(2) If the company has secured creditors, their written consent shall have to be obtained before passing a resolution as per provision of subsection (1) and the shares enlisted with the stock Exchange shall have to be delisted.

PROTECTION OF MINORITY INTEREST

233. Power of Court to give direction for protection interest of the minority.– (1) Subject to fulfillment of the conditions of the required minimum as specified in section 195 (a) and (b) any member or debenture holder of a company may either individually or jointly bring to the notice of the court by application that–

(a) the affairs of the company are being conducted or the powers of the directors are being exercised in a manner prejudicial to one or more of its members or debenture holders or in disregard of his or their interest; or

(b) the company is acting or is likely to act in a manner which discriminated or is likely to discriminate the interest of any member or debenture holder;

(c) a resolution of the members, debenture holders or any class of them has been passed or is likely to be passed which discriminates or is likely to discriminate the interest of one or more of the members or likely to debenture holder;

and pray for such order, as in his or their opinion, would be necessary for safeguarding his or their interest and also the interest of any other member or debenture holder.

(2) The Court shall, on receipt of an application under sub-section (1) send a copy thereof to the Board and fix a date for hearing the application

(3) If after hearing the parties present on the date so fixed, the Court is of opinion that the interest of the applicant or applicants has been or is being or is likely to be prejudicially affected for reasons specified in the application, it may make such order as prayed for or such other order as it deems fit including a direction–

(a) to cancel or modify any resolution or transaction; or

(b) to regulate the conduct of the company's affairs in future in such manner as is specified therein.

(c) to amend any provision of the memorandum and articles of the company.

(4) Where by an order of the Court, any amendment is made in the memorandum or articles of the company, the company shall not, without leave of the Court, make any amendment therein or take any action which is inconsistent with the direction contained in the order.

(5) A company shall, within fourteen days from the making of an order under this section, inform the Registrar in writing of such order and send him a copy thereof, and if the company makes default in complying with this sub-section the company, and also every officer of the company who is in default, shall be liable to a fine not exceeding one thousand taka.

Notes/Comments/Precedents

Applicability : A remedy under section 233 can be given only if the directors have acted in the breach of duty or if the company has breached any of its articles or any relevant agreement. Under section 233, the Court can give the relief sought by the applicant or any other relief. The objective of the relief is to negate the impact of the prejudicial or other relevant misconduct on the part of the majority shareholders. It can take any form that is thought to be suitable either by the applicant or by the court. The most common relief is for the majority to buy out the minority. In appropriate situation, the minority can be ordered to buy out the majority. In the present case the respondents 2-5 have failed to provide some information and to provide the books and records of the company in breach of the court's order made on 18-8-1999. Since then the respondent No. 1 company and its Managing Director, the respondent No. 3, failed to take any further steps in these proceedings until very recently. The respondent Nos. 2-5 have remained in exclusive control over and full knowledge of the company and its affairs for the last 15 years. The respondents' individual and cumulative actions will inevitably lead to actions being taken against the company in respect of unpaid taxes and penalties. Nothing has been paid to the petitioners as dividends or profits of any kind at all during the last 15 years. Section 233 enables a member to obtain a remedy where a company with sufficient profit persistently refuses to pay dividends or the member is excluded from the profit after he is no longer a director. The petitioners do not know anything about the sale of one vessel. If they take over the company, they will have to pursue other actions to recover the vessel or its value. It would be suicidal for the petitioners to get involved in a company that has been misrepresenting its financial situation over the last 15 years. These are the powerful reasons for directing the respondents to buy the shares of the petitioners.\[*Homera Ahmed and others Vs Nahar Shipping Lines Limited and others 7 BLC (2002) 107*].

A remedy under section 233 can be given only if the directors have acted in breach of duty or if the company has breached any of its articles or any relevant agreement. *[Nahar Shipping Lines Ltd. and another Vs Homera Ahmed and others (2004) 56 DLR (AD) 36].*

Company Court-Scope of : Company Court has been vested with power under section 233(3) of the Companies Act, 1994 to protect the interest of the minority share holders of a Company. Such power among others including power to nominate neutral person to convene and preside over Board meeting appoint auditor and convene AGM. *[Kader Textile (Pvt.) and another vs Md. Lehajuddin Miah being dead his heir s Mrs. Nurun Nessa Begum and others 58 DLR (AD) (2006) 238 10 MLR 2005 (AD) 70]*

Application if admitted should be disposed of on merit : When an application is admitted the same is not liable to be dismissed/rejected summarily without hearing on merit, unless such application is absolutely incompetent being without jurisdiction. *[Nahar Shipping Lines Limited and another Vs Homera Ahmed and others (2000) 52 DLR 585]*

Withdrawal of company matter : When an occasion arises an application under section 233 of the Companies Act, 1994 for withdrawal of the company matter can be filed and such cause of action is recurrent and in the absence of any provisions of law resisting simple withdraw the matter. ... *[3 BLC (1998) 224.]*

There cannot be any profit out of revaluation of any fixed assets of the company without disposal of the same by sale or otherwise and that too without writing off the trading losses in earlier financial periods. *[ABS Safdar and ors Vs People's Republic of Bangladesh and others. (2000) 52 DLR 249 5 MLR (2000) 200 (2000) 20 BLD 210]*

A shareholder does not become automatically entitled to any part of the profit until a resolution is taken and a dividend is declared by the company out of such profit. *ibid*

Minority Share holder : In the instant case, half of the Board companies the petitioners, rather out of the 4 directors two are the petitioners who having held 50% of the shares cannot be said to be minority share-holders and hence the petitioners are not entitled to invoke the jurisdiction of the Court under section 233 of the Companies, Act, 1994. *[Moksudur Rahman & another Vs Bashati Property Development Ltd & Ors. 5 BLC (2000) 245]*

Protection of interest of minority shareholders ; Section 233 of the Companies Act, 1994 provides for protection of the interest of minority share-holders and empowers the court to intervene and direct the majority shareholders to purchase the minority shares at appropriate valuation in the facts and circumstance of the case. *[Nahar Shipping Lines Ltd. and another Vs. Mrs. Humera Ahmed 9 MLR (AD) 59].* The section specifically protects the interests of the minority shareholder/shareholders when prejudiced and discriminated against it does not protect the interest of a director, however prejudiced or discriminated by the way the company is conducted. *[ASM Shamsul Islam Rashedi Vs Satellite Fishing Ltd. and others (2002) 54 DLR 28].*

Directorship removal of : in the instant case the respondent No. 1, who was a director as well as a joint signatory for operating the bank accounts of the company, also had a legitimate expectation to remain as such and moreover, his investment in the Company has been struck off because of his removal from directorship of the company and no opportunity at all was given to the respondent No. 1 to remove his capital upon reasonable terms and, as under section 233, the Court in a fit case may pass appropriate order and accordingly, the High Court Division gave direction upon the appellant Nos. 2 and 3 to purchase the shares of the respondent No. 1. *[HBS Association (Pvt) Ltd vs. Professor Shahbuddin Khaled Chowhdury (Civil) 11 BLC (AD) (2006] 67]*

Balance-sheet- when should not be accepted as acknowledgment : Balance-sheet, no doubt, is a good evidence of acknowledgment of any liability of the company. But the balance sheet should not be accepted as an acknowledgment if it is found that the directors or those who are in control of the company took decision favouring or in furtherance of their interest although that was to the detriment of the company and the minority shareholders. *[ABS Safdar and ors Vs People's Republic of Bangladesh and others (2000) 52 DLR 249]*

Fraud : In an application under section 233 the main function of the Court is not to see whether fraud is committed but whether the resolutions adopted are unfair to the company and the minority shareholders. *[Shahadat Hossain (Md) Vs Base Textile Ltd. (2002) 54 DLR 583].*

Loan to Managing Director : Absolute authorisation to give loan by the Managing Director from the Company's fund is contrary to he provisions of the company law and prejudicial to the interest of the company and its members. *[Md. Shahadat Hossain Vs Base Textile Ltd. (2002) 54 DLR 583].*

Appointment of Auditors- for past : The provisions of appointing auditors in the General Meeting is for prospective auditing of a Company. When the minority shareholders apply under section 233 of the Companies Act, the Court has inherent power to make alternative arrangement for appointment of auditors for past years as well *[Md. Faruk Vs. Abdul Hamid and ors. (1998) 18 BLD (AD) 236.]*

The provisions of appointing auditors in the Annual General Meeting is for prospective auditing of a Company when the minority share-holders apply under section 233 of the Company Act, the Court has inherent powers to make alternative arrangements for appointment of Auditors for past years, if no auditing has taken place.*[Md. Faruk Vs. Abdul Hamid and others. 51 DLR (1999) 48.]*

Article-amendment requirement of: For adoption of a special resolution in any Extraordinary General Meeting amending an article or articles, there should be a decision of the Board expressing the need for such amendment of the article. *[Shahadat Hossain (Md) Vs Base Textile Ltd. (2002) 54 DLR 583].*

PART- V
WINDING UP
PRELIMINARY

234. Mode of winding up.– (1) The winding up of a company may be either–

(i) by the Court; or

(ii) voluntary; or

(iii) subject to the supervision of the Court.

(2) The provisions of this Act with respect to winding up shall apply, to the winding up of a company in any of these modes, unless any thing contrary appears.

Notes/Comments/Precedents

Winding up : Winding up is a legal process by which the life of a company is put to an end. In the course of winding up the assets of the company are realised by converting them into money, and the same is then applied for the satisfaction of its debts, the balance being returned to the share-holders. The share-holders do not get anything until the creditors are fully paid.

A company may go into liquidation not only when it becomes insolvent but also when the share-holders think that it will not be profitable to continue the business in the way in which it had been done.

Modes of winding up : Section 234 of the companies Act, 1994 provides that a company may be wound up in either of the following ways --(i) Compulsory winding up by the Court (sections 241-254) (ii) Voluntary winding up without intervention of the Court (section 286-315), & (iii) Voluntary winding up under supervision of the Court (section 316-321)

Winding Up– P O. No. 27 of 1972 : *Held* No provision of the companies Act relating to the winding up of the companies shall apply to any scheduled Industrial enterprise under P.O. No. 27 of 1972 *[Abdul Hamid Vs. Dhakeswari Cotton Mills Ltd. & another BCR 1983 HCD 320.]*

CONTRIBUTORIES

235. Liability as contributories of present and past members.– (1) In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following, that is to say:-

(i) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up;

(ii) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member,

(iii) a past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act;

(iv) in the case of a company limited by shares, no contribution shall be required from any members exceeding the amount, if any, unpaid on the shares in respect to which he is liable as a present or past member,

(v) in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up:

(vi) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted or whereby the funds of the company are alone made liable in respect of the policy or contract ;

(vii) a sum due to any member of a company in his character of a member, by way of dividends, profits or otherwise, shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor who is not a member of the company.

(2) In the winding up of a company limited by guarantee which has a share capital, every member thereof shall be liable to pay the following amounts namely:-

(a) the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up; and

(b) an amount to the extent of any sums unpaid on any shares held by him.

Notes/Comments/Precedents

Contributory : The term "Contributory" is defined by section 237 of the companies, Act, 1994 A contributory, according to this section means a person who is liable to contribute to the assets of a company in the event of its being wound up, and in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged, to be a contributory.

A contributory can present a petition for winding up only when- (1) the number of members is reduced in the case of a private company, below two or in the case of any other company, below seven, and (2) the shares In respect of which he is a contributory have been held by him, or at least six months before the commencement of winding up. (3) A share-holder can also apply for compulsory winding up if there is default in filing the statutory report. (4) The Registrar is not entitled to present a petition for winding up except when it appears from the Balance sheet that the financial position of the company is such that company can not pay its debts and the permission of the government has been obtained for submitting such a petition.

236. Liability of directors whose liability is unlimited.– In the winding up of a limited company, any director whether past or present, whose liability is, in pursuance of this Act, unlimited, shall, in addition to his own liability (if any) to contribute as an ordinary member, be liable to make a further contribution, as if he were at the commencement of the winding up a member of an unlimited company :

Provided that-

(i) a past director shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding up;

(ii) a past director shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office;

(iii) subject to the articles, a director shall not be liable to make such further contribution unless the Court deems it necessary to require contribution in order to satisfy the debts and liabilities of the company and the costs, charges and expenses of the winding up.

237. Meaning of "contributory."– The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.

238. Nature of liability of contributory.– (1) The liability of the contributory shall create a debt payable at the time specified in the calls made on him by the liquidation.

(2) No claim founded on the liability of a contributory shall be cognizable by any Court of Small Causes.

239. Contributories in case of death of member.– (1) If a contributory dies either before or after he has been placed on the list of contributories, his, legal representatives and his heirs shall be liable in the due course, of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly.

(2) If the legal representatives or heirs make default in paying any money ordered to be paid by them, proceedings may be taken for administering the property of the deceased contributory, whether movable or immovable, or both, and for compelling payment thereout of the money due.

(3) For the purposes of this section, the surviving coparceners of a contributory who is a member of a Hindu Joint Family governed by the Mitakshara School of Hindu Law shall be deemed to be his legal representatives and heirs.

Notes/Comments/Precedents

Subscribers to memorandum : Whether or not the names of the subscribers to the memorandum, is entered in the register of members they are treated as members of the company and thus contributories *[London Hanburg & Continental Exchange Bank (1967) L.R. 2 Ch. ADD 427.]*

Liabilities of heirs : If a members dies before or after his name is placed in the list of contributories, his legal representatives are liable for the debts of the deceased contributory *[Bayswater Trading Co. Ltd. (1970) 1 All E.R. 608.]*

Legal representatives to be brought on record : Before any effective order is passed by the Court against the legal representatives of deceased contributory, his legal representatives must be brought on record *[Bharat National Co. Vs. Jogeswar AIR. 1941 Lah 480.]*

Dead contributory : If a contributory who was dead had been placed on the list of the contributories the proceedings taken shall not be bad unless it was in the knowledge of the company *[British India Banking and Industrial Corporation Ltd. Vs. Shiva AIR. 1934 Bom 469.]*

240. Contributories in case of insolvency of member.– If a contributory is adjudged insolvent either before or after he has been placed on the list of Contributors, then–

(a) his assignees shall represent him for all the purposes of the winding up, and shall be contributories accordingly, and may be called on to admit to prove against the estate of the insolvent, or otherwise to allow to be paid out of his assets in due course of law, any money due from the insolvent in respect of his liability to contribute to the assets of the company; and

(b) there may be proved against the estate of the insolvent the estimated value of his liability to future calls as well as calls already made.

WINDING UP BY COURT

241. Circumstances in which company may be wound up by Court.– A company may be wound up by the Court; if–

(i) the company has by special resolution resolved that the company be wound up by the Court; or

(ii) default is made in filing the statutory report or in holding the statutory meeting; or

(iii) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year; or

(iv) the number of members is reduced, in the case of a private company below two, or, in the case of any other company, below seven; or

(v) the company is unable to pay its debts; or

(vi) the Court is of opinion that it is just and equitable that the company should be wound up.

Notes/Comments/Precedents

Alternative remedy under section 228 : A is for a member to apply for the remedy Court on its own motion cannot exercise its power under section 153-A. Section 153-C of the Indian Companies Act gave an alternative remedy to a member of a company to apply to the Court for making the kinds of order mentioned therein instead of winding up a company under section 162 of the Act, 1913 (corresponding to sec. 241 of the Companies Act, 1994). It gave no power to the Court to *suo motu* resort to exercise the power mentioned therein. The choice even after introduction of sec. 153 C in the Indian companies Act was still with person applying for the remedy.

Where a person who was a contributory did not apply to the Court for the winding up of the company under section 162 of the Companies Act, 1913 (corresponding to section 241 of the companies Act, 1994) and the Court could not force him to apply under section 153 C. His petition for winding up was either to be allowed or rejected, but it could not be rejected merely because the Court felt that he could now resort to an alternative remedy. The Court had to decide whether the winding up was sought on just and equitable ground or not *[Shri Ladli Prashad Jaiswal Vs. The Karnal Distillery Co. (1965) 17 DLR (SC) 52 .]*

Grounds which justify dissolution of company : Some grounds which justify dissolution of the company: Section 162 of the Companies Act, 1913 (corresponding to sec. 241 of the Companies Act, 1994) provides for winding up a company on six grounds, three of which are quoted below as they are found present in this case: (iv) If default is made in filing a statutory report or in holding statutory meetings. (v) If the company is unable to pay its debt. (vi) If the Court is of opinion that it is just and equitable that the company should be wound up *[Rahimuddin Ahmed Vs. Bengal Water Ways Ltd (1979) 31 DLR 28.]*

Application of section 241–a serious matter : An application under section 241 of the Companies Act is a very serious matter and it amounts to killing of a company and thus it is liable to be rejected. It appears from the papers available on record that the petitioner has hopelessly failed to make out a case for winding up of the company. The claim is only Taka nine lac and odd as compensation but he has failed to show that the asset of the company are not sufficient to meet his claim and companies substratum is gone. Petitioner also failed to show that the respondent company is commercially insolvent or that it has admitted that it is unable to pay. In fact, the petitioner has admitted that the company is a running company. *[Mohiul Islam Vs Century Properties Development Ltd. and others 7 BLC (2002) 248].*

On a close reading of section 241, it appears that a petition for winding up should be considered keeping in view the disadvantage of a shareholder and therefore only a shareholder can resort to this provision of law. *[SMA Matin Sarker vs Bangladesh Jute Mills Association 57 DLR (2005) 128]*

Winding up matter is a serious affairs : The winding up matter is a serious affairs. The winding up matter is a serious affairs which is evident from the perusal of the entire Part V of the Act and in this connection the anxiety of the Privy Council in the case of unjustified winding up order may be noticed *[Ellal Textile Mills Ltd. Vs. Abdul Awal 38 DLR (AD) 26.]*

A limited company being a juristic person, lives, runs and functions under the provisions of a statute; death warrant can be issued under the same statute. The death warrant in the form of winding up should be sparingly issued. To the last minute effort should be made to save a company from liquidation *[Bangladesh Tyres Ltd. Vs. Agrani Bank & others 42 DLR 474.]*

Winding up of a company- use of fund by the Managing Director : When the Managing Director who is also the Chairman did not convene and Annual General Meeting, declare any dividend, submit any return and used the total fund of the company for his own cause and a dead lock prevailing during last 14 years to the total deprivation of the shareholders- all these are the most cogent grounds for winding up the company. *[S.M.M. Yousuf Vs. Bismillah Shipping Lines (Pvt. Ltd.) and others. 5 MLR (2000) 263]*

Winding– inability to pay debt : Winding-up of a company by Court for debt not called for where there is *bona fide* dispute relating to the existence of the debt. *Industrial development Bank of Pakistan Vs. Satter & Sons Ltd. (1970) 22 DLR 170.]*

A 'debt' within the meaning of sub-section (v) of section 241 of the Act must be a definite amount payable in present or in *future*. But an uncertain sum which may or may not be payable in future in return of services rendered by one person to another does not qualify itself as debt within the meaning of sub-section (v) of section 241 of the Act. *[Ataur Rahman (Md) & anr vs Edruc Ltd. 57 DLR (2005) 337] Ataur Rahman (Md) & anr vs Edruc Ltd (Statutory Original) 337]*

Petitioner not being a money lender or a financial institution is not legally permitted to pay loan to any one for deriving interest. On the other land, the respondent being a company and not a financial institution is also not legally permitted to take any loan and pay interest to any private individual. Under the Company law if money is required by the Company it may take it by way of issuing debenture and pay interest, etc. It appears that there exist bonafide dispute relating to the existence of the debt and the amount of debt and to determines the same winding up proceeding is not available to the petitioner. *[Tamanna-e-Jahan, Publisher Monthly Fulkuri Vs Paper Converting and Packaging Ltd. and others 7 BLC (2002) 443].*

A 'debt' must be a definite amount payable in present or in future. But an uncertain sum which may or may not be payable in future in return of service rendered by one person to another does not qualify itself as debt within the meaning of the Act. *[SM.I Matin Sarker vs Bangladesh Jute Mills Association 57 DLR (2005) 128]*

If there is bona fide dispute about debt then that cannot be a ground for passing of a winding up order under sub-section (v) of section 241 of the Act. *[Ataur Rahman (Md) & anr vs Edruc Ltd. 57 DLR (257) 337]*

Company's inability to pay debts, and when it is just and equitable that it should be wound up, are also legal grounds for winding up under section 241(V) and 241 (VI) respectively of he companies Act. *[Vega Sweaters (Pvt) Limited (2000) 52 DLR 372]*

Sustainability of petition for the winding up of company on the ground that it is unable to pay its debts does not depend on whether the company is able to pay the debt of the person who moves the petition; the company must be unable to pay its debts, which means that inability is not one to pay the debt of the person moving for winding up, but the debt as a whole due by the company. *Ataur Rahman (Md) & anr vs Edruc Ltd. 57 DLR (2005) 337]*

Private limited company : Status of private limited company legally is the same as that of partnership- Grounds for dissolving a private limited company are same as those of partnership: Domestic company formed with members of a family-Its dissolution can be brought about, like that of private company.

In the case of a private limited company the tendency of the Court has uniformly been to treat it more or less as a partnership and to apply the same principles in the winding up of private limited company as would entitle a partner to have a partnership firm dissolved.

Winding up of a private limited company : A private limited company can also be wound up on the principles of dissolution of partnership. *[Bengal Waterways Ltd. Vs. Rahimuddin Ahmad (1982) 34 DLR (AD) 47.]*

Application for winding up of a private limited company (run by two share-holders) rejected there being no ground that it is just and equitable to do so- But special circumstance of the case demanded an assurance from the respondent that he will act in a way which does not in any manner affect the interest of the other sharer *[Rahimuddin Vs. Bengal Waterways Ltd. (1974) 26 DLR 285.]*

When a company is formed not by appeal to the public but is in substance a domestic company where the real partners are the members of a family, then in such a case "all the reasons that apply to the dissolution of private companies on the grounds of incompatibility between the views or methods of the partners would be applicable in terms to the division amongst the share-holders" of such a company *[Ladli Prasad Jaiswai Vs. The Karnal Distillery Co. Ltd. (1965) 17 DLR (SC) 52.]*

Winding up– Power of a party to start winding up proceeding depends on the company's position when proceedings are started in court : It was contended on behalf of the respondent that the appellant had no longer any *locus standi* to ask for the winding up of the company, as he had during the pendency of the winding up petition in the High Court ceased to be a share-holder of the company. The Company, it is said, has completely changed its character, for, it has since been converted in India into a public limited company. ***Held :*** The rights of the parties in this matter are to be adjudged according to the legal position prevailing on the date of the institution of the proceedings for winding up and not on the basis of changes which have since been introduced without the consent of the appellant *pendente lite* by the unilateral acts of the others. A change in the law made subsequently in another country could not be regarded to be a relevant consideration for refusing an order for winding up if the appellant was otherwise entitled to the said order *[Ladli Prasad Jaiswai Vs. The Karnal Distillery Co. Ltd. (1965) 17 DLR (SC) 52.]*

Vesting of management of a company in one person : Vesting the share holdings of a company in one person-Difference between the two-In the former case the company does not lose its substratum. ..... Inherent drawbacks in handling management affairs are not matters which can be corrected by proceedings under sec. 162 of the Companies Act, 1913 (corresponding to section 241 of the Companies Act, 1994) *[Rahimuddin Ahmed Vs., Bengal waterways. Ltd. (1977) 29 DLR 95.]*

When assets and property of the mortgagor companies are mortgaged to the Bank : No occasion arises for invoking provision of section 162 of the Companies act when all the assets and property of the mortgagor companies are assigned and mortgaged to the Bank and specific remedy and procedure are provided in P.O. 129 of 1972.

A temporary inability to repay debt should not be an occasion for winding up of a company, that being opposed to the State's policy *[Bangladesh Shilpa Bank Vs. M.s. S.S. Mujibullah (1977) 29 DLR 67.]*

Winding up petition : Legitimate method of enforcing payment of just debt. Creditor who is unable to obtain payment of his debt has the right *ex debito justiciae* to a winding up order- Argument that debt is time barred, not by itself a proof of contention that debt is disputed *bona fide* and on sound, legitimate and substantial grounds- Respondent Company not disputing debt and not claiming discharge of its liabilities- Win-ding up proceedings in circumstances, held, competent *[National Bank of Pakistan Vs. Punjab National Silk Mills Ltd., (1969) 21 PLD (Lahore) 195.]*

The applicant has paid, by various instilments, the total amount of Taka 12,00,000, which was the total claim of the petitioner in its winding-up application. The dues of the petitioner Company having been paid and the possession of the properties of the Company in liquidation having been handed back to the applicant, Managing Director of respondent Company, nothing further remains to be done. Accordingly, the application is allowed. The order of the High Court Division dated 7-7-2004 winding up the Company and appointing a receiver is hereby recalled. The Company is reinstated to its original position and the application for winding up is finally disposed of. *[Mofizur Rahman (Md) and another vs Spectacles Frame Manufacturing Industries Ltd and others (Statutory) 10 BLC [2005] 548]*

Deadlock in the affairs of a company-when becomes a ground for winding up : Deadlock in the affairs of the company by itself has not been made a ground under section 162 of the Companies Act for winding up a company but clause (vi) of section 162 of the Companies Act, 1913 (corresponding to section 241 of the Companies Act, 1994) provides that if the court is of opinion that it is just and equitable that the company should be wound up the court may wind up a company *[Bengal Waterways Ltd. Vs. Rahimuddin Ahmad (1982) 34 DLR (AD) 47.]*

Winding up where AGM was not convened : When the Managing Director who is also the Chairman did not convene any Annual General Meeting, declare any dividend, submit any return and used the total fund of the company for his own cause and a dead lock prevailing during last 14 years to the total deprivation of the shareholders--all these are the most cogent grounds for winding up the company. *[S.M.M. Yousuf Vs. Bismillah Shipping Lines (Pvt. Ltd.) and others 5 MLR 2000 (HC) 263].*

A company when could never carry on business : Where a company could never carry on its business and there is no possibility for it to carry on business in future, it will be just and equitable to pass an order for winding up of the company and the order for winding up of the company and the official liquidator shall take up the assets of the company and proceed with liquidation proceeding in accordance with law. *[Sayeda Haque Vs Shams Ltd. and others 6 BLC (2001) 748].*

Winding up upon resolution : A company may be wound up by the Court upon the resolution that the company be wound up by the Court and on the ground that the Court would be of the opinion that it is just and equitable that the company should be wound up. The principle that would guide the dissolution of a partnership firm would also be applicable to a case of winding up of a private company- A mere lack of understanding which arose out of a personal dispute alone cannot be a ground for winding up the company. Parties seeking for an order from the Court must have an equity in his favour *[M Al-Amin Vs. Shafquat Haider 42 DLR 302.]*

Private Limited Company- quorum necessary for transaction of the business: **Held** since Articles of Association of the company provides that the quorum necessary for the transaction of the business of the Board of Directors is two, the company has been unable to do any business. And the business of the company has be stopped for more than one year. The company in its present state f affairs is unable to pay its debts and it is just and equitable that the company should be wound up. *[Vega Sweaters (Pvt.) Limited & Another. Vs. Agrani Bank. (2000) 52 DLR 372= 8 BLT (HCD) 226].*

Admission of a winding up application : Great care should be taken in admitting an application followed by usual notices in gazette and newspapers is likely to create alarm in the minds of all creditors of the company, divest its customers away and paralyse its business *[Amin Scales Ltd. Vs. Md. Yakub 39 DLR (AD) 201= (1987 BLD (AD) 259.]*

Winding up of a company : Maintainability of the application for winding up on grounds of inability to pay debts was challenged upon a counter-claim of money by the appellant company. The Court found the counter-claim to be just an allegation, no evidence having been placed before the Court in support of the counter-claim. Such counter-claim was not acceptable *[Bangladesh Tyres Ltd. Vs. Agrani Bank & others 42 DLR 474.]*

Petitioner bank when not entitled to interest forming part of the debts : The interest charged against the company related to period of turmoil and for the period from the date of its taking over as abandoned property till date of its release. To allow such interest is absolutely a discretion of the Court. During this period the shareholders and Directors had legal disabilities over the affairs of the company and as such they should not be made to pay interests for such period *[Bangladesh Tyres Ltd. Vs. Agrani Bank & others 42 DLR 474.]*

Winding up on plea of inability to pay debts : collateral security of the appellant company along with the value of the lands where its factory is situated and the value of machineries when take up

together, debts to the petitioner bank were fully secured. In such a position no application for winding up can be maintained *[Bangladesh Tyres Ltd. Vs. Agrani Bank & others 42 DLR 474.]*

The company judge simply incorporated the claims made by the creditors without considering in details the assets and liabilities of the company and other materials so as to see whether the company was actually unable to repay the loan. His sweeping finding for winding up was not acceptable *[Bangladesh Tyres Ltd. Vs. Agrani Bank & others 42 DLR 474.]*

Winding Up- Negotiable instrument Act : Proceeding of winding up under the Companies Act in a different forum, is altogether different from the proceedings under Chapter XVIII of the Negotiable Instruments Act. While section 138, 139, 140, 141 of Negotiable Instruments Act purports to impose penalties in case of dishonour of cheques, object of a petition for winding up of a company is to pay its debts out of its realisable assets. *[Mr. Amir Hossain V. Homeland Footwear Ltd. and others 22 BLD 2002 (HCD) 641 8 MLR 2003 (HC) 42].*

Company-winding up : winding up order of a company must be passed on the basis of subsisting facts and not on what they had been in the past. *[Motiur Rahman Vs. May Industries Ltd. 37 DLR 41.]*

The fact that one of the shareholders has a preponderating voice in the company is itself not a good reason for winding up. Non-payment of dividend regularly is also no ground for winding up a company *[Motiur Rahman Vs. May Industries Ltd. 37 DLR 41.]*

Claim- counter claim : In the facts of counter-claims raised the legal liability of the company may be determined in a regular suit, Even after the decree in the money suit, the bank may be entitled to go for winding up proceeding if the company fails to pay the decretal amount. When a bonafide dispute over the claim of debt is made, winding up proceeding is not an appropriate legal proceeding *[Bangladesh Tyres Ltd. Vs. Agrani Bank & others 42 DLR 474.]*

Dispute-Where admittedly there was a genuine dispute as to the liability of the respondent Company to pay the difference between what has been admitted and that has been claimed, it would not be proper to decide the case in the summary proceedings. *[Ataur Rahman (Md) & anr vs. Edruc Ltd. 57 DLR (2005) 337]*

Winding up- neglect to pay rent : Held, a) Arrears of house rent is a liability for the Company for which an application under Section 162 and 163 of the Companies Act, 1913 (corresponding to sections 241 and 242 of the Companies respectively) is maintainable. b) As the respondent Company is unable to pay its admitted liability and the formalities in filing the application have been observed and in view of the matter the Company is liable to be wound up. *[Nizamul Hoque and others Vs. Singa Bangla Garments Manufacturing Co. Ltd. (1991) 11 BLD (HCD) 49.]*

Circumstances for winding up by the Court : *ground of substratum of the Company being gone, under what circumstances may be attracted.* ***Held :*** A Company may be wound up by the Court if the Company has by special resolution resolved that the Company be wound up by the Court and, *inter alia*, on the ground that the Court would be of opinion that it is just and equitable that the Company should be wound up. A ground that the substratum of the Company had gone or that it is impossible to run the Company for want of mutual confidence or lack of confidence between the Directors, just and equitable rule would be attracted but that of lack of confidence must be relatable to the conduct and management, related to the affairs of the Company. *[M. Al-Amin and another Vs. Shafquat Haider and another (1991) 11 BLD (HCD) 284.]*

Liquidation of a Company and writ petition : *The liquidation of a company under the Companies Act, whether can be challenged in the Writ Jurisdiction of the High Court Division.* ***Held :*** The liquidation of a Company, registered under the Companies Act can not be challenged in the Writ Jurisdiction of the High Court Division when in the Company Court the liquidation proceeding itself is pending for disposal *[Md. Abu Yousuf Vs. Bangladesh and others) (1993) 13 BLD (AD) 154.]*

Company- Winding up : neglect to pay rent-petition for winding up can be made on failure or neglect to pay rent maintainable. As the company is unable to pay its admitted liability and the formalities in filing the application have been observed and in view of the matter the company is liable to be wound up. *[Nizamul Haque and others Vs. Singa- Bangla Garment Manufacturing Co. (Pvt.) Ltd.). BLD 1991 (HCD) 49.]*

A public limited company is precluded from applying two guardsticks in the matter of letter of allotment *[Investment Corporation of Bangladesh Vs. Bata Shoe Company (Bangladesh) Ltd. (HCD) 319.]*

Winding up & rectification of share register : Two prayers, one of winding up of the company under section 162 of the Companies Act, 1913 (corresponding to section 241 of the Companies Act, 1994) and another for rectification of the share-register under section 43 of the Companies Act (corresponding to section 38 of the Companies Act, 1913) in the same application made before the Company Judge, cannot be entertained *[Ellal Textile Mills Ltd. Vs. Md. Abdul Awal 38 DLR (AD) 26.]*

Winding up petition- competency to file : The petitioner who is not even a shareholder of the Bulk Management Limited can not derive any advantage or minimise any disadvantage from winding up of the respondent Company and as such he is not competent to file petition for winding up. Although he is a shareholder of Star Services Limited, which has shares in the Bulk Management Limited, he cannot be regarded a 'contributory' to the Bulk Management Limited to make him an interested person competent to petition for winding of the company. *[Mazharul Hoque Vs. Bulk Management (Bangladesh) Ltd. and others) (1996) 16 BLD (HCD) 45.]*

Winding Up– P O. No. 27 of 1972 : *Held*– No provision of the companies Act relating to the winding up of the companies shall apply to any scheduled Industrial enterprise under P.O. No. 27 of 1972 *[Abdul Hamid Vs. Dhakeswari Cotton Mills Ltd. & another BCR 1983 HCD 320.]*

242. Company when deemed unable to pay its debts.– (1) A company shall be deemed to be unable to pay its debts-

(i) if a creditor, by assignment or otherwise, to whom the company is indebted for a sum exceeding five thousand taka then due, has served on the company, by causing the same to be delivered by registered post or otherwise at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum' or to secure or compound for it to the reasonable satisfaction of the creditor; or

(ii) if execution or other process issued on a decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(iii) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in clause (i) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by an agent or legal adviser duly authorised on his behalf, or in the case of a firm, if it is signed by such agent, or by a legal adviser or by any one member of the firm on behalf of the firm.

Notes/Comments/Precedents

Winding up petition - Legitimate method of enforcing payment of just debt : Creditor who is unable to obtain payment of his debt has the right *ex debito justiciate* to a winding up order- Argument that debt is time barred, not by itself a proof of contention that debt is disputed bona fide and on sound, legitimate and substantial grounds- Respondent Company not disputing debt and not claiming discharge of its liabilities- Win-ding up proceedings in circumstances, held, competent. *[National Bank of Pakistan Vs. Punjab National Silk Mills Ltd., (1969) 21 PLD (Lahore) 195.]*

Winding up-inability to pay debts : Maintainability of the application for winding up on grounds of inability to pay debts was challenged upon a counter-claim of money by the appellant company. The Court found the counter-claim to be just an allegation, no evidence having been placed before the Court in support of the counter-claim. Such counter-claim was not acceptable *[Bangladesh Tyres Ltd. Vs. Agrani Bank & others 42 DLR 474]*

Existence of debt : The claim is not undisputedly ascertained, and unless it is admitted it cannot be said it is a debt and the respondent company is liable to pay the debt. Winding up of a company by Court for debt is not called for where there is a bonafide dispute relating to the existence of the debt. *[Ambala Cold Storage (Pvt) Ltd. Vs Prime Insurance Co. Ltd. (2004) 56 DLR (AD) 422].*

Company not being a financial institution cannot take money as a loan and give interest there on. : Held that the agreements providing payment of Taka 10,000.00 per month to the petitioner is illegal. This is not the case of the petitioner that the respondent Company issued debentures at a fixed premium. Further, the petitioner has failed to make out a case that it is just and equitable that the respondent No. 1 Company should he wound up. Under the aforesaid facts and circumstances of the case and the evidence on record I am inclined to hold that the respondent company did not take any loan from the petitioner, and the question of default in making the payment does not arise. The application for winding up of the respondent Company is accordingly, rejected. *[AKM Abdul Latif Vs Banani Metal Limited and others. (2000) 52 DLR 62]*

Ground for winding up : Admitted liability of the respondent No. 1 to the petitioner is more than Taka eight lac and no statement in the affidavit-in-opposition was made about the settlement of such liability and the respondent-company is unable to pay its admitted debt and hence the company is liable to be wound up. *[MA Gaffar and another Vs Sunjari Garments (Pvt) Ltd. 5 BLC (2000) 480]*

The Contention that Held : Decree obtained was not capable of execution and the process of the realization of the debt has become barred by law and as such order of winding up and liquidation of the company was not legally maintainable is of no substance since no such contention was taken before the High Court Division nor any particulars has been place before the Appellate Division to substantiate the aforesaid contention. *[Dira Dockyard and Engineers Ltd. Vs. Bangladesh Shilpa Rin Sangstha and others 10 BLC (AD) (2005) 13]*

Ex-Employee-Creditor- An ex-employee of the company may become a creditor within the ambit of section 242 (1) of the Act if his claim is determined in prior suit by a competent civil Court but in the instant case admitted position is that the claim the petitioners have not yet been decided by any Court. *[Ataur Rahman (Md) & anr vs Edruc Ltd. 57 DLR (257) 337]*

243. Winding up may be referred to District Court.– Where the High Court Division makes an order for winding up of a company under this Act, it may, if it thinks fit, direct all subsequent proceedings to be had in a District Court, and thereupon such District Court shall, for the purpose of winding up the company, be deemed to be "the Court" within the meaning of this Act and shall have, for the purposes of such winding up, all the jurisdiction and powers of the High Court Division.

244. Transfer of winding up from one District Court to another.– If during the progress of a winding up in a District Court it is made to appear to the High Court Division that the same may be more conveniently prosecuted in any other District Court, the High court Division may transfer the same to such other District Court, and there upon the winding up shall proceed in such other District Court, and at any stage of such proceedings, that Division may withdraw the proceedings from any of such District Court and dispose it of.

245. Provision as to applications for winding up.– An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors, including any contingent or prospective creditor or creditors, contributory or contributors, or by all or any of those parties, together or separately or by the Registrar:

Provided that-

(a) a contributory shall not be entitled to present a petition for winding up a company unless-

(i) either the number of members is reduced, in the case of a private company, below two, or in the case of any other company, below seven; or.

(ii) the shares in respect of which he is a contributory or some of them either were originally allotted to him or have held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder;

(b) the Registrar shall not be entitled to present a petition for winding up a company–

(i) except on the ground that from the financial condition of the company as disclosed in its balance sheet or from the report of an

inspector appointed under section 195, or in a case falling within section 204, it appears that the company is unable to pay its debts; and

(ii) unless the previous sanction of the Government has been obtained to the presentation of the petition:

Provided that no such sanction shall be given unless the company has first been afforded an opportunity of being heard.

(c) a petition for winding up of a company on the ground of default in filing the statutory report or in holding the statutory meeting shall not be presented by any person except by a shareholder, not before the expiration of fourteen days after the last day on which the meeting ought to have been held;

(d) the Court shall not give a hearing to a petition for winding up of a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a prima facie case for winding up has been established to the satisfaction of the Court.

Notes/Comments/Precedents

Scope : This Section deals with an application for winding up of companies. The application may be presented either by the company or by any of the persons mentioned in that section. Section 249 empowers the Court to dismiss the petition with or without costs, to adjourn the hearing conditionally or unconditionally or to make such interim order as it thinks fit or to make order for winding up of the company with of without costs or such other order as it deems fit. Section 249 does not specify to which all petitions it applies. Nor does it exclude petitions filed by the company. It follows that the Courts discretion in the matter of winding up covers all kinds of petitions filed under section 245 *[New Kerala Chits and Traders Ltd. Vs. Official Liquidator (1981) 51 Comp Cas 601.]*

246. Effect of winding up order.– An order for winding up of a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.

Notes/Comments/Precedents

Winding up order -creditors : Winding up order operates in favour of all creditors and with the passing of a winding up order no suit shall be proceeded with or commenced except with the Court's leave *[Uttara Bank Vs. M.S. Rahman Biscuit Factory Ltd. (1980) 32 DLR 45.]*

Rule making power of Supreme Court : The rule making power of the Supreme Court does not extend to providing an appellate forum from the decision of a single company Judge of the High Court division acting under section 38 of the Act. *[Moqbul Ahmed and another Vs. Ahmed Impex (Pvt) Ltd. and others 1 BLC (AD) 1996) 12.]*

247. Commencement of winding up by Court.– A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

248. Court may grant injunction.– The Court may, at any time after the presentation of the petition for winding up of a company under this Act and before making an order for winding up the company, upon the application of the company or of any creditor or contributory of the company, restrain further proceedings in any suit or proceedings against the company and may also pass other similar order upon such terms as the Court thinks fit.

249. Powers of Court on hearing petition.– (1) On hearing the petition, the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order or any other order which it deems just, but the Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to, in excess of, those assets, or that the company has no assets.

(2) Where the petition is presented on the ground of default in filing the statutory report or in holding the statutory meeting the Court may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default.

(3) Where the Court makes an order for the winding up of a company, it shall, except where a liquidator is appointed simultaneously, forthwith cause intimation thereof to be sent to the official receiver.

Notes/Comments/Precedents

Scope : This Section deals with an application for winding up of companies. The application may be presented either by the company or by any of the persons mentioned in that section. Section 249 empowers the Court to dismiss the petition with or without costs, to adjourn the hearing conditionally or unconditionally or to make such interim order as it thinks fit or to make order for winding up of the company with of without costs or such other order as it deems fit. Section 249 does not specify to which all petitions it applies. Nor does it exclude petitions filed by the company. It follows that the Courts discretion in the matter of winding up covers all kinds of petitions filed under section 245 *[New Kerala Chits and Traders Ltd. Vs: Official Liquidator (1981) 51 Comp Cas 601.]*

250. Suits stayed on winding up order.– When a winding up order has been made or a provisional liquidator has been appointed, no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such term as the Court may impose.

Notes/Comments/Precedents

'Suit' or 'other legal proceeding'- meaning of : For the purpose of section 171 of the Companies Act, 1913 (corresponding to section 250 of the Companies Act, 1994) the word "suit" means a suit instituted for the first time and the words "other Legal proceedings" mean legal proceedings which

are other than a suit instituted for the first time The words "other legal proceedings" in section 171 (corresponding to section 250 of the Companies Act, 1994) do not include any proceeding arising out of a suit or a proceeding, in other words they do not include appeal, revision etc. at the instance of a party other than the Official Liquidator.

If a party wants to institute a suit or start any legal proceeding for the first time against a company which had gone into liquidation, such suit or other legal proceedings shall not be proceeded with or commenced without the leave of the Court *[Sayedul Huq Vs. The Official Liquidator, Noakhali Union Bank Ltd. (1961) 13 DLR 481.]*

Section 250 read with (P.O. 27 1972) : Section 171 of the Companies Act, 1913 (corresponding to section 250 of the Companies Act, 1994) has no application to any Scheduled Industrial Enterprise as envisaged in Bangladesh Industrial Enterprise (Nationalisation) Order, (P.O. 27 of 1972) and the courts have no powers relating to winding up of a Scheduled Industrial Enterprise *[Abdul Hamid Vs. Dhakeswari Cotton Mills (Ltd. (1984) 36 DLR 257 1984 BLD 54.]*

Leave of the Court : The meaning of the expression leave of the Court referred to in this section means the consent of the winding up Court *[Bazlul Ghani Vs. Pioneer Bank Ltd. Comilla (1990) 42 DLR 480.]*

The Banking Companies Ordinance, 1962 made special provisions for banking companies when they are in liquidation and empowered the High Court Division exclusive jurisdiction to decide any claim by or against a banking company. Though this Ordinance is in addition and not in derogation of the Companies Act or any other law for the time being in force, section 60 of the Banking Companies Ordinance by its non obstinate clause made provision to prevail over the Companies Act, Civil Procedure Code or any other law for the time being in force *[Bazlul Ghani Vs. Pioneer Bank Ltd. Comilla (1990) 42 DLR 480.]*

Winding Up– P O. No. 27 of 1972 : *Held* No provision of the companies Act relating to the winding up of the companies shall apply to any scheduled Industrial enterprise under P.O. No. 27 of 1972 *[Abdul Hamid Vs. Dhakeswari Cotton Mills Ltd. & another BCR 1983 HCD 320.]*

251. Vacancy in the office of liquidator.– (1) For the purposes of this Act, so far as it relates to the winding up of companies by the court, the term "official receiver" means the official receiver attached to the Court or, if there is no such official receiver, then such person as the Government may, by notification in the official Gazette, appoint for the purpose.

(2) On the making of a winding up order the official receiver shall become the official liquidator of the company and shall continue to act as such until his further continuance is terminated by an order of the Court.

(3) The official receiver shall, as the official liquidator, forthwith take into his custody and control all the books, documents and the assets of the company.

(4) The official receiver shall be entitled so such remuneration as the Court shall fix.

Notes/Comments/Precedents

[The marginal note of this section both in Bangla and English does not tally by with the contents of the section.]

Official liquidator and Receiver : The position of an Official Liquidator and that of a Receiver appointed by the Court is analogous in certain respects but it is distinguishable. A receiver is

appointed by the Court and is removable by the Court. The Court has also an option to appoint the personnel of the receiver. There is no specific provision in the Companies Act for the removal of the Official Liquidator by the Court *[Indo-Burma Work Products (P) Ltd., in re. AIR. 1968 Cal 198.]*

252. Copy of winding up order to be filed with the Registrar.– (1) On the making of a winding up order, it shall be the duty of the petitioner in the winding up proceedings and of the company to file with the Registrar a copy of the order within thirty days from the date of the making of the order.

(2) On the filing of a copy of a winding up order, the Registrar shall register a summary thereof in his books relating to the company, and shall notify in the official Gazette that such an order has been made.

(3) Such order shall be deemed to be notice of discharge to the servants of the company, except when the business of the company is continued.

Notes/Comments/Precedents

Filing of copy of order : When the winding up order is made the petitioner as well as the company must file a copy of the said order with the Registrar of Joint Stock Companies within thirty days from the date of the making of the order. In computing the period of thirty days, the time for obtaining certified copy of the order will be excluded. It will be duty of the Registrar, on receipt of the copy of the order to make a summary of the same and enter it in the book and it will be the further duty of the Registrar to notify in the official Gazette that such an order has been made.

253. Power of Court to stay winding up.– The Court may, at any time after an order for winding up, on the application of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

Notes/Comments/Precedents

Stay order- matters to be considered by Court : In staying the winding up proceedings the Court should enquire as to whether trading operation of the company have been fair and should have regard to the commercial morality of the company *[East India Cotton Mills Ltd. AIR 1949 Cal 69.]*

254. Court may have regard to wishes of creditors or contributories.– The Court may, as to all matters relating to a winding up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence

Notes/Comments/Precedents

Winding Up– P O. No. 27 of 1972 : *Held–* No provision of the companies Act relating to the winding up of the companies shall apply to any scheduled Industrial enterprise under P.O. No. 27 of 1972 *[Abdul Hamid Vs. Dhakeswari Cotton Mills Ltd. & another BCR 1983 HCD 320.]*

OFFICIAL LIQUIDATOR

255. Appointment of official liquidator.– (1) For the purpose of conducting the proceedings in winding up of a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a person or persons, other than the official receiver, to be called an official liquidator or official liquidators.

(2) The Court may make such an appointment provisionally at any time after the presentation of a petition and before the making of an order for winding up, but shall, before making any such appointment, give notice to the company unless for reasons to be recorded it thinks fit to dispense with such notice.

(3) If more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act, by this Act required or authorised, to be done by the official liquidator is to be done by all or any one or more of such persons.

(4) The Court may determine whether any and what security is to be given by any official liquidator on his appointment.

(5) The acts of an official liquidator shall be valid notwithstanding any defect that may afterwards be discovered in his appointment.

Provided that nothing in this sub-section shall be deemed to give validity to acts done by an official liquidator after his appointment has been shown to be invalid.

(6) A receiver shall not be appointed of assets in the hands of an official liquidator.

Notes/Comments/Precedents

Provisional Liquidator, appointment of- Discretion of Court : To be exercised in judicial manner after giving due consideration to facts and circumstances of each cases- Not necessary, for Court to come to definite finding that Company must ultimately 'go into liquidation"- Respondent Company incurring debts exceeding its paid up capital, refusing to pay debts and also suspending its business for more than three years without any plausible reason- Appointment of Provisional Liquidator, held just and proper, in circumstances of case *[National Bank of Pakistan Vs. Punjab National Silk Mills Ltd (1969) 21 P.L.D. (Lahore) 195.]*

Section 101 of the Income Tax Ordinance–Liability of liquidator for tax of private companies under liquidation : (1) A liquidator of a private company which is wound up, whether under the orders of a court or otherwise shall, within thirty days after he as become such liquidator, give notice of his appointment as such to the Deputy commissioner of Taxes having jurisdiction to assess the company.

(2) The Deputy Commissioner of Taxes shall, after making such inquires or calling for such information as he may consider necessary, notify to the liquidator within three months of ten date of receipt of the notice under sub-section (1) the amount which, in his opinion, would be sufficient to provide for any tax which is then, or is likely thereafter to become, payable by the company.

(3) On being notified under sub-section (2), the liquidator shall set aside an amount equal to the amount so notified and shall not, before he sets aside such amount, part with any of the assets, of the

company except for the purpose of payment of tax payable by the company or for making payment to secure such creditors as are entitled under the law to priority or payment over the debts due to Government on the date liquidation.

(4) The liquidator shall be personally liable for payment of the tax on behalf of the company to the extent of the amount notified, if any, under sub-section (2), if he-

(a) fails to give notice are required by sub-section (1); or

(b) contravenes the provisions of sub-section (3).

(5) Where there are more liquidators than one, the obligations and liabilities of a liquidator under this section shall attach to all the liquidator jointly and severally.

(6) This section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.

Explanation : In this section, "liquidator" includes any person who has been appointed to be the receiver of the assets of the company under liquidation.

256. Resignations, removals, filling up vacancies and compensation.– (1) Any official liquidator may resign, or may be removed by the Court on due cause shown.

(2) Any vacancy in the office of an official liquidator appointed by the Court shall be filled up by the Court and until the vacancy is so filled up the official receiver shall be act as the official liquidator.

(3) There shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the Court may direct, and if more liquidators than one are appointed, such remuneration shall be distributed amongst them in such proportions as the Court directs.

Notes/Comments/Precedents

Filling up vacancies : If any vacancy occurs in the office of the official liquidator for any reason whatsoever either by resignation or death or otherwise, the court shall fill up the vacancy and as stop gap arrangement the Official Receiver shall act as liquidator.

Joint Liquidator : Where two or more persons are appointed as Liquidators jointly, they must act together or at least two of them must join in every act. If the named Liquidators refuse to act the resolutions be come invalid. Even if one of them refuses to act, the other Liquidator cannot act singly *[Allahabad Bank Lt. In re : AIR 1928 All 165]*

257. Official liquidator.– The official liquidator shall be described by the style of the official liquidator of the particular company in respect of which he is appointed, and not by his individual name.

Notes/Comments/Precedents

Style etc. of official Liquidator : Proceeding will not be vitiated as not describing the liquidator as per section is only an irregularity. *[Loomchand Vs. Official Liquidator (1953) 23 Comp. Cas 142.]*

258. Statement of affairs to be made to the liquidator.– (1) Where the Court has made a winding up order or appointment of an official liquidator provisionally, there shall, unless the Court thinks fit to order otherwise and so orders, be made out and submitted to the official liquidator a statements as to the affairs of the company verified by an affidavit and containing the following particulars, namely:-

(a) the assets of the company, staying separately the cash balance in hand and in the bank, if any;

(b) the debts and other liabilities;

(c) the names, residences and occupations of the creditors stating separately the amount of secured debts and unsecured debts, and in the case of secured debts, particulars of the securities, their value and the dates when they were given;

(d) the debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realised therefrom.

(2) The said statement shall be submitted and verified by one or more of the following persons.-

(a) the persons who were at the relevant date the directors and the person who was at that date the secretary, manager or other chief officer of the company, or

(b) such other person as the official liquidator may, subject to the direction of the Court, require to submit and verify the statement, and the said other persons are the persons.-

(i) who were had been directors or officers of the company;

(ii) who have taken part in the formation of the company at any time within one year before the relevant date;

(iii) who are in the employment of the company or had been in the employment of the company within the said year referred to in sub-clause (ii) above, and are, in the opinion of the official liquidator, capable of giving the information required;

(iv) who are or had been within the said year to which the statement relates officers of or in the employment of a company.

(3) The statement shall be submitted within twenty-one days from the relevant date, or within such extended time as the official liquidator or the Court may, for special reasons appoint.

(4) Any person making or concurring in making the statement and affidavit required by this section shall be allowed, and shall be paid by the official liquidator or provisional

liquidator as the case may be, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the official liquidator may consider reasonable, subject to an appeal to the Court.

(5) If any person, without reasonable excuse, knowingly and wilfully makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding five hundred taka for everyday during which the default continues.

(6) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled by himself or by his agent at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section and to a copy thereof or extract therefrom.

(7) Any person untruthfully so stating himself to be a creditor or contributory shall be guilty of an offence under section 182 of the Penal Code, 1860 (XLV of 1860), and shall, on the application of the liquidator or of the official Receiver be punishable accordingly.

(8) In this section, the expression "the relevant date" means, in a case where a provisional liquidator is appointed, the date of his appointment, and, in a case where no such appointment is made, the date of the winding up order.

Notes/Comments/Precedents

Scope of the Section : This section states that where the Court has made a winding up order or appointed the official liquidator as provisional liquidator a statement as to the affairs of the company verified by an affidavit and containing the particulars mentioned in the section is to be submitted to the official liquidator within twenty-one days from the relevant date or such extended time as the official liquidator or the Court may appoint. Default in compliance with the section makes a person liable to fine upto five hundred Taka. Any person if untruthfully states himself as creditor or contributory shall be punishable under section 182 of the Penal Code.

259. Statement by liquidator.– (1) In a case where a winding up order is made, the official liquidator shall, as soon as practicable after receipt of the statement to be submitted under section 258, and not later than one hundred and twenty days or with the leave of the Court one hundred and sixty days from the date of the order, or in a case where the Court orders that no statement shall be submitted, as soon as practicable after the date of the order, submit a preliminary report to the Court-

(a) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities giving separately under the heading of-

(i) cash and negotiable securities;

(ii) debts due to from securities,

(iii) debts due to and securities, if any, available of the company,

(iv) movable and immovable properties belonging to the company;

(v) unpaid calls, and

(b) if the company has failed, as to the causes of the failure, and

(c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure to the company, or the conduct of the business thereof.

(2) The official liquidator may also, if he thinks fit, make a further report or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by any director or other officer of the company in relation to the company since the formation thereof, and any other matter which in his opinion it is desirable to bring to the notice to the Court.

Notes/Comments/Precedents

From of report : The preliminary report will contain issued, subscribed and paid up capital, and the estimated amount of assets and liabilities showing separately cash, negotiable securities, debts, due from contributories, properties belonging to the company and unpaid capital. It should also state, where necessary, causes failure. He should further state whether further inquiry if is necessary as to the formation, promotion, or failure of the company or the conduct of its business.

260. Custody of company's property.– (1) The official liquidator, whether appointed provisionally or not, shall take into his custody, or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled.

(2) All the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order for the winding up of the company.

Notes/Comments/Precedents

Custody of company's property : The official liquidator is the statutory custodian of the property of the company in liquidation, and the custody of the Court is only the national custody. The actual custody and control of the company's property is given to the official liquidator and he is directed liquidator and he is directed to take into his custody or control the property and the effects and actionable claims of the company. The Court, however, exercise control over the liquidator, but that is only supervisory control *[In Re Mahalaxmi Cotton Mills Ltd (1960), 30 Comp Cas. 107]*

By filing an application under section 260 of the Companies Act, 1994 the company alleged that the respondent Nos. 2 and 3 in collusion with respondent No. 6 have been trying to dispose of 6 acres of land violating the Tripartite Agreement when the Company is in liquidation has already instituted a suit for specific performance of contract and prayed for a direction on the official liquidator to take the land in question into his custody and control and also to pass an order of injunction against the disposal of the said land and further to transfer the records of the said suit to the Company court for disposal. The Official Liquidator in the present case is only competent to take action for and on

behalf of the company with the sanction and approval of the Company court but where the Official Liquidator refuses or neglects to take any action to protect or safeguard the interest of the Company in liquidation, any share holder or director as a contributory can maintain an application like the present one. In the absence of such allegation against the Official Liquidator the present application is not maintainable and the petitioners have no locus standi to file the present application. *Held* : The Official Liquidator in the present case is only competent to take action for and on behalf of the company with the sanction and approval of the Company Court but where the Official Liquidator refuses or neglects to take any action to protect or safeguard the interest of the Company in liquidation, any share holder or director as a contributory can maintain an application under section 260 of the Companies Act. *[Bashati Property Development Limited and ors Vs Official Liquidator and others. 5 BLC (2000) 368]*

261. Committee of Inspection in compulsory winding up.– (1) The official liquidator shall, within a month from the date of the order for the winding up of a company, convene a meeting of the creditors of the company, as ascertained from the books and documents of the company, for the purpose of determining whether or not a committee of inspection shall be appointed to act with the liquidator, and who are to be members of the committees, if appointed.

(2) The official liquidator shall, within a week from the date of the creditors meeting convene a meeting of the contributories to consider the decision of the creditors and to accept the same with or without modification.

(3) If the contributories do not accept the decision of the creditors in its entirety, it shall be the duty of the official liquidator to apply to the Court for directions as to whether there shall be a committee of inspection and if so, what shall be the composition of the committee, and who shall be members thereof.

(4) A committee of inspection appointed under this section shall consist of not more than twelve members being creditors and contributories of the company or persons holding general or special powers of attorney from creditors or contributories in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in case of difference, may be determined by the Court.

(5) The committee of inspection shall have the right to inspect the accounts of the official liquidator at all reasonable times.

(6) The committee shall meet at such times as they may from time to time appoint, and, failing such appointment, at least once a month, and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary.

(7) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present.

(8) A member of the committee may resign by notice in writing signed by him and delivered to the liquidator.

(9) If a member of the committee becomes bankrupt, or compounds or arranges, with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories, as the case may be, his office shall thereupon become vacant.

(10) A member of the committee may be removed therefrom by an ordinary resolution at a meeting of creditors if, he represents creditors, or of contributories, if he represents contributories, of which seven days, notice has been given, stating the object of the meeting.

(11) On a vacancy occurring in the committee, the liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, to fill in the vacancy, and the meeting may, by resolution, re-appoint the same or appoint another creditor or contributory to fill in the vacancy.

(12) The continuing members of the committee, if not less than two, may act notwithstanding any vacancy in the committee.

Notes/Comments/Precedents

Committee : At the time of passing of the winding up order the Court may appoint a committee of inspection to act with the liquidator. It is through the committee of inspection that the body of creditors have a right of audience in matters in respect of a company in liquidation *[Dhanraj G Bhatia Vs. Janata Workers P. Ltd. (1984) Comp. Cas. 471.]*

262. Powers of official liquidator.– The official liquidator shall have power, with the sanction of the Court, to do the following things-

(a) to institute or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company.

(b) to carry on the business of the company so far as may be necessary, for the beneficial winding up of the same;

(c) to sell the immovable and movable property of the company by public auction on private contract, with power to transfer the whole thereof to any person or organisation or company, or to sell the same in parcels;

(d) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary the companyÆs common seal;

(e) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors·

(f) to draw, accept, make and endorse any bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, hundi, or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;

(g) to raise on the security of the assets of the company any more requisite;

(h) to take out, in his official name, letters of administration relating to the estate of 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 which cannot be conveniently done in the name of the company, and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money be deemed to be due to the liquidator himself;

Provided that nothing in clause (h) shall be deemed to affect the rights, duties and privileges of the Administrator General appointed under the Administrator General's Act, 1913 (III of 1913);

(i) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

Notes/Comments/Precedents

Scope : Section 179 of Act, 1913 (corresponding to sec. 262 of the Act, 1994) has been enacted to check and control Official Liquidator: Provisions in section 179 of Act, 1913 (corresponding to sec. 262 of the Act, 1994) have been made only to check and control Official Liquidator, so that no unnecessary litigation is started by the Official Liquidator or no flimsy defence is put up by the Liquidator.

Once a litigation is started by an official Liquidator with the leave of the Court no further leave of the Court need be taken by any party to a suit or proceeding other than by Official Liquidator for preferring an appeal or motion, as the case may be, against a decision given in such a suit or a proceeding *[Sayedul Hoque Vs. The Official Liquidator Noakhali Union Bank Ltd., (1961) 13 D.L.R. 481.]*

Properties to be vested in court's custody : Under sub-sec. (2) of sec. 262 (corresponding to section 178 of the Companies Act, 1913) company's properties shall vest in court's custody and under sub-section (1) Official Liquidator shall take into his custody all properties- Section 262 (corresponding to section 178 of the Companies Act, 1913) is controlled by Sec 324 (corresponding to section 229 of the Companies Act, 1913) which deals with insolvency rules *[Uttara Bank. Vs. M/s. Rahman Biscuit Factory Ltd. (1980) 32 D.L.R. 45.]*

263. Limit of Direction of official liquidator.– The Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court, and, where an official liquidator is provisionally appointed, may limit and restrict his powers by the order appointing him.

Notes/Comments/Precedents

Discretion of liquidator : The Court may by order, confer on the liquidator to exercise his direction is matters without sanctioned of the Court. In that case however, the Court will have the power over the acts of the official liquidator.

Communication of liquidator with Court : Neither the creditors nor the contributories have any right of inspection of report or communication of the liquidator with the Court *[Commercial Art Engravers ltd. Vs. Indian and Eastern Newspaper Society (1978) 48 Comp. Cas. 36.]*

264. Provision for legal assistance to official liquidator.– The Official liquidator may, with the sanction of the Court, appoint an advocate or attorney entitled to appear before the Court to assist him in the performance of his duties:

Provided that, where the official liquidator is an advocate or attorney, he shall not appoint his partner, unless the latter consents to act without remuneration.

265. Liquidator to keep books containing proceedings of meetings and to submit account of his receipts to Court.– (1) The official liquidator of a company which is being wound up by the Court shall keep, in the manner prescribed, proper books in which he shall cause to be made entries or minutes of proceedings at a meetings and of such other matters as may be prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent, inspect any such books.

(2) Every official liquidator shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Court an account of his receipts and payments as such liquidator.

(3) The liquidator shall prepare the account in the prescribed form in duplicate, and shall verify it by a declaration in the prescribed form.

(4) The Court shall cause the account to be audited in such manner as it thinks fit and for the purpose of the audit the liquidator shall furnish the Court with such vouchers, and information as the Court may require, and the Court may at any time require the production of and inspect any books or accounts kept by the liquidator.

(5) When the account has been audited, one copy thereof shall be filed and kept by the Court, and the other copy shall be delivered to the Registrar for filing, and each copy shall be open to the inspection of any creditor or of any person interested.

266. Exercise and control of liquidator's powers.– (1) Subject to the provisions of this Act, the official liquidator of a company which is being wound up by the Court shall, in the administration of the assets of the company and in the distribution

thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and any directions given by the creditors or contributories at any general meeting shall, in case of conflict be deemed to override any directions given by the committee of inspection.

(2) The official liquidator may summon general meeting of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, may direct, or whenever requested in writing to do so by one tenth in value of the creditors or contributories, as the case may be.

(3) The official liquidator may apply to the Court in the manner prescribed for directions in relation to any particular matter arising in the winding up.

(4) Subject to the provision of this Act, the official liquidator shall use his own discretion in the administration of the assets of the company and in the distribution thereof among the creditors.

(5) If any person is aggrieved by any act or decision of the official liquidator, that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just in the circumstances.

Notes/Comments/Precedents

Application to Court by liquidator : the liquidator may apply to the Court for directions in relation to any particular matter arising in the winding up. On such application the Court has sanction *exgratia* payment to a person to render services to the company but was not entitled to prove his claim *[Banque des Marchands de Moscow, Koupetschesky (1953) 1 All E.R. 278]*

Control of Liquidators power : It is not possible to formulate a definition which would satisfactorily distinguish between an administration and judicial order. However it many be conceived that an administrative order would be one which is directed to the regulation or supervision of matters as distinguished from an order which decide the rights of the parties or confers or refuses to confer rights to property which are the subject of adjudication before the Court *[Shankarlal Agarwal Vs. Shankarlal Poddar AIR (1965) SC 507]*

Appeal : The appellate Court has all powers to meet the ends of justice. It follows that considering an appeal organist the rejection of creditors proof by liquidation the Court many consider and additional evidence that may be led any parties *[Babu Lal Rakmanand Vs. Official liquidator, Bharat Oil Mills Ltd. (1968) 1 Comp. Case L.J. - AIR 1961 Raj 214]*

ORDINARY POWERS OF COURT

267. Settlement of list of contributories and application of assets.– (1) As soon as may be after making a winding up order, the Court, shall settle a list of contributories, shall have power to register of members in all case where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities.

(2) In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others.

Notes/Comments/Precedents

Duty of Court : The Court shall cause the assets of the company to be collected and applied in discharge of the company's liabilities. The Court will normally follow the list of contributories as settled. But the Court may resettle the list of contributories at any time before dissolution of the company and for that purpose may rectify the register. The Court's power to rectify the register is discretionary and it can go into all questions of law and fact in order to determine the question as to who is the real owner of the shares *[Phoenix Oil & Transport Co. Ltd. (1957) 3 All E.R. 218.]*

Settling list of contributories : After making an order for winding up of a company the Court shall settle the list of contributories. It shall distinguish, between contributories in their own rights and contributories as being representatives of or liable for others' debts. For this purpose, if necessary, the Court may rectify the Register of Members. If the transferor and transferee of shares have done all they were required to do but due to the company's fault the name of transferee was not entered in the register, the Court will rectify it, but if due to fault of the transferor his name could not be deleted from the register, the transferor will be put on the list of contributories *[Darjeeling Bank Ltd. A. 1959 Cal 335 63 C W N 464]*

268. Power to require transfer, delivery etc. of property.– The Court may, at any time after making a winding up order, require any contributory for the time being settled on the list of contributories and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, surrender or transfer forthwith, or within such time as the Court directs, to the official liquidator any money, property or documents in his hands to which the company is prima facie entitled.

Notes/Comments/Precedents

Application when maintainable- *The words "other persons" apply to which category:* An application under section 185 of the Companies Act, 1913 (corresponding to section 268 of the Companies Act, 1994) can be maintained only against a contributory trustee, receiver, banker or agent or officer of the company for the purpose of delivering, surrendering or transferring the money or other property which should be in such person's hand and to which the company should be *prima facie* entitled. But is a bona fide dispute is raised whether the company is entitled or not to the money or to the property, there is nothing in the section empowering the Court or Liquidator to determine that question. If the party against whom the order is sought submits to the jurisdiction of the Court, as for example, where it admits that it has the money and it claims to set off for a lesser sum the Court can determine the liability. The word trustee in section 185 of the Companies Act, 1913 (corresponding to section 268 of the Companies Act, 1994) means only an express trustee and, not a constructive trustee.

The words "other persons" appearing in section 188 of the Companies Act, 1913 (corresponding to section 271 of the Companies Act, 1994) refer to the category mentioned in section 185 and not to any one else *[8 PLR (Dac.) 385.]*

It is one of the condition for the application of section 185 of the Companies Act, 1913 (corresponding to section 268 of the Companies Act, 1994) that money or property in respect of which order is sought should be in the hands of the person against whom the order is to be made. Of course, this does not mean that by his own improper act the person concerned can take his case out of

the scope of section 185 of the Companies Act, 1913 (corresponding to section 268 of the Companies Act, 1994) If he improperly misappropriates it or wastes it, an order may still be passed against him. The proper interpretation of the words "in his hand" is that the property in dispute is either in fact in his hands or the circumstances are such the Court will regard it as still in his hands. Of his own default he will not be allowed to take advantage. The Court will, in the particular circumstances of each case, decide whether the property in dispute can still be said to be in the hands of the party against whom the order is to be passed *[(1953) PLR (Lah) 793.]*

Power of Court : Property in possession of contributory- Power of court to require him to pay rent- Where the property is in possession of a contributory, the court has no power to require him to pay rent in respect of that property *[Collector of Sabarkantha Vs. Shankarlal Kalidas Patel, AIR 1960 Bom.516 = (1960) 30 Comp. Cas. 491 Bom. LR 400.]*

269. Power to order payment of debts by contributory.– (1) The Court may, at any time after making a winding up order, make an order any contributory for the time being settled on the list of contributories to pay, in the manner directed by the order, any money due from him or from the estate of the person whom he represents to the company exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

(2) The Court in making such an order may, in the case of an unlimited company, allow to the contributory by way of set-off any money due to him or to the estate which he represents from the company, on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit, and may, in the case of a limited company, made to any director whose liability is unlimited or to his estate the like allowance:

Provided that, the case of any company, whether limited or unlimited, when all the creditors are paid in full, any money due to any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

Notes/Comments/Precedents

Application of recovery of unpaid share money : The application for recovery of money under this section is maintainable if the claim is within time. Where the liquidator makes an application for recovery of unpaid share money not based on the resolution of the Board of Directors, the provision will not apply and the liquidator cannot have recourse to it. *[Collector of Sabarkantha Vs. Shankarlal Kalidas Patel, AIR 1960 Bom. 516 = (1960) 30 Comp. Cas. 491 62 Bom. LR 400.]*

Claim barred by limitation : Where claim of the company is barred by limitation on the date of application order can be made under the section. *[Malabar Petroleum Co. Ltd. Vs. Continental Oil Co. Ltd., (1963) 33 Comp. Cas. 367 (Mad).]*

270. Power of Court to make calls.– (1) The Court may, at any time after making a winding up order, and that is either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment there of by all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the Court considers necessary to

satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

(2) In making the call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

Notes/Comments/Precedents

Power of court to make call- Call against contributories : The court is empowered to make calls under Section 270 of the Act. The debts of contributories cannot be set off against the calls whether made before of after the winding-up of the company. This is a proper rule which the court must take into consideration while making calls under this section *[Pure Milk Supply Co. Ltd. Vs. S. Harisingh, AIR 1963 Punj 22 : (1962) 32 Comp. Cas. 459.]*

271. Power to order payment into bank.– The Court may order any contributory, purchaser or other person from whom money is due to the company to pay the same into the account of the official liquidator in any scheduled banks as defined in the Bangladesh Bank Order, 1972 (P.O. No. 127), instead of to the official liquidator and any such order may be enforced in the same manner as if it had made direct payment to the official liquidator.

Notes/Comments/Precedents

Payment into Bank : The Court by an order direct any contributory, purchaser or other person from whom money is due to the company to pay the same into the account of the official liquidator in any scheduled banks instead of paying the same to the liquidator.

Purchaser - meaning of : Held- the word purchaser limited to the purchaser of interest of a contributory *[Gorakpur Electric Supply & Co. Vs. Siemens (India) Ltd. (1941) Comp.Cas.17.]*

272. Regulation of account with Court.– All moneys, bills, hundis, notes and other securities paid and delivered into the bank where the liquidator of the company may have his account, in the event of a company being wound up by the Court, shall be subject in all respect to the orders of the Court.

Notes/Comments/Precedents

Contributories- their rights : Adjustments of right of contributories shall be made on general principles of equity where articles not containing provision therefor. *[In re: Hindustan Investment and Financial Trust Ltd., AIR 1957 Mad. 262.]*

Contributories- their rights : Adjustments of right of contributories shall be made on general principles of equity where articles not containing provision therefor. *[In re: Hindustan Investment and Financial Trust Ltd., AIR 1957 Mad. 262.]*

273. Order on contributory conclusive evidence.– (1) An order made by the Court on a contributory shall, subject to any right of appeal, be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due.

(2) All other pertinent matters stated in the order shall be taken to be truly stated as against all persons, and in all proceedings whatsoever.

Notes/Comments/Precedents

Contributories- their rights : Adjustments of right of contributories shall be made on general principles of equity where articles not containing provision therefor. *[In re: Hindustan Investment and Financial Trust Ltd., AIR 1957 Mad 262.]*

274. Power to exclude creditors not proving in time.– The Court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved.

275. Adjustment of right of contributories.– The Court shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.

276. Power to order cost.– The Court may, in the event of the company's assets being insufficient to satisfy the liabilities, make an order as to the payment, out of the asset, of the costs, charges and expenses, incurred in the winding up in such order of priority as the Court thinks just.

277. Dissolution of company.– (1) When the affairs of a company have been completely wound up, the Court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

(2) The order shall be reported within fifteen days of the making thereof by the official liquidator to the Registrar, who shall record in his make books a minute of the dissolution of the company.

(3) If the official liquidator makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding one hundred taka for everyday during which he is in default.

Notes/Comments/Precedents

Dissolution : Dissolution of a company means an end to corporate existence for all practical purposes but it is not the extinction of the company. The company is kept, after dissolution, in "suspended animation" for two years. It is like a buried human body with suspended animation. The Magistrate may disinter, if necessary.

Circumstances when order for dissolution will be made : The corporate existence of a company continues through winding up till it is dissolved. Dissolution brings to an end of the company's existence as a legal entity *[Einto Silver Mining CO. 8 Ch. D. 373.]*

N: Company having its registered office in Calcutta applying for moratorium in Dhaka High Court in respect of its business in Pakistan is not a "Banking Company"-Chapter IX of the Companies Act is not applicable to an application for moratorium- High Court at Dhaka, it has inherent jurisdiction to pass orders in such applications *[53 CWN (1 DR) 126.]*

EXTRAORDINARY POWERS OF COURT

278. Power to summon persons suspected of having property of the company.– (1) The Court may, after it has made a winding up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company, or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

(2) The Court may examine him on oath concerning the same, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(3) The Court may require him to produce any documents in his custody or power relating to the company; but, where he claims any lien on documents produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien.

(4) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful impediment made known to the Court at the time of its sitting and allowed by it the Court may cause him to be apprehended and brought before the Court for examination.

Notes/Comments/Precedents

Power to summon persons -Classification of persons specified : The court is authorised to summon before it four classes of persons, namely, (1) officers of the company ; (2) persons known or suspected to have in their possession property of the company, (3) persons known or suspected to be indebted to the company ; and (4) persons whom the court deems capable of giving information concerning the promotion, trade, dealing, etc. of the company. In regard to the first class of persons there are no qualifying words used, while in regard to the last three classes of person there are qualifying words *[Pravin Sankaichand Shah Vs. D.B. Dalal, (1966)1 Comp. LJ 104.]*

279. Power to order public examination of promotors, directors etc.– (1)When an order has been made for winding up a company by the Court, and the official liquidator has applied to the Court stating that in his opinion, a fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company, in relation to the company since its formation, the Court may, after consideration of the application, direct that any person who has taken any part in the promotion or formation of the company, or has been a director manager or other officer of the company shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation of the conduct of the business

of the company, or as to his conduct and dealings as director, manager or other officer thereof.

(2) The official liquidator shall take part in the examination, and for that purpose may, if specially authorised by the Court in that behalf, employ such legal assistance as may be sanctioned by the court.

(3) Any creditor or contributory may also take part in the examination either personally or by any person entitled to appear before the Court.

(4) The Court may put such questions to the person examined as the Court thinks fit.

(5) The person examined shall be examined on oath, and shall answer all such questions as the Court may put or allow to be put to him.

(6) A person ordered to be examined under this section may at his own cost employ any person entitled to appear before the Court, who shall be at liberty to put to him such questions as the Court may deem just for the purpose of enabling him to explain or qualify any answers given by him :

Provided that if he is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as, in its discretion, it may think fit.

(7) Notes of the examination shall be taken down in writing, and shall be read over to or by and signed by, the person examined, and may thereafter be used in evidence against him in civil proceedings, and shall be open to the inspection of any creditor or contributory at the reasonable times.

(8) The Court may, if it thinks fit, adjourn the examination from time to time.

(9) An examination under this section may, if the Court so directs, and subject to any rules in this behalf, be held before any District Judge or before any officer of the High Court Division being an official referee, master, Registrar or Deputy Registrar and the powers of the Courts under this section as to the conduct of the examination, but not as to costs, may be exercised by the person before whom the examination is held.

Notes/Comments/Precedents

Costs of unsuccessful litigation : Costs of unsuccessful litigation awarded against Official Liquidator- Payable out of assets of company in priority to costs of liquidation itself *[In re: The Companies Act and Noakhali Union Bank Ltd. (in Liquidation (1964) 16 D.L.R. 656.]*

Application to allege fraud : Application under sec. 196 of the Companies Act, 1913 (corresponding to section 279 of the Companies Act, 1994) must allege fraud- Appeal under section 196 of the Companies Act, 1913 (corresponding to section 279 of the Companies Act, 1994) lies when penalty is imposed: Under section 196 of the Companies Act, 1913 (corresponding to section 279 of the Companies Act, 1994) the application must show a *prima facie* case of fraud against the person concerned ; merely a general allegation of fraud in the management of the company would not necessarily justify a public examination *[Debendra Nath Vs. Bangladesh Bank (1976) 28 D.L.R 402]*

Difference between s 66 of the Banking Companies Ordinance and sec. 279 of the Companies Act : So far as the contents of the report which may be submitted under sub-section (1) of section 66 of the Banking Companies Ordinance and sub-section (1) of section 196 of the Companies Act, 1913 (corresponding to section 279 of the Act, 1994) are concerned, the substantial difference between the two appears to result from the expressions "whether or not a fraud has been committed by such act or omission" which have been employed in sub-section (1) of section 66 of the Ordinance.

Provisions of sub-section (1) of section 66 of the Ordinance are wider than section 196(1) of the Act, 1913 (corresponding to section 279 of the Act, 1994) */Bangladesh Bank Vs. Debendra Nath Dutta (1981) 33 D.L.R. (AD) 355./*

Order u/s 66(1) of the Banking Companies Ordinance not appealable : An order made by Company Judge under section, 66(1) of the Banking Companies Ordinance not appealable. Even if an Appeal is possible from an order under section, 196 of the Companies Act, 1913 (corresponding to section 279 of the Act, 1994) if it falls within the purview of S. 66(1) of the Banking Companies Ordinance, no appeal will lie */Bangladesh Bank Vs. Debendra Nath Dutta (1981) 33 D.L.R. (AD) 355 /*

280. Power to arrest absconding contributory.– The Court, at any time either before or after making a winding up order and on proof of probable cause for believing that a contributory is or about to quit Bangladesh or otherwise to abscond, or to remove or conceal any of his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested and his books and papers and movable property to be seized, and him and them to be safely kept until such times as the Court may order.

281. Saving of other proceedings.– Any powers by this Act conferred on the Court shall be in addition to and not in restriction of, any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor for the recovery of any call or other sums.

ENFORCEMENT OF AND APPEAL FROM ORDERS

282. Power to enforce orders.– All orders made by the Court under this Act may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced.

Notes/Comments/Precedents

Enforcement of order by another Court : This section provides that any order made by a Court for or in the course of winding up of a company may be enforced in any other place by such Court as would have jurisdiction in respect of such company, if the registered office of the company had been situated at such other place */ Pierce Leslie & Miss Violet Ouchterlong Wapshare AIR 1969 S C 883 /*

283. Order made in any Court to be enforced by other Courts.– Any order made by the Court for or in the course of the winding up of a company shall be enforced in any place in Bangladesh by any other court that would have

had jurisdiction in respect of such company if the registered office of the company had been situated at such place and in the same manner in all respect as if such order had been made by the court that is hereby required to enforce the same, but in relation to the place where the registered office of the company is situate, only the court having jurisdiction over such place shall enforce such order.

Notes/Comments/Precedents

Enforcement of order by another Court : This section provides that any order made by a Court for or in the course of winding up of a company may be enforced in any other place by such Court as would have jurisdiction in respect of such company, if the registered office of the company had been situated at such other place *./ Pierce Lslie & Miss Violet Ouchterlong Wapshare AIR 1969 S C 883./*

284. Mode of dealing with orders to be enforced by other Courts.– Where any order made by one Court is to be enforced by another Court, a certified copy of the order so made shall be produced to the proper officer of the Court required to enforce the same, and the production of such certified copy shall be sufficient evidence of such order having been made; and thereupon the last mentioned Court shall take the requisite steps in the matter for enforcing the order, in the same manner as if it were the order of the Court enforcing the same.

285. Appeal from orders.– Re-hearing of, and appeal from order or decision made or given in the matter of the winding up of company by the Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction.

Notes/Comments/Precedents

Enforcement of order by another Court : This section provides that any order made by a Court for or in the course of winding up of a company may be enforced in any other place by such Court as would have jurisdiction in respect of such company, if the registered office of the company had been situated at such other place *[Pierce Lslie & Miss Violet Ouchterlong Wapshare A I R 1969 S C 883]*

Appeal and order : This section differentiates between appeal against order and appeal against decision. Section 199 of the Companies Act, 1913 (corresponding to section 282 of the Companies Act, 1994) applies only to orders. The last part of the section which lays down that appeal will be had in the same manner and subject to the same condition in and subject to which appeal may be had from any order or decision of the same court in case within its ordinary jurisdiction. *[Ellal Textile Mills Ltd. Vs. Md. Abdul Awal 38 DLR (AD) 26 (1985) BLD (AD) 230.]*

No appeal lies against an administrative order : If order made is administrative in nature an appeal would not lit under the provisions of section 202 of the Companies Act, 1913 (corresponding to section 285 of the Companies Act, 1994).

The Company Judge's order not binding on the executing Court which is to exercise its discretion according to the facts and circumstances of the case. It would be remembered in this case, the direction is not on any subordinate Court by a judge of a High Court but the direction is by the Company Judge to the official Liquidator, an officer of this Court and that it is plainly the duty of the

executing Court concerned to pass such order as may be warranted by circumstances. He has to apply law to the facts and circumstances of the case and exercise his discretion. The observation of the learned Company Judge will not influence in any manner the decision of the Executing Court *[Suruj Mia Vs. The Pioneer Bank Ltd. (1986) 20 D.L. R. 1206]*

Appeal lies against all orders winding up a Company thereby finally disposing of disputes between parties : Section 202 (corresponding to section 285 of the Companies Act, 1994) is wide enough to cover appeals against all orders made in the mater of the winding up of a Company, provided such an order finally decides a dispute between the parties or deprives the appellant of a substantial and important right and is not a mere formal or interlocutory order *[Suruj Mia Vs. The Pioneer Bank Ltd. (1986) 20 D.L. R. 1206]*

Substratum of a company, when will be deemed to be gone : *Held-* the substratum of a company will be deemed to be gone when (a) the subject matter of the company is gone, or (b) the object for which it was incorporated has substantially failed, or (c) it is impossible to carry on the business of the company expect at a loss, that is, there is no reasonable hope of trading at a profit *[Agrani Bank Vs. Bangladesh Tyres Ltd and others (1991) 11 BLD (AD) 171]*

Company Court - its inherent power- order for stay : The Company Court, in exercise of its inherent power, whether can make at any stage of the proceeding such order for stay of application for winding up on the ground that the winding up petition is an abuse of the process of the Court *[Dr Naimur Rahman and another Vs. Shahabazpur Tea Co. Ltd. and another (BLD) 1991 (AD) 138]*

Company Court- Direction to produce papers : Direction to produce certain papers and documents before the Company Judge is purely an interlocutory order which does not at all decide any issue in the case. No appeal against such an order is maintainable *[Aramit Limited Vs. A.N.Z. Grindlays Bank PLC and another) (1994) 14 BLD (HCD) 502]*

Appeal lies only against judgment and orders : The Companies Act provides a complete code of procedure governing appeal and this precluded appeals from judgments and orders made under the said Act, except those made under sections 38, 153 (7) and 202 of the Act, 1913 (corresponding to sections 43, 228, and 235 of the Companies Act, 1994 respectively) *[Suruj Mia Vs. The Pioneer Bank Ltd., (1968) 20 DLR 1206]*

Appeals from judgments and orders passed under the Act are governed by sections 38, 153 (7) and 202 of the companies Act, 1913 (corresponding to sections 43, 228, and 235 of the Companies Act, 1994 respectively). The Companies Act provides a complete code of procedure governing appeals and it has precluded appeals from judgment and orders made under the Act except those made under sections 38, 153 (7) and 202 of the Act, 1913.(corresponding to sections 43, 228, and 235 of the Companies Act, 1994 respectively) *[Jabed Ali Vs. Sultan Ahmed (1974) 26 DLR 196]*

Application under section 279 must allege fraud : Appeal under section 196 of the Companies Act, 1913 (corresponding to section 279 of the Companies Act, 1994) lies when penalty is imposed: Under section 196 of the Companies Act, 1913 (corresponding to section 279 of the Companies Act, 1994) the application must show a *prima facie* case of fraud against the person concerned ; merely a general allegation of fraud in the management of the company would not necessarily justify a public examination. *Debendra Nath Vs. Bangladesh Bank (1976) 28 D.L.R 402.*

Appealable orders : Order passed by Company Judge directing advertisement of winding-up petition whether appealable. *Held-* It is a appealable. *[Golcha Investment (P) Ltd. Vs. Shanti Chandra. (1970) 40 Comp. Cas. 1128: A.I.R. 1970 S.C. 1350]*

Appeal arising from winding up proceedings : In an appeal against an order refusing to wind-up company interference by the Appellate Court would not be justified unless the Appellate Court is satisfied that the discretion has not bee exercised in accordance with sound judicial principles. *[Lakshmiji Sugar Mills Co (Pvt.) Ltd. Vs. National Industrial Corporation Ltd., (1968) 1 Comp. L.J. 292 (1968) 38 Comp. Cas. 384 (Punjab)]*

VOLUNTARY WINDING UP

286. Circumstances in which company may be wound up voluntarily.– (1) A company may be wound up voluntarily-

(a) when the period, if any, fixed for the duration of the company by the articles expires, or the event, if any occurs, on the occurrence of which articles provide that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;

(b) if the company resolves by special resolution that the company be wound up voluntarily;

(c) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

(2) The expression "resolution for voluntarily winding up" when used hereafter in this Part means a resolution passed under clause (a), clause (b), or clause (c) of this section.

Notes/Comments/Precedents

In a voluntary winding up the company and its creditors are left free to settle their affairs between themselves, with the liberty, however, to apply to the court, if necessary. A company may be wound up voluntarily- (a) when the period, if any, fixed by the articles for the duration of the company has come to an end, or an event upon the happening of which the company is to be wound up has happened and the company has in general meeting passed a resolution to wind up ; (b) if the company passes a special resolution to wind up voluntarily.

A company may be solvent and even prosperous, and yet it may desire to wind up its affairs. For instance, a company may be voluntarily wound up for the purpose of reconstruction or amalgamation without the intervention of the court.

Grounds of voluntarily winding up : If the Articles provide for the duration of the company, then of the expiry of that period the company may be wound up on an ordinary resolution being passed at a general meeting. If the Articles provide that until happening of an event the company would be wound up then on the occurrence of that event the company may be wound up on an ordinary resolution being passed at a general meeting of the company. In other cases even without assigning any reason the company may be wound up voluntarily if a special resolution is passed to that effect in a general meeting of the company.

287. Commencement of voluntary winding up.– A voluntary winding up shall be deemed to commence at the time of the passing of the resolution for voluntary winding up.

Notes/Comments/Precedents

Commencement of voluntary winding up : A voluntary winding up commences from the passing of the resolution authorising the winding up. When it is wound up by the passing of a special resolution the winding up commences from the passing of the second or extraordinary resolution. But where a voluntary winding up is continued under the supervision of the Court, the winding up is deemed to commence at the date of the resolution.

288. Effect of voluntary winding up on status of company.– When a company wound up voluntarily, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof:

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved.

Notes/Comments/Precedents

Transfer of share after commencement of winding-up : After the commencement of the winding-up, every transfer of shares thereafter shall be void and no shares can be transferred without the sanction of the liquidator. Thus in Taylor's Case, *(1897) 1 Ch.* 298, it was held that shares transferred with the consent of the liquidator had the effect of making the transferees members of the company.

289. Notice of resolution to wind up voluntarily.– (1) Notice of any special resolution or extraordinary resolution for winding up a company voluntarily shall be given by the company within ten days of the passing of the same by advertisement in the official Gazette, and also in some news paper, if any, circulating in the district where the registered office of the company is situate.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding one hundred taka for everyday during which the default continues; and also every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to a like penalty.

290. Declaration of solvency.– (1) Where it is proposed to wind up a company voluntarily, the directors of the company or, in the case of a company having more than two directors, the majority of the directors shall, at a meeting of the directors held before the date on which the notice of the meeting at which the resolution for the winding up, the company is to be proposed are sent out, make a declaration verified by an affidavit to the effect that they have made a full inquiry into the affairs of the company, and that, having so done, they formed the opinion that the company will be able to pay its debts in full within a period, not exceeding three years, from the commencement of the winding up.

(2) Such declaration shall be supported by a report of the company's auditor on the company's affairs, and shall have no effect for the purposes of this Act unless it is delivered to the Registrar for registration before the date mentioned in sub-section (1).

(3) A winding up, in the case or which a declaration has been made and delivered in accordance with sub-sections (1) and (2), is in this Act referred to as "members voluntary winding up", and, where a declaration has not been made and delivered as aforesaid, is in that Act referred to as "creditors voluntary winding up."

Notes/Comments/Precedents

Declaration of solvency : Majority of the Directors not below two, by a resolution may make a declaration to the effect that they have made a full enquiry into the affairs of the company and having done so they have formed the opinion that the company has no debts or that the company will be able to pay in debts in full within a specified period not exceeding three years from the commencement of the winding up.

MEMBERS' VOLUNTARY WINDING UP

291. Provisions applicable to a members' voluntary winding up.– The provisions contained in section 292 to 296 (both inclusive), shall apply in relation to a members, voluntary winding up.

Notes/Comments/Precedents

Kinds of Voluntary Winding up : There are two kinds of voluntary winding up, e.g., (1) Members Voluntary Winding up and (2) Creditors Voluntary Winding up. The Companies Act, 1914 makes a distinction between (i) Members voluntary winding up when the company is solvent, and (ii) a creditors winding up when it is insolvent.

Members Voluntary Winding up : To bring about a members voluntary winding up the following conditions must be satisfied : (1) The majority of the directors must deliver to the Registrar a statutory declaration that the company is solvent and that the company will be able to pay its debts in full three years from the commencement of the winding up. (2) The statutory declaration has to be made within five weeks before the winding up resolution and has to be filed with the Registrar before the passing of the winding up resolution. (3) After the above statutory declaration, the share-holders must meet and pass a resolution, ordinary, special or extra-ordinary as the case may be, for the winding up of the company.

The Companies Act provides that the company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them. On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof.

If the winding up continues for more than a year the liquidator must summon a general meeting of the company at the end of the first year from the commencement of the winding up and of each successive year and lay before the meeting an account of his conduct.

After the affairs of the company are fully wound up, the liquidator must prepare a final account and call a general meeting of the company called the 'final meeting' which must be properly advertised. Within a week of the final meeting the liquidator must send a copy of the account and a return of the meeting to the Registrar. The Registrar registers the accounts and returns and at the end of three months from such registration the company is dissolved.

292. Power of company to appoint and fix remuneration of liquidator.– (1) The company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company and may fix the remuneration to be paid to him or them.

(2) On the appointment of liquidator, all the powers of the directors shall cease, except so far as the company in general meeting or the liquidator, sanctions the continuance thereof.

293. Power to fill vacancy in the office of liquidator.– (1) If a vacancy occurs by death, resignation or otherwise in the office of the liquidator appointed by the company, the company in the general meeting may, subject to any agreement with its creditors, fill the vacancy.

(2) For the purpose of filling in the said vacancy, a general meeting may be convened by any by the contributory or, if there were more liquidators than one by the continuing liquidator.

(3) The meeting shall be held in the manner provided by this Act or by articles, or in such manner as may, on application contributory or by the continuing liquidators, be determined by the Court.

294. Power of liquidator to accept shares, etc., as consideration for sale of property of company.– (1) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company, whether a company within the meaning of this Act or not, in this section called "the transferee company", the liquidator of the first-mentioned company in this section called "the transferor company," may with the sanction of a special resolution of that company conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer or sale, shares, policies, or compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement where by the members of the transferor company may, in lieu of receiving cash or shares, policies or other like interests or in addition thereto, participate in the profits of or receive any other benefit from, the transferee company.

(2) Any sale or other transfer or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company who did not vote in favour of the special resolution expresses his dissent therefrom in writing addressed to the liquidator and left at the registered office of the company within seven days after the passing of the special resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or any arbitration in manner hereafter provided.

(4) If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(5) A special resolution shall not be invalid, for the purposes of this section by reason only that it is passed before or concurrently with a resolution for voluntary winding up or for appointment of liquidators, but if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court.

(6) The provisions of the Arbitration Act, 1940 (X of 1940), other than those restricting the application of that Act in respect of the subject matter of the arbitration, shall apply to all arbitrations in pursuance of this section.

295. Duty of liquidator to call general meeting at the end of each year.– (1) In the event of the winding up continuing of more than one year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding up and of each succeeding year, or as soon thereafter as may be convenient within ninety days of the close of the year and shall lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the liquidator.

(2) If the liquidator fails to comply with this section, he shall be liable to a fine not exceeding five hundred taka.

296. Final meeting and dissolution.– (1) As soon as the affairs of the company are fully wound up, liquidator shall make up an account of the winding of up showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving any explanation thereof.

(2) The meeting shall be called by advertisement specifying the time, place and object thereof, and published one month at least before the meeting in the manner specified in sub-section (1) of section 289 for publication of a notice under that sub-section;

(3) Within one week after the meeting, the liquidator shall send to the Registrar a copy of the account and shall make a return to him of the holding of the meeting and of its date, and if the copy is not sent or the return is not made in accordance with this sub-section, the liquidator shall be liable to a fine not exceeding one hundred taka for everyday during which the default continues:

Provided that, if a quorum is not present at the meeting the liquidator shall in lieu of the said return make a return that the meeting was duly summoned and that no quorum was present there at, and upon such a return being made the provisions of this sub-section as to the making of the return shall be deemed to have been complied with.

(4) The Registrar on receiving the account and either of the returns mentioned in sub-section (3) shall forthwith register them and on the expiration of three months from the registration of the return the company shall be deemed to be dissolved:

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5) It shall be the duty of the person on whose application an order of the Court under sub-section (4) is made, within twenty-one days after the making of the order, to deliver to the Registrar a certified copy of the order for registration and if that person fails to do so he shall be liable to a fine not exceeding one hundred taka for everyday during which the default continues.

CREDITOR'S VOLUNTARY WINDING UP

297. Provision applicable to a voluntary winding up.– The provisions contained in sections 298 to 305, both inclusive, shall apply in relation to a creditors voluntary winding up.

Notes/Comments/Precedents

Creditor's Voluntary winding up : Where no declaration as to solvency of the company is made and the shareholders pass a resolution for winding up, the winding up is known as *creditor's voluntary winding up*. In the case of creditor's voluntary winding up the company is obliged to convene a meeting of the creditors on the day on which the meeting for passing the resolution for winding up is to be held.

The Procedure for a Creditors voluntary winding up is as follows :(1) The company shall cause a meeting of the Creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the said meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the said meeting of the company. (2) The company shall cause notice of the meeting of the creditors to be advertised in the prescribed manner. (3) The directors duty is to- (a) cause a full statement of the position of the company's affairs together with a list of the creditors and the estimated amount of their claims to be laid before the meeting of creditors to be held as aforesaid ; and (b) appoint one of their member, to preside at the said meeting. (4) The director appointed to preside at the meeting of creditors will attend the meeting and preside thereat. (5) Of the meeting of the company at which the resolution for voluntary winding up is to be proposed is adjourned and the resolution is passed at an adjourned meeting, any resolution passed at the meeting of the creditors, shall have effect as if it had been passed immediately after the passing of the resolution for winding up the company.

Section 305 of the Companies Act, 1994 provides that the creditors and the share-holders of the company at their respective meetings may nominate a person to be liquidator for winding up the affairs and distributing the assets of the company, and the creditors appoint different persons, the

person nominated by the Creditors shall perform the duties of a liquidator, and if no person is appointed by the creditors, the person nominated by the company shall be liquidator.

The Creditors may appoint a committee of inspection consisting of ten members of whom not more than five are to be nominated by the Share-holders.

If the winding up continues for more than a year the liquidator must summon a general meeting of the company and a meeting of the creditors at the end of the first year from the commencement of the winding up, and of each successive year and lay an account before the meetings.

298. Meeting of creditors.– (1) The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the said meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the said meeting of the company at which such resolution will be proposed.

(2) The company shall also cause notice of the meeting of the creditors be advertised in the manner specified in sub-section (1) of section 289 for the publication of a notice under that sub-section.

(3) The directors of the company shall-

(a) cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount to their claims to be laid, before the meeting of creditors to be held as aforesaid ; and

(b) appoint one of their number to preside at the said meeting.

(4) It shall be the duty of the director appointed to preside at the meeting of creditors to attend the meeting and to preside thereat.

(5) If the meeting of the company at which the resolution for voluntary winding up is to be proposed is adjourned and the resolution is passed at an adjourned meeting, any resolution passed at the meeting of the creditors, held in pursuance of sub-section (1) shall have effect as if it had been passed immediately after the passing of the resolution for winding up of the company.

(6) If defaults made-

(a) by the company in complying with sub-sections (1) and (2);

(b) by the board of directors of the company in complying with subsection (3);

(c) by any director of the company in complying with sub-section (4).

the company, every member of the board of directors or director, as the case may be, shall be liable to a fine not exceeding five thousand taka and, in the case of default by the company every officer of the company who is in default shall be liable to the like penalty.

Notes/Comments/Precedents

Nom compliance of provision– effect of : *Held-* Non-compliance with requirements of sub-section (2) would render the directors punishable with fine, but would not render the meeting invalid *[Pure Milk Supply Company Ltd. Vs. Hari Singh A I R 1962 Punj 190.]*

299. Appointment of liquidator.– The creditors and the company at their respective meetings mentioned in section 298 may nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors shall be the liquidator, and if no person is nominated by the creditors the person, if any, nominated by the company shall be liquidator.:

Provided that in the case of different persons being nominated, any director, member or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the Court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors.

Notes/Comments/Precedents

Liquidator appointed by the members of the company : Held- The Liquidator appointed by the members of the company will not be disentitled to act as liquidator of the company *[Centrebind Ltd. (1967) 1 Comp. L.J. 159.]*

300. Appointment of committee of inspection.– The creditors at the meeting to be held in pursuance of section 298 or at any subsequent meeting may, if they think fit, appoint a committee of inspection consisting of not more than five persons and if such a committee is appointed the company may, either at the meeting at which the resolution for voluntary winding up is passed or at any time subsequently in general meeting, appoint such number of persons as they think fit to act as members of the committee not exceeding five in number:

Provided that the creditors may, if they think fit, resolve that all or any of the persons so appointed by the company ought not to be members of the committee of inspection and, if the creditors so resolve, the persons mentioned in the resolution shall not, unless the Court otherwise directs, be qualified to remain or to act as members, of the committee, and on any application to the Court may under this provision the Court may, if it thinks fit, appoint other persons to act as such members in place of the persons mentioned in the resolution.

Notes/Comments/Precedents

Appointment of Committee of Inspection : The creditors may appoint a Committee of Inspection consisting of not more than five persons, and in that event the company may also appoint not more than five persons to be members of the committee, subject to the powers of the creditors to disapprove any person so appointed. The Court may, however give any directions to appoint other persons.

301. Fixing of liquidator's remuneration and cessation of directors powers.– The committee of inspection, or if there is no such committee, the creditors may fix the remuneration to be paid to the liquidator or liquidators, and where the remuneration is not so fixed, it shall be determined by the Court.

(2) On the appointment of a liquidator, all the powers of the directors shall cease, except so far as the committee of inspection, or if there is no such committee, the creditors sanction the continuance thereof.

302. Power to fill vacancy in the office of liquidator.– If a vacancy occurs by death, resignation or otherwise, in the office of a liquidator then the vacancy may be filled in by the Court when the liquidator was appointed by the Court or by the creditors where the liquidator was appointed by creditors.

303. Application of section 294 to a creditors' voluntary winding up.– The provisions of section 294 shall apply in the case of a creditors voluntary winding up as in the case of a members voluntary winding up with the modification that the powers of the liquidator under the said section shall not be exercised with the sanction either of the Court or of the committee of inspection.

Notes/Comments/Precedents

Liquidator may sell the property : The liquidator may, with the sanction of the Court or the Committee of Inspection, sell all or any part of the company's business or property or shares or like interests in another company to be distributed among the members for purposes of reconstruction. It may be recalled here that under section 294 of the Act the liquidator of the members' voluntary winding up has the power to accept shares, etc. as consideration or the sale of the property of the company with the sanction of a special resolution of the company.

304. Duty of liquidator to call meetings of company and of creditors at the year end.– (1) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company and a meeting of creditors at the end of the first year from the commencement of the winding up, and of each succeeding year, or as soon thereafter as may be convenient and shall lay before the meetings an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the winding up.

(2) If the liquidator fails to comply with this section, he shall be liable to a fine not exceeding five hundred taka.

305. Final meeting and dissolution.– (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the

winding up showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company and a meeting of the creditors, for the purpose of laying the account before the meetings and giving any explanation thereof.

(2) Each such meeting under sub-section (II) shall be called by advertisement specifying the time, place and object there of and published one month at least before the meeting in the manner specified in sub-section (1) of section 289 for the publication of a notice under that sub-section.

(3) Within one week after the date of the meetings, or if the meetings, are not held on the same date after the date of the later meeting, the liquidator shall send to the Registrar of copy of the account, and shall make a return to him of the holding of the meetings and of their dates, and if the copies are not sent or the return is not made in accordance with this sub-section, the liquidator shall be liable to a fine not exceeding one hundred taka for everyday during which the default continues:

Provided that, if a quorum, which for the purposes of this section shall be two persons, is not present at either of such meeting the liquidator shall, in lieu of such return, make a return that the meetings was duly summoned and that no quorum was present thereat, and upon such a return being made the provisions of this sub-section as to the making of the return shall, in respect of that meeting be deemed to have been complied with.

(4) The Registrar on receiving the account and in respect of each such meeting and any of the returns mentioned in sub-section (3), shall forthwith register them, and on the expiration of three months from the registration there of the company shall be deemed to be dissolved:

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5) It shall be the duty of the person on whose applications an order of the Court under sub-section (4) is made, within twenty one days after the making of the order, to deliver to the Registrar a certified copy of the order for registration, and if that person fails to do so, he shall be liable to a fine not exceeding one hundred taka for everyday during which the default continues.

GENERAL PROVISION FOR VOLUNTARY WINDING UP

306. Provisions applicable to every voluntary winding up.– The provisions contained in section 307 to 314, both inclusive, shall apply to every voluntary winding up whether a members or a creditors winding up.

Notes/Comments/Precedents

Voluntary winding up- Object of : The object of voluntary winding up is to allow the company and its creditors to settle their affairs between themselves. So an arrangement by a company with its creditors can be made either before or during winding up.

Kinds of Voluntary Winding up : There are two kinds of voluntary winding up, e.g., (1) Members Voluntary Winding up and (2) Creditors Voluntary Winding up. The Companies Act, 1914 makes a distinction between (i) Members voluntary winding up when the company is solvent, and (ii) a creditors winding up when it is insolvent.

307. Distribution of property of company.– Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities *pari passu* and, subject, to such application, shall unless the articles otherwise provide, be distributed among the members according of their rights and interested in the company.

308. Powers and duties of liquidator in voluntary winding up.– (1) The liquidator may-

(a) in the case of a members voluntary winding up, with the sanction of an extraordinary resolution of the company, and in the case of a creditor's voluntary winding up, with the sanction of either the Court or the committee of inspection, exercise any of the powers given by clauses (d), (e), (f) and (h) of section 262 to a liquidator in a winding up; but the exercise by the liquidator of the powers given by this clause shall be subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers;

(b) without the sanction referred to in clause (a), exercise any of the other powers by this Act given on the liquidator in a winding up by the Court;

(c) exercise the power of the Court under this Act of settling a list of contributories, and the list of contributories shall be prima facie evidence of the liability of the persons named therein to be contributories;

(d) exercise the power of the Court of making calls on shares or otherwise;

(e) summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution or for any other purpose he may think fit.

(2) The liquidator shall pay the debts of the company and shall adjust the rights of the contributories among themselves.

(3) When several liquidators are appointed, any power given by this Act may be exercised by such one or more of them as may be determined at the time of the appointment, or, in default of such determination, by any number not less than two.

309. Power of Court to appoint and remove liquidator in voluntary winding up.– (1) If, from any cause whatever, there is no liquidator acting, the Court may appoint a liquidator.

(2) The Court may, on any cause shown, remove a liquidator and appoint another liquidator, and, in case of such removal, shall immediately send a copy of the removal order to the removed liquidator.

310. Notice by liquidator of his appointment.– (1) The liquidator shall, within twenty-one days after his appointment, deliver to the Registrar for registration a notice of this appointment in the form prescribed.

(2) If the liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding one hundred taka for everyday during which the default continues.

311. Arrangement when binding on creditors.– (1) Any arrangement entered into between a company about to be, or in the course of being wound up and its creditors shall, subject to the right of appeal under sub-section (2) be binding on the company if sanctioned by an extraordinary resolution, and also on the creditors if acceded to by three-fourths in number and value of the creditors.

(2) Any creditor or contributory may, within three weeks from the completion of the arrangement, appeal to the Court against it, and the Court may thereupon, as it thinks just, amend, vary or confirm the arrangement.

312. Power to apply to Court to have questions determined of powers exercised.– (1) The liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls, staying of proceedings or any other matter all or any of the powers which the Court might exercise if the company were being wound up by the Court.

(2) The liquidator or any creditor or contributory may apply for an order setting aside any attachment, distress or execution put into force against the estate or effects of the company after the commencement of the winding up.

(3) The application under sub-section (2) shall be made-

(a) if the attachment, distress or execution is levied or put into force by the High Court Division, to the High Court Division; and

(b) if the attachment, distress or execution is levied or put into force by any other Court, to the Court having jurisdiction to wind up the company.

(4) The Court, if satisfied that the determination of the question or the required exercise of power or the order applied for will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.

Notes/Comments/Precedents

Winding up- application to court for solution : Where in the course of voluntary winding up, any difficulty arises the same may be best solved by the Court. This section empowers the liquidator or any creditor or contributory to apply to the Court for that purpose.

313. Cost of voluntary winding up.– All costs, charges and other expenditure properly incurred in the winding up including the remuneration of the liquidator, shall, subject to the rights of secured creditors, if any, be payable out of the assets of the company in priority to all other claims.

314. Saving for rights of creditors and contributories.– The winding up of a company shall not bar the right of any creditor or contributory to apply for a winding up by the Court, but in the case of an application by a contributory, the Court must be satisfied that the rights of the contributories will be prejudiced by a voluntary winding up.

315. Power of Court to adopt proceeding of voluntary winding up.– Where a company is being wound up voluntarily and an order is made for winding up by the Court, the Court may if it think fit, by the same or subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding up and also for any incidental on consequential situation.

WINDING UP SUBJECT TO SUPERVISION OF COURT

316. Power to order winding up subject to supervision.– When a company has by special or extraordinary resolution, resolved to wind up voluntarily, the Court may make an order that the voluntary winding up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories or others to apply to the court and generally on such terms and conditions as the Court thinks just.

Notes/Comments/Precedents

Winding up, subject to supervision of court : When a company is being wound up Voluntarily the court may at any moment order that the winding up shall take place under the supervision of the court.

When a company has by special or extra-ordinary resolution resolved to wind up voluntarily, the court may make an order that the voluntary winding up shall continue, but subject to such supervision of the court, and with such liberty for creditors, contributories or others to apply to the court and generally on such terms and conditions as the court thinks just. The share-holders or creditors may apply for this supervision order after the passing of the resolution for winding-up. The order which is called a 'supervision order', pre-supposes the existence of a voluntary winding up, and secondly, no such order can be made where the voluntary winding up has commenced under an ordinary resolution.

317. Effect of petition for winding up subject to supervision.– A petition for continuance of a voluntary winding up subject to the supervision of the Court shall, for the purpose of giving jurisdiction to the Court over suits, be deemed to be a petition for winding up by the Court.

318. Court may have regard to wishes of creditors and contributories.– The Court may, in deciding between a winding up by the Court and winding up subject to supervision, in the appointment of liquidators, and in all other matters relating to the winding up subject to supervision have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

319. Power of Court to appoint and remove liquidators.– (1) Where an order is made for a winding up subject to supervision, the Court may by the same or any subsequent order appoint any additional liquidator.

(2) A liquidator appointed by the Court under this section shall have the same powers, be subject to the same obligations and in all respects stand in the same position as if he had been appointed by the company.

(3) The Court may remove any liquidator so appointed by the Court or any liquidator continued under the supervision order and fill any vacancy occasioned by the removal or by death or resignation.

320. Effect of supervision order.– (1) Where an order is made for a winding up subject to supervision, the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily.

(2) Expect as provided in sub-section (1), and save for the purposes of section 279, any order made by the Court for a winding up subject to the supervision of the Court shall for all purposes, including the staying of suits and other proceedings, be deemed to be an order of the Court for winding up of the company by the Court, and shall confer full authority on the Court to make calls or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court.

(3) In the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidator, the expression "official liquidator" shall be deemed to mean the liquidator conducting the winding up subject to the supervision of the Court.

Notes/Comments/Precedents

Directions given by Company Judge to Official Liquidator are not orders of High Court : Such directions are not binding on executing Court which is to exercise its own discretion according to the facts and circumstances of the case. *[Subhkaran Rajgoria Vs. Pioneer Bank Ltd. (1971) 23 D L R 1].*

Money received by Official Liquidator, pending approval of Company Judge for settlement of claim with judgment- debtor is a deposit and not payment : If approval is not granted, the Official Liquidator is to return the money-Adjustment of the amount by the Official Liquidator is illegal *[Subhkaran Rajgoria Vs. Pioneer Bank Ltd. (1971) 23 D L R 1.]*

Effect of supervision order : The effect of a supervision order is the same as an order for compulsory winding-up except that the liquidator may subject to any restrictions imposed by the court, exercise all his powers without the sanction or intervention of the court, in the same manner as if the company was being wound-up altogether and voluntarily. The liquidator appointed by the company continues to act as such unless removed by the court. He will have all the powers which a liquidator under a voluntary liquidation possesses subject to any direction made by the court.

Who may present petition for winding up : A petition for winding-up may be presented either by the company itself or by a creditor or all creditors, or by a contributory or all contributories, or share-holders, or by the debenture-holders. Under Section 245 on application to the court for the winding up of a company shall be by petition presented, either by the company, or by any creditor or creditors, contributory or contributories, or by all or any of those parties, together or separately, (or by the Registrar) ;

A contributory is not however entitled to present a petition for winding up a company unless- (i) either the number of members is reduced, in the case of a private company, below two, or in the case of any other company, below seven; or (ii) the shares in respect of which he is contributory or some of them either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up or have devolved on him through the death of a former holder ;

The Registrar is not entitled to present a petition- (i) except on the ground that from the financial condition of the company as disclosed in its balance-sheet or from the report of an inspector it appears that the company is unable to pay its debts, and (ii) unless the previous sanction of the Government has been obtained to the presentation of the petition.

A petition for winding up a company on the ground of default in filing the statutory report or in holding the statutory meeting shall not be presented by any person except a share-holder, nor before the expiration of 14 days after the last day on which the meeting ought to have been held ;

The court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the court thinks reasonable and until a *prima facie* case for winding up has been established to the satisfaction of the court.

321. Appointment of liquidators subject to supervision to the office of official liquidators.– Where an order has been made for the winding up of a company subject to supervision, and an order is afterwards made for winding up by the Court, the Court may, by the last-mentioned order or by any subsequent order, appoint the liquidators for the first mentioned winding up or any of them either provisionally or permanently, and either with or without the addition of any other person, to be official liquidator in the winding up by the Court.

SUPPLEMENTAL PROVISIONS

322. Avoidance of transfers, etc. after commencement of winding up.– (1) In the case of voluntary winding up, every transfer of shares, except transfers made to or with the sanction of the liquidator, and every alteration in the status of the member of the company made after the commencement of the winding up shall be void.

(2) In the case of a winding up by, or subject to the supervision of the Court, every disposition of the property, including actionable claims of the company, and every transfer of shares, alteration in the status of its members, made after the commencement of the winding up shall, unless the Court otherwise orders be void.

Notes/Comments/Precedents

Voluntary winding up : Transfer of shares or alteration of status of members of the company after commencement of voluntary winding up is void. The execution of a transfer without the liquidator's sanction is void but not illegal and an action may lie for refusal to execute a transfer even though no sanction has been obtained. *[Biederman v. Stone, (1867) L.R. 2 C.P. 504].* Equities against the transferor are enforceable against the transferee. [Palmer's Decoration and Furnishing Co., (1904) 2 Ch. 743.] A liquidator may set aside a transfer to a minor shortly before the commencement of winding up even if the minor attained majority in the meantime. *[Symon's Case, (1870) 5 Ch. App. 298.]*

When Company Court can validate transfer during winding-up : It is well settled on matter of principle and authority that if the Company Court is satisfied that a particular disposition of the property of a company which is the subject-matter of a winding-up petition, is necessary or expedient in the interest of the company and particularly its creditors and shareholders and the transactions are in the ordinary course of its current trade bonafide entered into and completed, and it is in the interest of every one to preserve the company as a going concern, and if such transactions are not maintained, and the presentation of a petition groundless or well-founded result *ipso facto* into paralysing the trade of the company and a great injury without any counter-balance of advantage would be done to those interested in the assets of the company, if would be in the discretion and duty of the court to validate such transactions. *[Navjivan Mills Ltd. In re : (Guj.) (1986) 59 Comp. Cas. 201.]*

323. Debts of all descriptions to be proved.– In every winding up, subject in the case of insolvent companies to the application in accordance with the provisions of this Act or the law of insolvency, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, shall be admissible to proof against the company, a just estimate being made, so far as possible, of value of such debts or claims as may be subject to any contingency or for some other reason do not bear a certain value.

324. Application of insolvency rules in winding up of insolvent companies.– In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts probable and the valuation of annuities and future

and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estate of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section.

Notes/Comments/Precedents

Under sub-sec. (2) of sec. 260 (corresponding to sec.178 of the Companies Act, 1913) company's properties shall vest in court's custody and under sub-s. (1) Official Liquidator shall take into his custody all properties- Section 178 (corresponding to sec.260 of the Companies Act, 1994) is controlled by Sec 229 (corresponding to sec.324 of the Companies Act, 1994) which deals with insolvency rules *[Uttara Bank Vs. M/s. Rahman Biscuit Factory Ltd. (1980) 32 D.L.R. 45.]*

Position of an attaching creditor : The position of an attaching creditor under the Act is similar to that under the Provincial Insolvency Act (Section 51). *[Chandpur Mills Ltd. Vs. Economic Aid Corporation. (1959) 11 DLR 459.]*

Under sub-sec. (2) of sec.262 (corresponding to section 178 of the Companies Act, 1913) company's properties shall vest in court's custody and under sub-section (1) Official Liquidator shall take into his custody all properties- Section 262 (corresponding to section 178 of the Companies Act, 1913) is controlled by Sec 324 (corresponding to section 229 of the Companies Act, 1913) which deals with insolvency rules. *[Uttara Bank, Vs. M/s. Rahman Biscuit Factory Ltd. (1980) 32 D.L.R. 45.]*

325. Preferential payments.– (1) In a winding up there shall be paid in priority to all other debts-

(a) all revenue, taxes, cesses and rates, whether payable to the Government or to a local authority due from the company at the date, specified in sub-section (5), hereinafter referred in this sub-section as the said date and having become due and payable within the twelve months next before the said date;

(b) all wages or salary of any clerk and other servant in respect of service rendered to the company within the two months next before the said date, not exceeding one thousand taka for each clerk or servant;

(c) all wages of any labourer or workman, not exceeding five hundred for each, whether payable for the time or piece-work, in respect of services rendered to the company within the two months next before the said date;

(d) compensation payable under the Workmen's Compensation Act, 1923 (VIII of 1923), in respect of the death or disablement of any officer or employee of the company;

(e) 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; and

(f) the expenses of any investigation held in pursuance of clause (c) of section 195 of this Act.

(2) The debts mentioned in sub-section (1) shall-

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportion; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(3) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forth with so far as the assets are sufficient to meet them.

(4) In the event of any person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on the proceeds of the sale thereof:

Provided that in respect of any money paid under any such charge the said persons shall have the same rights of priority as the person to whom the payment is made.

(5) The date referred to in sub-section (1) (a) is-

(a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily the date of the winding up order; and

(b) in any other case, the date of the commencement of the winding up.

Notes/Comments/Precedents

Cost and expense of winding up : Where a Liquidator appointed under the Companies Act, instead of taking any step to give up a property which was held on lease by the company, tries to retain the same and uses the same for the benefit of the business of the Company in liquidation, the rent of the property should be regarded as cost and expenses of the winding-up under section 230 (3) of the Companies Act, 1913 (corresponding to section 325(3) of the Companies Act, 1994) and it should be paid in full like any other debt or expenses property incurred by the liquidation *[8 PLR (Dac.) 409]*

Costs of unsuccessful litigation awarded against Official Liquidator : Payable out of assets of company in priority to costs of liquidation itself. *[In re: Noakhali Union Bank Ltd. (in Liquidation (1964) 16 D.L.R. 656.]*

This section enumerates certain debts which are to be paid in priority to all other debts. The secured creditors' and workmen's claims come first, then comes costs, charges and expenses of the winding up. Whatever assets and moneys are left thereafter will be applied in paying the debts according to the provisions of the section and subject to this, some debts mentioned in this section should be paid in priority to all other debts. But so far as these are concerned they stand on equal footing and any money available should be distributed among these heads in equal proportion. Workmen's claims have been excluded from this section.

326. Disclaimer of property.– (1) Where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares, or stock in other companies, or unprofitable contracts or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof the performance of any onerous act, or to the payment of any sum of money, the liquidator of the company, notwithstanding that he had endeavoured to sell or has taken possession of the property, or had exercised any act of ownership in relation thereto, may with the leave of the Court and subject to the provisions of this section, by writing signed by him at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the Court, disclaim the property:

Provided that, where any such property has not come to the knowledge of the liquidator within one month after the commencement of the winding up, the power under this section of disclaiming the property may be exercised at any time within twelve months after he has become aware thereof or such extended period as may be allowed by the Court.

(2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the company, and the property of the company, in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person.

(3) The Court, before or on granting leave to disclaim, may require such notice to be given to persons interested and impose such terms as a condition or granting leave, and make such other order in the matter as the Court thinks just.

(4) The liquidator shall not be entitled to disclaim any property under this section in any case where an application in writing has been made to him by any persons interested in the property requiring him to decide whether he will or will not disclaim, and the liquidator has not within a period of thirty days after the receipt of the application or such further time as may be allowed by the Court, given notice to the applicant that he intends to apply to the Court for leave to disclaim, and in the case of a contract, if the liquidator, after such an application as aforesaid, does not within the said period or further period disclaim the contract, the company shall be deemed to have adopted it.

(5) The Court may, on the application of any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract on such terms as to payment by either party of damages for the nonperformance of the contract, or otherwise as the Court thinks just, and any damages payable under the order to any such person may be proved by him as debt in the winding up.

(6) The Court may, on an application by any person who either claims any interest in any disclaimed property or is under any liability not discharged by this Act in respect of any disclaimed property and or hearing any such persons as it thinks fit, make an order for the vesting of the property in or the delivery of the property to any persons entitled thereto or to whom it may seem just that the property should be delivered by way of compensation for such liability as aforesaid, or a trustee for him and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose:-

Provided that, where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the company whether as under-lessee or as mortgagee expect upon the terms of making that person-

(a) subject to the same liabilities and obligations as those to which the company was subject under the lease or mortgage in respect of the property at the commencement of the winding up; or

(b) if the Court thinks fit, subject only to the same liabilities and obligations as if the lease had been assigned to that person at that date;

and in either, if the case so requires, as if the lease had comprised only the property comprised in the vesting order, and any mortgage or under lease declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and, if there is no person claiming under the company who is willing to accept an order upon such terms, the Court shall have power to vest the estate and interest of the company in the property in any person liable, either personally or in representative, and either alone or jointly with the company, to perform the lessee's covenants in the lease, freed and discharged from all estates, in cumbrances and interests created therein by the company.

(7) Any person injured by the operation of a disclaimer under the section shall be deemed to be a creditor of the company to the amount of the injury, and may accordingly prove the amount as a debt in the winding up.

327. Fraudulent preference.– (1) Any transfer, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent preference, shall if made or done by or against a company, be deemed in the event of its being wound up a fraudulent preference of its creditors, and be invalid accordingly.

(2) For the purpose of this section, the presentation of a petition for winding up in the case of winding up by or subject to the supervision of the Court, and a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond with the act of insolvency in the case of an individual.

(3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

Notes/Comments/Precedents

Fraudulent Preference : The insolvency rules as to fraudulent preference apply to companies. The object of the Act being a *pari passu* distribution, Section 327 provides that every transfer of property, movable or immovable, delivery of goods, payment, execution or other act relating to property, made, taken or done by or against a company within 6 months before commencement of its winding up shall be deemed, in the event of its being wound up, a fraudulent preference of its creditors and so invalid.

328. Avoidance of certain attachments, executions, etc.– (1) Where any company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force without leave of the Court against the estate or effects or any sale held without leave of the Court of any properties of the company after the commencement of the winding up shall be void.

(2) Nothing in this section applies to proceedings by the Government.

329. Effect of charge created after commencement of winding up.– A floating charge on the undertaking or property of the company created within ninety days of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent, per annum.

330. General scheme of liquidation may be sanctioned.– (1) The liquidator may with the sanction of the Court when the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company in the case of a voluntary winding up, do the following things or any of them:-

(i) pay to any classes of creditors in full;

(ii) make any compromise or arrangement with creditors or persons claiming to be creditors or alleging themselves to have any claim, present or future, whereby the company may be rendered liable;

(iii) compromise all calls and liabilities to calls, debts and liabilities, capable of resulting in debts, and all claims, present or future, certain or contingent, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person

apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

(2) The exercise by the liquidator of the powers under this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise or any of these powers.

331. Power of Court to assess damages against delinquent directors. etc.– (1) Where, in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company or any part or present director, manager or liquidator, or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance of breach of trust in relation to the company, the Court may, on the application of the liquidator or of any creditor or contributory made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer misfeasance or breach of trust, as the case may be, whichever is longer, examine of the conduct of the promoter, director, manager, liquidator or officer and may compel him to repay or restore the money or property or any past thereof respectively with interest at such rate as the Court thinks, just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Court thinks just.

(2) This section shall apply notwithstanding that offence is one for which the offender may be criminally prosecuted.

Notes/Comments/Precedents

Application- maintainability of : Application under section 235 of the Companies Act, 1913 (corresponding to section 331 of the Companies Act, 1994) read with section 67 of the Banking Companies Ordinance maintainable even against a person who does not fall under any of the categories mentioned therein.

Section 61 of the Banking Companies Ordinance enables the High Court to decide all matters relating to a Bank in liquidation.

Two partners both had a current account each and were in the habit of transferring deposits from one account to another and this practice had been accepted by the bank and such transfers were even made by the transferee from the transferor's account to be subsequently endorsed confirmed by the transferor though not invariably and after one such particular transfer on the transferee's instruction, the Bank went into liquidation and the transferred amount remained with the Bank. The partners subsequently fell out and the transferor who had apparently not authorised the transfer tried to hold the Bank liable on the allegation that the transfer was illegal and prayed for a declaration that the Bank owed to him the transferred amount.

Held: On the evidence adduced it was proved that such transfers though apparently irregular was an established practice as between the Bank and the two current account-holders. As such, the impugned transfer was legal and the Bank was in no way liable.

Further held, though strictly speaking the liability of the transferee account-holder was outside the scope of enquiry of either section 235 of the Companies Act, 1913 (corresponding to section 331 of the Companies Act, 1994)and section 67 of the Banking Companies Ordinance yet in view of the fact that the impugned amount was still lying with the Bank when it went into liquidation and further in view of section 61 of the Banking Companies Ordinance which requires that all matters relating to a Bank in liquidation would be decided by this Court, the impleading of Respondent No.3 (the transferee account-holder) was maintainable in an application under section 235 of the Companies Act, 1913 (corresponding to section 331 of the Companies Act, 1994) read with section 67 of the Ordinance: *[Khondker Faizur Rahman Vs. The Official Liquidator. (1969) 21 DLR 44.]*

332. Penalty for falsification of books.– If any director, manager, officer or contributory of any company being wound up destroys, mutilates, alters or falsifies or fraudulently secrets any books, papers or securities or makes or is privy to the making of any false or fraudulent entry in any register book of account or document belonging to the company with intent to defraud or deceive any person, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Notes/Comments/Precedents

Officer includes auditor : Where the auditor fails to point out that the company has not maintained proper books of account he is liable for misfeasance. *[Fulton (John) and Co. Vs Inspector of Taxes (1932) N I 35.]*

333. Prosecution of delinquent directors.– (1) If it appears to the Court in the course of a winding up by, or subject to the supervision of, the Court that any past or present director, manager or other officer, or any member of the company has been guilty of any offence in relation to the company for which he is criminally liable, the Court may, either on the application of any person interested in the winding up or of its won motion, direct the liquidator either himself to prosecute the offender or to refer the matter to the Registrar.

(2) If it appears to the liquidator in the course of a voluntary winding up that any past or present director, manager of other officer or any member of the company has been guilty of any offence in relation to the company for which he is criminally liable, he shall forthwith report the matter to the Registrar and shall furnish to him such information and give to him such access to and shall furnish to him such information and give it him such access to and facilities for inspecting and taking copies of any documents, being information or documents in the possession or under the control of the liquidator relating to the matter in question, as he may require.

(3) Where any report is made under sub-section (2) to the Registrar, he may, if he thinks fit, refer the matter to the Government for further inquiry, and the Government shall thereupon investigate the matter and may, if they think it expedient, apply to the Court for an order conferring on any person designated by the Government for the purpose with respect to the company concerned all such powers of investigating the affairs of the company as are provided by this Act in the case of a winding up by the Court.

(4) If on any report to the Registrar under sub-section (2) it appears to him that the case is not one in which proceedings ought to be taken by him, he shall inform the liquidator accordingly, and thereupon, subject to the previous sanction of the Court, the liquidator may himself take proceedings against the offender.

(5) If it appears to the Court in the course of a voluntary winding up that any past or present director, manager or other officer or any member of the company has been guilty as aforesaid, and that no report with respect to the matter has been made by the liquidator to the Registrar, the Court may, on the application of any person interested in the winding up or of its own motion, direct the liquidator to make such a report, and on a report being made accordingly, the provision of this section shall have effect as though the report has been made in pursuance of the provisions of sub-section (2).

(6) If a matter is reported or referred to the Registrar under this section and he considers that prosecution ought to be instituted there on, he shall place the papers before the Attorney General or the public prosecutor and shall if advised to do so, institute proceedings:

Provided that no prosecution shall be undertaken without first giving the accused person an opportunity of making a statement in writing to the Registrar and of being heard thereon.

(7) Notwithstanding anything contained in the Evidence Act, 1872 (1 of 1872), when any proceeding are instituted under this section it shall be the duty of the liquidator and of every officer and agent of the company past and present, other than the defendant in the proceedings, to give all assistance in connection with the prosecution which he is reasonably able to give, and for the purposes of this sub-section the expression "agent" in relation to a company shall be deemed to include any banker or legal adviser if the company and any person employed by the company as auditor, whether that person is or is not an officer of the company.

(8) If any person fails or neglects to give assistance in manner required by sub-section (7), the Court may, on the application of the Registrar direct that person to comply with the requirements of the said sub-section, and where any such application is made with respect to a liquidator, the Court may, unless it appears that the failure on neglect to comply was due to the liquidator not having in his hands sufficient assets of the company to enable him so to do, direct that the costs of the application shall be borne by the liquidator personally.

334. Penalty for false evidence.– If any person, upon any examination upon oath authorised under this Act, or in any affidavit, deposition or solemn affirmation, in or about the winding up of any company under this Act, or otherwise in or about any matter arising under this Act intentionally gives false evidence, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine.

335. Penal provisions.- (1) If any person, being a past or present director, managing agent, manager or other officer of a company which at the time of the commission of the alleged offence is being wound up in any manner.-

(a) does not to the best of his knowledge and belief fully and truly discover to the 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 way of the business of the company, or

(b) does not deliver up to the liquidator, or as he directs, all such part of movable and immovable property of the company as in his custody or under his control, and which he is required by law to deliver, or

(c) does not deliver to the liquidator, or as he directs, all books and papers in his custody or under his control belonging to the company and which he is required by law to deliver, or

(d) within twelve months next before the commencement of the winding up or at any time thereafter, conceals any part of the property of the company to the value of one hundred taka or up wards or conceals any debt due to or from the company, or

(e) within twelve months next before the commencement of the winding up or at any time thereafter fraudulently remove any part of the property of the company to the value of one hundred taka or upwards, or

(f) makes any material omission in any statement relating to the affairs of the company, or

(g) knowing or believing that a false debt has been proved by any person under winding up, fails within the period of a month to inform the liquidator thereof, or

(h) 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, or

(i) within twelve months next before the commencement of the winding up or any time thereafter, 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, or

(j) within twelve months next before the commencement of the winding up or at any time thereafter 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, or

(k) within twelve months next before the commencement of the winding up or at any time thereafter fraudulently parts with, alters or makes any omission in, or is privy to the fraudulent parting with, altering or making any omission in, any document affecting or relating to the property or affairs of the company, or

(l) after the commencement of the winding up or at any meeting of the creditors of the company within 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

(m) within twelve months next before the commencement of the winding up or at any time thereafter by any false representation or other fraud, obtained any property for or on behalf of the company on credit which the company does not subsequently pay, or

(n) within twelve months next before the commencement of the winding up or at any time thereafter, 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

(o) within twelve months next before the commencement of the winding up or at any time thereafter pawns, pledges, or disposes of any property of the company which has been obtained on credit and has not has been paid for, unless such pawning pledging or disposing is in the ordinary way of the business of the company, or

(p) is guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the company or any of them through an agreement with reference to the affairs of the company or to the winding up,

he shall be punishable, in the case of the offence mentioned in clauses (m) (n) and (o) with imprisonment for a term not exceeding seven years, and, in the case of any offence, mentioned in other clauses with imprisonment for a term not exceeding two years:

Provided that it shall be a good defence to a charge under any of clauses (b), (c), (d), (f), (n) and (o), if the accused proves that he had no intent to defraud, and to a charge under any of the clauses (a), (h), (i) and (j), if he proves that he had no intent to conceal the 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 and amount to an offence under clause (o) of subsection (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 not exceeding three years.

336. Meeting to ascertain wishes of creditors or contributories.– (1) where by this Act the Court is authorised in relation to winding up to have regard to the wishes of creditors or contributories, as proved to it by any sufficient evidence, the Court may, if it thinks for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the Court directs, and may appoint a person to act as Chairman of any such meeting and to report the result thereof to the Court.

(2) In the case of creditors, regard shall be had to the value of each creditor's debt.

(3) In the case of contributories regard shall be had to the number of votes conferred on each contributory by the articles.

Notes/Comments/Precedents

Direction by court to hold meeting : The court is empowered to direct to holding of a meeting to ascertain wishes of the creditors or contributories in all matters relating to the winding-up of the company. The scope of this section cannot be restricted only to the actually winding-up of the company, and the realisation of the assets of the company is not unrelated to the matters relating to the winding-up of the company. *[Jamnalal Ramlal Kimtee v. Konda Lakshman Bapuji, A.I.R. 1961 A.P. 259 (1961) 31 Comp. Cas. 315]*

337. Evidentiary value of documents of company.– Where any company is being wound up, all documents of the company and of the liquidator shall as between the contributories of the company, be prima-facie evidence of the truth of all matters purporting to be therein recorded.

338. Inspection of documents.– After an order for a winding up by or subject to the supervision of the Court, the Court may make such order for inspection by creditors and contributories of the company of its documents as the Court thinks just, and any documents in the possession of the company may be inspected by creditors or contributories accordingly, but not, further or otherwise.

Notes/Comments/Precedents

Inspection refusal of : The inspection of looks and papers cannot be refused merely on the ground that the information obtained will be used in favour of directors publicly examined *[Uma Shankar Malhotra Vs. People's Bank of Northern India Ltd. (1936) 6 Comp. Cas 387.]*

339. Disposal of documents of company.– (1) When a company has been wound up and is about to be dissolved, the documents of the company and of the liquidators may be disposed of as follows, that is to say:–

(a) in the case of a winding up by or subject to the supervision of the Court, in such way as the Court directs:

(b) in the case of voluntary winding up, in such way as the company by extraordinary resolution directs.

(2) After three years from the dissolution of the company, no responsibility shall rest on the company of the liquidators, or any person to whom the custody of the documents has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein.

Notes/Comments/Precedents

Liquidator can be asked to produce books and Papers : The liquidator of a company dissolved after voluntary winding-up could be ordered to produce books and papers of the company *[London & Yorkshire Bank Vs. Cooper (1885) 15 QBD 473]*

340. Power of Court to declare dissolution of company void.– (1) Where a company has been dissolved, the Court may, at any time within two years of the date of the dissolution on an application being made for the purpose by liquidator of the company or by any other person who appears to the Court to be interested, make an order upon such terms as the Court may thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

(2) It shall be the duty of the person on whose application the order was made, within twenty-one days after the making of the order, to file with the Registrar a certified copy of the order, and if that person fails so to do, he shall be liable to a fine not exceeding one hundred taka for everyday during which the default continues.

341. Information as to pending liquidations.– (1) Where a company is being wound up, if the winding up is not concluded one year after its commencement, the liquidator shall, once a year and at intervals of not more than twelve months until the winding up is concluded, file in the Court or with the Registrar, as the case may be a statement in the prescribed form and containing the prescribed particulars with respect to the proceeding in and the position of the liquidation.

(2) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement and to receive a copy

thereof or extract therefrom; but any person untruthfully so stating himself to be a creditor or contributory shall be deemed to be guilty of an offence under section 182 of the Penal Code (XLV of 1860), and shall be punishable accordingly on the application of the liquidator.

(3) If a liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding one thousand taka for each day during which the default continues.

(4) When the statement is filed in Court, a copy shall simultaneously be filed with the Registrar and shall be kept by him along with other records of the company.

342. Payment of liquidator into bank.– (1) Every liquidator of a company which is being wound up by the Court shall, in such manner and at such times as may be prescribed, pay the money received by him into a scheduled bank as defined in the Bangladesh Bank Order 1972 (P.O. No. 127 of 1972):

Provided that if the Court is satisfied than for the purpose of carrying on the business of the company or of obtaining advances or for any other reason it is for the advantage of the creditors or contributories that the liquidator should have an account with any other bank, the Court may authorise the liquidator to make his payments into or out of such other bank as the Court may select and there upon those payments shall be made in the prescribed manner.

(2) If any such liquidator at any time retains for more than 10 day's a sum exceeding five hundred taka or such other amount as the Court may in any particular case authorise him to retain, then, unless he explains the retention to the satisfaction of the Court, he shall pay interest on the amount so retained excess at the rate of twenty per cent per annum and shall be liable to disallowance of all or such part of his remuneration as the Court may think just and to be removed from his office by the Court and shall be liable to pay any expenses occasioned by reason of his default.

(3) A liquidator of a company which is being wound up shall open a special banking account and pay all sums received by him as liquidator into such account.

Notes/Comments/Precedents

Keeping of Bank account : Keeping of bank account is important and essential for carrying out on a liquidation *[Pabna Dhanabhandar Co. Ltd. In re: (1936) 6 Comp. Cas 422.]*

343. Unclaimed dividends and undistributed assets to be paid to Companies Liquidation Account.– (1) Where any company is being wound up, if the liquidator has in his hands or under his control any money of the company representing unclaimed dividends payable to any creditor or undistributed asset refundable to any contributory which have remained unclaimed for one

hundred and eighty days after the date on which they became payable or refundable, that liquidator shall forthwith pay the said money into the Bangladesh Bank to the credit of the Government in an account to be called the "Companies Liquidation Account" and the liquidator shall, on the dissolution of the company, similarly pay into the said account any money representing unclaimed dividend or undistributed assets in his hand at the date of dissolution.

(2) The liquidator shall, when making any payment referred to in sub-section (1), furnish to such officer as the Government may appoint in this behalf a statement in the prescribed form setting forth in respect of all sums included in such payment the nature of the sums, the names and last known addresses of the persons entitled to participate therein, the amount to which each is entitled and the nature of his claim thereto, and such other particulars as may be prescribed.

(3) The receipt of the Bangladesh Bank for any money paid to it under sub-section (1) shall be an effectual discharge of the liquidator in respect thereof.

(4) Where the company is being wound by the Court, the liquidator shall make the payment referred to in sub-section (1) by transfer from the special banking account referred to in sub-section (3) of section 342, and where the company is being in wound up voluntarily, or subject to the supervision of the Court, the liquidator shall, when filing a statement in pursuance of sub-section (1) of section 341, indicate the sum to money which is payable to the Bangladesh Bank under sub-section (1) of this section which he has had in his hands or under his control during the one hundred and eighty days, preceding the date to which the said statement is brought down, and shall, within fourteen days of the date of filing the said statement, pay that sum into the Companies Liquidation Account.

(5) Any person claiming to be entitled to any money, paid into the Companies Liquidation Account in pursuance of this section may apply to the Court for an order for payment thereof, and the Court, if satisfied that the person claiming is entitled may make an order for the payment to that person of the sum or the asset due to him:

Provided that before making such order the Court shall cause a notice to be served on such officer as the Government may appoint in this behalf calling on the officer to show cause within thirty days from the date of the service of the notice why the order should not be made.

(6) Any money paid into the Companies Liquidation Account in pursuance of this section, which remains unclaimed thereafter for a period of fifteen years, shall be transferred to the general revenue account of the Government; but any claim preferred under sub-section (5) to any money or asset so transferred shall be allowable as if such transfer had not been made, the order for payment on such claim being treated as an order for refund of revenue.

(7) Any liquidator retaining any money or asset which should have been deposited by him into the Companies Liquidation Account under this section shall pay interest on the amount retained at the rate of twenty per cent per annum and shall also be liable to pay any expense occasioned by reason of his default and where the winding up is by or under the supervision of the Court, he shall also be liable to disallowance of all or such part of his remuneration as the Court may think just and to be removed from this office by the Court.

(8) For the purposes of this section, the liquidator may with the sanction of the Court or as the case may be, of the Government, sellout the undistributed asset referred to in sub-section (1) and deposit the sale proceed in the company's Liquidation Account and it may be accordingly be disposed under this section.

Notes/Comments/Precedents

Unclaimed dividend and undistributed assets : Liquidator as an agent of the company must exercise a high degree of care and diligence in discharging his statutory duty. Where company is being wound up the liquidator has in his hands or under his control any many representing dividends payable to any creditor or assets refundable to any contributory, he shall pay the same in the 'Companies Liquidation Account' in the Bangladesh Bank.

344. Court or person before whom affidavit may be sworn.– (1) Any affidavit required to be sworn under the provisions or for the purposes of this Part may be sworn in Bangladesh before any Court, Judge or person lawfully authorised to take and receive affidavits or in any place outside Bangladesh before a Bangladesh Consul or Vice-Consul.

(2) All Courts, Judges, Justices, Commissioners, and persons acting judicially in Bangladesh shall take judicial notice of the seal or stamp or signature, as the case, may be, of any such Court, Judge, person, Consul or Vice-Consul, attached, appended or subscribed to any such affidavit or to any other document to be used for the purposes of this Part.

RULES

345. Power of Supreme Court to make rules.– (1) The Supreme Court, may from time to time, make rules consistent with this Act and with the Code of Civil Procedure 1908 (Act v of 1908) concerning the following matters namely:-

(a) the mode of proceedings to be held for winding up of a company in the High Court Division and in a court subordinate thereto.

(b) in the case of voluntary winding up by members or creditors, for the holding of meetings of creditors and members in connection with proceedings under section 228 of this Act;

(c) giving effect to the provisions of this Act for the purpose of reduction of share capital and sub-division of the share of a company;

(d) all applications to be made to the Court under the provisions of this Act.

(2) The Court shall make rules providing for all matters which by this Act, are required to be prescribed.

(3) Without prejudice to the generality of the foregoing power, the Supreme Court may be such rules enable or require all or any of the powers and duties conferred and imposed on the Court by this Act in respect of the matters following to be exercised or performed by the official liquidator, and subject to the control of the Court, that is to say, the powers and duties of the Court in respect of-

(a) holding and conducting meetings to ascertain the wishes of creditors and contributories;

(b) Settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets; of the company

(c) requiring delivery of property or documents to the liquidator;

(d) making calls;

(e) fixing a time within which debts and claims must be proved;

Provided that the official liquidator shall not, without the special leave of the Court, rectify the register of members, and shall not make any call without the special leave of the Court.

REMOVAL OF DEFUNCT COMPANIES FROM REGISTER

346. Registrar may strike defunct company of register.– (1) Where the Registrar has reasonable cause to believe that a company is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation;

(2) If the Registrar does not within thirty days of sending the letter receive any answer thereto, he shall within fourteen days, after the expiration of the said thirty days send to the company by post a registered letter referring to the first letter and stating that no answer thereto has been received and that, if an answer is not received to the second letter within thirty days from the date, thereof, a notice will be published in the official Gazette with a view to striking the name of the company off the register;

(3) If the Registrar either receives an answer from the company to the effect that it is not carrying on business or in operations, or does not within thirty days after sending the second letter receive any answer, he may publish in the Official Gazette, and send to the company by post a notice that, at the expiration of ninety days from the date of that notice, the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company

will be dissolved, and in such a case the Registrar may send a copy of the notice to the company while in sending it to the concerned authority for its publication in the official Gazette;

(4) If, in any case where a company is being wound up, the Registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months after notice by the Registrar demanding the returns, has been sent by post to the company, or to the liquidator at his last known place of business, the Registrar may publish in the official Gazette and sent to the company a like notice as is provided in the sub-section (3);

(5) At the expiration of the time mentioned in the notice the Registrar may unless cause to the contrary is previously shown by the company, strike its name on the register and on the publication in the official Gazette to a notice to the effect the company shall be dissolved:

Provided that the liability, if any, of every director and member of the company shall continue and may be enforced as if the company had not been dissolved.

(6) If a company or any member or creditor thereof feels aggrieved by the company's having been struck off the register, the Court, on the application of the company or member or creditor, may, if satisfied that the company was at the time of the striking off carrying on business or in operation or otherwise that it is just that the company be restored, to the register, and thereupon the company shall be deemed to have continued in existence as its name had not been struck off; and the Court may by order give such directions and make such provisions as seems just for placing the company and all other persons in the same positions as nearly as may be as if the name of the company had not been struck off;

(7) A letter or notice under this section may be addressed to the company at its registered office, or, if no office has been registered, to the care of some director, manager or other officer of the company or, if there is no director, manager or other officer of the company whose name and address are known to the Registrar such letter or notice may be sent to each of the persons who subscribed the memorandum, at the address mentioned in the memorandum.

Notes/Comments/Precedents

Grounds for striking off - Power of the Registrar as opposed to duty : If the Registrar has reasonable cause to believe that the company is not carrying on business or the company is not in operation he may strike out the name of the company from the register, he has the power as opposed to a duty, of striking off of a defunct company *[Sudhir Saran Bhatnagar Vs. Regr. of Companies (1972) 42 Comp Cas 408.]*

Application for restoration : The company whose name has been struck off the register, any member or creditor who feels aggrieved by the striking off the name of the company is entitled to make an application for restoration under this section. It is quite clear that the dissolved company can apply for restoration of its name to the register *[Conrad Hall and Co. (1916) WN 275.]*

Restoration of defunct companies, names of which have been strike off : The Registration of the company may be restored to the registrar and then wound up. *[Kalyanasundara Gunder, In re: AIR 1947 Mad. 247.]*

PART-VI
REGISTRATION OFFICE AND FEES

347. Registration office.– (1) For the purposes of the registration of companies under this Act, there shall be a central office and original offices at such places as the Government thinks, fit and no company shall be registered except at an office within the territorial jurisdiction in which by the memorandum, the registered office of the company is declared to be established.

(2) The Government may appoint such Registrar, Additional Registrar, and Assistant Registrar as it thinks necessary for the registration of companies under this Act and may make regulation rule with respect to their duties.

(3) The salaries of the persons appointed under this section shall be fixed by the Government.

(4) The Government may direct a seal or seals to be prepared for the authentication of documents required for or connected with the registration of companies.

(5) Any person may inspect the documents kept by the Registrar on payment of such fees as may be specified by the Government, not exceeding the fee specified in Schedule II for each inspection; and any person may require a certificate of the incorporation, or certificate of commencement of business, of any company, or a copy or extract of any other document or any part of other document, to be certified by the Registrar on payment for the certificate, certified copy or extract, of such fees as the Government may specify not exceeding the fee specified in the said Schedule.

(6) Whenever any act is by this Act directed to be done to or by the Registrar it shall until the Government otherwise directs, be done to or by in the case of the central office the existing Registrar or in his absence to or by such person as the Government may for the time being authorise and in the case of a regional office be done to or by such Additional Registrar or Joint Registrar or Deputy Registrar or Assistant Registrar as is appointed as the Chief Officer of that office.

Notes/Comments/Precedents

Purpose of section : Registration of companies is mandatory.This section makes provisions of appointment of registering authorities and their offices. The office of the Registrar of Companies is very important. Strict enforcement of the Act can be made by this agency making the workings of the companies more efficient and worth the monetary and other costs involved.

348. Fees.– (1) There shall be paid to the Registrar in respect of the several matters mentioned in Schedule II the several fees therein specified, or such smaller fees as the Government may direct.

(2) All fees paid to the Registrar in pursuance of this Act shall be accounted for to the Government.

349. Enforcing submission of returns and documents to Registrar.– (1) If a company, having made default in complying with any provision of this Act, which requires it to file with, deliver or send to the Registrar any return account or other document, or to give notice to him of any matter fails to make good the default within fourteen days after the service of a notice on the company requiring it to do so, the Court may, on an application made to the Court by any member or creditor of the company or by the Registrar, make an order directing the company and any officer thereof to make good the default within such time as may be specified in the order.

(2) Any such order may provide that all cost of and incidental to the application shall be borne by the company or the concerned officer in respect of any such default as aforesaid.

(3) Nothing in this section shall be taken to prejudice the operation of any other enactment imposing penalties on a company or its officers in respect of any such default as aforesaid.

350. Filing or registration of documents, etc. after the time specified.– Any documents or return by this Act required or authorised to be filed or registered or any fact by this Act required or authorised to be registered with the Registrar on payment of fees specified therefore in Schedule II may, without prejudice to any other liabilities be filed or registered after the time if any specified in this Act for its filing or registration on payment of late fee specified in the said Schedule II.

PART VII

APPLICATION OF ACT TO COMPANIES FORMED AND REGISTERED UNDER FORMER COMPANIES ACT

351. Application of Act to companies formed under former Companies Act.– In the application of this Act to existing companies it shall apply in the same manner in the case of a limited company other than a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by shares; in the case of a company limited by guarantee as if the company had been formed and registered under this Act as a company limited by guarantee and in the case of a company other than a limited company as if the company had been formed and registered under this Act as an unlimited company;

Provided that–

(a) nothing in Schedule I shall apply to a company formed and registered under any law in force at any time before the commencement of this Act;

(b) reference express or implied to the date of registration shall be constructed as a reference to the date at which the company was registered under any law in force at any time before the commencement of this Act.

Notes/Comments/Precedents

Application of present Act to Companies formed under companies Act 1913 : The provision of the companies Act, 1994 will apply to all companies which are limited by shares or guarantee or unlimited liability and which were incorporated under any Companies Act enacted earlier to present Act. This means that all existing companies have come under purview of present Act. "The existing Company" has been defined in section to clause (4) as a company formed and Registered under any law relating to companies in force at any fine before the commencement of the Companies Act, 1994 and is in operation after commencement this Act. However schedule of the present Act will not apply to a company registered under any of the preview acts i.e. Acts of 1872, 1860 1866, 1882 or 1913.

352. Application of Act to companies registered but not formed under former Companies Act.– This Act shall apply to every company registered but not formed under any law in force at any time before the commencement of this Act in the same manner as it is hereinafter in this Act, declared to apply to companies registered but not formed under this Act:

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the said laws or any of them.

Notes/Comments/Precedents

Scope : The Companies Act, 1994 should apply to companies formed otherwise than any of the previous companies Acts, for example under deed of settlement and registered under any of previous Acts. The application will be in the manner the provisions of part VIII of this Act have been made applicable to companies Registered but not formed under this Act.

353. Mode of transferring.– A company registered under any law in force at any time before the commencement of this Act may cause its shares to be transferred in the manner hitherto in use or in such other manner as the company may direct.

Notes/Comments/Precedents

Scope : Although the provisions of the Companies Act, 1994 are applicable to all companies registered but not formed under the previous Companies Acts, yet the transfer of shares of such companies will be according to the practice existing in these companies or in the manner as such companies may direct.

PART-VIII
COMPANIES AUTHORISED TO BE REGISTERED

354. Companies capable of being registered.– (1) With the exceptions and subject to the provisions mentioned and contained in this section, any company formed whether before or after the commencement of this Act in pursuance of any Act of Parliament other than this Act or being otherwise duly constituted according to law and consisting of seven or more members, may, at any time register under this Act as an unlimited company or as a company limited by shares or as a company limited by guarantee; and the registration shall not be invalid by reason that it has taken place with a view to the company being wound up

Provided that–

(a) a company having the liability of its members limited by Act of Parliament and not being a joint-stock company as in section 355, defined, shall not register in pursuance of this section;

(b) a company having the liability of its members limited by Act of Parliament shall not register in pursuance of this section as an unlimited company or as accompany limited by guarantee;

(c) a company that is not a joint-stock company as in section 355 defined shall not register in pursuance of this section as a company limited by shares;

(d) a company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person or by proxy, in cases where proxies are allowed, by the articles, at a general meeting summoned for the purpose;

(e) where a company not having the liability of its members limited by act of Parliament is about to register as a limited company, the majority required to assent as mentioned in clause (d) shall consist of not less than three-fourths of the members present in person or by proxy at the meeting;

(f) where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets to the company, in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceased to be a member and of the costs and expenses of winding up and for the adjustment of the rights of the contributories among themselves such amount as may be required not exceeding a specified amount.

(2) In computing any majority under this section, when a poll is demanded, regard shall be had to be member of votes to which each member is entitled according to the articles.

355. Definition of joint-stock' company.– (1) For the purpose of this part, so far as it relates to registration of companies limited by shares, a joint-stock company means–

(a) a company having a permanent paid up or nominal share capital of fixed amount divided into shares, also fixed amount, or held and transferable as stock or divided and held partly in one way and partly in the other; and

(b) formed on the principle or having only for its members as the holders of those shares or that stock and for no other person.

(2) Such a company, when registered with limited liability under this Act, shall be deemed to be a company limited by shares.

356. Requirements for registration of joint-stock companies.– Before the registration in pursuance of this part of a joint-stock company, there shall be delivered to the Registrar the following documents, that is to say–

(a) a list showing the names, address and occupations of all persons who on a day named in the list not being more than six clear days before the day of registration, were members of the company with the addition of the shares or stock held by them respectively distinguishing in the case where the shares are numbered, each share by its number;

(b) a copy of deed of settlement, contract of co-partnery or other instrument constituting or regulating the company; and

(c) if the company is intended to be registered as a limited company, a statement specifying the following particulars, that is to say-

(i) the nominal share capital of the company and the number of shares into which it is divided or the amount of stock of which it consists;

(ii) the number of shares taken and the amount paid on each share;

(iii) the name of the company with the addition of the word "Limited" as the last word thereof; and

(iv) in the case of a company intended to be registered as a company limited by guarantee, the resolution declaring the amount of the guarantee.

357. Requirements for registration of companies other than joint-stock companies.– Before the registration in pursuance of this Part of

any company not being a joint-stock company, there shall be delivered to the Registrar.–

(a) a list showing the names, addresses and occupations of the directors of the company; and

(b) a copy of deed of settlement, contract of co-partnery or other instrument constituting or regulating the company; and

(c) in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee.

358. Authentication of statement of existing companies.– The list of members and directors and any other particulars relating to the company required to be delivered to the Registrar shall be duly verified by the declaration of any two or more directors or other principal officers of the company.

359. Registrar may require evidence as to nature of company.– The Registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether any company proposing to be registered is or is not a joint-stock company as defined in section 355.

360. On registration of banking company with limited liability, notice to be given to customers.– (1) Where a banking company, which was in existence on the commencement of this Act, proposes to register as a limited company, it shall, at least thirty days before so registering, give notice of its intention so to register to every person who has a banking account with the company be delivered of the notice to him by posting at or his last known address.

(2) If the company omits to give the notice required by this section, then as between the company and the person for the time being interested in the account in respect of which the notice ought to have been given and so far as respects the account down to the time at which notice is given, but not further or otherwise, the certificate of registration with limited liability shall have no operation.

361. Exemption of certain companies from payment of fees.– No fees shall be charged in respect of the registration in pursuance of this part of a company if it is not registered as a limited company, or if before its registration as a limited company the liability of the shareholders was limited by some Act of Parliament.

362. Addition of "Limited" to name.– When a company registers in pursuance of this Part with limited liability, the word "Limited" shall form and be registered as part of its name.

363. Certificate of registration of existing companies.- On compliance with the requirements of this Part with respect to registration and on payment of such fees, if any, as are payable under Schedule II, the Registrar shall certify under his hand that the company applying for registration is incorporated as a company under this Act and in the case of a limited company that it is limited, and thereupon the company shall be incorporated, and shall have perpetual succession and a common seal.

364. Vesting of property on registration.- All property, movable and immovable, including all interest and rights into and out of property, movable and immovable, and including obligations and actionable claims as may belong to or be vested in a company at the date of its registration in pursuance of this Part, shall, on registration, pass to and vest in the company as incorporated under this Act for all the state and interest of the company therein.

365. Saving of existing liabilities.- The registration of a company in pursuance of this Part shall not affect the rights or liabilities on the company in whatever manner such rights or liabilities accrued or arose.

366. Continuation of existing suit.- All suits and other legal proceedings which at the time of the registration of a company, in pursuance of this part are pending by or against the company or an officer or member thereof, may be continued in the same manner as if the registration had not taken place, nevertheless execution shall not issue against the effects of any individual member of the company on any decree or order obtained in any such suit or proceeding, but, in the event of the property and effects of the company being insufficient to satisfy the decree or order, an order may be obtained for winding up the company.

367. Effect of registration under this Act.– When a company is registered in pursuance of this Part–

(a) all provisions contained in any Act of Parliament, deed of settlement, contract of co-partnery or other instrument constituting or regulating the company or, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be the conditions and regulations of the company in the same manner and with the same incidence; as it-

(i) so much thereof as would, if the company had been formed under this Act, have been required to be inserted in the memorandum, were contained in a registered memorandum; and

(ii) the residue thereof were contained in a registered articles;

(b) all the provisions of this Act shall apply to the company and the members, contributories and creditors thereof, in the same manner in all respects as of it had been formed under this Act subject as follows, that is to say–

(i) the regulations in Schedule I shall not apply, unless adopted by special resolution:

(ii) the provisions of this Act relating to the numbering of shares shall not apply to any joint-stock company whose shares are not numbered:

(iii) subject to the Provisions of this sections the company shall not have power to alter any provision contained in any Act of Parliament relating to the company:

(iv) in the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted before registration who is liable to pay or contribute to the payment of any such debt or liability, or to pay or contribute to the payment of any sum for the adjustment of the rights of the Members among themselves in respect of any such debt or liabilities; or to pay or contribute to the payment of the cost and expenses of winding up the company, so far as relates to such debts or liabilities as aforesaid; and every contributory shall be liable to contribute to the assets of the company, in the course of the winding up, all sums-due from him in respect of any such liability as aforesaid; and in the event of the death or insolvency of the contributory; the provisions of this Act with respect of the legal representatives and heirs of deceased contributories, and with reference to the assignees of insolvent contributories, shall apply;

(c) the provisions of this Act with respect to-

(i) the registration of an unlimited company as limited;

(ii) the powers of an unlimited company on registration as a limited company to increase the nominal amount of its shares capital and to provide that a portion of its shares capital and to provide that a portion of its shares capital shall not be capable of being called up except in the event of winding up;

(iii) the power of a limited company to determine that a portion of its share capital shall not be capable of being called up except in the event of winding up;

shall apply notwithstanding any provisions contained in any Act of Parliament, deed of settlement, contract of co-partnery, or other instrument constituting or regulating the company;

(d) nothing in this section shall authorise the company to alter any such provisions contained in any Act of Parliament, deed of settlement, contract of copartnery or other instrument constituting or regulating the company, as would, if the company had originally been formed under this Act have been required to be contained in the memorandum and are not authorised to be altered by this Act.

(e) nothing in this Act shall derogate from any lawful power of altering its continuing or regulating the company which may by virtue of any Act of Parliament, deed of settlement, contract of co-partnery or other instrument constituting or regulating the company, be vested in the company.

368. Power to substitute memorandum and articles for deed of settlement.– (1) Subject to the provisions of this section, a company registered in pursuance of this Part may, by special resolution, alter the form of its constitution by substituting a memorandum and articles for a deed of settlement;

(2) The provisions of this Act with respect to confirmation by the Court and registration of an alteration of the objects of a company shall, so far as applicable, apply to an alteration under this section with the following modifications, namely:–

(a) there shall be substituted for the printed copy of the altered memorandum required to be filed with the Registrar a printed copy of the substituted memorandum and articles; and

(b) on the registration of the alteration being certified by the Registrar, the substituted memorandum and articles shall apply to the company in the same manner as if it were a company registered under this Act with that memorandum and those articles, and the company's deed of settlement shall cease to apply to the company.

(3) An alteration under this section may be made either with or without any alteration of the objects of the company under this Act.

(4) In this section, the expression "deed of settlement" includes any contract of co-partnery or other instrument constituting or regulating the company, not being an Act of Parliament.

Notes/Comments/Precedents

Confirmation : Where a memorandum and articles of association adopted in place of deed of settlement, special resolution passed must be confirmed by the Court *[In Re Braintree and Bocking Gas Co. (1920) 2 Ch. 12]*

369. Power of Court to stay or restrain proceeding.– The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time after the presentation of a petition for winding up

and before the making of a winding up order shall, in the case of a company registered in pursuance of this Part, were the application to stay or restrain is by creditor, extend to suits and legal proceedings against any contributory of the company.

Notes/Comments/Precedents

Dismissal of suit after liquidation: For maintenance of claim before the official liquidator the dismissal of suit against the registered company after liquidation is no bar [AIR 1914 All 439].

370. Suits stayed on winding up order.– When an order has been made for winding up a company registered in pursuance of this Part, no suit or other legal proceeding shall be commenced or proceeded with against the company or any contributory of the company in respect of any debt of the company, except by leave of the Court and subject to such terms as the Court may impose.

PART IX

WINDING UP OF UNREGISTERED COMPANIES

371. Meaning of "unregistered company".– For the purposes of this Part, the expression "unregistered company shall not include a company registered under this Act or under any company law in force at any time before the commencement of this Act, but any partnership, associations or company consisting of more than seven members and not registered under this Act or the said company law shall be deemed to be an "unregistered company".

Notes/Comments/Precedents

Word 'Company' explained : Word 'company' in section 270, Companies Act, 1913 (corresponding to section 371 of the Companies Act, 1994) means a body which has no corporate existence not being registered under the Act *[Tobacco Company Ltd. Vs. Bangladesh, Tobacco Employees, (1973) 25 DLR 270.]*

372. Winding up of unregistered companies.– (1) subject to the provisions of this Part, any unregistered company may be wound up under this Act and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions, namely:-

(a) no unregistered company shall be wound up under this Act voluntarily or subject to supervision of the Court;

(b) the circumstances in which an unregistered company may be wound up are as follows, namely:-

(i) if the company is dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;

(ii) if the company is unable to pay its debts;

(iii) if the Court is of option that it is just and equitable that the company should be wound up.

(c) an unregistered company shall, for the purposes of this section be deemed to be unable to pay its debts.

(i) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred taka then due has served on the company, by leaving at its principal place of business, or by delivering to the secretary, or some director, manager or principal officer of the company, or by otherwise serving in such manner as the Court may approved or direct a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks after the service of the demand neglected to pay the sum, or to secure or compound for it to the satisfaction of the creditor; or

(ii) if any suit or other legal proceeding has been instituted against any member for any debt or demand due or claimed to be due, from the company or from him in his character of member, and notice in writing of the institution of the suit or other legal proceeding having been served on the company by leaving the same at its principal place of business or by delivering it to the secretary, or some director, manager or principal officer of the company or by otherwise serving the same in such manner as the Court may approve or direct, the company has not within ten days after service of the notice paid, secured or compounded for the debt or demand, procured an order for the suit or other legal proceeding to be stayed, or indemnified the said member or defendant to his reasonable satisfaction against the suit or other legal proceeding, and against all costs, damages and expense to be incurred by him by reason of the same; or

(iii) if execution or other process issued on a decree or order obtained in any Court in favour of a creditor against the company, or any member thereof as such, or any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied; or

(iv) if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) Nothing in this Part shall affect the operation of any enactment which provides for any partnership, association or company being wound up or being wound up as a company or as unregistered company, under any enactment repealed by this Act, except that references in any such first-mentioned enactment to any such repealed enactment shall be read as references to the corresponding provision, if any, of this Act.

(3) Where a company incorporated outside Bangladesh which has been carrying on business in Bangladesh, it may be wound up as an unregistered company under this Part, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.

Notes/Comments/Precedents

Winding-up unregistered Company : Under section 271 of the Companies Act, 1913 (corresponding to section 372 of the Companies Act, 1994), all the provisions of the Act with respect to winding up would apply to an unregistered company and a provision to avert a winding up will be a provision with respect to the winding-up *[In the matter of Noakhali Union Bank Ltd. (1950) 2 DLR 181.]*

373. Contributories in winding up of unregistered companies.– -

(1) In the event of an unregistered company being wound up, every person shall be deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves, or to pay or

contribute to the payment of the costs and expenses or winding up the company, and every contributory shall be liable to contribute to the assets to the company all sums due from him in respect of any such liability as aforesaid.

(2) In the event of any contributory dying or being adjudged insolvent the provisions of this Act shall apply to the legal representatives and heirs of deceased contributories, and to the assignees of insolvent contributories.

374. Power to stay or restrain proceedings.- The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of an unregistered company, where the application to stay or restrains is by a creditor, extend to suits and legal proceedings against any contributory of the company.

375. Restrictions on commencing etc. of suit after winding up order.- Where an order has been made for winding up of a company under this Part, no suit or other legal proceedings shall be proceeded with or commenced against any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

376. Courts directions as to property in certain cases.- If an unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the Court may, by the winding in order, or by any subsequent order, direct that all or any part of the property, movable or immovable, including all interests and rights in, to and out of property, movable and immovable, and including obligations and actionable claims as may belong to the company or to trustees on its behalf, is to vest in the official liquidator by his official name and thereupon the property or the part thereof specified in the order shall vest accordingly, and the official liquidator may, after giving such indemnity, if any, as the Court may direct, bring or defend in his official name any suit or other legal proceeding relating to that property, or necessary to be brought or defended for purposes of effectually winding up the company and recovering its property.

377. Provisions of this part cumulative.- The provisions of this Part with respect to unregistered companies shall be in addition to, and not in restrictions of, any provisions herein before in its Act contained with respect to winding up companies by the Court, and the Court or official liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in the winding up of companies formed and registered under this Act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this Part.

PART X

FOREIGN COMPANIES' REGISTRATION, ETC.

378. Application of sections 379 to 387 to foreign companies.- Sections 379 to 387 shall apply to all foreign companies, that is to say, companies falling under the following two classes, namely:-

(a) companies incorporated outside Bangladesh which, after the commencement of this Act, establish a place of business within Bangladesh; and

(b) companies incorporated outside Bangladesh which have, before the commencement of its Act, established a place of business within Bangladesh and continued to have an established place of business within Bangladesh, at the commencement of this Act.

Notes/Comments/Precedents

Foreign Company : A company formed or incorporated outside Bangladesh under the law of that country is a foreign company. Such foreign companies can carry on business in Bangladesh. Those companies may or may not establish a place of business in Bangladesh.

The restrictions imposed by provisions of the companies Act apply to such foreign companies. The Act cast some duty upon the foreign companies for their observance.

Foreign companies carrying on business is Bangladesh are of two types, Viz.-(i) companies incorporated outside Bangladesh which after the commencement of this Act, i.e. 1.1.1995 establish a place of business within Bangladesh and (ii) companies which established place of business in Bangladesh earlier and continue to have the same after commencement of this Act.

Foreign Corporation owning ship : The foreign corporation owning ship does not reside in the place visited by the ship unless the test of residence is satisfied namely that the corporation has an office at a fixed place where it carries on through its agents or servants its own business for a substantial time *[Johnson Vs. Astrofiel Armadron S. A. of Panama (1990) 69 Comp. Cas. 619 Ker]*

Foreign Company Carrying on business through agent : Where foreign company carries on business through an agent it shall be deemed to carry on business in the country *[Guardian Assurance Co. Vs. Thakur Siva Mangal AIR 1937 All 208]*

379. Documents, etc. to be delivered to Registrar by foreign companies carrying on business in Bangladesh.- (1) Foreign companies, which after the commencement of this Act, establish a place of business within Bangladesh shall, within one month of the establishment of the place of business, deliver to the Registrar for registration-

(a) a certified copy of the charter or statues or memorandum and articles of the company or other instrument constituting or defining the constitution of the company; and if the instrument is not written in Bengali or English language, a certified Bengali or English translation thereof;

(b) the full address of the registered or principal office of the company;

(c) a list of the directors and secretary, if any, of the company;

(d) the name and address or the names and addresses of one or more persons resident in Bangladesh, authorised to accept on behalf of the company service of process and any notice or other documents required to be served on the company;

(e) the full address of the office of the company in Bangladesh which is to be deemed its principal place of business in Bangladesh.

(2) Foreign companies, other than those mentioned in sub-section (1), shall, if they have not delivered to the Registrar before the commencement of this Act the documents and particulars specified in the sub-section (1) of section 277 of the Companies Act, 1913 (VII of 1913), replaced by this Act, shall continue to be subject to the obligation to deliver those documents and particulars in accordance with this Act.

(3) If any alteration is made or occurs in-

(a) the charter, statutes, or memorandum and articles of a foreign company or other instrument constituting or defining the constitution of a foreign company, or

(b) the registered or principal office of a foreign company, or

(c) the directors or secretary, if any, of a foreign company, or

(d) the names and addresses of the persons authorised to accept service on behalf of a foreign company, or

(e) the principal place of business of a foreign company in Bangladesh, the company shall, within the prescribed time, file with the Registrar a return containing the prescribed particulars of the alteration.

Notes/Comments/Precedents

Filing of documents by foreign Companies : Foreign companies are of the two types. The companies incorporated outside Bangladesh– (i) having already established a place of business in Bangladesh and (ii) which may establish place of business after commencement of this Act.

The first type of companies are required to file with the Registrar : (a) a certified copy of the charter or statutes or memorandum and articles of the company or other instrument constituting or defining the constitution of the company : and if the instrument is not written in Bengali or English language, a certified Bengali or English translation thereof : (b) the full address of the registered or principal office of the company ; (c) a list of the directors and secretary, if any of the company ; (d) the name and address or the names and addresses of one more persons resident in Bangladesh, authorised to accept on behalf of the company service of process and any notice or other document required to be served on the company : (e) the full address of the office of the company in Bangladesh which is to be deemed its principal place of business in Bangladesh.

The second type of companies also must file similar type of documents as provided in section 277 of the companies Act, 1913.

Suit against foreign company: *Held* - Having regard to the Rules of Private International Law ..... the High Court has jurisdiction to entertain and try the suit against foreign companies *[Ananta Narayan Vs. Massey Farguson Ltd. (1965) 1 Comp. L.J. 269.]*

380. Accounts of foreign company.- (1) Every foreign company shall, in every calendar year,–

(a) make out a balance sheet and profit and loss account or in the case of a company not trading for profit, an income and, expenditure account the company is a holding company, group accounts, in such a form, and containing such particulars and including such documents, as under the provision of this Act it would, if it had been a company within the meaning of this Act, have been required to make out and lay before the company in a general meeting; and,

(b) deliver three copies of those documents to the Registrar:

Provided that the Government may, by notification in the official Gazette, direct that in the case of a 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 the notification.

(2) If any such document as is mentioned in sub-section (1) is not written in Bengali or English language, there shall be annexed to it a certified translation thereof.

Notes/Comments/Precedents

Accounts : Foreign companies must keep their books of accounts at their place of business in Bangladesh. They must prepare balance sheets and profit and loss account with supporting documents and deliver three copies thereof to the Registrar. The Government may, however, modify application of the general provisions in case of such companies.

381. Obligation to state name, etc. of foreign company.–Every foreign company shall-

(a) in every prospectus inviting subscription in Bangladesh for its shares or debentures, state name of the country in which the company is incorporated;

(b) conspicuously exhibit on the outside of every office or place where it carries on business in Bangladesh, the name of the company and the country in which it is incorporated, in the letters easily legible in Bengali or English character,

(c) cause the name of the company and of the country in which the company is incorporated, to be stated in legible Bengali or English characters in all bill heads and letter paper, and in all notices and other official publications of the company; and

(d) if the liability of the members of the company is limited, cause a notice of that fact–

(i) to be stated in every such prospectus as aforesaid and in all bill heads, letter paper, notices, advertisements and other official publications of the company, in legible Bengali or English characters;

(ii) to be conspicuously exhibited on the outside of every office or place where it carries on business in Bangladesh, in legible Bengali or English characters.

Notes/Comments/Precedents

Particulars to be contained in a prospectus: Every prospectus issued by a foreign company must contain the particulars to be written in Bengali or in English such as the name of the company, the country in which it was incorporated, address of the registered office, principal place of business in Bangladesh etc.

Every foreign company like all other companies incorporated under the provisions of this Act has similar liability of publication of its name and it has a duty to paint or affix its name in a conspicuous place in which its business is carried on. In all bill-heads, letter paper the foreign company has a liability to print its name in legible Bengali or English character.

382. Service on foreign company.– Any process notice, or other document required to be served on a foreign company shall be deemed to be sufficiently served, if addressed to any person mentioned in section 379(1) (d) and left at, or sent by post to the address which has been so delivered under that section to the Registrar

Provided that–

(a) where any such company makes default in delivering to the Registrar in pursuance of that section the name and address of a person, or

(b) if at any time all the person whose names and address have been delivered to the Registrar are dead, or ceased or have ceased so to reside at those addresses, or refused to accept on behalf of the company any process, notice or other document, or, those cannot be served or sent for any other reason, such document may be served on the company by leaving it at, or sending it by post to, any place of business established by the company in Bangladesh.

Notes/Comments/Precedents

Service–Mode of : The service on the foreign company shall be as per the section and not as per the provisions of the Civil Procedure Code *[Asiatic Steam Navigation Ltd. Vs. Tribhawandas & Co. AIR 1928 Sind III.]*

If it is not possible to serve on the authorised representatives of the company, the document may be served by leaving it or sending it by post to any of the existing places of business of the company in Bangladesh.*[Ref: Deverall Vs. Great Advertising Inc.(1954) 3 All E.R. 389.]*

383. Notice of ceasing place of business of a company.– If any foreign company ceases to have a place of business in Bangladesh, it shall forthwith give notice of the fact to the Registrar, and as from the date on which notice is so given, the obligation of the company to deliver any document to the Registrar shall cease, provided it has no other place of business in Bangladesh.

384. Penalties.– If any foreign company fails to comply with any of the foregoing provisions of this Part, the company shall be punishable with a fine which may extend to one thousand taka, or, in the case of a continuing offence, with an additional fine of five hundred taka for everyday after the first day during which the default continues; and every officer or agent of the company who is knowingly and willfully, makes such default, shall be punishable with the same fine.

Notes/Comments/Precedents

Penalties : If a foreign company fails to comply with the provisions of sections 378 to 383 of the Act the company, along with its every officer or agent responsible for the default shall be punishable with fine which may extend to one thousand taka and in case of continuing offence with an additional fine of taka five hundred for every days default after the first offence was committed.

385. Company's failure to comply with this Part not to affect its liability under contracts.– Any failure by a foreign company to comply with any of the foregoing provisions of this Part shall not affect the validity of any contract dealing or transaction entered into by the company or its liability to be sued in respect thereof; but the company shall not 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, dealing or transaction until it has complied with the provisions of this Part.

Notes/Comments/Precedents

Disability to sue– no bar of being sued : The disability of a foreign company to sue, set off claims etc. will not prevent the company being sued or proceedings being taken against the company itself *[Babu Lal Choukhari Vs. Caltex (India) Ltd. AIR 1967 Cal 205]*

386. Fees for registration of documents under this Part.– There shall be paid to the Registrar for registering any document required by the foregoing provisions of this Part such fees as specified in Schedule II.

387. Interpretation.– For the purposes of the foregoing provisions of this Part-

(a) the expression "director" includes any person occupying the position of director by whatever name called.

(b) the expression "prospectus" has the same meaning as when used in relation to a company incorporated under this Act;

(c) the expression "place of business" includes a share transfer or share registration office;

(d) the expression "secretary" includes any person occupying the position of secretary, by whatever name called, and

(e) the expression "certified" means certified in the prescribed manner to be a true copy or a correct translation.

388. Restriction on sale and offer for sale of shares.- (1) It shall not be lawful for any person-

(a) to issue, circulate or distribute in Bangladesh any prospectus offering to the public for subscription to shares in or debentures of a company incorporated or to be incorporated outside Bangladesh whether the company has or has not established, or when formed will or will not establish, a place of business in Bangladesh, unless-

(i) before the issue, circulation or distribution of the prospectus in Bangladesh a copy thereof, certified by the chairman and two other directors of the company as having been approved by resolution of the managing body, has been delivered for registration to the Registrar;

(ii) the prospectus state on the face of it that the copy has been so delivered;

(iii) the prospectus is dated; and

(iv) the prospectus other wise complies with this Part; or

(b) to issue to any person in Bangladesh a form of application for shares in or debentures of such a company or intended company as aforesaid unless the form is issued with a prospectus which complies the requirements of this Part:

Provided that this clause shall not apply if it is shown that the form of application was issued in connection with a bonafide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures.

(2) This section shall not apply to the issue to existing members or debentures holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will not have the right to renounce in favour of other persons, but, subject as aforesaid, this section shall apply to a prospectus or form of application whether issued or with reference to the formation of a company or subsequently.

(3) Where any document by which any shares in or debentures of a company incorporated outside Bangladesh are offered for sale to the public would, if the company concerned had been a company within the meaning of this Act, have been deemed by virtue of section 142 to be a prospectus issued by the company, that document shall be deemed to be, for the purposes of this section, a prospectus issued by the company.

(4) An offer of share or debentures for subscription or sale to any person whose ordinary business or part of whose ordinary business is to by or sell shares or debentures, whether as principal or agent, shall not be deemed an offer to the public for the purposes of this section.

(5) A person who is knowingly responsible for the issue, circulation or distribution of any prospectus, or for the issue of a form of application for shares or debentures, in contravention of the provisions of this section shall be liable to a fine not exceeding ten thousand taka.

(6) In this section and in section 389, the expression "prospectus" "shares" and "debentures" have the same meaning as and when used in relation to a company incorporated under this act.

Notes/Comments/Precedents

A foreign company cannot issue any application form for shares or debentures in Bangladesh without a copy of the prospectus. Every prospectus issued circulated or distributed by a foreign company must be dated and contain particulars of the name of the company is Bangla or English and the date on which and the country is which it was incorporate, address of its registered office and place of business in Bangladesh, instruments defining their constitution and where the documents can be inspected. Before issue of prospectus, a copy thereof certified by the chairman and two other directors as having been approved by the resolution of the managing body must be registered with the Registrar.

389. Requirements as to prospectus.- (1) In order to comply with this Part a prospectus, in addition to complying with the provisions of sub-clauses (ii) and (iii) of clause (a) of sub-section (1) of section 388, must-

(a) contain particulars with respect to the following matters, namely-

(i) the objects of the company;

(ii) the instrument constituting or defining he constitution of the company;

(iii) the enactments, or provisions having the force of an enactment, by or under which the incorporation of the company was effected;

(iv) an address in Bangladesh where the said instrument, enactments or provisions, or copies thereof, and if the same are in a foreign language other than English a translation thereof in the Bengali or English certified in the prescribe manner can be inspected;

(v) the date on which and the country in which the company was incorporated;

(vi) whether the company has established a place of business in Bangladesh:

Provided that the provisions of sub-clause (i), (ii) and (iii) of this clause shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business;

(b) subject to the provisions of this section, state the matters specified in sub-section (i) of section 135 and set out the reports specified in that section:

Provided that–

(i) where any prospectus is published as a newspaper advertisement, it shall be a sufficient compliance with the requirements that the prospectus must specify the objects of the company if the advertisement specified the primary objects with which the company was formed; and

(ii) in section 135 of this Act, a reference to the article of the company shall be deemed, to be a reference to the construction of the company.

(2) Any condition requiring or binding any applicant for shares or debentures shall be void, if the acceptance thereof has the effect of-

(a) waiving compliance with any requirements of this section; or

(b) serving him with notice of any contract, document or matter not specifically referred to in the prospectus.

(3) In the event of non-compliance with or contravention of any of the requirements, of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if-

(a) as regards any matter not disclosed, he proves that he was not cognizant thereof; or

(b) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part; or

(c) the non-compliance or contravention was in respect of matter which, in the option of the court dealing with the case, were immaterial or were otherwise such as ought, in the option of that Court, having regard to all the circumstances of the case, reasonably to be excused,

Provided that in the event of failure to include in a prospectus a statement with respect to the matters specified in clause 18 in the Part-I of Schedule-III or in pursuance of sub-section (1) of section 135, no director or other person shall incur any liability in respect of the failure unless it be proved that he had knowledge of the matters not disclosed.

(4) Nothing in this section limit or diminish any liability which any person may incur under the general law or this Act, apart from this section.

390. Restriction on canvassing for sale of shares.- (1) It shall be an offence of any person going from house to house of the public or any member of public offering shares of a company incorporated outside Bangladesh for subscription to or sale of such shares.

(2) In this sub-section the expression "house" shall not include an office used for business purposes.

(3) Any person acting in contravention of this section shall be liable to a fine not exceeding five hundred taka.

391. Provisions regarding charges.- The provisions of section 159 to 168 both inclusive, and 171 to 176, both inclusive, shall extend to charge on properties in Bangladesh which are created and to charges on property in Bangladesh which is acquired, by a company incorporated outside Bangladesh which has an established place of business in Bangladesh:

Provided that, where charge is created outside Bangladesh or the completion of the requisition of property takes place outside Bangladesh, sub-clause (i) of the proviso to sub-section (i) of section 159 and the proviso to sub-section (1) of section 160 shall apply as if the property wherever situated were situated outside Bangladesh.

392. Notice of appointment of receiver etc.– (1) The provisions of section 169 and 170 shall apply to the case of all companies incorporated outside Bangladesh but having an established place of business in Bangladesh.

(2) The provisions of section 181 shall apply to such companies to the extent of requiring them to keep at their principal place of business in Bangladesh the books of account required by that section with respect to money received and expended, sales and purchases made, and assets and liabilities in relation to its business in Bangladesh.

PART XI
SUPPLEMENTAL
LEGAL PROCEEDINGS, OFFENCE, ETC.

393. Cognizance of offence.– (1) No Court inferior to that of a Magistrate of the first class shall try any offence under this Act.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (V of 1898).-

(a) every offence under this Act shall, for the purpose of the said Code, be deemed to be non-cognizable.

(b) where the complainant is the Registrar, the personal attendance of the complainant before the Court trying the offence shall not be necessary unless the Court, for reasons to be recorded in writing, requires his personal attendance for the purpose of taking cognizance or holding trial.

394. Application of fines.– The court imposing any fine under this Act may direct that the whole or any part thereof be applied in or towards payment of the cost of the proceedings, or in or towards the rewarding of the person on whose information the fine is recovered.

395. Power to require limited company to give security for costs.– Where a limited company is plaintiff or petitioner in any suit or other legal proceeding, any Court having jurisdiction in the matter may, if it appears that there is reason to believe that the company will be enable to pay the cost of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

396. Power of Court to grant relief in certain cases.– (1) If in any proceeding for negligence, default, breach of duty or breach of trust against a person specified in sub-section (3), it appears to the Court hearing the case that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think fit.

(2) Where any person specified in sub-section (3) has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the Court for relief, and the Court

on any such applications shall have the same power to relieve him under this sub-section of it would have under sub-section (1).

(3) the persons to whom this section applies are the following:–

(a) directors of a company;

(b) managers and managing agents of a company;

(c) officers of a company;

(d) persons employed by a company as auditors, whether they are or are not officers of the company.

397. Penalty for false statement.– Whoever in any return, report, certificate balance-sheet or other documents, required by or for the purposes of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment of either description for a term which may extend to five years, and shall also be liable to a fine.

398. Penalty for wrongful with holding of property.– Any director, managing agents, manager or other officer or employee of a company who wrongfully obtains possession of any property of a company, or having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other than those expressed or directed in the articles and authorised by this Act, shall on the complaint of the company or a creditor or contributory there-of, be punishable with fine not exceeding five thousand taka, and may be ordered by the Court trying the offence, to deliver of or refund within a time to be fixed by the Court any such property improperly obtained or wrongfully with held or wilfully misapplied, or in default to suffer imprisonment for a period not exceeding two years.

399. Penalty for misapplication of securities by employers.– (1) All moneys of securities deposited with a company by its employees in pursuance of their contracts of service, with the company shall be kept or deposited by the company in a special account to be opened by the company for this purpose in a scheduled bank as defined in the Bangladesh Bank Order, 1972 (P.O.No.127 of 1972) and no portion thereof shall be utilised by the company except for the purposes agreed to in the contract of service.

(2) Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such fund whether by the company or, by the employees or accruing by way of interest or otherwise to such fund shall be either deposited on a Post Office Saving Bank account or invested in securities mentioned or referred to in clauses (a) to (e) of section 20 of the Trusts

Act, 1882 (II of 1882); and all moneys belonging to such fund which are so deposited or invested shall be so deposited or invested in such securities by annual installments not exceeding ten in number and not less in amount in any year than one tenth of the whole amount of such moneys.

Provided that where the said one-tenth part of the whole amount of the moneys belonging to such fund exceeds the maximum amount which may be deposited in a Post Office Savings Bank account under the rules regulating such deposits for the time being in force, the excess amount may be kept or deposited in a special account to be opened for the purpose in such scheduled bank.

(3) Notwithstanding anything to the contrary in the rules of any fund to which sub-section (2) applies or in any contract, between a company and its employees, no employee shall be entitled to receive in respect of such portion of the amount to his credit in such fund as is invested in accordance with the provisions of sub-section (2) interest at a rate exceeding the rate of interest yielded by such investment.

(4) An employee shall be entitled on request made in this behalf to the company to see the bank receipt for any money on security such as is referred to in sub-sections (1) and (2).

(5) Any director, managing agent, manager or other officer of the company who knowingly contravenes or permits or authorises the contravention of the provisions of this section shall be liable on conviction to a fine not exceeding five hundred taka.

(6) Nothing in sub-section (2) shall affect any right of any employee under the rules of a provident fund to obtain advance from or to withdraw money standing to his credit in the fund where the fund is a recognised provident fund within the meaning of clause (52) of section 2 of the Income Tax Ordinance, 1984 (XXXVI of 1984), or the rules of the fund containing provisions corresponding to rules 4,5,6,7,8, and 9 of the Income Tax (Provident Fund Rules, 1984) or similar provisions of a similar Rules.

400. Penalty for improper use of the word "Limited".- If any person or persons trade or carry on business under any name of title of which "Limited" is the last word, that person or those persons shall be liable to a fine not exceeding five hundred taka everyday upon which that name or title has been used.

401. Construction of "Registrar of Joint Stock Companies" in Act XXI of 1860.- In sections 1 and 18 of the Societies Registration Act, 1860 (XXI of 1860), for the registration of Literary, Scientific and Charitable Societies, the words "Registrar of Joint Stock Companies" shall be construed to mean the Registrar under this Act.

402. Repeal and saving.- (1) The Companies Act 1913 (VII of 1913.) hereinafter referred to as the said Act, is hereby repealed.

(2) Notwithstanding the repeal of he said Act-

(a) any order, rule, regulation appointment, mortgage or other transfer deed, document or agreement made, fee directed, resolution passed, direction given, proceeding taken, instrument executed or issued, or thing done under or in pursuance of the said Act shall, if in force at the commencement of this Act, continue to be in force and shall have effect as if made, directed, passed, given, taken, executed, issued or done under or in pursuance of this Act;

(b) any person appointed to any office under or by virtue of the said Act shall be deemed to have been appointed to that office under or by virtue of this Act;

(c) the offices existing at the commencement of this Act for the registration of companies shall be continued as if they had been established under this Act;

(d) any register or other kept or made under the provisions of the said Act shall be deemed to be part of the register of other document to be kept or made under the corresponding provisions of this Act;

(e) all funds constituted and accounts kept under this said act shall be deemed to be in continuation of the funds constituted and accounts kept under the corresponding provisions of this Act.

(3) Nothing in this Act shall affect the incorporation of any company registered under the said Act or the operation of the provisions of the Insurance Act 1938 (IV of 1938).

403. Section 6 of the General Clauses Act, 1897 to apply.– The mention of particular matters in section 402 or in any other provision of this Act shall not prejudice the general application of section 6 of the General Clauses Act, 1897 (X of 1897).

404. Publication of Authentic English Text.– After the commencement of this Act, the Government shall, by notification in the official gazette publish a Text of this Act translated in English, and this Text shall be called the Authentic English Text of the Act:

Provided that in the event of conflict between the Act (Bengali Text) and the said English Text the Act shall prevail.

SCHEDULE-I

(*See* section 2, 17, 18, 86, 367)

REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES

PRELIMINARY

1. In these regulations, unless the context otherwise requires–

(a) expressions defined in the Companies Act, 1994 shall have the meanings so defined;

(b) words importing the singular shall include the plural, and vice versa;

(c) words importing he masculine gender shall be taken to include females; and

(d) words importing persons shall include bodies corporate.

BUSINESS

2. In the case of commencement of the business of the company, the directors shall comply with to the restrictions on such commencement imposed by section 150 of the Companies Act, 1994 so far as those restrictions are binding upon the company.

SHARES

3. Subject to the provisions, if any, in that behalf of the memorandum of association of the company, and without prejudice to any special right previously conferred on the holders of existing shares, the company may, from time to time, by special resolution determine the following matters:–

(a) issue of preference shares, deferred shares or shares having special right;

(b) restrictions that may be imposed with regard to dividend, voting, return of share capital or any other matter;

(c) issue of any preference share on the terms that it is liable to be redeemed or that it is so liable at the option of the company.

4. (1) If at any time the share capital is divided into different classes of shares, the rights attached to any such class, unless otherwise provided by the terms of issue of the shares of that class, may, subject to the provisions of section 71 of the Companies Act, 1994, be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of that class.

(2) To every separate general meeting mentioned in sub-regulation (1) shall, *mutatis mutandis*, apply, and to constitute a quorum in such meeting presence of two persons who hold or represent by proxy at least one third of the issued shares of that class, shall be necessary.

5. No share shall be offered to the public for subscription except upon the terms that the amount payable on application shall be at least five per cent of the nominal value

of the share; and the Directors shall as regards any allotment of shares, duly comply with such of the provisions of section 148 and 151 of the Companies Act 1994, as may be applicable thereto.

6. Every person whose name is entered as a member in the register of members shall, without payment, be entitled to a certificate under the common seal of the company specifying the share or shares held by him and the amount paid up thereon:

Provided that in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for one or more shares to one of several joint holders shall be sufficient delivery to all.

7. If a share certificate is defaced, lost or destroyed it may be renewed on payment of such fee, if any, not exceeding five taka, and on such terms, if any, as to evidence and indemnity as the directors think fit.

8. Except to the extent allowed by section 58 of the Companies Act, 1994 no part of the funds of the company shall be employed in the purchase of or in loans upon the security of, the company's shares.

LIEN

9. (1) The Company shall have a lien on the following shares and also on all dividends payable thereon namely:-

(a) all shares, other them fully paid up share, for all money, whether presently payable or not, called or payable at a fixed time in respect of that share and

(b) all shares, other than fully paid up shares, standing registered in the name of a single person, for all moneys presently payable by him or his estate to the company.

(2) The directors may at any time declare any share specified in sub-resolution (1) to be wholly or partly exempt from the provision of this Regulation.

10. The company may sell, in such manner as the directors think fit, any share on which the company has a lien:

Provided that no sale shall be made unless some money in respect of which the lien exists is payable in cash and a period of fourteen days had expired after a written notice, stating and demanding such money, has been served upon the holder of the share registered for the time being or upon the person entitled to the share by reason of the former's death or insolvency.

11. (1) The proceeds of the sale shall be applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the rest shall, subject to a like lien for sums not presently payable as existed upon the shares prior to the sale, be paid to the persons entitled to the shares at the date of the sale.

(2) The purchaser shall be registered as the holder of the shares, and he shall not be bound to see to the application to the purchase-money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceeding in reference to the sale.

CALL ON SHARES

12. The directors may from time to time make calls upon the members in respect of any money unpaid on their shares, provided that no call shall exceed one fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall, subject to receiving at least fourteen day's notice specifying the time or times of payment, pay to the company at the time or times so specified the amount called on his shares.

13. The joint-holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

14. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the persons from whom the sum is due shall pay interest upon the sum at the rate of five percent per annum from the day appointed for the payment thereof to the time of the actual payment but the directors shall be at liberty to waive payment of that interest wholly or in part.

15. The provisions of these regulations as to payment of interest shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share or by way of premium.

16. The directors may make arrangements on the issue of shares for difference between the holders in the amount of calls to be paid and in the times of payment.

17. The directors may, at their option, receive from any member willing to advance all or any part of the moneys uncalled and unpaid upon any shares held by him; and upon all or any of the moneys so advanced may, until at such rate not exceeding, without the sanction of the company in general meeting, six percent, as may be agreed upon between the member paying the sum in advance and the directors.

TRANSFER AND TRANSMISSION OF SHARES

18. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall remain holder of the share until the name of the transferee is entered in the register of members in respect thereof.

19. Shares in the company shall be transferred in the following form or in a similar form generally used for this purpose or in any other similar form approved by the directors:

SHARE TRANSFER FORM

(a) Full name(s) and address (es)
of Transferor

.....
.....

(b) Full name (s) and address (es) of Transferee

.....
.....

(c) Mode of Transfer (Sale, Gift etc.)

.....

(d) Total number of the shares transferred

.....
.....

(e) Serial Nos. of the share

.....
.....
.....
.....

(f) Consideration of transfer

.....
.....

I/We (Transferor's) .....(Name and address).....received as consideration .....(taka or otherwise) from you (Transferee) .....(Name and address) for.....the shares bearing Sl. No.....of ....Co. Ltd. and hereby transferred those shares to you by way of.....(sale or otherwise).

The conditions which were, in relation to those shares, applicable to the transferor immediately before the transfer shall be applicable to the transferee and the transferee or his executor/administrator/assignee shall hold the shares subject to the said conditions.

We i.e. both the transferor and the transferee on being agreed to the above conditions hereby execute this deed on the.....day of ..... (month) of the year.....

(Transferor) (Transferee)

Witness to Transfer
Signature
Name :
Address :
Date :

Witness to Transfer
Signature
Name :
Address :
Date :

20.(1) The directors may decline to register any transfer of shares not being fully paid up shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has lien.

(2) The directors may suspend the registration of transfer during the fourteen days immediately preceding the ordinary general meeting in each year.

(3) The directors may decline to recognise any instrument of transfer or refuse to register such transfer, unless-

(a) a fee not exceeding taka ten as may be fixed by the company is paid to the company in respect thereof;

(b) the instrument of transfer is accompanied by the certificate of share to which it relates, and

(c) such evidence as the directors may reasonably require to show the right of the transferor to make the transfer has been furnished.

(4) If the directors refuse to register or decline to recognise the transfer of any shares, they shall, within two months after the date on which the transfer was lodged with the company, send to the transferee and transferor notice of the refusal or decline.

21. The executors or administrators of a deceased sole holder of a share shall be the only persons recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivor or survivors, or the executors or administrators of the deceased survivor or survivors shall be the only person recognised by the company as having any title to the share.

22. (1) Any person becoming entitled to a share in consequence of the death or insolvency of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share or to make such transfer of the share as the deceased or insolvent person could have made.

(2) Notwithstanding the provisions of sub-regulation (1) the directors shall have the same right to decline to recognise the transfer or to refuse or suspend the registration of the transfer as they could have done under regulation 20, had the transfer been made by the deceased or insolvent shareholder before his death or insolvency.

23. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not before being registered as a member in respect of the share, be entitled in respect of its exercise any right conferred by membership in relation to meeting of the company.

FORFEITURE OF SHARES

24. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter as any part of such call or instalment remain unpaid serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

25. The notice shall name a further day, not earlier than the expiration of fourteen days from the date of the notice, on or before which the payment required by the notice is to be made, and shall state that in the event of non-payment at or before the time so appointed, the shares in respect of which the call was made will be liable to be forfeited.

26. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may, at any time thereafter but before the payment required by the notice has been made be forfeited by a resolution of the directors to that effect.

27. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit and at any time before a sale or disposition of the forfeiture may be cancelled on such terms as the directors think fit.

28. A person whose share have been forfeited shall cease to be a member in respect of the forfeited share but shall notwithstanding, remain liable to pay to the company all moneys which at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company received payment in full of the nominal amount of the share.

29. (1) A duly verified declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share.

(2) Such declaration, and the receipt of the company for the consideration if any, given fore the share on the sale or disposition thereof, shall constitute a good title to the share.

(3) The person who becomes the shareholder under sub-regulation (2) shall be registered as the holder of the share and shall not be bound to see to the application of the purchase-money, if any, nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

30. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, become payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same has been payable by virtue of a call duly made and notified.

CONVERSION OF SHARES INTO STOCK

31. The directors may, with the sanction of the company previously given in general meeting convert any paid up shares into stock, and may with the like sanction reconvert any stock into paid up shares of any denomination.

32. The holders of stock may transfer the same, or any part thereof, in the same manner, and subject to the same conditions and regulations, as and subject to which,

the shares from which the stock arose might previous to conversion, have been transferred, or as near thereto as circumstances admit; but the directors may from time to time fix the minimum amount of the transferable stock not exceeding the nominal value of the shares from which the stock arose, and may also prohibit or restrict the transfer of such stock.

33. The holders of stock, shall, according to the amount of the stock held by them, have the same rights, privileges and advantages as regards dividends, voting at meetings of the company, and other matters, as if they held the shares from which the stock arose but no such privileges, except participation in the dividends and profits of the company, shall be conferred by any such aliquote part of stock as would not, if existing in shares, have conferred that privileges or advantages.

34. Such of the regulations of the company, other than those relating to share warrants, as are applicable to paid up shares, shall apply to stock, and the words "shares" and "share-holder" occurring therein shall include "stock" and "stock-holder".

SHARE WARRANT

35.(1) The company may issue share-warrants, and accordingly directors, may, in their discretion, with respect to any share which is fully paid up on application in writing signed by the person registered as holder of the share, and authenticated by such evidence, if any, as the directors may from time to time require as to the identity of the person signing the request, and on receiving the certificate, if any, of the share and the amount, the stamp-duty on the warrant and such fee as the directors may, from time to time require, issue under the company's seal a warrant, duly stamped, stating that the bearer of the warrant is entitled to the shares therein specified.

(2) Where such warrant is issued, it shall be stated therein that dividends or other moneys on the shares specified in the warrant may be paid by way of coupon or otherwise.

36. A shares warrant shall entitle the bearer to the share included in it, and the share shall be transferred by the delivery of the share warrant and the provisions of the regulations of the company with respect to transfer and transmission of share shall not apply thereon.

37. The bearer of a share-warrant shall on surrender of the warrant to the company for cancellation and on payment of such sum as the directors may from time to time prescribe, be entitled to have his name entered as a member in the register of members in respect of the shares included in the warrant.

38. The bearer of a share-warrant may at any time deposit the warrant at the office of the company, and so long as the warrant remains so deposited the depositor shall have the same right of signing a requisition for calling a meeting of the company, and of attending and voting and exercising the other privileges of a member at any meeting held after the expiration of the day preceding the day of deposit, as if his name were

inserted in the register of members as the holders of the shares included in this share-warrant but not more than one person shall be recognised as depositor of the share-warrant and the company shall, on two days written notice, return the deposited share-warrant to the depositor.

39. Subject as herein otherwise expressly provided no person shall, as bearer of a share-warrant, sign a requisition for calling meeting of the company, or attend, or vote or exercise any other privileges of a member at a meeting of the company, or be entitled to receive any notice from the company; but the bearer of a share-warrant shall be entitled in all other respects to the same privileges and advantages as if he was named in the register of members as the holder of a share-warrant shall be entitled in all other respects to the same privilege and advantages as if he were named in the register of members as the holder of the shares included in the warrant, and he will be a member of the company.

40. The directors may, from time to time, make rules as to the terms on which, if they shall think fit, a new share-warrant or coupon may be issued by way of renewal in case of defacement, loss or destruction.

ALTERATION OF CAPITAL

41. The directors may, with the sanction of the company in general meeting increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

42. Subject to any resolution sanctioning the increase of share capital, all new shares shall, before issue be offered to such person as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer if not accepted, will be deemed to be declined, and after the expiration of that time or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which, by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares, cannot, in the opinion of the directors, be conveniently offered under this Regulation.

43. The new shares shall be subject to the same provisions with reference to the payment of calls lien, transfer, transmission, forfeiture and otherwise as the shares in the original share capital.

44. The company may by ordinary resolution—

(a) consolidate and divide its share capital into shares of larger amount than its existing shares;

(b) by sub-division of its existing shares or any of them, divided the whole or any part of its share capital into shares of smaller amount than is fixed by

the memorandum of association subject, nevertheless, to the provision of paragraph (d) of sub-section (1) of section 53 of the Companies Act, 1994;

(e) cancel any shares which, at the date of the passing of the resolution have not been taken or agreed to be taken by any person.

45. The company may by special resolution, reduce its share capital in any manner and with, and subject to, any incident authorised and consent required by law.

GENERAL MEETINGS

46. The statutory general meeting of the company shall be held within the period required by section 83 of the Companies Act, 1994.

47. A general meeting shall be held within eighteen months from the date of its incorporation and thereafter once at least in every year at such time not being more than fifteen months after the holding of the last preceding general meeting and at such place as may be prescribed by the company in general meeting.

48. The above mentioned general meeting shall be called ordinary meetings; and all other general meetings shall be called extraordinary.

49. The directors may, whenever they think fit, call an extraordinary general meeting and extraordinary general meetings shall also be called on such requisition, or in default, may be called by such requisitionist, as provided by section 84 of the Companies Act, 1994. If at any time, there are not within Bangladesh sufficient directors capable of acting to form a quorum, any director or any two members of the company may call an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be called by the directors.

PROCEEDINGS AT GENERAL MEETING

50. Subject to the provisions of sub-section (2) of section 87 of the Companies Act, 1994 relating to special resolution, fourteen days notice shall be served; in reckoning this fourteen days the day on which the notice is served or deemed to be served shall be excluded but the day for which notice is given shall be included in the notice the place, the day and the hour of meeting and, in case of special business, the general nature of that business shall be given in a manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting to such persons as are under the Companies Act, 1994, or the regulations of the company, entitled to receive such notice from the company, but the accidental omission to give notice to or the non receipt of notice by any members shall not invalidate the proceedings at any general meeting.

51. All business shall be called special business that are transacted at an extraordinary meeting but the sanctioning a dividend the consideration of the accounts balance-sheets and the ordinary report of the directors, and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors shall not be called special business.

52. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to transact business and save as herein otherwise provided, two members in the case of a private company and five members in the case of any other company personally present shall be a quorum.

53. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if called upon the requisition of members, shall be dissolved; in any other case, it shall stand adjourned to the same day in the next week at the same time and place, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum.

54. The Board of Directors shall select one of their members as its Chairman who shall preside at every general meeting of the Company:

Provided that the Chairman and the managing director shall not be the same person.

55. If at any meeting the Chairman is not present within thirty minutes after the time appointed for holding the meeting, the members present shall choose some one of their number to be the chairman.

56. The Chairman may, with the consent of any meeting at which a quorum is present and shall, if so directed by the meeting, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an adjournment or of the business to be transacted at an adjourned meeting.

57. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is, before or on the declaration of the result of the show of hands demanded in accordance with provisions of clause (c) of sub-section (1) of section 85 of the Companies Act, 1994, and unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recovered in favour of, or against, that resolution.

58. If a poll is demanded, it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

59. In the case of an equality of votes, whether on show of hands or on a poll, the Chairman of the meeting at which the show of hands takes place, or at which the poll is demanded, shall be entitled to a second or casting vote.

60. A poll demanded on the election of Chairman or on question of adjournment shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the Chairman of the meeting directs.

VOTES OF MEMBERS

61. On a show of hands every members present in person shall have one vote. On a poll, every members shall have one vote in respect of each share or each hundred taka of stock held by him.

62. In the case of joint-holders, the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint-holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

63. A member of unsound mind, or in respect of whom an order has been made by any court having jurisdiction in lunacy, may vote whether on a show of hands or on poll, by his committee or other legal guardian, and any such committee or guardian may vote by proxy.

64. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

65. On a poll, votes may be given either personally or by proxy, but a member company shall not vote by proxy so long a resolution of its directors in accordance with the provisions of section 86 of the Companies Act, 1994, is in force.

66. The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing, or, if the appointor is a body corporate either under the common seal or under the hand of an officer or attorney so authorised.

67. The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed, or a notarially certified copy of that power or authority, shall be deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting at which the person named in the instrument proposes to vote and in default the instrument of proxy shall be treated as valid.

68. An instrument appointing a proxy may be in the following form, or in any other similar form which the directors shall approve:-

.....Company, Limited

"I of in the district of being a member of the Company Limited hereby appoint.....Address..... as my proxy to vote for me and on my behalf at the ordinary/extraordinary general meeting of the company to be held on the day of.....and at any adjournment thereof"

(Please mention-membership No. or other identity No. and share No.)

.....
(Signature with date)

DIRECTORS

69. The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association.

70. Subject to the provisions, if any, in any law for the time being in force, the remuneration of the directors shall from time to time be determined by the company in a general meeting.

71. The qualification of a director shall be the holding of at least one share in the company, and it shall be his duty to comply with the provisions of section 97 of the Companies Act, 1994.

POWERS AND DUTIES OF DIRECTORS

72. The business of the company shall be managed by the directors, who may pay all expenses incurred in forming and registering the company, and may exercise all such powers of the company as are not, by the Companies Act, 1994 or by these regulations, required to be exercised by the company in general meeting subject nevertheless to any of these regulations, to the provisions of the said Act, and to such provisions being not inconsistent with the aforesaid regulations, as may be prescribed by the company in general meeting; but no provision made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that provision had not been made.

73. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration, whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another as they may think fit; and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the time of retirement of directors, but his appointment shall be subject to determination ipso facto if he ceases for any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.

74. The amount for the time being remaining undercharged of moneys borrowed or raised by the directors for the purposes of the company otherwise than by the issue of share capital, shall not at any time exceed the issued share capital of the company without the sanction of the company in general meeting.

75. The directors shall duly comply with the provisions of the Companies Act, 1994, and in particular with the provisions in regard to the registration of the particulars of mortgages and charges affecting the property of the company or created by it, and keeping a register of the directors, and sending to the Registrar an annual list of members and a summary of particulars relating thereto and notice of any consolidation or increase of share capital or conversion of shares into stock, and copies of special resolutions and a copy of the register of directors and notifications of any changes therein.

76(1) The directors shall cause minutes to be made in books provided for the purpose-

(a) of all appointments of officers made by the directors;

(b) of the names of the directors present at each meeting of the directors and of any committee of the directors;

(c) of all resolutions and proceedings at all meetings of the company and of the directors, and of committees of directors.

(2) Every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

THE SEAL

77. The common seal of the company shall not be affixed to any instrument except by the authority of a resolution of the Board of Directors and in the presence of at least two directors including the managing director or the chief executive by whatever name called and of the secretary or such other person as the directors may appoint for the purpose, and those two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

78. The office of a director shall be vacated if the director–

(a) fails to obtain within the time specified in sub-section (1) of section 97 of the Companies Act, 1994 or at any time thereafter ceases to hold, the share qualification necessary for his appointment; or

(b) is found to be of unsound mind by a court of competent jurisdiction; or

(c) is adjudged insolvent; or

(d) fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made; or

(e) without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of the managing director or manager, or legal or technical adviser or banker; or

(f) absents himself from three consecutive meetings of the directors without leave of absence from the Board of Directors; or

(g) accepts a loan from the Company; or

(h) is concerned or participates in the profits of any contract with the company; or

(i) is punished with imprisonment for a term exceeding six months:

Provided that no director shall vacate his office only by reason of his being member of any other company which has entered into contracts with or done a work for such other company of which he is director, but a director shall not vote in respect of any such contract or work and if he does so his vote shall not be counted.

ROTATION OF DIRECTORS

79. At the first ordinary meeting of the company, the whole of the directors shall retire from office and at the ordinary meeting in every subsequent year, one-third of the directors for the time being or, if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office.

80. The directors to retire in every year shall be those who have been longest in office since their last election, but as between person as who became directors on the same day those to retire shall, unless they otherwise agreed among themselves, be determined by lot.

81. A retiring director shall be eligible for re-election.

82. The company at the general meeting at which a director retires in manner aforesaid may fill in the vacated office by electing a person thereto.

83. If at any meeting at which an election of directors ought to take place, the offices of the vacating directors are not filled in, the meeting shall stand adjourned till the same day in the next week and shall be held at the same time and place and if at the adjourned meeting the offices of the vacating directors are not filed in, the vacating directors or such of them as have not had their office filled in shall be deemed to have been re-elected at the adjourned meeting.

84. Subject to the provisions of sections 90 and 91 of the Companies Act, 1994, the company may from time to time in general meeting increase or reduce the number of directors and may also determine in what rotation the increased or reduced number is to go out of office.

85. Any casual vacancy occurring in the Board of Directors may be filled in by the directors but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director. A director so chosen shall be known as an alternative director.

86. The directors shall have power at any time, and after the expiry of a specified period to appoint a person as an additional Director who shall retire from office at the next following ordinary general meeting but shall be eligible for election by the company at that meeting as an additional director.

87. The company may, by extraordinary resolution, remove any director before the expiration of his period of office, and may by, an ordinary resolution, appoint another person in his stead: the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

PROCEEDINGS OF DIRECTORS

88. The directors may meet together for the disposal of business and adjourn and otherwise regulate their meetings as they think fit. Questions arising at any meeting

shall be decided by a majority of votes. In case of an equality of votes, the Chairman shall have a second or casting vote. A director may, and Secretary on the requisition of a director, shall at any time, summon a meeting of directors.

89. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall, when the number of directors exceeds three, be three.

90. The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, after may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose.

91. The directors shall determine the period for which the Chairman shall hold office.

92. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall, in the exercise of the powers so delegated, conform to any restriction and regulations that may be imposed on them by the directors.

93. A committee may elect a chairman of their meetings; if no such chairman is elected or if at any meeting the chairman is not present thirty minutes after the time appointed for holding the same the members present may choose one of their number to the chairman of the meeting.

94. A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority votes of the members present and in case of an equality of votes, the chairman shall have a second casting vote.

95. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

DIVIDEND AND RESERVE

96. The company in general meeting may declare dividends, but no dividends shall exceed the amount recommended by the directors. When a dividend is declared, it shall be paid within two months from the date of its declaration:

Provided that the period of two months shall not apply in case where-

(a) there is a dispute regarding the right to receive the payment; or

(b) the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder.

97. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by he profits of the company.

98. No dividend shall be paid otherwise than out of profits of the year or any other undistributed profits.

99. Subject to the rights of persons, if any, entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares; but if and so long as nothing is paid upon any of the shares in the company, dividends may be declared and paid according to the nominal value of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purpose of this Regulation as paid on the share.

100. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the direction of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments as the directors may from time to time think fit.

101. If several persons are registered as joint-holders of any share, any one of them may give effectual receipts for any dividend payable on the share.

102. Notice of any dividend that may have been declared shall be given in a manner hereinafter mentioned to the persons entitled to share therein.

103. No dividend shall bear interest against the company.

ACCOUNTS

104. Director shall cause to be kept proper books of account with respect to–

(a) all sums of money received and expended by the company and the matters in respect of which the receipts and expenditure take place;

(b) all sales and purchases of goods by the company;

(c) the assets and liabilities of the company:

(d) cost accounts, where applicable.

105. The books of account shall be kept at the registered office of the company or at such other place as the directors shall think fit and shall be open to inspection by the directors during business hours.

106. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member not being a director shall have any right of inspecting any account or book or document of the company except as conferred by law or authorised by the directors or by the company in general meeting.

107. The directors shall be required by sections 183 and 184 of the Companies Act, 1994, cause to be prepared and to be laid before the company in general meeting such

profit and loss accounts or income and expenditure accounts, balance-sheet, and reports as are referred to in those sections.

108. The profit and loss account shall in addition to the matters referred to in sub-section (2) of section 185 of the Companies Act, 1994 show, arranged under the most convenient heads, the amount of gross income, and in the case of a banking company, the amount of any provision made to the satisfaction of the auditors for bad and doubtful debts distinguishing the several sources from which it has been derived, and the, amount of gross expenditure distinguishing the expenses of the establishment salaries and other like matters.

(2) Every item of expenditure fairly chargeable against the year's income shall be brought into account so that a just balance of profit and loss may be laid before the meeting, and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

109. A balance-sheet shall be made out in every year and laid before the company in general meeting the balance-sheet shall be made up to a date not more than nine months before such meeting. The balance-sheet shall be accompanied by a report of the directors as to the state of the company's affairs, and the amount, if any, which they propose to carry to a reserve fund.

110. A company of the balance sheet and report shall , twenty one days previously to the meeting be sent to the persons entitle to receive notices of general meetings in the manner in which notices are even here under.

*[**Note :** The translation of this articles as published in the "Authentic English Text" does not tally with the original Bangla Text. The Translation even in the "Authentic English Text is reproduced here under.*

110. A copy of the balance-sheet and report shall, fourteen days previous to the meeting, in be sent to the persons entitled to receive notice of general meetings the manner in which notice are to be given here under.]

111. The directors shall in all respect comply with the provisions of sections 181 to 191 of the Companies Act, 1994.

AUDIT

112. Auditors shall be appointed and their duties regulated in accordance with sections 212 and 213 of the Companies Act., 1994.

NOTICE

113. A notice may be given by the company to any member either personally or by sending it by registered post to him to his registered address or, if he has no registered address in Bangladesh, to the address, if any, within Bangladesh supplied by him to the company for the giving of notice to him.

114. If a member has no registered address in Bangladesh, and has not supplied to the company an address within Bangladesh for the giving of notice to him, a notice addressed to him and advertised in a newspaper circulating in the neighborhood of the registered office of the company shall be deemed to be duly given to him on the day on which the advertisement appears.

115. A notice may be given by the company to the joint holders of a share by giving the notice to the joint-holder named first in the register in respect of the share.

116. A notice may be given by the company to the persons entitled to a share in consequence of the death or insolvency of a member by sending if through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or assignee of the insolvent or by any like description, at the address, if any, in Bangladesh supplied for the purpose by giving the notice in any manner in which the same might have been given if the death or insolvency had not occurred.

117. Notice of every general meeting shall be given in some manner herein before authorised to-

(a) every member of the company including bearers of share-warrants except those members who have no registered address within Bangladesh and have not supplied to the company an address within Bangladesh for the giving of notices to them and.

(b) every person entitled to a share in consequence of the death or insolvency of a member, who but for his death or insolvency, would be entitled to receive notice of the meeting.

SCHEDULE II

(*See* sections 348 and 363)

TABLE OF FEES TO BE PAID TO THE REGISTRAR

		(Fees) (Taka)
I. By a company having a share capital:		
(1)	For registration of a company whose nominal share capital does not exceed Tk. 20.00.....	120.00
(2)	For registration of a company whose nominal share capital exceeds Tk. 20,000 the above fee of taka 120.00 with the following additional fees regulated according to the amount of nominal capital that is say-	
	(a) For every 10,000 taka of nominal share capital, or part of 10,000 taka, after the first 20,000 taka up to 50,000 taka.....	60.00
	(b) For every 10,000 taka of nominal share capital, or part of 10,000 taka, after the first 50,000 taka up to 10,00,000 taka	15.00
	(c) For every 10,000 taka of nominal share capital, or part of 10,000 taka, after the first 10,00,000 taka up to 50,00,000 taka.....	80.00
	(d) For every 1,00,000 taka of nominal share capital, or part of 1,00,000 taka, after the first 50,00,000 taka up to any limit.....	15.00
(3)	For registration of any increase of share capital made after the first registration of the company, the same fee as would have been payable if such increased share capital had formed part of the original share capital at the time of registration	
(4)	For registration of any existing company except such companies as are by this Act exempted from payment of fees in respect of registration, the same fee as is charged for registration a new company.....	
(5)	For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the Registrar by a receiver or the statement required to be field with the Registrar by the liquidator in a winding up.....	20.00
(6)	For making a record of any fact by this Act required or authorised to be recorded by the Registrar	20
(7)	For registration of mortgages, debentures and charges–	
	(a) Where the total amount secured either by mortgages or debentures or charges does not exceed taka 5 lac.....	50.00
	(b) For every 5 lac taka or part of 5 lac taka, after the first 5 lac taka up to 50 lac taka.....	40.00

(c) For every 5 lac taka or part of 5 lac taka, after the first 50 lac taka up to any limit; 20.0

(d) For inspection of the register of mortgage and charge 10.00

(e) For registration of appointment of the receiver 20.00

(8) For registration of any increase in the secured amount made after the first registration of mortgage or debentures or charges, the same fees per 5 lac taka, or part of 5 lac taka as would have been payable if such increased amount had formed part of the original amount at the time of registration.....

II. By a company not having share capital and a company registered under licence granted under section 28.....

(1) For registration of a company whose number of members, as stated in the articles of association, does not exceed 20 ..... 200.00

(2) For registration of a company whose number of members, as stated in the articles of association exceeds 20, but does not exceed 100 ..... 500.00

(3) For registration of a company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of Tk. 500 and for every 100 members, or less number than 100 members, after the first 100 members..... 50.00

(4) For registration of a company whose number of members is stated in the articles of association to be unlimited 1500.0

(5) For registration of any increase in the number of members made after the registration of the company, the same fees at the rate prescribed in Sl. No.s (1) (2), (3) and (4) above, as if such increase has been stated in the articles of association at the time of registration .....

Provided that no one company shall be liable to pay on the whole a greater fee than Tk. 1500 in respect of its number of members, taking into account the fee paid on the first registration of the company.....

(6) For registration of any existing company except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registration as a new company.....

(7) For filing any document by this Act required or authorised to be filed other than memorandum or the abstract required to the filed with the Registrar by a receiver or the statement required to be filed with the Registrar by a liquidator in a winding up-

(a) In case of a memorandum 100.00

(b) In case of any other document 10.00

(8) For making a record of any fact by this Act authorised or required to be recorded by the Registrar 20.00

(9) For registration of mortgage, debentures and charges

(a) Where the total amount secured by mortgage or debenture or charges does not exceed taka 5 lac. 50.00

(b) For every 5 lac taka or part of 5 lac taka, after the first 5 lac taka up to 50 lac taka 40.00

(c) For every 5 lac taka or part of 5 lac taka, after the first 50 lac taka up to any limit 20.00

(d) For inspection of the register of mortgage and charge 10.00

(e) For registration of appointment of the receiver 20.00

(10) For registration of any increase in the secured amount made after the first registration of mortgage or debenture or charge, the same fees per 5 lac taka or part thereof, as would have been payable if such increased amount had formed part of the original amount at the time of registration.

III. By a company established outside Bangladesh which has a place of business in Bangladesh:

(1) For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the Registrar by a receiver or the statement required to be filed with the Registrar by the liquidator in a winding up–

(a) in case of memorandum and articles of association 100.00

(b) In case of the documents 10.00

(2) For registration of mortgages, debentures and charge

(a) Where the total amount secured by mortgage or debenture or charges does not exceed taka 5 lac. 50.00

(b) For every 5 lac taka or part of 5 lac taka, after the first 5 lac taka up to 50 lac taka 40.00

(c) For every 5 lac taka or part of 5 lac taka, after the first 50 lac taka up to any limit 10.00

(d) For inspection of the register of mortgage and charge 20.00

(e) For registration of appointment of the receiver 20.00

(3) For registration of any increase in the secured amount made after the first registration of mortgage, or debenture or charge, the same fees per 5 lac taka or part thereof as would have been payable if such increased amount had formed part of the original amount at the time of registration.

IV. General:

(1) For inspection of records, issue of certified copies, etc.

(a) For inspection of records. 10.00

(b) For copy of certificate of incorporation	15.00
(c) For copy of certificate of commencement of business	15.00
(d) Copying of documents at taka one for each 100 words or part thereof subject to a minimum of Tk. 10.00	10.00
(e) Comparison of documents at 50 poisha for each hundred words or part thereof subject to a minimum of taka 5 for each document	5.00

(2) For each application to the Registrar for information as to whether name of the company or the proposed change of name of the registered company is available or not

(3) For filing or registration of any document or return by this Act required or authorised to be filed or registered, or for any fact by this Act, required to authorised to be registered or filed with the Registrar after the time specified, Taka 1.00 for each day of default subject to a maximum of taka. 500.00

SCHEDULE III

MATTERS TO BE SPECIFIED IN PROSPECTUS AND REPORTS TO BE SET OUT THEREIN

PART-I

MATTERS TO BE SPECIFIED

1. (a) Save as hereinafter provided in clause 27, the following particulars the names, addresses, descriptions and occupations of the signatories to the memorandum and the number of shares subscribed for by them.

(b) The number and classes of shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company.

(c) The number of redeemable preference shares intended to be issued, with the date of redemption or, where no date is fixed the period of notice required for redeeming the shares and the proposed method of redemption.

2. (1) The number of shares, if any, fixed by the articles as the qualification of a director.

(2) Any provision in the articles as to the remuneration of the directors whether for their services to the company as directors, managing directors or otherwise.

3.(I) The names, addresses, descriptions and occupations of-

(a) the directors or proposed directors;

(b) the managing director or proposed managing director, if any;

(c) the managing agent or proposed managing agent, if any;

(d) the manager or proposed manager, if any;

Provided that—

(i) where any such person is already a director, managing director or manager of any other company, or

(ii) where any such person, including a firm or body corporate, is already a managing agent of any other company.

The matters to be specified under this clause shall include the names of all the companies in which such person is a director, managing director or managing agent or manager, and where any such person is a firm or a body corporate, the said particulars shall also be given in respect of every partner of the firm or, as the case may be, in respect of every director of the body corporate.

(2) Any provision in the articles or in any contract which has been entered into as to the appointment of a managing director, managing agent or manager, the remuneration payable to him or them, and the compensation, if any, payable to him or them for loss of office.

4. In the case of a company managed by a managing agent which is a body corporate, the subscribed capital of that body.

5. Where shares are offered to the public for subscription, particulars as to–

(a) the minimum amount which, in the opinion of the directors or of the signatories of the memorandum must be raised by the issue of those shares in order to provide the sums, required to be provided in respect of each of the following heads and distinguishing the amount required under each head:

(i) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;

(ii) any preliminary expenses payable by the company, and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the company;

(iii) the repayment of any money borrowed by the company in respect of any of the matters specified in sub-clause (I) and (II)

(iv) working capital;

(v) any other expenditure, stating the nature and purpose thereof and the estimated amount in each case;

(b) if any part of the amount specified in clause (a) is defrayed in any manner otherwise than those specified in that clause, then the amount so defrayed and the balance.

(c) if the amounts to be provided in respect of the matters specified in clause (a) and (b) otherwise tan out of the proceeds of the issue then the sources out of which those amounts are to be provided.

6. The time of the opening of the subscription lists.

7. The amount payable on application and allotment on each share, and in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, the amount actually allotted, and the amount, if any paid on the shares so allotted.

8. The substance of any contract or arrangement or proposed contract or arrangement, whereby any option or preferential right of any kind has been or is proposed to be given to any person to subscribe for any share, in or debentures of, a company, giving the number, description and amount of any such shares or debentures shall and including the following particulars of the option or right–

(a) the period during which the option or right is exercisable;

(b) the price to be paid for shares or debentures subscribed for under the option or right;

(c) the consideration, if any, given or to be given for the option or for the right thereto;

(d) the names, addresses, descriptions and occupations of the persons to whom the option or the right thereto has been given or, is proposed to be given, if given to existing shareholders or debenture holders as such, the description and the number of the relevant shares or debentures;

(e) any other material fact or circumstances relevant to the grant of the option or right.

Explanation : Subscribing for shares or debentures shall, for the purpose of this clause, including acquiring them from a person to whom they have been allotted or agreed to be allotted with a view to his offering them for sale shall be deemed to subscription for such share or debenture.

9. The number, description and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or agreed to be issued.

10. The amount paid or payable by way of premium, if any, on each share which has been issued within the two years preceding the date of the prospectus, or is to be issued, stating the dates or proposed dates of issue and, where some shares have been or are to be issued at a premium and other shares of the same class at a lower premium, or at par or at a discount, the reasons for the differentiation and how any premiums received have been or are to be disposed of.

11. Where any issue of shares or debentures, is underwritten, the name of the underwriters, and the opinion of the directors that the resources of the underwriters are sufficient to discharge their obligations.

12. (1) The following particulars as respects any property to which this clause applies is specified in sub-clause (2)

(a) the names, addresses, descriptions and occupations of the vendors;

(b) the amount payable in cash, shares or debentures to the vendor and, where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor specifying separately the amount, if any, paid or payable for goodwill.

(c) the nature of the title or interest in such property acquired or to be acquired by the company;

(d) sort particulars of any transaction relating to the transaction of the property completed within the two preceding years in which any vendor of the property to the company or any person who is, or was at the time of the transaction, a promoter or a director or proposed director of the company had any interest direct or indirect specifying the date of the transaction and the name of such promoters, director for proposed director and stating the amount payable by or to such vendor, promoter, director or proposed director in respect of the transaction.

(2) The property to which sub-clause (1) applies is property purchased or acquired, by the company or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus or the purchase or acquisition of which has not been completed at the date of the issue of the prospectus, other than property.—

(a) the contract for the purchase or acquisition whereof was entered into in the ordinary course of the company's business, the contract not being made in contemplation of the issue nor the issue in consequence of the contract; or

(b) as respects which the amount of the purchase money is not material.

13. The amount, if any, paid within the two preceding years, or payable as commission to any person including commission to sub-under writers who is a promoter or officer of the company, for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscription, for any shares in or debentures of the company, and giving also the following particulars namely:—

(a) the name, address, description and a occupation of each person;

(b) particulars of the amounts which each has underwritten or sub-underwritten as aforesaid;

(c) the rate of the commission payable to each for such underwriting or sub-underwriting;

(d) any other material term or condition of the underwriting or sub-underwriting contract with-each such person; and

(e) where any such person is a company or a firm, the nature of any interest, direct or indirect, in such company or firm of any promoter or officer of the company in respect of which the prospectus is issued.

14. The amount or estimated amount of preliminary expenses and the persons by whom any of those expenses have been paid or are payable, and amount or estimated amount of the expenses of the issue and the persons by whom any of those expenses have been paid or are payable.

15. Any amount or benefit, paid or given within the two preceding years or intended to be paid or given to any promoter, and the consideration for the payment or the giving of the benefit.

16. (1) The dates of, parties to and general nature of every contract appointing or fixing the remuneration of a managing director, managing agent or manager whenever entered into, that is to say, whether within, or more than two years before the date of the prospectus;

(2) The dates, parties and the general nature of every other material, contract, not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company or a contract entered into more than two years before the date of issue of the prospectus.

(3) A reasonable time and place at which any such contract or a copy thereof may be inspected.

17. The names and addresses of the auditors, if any, of the company.

18. (1) Full particulars of the nature and extent of the interest, if any, of every directors or promoter in the promotion of the company; or in any property acquired by the company within two years of the date of the prospectus or proposed to be acquired by it.

(2) Where the interest of such director or promoter consists is being a member of a firm or company, the nature and extent of the interest of the firm or company, with a statement of all sums paid or agreed to be paid to him or to other firm or company in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director or otherwise for services rendered by him or by the firm or company in connection with the promotion or formation of the company.

19. If the share capital of the company is divided into different classes of shares, the right of voting at matters of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.

20. Where the articles of the company impose any restrictions upon the members of the company in respect of the right to attend, speak or vote at meetings of the company or of the right to transfer shares, or upon the directors of the company in respect of their powers of management, the nature and extent of those restrictions.

21. (1) In the case of a company which has been carrying on business, the length of time during which the business of the company has been carried on.

(2) If the company proposes to acquire a business which has been carried on for less than three years, the length of time during which the business has been carried on.

22. (1) If any reserves or profits of the company or any of its subsidiaries have been capitalised, particulars of the capitalisation.

(2) Particulars of the surplus arising from any revaluation of the assets of the company or any of its subsidiaries during the two years preceding the date of the prospectus and the manner in which such surplus has been dealt with.

23. A reasonable time and place at which copies of all balance sheets and profit and loss accounts, if any, on which the report of the auditors is based, may be inspected.

Explanation : In this regulation "report" means a report prepared under Part II of the schedule and on the basis of which the company's balance sheet and Profit and Loss account is prepared.

PART- II

(SCHEDULE- III)

REPORTS TO BE SET OUT

24. (1) The auditors of the company shall prepare a report on the following, namely:-

(a) Profits and losses, and assets and liabilities, in accordance with sub-clause (2) or (3), as the case may be;

(b) the rates of the dividends, if any, paid by the company in respect of each class of shares in the company for each of the five financial years immediately preceding the issue of the prospectus, giving particulars of each such class of shares on which the dividends have been paid and also particulars of the cases in which no dividend has been paid on any of those classes of shares for any of those years;

(c) if no accounts have been made-up in respect of any of the said financial years, or part thereof ending on a date immediately preceding three months prior to the issue of the prospectus (hereinafter referred to as the said period), then the following matters:–

(i) a statement that such accounts have not been made up;

(ii) an account of the profit and loss of the company up to a date prior to the issue of the prospectus which date is not beyond one hundred and eighty days including the said period (three months);

(iii) the accounts referred to in sub-clause (ii) may indicate as to whether any adjustment has been made or yet to be made and the nature of the adjustment;

(iv) a certificate that the profit and loss account and the assets and liabilities of the company have been examined by the auditors and found to be correct by them.

(2) If the company has no subsidiaries, the report shall as regards,

(a) profits and losses, deal with the profits or losses of the company' distinguishing it of a items of a non-recurring nature, in respect of each of the five financial years immediately preceding the issue of the prospectus; and

(b) assets and liabilities, deal with the assets and liabilities of the company at the last date to which the accounts of the company were made up.

(3) If the company has subsidiaries, the report shall as regards,

(a) profits and losses, deal separately with the company's profits or losses as provided by sub-clause (2) and in addition, deal either–

(i) as a whole with combined profits or losses of its subsidiaries, so far as they concern members of the company; or

(ii) individually with the profits of losses of each subsidiary, so far as they concern members of the company; or,

(iii) instead of dealing separately with the company's profits or losses, deal as a whole with the profits or losses of the company and, so far as they concern members of the company, with the combined profits or losses of its subsidiaries; and

(b) assets and liabilities, deal separately with the company's assets and liabilities as provided by sub-clause (2) and, in addition, deal either–

(i) as a whole with the combined assets and liabilities of its subsidiaries, with or without the company's assets and liabilities; or

(ii) individually with the assets and liabilities of the each subsidiary;

(c) the assets and liabilities of the subsidiaries indicate the allowance to be made for persons other than members of the company.

25. If the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly–

(i) in the purchase of any business; or

(ii) in the purchase of an interest in any business and by reason of that purchase or, anything to be done in consequence thereof, or in connection therewith, the company will become entitled to an interest as respect either the capital or profits and losses or both, in such business exceeding fifty per cent thereof;

a report shall be made by accountants, who shall be named in the prospectus, upon the profits or losses of the business for each of the five financial years immediately preceding the issue of the prospectus; and the assets and liabilities of the business at the last date to which the accounts of the business were made up.

26. (1) If—

(a) The proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly in any manner resulting in the acquisition by the company of shares in any other body corporate; and

(b) by reason of that acquisition or anything to be done in consequence thereof or in connection therewith that body corporate will become a subsidiary of the company;

a report made by accountants who shall be named in the prospectus upon the profits or losses of the other body corporate for each of the five financial years immediately preceding the issue of the prospectus; and the assets and liabilities of the other body corporate at the last date to which the accounts of the body corporate were made up.

(2) The said report shall—

(a) indicate how the profits or losses of the other body corporate dealt with by the report would, in respect of the shares to be acquired, have concerned members of the company and what allowance would have fallen to be made, in relation to assets and liabilities so dealt with, for holders of other shares, if the company had at all material time held the shares to be acquired; and

(b) where the other body corporate has subsidiaries, deal with the profits or losses and the assets and liabilities of the body corporate and its subsidiaries in the manner provided by sub-clause (3) of clause 24 of this Schedule in relation to the company and its subsidiaries.

SCHEDULE-III

PART- III

PROVISIONS APPLYING TO PARTS I AND II OF THE SCHEDULE;

27. Clause 1 so far as it relates to particulars of the signatories of the memorandum and the shares subscribed for by them, and clause 14, so far as it relates to preliminary expenses, of this schedule shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business.

28. Every person shall, for the purposes of this Schedule, be deemed to be a vendor who has entered into any contract, absolute or conditional for the sale or purchase, or for any option of purchase, or any property to be acquired by the company, in any case where—

(a) the purchase money is not fully paid at the date of the issue of the prospectus;

(b) the purchase money is to be paid or satisfied, wholly or in part, out of the proceeds of the issue offered for subscription by the prospectus;

(c) the contract depends for its validity or fulfillment on the result of that issue.

29. Where any property to be acquired by the company is to be taken on lease, its Schedule shall have effect as if the expression "vendor" included the lessor, the expression "purchase money" included the consideration for the lease, and the expression "sub-purchase" included a sub-lessee.

30. If, in the case of a company which has been carrying on business for less than five years or in the case of a business which has been carried on for less than five years, the accounts of the company or the business have been accordingly made for any number of years or period less than five year (e.g. four/three/two/one etc.) then, the

provisions of part II of this Schedule shall have effect as if any references to five years in that part were the references to the said less number of years or to the said period less than five years.

31. Where the five financial years immediately preceding the issue of the prospectus which are referred to in Part II of this Schedule or in this Part cover a period of less than five years, reference to the said five financial years in either Part shall have effect as if references to a number of financial years the aggregate period covered by which is not less than five years immediately preceding the issue of the prospectus were substituted for reference to the five financial years aforesaid.

32. Any report required by Part II of this Schedule shall either–

(a) indicate by way of note any adjustments as respects the figures of any profits or losses or assets and liabilities dealt with by the report which appear of the persons making the report necessary; or

(b) make those adjustments and indicate that adjustment have been made.

33. Any report by accountants required by Part II of this schedule–

(a) shall be made by accountants qualified under the companies Act, 1994 for appointment as auditors of a company; and

(b) shall not be made by any accountant who is an officer or servants, or a partner or in the employment of an officer or servant, of the company or of the company's subsidiary or holding company or of a subsidiary of the company's holding company.

Explanation: For the purpose of this clause, the expression "officer" shall include a proposed director but not an auditor.

SCHEDULE- IV

(*See* section 141)

Form of statement in lieu of Prospectus to be delivered to the registrar by a company which does not issue a Prospectus or which does not go to allotment on a Prospectus and reports to be set out therein.

PART-I

FORM OF STATEMENT IN LIEU OF PROSPECTS AND PARTICULARS TO BE INCLUDED THEREIN

For registration of the Statement in lien of Prospectus delivered to the Registrar pursuant to section 141 of the Companies Act, 1994 for registration by.....Co. Ltd.

Subjects on which Particulars given			Particulars
1.	(a)	Nominal share capital of the	1. (a) Taka.....
	(b)	Nominal value of each share company	(b) Taka .....
	(c)	Total number of shares (specify the class):	(c) .....
		.....shares	.....
		.....shares	.....
2.	(a)	The amount, if any, the above share capital consisting of redeemable preference shares	2 (a) Total amount; Taka..... ..... Number of shares:- Nominal value of each share.....
	(b)	The earliest date on which the company has the power to redeem	(b) Date .....
3.		Names, addresses and occupation of the following :	
	(a)	Directors or proposed directors	(a) .....
	(b)	Managing Director or proposed	(b).....
	(c)	Managing agent or proposed Managing agent, if any;	(c).....
	(d)	Manager or proposed Manager	(d) .....

4.	Any provision in the articles or in any contract irrespective of the time when it entered into as to the appointment of, and remuneration payable to, the persons referred in (a) (b), (c) and (d) of Sl. No.3	4 (a) Provision .... (b) Remuneration ....
5.	If the share capital is divided into different classes of shares- (a) the right of voting at meetings of the company conferred by such shares (b) the rights is respect of the capital and dividends, attached to the overall classes of shares	5. (a)..... (b) .....
6.	Number of shares and debentures issued or agreed to be issued as fully or partly paid up otherwise then in cash.	6.(a) Fully paid up shares: (1) Nominal value of each share Taka..... (2) Total number of shares..... (3) Total amount paid : Taka..... (b) Partly paid up shares :- (1) Nominal value of each share Taka..... (2) Total number of shares..... (3) Total amount of money partly paid on those shares, Taka..... (4) Amount of money unpaid, Taka..... (c) Fully paid up Debentures:- (1) Nominal value of each Debenture Taka..... .. (2) Total number of Debentures.. (3) Total amount paid Taka..... (d) Partly paid up debentures:- (1) Nominal value of each:- Taka..... (2) Total number of Debentures.. (3) Total amount of money partly paid on whose debentures:- Taka..... (4) Amount of money unpaid:- Taka.....

The consideration for the intended issue of those shares and debentures	7. Consideration:– (a) For shares: Taka..... (b) For Debentures: Taka.....
(a) Number, description and amount of any shares or debentures which any person has been or; in respect of which he is entitled to be given an option to subscribe for or to acquire from a person to whom they have been allotted agreed to be allotted with a view to his offering them for sale.	8.(a) (1) Shares :- Nominal value of such share Taka ..... Total Number of shares ..... Total Value : Taka ..... Description : ..... (2) Debentures:– Nomigal value of each, Taka Total number of Debentures Total value Taka..... Description.....
(b) Period during which option is exercisable.	(b) Until .....
(c) Price to be paid for shares or debentures subscribed for or acquired under the option.	(c) Taka.....
(d) Consideration for the option or right to option.	(d) Consideration.....
(e) Persons to whom option or right to option was given or, if given to existing share holders of debenture holders as such, the relevant shares or debentures.	(e) (1) Names and addresses of persons etc..... (2)Description of shares/ Debentures.....
(a) Names, occupation and addresses of vendors of property purchased or acquired or proposed to be purchased or acquired by the company, except share the contract for its purchase or acquisition was entered in the ordinary course of the business intended to be carried on by the company or the amount of the purchase money is not mentioned Amount in cash, shares of debentures, payable to each separate vendor to be stated).	9.(a) Names, addresses and occupation of each vender/transferor or and the amount paid in cash/or other wise 1. Name and address..., 2. Cash Tk..... 3. Shares Tk..... 4. Debentures Tk.....
(b) Total amount if any, paid or payable,	(b) (1) Total amount:

	in cash, shares or debentures, for any such property, specifying amount, if any, paid or payable for goodwill.	Taka..... Cash. Tk..... Shares. Tk..... Debentures. Tk..... (2) For goodwill Tk.....
10.	Short particulars of any transaction relating to each property specified in Sl. No.9 which was completed within the two preceding vendor and in which any year to the company or any person who is, or was at the time thereof, a promoter, director or proposed director of the company had any interest, direct or indirect.	10.(a) Transaction..... (b) Interest therein of directors etc..... .....
11.	(a) Amount, if any, paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company; or (b) Rate of the commission (c) The number of shares, if any, which persons have agreed to subscribe for a commission.	11. (a) Commission:- Amount paid..... Amount payable..... Rate per cent ..... (c) Shares.....
12.	If it is proposed to acquire any business the amount, as certified by the persons by whom the accounts of the business have been audited, of the profits of the business in respect of each of the five years immediately preceeding the date of this statement: Provided that in the case of a business which has been carried on for less than five years and the accounts of which have only been made up in respect of four years, three years, two years or one year, the above requirements shall have effect as if reference to four years, three years, two years or one year, as the case may be, were substituted for references to five years, and in any such case the statement shall say how long the business to be acquired has been carried on.	12.
13.	(a) Estimated amount of preliminary expenses.	13. (a) Tk.....

(b) By whom (promotor or others) those expenses have been paid or are payable.	(b) Names and addresses..... .....
(c) Amount paid or intended to be paid to any promotor and the Consideration for the payment.	(c) Name of Promotor..... Amount Tk..... Consideration.....
(d) Any other benefit given or intended to be given to any promoter and the Consideration for giving of benefit.	(d) Name of promotor..... Nature and value of benefit: consideration .....
14. Dates of, parties to, and general nature of, the following:-	14.
(a) contract appointing or fixing the remuneration of directors, managing director, managing agent, or manager; and	(a) (1) Date of contract..... (2) Nature of contract (3) Remuneration of the appointed person.....
(b) every other material contract, other than-	(b) other material contract:-
(i) contracts entered into in the ordinary course of the business intended to be carried on by the company; or	(i).....
(ii) entered into more than two years before the delivery of this statement.	(ii).....
15. Time and place at which the following contracts/documents may be inspected:	15.
(a) written original contractor its copy	(a) Time and place..... .....
(b) in the case of an unwritten contract, a memorandum giving full particulars thereof	(b) Time and place..... .....
(c) If the contract is partly or wholly written in a foreign language other than English, a copy of its English translation (in whole) or, as the case may be, a copy of the translation of its relevant portion in English. (In such cases the translation must be certified to be an correct translation).	(c) Time and place..... .....
16. Names and addresses of the auditors of the company, if any.	16.

17. (a)	Full particulars of the nature and extent of the interest of every director, managing director, managing agent or manager in the promotion of, the company:-	17. (a)
(b)	The interest of any of the above persons in a property proposed to be acquired by the company:-	(b)
(c)	Where the interest of a director consists of being a partner in a firm the nature and extent of his interest in the firm:-	(c)
(d)	The following particulars in respects of clause (c) above:	(d)
	(i) a statement of all sums paid or agreed to be paid to the director or the firm in cash or shares or otherwise or to any person either to induce him to become, or to qualify his or his firm as, a director:-	(i) .....
	(ii) a statement of all sums shares or otherwise paid or agreed to be paid to the director or to his firm for services rendered by him or his firm in connection with the promotion of formation of the company.	(ii).....

Signature of the persons above-named and directors, proposed directors, or to their agents and soliset in writing. ....

Dated: .....

SCHEDULE IV

PART-II
REPORTS TO BE SET OUT

1. Where it is proposed to acquire a business, a report made by accountants who shall be named in the statement, upon the following:-

(a) the profits or losses of the business in respect of each of the five financial years immediately preceding the deliver a of the statement to the Registrar; and

(b) the assets and liabilities of the business as on the last date to which the accounts of the business were made up.

2. (1) Where it is proposed to acquire shares in a body corporate which by reason of the acquisition or anything to be done in consequence there of or in connection therewith will become a subsidiary of the company, a report made by accountants, who shall be named in the statement, with respect to the profits and losses and assets and liabilities of the other body corporate in accordance with sub-clauses (2) and (3) of this clause, as the case may require, indicating how the profits or losses of the other body corporate dealt with by the report would, in respect of the shares to be acquired, have concerned members of the company, and what allowances would have fallen to be made, in relation to assets and liabilities so dealt with for holder of other shares, if the company had at all material times held the shares to be acquired.

(2) If the other body corporate referred to in sub-clause (1) has no subsidiaries, the report referred to in that sub-clause shall state the following:-

(a) the profits or losses of the body corporate in respect of each of the five financial years immediately preceding the delivery of the statement to the Registrar; and

(b) the assets and liabilities of the body corporate as on the last date to which the accounts of the body corporate were made up.

(3) If the other body corporate referred to in sub-clause (1) has subsidiaries, the report referred to in that sub-clause state the following:-

(a) the other body corporate's profits or losses as provided by sub-clause (2) and in addition the following:-

(i) the combined profits or losses of the body corporate including that of its subsidiaries, so far as they concern members of the other body corporate; or

(ii) individually the profits or losses of each subsidiary, or far as they concern members of the other body corporate, or

(b) instead of stating separately with the other body corporate's profits or losses, as per sub-clause (2) the total profits or losses of the other body corporate, and, so far as they concern members of the other body corporate, with the combined profits or losses of its subsidiaries, and

(c) the other body corporate's assets and liabilities as provided by sub-clause (2) and, in addition, the following:-

(i) as a whole the combined assets and liabilities of its subsidiaries, with or without the other body corporate's assets and liabilities: and

(ii) individually with the assets and liabilities of each subsidiary; and

(d) as respects the assets and liabilities of the subsidiaries, the allowance to be made for persons other than members of the company.

SCHEDULE IV

PART-III

PROVISIONS APPLYING TO PARTS I AND II OF THIS SCHEDULE

1. In this Schedule, the expression "vendor" includes a vendor as defined in Part III of Schedule III and the expression "financial year" has the same meaning assigned to it in that part of that Schedule.

2. If in the case of a business which has been carried on, or of a body corporate which has been carrying on business, for less than five financial years, the accounts of the business or of the body corporate have only been made up in respect of any period less than five years e.g. four year's three years two years or one year, Part II of this Schedule shall have effect as if reference to four financial years, three financial years, two financial years or one financial year, as the case may be, were substituted for reference to five financial years.

3. Any report required by Part II of this Schedule shall either-

(a) indicate by way of note any adjustments as respect the figures of any profits or losses or assets and liabilities dealt with by the report which appear to the persons making the report necessary; or

(b) make those adjustments and indicate that adjustments have been made.

4. Any report by accountants required by Part II of this Schedule-

(a) shall be made by accountants qualified under the Companies Act, 1994 for appointment as auditors of a company; and

(b) shall not be made by any accountant who is an officer or servant or a partner or in the employment of an officer or servant, of the company or of a subsidiary of the company's subsidiary or holding company or of a subsidiary of the company's holding company.

Explanation: For the purposes of this clause the expression "officer" shall include a proposed director but not an auditor.

SCHEDULE-V

(*See* section 231)

Form of statement in lieu of Prospectus to be delivered to the Registrar by a Private Company on becoming a Public Company and Report to be set out therein.

PART-I

Form of statement in lieu of Prospectus and Particulars to be contained therein

For registration of the
Statement in lieu of Prospectus
delivered to the Registrar
pursuant to section 231 of the
Companies Act, 1994 for registration by
.....Co. Ltd.

Subjects on which particulars given	Particulars
1 (a) Nominal share capital of the company	1 (a) Taka.....
(b) Nominal value of each share	(b) Taka.....
(c) Total number of shares (specify the class): ..... shares .....shares	(c) .....
2. (a) The amount if any, of the above share capital consisting of redeemable preference shares	(2) Total amount Taka..... ..... Number of shares:- Nominal value of each share..... .....
(b) The earliest date on which the company has the power to redeem	(b) Date.....
3. Names, addresses and occupations of the following:-	
(a) Directors or proposed directors	(a) .....
(b) Managing Director or Proposed Managing Director	(b).....
(c) Managing Agent or proposed Managing Agent, if any;	(c) .....
(d) Manager or proposed Manager	(d).....
4. Any special provision in the article	4. (a) Special Provisions.....

	or irrespective of the time of execution of any contract, the special provision in such contract, according to which the persons referred to in item nos. (a), (b), (c) or (d) of SL. 3 are to be paid any remuneration.	..... (b) Remuneration.....
5	(a) Amount of issued share capital	5. (a) Tk.....
	(b) Total number of shares issued	(b) .....shares
	(c) Amount of commission paid in connection with such issue.	(c) Tk.....
6.	(a) Amount of discount, if any, allowed on the issue of any shares.	6. (a) Tk.....
	(b) So much of the issue as has not been written off at the date of the Statement.	(b) Tk.....
7.	Unless more than two years have elapsed since the date on which the company was entitled to commence business	
	(a) Amount of estimated preliminary expenses:-	(a) Tk.....
	(b) By whom (promoter or others) those expenses have been paid or payable:-	(b) Name and address.....
	(c) Amount paid or intended to be paid to any promoter and consideration for such payment	(c) Name of promoter..... Amount..... Consideration.....
	(d) Any benefit given or intended to be given to any promoter and consideration for giving of such benefit.	(d) Name of Promoter..... Nature and value of benefit ..... Consideration.....
8.	If the share capital is divided into different classes of shares	8.
	(a) the right of voting at meetings of the company conferred by such shares.	(a) .....
	(b) the right in respect of capital and dividend attached to the several classes of shares.	(b).....
9.	Number and amount of shares and	9. (a) Fully paid up shares:-

debentures issued within the two years preceding the date of this statement as fully or partly paid up otherwise than for cash or agreed to be so issued at the date of this statement.

(1) Nominal value of each share
Taka.....
(2) Total number of shares.....
(3) Total amount paid:
Taka.....

(b) Partly paid up shares:-
(1) Nominal value of each share
Taka.....
(2) Total number of shares .....
(3) Total amount of money partly paid on those shares Taka.....
(4) Amount of money unpaid
Taka.....

(c) Fully paid up debentures:-
(1) Nominal value of each Debenture .....
Taka.....
(2) Total number of Debentures.....
(3) Total amount paid
Taka.....

(d) Partly paid up debentures:-
(1) Nominal value of each:-
Taka.....
(2) Total number of Debentures:-
(3) Total amount of money partly paid on those Debentures:-
Taka.....
(4) Amount of money unpaid:-
Taka.....

10. The consideration for the intended issue of those shares and debentures

10. Consideration:-
(a) For shares: Taka.....
(b) For Debentures Taka.....

11. (a) Number, description and amount of any shares or debentures which any person has, or in respect of which he is entitled to be given an option to subscribe for or to acquire from a persons to whom they have been

11.(a)
(1) Shares :-
Nominal value of each shares
Taka.....
Total number of shares.....

	allotted or agreed to be allotted with a view to his offering them for sale.	Total value ..... Description .....
		(2) Debentures:- Nominal value of each, Tk..... Total number of Debentures ..... Total value..... Description.....
	(b) Period during which option is exercisable.	(b) Until.....
	(c) Price to be paid for shares or debentures subscribed for or required under the option.	(c) Taka.....
	(d) Consideration for the option or right to option.	(d) Consideration.....
	(e) Persons to whom option or right to option was given or, if given to existing share holders or debenture holders as such, the relevant shares or debentures.	(e) (1) Names and addresses, of persons etc..... ..... (2) Description of shares/ Debentures.....
12.	(a) Names, occupations and addresses of vendors of property purchased or acquired or proposed to be purchased or acquired by the company, except where the contract for its purchase or acquisition was entered in the ordinary course of the business intended to be carried on by the company or the amount of the purchase money is not significant and the contract is not related to the company when it was private.	12. (a) Names, addresses and occupations of each vendors/ transferor Name and addresses ....
	(b) Amount in cash, shares or debentures, payable to each separate vendor to be stated.	(b) Amount paid in cash/shares etc. to each vendor cash.....Taka..... Shares..... Taka..... Debentures..... Taka.....
	(c) Total amount, if any, paid or payable, in cash, shares or debentures, for, any such	(c) (1) Total amount..... Taka..... Cash Tk.....

property, specifying the amount, if any, paid or payable for goodwill.

13. Short particulars of any transaction relating to each property specified in Sl. No. 12 which was completed within the two preceding years and which any vendor to the company or any person who is, or was at the time thereof, a promoter, director or proposed director of the company, had any interest, direct or indirect.

14. (a) Amount, if any, paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debenture in the company.

(b) Rate of the commission

(c) The number of shares, if any which persons have agreed to subscribe for a commission.

15. If it is proposed to acquire any business the amount, as certified by the persons by whom the accounts of the business have been audited, of the not profits of the business in respect, of each of the five years immediately preceding the date of this statement:

Provided that in the case of a business which has been carried on for less than five years and the accounts of which have only been made up in respect of four years, three years, two years or one year or less the above requirements shall have effect, as If reference to four years, three years, two years or one year, as the case may be, were substituted for reference to five years, and in any such case the statement shall any how long the business to be acquired has been carried on:-

Shares Tk.....

Debentures Tk.....

(2) For goodwill Tk.....

13. (a) Transaction.....

(b) Interest therein of directors etc.....

.....

14. (a) Commission:-

Amount paid .....

Amount Payable .....

(b) Rate percent....

(c) Shares....

15.

16. Dates of parties to, and general nature of the following:-	16.
(a) contract appointing or fixing the remuneration of directors, managing director, managing agent, or manager; and	(1) Date of contract.... (2) Nature of control (3) Remuneration of the appointed person..... (4) Parties to the contract
(b) every other material contract, other than-	(b) other material contract:
(i) contracts entered into in the ordinary course of the business intended to be carried on by the company: or	(i).....
(ii) contracts entered into more than two years before the delivery of this statement.	(ii).....
17. Time and place at which the following contracts/documents may be Inspected:-	17.
(a) written original contract or its copy;	(a)Time and place.....
(b) In the case of an unwritten contract, a memorandum giving full particulars of thereof;	(b) Time and place.....
(c) If the contract is partially or wholly written in a foreign language other than English, a copy of its English translation (in whole) or, as the case may be, a copy of the translation of its relevant portion in English (in such cases the translation must be certified to be a correct translation).	(c) .....
18. Names and addresses of the auditors of the company, if any.	18.
19. (a) Full particulars of the nature and extent of the interest of every director, managing director, managing agent or manager in the promotion of the company:-	19. (a)
(b) The interest of any of the above persons is a property proposed to be a acquired by the company:-	(b)

(c) Where the interest of a director consists of being a partner is a firm, the nature and extent of the interest of the firm:- (c)

(d) The following particulars, in respect of clause (c) above:-

(i) a statement of all sums paid or agreed to be paid to the director or the than firm in cash or shares or otherwise or to any person either to induce him to become, or to qualify him or his firm as, a director;- (i)

(ii) a statement of all sums, shares or otherwise paid or agreed to be paid to the director or to his firm for services rendered by him or his firm in connection with the promotion or formation of the company. (ii)

20. (a) The rate of dividend, it of the company has paid any dividend for the financial year immediately preceding this statement or for the period after the incorporation of the company, which ever is less, for the different classes, of shares,

(b) If any dividend the amount been paid for any of the said financial years for any class of shares, the particulars of such year and class. (b)

Signature of the directors or proposed directors or their agents authorised in writing.

Signature and date

.....

.....

SCHEDULE-V

PART-II

REPORTS TO BE SET OUT

1. If unissued shares or debentures of the company are to be applied in the purchase of a business, a report made by accountants, who shall be named in the statement, upon-

(a) the profits or losses of the business in respect of each of the five financial years immediately preceding the delivery of the statement to the Registrar; and as at the last date to which the accounts of the business;

(b) the assets and liabilities of the business were made up.

2.(1) If unissued shares for debentures of the company are to be applied directly or indirectly in any manner resulting in the acquisition of shares in a body corporate which by reason of the acquisition of anything to be done in consequence thereof or in connection therewith will become a subsidiary of the company a report made by accountants, who shall be named in the statement, with respect to the profits and losses and assets and liabilities of the other body corporate in accordance with sub-clause (2) or (3) or this clause, as the case requires, indicating how the profits or losses of the other body corporate dealt with by the report would in respect of the shares to be acquired, have concerned members of the company, and what allowance would have fallen to be made in relation to assets and liabilities so dealt with, for holders of other shares, if the company had at all material times held the shares to be acquired.

(2) If the other body corporate has no subsidiaries, the report referred in the sub-clause- (1) shall, as regards-

(a) profits and losses, deal with the profits or losses of the body corporate in respect of each of the five financial years immediately preceding the delivery of the statement to the Registrar; and

(b) assets and liabilities, deal with the assets and liabilities of the body corporate as at the last date to which the accounts of the body corporate were made up.

(3) If the other body corporate has subsidiaries, the report referred to the sub-clause (1) of this clause shall as regards-

(a) profits and losses, deal separately with the other body corporate's profits or losses as provided by the sub-clause and, in addition, deal either-

(i) as a whole with the combined profits or losses of its subsidiaries, so far as they concern members of the other body corporate; or

(ii) individually with the profits or losses of each subsidiary, so far as they concern members of the body corporate;

(b) instead of dealing separately with the other body corporate's profits or loss under para (a) deal as a whole with the profits or losses of the other body

corporate and, so far as they concern members of the other; body corporate, with the combined profits or losses of its subsidiaries and;

(c) so far as regards assets and liabilities, deal separately with the other body corporate's assets and liabilities as provided by sub-clause (1) and in addition deal either–

(i) as a whole with the combined assets and liabilities of its subsidiaries, with or without the other body corporate's assets and liabilities; or

(ii) individually with the assets and liabilities of each subsidiary;

(d) indicate, as respects the assets and liabilities of the subsidiaries, the allowance to be made for person other than members of the company.

SCHEDULE-V

PART-III

PROVISION APPLYING TO PARTS I AND II OF THIS SCHEDULE

1. In this Schedule, the expression "vendor" includes a vendor as defined in Part III of the Schedule II to the Ordinance and the expression "financial year" has the same meaning as assigned to that Part of the Schedule.

2. If in the case of a business which has been carried on, or of a body corporate which has been carrying on business, for loss than five financial year, the accounts of the business or body corporate have only been made up in respect of any period less than five years e, g, four such years, three such years, two such years or one year, Part II of this Schedule shall have effect as if references to four financial years, three financial years, two financial years, or one financial year, as the case may be, were substituted for references to five financial years.

3. Any report required by Part II of this Scheduled shall either–

(a) indicate by way of not any adjustments as respect the figures of any profits or losses or assets and liabilities dealt with by the report which appear to the persons making the report necessary; or

(b) made those adjustment, and indicate that adjustments have been made.

4. Any report by accountants required by Part II of this Schedule-

(a) shall be made by accountants qualified under the Company Act, 1994 for appointment as auditors of a company; and

(b) shall not be made by any accountant who is an officer or servant, or a partner the employment of an officer or servant, of the company, or of the company's subsidiary or holding company or of a subsidiary of the company's subsidiary or holding company or of a subsidiary of the company's holding company.

Explanation : For the purposes of this clause the expression "Officer" shall include a proposed director but not an auditor.

SCHEDULE-VI

(*See* sections 6 and 226)

MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES

Ist.— The name of the company is "e.g. The Eastern Steam Packet Company, Limited".

2nd.— The registered office of the company shall be situated in Bangladesh.

3rd.— The objects for which he company is established are "as follows:–passengers, and goods in ships or boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above object".

4th.— The liability of the members is limited.

5th.— The share capital of the company is two hundred thousand taka divided into one thousand shares of two hundred taka each.

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 and here under subscribe to the memorandum.

Names, addresses, nationality descriptions of subscribers.	Number of shares taken by each subscriber. (in figures and words)	Signatures.
1.	.. ..	
2.	.. ..	
3.	.. ..	
4.	.. ..	
5.	.. ..	
6.	.. ..	
7.	.. ..	
	Total shares taken.....	

Name, addresses and signatures of witnesses attesting the above signature

1. Dated.....

2. Dated.....

SCHEDULE-VII

(see section 7 and 226)

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

Memorandum of Association

Ist.— The name of company is .. .. e.g. ("The Mutual (Dhaka) Marine Association. Limited".)

2nd.— The registered office of the company shall be situated in Bangladesh.

3rd.— The object for which he company is establish are "The mutual insurance of ships to belonging to members of the company, and the doing of all such other thing as are incidental or conducive to the attainment of the above object".

4th.— The liability of the members is limited.

5th.— Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and the costs, charges and expenses of winding up and for the adjustment of the right of the contributories among themselves, such amount as may be required not exceeding one hundred taka.

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;

Name, addresses, nationality, descriptions and signatures of the subscribers.

1. .. ..
2. .. ..
3. .. ..
4. .. ..
5. .. ..
6. .. ..

7. Name addresses and signatures of witnesses attesting the above signatures

1. .. .. Dated.....
2. .. .. Dated.....

ARTICLES OF ASSOCIATION OF A CCOMPANY (TO BE ATTACHED WITH THE MEMORANDUM OF ASSOCIATION

Number of Members

1. The company for the purpose of registration is declared to consist of five hundred members.

2. The directors, hereinafter mentioned, may, whenever the business or the association requires it, register an increase of members.

Definition of members

3. Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

General Meeting

4. The first general meeting shall be held at such time not being less than one month and not more than three months after the incorporation of the company, and at such place, as the directors may determine.

5. A general meeting shall be held once in every year at such time, not being more than fifteen months after the holding of the last preceding general meeting, and place as may be prescribed by the company in general meeting or, in default, at such time and in the month following that in which the anniversary of the company's incorporation occurs, and at such place, as the directors shall appoint in default of a general meeting being so held, a general meeting shall be held in the month next following, and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the directors.

6. The above mentioned general meeting shall be called ordinary meetings all other general meetings shall be called extraordinary.

7. The directors may, whenever think fit, and shall, on a requisition made in writing by one tenth or more members, call an extraordinary general meeting.

8. Any requisition made by the members must state the object of the meeting proposed to be called, and must be signed by the requisitionists and deposited at the registered office of the company.

9. On receipt of the requisition, the directors shall forthwith proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited failing which the requisitionists may themselves call a meeting.

Proceeding at General Meetings

10. Fourteen day's notice at the least, specifying the place, the day and the hour of meeting, and in case of special business the general nature of the business, shall be given to the members in a manner hereinafter mentioned or in such other manner if any

as may be prescribed by the company in general meeting, but the non-receipt of such a notice by any member shall not invalidate the proceedings at any general meeting.

11. All business shall be deemed special that is transacted at any extraordinary meeting and all that is transacted at an ordinary meeting with the exception of the consideration of the accounts, balance-sheets and the ordinary reports of the directors and auditors the election of directors and other officers in place of those retiring by relation and the fixing of remuneration of the auditors shall be deemed ordinary.

12. No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of members is present at the commencement of the business. If the members of the company at the time of the meeting do not exceed ten in number, the quorum shall be five and if they exceed ten, there shall be added to the above quorum one for every five additional members with the limitation so that no quorum shall in any case exceed ten.

13. If within one hour from the time appointed for the meeting quorum of members is not present, the meeting, if called on the requisition of the members, shall be dissolved; in any other case, it shall stand adjourned to the same day in the following week at the same time and place ; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned sine die.

14. The chairman of the Board of Directors shall preside as chairman at every general meeting of the company.

15. If the chairman at any meeting is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of that meeting.

16. The chairman may, with the consent of the meeting, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

17. At any general meeting unless a poll is demanded by at least three members, a declaration by the chairman that a resolution has been carried and an entry to that effect in the book of proceedings of the company, shall be conclusive evidence of the fact, without proof of the number of proportion of the votes recorded in favour of or against the resolution.

18. If a poll is demanded by at least three members the same shall be taken in such manner as the chairman direct and the result of the poll shall be deemed to be the resolution of the meeting at which the poll as demanded.

Votes of members

19. Every member shall have one vote and no more.

20. If any member is a lunatic or idiot, he may vote through the committee appointed for this purpose or through other legal guardian.

21. No member shall be entitled to vote at any meeting unless all moneys due from him to the company have been paid,.

22. On a poll, votes may be given either personally or by proxy:

Provided that a proxy shall be appointed in writing under the hand of the appointor and if the appointor is a body corporate, under its common seal.

Provided further that a company shall not vote by proxy so long there is a resolution of its directors in accordance with the provisions of section 86 of the companies Act, 1994.

23.(1) No person shall act as a proxy unless he is appointed to act it the meeting as such.

(2) The instrument appointing a proxy shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.

24. Any instrument appointing a proxy shall be in the following form:

.....**Company, Limited.**

I,.....of..... being

a member of the ..... Company, Limited. hereby appoint as my proxy, to vote for me and on my behalf at the ordinary extraordinary general meeting of the company, to be held on the day of..... and at any adjournment thereof.

Signed this..... day of .....

Directors

25. The number of the directors and the names of the first director shall be determined by the subscribers of the memorandum of association.

26. Until directors are appointed the subscribers of the memorandum of association shall for all the purposes of the companies act. 1994 be deemed to be Directors.

Powers of Directors

27. The business of the company shall be managed by the director who may exercise all such powers of the company as are not by the Companies Act, 1994, or by these articles, required to be exercised by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

Election of Directors

28. The directors shall be elected annually by the company in general meeting.

Business of Company

(Here insert rules as to mode in which business of insurance is to be conducted).

29. Auditors shall be appointed and their duties regulated in accordance with sections 210 and 213 of the Companies Act, 1994 and for this purpose the said sections shall have effect as if the word "members were substituted for "shareholders, and as if "first general meeting" were substituted for "statutory meeting".

Notice

30. A notice may be given by the company to any member either personally, or by sending it by post to him to his registered address.

32. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and unless the contrary is proved, and the same shall also be deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Name, addresses and descriptions of subscribers.

1.	A.	B.	of
2.	D.	D.	of
3.	E.	F.	of
4.	G.	H.	of
5.	I.	J.	of
6.	K.	L.	of
7.	M.	N.	of

Dated the .....day of.....19.....

Witness to the above signatures.

S. Y. of

Dated the .....day of.....19 .....

SCHEDULE-VIII

(see sections 7 and 226)

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

Memorandum of Association

1st. The name of the Company is..... Company Limited, e.g. ("The Snowy Range Hotel Company, Limited").

2nd. The registered office of the company shall be situated in Bangladesh.

3rd. The objects for which the company is established are as follows:-e.g. providing facilities in the Snowy Range, by providing hotels and conveyances by sea and by land for the accommodation of travellers and the doing of all such other things as are incidental or conducive to the attainment of the above objects".

4th. The liability of the member limited.

5th. Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company, contracted before he ceases to be a member, and the cost, charges and expenses of winding up the same and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding fifty taka 50 e.g. (fifty taka).

6th. The share capital of the company is.....(e.g. five hundred thousand taka, divided into..... e.g., five thousand shares of ..... (e.g., one hundred) taka each.

We the several persons whose names and addresses are set forth below signed the documents and we 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:

Names, Addresses,	Nationality and descriptions of subscribers.	Number of shares taken
1.		
2.		
3.		
4.		
5.		
6.		
7.		

Dated the .....day of 19.....

Witness to the above signatures.

Total shares taken.

Name, addresses and signature of the witnesses.

Total shares taken.....

1.

2.

Dated the..... day of.....

FORM OF ARTICLES OF ASSOCIATION OF A COMPANY TO BE APPENDED WITH THE PRECEDING MEMORANDUM

1. The share capital of the company is .....e.g. (five hundred thousand) taka divided into (five thousand) shares of (one hundred) taka each.

2. The directors may, with the sanction of the company in general meeting, reduce the amount of shares in the company.

3. The directors may, with the sanction of the company in general meeting cancel any share belonging to the company.

4. All the Regulations of Schedule I of the Companies Act, 1994 shall be deemed to be incorporated with these articles and to apply the company.

Names, Address, Nationality and Description and Signatures of subscribers:

1. .....
2. .....
3. .....
4. .....
5. .....
6. .....
7. .....

Dated, the ..... day of .....19.....

Names, addresses and signatures of attesting witnesses.

1.
2.

Dated the .....day of .....: 19.....

SCHEDULE-IX

(see section 8 and 226)

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

Memorandum of Association

Ist.— The name of the company is .....Company, e.g. "The Patent Stereotype Company".

2nd.— The registered office of the company shall be situated in Bangladesh.

3rd.— The objects for which the company are as follows, e. g "the working of a patent method of founding and casting stereotype plates of which method P.O of Dhaka, is the sole patentee".

4th.— The share capital of the company shall consist of one lack taka divided into ten thousand shares of the each.

We, the several persons, whose names are subscribed and addresses are set for the below signed this documents and we 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:-

Serial No.	Names.	Addresses, nationality and descriptions of subscribers	Number of shares taken by each subscriber. *(In figures and in words)*
1.		---	----
2.		---	---
3.		---	---
4.		---	---
5.		---	---
6.		---	---
7.		---	---
8.		---	---

		Total Share taken	-------

Dated the ..... day of.....19.....

Name, addresses, and signatures of attesting witnesses.

1.

2.

Dated the.....day of..... 19.....

FORM OF ARTICLES OF ASSOCIATION OF A COMPANY TO BE APPENDED WITH THE PRECEDING MEMORANDUM

1. The share capital of the company is one lac taka divided into ten thousand shares of ten taka each.

2. All the regulations of Schedule I of the Companies, Act, 1994, shall be deemed to be incorporated in these articles, and to apply to the company.

Names, address, nationality & descriptions and signatures of subscribers.

1.

2.

3.

4.

5.

6.

7.

Dated, the ..... day of.....20.....

Names, addresses and signatures of attesting witnesses.

1.

2.

Dated, the .....day of..... 20.....

SCHEDULE-X

ANNUAL SUMMARY OF SHARE CAPITAL AND LIST OF SHAREHOLDERS/DIRECTORS AS REQUIRED BY PART I OF THE COMPANIES ACT, 1994

[*See* section 36(1)]

Summary of share capital and share of company limited, made up to the .....day of ..... 19..... (being the day of the first general meeting 19.....).

Nominal share capital Taka.....divided into shares of Taka.....each shares of taka..... each.

1. Total number of shares taken up to the day of 19 which (number must agree with the total shown in the list as held by existing members).
2. Number of shares issued subject to payment wholly in cash.....
3. Number of shares issued as fully paid-up otherwise than in cash.....
3. Number of shares issued as fully paid-up otherwise than in cash.....

4 (a). Number of shares issued as partly paid-up to the extent of per share otherwise than in cash.....

(b) Extent payment to be made per share otherwise than in cash.....

5. There has been called up on each of shares..... Taka
   of.....class
6. There has been called up on each shares... ..... Taka
   of ..... clash.
7. There has been called up on each of shares ..... Taka
   of ..... class
8. Total amount received on calls, ... Taka
9.(a) Total amount received along with applications for shares Taka
   (b) Numbers of shares allotted on application ... . Taka
10. Total amount, if any, agreed to be considered as paid on shares which have been issued as fully paid up otherwise than in cash ..... Taka
11. Total amount, if any, agreed to be considered as paid on shares which have been issued as partly paid up to the extent of per share ..... Taka
12. Total amount of calls unpaid ... ... Taka.
13. Total amount if any, of sums paid or allowed in respected of shares or debentures since date of last summary.. ... .
    (a) as commission..... Taka.
    (b) as discount ..... Taka.

14. (a) Total Number of shares forfeited if any ... . Taka
(b) Total money paid thereon ... ... Taka
15. Total amount of shares and stock for which share warrants are outstanding.. ... . Taka
16. Total amount of share-warrants issued and surrendered respectively since date of last summary..... Taka
17. Number of shares or amount of stock comprised in each share-warrant ... ... Taka
18. Total amount of debt due from the company in respect of all mortgages and shares which are required to be registered with the Registrar under the companies Act, 1994 .. .. Taka

Notes :-

*(a) When there are shares of different kinds or amounts (e.g. Preference and Ordinary of Taka 200 or Taka 100) state the numbers and nominal values separately.

(b) Where various amounts have been called or there are shares of different kinds, state them separately.

(c) Include separately what has been received, or forfeited, as well as on existing shares.

(d) State the aggregate number of share forfeited.

19. List of persons holding shares in.....company, Limited, on the .....day of..... 19..... and of persons who have held shares therein at any time since the date of the last return, showing their names and addresses and an account of the shares so held.

Folio in register/ ledger containing Particulars.	Names, addresses and occupations			
	Name in full	Father's Name	Address and nationality	Occupation of caste

Accounts of Shares

Number of shares held by existing members at the date return.	Particulars of shares transferred since the date of the last return by persons who are still members	Particulars of shares transferred since the date of the last return by persons who have ceased to be members.
	Number Date of registration of Transfer.	Number Date of registration of Transfer.

20. Names and addresses of the persons who are the directors of the .....Limited on the..... day of .....19.....

Names	Addresses

21. Names and addresses of the persons who are the managing director managing agents or managers and auditors of the ..... Limited on the.....day ..... 20.....

Name	Address

Certificate

22. I, ...do hereby certify that- .....

(a) the above list and summary truly and correctly states the facts as they stood on the.....day of .....20.....

(b) the company has not since the date of its incorporation last return issued any invitation to the public to subscribe for any shares or debentures of the company (in case of private Company); and

(c) the excess of the number of its members beyond fifty shown in the list are the persons who are in the employment of the company. (in case of private Company).

Signature.....

(State whether managing director/ manager/secretary)

(Strike out the portions which do not apply).

SCHEDULE - XI

(See section 185)

PART-1 BALANCE SHEET

(The balance sheet of a company shall be either in horizontal or vertical form)

A. HORIZONTAL FORM

Balance sheet of M/S.....Limited as at .....19.....

Instruction in accordance with which liabilities should be made out	Liabilities		Assets		Instructions in accordance with which assets should be made out
	Figure for the previous year	Figure for the current year	Figure for the previous year	Figure for the current year	
	Tk.	Tk.	Tk.	Tk.	
1. Term of redemption or conversion, if any, of any redeemable preference to be stated each together with earliest date of redemption or conversion	*Share Capital :* Authorised ..... Shares of Tk. ... each.		*Fixed Assets*		(A) Separate disclosure should be made for assets acquired on hire purchase plans.
2. Particulars of any option on un-issued share capital to be specified.	issued total number of shares ..... make each shares Total value (distinguishing between the various classes of capital and stating the particulars specified below in respects of each class) shares of Tk. .... each. (This column respect of each class)				(B) Under each head of fixed assets the original cost and the additions thereto and deductions therefrom during the year and the total depreciation written off or provided up to the end of the year to be stated
3.			Distinguishing as far as possible between expenditure upon (a) goodwill, (b) land, (c) building,		

(d) leaseholds. (e) railway sidings (f) plant and machinery. (g) furniture and fittings. (h) development of property. (i) patents. trade marks and designs. (j) Vehicles. etc.

4. .....

(c) Where the original cost aforesaid and additions and deductions thereto, relates to any fixed asset which has been acquired from a country outside Bangladesh, and in consequence of a change in the rate of exchange at anytime after the acquisition of such asset, there has been an increase or reduction in the liability of the company, as expressed in Bangladesh currency for making payment towards the whole or a part of the cost of the asset or for repayment of the whole or a part of moneys borrowed by the company from any person, directly or indirectly in any foreign currency specifically for the purpose of acquiring the asset being in either case the liability existing immediately before the date on which the change in the rate of exchange takes effect, the amount by which the liability is so increased or reduced during the year shall be added to, or as the case may be, deducted from the cost and the

Instruction in accordance with which liabilities should be made out	Liabilities		Assets		Instructions in accordance with which assets should be made out
	Figure for the previous year	Figure for the current year	Figure for the previous year	Figure for the current year	
	Tk.	Tk.	Tk.	Tk.	
					amount arrived at after such addition or deduction shall be taken to the cost of the fixed asset.
5. Particulars of the different classes of preference share be given	Subscribed (distinguishing between the various classes of capital and stating the particulars specified below in respect of each class).				Where sums have been written off on a reduction of capital or a revaluation of assets, every balance sheet (After the first balance sheet) subsequent to the reduction or revaluation shall show the reduced figure and with the date of the reduction in place of the original cost.
6. In the case of subsidiary companies the number of shares held by the holding company as well as by the ultimate holding company and its subsidiaries must be separately stated. The auditor is not required to certify the correctness of such share holding as certified by the management	.....shares of Tk. ..... each. Tk. ..... called up of the above shares..... shares are allotted as fully paid up pursuant to a contract without payments. being received in cash				
7. Specify the source from which bonus shares are	Of the above shares are allotted as fully paid up by				Each balance sheet for the first five years subsequent to the date of the

issued e.g. capitalisation of profits or reserves of from share Premium Account.

way of the bonus shares.

8. .....

Less: Calls unpaid :

(i) by managing agent and where managing agent is a firm, by the partners thereof and where the managing agent is a private company, by the directors or members of that company.

(ii) By directors.

(iii) By others.

9. Any capital profit on the issue of forfeited shares should be transferred to capital reserve.

Add: Forfeited shares (amount originally paid up).

10. Additions and deduction since last balance sheet to be shown under each of the specified heads.

The word fund in relation to any "Reserve" should be used only where such Reserve is specifically represented by earmarked investments.

Reserved and surplus :

(1) Capital Reserve.

(2) Capital Redemption Reserve.

(3) Share Premium Account.

(4) Other Reserves specifying the nature of each Reserve and the amounts is respects thereof.

Investments: Showing nature of investments and mode of valuation, for example cost or market value of and distinguishing between-

(1) Investment in Government or trust securities.

(2) Investment in shares, debentures or bonds (showing separately shares fully paid and

reduction, shall show also amount of the reduction made.

Similarly, where sums have been added by writing up the assets, every balance sheet subsequent to such writing up shall show the increased figures with the date of increase in place of the original cost. Each balance sheet for the first five years subsequent to the date of writing up shall also how the amount of increase made.

(D) Aggregate book value of company's quoted investments and also the market value there shall be shown.

Aggregate book value of company's unquoted investments shall also be shown.

A Statement of investment should be annexed to the balance sheet showing the name of the bodies corporate (indicating separately the names of companies under the same management) in whose shares or

Instruction in accordance with which liabilities should be made out	Liabilities		Assets		Instructions in accordance with which assets should be made out
	Figure for the previous year	Figure for the current year	Figure for the previous year	Figure for the current year	
	Tk.	Tk.	Tk.	Tk.	
	Less: Debit Balance in profit and loss account (if any). (5) Balance in Profit & Loss account, after providing for proposed allocations, namely-Dividend, Bonus and Reserves. (6) Proposed addition to Reserve (7) Sinking Fund.		partly paid up and also distinguishing the different classes of the shares and showing also in similar details investment in shares, debentures of bonds subsidiary companies). (3) Investment in immovable properties (4) Investment in the capital of partnership firms. *Current Assets,* *Loans and Advances :* (a) Current Assets: (1) Interest accrued on investments. (2) Loose Tools. (3) Inventories of Store & Spare parts, Raw Materials, Stock in trade, Work in progress	debentures investments have been made including all investments, whether existing or not, made subsequent to the date at which the previous balance sheet was made out and the nature and extent of the investments so made in each body corporate, provided that in the case of an investment company, that is to say a company whose principal business is the acquisition of shares, stock, debentures or other securities, it shall be sufficient if the statements existing on the date as at which the balance sheet has been made out. In regard to the investments in the capital of partnership firms, the names of the firms (with the names of all their partners total capital and shares of each partner) shall be given in the statement.	
11. Loans from directors, managing agents, managers	Long Term Secured Loans: (1) Debentures.				(E) Mode of valuation of inventories to be stated :-	

should be shown separately.

Terms of redemption or conversion, if any, of debentures issued to be stated together with earliest date of redemption or conversion.

Where any of the company's debentures are held by a nominee or a trustee of the company the Nominal amount of the debentures and the amount at which they are stated in the books of the company shall be stated.

Loans form director, managing agents and managers should be shown separately. When loans have been guaranteed by managing agents, managers or directors, a mention thereof shall also be made with the aggregate amount of such loans under each head.

Short-term Loans will include those which are due

(2) Loans and Advances from Banks.

(3) Loans and Advances from subsidiaries.

(4) Other Loans and Advances.

Loans Term Un-secured Loans-

(1) Fixed Deposits.

(2) Loans and advances from subsidiaries.

(3) Other loans and advances

(a) From Banks.

(b) From others

Current liabilities and provisions:

(1) Inventories should be valued at the lower of historical cost and not realisable value.

Historical cost of inventories is the aggregate of cost of purchased cost of conversion and other costs incurred in bringing the inventories to their present location and condition.

(2) Costs of purchase companies the purchase price including import duties and other purchase taxes, transport and handling cost and any other directly attributable cost of acquisition less trade discounts, rebates and subsidies. Costs of conversions are those costs, in addition to the cost of purchase that relate to bringing the inventories to their present location and condition.

(3) The historical cost of manufactured inventories should include a systematic allocation of those production overhead costs that relate to putting the inventories in their present location and condition.

Instruction in accordance with which liabilities should be made out	Liabilities		Assets		Instructions in accordance with which assets should be made out
	Figure for the previous year	Figure for the current year	Figure for the previous year	Figure for the current year	
	Tk.	Tk.	Tk.	Tk.	
for not more than one year as on the date of the balance sheet. Nature of security, if any, for short term loans to be stated. Indication portion repayable within one year	(A) Current Liabilities- (1) Short-term Loans and Advances : (a) From Banks. (b) From others :				
12. Dividends stated to be in respect of the period covered by the financial statements and that are proposed or declared after the balance sheet date but before approval of the financial statements should be either adjusted to or disclosed.	(2) Current posting of long term liabilities. (3) Sundry Creditors- (a) For goods (b) For services (4) Subsidiary Companies. (5) Advance payment. (6) Unclaimed Dividend. (7) Interest on Loans- (a) Accrued and due. (b) Accrued but not due. (8) Other liabilities (if any) (B) Provisions- (9) Provision for Taxation.				Allocation of fixed production overhead to the cost of conversion should be based on the capacity of the facilities. If fixed production overhead has been entirely or substantially excluded from the valuation of inventories on the grounds that it does not directly relate in their present location and condition, the fact should be disclosed. (4) Overheads other than production overheads should be included as part of inventory cost only to the extent that they clearly relate to putting the inventories in their present location and conditions. 5. Exceptional amounts of wasted material, labour or other expenses should not be included as part of inventory cost. 6. Except as set out in paragraph

(10) Proposed Dividends.

(11) For contingencies.

(12) For provident Fund Scheme.

(13) For Insurance, pension and similar staff benefit schemes.

(14) Other provisions.

Following foot-note to the balance sheet may be added to show separately--

(1) Claims against the company not acknowledged as debts.

(2) Uncalled liabilities on shares partly paid

(3) Arrears of fixed commulative dividends.

(4) Estimated amount of contracts remaining to be executed on capital account and not provided for.

7 the historical cost of inventories, should be accounted for using the FIFO formula or a weigted average cost formula

7. Inventories of item that are not ordinarily interchangeable or goods manufactured and segregated for specific project should be accounted for by using specific identification of their individual costs.

8. The LIFO or bose stock formulas many be used provided that their disclosure of the difference between the amounts of inventories as shown in the balance sheet and either-

(a) The lower of the amount arrived at in accordance with paragraph 6 and net realisable value or

(b) The lower of the current cost at the balance sheet date and not realisable value.

9. Techniques, such as , the standard cost method of valuing products may be used

Instruction in accordance with which liabilities should be made out	Liabilities		Assets		Instructions in accordance with which assets should be made out
	Figure for the previous year	Figure for the current year	Figure for the previous year	Figure for the current year	
	Tk.	Tk.	Tk.	Tk.	

13. The amount of a contingent loss should be accrued by a charge to the profit and loss account if–

(a) it is probable that future events will confirm that, after taking into account any related probable recovery, an asset has been impaired or a liability incurred at the balance sheet date, and

(b) a reasonable estimate of the amount of the resulting loss can be made.

14. The period for which the dividends are in arrears or if there is more than one class of shares the dividends on each such class are in arrears, shall be stated. The amount shall be stated before deduction income tax except that in the case of tax free dividends the amount shall be shown free of income tax

(5) Other money for which the company is contingently liable.

(4) Sundry Debtors :

(a) Debts outstanding for a period exceeding six months.

(b) Other debts less provision.

for convenience if they approximate consistently the results that would be obtained in accordance with paragraph 10.

10. Net realisable value is the estimated selling price in the ordinary course of business less costs of completion and less costs necessarily to be incurred in order to make the sale.

11. The net realisable value of the quantity of inventory in the value which is held to satisfy firm sales contracts price. If The sales contracts are or less that the inventor quantities held, not realisable value for the excess should be based on general market prices.

12. Estimate of not realisable value should be based not on temporary fluctuations of price of cost but on the most reliable evidence available at the time

and the fact that it is so shown shall be stated.

estimated are made as to what the inventories are expected to realise.

13. Normal quantities of materials and other supplies held for in corporation in the production of goods should not be wirtten down below historical cost if they will be incorporated are expected to be realised at or above historical cost.

(F) In regard to sundry debtors the following particulars shall be given separately:—

(i) debts considered good and in respect of which the company is fully secured.

(ii) debts considered good for which the company holds no security other than the debtors personal security and

(iii) debts considered doubtful or bad.

(iv) Debts due by directors or other officers of the company or any of them either severally or jointly with any other person or debts due by firms or private companies respectively in which any director is a

Instruction in accordance with which liabilities should be made out	Liabilities		Assets		Instructions in accordance with which assets should be made out
	Figure for the previous year	Figure for the current year	Figure for the previous year	Figure for the current year	
	Tk.	Tk.	Tk.	Tk.	
					partner or a director or a member to be separately stated.
					(v) Debts due by companies under the same management to be disclosed with the names of the companies.
					(vi) The Maximum amount due by directors or other officers of the company at any time during the year to be shown by way of a note.
					(G) The provision to be shown under this head should not exceed the amount of debts stated to be considered doubtful or bad any surplus of such provision, if already created should be shown at every closing under "Reserves and Surplus" (in the liabilities side under a separate sub-head "Reserve for Doubtful or Bad Debts"
			(5) Cash :		(H) Cash which is not immediately available for use, for example balances frozen in foreign bank by
			(a) in hand		
			(b) in bank		

exchange restriction should be disclosed.

The following particular should be given separately :—

(i) The balance lying with scheduled or Nationalised Banks on current accounts call accounts and deposit accounts.

(ii) The names of the bankers other than Scheduled or Nationalised Banks and the balance lying with each such banker on current accounts call and the maximum amount outstanding at any time during the year from each such banker.

(iii) Nature of the interest, if any, of any director or his relative in each of the banks other than Scheduled or Nationallised Banks referred to in (ii) above.

(I) Classification shall be made as far as possible, between Long Term and Short Term Loans and Advances.

(6) Loans and Advances :

(a) Advances and Loans to in subsidiaries.

(b) Advances and Loans

(J) Instructions regarding "Sundry Debtors apply to Loans and Advance" also.

(k) Expenditure under this head, which has not been capitalised shall be

Instruction in accordance with which liabilities should be made out	Liabilities		Assets		Instructions in accordance with which assets should be made out
	Figure for the previous year	Figure for the current year	Figure for the previous year	Figure for the current year	
	Tk.	Tk.	Tk.	Tk.	

to partnership firms in which the company or any or its subsidiaries is a partner.

8. Bills of Exchange.

(8) Balances with Agents.

(9) Advances recoverable in cash or in kind or for value to be received *e.g.* Rates, taxes, Insurance, etc.

10. Balance with Customs Port Trust, etc. where payable on (demend).

Miscellaneous Expenditures (to the extent not written off or adjusted) :

(1) Preliminary expenses.

(2) Expenses including commission or brokery as on under writing or

written off over the years on which the benefits of such expenditure is expected to accrue, or on some other suitable basis

(L) Development cost of project may be deferred to future periods if all the following criteria are satisfied:

(i) the product or process is clearly defined and the costs attributable to the product or process can be separately identified.

(ii) the technical feasibility of the product or process has been demonstrated.

(iii) the management of the enterprise has indicated its intention to produce and market or use the product or process.

(iv) there is a clear indication of a future market for the product or process or if it is to be used internally rather sold its usefulness to the enterprise can be demonstrated, and

subscription of shares or debentures.

(3) Discount allowed on the issue shares or debentures.

(4) Interest paid out of capital during construction (also stating the rate of interest).

(5) Development expenditure not adjusted.

(6) Other items

(Specifying nature).

Profit & Loss Account

(v) adequate resource exist or are reasonably expected to be available to complete the project and market the product or process.

(M) The deferral of development cost of a project under the above criteria should be limited to the amount, that taken together with further development cost, related production costs and selling and administrative cost directly incurred in marketing the product, can reasonably be expected to recovered from related future revenue.

(N) If development costs of a project are deferred, they should be allocated on systematic basis to future accounting periods by reference either to the sale or use of the product or process or to the time period over which the product or process is expected to be sold or used.

(O) Where the criteria stated above which previously justified deferral of the costs, no longer apply the unamortised balance should be charged as an expense immediately.

(P) Show are the debit balance of Profit and Loss Account carried forward after deduction of uncommitted reserves, if any.

NOTES :

General Instruction for preparation of balance sheet.

(a) All material information should be disclosed that is necessary to make the balance sheet clear and understandable.

(b) Any restriction on the title to assets should be clearly stated.

(c) The balance sheet shall include a brief description of the nature of the activities of the enterprise.

(d) Going concern, consistency and accrual are fundamental accounting assumptions which shall be followed in the preparation of balance sheet. If a fundamental accounting assumption is not followed that fact should be disclosed together with reasons.

(e) Balance sheet shall include clear and concise disclosure of all significant accounting policies which have been used.

(f) A change in an accounting policy that has a material effect in the current period or may have a material effect in subsequent periods should be disclosed together with the reasons. The effect of the change should, if material, be disclosed and quantified.

(g) A statement of changes in financial position shall be included as an integral part of the financial statements, and shall be presented for each period for which the profit and loss account is prepared.

(h) Assets and liabilities should be adjusted for events occurring after the balance sheet date that provide additional evidence to assist with the estimation of amounts relating to conditions existing at the balance sheet date or that indicate that the going concern assumption in relation to the whole or part of the enterprise is not appropriate. Assets and liabilities should not be adjusted for, but disclosure should be made of, those events occurring after the balance sheet date that do not effect the condition of assets or liabilities at the balance sheet date but are of such importance that non-disclosure would after the ability of the users of the financial statements to make proper evaluations and decisions.

(i) Dividends declared by subsidiary companies after the date of the balance sheet should not be included unless they are in respect of periods which closed on or before the date of the balance sheet.

(j) Any reference to benefits expected from contracts to the extent not executed shall not be made in the balance sheet but shall be made in they are in the Boards Report.

(k) Current accounts with directors, managing agents, managers, whether they are in credit or debit shall be shown separately.

(l) The information required to be given under any of the items or sub-items in this form, if it cannot be conveniently included in the balance sheet itself, shall be furnished in a separate schedule or schedules to be annexed to and to form part of the balance sheet. This recommended when items are numerous.

(B. VERTICAL FORM)

Name of the Company.....

Balance sheet as at.....

Sl. No.	Subject Matter	Schedule	Figures as at the end of current financial year	Figures as at the end of previous financial year.
1	2	3	4	5

I. Sources of funds :

1. Shareholders funds.
   (a) Capital
   (b) Reserves and surplus.
2. Loan funds :
   (a) Secured loans
   (b) Unsecured loans
   Total :

II. Application of funds :

(1) Fixed assets :
   (a) Gross block
   (b) Less depreciation
   (c) Net block
   (2) Investments

(3) Current assets,
   loans and advances :
   (a) Inventories
   (b) Sundry debtors
   (c) Cash in Bank
   (d) Other current assets.
   (e) Loans and advances.

Less :

Current liabilities and provisions :
   (a) Liabilities
   (b) Provisions

Net current assets

(4) Miscellaneous
   (a) expenditure to the extent not written off or adjusted
   (b) profit and loss account

Total :

NOTES :

1. Details under each of the above items shall be given in separate schedules. The schedules shall incorporate all the information required to be given under A-Horizontal Form read with notes containing general instruction for preparation of balance sheet.
2. The schedules, referred to above, accounting policies and explanatory notes that may be attached shall form an integral part of the balance sheet.
3. The figures in the balance sheet may be rounded off to the nearest '000' or '00' as may be convenient or may be expressed in terms of decimals of thousands.
4. A footnote to the balance sheet may be added to show separated contingent liabilities.

SCHEDULE-XI

PART-II

Requirements as to Profit and Loss Account

1. The provisions of this Part shall apply to the income and expenditure account referred to in sub-section (1) of Section 185 of the Companies Act, 1994 in like manner as they apply to a profit and loss account, but subject to the modification of references as specified in that sub-section.

2. The profit and loss account—

(a) shall so made out as clearly to disclose the result of the working of the company during the period covered by the account ; and

(b) shall disclose every material feature, including credits or receipts and debits or expenses in respect of non-requiring transactions or transaction of an exceptional nature.

3. The profit and loss account shall set out the various items relating to the income and expenditure of the company arranged under most convenient heads; and in particular, shall disclose the following information in respect of the period covered by the account :--

(a) the turn over, that is the aggregate amount for which sales are effected by the company, giving the amount of sales in respect of each class of goods dealt with by the company, and indicating the quantities of such sales for each class separately.

(b) commission paid to selling agents.

(c) brokerage and discount on sales, other than the usual trade discount.

(d) in the case of manufacturing companies—

(i) The value of the raw materials consumed, giving item-wise breakup and indicating the quantities thereof. In this breakup, as far as possible, all important basic raw materials shall be shown as separate items. The intermediates or components produced from other manufacturers may, if their list is too large to be included in the breakup, be grouped under suitable headings without mentioning the quantities, provided all those items which in value individually account for 100% or more of the total value of the raw materials consumed shall be shown as separate and distinct items with quantities thereof in the breakup.

(ii) The opening and closing stocks of goods produced, giving breakup in respect of each class of goods and indicating the quantities thereof.

(c) In the case of trading companies, the purchase made and the opening and closing stock, giving breakup in respect of each class of traded in by the company and indicating the quantities thereof.

(f) In the case of companies rendering or supplying services, the gross income derived from services rendered or supplied.

(g) In the case of a company, wills false under more than one of the categories mentioned in (d) and (e) above, it shall be sufficient compliance with requirements here in if the total amounts are shown in respect of the opening and closing stocks, purchases, sales and consumption of raw materials with value and quantitative breakup and the gross income from services rendered and shown.

(h) In the case of other companies, the gross income derived under different heads.

NOTES :

1. The quantities of raw materials, purchases, stocks and turnover, shall be expressed in Quantitative denominations in which these are normally purchased or sold in the market.
2. For the purpose of items (ii) (a), (ii) and (b), (ii) (d), the items for which the company is holding separate industrial licences, shall be treated as separate class of goods, but where a company has more than one industrial licence for production of the same items at different places for expansion of the licenced capacity, the item covered by all such licences shall be treated as one class. In the case of trading companies, the imported items shall be classified in accordance with the classification adopted by the Chief Controller of Imports and Exports in granting the import licences.
3. In giving the breakup of purchase, stocks and turnover, items like spare parts and accessories, the list of which is not large to be included in the breakup may be grouped under suitable headings without quantities, provided all these items, which value individually account for 10% or more of the total the purchases, stocks, or turnover, as the case may be, are shown as separate and distinct items with quantities thereof in the breakup.

(i) In the case of all concerns having work-in-progress, the amounts for which works such works have been completed at the commencement and at the end of the accounting period.

(j) The amount provided for depreciation, renewals or diminution in value of fixed assets. If such provision is not made by means of depreciation charge, the method adopted for making such provision.

If such provision is not made for depreciation, the fact that no provision has been made shall be stated and the quantum of arrears of depreciation computed in accordance with the law shall be disclosed by way of a note.

(k) The amount of interest on the company's debentures and other fixed loans, that is to say, loans for fixed period stating separately the amount of interest, if any, paid or payable to the managing director, the managing agent and the manager, if any.

(l) The amount of charge for income tax and other taxation on profits, including, where practicable, with income tax or any taxation imposed elsewhere to the extent of the relief, if any, from income tax and distinguishing, where practicable, between income tax and other taxes.

(m) The amount reserved for—

(i) repayment of share capital ; and

(ii) repayment of loans.

(n) (i) the aggregate, if material, of any amounts set aside or proposed to be set aside, to reserves, but not including provisions made to meet any specific liability, contingency or commitment know to exist at the date as at which the balance sheet is made up.

(ii) the aggregate, if material, of any amounts withdrawn from such reserves.

(o) (i) the aggregate, if material, of the amounts set a side to provisions made for meeting specific liabilities, contingencies of commitments.

(ii) the aggregate, if materials of the amounts withdrawn from such provisions, as no longer required.

(p) Expenditure incurred on each of the following items, separately for each items:—

(i) Consumption of stores and spare parts.

(ii) Power and fuel.

(ii) Rent.

(iv) Repairs to buildings.

(v) Repairs to machinery.

(vi) (1) Salaries, wages and bonus.

(2) contribution to provident and other funds.

(3) Workmen and staff Welfare expenses to the extent not adjusted from any previous provision or reserve.

NOTES :

3. Information in respect of the above items should also be given in the balance sheet under the relevant provision or reserve account.

4. In respect of sub-items (i) and (ii) above the Profit and Loss Account shall also contain by way of a note, breakup of the expenditure incurred on employees who–

(i) if employed throughout the financial year were in receipt of remuneration for that year which in the aggregate was not less than Tk. 36,000 ; or

(ii) it employed for a part of the financial year were in receipt of remuneration for any part of that year which in the aggregate was not less than Tk. 3,000 per month.

The said note shall also indicate the number of employees falling in each of the above two categories. Remuneration shall include honoraria. The monetary value of the perquisites shall be calculated in accordance with the provisions of the income Tax Ordinance, 1984 (XXXVI of 1984), and the rules made thereunder.

(q) Insurance.

(r) Rates and taxes, excluding taxes on income.

(s) Miscellaneous expenses :

Provided that any item under which the expenses exceed 1 per cent of the total revenue of the company or Tk. 5,000 whichever is higher, shall be shown as a separate and distinct

item against an appropriate account head in the profit and loss account and shall not be combined with any other item to be shown under miscellaneous expenses.

(t) (i) The amount of income from investments, distinguishing between trade investments and other investments.

(ii) Other income by way of interest, specifying the nature of the income.

(iii) The amount of income tax deducted if the gross income is stated under sub-paragraph (a) and (b) above.

(u) Profits or losses on investments (showing distinctly the extent, of the profit or losses earned or incurred on account of membership of a partnership firm) to the extent not adjusted from any previous provision or reserve.

Notes :

6. Information in respect of this item should also be given in the balance sheet under the relevant provision or reserve account.
7. Profits or losses in respect of transactions of a kind not usually undertaken by the company or undertaken in circumstances of an exceptional or non-recurring nature, if material in amount.
8. Miscellaneous income.

(v) (i) Dividends from subsidiary companies.

(ii) Provisions for losses of subsidiary companies.

(w) the aggregate amount of the dividends paid, and proposed and stating whether such amounts are subject to deduction of income tax or not.

(x) amount, if material, by which any items shown in profit and loss account are affected by any change on the basis of accounting.

4. The profit and loss account shall also contain or give by way of a note detailed information, showing separately the following payments provided or made during the financial year to the directors, including managing director, the managing agents or manager, if any, by the company, the subsidiaries of the company and any other person:—

(a) managerial remuneration paid or payable during the financial year to the directors, including managing director, a managing agent or manager, if any ;

(b) expenses reimbursed to the managing agent ;

(c) commission or other remuneration payable separately to a managing agent or his associate ;

(d) commission received or receivable by the managing agent or his associate as selling or buying agent of other concerns is respect of contracts entered into by such concerns with the company ;

(e) the money value of the contracts for the sale or purchase of goods and materials or supply of services, entered into by the company with the managing agent or his associate during the financial year;

(f) any other perquisites or benefits in cash or in kind stating, approximate money value where practicable ;

(g) other allowances and commission including guarantee commission (details to be given) ;

(h) pensions, etc.--

(i) pensions,

(ii) gratuities,

(iii) payments from provident funds, in excess of own subscription and interest thereon ;

(iv) compensation for loss of office ;

(v) consideration in connection with retirement from office.

5. The profit and loss account shall contain or give by way of a note a statement showing the computation of net profits in accordance with Section 119 of the Companies Act 1994, with relevant details of the calculation of the commissions payable by way of percentage of such profits to the directors including managing director, managing agent or manager, if any.

6. The profit and loss account shall further contain or give by way of a note detailed information in regard to amounts paid to the auditor, whether as fees, expenses or otherwise for services rendered—

(a) as auditor ;

(b) as advisor, or in any other capacity, in respect of--

(i) taxation matters ;

(ii) company law matters ;

(iii) management services ; and

(c) in any other manner.

7. In the case of manufacturing companies, the profit and loss account shall also contain, by way of a note in respect of each class of goods manufactured, detailed quantitative information in regard to the following, namely :—

(a) the licensed capacity ; where licence is in force ;

(b) the installed capacity; and

(c) the actual production.

Notes

1. The licensed capacity and installed capacity of the company as on the last date of the year to which the profit and loss account relates, shall be mentioned against items (a) and (b) above respectively.
2. Against item (c), the actual production in respect of the finished products meant for sale shall be mentioned. In cases where semi-processed products are also sold by the company, separate details thereof shall be given.
3. For the purpose of this paragraph, the items for which the company is holding separate industrial licence shall be treated separate classes of goods but where a company has more than one industrial licence for production of the same item at different places or for expansion of the licenced capacity, the item covered by all such licences shall be stated as one class.

8. The profit and loss account shall also contain by way of a note the following information, namely:—

(a) value of imports calculated on C.I.F. basis by the company during financial year in respect of:—

(i) raw materials ;

(ii) components and spare parts;

(iii) capital goods;

(b) expenditure in foreign currency during the financial year on account of royalty, know-how, professional consultation fees, interest, and other matters;

(c) value of all imported raw materials, spare parts and components consumed during the financial year and the value of all indigenous raw materials, spare parts and components similarly consumed and the percentage of each to the total consumption ;

(d) the amount remitted during the year in foreign currencies on account of dividends with a specific mention of the number of non-resident shareholders, the number of shares held by them on which the dividends were due and the year to which the dividends, related:--

(e) earning in foreign exchange classified under the following heads namely:—

(i) exports for goods calculated on F.O.B. basis :

(ii) royalty, know-how, professional and consultation fees ;

(iii) interest and dividend ;

(iv) other income, indicating the nature thereof.

9. The government may direct that a company shall not be obliged to show the amount set aside to provisions other than those relating to depreciation, renewal or diminution in value of assets, if the Government is satisfied that the information should not be disclosed in the public interest and would prejudice the company, but subject to the condition that it any heading stating an amount arrived at after taking into account the amount set aside as such, the provisions shall be so framed or marked as to indicate that fact.

10. (1) Except in the case of the first profit and loss account laid before the company after the commencement of the Companies Act, 1994 the corresponding amounts for the immediately preceding financial year for all items shown in the profits and loss account shall also be given in the profit and loss account.

(2) The requirement in sub-clause (1) shall in the case of companies preparing quarterly or half-yearly accounts, relates to the profit and loss accounts for the period which ended on the corresponding date of the previously year.

SCHEDULE-XII
PART-III
INTERPRETATION

11. (1) For the purpose of part I and II of this Schedule, unless the context otherwise requires :

(a) the expression "provision" shall, subject to sub-clause (2) of this clause, mean any amount written off or retained by way of providing for depreciation, renewals or diminution in value of assets, or retained by way of providing for any known liability of which the amount cannot be determined with substantial accuracy ;

(b) the expression "reserve" shall not, subject to the provision of clause (d) include any amount written off or retained by way of providing for depreciation, renewals or diminution in value of assets of retained by way of providing for any known liability;

(c) the expression "capital reserve" shall not include any amount regarded as free for distribution through the profit and loss account ; and

(d) the expression "revenue reserve" shall mean any reserve other than a capital reserve ;

Provided that in this sub-clause the expression "liability" shall include a liabilities in respect of expenditure contracted for and all disputed or contingent liabilities.

(2) Where—

(a) any amount retained written off or retained by way of providing for depreciation, renewals or diminution in value of assets, not being an amount written off in relation to fixed assets before the commencement of this Companies Act, 1994 ; or

(b) any amount retained by way of providing for any known liability, is in excess of the amount which in the opinion of the directors is reasonable necessary for the purpose, the excess shall be treated for the purpose, of this schedule as a reserve and not as a provision.

12. For the purposes of clause II, the expression, "quoted investment" means an investment as respects which there has been granted a quotation or permission, to deal on a recognised stock exchange, and the expression "unquoted investment" shall construed accordingly.

SCHEDULE XII

(*See* Section 192)

STATEMENT TO BE PUBLISHED BY BANKING AND INSURANCE COMPANIES AND DEPOSIT, PROVIDENT OR BENEFIT SOCIETIES

1. The share capital of the company is ..... lakh divided into ..... shares of ..... Taka each.
2. The number of shares issued is ..... and calls to the amount of ..... Taka per share have been made, under which the sum of ..... Taka has been received.
3. The liabilities of the company on the thirty-first day of December or thirtieth of June were–
   (a) Debts owing to sundry persons by the company : Taka.
   (b) Under decree- Tk.....
   (c) On mortgage or bonds- Tk.....
   (d) On notes, bills or hundis Tk.....
   (e) On other contracts-Taka.....
   (f) On estimated liabilities- Taka.....
4. The assets of the company on that day were :
   (a) Government securities (stating them) Tk.....
   (b) Bills of exchange, houndis and promissory notes,– Tk.....
   (c) Cas at the bankers– Tk.....
   (d) Other securities– Tk.....

THE COMPANIES (FOREIGN INTERESTS) ACT, 1918

(Act No XX of 1918)

THE COMPANIES (FOREIGN INTERESTS) ACT, 1918

(Act No XX of 1918)

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THE COMPANIES (FOREIGN INTERESTS) ACT, 1918

(Act No XX of 1918)

[26th September, 1918]

An Act to take power to prohibit the alteration, except with the sanction of the [Government][1], of articles of association which restrict foreign interests in certain companies, and to provide for other purposes connected therewith.

WHEREAS it is expedient to take power to prohibit the alteration, except with the sanction of the [1][Government], of articles of association which restrict foreign interests in certain companies, and to provide for other purposes connected therewith;

It is hereby enacted as follows :-

1. Short title.- This Act may be called the [2]** Companies (Foreign Interests) Act, 1918.

2. Definitions.- (1) In this Act-

[3][(a) the expression ***'Commonwealth citizen'*** has the same meaning as in section 1 of the British Nationality Act, 1948, but shall include any association incorporated in any part of the commonwealth, including [4][Bangladesh];]

(b) the expression ***'restrictive provision'*** means any provision in the articles of association of a company which, in the opinion of the [1][Government], is designed to restrict or limit or has the effect or restricting or limiting the share or shares or interest which may be held, or the rights, powers or authority which may be conferred upon or exercised by or on behalf of persons other than [5][Commonwealth citizens] in the company, or in respect of control, management or direction of the affairs thereof.

---

1. The word "Government" was substituted by Act VIII of 1973 as amended by Act LIII of 1974 (w.e.f. the 26th March, 1971), for the words "Central Government".
2. The word "Indian" was omitted by the Federal Laws (Revision and Declaration) Act, 1951 (Act XXVI of 1951).
3. The clause (a) was substituted by A.O., 1961, Act. 2 and Sch. (with effect from the 23rd March, 1956), for the original clause (a) as amended by A.O., 1937 and Act XXVI of 1951.
4. The word "Bangladesh" was substituted by Act VIII of 1973 as amended by Act LIII of 1974 (w.e.f. the 26th March, 1971), for the word "Pakistan".
5. The words "Commonwealth citizens" was substituted by A.O., 1961, for the words "British Subjects" (with effect from the 23rd March, 1956).

(2) All words and expressions used in the Act and defined in the [Companies Act, 1994][1], shall be deemed to have the meanings respectively attributed to them by that Act.

3. Application of Act.- This Act shall apply to such companies as the [2][Government] may, by notification in the [3][official Gazette], declare to be companies with restrictive provisions, and any such notification shall specify the restrictive provisions.

4. Alterations in restrictive provisions and winding up.- So long as a notification issued under section 3 is in force in respect of any company, notwithstanding anything to the contrary in any other Act-

(1) no alteration of the articles of association of the company affecting either directly or indirectly any restrictive provision shall be of any effect until it has received the consent in writing of the [2][Government] ;

(2) a resolution for the voluntary winding up of the company shall be of no effect unless the [2][Government] authorities or ratifies it by a written consent ;

(3) any Court which has jurisdiction to wind up the company may in its discretion refuse to make a winding up order. In the exercise of its discretion, the Court shall be guided by the consideration whether the winding up is bona fide with a view to the discontinuance of the undertaking or is with a view to continuing the undertaking freed either wholly or in part from any restrictive provision ;

(4) the [2][Government] in giving consent, or the Court in making a winding up order, as the case may be, may impose such terms or conditions for giving effect to the purposes of this Act as [4][it] thinks fit.

---

1. The Companies Act, 1913 has been repealed and in its placed the Companies Act, 1994 [Act XVIII of 1994] has been enacted *vide* Gazette notification dated September 12, 1994.
1. The word "Government" was substituted by Act VIII of 1973 as amended by Act LIII of 1974 (w.e.f. the 26th March, 1971), for the words "Central Government".
3. The words "Official Gazette" was substituted by A.O., 1937 for the words "Gazette of India".
4. The word "it" was substituted for the words "he or it" *ibid.*

THE UNDESIRABLE COMPANIES ACT, 1958

Act No. X of 1958

THE UNDESIRABLE COMPANIES ACT, 1958

Act No. X of 1958

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THE UNDESIRABLE COMPANIES ACT, 1958

[Act No. X of 1958]

[8th January, 1958]

An Act to prohibit the registration of companies for carrying on business for certain undesirable purposes and for the winding up and dissolution of such companies.

Whereas it is expedient to prohibit the registration of companies for carrying on business for certain undesirable purposes and for the winding up and dissolution of such companies :

It is hereby enacted as follows:-

1. Short title, extent and commencement.- (1) This Act may be called the Undesirable Companies Act, 1958.

(2) It extends to the whole of [1][Bangladesh].

(3) It shall come into force at once.

2. Definitions.- In this Act, unless there is anything repugnant in the subject or context-

(a) *"specified purpose"* means the promotion or the carrying on of any scheme or business except the business authorised and carried on under the provisions of the Insurance Act, 1938, by whatever name called, whereby, in return for a deposit or contribution, whether periodically or otherwise, of a sum of money in cash or by means of coupons, certificates, tickets or other documents, payment, at future date or dates of money or grant of property, right or benefit, directly or indirectly, and whether with or without any other right or benefit, determined by chance or lottery or any other like manner, is assured or promised ;

(b) *"undesirable company"* means a company which, with objects and business not confined to one province, is registered under [2][the Companies Act, 1994], and carries on business for a specified purpose or for purposes which, among others, include a specified purpose and includes a company, association or other

1. The word "Bangladesh" was substituted by Act VIII of 1973 as amended by Act LIII of 1974 (w.e.f. the 26th March, 1971), for the words "East Pakistan".

2. The Companies Act, 1913 repealed by the Companies Act, 1994 [Act XVIII of 1994]

body of individuals which, with objects [1][***]carries on business for a specified purpose or for purposes which, among others, includes a specified purpose ; and

(c) all other words and expressions have the same meanings as assigned to them under the Companies Act, 1913.

3. Registration of undesirable companies prohibited.– (1) Notwithstanding anything in [2][the Companies Act, 1994], or in any other law for the time being in force, no association or other body of individuals which, with objects and [3] [***], carries or intends to carry on business for a specified purpose or for purposes which, among others, include a specified purpose, shall, on and after the commencement of this Act, be registered under [2][the Companies Act, 1994].

(2) Registration in contravention of sub-section (1) shall be void.

(3) Notwithstanding anything contained in any other law for the time in force, no company, association or other body of individuals, with objects and [1] [***], shall carry on, or shall be formed to carry on, business for a specified purpose or for purposes which, among others, include a specified purpose.

(4) Any person who forms, or associates himself in the formation of, a company, association or other body of individuals in contravention of sub-section (3) and every officer or agent of a company, association or other body of individuals which carries on business in contravention of the said sub-section shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

4. Existing Undesirable companies to cease functioning.– (1) Every undesirable company existing immediately before the commencement of this Act shall, on such commencement, cease to function and, notwithstanding anything in [2] [the Companies Act, 1994], or in any other law for the time being in force, shall be wound up and dissolved in the manner provided in this Act.

(2) Any transaction with an undesirable company or with any office or agent acting for or on behalf of such company shall be void.

(3) Any officer or agent acting for or on behalf of any such company who, on or after the commencement of this Act, carries on, or attempts to carry on the business of the company shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

5. Deposit of cash and preservation of assets, etc.– (1) Any officer or agent acting for or on behalf of an undesirable company who has in his possession or under his control any cash belonging to the company shall, immediately after the commencement of this Act, deposit or cause to be deposited such cash with the company's bankers.

1. The words "[and business confined to the Karachi Division] " omitted by P.O No.48 of 1972
2. The Companies Act, 1913 repealed by the Companies Act, 1994 [Act XVIII of 1994]
3. The words "[and business not confined to one Province,] " omitted by P.O No.48 of 1972

(2) Until such time as the official liquidator appointed under section 7 takes into his custody or under his control all the books, documents and assets of the company, including actionable, claims to which the company is or appears to be entitled, every officer and agent acting for or on behalf of the company shall preserve all such books, documents, assets, property, effects and claims, and shall be jointly and severally liable for any loss or damage.

(3) Any person who, with intent to evade the provisions of this Act, conceals, destroys, mutilates or defaces any books, documents, assets, property, effects or claims or knowingly allows such concealment, destruction, mutilation or defacement to be caused, shall, without prejudice to any liability to which he may be subject under sub-section (2), be punishable with imprisonment for a term which may extend to three years or with fine or with both.

6. Statement of assets, etc., to be submitted to registrar.- (1) Within three days of the commencement of this Act, or within such period as the registrar may allow, the manager of an undesirable company shall submit to the registrar a statement showing the assets and liabilities of the company.

(2) Anyone who contravenes the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to one year or with fine or with both.

7. Winding up of undesirable companies.- (1) As soon as may be after receipt of the statement submitted under sub-section (1) of section 6, the registrar shall make a petition to the court for winding up the company, and thereupon the court shall make an order for the winding up of the company and shall appoint the official liquidator for such winding up.

(2) After the official liquidator has been appointed under this section, the provisions of the Companies Act, 1994, relating to the winding up by court of a registered company shall *mutatis mutandis* apply in relation to the winding up of the company in respect of which the petition has been made under sub-section (1).

8. Dissolution of undesirable companies.- When the affairs of an undesirable company have been completely wound up, the company shall be deemed to have been dissolved under sub-section (1) of section 194 of [1] [the Companies Act, 1994].

9. Power to call for certain information, etc.- (1) Where the registrar has reason to believe that a company is an undesirable company or that an undesirable company is carrying on business in contravention of section 4, he or any Gazetted officer authorized by him in this behalf, may,-

(a) direct any person to give such information in his possession with respect to any business carried on by that company as he may demand ;

1. The Companies Act, 1913 repealed by the Companies Act, 1994 [Act XVIII of 1994]

(b) Inspect or cause to be inspected any book or other document belonging to or under the control of the company or any officer thereof ;

(c) enter and search any premises and seize or authorize any person to seize any control of the company or any officer thereof.

(2) If the registrar is satisfied that a company is an undesirable company or that an undesirable company is carrying on business in contravention of section 4, he shall, by order in writing, direct the manager of the company to hand over the management of the company to a person to be appointed by the registrar for the purpose, and the manager shall forthwith hand over the management of the company to such person.

(3) The person to whom management is handed over in pursuance of sub-section (2) shall be deemed to be the manager of the company, and the other provisions of this Act shall apply accordingly.

(4) Whoever fails to comply with any direction given under sub-section (1) or sub-section (2) shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

10. Offences to be cognizable.- Notwithstanding anything contained in the Code of Criminal Procedure, 1898, any offence punishable under this Act shall be cognizable.

11. Cognizance by court with consent of registrar.- No court shall take cognizance of any offence under this Act except with previous consent of the registrar in writing.

12. Power to make rules.- The [1][Government] may make rules to carry out the purposes of this Act, and such rules may provide that the breach of any of them shall be punishable with imprisonment for a term not exceeding three months or with fine not exceeding one thousand rupees or with both.

[***][2]

13. Repeal. - (1) The Undesirable Companies Ordinance, 1957, is hereby repealed.

(2) Without prejudice to the General Clauses Act, 1897 any statement submitted or received, anything done or any action taken under any provision of the said Ordinance shall be deemed to have been submitted, received, done or taken under the corresponding provision of this Act.

1. The word " Government " was substituted for the words "Central Government" by P.O No. 48 of 1972
2. The proviso added to the Act by A.O. 1964 omitted as redundant *ibid.*

THE PARTNERSHIP ACT, 1932

THE PARTNERSHIP ACT, 1932

(ACT 1X OF 1932)

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THE PARTNERSHIP ACT, 1932

[Act IX of 1932]

[8th April, 1932]

An Act to define and amend the law relating to partnership

Whereas it is expedient to define and amend the law relating to partnership ;

It is hereby enacted as follows:–

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement.– (1) This Act may be called the[1][Partnership] Act, 1932.

[2][(2) It extends to the whole of [Bangladesh.][3]

(3) It shall come into force on the 1st day of October, 1932, except section 69, which shall come into force on the 1st day of October, 1933.

Notes/Comments/Precedents

History of law of partnership: The law of partnership developed from the concept of joint trading in UK as early as in the 11th century. Joint trading in UK in 11-13th centuries, was of two types society as or *commenda (please see Note at page 1).*

The form of trading named *societas*, unlike *commenda*, two distinguishing features (i) all the members of the joint venture took part in the management of trade and (ii) all the members had unlimited liability. The two main stream in trading i.e. the *commenda* and *societas* gave birth to two types of joint stocks. The concept of companies grew up from *commenda* whereas the '*Societas*' matured into partnership.

In this sub continent first the law relating to partnership came into force in 1932. Before the enactment of the Partnership Act, 1932, the law of partnership was dealt with in Chapter XI of the Indian Contract Act, 1872. The Partnership Act makes considerable changes in definition and arrangement, gives effect (but short of making the firm a legal person) to the mercantile view of a firm's continuity, and adds provisions for voluntary registration of firms. The law relating to the insolvency of partners and its effect upon partnership has been altered.

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1. The word "Indian" from the name was omitted by A. O. 1949.
2. Sub-section 2 was substituted by Ordinance No. XXI of 1960.
3. The word "Pakistan" was substituted by the word "Bangladesh" by Act No. VIII 1973 as amended by Act No. LIII of 1974

Creation of Partnership: A partnership is brought into existence by agreement or contract between persons who agree to become partners in business. This agreement need not be in writing and the terms of partnership may be proved by oral evidence or even inferred from the course of dealing of the parties. But generally, where the business is large, the partnership contract is reduced into writing and very generally the terms are embodied in a deed. This deed is known as the articles of Partnership.

Nature of a firm- English Law : The position as regards the nature of a firm and its property in Indian Law under the Indian Partnership Act, 1932 is almost the same as in English law. Here also a partnership firm is not a distinct legal entity and the partner ship property in law belongs to all the partners constituting the firm. The Indian Act, like the English Act avoids making a firm a corporate body enjoying the right of perpetual succession

A partnership firm under the Indian Partnership Act, 1932 is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate rights of its own in the partnership assets and when one talks of the firm's property or firm's assets all that is meant is property in which all partners have a joint or common interest. *[malabar fisheries co. calcutta vs. Commissioner of income tax, kerala 1980 air 176 1980 scr (1) 696]*

2. Definitions.– In this Act, unless there is anything repugnant in the subject or context,–

(a) an ***"act of a firm"*** means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm ;

(b) ***"business"*** includes every trade, occupation and profession ;

(c) ***"prescribed"*** means prescribed by rules made under this Act ;

(d) ***"third party"*** used in relation to a firm or to a partner therein means any person who is not a partner in the firm ; and

(e) expressions used but not defined in this Act and defined in the Contract Act, 1872 (Act IX of 1882), shall have the meanings assigned to them in that Act.

Notes/Comments/Precedents

Business: The definition of "Business" is not exhaustive. Business would include a single commercial adventure *[Nathi Lal Vs Sri Mal AIR (1940) All 256]*

The expression 'business' does not necessarily mean trade or manufacture only it is being used as including within its scope professions, vocations, and callings from a fairly long time. From section 2(b) of the Partnership Act, 1932, it is clear that the 'business is one of wide import and it means an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income.] *Barendra prasad ray & ors. Vs. The income tax officer 'a' ward foreign section and ors. 1981 air 1047 1981 scr (3) 387]*

Third Party: In the Act the word third party has been used in relation to all persons other than the partners. Thus a creditor, a debtor, a transferee of any partner's share is a third party.

Partnership- right of partners : Right of each partner does not give a partner any exclusive right in any pat thereof until dissolution and accounts taken. *[Musa Bin Shamsher Vs. Ansarul Huq. 39 DLR (HC) (1987) 24]*

3. Application of provisions of Act IX of 1872.– The unrepealed provisions of the Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to firms.

CHAPTER II

THE NATURE OF PARTNERSHIP

4. Definition of "partnership" "partner", "firm name."– *"Partnership"* is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually *"partners"* and collectively "a *firm*", and the name under which their business is carried on is called the "*firm name*".

Notes/Comments/Precedents

Accounts in the bank- not a proof of partnership : Mere fact that the bank account of a business was in the name of proprietor and his manager will not show that they were partners. *[Hubert James Vs. Gulam Hussain Paksuma (1949) 1 DLR (PC) 5.]*

Cause of action arising after death of partner- Suit by firm not competent : When the suit was instituted one of the partners in the firm was dead and the cause of action had also arisen after his death. It was held that the suit was incompetent at the time of its institution and no amendment of plaint could be permitted after limitation for the suit had expired. *[Shujaul- Mulk Vs. Firm Abdul Ghafoor. PLD 1964 Pesh. 110 PLR 1964(2) W.P. 235.]*

Creation of partnership-Oral agreement- Valid : The Partnership Act does not prescribe any special mode for the creation of a partnership which can validly come into being even upon an oral agreement between the partners. *[Usman Vs. Haji Omer Haji Ayub. PLD 1966 Supreme Court 328.]*

Partnership- essential elements of : The first element of partnership relates to the voluntary nature of relation between certain persons. The second element emphasises the fact that partnership can only arise as a result of an agreement express of implied between two or more persons. It does not arise from status. It does not operate by operation of law; but they do not *ipso facto* become partners. To constitute partnership there must be an agreement. The agreement of partnership may be oral or written.

In *Abdul Badsha Vs. Century Wood Industries A I R 1954 Mys. 33,* two brothers inherited certain property from their father. They sold a garden and the sale proceed was invested in a business. Abdul Badsha supplied some poles to a company named Century Wood Industries. The company failed to pay the money. Abdul Badsha filed a suit against the Company for recovery of the money. The defendant pleaded that the suit was not maintainable as the firm was an unregistered partnership. The plaintiff pleaded that the brothers were joint proprietors and it did not amount to partnership. The High Court of Mysore, held that the brothers were partners.

The third element stipulates the carrying on the business, for without business, there cannot be partnership. In *Hindustan Steel Ltd. Vs. State of Orissa AIR 1970 SC 253,* it has been held that 'to regard an activity as business there must be course of dealings, either actually continued or contemplated to be continued with a profit motive and not for sport or pleasure".

The fourth element is the sharing of profits derived from the business. Sharing of profits of the business is the essence of the partnership. Therefore a piece of philanthropy cannot be a partnership.

The last element that the business must be carried on by the partners or some or one of them acting for all. It states that fundamental principle of mutual agency i.e. the fact that each partner is an agent as well as the principal of others. Every partner while carrying on business has a dual status. He is an agent and at the same time a principal Each of the partner is the agent of others for the purpose of partnership business.

B. Smith and J. Smith were carrying on business in iron and corns under the name of B. Smith & Son. The firm became indebted and entered into an arrangement with the creditors, by which it was provided that five creditors will carry on the business as trustees for the general creditors and to divide the net income of the business among the general creditors. It was provided that the property will be re-transferred to Smiths after the satisfaction of debts. Of the creditors Cox never act as trustee of creditors, and Wheatcroft resigned six weeks after the deed, the remaining three creditors continued the business. They purchased a quantity of iron ores from one Hickman on credit. Hickman filed a suit for the price against Cox and Wheatcroft for the price. The House of Lords *(In Cox Vs. Hickman (1860)* held that Cox and Wheatcroft were not partners, therefore they were not liable.

Partnership- How may be determined : The question whether there is a relation of partnership in any particular case will depend on the facts and circumstances brought out in each case or in the words of section 6 "regard shall be had to the real relation taken together." *[Essa E.H. Jaffar vs. Nishat Ltd., PLD 1962 (W.P.) Karachi 603 = PLR 1962(2) W.P. 929]*

Distinction between a partnership firm and a co-ownership : Where two or more persons jointly own a property each of them is co-owner, and relation between them is termed as "co-ownership". The principal differences between partnership and co-ownership are— (i) The relation of partnership arises from agreement and agreement only but co-ownership is not necessarily the result of agreement; (ii) Business is necessary in partnership whereas it is not necessary in co-ownership; (iii) There is mutual agency between partners , but one co-owner is not as such the agent of others; (iv) Sharing of profits is necessary is partnership whereas it is not necessary in co-ownership. Co-owners share only gross return; (v) A partner cannot transfer her interest to outsider without the consent of all the partners, but one co-owners can and (vi) A partner cannot seek partition of the partnership property, but one co-owner always can.

Distinction between Partnership and Company : Company and Partnership firm may be compared under the following heads–

(1) Mode of creation – A partnership firm is formed by agreement, which may be either in writing or oral. Registration of a partnership firm is not compulsory, but a company is formed and created by registration under the provision of the Companies Act.

(2) Legal Status–Partnership is merely an association of persons for carrying on the business of partnership and in law the firm name is a compendious method of describing the partners A company has been regarded by law as a juristic person, where as a partnership firm is not a person. A company is separate from its members. A partnership is not distinct from several persons who compose it.

(3) Number of members – In the case of a company, no maximum number of membership is fixed. The maximum number is two in case of private company and seven in the case of public company. But a partnership firm cannot have more than twenty members.

(4) Liability of members – The liability of partners for debts of a firm is unlimited. Partners are liable both jointly and severally to the creditors of the firm. The liability of the members of a company is limited to the extent of the nominal value of their shares Creditors can realise their debts from the company, if the company is a guaranteed by them.

(5) Transfer of shares – Company's shares are freely transferable by shareholders. But a partner in the firm cannot transfer his share without the consent of all the partners.

(6) Objects and powers – A company's powers are limited to those objects which are allowed by the object clause in the Memorandum of Association. If a company does anything beyond its objects clause, it is *ultra-vires*. But the partners can do anything .

(7) Authority of members– The management of a company vests in the hands of directors elected from amongst and by the shareholders, but the shareholders are merely the recipients of dividends. In case of a firm, all the partners are entitled to take part in the management of the firm subject to the contract to the contrary. Partners act both as principles and agents.

(8) Dissolution – Members of a company may come and go but the company goes for ever. A company has a perpetual succession. The death of a members leaves the company unmoved; It is created by registration and it can be dissolved only by the order of a court or by being wound. In the case of partnership the firm can be dissolved at any time by an agreements between the partners. The death or the insolvency of a partner subject to the contract between the partners dissolves a firm.

Partnership and co-ownership : The mete fact that the profits or even losses are distributed in accordance with the shares of the two owners does not necessarily establish a partnership within the meaning of the Partnership Act.

One of the principal differences between a partnership and co-ownership is that co-ownership -is not necessarily the result of agreement whereas partnership is. The second difference is that co-ownership does not necessarily involve community of profit or of loss but partnership does. Another difference is that one co-owner can without the consent of other. transfer his interest etc. to a stranger but a partner cannot do this. Fourthly. in a partnership each partner acts for all but a co-owner is not such an agent real or implied of the other.*[Champaran Cane Concern Vs. State of Bihar 1963 AIR 1737 = 1964 SCR (2) 921.]*

'Partnership' is the relation between persons for sharing profit : 'Partnership' as defined in Section 4 of the Partnership Act. 1932. is the relation between persons who have agreed to share the profits of a business carried on by all or any of them for the benefit of all. A firm or partnership is not a legal entity separate and distinct from the partners. Firm is only a compendious description of the individuals who compose the firm. The business being carried on by all or any of the partners, all of them are jointly and severally responsible for the liabilities incurred in the course of the business as each one is considered as an agent of the other. Such partners can be taxed as persons. in their individual.*[Munshi Ram and others Vs.Municipal Committee, Chheharta 1979 AIR 1160 1979 SCR (3) 453]*

Bank account in firm name : Opening of an account in the firm name shoeing a person as proprietor- *held* : does not conclusively mean that the account belongs to him personally. *[Mafizur Rahman Manju Vs. Mahmudunnabi and others (1988) 40 DLR 451 = Sachindra Kr. Guha Vs. Eastern Banking Corporation Ltd. PLD 1967 Dacca 35.]*

5. Partnership not created by status.– The relation of partnership arises from contract and not from status ;

and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business.

Notes/Comments/Precedents

Relation of partnership : *How arises.* the relation of partnership under the Partnership Act arises from contract and not from status. *[Noor Hossain Vs. Commissioner of. Income- Tax. PLD 1994 Dacca 373 = PLR 1962 Dacca 1419.]*

6. Mode of determining existence of partnership.– In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

Explanation 1.– The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

Explanation 2.– The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business ; and, in particular, the receipt of such share or payment–

(a) by a lender of money to persons engaged or about to engage in any business,

(b) by a servant or agent as remuneration,

(c) by the widow or child of a deceased partner, as annuity, or

(d) by a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof, does not or itself make the receiver a partner with the persons carrying on the business.

Notes/Comments/Precedents

Determination -whether a person is a partner: In determining whether a person is or is not a partner regard shall be had to the real relation between the parties, taking all the relevant facts together. *[Mohammad Musa Vs. Kabir Ahmed 41 DLR (1991) AD 151]*

Partnership- How may be determined- Facts and circumstances must be looked into : The question whether there is a relation of partnership in any particular case will depend on the facts and circumstances brought out in each case or in the words of section 6 "regard shall be had to the real relation taken together." *[Essa E.H. Jaffar Vs. Nishat Ltd., PLD 1962 (W.P.) Karachi 603 PLR 1962(2) W.P. 929]*

Joint management and sharing of profits- Not enough to prove partnership : A land in dispute was taken on lease jointly by two persons. It was contended that they were partners on that score. *Held* The respondent only alleged that the land in dispute was obtained by the parties jointly with a view to share profits. That by itself cannot make this adventure as of partnership and will not make the relationship of the parties as that of partners. According to section 6 of the Partnership Act in determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be ad to the real relation between the parties; as shown by all persons. Holding a joint or common interest in that property does not of it-self make persons partners. Thus, in the absence of any allegation of the respondent that the lease was obtained by them as partners or that the land in dispute was to be cultivated in order to carry on a partnership business, and further in the absence of any case of the appellant that the lease was obtained in partnership and the parties were carrying on any partnership business, it is difficult to appreciate how the question of partnership can arise in the present case. It, however, appears that if the co-owners of the land or the co-lessees of the land are shown not to have any interest in the land other than of receiving their share of its income, that by itself would not make them partners. *[Mobarak Ali Shah vs. Muhammad Sadiq, PLD 1961 (W.P) Karachi 265]*

Partnership-unregistered firm : suit initially for declaration of share right, title and interest in the suit property and Cinema Hall and business- to overcome the effect of non- registration of the Partnership in Sec. 69 of the Partnership Act, 1932 the plaintiff- appellant petitioned for amendment of plaint by was of substituting a prayer, with further prayer for giving direction to furnish up-to-date accounts of the Cinema business since beginning- High Court held that the amendment changed the character and nature of the suit requiring the farming of fresh issues and permission to produce evidence by both parties to decide whether legal requirements of Sec. 44 of the Partnership act, 1932 for the dissolution of the Partnership were fulfilled or not-effect of non-registration- maintainability of suit. *[Radha Kirishna Jogani (Agerwalla) Vs. Dwarka Das Agarwalla & others BCR 1984 AD 313 (1984) 36 DLR (AD) 253.]*

7. Partnership at will.– Where no provisions is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "*partnership at will*".

8. Particular partnership.– A person may become a partner with another person in particular adventures or undertakings.

Notes/Comments/Precedents

One transaction- If partnership be for one transaction only : Under S. 8 a partnership can be for one transaction or one adventure only. *[Muhammad Zakaria vs. Mazahar Ali, PLD 1961 (W.P) Karachi 213.]*

CHAPTER III

RELATIONS OF PARTNERS TO ONE ANOTHER

9. General duties of partners.– Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.

Notes/Comments/Precedents

Nature of relationship between the partners : Maintainability of prosecution for cheating and criminal misappropriation by a partner against his co-partner. *Held that* in case of partnership every partner has dominion over the partnership property by reason of the fact that he is a partner. But it is not dominion of the kind which satisfied the requirement of Sec.405 of the Penal Code. Once it is held that a business concern in a partnership business and the complainant and the accused persons are partners in that business, then prosecution for criminal misappropriation cannot be maintained ; prosecution for cheating cannot also be maintained. To justify prosecution for cheating, there must be allegation of initial intention to deceive. In the absence of such allegation, the proceeding must be quashed.- *[Nasruddin Mahmud & others V's. Momtazuddin Ahmed & another (1984) 13 BLR (AD) 193 =(1984) 36 DLR (AD) 14 =1984 BLD (AD) 97.]*

10. Duty to indemnify for loss caused by fraud.– Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.

11. Determination of rights and duties of partners by contract between the partners.– (1) Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be express or may be implied by a course of dealing.

Such contract may be varied by consent of all the partners, and such consent may be express or may be implied by a course of dealing.

(2) *Agreements in restraint of trade.–* Notwithstanding anything contained in section 27 of the Contract Act, 1872 (Act IX of 1872), such contracts may provide that a partner shall not carry on any business other than that of the firm while he is a partner.

Notes/Comments/Precedents

Agreement—subject to Partnership Act : Section 11 provides for the determination of rights and duties of partners, by agreement between them, has been made subject to the provisions of Partnership Act, meaning thereby that no such agreement can override the provisions of the Act, but would be subordinate to it. No limitation, however, is placed on the power conferred by section 32 of the Act, on a partner to retire from the partnership, by agreement with the other partners, but this does not mean that such an agreement between them can override any other provisions of the Partnership Act, specially those of section 44, which permit a Court to dissolve a firm under certain conditions. Sections 32 and 44 of the Act being both independent provisions of law, one cannot override the other and hence, the argument that an agreement entered into between the partner permitting one of them to retire, would take away the power of the Court to dissolve such a partnership under section 44 of the Act, has no force. *[Muahmmad Yaseen V's. Muhammad Yasin, PLD 1961 (W.P.) Lahore 468]. Rel: AIR 1917 P.C. 116.]*

Minor's right -when included in the partnership : A minor may be included in partnership and when included it means he has been admitted to the benefits of partnership and he cannot be made liable

personally, his liability is limited to the extent of his share in the partnership- Technical defect that the minor has been described as a partner in the document instead of showing him as 'admitted t the benefits of partnership is no ground to refuse registration of a firm under section 26-A of the Income-tax Act. *[Ittehad Textile Mills Multan V's. Commissioner of Income Tax, (1969) 21 DLR (WP) 325.]*

12. The conduct of the business.– Subject to contract between the partners–

(a) every partner has a right to take part in the conduct of the business;

(b) every partner is bound to attend diligently to his duties in the conduct of the business ;

(c) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners ; and

(d) every partner has a right to have access to and to inspect and copy any of the books of the firm.

13. Mutual rights and liabilities.– Subject to contract between the partners–

(a) a partner is not entitled to receive remuneration for taking part in the conduct of the business ;

(b) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm ;

(c) where a partner is entitled to interest on the capital subscribed by him such interest shall be payable only out of profits ;

(d) a partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six per cent per annum ;

(e) the firm shall indemnify a partner in respect to payments made and liabilities incurred by him–

  (i) in the ordinary and proper conduct of the business, and

  (ii) in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances ; and

(f) a partner shall indemnify the firm for any loss caused to it by his willful neglect in the conduct of the business of the firm.

Notes/Comments/Precedents

Appointment of Receiver : Appointment of receiver is within the discretionary power of the court- This power may be exercised where it appears to the court to be just and convenient to make it- Where a partner misconducts or mismanages the business or misappropriates funds or colludes with the debtors or partnership fund is in danger of being lost or the whole concern is endangered then a receiver is appointed where one partner excludes his copartner from his rightful interference in the management of the partnership's affairs or if he persists in acting in violation of partnership articles or he does not consult his partner on any point of importance, or grossly misconducts himself, the court will interfere for the protection of the others rights- Where the right of personal intervention has been forfeited by misconduct,

or partnership funds are in danger of being lost. or where a partner has so misconduct himself as to show that he is no longer to be trusted. such as. he carries on private trade with the fund of the partnership firm. or he colludes with the firm's debtors. or he has so grossly mismanaged the business as to endanger the whole concern. or he has made away with partnership fund. the appointment of a receiver is a must- it is only in the circumstances where parties have become so much antagonic to each other that restoration of mutual trust and co-operation is an utter impossibility that appointment of Receiver is resorted to- when a receiver is appointed all the partners stand removed from management. *[Mujibur Rahman Sikder Vs. Mahbubur Rahman Skkder & other 1983 BLD (AD) 164 = 1982 BSCR 383]*

Right of purdanshin lady to invoke arbitration clause in a partnership deed : Stiit for declaration of accounts and for dissolution of partnership business-reteable distribution of assets instituted by the plaintiff Respondent No.1- clause 15 of Partnership Deed provided for arbitration for setting disputes between the plaintiffs and the predecessor of defendant- appellants- plaintiff alleged that defendant-appellants could not be allowed to take advantage of arbitration clause as they denied partnership deed- Subordinate judge allowed the defendant appellant's prayer for arbitration and stayed the suit pending arbitration which was reversed by the High Court Division in appeal-subordinate judge's order was restored and appeal was allowed- the fact is that the defendant- appellant are purdanashin ladies and they had no knowledge of arbitration of clause of the Partnership Deed and, as such they cannot be deprived of their rights invoking the arbitration clause of the contract which would enable them to settle the dispute by way of arbitrations as provided u/s. 34 of the Arbitration Act. *[Mrs. Najibun Nessa Chowdhury & another Vs. Md. Quayyun Khan Chowdhury & others BCR 1984 AD 130.]*

14. The property of the firm.– Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm.

Notes/Comments/Precedents

Scope : The provisions of section 14 of the Partnership Act which describes the property of the firm, and section 46 of the same Act which deals with the right of partners to have business wound up after dissolution, do not override the mandatory provision of the Indian Registration Act. *[Zainab Bai vs. Ibrahimji, PLD 1962 (W.P.) Karachi 209 = PLR 1962 (1) W.P. 530.]*

Partnership property : This section is in the nature of an inclusive definition not properly defining the expression "the property of the firm". But property, rights and interests in property included in its first paragraph which are all partnership properties "subject to contract between the partners." Its second paragraph includes a fifth kind of property and rights and interests in property if the same is acquired with money belonging to the firm "unless the contrary intention appears", introducing a legal fiction which creates a rebuttable presumption. The decision of the question whether a disputed property is or is not a partnership property would depend upon the intention of the partners. Evidence is admissible to show that a contrary intention governed the transaction which may justifiably be gathered from the purpose of acquisition of property and mode in which it has been dealt with. These considerations are germane to the determination of contrary intention. *[Mahbubul Alam Chowdhury Vs. Chaman Ara Begum 43 DLR (1991) AD 121.]*

Goodwill- Place of business is not always part of goodwill : The place of business of a firm is not invariably a part of its goodwill. *[Peshoton vs. Peerozshaw, PLD 1962 (W.P.) Karachi 293 = PLR 1962 (I) W.P. 880.]*

Rent paid in form of services : If a lease is created by agreement of the parties in which rent is paid in the form of service rendered to the owners of the property, it is interest in the property and would form a part of the assets of the firm in terms of section 14 of the Partnership Act. *[Peshoton Vs. Peerozshaw, PLD 1962 (W.P.) Karachi 293- PLR 1062 (1) P.W. 880.]*

15. Application of the property of the firm.– Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

16. Personal profits earned by partners.– Subject to contract between the partners,–

(a) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm ;

(b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for any pay to the firm all profits made by him in that business.

17. Rights and duties of partners after a change in the firm.– Subject to contract between the partners,–

(a) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be ;

(b) *after the expiry of the term of the firm* – where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership at will ; and

(c) *where additional undertakings are carried out.*– where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings.

Notes/Comments/Precedents

Partnership after death of a partner: Partnership firm may be reconstituted when one of the partner dies, resigns, or ceases to be a partner and the other partners may continue the business. *[The Eastern Agencies, Vs. Alhaj Mafuzuddin, (1968) 20 DLR 1056.]*

CHAPTER IV

RELATIONS OF PARTNERS TO THIRD PARTIES

18. Partner to be agent of the firm.– Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm.

Notes/Comments/Precedents

Act of a partner -when there is specific provision: It is true, a partner may, subject to the provisions of the Partnership Act, bind the firm itself. But in this case a specific provision has been made to the effect

that while applying for registration under section 26-A of the Act, the application shall be signed by all the partners. Section 18 of the Partnership Act cannot override the provision of another Central Act, namely, 26A of the Income Tax Act and compel the Income Tax Authorities to accept the application filed by some of the partners. The Partnership Act is a general law which will govern the business transaction of the firm but cannot over-ride a specific provision made in section 26A of the Income Tax Act. In fact, this specific provision shall override the general provisions made in the Partnership Act. *[M/s. Essential Industries Dacca Vs. Commissioner of Income Tax, (1968) 20 DLR 1204.]*

19. Implied authority of partner as agent of the firm.– (1) Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.

The authority of a partner to bind the firm conferred by this section is called his "implied authority".

(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to–

(a) submit a dispute relating to the business of the firm to arbitration,

(b) open a banking account on behalf of the firm in his own name,

(c) compromise or relinquish any claim or portion of a claim by the firm,

(d) withdraw a suit or proceeding field on behalf of the firm,

(e) admit any liability in a suit or proceeding against the firm,

(f) acquire immoveable property on behalf of the firm,

(g) transfer immoveable property belonging to the firm, or

(h) enter into partnership on behalf of the firm.

Notes/Comments/Precedents

Partner signing agreement as "of E & Co." : Deemed to have signed on behalf of partnership. When a partner R. of the E & Co. signed a contract as "of R of E and Co." It was held that in the circumstances of the case he would be held to have signed the contract on behalf of the Company. *[Hassandlly Shah Vs. M/S. Engineering & Co., PLD 1966 Kar. 52]*

Partnership entered into by two firms : Deed of partnership signed by one partner of one firm on his own behalf alone, and by one partner of the other firm on behalf of his firm- bigger partnership not formed. *[S. A Rahim & Ors. Commr. I Tax Punjab. (1959) II DLR (SC) 289.]*

Power of transfer of immovable properties : It is clear from section 19(2)(f) of the Act that in the absence of any usage or custom of the trade to the contrary, the implied authority does not include the power to transfer immoveable properties belonging to the firm.

In the absence of an express authority two of the partners of the firm had no authority to transfer the immoveable properties of the firm even though the deed of sale was executed on behalf of the firm. *[2 PLR (Dac.) 187.]*

20. Extension and restriction of partner's implied authority.– The partners, in a firm may, by contract between the partners, extend or restrict the implied authority of any partner.

Notwithstanding any such restriction, any act done by a partner on behalf of the firm which falls within his implied authority binds the firm, unless the person with whom he is dealing knows of the restriction or does not know or believe that partner to be a partner.

Notes/Comments/Precedents

Partner-- Liability of other partners for act of a partner : The public have a right to assume that every partner has authority from his co-partners to bind the whole firm in contracts made according to the ordinary usages of the trade. In a trading concern a partner has implied authority to accept and draw bills on behalf of the firm. Even if the authority to do so has been cancelled and such cancellation has not been brought to the notice or knowledge of a discounting bank, the bank is entitled to recover as against the other partners also. *[Suleman Ibrahim vs. Eastern Rice Syndicate. PLD 1966 (W.P.) Karachi 289.]*

A firm can only be made liable for what is done by one of its members on the supposition that the action in question was authorised by the other members. Now, as by law they are held *prima facie* to authorise all acts done in carrying on the business of the firm in the usual way, they cannot escape liability for any act of this character unless they can show that the apparent authority to do it did not exist, and was known not to exist. But when it is sought to make the firm liable for some act not prima facie authorised by it, an actual authority by it must be shown : and if this cannot be done, no case is made out against the firm, however, ignorant the person seeking to charge it may have been of what was authorised and what was not. In the case now supposed the firm did not mislead him and if he was misled by the representations of the partner with whom he dealt, his remedy is against that partner : just as when as agent untruly represents his authority, a person dealing with him acquires no right against the principal but must look to the agent for indemnity. *[Aziz-ur-Rahman vs. Bahawalnagar Corp. Comm. Shop Ltd., PLD 1962 Baghdadul- Jadid 20 PLR 1962 (2) W.P. 359.]*

Opening of account in the name of partner : Opening of account in the name of individual partners, will bind the partnership firm. *[Sachindra Kumar Saha vs. Eastern Banking Corporation Ltd. (1967) 19 DLR 200.]*

21. Partner's authority in an emergency.– A partner has authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.

22. Mode of doing act to bind firm.– In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

Notes/Comments/Precedents

Sub-lease in personal capacity : The sub-lease was not executed in the name of the firm. *Held:* that Section 22 of the Indian Partnership Act, clearly provides that in order to bind a firm by an Act or an instrument executed by a partner on behalf of the firm, the Act should be done or the instrument should be executed in the name of the firm, or in any other manner expressing or implying an intention to bind the firm..[*Deviji Shivji Vs. Maganlal R. Athrana 1965 AIR 139 =1964 SCR (7) 564*

23. Effect of admissions by a partner.– An admission or representation made by a partner concerning the affairs of the firm is evidence against the firm, if it is made in the ordinary course of business.

24. Effect of notice to acting partner.– Notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to

the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

25. Liability of a partner for acts of the firm.– Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

Notes/Comments/Precedents

Liability of firm : Suit may be brought against firm or partners-All partners need not be impleaded.

If the firm is liable, then it is left to the plaintiff to make his choice as to whether he wants to use al the partners of the firm or some of them. Under Order XXX, rule 1, Civil Procedure Code, a plaintiff is not debarred from making his choice in the above mentioned matter. The rule is a permissive one and does not make it incumbent on a plaintiff to sue a firm in the name of the firm. The liability of the partners of a firm being joint and several, any one of the partners could be sued with reference to the liability of the firm. *[Nazar Mohd. Vs. Shafiq Ahmad, PLD 1963 (W.P.) Lahore 23.]*

26. Liability of the firm for wrongful acts of a partner.– Where, by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the partner.

27. Liability of firm for misapplication by partners.– Where–

(a) a partner acting within his apparent authority receives money or property form a third party and misapplies it, or

(b) a firm in the course of its business receives money or property from a third party, and the money or property is misapplied by any of the partners while it is in the custody of the firm, the firm is liable to make good the loss.

28. Holding out.– (1) Anyone who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to anyone who has on the faith of any such representation given credit to the firm, whether the person representing himself of represented to be a partner does or does not know that the representation has reached the person so giving credit.

(2) Where after a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a party thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.

29. Rights of transferee of a partner's interest.- (1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

(2) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share to the assets of

the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

30. Minors admitted to the benefits of partnership.– (1) A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to be benefits of partnership.

(2) Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm.

(3) Such minor's share is liable for the acts of the firm but the minor is not personally liable for any such act.

(4) Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules contained in section 48 :

Provided that all the partners acting together or any partner entitled to dissolve the firm upon notice to other partners may elect in such suit to dissolve the firm, and thereupon the Court shall proceed with the suit as one for dissolution and for settling accounts between the partners, and the amount of the share of the minor shall be determined along with the shares of the partners.

(5) At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, such person may give public notice that he has elected to become or that he has elected not to become a partner in the firm, and such notice shall determine his position as regards the firm:

Provided that, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months.

(6) Where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on the persons asserting that fact.

(7) Where such person becomes a partner,–

(a) his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and

(b) his share in the property and profits of the firm shall be the share to which he was entitled as a minor.

(8) Where such person elects not to become a partner,–

(a) his rights and liabilities shall continue to be those of a minor under this section, up to date on which he gives public notice,

(b) his share shall not be liable for any acts of the firm done after the date of the notice, and

(c) he shall be entitled to sue the partners for his share of the property and profits in accordance with subsection (4).

(9) Nothing in sub–sections (7) and (8) shall affect the provisions of section 28.

Notes/Comments/Precedents

Minor-Cannot create partnership- May be admitted benefits of partnership: A minor cannot create a partnership but it cannot be said that by being merely admitted to the benefits of a partnership he also becomes a partner. There is no reason why the inclusion of the minors should render the constitution of the fir itself invalid when there were at least two adult partners, besides the minors, who could lawfully have entered into the partnership. Under section 26-A of the Income-Tax Act two conditions have only to be satisfied, firstly, that the firm has been constituted under an instrument of partnership, and, secondly, that the instrument has specified the shares of the partners. If these conditions are satisfied, the fir is entitled to registration. *[Commissioner. of I-T. vs. Amin Match Works, PLD 1964 Supreme Court 337 = (1964) 16 DLR (S.C. 183.]*

Minor and partnership : A minor cannot be admitted into partnership, but he can be admitted to the benefits of partnership under section 30 of the Partnership Act with the consent of all partners for the time being. *[Maya Ray Vs. Mrs. Dorothy Watts. (1954) DLR 285.]*

The minor becomes a partner unless within six months of his attaining majority or of his obtaining knowledge that he had been admitted to the benefits, whichever date is later, he elects by public notice not to become a partner to the firm.

The consequence of the attainment of majority of a partner in a partnership firm is that the contract so far as it seeks to make him a partner, and as such, make him personally liable for the act of the firm, is not effective. But the partnership agreement as between the adult is valid, the minor would be deemed ship. *Ibid.*

Contract entered into by a minor : A contract entered into by a minor is void. But the doctrine of the minor's incapacity is a doctrine for his protection by preventing others from injuring him by taking advantage of his incompetence. *Ibid.*

Partnership is an agreement and agreement with a minor is void. No doubt under sec. 30 of the Partnership Act a minor can be admitted to the benefits of partnership but in order that section 30 may apply there should be a partnership already in existence and cases where a minor became a partner from the very inception of partnership are beyond the scope of sec. 30.*[1955 PLR (Lah) 588.]*

Minor- admission through inheritance : Minors acquire interest in partnership business by right of inheritance- To such a case section 30 not applicable. *[Commissioner of Income Tax, Vs. Mst. Safiya Bai (1979) 31 DLR (A.D) 41.]*

Minor-When may be admitted to benefits of partnership- Status of such minor : For the applicability of S. 30(1), two things are required, namely: (1) the existence of a valid partnership on the benefits of which a minor may be admitted, and (ii) the mutual consent of the partners to admit a minor to the benefits of that partnership. The minors admitted to benefits of partnership are only beneficiaries under that section and not partners. Although a partner, for the purposes of Income -tax Act, includes a minor who has been admitted to the benefits of partnership, a partner within the meanings of the Partnership Act does not include a minor. *[Amin Match Works Vs. Commissioner of Income-tax, PLD 1964 Dacca 295]*

Minor's right -when included in the partnership : A minor may be included in partnership and when included it means he has been admitted to the benefits of partnership and he cannot be made liable personally, his liability is limited to the extent of his share in the partnership- Technical defect that the minor has been described as a partner in the document instead of showing him as 'admitted t the benefits of partnership is no ground to refuse registration of a firm under section 26-A of the Income-tax Act. *[Ittehad Textile Mills Multan Vs. Commissioner of Income Tax, (1969) 21 DLR (WP) 325.]*

CHAPTER V

INCOMING AND OUTGOING PARTNERS

31. Introduction of a partner.– (1) Subject to contract between the partners and to the provisions of section 30, no person shall be introduced as a partner into a firm without the consent of all the existing partners.

(2) Subject to the provisions of section 30, a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner.

32. Retirement of a partner.– (1) A partner may retire–

(a) with the consent of all the other partners,

(b) in accordance with an express agreement by the partners, or

(c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement:

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub–section (3) may be given by the retired partner or by any partner of the reconstituted firm.

Notes/Comments/Precedents

Retiring partner- liability of : A retiring partner under section 32(3) read with s. 72 of Partnership Act continues to be liable for any subsequent act of any other partner which would bind the firm until the public notice as prescribed by section 72 is given.*[Md Mahmudun Nabi Vs. Mafizur Rahman Manju 42 DLR (1990) AD 120]*

33. Expulsion of a partner.– (1) A partner may not be expelled from a firm by any majority of the partners, save in the exercise in good faith of powers conferred by contract between the partners.

(2) The provisions of sub–sections (2), (3) and (4) of section 32 shall apply to an expelled partner as if he were a retired partner.

34. Insolvency of a partner.– (1) Where a partner in a firm is adjudicated an insolvent he ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is thereby dissolved.

(2) Where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made.

Notes/Comments/Precedents

Effect of insolvency of partner on the firm : Section 34 of the Partnership Act deals with effect of insolvency of partner thus–Where the partner in a firm is adjudicated an insolvent, he ceases to be a partner from the date on which the order of adjudication was passed by the Court. It is further stated that whether the firm is thereby dissolved or not depends on the terms of the agreement between the partners.

However if the firm appears to be dissolved, the usual procedure in case of dissolution is adopted i.e. the assists will be collected and the debts charges will be paid. If any balance remains due to the insolvent out of the assets, the same would be handed over to the official assignee or the official Receiver.

Insolvent partners act- binding on the firm : If the firm is not dissolved by the insolvency, the insolvent partner's share vest in the Official Assigner or the Official Receiver. After that the estate of the insolvent partner shall not be liable for any act of the insolvent done after the date of the declaration of insolvency.

35. Liability of estate of deceased partner.– Where under a contract between the partners the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any act of the firm done after his death.

36. Rights of outgoing partner to carry on competing business.– (1) An outgoing partner may carry on a business competing with that of the firm and he may advertise such business, but, subject to contract to the contrary, he may not–

(a) use the firm name,

(b) represent himself as carrying on the business of the firm, or

(c) solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

(2) *Agreements in restraint of trade.–* A partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits; and, notwithstanding anything contained in section 27 of the Contract Act, 1872 (IX of 1872), such agreement shall be valid if the restrictions imposed are reasonable.

Notes/Comments/Precedents

Partnership business partitioned- principle of granting injunction in such matters : *Held-* When the circumstances are such that the business for all practical purpose has been partitioned and the old assets and business etc. of the Company have been divided between the two partners and they are carrying on their respective business in their independent names, the well established principle of law is, injunction may not be granted to restrain the new Company from running its business. *[Dilip Kumar Paul Vs. Narayan Paul & others [Dilip Kumar Paul Vs. Narayan Paul & others 1983 BSCR 79.]*

Whether right of an outgoing partner can be restricted : A partner may make an agreement with his partner that on ceasing to be a partner he will not carry on business similar to that of the firm within a specified period or within specified local limits and notwithstanding anything contained in Section 27 of the Contract Act such agreement shall be valid if the restrictions imposed are reasonable.

37. Right of outgoing partner in certain cases to share subsequent profits.– Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent. per annum on the amount of his share in the property of the firm :

Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits ; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

Notes/Comments/Precedents

Outgoing partners' right in the partnership asset of the partnership : The outgoing partner has either to claim a share in the profits made since he ceased to be a partner in so far as that may be attributable to the use of his share of the property of the fir or to claim interest at the rate of 6% per annum.

The principle accepted is that the deceased or the outgoing partner has rights over all the assets of the partnership and that this right is in the nature of an unascertained interest in every single item of asset thereof. He cannot be regarded merely as a person entitled to a particular sum of cash ascertained upon the striking of a balance. If the continuing partners choose to carry on the business they obviously utilize the assets of the partnership and are thus placed in a fiduciary position with regard to the share of the outgoing partner in those assets. This makes them liable to account for whatever profits are attributable to such user. *[Usman vs. Omar Jaji (1966) 18 DLR (SC) 322.]*

Existing partners entitled to profits attributable to their personal skill or assets supplied by them alone : or it may be that the profits have been earned by reason of the fact that the remaining partners themselves provided further assets and further capital by means of which the business became a profitable one. Under this system of accounting, if insisted upon by the outgoing partner under section 37 of the Partnership Act, it will be open for the remaining partners to claim to be recompensed for the skill and labour employed by them in the conduct of the business after dissolution and they will also be entitled to prove what portion, if any, of the profits was obtained not by reason of the use of the partnership assets but in some other manner.*[Usman Vs. Omar Jaji (1966) 18 DLR (SC) 322.]*

Good-will of a firm : Section 37 of the Partnership Act lays down the substantive law relating to the liability of a surviving partner who without a settlement of account with the legal representatives of a deceased partner, utilises the assets of the partnership for continuing the business as his own. This section cannot stand in the way of conversion prayed for by the respondents. The good-will of a firm being part of the assets has to be sold just like other assets before the accounts between the partners can be settled and partnership would up. *[Laxmidas Dahyabhai Kabarwala Vs. Nanabhai Chunilal Kabarwala and ors. 1964 AIR 11= 1964 SCR (2) 567.]*

38. Revocation of continuing guarantee by change in firm.- A continuing guarantee given to a firm, or to a third party in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future, transactions from the date of any change in the constitution of the firm.

Notes/Comments/Precedents

Continuing guarantee : The agreement to the contrary required to displace the effect of this section must be clearly shown. It is not implied in the mere fact that the guarantee is given to a firm whose name has ceased to describe its existing members, and is to secure the balance of a current account. *[Backhoue Vs. Hall (1865) 6 B. &S. 509.]*

CHAPTER VI
DISSOLUTION OF A FIRM

39. Dissolution of a firm.– The dissolution of partnership between all the partners of a firm is call the "dissolution of the firm".

Notes/Comments/Precedents

Retirement of a partner from a partnership and dissolution of the firm : Retirement of a partner from a firm and dissolution of the firm are quite distinct and a clear distinction exists between the two concepts inasmuch as the consequences flowing from each are entirely different. *[Liu Ying Ping Vs. Leon Fang Ai. (1984) 36 DLR (AD) 273.]*

Immovable property of partner held in a partner farm-transfer of such property by a partner does not require registration u/s. 17(1) of the Registration Act being treated as a moveable property *[Liu Ying Ping Vs. Leon Fang Ai. (1984) 36 DLR (AD) 273.]*

40. Dissolution by agreement.– A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

41. Compulsory dissolution. – A firm is dissolved–

(a) by the adjudication of all the partners or of all the partners but one as insolvent, or

(b) by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on the partnership:

Provided that, where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings.

42. Dissolution on the happening of certain contingencies.– Subject to contract between the partners a firm is dissolved–

(a) if constituted for a fixed term. by–the expiry of that term ;

(b) if constituted to carry out one or more adventures or undertakings, by the completion thereof ;

(c) by the death of a partner ; and

(b) by the adjudication of a partner as an insolvent.

Notes/Comments/Precedents

When a firm is dissolved: Where a disputed partnership was to carry out one or more adventures or undertakings, and in the absence of a contract to the contrary, the firm is dissolved, by the completion thereof under section 42 of the Partnership Act, where it is not made out that the partnership was to continue even after the completion of the adventure or undertaking. *[7 PLR (Dac) 23.]*

Prosecution of the suit, when partnership dissolves : Partnership (consisting of 2 persons) is dissolved due to retirement of one of the partner during the pendency of the suit- Remaining partner competent to proceed with the sit and upon decree passed therein competent to execute the decree in the name of the partnership. *[Menon Trading Co. Vs. Hajee Gaffar Hajee Ha bib Janoo (1968) 20 DLR 41.]*

The Partnership firm has been dissolved automatically by operation of law and become non-existent with the death of its partners. *[Pubali Bank Ltd. vs. Sultana Oil Mills and Soap Factory and others 51 DLR (1999) 323.]*

43. Dissolution by notice of partnership at will.– (1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.

(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

Notes/Comments/Precedents

Issuance of Commission- Examination of accounts : The prayer in the plaint for pronouncing a firm as dissolved cannot be construed as a prayer for dissolution by the court. *[7 PLR (Dac.) 23]*

A partnership account should cover all the truncations of the partnership. A commission for examination of accounts should not be issued unless the court is satisfied that an examination and adjustment is necessary. *[Md. Mustafa Chowdhury -Vs- Sudhangshu Bimal Biswas. (1956) 8 DLR 381.]*

Dissolution by notice of partnership at will -Effect of non-registration of a firm : An oral agreement was arrived at between the appellant and respondent that they would carry on jointly the business of military contracts on the basis of equal share in profits and losses, and the business was carried on till the end of March, 1946, when all war contracts ceased. A suit thereafter was brought for a declaration of dissolution of partnership and rendering of accounts. The existence of partnership was denied and the liability for rendering accounts too. Maintainability of the suit was also questioned. *Held-* (1) Since the partnership was confined to a particular class of business venture and it terminated automatically with the termination of the venture neither section 43 nor section 69 of the Act would be a bar to the maintainability of the suit for accounts of a dissolved firm. (2) No notice was necessary under section 43 of the Act to sustain a claim for accounts of a partnership in certain ejmali contracts which on completion of the business terminated in March, 1946. *[Sudhangshu Bimal Biswas Vs. Md. Mustafa Chowdhury, (1960) 12 DLR (SC) 259.]*

Business stopped- whether amounts of dissolution : It is now well established that the mere fact that after a particular date no further business was done will no amount to a dissolution of the partnership. *[Md. Mustafa Chowdhury Vs. Sudhangshu Bimal Biswas. (1956) 8 DLR 381.]*

Suit by one partners against another : There is no restriction for a member of a registered firm or the firm itself for bringing a suit against another partner or the firm itself either for accounts or for dissolution of the firm or for both. *[7 PLR (Dac.) 23.]*

Once suit field for dissolution of an unregistered firm it will attract the operation of Order 20, Rule 15 of the C.P. Code and Court can grant a decree for accounts even if not prayed for specifically- Power of Court under Or. 20 r. 15 of C.P.C. not subject to provisions of sec. 69 of the Partnership Act- The firm is dissolved under sec. 42 of the act after completion of one or more adventures or undertaking when there is no contract to the contrary. *[7 PLR (Dac.) 23.]*

Notice of dissolution- effective date of : A suit for dissolution filed on May 13, 1944, had ended in a dismissal for default, and as such no date of dissolution of the partnership as contemplated by 0.20, r. 15, of the Code of Civil Procedure had been fixed by the Court; the plaint could not be construed as the notice contemplated by s. 43 of the Partnership Act, to terminate the partnership. Even on the assumption that the summons accompanied by the plaint could be said to be the service of notice for dissolution of the partnership, the date of dissolution could only be the date on which the [illegible] of the partners was served. *[Vanarsi Das vs. Seth Kanshi Ram & others 1963 AIR 1165 1964 SCR (1) 5[illegible]]*

Firm not registered : Firm not registered at time of institution of suit-plaint must be rejected- Subsequent registration of the firm will not validate proceedings invalid in their inception. *[1952 PLR (Lah) 263.]*

Whether a partner can sue in his individual capacity : One partner may sue alone on a written contract made with himself if it does not appear from the contract itself that he was acting as an agent of the firm : and a partner ought to sue only on a contract entered into with himself, if such contract is in fact made with him as a principal, and not on behalf of himself and others. If one partner acting for the firm has represented himself to be acting on his own account only, and has ostensibly entered into a contract on his own account, he alone ought to sue on it. *[Gopal Ch. Chattopaddhyay Vs. Brojonathdon Poddar. (1955) 7 DLR 615]*

Creation of partnership -without agreement in writing : Notice under section 43 when can be held not necessary. An oral agreement was arrived at between the appellant and respondent that they would carry on jointly the business of military contracts on the basis of equal share in profits and losses and the business was carried on till the end of March, 1946, when all war contracts ceased.

A suit was brought for a declaration of dissolution of partnership and rendering of accounts. The defendant denied existence of partnership and also the liability for accounts and further contended that the suit was not maintainable in law. *Held-* Where a partnership was confined to a particular class of ventures which automatically came to an end wit the termination of those ventures no notice under section 43 was necessary.

Even if it be held that the partnership, if proved, was one at will the exchange of notices and the counter-claim made by the plaintiff as a simple creditor must be taken to amount to a notice to terminate the partnership as well as to a dissolution by consent. *[Sudhangshu Bimal Biswas Vs. Md. Mostafa Chowdhury, (1960) 12 DLR (SC) 259.]*

Dissolution of Partnership business in case of partnership-at-will : it is dissolved by notice- filing of a plaint by a partner is enough to put an end to the partnership. *[Mujibur Rahman Sikder Vs. Mahbubur Rahman Sikder & others 1983 BLD (AD) 164=1922 BSCR 385]*

44. Dissolution by the Court.– At the suit of a partner, the Court may dissolve a firm n any of the following grounds, namely:–

(a) that a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner ;

(b) that a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner ;

(c) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business ;

(d) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affair of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him ;

(e) that a partner, other than the partner suing, has in any way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under the provisions of rule 49 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908 (V of 1908), or has allowed it to be sold in the recovery of arrears of land–revenue or of any dues recoverable as arrears of land–revenue due by the partner ;

(f) that the business of the firm cannot be carried on save at a loss ; or

(g) on any other ground which renders it just and equitable that the firm should be dissolved.

Notes/Comments/Precedents

Agreement between parties- Should be subject to Partnership Act : Section 11 of the Partnership Act, which provides for the determination of rights and duties of partners, by agreement between them, has been made subject to the provisions of Partnership Act, meaning thereby that no such agreement can override the provisions of the Partnership Act, but would be subordinate to it. No limitation, however, is placed on the power conferred by section 32 of the Act, on a partner to retire from the partnership, by agreement with the other partners, but this does not mean that such an agreement between them can override any other provisions of the Partnership Act, specially those of section 44, which permit a Court to dissolve a firm under certain conditions. Sections 32 and 44 of the Act being both independent provisions of law, one cannot override the other and hence, the argument that an agreement entered into between the partner permitting one of them to retire, would take away the power of the Court to dissolve such a partnership under section 44 of the Act, has no force. *[Muahmmad Yaseen Vs. Muhammad Yasin, PLD 1961 (W.P.) Lahore 468]. Rel: AIR 1917 P.C. 116.]*

Court's power to dissolve partnership inspite of not taking recourse to litigation : Even if the partners had agreed that any of them would be at liberty to retire, by giving notice of this fact, and would not have recourse to litigation for having the partnership dissolved, the power of the Court to order dissolution remained unaffected, nor was the right of the partners to claim dissolution taken away by such an agreement. *ibid*

Grounds for dissolution : Grounds for dissolution was based on three grounds. Firstly that the Managing Director was guilty of misconduct in so far as he had been utilizing the assets of the partnership for his personal needs, secondly, that although the partnership was carried on for more than two years not a pie in the shape of profits, was paid to the financing partner, and thirdly, that the relations between the parties having become strained, on account of criminal litigation, it was just and equitable to dissolve the firm.

Partner guilty of misconduct– not entitled to sue for dissolution : A partner who is himself guilty of misconduct was not entitled to sue for dissolution of partnership. *Ibid*

Unregistered Partnership firm : Suit initially for declaration of share right, title and interest in the suit property and Cinema Hall and business- to overcome the effect of non-registration of the Partnership in the Sec. 69 of the partnership Act, 1932 the plaintiff-appellant petitioned for amendment of plaint by way of substituting a prayer, with further prayer for giving direction to furnish up-to-date accounts of the Cinema business since Commencement-High Court held that he amendment charged the character and nature of the suit requiring the framing of fresh issues and permission to produce evidence by both parties to decide whether legal requirements of Sec. 44 of the Partnership Act, 1932 for the dissolution of the Partnership

were fulfilled or not- effect of non-registration- maintainability or suit. *Held*- There is no controversy that the partnership firm in the present case is an unregistered one. It would, therefore, follow that in view of the provisions of sub-sec. (1) of Sec. 69 of the suit would prima facie appear to be barred thereunder. But according to the provisions of sub-sec. (3) of sec. 69 such a suit does not seem to be affected by the bar imposed by sub-sec. (1), so as not to be maintainable. The provisions of the said sub-section lay down the rule that sub-sec (1) & (2) "shall not affect (a) the enforcement of any right to sue for the dissolved firm, or any right or power to realise the property of a dissolved firm." Appellant's suit was originally for declaration of the firm. Neither logic nor the reality inherent in the situation can advanced as a ground against combination of such prayers in a single suit. *[Radha Krinsha Jogani (Agarwalla) Vs. Dwarks Das Agrwalla & others BCR 1384 AD 213 - (1984) 36 DLR (AD) 253.]*

45. Liability for acts of partners done after dissolution.– (1) Notwithstanding the dissolution of a firm the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution:

Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner.

(2) Notices under sub–section (1) may be given by any partner.

46. Right of partners to have business wound up after dissolution.– On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.

47. Continuing authority of partners for purposes of winding up.– After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise :

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent ; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.

48. Mode of settlement of accounts between partners.– In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed :–

(a) Losses, including deficiencies of capital, shall be paid first out of profit, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

(b) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order:–

(i) in paying the debts of the firm to third parties ;

(ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital ;

(iii) in paying to each partner reteably what is due to him on account of capital ; and

(iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

Notes/Comments/Precedents

Suit after dissolution of partnership : After the dissolution a partner may sue or be sued in firm's name provided the cause of action arose before its dissolution.

Merely because the firm was dissolved during the pendency of the suit will not render the suit untenable. *[M/S. Memon Trading Co. Vs. M/S. Hajee Gaffar (1965) 17 DLR 677.]*

49. Payment of firm debts and of separate debts.– Where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

50. Personal profits earned after dissolution.– Subject to contract between the partners, the provisions of clause (a) of section 16 shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up :

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

51. Return of premium on premature dissolution.– Where a partner has paid a premium on entering into partnership for a fixed term, and the firm is dissolved before the expiration of that term otherwise than by the death of a partner, he shall be entitled to repayment of the premium or of such part thereof as may be reasonable, regard being had to the terms upon which he became a partner and to the length of time during which he was a partner, unless–

(a) the dissolution is mainly due to his own misconduct, or

(b) the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it.

52. Rights where partnership contract is rescinded for fraud or misrepresentation.– Where a contract creating partnership is rescinded on the ground of the fraud or misrepresentation of any of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled–

(a) to a lien on, or a right of retention of, the surplus or the assets of the firm remaining after the debts of the firm have been paid, for any sum paid by him for the purchase of a share in the firm and for any capital contributed by him ;

(b) to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm ; and

(c) to be indemnified by the partner or partners guilty of the fraud or misrepresentation against all the debts of the firm.

53. Right to restrain from use of firm name or firm property.– After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up :

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

Notes/Comments/Precedents

Scope : This section gives a right to every partner to restrain any other partner from carrying on a similar business in the firm name or from using everything of the property of the firm for his own benefit until the affairs of the firm have been completely wound up-but the provision of the section is subject to a contract between partners.

In the instant case, pursuance of contract dated 30-10-82 the assets were divided. Two firms-one in the old name and another in the name "M/s. New G. Paul Company" started their business and necessary "Hal Khataas" were opened and invitation cards in the name of respective firms were issued. The plaintiff challenged these contracts as void and illegal which was the subject- matter of the suit.

The suit itself is 'pending and granting of injunction at this stage will have the effect of prejudging the issue which have to be raised and decided in evidence. The question is whether there is any prima facie case and the opinion is in the facts and circumstances of the case, it does not appear to be so. The injunction was therefore unwarranted and the trial court rightly refused it. *[Dilip Kumar Paul Vs. Narayan Paul & others 1983 BSCR 79.]*

Partitioned business: When the circumstances are such that the business for all practical purpose has been partitioned and the old assets and business etc. of the old Company have been divided between the two partners and they are carrying on their respective business in their independent names, the well-established principle of law is injunction may not be granted to restrain the new Company from running its business. *[Dilip Kumar Paul Vs. Narayan Paul & others 1983 BSCR 79.]*

54. Agreements in restraint of trade.– Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits ; and notwithstanding anything contained in section 27 of the Contract Act, 1872 (IX of 1872), such agreement shall be valid if the restrictions imposed are reasonable.

55. Sale of goodwill after dissolution.– (1) In settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm.

(2) *Rights of buyer and seller of goodwill.–* Where the goodwill of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business, but, subject to agreement between him and the buyer, he may not–

(a) use the firm name,

(b) represent himself as carrying on the business of the firm, or

(c) solicit the custom of persons who were dealing with the firm before its dissolution.

(3) *Agreements in restraint of trade* Any partner may, upon the sale of the goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits, and, notwithstanding anything contained in section 27 of the Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

CHAPTER VII
REGISTRATION OF FIRMS

56. [* * * *][1]

57. Appointment of Registrars.– (1) The [Government][2] may appoint Registrars of Firms for the purposes of this Act, and may define the areas within which they shall exercise their powers and perform their duties.

(2) Every Registrar shall be deemed to be a public servant within the meaning of section 21 of the [Penal code (XLV of 1860)][3]

58. Application for registration.– (1) The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating–

(a) the firm name,

(b) the place or principal place of business of the firm,

(c) the names of any other places where the firm carries on business,

(d) the date when each partner joined the firm,

(e) the names in full and permanent addresses of the partners, and

(f) the duration of the firm.

The statement shall be signed by all the partners, or by their agents specially authorised in this behalf.

(2) Each person signing the statement shall also verify it in the manner prescribed.

[4][(3) A firm name shall not contain any of the following words, namely:–

State or words expressing or implying the sanction, approval or patronage of the Government or of Bangabandhu, except when the Government signifies its consent to the use of such words as part of the firm name by order in writing.]

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1. Section 56 was omitted by Act VIII of 1973 (As amended by Act LIII of 1974
2. The word [*Government*]was substituted for the words [*Provincial Government*]*ibid.*
3. The word [*Pakistan*] was omitted from the name of [*Pakistan Penal Code*] by P.O No. 48 Of 1972 and further the worf [*Penal Code*] was substituted for the word [*Pakistan Penal Code*] by Act VIII of 1973 (As amended by Act LIII of 1974
4. Sub-section (3) was substituted for the original sub-section (3) by Act VIII of 1973 (As amended by Act LIII of 1974

[1][3A) A firm name shall not contain the name of the "United Nations" or its abbreviations through the use of its initial letters or of any subsidiary body set up by that body unless it has obtained the previous authorisation of the Secretary–General of the United Nations in writing.]

[2][(3B) A firm name shall not contain the name of the "World Health Organisation" or its abbreviations through the use of its initial letters unless it has obtained the previous authorisation of the Director–General in writing.]

59. Registration.– When the Registrar is satisfied that the provisions of section 58 have been duly complied with, he shall record an entry of the statement is a register called the Register of Firms, and shall file the statement.

60. Recording or alterations in firm name and principal place of business.– (1) When an alteration is made in the firm name or in the location of the principal place of business of a registered firm, a statement may be sent to the Registrar accompanied by the prescribed fee, specifying the alteration, and signed and verified in the manner required under section 58.

(2) When the Registrar is satisfied that the provisions of sub–section (1) have been duly complied with, he shall amend the entry relating to the firm in the Register of Firms in accordance with the statement, and shall file it along with the statement relating to the firm filed under section 59.

61. Noting of closing and opening of branches.– When a registered firm discontinues business at any place or begins to carry on business at any place, such place not being its principal place of business, any partner or agent of the firm may send initiation thereof to the Registrar, who shall make a note of such intimation in the entry relating to the firm in the Register of Firms and shall file the intimation along with the statement relating to the firm filed under section 59.

62. Noting of changes in names and addresses of partners.– When any partner in a registered firm alters his name or permanent address, an intimation of the alteration may be sent by any partner or agent of the firm to the Registrar, who shall deal with it in the manner provided in section 61.

63. Recording of changes in and dissolution of a firm.– (1) When a change occurs in the constitution of a registered firm any incoming, continuing or outgoing partner, and when a registered firm is dissolved any person who was a partner immediately before the dissolution, or the agent of any such partner or person specially authorised in this behalf, may give notice to the Registrar of such change or dissolution, specifying the date thereof; and the Registrar shall make a record of the notice in the entry relating to the firm in the Register of Firms, and shall file the notice along with the statement relating to the firm filed under section 59.

1. Sub-section (3 A) was inserted by Partnership Amendment Act, 1949 (Act V of 1949)
2. Sub-section (3 B) was inserted by Partnership Amendment Act, 1949 (Act V of 1949)

(2) *Recording of withdrawal of a minor.*– When a minor who has been admitted to the benefits of partnership in a firm attains majority and elects to become or not to become a partner, and the firm is then a registered firm, he, or his agent specially authorised in this behalf, may give notice to the Registrar that he has or has not become a partner, and the Registrar shall deal with the notice in the manner provided in sub–section (1).

Notes/Comments/Precedents

Change of name and membership of firm : Suit filed for cause of action arising prior to change-Intimation of change given to Registrar after filing of suit-Suit competent.

There was a change in the name and membership of the firm and a suit was brought by it on a cause of action which arose prior to the change. It was argued that as the intimation of the change had not been sent to the Registrar regarding the change at other time of the filing of the suit : the suit did not lie. *Held* Section 63 of the Partnership Act under which an intimation with regard to the change in the members of the firm and of the name of the firm has to be given to Registrar does not prescribe any time limit for sending such an intimation. The mere fact that an intimation about this change was given to the Registrar subsequently does not alter the situation. The firm running under the name and style of Messes Jumani Brothers, therefore, was fully competent to file a suit against the applicant and by filing such a suit there has been absolutely no contravention of the provision contained in section 69 of the Partnership Act. *[Muhammad Zaman Khan vs. Jumani Bros., PLD 1971 (W.P) Karachi 19.]*

64. Rectification of mistakes.– (1) The Registrar shall have power at all times to rectify and mistake in order to bring the entry in the Register of Firms relating to any firm into conformity with the documents relating to that firm filed under this Chapter.

(2) On application made by all the parties who have signed any document relating to a firm filed under this Chapter, the Registrar may rectify and mistake in such document or in the record or note thereof made in the Register of Firms.

65. Amendment of Register by order of Court.– A court deciding any matter relating to a registered firm may direct that the Registrar shall make any amendment in the entry in the Register of Firms relating to such firm which is consequential upon its decision : and the Registrar shall amend the entry accordingly.

66. Inspection of Register and filed documents.– (1) The Register of Firms shall be open to inspection by any person on payment of such fee as may be prescribed.

(2) All statements, notices and intimations filed under this Chapter shall be open to inspection, subject to such condition and on payment of such fee as may be prescribed.

67. Grant of copies.– The Registrar shall on application furnish to any person, on payment of such fee as may be prescribed, a copy, certified under his hand, of any entry or portion thereof in the Register of Firms.

68. Rules of evidence.– (1) Any statement, intimation or notice recorded or noted in the Register of Firms shall, as against any person by whom or on whose behalf such statement, intimation or notice was signed, be conclusive proof of any fact therein stated.

(2) A certified copy of an entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement, intimation or notice recorded or noted therein.

Notes/Comments/Precedents

Object of the section : The object of this section is to compel members of a firm to have all subsequent changes in the constitution of a registered firm notified to or "registered" with the Registrar of Firms. This object is carried out by providing that any statement, intimation or notice recorded in the Register shall be conclusive proof of the fact stated therein, as against any person by whom or on whose behalf the same was signed ; in other words, he will not be able to set up a state of affairs different from that which he has caused to be stated in the Register.

69. Effect of non-registration.– (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner n the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub–sections (1) and (2) shall apply also to a claim of set–off or other proceeding to enforce a right arising from a contract, but shall affect–

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the [1][দেউলিয়া বিষয়ক আইন ১৯৯৭ (Act X of 1997)] to realise the property of an insolvent partner.

(4) This section shall not apply–

(a) to firms or to partners in firms which have no place of business in [2][Bangladesh], or whose places of business in [2][Bangladesh] are situated in areas to which, by notification under [3][section 56], this Chapter does not apply, or

(b) to any suit or claim of set–off not exceeding one hundred [4][Taka] in value which, [5][***] is not of a kind specified in the Second Schedule to the [6][**] Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

Notes/Comments/Precedents

Non registration -effect of : An unregistered firm will only suffer the consequences of non-registration under Section 69 of the Partnership Act. *[Mafizur Rahman Manju Vs. Mahmudun Nabi 40 DLR (1988) 451]*

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1. The words [Insolvency (Karachi Division and Dacca) Act or the provincial was substituted by the words "Insolvency Dacca" Act 1909 or the Insolvency Act 1920 by Act No. VIII 1973 and finally the above to insolvency Acts were replaced by Dewlia Bishayak Aain 1997.
2. The word "Bangladesh" was substituted for the word Pakistan by Act No. VIII of 1973 as amended by Act LXX of 19974
3. Section 56 was replaced for the words and figure section 55 by Act XXIV of 1934
4. The word "Taka" was substituted for the word Rupees by Act VIII of 1973 as amended by Act LIII of 1974
5. The word "in the Presidency Towns, is not of a kind specified in section 19 of the Presidency Small Causes Courts Act, 1882, or, outside the presidency Towns" were omitted by A. O. No. 1949
6. The word Provincial was omitted by Act VIII of 1973 as amended by Act LIII of 1974

When the suit properties are not partnership properties the bar of this section against instituting the suit in question is not attracted. *[Mahbubul Alam Chowdhury Vs. Chaman Ara Begum 43 DLR (1991) AD 121.]*

Dissolution by notice of partnership at will -Effect of non-registration of a firm : An oral agreement was arrived at between the appellant and respondent that they would carry on jointly the business of military contracts on the basis of equal share in profits and losses, and the business was carried on till the end of March, 1946, when all war contracts ceased. A suit thereafter was brought for a declaration of dissolution of partnership and rendering of accounts. The existence of partnership was denied and the liability for rendering accounts too. Maintainability of the suit was also questioned. *Held-* (1) Since the partnership was confined to a particular class of business venture and it terminated automatically with the termination of the venture neither section 43 nor section 69 of the Act would be a bar to the maintainability of the suit for accounts of a dissolved firm. (2) No notice was necessary under section 43 of the Act to sustain a claim for accounts of a partnership in certain ejmali contracts which on completion of the business terminated in March, 1946. *[Sudhangshu Bimal Biswas Vs. Md. Mustafa Chowdhury, (1960) 12 DLR (SC) 259.]*

Applicability of provision of section 69 when the suit is one for accounts of dissolved firm : Where on an interpretation of the plaint it is evident that the suit was for the accounts of a dissolved firm, the provisions of section 69 would not be a bar for the maintainability of the suit. *[Sudhangshu Bimal Biswas Vs. Md. Mustafa Chowdhury, (1960) 12 DLR (SC) 259.]*

Change in members and name of firm : *Does not debar firm from filing suit on cause of action which accrued prior to the change.* Where some new partners were introduced in a firm with a change in the name of firm, and the new firm brought a suit under the new name. *Held-* There is in law no restriction in regard to some of the members of the firm leaving the firm and some new members being taken in their place. There is also no restriction for the changing of the name of the firm. Merely because the name of the firm has been changed or some of the members of the firm have left and some new members have been taken in it does not necessarily mean that the firm has been dissolved and that a new firm has been set up. The firm Messes Jamani Brothers & Co. which has ultimately come into being as Messes Jumani Brothers is not a new firm but is the same firm continuing under a different name. Therefore the suit was maintainable. *[Muhammad Zaman Khan Vs. Jumani Brothers, PLD 1961 (W.P.) Karachi 19.]*

Loan made to person to earn profits on his business : Where two persons advanced a loan to another without interest on the hope of making profit in his business of paddy. *Held-* That was not sufficient to constitute them his partners. *[Muhammad Zakria vs. Mazahar Ali, PLD 1961 (WP) Karachi 213.]*

Partnership agreement not registered--Suit for accounts or realization of assets on dissolution is not barred- Suits by or against firm not permitted : Non- registration of the firm under section 69 of the Partnership Act does not affect the validity of the partnership or prevent any of the partners from suing for the dissolution of the firm of for accounts or the realization of the property of a dissolved firm. This section only bars a suit for enforcing a right arising out of a contract against either the firm or any past or present member of it or against any third party. *[Usman vs. Jaji Omar Haji Ayub, PLD 1966 Supreme Court 328.]*

Suit by partner in individual capacity- Not for benefit of the firm Suit not barred under the Act : Section 69 of the Partnership Act, 1932 applies to those cases only where the plaint shows that the dispute in respect of which the suit is brought was for the benefit of the partnership and the plaintiff has either brought the suit for the benefit of the partnership of has based his claim in respect of transaction which was entered into between the partners and the defendant. Where a suit, on a claim arising out of a contract, was brought by one person along and there was no allegation in the plaint that the benefits of the contract in dispute also accrued to some other persons, it was held that the suit was not barred under section 69 of the Partnership Act, 1932. *[Jaffar Khan vs. Muhammad Achar, PLD 1961 (W.P) Karachi 335.]*

Partnership defacto : Partnership-Not necessarily involved in mere promise of share of profits in lieu of work. *[1955 PLR (Lah.) 588.]*

Suit by unregistered firm : Suit against a 3rd party will not lie unless the partnership is registered. *[M.S. Eastern Union Insurance Co. Ltd. vs. M.S. Yusuf & Co. (1967) 19 DLR 69.]*

Suit by a member of dissolved firm: A suit for recovery of damages is not one by the firm but by one of its members of the dissolved firm- such a suit at the instance of such a member is not hit by sub-sections (1) and (2) of section 69 of the Partnership Act.

Where the deed dissolving the partnership authorises one of the members of the partnership firm to institute a suit such a member is entitled to institute such a suit and the provisions of sub-section (1) and (2) of section 69 do not stand as a bar. *[M. Ismail & Sons V's. Trans Oceanic Steamship (1965) 17 DLR 269.]*

Scope -All rights assigned by partners of dissolved firm to one partner : Where one of the partners of the dissolved firm was at the time of dissolution authorised to realise their assets and meet the liabilities of the dissolved firm, and he brought a suit for realizing the assets of the firm. It was held that as it is not a suit by the firm but by one of the members of the dissolved firm at the instance of the plaintiff, it cannot be held to be hit by sub-sections (1) and (2) of section 69 of the Partnership Act. *[M. Ismail & Sons vs. Trans Oceanic Steamship Co. Ltd., PLD 1966 Dacca 296.]*

Suit for accounts - amendments of : A suit originally field for declaration of rights and for accounts- By a subsequent prayer and additional ground for dissolution of the firm was sought to be included in the suit- Question arose whether the amendment sought would alter the nature of the suit so as to substitute one cause of action for another cause in the suit and whether such an amendment may be allowed under Or. 6, r. 17 C.P. Code. *Held*–An amendment of such nature in the plaint may be allowed under the provisions of law without affecting the nature of the suit. *[Radha Krishna Jogani V's. Dwarka Das Agarawalla (1984) 36 DLR (AD) 253.]*

Case of compensation: Held– The case in question is a compensation case and not a suit to enforce a right arising from a contract. There being no existence of a contract between the petitioner and the opposite party, in the present case, is not hit by S. 69(2).

In the absence of any contract between the contesting parties, the question of enforcing rights arising from a contract does not arise and so, section 69 of the Partnership Act has no manner of application to this case. The section puts bar only on particular is types of suits and not to all kinds of suits. *[Ganga Sagar & another. vs. Province of East Pak 25 DLR (1973) 246.]*

Contract between third party and unregistered firm- containing Arbitration clause : Section 69 of the Act provides that no suit to enforce a right arising from a contract or conferred by this Act be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

In Iqbal Singh V's. Ram Narain (1977) (3) A I R 273, it has been held that by sub-section (3) of section 69 the legislature made to proceeding instituted to enforce a right arising out of a contract. Now since the application under Section 20 of the Arbitration Act, was filed by the appellants in view of the arbitration clause existing in the agreement executed between the parties, it is manifest that the proceeding arising out of the application under Section 20 were proceedings to enforce the right arising from the contract as envisaged in sub-section (3) of Sec. 69 and therefore barred.

In view of the principles of law above, it is clear that the plea of X that the firm being unregistered, the award could not be filed in court is right, as the filing of the award is to execute a right arising from a contract and therefore barred by Section 69 of the Partnership Act.

70. Penalty for furnishing false particulars.– Any person who signs any statement, amending statement, notice or intimation under this Chapter containing any particular which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to three months, or with fine, or with both.

71. Power to make rules.– (1) The [Government][1] may make rules prescribing the fees which shall accompany documents sent to the Registrar of Firms, or which shall be payable for the inspection of documents in the custody of the Registrar of Firms, or for copies from the Register of Firms:

Provided that such fees shall not exceed the maximum fees specified in Schedule I.

(2) The [Government][1] may also make rules:-

(a) prescribing the form of statement submitted under section 58, and of the verification thereof ;

(b) requiring statements, intimations and notices under sections 60, 61, 62 and 63 to be in prescribed form, and prescribing the form thereof ;

(c) prescribing the form of the Register of Firms, and the mode in which entries relating to firms are to be made therein, and the mode in which such entries are to be amended or notes made therein ;

(d) regulating the procedure of the Registrar when disputes arise ;

(e) regulating the filing of documents received by the Registrar ;

(f) prescribing conditions for the inspection of original documents ;

(g) regulating the grant of copies ;

(h) regulating the elimination of registers and documents ;

(i) providing for the maintenance and form of an index to the Register of Firms; and

(j) generally, to carry out the purposes of this Chapter.

(3) All rules made under this section shall be subject to the condition of previous publication.

Notes/Comments/Precedents

Retirement of partner : The retirement of a partner is not effective unless and until other partners agree to discharge him to possible liability and a public notice is given under section 72. *[Md Mahmudun Nabi Vs. Mafizur Rahman Manju 42 DLR (1990) AD 120.]*

1. The word [*Government*] was substituted for the words [*Provincial Government*] Act VIII of 1973 as amended by Act LIII of 1974

CHAPTER VIII
SUPPLEMENTAL

72. Mode of giving public notice.– A public notice under this section is given–

(a) where it relates to the retirement or expulsion of a partner from a registered firm, or to the dissolution of a registered firm, or to the election to become or not to become a partner in a registered firm by a person attaining majority who was admitted as a minor to the benefits or partnership, by notice to the Registrar of Firms under sections 63, and by publication in the [official Gazette][1] and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business, and

(b) in any other case, by publication in the [official Gazette][1] and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business.

Notes/Comments/Precedents

Retiring partner- liability of : A retiring partner under section 32(3) read with s. 72 of Partnership Act continues to be liable for any subsequent act of any other partner which would bind the firm until the public notice as prescribed by section 72 is given.*[Md Mahmudun Nabi Vs. Mafizur Rahman Manju 42 DLR (1990) AD 120]*

73. [*Repealed.*][2]

74. Savings.– Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect–

(a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act, or

(c) anything done or suffered before the commencement of this Act, or

(d) any enactment relating to partnership not expressly repealed by this Act, or

(e) any rule of insolvency relating to partnership, or

(f) any rule of law not inconsistent with this Act.

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1. The words official Gazette were substituted by for the word local official Gazette" by A.O. 1936

2. Section 73 Rep. by the Repealing Act, 1938 (I of 1938), s. 2 and Schedule.

SCHEDULE I

MAXIMUM FEES

[*See* sub–section (1) of section 71]

Document or act in respect of which the fee is payable.	**Maximum fee**
Statement under section 58	Ten [Taka]
Statement under section 60	Four [Taka]
Intimation under section 61	Four [Taka]
Intimation under section 62	Four [Taka]
Notice under section 63	Four [Taka]
Application under section 64	Four [Taka]
Inspection of the Register of Firms	[Taka] one and fifty
under sub–section (1) of section 66.....	[Poisha]
Inspection of documents relating to a firm	[Taka] one and fifty
under sub–section (2) of section 66.....	[Poisha]
Copies from the Register of Firms	Fifty [Poisha] for each hundred words or part thereof.]

SCHEDULE II.– [ENACTMENTS REPEALED] Rep. by the Repealing Act, 1938 (I of 1938),s. 2 and Sch.

STAMP DUTY ON INSTRUMENT OF PARTNERSHIP

[As per Finance Act, 1998 (Act XIV of 1998]

(a) Where the capital of the partnership does not exceed Tk. 25,000 .....Five hundred Taka

(b) In any other case .....One thousand Taka

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