PART V

REGISTRATION OF CHARGES

GENERAL NOTES

ONE OF the principal reasons for the phenomenal growth of the corporate sector is the facility which incorporation of the company provides for raising capital for large-scale projects which are not normally within the reach of individual effort and means. Initially the only method available to a company for raising money was by issue of equity or preference shares which constituted the company's share capital. As capital requirements became more pressing, alternative modes of raising funds by way of loans were explored and the concept of loan capital came into being. Borrowing has become an equally important method along with share capital of financing projects. Corporate borrowing has its own peculiarities. No single individual may in normal circumstances be in a position to meet the loan requirements of a company. Loan-money has, therefore, to be raised from a large number of persons very much in the same way as share capital. Again loans may have to be obtained in a sequence one after the other. The problem was solved by the evolution, on the one hand, of debentures and, on the other, of the concept of floating charge, both being reserved only for the corporate sector. The same assets are charged to several lenders and also to several lenders in a series. That raises a question as to who shall have priority. This brought about the application of the concept of *pari passu* ranking. Since other trade creditors have also to seek payment only out of the company's assets, the problem had to be tackled as to how they should know, before supplying more credit, what assets would be available as security for their payment? The Act prescribes for registration of charges with the Registrar of Companies, and also gives a list of assets a charge on which must be registered. Registration of charges identifies the assets which are subject to the charge. It becomes a source of knowledge, and, therefore, operates as constructive notice and a protection, to all classes of persons interested in knowing the assets position of the company. It makes the charge effective against all quarters including the liquidator.

The method of registration devised by the Act is the filing of particulars of charge alongwith instrument creating charge with the Registrar within the period prescribed. Lest the failure of the company to file particulars within time cause hardship to any quarter, any interested person can get the charge registered and the Central Government (earlier the Company Law Board) is empowered to order registration even if applied for after the prescribed period. This is known as "rectification of the register of charges," and is liberally allowed so long as the company is a going concern, but no change can be made in the status of creditors after commencement of winding up. Where the company files the particulars within time but the Registrar does not enter them in the register of charges or where the company files wrong particulars, the Act being silent on the point, the courts solved the problem by holding that the charge must be deemed to have been registered with the filing of particulars.

Charges are temporary phenomena. The company may overcome them and free its assets. The memorandum of satisfaction is also required to be brought on the Register so that the register may at all times reflect only the true position of the company's assets. Any delay on the part of the company in filing the modification or satisfaction of charges, as in the case of creation of charge as afore stated may be condoned by the Central Gov-

ernment. For the purposes of convenience of reference, register of charges is required to be maintained both by the company and Registrar of Companies.

S. 124. "Charge" to include mortgage in this Part.—In this Part the expression "charge" includes a mortgage.

NOTES

Eng. Act, 1948 : Sec. 95(10)(a)
Eng. Act, 1985 : Sec. 396

Charge, fixed and floating

The term "charge" is defined in s. 100 of the Transfer of Property Act, 1882 as follows:

"S. 100. Charges.—Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

"Where in a transaction for value, both parties evidence an intention that property, existing or future, shall be made available as security for the payment of a debt and that the creditors shall have a present right to have it made available, there is a charge even though the present legal right which is contemplated can only be enforced at some future date, and, though the creditor gets no legal right of property, either absolute or special or any legal right to possession, but only gets the right to have the security made available by an order of the Court." *National P. & U. Bank v. Charnley,* (1924) 1 KB 431 at 449.

'Charge' includes a lien and also an equitable charge whether created or evidenced by an instrument in writing or by deposit of title deeds or by an agreement to deposit. *Dublin City Distillery Co. v. Doherty,* 1914 AC 823. Deposit of title deeds creates a charge on land even if the depositor is not the debtor. *Wallis and Simmonds (Builders) Ltd., Re.,* (1974) 1 All ER 561 : (1974) 1 WLR 491. Physical delivery of documents by the debtor to the creditor is not the only mode of deposit. There may be constructive deposit. *K. H. Nathan v. S. V. Maruthi Rao,* AIR 1965 SC 430.

A charge may be 'fixed' or 'floating'. When the charge is fixed, a company which has created the charge, can only deal with the property subject to the charge. But when the charge is 'floating' the company may, in the ordinary course of business, deal with the property in any manner until the charge attaches. In the words of LORD MACNAGHTEN (in 1897 AC 81 at 86) "a floating security is an equitable charge on the assets for the time being of a going concern; it attaches to the subject charged in the varying conditions it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes. His right to intervene may, of course, be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default. *Re, Yorkshire Woolcombers' Association Ltd.,* (1903) 2 Ch 284 **affirmed** in *Illingworth v. Houldsworth,* (1904) AC 355. Whether a charge is fixed or floating is to be determined by the substance of the transaction and not by the descriptions or terminology used by the parties. *Armagh Shoes Ltd., Re,* 1984 BCLC 405 Ch D.

The fact that a charge was described as "fixed" was not conclusive as to its true nature and it was necessary to ascertain whether the charge had the characteristics of fixed or floating charge. Where the charger had a contractual right to collect the proceeds of the charged assets and to place them in his own bank accounts to be used in the ordinary course of business, the charge was to be construed as floating rather than fixed. Where a trading company was carrying on a business and the debenture clearly envisaged that it would continue to do so, the court would be reluctant to interpret the debenture as prohibiting the operation of a bank account in the ordinary course of business. Accordingly,

even though the charge over the book and other debts and revenues in the debenture in the instant case was described as "fixed", it had to be treated as a floating charge. In this case, the company borrowed from a person in order to enable it to purchase the premises of the lender. Repayment was secured by the issue of a debenture which was registered, describing the charge as fixed charge. The court did not go by that description. *Westmaze Ltd. (in Administrative Receivership) Re, The Times*, July 15, 1998 (Ch D). The court **followed** *Royal Trust Bank Plc. v. National Westminister Bank,* (1996) BCC 613 : (1996) 1 CLY 400.

The court repeated the warning that labels attached to types of charges created by debentures are not conclusive. A charge over funds lodged in a bank which as described as a fixed charge was indeed found to operate in substance as a floating charge. *Re, ASRS Establishment Ltd.,* [2000] 1 BCLC 727 **Affirmed** by Court of Appeal in *ASRS Establishment Ltd. (In administrative receivership and Liquidation) Re,* [2000] 2 BCLC 631 (CA).

Whether fixed or floating charge

The debenture in question created a fixed charge over classes of assets and a floating charge over all other property, assets and rights not subjected to fixed charge. The company was entitled to sell or otherwise deal with individual items without consent in the ordinary course of and for the purposes of its business. The major asset of the company was a fund held in escrow. The question arose whether the charge over the company's interests in the escrow moneys was of fixed or floating nature and whether the company was entitled to use the proceeds of escrow money in the ordinary course of its business. Going by the clauses of the debenture agreement, the court said that the effect was to create a floating charge and consequent freedom to deal with the assets. *ASRS Establishment Ltd. Re,* (2000) 2 BCLC 631 (CA).

The contract constituted by the debenture must be construed by reference to the facts as they were, or might be foreseen to be, at the time it was executed and not by reference to the subsequent conduct of the parties. *James Miller & Partners v. Whitworth Street Estates (Manchester) Ltd.,* (1970) 1 All ER 796. The very essence of a specific charge is that the assignee takes the possession and is the person entitled to receive the book debts at once. So long as he licences the mortgagor to go on receiving the book debts and carry on the business, it is within the exact definition of the floating security, *Houldsworth v. Yorkshire Woolcombers Assn.,* (1903) 2 Ch 284 at 289.

It is clear from the above observation that a floating charge is an equitable charge which does not fasten on any specific property but covers the whole of the company's property whether it is or is not subject to a fixed charge. Upon the happening of any of the events set out in the deed of the floating charge, it crystallises or becomes fixed and thereafter the assets comprised in the charge are subject to the same restrictions and affected in the same manner as under a specific charge. See *Union of India v. Coorg Estates Ltd.,* (1963) 2 Comp LJ 164 (Ker–DB).

Some cases, however, point to the view that a floating charge need not cover the whole of the property of the company but may be confined to a specific portion of the assets. See the observation in *Illingworth v. Houldsworth* (*supra*). HENRY J. of the High Court in New Zealand has held that a specific charge over "fixed plant and machinery" did not encompass source code computer software which accordingly was only secured by a floating charge. The term "fixed plant and machinery" was narrowly construed to mean items firmly attached to the company's premises—*National Bank of New Zealand Ltd. v. Commissioner of the Inland Revenue,* (1992) 1 NZLR 250. In *Re, Atlantic Medical Ltd.,* 1993 BCLC 386 (Ch D) VINELOTT J, on an application by liquidators for directions, concluded that a finance agreement assigning the benefit of rents arising under sub-leases of medical equipment created a fixed rather than floating charge over the items in question.

So also a floating charge may include future acquisitions if the terms of the charge are wide enough to cover them.

The moment a floating charge crystallises into a fixed charge, all equities existing between the debtor company and its other creditors, so far as the subject-matter of the charge is concerned, will disappear. *Cf. Robbie & Co. Ltd. v. Witney Warehouse Co. Ltd.*, (1963) 3 All ER 613 : (1964) 34 Com Cases 178 (CA).

One distinguishing feature of a fixed from a floating charge is the degree of control over the property which the chargeholder exercises. This was highlighted in the decision in *Double S. Printers Ltd. Re,* (1999) 1 BCLC 220 (Ch D). A company was owned by S and W who were directors. The company granted a debenture in favour of S. The debenture purported to create a legal mortgage over 'printing equipment as determined' and a fixed charge over the company's book debts. The company came into serious financial difficulties and sold all its physical assets, including all its printing equipment, to another company and S joined in the sale agreement for the purpose of releasing the assets from the debenture. On the following day the company went into creditors' voluntary liquidation. The liquidators applied for directions as to whether and to what extent the debenture created a valid and enforceable fixed charge over the assets of the company, including its book debts. It was held that in order for the debenture to take effect as a fixed charge over present and future book debts, there had to be some right of control over the debts, or their proceeds, exercisable by the charge-holder in his capacity as chargee and it was insufficient to show that he as a director exercised actual control over the book debts and over the company's bank account. Accordingly the charge over book debts could take effect only as a floating charge. The debenture did not create a fixed charge over the printing equipment. The expression 'printing equipment as determined' connoted some future 'determination' so as to render a particular item of printing equipment subject to a fixed charge and did not mean all present and future printing equipment owned by the company or all primary equipment owned by the company at the date of enforcement of the charge. In any event the answer to the question whether the debenture created a fixed charge over printing equipment was that in the sale agreement the chargee expressly released the assets the subject of that agreement, which included the printing equipment, from the debenture and the proceeds were payable to the company and not to S. The court **applied** the principle of the decision in *Cosslett (Contractors) Ltd.*, (1999) 1 BCLC 205 : (1997) 4 All ER 115.

In *Smith v. Bridgend County Borough Council,* (2002) 1 BCLC 77 (HL) the agreement was held to constitute a floating charge, registrable under s. 395 of the 1985 Act, in so far as it allowed the employer, in various situations of default by the contractor, to sell the contractor's plant and equipment and apply the proceeds in discharge of its obligations. A right to sell an asset belonging to a debtor and appropriate the proceeds to payment of the debt could not be anything other than a charge. It was a floating charge because the property in question was a fluctuating body of assets which could be consumed or removed from the site in the ordinary course of the contractor's business.

Fixed or floating charge - categorisation

The question whether a charge could be fixed or floating came up for consideration before the Privy Council in *Agnew v Commissioner of Inland Revenue,* (2001) 2 AC 710 (PC). The judgment of LORD MILLET is important and part thereof deserves to be reproduced.

"In deciding whether a charge is a fixed charge or a floating charge, the court is engaged in a two-stage process. At the first stage, it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. But the object at this stage of the process is not to discover whether the parties intended to create a fixed or a floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties. If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it. A similar process is involved in construing a document to see whether it creates a licence or tenancy. The court must construe the grant to ascertain the

intention of the parties: but the only intention which is relevant is the intention to grant exclusive possession: see *Street v Mountford,* (1985) A.C. 809, 826 per LORD TEMPLEMAN. So here: in construing a debenture to see whether it creates a fixed or a floating charge, the only intention which is relevant is the intention that the company should be free to deal with the charged assets and withdraw them from the security without the consent of the holder of the charge; or, to put the question another way, whether the charged assets were intended to be under the control of the company or of the charge holder."

LORD MILLET referred to an earlier decision of HOFFMAN J in the case of *In Re Brightlife Ltd.,* 1987 Ch. 200. The court held that when a particular debenture permitted the creditor to collect its debts and pay its proceeds into its bank account, the right to deal in this way is a badge of a floating charge and is inconsistent with a fixed charge. The above judgments have been discussed in great detail in an excellent article *Recharacterisation after Enron* by ALAN BERG [2003] J.B.L 205.

When floating charge becomes crystallised

1. When company ceases to be going concern and charge holder intervenes/appoints Receiver.—A floating charge becomes fixed or crystallised when the debtor company ceases to carry on business or goes into liquidation or the debenture-holder or creditor, in whose favour the charge is created, intervenes by getting a receiver appointed or doing some other act which affects the company's power of disposition over the assets charged. *Colonial Trust Corpn., Re,* (1879) 15 Ch D 465 (CA). Mere default on the part of the company or the issue of a notice demanding the debt is not enough. As LORD MACNAGHTEN pointed out in *Government Stock and Other Securities Investment Co. v. Manila Rail Co.,* 1897 AC 81, a floating charge "remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may, of course, be suspended by agreement. But if there is no agreement for suspension, he may exercise this right whenever he pleases after default". For a brief note on automatic crystallisation without intervention of the charge holder, See comments under Section 125(4)(f), *infra.*

The position is further clearly explained as follows by VAUGHAN WILLIAMS, LJ in *Evans v. Rival Granite Quarries Ltd.,* (1910) 2 KB 979 (CA):—"Generally the right (*i.e.,* the right of the company to carry on its business when a floating charge over all its assets exists) is determined by the happening of something which entitles the making of an application to the Court for the appointment of a receiver. This is a case in which a receiver could be appointed without an order of the Court: it is not a case in which persons claiming to be secured creditors could exercise the full rights of legal mortgages. But it is a case in which, when an occasion arises for entirely putting an end to the company's *jus disponendi,* an application may be made to the Court for the appointment of a receiver. In my opinion, unless something has occurred entitling the debenture-holder to make such an application, and the application has, in fact, been made for the appointment of a receiver, or an action brought by them or on their behalf to realise their security, or unless something has happened which entitles the debenture-holders to determine their licence to the company to carry on its business and they have actually done so, the company is entitled to do all the things which the licence entitles them to do." Thus the event which transforms a floating charge into a fixed charge is either the cessation of the carrying on of the business of the company or the actual intervention by the charge holder by the appointment of a receiver or institution of a suit to enforce the charge or the company going into liquidation. See also *Grifin Hotel Co., Re,* (1941) 11 Com Cases 268; *Holson v. Tea Co.,* (1880) 14 Ch 859; *Wallace v. Universal Automatic Machines Co.,* (1894) 2 Ch 547 (CA). This is notwithstanding any provisions to the contrary in the trust deed. *In re, Crompton & Co. Ltd. Player v. Crompton & Co. Ltd.,* (1914) 1 Ch 954.

See also *Union of India v. Coorg Estates Ltd.,* (1963) 2 Comp LJ 164 (Ker–DB) which contains a review of all the case-law on the subject.

2. Crystallisation on event specified in the charge.—A floating charge may also crystallize on the happening of an event specified in the charging deed. If the charge

contract so provides, when the chargee gives notice that the charge is converted into a fixed charge on whatever assets of the charged class are owned by the company at the time the notice is given. *Brightlife Ltd., Re,* (1987) Ch 200.

Where a debenture creating a charge in favour of the lending bank specified that the charge was to crystallise on the happening of an event or default in payment and the bank having demanded payment which was not made, the Court held that the charge had become crystallised and since this had occurred before the appointment of the receiver, the floating charge was no longer a floating charge at the time of receiver's appointment. On the facts the decision was that the money in the company's banking account was to be handed over to the charge holder and not to the preferential creditors. *Permanent Houses (Holdings) Ltd., Re,* 1988 BCLC 563 (Ch D); *Stein v. Saywell,* (1969) 121 CLR 529; *Re, Manurewa Trasport Ltd.,* (1971) NZLR 909; *Fire Nymph Products Ltd. v. Heating Centre Pty. Ltd., Covacich v. Riordan,* (1994) 2 NZLR 502. A provision in a floating charge contract that the charge is to crystallise on the happening of a certain event without any action by the chargee is usually described as a provision for 'automatic crystallisation'. For Automatic Crystallisation see Notes under s. 125.

3. When winding up of company commences.—In *Re, Brightlife Ltd.,* (1987) Ch 200, HOFFMANN J suggested, at p. 212, that this was an implied term of a floating charge contract and could be excluded by an express provision to the contrary. See *Wallace v. Universal Automatic Machines Co.,* (1894) 2 Ch 547 (CA); *Re, Panama, New Zealand & Australian Royal Mail Co.,* (1870) LR 5 Ch App 318; *Re, Crompton & Co. Ltd.,* (1914) 1 Ch 954.

Floating charge on undertaking or any property.—For pointwise enumeration of the circumstances of crystallisation, see Notes under Section 125(4)(f), *infra.*

Effect of floating charge becoming fixed or crystallised

When a floating security upon all the property or assets of the company becomes fixed, it constitutes a charge upon all the property or assets then belonging to the company. It has priority over any subsequent equitable charges and over unsecured creditors and over money advanced to the liquidator to carry on the business of the company, even though the advances were made with the sanction of the court in the winding up, and over the costs of the liquidators other than costs of realisation, but it is subject to all the existing charges and to the payment of debts which by statute are made payable out of property subject to a floating security in priority to the money thereby secured. A floating charge on all the undertaking and property of a company including uncalled capital constitutes a charge on money recovered by a liquidator in misfeasance proceedings as well as on calls got in by him. HALSBURY'S LAWS OF ENGLAND, 4th edition, Vol. 7, para 830: [Reissue 1988, Vol. 7(2), Para 1104, Page 880]: Reissue 1996, Vol. 7(2), para 1266, p. 948. See also *Re, Christonette International Ltd.,* (1982) 3 All ER 225 : (1983) 3 Comp LJ 189 (Ch D).

The crystallisation of a floating charge on the appointment of an administrative receiver effects an assignment of the goods subject to the charge to the debenture holder with the consequence that they are no longer goods of the company and the local authority is precluded from levying distress on those goods for the non-payment of rates. *ELS Ltd., Re,* (1994) 1 BCLC 743 (Ch D).

The crystallisation of a subsequent floating charge does not have the effect of crystallising a prior floating charge in the absence of a term to that effect in agreement creating the prior charge. *Re, Woodroffes (Musical Instruments) Ltd.,* (1985) 2 All ER 908 : 1985 BCLC 227; *Benjamin Cope & Sons Ltd.,* (1914) 1 Ch 800.

Further floating or specific charges on same assets.—A company has the right to create further floating or specific charges on the same assets to secure a new series of debentures. The existing debenture-holders cannot prevent the company from doing so unless there is some provision in the terms of the issue which prohibits it. Thus where the trust deed in respect of the earlier issues enabled the company to make further issues provided that certain conditions as to value of assets and level of profits were satisfied, it

was held that the court could go by the company's annual accounts and reports so as to make sure that the conditions are satisfied. A debenture-holder, who was seeking to stay the issue of a further series, was not entitled to go behind the accounts into the company's registers and records so as to see whether the balances contemplated by the earlier issues were really maintained. The court, however, readily agreed that he was entitled to sue in his right as the beneficiary of the debenture-trust deed without bringing in the trustees and that the company was bound to pay him off should he so insist. As to the motives of a petitioner, about which it has been held several times over that they cannot be taken into account, (Mrs.) SUJATA MANOHAR J said: "The allegations of *mala fides* cannot, therefore, be lightly brushed aside. I prefer, however, to dispose of the motion on the basis of disclosed material and on merit, irrespective of the alleged motives of the plaintiff." *Narotamdas T. Toprani v. Bombay Dyeing & Mfg. Co. Ltd.*, (1990) 68 Com Cases 300 (Bom).

Holding/subsidiary relationship.—Where a floating charge created by a holding company covers shares in its subsidiary, the crystallisation of that charge constitutes an equitable assignment of those shares to the debentureholder and so precludes the exercise of any options, granted by the holding company after the creation of the floating charge to purchase the said shares. An attempt to exercise that option after the appointment of the receiver was, therefore, ineffective and specific performance would not be granted against the receiver—*Re, Tullow Engineering (Holdings) Ltd.*, (1990) IR 452 (Irish HC).

NBFCs—requirement of consent of first charge holder

RBI Press Release, dt. 24-3-1998.—Please refer to your Letter No. LFS/746/1997-98, dated February 23, 1998. We advise that Non-Banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 1998 have not stipulated that the debentures/bonds have to be secured by first charge of the asset of the NBFCs in order to be excluded from the definition of the expression, 'public deposits'. In view thereof, if second charge of the asset adequately covers the debentures/bonds issue, it may be regarded as secured debentures. It may, however, be ensured that—

(1) the value of asset against which debentures are to be issued fully covers both the sanctioned limit by the bank/s and the proposed amount to be raised by issue of secured debentures/bonds.

(2) there is nothing in the documents creating the first charge which prohibits the company from granting second charge. If the documents granting first charge require the company to obtain the consent of first charge holder for creating any subsequent charge, such consent will have to be obtained.

[*Press Release, Ref. DNBS (PD) No. 2062/02.04/97-98, dated 24th March, 1998, issued by the Department of Non-Banking Supervision, RBI*]

Floating charges, real protection not illusory

It is incorrect to say that a floating charge creates an illusory charge, and that too only because future securities can be created ranking in priority over it. The floating charge creates a present equitable right on the property of a company even before the time for payment of the debentures arrives. The company can deal with its property without permission of the debenture-holders/trustees before crystallisation of the charge. This does not mean that the company can keep on creating future charges with superior ranking without any hindrance, because the debenture-holders/trustees can at any time move to crystallise the floating security if they feel the security is in jeopardy. *Narendra Kumar Maheshwari v. Union of India*, AIR 1989 SC 2138. In this very case Supreme Court listed the following points in reference to debentures secured by a floating charge:

(1) A debenture is usually secured by floating charge only.

(2) A company which creates floating charge has a right to create future securities which may rank superior in ranking.

(3) However, this right may be restricted by agreement.

(4) Where no restriction is provided, any future specific charge will rank superior to the earlier floating charge (section 123 of the Companies Act).

(5) Where no specific provision is made in the earlier floating charge with respect to the ranking of future floating charge, then any future floating charge will be inferior [*sic.* superior] to the earlier floating charge. In this connection reference may be made to section 48 of the Transfer of Property Act. The risk of floating charges can be controlled by creating legal mortgage in favour of debenture-trustees.

Burden of proof

A party who wants to enjoy the benefit of a security has to prove that he was in fact a secured creditor. See *Industrial Finance Corporation of India v. Century Metals Ltd.*, (1992) 73 Com Cases 630, 659 (Del) where no effort was made by IDBI to prove its status as a secured creditor.

Foreign Companies.—This section also applies to foreign companies. See Notes under section 600.

S. 125. Certain charges to be void against liquidator or creditors unless registered.—(1) Subject to the provisions of this Part, every charge created on or after the 1st day of April, 1914, by a company and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge[1], together with the instrument, if any, by which the charge is created or evidenced or a copy thereof verified in the prescribed manner[2], are filed with the Registrar for registration in the manner required by this Act within [3][thirty] days after the date of its creation:

[4][*Provided* that the Registrar may allow the particulars and instrument or copy as aforesaid to be filed within thirty days next following the expiry of the said period of thirty days on payment of such additional fee not exceeding ten times the amount of fee specified in Schedule X as the Registrar may determine, if the company satisfies the Registrar that it had sufficient cause for not filing the particulars and instrument or copy within that period.]

(2) Nothing in sub-section (1) shall prejudice any contract or obligation for the repayment of the money secured by the charge.

(3) When a charge becomes void under this section, the money secured thereby shall immediately become payable.

(4) This section applies to the following charges:—

(a) a charge for the purpose of securing any issue of debentures;

(b) a charge on uncalled share capital of the company;

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1. Form Nos. 8, 13 and 55 of the Companies (Central Government) General Rules & Forms, 1956 are the prescribed forms relevant to the section.
2. Refer R. 6(b) of Companies (Central Government's) General Rules & Forms, 1956 for the prescribed manner of verification.
3. The word "thirty" was substituted for the word "twenty-one" by s. 62 and Sch. to the Companies (Amendment) Act (31 of 1965) (w.e.f. 15-10-1965).
4. Subs. by the Companies (Amendment) Act, 1988, for the proviso namely "Provided that the Registrar may allow the particulars and instrument or copy as aforesaid to be filed within seven days next following the expiry of the said period of thirty days if the company satisfies the Registrar that it had sufficient cause for not filing the particulars and instrument or copy within that period," s. 18 w.e.f. 15-6-1988 *vide* GSR No. 559(E) dt. 10-6-1988.

(c) a charge on any immovable property, wherever situate, or any interest therein;

(d) a charge on any book debts of the company;

(e) a charge, not being a pledge, on any movable property of the company;

(f) a floating charge on the undertaking or any property of the company including stock-in-trade;

(g) a charge on calls made but not paid;

(h) a charge on a ship or any share in a ship;

(i) a charge on goodwill, on a patent or a licence under a patent, on a trade-mark, or on a copyright, or a licence under a copyright.

(5) In the case of a charge created out of India, and comprising solely property situate outside India, [5][thirty] days after the date on which the instrument creating or evidencing the charge or a copy thereof could, in due course of post and if despatched with due diligence, have been received in India, shall be substituted for [5][thirty] days after the date of the creation of the charge, at the time within which the particulars and instrument or copy are to be filed with the Registrar.

(6) Where a charge is created in India but comprises property outside India, the instrument creating or purporting to create the charge under this section or a copy thereof verified in the prescribed manner[6], may be filed for registration, notwithstanding that further proceedings may be necessary to make the charge valid or effectual according to the law of the country in which the property is situate.

(7) 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 charge on those book debts.

(8) The holding of debentures entitling the holder to a charge on immovable property shall not, for the purposes of this section, be deemed to be an interest in immovable property.

NOTES

Eng. Act, 1948 : Sec. 96
Eng. Act, 1985 : Sec. 399

Previous Act : Sec. 109

Companies Act, 1956

This section is based on clause 119 of the Companies Bill, 1953 which took into account the recommendations of the Company Law Committee [*Report*: Para 226].

Companies (Amendment) Act of 1960 and Act of 1988

Under the Amendment Act of 1960, a proviso was added to sub-section (1) allowing the companies to file particulars of charge within 7 days after the prescribed period of 30 days, in order to obviate inconvenience of seeking Court intervention for condoning small postal and other delays in filing the instrument creating the charge, when the Reg-

5. The word "thirty" was substituted for the word "twenty-one" by s. 62 and Sch. to the Companies (Amendment) Act (31 of 1965) (w.e.f. 15-10-1965).
6. Refer R. 6(b) of Companies (Central Government's) General Rules & Forms, 1956 for the prescribed manner of verification.

istrar was satisfied that the delay was due to reasons beyond the control of the company. (*Companies Act Amendment Committee's Report* : para 56). Based on the recommendations of the Sachar Committee (para 17.27), this proviso has been further amended by the Amendment Act of 1988 to empower the Registrar to accept for registration the delayed filing of the particulars of charges and mortgages within a period of 30 days, as against seven days as at present, by imposing additional fees. (Clause 18 of *Notes on clauses*). Any further delay in filing the particulars of the charge can be condoned by the Company Law Board under section 141. These provisions apply *mutatis mutandis* to modification of charge under section 135. It may be noted that in so far as satisfaction of charge is concerned, it is required to be intimated to the Registrar within 30 days of such satisfaction and any delay in doing so will require condonation from the CLB under section 141.

Scope of section

The scope of this section depends upon the nature of the rights acquired in the assets of the company and the answer to the following three questions:

(1) Do the rights constitute a charge?

(2) If the rights constitute a charge, is it one of the charges listed in the Section?

(3) Were the rights created by the company?

The section applies only to a charge created by a company and not to a charge arising by operation of law, such as a vendor's lien for unpaid purchase money. The expression "created" shows that only charges founded on contract are intended to be covered. *Cf. K. Saradambal v. Jagannathan,* (1972) 42 Com Cases 359 (Mad); *Hukum Chand v. Pioneer Mills Ltd.,* AIR 1927 Oudh 55. Thus where a charge is created by an order of the court it will not require registration, since it is not created by the company. *Praga Tools Ltd. v. Official Liquidator of Bengal Engineering Co. Pvt. Ltd.,* (1984) 56 Com Cases 214 (Cal); *Overseas Aviation Engineering (G.B.) Ltd.,* (1963) 33 Com Cases 315 (CA) **reversing** *Sub-nom,* (1962) 32 Com Cases 818. Dealings by the trustee of charge holders with the property subjected to the charge or with the cash realised from sale of the mortgaged property are not within the scope of the section even if they involve some investment or conveyance in the nature of mortgage, etc. *United Breweries Ltd. v. Abbot,* (1908) 1 Ch 279. But where a legal charge is created for balance of purchase price, the vendor's lien will be deemed to have been thereby abandoned, and if the charge is not registered, the vendor cannot fall back upon the lien, *Capital Finance Co. Ltd. v. Stokes,* (1968) 3 All ER 625 : (1969) 1 Comp LJ 341 (CA).

In the case of a carrier it has been held that his lien for the freight in respect of goods which came into his possession after the appointment of a Receiver is not a charge and will be effective and it was immaterial that the lien was exercised after the appointment of a Receiver. *George Barket (Transport) v. Eynon,* (1973) 3 All ER 374 (CA) (**overruling** MOCATTA J. (1973) 1 WLR 1461). In *Channel Airways v. The Lord Mayor, Aldermen & Citizen of the City of Manchester,* (1974) 1 Lloyd's Rep 456, a statutory right of detention exercised by an airport operator was distinguished from an ordinary lien. It was held to enable the airport operator to detain an aircraft for airport dues at the time when it was known to be subject to a floating charge, which had already crystallized by the appointment of a receiver.

An order in the shape of a Mareva injunction will prevail where the floating charge has not yet crystallised, *Cretanor Maritime Co. Ltd. v. Irish Marine Management Ltd.,* (1978) 1 WLR 968.

Where in sale of some farmland to a property development company, the price was paid with a commitment to pay some additional price if planning permission for development was obtained and that the seller would then be entitled to demand a legal mortgage of the land to secure payment of the additional price, it was held that this did not require registration because it was a right of a contingent nature and not enforceable

without the happening of the contingency. *Williams v. Burlington Investment Ltd.,* (1977) 121 Sol Jo 424 (HL).

The provisions of this section do not apply to a charge created by a partnership firm over its assets, merely because one of the partners is a limited company, because the limited company is not the owner of the assets.

The 'thirty days' have to be calculated from the date when the instrument of charge is executed, though it may be stipulated to take effect on a later date on the happening of a later event. *Esberger & Son Ltd. v. Capital and Counties Bank,* (1913) 2 Ch 366; *Dublin City Distillery v. Doherty,* 1914 AC 823.

Whether a particular transaction is a charge or not is to be determined not by the form in which it is couched but by looking at the substance of it. Though a document is given the form of an assignment, if in reality it is an instrument creating a security, registration as a charge cannot be evaded, *Re, Inglefield Ltd.,* (1933) Ch 1 *Kent & Sussex Saw Mills Ltd., In Re,* (1946) 2 All ER 638 (Ch D) : (1947) 17 Com Cases 168; *Stoneleigh Finance Ltd. v. Phillips,* (1965) 1 All ER 513 (CA). In *Bond Worth Ltd., Re,* (1980) Ch 228, 248. SLADE, J. said: "In my judgment, any contract which, by way of security for the payment of a debt, confers an interest in property defeasible or destructible upon payment of such debt, or appropriates such property for the discharge of the debt, must necessarily be regarded as creating a mortgage or charge, as the case may be."

In the *Kent & Sussex case, (Supra)* a contract in order to get bank finance for working a Government contract gave the authority to the Government on the insistance of the bank that all payments under the contract should be directly sent to the contracting company's bank account and that would be sufficient discharge of the Government and that the instruction was irrevocable except with the consent of the bank. This arrangement was not registered because the bank thought it was an outright assignment of the debts, but the court held that the transaction was a charge requiring registration because otherwise there would have been no need to say anything about revocation. Where, on the other hand, certain bills of exchange were handed over to a bank with the instruction that the proceeds shall be credited to the account of the supplier of the goods to the company, this was held to be absolute assignment requiring no registration. *Siebe Gorman & Co. Ltd. v. Barclays Bank Ltd.,* (1979) 2 Lloyd's Rep 142.

A charge on all the products, movable property and book debts created in favour of a bank to secure overdraft facility would be void against the liquidator of the company and other creditors of the company. It was necessary that the prescribed particulars and the instrument under which the charge was created were filed with the Registrar within 30 days of the creation of the charge. In the event of delay, any interested person could have asked for condonation of delay by the Company Law Board. *Deutche Bank v. S.P. Kala,* (1999) 32 CLA 448 : (1999) 20 SCL 340 : (1999) 98 Com Cases 841 (Bom).

When there are two provisions, one requiring registration and the other not requiring registration, there is no reason why second provision should not be availed of by the company or by the bank with whom the fixed deposits receipts have been pledged. *Sri Meenakshi Mills Limited v. ROC,* (1966) 36 Com Cases 961, 964 : AIR 1966 Mad 24.

When property acquired by a company is made the subject matter of a charge, the company will have to file the necessary particulars regarding the charge to which the property becomes subject. Where property which is subject to a charge is transferred by the company and is released from the charge, it will result in a modification of the existing charge since one asset which was available to the charge holder is no longer so available. Where property which is already charged in favour a creditor is also offered as security for a fresh loan, the transaction being an independent and subsequent transaction, the second charge over the same property for the fresh loan must be registered and the procedure for creation of a charge must be followed.

As the particulars of charge have to be filed for registration within a period of thirty days, the adoption of the method of renewing a security once in every 15 or 20 days, though an evasion of the Act, will not be illegal. *Re, Renshaw & Co.*, 1908 WN 210.

The section prescribes no period within which the Registrar is to register the charge or make entries in the register of charges. *Siva Sankhara Panicker (C.K.) v. Kerala Financial Corpn.*, (1980) 50 Com Cases 817 (Ker–DB). The result, therefore, is that the duty of the company is fulfilled as soon as particulars are filed. The charge stands registered from the date of the filing of the particulars even if the registrar delays making the entries in his books. *State Bank of India v. Haryana Rubber Industries P. Ltd.*, (1986) 60 Com Cases 472 (P&H); *Benaras Bank Ltd. v. Bank of Bihar*, (1947) 17 Com Cases 249 : AIR 1947 All 117. **Following** the decisions in *Siva Sankara Panicker v. Kerala Financial Corpn.*, (*Supra*) and *State Bank of India v. Haryana Rubber Industries*, (*Supra*) the Madras High Court held in *N. Babu Janardhanam v. Official Liquidator, Golden Cine Studios P. Ltd.*, (1993) 78 Com Cases 490 (Mad) that the onus on the chargeholder is only to send the particulars within the stipulated time to the Registrar. The registration of the charge by entering it in the register is within the jurisdiction of the Registrar and that the chargeholder cannot be prejudiced by the Registrar's conduct in making delay in the act of registration. If the requirements have been complied with, it is a conclusive evidence of the fact that the chargeholder had presented the documents to the Registrar for registration in the manner required by the Act. This fact creates a strong presumption in favour of the document being valid [pp. 499-500]. The charge documents were presented for registration within the period of 30 days as required by the Act but it was actually registered some eight months later and that too after a winding up petition was filed against the company. Winding up was ordered subsequent to the registration. But because the filing of the particulars was earlier to the petition, the registration was held to be valid and effective.

The fact that the Registrar does not enter the charge in his register is not material in this regard. Similarly a charge is not void merely because there is no registration certificate under section 132. *State Industrial and Investment Corporation of Maharashtra Ltd. v. MSFC*, (1988) 64 Com Cases 102, 106, 107 (Bom). The duty of the charge holder is to send the particulars of the charge along with the relevant instrument and if the charge is not registered by the Registrar then the former cannot be held responsible for that. In such a case all the charges in favour of the charge holder shall be deemed to have been registered, though they have not in fact been entered in the register. *State Bank of India v. Depro Foods Ltd.*, (1988) 64 Com Cases 375, 384 (P&H).

The creation of the charge takes place when the debenture is issued to the holder. *Re, Harrogate Estates Ltd.*, (1903) 1 Ch 498 (see also section 128).

Promise to create mortgage is not a present charge

Where a company accepted the stipulated terms and conditions of a loaning agreement and passed resolutions to create a mortgage on the company's immovables but failed to do so, it was held that an undertaking to create a mortgage does not amount to a charge whether equitable or legal and, therefore, there was no question of its registration. *Industrial Credit and Investment Corporation of India Ltd. v. Official Liquidator, Usha Automobiles and Engineering Co. Ltd. (In Liquidation)*, (2000) 100 Com Cases 150 : (2000) 36 CLA 362 (CLB—EB).

Foreign Companies

This section also applies to foreign companies. See Notes under section 600.

Registration when necessary

An equitable mortgage or charge created by deposit of title deeds, also requires registration under the section. *Calcutta National Bank Ltd. v. Rangaroon Tea Co. Ltd.*, (1970) 40 Com Cases 565 (Cal). In this case the charge was also in contravention of the Defence of India Rules.

So also, an agreement to give security will have to be registered, if it is so expressed as to create a present equitable right to a security. *Cf. Buckley, Companies Act,* 14th Edn., p. 248.

A hire-purchase agreement, as it places the financier in the position of a secured creditor, must be registered under this section. *Cf. Official Liquidator Manasuba & Co. (Private) Ltd. v. Commissioner of Police, Madras,* (1968) 38 Com Cases 884 (Mad).

A lien on a sub-freight has been regarded as a charge on the company's book debt and, therefore, requires registration. *Welsh Irish Ferries Ltd., Re,* 1985 BCLC 327 (Ch D) : (1985) 2 Lloyd's Rep 372; *Annangel Glory Campania Naviera v. Middle East Marketing Corpn. (UK),* 1988 PCC 37 : (1988) 1 Lloyds Rep 45. Assignment of part of a sum receivable under an agreement of sale was held to be a present charge on future book debts and therefore liable to registration under this section. An unpaid vendor's lien arises by operation of law and not out of contract and is therefore not registrable under this section. *London and Cheshire Ins. Co. Ltd. v. Laplagrene Property Co. Ltd.,* (1971) 1 All ER 766 (Ch D).

Where the sale of a company's property was made under a scheme of arrangement sanctioned by the court and the decree holders against the company were assured by the chairman that certain property which was sufficient to pay off the decreed amount would be held in reserve for their payments, it was held that this did not amount to creating a charge on the company's assets. Even if a charge was created, it was void against the liquidator after commencement of winding up, because it was not registered under this section. *Estates Development Ltd., In Re,* (1957) 27 Com Cases 581 (Punj).

Lien on goods sold

Where goods are sold subject to a reservation of title so as to give to the seller a lien for the price, whether this would be a charge requiring registration was one of the questions in *Welsh Development Agency v. Export Finance Co. Ltd.,* (1992) BCLC 148 (CA). [The appeal was from *sub nom, Welsh Development Agency v. Export Finance Co. P. Ltd.,* (1991) BCLC 936 (Ch D)]. In this case goods were exported by an exporter under a financial arrangement with a finance company which was given lien over the price of the goods payable by the overseas buyers. The exporter company subsequently created a charge on its book-debts in favour of another agency and the same was registered. The exporter company went into receivership and the charge agency claimed that the moneys owed by overseas buyers were subject to its charge and finance company claimed its lien on that money. The right of lien was held to be valid. It was not in the nature of a charge and did not require registration for its validity. The court felt that there is no clear touchstone by which it is possible to say that a transaction is not a sale of goods but a charge or mortgage on the goods. The court has to examine the agreement as a whole so as to find out the nature of the legal relationship created by the parties. Taking the agreement as a whole, the court held that it was a sale of goods and not a loan by the finance company secured on the goods or proceeds of the goods. The court further held that the receiver was not to be held liable for any interference in contractual relations because the contract with the overseas buyers was that of the exporter and not that of the finance company.

Possessory lien

The possessory lien of a warehousekeeper for his charges including the power to sell the goods to realise outstanding charges does not amount to a charge on the goods so as to require registration or be void in winding up. *Hamlet International Plc.,* (1998) 2 BCLC 164 (Ch D). The Court of Appeal **affirmed** this decision in *Hamlet International Plc, Re* (1999) 2 BCLC 506 (CA).

Title retention clauses

A firm sold computers to a buyer on terms containing a title retention clause and constituting the buyer a bailee of the goods till the proceeds of the goods were accounted for to the sellers. The buyers executed two fixed and floating charges on its book debts by

discounting its invoices with a finance company. The buyers went into liquidation. The security holder contended that the seller's title retention clause amounted to a charge on the goods for their price and the same having not been registered, was void against the liquidator. The court agreed with this contention. The beneficial interest which the sellers had in the proceeds of the sale would come to an end when the debt due to the seller was paid. The seller could also sue the buyer if the proceeds of the goods were not sufficient to meet the seller's claims. The court said that in the light of these factors it appeared that the relationship between the parties was more characteristic of a charge rather than the relationship of trustee and beneficiary. It being a charge, it should have been registered and being not registered it was void against the liquidator. *Compaq Computers Ltd. v. Abercorn Group Ltd.*, (1993) BCLC 602 (Ch D). MUMMERY J summarised the developing legal position on the subject as follows [at pp. 611-612]:

"The accumulation of decisions on retention of title clauses since the *Romalpa* case, (1976) 2 All ER 552, makes it possible to state some well-settled principles without the need to refer in detail to the facts and legal discussion in individual cases. The authorities exhibit a wide variety of factual situations. There is, for example, the relatively straightforward case of a clause retaining title to goods pending payment of the purchase price and compliance with other conditions, where those goods remain unchanged and identifiable in the possession of the buyer. A more complicated case is where the goods in which title has been retained by the seller have, after delivery to the buyer but before payment of the price, been mixed with other goods or incorporated with other goods into manufactured articles. This case is concerned with the even more complex situation where the seller has not been paid the price of the goods or other sums owing to him, and the buyer has sold the goods to a sub-purchaser who has either paid the price of the goods to the original buyer or is under a contractual obligation to pay for those goods." To this effect is the decision in *Modelboard Ltd. v. Outer Box Ltd.*, (1993) BCLC 623 (Ch D). The plaintiff supplied to the defendant a number of cardboard sheet boards. Under the terms of the agreement the goods were to remain the property of the seller until payment of the price, the purchaser acknowledged that he was in possession of the goods as a bailee, the product from processing the goods belonged to the seller and the proceeds of the sale of the goods would be held in trust for him. The buyer-defendant executed a secured debenture in favour of his bank which was duly registered. The defendant went into liquidation. It was held that the arrangement between the parties had created a defeasible interest in the product of the goods and the proceeds of its sale and this constituted in interest by way of charge which was void for non-registration.

Where the terms of a sale provided that the equitable and beneficial ownership in the goods would remain in the seller until payment was received and that if the buyer became insolvent or about to became so or if a Receiver was appointed, the seller would have the right to take back the goods, it was held that the agreement and its terms created a floating charge in favour of the seller and the same having not been registered became void on the appointment of the administrative Receiver on the insolvency of the buyer. *Stroud Architectural Systems Ltd. v. John Laing Construction Ltd.*, (1994) 2 BCLC 276 (QBD). The same effect followed where the agreement provided that the seller would have the right to seize not only the fabric supplied but also the traces made from it. The charge thus created being not registered was accordingly held to be void. *Ian Chisholm Textiles Ltd. v. Griffiths*, (1994) 2 BCLC 291 (Ch D). The court also held *per curiam* that though the charge was not registered it had priority in rank to the subsequent chargee who was aware of its existence and its negative clause (*ibid*).

The right of a supplier of goods subject to title retention will only be defeated by delivery of those goods to a sub-purchaser if there is an actual sale. Delivery to a prospective purchaser under a mere agreement to sell will not suffice—*Re, Highway Foods Ltd., The Times*, November 1, 1994 (UK).

Simplification of procedure for Registration, Modification and Satisfaction

Following is the simplified procedure:

(1) The prescribed particulars together with copy of the instrument creating the charge or modification thereof or satisfaction of charge shall be filed with the Registrar in Form 8, or Form 10, or Form 17 as the case may be, in triplicate.

(2) A copy of every instrument evidencing any charge or modification of charge and required to be filed with the Registrar in pursuance of sections 125, 127, 128 and 135 shall be verified as follows:—

(i) Where the instrument or deed relates solely to property situate outside India, a copy shall be verified by a certificate either under the seal of the company, or under the hand of a responsible officer of the company, or under the hand of some person interested in the mortgage or charge on behalf of any person other than the company, stating that it is a true copy.

(ii) Where the instrument or deed relates, whether wholly or partly, to property situate in India, the copy shall be verified by a certificate of a responsible officer of the company stating that it is true copy or by a certificate of public officer given under and in accordance with the provisions of section 76 of the Indian Evidence Act, 1872.

(3) Form 13 shall be filed in triplicate, along with the relevant Form 8, or Form 10, or Form 17, as the case may be, with a fee of rupees fifty.

(4) Form 8, or Form 10, or Form 13, or Form 17, as the case may be, shall be signed on behalf of the company and the charge-holder.

(5) For the purposes of section 132, the Registrar shall affix stamp on the relative Forms and accompanying instruments with the word 'Registered' under his signature with date and a copy thereof be delivered to the company and the charge-holder. [**Note:** See further *Circular No.* 3/95, dated 18-7-1995—*printed hereinafter*]

(6) The register kept in pursuance to sub-section (3) of section 130 shall be open for inspection by any person on payment of a fee of rupees ten for each inspection. [*Rule 6 of the Companies (Central Government's) General Rules & Forms, 1956*].

Departmental Circular, dt. 18-7-1995.—1. I am directed to refer to the recent amendment in rule 6 of Companies (Central Government's) General Rules and Forms, 1956 wherein it is stated that for purposes of section 132, the Registrar shall affix stamp on the relative forms and accompanying instruments with the word 'Registered' under his signature with date and a copy thereof be delivered to the company and the charge-holder.

2. I am directed to state that in the meeting of the Regional Directors held on 14th June, 1995, the above matter was discussed and it was decided that the seal put by ROC on the form could be amended as under:—

> "CERTIFIED THAT THE CHARGE ABOVE IS REGISTERED"
>
> *Registrar of Companies*

3. You are requested to register the charge on the spot with the above certificate by affixing the seal and signing it. [*Circular No.* 3/95 (No. 14/1/95-CL-V), dated 18th July, 1995]

Department's Instructions, dt. 16-2-1995.—This is an area where companies and the lending banks/financial institutions are finding it extremely difficult to get the charges registered in time and getting necessary certificates. In most of the cases, objections are raised by ROCs regarding the contents in Form No. 8/13/17 and this delays the matter. It has now been decided that the procedure in this regard may be changed by amending the Rules/Forms so as to make the filing of charge documents a smooth operation. The proposed procedure envisages filing of prescribed form and instrument evidencing the charge, in triplicate, under the signature of both the company and the creditor. Once the document is filed, in triplicate, along with the requisite fee, ROC will endorse on all the three copies (including the accompanying instrument) by rubber stamp with the impression "Registered" and sign the same. The first copy be taken on ROC's record and the duplicate and triplicate copies be returned to company/creditor concerned. In this procedure, there would be no necessity of issuing any separate certificate of registration of charge, as endorsed document itself will constitute such a certification. The proposed simplified procedure specified above, will ensure that these documents are registered the same day and endorsed document be returned to the company representative across the table. The Rules are being amended in this behalf and will be notified to ROCs shortly. (para X). [*Circular No.* 1/95; F.No. 14-6-94—CL-V, dated 16-2-1995].

Some practical hints as to registration of charges

Department's view.—(Extract from enclosure to *Circular No.* 8(39)-125/59-PR, dated the 24th November, 1959). Problem arising out of the registration of prescribed particulars of charges and of modification of those charges and the Department's views thereon.

S. No.	Nature of the problem	Department's view to be taken by ROC
	After a company has filed particulars of the charge relating to a property in Form No. 8, occasions arose subsequently when it becomes uncertain as to whether particulars of the fresh charge in Form No. 8 or those of the modifications of the earlier charge should be filed. Such occasions are likely to fall within one or more of the categories stated below, the mortgagor company and the mortgagee remaining the same.	
1.	Loan is raised by charging property	This is the simplest case where particulars of the charge are required to be filed.
2.	The nature of the charge created in (1) above is changed or modified without raising any additional loan, *viz.*, from equitable mortgage Property A to one of the regular legal mortgage etc.	This is also a case falling under section 135 of the Companies Act, 1956 and, as such, particulars of the charge are required to be filed.
3.	Without changing or modifying the nature of the charge or raising fresh loan, the other terms and conditions or the extent or operation of the charge created as per (1) above is changed or modified.	This is also a simple case falling under s. 135 of the Companies Act, 1956 and, as such, particulars of the modification are required to be filed
4.	Additional loan is raised against remortgage or further charge of the Property A, the further charge not to rank *pari passu* with the prior charge.	Section 135 of the Act does not appear, to come into play here as the terms and conditions or the extent or operation of the prior charge are not modified and, therefore, particulars of the further charge only are required to be filed in Form No. 8.
5.	Additional loan against remortgage or further charge of property A is raised with the condition that the further charge will rank *pari passu* with the old one.	Section 135 of the Act is attracted in this case since the extent of the prior charge is modified and as such particulars of the modification are required to be filed.
6.	In respect of the loan already taken, further security is given by charging Property B.	Only section 135 of the Companies Act, 1956 is attracted and Form prescribed is required to be filed.
7.	In respect of the loan already taken Property B is charged with option to the mortgagee to proceed against A or B or A and B simultaneously.	Only section 135 of the Companies Act, 1956 is attracted and Form prescribed is required to be filed.
8.	Additional loan is taken against mortgage or charge of property B without referring to the loan already taken by charging property.	This falls under section 125 of the Companies Act, 1956, and, such, particulars of the fresh charge in Form No. 8 are required to be filed.
9.	Additional loan is raised and it is stipulated that the entire amount of the loan, including the loan already raised, will be secured against Property A already charged and the mortgage of charge of Property B.	Section 125 of the Companies Act, 1956 is attracted in respect of the charge or mortgage of Property B and, as such, particulars thereof, in Form No. 8 are required to be filed. Since the extent of the charge against Property A is modified. Section 135 of the Companies Act, 1956 is also attracted and, as such, particulars of modification are required to be filed.

Necessity of formal instrument of charge

A formal instrument of charge being not necessary, delivery of title deeds amounts to an equitable charge. In such cases only the particulars of the properties of which the documents have been delivered have to be shown in the prescribed form. Where the company delivered its documents to the charge holder and filed the application for registration enclosing photostat copies of the documents and with no instrument of charge, the application was held to be competent. The court agreed that it had the power to review the decision of the Registrar and issue *mandamus,* but did not do so in this case partly because even the prescribed particulars were not filed and the winding up had commenced. *Attorney General v. Sun Kung Kai Bank Ltd.,* (1986) LRC (Comm) 677.

Effects of non-registration

If a mortgage or charge which requires registration is not registered, it does not mean that the transaction is altogether void or the debt not recoverable. The only consequence is that the security created by the mortgage or charge becomes void as against the liquidator and other creditors. *Cf. Official Liquidator v. Union Bank of India,* AIR 1988 NOC 78 (Ker); *Alton Corpn., Re,* 1985 BCLC 27 Ch D; *Calcutta National Bank Ltd. v. Rangaroon Tea Co. Ltd.,* AIR 1969 Cal 578. *Official Liquidator v. Indian Bank,* (1986) 2 ILR 269 (Ker—DB).

The omission to register does not prejudice any contract or obligation for repayment of the money secured by the charge, and where the charge becomes void for want of registration, the money secured by it immediately becomes payable.

As a result of winding up, a creditor under an unregistered charge becomes an unsecured creditor. *Rajasthan Financial Corporation v. Official Liquidator, Jaipur Spinning and Weaving Mills Ltd. (In Liquidation),* (1997) 88 Com Cases 192, 194 (Raj).

It must, however, be noted that as against the company itself, so long as the company does not go into liquidation, the mortgage or charge is good, and may be enforced. *State Bank of India v. Viswaniryat (P.) Ltd.,* (1989) 65 Com Cases 795 (Ker—DB). It is void only as against the liquidator and the creditors. *T. R. Thaiagarajan v. Official Liquidator,* (1960) 30 Com Cases 481 (Mad); see also *Meyappa Chettiar v. Jayanti Films (Madura) Private Ltd.,* AIR 1964 Mad 134; *Official Liquidator v. Bharatpur Princesses Trust, Mysore,* (1971) 41 Com Cases 978 (Mad). See also *Marturi Umamaheswara Rao v. Pendyala Venkatarayudu,* (1970) 40 Com Cases 751 (AP—DB); *Bhramar Lal Baxi v. Promode Ranjan,* AIR 1963 Assam 56. Thus where immovable property of a company which was mortgaged to a bank was sold, while the company was a going concern, in the execution of a decree, it was held that the charge in favour of bank, though unregistered, was effective against the purchaser of the property. *State Bank of India v. Vishwaniryat (P.) Ltd.,* (1987) 3 Comp LJ 171 (Ker—DB). The company itself cannot have a cause of action arising out of non-registration, *Independent Automatic Sales Ltd. v. Knowles & Foster,* (1962) 3 All ER 27 : (1962) 32 Com Cases 1090 (Ch D).

It is not necessary for the official liquidator to raise the objection of non-registration at the stage when the creditor is seeking leave under S. 446 to proceed against the company. He can raise the objection when actual proceedings for the enforcement of the charge are commenced. He can also raise the matter before the Execution Court. It is not necessary for the liquidator to take any steps for a declaration that an unregistered charge is void. The charge *ipso facto* becomes void against the liquidator when winding-up commences. Where the claim of the creditor is converted into a decree it has to be seen whether the unregistered charge was kept alive by the decree or extinguished or replaced by an order of sale. Where the unregistered charge is kept alive by the decree, S. 125 would apply and it would be void. In this case the declaration in the decree that the equitable mortgage and the charge created under it could be redeemed within the specified period amounted to keeping the charge alive. This being so the charge was void against the liquidator. *Of-*

ficial Liquidator, High Court, Bombay v. Suryakant Natvarlal Surati, (1986) 59 Com Cases 147 (Bom).

Where an earlier charge and a subsequent charge have been created in succession in favour of the same charge holder, if, on account of non-registration or other cause, the later charge is or becomes void, the equitable doctrine of revival will apply so as to revive the earlier charge. See *United Bank of India v. K.C. Mullick & Sons Ltd. (in Liquidation),* (1966) 2 Comp LJ 255 (Cal). The disabilities of non-registration do not apply until the time-limit for registration of charge has expired. If a company creates a charge over its property and, before the time-limit for its registration has expired, sells the property or creates another charge over it then priorities will be determined by the rules of priority in order of creation. *Re, Ehrmann Brothers Ltd.,* (1906) 2 Ch 697 (CA); *Watson v. Duff Morgan & Vermont (Holdings) Ltd.,* (1974) 1 All ER 794; *Radha Kishan Moti Lal Chamaria Firm,* (1929) LR 57 IA 76 (PC). A registered subsequent mortgage will have priority over a prior unregistered mortgage even if the subsequent mortgagee had notice of the prior mortgage. *Monolithic Building Co., Re,* (1915) 1 Ch 643 (CA). Stating the reason PHILLIMORE LJ said [at. p. 667]: "We have to construe s. 93 [s. 395 of 1985 (English) Act] of the statute. It makes void a security; not the debt, not the cause of action, but the security, and not as against everybody, not as against the company grantor, but against the liquidator, and against any creditor, and it leaves the security to stand as against the company while it is a going concern. It does not make the security binding on the liquidator as successor of the company" [cited with **approval** in *Smith v. Bridgend County Borough Council,* (2000) 1 BCLC 775 CA at p. 791.

It has been held that on true construction of s. 395(1) of the [English] 1985 Act, an unregistered floating charge on a company's property was void against the company in administration i.e., it was void against the company when acting by its administrator. Such a charge is void against a company in liquidation, and s. 395 operates in relation to a company in administration in exactly the same way as it does in relation to a company in liquidation. Its purpose is to protect the interests of the company in administration and, if it should subsequently go into liquidation, the interests of creditors. If, on the other hand, the company emerges solvent from the administration, the secured creditor would by definition obtain payment of its debt without recourse to the avoided security. *Smith v. Bridgend County Borough Council,* (2002) 1 BCLC 77 (HL).

Where a charge is void for non-registration, no right of lien can be claimed on the documents of title, as they were only ancillary to the charge and were delivered pursuant to the charge. See *In re, Molton Finance Ltd.,* (1968) 38 Com Cases 833 : (1967) 3 All ER 843 (CA); *Smith v. Bridgend County Borough Council,* (2002) 1 BCLC 77 (HL), where their Lordships remarked that if this were not so, everyone would in effect have a lien over any property of his debtor which happened to be in his possession.

Individual creditors have no right to challenge a charge on the grounds of non-registration. *Ayala Holdings Ltd., Re,* 1993 BCLC 250.

The default is also punishable under s. 142.

Decree on the basis of unregistered charge.—A charge, which is not registered is void against all the creditors of the company irrespective of the date on which their debts accrued; and the fact that decrees have been obtained on such unregistered mortgages prior to the winding up application, does not take it out of the requirement of registration.

Such a decree-holder cannot stand outside the winding up and realise his security, thereby diminishing the assets divisible amongst creditors.

Accordingly an application for leave to proceed with the execution of such mortgage decrees was refused. *Sathgram Coal Co. Ltd. (In Liquidation) Re,* (1935-36) 40 CWN 1171 (Cal).

Registration of charge created by liquidator not necessary

Department's Clarification.—Section 125 of the Companies Act, *inter alia*, provides that every charge created on or after the 1st day of April, 1914 by a company and being a charge to which the section applies shall, so far as any security on the company's property or undertaking is conferred thereby be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instruments, if any, by which charge is created, filed with the Registrar for registration in the manner and within the time specified. Sections 125, 134 and 138 are co-related.

2. Thus, if a mortgage or charge which requires registration is not registered, it does not mean that the transaction is altogether void or the debt is not recoverable. The only consequence is that the security created by the mortgage or charge becomes void as against the liquidator and other creditors. As against the company itself, so long as the company does not go into liquidation, the mortgage or charge is enforceable. *Official Liquidator v. Bharatpur Princesses' Trust, Mysore,* (1971) 41 Com Cases 978 (Mad).

3. Moreover, as judicially interpreted, the section applies only to a charge created by a company and not to a charge arising by operation of law. The expression "created" shows that only charges founded on contracts are intended to be covered. *Saradambal (K.) v. Jagannathan,* (1972) 42 Com Cases 359 (Mad).

4. Therefore, a charge created by a liquidator of a company does not appear to be registrable under section 125/134 of the Companies Act." (*Circular letter No.* 8/8(125)/80-CL-V, dated 7th May, 1980).

Solicitor's duty and liability in registration of charges

Where the solicitors for the company defaulted in getting the charge registered, the court said that the defendants owed a duty to the company, their client, to advise the company as to the effects of non-registration not only in relation to the mortgages but also in relation to the guarantors and to take reasonable steps to ensure that the company discharged its obligation to deliver particulars to the Registrar. The defendants must have known of the relationship between the guarantors and the company and must be taken to have known that the guarantors' rights of subrogation, after payment, under the guarantee, would be prejudiced if the mortgages were void. There was, thus, a sufficient relationship of proximity such that, in the reasonable contemplation of the defendants, carelessness on their part might cause damage to the guarantors. *Trustees of the Property of PAF Foster v. Crusts,* 1986 BCLC 307 (Ch D).

Where there was the understanding that the mortgage would be registered by the mortgagee's solicitors and they failed to do so, it was held that the liquidator in a voluntary winding up was justified in the defence of non-registration. On the facts, there was nothing unworthy in the behaviour of the company in doing nothing in respect to the registration because of the solicitor's undertaking. *John Bateson & Co. Ltd., Re,* 1985 BCLC 259 Ch D.

Directors' personal guarantees supported by mortgage of personal property

Where a deed creates a charge not only on the assets of the company but also on the personal assets of a director, S. 125 can apply only to the extent the deed creates a charge on the assets of the company. It can in no way affect the deed in so far as it creates a charge on the director's assets. Even so far as the assets of the company are concerned, whilst it may be void against the official liquidator, it does not affect his right to enforce the guarantees which are given by the directors or other persons. *Maharashtra State Financial Corpn. v. Masvi and Co. P. Ltd.,* (1993) 76 Com Cases 168 at 193 (Bom).

Provisions of special Act override section 125

Where any provision of any special Act such as s. 46-B of the State Financial Corporations Act (1951) provides that the provisions of that Act will have effect, notwithstanding anything in the Companies Act, then S. 125 will have to give way to that provision, so that even if a charge is not registered the unregistered charge, within the scope of such provision of the Special Acts will prevail. See *Kerala Finance Corporation v. C.K.S. Pannikar,* 1978 Tax LR 1850. **Followed** in *Maharashtra State Financial Corporation v. Official Liquidator,* (1988) 64 Com Cases 641, 648 (Bom).

The Punjab & Haryana High Court held that unless the provisions of this section are complied with, the creditor cannot claim priority. Even a Financial Institution will not be entitled to priority in respect of a charge created in its favour, unless the charge is regis-

tered in accordance with this section. *Haryana Financial Corporation v. Depro Foods Ltd.*, 1982 Tax LR 2537 (P&H).

Charge created by court decree

A charge created by an order of the court does not require registration under section 125. The order in this case was in the shape of a decree passed on the basis of an unregistered charge. The Supreme Court laid down that once a charge is converted into a decree, it is no longer a charge and the defence of non-registration is not available. Only if the decree kept the charge alive, the question would be whether the charge is still registrable. *Indian Bank v. Official Liquidator, Chemmeens Exports P. Ltd.*, (1998) 3 Comp LJ 34 : (1998) 29 CLA 425 (SC).

Where a decree has been passed on the basis of a mortgage, even though the mortgage has not been registered, the decree is not hit by this section. This statement of the law would, however, seem to be doubtful as a decree based on a mortgage does not change the character of the claim as it only seeks to enforce the right over the mortgage property. *Kerala Finance Corpn. v. C.S.K. Pannikar, (supra).*

A decree is not a charge and the rights of a decree holder flow from the decree. A decree on a mortgage, especially one obtained before winding up of a company is not governed by section 125 and the same is valid. *Suryakant Natvarlal Surati v. Kamini (Brothers) Pvt. Ltd.*, (1984) 2 Comp LJ 182 (Bom); *Presidency Industrial Bank Ltd. v. Hindustan Leather Industries Ltd.*, AIR 1969 Bom 84 at 89.

Power to borrow

In the case of a company, the power to borrow and mortgage or charge its property or assets depends on its memorandum of association. But such a power whether expressly provided in the memorandum or not is necessarily implied in the case of a trading company, as being incidental to the carrying on of its business. See *General Auction Estate and Monetary Co. v. Smith*, (1891) 3 Ch 432. But in regard to non-trading companies such as a building society there must be something in the memorandum or articles to show that the company has power to borrow, for a company being a statutory body, has limited powers, *Cf. R. v. Sir Charles Reed*, (1880) 5 QBD 483; *Baroness Wenlock v. River Dee*, (1885) 10 App Cases 354 (HL).

Charges on substituted property.—Where the property covered by a specific charge is released and is replaced or substituted by some other property, it requires registration, unless there is a trust deed which has already been registered under the section. The case of *Bristol United Breweries v. Abbott*, (1908) 1 Ch 279 which was decided before Section 400 of the English Act, 1985 (corresponding to S. 127 of Indian Act) was adopted must be taken to be overruled by the section. This section requires that when a company purchases a property which is already subject to a charge the same must also be registered. In the case of a charge securing an issue of debentures registered under S. 397 of the English Act (S. 128 of Indian Act), no registration is needed of any substituted security since registration under that section protects the substituted property without further registration. *Cunard SS Co. Ltd. v. Hopwood*, (1908) 2 Ch 564.

Sale of property subject to charge.—Where property subject to a mortgage is sold and the sale proceeds are used to purchase some other property which is then mortgaged by the company to the mortgagee to whom the earlier property was mortgaged, this requires registration with the only exception of the case covered by S. 130 where a trust deed already stands registered. *Cornbrook Brewery Co. Ltd. v. Law Debenture Corpn. Ltd.*, (1904) 1 Ch 103 (CA); *Capital Finance Co. Ltd. v. Stokes*, (1968) 3 All ER 625 : (1969) 1 Comp LJ 341 (CA). In a case under Scottish property law it was held that in Scotland a floating charge continued to attach to land which the company (which had granted the charge) had agreed to sell and any delivery of that land to the purchaser would not give priority to the purchaser unless the conveyance had been recorded in the

Register of Sasines prior to the date when the floating charge crystallised. *Sharp v. Thompson,* 1995 Scot LT (Scot).

Stamp duty.—The documents creating a charge etc. have to satisfy the requirements of the Stamp Act, if any. Registrar is under a duty to pay attention to this fact and should he entertain any doubt as to the nature of the document brought before him and stamp duty required by it, he is bound to impound the document and to bring it to the notice of the Stamp Act authorities. *Chemicals Ltd. v. ROC,* (1959) 29 Com Cases 238 (AP). A copy of an instrument produced under s. 125 of the Companies Act, 1956, though not an "instrument" within the meaning of the Act, would be liable to stamp duty under S. 7(1) read with S. 19 the of Bombay Stamp Act, 1958. *Chief Controlling Revenue Authority, Ahmedabad v. Nutan Mills Ltd.,* AIR 1978 Guj 1 at 9 (Special Bench). Under the Bombay Stamp Act, 1958, it is provided and accordingly it has been held in *Antifriction Bearings Corpn. Ltd. v. State of Maharashtra,* (1999) 33 CLA 137 : (1999) 20 SCL 373 (Bom), that where an instrument stamped in Gujarat according to the law applicable there was brought to Bombay for implementation, the difference in the stamp duty applicable in Bombay would have to be made up. The provision is intended to prevent evasion of duty.

Registrar's power to extend time and appeal against order [Sub-sec. (1) Proviso]

The Department's view, which the Registrar has per force to follow, is that if the instrument or copy is not filed within the thirty days or the period extended as per the proviso, the Registrar cannot take the documents on record, even on payment of the additional fee as provided in section 611(2), unless the sanction of the Company Law Board is obtained under section 141 as the power to do so has been specifically vested in the CLB (*Company News and Notes* dated 1-7-1963). The reason is that an issue might arise as to the validity of the charge or charges created and it is outside the Registrar's competence.

An appeal lies against the order of the Registrar under section 125(1) (proviso) or that of the CLB under section 141 extending or rejecting the application to extend the time for registration. The basis on which the Court will exercise its discretion in ordering out of time registration have been explained by the High Court of Chancery Division in *Braemar Investments Ltd., Re,* 1988 BCLC 556 (Ch D). The Court said that in deciding whether to discharge the Registrar's order to grant an extension of time, the Court is not confined to the evidence before the Registrar but can consider fresh evidence since the proceedings before the Court are to be treated as a rehearing and involve a fresh exercise of discretion. Under section 404 of the (English) Companies Act, 1985 the Court (under section 141 of our Act, the CLB) has jurisdiction to order that the time for registration be extended where 'it is just and equitable to grant relief'. This confers the widest possible discretion on the Court. In particular, it is not necessary to show that the omission was due to one of the specified grounds set out in the section. Although the imminence of liquidation is a factor relevant to the exercise of discretion it is not an absolute bar to such an order. On the facts, as the failure to register the charge had been due to a breach of duty owed by the solicitors to the bank and as the bank had acted with promptness on discovering that the charge had not been registered, the Court held that it was just and equitable that the charge should be registered. The Registrar's application against the registration order was dismissed.

Registration effected after obtaining extension of time either from the Registrar or the CLB, is a valid registration and precludes any question about its validity, *Albert v. Ehrmann Bros. Ltd.,* (1906) 2 Ch 697 (CA).

Failure to register in time the mortgage of the company's ships caused by delay by the Central Government in according its approval has been held to be not a sufficient cause for granting extension of time particularly when a provisional liquidator had been appointed. *Air Transport Ltd., Re,* (1955) 25 Com Cases 473 (Cal).

Delay in registration of charges

Department's Circular I.—"With a view to taking on record the documents relating to charges/modification of charges/satisfaction of charges, it has been decided that as and when the aforesaid documents are filed by the companies or the creditors concerned, duly certified as correct by a Chartered Accountant/Cost Accountant/Company Secretary in practice, the same may be taken on record within a reasonable period of say, ten (10) days. You are also advised that in case the relevant certificate of charge, etc. is not collected by the company's representative concerned within seven (7) days thereafter, the same may be sent by post." (*No.* 1/1/90-CL-V *Circular No.* 14/90, dated 5-9-1990).

Department's Circular II.—All the three professionals mentioned in *Circular No.* 14/90, dated 5-9-1990 are intended to be covered by the words 'in [*Sic.*] practice'. [*Circular No.* 3/10/90-CL-V, dated 17-9-1990].

Department's Circular III.—This has reference to this *Department's Circular No.* 14/90, dated 5-9-1990 on the above mentioned subject. It has been decided that all documents required to be filed with you by companies be taken on record within a reasonable period, say, ten days, if the same are duly certified as correct by a Company Secretary/Chartered Accountant/Cost Accountant, in practice. (*Circular No.* 5/91, No. 1/3/91-CL-V; 3/10/91-CL-V, dated 26-2-1991).

Central Government cannot condone delay under S. 637B

In view of the specific provisions contained in section 125, providing for the consequences of not filing the particulars of charge within the prescribed period, being the charge to be void against the liquidator and any creditor of the company and in view of the power given to the Company Law Board for condonation of the delay under section 141, the Central Government cannot exercise its powers under section 637B.

Condonation of delay by CLB

§ See Notes under section 141 *post.*

Charge securing issue of debentures [Sub-section (4)(a)]

As to the meaning of debenture, see Notes under section 2(12). Where for any reason any debentures which have been issued are omitted to be registered, the company may cancel them and issue a new series and register the latter within thirty days of their issue. See *Defries (N) & Co. Ltd., Re, Bowen v. N. Defries & Co. Ltd.,* (1904) 1 Ch 37; *Re, Renshaw & Co.,* 1908 WN 210.

Charge on uncalled capital [Sub-section (4)(b)]

Unless there is an express power given in the memorandum or the articles, there cannot be a mortgage or charge of unpaid capital. See *Bank of South Australia v. Abrahams,* (1875) LR 6 PC 265; *Newton v. Anglo Australian Investment Co.'s Debentureholders,* 1895 AC 244. But where there is power to mortgage all properties and rights or borrow in such other manner as the company may determine, a power to charge uncalled capital will be implied. *Jackson v. Rainford Coal Co.,* (1896) 2 Ch 340.

Capital uncalled is in no sense 'property' of the company. It is more in the nature of a power than property, and for such a power to be charged there must be express authority. *Cf. Re, Streatham and General Estate Co.,* (1897) 1 Ch 15; *Russian Spratts Patent Ltd., Re, Johnson v. Russian Spratts Patent Ltd.,* (1898) 2 Ch 149.

Charge on immovable property and fixed plant and machinery [Sub-section (4)(c)]

Immovable property is defined in the General Clauses Act as follows:—

"Immovable property" shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth.

The plant and machinery of a company embedded in the earth or permanently fastened to things attached to the earth became a part of the company's immovable property and therefore apart from the registration under the Companies Act, registration under the Indian Registration Act would also be necessary to make the charge valid and effective. *Official Liquidator v. Sri Krishna Deo,* (1959) 29 Com Cases 476 : AIR 1959 All 247. See also *Roy & Bros. v. Ramnath Das,* (1945) 15 Com Cases 69, 75 (Cal).

Where a charge was created on "fixed plant and machinery" of the company, the court said that the phrase would have the connotation of plant and machinery which was in some way firmly attached to the company's premises. In the case before it the court found that since the company's machinery was not attached to the company's premises, it could not be said to be "fixed plant and machinery" and, therefore, the charge would be in the nature of a floating charge under the debenture with the result that the proceeds of the sale of the machinery were to be used initially to satisfy the claims of the preferential creditors. *Hi Fi Equipment (Cabinets) Ltd., Re,* 1988 BCLC 65 (Ch D).

A construction company's washing machine which was in use at the site was declared under the terms of the contract to be the employer's property during the period of construction. This was held to have created a fixed charge and not a floating charge on the machine because the machine was only one fixed item and was not likely to change. *Cosslett (Contractors) Ltd., Re,* (1996) 1 BCLC 407 (Ch D). This decision was **affirmed** by the Court of Appeal on other grounds in *Cosslett (Contractors) Ltd. Re,* (1999) 1 BCLC 205 (CA). The charge in question was held to be floating charge for the reason that the local authority had the power to sell the plant. That power created a security interest constituting an equitable charge since it was a charge on present and future assets because in the hands of the company the plant was an asset of changing nature. Though for this reason the charge was void but the end result of the decision remained the same, namely, the employer continued to have the contractual right of using the machine till the project was completed and this right was effective without registration.

Account creating trust for payment for construction work

A construction company entered into an agreement with another company to carry out certain construction work. Both the companies entered into an escrow agreement under which an account was opened and the moneys paid into it were to be impressed with a trust in favour of the construction company, although in certain circumstances the money could be paid to the other company also. It was held that the account created under the escrow agreement was intended to provide a machinery for payment to the construction company and not to create a charge on the account. Both the companies had a beneficial interest in the account. There was no charge created and therefore there was no need for registration. *Lovell Construction Ltd. v. Independent Estates Plc. (In Liq.),* (1994) 1 BCLC 31 (QBD).

As the expression used is 'immovable property', wherever situate, the charge requires registration even if it relates to immovable property situate in a foreign country.

Charge on machinery for expenses of repair

Where a contract for repair of machinery provided that if the repair involves the supply of parts the ownership of the new article would rest in the repairer as security for payment by the company, the contract was held to create a charge which was void for non-registration under S. 95 of the [English] Companies Act, 1948. *Specialist Plant Services Ltd. v. Braith Waite Ltd.,* 1987 BCLC 1 (CA).

Charge on book debts [Sub-section (4)(d)]

By a 'book debt' is meant a debt which is in some way connected with the trade of the person concerned. It should be one arising out of a transaction in the ordinary course of business and usually finding its way as an entry in his books of account. But to constitute a "book debt" it is not necessary that the transaction should be actually entered in a book. A mere right under a contract of insurance, indemnity, guarantee and the like, which may result in a book debt is only a contingent contract and cannot be described as a book debt until and unless the contingency happens.

A charge on 'book debts and other debts' even if called a 'first specific charge' does not cover the balance in a bank account as this in commercial practice is not a 'book debt'. *Re, Brightlife Ltd.,* 1986 BCLC 418 : (1986) 3 All ER 673 : (1987) 3 Comp LJ 102 (Ch D); *Re, Permanent Houses (Holdings) Ltd.,* 1988 BCLC 563 (Ch D). A charge on the

book debts, present and future, of a company, which is expressed to be a 'fixed charge' is actually a floating charge if it contemplates that the company will be free to use in its business the money it collects from its debtors without reference to the chargee: it is actually a fixed charge only if the money collected from debtors must be paid to the chargee (*e.g., to reduce a bank overdraft*) (*Siebe Gorman & Co. Ltd. v. Barclays Bank Ltd.*, (1979) 2 Lloyd's Rep 142; *Re, Brightlife Ltd.*, (1987) Ch 200; *Re, A Company (No. 005009 of 1987)*, 1989 BCLC 13). Such a charge cannot normally be construed as charging a credit balance in the company's bank account *Re, Brightlife Ltd.; Re, Permanent Houses (Holdings) Ltd.*, 1988 BCLC 563; *Northern Bank Ltd. v. Ross*, 1991 BCLC 504 (CA).

The decision in *Siebe Gorman, (Supra)*, has been described as unsound for two reasons. *First*, because it was decided in isolation from the matrix of facts in which the security in issue was granted. *Secondly*, to construe a charge of all a company's present and future book debts as a fixed security necessarily entailed imputing to the bank and the company's directors the improbable intention that even before the bank served a demand, the company would not have the free use of its book debts, which must have been the main source of the company's cash flow.

The Irish Supreme Court held in *Holidair Ltd, Re*, (1994) 1 ILRM 481 that a charge over book debts in a debenture granted by three companies was a floating charge, although expressed to be fixed. In order to make it a fixed charge there should be an express prohibition on any other application of the fund than the repayment of the loan as in the case of *Keenan Bros.*, (1986) BCLC 242. The decision was **not followed** in New Zealand in *Supercool Refrigeration and Air Conditioning v. Hoverd Industries Ltd.*, (1994) 3 NZLR 300. The court noted the remarks in the outstanding cases that a specific charge is one which fastens "without more" on ascertained property. Thus the phrase "without more" is the badge that identifies the specific charge. The agreement to pay the proceeds of charged book debts into the company's account with the chargee bank would not give the bank "effective possession of the proceeds and, therefore, would not, without more" fasten the charge on to those proceeds. Where it is intention of the parties that the company should continue to trade in the normal way, that would be impossible if the company could not freely use the proceeds of its book debts.

But a charge may be created not only on book debts, which have actually come into existence, but also on future debts as soon as they come into existence, such as a contract for the sale of goods on credit. In such cases, the moment a book debt results from a contract, the charge will attach. The charge will not, however, apply until and unless a book debt results. Thus a charge may be created so as to attach future book debts resulting from future contract but no charge can be created over mere possibilities of a book debt resulting in the future. The mere benefit of a contract which does not comprehend a book debt, though it may ultimately result in a book debt, cannot be brought within the section. As PENNY QUICK J. observed in *Paul & Frank Ltd. v. Discount Bank (Overseas) Ltd.*, (1966) 2 All ER 922 (Ch D): (1967) 37 Com Cases 76 "in order to ascertain whether any particular charge is a charge on book debts within the meaning of the section one must look at the items of property which form the subject-matter of the charge at the date of its creation and consider whether any of those items is a book debt" ..... "If a charge on its proper construction covers future debts, in the sense of debts under a future contract which when the contract comes to be made will constitute book debts. I see no reason why section 95(2)(e) [corresponding to Indian section 125(4)(d)] should not be made applicable to the charge". But as the Judge takes care to observe : "It by no means follows that para (e) applies to an existing contract which does not comprehend a book debt merely by reason that that contract may result in a book debt in the future." In the case of *Paul & Frank Ltd.*, (*Supra*) an insurance policy popularly known as credit insurance policy was taken out to cover the risk of loss on non-realisation of foreign debts and on the basis of the foreign books debts a loan was taken from a bank and the insurer was instructed to pay the amount directly to the bank in respect of the failed foreign debts.

This was held to be not a charge. See also *Brush Aggregates Ltd., Re,* (1983) BCLC 320 (Ch D). See also *Independent Automatic Sales Ltd. v. Knowles & Foster,* (1962) 3 All ER 27 : (1962) 32 Com Cases 1090 (Ch D).

The expression 'book debts' is defined as such debts accruing in the ordinary course of business as are usually entered in the trade books. See (1886) 18 QBD 25. See also *Ranjit Ray v. D.A. David,* (1935) 5 Com Cases 281 : AIR 1935 Cal 218.

An assignment of a book debt also comes within the section, if it is intended to be security for a debt. *Ladenburg & Co. v. Goodwin,* (1912) 3 KB 275. However, an absolute assignment of a part of a debt which was to fall due in future is not a 'charge'. *Ashby Warner & Co. v. Simmons,* (1938) 8 Com Cases 111, 118 (CA).

Where the supplier of an equipment to the company reserved to himself the title to the goods under a clause which provided that if the buyer company resold the goods, the right to recover the price was to be automatically transferred to the original supplier, it was held that this amounted to creating a charge over the book debts and being not registered was not enforceable in the winding up of the company. *Weldtech Equipment Ltd., Re,* 1991 BCLC 393 (Ch D). See further *Tatung (UK) Ltd. v. Galex Telesure Ltd.,* (1989) 5 BCC 325 where the court analysed the effects of such assignments of book debts.

A credit card company entered into a contract for financing its activities whereby all present and future debts owed by the card-holders to the company were assigned to the financing company which paid to the credit card company the amount of the debts less a discounting charge. Under the agreement the financing company was entitled to retain such amount as it thought fit as security for any claims against credit card company, any risk of non-payment by card-holders and any debts chargeable to the company under the financing agreement it was held that the rights of retention in the financing agreement were not registrable charges under S. 95(1) of the [English] Companies Act, 1948 because it was not possible for a charge to be created in favour of a debtor of his own indebtedness and also because there was no property capable of forming the subject-matter of the charge. *Re, Charge Card Services Ltd.,* 1987 BCLC 17 : (1986) 3 All ER 289 (Ch D) **affirmed** in Court of Appeal in *Sub-nom,* (1988) 3 All ER 702 : 1988 BCLC 711.

An arrangement by which a company gives irrevocable instructions to its debtor to pay into the company's account at a bank in repayment of advances made by the bank to the company, unless the bank should consent to their cancellation, has been held to be a charge on book debts. *Re, Kent & Sussex Saw Mills Ltd.,* (1947) 17 Com Cases 168 : (1946) 2 All ER 638 (Ch D). The debts owing to a company with respect to the cheques and credit card transactions do constitute debts and being subject to the charge in favour of the company's bank. It was held to be an that the proceeds of the cheques and the credit card transactions were covered by the charge and were held on a constructive trust in favour of the company's bank *Northern Bank Ltd v. Ross,* 1991 BCLC 504 (CA).

Accordingly where a loan was assigned with an obligation by the lenders to repurchase the loan secured by delivery of promissory notes issued by the borrower to the lenders, and where the lenders failed to deliver the note to the assignee, the charge over the loan was treated as a book-debt of the lenders and required registration. *Chase Manhattan Asia v. Official Receiver and Liquidator of First Bangkok City Finance,* (1990) 1 WLR 1181 (PC).

An agreement between a company and a lender of the company that the latter would advance all necessary funds up to a certain limit and in return would have the sole right to collect all sums due on bills to the company and repay himself the advances made as also his remuneration was held to be an agreement which, if otherwise binding, created an equitable charge on the company's outstanding bills for the amount owing to the lender. *Probodh Chandra Mitra v. Road Oils (India) Ltd.,* AIR 1930 Cal 782 : (1929-30) 34 CWN 570.

Registration of what in effect is charge cannot be evaded by giving it the form of an assignment *Re, Kent & Sussex Saw Mills Ltd., (Supra).*

Fixed and floating charge on book debts.—Where a charge was created in favour of the company's bank under a debenture which gave the bank a fixed charge and a floating charge over all the future book debts of the company, it was held that the bank was entitled to the rents payable by the sub-tenants of the company's leasehold property. *Rhodes v. Allied Dunlar Pension Services Ltd.; Offshore Ventilation Ltd., Re,* 1988 BCLC 186 (Ch D) on appeal *Sub-nom,* (1989) BCLC 318 (CA). Where a specific charge was created on all the book and other debts from time to time due and owing, it was held to be a fixed charge irrespective of the fact that the company had to bring all receipts into its account with the bank and execute legal assignments as and when demanded. The Court agreed that by virtue of this power to dictate a course of action on the part of the company's directors, the bank might be regarded as occupying the position of a shadow director but that would make no difference to the case because the charge given to the bank was not a floating charge. *A Company (No. 005009 of 1987) Re, ex parte, Copp and Another,* 1989 BCLC 13 (Ch D).

Fixed charge over future debts.—It has similarly been held that where a debenture creates a valid fixed charge over future debts, the assignment of that debenture would have no effect upon the nature of the security and would not reduce it to the status of a floating charge. All that happens is that a different person would be entitled to collect the book debts. *William Gaskell Group Ltd. v. Highley,* (1994) 1 BCLC 197 (Ch D). But it has also been held that a charge which purports to cover future book debts would be by nature a floating charge and not a fixed security and accordingly preferential claimants had to be first paid out of the proceeds of realisation. The fact that the charge was labelled as fixed was not conclusive. In substance the company had significant freedom to deal with its book debts. *New Bullas Trading Ltd., Re,* (1993) BCC 251. In confirming the validity of a fixed charge over future book debts the Irish Supreme Court has indicated that the intention of the parties as to the nature of the security is to be ascertained from the contractual documentation and not from their subsequent conduct—*Re, Wogan's (Drogheda) Ltd.,* (1993) 1 IR 164. (Irish Supreme Court). But in *Re, CCG International Enterprises Ltd.,* (1993) BCLC 1428 LINDSAY J. held that a clause in a lending agreement permitting a lender to direct that fire insurance receipts be used either to replace the covered assets or to repay the debt gave rise to a fixed charge, even though the bank never exercised its power of direction and never required the receipts to be paid into a particular account. **Contrast** with *Re, New Bullas Trading Ltd.* and the case of *Re, Wogan's (Drogheda) Ltd.* The Irish High Court in reviewing a fixed charge over a company's future book and other debts held that it was wide enough to embrace premium refunds payable to the company. *Jackson v. Lombard and Ulster Banking,* (1992) IR 94.

In a transaction of sale of goods the property in the goods passes according to the intention of the parties. A seller may by the terms of the contract continue as owner of the goods after delivery. He may reserve the right of disposal until certain conditions are fulfilled. Despite the effect of security which such reservation gives to the seller for the price, the device is not registrable as a charge. As early as 1895 an apparent leasing transaction which the House of Lords regarded as a sale was held not to create a registrable charge under the Bills of Sale Acts. [English]. *Mcentire v. Crossley Bros. Ltd.,* (1895) AC 457 (HL). In that case it was said that the whole agreement must be looked at to ascertain whether the parties intended property to be retained by the seller. An expressed intention to retain title might be negatived by other implications in the agreement. Holding that as title in this case was intended to be retained by the seller, notwithstanding the effect of security, the contract was not registrable. The right of a seller to seize his own goods was not a registrable security. In Lord HERSCHELL'S words: "A man does not have a lien on his own property or a charge either." The matter was taken further by the Court of Appeal in *Clough Mill Ltd. v. Martin,* (1984) 3 All ER 982, confirming that the key issue in deciding whether a registrable charge is created is not the purpose of the clause as security but whether property did or did not pass to the buyer. If it did pass, then any property rights of the seller must have been conferred by the buyer as a charge on his own goods.

If property did not pass, then the seller is merely seeking to recover his own goods and no registrable charge is created.

More difficult have been the so-called "all-monies" clauses which retain title to the goods until all debts owed to the seller on any legal grounds, and whether yet due and payable, are fully paid. The advantage of such clauses to the seller is that, (like a general as opposed to a particular lien), they extend the category of debts against which title is retained. They also may assist the unpaid seller claiming goods against a liquidator or receiver by avoiding the problem of identifying which of his goods piled up in the insolvent buyer's premises have or have not been paid for. Where the clause requires the seller who seizes and sells the goods to account for the surplus, it is likely to indicate a registrable charge. See, *e.g.*, *Andrabell Ltd., Re,* (1984) 3 All ER 407. In *Armour v. Thyssen Edelstablswerke AG,* (1990) 3 All ER 491, an appeal from Scotland, the term was all goods delivered remained the seller's property "until all debts owed to us... due to us on any legal grounds—are settled". This was held to be not a right or charge over the goods which the buyer had given to them. The seller in taking back his own goods was also not accountable for the proceeds of the sale of those goods.

Charge on book debts described as fixed charge.—In *New Bulas Trading Ltd., Re,* (1993) BCLC 1389 (Ch D) the administrative receivers of the company applied to the court for determination whether the charge on book debts which was described as "fixed charge" was in reality of fixed or floating nature. The question was crucial to them because if it was a fixed charge it would not be subject to preferential payments. The court held that in spite of the parties' declared intention of creating a fixed charge, they succeeded in creating only a floating charge. The company had the freedom to give directions to the bank as to the appropriation of the money as it would flow in and this was something inconsistent with the characteristics of a fixed charge. On appeal against the decision, the Court of Appeal **modifying** the decision of the Chansery Division, laid down that just as it is open to contracting parties to create a fixed charge over future book debts it was open to them to provide that the book debts shall be subject to a fixed charge as long as they remain uncollected and a floating charge on realisation. The debenture in this case had created a fixed charge over the uncollected book debts and a floating charge over the proceeds of such debts once paid into the designated bank account. *New Bullas Trading Ltd., Re,* (1994) 1 BCLC 485 (CA). The decision in *Brightlife Ltd. Re,* (1986) BCLC 418 was **applied** and that in *New Bullas Trading Ltd.,* (1994) 1 BCLC 485 **distinguished** in *Chalk v. Kalin,* (2000) 2 BCLC 361 (Ch D). A charge over book debts was stated to be a fixed charge. The charge contained a direction to the company to pay proceeds from book debts into its bank account. It was held that on a proper construction of the debenture and the direction by the debenture holder that the company should pay all moneys received in respect of book debts into its current account, the intention of the parties was that the company should be free to deal as it chose with the proceeds of book debts and to use those proceeds for its own business without requiring the debenture holder's written consent. For this reason the charge was a floating charge irrespective of its description. It was, therefore, held by the receiver for the benefit of preferential creditors in the receivership.

Where a charge was created on the book debts of the company, the latter continuing to have the right to collect the debts and appropriate the proceeds, the court quite naturally held that the charge was a floating charge. The court said that: In characterising the charge as a floating charge or a fixed charge, the question is whether the charged assets are under the control of the chargee. There is no distinction between dealing with charged assets by way of disposal to third parties and dealing with them by collection. Where the charged assets are book debts which the charger is free to collect thus extinguishing the book debts and is free to deal with the proceeds in the normal course of its business, the charged book debts are not sufficiently under the control of the chargee to make the charge a fixed charge. The charge as created was accordingly a floating charge. *Brumark Investments Ltd. Re,* (2000) 1 BCLC 353 (NZCA). An appeal against the decision was

dismissed by the Privy Council in *Agnew v. Commr. of Inland Revenue,* (2001) 2 BCLC 188 : (2001) UK PC 28 : (2001) 2 AC 710 (PC—New Zealand]. Their Lordships were of the view that in deciding whether a charge is a fixed charge or a floating charge, the court is required to engage in a two-stage process. First, it has to construe the instrument of charge and seek to gather the intention of the parties from the language used in order to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged asset. Once that has been ascertained, the second stage of the process is one of categorisation and is a matter of law. In the instant case, their Lordships said that the company's freedom to deal with the charged assets without the consent of the holder of the charge was characteristic of a floating charge. The company was free to use the proceeds of the uncollected book debts for its own benefit. That was inconsistent with the nature of a fixed charge. The charge as created was, therefore, a floating charge.

Where a loan was given to the company for the purpose of enabling it to continue trading, it could not be sensibly concluded that the consent of the trustees of the charge would be required to the operation of the company's bank account in the ordinary course of business. The charge contained no provision restricting the company in operating its bank account except in a particular manner. It could not be said that the debenture succeeded in creating a fixed charge. *Portbase Clothing Ltd., Re,* (1994) 2 Comp LJ 243 ; (1993) 3 All ER 829 : 1993 BCLC 796 (Ch D). In interpreting a debenture granted by a company to one of its directors it was held that security created over future book debts was in the nature of a floating rather than a fixed charge because the chargee failed to have the requisite degree of control over the charged items in its capacity as chargee. Control exercised in his capacity as director was irrelevant. *Double S Printers Ltd., Re,* (1999) 1 BCLC 220.

A debenture although purporting to create a fixed charge over book debts (which had to be paid by the borrowing company into a specified bank account) in fact allowed the company freedom to deal with those debts by paying them into another account. The court said that the result of this freedom was that the charge was merely a floating charge. *Re CIL Realisations Ltd.*, **unreported** but noted in *The Lawyer* 18 September, 2000.

Charge on insurance policies.—A contrast to the above decision is provided by the facts of *CCG International Enterprises Ltd., Re,* (1993) BCLC 1428 (Ch D). Here the charge described as a fixed charge was created on the company's policies of insurance. One of the effects of the clauses stated in the charge was that the moneys received as proceeds of the insurance policies were not at the free disposal of the company and accordingly the charge was a fixed charge.

Assignment of book debts.—In *Atlantic Medical Ltd., Re,* (1993) BCLC 386 (Ch D) a company carried on the business of leasing medical equipment and its business was funded by the banks by way of hire-purchase and leasing agreements. The equipment was then sub-let or sold on hire-purchase to end-users. The company assigned by way of security sub-letting agreements and rental due from the end users to its financing banks and the assignment extended to any future agreements that the company entered into with the end users. A resolution for the creditors' winding up was passed. The question before the court was whether the charge in favour of the banks was a fixed or a floating charge. The court held that the charge was a fixed charge created on the sub-letting agreements and the rents due thereunder and the fact that the charge also covered future agreements did not preclude it from being a fixed charge. A similar question arose in the related case of *Atlantic Computer Systems plc., Re,* (1991) BCLC 606.

Where the clause prohibiting assignment related to the principal agreement and not to where claim which was based on assignment of a debt, it was held that the assignment was valid because there was no contractual provision against assignment at the time the debenture was granted. *Foamcrete (UK) Ltd. v. Thrust Engineering Ltd.,* (2002) BCC 221 (CA).

Assignment of rental income.—The assignment of an equipment-lease by the lessor to another person has been held to be valid even if there is a clause in the lease agreement that the lessee could terminate the lease before the expiry of time and that the rents due under the lease should not be assigned without his consent which consent was not be unreasonably withheld. This arrangement was held to have created a charge on the rental income and therefore required registration. Only one of the two assignment was registered. The action of the lessee was successful in respect of the registered assignment but the unregistered assignment was held to be void against the liquidator. *Orion Finance v. Crown Financial Management,* (1994) 2 BCLC 607.

On appeal it was held that where the structure of the financing arrangements and the language in which they were expressed compelled the conclusion that the assignments of the rentals were by way of security and the same having not been registered, was void against the liquidator. *Orion Finance Ltd. v. Crown Financial Management Ltd.,* (1996) 2 BCLC 78 (CA). On second stage of the appeal, *Orion Finance Ltd. v. Crown Financial Management Ltd. (No. 2),* (1996) 2 BCLC 382 (CA), it was held that charge being void, the rent due was payable to the liquidator and not to the finance company and, therefore, was subject to the right of set off of any claim by the end user against the funding company.

Sale of goods with reservation of title.—Where the goods were sold by a finance company (who advanced money to the manufacturer) to an overseas buyer and it was not certain whether the company was selling as a principal or as an agent for the manufacturer it was held that the moneys due from the overseas buyers were subject to the floating charge on the manufacturer's book debts. *Welsh Development Agency v. Export Finance Co. Ltd.,* 1991 BCLC 936 (Ch D) An appeal against this decision was allowed by the Court of Appeal, *sub nom.* 1992 BCLC 148 (CA) so as to hold that the transfer of the goods by the manufacturer to a finance company pending repayment of its loan to the manufacturer, and then a sale to a foreign buyer as an undisclosed agent of the financier, did not constitute a registrable charge over the manufacturer's assets. It rather constituted a sale and gave the financier an enforceable claim to sums arising from the export deals and lodged in a special collection account held by the company.

Where goods were apparently sold with the seller retaining title to the goods which had the effect of entitling the seller to ask for return of the goods, it was held that this right was against the concept of sale and hence the goods were charged, not sold. *Curtain Dream plc., Re,* 1990 BCLC 925 (Ch D). *Clough Mill Ltd. v. Geoffery Martin,* 1984 BCLC 97 (Ch D); *E. Pfeiffer Weinkellerei Weineinkauf Gmbh & Co. v. Arbuthnot Factors Ltd.,* 1987 BCLC 522 QBD. Earlier to this in *John Snow & Co. Ltd. v. DBG Woodcroft Co. Ltd.,* 1985 BCLC 54 (QBD), where timber was supplied to a company under condition that title would remain in the seller until paid for, it was held that this was a usual method of protecting the rights of an unpaid seller and, therefore, did not amount to a charge on the goods.

A supply of goods on the condition that ownership would not pass until payment had been made in full did not entitle the supplier to demand an account of the sale proceeds of the goods, they having been sold by the company in the ordinary course of business. *Andrabell Ltd., Re; Airborne Accessories Ltd. v. Goodman,* 1984 BCLC 522 (Ch D); *Hendy Lennox (Industrial Engines) Ltd. v. Grahame Putlick Ltd.,* 1984 BCLC 285 (QBD). Where at the time of the appointment of the receiver the goods were still with the company, the property in the goods remained with the seller by virtue of the title reservation clause and the supplier was held entitled to the proceeds of the sale of such stock but not those of the goods rolled into manufacturing process. *Peachdart Ltd., Re,* 1983 BCLC 225 (Ch D).

"Complex retention of title clauses which purport to give the seller rights to goods which have been altered or to the proceeds from the sale of those goods would be treated as registrable charges as they currently are by the courts." *Rfeifter GmbH & Co. v. Ar-*

buth not Factors Ltd., (1988) 1 WLR 150, noted under the heading "Banking" 2002 JBL 457 at 464.

Block discounting agreement.—A trading agreement entered into between a trading company and a finance company, under which the companies intended to and did carry on business, required the trading company to discount all its debts under an absolute assignment to the finance company. The trading agreement provided for the sale and purchase of debts and the documents and oral evidence clearly negated any intention of creating any charge over book debts or merely making a series of loans. Hence, their Lordships held that there was no registrable charge. In the circumstances in some respects there were rough edges in the way that business was done and commercial practicability may have taken precedence over legal exactitude but, over the whole field, given the flexibility of the trading agreement and the great number of transactions handled, it was clear that the parties were in substance carrying out the trading agreement. *Lloyds & Scottish Finance Ltd. v. Cyril Lord Carpets Sales Ltd.*, 1992 BCLC 609 (HL).

Charge on proceeds of hiring agreement.—The proceeds of hire-purchase agreements were charged in favour of the financing bank. It was agreed that the proceeds would be received into a special account to be opened with the bank and the company would have the full right to use the proceeds. But no such account was opened. They remained flowing into the company's account with another bank. From there the proceeds were transferred from time to time to the financing bank so that the company's bank had knowledge of the arrangement. The company's bank tried to withhold the proceeds under its own rights. Irrespective of the fact whether the charge was a fixed or floating one, the rights of the company's bank became subordinated to those of the financing bank because of the notice. In the Court of Appeal MILLET LJ observed: The contractual right of the company to deal with the proceeds of the hire-purchase agreements in the ordinary course of business and pay them into its bank account was the badge of a floating charge. Accordingly, the charge should be characterised as a floating charge. It is obviously possible to distinguish between a capital asset and its income, it is not possible to separate a debt or other receivable from the proceeds of its realisation.

Pledge of movables is excluded from this section [Sub-section (4)(c)]

The object of the legislature in introducing the words 'not being a pledge' was to provide that registration should not be necessary when the person entitled to the security has possession of the goods. *T. Radhakrishna Chettiar v. Official Liquidator, Madras People's Bank*, (1943) 13 Com Cases 21, 24 : AIR 1943 Mad 73 **followed** in *Ramnathan Chettiar v. Divakin Ltd.*, (1956) 1 Mad LJ 8. See also *Hardwick, Re*, (1886) 17 QBD 690; *East Africa Hardware Co., Re*, AIR 1949 Bom 262 **followed** in *V. Ramamurthy, OL v. Indian Bank*, (1955) 25 Com Cases 462 : AIR 1956 Mad 234; *Hardwick, Re*, (1886) 17 QBD 690.

To constitute a pledge, delivery of possession, actual or constructive, to the pledgee is necessary. If the person entitled to the security is in possession of the movable property, it is a pledge, carrying with it a power of sale on default of payment on the due date, or if no date is fixed, after notice. See *Deverges v. Sandeman Clark & Co.*, (1902) 1 Ch 579; *Wrightson v. Mcarthur & Hutchinson (1919) Ltd.*, (1921) 2 KB 807. See also *Re, David Allester Ltd.*, (1922) 2 Ch 211. Where a company delivering certain fixed deposit receipts to a bank raises a loan on the security of those deposit receipts it is a case of pledge of movable property and need not be registered. *Sri Meenakshi Mills Ltd. v. Registrar of Companies*, (1966) 36 Com Cases 961 : AIR 1966 Mad 24.

No particular formality is required to create a charge on movable property. But the intention to create a charge, *i.e.*, to make any property a security for the payment of any money must be clear. There must be an agreement, express or implied, that in the case of default, there would be right of payment of the property. *Bank of India Ltd. v. Rustom Fakirji Cowasjee*, AIR 1955 Bom 419. See also *Motilal Kejriwal v. Indian Overseas Airlines Ltd.*, (1960) 30 Com Cases 390 : AIR 1959 Cal 117 (DB).

Where the transaction amounts to a charge on some movable property, registration would become necessary. A charge of this kind was created by a company but was not registered. Subsequently, the assets and liabilities of the company were taken over by another company which accepted the liability under the charge but the charge was not registered. This company went into winding up. It was held that the charge was not effective against the liquidator. The word 'created' as used in section 125(1) cannot be equated with 'accepted'. *T.R. Tyagarajan v. Official Liquidator,* (1960) 30 Com Cases 481 : AIR 1959 Mad 538.

Hypothecation is also a kind of pledge and is exempt from registration. Where movable property is hypothecated to a bank, whether delivery has been made or not, it will be an effective pledge whether registered or not. *Ideal Bank Ltd. (In liquidation) v. Pride of India Pictures Ltd. (In liquidation),* (1985) 57 Com Cases 546 : AIR 1983 Del 546.

Registration of pledge of movable property not compulsory but permissible

Department's Circular.—Section 125(4)(c) of the Companies Act provides that a charge, being a pledge on the movable property of a company, is not required to be registered with the Registrar of Companies. However, there have been instances in which a company or any interested person, as envisaged in section 134(1) of the Act, had approached the Registrar for registration also of charges which are pledges on its movable property. It is also stated that in most of such cases, it is the pledgees who desire the registration of the charge. In some cases, however, registration is sought on the ground that the exact legal nature of the document relating to the pledge is in doubt, although it has been called a pledge since it is the whole tenor of the document that will decide its legal character. The question has, therefore, been raised as to whether the Registrar should register a charge which is a pledge on the movable property of a company, since such registration is not required to be done under the provisions of the Companies Act and if he should so register, whether the company is under a legal obligation to register subsequently the particular, if any, relating to its modification and also send to the company later on a copy of the memorandum of satisfaction in respect of the same. It is stated in this connection that even if the pledge had been registered by the Registrar, the company would be entitled to disown responsibility, for complying with the provisions of sections 135 and 138 of the Act on the plea that the original registration of the charges constituted by the pledge was itself not warranted by the provisions of the Act. In such cases, therefore, there is a possibility of the charge appearing as subsisting even after its full satisfaction, in the register of charges maintained by the Registrar under section 130 of the Act.

The matter has been examined in this Department, with particular reference to the point as to what action the Registrar should take in such cases. It is considered that the registration by the Registrar of a charge being a pledge on the movable property of a company, though not mandatory, is permissible at the instance of the company or of any interested person, provided the latter files the necessary particulars with the prescribed filing fee. The Registrar should, however, point out to the party concerned that such registration is not statutorily compulsory but would be made by him "without prejudice", if the party insists on the Registrar registering the charge. The Registrar should also simultaneously advise the party seeking registration of the charge that in that case it would be in the company's own interest if particulars of any subsequent modification of the charge and of its satisfaction are duly intimated to the Registrar. (*Circular No.* 8(6)/125/60-PR, dated 7th July, 1960).

Charge on choses-in-action

It has been held that the charges over the shares in the horses were not the type of charges that had to be registered under the Companies Act since they are choses-in-action. As the charges were validly created and the sale of the horses would be for the benefit of those interested in the assets of the company, the Court made the order that the proceeds of the sale should be used to discharge the sum covered by the charge and the balance to be held pending the outcome of the winding up petition. *Sugar Properties (Derisley Wood) Ltd., Re,* 1988 BCLC 146 (Ch D).

Floating charge on undertaking or any property [Sub-section (4)(f)]

The word 'undertaking' has been held to mean all the property, present and future, of the company, *Re, Panama New Zealand and Australian Royal Mail Co.,* (1870) 5 Ch App 318.

As to what is a 'floating charge' or 'floating security' (both mean the same thing), see Notes under section 124.

For a discussion of the nature of a floating charge, see *State of Madras v. Madras Electric Tramways,* (1956) 26 Com Cases 398 : AIR 1957 Mad 169; *U.P. Oil Mills Ltd.,* AIR 1962 All 101; *Yellamma Cotton, Woollen and Silk Mills Ltd. v. Official Liquidator,* (1970) 40 Com Cases 466 at 486 (Mys).

A floating charge has the effect of creating an immediate charge on the property charged, with the exception that it leaves the company to deal with the property in the ordinary course of business and subject to such limitation as may be prescribed by the instrument. *Evans v. Rival Granite Quarries Ltd.,* (1910) 2 KB 979. So long as the charge does not crystallise, the company is allowed, in the usual course of business, to deal with the assets which are subject to the floating charge in any way it likes. See *Re, Automatic Bottlemakers Ltd.,* (1926) Ch 412. A floating charge need not be on all assets of a company. It may be created with regard to a particular class or species of assets, *e.g.*, book-debts or stock-in-trade only. See *National Provincial Bank of England v. United Electric Theatres,* (1916) 1 Ch 132.

A charge though expressed in words as a fixed mortgage will be treated as a floating charge if the intention was that the company should be allowed to continue to use the charged assets in the carrying on of its business. The principal tests whether a charge is floating have been stated by the Court of Appeal in England as follows:—

(1) if it is a charge upon all or one or more classes of assets, present and future;

(2) if the assets charged would in the ordinary course of business be changing from time to time; and

(3) if, expressly or by necessary implication, the company has the power until some step is taken by the charge-holder, of carrying on its business in the ordinary way so far as regards the assets charged. *Yorkshire Woolcomber's Association Ltd., Re,* (1903) 2 Ch 284 **affirmed** by the House of Lords in *Illingworth v. Houldsworth,* 1904 App Cases 355.

What is the ordinary course of business will depend upon the circumstances of each case. A specific mortgage to raise money for the purpose of carrying on the business of the company is within the words. *Cox Moore v. Peruvian Corpn.,* (1908) 1 Ch 604. See also *Maheshwari Bros. v. Official Liquidator, Indra Sugar Works Ltd.,* (1942) 12 Com Cases 75, 78 : AIR 1942 All 119; *Alfred Priestman & Co., Re,* (1936) 2 All ER 1340. In *Keenan Bros. Ltd.,* 1986 BCLC 242 the Irish Supreme Court upheld a fixed charge over book debts which was reinforced not only by a covenant obliging the company to pay the proceeds into an account with the bank and also not, without the bank's consent, to make any withdrawal or direct any payment.

Where a film company borrowed money declaring a lien on all the company's assets including machinery then lying with the company or that might be subsequently bought until the loan was repaid, the court had no hesitation in regarding this as a floating charge. It covered assets both present and future of extremely fluctuating nature. It imposed no restrictions on the business use of the assets. *Indus Film Corpn Ltd., In re,* (1939) 9 Com Cases 166, 173 : AIR 1939 Sind 100. A deposit of all the liquid assets including stock-in-progress now or at any time hereafter to be stored by the company in its godowns, the keys of which had been delivered to the bank is not a floating charge but a mortgage of specific assets, with a licence to the company to deal with them in course of its business. *Bank of Baroda v. H.B. Shivdasani,* AIR 1926 Bom 427. A company issued a creditor with a debenture, in which money deposited in bank (escrow moneys) was described as subject to a fixed charge. The question was whether the particular asset could be subjected to a fixed or only a floating charge. It was held that the asset in question was such that it could not be subjected to a fixed charge but only to a floating charge. *ASRS Establishment Ltd. (in Administrative Receivership and Liquidation), Re,* (2000) 1 BCLC 727 : **affirmed** by the Court of Appeal, in *ASRS Establishment Ltd. (In Administrative Receivership and Liquidation) Re,* (2000) 2 BCLC 631 (CA).

The description of a charge in a debenture as "fixed" would not be conclusive if the operation of the security was such as to leave considerable freedom to the borrowing company to collect and deal with the charged assets. Such security should be regarded as floating in nature. *Westmaze Ltd., Re, The Times*, July 15, 1998.

A company which carried on the business of sale and repair of motor cars had created a charge on its assets describing it as floating charge and covering "all other assets now owned or hereafter acquired". The company was free to deal with those assets in the ordinary course of business. These were held to be characteristics sufficient to make it a floating charge. *G.E. Tunbridge Ltd., Re,* (1995) 1 BCLC 34 (Ch D). This decision was **applied** in *ASRS Establishment Ltd. Re*, (2000) 1 BCLE 727 (Ch D), [**affirmed** by the Court of Appeal, July 20, 2000, PALMER IN COMPANY, Oct., 2000] holding that the charge over 'other debts and claims' was not a fixed charge. The clause could not create a fixed charge over some only of the 'other debts and claims. Either it created a fixed charge over all of them or over none of them. Where the machinery used for production was charged and one of the terms was that the property could be dealt with only with the consent of the lender, it was held that the result was the creation of a fixed charge. *Climex Tissues Ltd., Re,* (1995) 1 BCLC 409 (Ch D). The court observed generally that it is not necessary that a floating charge should cover the whole of the company's assets. A floating charge on a part of the company's assets is perfectly possible. A provision for appointment of a receiver is also not necessary. *Bond Worth, Re,* (1979) 3 All ER 919: (1980) Ch 228 and *Armagh Shoes Ltd., Re,* (1984) BCLC 405. The existence of some restriction on the company's dealings with the charged property is not inconsistent with a floating charge. *Brightlife Ltd., Re,* (1986) BCLC 418 at 422 : (1987) Ch 200 at 209. This was **followed** in *ASRS Establishment Ltd. Re*, (2000) 1 BCLC 727 (ChD) [**affirmed** by the Court of Appeal, July 20, 2000, PALMER IN COMPANY, Oct., 2000] where the court found that the true construction of the debenture the company was free to deal in the course of its business with the property charged without having to ask for the debentureholder's consent. Accordingly the agreement did not create a fixed charge but a floating charge.

A charge may be regarded as a fixed charge notwithstanding that the charger is given some right to deal with the property charged. For example, in *Holroyd v. Marshall,* (1862) 10 HL Cas 191, the chargor was given the right to substitute the old machinery of his mill with new one, even so the charge on the machinery was held to be a fixed charge. [Citing *Seed v. Bradley,* (1894) 1 QB 319 and *Coates v. Moore,* (1903) 2 KB 140]. A charge on book debts was described as fixed charge and yet giving freedom to the company to collect them and pay them into its bank account and use the proceeds in the ordinary course of business. The charge was held to be a floating charge. The receiver came under an obligation to keep a sum of money for preferential payments and for that reason he retained his power to deal with debts even when the debentureholders who appointed him had been paid out. *Pearl Maintenance Services Ltd. Re,* (1995) 1 BCLC 449 (Ch D); *Pearl Building Contracts Ltd., Re,* (1995) 1 BCLC 449 (Ch D).

So long as the charge is floating and has not become settled and fastened on the subject of the charge or, to use an expression in common parlance, become 'crystallised', the company may in the ordinary course of its business sell, let, mortgage, pledge and otherwise deal with its assets and pay dividend out of its profits, even though the profits are included in the charge, just as if the floating charge had not been created. It is of the essence of a floating charge that it is not to be put into immediate operation but is only to 'float', so that the company is allowed to carry on its business as though the charge does not exist. A floating charge will remain dormant until the undertaking charged ceases to be a going concern or the person in whose favour the charge is created intervenes, HALSBURY'S LAWS OF ENGLAND, Fourth Edn., Vol 7, Paras 824 and 825, pages 489-491 : [Re-issue 1988, Vol. 7(2), Paras 1098-1104, pages 874-880: Reissue 1996, Vol. 7(2), Paras 1260-1266] and cases noted in foot-notes thereunder. *Wheatley v. Silkstone and Haigh Moor Coal Co.*, (1885) 29 Ch D 715, is authority for the position that a floating

security does not preclude the debtor-company from creating in the ordinary course and for the purposes of its business a specific mortgage or charges or other encumbrance on the assets so as to have priority over the floating charge and this ruling has been followed in subsequent decisions without demur down to this date to the same effect; *Colonial Trust Corpn.*, (1879) 15 Ch D 465 (CA).

A charge holder cannot complain of anything which is done by the company *intra vires* and in the ordinary course of business. Consequently a scheme of amalgamation within the objects of the company under which the company transfers the whole of its undertaking to another, does not have the effect of crystallising the floating charge. *Foster v. Borax Co.*, (1901) 1 Ch 326 (CA).

A subsequent mortgagee who did not know about the earlier charge may complete his title by taking legal steps and thereby secure a priority. *English and Scottish Trust v. Brunton*, (1892) 2 QB 700 (CA). But now under S. 126 every subsequent chargee is deemed to have notice of all the earlier charges which have been registered under S. 125. The same would be the case if he did not know that the earlier floating charge included a covenant forbidding the creation of a prior specific mortgage, *Standard Rotary Machine Co.*, (1906) 95 LT 829; *In re, Valletort Sanitary Steam Laundry Co.*, (1903) 2 Ch 654.

Now-a-days, it has become usual to qualify the operation of a floating charge on security by providing that the debtor-company shall not create a mortgage or charge on all or any of its assets-ranking in priority to or *pari passu* with the floating charge or that the company shall not effect any other alterations and impose other restrictions. *The Imperial Bank of India Ltd. v. The Bengal National Bank Ltd.*, (1931) 1 Com Cases 159 : AIR 1931 Cal 223. But whatever may be the legal rights *inter se* between the floating charge holder and the company, such restrictions cannot affect the priority rights of third persons dealing *bona fide* with company. Further, as such restrictive clauses are not usually registered with the Registrar when the floating charge is registered, constructive notice of such restrictions cannot be imputed to such third persons, and so in all cases where specific charges are created subsequent to the floating charge, the subsequent specific charge have priority over the floating charge, so long as it remains floating and not crystallised. Otherwise "it would be a monstrous thing to hold that the floating security prevented the making of specific charges or specific alienations of property, because it would destroy the very object for which the money was borrowed, namely the carrying on of the business of the company". *Re, Florence Land and Public Works Co., Ex Parte, Moor*, (1878) 10 Ch D 530 (CA).

Where a floating charge is created on immovable property, even if it does not immediately operate as a charge on the property, it requires for its validity registration not only under this section but also under the Indian Registration Act. Otherwise, it will be invalid, *Krishna Deva Bhargava v. Official Liquidator, U.P. Oil Mills Industries Ltd.*, (1962) 32 Com Cases 925 : AIR 1962 All 101 (DB).

Where a floating charge covers foreign assets also, it will have effect as an agreement to charge those assets and will be valid and enforceable as an equitable security. See *Re, Anchorline Henderson (Bros.) Ltd.*, (1937) 2 All ER 823 : (1938) 8 Com Cases 59 (Ch D).

A charge on the entire assets of a company does not, however, include the books, registers and papers which are required by the statute to be kept at company's registered office and pertain to the company's management, as distinct from the title deeds which relate to the ownership of assets. See *Engel v. South Metropolitan, Brewing & Bottling Co.* (1892) 1 Ch 442; *Re, Capital Fire Insurance Association*, (1883) 24 Ch D 408; *Re, Clyne Tin Plate Co.*, (1882) 47 LT 439. A floating charge on the whole of the company's property and undertaking has been held not to cover an item of property (a flat in this case) to which the company held the recorded title but in which it had no beneficial interest. *Sharp v. Woolwich Building Society*, (1997) 1 BCLC 603 HL. Explaining the concept of "property" in this context their Lordships cited (at p. 608) the following passage from

the speech of LORD HERSCHELL in *Heritable Reversionary Co. Ltd. v. Millar,* (1892) AC 598 at 606:

"Wherever, therefore, it has to be determined whether heritable or any other estate vested in the trustee, the first question which arises is, Was it the 'property of the debtor?.' The expression is not a technical one, but is obviously intended to comprehend all that would ordinarily be understood as covered by it. It cannot be doubted that it includes all beneficial interests possessed by the bankrupt, even though the property be vested in other persons as trustees for him. On the other hand, I cannot think, unless compelled by authority to take that view, that it includes or was ever intended to include, estates of which the bankrupt was a bare trustee, and in which he had no beneficial interest."

Thus, the term "property" in its practical meaning would include property which is available for the use of the company, in which it has a beneficial interest and which it is in law entitled to dispose of or subject it to beneficial security.

For a discussion of the distinction between floating charge and specific charge, see also *State of Andhra Pradesh v. Sri Rajaram Janardhana,* (1966) 36 Com Cases 950 (DB) (AP). A pledge without parting with possession would only create a floating charge. *D. Pudumjee v. N.H. Moss,* AIR 1926 Bom 28. Thus presence of the element of possession of the property secured will negate the creation of a floating charge. *J. D. Jones & Co. Ltd. v. Ranjit Roy,* AIR 1927 Cal 682. It will also negate the intention to create purely equitable charge *Karundia v. OL, A.P. Paper Mills Co. Ltd.,* AIR 1952 Mad 595 at 597 following *J.D. Jones & Co. Ltd. v. Ranjit Roy* (*Supra*).

If the assets covered by a floating charge include mortgaged land then the floating chargee should be made a defendant to an action to foreclose the mortgage and is entitled to redeem the mortgage whether or not the floating charge has crystallised (*Wallace v. Evershed,* (1899) 1 Ch 891; *Westminster Bank Ltd. v: Residential Properties Improvement Co. Ltd.,* (1938) Ch 639).

By Section 534 a floating charge created within twelve months preceding the commencement of a winding up is invalid, unless it is proved that the company immediately after the creation of the charge, was solvent.

Provision for automatic crystallisation of floating charge

An attempt to protect the first charge holder against possibilities of burdening the property with subsequent charges was made in some cases by providing a clause for *automatic crystallisation.* The usual form of such a clause is that the document creating the charge states that,the charge will crystallise on the happening of some particular event, *e.g.*, if a creditor of the company levies execution against its property, or if the company gives security over assets covered by the charge to a third party without the charge holder's consent. Of course, it is reasonable to provide that the charge holder shall have the right to appoint a Receiver in such an event, but what if the document provides that the charge shall instead crystallise automatically without any act on the part of any one. See SEALY, CASES AND MATERIALS IN COMPANY LAW, 380, 381 (4th Edn,, 1989). There is a clear authority upholding the effectiveness of an automatic crystallisation clause in New Zealand; *Manurewa Transport Ltd.* (1971) NZLR 909. *Dovey Enterprises v. Guardian Assurance Publications,* (1993) 1 NZLR 540, where a clause providing for the charge to become fixed on termination of the company's lease of its business premises was held to be effective. See also *Permanent Houses (Holdings) Ltd.,* 1988 BCLC 563; *Fire Nymph Products Ltd. v. The Heating Centre Pty. Ltd.* (1988) 14 ACLR 274 (Aust).

In the Australian decision *Stein v. Saywell,* (1969) 121 CLR 529 : (1969) ALR 481 (Aust.), the High Court was divided in its opinion. In Canada, opposition to automatic crystallisation clauses can be found in *R. v. Consolidated Churchill Copper Corpn. Ltd.,* (1978) 5 WWR 652. In *Re, Woodroffes (Musical Instruments) Ltd.,* 1985 BCLC 227 : (1985) 2 All ER 908, NOURSE J. expressed the view, obiter, that 'the general body of in-

formed opinion is of the view that automatic crystallisation is undesirable'. This may be contrasted with the remarks, also obiter, of HOFFMANN J. in *Re, Brightlife Ltd.,* (1986) 3 All ER 673 at 680-681. He said: "(Counsel) said that public policy required restrictions upon what the parties could stipulate as crystallising events. A winding up or the appointment of a receiver would have to be noted on the register. But a notice (of conversion) need not be registered and a provision for automatic crystallisation might take effect without the knowledge of either the company or the debenture-holder. The result might be prejudicial to third parties who gave credit to the company. Considerations of this kind impressed BERGER, J. in the Canadian case of *R. v. Consolidated Churchill Copper Corpn. Ltd.,* (1978) 5 WWR 652 (Can.) where the concept of 'self-generating crystallisation' was rejected.

"I do not think that it is open to the courts to restrict the contractual freedom of parties to a floating charge on such grounds. The floating charge was invented by Victorian lawyers to enable manufacturing and trading companies to raise loan capital on debentures. It could offer the security of a charge over the whole of the company's undertaking without inhibiting its ability to trade. But the mirror image of these advantages was the potential prejudice to the general body of creditors, who might know nothing of the floating charge but find that all the company's assets, including the very goods which they had just delivered on credit, had been swept up by the debenture-holder. The public interest requires a balancing of the advantages to the economy of facilitating the borrowing of money against the possibility of injustice to unsecured creditors. These arguments for and against the floating charge are matters for Parliament rather than the courts and have been the subject of public debate in and out of Parliament for more than a century.

"Parliament has responded, first, by restricting the rights of the holder of a floating charge and secondly, by requiring public notice of the existence and enforcement of the charge. For example, priority was given to preferential debts in 1897 and the Companies Act, 1907 invalidated floating charges created within three months before the commencement of the winding up. This period has since been extended and is now one year. The registration of floating and other charges was introduced by the Companies Act, 1900. The Companies Act, 1907 required registration of the appointment of a receiver and the Companies Act, 1929 required notice of such appointment to be given on the company's letters and invoices.

These limited and pragmatic interventions by the legislature make it in my judgment wholly inappropriate for the courts to impose additional restrictive rules on grounds of public policy. It is certainly not for a judge of first instance to proclaim a new head of public policy which no appellate court has even hinted at before. I would therefore respectfully prefer the decision of the New Zealand Supreme Court in *Re, Manurewa Transport Ltd., (Supra)* recognising the validity of a provision for automatic crystallisation, to the **contrary** dicta in the Canadian case I have cited."

The English Department of Trade and Industry has pointed out in its *Department's Letter* dated 7-7-1988: "Such clauses may often be inserted precisely because neither the chargee nor the company will know at the time that the crystallising event has occurred. A requirement to notify could undermine the reason for such clauses, and, in doing so, prevent potential lenders from offering loans where they might do so now given the protection conferred by automatic crystallisation. Lenders could be deprived of the opportunity for profitable business and companies could be deprived of a means of raising finance."

Crystallisation and right of set off

A right of set off which accrues in the favour of a debtor of the company before crystallisation can be raised by the debtor against a claim by the receiver. *Rother Iron Works Ltd. v. Canterbury Precision Engineers Ltd.,* (1973) 1 All ER 394 (CA). The court distinguished this case from *Robbie (N.W.) & Co. Ltd. v. Witney Warehouse Co. Ltd.,* (1963) 3

All ER 613 : (1964) 34 Com Cases 178 (CA) where the claim being sought to be set off was assigned to the debtor after the crystallisation of the charge. A debt which accrues before the notice of an assignment is received, whether or not it is payable before that date, or a debt which arises out of the same contract as that which gave rise to the assigned contract, can be set off against the assignee. The same principles apply where an assignment involves a complete equitable assignment of the assets charged. Thus in *Business Computers Ltd. v. Anglo-African Leasing Ltd.*, (1977) 2 All ER 741 where a receiver was appointed and notice of this was received by the debtor, the latter could not set off a claim for damages arising as a result of repudiation of the contract by the receiver after his appointment.

Priorities in the matter of charges

Where there are successive charges on the same property, a very serious problem arises as to the order in which they are to be paid out of the proceeds of the property. The priorities are a bit different according as whether the charge is of fixed or floating nature.

Fixed or Specific Charges.—The following is the order of priority where there are successive fixed or specific charges on the same property:

(1) A registered charge will take priority over an unregistered charge whether it be previous or subsequent to the unregistered charge. This order of priority may become displaced by the fact that two independent charges were registered within the same time gap of thirty days allowed for registration after the creation of a charge or within the extended period as may be allowed by the Registrar, the Company Law Board or the Central Government. This priority may also be displaced by estoppel or equitable considerations unless the registered charge constitutes a legal purchase without notice actual or constructive or has better equity.

(2) A subsequent purchaser or absolute assignee of the mortgaged property takes it subject to the registered charge because of the doctrine of the constructive notice. Section 126 and see *Wilson v. Kelland,* (1910) 2 Ch 306.

(3) Between the fixed charges the date of issue of various debentures is the crucial factor in absence of any priority agreement. *Griffiths v. Yorkshire Bank,* (1994) 1 WLR 1427.

(4) Where registration under some other applicable system is required that must be carried out to achieve priority, *e.g.*, charges on immovable property, a ship or an aircraft require special registration under the laws applicable to them.

(5) Registered charges depend for their validity on registration but they take priority from the date of the creation though constructive notice arises from the date of registration. This priority may be displaced by an estoppel or some equitable consideration or when the latter charge is a legal charge without actual or constructive notice or has a better equity.

(6) An unregistered charge may effectively achieve priority over a subsequent registered charge if it has been discharged before its validity has been called in question. See *Mercantile Bank of India v. Chartered Bank of India,* (1937) 1 All ER 231.

(7) Where a fixed and floating charge was created over land on the same day, the floating charge prohibiting creation of any subsequent fixed charge, it was held that the fixed charge became effective only after registration with the Registrar of documents which was naturally subsequent to the floating charge, the floating charge had priority over it. *AIB Finance Ltd. v. Bank of Scotland,* (1995) 1 BCLC 185 (CS).

(8) An unregistered charge takes priority over subsequently created unregistered charge both at law and equity unless displaced by an estoppel or by the subse-

quently created charge which constitutes a legal purchase without notice actual or constructive or has a better equity.

Floating charges

(1) A registered floating charge without a restrictive clause ranks after a prior or subsequent specific charge which is duly registered. *Hamilton's Windsor Iron Works, Re,* (1879) 12 Ch D 707.

(2) A subsequent registered floating charge over the undertaking and purporting to rank prior or *pari passu* will rank after the first registered floating charge, unless agreed otherwise. *Benjamin Cope & Sons Ltd., Re,* (1914) 1 Ch 800.

(3) A subsequent registered floating charge over a part of the company's property made under an expressly reserved power to create a security over the same property ranking prior to the earlier charge will acquire priority over the earlier charge. *Automatic Bottle Makers Ltd., Re,* (1926) Ch 412.

(4) A registered floating charge carrying a restrictive clause to the effect that the same property shall not be subjected to any charges whether specific or floating will rank before any subsequently created specific charge if the specific chargee had knowledge or notice of the clause. *English & Scottish Mercantile Investment Trust. Ltd. v. Brunton,* (1892) 2 QB 700. Constructive notice of floating charge is not a constructive notice of the restrictive clause. *Wilson v. Kelland,* (1910) 2 Ch 306, unless there is proof of wilful blindness to the existence of the earlier charge and its restrictive clauses.

(5) A crystallised registered floating charge takes priority over a subsequent registered specific charge or an assignment unless the mortgagee or assignee had no notice of the crystallisation. There will be constructive notice of the appointment of a receiver or the commencement of winding up or in some cases of the special warnings in the file of the Registrar by the system of special warning fiches.

Charge on calls [Sub-section (4)(g)]

Note that as per Section 14 of the Banking Companies Act "no banking company shall create any charge upon any unpaid capital of the company, and any such charge shall be invalid".

Ship or any share in a ship [Sub-section (4)(h)]

A lien in favour of the owners of a vessel over sub-freights granted by the person chartering the ship has been held to be a floating charge and, therefore, registrable in accordance with the statutory provisions. The court laid down that it is not necessary for the creation of a floating charge that the subject of the security must exist at the time of the creation of the charge. *Annangel Glory Compania Naviera SA v. Golodetz Middle East Marketing Corpn. (UK) and Hammond,* 1988 PCC 37 : (1988) 1 Lloyds Rep 45.

Goodwill etc. [Sub-section (4)(i)]

The promise by a company to pay monthly instalments of the price of transfer of goodwill or other rights was held to be not a charge requiring registration under the section. *M.M. Hussain v. Laminated Package P. Ltd.,* (2000) CLC 330 (AP).

Charge on shares and distribution rights.—In a Scottish case, a charge on shares was held to be a fixed charge. The court said : "Although the debentures referred to subsidiary shares generally, the only shares mentioned in the debenture were the shares of a particular company. The shares in that company were not a part of the company's circulating capital and it did not need to sell them, to deal with them or to substitute them as part of its ordinary business as a management consultant. The shares were not part of a fluctuating body of assets which changed from time to time in the ordinary course of the company's business. The shares did not remain under the management and control of the charger and under the terms of the debenture could not be disposed of, dealt with or sub-

stituted. The company was able to trade as a management consultant without recourse to the shares. The fact that the debenture also charged the distribution rights did not alter the characterisation of the charge over the shares as fixed. Therefore the charge over the shares did not require registration and was valid as against the administrators. *Arthur D Little v. Ableco Finance LLC*, (2002) 2 BCLC 799 (Ch D).

Charge on property situate abroad [Sub-section (5)]

The extended time given by this sub-section will apply only to the case of a charge created solely on property situate outside India. Where the charge comprises also of any property, however small, situate in India the sub-section will not apply.

As regards charges created out of India and acquired or held by a person resident in India (other than a foreign national), section 25 of the erstwhile Foreign Exchange Regulation Act, 1973, required the permission of the Reserve Bank to be complied with before it could be filed with the Registrar.

In the case of charges created before the commencement of Foreign Exchange Regulation Act, 1973, *viz.*, 1st January, 1974, a declaration of holding it will have to be made within three months or such further extended time as may be granted by the Reserve Bank. [*Vide* Section 26(4) and (5) (*ibid*)]. Now see FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2000, given in *Appendix* 123.

Charge created in India on property situate abroad [Sub-section (6)]

The use of the words 'may be filed' in this sub-section as contrasted with the wording 'shall' and 'are' used in sub-section (1) probably means that it is not obligatory to register such charge within thirty days of its creation. But as sub-section (1) says that it extends to every charge to which the section applies it is advisable to file for registration the instrument or copy registrable under this sub-section, also within the period of thirty days as provided by sub-section (1). If the charge, however, includes property in India also the registration must certainly be effected within that period.

General rights of chargee

The projects of a property company were financed through a bank and the architectural services were being rendered by a firm of surveyors. Money was provided for the purchase of a property which was subjected to a charge. For various reasons the development did not go ahead as planned. Interest on the overdraft accumulated. Ultimately the bank agreed to provide more money provided the architects were dismissed and the services of a more prestigious firm were hired. The company accordingly did so and the architects sued the bank for damages for the tort of inducing breach of contract. Their action was dismissed. The court said that the chargee-lender becomes so closely identified with the project that for safeguarding his investment he gets a right to ask the borrower to suitably change his staff and, therefore has a justification in doing so. *Edwin Hill & Partners v. First National Finance Corpn. Plc.*, 1989 BCLC 89 (CA).

It has been held that it is not contrary to the corporate insolvency law for a creditor of a company to agree that he should rank for repayment after other creditors of the company. *Maxwell Communications plc., Re,* (1992) BCLC 465 (Ch D). Where a fixed chargeholder agreed to give up a prior claim to certain assets of the company in favour of a later floating charge, it was held that the effect of this postponement was that the priority had become surrendered to preferential claims and liquidation expenses. *Portbase (Clothing) Ltd., Re,* 1993 BCLC 796 : (1994) 2 Comp LJ 243 : (1993) 3 All ER 829 (Ch D).

Duties of chargee

It is the duty of chargee in possession not to use rights and powers under the charge for improper or ulterior purposes. The chargee's duty is to exercise the rights and powers under the charge for the purposes of obtaining repayment of the loan. The chargee allowed the company to go into liquidation. One of the consequences of this was that the shares of the company had become worthless. The owners of those shares sued the char-

gee. It was held that the chargee was under no duty to intervene and to attempt a rescue of the company. *Worwood v. Leisure Merchandising Services Ltd.*, (2002) 1 BCLC 249 (Ch D).

Property held on trust

In a case before the New Zealand Court of Appeal a receiver acting to enforce a floating charge was denied the right to realise certain bullion stocks in the possession of the company because the company had created a trust over that bullion in favour of its purchasers who had left the bullion with the vendor company for safekeeping, *Liggett v. Kensington*, (1993) 1 NZLR 257 (CA).

Company compellable to file particulars

Where a bank sanctioned credit facilities in favour of a company in consideration of which the company created a charge on its assets by executing a hypothecation deed but inspite of repeated requests the company did not file the particulars of the charge with the Registrar and did not sign Forms 8 and 13 forwarded by the bank, it was held that the company was compellable by an order under section 614 to do the needful. *ICICI Bank Ltd. v. Klen & Marshall Mfrs & Exporters Ltd.*, (2000) 28 SCL 123 : (2000) 39 CLA 215 : (2000) 4 Comp LJ 411 : (2001) CLC 390 (CLB—SB).

Transfer of immovable property by non-residents under FEMA 1999.

Clause (*i*) of sub-section (3) of section 6 of FEMA, 1999 empowers RBI to prohibit, restrict or regulate acquisition or transfer of immovable property in India, other than a lease not exceeding 5 years, by a person resident outside India.

Under section 2(*ze*) of FEMA, 1999, "transfer" includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

RBI has issued FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2000 [For text, see *Appendix* 123]

Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000

(i) Except under the provisions of the Act or rules or regulations made thereunder, acquisition or transfer of immovable property in India by a person including an Indian citizen resident outside India would require approval of Reserve Bank.

BY PERSON RESIDENT OUTSIDE INDIA

(ii) In terms of Section 6(5) of the Act a person resident outside India can hold own or transfer immovable property in India if such property was acquired by him when he was a resident in India or inherited from a person resident in India.

BY INDIAN CITIZEN RESIDENT OUTSIDE INDIA

(iii) In terms of Regulation No.3, an Indian citizen resident outside India is permitted to –

(a) acquire any immovable property in India other than agricultural/plantation property or a farm house;

(b) transfer any property in India to a person resident in India;

(c) transfer any property other than agricultural or plantation property or a farm house to an Indian citizen or a person of Indian origin as defined in Regulation 2(c), resident outside India.

BY PERSON OF INDIAN ORIGIN

(iv) In terms of Regulation No.4 a person of Indian origin has been permitted to –

(a) acquire immovable property other than agricultural land/plantation property or a farm house by way of purchase subject to the conditions mentioned in clause (a) of the Regulation;

(b) acquire any immovable property other than agricultural land/plantation property/farm house by way of gift from an Indian citizen resident outside India or from a PIO;

(c) acquire property by inheritance subject to the conditions stipulated in clause (c) of the Regulation;

(d) transfer by way of sale any immovable property other than agricultural/plantation property or a farm house by way of sale to a person resident in India;

(e) transfer agricultural land/farm house or plantation property by way of gift or sale to an Indian citizen resident in India.

BY INDIAN BRANCH/OFFICE OF FOREIGN ENTITY

(v) A branch or office in India of a foreign entity other than a liaison office has been permitted to acquire immovable property which is necessary for or incidental to the activity carried on in India by such branch or office subject to the terms and conditions mentioned in Regulation No.5. Such property can also be mortgaged to an authorised dealer as a security for any borrowing by a branch or office.

REMITTANCE OF SALE PROCEEDS

(vi) Authorised dealers have been permitted to allow remittance of sale proceeds of property other than agricultural/plantation property or a farm house to an Indian citizen resident outside India or a PIO as defined in clause (c) of Regulation No.2 who has sold the property in India subject to the terms and conditions stipulated in Regulation No. 6.

(vii) A person who is a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan requires approval of Reserve Bank for acquisition or transfer of property in India other than lease not exceeding 5 years, in terms of Regulation No. 7. [*See Annexure II of AD (MA Series) Cicular No. 11, dated 16-5-2000*]

Relevant Rule and Prescribed Forms

The copy to be filed with the Registrar should be verified in accordance with Rule 6 in *Appendix* 1 and for Form of particulars of charge to be filed, see Form No. 8 therein. Rule 6 has been amended w.e.f. 21-3-1995 to provide for liberalised procedure for filing and registration of charges.

As regards the particulars of charge on property in India created by a foreign company see Forms Nos. 55 and 56 in *Appendix* 1.

Penalty for default : Legal obligation on company to register

It is obligatory for a company to file the particulars of charge and default thereof is punishable under section 142 unless the registration has been effected on the application of some other person, *viz.*, secured creditor.

Compoundable offence.—The offence is compoundable under section 621A.

Fixed rate of additional fee for belated filing of documents

Press Note 2/95, dated 21-3-1995.—Government has revised the additional fees payable on belated filing of documents w.e.f. 1-5-1995. The levy of fixed additional fee will be regulated according to the table given in Press Note. For the text of the Press Note see Notes under Schedule X and section 611.

Late payment of Fee for registration of charges

Fee has to be paid alongwith the presentation of Forms 8 and 13. Mere submission of these forms without filing fee, though within time, does not amount to a proper compliance of the requirements of registration within the meaning of s. 125. The CLB, however, condoned the delay and directed that the forms as already filed be taken on record on payment of costs of Rs. 500. *State Bank of Mysore v. City Hospital and Diagnostic*

Centre P. Ltd., (2001) 3 Comp LJ 241 : (2001) 43 CLA 43 : (2001) 32 SCL 363 (CLB—Chennai).

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of the matters specified under Rule 3 of the Companies (Compliance Certificate) Rules, 2001. Paragraph 2 under Rule 3 relates to filing of Forms and Returns with the ROC, RD, Central Government, CLB and other authorities and reads as follows:

Paragraph 2.—**The company has duly filed the forms and returns as stated in Annexure "B" to this certificate, with the Registrar of Companies, Regional Director, Central Government, Company Law Board or other authorities within the time prescribed under the Act and the Rules made thereunder.**

Registration of Creation/Modification/Satisfaction of Charge

Prescribed Check List

Check whether:

(i) the charge falls within any one of the categories of registrable charges as provided in sub-section (4) of section 125;

(ii) the prescribed particulars of the charge requiring registration were filed in three copies with the ROC in Form No.8 along with Form No. 13 duly signed by the company as well as the charge-holder and along with the original/certified copy of the instrument, if any, within 30 days after the date of, its creation or within the time permitted by the ROC under proviso to sub-section (1) of section 125 of the Companies Act;

(iii) in case of issue of debentures of a series, if there has been any charge to the benefit of debenture holders of that series, the required particulars have been filed with the Registrar in Form No. 10 along with Form No. 13 (in triplicate) within 30 days from the date of execution of or the modification of the trust deed;

(iv) in case commission, allowance, discount is paid or made in consideration for subscribing, *etc.*, to debentures, whether the forms included particulars of such commission, *etc.*;

(v) abstract of registration is duly endorsed on every debenture or certificate of debenture stock issued, the payment of which is secured by the charge registered;

(vi) particulars of modification of charges were filed in three copies in Form No.8 along with Form No. 13 duly signed with the ROC within 30 days of the modification or within the extended period;

(vii) a copy of the instrument creating/modifying charge/a copy of debenture of the series, if any, required to be registered was kept at the registered office;

(viii) where payment or satisfaction of charge registered has been effected in full, intimation thereof has been sent to the ROC in three copies in Form No. 17 along with Form No. 13 duly signed, by the company as well as the charge-holder within 30 days from the date of such payment or satisfaction (section 138);

(ix) the creation/modification/satisfaction of charge has been registered by the ROC and endorsed copies of documents have been obtained.

(x) in case of delay/omission/mis-statement in filing particulars of charge created/modified or issue of debentures of a series or intimation of satisfaction of charge, to the ROC a petition has been made to the Company Law Board in ac-

cordance with the Company Law Board Regulations, 1991 and CLB* order obtained and certified copy of such order has been furnished to the ROC along with Form No. 21; and

(xi) instruments creating/modifying charges are kept open for inspection as prescribed.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

S. 126. Date of notice of charge.—Where any charge on any property of a company required to be registered under section 125 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 charge as from the date of such registration.

NOTES

Previous Act : Sec. 109(2)

Scope of section

The date of execution of a charge is the date of creation for the purpose of computing the time prescribed by section 125 for registration, *Watson & Co. v. Spiral Globe Co.*, (1902) 2 Ch 209; *New London & Suburban Omnibus Co.*, (1908) 1 Ch 621; *Cf. Harrogate Estates Ltd., Re,* (1903) 1 Ch 498, though it may be stipulated to take effect on a later date on the happening of a later event. *Esberger & Son Ltd. v. Capital & Counties Bank*, (1913) 2 Ch 366; *Dublin City Distillery v. Doherty*, 1914 AC 823.

Foreign companies.—The section also applies to foreign companies. See Notes under section 600.

Constructive notice

For the purposes of this section the date of registration is the date on which the doctrine of constructive notice (deemed notice) comes into play with this effect that any person acquiring the property which has been subjected to the charge or any part thereof or any share or interest therein, shall be deemed to have notice as from the date of registration. *English and Scottish Mercantile Investment Co. Ltd.*, (1892) 2 QB 700 (CA).

No constructive notice of contents of charge

Though the registration of a charge constitutes notice to the whole world that a charge of a particular type exists, it does not constitute notice of the terms and conditions of the charge. *Standard Rotary Machine Co. Ltd.*, (1906) 95 LT 829; *Wilson v. Kelland*, (1910) 2 Ch 306. It is a common practice to include a term that the company will not create a subsequent charge without the consent of a charge holder but the registration of such a floating charge have been held not to constitute notice of the prohibition to a third party who for a valuable consideration actually obtains a charge on the company's assets with priority over the floating charge. In *G & T Earle Ltd. v. Hemsworth Rural District Council*, (1928) 44 TLR 605, WRIGHT J. said: '.....the debentures having been duly registered.... the plaintiffs, like all the world, are deemed to have constructive notice of the fact that there are debentures. But it has never been held that the mere fact that persons in the position of the plaintiffs have constructive notice of the existence of debentures also affects them with constructive notice of the actual terms of the debentures or that the de-

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* **Power transferred to the Central Government from the commencement of the Companies (Second Amendment) Act, 2002 (11 of 2003).**

bentures are subject to the restrictive condition to which these debentures were subject. No doubt it is quite common for debentures to be subject to this limiting condition as to further charges, but that fact is not enough in itself to operate as constructive notice of the actual terms of any particular set of debentures.' This decision has been followed by the Supreme Court in the Republic of Ireland, where the registration system is essentially the same as in England, Wales and India (*Welch v. Bowmaker (Ireland) Ltd.*, (1980) IR 251).

S. 127. Registration of charges on properties acquired subject to charge.—(1) Where a company acquires any property which is subject to a charge of 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[1], together with a copy (certified in the prescribed manner[2] 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 the manner required by this Act within [3]["thirty"] days after the date on which the acquisition is completed:

Provided that, if the property is situate, and the charge was created, outside India, [3]["thirty"] days after the date on which a copy of the instrument could, in due course of post and if despatched with due diligence, have been received in India shall be substituted for [3]["thirty"] days after the completion of the acquisition as the time within which the particulars and the copy of the instrument are to be delivered to the Registrar.

(2) If default is made in complying with sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [4][*five thousand rupees*].

NOTES

Eng. Act, 1948 : Sec. 97
Eng. Act, 1985 : Sec. 400

Previous Act : Sec. 109-A

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 500 rupees to 5000 rupees under sub-section (2).

Scope of section

Validity of charge not affected.—Where a company acquires property subject to a charge, and fails to deliver particulars of the charge to the Registrar for registration, the validity of the charge is not affected. *T.R. Tyagarajan v. Official Liquidator,* (1960) 30 Com Cases 481 (Mad).

Acquisition of property on dissolution of partnership

Where a charge is created by a partnership firm on its property and where partners which also include companies, acquire a portion of the property on dissolution of the partnership firm, it appears that the company would have to file the particulars of charge within 30 days from the date of such acquisition.

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1. Form Nos. 8, 13, 55, 56 of the Companies (Central Government) General Rules & Forms, 1956 are the prescribed forms relevant to the section.
2. Refer R. 6(b) of Companies (Central Government's) General Rules & Forms, 1956 for the prescribed manner of verification.
3. The word "thirty" was substituted for the word "twenty-one" by s. 62 and Schedule to the Companies (Amendment) Act (XXXI of 1965).
4. The words "five hundred rupees' substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 50 (w.e.f. 13-12-2000).

Foreign companies.—This section also applies to foreign companies. See Notes under section 600.

Compoundable offence.—The offence is compoundable under Section 621A.

Relevant Rule and Prescribed Form.—The copy to be filed with the Registrar should be verified in accordance with Rule 6 in *Appendix* 1 and the particulars of the charge in Form No. 8 therein.

Secretarial Practice Notes.—See Practice Notes under section 125.

S. 128. 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 debenture-holders of that series are entitled *pari passu,* is created by a company, it shall, for the purposes of section 125, be sufficient, if these are filed with the Registrar, within [2]["thirty"] 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 particulars:—

(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; and

(d) the names of the trustees, if any, for the debenture-holders;

together with the deed containing the charge, or a copy of the deed verified in the prescribed manner[3], 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[4], 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.

NOTES

Eng. Act, 1948 : Sec. 95 (8)
Eng. Act, 1985 : Sec. 397(1)

Previous Act : Sec. 110

Scope of section.

By reason of the definition of 'debenture' including 'debenture stock' an issue of debentures stock secured by a deed will also come under this section.

The section permits registration of certain particulars in cases where a series of debentures are issued, and the holders are entitled *pari passu* to the benefits of a charge created for the benefit of the debenture-holders. In such a case the particulars given in sub-clauses (*a*), (*b*), (*c*) and (*d*), together with a copy of the debenture deed or where there is no deed, one of the debentures, are sufficient. But these provisions will not apply to a

1. Form Nos. 10, 13, 58 of the Companies (Central Government's) General Rules & Forms, 1956 are the prescribed forms relevant for the section.
2. The word "thirty" was substituted for the word "twenty-one" by s. 62 and Schedule to the Companies (Amendment) Act (XXXI of 1965).
3. Refer R. 6(b) of Companies (Central Government's) General Rules & Forms, 1956 for the prescribed manner of verification.
4. Form Nos. 57, 58 of the Companies (Central Government) General Rules & Forms, 1956 are the prescribed forms relevant to the section.

case where the debentures do not rank *pari passu*. Where in fact debentures do not rank *pari passu* but are registered as such, they would not rank *pari passu* by reason of the registration. *Yolland Husson & Birkett Ltd., Re,* (1908)1 Ch 152. The registration of a debenture, under the provisions of this section, will protect all debentures subsequently issued as also all debentures issued not more than 30 days before registration, but will not protect debentures issued at an earlier date. *Re, Harrogate Estates Ltd.,* (1903) 1 Ch. 498 at 503. The type of registration which is permitted by this provision is different from that under the Registration Act, 1908 because that Act requires the details of the property to be specifically stated for precise identification of the security. *Official Liquidator v. Shri Krishna Deo,* AIR 1959 All 247 : (1959) 29 Com Cases 476.

Registration under this section protects not only debentures of the series properly issued but also irregularly issued debentures, which though on account of certain technical defects are invalid as debentures, may be valid as agreements for the issue of debentures binding on the company. *Re, Fireproof Doors Ltd.,* (1916) 2 Ch 142.

Foreign companies.—This section also applies to foreign companies. See Notes under section 600.

Prescribed Forms and Relevant Rules.—For form of particulars to be filed with the Registrar under the proviso to the section, see Form No. 10 and Rule 6, of the Companies (Central Government's) General Rules and Forms, 1956 in *Appendix* 1.

For the particulars of an issue of debentures in a series by a foreign Company see Form Nos. 57 and 58 in *Appendix* 1.

Secretarial Action Points for creating charge for securing debentures

1. File the particulars of the charge in Form No. 10 with the ROC within 30 days of the execution of the debenture trust deed, along with a certified true copy of the deed.

2. Give the particulars of the commission, discount or allowance paid to any person for subscribing or procuring or agreeing to subscribe or procure any debentures.

3. Give the following particulars in Form No. 10:—

(a) the total amount secured by the whole series;

(b) the dates of the resolutions authorising the issue of the series;

(c) the date of the debenture trust deed;

(d) the general description of the property charged;

(e) the names of trustees for debentureholders.

4. Pay the requisite fee prescribed in Schedule X to ROC.

5. File the particulars of charges in Form No. 13 with ROC on payment of fee of Rs. 50.

6. If the charge filed with the ROC is certified by a practising chartered accountant, cost accountant or a company secretary, it will be taken on record within ten days.

Penalty for default

The default is punishable under section 142.

Compoundable Offence.—The offence is compoundable under section 621A.

Secretarial Practice Notes : Particulars in case of series of debentures

In case of issue of debentures of a series, if there be any charge to the benefit of the debenture-holders of that series check whether the required particulars were filed with the Registrar in Form 10 within 30 days from the date of execution of the debenture deed or debentures?

S. 129. Particulars in case of commission[1], etc., on debentures.—Where any commission, allowance or discount has been paid or made either directly or indirectly by a company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be filed for registration under sections 125 and 128 shall include particulars as to the amount or rate per cent 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 section, be treated as the issue of the debentures at a discount.

NOTES

Eng. Act, 1948 : Sec. 95(9)
Eng. Act, 1985 : Sec. 397(2)

Previous Act : Sec. 111

Scope of section

This section recognises the legality of issuing debentures at a discount or on a commission basis. But if it forms part of a scheme to issue shares at a discount, otherwise than as permitted by Section 79, it will not be valid. *Moseley v. Koffyfontein Mines Ltd.*, (1904) 2 Ch 108; *Famatina Development Corporation v. Bury*, (1910) AC 439. *Cf. Investment Trust Corporation v. Singapore Traction Co.*, (1935) Ch 615 : (1937) 7 Com Cases 317 (CA). The power of issuing debentures is vested in the Board of Directors (Section 292).

Foreign companies.—This section also applies to foreign companies. See Notes under section 600.

Prescribed Form.—For form of particulars of commission, etc., to be filed with the Registrar, see Form No. 10 in *Appendix* 1.

Secretarial Practice Notes : Commission on debentures

Where commission, allowance, discount, etc. was paid or made in consideration for subscribing etc., to debentures, check whether Forms 8/10, as the case may be, included particulars of such commission, etc.?

S. 130. Register of charges to be kept by Registrar.—[2][(1) The Registrar shall, in respect of each company, cause to be kept a register containing the particulars of all the charges requiring registration under this Part.

(1A) Every company shall forward to the Registrar for being entered in the register kept under sub-section (1) the particulars of all the charges requiring registration under this Part in such form and manner, and after payment of, such fees as may be prescribed.[3]

(1B) The particulars of the charges referred to in sub-section (1) shall relate to,—

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1. Form Nos. 10, 58 of the Companies (Central Government's) General Rules & Forms, 1956 are the prescribed forms relevant for the section.
2. Subs. by the Companies (Amendment) Act, 1988, for sub-sections (1) & (2) [w.e.f. 17-4-1989].
3. *Vide* R. 6 as amended (w.e.f. 21-3-1995) of the Companies (Central Government's) General Rules and Forms, 1956. Form No. 13 along with Form No. 8, 10 or 17 as the case may be with a fee of Rs. ten (now Rs. 50/- w.e.f. 1-5-2000 *vide* GSR 363(E), dt. 27-4-2000) has been prescribed for filing the particulars of charges with the Registrar of Companies.

(a) in the case of a charge to the benefit of which the holders of a series of debentures are entitled, such particulars as are specified in sections 128 and 129;

(b) in the case of any other charge,—

(i) if the charge is a charge created by the company, the date of its creation, and if the charge was a charge existing on property acquired by the company, the date of the acquisition of the property;

(ii) the amount secured by the charge;

(iii) short particulars of the property charged; and

(iv) the persons entitled to the charge.

(1C) The pages of the register shall be consecutively numbered and the Registrar shall,—

(a) cause to be kept in such register in the prescribed form the documents of charges filed in such form and manner as may be prescribed; and

(b) sign or initial every page of such register.

(2) After entering the particulars of all the charges required under 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 this Part to the person filing it.]

(3) The register kept in pursuance of this section shall be open to inspection by any person on payment of [4][such fee as may be prescribed[5]] for each inspection.

NOTES

Eng. Act, 1948 : Sec. 98
Eng. Act, 1985 : Sec. 401

Previous Act : Sec. 112

Companies (Amendment) Act, 1988

This section has been recast by the Companies (Amendment) Act, 1988 with a view to dispense with the time-consuming procedure of entering by hand the particulars of charges by providing that companies will henceforth file particulars of charges in the prescribed form and manner. As a safeguard, this clause also provides for signing or initialling of each page of the register by the Registrar. (Refer to clause 19 of *Notes on clauses*).

The validity of the charge does not depend upon the date on which the Registrar chooses to make the necessary entry in the register. *Benaras Bank Limited v. Bank of Bihar*, (1947) 17 Com Cases 249, 258 : AIR 1947 All 117.

Foreign companies.—This section also applies to foreign companies. See Notes under section 600.

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4. Subs. by the Companies (Amendment) Act, 1988, s. 19(b) w.e.f. 17-4-1989, *vide* GSR No. 448(E), dated 17- 4-1989, for the words "a fee of one rupee".
5. The new prescribed fee is Rs. ten, *vide* GSR No. 449(E), dated 17-4-1989 under Rule 6(b) of the Companies (Central Government's) General Rules and Forms, 1956 substituted *vide* GSR No. 283(E), dt. 21-3-1995.

Form of charges to be forwarded to registrar

Every company shall forward to the Registrar the particulars of charges in Form 13 with a fee of rupees fifty, for being entered in the register of charges. Form 13 shall be filed along with the relevant Form 8 or Form 10, or Form 17, as the case may be.

Power of Registrar to refuse registration.—A mortgage was created by deposit of title deeds in pursuance of an oral agreement. The date and description of the charge was not stated in the application to the Registrar for registration. The Registrar refused to accept the application. The question was whether the particulars on the application were sufficient for registration. Their Lordships of the Privy Council said that the entitlement to registration of a charge within the terms of section 80(1) of the Companies Ordinance, (Hong Kong) where such a charge was not created or evidenced by an instrument, required demonstration by the applicant for registration of the method of creation of the particular charge, the date and the reason for the lack of any instrument. Their Lordships referred to the requirements of the prescribed form and said that the applicant could use the form with such variations and additions as the circumstances of the particular case might require, although the form itself made no express reference to charges not created or evidenced by an instrument. A charge created by deposit of title deeds clearly entailed variations and additions to the form. Accordingly, the bank should have stated that each charge respectively was created by deposit of title deeds, the relevant dates of creation and the fact that it was created pursuant to an oral agreement. Failure to supply particulars which the Registrar could reproduce in the register he was obliged to maintain entitled the Registrar to reject the application and refuse to issue a certificate of registration. An applicant for registration who knowingly applied for and obtained a certificate falsely affirming or implying that his charge was created within the time limit, would be liable to have his certificate set aside by the court on the grounds of fraud. *Sun Tai Cheung Credits Ltd. v. A.G.*, (1988) LRC (Comm) 752 [PC, Hong Kong]

Fee for inspection of register of charges

The register kept in pursuance to sub-section (3) of section 130 shall be open to inspection by any person on payment of a fee of Rs. 10/- for each inspection. [Rule 6 of the Companies (Central Government's) General Rules and Forms, 1956, for the text of Rule, see *Appendix* 1.]

Delay in filing Form No. 13

Department's Clarification.—Consequent upon the amendment to section 130 of the Companies Act, 1956, every company is required to forward to the Registrar of Companies for being entered in the register, the particulars of all the charges requiring registration in Form No. 13 which is required to be filed along with Form Nos. 8/10/17, as the case may be. The Institute sought a clarification from the Department of Company Affairs whether the delay in filing Form No. 13 would attract the provisions of section 141 of the Act, requiring condonation of delay by the Company Law Board. The department clarified as under:

"I am directed to refer to your *letter No.* 1004: 7: DR, dated 13-3-1990 on the subject mentioned above and to say that delay in filing of Form No. 13 pursuant to the provisions of section 130 of the Companies Act, 1956, does not attract the provisions of section 141 of the Act. However, it may please be noted that Form No. 13 is required to be filed along with Form Nos. 8/10/17, as the case may be, which attract the provisions of section 141 of the Act if those are filed after the period prescribed in section 125/135/138 of the Act respectively." (*No.* 3/23/89-CL-V, dated 21-3-1990).

Relevant Rule: Rule relevant for the amended section is Rule 6 of the Companies (Central Government's) General Rules and Forms, 1956, for the text see *Appendix* 1.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of the matters specified under Rule 3 of the Companies (Compliance Certificate) Rules, 2001. Paragraph 2 under Rule 3 relates to filing of Forms and Returns with the ROC, RD, Central Government, CLB and other authorities and reads as follows:

Paragraph 2.—**The company has duly filed the forms and returns as stated in Annexure "B" to this certificate, with the Registrar of Companies, Regional Director, Central Government, Company Law Board or other authorities within the time prescribed under the Act and the Rules made thereunder.**

Particulars of charges requiring registration

Prescribed Check List

See under sec. 125.

S. 131. Index to register of charges.—The Registrar shall keep a chronological index, in the prescribed form[1] and with the prescribed particulars, of the charges registered with him in pursuance of this Part.

NOTES

Previous Act : Sec. 113

Prescribed Form

Index to the Register of charges shall contain particulars in Form No. 12. (See *Appendix* 1).

S. 132. Certificate of registration.—The Registrar shall give a certificate under his hand of the registration of any charge registered in pursuance of this Part, stating the amounts thereby secured; and the certificate shall be conclusive evidence that the requirements of this Part as to registration have been complied with.

NOTES

Eng. Act, 1948 : Sec. 98(2)
Eng. Act, 1985 : Sec. 401(2)

Previous Act : Sec. 114

Conclusiveness of certificate

Error as to particulars.—The certificate of registration is conclusive even though some particulars of the property charged as entered in the register are discovered to be incorrect *National Provincial and Union Bank of England v. Charnley,* (1924) 1 KB 431. See also *R. v. Registrar of Companies, Ex-parte, Central Bank of India,* (1986) 1 All ER 105 : 1985 BCLC 465 (CA) **reversing** (1985) 2 All ER 79 : 1985 BCLC 84 (QBD). "When the Registrar gives his certificate it is to be evidence in fact not only that, he, the Registrar, has entered the particulars in the register of charges but also that the steps preliminary thereto have been carried out, that is to say, that the prescribed particulars have been presented to him.....the effect of the certificate is to put it out of anybody's power to say that the prescribed particulars have not been presented to him." 'Shall be conclusive' evidence, means 'shall be conclusive evidence that the particulars delivered to the Registrar are accurate particulars and that the requirements as to registration have been complied with, so that neither the company nor the charge-holder can be heard to say that any of the particulars are inaccurate or that the registration was irregular.' See *In re, Mechanisations (Eaglescliffe) Ltd.,* (1964) 3 All ER 840 (Ch D) : (1965) 35 Com Cases 478; *In re, Eric Holmes (Property) Ltd.,* (1965) 2 All ER 333 (Ch D) : (1965) 35 Com Cases 811. If the certificate sufficiently identifies the instrument of charge, it is conclusive evidence of the effective registration of the charge in respect of all the properties comprised in it, even though the registered particulars omit some of the properties. *National Provincial and Union Bank of England v. Charnley,* (1924) 1 KB 431. See also *Yolland, Husson & Birkett Ltd.,* (1908) 1 Ch 152; *Cunard Steamship Co. Ltd. v. Hop-*

1. Form No. 12 of the Companies (Central Government) General Rules & Form, 1956 is the prescribed form relevant for the section.

wood, (1908) 2 Ch 564. The certificate is conclusive evidence that there was no defect in its registration even if there was a defect. No judicial review of the Registrar's certificate is permitted. *R. v. ROC, ex. p., Central Bank of India, ex. p.,* (1986) 2 WLR 177. For further study see R.M. GOODE, LEGAL PROBLEMS OF CREDIT AND SECURITY, 37 (2nd Edn., 1988) : 2002 JBL at p. 458.

Where evidence of the registration of a charge was there as shown by the fact that the Registrar had issued the certificate of registration and there was no evidence to show whether the instrument of the charge or a verified copy of the same was submitted along with the particulars of the charge, the court said that in the absence of such evidence, the certificate becomes conclusive evidence that the instrument or a verified copy was submitted along with the particulars. The Assistant Registrar testified that if the instrument was not submitted the charge would not have been registered. It also spoke of the natural conduct of that office. There was evidence of the stamp duty paid on the instrument. In the face of so much evidence the court was not prepared to believe that the instrument or its copy must not have been submitted. *Maharashtra State Financial Corpn. v. Masvi & Co. P. Ltd.,* (1993) 76 Com Cases 168 at 192 (Bom). The court **followed:** *Bank of Maharashtra Ltd. v. OL,* (1973) 43 Com Cases 505 (Mys); *Des Raj v. Punjab Financial Corpn.,* (1970) 40 Com Cases 551 (P&H); *Eric Holmes (Property) Ltd., Re,* (1965) 35 Com Cases 811 (Ch D); *Mechanisations (Eaglescliffe) Ltd., Re,* (1965) 35 Com Cases 478 (Ch D); *CL Nye Ltd., Re,* (1971) 41 Com Cases 96 (CA).

Retrospective registration

In *R. v. Registrar of Cos., ex parte, Esal (Commodities) Ltd. (In liquidation),* (1985) 2 All ER 79 : 1985 BCLC 84 (QBD), it was held that the Registrar's action in issuing a certificate under S. 98(2) of the (English) Companies Act, 1948 (Corresponding to S. 132), when registering a charge retrospectively more than 21 days after its creation amounted to a usurpation of power under S. 101 (corresponding to S. 141 of the Indian Act) and was liable to be quashed. *Reversing* this judgment, the Court of Appeal held that although a certificate granted under this section is conclusive that the requirements of the Act have been complied with, the grant is open to challenge if it was obtained by fraud or duress. In this case, the trial Court had allowed evidence to be led in support of the creditor's claim which was not permissible. Further, even if the Registrar granting the certificate had committed errors of fact or law or both, *certiorari* to quash the grant could be issued only on the application of the Attorney General. The certificate was therefore held valid. *R. v. Registrar of Cos., Ex parte, Central Bank of India,* (1986) 1 All ER 105 : 1985 BCLC 465 (CA). The technical procedural requirements relating to judicial review in England do not apply in India. It is, therefore, submitted that a challenge to a certificate improperly granted by the Registrar, as in the case mentioned above, would be maintainable. After the issue of the certificate, nothing done by the Registrar will affect the validity of the documents. *Imperial Bank of India v. Bengal National Bank Ltd.,* (1931) 1 Com Cases 63 : AIR 1930 Cal 536. See also *Desraj Voluntary Liquidator v. Punjab Financial Corporation,* (1970) 40 Com Cases 551 (P&H).

A certificate for the registration of a charge created by a company is conclusive evidence that the relevant registration requirement had been satisfied, even though the registration had been effected and a certificate issued in reliance on an order extending the time for registration which was later set aside on appeal. *Exeter Trust Ltd. v. Screen Ways Ltd.,* 1991 BCLC 888 : (1993) 3 Comp LJ 366 (CA).

Responsibility of solicitors towards the client company and its shareholder

A charge created by a company in favour of its own bank was not registered through the failure of the bank's solicitor who had undertaken the responsibility of doing so. A second charge was created on the same assets in favour of the company's own two directors and still subsequently a third charge in favour of a third person. Both these charges were duly registered. The banker's request for order of registration out of time of the charge in its favour was allowed subject to the condition that it would be subject to

the charge in favour of the third person. The charge in favour of directors was not given any priority because as insiders they had knowledge of the charge in favour of the bank and were trying to take an undue advantage of the knowledge that the banker's charge was not registered. *Fable Hill Ltd., Re,* (1991) BCLC 830 (Ch D). In another case, *Chantry House Developments Plc., Re,* (1990) BCLC 813 (Ch D) where registration out of time was ordered the Court said that care must be taken of all the interests likely to be affected by the order. In this case the Court noted that the effect of the registration was to reduce unsecured creditors from 9.p in the pound to 3.p and therefore the court ordered the company to inform all such creditors so as to give them an opportunity to seek discharge of the order.

Priority among charges

In *Watson v. Duff Morgan and Vermont (Holdings) Ltd.,* (1974) 1 All ER 794 (Ch D), a charge was executed before another charge but was registered afterwards with an order of the court. The charge executed earlier was allowed to claim priority over the other. See also *Ram Narain v. Radha Krishan Motilal Chamaria,* AIR 1930 PC 66. An unregistered charge is void as against a liquidator and creditors. *Ebrinann Bros. Ltd. Re,* (1908) 2 Ch. 697.

***Mala fide* mis-statement of particulars**

Where, in getting a charge registered, the charge-holder makes a mis-statement as to its date for his own benefit, he cannot later on, when it is found disadvantageous to him, challenge the conclusive nature of the certificate of registration and show that the true date of creation of the charge was an earlier date. *In re, Nye (C.L.) Ltd.* (1969) 2 All ER 587 (Ch D) : (1970) 40 Com Cases 34, where the entire case-law is reviewed. The decision, however, was **reversed** by the Court of Appeal [(1970) 3 All ER 1062 (CA) : (1971) 41 Com Cases 96] on the ground that notwithstanding that the date of the charge was mis-stated in the particulars delivered to the Registrar, once the certificate was granted it was conclusive and the charge was not invalidated by non-compliance with the requirements of the Act as regards registration. Further, it was held on the facts of the case that there were no unsecured creditors as between the true date and the wrong date given for registration, who could be prejudiced. The Court of Appeal also held that the requirement of delivery of particulars within 21 days [under the Indian Act 30 days, *vide* section 125(1)] was not a condition precedent to the Registrar's jurisdiction to register the charge or grant a certificate. The duty to register is that of the Registrar, and if he does register that is the end of the matter. The certificate is no less conclusive as to date than as to amount and to hold otherwise would frustrate the whole purpose of the Act (per HARMAN, LJ at page 107).

In *R. v. Registrar of Companies, ex., p., Central Bank of India,* (1986) 1 All ER 105 (CA) it was held that judicial review of the Registrar's issue of the certificate was not available, save possibly in cases of fraud. See also *First City Corpn. Ltd. v. Downsview Nominees Ltd.,* (1990) 3 NZLR 265.

Misstatement of company's registration number

As to the effect of such misstatement the Court said that the company's registered number was a detail which the applicant for registration was required to complete, but it could not fairly be described as 'a particular of the charge' to be registered. It was a particular of the mortgagor. The failure to provide the correct registered number did not constitute a failure to comply with the registration requirements of the Act. The mortgage was, therefore, duly registered and valid. *Grove v. Advantage Health (TIO) Ltd.,* (2000) 1 BCLC 661 (Ch D).

Questioning validity in winding up

Where a charge is registered and a certificate of registration is granted, it is not open to the Official Liquidator in winding up proceedings to question the validity of the registration of the charge and contend that it is not enforceable against the assets of the company. *Bank of Maharashtra Ltd. v. Official Liquidator, Mysore,* (1973) 43 Com Cases 505

(Mys). The Official Liquidator will not, however, be precluded from questioning the validity of the charge on other grounds. But see *Arnold (RM) & Co. Ltd., Re,* 1984 BCLC 535 (Ch D) where the court held that the rule is not absolute and that in exceptional situations the register of charges may be ordered to be rectified even after the commencement of winding up. Thus where there was neither an aggrieved creditor nor a creditor to object, the court ordered rectification even after presentation of a petition for winding up.

The case of *Bank of Maharashtra* was **followed** in *Maharashtra State Financial Corpn. v. Masvi & Co. P. Ltd.,* (1993) 76 Com Cases 168 (Bom) so as to hold that even where the particulars were not filed in time, it is not open to the official liquidator to question the validity of the registration. Even the court cannot reopen that question. The section does not raise a presumption. It talks of conclusiveness. The court is under a duty to implement the directive of Parliament. The Court felt that the legislature has not left any scope for cases where there is genuine mistake or a fraud. To that extent, the court said, there is a lacuna in the Act. It is, however, submitted with respect, that any fraud or mistake occurring in the process of registration would be rectifiable. See the *Arnold* case (cited above). Guarantees given by the company's directors are enforceable even if they are not registered because such guarantees are not affected by the provisions relating to registration.

Subsequent court order undoing earlier registration

Where the registration of a charge was ordered out of time which was accordingly implemented by issuing the certificate of registration but subsequently still the court ordered that the charge be removed from the register, it was held that the certificate issued by the Registrar was conclusive evidence that the charge had been validly registered and the subsequent removal of the charge from the register did not affect the validity of the original registration. *Exeter Trust Ltd. v. Screenways Ltd.,* 1991 BCLC 888 : (1993) 3 Comp LJ 366 (CA).

Relevant Rule

Rule 6(e) in *Appendix* I provides that for purposes of section 132, Registrar shall affix stamp on the relative Forms and accompanying instruments with the word 'Registered' under his signature with date and a copy thereof be delivered to the company and the charge-holder.

No separate certificate of registration is now necessary.

Departments Circular.—Circular No. 3/95, 14/1/95-CL-V, dated 18-7-1995 :

The seal put by ROC on the form could be amended as under:—

"CERTIFIED THAT THE CHARGE ABOVE IS REGISTERED"
Registrar of Companies

3. You are requested to register the charge on the spot with the above certificate by affixing the seal and signing it.

Secretarial Practice Notes : Certificate of registration

Check: whether certificate of registration of charge obtained from the Registrar?

S. 133. Endorsement of certificate of registration on debenture or certificate of debenture stock.—(1) The company shall cause a copy of every certificate of registration given under section 132, 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 charge so registered:

Provided that nothing in this sub-section shall be construed as requiring a company to cause a certificate of registration of any charge so given to be endorsed on any debenture or certificate of debenture stock issued by the company before the charge was created.

(2) If any person knowingly delivers, or wilfully authorises or permits the delivery of, any debenture or certificate of debenture stock which, under the provisions of sub-section (1), is required to have endorsed on it a copy of a certificate of registration without the copy being so endorsed upon it, he shall, without prejudice to any other liability, be punishable with fine which may extend to [1][*ten thousand rupees*].

NOTES

Eng. Act, 1948 : Sec. 99
Eng. Act, 1985 : Sec. 402

Previous Act : Sec. 115

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 1000 rupees to 10,000 rupees under sub-section (2).

Penalty for default [Sub-section (2)].—Any person who wilfully authorises or permits the delivery of or knowingly delivers any debenture or certificate of debenture, not conforming to the requirements of sub-section (1) is punishable. He need not be an officer of the company.

Compoundable offence.—The offence is compoundable under section 621A.

§ For the meaning of "knowingly and wilfully" see Notes under Section 5.

Secretarial Practice Notes : Endorsement of certificate of registration of debenture

Check: Whether certificate of registration had been duly endorsed on every debenture or certificate of debenture stock issued and the payment of which was secured by the charge registered?

S. 134. Duty of company as regards registration and right of interested party.—(1) It shall be the duty of a company to file with the Registrar for registration the particulars of every charge created by the company and of every issue of debentures of a series, requiring registration under this Part; but registration of any such charge may also be effected on the application of any person interested therein.

(2) Where 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.

NOTES

Eng. Act, 1948 : Sec. 96
Eng. Act, 1985 : Sec. 399

Previous Act : Sec. 116

Scope of section

Apart from the company, charge can also be filed by the creditor (charge-holder). However, the company cannot escape its liability, if the charge is not filed by the creditor.

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1. The words "one thousand rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 51 (w.e.f. 13-12-2000).

In a petition before the Company Law Board, the allegation was that the private company in question had taken a loan from a finance company and created a charge on the property of another private company in the same group. Both companies denied the transaction. The CLB said that it could not decide such a vexed question only on the basis of affidavits of both the parties. It refused to provide relief of registration to the creditor. *Sardha Finance v. Asia Investments P. Ltd.*, (2002) 51 CLA 15 : (2002) 110 Com Cases 713 : (2002) 38 SCL 557 (CLB).

Foreign companies.—This section also applies to foreign companies. See Notes under section 600.

Secretarial Practice Notes.—See Practice Notes under section 125.

S. 135. Provisions of Part to apply to modification of charges.—Whenever the terms or conditions, or the extent or operation, of any charge registered under this Part are or is modified, it shall be the duty of the company to send to the Registrar the particulars of such modification[1], and the provisions of this Part as to registration of a charge shall apply to such modification of the charge.

NOTES

Previous Act : Sec. 116(3)

Modification of charge

The effect of this section is that every instrument by which a change is brought about in the terms or conditions or extent or operation of any charge is regarded as an instrument of charge within the meaning of S. 125 and all other provisions will apply. *Trichinopoly Mills Limited v. Assistant Registrar of Joint Stock Companies, Trichinopoly*, (1941) 11 Com Cases 1, 3 (Mad). Where, under a power in the debenture trust deed, other property of the company is substituted for the property originally charged, no new registration is required. No new charge requiring registration is thereby created. *Cunard SS Co. Ltd. v. Hopwood*, (1908) 2 Ch 564. Where the benefit of a mortgage or charge on land owned by a company is transferred, and the company is a party to the transfer, the general practice is to register the transfer as a new charge, but the question of registration does not arise if the company is not a party to the transfer. The proper means of obtaining a decision of the court as to whether registration is necessary is by proceedings instituted for the purpose (*ibid*).

'Modification' will include any variation of any of the terms. *Cf. Official Liquidator v. Bharatpur Princesses Trust*, (1971) 41 Com Cases 978 (Mad). It may be by mutual agreement or by operation of law (*Letter No.* 8/42 (135)/66-CL-V, dated 25-11-1966).

But in case of a secured cash-credit; variation of the amount outstanding is not a modification, since there is no change either in the terms, conditions, or extent or operation of the charge. The section clearly applies to the variations in the terms conditions, etc. on which the charge is created, not the variations in the amount secured by the charge.

In terms of section 125(1), the particulars of modification of charge are required to be filed within 30 days. The particulars can, however, be filed within 30 days, next following on payment of additional fee and subject to the satisfaction of Registrar. In terms of section 134, charge can also be filed by the charge holder (creditor). These provisions apply *mutatis mutandis* to modification of charge.

Assignment of rights as modification

Department's views.—The assignment of the rights by the charge-holder in favour of a third person is also to be regarded as "modification". (*Department's letter No.* 8/50 (135)/60-PR, dated 12-8-1960).

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1. Form Nos. 8, 13 and 59 of the Companies (Central Government's) General Rules & Forms, 1956 are the prescribed forms relevant for the section.

Procedure for Registration, Modification and Satisfaction of Charges

§ For the simplified procedure for registration, modification and satisfaction of charges, see Notes under Section 125, *ante*.

Registration of modification of charges as a result of change in law

Department's Clarification.—So long as the terms or conditions or the extent of operation of any charge is modified for whatever reason the provisions of section 135 of the Companies Act, 1956, would become applicable. Therefore, even in case of modification of charges without any mutual agreement between the parties thereto namely as a result of a change in law, the provisions of section 135 of the Act become attracted. (*Letter No.* 8/42(135)66-CL-V, dated 25-11-1966).

Variation in rate of interest arising out of increase in bank rate

Department's Clarification.—In a case where under the relevant mortgage deed/ agreement, the 'term' as to the rate of interest on a charge etc. has been fixed at a specified percentage above the bank rate as notified by the Reserve Bank, a change in the rate of interest payable on the charge arising out of variation of the Bank Rate would not amount to a change in a 'term' of the charge under section 135 and hence in such a case no return need to be filed under the said section. In such cases, the Registrar of Companies need not insist on the company filing Form No. 14 under section 135 of the Act (in this case) (*Letter No.* 8/14(135)/65-CL-V, dated 13-9-1965).

Department's Clarification II.—"The scope of *Circular No.* 8/14(135)/65-CL-V, dated 13-9-1965, (printed above) is limited to the cases where the rate of interest on a charge, etc., has been fixed at a specified percentage above the bank rate, as notified by the Reserve Bank and there is a change of rate of interest arising out of the variation of bank rate made by the Reserve Bank by a notification. In other cases of change of rate of interest, section 135 would be applicable and Form No. 8 would be required to be filed, unless the change is consequent upon the change in the bank rate notified by the Reserve Bank." (*Letter No.* 8/6/81-CL-V, dated 14-4-1981).

Filing of modification of charge by charge holder (creditor)

Department's view.—"A question has arisen whether a person interested in the registration of a charge (the creditor) may take steps for modification of that charge under section 134. The matter has been examined in consultation with the Ministry of Law.

2. In terms of section 134 of the Act, it is the duty of the company to file particulars of charge with the Registrar, but registration of such charge may also be effected on the application of any person interested therein. Accordingly, particulars of charge under section 125 read with section 134 of the Act can be filed either by the company or by the charge-holder. Section 135 further provides that it shall be the duty of the company to send to the Registrar the particulars of such modification and the provisions as to registration of a charge shall apply to such modification of charge. The harmonious construction of both the provisions of law and, more particularly the language of section 135 suggests that it includes modification of a charge by an interested person as well; such modification shall also be deemed to have been made by the company and on behalf of the company. Further, section 21 of the General Clauses Act provides that if a person has power to make, it shall necessarily include a power to add, to amend, rescind etc. Though the said section deals with orders, rules, bye-laws etc., but the rule enshrined therein may also be applied in case of modification of charge as well.

3. In view of the aforesaid, the particulars for modification of charge can be filed by the subject company, as also by the charge-holder. You are, therefore, requested to accept for registration modification of charge, if filed by the charge-holder." (*Circular No.* 12/90, dated 6-6-1990 (No. 14/3/87-CL-V.)

Liberalised procedure for registration of charges

Rule 6 in *Appendix* 1 provides for liberalised procedure in filing and registration of charges etc. Form 8 is required to be signed both by the company and the chargeholder.

§ See also Notes under s. 125 for this subject.

Condonation of delay under section 141

The delay in filing modification of charge may be condoned by CLB on filing a petition under section 141.

Fixed rate of additional fee for belated filing of documents

Press Note No. 2/95, dated 21-3-1995.—The levy of fixed additional fee will be regulated according to the table given in the Press Note. For the text of the Press Note, see Notes under section 611 and Schedule X.

Foreign companies.—The section also applies to foreign companies. See Notes under section 600.

Prescribed Form.—The particulars of modification of charge to be filed with the Registrar should be in Form No. 8 printed in *Appendix* 1. For particulars of modification of charge created by a foreign company please refer Form No. 59 in *Appendix* 1.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of the matters specified under Rule 3 of the Companies (Compliance Certificate) Rules, 2001. Paragraph 2 under Rule 3 relates to filing of Forms and Returns with the ROC, RD, Central Government, CLB and other authorities and reads as follows:

Paragraph 2.—**The company has duly filed the forms and returns as stated in Annexure "B" to this certificate, with the Registrar of Companies, Regional Director, Central Government, Company Law Board or other authorities within the time prescribed under the Act and the Rules made thereunder.**

Prescribed Check List

See under sec. 125.

Secretarial Practice Notes : Modification of charges

Check : whether particulars of modification of charge, if any, had been filed in Form 8/Form 13 with the Registrar within 30 days after the date of such modification?

S. 136. Copy of instrument creating charge to be kept by company at registered office.—Every company shall cause a copy of every instrument creating any charge requiring registration under this Part 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 debenture of the series shall be sufficient.

NOTES

Eng. Act, 1948 : Sec. 103
Eng. Act, 1985 : Sec. 406

Previous Act : Sec. 117

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of maintenance of registers. The relevant paragraph 1 of the Form prescribed under Rule 3 of the Companies (Compliance Certificate) Rules, 2001 states :

"Paragraph 1.—**The company has kept and maintained all registers as stated in Annexure "A' to this certificate, as per the provisions and the rules made thereunder and all entries therein have been duly recorded."**

Register of Charges under Section 143/Copies of Instruments Creating Charge under Section 136

Prescribed Check List [*Item (d)*]

Check whether:

(i) all charges specifically affecting the property of the company and all floating charges on the undertaking or on any property of the company have been entered in the register giving, in each case, the particulars prescribed in subsection (1) of section 143 *i.e.* (a) a short description of the property charged; (b) the amount of charge; and (c) except in the case of securities of bearer, the names of the persons entitled to the charge; and

(ii) copies of instruments creating charges kept in pursuance of section 136 and the register of charges kept in pursuance of section 143 are kept open for inspection as provided in section 144 by any member or creditor without fee, and by any other person on payment of Rs. 10/- or such other fee as may be prescribed during business hours subject to reasonable restrictions as imposed by the general Meeting.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

Secretarial Practice Notes

Check: Whether a copy of instrument creating or modifying charge/a copy of debenture of the series, if any, required to be registered, has been kept at the registered office?

S. 137. Entry in register of charges of appointment of receiver or manager[1].—(1) If any person obtains an order for the appointment of a receiver of, or of a person to manage the property of a company, or if any person appoints such receiver or person under any powers contained in any instrument, he shall, within [2]["thirty"] days from the date of the passing of the order or of the making of the appointment under the said powers, give notice[3] of the fact to the Registrar; and the Registrar shall, on payment of the prescribed fee, enter the fact in the register of charges.

(2) Where any person so appointed under the powers contained in any instrument ceases to act as such, he shall, on so ceasing, give to the Registrar notice[4] to that effect; and the Registrar shall enter the notice in the register of charges.

(3) If any person makes default in complying with the requirements of sub-section (1) or (2), he shall be punishable with fine which may extend to [5][*five hundred rupees*] for every day during which the default continues.

NOTES

Eng. Act, 1948 : Sec. 102 Previous Act : Sec. 118
Eng. Act, 1985 : Sec. 405

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 50 rupees to 500 rupees under sub-section (3).

Appointment of Receiver or Manager

The obligation to give notice to the Registrar of the appointment of a receiver by the court and of his ceasing to act is also extended to the appointment of a manager and his ceasing to act.

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1. Form Nos. 13 and 15 of the Companies (Central Government's) General Rules & Forms, 1956 are the prescribed forms relevant for the section.
2. The word "thirty" was substituted for the word "fifteen" by s. 62 and Sch. to the Companies (Amendment) Act (XXXI of 1965) (w.e.f. 15-10-1965).
3. Form No. 15 of the Companies (Central Government's) General Rules & Forms, 1956 is the prescribed form of notice relevant for the section.
4. Form No. 16 of the Companies (Central Government's) General Rules & Forms, 1956 is the prescribed form of notice relevant for the section.
5. The words "fifty rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 52 (w.e.f. 13-12-2000).

It has to be noted that 'manager' in the context here is different from the 'manager' as defined in Section 2(24). The 'manager' here is not one under the superintendence, control and direction of the Board of Directors.

Where the assets of a company are in jeopardy, the court will readily appoint a receiver to preserve the assets, whether the debenture holders want to enforce their security or not. *Re, Newport Construction Co. Ltd.*, (1948) 1 All ER 365 (Ch D).§

Where a receiver is appointed under power in a deed, the appointment does not oust the jurisdiction of the court to substitute its own appointee in his place. See *Re, Slogger Automatic Feeder Co., Hoare v. The Company*, (1915) 1 Ch 478. A power for a debenture-holder of a company to appoint a receiver, conferred by a debenture which stated that all the debentures were to rank "*pari passu*", is a fiduciary power, and must be exercised for the benefit of all the debenture-holders. If such a power is exercised by a debenture-holder not in the interests of all the debenture-holders, but with a view to the benefit of the shareholders of the company, the court has jurisdiction to appoint and will appoint its own receiver; *Maskelyne British Typewriter Ltd. Re*, (1898) 1 Ch 133. If the new receiver recognises the acts of the agent of the old receiver, it is valid in law and will not affect the previous receiver in any way. *Lawson (Inspector of Taxes) v. Hosemaster Machine Co. Ltd.*, (1965) 3 All ER 401 (CA).

As to the cases in which the Court has jurisdiction to appoint a receiver or manager, see *Re. Jagadhri Light Rly. Co.*, (1946) 16 Com Cases 21 : AIR 1946 Lah 193, where the Court said that it is possible in suitable cases to appoint a receiver who may take up the business of the company and the management of its property and its affairs pending the decision of the court, **dissenting** from *Kailash Chandra Datta Sadar Munsif, Silchar*, AIR 1925 Cal 817. The appointment of a company as a receiver is illegal, *S.A.P. Fernando v. Rainbow Sea Foods (Pvt.) Ltd.*, (1991) 70 Com Cases 181, 183 (AP).

The legal position of a receiver appointed by or on behalf of the debenture holders depends upon the terms of the debenture deed: *P.G. Brookes v. Industrial Tribunal*, AIR 1953 Mad 369 : (1953) 23 Com Cases 351.

§ See also Notes under sections 117 and 424 as regards appointment of receiver and manager.

Foreign companies.—This section also applies to foreign companies. See Notes under section 600.

Effect on company of appointment of receiver

The appointment by the Court of a receiver "supersedes the company in the conduct of its business; deprives it of all powers to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession or under the control of receiver and manager. Its powers in these respects are entirely in abeyance." *Moss S.S. Co. Ltd., v. Whinney*, 1912 AC 254; *Victoria Steam Boards Co., Re*, (1897) 1 Ch 158. A receiver appointed by the court is an officer of the court and any interference with his possession of the property of which he is appointed receiver will be contempt of Court.

A specific performance contract entered into prior to the appointment of a receiver will be enforceable even after it. *Freevale Ltd. v. Metrostore (Holidays) Ltd.*, (1984) BCLC 72 (Ch D). Existing contracts continue to bind the company and the receiver should, to protect the goodwill of the company, perform them. *Newdigate Colliery Ltd., Re*, (1912) 1 Ch 468 (CA). Where the goodwill of the company is not involved and where damages will not be an adequate remedy, the court may authorise the receiver to disregard such contracts. *Airlines Airspares Ltd. v. Handley Page Ltd.*, (1970) 40 Com Cases 604 : (1970) 1 All ER 29. Where the receiver carries out existing contracts he is not personally liable under them unless there is a formal substitution of parties showing a complete novation. *Parson v. Sovereign Bank of Canada*, (1913) AC 160, 167 (PC); *Scarle v. Choat*, (1884) 25 Ch D 723. If he fails to carry out an existing contract the other party may ask

him to adjust by way of set off his claim as to damages against the company's claim against him (*ibid*) and see *NW Robbie & Co. Ltd. v. Witney Power House Co. Ltd.*, (1963) 3 All ER 613 : (1964) 34 Com Cases 178. Such a set off will not be allowed unless the third party can show some equitable ground for being protected but it might be allowed if the debenture-holder is the person for whose ultimate benefit and at whose direction the debt was incurred by the receiver. *West St. Properties Pty. Ltd. v. Jamiesom*, (1974) 2 NS WLR 435; *B. Johnson & Co. (Builders) Ltd., Re*, (1955) 25 Com Cases 317 (CA).

He will be personally liable for contracts entered into by him though he can protect himself by an indemnity clause to the effect that he will be indemnified out of the assets of the company in priority to debenture-holders for any liability arising out of a proper functioning. *Moss S.S. Co. Ltd. v. Whinney*, 1912 AC 254. Such indemnity will not safeguard him against the consequences of his default in meeting the claims of the creditor. That is why he is also permitted to exclude his personal liability altogether and to leave the contracting party to look to the assets of the company, *British Power Traction and Lighting Co. Ltd., Re*, (1910) 2 Ch 470.

Unlike in the case of a winding up, the appointment of receiver out of Court does not have the effect of determining existing contracts of service and operating a *Mack Trucks (Britain) Ltd.*, (1967) 1 All ER 977 (Ch D); *Foster Clark Ltd.'s Indenture Trusts: Re, Loveland v. Horscroft*, (1966) 1 All ER 43. It also does not necessarily terminate the service of the managing director, except when the appointment is accompanied by the sale of the company's business or unless new person has been appointed by the receiver, or the continuance is in conflict with the role and functions of the receiver and manager. *Griffiths v. Secy. of State for Social Services*, (1973) 3 All ER 1184 (QBD). See also Notes under s. 424.

The directors also do not loose their power to institute proceedings for the benefit of the company to the extent to which they would not interfere with the receiver's work or prejudicially affect the assets available to debenture-holders. Thus the directors were allowed to sue, for the benefit of creditors, a debenture-holder who in breach of contract deprived the company of funds needed for the company's property development project. *Newhart Development Ltd. v. Co-operative Commercial Bank Ltd.*, (1978) 2 All ER 896. In the subsequent case of *Tudor Grange Holdings Ltd. v. Citibank NA*, (1991) 4 All ER 1 : 1991 BCLC 1009 doubts were expressed on the general validity of the solution provided in the Newhart case though not on the decision on facts. It has been suggested that if the action relates to assets outside the security then the directors retain their full powers to deal with them on behalf of the company. But where the action is in reference to the security itself and if the receiver is against the action he should better seek directions of the court.

§ As for the obligation of a receiver or manager to file accounts, etc., see sections 117, 421 and 424.

Sections 137 and 421 applicable to all Receivers

Whether sections 137 and 421 of the Companies Act, 1956 are applicable to Receiver appointed in the case of a company in liquidation.

Department's view.—In case of *Alcock Ashdown & Company Limited (in liquidation)*, the Court Receiver was appointed by High Court on 26-2-1972 and he took possession of the properties in May, 1972. When asked by Registrar of Companies, that a notice of appointment of Receiver should be filed with him under section 137 of Companies Act, 1956, the petitioning creditor (Bank of Maharashtra) did so under protest, their Solicitors contending that the provisions of section 137 of the Act are not applicable to a company in liquidation.

It is clarified that sections 137 and 421 of the Act, are applicable to all Receivers whether appointed by the debenture holders under the terms of the Debenture Deed or by the Court. The sections do not exclude receivers appointed in respect of assets of companies in liquidation. However, since receivers appointed by Court have to render periodic account to the Court, there may be no difficulty for the receivers to furnish a copy of such accounts to the Registrar of Companies under section 421 of the Act. (*Circular No.* 16/76, dated 28-6-1976).

Whether the Receiver and Liquidator can co-exist indefinitely?

Department's view.—In case of *Sholapur Spinning and Weaving Co. Ltd.*, which was taken into liquidation under High Court's orders dated 22-4-1964, the High Court also appointed a Receiver by order passed on 7-8-1964 and 11-8-1964 on an application of Bank of Baroda. In view of provisions of section 453 of Companies Act, 1956 the Registrar has raised doubt whether the Receiver and Official Liquidator can co-exist for a long time.

In this connection, it is clarified that though the section 176(b) of Indian Companies Act, 1913 had totally prohibited the appointment of a Receiver when the Official Liquidator was already existing, section 453 of Companies Act, 1956 provides that a Receiver can be appointed with leave of the Court or by the Court. In the instant case, the appointment is by the Court and so both the Receiver and the Official Liquidator co-exist and function.

A secured creditor is entitled to remain outside the winding up proceedings and recover his debt by proceeding against the security. In any event there is any surplus left after satisfying his debt and expenses, then he has to make over the surplus to the Official Liquidator for general distribution among the unsecured creditors. The Official Liquidator while submitting his accounts under section 462 or 551 of the Companies Act, 1956 is to include in his accounts only the receipt arising out of assets of the company which have come into his hands and control. He is not expected to render accounts in respect of those assets which are not in his control or management. He is entitled to exclude assets which have remained outside his hands from his accounts." (*Circular No.* 16/76, dated 28-6-1976).

Prescribed form and procedure.—The notice of appointment of receiver or manager should be in Form No. 15 : and the notice to be given when the receiver or manager ceases to act as such should be in Form No. 16, given in *Appendix* 1.

A person appointed as receiver should also give notice of his appointment within thirty days of such appointment to the Income-tax Officer who is entitled to assess the income of the company. See Section 178 of the Income-tax Act, 1961. Failure to give the notice will make him liable to the extent to which the company itself will be liable, as regards the tax payable by it.

Penalty for default [Sub-section (3)]

A person who makes default in complying with requirements of sub-sections (1) and (2), is punishable with fine which may extend to five hundred rupees for every day during which the default continues.

Compoundable offence.—The offence is compoundable under section 621A.

ICSI Guidance Note on Compliance Certificate (August, 2003)

Appointment of Officers

Check List

Check whether:

If receiver or manager of property of the company under section 137 has been appointed, notice thereof has been given to the ROC within 30 days in Form No. 15 of the Companies (Central Government's) General Rules and Forms, 1956.

This matter is not directly referred to in the 33 paragraphs appended to the Form prescribed under the Companies (Compliance Certificate) Rules. The Check List given by the ICSI under the heading "Check List of Other Compliance" [*Item 1(a)(iii)*] is for the guidance of CSP who may, in the course of his scrutiny, come across non-compliance with regard to this matter. CSP need not qualify such non-compliance.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

S. 138. Company to report satisfaction and procedure thereafter[1].—(1) The company shall give intimation[1] to the Registrar of the payment or satisfaction, [2][in full], of any charge relating to the company and requiring registration under this Part, within [3]["thirty"] days from the date of such payment or satisfaction.

(2) The Registrar shall, on receipt of such intimation, cause a notice to be sent to the holder of the charge calling upon him to show cause within a time (not exceeding fourteen days) specified in such notice, why payment or satisfaction should not be recorded as intimated to the Registrar.

(3) If no cause is shown, the Registrar shall order that a memorandum of satisfaction [4][* * * *] shall be entered in the register of charges.

(4) If cause is shown, the Registrar shall record a note to that effect in the register, and shall inform the company that he has done so.

(5) Nothing in this section shall be deemed to affect the power of the Registrar to make an entry in the register of charges under section 139 otherwise than on receipt of an intimation from the company.

NOTES

Eng. Act, 1948 : Sec. 100
Eng. Act, 1985 : Sec. 403

Previous Act : Sec. 121

Companies (Amendment) Act, 1960

Only full satisfaction and not part satisfaction need hereafter be intimated to the Registrar. As stated in Notes on clauses: "The existing Section 138 creates some practical difficulties and causes hardship to many companies particularly in regard to the giving of notice of part satisfaction to the Registrar. It is, therefore, proposed to amend sub-section (1) removing the obligation to notify part satisfaction to the Registrar and make consequential change in sub-section (3)." (*Clause* 30 of the Companies (Amendment) Bill, 1959).

Charge-holder's right to be heard before entry of satisfaction

Where, on the application of the debtor or company the Registrar had taken on record the form intimating that the charge had been satisfied without giving an opportunity of hearing to the charge holder and had subsequently given such a hearing and made an order, the Court rejected the petition of the company for quashing the subsequent order. The Court held, **following** *CIT v. B.N. Bhattacharjee,* (1979) 118 ITR 461 : AIR 1979 SC 1725, and *Sunil Batra v. Delhi Administration,* AIR 1978 SC 1675, that a failure of natural justice caused by an initial omission to give a hearing to the person affected could be cured, in exceptional cases, by an *ex post facto,* hearing. *Walford Transport (E.) India Ltd. v. S.K. Mandal, Registrar of Companies,* (1980) 50 Com Cases 600 (Gauh). However, it is now enjoined on the Registrar under sub-section (2) to give notice to the holder of the charge.

Supporting letter of satisfaction from charge-holder

Section 138(1) does contemplate that intimation may be given without a supporting letter from the financial institution/banks in case the same is not available. This is the

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1. Form Nos. 17, 13, 60 of the Companies (Central Government's) General Rules & Forms, 1956 are the prescribed forms relevant for the section.
2. Subs. by Act 65 of 1960, s. 30 for "in whole or in part".
3. The word "thirty" was substituted for the word "twenty-one" by s. 62 and Sch. to the Companies (Amendment) Act (XXXI of 1965) (w.e.f. 15-10-1965).
4. The words "in whole or in part, as the case may be" omitted by Act 65 of 1960, s. 30.

reason why sub-section (2) contemplates sending a notice by the Registrar to the charge-holder. The provisions of s. 138 leave no scope for interpretation of date of such payment or satisfaction to be shifted from the actual date of payment or satisfaction. Proper compliance of s. 138 would necessarily mean that intimation should be given to the Registrar within 30 days of actual payment or satisfaction, who in turn will obtain confirmation from the charge-holder 'within 14 days about the full satisfaction or payment'. The intimation, however, may be without a supporting letter if the same is not available. It is precisely for this reason that the Registrar under s. 138(2) is required to send a notice to the holder of the charge to show cause why such payment or satisfaction should not be recorded. *Swaraj Mazda Ltd., Re,* (1992) 73 Com Cases 569 at p. 571 (CLB).

Satisfaction of charges, notice to charge-holder advisedly within a week's time

Department's Instruction.—Under the provisions of sub-sections (1) and (2) of section 138 of the Act, the Registrar on receipt of an intimation of satisfaction of a charge from a company is required to send a notice to the holder of the charge calling upon him to show cause within a time (not exceeding fourteen days) specified in such notice as to way the payment or satisfaction should not be recorded as intimated to the Registrar. Although time-limit has been laid down in sub-section (1) for a company to report satisfaction to the Registrar and in sub-section (2), for the holder of the charge to send him reply to the Registrar, no such limit is laid down for the Registrar to send his notice to the holder of the charge. In some cases unusual delay takes place in issuing the notice of the intimation from the company relating to the satisfaction of charge, and consequently in recording satisfaction or payment of charges. It has, therefore, been decided that the notice under section 138(2) should be issued by the Registrar as early as possible and in any case *within a week* after the receipt of an intimation of satisfaction of charge from the company so that the unnecessary delay in registering the memorandum of satisfaction of a charge is avoided. (*Circular Letter No.* 2/4/60-PR, dated 15-2-1960.)

Merger of original loan into loan of higher amount, a satisfaction

Department's Circular.—The Department is of the view that when an original loan is later merged into a loan of the higher amount, with a provision therein that the earlier charge stands suspended/ extinguished, it is advisable to take this as case of satisfaction of charge, as far as the original loan is concerned, and file Form 8 taking the new loan as a case of creation of the charge. (*Letter No.* 8/15(135)/87-CL-V, dated 18-5-1967).

Reckoning of thirty days in case of banks

Department's Circular I.—The Department is of the view that the period of 30 days under section 138, in case where banks are involved, will be counted from the date of the issue of the bank's letter to companies intimating them about the satisfaction of the charge under section 138 (*Letter No.* 3(141) 17/78, dated 17-8-1978 as corrected by *Letter No.* 8/10(25)/77, dated 20-9-1978).

Circular II.—In a later Circular the department further clarified: "The matter has been re-considered and it is felt that Section 138 of the Act refers to the "date of payment or satisfaction" and there is no linkage to the date of the Bank's letter. It is, therefore, clarified that satisfaction of charge under Section 138 of the Act be filed with the Registrars of Companies within 30 days from the date of satisfaction/payment of charge". (*Letter No.* 3/23/89-CL-V, dated 26-12-1991). This circular is in accord with the decision of CLB in *Swaraj Mazda* case, (*Supra*).

Foreign companies.—This section also applies to foreign companies. See Notes under section 600.

Penalty for default.—The default is punishable under section 142.

Compoundable offence.—The offence is compoundable under section 621A.

Condonation of Delay.—The delay may be condoned by CLB on a petition filed under section 141.

Relevant Rules and Prescribed Form.—For form of intimation of satisfaction of charge, see Form No. 17 in *Appendix* 1. For memorandum of complete satisfaction of charge created by Foreign Company, please see Form No. 60 in *Appendix* 1. For relevant Rules see Rule 6 in *Appendix* 1.

Procedure for Registration, Modification and Satisfaction of Charges.—For the simplified procedure for registration, modification and satisfaction of charges, see Notes under s. 125, *ante*.

Procedure of filing of Form No. 17 with ROC

Department Circulars I.—I am directed to state that in order to simplify the procedure of filing of Form No. 17 and its registration, it has been decided that the said Form may be filed with the Registrar of Companies after obtaining the signatures of the Lender Company and the Banks/Financial Institutions. This Form be filed in triplicate with Registrar who will return two copies of the Form after endorsing the fact that the same has been registered. It may also be noted that the said Form No. 17 is required to be filed within a period of thirty days of the date of satisfaction of charge. [*F. No.* 14/1/95-CL-V, *Circular No.* 1/96, dated 15-4-1996].

Circular II.—It has come to the notice that certain Registrar of Companies are insisting on a separate letter from Banks/Financial Institutions in respect of the date of satisfaction of charge even if Form No. 17 had been signed by both the parties *i.e.* lender and the borrower. In terms of section 138(2) of the Companies Act, 1956, the Registrar is required to send a notice to the holder of the charge as to why the satisfaction should not be recorded as intimated to the Registrar. If Form No. 17 is signed by both the parties and is filed with Registrar in triplicate, the satisfaction of charge can be registered on the spot without issuing any notice to the holder of the charge under section 138(2) of the Act. As in the case of registration of charge one copy of Form No. 17 may be retained by the ROC and two copies duly signed indicating the registration of satisfaction of charge may be returned on the spot. *Circular No.* 2/96; *F.No.* 14/1/95—CL-V, dated 15-4-1996].

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of the matters specified under Rule 3 of the Companies (Compliance Certificate) Rules, 2001. Paragraph 2 under Rule 3 relates to filing of Forms and Returns with the ROC, RD, Central Government, CLB and other authorities and reads as follows:

Paragraph 2.—**The company has duly filed the forms and returns as stated in Annexure "B" to this certificate, with the Registrar of Companies, Regional Director, Central Government, Company Law Board or other authorities within the time prescribed under the Act and the Rules made thereunder.**

Prescribed Check List

See under sec. 125.

Secretarial Practice Notes : Report of satisfaction and procedure

Where payment or satisfaction of registered charge was effected in full, check whether intimation thereof was given to the Registrar in Forms 17 and 13 within 30 days from the date of such payment or satisfaction?

S. 139. Power of Registrar to make entries of satisfaction and release in absence of intimation from company.—The Registrar may, on evidence being given to his satisfaction with respect to any registered charge,—

(a) that the debt for which the charge was given has been paid or satisfied in whole or in part; or

(b) that part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking;

enter in the register of charges a memorandum of satisfaction in whole or in part, or of the fact that part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking, as the case may be, notwithstanding the fact that no intimation has been received by him from the company.

NOTES

Eng. Act, 1948 : Sec. 100
Eng. Act, 1985 : Sec. 403

Previous Act : Sec. 121

This section is new and confers power on the Registrar to make entries of satisfaction, even though not intimated by company.

If the entry turns out to be incorrect, it cannot affect the chargeholder's rights, unless he was a consenting party to the making of the entry.

Foreign companies.—This section also applies to foreign companies. See Notes under section 600.

S. 140. Copy of memorandum of satisfaction to be furnished to company.—Where the Registrar enters a memorandum of satisfaction in whole or in part, in pursuance of section 138 or 139, he shall furnish the company with a copy of the memorandum.

NOTES

Eng. Act, 1948 : Sec. 100
Eng. Act, 1985 : Sec. 403

Previous Act : Sec. 121

Secretarial Practice Notes : Memorandum of satisfaction

Check: Whether the company received a copy of the memorandum of satisfaction of charge from the Registrar?

[1][S. 141. Rectification by Central Government of register of charges.—(1) The Central Government, on being satisfied—

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1. **Subs. by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 20. Prior to its substitution it stood as under:**

S. 141. Rectification by [1][Company Law Board] of register of charges.

[2][(1) The [1][Company Law Board], on being satisfied—

(a) that the omission to file with the Registrar the particulars of any charge created by a company or of any charge subject to which any property has been acquired by the company or of any modification of any such charge or of any issue of debentures of a series, or that the omission to register any charge within the time required by this Part, or that the omission to give intimation to the Registrar of the payment or satisfaction of a charge, within the time required by this Part, or that the omission or misstatement of any particular with respect to any such charge, modification or issue of debentures of a series or with respect to any memorandum of satisfaction or other entry made in pursuance of section 138 or 139, was accidental or due to inadvertence or to some other sufficient cause or is not of a nature to prejudice the position of creditors or shareholders of the company ; or

(b) that on other grounds it is just and equitable to grant relief;

may, on the application* of the company or any person interested and on such terms and conditions as seem to the [1][Company Law Board] just and expedient, direct that the time for the filing of the particulars or for the registration of the charge or for the giving of intimation of payment or satisfaction shall be extended or, as the case may, require, that the omission or misstatement shall be rectified.]

(2) The [3][Company Law Board] may make such order as to the costs of an application under sub-section (1) as it thinks fit.

(3) Where the [3][Company Law Board] extends the time for the registration of a charge, the order shall not prejudice any rights acquired in respect of the property concerned before the charge is actually registered.

[4][Note.—Nothing in sub-section (1) shall affect any order made by the Court under section 141 or any proceeding relating to any matter specified in that section which is pending before the Court at the commencement of the Companies (Amendment) Act, 1974.]

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1. "Company Law Board" was substituted for "Court" in this section by the Companies (Amendment) Act (XLI of 1974), s. 13 (w.e.f. 1-2-1975).
2. Subs. by Act 65 of 1960, s. 31 for sub-section (1).
* In Form No. 1 of CLB Regulations, 1991 with fee of Rs. 200/- under, CLB (Fees on Applications & Petitions) Rules, 1991. For texts, see *Appendix* 6.
3. "Company Law Board" was substituted for "Court" in this section by the Companies (Amendment) Act (XLI of 1974), s. 13 (w.e.f. 1-2-1975).
4. Added by s. 13(2) of the Companies (Amendment) Act (XLI of 1974).

(a) that the omission to file with the Registrar the particulars of any charge created by a company or of any charge subject to which any property has been acquired by the company or of any modification of any such charge or of any issue of debentures of a series, or that the omission to register any charge within the time required by this Part or that the omission to give intimation to the Registrar of the payment or satisfaction of a charge, within the time required by this Part, or that the omission or misstatement of any particular with respect to any such charge, modification or issue of debentures of a series or with respect to any memorandum of satisfaction or other entry made in pursuance of section 138 or section 139, was accidental or due to inadvertence or some other sufficient cause or is not of a nature to prejudice the position of creditors or shareholders of the company; or

(b) that on other grounds it is just and equitable to grant relief;

may, on the application of the company or any person interested and on such terms and conditions as it may seem to the Central Government just and expedient, direct that the time for the filing of the particulars or for the registration of the charge or for the giving of intimation of payment or satisfaction shall be extended or, as the case may require, that the omission or mis-statement shall be rectified.

(2) The Central Government may make such order as to the costs of an application under sub-section (1) as it thinks fit.

(3) Where the Central Government extends the time for the registration of a charge, the order shall not prejudice any rights acquired in respect of the property concerned before the charge is actually registered.].

NOTES

Eng. Act, 1948 : Sec. 101
Eng. Act, 1985 : Sec. 404

Previous Act : Sec. 120

General Note : As and when the Companies (Second Amendment) Act, 2002 (11 of 2003) comes into force, the power under this section shall become transferred to the Central Government to be exercised by it in place of the Company Law Board. The commentary should be read keeping this change in mind.

Companies (Amendment) Act, 1960

The object of the amendments effected by the Companies (Amendment) Act 1960, is to make the section comprehensive enough to include all cases of failure or omission under Part V of the Act. (*Joint Committee Report*, para 33).

"Company Law Board" was substituted for 'Court' by the Companies (Amendment) Act (XLI of 1974), in Sections 17, 18, 19, 79, 141 and 186.

For the reasons for making this substitution, see Notes under Section 17.

Though the power and jurisdiction have been transferred to the Company Law Board, the principles on which the Board will exercise the power will be the same as were applied by the Courts and the judicial decisions quoted in these notes will guide the Board also.

Proceedings pending before 'the Court' at the time of commencement of the Amendment Act, are not to be affected, as per sub-section (2) of section 13 of that Act.

Companies (Second Amendment) Act, 2002 [11 of 2003]

The powers of Company Law Board under this section have been conferred on the Central Government. Consequential changes have accordingly been made in the section. As per the Bill, the powers of CLB were initially proposed to be transferred to the Tribunal constituted under section 10FB. Notes on Clauses of the Bill stated thus:

Notes on Clause.— This clause seeks to amend section 141 of the Companies Act, 1956. The provisions contained in the said section empower the Company Law Board to rectify the register of charges. It is proposed to confer this power upon the Tribunal. This amendment is of consequential nature. (*Clause 15 of the Companies (Amendment) Bill, 2001*).

Exercise of power of rectification of register of charges

The power of CLB under this section for condonation of delay in filing the particulars of charge, modifications or satisfaction thereof within the prescribed period or for rectification is a discretionary power. "It is most important that the Court should be fully informed of the circumstances which have given rise to the omission to register within the proper time and that the evidence should not, as is so often the case, merely state that the matter was accidental and due to inadvertence, without particularising the reasons for the breach of statutory requirements and the surrounding circumstances. People seem to be under the impression that, on their merely saying that the omission was 'due to inadvertence' the Court is practically obliged to exercise the power..... there is a statutory right in the mortgagee or chargee to come to the Court to be relieved of the consequences of his own negligence and lack of caution, provided that the Court is satisfied that the omission to register was not with any fraudulent intention but was in the words of the Companies Act, 1948, Section 101 'due to inadvertence' or to 'some other sufficient cause'. Pausing there, I think that the words 'some other sufficient cause' would be satisfied if it were proved that the secretary of a company had been wrongly advised by his solicitor or counsel that registration need not be sought. There are other possible circumstances to which those additional words following the word 'inadvertence' might apply. In the present case, the inadvertence is due to an obvious mistake ..... That seems to me to be inadvertence, inattention, carelessness but very far removed from the kind of cases to which this relief should be refused—a typical case of which would be one in which there was some fraudulent or improper motive in withholding the knowledge of the existence of the charge from the public, to whom the registration would have given the appropriate notice..... In the present case, I think the evidence just goes far enough, but I hope that, in future, applications of this kind will be supported by evidence much more carefully framed. Otherwise I may find myself compelled to dismiss an application merely supported by evidence copied out of a common form book which informs me that the omission was 'due to inadvertence' without going into any particulars of the nature of the inadvertence and the excuses which can be offered for the negligence and omissions on the part of those whose duty it is to comply with the statutory requirements of registration." *Re, Kris Cruisers Ltd.*, (1948) 2 All ER 1105 : (1949) 19 Com Cases 134 (Ch D). 'Accidental or due to inadvertence'—these words are given a very wide meaning; so that the discretionary power of the Court is exercised liberally in the ends of justice. The order of the Court is usually expressed to be without prejudice to the rights of parties acquired prior to the time when such charge shall be actually registered. See *Re, Joplin Brewery Co., Ltd.*, (1902) 1 Ch 79; *Cf. Re, M.I.G. Trust*, 1933 Ch 542 : (1933) 3 Com Cases 345. See also *Barclays Bank plc v. Stuart London Ltd.*, (2001) 2 BCLC 316 : (2001) EWCA Cir 140 (CA), where extension of time was allowed to a bank which had not registered the charge within due time due to inadvertence.

Where due to inadvertence and oversight the parties to the charge did not include in the particulars immovable properties on which also the charge was created and without such properties being included the lender bank was likely to be seriously prejudiced and there being no objections from any quarter the court ordered rectification to cover the com-

pany's immovable properties also. *R.K. Nutrisnax (India) P. Ltd. Re*, (2000) 4 Comp LJ 185 : (2000) 27 SCL 99 (CLB—EB)

Memorandum of complete satisfaction signed by the lead bank and the company was filed with ROC through inadvertence and oversight while the charge was subsisting. The lead bank supported the company's request for rectification as otherwise the consortion of banks would be put to irreparable loss on account of mis-statement. Rectification was allowed as it was just and equitable to do so. *Re IFB Industries Ltd.*, (2000) 38 CLA 215 (CLB—EB).

Where the Company Law Board condoned delay in registration and in so doing also dilated on merits of other issues, it was held that the High Court in appeal couldnot substitute its satisfaction for that of the Company Law Board, but the Registrar was asked to proceed with the matter in accordance with the law after hearing the parties concerned and without taking any influence of the remarks of the Company Law Board on merits of various issues. *Choudhary Builders P. Ltd. v. Sanghi Bros (Indore) Ltd.*, (2000) 1 Comp LJ 236 : (2000) 37 CLA 341 (MP).

The provisions of the section would be attracted only when there is a registrable charge. If a particular charge is not registrable in its inception, its omission from registration will involve no consequences, nor an application for extension of time for registration would lie. This case involved transfer of majority shareholding. The transferee gave a guarantee for payment of the consideration money and undertook not to transfer the shares. There was no guarantee from the side of the company. Nor any of its assets were committed towards payment. Thus there was no charge on the company's assets and no occasion for seeking extension of time for registration. *S.T. Patil v. ROC*, (1998) 91 Com Cases 578 : (1997) 26 CLA 298 : (1997) 13 SCL 298 (CLB—SB).

Where a company assigned its interest in its immovable properties to another company but failed to register the assignment under section 125 within time, an application by the assignee company for extension of time was allowed by the CLB, and the High Court refused to interfere in the matter. *Chaudhary Builders (P.) Ltd. v. Sanghi Bros. (Indore) Ltd.*, (2000) 37 CLA 341 (MP).

Rectification after going into liquidation

In *Re, Resinoid & Mica Products Ltd.*, (1982) 3 All ER 677 (CA), LORD DENNING M.R. held that time should not be extended for registering a charge after the company had gone into liquidation as such a step would prejudicially affect the rights of all parties which are determined on the commencement of winding up. The court also held following the dicta in *Re, Charles (LH) & Co. Ltd.*, 1935 WN 15 that an extension of time was properly refused when the application was not made for 20 months and then moved when liquidation was imminent. **Followed** in *Victoria Housing Estates Ltd. v. Ashpurton Estates Ltd.*, (1982) 3 All ER 665 (CA) where the Court further observed that when a chargee discovers that by mistake, he is unregistered, he should apply without delay for an extension of time if he desires to register; and the court when asked to exercise its discretion should look askance at a chargee who deliberately defers his application in order to see which course would be to his best advantage. See also *Krishna Silicate and Glass Works, In re*, 1975 Tax LR 1253 (Cal); *Ashpurton Estates Ltd.*, (1983) Ch 110; *Resinoid & Mica Products Ltd., Re*, (1983) Ch 132.

A very exceptional case will have to be made out to justify the Court in making an order for rectification, after a company has gone into liquidation and the rights of unsecured creditor in the liquidation had crystallised. *In re, Mechanisations (Eaglescliffe) Ltd.*, (1965) 35 Com Cases 478 : 1966 Ch 20.

Extension of time when winding up inevitable

In *Reshma Estate (P.) Ltd., Re*, (1977) 47 Com Cases 447 (Bom) the court refused to grant extension of time because a petition for winding up was already pending when the condonation was sought and the person seeking condonation was on his own showing unable to ex-

plain the delay in filing the particulars. Further, the court said that the rights of unsecured creditors, in the event of winding up order being passed, could not be ignored.

Where an application for registration of the charge alongwith the requisite form was filed after a long lapse of about five years and there was also the imminence of liquidation at the time, the Company Law Board did not allow the extension as it would have defeated the interests of other creditors. *Ravi Constructions v. ROC,* (2000) 1 Comp LJ 115 : (1999) 35 CLA 434 : (2000) 23 SCL 14 (CLB–SB); *Karnataka Telecom Ltd. v. Ravi Constructions, Engineers & Contractors*, (2000) 23 SCL 14 (CLB—SB).

The case of *Victoria Housing Estates Ltd.,* (1982) 3 All ER 665 (CA), was referred to in *Barrow Borough Transport Ltd., Re,* 1989 BCLC 653 (Ch D), where it was said that the Court would not extend time in which a charge would be registered under section 404 of Act 1985 since liquidation was inevitable and not just imminent and it was settled practice to refuse an extension of time once liquidation has supervened. On the facts, since the administrators had concluded that rescue of the company was not feasible and the creditors had approved proposals to sell the business and put the company into liquidation, liquidation was inevitable and the application for extension would be refused.

Where the time for the registration of a charge against a company is extended notwithstanding the imminence of liquidation, the order should provide liberty for the company to apply for discharge of the order within a specified period after a winding up becoming effective on or before a specified date. *Exeter Trust Ltd. v. Screenways Ltd.,* 1991 BCLC 888 : (1993) 3 Comp LJ 366 (CA).

No extension of time was allowed where the company had been struck off the register and dissolved and the application was after a long delay. The circumstances were such that even if the company was restored to the register it would in all probability be insolvent. The court also observed that even if leave were to be given for registration, it would not have been allowed to prejudice the position of the subsequent chargee who had knowledge of the earlier unregistered charge the reason being that the statutory scheme is one based on registration on the Companies Register, not one based on actual notice apart from that register. *Telomatic Ltd., Re,* (1994) 1 BCLC 80 (Ch D). Extension is allowed with due safeguards against prejudice to the interest of others. Subject to this principle, a bank was allowed to register out of time a charge which it had failed to register in due time due to inadvertence. *Barclays Bank plc. v. Stuart Landon Ltd.,* (2001) 2 BCLC 316 : (2001) EWCA Cir 140 (CA).

Jurisdiction covers omission, mistake and mis-statement but not validity

The conditions in the section are not cumulative. If the Court is satisfied that the omission to register was due to some cause and that it is just and equitable to give relief it will grant an extension of time even if the company is in winding up. The court need not further satisfy itself that the position of shareholders or creditors will not be prejudiced thereby. *Thuppan Nambudri (A.M.H.) v. Shankara Menon,* (1954) 24 Com Cases 489, 497 : AIR 1955 Mad 35. The relief can be granted when the omission is due to inadvertence and oversight and is not of a nature to prejudice the position of any creditor or shareholder of a company. *In re, The Punjab Club,* (1933) 3 Com Cases 116, 117 (Lah). It is not sufficient merely to state that the omission to register was due to inadvertence, the circumstances in which the omission arose must also be explained. *Kris Cruisers Ltd., Re,* (1948) 2 All ER 1105 : (1949) 19 Com Cases 134. In an application for extension of time the Court will not go into the question of the validity of the charge. *Re, Heathstar Properties Ltd. (No. 2),* (1966) 1 All ER 1000 (Ch D) : (1966) 2 Comp LJ 246. Where the delay was caused because of slow documentation by the company and delay in getting no objection certificate from the first charge holder, the CLB ordered extension of time up to the actual date of filing of particulars and directed the ROC the register the charge within 30 days of the receipt of the order. *Central Bank of India v. Saraf Textile Industries Ltd.,* (1998) 1 Comp LJ 143 : (1998) 15 SCL 60 (CLB—N. Delhi).

The delay contemplated by the section is delay due to the omission to file the particulars of the charge in time and not the delay on the part of Registrar in registering the charge. *Siva Sankara Panicker (C.K.) v. Kerala Financial Corpn.*, (1980) 50 Com Cases 817 (Ker); *Chantry House Development, Re,* 1990 BCLC 813 (Ch D), (accidental omission, registration allowed).

In *Re, C.L. Nye Ltd.*, (1971) 41 Com Cases 96 : (1970) 3 All ER 1061, the Court of Appeal in England, in dealing with the corresponding section of the English Act (101) has observed that under the section the jurisdiction of the Court extends only to rectification of an omission or mistake or mis-statement and the Court has no power to order the deletion of a whole registration in respect of which the certificate issued by the Registrar has become conclusive evidence of the registration. (See section 132).

The CLB does not have the power to go into the questions of the validity of a charge. It also cannot order the deletion of a charge already entered in the register of charges, nor can it order a creditor to deliver the original title deeds relating to the charge to another creditor. *Times Bank Ltd. v. Sri Sharadaparameshwari Textiles Ltd.*, (2000) 38 CLA 270 (CLB).

An order under this section is open to review. *Re, Dinshaw & Co., (Bankers) Ltd.*, (1936) 6 Com Cases 434 : AIR 1937 Oudh 62. Where in any case it is felt necessary, evidence may also be taken about the facts. *In re, Heathstar Properties Ltd. (No.1),* (1966) 2 Comp LJ 26 : (1966) 1 All ER 628 (Ch D).

Condonation of delay by Central Government under section 637-B

In view of the specific provision contained in section 141 for condonation of delay, the Central Government cannot exercise its powers under section 637B.

Existing rights not to be prejudiced [Sub-section (3)]

The object of this provision is to protect rights acquired against the property concerned, in the interval between the expiration of the thirty days or the period extended by the Registrar as per proviso to sub-section (1) of Section 125, and the extended time allowed by the Court's order. See *Re, Monolithic Building Co., Tacon v. Monolithic Building Co.*, (1915) 1 Ch 643. The court may impose 'such terms and conditions as seem to the court just and expedient'. When a late registration is permitted the court always makes the proviso that the registration is to be without prejudice to the rights of any parties acquired prior to the time when the charge is actually registered. *I.C. Johnson & Co. Ltd., Re,* (1902) 2 Ch 101 (CA). In exercising the discretionary power it has become a practice to insert in the order the following words; this order to be made without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered. *Re, Joplin Brewery Co.*, (1902) 1 Ch 79. The words of the section are capable of conferring a wide discretion on the court. *Jackson & Co., Re,* (1899) 1 Ch 348; *Abrahams & Sons Ltd., Re,* (1902) 1 Ch 695.

Where extension of time was granted to register two further hypothecation agreements which were a part of an already registered hypothecation, it was held that this would not prejudice any rights in respect of the properties covered by the agreements and which were acquired before the registration was effected after the extension of time. *Corporation Bank v. ROC,* (1998) 93 Com Cases 415 : (1997) 2 Comp LJ 257 (CLB—SB); *Evertaut Steels (P.) Ltd., Re,* (1997) 26 Corpt LA 250 (CLB); *State Bank of India v. ROC,* (1997) 26 Corpt LA 250: (1997) 13 SCL 241; *State Bank of India v. ROC,* (1998) 91 Com Cases 407 : (1997) 4 Comp LJ 278; *Kesaria Tea Co. Ltd., Re,* (1998) 91 Com Cases 407 : (1997) 26 Corpt LA 253 : (1997) 4 Comp LJ 249 (CLB) [where in addition to saving existing rights, costs of Rs. 5000/-were also awarded].

In *Corporation Bank v. ROC (Supra),* it was held that the Company Law Board is not to go into the question of the validity of the charge in an application for extension of time. Other charge holders objected to the transaction. Extension was granted subject to

this that extension should not affect the objectors' rights. The court **followed** *Heathstar Properties Ltd. Re,* (1966) 36 Com Cases 768 (Ch D).

A company is not allowed to take advantage of its own default in filing particulars. In *Central Bank of India v. Saraf Textile Industries Ltd.,* (1998) 93 Com Cases 309 : (1998) 1 CLJ 143 : (1998) 15 SCL 60 : (1998) 28 CLA 62 (CLB—NR), the bank filed an application for extension of time for filing particulars. The correspondence between the bank and the company showed that the company intended to create a second charge on the same block of assets without taking no objection certificate from the bank. The bank was accordingly given the benefit of extension of time for filing particulars.

The delay of more than a year in filing particulars of the modification was condoned where the company offered additional security and also no objection. *State Bank of India v. ROC,* (1998) 92 Com Cases 188 : (1997) 13 SCL 247 : (1997) 4 Comp LJ 278 (CLB—Mad).

If, before registration in pursuance of an order of Court, a winding-up whether by Court or voluntary, intervenes, the mortgage or charge, even if registered, will not be effective as against the general body of creditors. See *Re, L.H. Charles & Co. Ltd.,* 1935 WN 15; *Re, Anglo-Oriental Carpet Co.,* (1903) 1 Ch 914.

When extension to be subjected to subsequent charges

In *Fablehill Ltd., Re,* (1991) BCLC 830 (Ch D) the company executed a charge in favour of its bank. The bank's solicitors failed to register the charge with the Registrar of Companies although they had accepted the responsibility to do so. Subsequently the company executed a second charge on the same property in favour of the two directors. The charge was not made subject to the charge in favour of the bank. Subsequently still a third charge was executed on the same property in favour of a third person and was not made subject to any prior charge. Both the subsequent charges were duly registered with the Registrar of Companies. The bank, on learning that the solicitors had failed in their duty applied for extension of time for registration of the charge in its favour. The court first observed that in deciding whether to grant an extension of time the overriding principle is whether for any reason it would not be just and equitable to grant the extension. The two directors in whose favour a charge was created were the only directors of the company and it was the responsibility of the company to register the charge in favour of the bank. The court, therefore, held that it would be plainly inequitable to include in any order allowing time for registration a proviso protecting the rights of directors who when they learned that the company had failed in its duty to register a charge took advantage by registering a charge in their own favour. The bank had not acted unreasonably with respect to the delay and an order was granted for the bank's charge to be registered. That order was not subjected to the proviso that it would be subject to the charge in favour of the directors but a proviso was inserted making it subject to the charge in favour of the third person.

***Locus standi* of unsecured creditor**

An unsecured creditor as such has no *locus standi* to file an application or otherwise take part in a proceeding under this section. *Calcutta National Bank v. Abhoy Singh Sahela,* (1959) 29 Com Cases 337 : AIR 1959 Cal 464.

The English Court of Appeal has held that an unsecured creditor who has been or is likely to be prejudiced by the order of rectification has *locus standi* to seek judicial review of the order after a petition for winding up has been presented. *R. v. Registrar of Companies, Ex. P., Central Bank,* (1986) 1 All ER 105 (CA).

There may, however, be cases where the absence of the charge on the register may have induced the giving of credit to a company on the footing that its assets were not subject to any registrable charge or mortgage. This anomaly is pointed out in *Re, Kris Crusers Ltd.,* (1948) 2 All ER 1105 : (1949) 19 Com Cases 134 (Ch D).

Default or delay in filing particulars of charge

A member or creditor or ROC may approach CLB under section 614 for a direction to the company to file particulars of the charge created over the assets of the company. *ICICI Bank Ltd. v. Klen & Marshall Mfrs. & Exporters Ltd.*, (2000) 28 SCL 123 : (2000) 39 CLA 215 : (2000) 4 Comp LJ 411 : (2001) CLC 390 (CLB—SB).

Where the ROC refused to register particulars of modification of charges because there was a delay in filing them, and the CLB found that the charge holder had substantially complied with the procedure prescribed under Rule 6, and, therefore held that the mere non-signing of Forms 8 & 13 by the companies would not disentitle the charge holder from registration of modification of charges especially when the company had neither appeared nor opposed the petition inspite of the notices of hearing served on them. The CLB condoned the delay and ordered registration. *State Bank of India v. Shakthi Cotton Processes P. Ltd.*, (1993) 43 SCL 539 (CLB—Chennai).

§ See Notes under section 614 also.

Application to CLB for condonation of delay where charge-holder waives claim

Department's Clarification.—A query was raised to the Department: Whether, after making an inadvertent default in filing the particulars of charges in respect of a certain loan from a bank, the company should apply to the Court (now CLB) under section 141, in spite of the fact that the lending bank subsequent to the fact coming to the notice of the Registrar, waives its claim of the charge on the assets of the company. The Department is of the view that the company should apply to the Court (now CLB) under section 141 of the Act. (*Company News & Notes*, dated 1-6-1963.)

Additional penal fee not to be levied unless CLB so orders in the order of extension

Department's view.—In cases where specific provisions in the Act like those of section 141 exist requiring an order of the Court (now CLB) for extension of time for filing or registering any documents, the Registrar should not accept such documents without appropriate orders of the Court (now CLB); to accept such documents without the Court's (now CLB) orders by using the power under section 611 would conflict with the jurisdiction of the Court (now CLB). In such cases if the Court has ordered an extension of the time for filing or registration, the question of the imposition of a penal fee under section 611 will not arise, though if the Registrars get an opportunity to do so they could submit to the Court itself to prescribe a higher fee for the document under the powers the Court has to extend the time "on such terms and conditions as seem to the Court to be just and expedient", always of course keeping in mind the question whether any increase in fees would be commensurate with the cost of making the submission to the Court. (*Department's File No.* 8/1(1)/61-PR).

Registrar not to accept documents filed out of time without CLB order

Department's view.—The Department's view is that if the instrument creating mortgage or charge on company's property or copy thereof is not filed within thirty days or the period extended as per proviso to section 125(1), the Registrar cannot take the documents on record even on payment of additional fee as provided in section 611(2), unless the sanction of the Court (now CLB) is obtained under section 141 as the power to do so has been specifically vested in the Court (now CLB). (Extract from queries raised by the Maharashtra Chamber of Commerce in a Memorandum submitted to the Department on 30-7-1962 and the Department's views thereon *Company News & Notes*, dated 1-7-1963).

Delay in Filing Form No. 13

Department's Clarification.—Consequent upon the amendment to section 130 of the Companies Act, 1956, every company is required to forward to the Registrar of Companies for being entered in the register, the particulars of all the charges requiring registration in Form No. 13 which is required to be filed along with Form Nos. 8/10/17, as the case may be. The Institute sought a clarification from the Department of Company Affairs whether the delay in filing Form No. 13 would attract the provisions of section 141 of the Act, requiring condonation of delay by the Company Law Board.

"I am directed to refer to your *letter No.* 1004: 7: DR, dated 13-3-1990 on the subject mentioned above and to say that delay in filing of Form No. 13 pursuant to the provisions of section 130 of the Companies Act, 1956, does not attract the provisions of section 141 of the Act. However, it may please be noted that Form No. 13 is required to be filed along with Form Nos.8/10/17, as the case may be, which attract the provisions of section 141 of the Act if those are filed after the period prescribed in section 125/135/138 of the Act respectively." (*No.* 3/23/89-CLV, dated 21-3-1990 : (1990) Chartered Secretary, 294).

Prescribed Form.—A certified copy of the final order passed by the Company Law Board extending the time shall be filed by the company with the Registrar as an annexure to Form No. 21 as set out in *Appendix* 1.

Filing of papers and memorandum of appearance before CLB

The mere filing of papers in a professional capacity would not require a memorandum of appearance. Only when an officer of a company appears to file papers, Rule 28(4)(a) of CLB (Bench) Rules, 1975, *since repealed,* and the second para of form No. 4 would apply and, therefore, the authorised representative has to file his letter of authorisation together with the memorandum of appearance in Form No. 4. *Kathayee Cotton Mills Ltd. v. ROC, Kerala,* (1987) 61 Com Cases 420 (Ker). In this case certain papers were filed by the company through its advocate under *Vakalatnama*. The papers were retained to the company because the memorandum of appearance was not filed. This was held to be wrong because memorandum is necessary only when there is going to be a hearing before the Bench. The Form No. 5 of CLB Regulations 1991, refers only to the secretary in whole time practice, Chartered Accountant, practising cost and works accountant for filing of memorandum of appearance.

Petition before CLB

Petition under sub-section (1)/(3) be filed by the company or the creditor entitled to the charge, before the Regional Bench of CLB as in Form No I of Annexure II to the CLB Regulations, 1991 along with a fee of Rs. 200/-and accompanied by the following documents:—

(1) Copy of the agreement creating, modifying the charge or satisfaction of charge, as the case may be.

(2) Copy of the resolution envisaged by section 292(1)(b) or (c) and Section 293(1)(d), as may be applicable.

(3) Copy of Form 8/13 filed with ROC belatedly.

(4) Affidavit verifying the petition.

(5) Bank draft evidencing payment of application fee.

(6) Memorandum of appearance in Form No. 5 of Annexure I with copy of Board Resolution or the executed *Vakalatnama*, as the case may be.

Copy of advertisement need not be attached.—There is no stipulation in CLB Regulations, 1991 on this point and therefore there is no necessity of enclosing a copy of newspaper advertisement with the application for condonation of delay in filing memorandum of charges in prescribed Form No 17. *Engineering Systems Ltd., Re,* (1992) 2 Comp LJ 32 (CLB).

Foreign companies.—This section also applies to foreign companies. See Notes under section 600.

Secretarial Practice Notes : Rectification of register of charges

(a) Whether there was any delay/omission/misstatement in filing particulars of charge created/modified/satisfied, or issue of debentures of a series or intimation of satisfaction of charge, to the Registrar?

(b) If so, whether petition was made to the Company Law Board in accordance with the Company Law Board Regulations, 1991, and order obtained?

(c) Whether notice of such order was given to the Registrar in Form 21?

(d) Whether the registration certificate issued by ROC?

S. 142. Penalties.—(1) If default is made in filing with the Registrar for registration the particulars—

(a) of any charge created by the company;

(b) of the payment or satisfaction [1][* * * *] of a debt in respect of which a charge has been registered under this Part; or

(c) of the issues of debentures of a series;

requiring registration with the Registrar under the provisions of this Part, then, unless the registration has been effected on the application of some other person, the company, and every officer of the company or other person who is in default, shall be punishable with fine which may extend to [2][*five thousand rupees*] for every day during which the default continues.

(2) Subject as aforesaid, if any company makes default in complying with any of the other requirements of this Act as to the registration with the Registrar of any charge created by the company or of any fact connected therewith, the company, and every officer of the company who is in default, shall, without prejudice to any other liability, be punishable with fine which may extend to [3][*ten thousand rupees*].

NOTES

Eng. Act, 1948 : Secs. 96 and 99
Eng. Act, 1985 : Secs. 399 and 402

Previous Act : Sec. 22

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount :

(1) from 500 rupees to 5000 rupees under sub-section (1); and

(2) from 1,000 rupees to 10,000 rupees under sub-section (2).

Scope of section

The penalty provided in this section is for default in filing charge or a satisfaction of charge under sections 125, 127, 128, 135 and 138 within the prescribed time or within such extended time.

It is open to the company to seek condonation of delay by CLB under section 141 to avoid any penalty under this section.

Compoundable offence.—The offence is compoundable under section 621A.

Foreign companies.—This section also applies to foreign companies. See Notes under section 600.

S. 143. Company's register of charges.—(1) Every company shall keep at its registered office a register of charges and enter therein all 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—

(i) a short description of the property charged;

(ii) the amount of the charge; and

(iii) except in the case of securities of bearer, the names of the persons entitled to the charge.

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1. The words "in whole or in part" omitted by Act 65 of 1960, s. 32.
2. The words "five hundred rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 53 (w.e.f. 13-12-2000).
3. The words "one thousand rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 53 (w.e.f. 13-12-2000).

(2) If any officer of the company knowingly omits, or wilfully authorises or permits the omission of, any entry required to be made in pursuance of sub-section (1), he shall be punishable with fine which may extend to [4][*five thousand rupees*].

NOTES

Eng. Act, 1948 : Sec. 104
Eng. Act, 1985 : Sec. 407

Previous Act : Sec. 123

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 500 rupees to 5000 rupees under sub-section (2).

Scope of section

Register of charges shall be kept at the registered office of the company.

Not only the names of the original parties to the mortgage deed but also those of their transferee must be included in the register. It is violative of common sense to hold that though the law requires a register to be maintained, it does not require it to be posted up to date. *Basant Company v. Benaras Cotton and Silk Mills Ltd.*, (1964) 34 Com Cases 394, 399 (All).

Foreign companies.—This section also applies to foreign companies. See Notes under section 600.

Penalty for default [Sub-section (2)].—If any officer of the company knowingly omits, or wilfully authorises or permits the omission of any entry in the company's register of charges, he is punishable with fine which may extend to five thousand rupees.

Compoundable Offence.—The offence is compoundable under section 621A.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of maintenance of registers. The relevant paragraph 1 of the Form prescribed under Rule 3 of the Companies (Compliance Certificate) Rules, 2001 states :

"Paragraph 1.— **The company has kept and maintained all registers as stated in Annexure "A' to this certificate, as per the provisions and the rules made thereunder and all entries therein have been duly recorded."**

Register of Charges under Section 143/Copies of Instruments Creating Charge under Section 136

Prescribed Check List—See Notes under sec. 136.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

Secretarial Practice Notes : Company's register of charges

Check : whether the company is maintaining at its registered office a Register of Charges with particulars prescribed in sub-section (1)?

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4. The words "five hundred rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 54 (w.e.f. 13-12-2000).

S. 144. Right to inspect copies of instruments creating charges and company's register of charges.—(1) The copies of instruments creating charges kept in pursuance of section 136, and the register of charges kept in pursuance of section 143, shall be open during business hours (but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day are allowed for inspection) to the inspection of any creditor or member of the company without fee, at the registered office of the company.

(2) The register of charges kept in pursuance of section 143 shall also be open, during business hours but subject to the reasonable restrictions aforesaid, to the inspection of any other person on payment of a fee of [5][such sum as may be prescribed[6]] for each inspection, at the registered office of the company.

(3) If inspection of the said copies or register is refused, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [7][five hundred rupees] and with a further fine which may extend to [8][two hundred rupees] for every day during which the refusal continues.

(4) The [9][*Central Government*] may also by order[10] compel an immediate inspection of the said copies or register.

NOTES

Eng. Act, 1948 : Sec. 105
Eng. Act, 1985 : Sec. 408

Previous Act : Sec. 124

General Note : As and when the Companies (Second Amendment) Act, 2002 (11 of 2003) comes into force, the power under this section shall become transferred to the Central Government to be exercised by it in place of the Company Law Board. The commentary should be read keeping this change in mind.

Companies Amendment Act, 1988

This section has been amended by Amendment Act of 1988 to confer the power of the court under sub-section (4) on the Company Law Board. Sub-section (2) has also been amended to prescribe fee for inspection of register of charges.

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount :

(1) from 50 rupees to 500 rupees under sub-section (3).

(2) from 20 rupees to 200 rupees under sub-section (3) for every day of default.

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5. Subs. by the Companies (Amendment) Act, 1988, for the word "one rupee", s. 67, w.e.f. 15-7-1988 *vide* GSR No. 781(E) dated 13-7-1988.
6. The new prescribed fee is now Rs. Ten *vide* GSR No. 782(E) dated 13-7-1988 under Rule 21A(3) of the Companies (Central Govt.) General Rules and Forms, 1956 inserted w.e.f. 15-7-1988.
7. The words "fifty rupees" substituted by the Companies (Amendment) Act, 2000, (53 of 2000) s. 55 (w.e.f. 13-12-2000).
8. The words "twenty rupees" substituted by the Companies (Amendment) Act, 2000, (53 of 2000) s. 55 (w.e.f. 13-12-2000).
9. **Subs. for "Company Law Board" by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 21. Earlier subs. by the Companies (Amendment) Act, 1988, (w.e.f. 31-5-1991) *vide* GSR dated 31-5-1991, for the word "Court".**
10. Application for order to be made in Form No. 1 of CLB Regulations, 1991 with fee of Rs. 200/- *vide* GSR 219(E), dt. 2-3-2000, w.e.f. 1-4-2000, under CLB (Fees on Applications & Petitions) Rules, 1991. For texts, see *Appendix* 6.

Companies (Second Amendment) Act, 2002 [11 of 2003]

The powers of Company Law Board under this section have been conferred on the Central Government. Consequential changes have accordingly been made in the section. As per the Bill, the powers of CLB were initially proposed to be transferred to the Tribunal constituted under section 10FB. Notes on Clauses of the Bill stated thus:

Notes on Clause.—This clause seeks to amend sections 144 and 163 of the Companies Act, 1956. The existing provisions contained in sections 144 and 163 of the Act, *inter alia*, empower the Company Law Board to compel an immediate inspection of copies of instruments creating charges and documents or taking extract thereof. It is now proposed to confer these powers upon the Tribunal. These amendments are of consequential nature. (*Clause 16 of the Companies (Amendment) Bill, 2001*).

Foreign companies.—This section also applies to foreign companies. See Notes under section 600.

Right of inspection

Where the copies of instruments creating charges are open to inspection by members and creditors, they are not open to inspection by other persons as in the case of register of charges kept by the company. Any restriction as to the right to inspection during business hours shall be made by the company in general meeting and not otherwise and at least two hours should be made available for inspection.

Fees for inspection of documents, etc.—The prescribed fee payable for inspection of register of charges as per S. 144(2) is Rupees ten [*vide Rule 21A of the Companies (Central Government's) General Rules and Forms, 1956*]. For the text of Rule, *see Appendix* 1.]

Petition before CLB

Petition under sub-section (4) be filed in Form No. I of Annexure II to the CLB by following the procedure as laid down in the CLB Regulations, 1991 with a fee of Rs. 200/-and accompanied by the following documents:

(1) Documentary evidence, if any, showing the refusal of the company to give inspection to the petitioner.
(2) Affidavit verifying the petition.
(3) Bank draft evidencing payment of application fee.
(4) Memorandum of appearance in Form No. 5 of Annexure I with a copy of the Board's resolution or the executed Vakalatnama, as the case may be.

§ For text of the Company Law Board Regulations, 1991, refer *Appendix 3*.

Secretarial Practice Notes : Inspection of instruments of charge and register

Whether the instrument creating/modifying charges and the register of charges were kept open for inspection at the registered office during business hours as prescribed?

S. 145. Application of Part to charges requiring registration under it but not under previous law.—In respect of [1][any charge created before, and remaining unsatisfied at, the commencement of this Act,] which, if this Act had been in force at the relevant time, would have had to be registered by the company in pursuance of this Part but which did not require registration under the Indian Companies Act, 1913 (VII of 1913), and in respect of all matters relating to such charge, the provisions of this Part shall apply and have effect in all respects, as if the date of commencement of this Act had been substituted therein

1. Subs. by Act 65 of 1960, s. 33 for "any charge created before the commencement of this Act".

for the date of creation of the charge, or the date of completion of the acquisition of the property subject to the charge, as the case may be.

Nothing contained in this section shall be deemed to affect the relative priorities as they existed immediately before the commencement of this Act, as between charges on the same property.

NOTES

Scope of section

All those charges created before and existing at the date of commencement of this Act, which did not require registration under the previous Act but which by virtue of the provisions of this Act are required to be registered, should be registered within the prescribed period, *i.e.*, within twenty-one days (*vide* Section 125), from the date of commencement of this Act—that date being treated as the date of creation of such charges.

The charges covered by this section are: (1) those mentioned in clauses (g), (h) and (i) and clause (f) to the extent of its including stock-in-trade, of sub-section (4) of Section 125. Such charges did not require registration under the previous Act but now require to be registered under Section 125; (2) those on properties acquired subject to charge, as provided in Section 127. In cases coming under this second category, the date of commencement of the Act will be taken to be the date of completion of the acquisition of the property acquired subject to the charge.

Foreign companies.—This section also applies to foreign companies. See Notes under section 600.

PART VI

MANAGEMENT AND ADMINISTRATION

CHAPTER I

GENERAL PROVISIONS

Registered Office and Name

S. 146. Registered office of company.—(1) A company shall, as from the day on which it begins to carry on business, or as from the [1][thirtieth] 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[2] of the situation of the registered office, and of every change therein, shall be given within [1][thirty] days after the date of the incorporation of the company or after the date of the change, as the case may be, to the Registrar who shall record the same:

Provided that except on the authority of a special resolution passed by the company, the registered office of the company shall not be removed—

(a) in the case of an existing company, outside the local limits of any city, town or village where such office is situated at the commencement of this Act, or where it may be situated later by virtue of a special resolution passed by the company; and

(b) in the case of any other company, outside the local limits of any city, town or village where such office is first situated, or where it may be situated later by virtue of a special resolution passed by the company.

(3) The inclusion in the annual return of a company of a statement as to the address of its registered office shall not be taken to satisfy the obligation imposed by sub-section (2).

(4) If default is made in complying with the requirements of this section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [3][*five hundred rupees*] for every day during which the default continues.

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1. The words "thirtieth" and "thirty" were substituted for the words "twenty-eighth" and "twenty-eight" by s. 62 and Schedule to the Companies (Amendment) Act (XXXI of 1965) (w.e.f. 15-10-1965).
2. Form No. 18 of the Companies (Central Government's) General Rules & Forms, 1956 is the prescribed form of notice relevant for the section.
3. The words "fifty rupees" substituted by the Company (Amendment) Act, 2000 (53 of 2000), s. 56 (w.e.f. 13-12-2000).

NOTES

Eng. Act 1948 : Sec. 107
Eng. Act 1985 : Sec. 207

Previous Act : Sec. 72

Companies (Amendment) Act, 2000

(1) Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 50 rupees to 500 rupees under sub-section (4).

(2) Regional Director's Permission for change of registered office.—As per section 17A, which has been inserted by Companies (Amendment) Act, 2000, no company shall change the place of its registered office from the jurisdiction of one Registrar to the jurisdiction of another Registrar within a State unless confirmed by Regional Director.

Scope of Section

The section requires that the registered office of an existing company as well as a new company shall not be removed outside the city, town or village where it is situate, in the state except on the authority of a special resolution of the company. In case of shifting of the registered office from the jurisdiction of one Registrar to another within the State, confirmation of Regional Director is required under section 17A. The change of registered office from one State to another will however require the confirmation of CLB under the provisions of section 17.

Intimation to Registrar [Sub-section (2)]

Removal of the registered office from one place to another within the same city, town or village, does not however require any special resolution, though notice of such change also should be given to the Registrar. It is wrong to contend that a resolution to change the registered office is sufficient and the only effect of the failure to notify is to render the company liable for a fine. *Jan Bazaar Manna Estate Ltd., Re,* (1931) 1 Com Cases 243, 248 : AIR 1931 Cal 692.

Shifting of registered office outside the "local limits" [Sub-section (2)(a)]

Departments Circular.—Clause (a) of sub-section (2) of section 146 of the Companies Act, 1956, lays down that the registered office of an existing company shall not be shifted outside the *local limits* of any city, town or village where such registered office is situated unless the company passes a special resolution to that effect. As a result of rapid urbanisation, cities frequently tend to expand beyond municipal limits. In view of this, the expression "local limits" in the aforesaid section of the Companies Act should be taken to mean both the local body limits and the postal limits, and where the two do not coincide, the wider of the two. (*Circular No.* 19/72, dated 26-6-1972.)

Penalty for default [Sub-section (4)]

The registered office of a company can be removed from the city, town or village where it is situated only on the authority of a special resolution of the company. Any default in compliance with this requirement will attract penalty for the company and every officer of the company who is in default by way of fine which may extend to Rs. 500 for every day of default.

The liability for prosecution and punishment is that of the officer of the company who is in default. All the directors of the company will be officer-in-default only when there is no managing director, whole time director, manager, secretary, a person charged by the Board with the responsibility of complying with the provisions of the Act and the Director/Directors specified by the Board under section 5(g). *Vijay Kumar Gupta v. ROC,* (2004) 50 SCL 171 : (2003) CLC 777 : (2004) 118 Com Cases 604 (HP).

Compoundable offence.—The offence is compoundable under section 621A.

Importance of registered office

Domicile and residence.—The situation of the registered office of a company determines its domicile for all purposes. *Daimler Co. Ltd. v. Continental Tyre & Rubber Co. Ltd.,* (1916) 2 AC 307; *Gasque v. IRC,* (1940) 2 KB 80. On the situation of the registered office depends the place where the company is to be registered and the state of the country and the court which will have jurisdiction over it. *R. v. Industrial Disputes Tribunal, ex. p., Kigace Ltd.,* (1953) 1 WLR 411, 414.

For the purposes of Companies Act.—There are various provisions of the Act relating to registered office : (a) the register of members is to be kept there (Section 163); (b) the right of inspection has to take place there (Section 163); (c) the register of directors, etc., is also to be kept there (Section 303); (d) the account books are to be maintained there unless the directors decide otherwise (Section 209); (e) the register of mortgages and charges and copies of registered documents are also to be kept there (Section 143); and the right of inspection of them is to be exercised there (Section 144); (f) banking and insurance companies have to publish their statements of accounts at the registered office (Section 223); (g) service of documents should be effected there. (Section 51). *Cf.* also Order 29, Rule 2, Civil Procedure Code, in this connection.

For purpose of jurisdiction of the High Court to wind up companies, the registered office means the place which has longest been the registered office of the company during the 6 months immediately preceding the presentation of the petition for winding up, see section 10.

The name of the company and full address of the registered office is to be published as required by section 147 outside the various offices and places of business of every company and also in all letter heads, bills and other documents specified in that section.

§ As to the nature of the 'registered office' and its distinction from 'head office' see Notes under section 2(9), *ante.*

Service of documents

Where the registered office of a company had been pulled down and the officers of the company were working at a place of business which was not registered, the court ordered that the petition for winding up should be served upon the secretary and two of the directors at the unregistered working place. *Fortune Copper Mining Co.,* (1870) LR 10 Eq 390. Similarly where a company, though not formally dissolved, had practically ceased to exist and had no office or officer, the company being made a defendant in a suit, the court ordered that service of the summons on the former chairman and secretary of the company should be good service, *Gaskell v. Chambers,* 53 ER 895 : (1858) 28 LJ Ch 385.

Where however the registered office of the company is intact and working, a service on the company's solicitor or local manager, though accepted by them, was not a good service unless service was presented at the office of the company also. *Pearks, Gunston & Tee Ltd. v. Richardson,* (1902) 1 KB 91; *Denver United Breweries Ltd., Re,* (1890) 63 LT 96. These cases go to show that the requirement of service at the residence of the company is a permissive method and not an imperative method and, therefore, constitutes only one of the several methods available for the establishing a communication with a company. *Dawsons Bank Ltd. v. Municipal Committee, Kyaiklat,* AIR 1941 Rang 339.

Where the registered office of the company was intact and in existence, and though the company was giving a different address for correspondence, it was held that the service of statutory notice under section 434 for payment of a debt, a condition necessary for presenting a winding up petition, should have been served at the registered office. The court **distinguished** the case from the decision in *Fortune Copper Mining Co., Re,* 1870 LR 10 Eq 390, because in that case the office had ceased to exist by reason of the demolition of the building in which it was housed. *Vysya Bank Ltd. v. Randhir Steel and Alloys P. Ltd.,* (1993) 76 Com Cases 244 (Bom).

Where a company carries on business in a foreign country at a definite and reasonably permanent place, that will constitute residence of the company so as to render the company subject to the jurisdiction of the courts of that country, *Littauer Glove Corpn. v. F.W. Millington (1920) Ltd.,* (1928) 44 TLR 76. But even so the company remains a resident of its original country of incorporation. Thus, a company can have more than one places of residence. *Egyptian Delta Land & Investment Co. Ltd.,* (1907) 51 Sol Jo 211.

The affixture of suit summons on the registered office of the company is sufficient service. *All India General Transport Corporation v. Raghunath Sahay,* (1970) 40 Com Cases 203, 205 (Pat).

Where the notice for execution proceedings could not be served upon the company and it was returned by the bailiff under the remark "that there was no such company at the address given by the petitioner" and therefore the execution proceedings were dismissed, it was held that if the address filed by the company with the Registrar was wrong or if the address supplied by the Registrar was wrong, they could be prosecuted for violation of the requirements of Sections 146, 147 and 234 but they could not be sued under these sections for the recovery of the decretal amount. The decree holder cannot ask that the fine money should be used for satisfaction of the decree. His remedy is to seek execution of the decree at the exact address or initiate winding up proceedings. *C. Hamsa Koya, District Employment Officer v. Sakthi Automobiles P. Ltd.*, (1992) 73 Com Cases 74 (Mad).

§ See also Notes under the heading 'Territorial Jurisdiction' under section 10 and Notes under the heading 'Mode of Service' under section 51.

Registered office at managing director's residence

Departmental Clarification.—The Department has advised that as a rule of prudence, the registered office of the company whose shares are held by a large number of persons who are not tied by bonds of kinship etc. should be located as far as possible in the premises not ordinarily occupied by the Managing Director or Manager. This was clarified on a question as to whether the registered office of a large company could be located at the Managing director's residence. (*Third Annual Report* on Working and Administration of the Companies Act, 1956).

Prescribed Form.—The notice of situation or of change of situation of the registered office to be given to the Registrar should be in Form No. 18, given in *Appendix* 1.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of the matters specified under Rule 3 of the Companies (Compliance Certificate) Rules, 2001. Paragraph 2 under Rule 3 relates to filing of Forms and Returns with the ROC, RD, Central Government, CLB and other authorities and reads as follows:

Paragraph 2.—**The company has duly filed the forms and returns as stated in Annexure "B" to this certificate, with the Registrar of Companies, Regional Director, Central Government, Company Law Board or other authorities within the time prescribed under the Act and the Rules made thereunder.**

Notice of Situation/Change in Situation of Registered Office

Prescribed Check List [*Item (d) of "Other Important Returns"*]

Check whether :

(i) the notice of situation or the notice of change in the situation of registered office in Form-18 has been flied within 30 days of the date of incorporation or change;

(ii) in addition to the above, check also the following (if applicable):

(a) In the case of change in the situation of the registered office outside the local limits of any city, town or village but within the State and within the jurisdiction of the same ROC, check whether:

(i) Form No. 23 has been flied along with the copy of special resolution passed by the company; and

(ii) In case of a listed public company, the resolution for change of registered office was duly passed through postal ballot.

(b) In the case of change in the situation of the registered office outside the local limits of any city, town or village though within the same State but from the jurisdiction of one ROC to the jurisdiction of another ROC, check whether:

(i) confirmation from Regional Director has been received;

(ii) the confirmation has been flied with the ROC within two months from the date of confirmation;

(iii) Form No. 23 has been flied within 30 days along with the copy of special resolution passed by the company;

(iv) Form No. 18 has been flied with both the ROCs within 30 days;

(v) the ROC has certified the registration.

(c) In the case of change in situation of the registered office from one State to another, check whether:

(i) Form No. 18 has been flied with both the ROCs;

(ii) Form No.21 has been filed along with the certified copy of the order of the Company Law Board* with both the ROCs within three months.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

S. 147. Publication of name by company.—(1) Every company—

(a) shall paint or affix its name [1][and the address of its registered office], and keep the same painted or affixed, on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible; and if the characters employed therefor are not those of the language, or of one of the languages, in general use in that locality, also in the characters of that language or of one of those languages;

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

(c) shall have its name [1][and the address of its registered office] mentioned in legible characters in all its business letters, in all its bill heads and letter paper, and in all its notices [2][* * * *] and other official publications; [3][and also have its name so mentioned in all bills of exchange], hundies, promissory notes, endorsements, cheques and orders 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.

(2) If a company does not paint or affix its name [4][and the address of its registered office], or keep the same painted or affixed in the manner directed by clause (a) of sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [5][*five hundred rupees*] for not so painting or affixing its name [4][and the address of its registered

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* Power transferred to the Central Government from the commencement of the Companies (Second Amendment) Act, 2002.

1. Ins. by Act 65 of 1960, s. 34.
2. The word "advertisements" omitted by Act 65 of 1960, s. 34.
3. Subs. by Act 65 of 1960, s. 34, for the words "and in all bills of exchange".
4. Ins. by Act 65 of 1960, s. 34.
5. The words "fifty rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 57 (w.e.f. 13-12-2000).

office], and for every day during which its name [6][and the address of its registered office], is not so kept painted or affixed.

(3) If a company fails to comply with clause (b) or clause (c) of sub-section (1), the company shall be punishable with fine which may extend to [7][*five thousand rupees*].

(4) If an officer of a 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 in the manner aforesaid;

(b) issues or authorises the issue of, any business letter, bill head, letter paper, notice [8][* * * *] or other official publication of the company wherein [9][its name and the address of its registered office are] not mentioned in the manner aforesaid;

(c) 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 wherein its name is not mentioned in the manner aforesaid; or

(d) issues, or authorises the issue of, any bill of parcels, invoice, receipt or letter of credit of the company, wherein its name is not mentioned in the manner aforesaid;

such officer or person shall be punishable with fine which may extend to [10][*five thousand rupees*], and shall further be personally liable to the holder of the bill of exchange, hundi, promissory note, cheque or order for money or goods, for the amount thereof, unless it is duly paid by the company.

NOTES

Eng. Act, 1948 : Sec. 108.
Eng. Act, 1985 : Secs. 348, 349 and 350.

Previous Act : Secs. 73 and 74.

Companies (Amendment) Act, 1960

Requirement as to publicity of name.—The changes made by the Amendment Act of 1960 were designed to dispense with the mentioning of name and address of the registered office in purely commercial advertisements and to mention the address in the letters, bill heads of the company. The recommendations of Companies Act Amendment Committee, 1957 and the changes made by the Joint Committee explain the amendments, thus:

"It has been pointed out that the requirement of section 147(I)(c) that the name of the company shall be mentioned *inter alia* in all kinds of advertisements causes inconvenience to business houses among whom it is customary to push their sales under trade names without mentioning the company's name, address etc. in full. The reference to "advertisement" in section 147(I)(c) is perhaps to the advertisement referred to in specific sections of the Act like sections 2(36), 53(3), 72(2) etc. but the language is comprehen-

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6. Ins. by Act 65 of 1960, s. 34.
7. The words "five hundred rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 57 (w.e.f. 13-12-2000).
8. The word "advertisement" omitted by Act 65 of 1960, s. 34.
9. Subs. by Act 65 of 1960, s. 34, for the words "its name is".
10. The words "five hundred rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 57 (w.e.f. 13-12-2000).

sive. The Cohen Committee pointed out that the word "advertisements" which was found in section 93 of the English Act of 1929 should be removed as the provision had, in practice, been disregarded and no harm was likely to ensue from its deletion. In India, too, the practice appears to be that in trade and commercial advertisements the name of the company is not mentioned in full but only the trade-mark or brand name of the product advertised. This is so particularly in the case of advertising media other than the Press, such as dealer aids, display material hoardings, posters, mobile advertisement, radio, cinema slides etc. In our opinion, the word "advertisements" might be deleted from section 147 because the other words found in the section, namely, "notices and other official publications" are wide enough to include important business advertisements. We are recommending a similar amendment of section 595(c) in the case of foreign companies. It has also been represented to us that while it is desirable that the address of the registered office of the company should be mentioned in all its business letters, bill heads etc. under the first part of section 147(I)(c), it is not necessary to do so in the documents mentioned in the latter part. We accept the suggestion and recommend the insertion of the words "and the address of its registered office" after the word "name" in the first line of section 147(I)(c) and the addition of the words "its name" after the word "and" and before the words "in all bills of exchange etc. etc." in the fourth line of the clause. [*Report* : para 59, pages 52, 53]

"The Committee consider that besides the name of the company, the address of its registered office should also be painted or affixed outside every office or place in which its business is carried on. This has been provided in the amended clause." (Para 33 of the *Joint Committee Report*).

Note that the name of the company, need not be written in the English language. It is enough if it is in one of the local languages.

Besides the name of the company, the address of its registered office is required to be painted or affixed, outside every office or place in which its business is carried on, besides being mentioned in the several documents and papers as detailed in the section.

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount :

(1) from 50 rupees to 500 rupees under sub-section (2);

(2) from 500 rupees to 5000 rupees under sub-sections (3) and (4).

Object of the section

The object of insisting on the publication of the name and address of the company as detailed in the section is to make the company itself continually to bring to the notice of all those having any dealings with it the fact of its being a company with "limited" liability.

Publishing the name in a name board "on the outside of every office" does not require that the board should be kept outside the compound wall of the building. It is enough, if it is affixed just outside the office premises. See *Batliwala (Dr. H.L.) Sons & Co. v. Emperor,* (1941) 11 Com Cases 154 : AIR 1941 Bom 97.

The requirements of the section do not 'however' preclude a company from carrying on business in other names also, while not concealing its own name as the owner thereof. *Rajendra Prasad Oil Mills Ltd. v. Smt. Chuni Devi,* (1968) 2 Comp LJ 137 (All–DB).

The use of abbreviation 'Ltd.' instead of 'Limited' or 'Co.' for 'company' or similar abbreviations does not make the name of the company incorrect and does not render the directors or other officers personally liable. *Re, Banque de l' Indochine v. Euroseas Group Finance Co. Ltd.,* (1981) 3 All ER 198 (QB). However, omitting the word "limited" completely is a breach. *Penrose v. Martyr,* (1858) EB&E 499 : 28 LJQB 28; *Atkins & Co. v. Wardle,* (1889) 5 TLR 734; *British Airways Board v. Parish,* (1979) 2 Lloyd's Rep 361 (CA); *Blum v. OCP Repartition SA,* 1988 BCLC 170 (CA). In *Basudeolal Modi*

v. Madanlal, AIR 1967 Ori 107 a company secretary signing without using the word "limited", was held personally liable.

It is a breach to abbreviate a proper name to an initial. *Durham Fancy Goods Ltd. v. Michael Jackson (Fancy Goods) Ltd.,* (1968) 2 All ER 987 where 'Michael Jackson' was abbreviated to 'M Jackson' and this was held as not capable of conveying the full word unambiguously as 'Ltd.' and 'Co.' are capable of doing. A minor mistake in the spelling of the name of a company does not invalidate the advertisement for winding up. *Re, J&P Sussman Ltd.,* (1958) 28 Com Cases 457 : (1958) 1 WLR 519 (Ch D). Omission of the word 'Limited' from the name of the company and describing the company as 'Firm' is a mere misdescription which can be corrected and is not fatal to the suit. *Whittam v. WJ Daniel & Co. Ltd.,* (1962) 32 Com Cases 669 : (1961) 3 All ER 796 (CA).

Exhibition of name in local language necessary

Department's Clarification.—There appears to be some doubt in commercial quarters as to the language or languages to be employed in exhibiting the names of companies outside their offices or places of business as required by sub-section (1)(a) of section 147 of the Companies Act. Unlike the corresponding section (Section 73) in the repealed Indian Companies Act of 1913, which required the name of a company to be shown in the English language, section 147(1)(a) enjoins on all companies to paint or affix their names, outside their offices or places of business in the language or one of the languages in general use in the locality. Exhibition of the names in English alone without, at the same time, showing them in the local language will not, therefore, be sufficient compliance with the requirements of the section. (*Press Note,* dated July 4, 1956).

'Notice' to be liberally construed for purposes of publication of name [Sub-s. (1)(c)]

Department's Clarification.—In a query to the Department: "Section 147 provide for publication of the address of the registered office in all its "notices" along with other official publications but the word "notices" was not clearly defined. It should, therefore, be clarified as to whether the word "notices" applied to notices to be given under the Act or it also included the other notices such as notice inviting tenders, employment notices, notice for lost shares or debenture certificates, notice for a change of name by the company or closure of register of members, etc.

The Department expressed the view: "As the expression "notice" has not been defined in the Companies Act or in the General Clauses Act, the word "notice" should be liberally construed in the context of section 147. (*Company News & Notes,* dated 1st July, 1963).

Name on goods

The section does not require that the full name of the company with word "limited" should be published in the manner required by this section, on the goods manufactured or supplied by the company. Any abbreviated form of its name may be used on the goods. But in *Maxform SpA v. Mariam,* (1979) 2 Lloyds Rep 385 it was said that putting a trade name or business name, and not putting the registered corporate name, of a company on any of the documents covered by S.147(1) is a breach of that provision. This point was not considered in appeal in *Penrose v. Martyr,* (1858) EB&E 499; *Maxform SpA v. Mariam,* (1981) 2 Lloyds Rep 54 (CA).

Personal liability of officer in default

Note that the failure to comply with the provisions of the section is not only punishable but also makes the officer or person concerned personally liable. *Cf. Basudeo Lal Modi v. Madanlal Chapolia,* AIR 1967 Ori 107. But he will be relieved of his personal liability on the company paying the amount due under the document.

Liability even when non-compliance is due to oversight.—Where, through an oversight, however innocent and honest, an officer of a company fails to comply with any one requirement of the provisions of sub-section (4), the creditor or other person even though the creditor or other person concerned knows that the bill, cheque or pronote was executed only for and on behalf of the company, the personal liability of the officer cannot be avoided.

Bills of Exchange, Cheques and other Negotiable Instruments.—Where the name of the company was "South Shields Salt Water Baths Co. Ltd." and it was described in a bill

of exchange as "Salt Water Baths Co. Ltd." the directors were held personally liable on the bill. *Atkins and Co. v. Wardle,* (1889) 58 LJ QB 377. **Affirmed** (1889) 5 TLR 743 (CA). See also *Durham Fancy Goods Ltd. v. Michael Jackson (Fancy Goods) Ltd.,* (1968) 2 All ER 987 : (1968) 2 Lloyd's Rep 98. Where the name of the company was "Clipper International Communications Sarl", the omission of the label "Sarl" from the contract signed by the agent *per pro* was held to be a material non-disclosure making the agent personally liable. *Bailey v. de Kerangot,* The Independant, Jan. 10, 1994 (UK).

In *Hendon v. Adelman,* (1973) 117 Sol Jo 631 the overprinted account title on a cheque drawn by the directors of "L & R Agencies Ltd." omitted the word '&', the directors were held personally liable on the cheque. Similarly where the word ' London' in parenthesised form was not used in the name of the company in drawing a cheque, the directors became personally liable on the cheque. *Barber & Nicholls Ltd. v. R & G Associates (London) Ltd.,* (1981) 132 N LJ 1076. A director was also held personally liable for signing a promissory note intending to do so on behalf of the company, but on which the name of the company was not accurately stated. *Lindholst & Co. A/S v. Fowler,* 1988 BCLC 166 (CA); *Blum v. OCP Repartition SA,* 1988 BCLC 170 (CA). If the company's name is given correctly as drawee then this is sufficient to comply with s. 147(1)(c) and it does not matter that it is given incorrectly in the acceptance. *Dermatine Co. Ltd. v. Ashworth,* (1905) 21 TLR 510. In *Atkin v. Wardle,* (1889) 5 TLR 734 (CA), the name of the company was given incorrectly both as drawee and as acceptor, but the company's correct name could have been formed by taking words from both incorrect names, it was held that this was not sufficient to comply with s.147(1)(c). See also *Penrose v. Martyr; Maxform SpA v. Mariam,* (1981) 2 Lloyd's Rep 54 (CA).

In *Jenice Ltd. v. Dan,* (1993) BCLC 1349 (QBD) the cheque signed by a director bore the name 'Primkeen Ltd.' whereas the name of the company was 'Primekeen Ltd.'. The cheque was dishonoured and the holder sued the director. The court held that the purpose of the section is that persons dealing with companies should come to know that they are dealing with a limited company with a particular name. The company's name in this case was mentioned on the cheque but misspelt and the circumstances were such as did not lead to any of the vices against which the statutory provisions are directed. Hence, the director was not to be held personally liable.

The requirement of the section was also held to be not complied with when the cheques in question carried the company's bank account number but not the name of the company. *Rafsanjan Pistachio Producers Co-operative v. Reiss,* 1990 BCLC 352 (QBD). The mere fact that the payee of the cheques asked the director to rectify the cheques by inserting on them the company's name did not estop the payees from suing directors on their personal liability on cheques issued by them without bearing the company's name. Further rectification would have served no purpose except fallacious impression that the directors would thereby be saved from personal liability. The liability being a statutory liability arising by virtue of the section it could not be avoided by that method.

The liability imposed by this Section on an officer for issuing a cheque on which the company's name is not properly printed/written is not identical in its legal consequences with that of a guarantor or surety under a contract of guarantee. When such a cheque was dishonoured as not duly paid, the liability arose on the date on which the cheque or bill was not duly paid and it cannot be said that the liability having come into existence could be affected thereafter in the same manner as the liability of a guarantor under the ordinary law of principal and surety. *British Airways Board v. Parish,* (1979) 2 Lloyd's Rep 361 (CA).

The use of an additional word, *e.g.*, 'old' which was not the part of Company's name rendered the directors liable. *Nassau Steam Press v. Tyler,* (1894) 70 LT 376.

To be liable the officer or other person must not only authorise the signing of the relevant document but authorise it in such a way that the name of the company does not properly appear. *John Wilkes (Footwear) Ltd. v. Lee International (Footwear) Ltd.,* 1985

BCLC 444 (CA). The words holder of the bill, etc. have been taken to mean in reference to an order for goods as the person to whom the order was addressed. *Civil Service Co-operative Society Ltd. v. Chapman,* (1914) 30 TLR 679.

Mode of authenticating negotiable instruments on company's behalf

§ For a detailed study under this heading, see Notes under Section 47, *ante.*

Validity of the document

The fact that a company is misprescribed or misnamed in a document does not make the document ineffective provided it was clear that the document was intended to be made in the name of the company. The section only prescribes the additional liability of the officers concerned as long as the company does not honour the document. *Bird & Co. (London) Ltd. v. Thomas Cook & Son (Bankers) Ltd.,* (1937) 2 All ER 227; *F. Goldsmith (Sicklesmere) Ltd. v. Baxter,* (1969) 3 All ER 733; *Davies v. Elsby Brothers Ltd.,* (1961) 1 WLR 170. The fact that an officer of the company is liable in respect of a document which should have used the company's name in full but did not do so, would not exonerate the company if it is liable otherwise, and if the company is liable, it would appear that the officer or agent who has been compelled to satisfy the obligation may recover an indemnity from it. *Brook's Wharf and Bull Wharf Ltd. v. Goodman Bros.,* (1936) 3 All ER 696.

Specifying authorised capital on share certificate

Department's Circular.—It is not obligatory to publish the authorised capital of the Company on its share certificates. However, where the Company does so, it would be mandatory in terms of Sec. 148, to publish the subscribed and the paid-up capital also. Paid-up capital for the purpose would mean the capital paid-up at the time of the issue of the share certificate [*Circular No.* 8/35(147)/66-CL-V, dated 13th January, 1967].

Share certificate is not official publication within section 147(1)(c)

Department's Clarification.—The question is whether a share certificate is an official publication within the meaning of section 147(1)(c) of the Companies Act, 1956. It will be seen that in terms of section 82 of the Act the shares are moveable properties transferable in the manner provided in the Articles of the company. Section 83 provides that each such share shall be distinguished by its appropriate number. Section 84 provides that a certificate under the common seal of the company specifying any shares held by any member shall be *prima facie* evidence of the title of the member to such shares. Thus shares are moveable properties transferable in the manner provided in the Articles of the company and the share certificates are certificates of title and are moveable properties but are not publications in the nature of prospectus, balance sheets, profit and loss accounts, notices and advertisements. The conclusion reached, therefore, is that the share certificate is not an official publication within the meaning of section 147(1)(c) of the Companies Act, 1956. (*Circular No.* 3 of 73, dated 3-2-1973).

Trading in altered name without getting it registered

Where a company alters its name by special resolution and starts trading in that name without getting it registered with the Registrar, it is an improper use of the company's name. This court distinguished this phenomenon from a pre-incorporation contract because a company does not commence a new life after altering its name. *Oshkosh B'Ghos Inc. v. Dan Marbel Inc. Ltd.,* 1989 BCLC 507 (CA). The same pragmatic view was adopted in the Scottish case of *Vic Spence Associates v. Balchin,* 1990 SLT 10 (Scot).

Exemption to section 25 companies

Section 25 companies are exempted from compliance of the provisions of this section. (*S.O.* No. 1578, dated 1-7-1961).

Provision in articles on mode and manner of keeping seal and seal to be metallic

Department's Clarification.—Though the Companies Act, 1956 or the model regulations in Table 'A' of Schedule I to the Act do not provide for the form and manner in which the common Seal of a company should be kept, *i.e.* whether a metallic one or a rubber stamp—it is understood that the general practice obtaining among enlightened company management is to use metallic 'Common Seals' having regard to the importance of the use of such seals in the day-to-day working of companies. In view of the above, as also the wordings of section 147(1)(b) of the Act, it is considered that the view that only a me-

tallic seal should be used is correct. The provisions, if any, in the articles of association of the concerned company should also be looked into in this connection to see if they clearly lay down the mode and manner of keeping a common seal. (*Letter No.* 8/70(147)/64-PR, dated 8-12-1964)

Penalty for default.—*(1) Company's name outside its registered office.*—If a company does not paint or affix its name and address of its registered office as required by section 147(1), the company and every officer of the company who is in default are punishable with fine up to Rs. 500 [*sub-sec. (2)*].

(2) Company's name on its seal or its business letters, etc.—If a company fails to have its name engraved in legible characters on its seal or to have its name and address of the registered office mentioned in legible characters in all its business letters, bill heads, letter papers, notices, etc., the company is punishable with fine up to Rs. 5,000. [*sub-sec. (3)*].

(3) Personal liability of officer for non-compliance with section 147(4).—Where an officer of a company fails to comply with any of the requirements of the provisions of section 147(4), he is punishable with fine up to Rs. 5,000 and will further be personally liable to holder of the bill of exchange, promissory note, etc. for the amount thereof, unless it is duly paid by the company. [*sub-sec. (4)*].

Compoundable Offences.—The offences are compoundable under section 621A.

Model regulations as per Table-A.—For model regulations in the Articles of Association authorising the Board to appoint signatories of cheques, bills, etc., see Regulation 70 of Table-A.

Secretarial Practice Notes : Publication of name and address

Check whether:

(i) the name and address of the registered office of the company have been prominently displayed outside every place of business and office in legible letters?

(ii) the name and address are engraved in legible characters in the common seal and also mentioned legibly in all documents specified in the section?

(iii) change of name, if any, intimated to all concerned authorities *viz.* under Stock Exchange Regulations, Shops and Establishments Act, etc.?

S. 148. Publication of authorised as well as subscribed and paid-up capital.—(1) Where any notice, advertisement or other official publication, or any business letter, bill head or letter paper, of a company contains a statement of the amount of the authorised capital of the company, such notice, advertisement or other official publication, or such letter, bill head or letter paper, 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) If default is made in complying with the requirements of sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [1][*ten thousand rupees*].

NOTES

Previous Act : Sec. 75.

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 1,000 rupees to 10,000 rupees under sub-section (2).

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1. The words "one thousand rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 58 (w.e.f. 13-12-2000).

Scope of Section

The provision that where any notice, advertisement, or other official publication of a company mentions the authorised capital, it should also mention the subscribed and paid-up capital as well, has been extended to business letters, papers and bill heads.

Department's Circular.—This section does not require a company to specify its authorised capital on its share certificates. See (*Circular No.* 8/35(147) 66-CL-V, dated 13-1-1967). For the text of the circular see Notes under S. 147.

Penalty for default [Sub-section (2)]

Where any notice, advertisement or other official publication of a company mentions the authorised capital, it is required to mention the subscribed and paid-up capital as well. Failure to do so shall attract penalty for the company and every officer of the company who is in default by way of fine up to Rs. 10,000.

Compoundable offence.—The offence is compoundable under section 621-A.

Secretarial Practice Notes : Publication of capital

Check whether all documents (specified in the section) bearing a statement of authorised capital also mention the subscribed and paid-up capital?

Restrictions on Commencement of Business

S. 149. Restrictions on commencement of business.—(1) Where a company having a share capital has issued a prospectus inviting the public to subscribe for its shares, the 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;

(b) every director of the company has paid to the company, on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription;

(c) no money is, or may become, liable to be repaid to applicants for any shares or debentures which have been offered for public subscription by reason of any failure to apply for, or to obtain permission for the shares or debentures to be dealt in on any recognised stock exchange; and

(d) there has been filed with the Registrar a duly verified declaration[1] by [2][one of the directors or the secretary or, where the company has not appointed a secretary, a secretary in whole-time practice] in the prescribed form[1], that clauses (a), (b) and (c) of this sub-section, have been complied with.

(2) Where a company having a share capital has not issued a prospectus inviting the public to subscribe for its shares, the company shall not commence any business or exercise any borrowing powers, unless—

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1. Form No. 19 of the Companies (Central Government's) General Rules & Forms, 1956 is the prescribed form of declaration relevant for the section.
2. The words "one of the directors or the secretary" subs. by the Companies (Amendment) Act, 1988 w.e.f. 15-6-1988, s. 20 *vide* GSR No. 559(E) dt. 10-6-1988.

(a) there has been filed with the Registrar a statement in lieu of prospectus;

(b) every director of the company has paid to the company, on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares payable in cash; and

(c) there has been filed with the Registrar a duly verified declaration[3] by [4][one of the directors or the secretary or, where the company has not appointed a secretary, a secretary in whole-time practice] in the prescribed form[3], that clause (b) of this sub-section has been complied with.

[5][(2-A) Without prejudice to the provisions of sub-section (1) and sub-section (2) a company having a share capital, whether or not it has issued a prospectus inviting the public to subscribe for its shares, shall not at any time commence any business—

(a) if such company is a company in existence immediately before the commencement of the Companies (Amendment) Act, 1965, in relation to any of the objects stated in its memorandum in pursuance of clause (c) of sub-section (1) of section 13;

(b) if such company is a company formed after such commencement, in relation to any of the objects stated in its memorandum in pursuance of subclause (ii) of clause (d) of sub-section (1) of the said section,

unless,—

(i) the company has approved of the commencement of any such business by a special resolution passed in that behalf by it in general meeting; and

(ii) there has been filed with the Registrar a duly verified declaration[6] by [7][one of the directors or the secretary or, where the company has not appointed a secretary, a secretary in whole-time practice] in the prescribed form[6], that clause (i) or as the case may be, sub-section (2-B) has been complied with;

and if the company commences any such business in contravention of this subsection, every person who is responsible for the contravention shall, without prejudice to any other liability, be punishable with fine which may extend to [8][*five thousand rupees*] for every day during which the contravention continues.

Explanation.—A company shall be deemed to commence any business within the meaning of clause (a) if and only if it commences any new business which is

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3. Form No. 20 of the Companies (Central Government's) General Rules & Forms, 1956 is the prescribed form of declaration relevant for the section.
4. The words "one of the directors or the secretary" subs. by the Companies (Amendment) Act, 1988 w.e.f. 15-6-1988, s. 20 *vide* GSR No. 559(E), dt. 10-6-1988.
5. Sub-sections (2-A) and (2-B) were inserted by section 15 of the Companies (Amendment) Act (XXXI of 1965) (w.e.f. 15-10-1965).
6. Form No. 20A of the Companies (Central Government's) General Rules & Forms, 1956 is the prescribed form of declaration relevant for the section.
7. Subs. by the Companies (Amendment) Act, 1988, for the words "one of the directors or the secretary", s. 20 w.e.f. 15-6-1988 *vide* GSR No. 559(E) dt. 10-6-1988.
8. The words "five hundred rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 59 (w.e.f. 13-12-2000).

not germane to the business which it is, carrying on at the commencement of the Companies (Amendment) Act, 1965, in relation to any of the objects referred to in the said clause.

(2-B) Notwithstanding anything contained in sub-section (2-A) where no such special resolution as is referred to in that sub-section is passed but the votes cast (whether on a show of hands, or as the case may be, on a poll) in favour of the proposal to commence any business contained in the resolution moved in that general meeting (including the casting vote, if any, of the chairman) by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy exceed the votes, if any, cast against the proposal by members so entitled and voting, the Central Government may on an application made to it by the Board of Directors in this behalf allow the company to commence such business as if the proposal had been passed by a special resolution by the company in general meeting[9].]

(3) The Registrar shall, on the filing of a duly verified declaration in accordance with the provisions of sub-section (1) or sub-section (2), as the case may be, and in the case of a company which is required by sub-section (2) to file a statement in lieu of prospectus, also of such a statement, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled.

(4) Any contract made by a company before the 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.

(5) 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 applications for debentures.

(6) 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 punishable with fine which may extend to [10][*five thousand rupees*] for every day during which the contravention continues.

(7) Nothing in this section shall apply to—

(a) a private company; or

(b) a company registered before the first day of April, 1914, which has not issued a prospectus inviting the public to subscribe for its shares.

[11][* * * *]

NOTES

Eng. Act, 1948 : Sec. 109
Eng. Act, 1985: Sec. 117

Previous Act : Sec. 103

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9. A declaration in Form No. 20A of the Companies (Central Govt's) General Rules & Forms is also to be filed under this sub-section.
10. The words "five hundred rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 59 (w.e.f. 13-12-2000).
11. Sub-section (8) omitted by Act 65 of 1960, s. 35.

Companies Act, 1956

This section, corresponds to section 103 of the Indian Companies Act, 1913 and section 109 of the English Act. Section 109(1)(c) of the English Act has been incorporated as suggested at page 299 of the Company Law Committee's Report. The addition will prevent companies from commencing business until it has been ascertained that no money is liable to be repaid to applicants for shares or debentures offered for public subscription by reason of failure to obtain permission for the shares or debentures to be dealt in on a stock exchange." (*Clause* 142 of the Companies Bill, 1953).

Companies (Amendment) Act, 1965

Reasons for insertion of sub-sections (2-A) and (2-B).—Sub-sections (2A) and (2B) were amended in their present form by the Joint Committee who explained the same as follows : The Committee feel that this clause should not apply to—

(a) any existing company except where it commences any new business which is not germane to the business which it is already carrying on at the commencement of this Bill, when enacted;

(b) any new company except where it commences any business in relation to its objects which are not its main objects or objects incidental or ancillary thereto.

The Committee also feel that private companies should continue to be excluded from the purview of Section 149 as at present. Sub-clause (b) of the clause has accordingly been omitted.

The Committee further feel that even if a special resolution cannot be passed when it is required, the Company Law Board should be empowered to allow the company to commence such business even if it is passed by a simple majority which is not sufficient for the passing of a special resolution.

The clause has been amended accordingly." (*Report* : Para 18).

The amendments made by the Joint Committee were adopted by Parliament except that in the place of the words "Company Law Board" the words "Central Government" were substituted.

These two sub-sections as well as the amendments in Section 13 were inserted on the recommendations, in para 6 of the Report of the Vivian Bose Commission as endorsed by the Daphtary-Sastri Committee, with some modifications.

The relevant passages from the Commission's Report and the Committee's observations are quoted in the Notes under Section 13.

Companies (Amendment) Act, 1988

This section has been amended to empower a secretary in whole-time practice to verify the declaration which is required to be filed under sub-sections (1), (2) and (2-A), in addition to the categories of persons already named therein, *viz.*, a director or secretary. The effect of the amendment is that if the company does not have a secretary, it can get the declaration signed by a secretary in whole-time practice.

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount :

(1) from 500 rupees to 5000 rupees under sub-section (2A);

(2) from 500 rupees to 5000 rupees under sub-section (6).

Meaning of "germane" [Sub-section (2A) Explanation]

The Explanation to this sub-section provides that a company shall be deemed to commence any business only if it commences (i) a new business and (ii) this new business is not 'germane' to the existing business. The Act does not define the word 'germane'. The RANDOM HOUSE DICTIONARY defines 'germane' as 'closely or significantly related; relevant; pertinent'. BLACK'S LAW DICTIONARY, 5th Ed. defines 'germane' as 'in close rela-

tionship; appropriate; relative; pertinent'. Therefore, the passing of a special resolution and filing of the same with the Registrar are necessary only if the business which the company intends to carry on is a new business and it is not germane, *i.e.* is unrelated to the existing business. See P. RAMNATHA AIYAR LAW LEXICON 2nd Edn., 1997.

Where a contract to start a new business which requires approval under this sub-section is entered into without complying with the formalities under the sub-section, the contract does not become void but is provisional only, *i.e.* it does not bind the company until the formalities are complied with. See *Otto Electrical Mfg. Co. (1905) Ltd., Jenkin's Claim,* (1906) 2 Ch 390, **followed** in *Ambica Textiles Ltd., Re,* (1950) 20 Com Cases 160, 163 : AIR 1950 Cal 491. See also *New Druce-Portland Co. Ltd. v. Blakiston,* (1908) 24 TLR 583.

Stage of commencement of new business: Restrictions on exploratory activities

Section 149 provides that a company should not commence any business which is not germane to its existing business without complying with certain formalities prescribed in the Act. However, the formalities have to be complied with only before actual commencement of business. The restrictions do not apply to exploratory activities for commencement of business. For example, research and development, discussions with management consultants, foreign collaborators, Government officials, preparing feasibility reports are exploratory activities before the business can be taken up. Mere exploratory activities will not require compliance of the formalities prescribed in section 149, even though they may involve significant expenditure by the company.

Department's Criterion—whether new activity is germane to original business.—"The guiding criterion in such cases is whether the new activity is germane to the original business or not. In case the reply is 'Yes', no special resolution is necessary and *vice versa.* This is the general enunciation of the principle." [Govt. of India publication, Clarifications and Circulars on Company Law, 1977 Edition, page 72].

Payment in cash

As to what is payment in cash, see Notes under section 75, *Cf. Malabar Iron and Steel Works, Ltd. v. ROC,* (1963) 33 Com Cases 886 : AIR 1964 Ker 311.

Restrictions on commencement of business

To the restrictions already existing a further restriction under sub-section (1)(c) on the lines of section 109(1)(c) of the English Act is added, requiring a condition under which there should be no liability for repayment of any money to applicants for shares or debentures, by reason of failure to apply for or obtain permission for the shares or debentures to be dealt in on a recognised stock exchange. The reason for the addition of the sub-section (1)(c) is this: "The addition will prevent companies from commencing business until it has been ascertained that no money is liable to be repaid to applicants for shares or debentures offered for public subscription by reason of failure to obtain permission for the shares or debentures to be dealt in a stock exchange". (*Notes on clause* 142 of Bill.)

It has to be noted that the language of the section is that "the company shall not commence any business". This will imply that the company shall not be bound by any transactions whatever in the nature of business.

"Commence any business" does not mean merely the business for which the company was started, but any transaction including sale, purchase, etc. *Kishangarh Electric Supply Co. Ltd. v. United State of Rajasthan,* AIR 1960 Raj 49. But the taking of such preliminary steps as the issuing of prospectus, making of provisional contracts, or allotment of shares or the appointment of experts or technicians will not be considered as "commencement of business".

Commencement Certificate

The certificate is conclusive evidence that a company is entitled to commence business. No distinction can be drawn between the power to commence business and the power to

borrow. The company is entitled to do both after the issue of the certificate. *Kodak Ltd. v. Sreenivasan,* (1936) 6 Com Cases 440, 446 (Mad); *Equity Insurance Co. v. Dinshaw & Co.,* (1940) 10 Com Cases 93, 99 (Oudh).

A writ cannot be issued to cancel the commencement certificate of a company under the Companies Act. *Maluk Mohamed v. Capital Stock Exchange Kerala Ltd.,* (1991) 72 Com Cases 333 (Ker).

Commencement certificate not required by private companies becoming public

Department's Clarification.—The provisions of sections 149 and 165 of the Companies Act, 1956 relating to the certificate of commencement of business and the statutory meeting would not be applicable to a private company which has converted itself into a public company. (*Department's File No.* 44/50-CL-IV/62).

Commencement certificate (s. 149) and statutory meeting (s. 165) necessary for companies registered under Part IX

Department's Clarification.—A point has been raised as to whether a public company registered under Part IX of the Companies Act, 1956 is required to comply with the provisions of sec. 149 and sec. 165 of the Act. This Department is of the view that as provided under sub-section (1) of section 578, all the provisions of the Act shall be applicable to such companies subject to the exceptions as enumerated under clauses (a) to (g) of the said sub-section of the Act. Therefore, the provisions of Ss. 149 and 165 of the Act shall be fully applicable to the public companies registered under Part IX of the Act. (*Circular No.* 24/75, dated 20-11-1975).

The effect of the section is to make the company not bound by any contract or transaction until and unless the company is entitled to commence business and on the commencement of business, without any further act on the part of the company to make it free to be bound in respect of all transactions from the date of incorporation. See *Re, Otto Electrical Manufacturing Co., (1905) Ltd., Jenkin's Claim,* (1906) 2 Ch 390 **followed** in *Ambica Textiles Ltd., Re,* (1950) 20 Com Cases 160 : AIR 1950 Cal 491.

Contracts "shall become binding" [Sub-section (4)]

The words "shall become binding" in sub-section (4) do not mean that the company is bound to recognise all contracts made between the date of incorporation and the date of commencement of business. If a contract is oppressive, fraudulent or voidable for any reason, the company may avoid them by taking appropriate proceedings. The sub-section only means that contracts which were till then provisional would become good thereafter, for what they might be worth.

Any liability incurred under any contract which remains provisional and does not become binding cannot be enforced against the company. If the company has gone into winding up the shareholders (contributories) cannot be called upon to make any contribution towards such liability. *Merchants Ltd., Re,* (1932) 2 Com Cases 407, 410 (Lah).

Section 149 of Companies Act and S. 12(1-B) of SEBI Act are independent.—A certificate for commencement of business under the Companies Act does not by itself satisfy the requirement of s. 12 (1-B) of the SEBI Act. They are independent requirements. One cannot be a substitute for the other. *Phenomenal Planatations Ltd. v. SEBI,* (2002) 48 CLA 250 (SAT).

Contracts made before and after incorporation and "provisional contracts"

A contract made before incorporation of a company will not bind the company unless a new contract embodying the terms of the old one or adopting the old one is made afresh. See *Natal Land and Colonisation Co. v. Pauline Colliery and Development Syndicate,* 1904 AC 120; *Surrendro & Co. v. Liquidator, Punjab Tannery Co.,* AIR 1923 Lah 100. For an exhaustive discussion of the subject reviewing all English authorities see *Newborne v. Sensolid (Great Britain Ltd.),* (1953) 1 All ER 708 (CA) : (1954) 24 Com Cases 159.

As regards contracts made by the company itself after incorporation, such contracts will become binding on the company only on its becoming entitled to commence busi-

ness. The expression "provisional," means that the contract will not be binding on the company until the certificate of commencement of business is granted by the Registrar. If it is liable to be avoided for fraud or misrepresentation, the company may question its validity. The wording of the sub-section is so wide that it may apply to all contracts including contract of membership itself, that is to say, even allotment of shares to a person may be questioned.

§ See also Notes under S. 46 under heading "Contract made before incorporation" and "section 575 vesting of property on registration" under the heading "Scope of section".

Penalty for default [Sub-sections (2-A) and (6)]

If a company commences any business or exercises borrowing powers in contravention of sub-section (2-A) or sub-section (6), every person who is responsible for the contravention is, without prejudice to any other liability, punishable with fine which may extend to five thousand rupees for every day during which the contravention continues.

Compoundable offence.—The offence is compoundable under section 621A.

Private company [Sub-section (7)].—This section does not apply to a private company, even if it is a subsidiary of a public company. It also does not apply to a company registered before the first day of April, 1914, which has not issued a prospectus inviting the public to subscribe for its shares.

Government companies exempted: Section 149(2A) does not apply to a wholly owned Government Company. *Notification* : GSR 577(E), dated 16th July, 1985. See Notes under Section 620.

Prescribed Forms: For forms of declaration to be filed under sub-sections (1), (2), (2-A) and (2-B), see Forms 19, 20 and 20-A in *Appendix* 1.

ICSI Guidance Note on Compliance Certificate (August, 2003)

***Commencement of New Business stated in 'Other Objects' in the Memorandum in the Case of Public Companies**

Check List

Check whether:

(i) a special resolution was passed under section 149(2A) before commencement of such new business and Form No. 23 was filed with the ROC;

(ii) the shareholders approved the resolution by a simple majority, and if so check whether approval was obtained from the Central Government;

(iii) a duly verified declaration by one of the directors or the secretary or, where the company has not appointed a secretary, by a PCS in Form No. 20A was filed with the ROC.

* This matter is not directly referred to in the 33 paragraphs appended to the Form prescribed under the Companies (Compliance Certificate) Rules. The Check List given by the ICSI under the heading 'Check List for other Compliances' [*Item 4(i)*] is for the guidance of CSP who may, in the course of his scrutiny, come across non-compliance with regard to this matter. CSP need not qualify such non-compliance.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

Check further—

In the case of a new company check whether:

(i) the company had complied with the prescribed formalities to obtain certificate of commencement of business? (Form 19 or 20)

(ii) borrowing powers were not exercised before obtaining the certificate of commencement of business?

(iii) directors of company had complied with requirements regarding payment towards shares?

Documents Involved: 1. Certificate of Commencement of Business, 2. Prospectus/Statement in lieu of Prospectus, 3. Memorandum and Articles, 4. Minutes of Board/General Meeting, 5. Forms 19, 20, 20A and 23, 6. Approval of the Central Government, if any, 7. Annual Report.

Registers of Members and Debenture-holders

S. 150. Register of members.—(1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars:—

(a) the name and address, and the occupation, if any, of each member;

(b) in the case of a company having a share capital, the shares held by each member, [1][* * * * *] [2][distinguishing each share by its number except where such shares are held with a depository] and the amount paid or agreed to be considered as paid on those shares;

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

(d) the date at which any person ceased to be a member:

Provided that where the company has converted any of its shares into stock and given notice of the conversion to the Registrar, the register shall show the amount of stock held by each of the members concerned instead of the shares so converted which were previously held by him.

(2) If default is made in complying with sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [3][*five hundred rupees*] for every day during which the default continues.

NOTES

Previous Act : Sec. 31.

Eng. Act, 1948 : Sec. 110.
Eng. Act, 1985 : Secs. 191(7), 352 and 353.

The place where the register is to be kept is the registered office of the company or such other place as provided in Section 163(1).

The register is open to the inspection of members and non-members as provided in Section 163(2).

No notice of any trust can be entered in the register [Section 153].

Depositories Act, 1996 and Depositories Related Laws (Amendment) Act, 1997

Clause (b) of sub-section (1) was amended by *omitting* the words "distinguishing each share by its number" by the Depositories Act, 1996 (w.e.f. 20-9-1995 being the date of promulgation of the Ordinance). This clause was again amended by the Depositories Re-

1. The words "distinguishing each share by its number," omitted by the Depositories Act, 1996 (w.e.f. 20-9-1995).
2. Inserted by Depositories Related Laws (Amendment) Act, 1997 (w.e.f. 15-1-1997).
3. The words "fifty rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 60 (w.e.f. 13-12-2000).

lated Laws (Amendment) Act, 1997 (w.e.f. 15-1-1997) to restore the *omitted* words and to insert the words "except where such shares are held with a depository". The amendment was considered necessary as securities held in a depository mode are fungible and need not be distinguished by their number, while the shares outside the depository mode will still continue with their distinctive numbers. See also section 83.

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 50 rupees to 500 rupees under sub-section (2).

Under section 11 of the Depositories Act, 1996, every depository shall maintain a register and index of beneficial owners in the manner provided in sections 150, 151 and 152. See also section 152A.

Depository system

Shares are traditionally held in physical or paper form. This method has its own inherent weaknesses like loss/theft of certificates, forged/fake certificates, cumbersome and time consuming procedure for transfer of shares, *etc.* Therefore, to eliminate these weaknesses, a new system called Depository System has been established.

A depository is a system which holds your shares in the form of electronic accounts in the same way as a bank holds your money in a savings account.

Depository System provides the following advantages to an investor:

- —Your shares cannot be lost or stolen or mutilated because they are not certificated.
- —You never need to doubt the genuineness of your shares *i.e.*, whether they are forged or fake.
- —Share transactions like transfer, transmission *etc.* can be effected immediately through computers instructors.
- —Transaction costs are usually lower than on the physical segment.
- —There is no risk of bad delivery.
- —Bonus/Rights shares allotted to you will be immediately credited (automatically added) to your account.
- —You will receive the statement of accounts of your transactions/holdings periodically.

When you decide to have your shares in electronic form, you should approach a Depository Participant (DP) who is an agent of the depository and open an account. You should surrender your share certificates in physical form and your DP will arrange to get them sent to and verified by the company and on confirmation credit your account with an equivalent number of shares. This process is known as dematerialisation. You can always reverse this process if you so desire and get your shares reconverted into paper format. This process is known as re-materialisation.

Further study.—For a fuller account of advantages and disadvantages of the new system of paperless securities, see DR. EVA MICHELER, FAREWELL QUASI-NEGOTIABILITY? LEGAL TITLE AND TRANSFER OF SHARES IN PAPERLESS WORLD, 2002 JBL 358.

Functioning of Depository System

The depository system for handling the securities in the electronic form functions in accordance with the provisions laid down in the Depositories Act, 1996, under that Act:

- —A "depository" means a company formed and registered under the Companies Act, 1956, and which has been granted a certificate of registration under sub-section (1A) of section 12 of the Securities and Exchange Board of India Act,

1992. Presently the National Securities Depository Limited (NSDL) is the company which has been authorised to function as the Depository.

— The Depository functions through its agents, who are known as Depository-participants, under an agreement entered into between the Depository and the Depository-Participant.

— An investor, through a Depository-Participant, may enter into an agreement with the Depository for availing his services.

— A Depository-Participant (DP) is the representative (agent) of the Depository in the Depository System, will maintain the accounts holder's securities balance.

— The investor who wishes to avail the services of the Depository (through his agent) is required to surrender the certificate(s) of security for which he seeks to avail the services of the Depository, to the issuer-company who issued the certificate(s) through the Depository-Participant. The issuer-company, on receipt of the certificate(s) of security, shall cancel the certificate(s) of security and substitute in its records the name of the Depository as the registered owner in respect of that security, and inform the Depository accordingly. The Depository, on receipt of the intimation from the issuer company, enters the name of the investor in his records as the beneficial owner of the said security.

— The depository shall, on receipt of the intimation from the holder of the security, through the depository-participant, register the transfer of securities in the name of the transferee in its records. If the beneficial owner/transferee wishes to have the custody of the said security, the depository shall inform the issuer-company accordingly.

— The beneficial owner may with the previous approval of the depository (to be sought through the Depository-Participant) create a pledge or hypothecation in respect of the security owned by him through the Depository.

— An entry in the records of the Depository to the above effect shall be the evidence of the pledge or hypothecation.

§ See also Notes under section 108 under the heading "Depository—How it functions".

Register of Members on Computer floppy

*A company may however, optionally adopt magnetic media for maintaining its register of members. *H.B. Stockholdings Ltd. v. Jaiprakash Industries Ltd.*, (2003) 52 CLA 263 (CLB).

Particulars of Register of Members [Sub-section (1)]

The contents of the register of members constitute a *prima facie* evidence of the truth of the matter stated in it. It is therefore the duty of the company to record all changes in the particulars of the register that have come to the notice of the company so that the register may not retain any particulars which are not true. Thus where a change occurs in the ownership of shares by transfer, transmission, forfeiture, surrender, etc. the register should be accordingly altered. A person who claims to have purchased the shares of a member will be entitled to have his name entered in the register by satisfying the requirement of either S.108 or S.109. *Lalithamba Bai v. Harrisons Malayalam Ltd.*, (1988) 63 Com Cases 662 (Ker) on appeal *Lalithamba Bai v. Harrisons Malayalam Ltd.*, (1997) 13 SCL 175 (Ker—DB). Where the company has converted any of its shares into stock and has notified the Registrar accordingly, the register must show the amount and class of stock held by each member. The subscribers of the memorandum, the directors who have filed their consent to take qualification shares and others agreeing to become members, must be entered in the register.

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* Under s. 150 every company is under a mandate to maintain its register of members in print form. There is no specific provision enabling maintenance in magnetic media.

No company should enter in the register a statement that it has a lien on the shares of a member, *W. Key & Son Ltd.*, (1902) 1 Ch 467. A company cannot insist upon putting in the register anything except that which is required by the section to be inserted in it. *T. H. Saunders & Co. Ltd., Re,* (1908) 1 Ch 415.

The necessary alterations in the contents of the register are carried out by the secretary or by the company's registrar of transfers but after taking authority from the company's Board of directors. A secretary cannot alter the register of his own. *Wheatcropt's* case, (1873) 29 LT 324, 326; *Chida Mines Ltd. v. Anderson,* (1905) 22 TLR 27. But in view of the expanding role of the secretary in the administration of the company's affairs, the court may infer an authority of that kind on the part of the secretary. See Notes under s. 2(45), *ante.*

In a voluntary winding up, the liquidator may accept share transfers and alter the register accordingly. *Taylor, Phillips and Richard's* case, (1897) 1 Ch 298.

By virtue of the definition of a member given in S. 41 the twin requirements of membership are, an agreement in writing to be member and an entry in the register. Hence ordinarily an entry in the register is a *sine qua non* of membership. But there can be deemed membership also *e.g.*, those who sign the company's memorandum automatically become members in respect of the shares entered opposite their names when the memorandum is registered. Similarly in respect of the qualification shares for which a director has filed consent with the Registrar, he automatically becomes a member, *Nicol's* case, *Tufnell and Ponsonby's* case, (1885) 29 Ch D 421 (CA); *Re, Macdonald, Sons & Co.,* (1894) 1 Ch 89 (CA).

. **Correction of wrong entries in Register of Members.**—Where a wrong entry creeps into the register of members, it is open to the company to rectify it of its own initiative and without the intervention of the court. Certain shares were to be registered in the name of the claimant after the completion of the transfer of certain property. That having been done and the company's register remaining as it was, the company could have rectified the error of its own. Even without it, the court could proceed on the basis of the facts as proved irrespective of the fact that it would be inconsistent with the entry in the register. *Michaels v. Harley House (Marylebone) Ltd.*, (1997) 2 BCLC 166 (Ch D): (1999) 2 Comp LJ 466. The court **relied** on *Reese River Silver Mining Co. Ltd. v. Smith*, (1869) LR 4 HL 64, 81.

Duty to keep register up to date.—The company's duty is to keep the register updated with correct and accurate position as to particulars of shareholding. If the company does not do so, an order can be sought from the Company Law Board in all cases falling within sections 111 and 111A. *Volvo Lastvagnar Komponenter AB v. Morgard Shammar India Ltd.*, (1998) 4 Comp LJ 112 : (2000) 100 Com Cases 131 (CLB—NB). The CLB **relied** upon *Benarsi Das Saraf v. Dalmia Dadri Cement Ltd.*, AIR 1959 Punj 232.

Disclosure of class of members.—The register of members need not show separate classes of members. *Cumbrian Newspapers Groups Ltd. v. Cumberland and West Morland Herald Newspapers and Printing Co. Ltd.*, (1986) 2 All ER 816. A company limited by guarantee which may have different categories of members need not disclose those categories in the register of members. *Performing Rights Society, Re,* (1978) 1 WLR 1197 (CA). This decision would seem to be applicable to companies limited by shares as well.

Amount paid or agreed to be considered as paid [Sub-section 1(b)].—Where the shares are paid for in cash, the amount so paid should be disclosed in the register. If the shares have been allotted for consideration other than cash, the monetary value of such consideration should be disclosed. *Anglesea Colliery Co., Re,* (1866) 1 Ch App 55.

Nomination of shares.—It would be useful to specify the name and address of nominees, nominated by shareholders in the Register of Members.

Entry in case of firms.—A firm in its own name cannot be registered as a member, as a firm is not a legal person like a company incorporated under the Act. Only the partners can be recognised and registered as joint holders. See *Re, Vagliano & Anthracite Collieries Ltd.,* (1910) 79 LJ Ch 769; *Sadler v. Whiteman* (1910) 1 KB 868 and on appeal 1910 AC 514; *Re, Glory Paper Mills, Dunster's* case, (1894) 3 Ch 473; *Weikersheims* case, (1873) 8 Ch App 831.

A firm can be, however, registered as a member of section 25 company as provided in sub-section (4) thereof.

§ For further Notes on the point see under s. 41 under the heading "Whether a partnership firm can be a member".

Entry in case of joint holders.—Joint holders of shares may request the company to enter their names on the register in a certain order, or execute transfers to have the holding split, with the result that part of the holding is entered showing the name of one holder and part showing the name of another. Alternatively, joint holders may split their holding into a number of smaller holdings so that their names appear in a different order in each split account. The reason for this is that the articles of most companies provide that, in the case of joint holders the vote of the senior who tenders a vote shall be accepted to the exclusion 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. *Burns v. Siemens Bros. Dynamo Works,* (1919) 1 Ch 225; *Re, Bell Bros., Ex p., Hodgson* (1891) 65 LT 245.

Particulars and occupation of joint shareholders—Department's view.—In case of joint-holders, particulars like the address and occupation of each joint-holder are to be included in the register of members. [*Company News and Notes,* 1st July, 1968].

Entry in case of minors—Department's views.—The minors are incompetent to enter into any contract and as such their names cannot be entered in the register of members of the company. Therefore, the names of the guardians of the minors should be entered in the register of members with a view to comply with the provisions of law in this respect. (*Department's Circular No.* 1968/5614, dated 26-2-1964). The statement that the provisions of the law can be complied with by getting the name of the guardian entered in the register of members on behalf of the minor is not correct. Also see the commentary under S. 41.

Register of members a public register

A 'public register' means any register open to public inspection. Accordingly, since the company's register of members is open to public inspection and the subject-matter of the proceedings was the validity of an entry on that register, the court [here in India, CLB] has exclusive jurisdiction in respect of the application for rectification. It was sufficient for an applicant to show that the register of members is incorrect because an entry had been omitted or made by error. It was not necessary to show any wrong by the company. Accordingly, the proceedings for rectification were not stayed or struck out. The company in whose name a larger number of shares was entered in the register by mistake was a foreign company. As to this it was held that the court at the place where the register is maintained has exclusive jurisdiction to order rectification even in such cases. *Fagin's Bookshop plc., Re,* 1992 BCLC 118 (Ch D). The contents of the register of members are of decisive importance in determining as to who were the shareholders of the company at the crucial time. *Ashish Das Gupta v. Satvinder Singh,* (2000) 37 CLA 104 (CLB–PB).

Authentification of particulars

Clauses (a) to (d) set out the particulars to be included in the register. The form of Register of Members is, however, set out in the *Appendix* 14 to the Companies (Issue of Share Certificates) Rules, 1960 [*vide* Rule 7(1)]. All entries made in the register should be authenticated either by the Secretary of the company or by any person appointed by the Board of director to sign the share certificates [*vide* Rule 7(3)].

Penalty for default [Sub-section (2)]

If default is made in complying with the requirements as to maintenance of register of members specified in sub-section (1), the company and every officer of company who is in default are punishable with fine which may extend to Rs. 500 for every day during which the default continues.

Any insignificant or minor deviation or omission will not invalidate the register. *Re : Alliance Financial Corpn.*, 3 Bom HCOC 106, 111 (Bom). Such deviation or omission may not be construed as default so as to attract the penal provisions.

Compoundable offence.—The offence is compoundable under section 621A.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of maintenance of registers. The relevant paragraph 1 of the Form prescribed under Rule 3 of the Companies (Compliance Certificate) Rules, 2001 states :

***"Paragraph 1.*— The company has kept and maintained all registers as stated in Annexure "A' to this certificate, as per the provisions and the rules made thereunder and all entries therein have been duly recorded."**

Register of Members under Section 150 and Index of Members under section 151 [*Item (e) of statutory Registers'*]

Prescribed Check List

Check whether:

(i) separate registers for each class of shares are maintained in the format as prescribed under rule 7 of the Companies (issue of Share Certificate) Rules, 1960;

(ii) entries in the register are authenticated by the Secretary or any other person authorised by the Board for the purposes of sealing and signing share certificates;

(iii) declaration made to a company under sub-section (1), (2) or (3) of section 187C has been noted in its Register of members within 30 days from receipt of declaration;

(iv) an index of members is maintained unless the Register of members is in such a form as in itself constitutes an index, where the company has more than 50 members. The index can be in the form of a card index;

(v) every change made in the Register of members has also been recorded in the index within 14 days; and

(vi) list of beneficial owners, (in case of shares held in depository) is also kept by the company.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

Documents Involved: 1. Minutes of Board Meeting, 2. Copy of the Advertisement in Newspapers, 3. Register of Members/Debenture-holders, 4. Transfer Register.

S. 151. Index of members.—(1) Every company having more than fifty members shall, unless the register of members is in such a form as in itself to constitute an index, keep an index (which may be in the form of a card 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 the necessary alteration in the index.

(2) The index shall, in respect of each member, contain a sufficient indication to enable the entries relating to that member in the register to be readily found.

(3) The index shall, at all times, be kept at the same place as the register of members.

(4) If default is made in complying with sub-section (1), (2) or (3), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [1][*five hundred rupees*].

NOTES

Eng. Act, 1948 : Sec. 111. Previous Act : Sec. 31-A.
Eng. Act, 1985 : Sec. 354.

Companies Act, 1956

The Act of 1913 was silent as to the place where the index was to be kept. It is now provided that the index should at all times be kept in the same place as the register of members.

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 50 rupees to 500 rupees under sub-section (4).

Scope of section

This index may be kept in the shape of bound books or in any other manner such as a card index. It must contain in respect of each member a sufficient indication to enable the account of that member in the register to be readily found.

In case the entries are so made in the register of members as to serve the purpose of an index, then no separate index is required to be maintained.

This section applies to all companies having more than fifty members. In the case of a private company, in computing the figure of more than fifty members, employee members will also be included.

Penalty for default [Sub-section (4)]

For default made in complying with the provisions of this section regarding maintenance of index of members, the company and every officer of the company in default, is punishable with fine which may extend to Rs. 500.

This is not a continuing default but is one time default only.

Compoundable Offence.—The offence is compoundable by the Central Government under section 621A.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of maintenance of registers. The relevant paragraph 1 of the Form prescribed under Rule 3 of the Companies (Compliance Certificate) Rules, 2001 states :

***"Paragraph 1.*— The company has kept and maintained all registers as stated in Annexure "A' to this certificate, as per the provisions and the rules made thereunder and all entries therein have been duly recorded."**

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1. The words "fifty rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 61 (w.e.f. 13-12-2000).

Register of Members under section 150 and Register of index of Members under Section 151

Prescribed Check List—See Notes under sec. 150

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

S. 152. Register and index of debenture-holders.—(1) Every company shall keep in one or more books, a register of the holders of its debentures and enter therein the following particulars, namely:—

(a) the name and address, and the occupation, if any, of each debenture-holder;

(b) the debentures held by each holder, [1][* * * * *] [2][distinguishing each debenture by its number except where such debentures are held with a depository] and the amount paid or agreed to be considered as paid on those debentures;

(c) the date at which each person was entered in the register as a debenture-holder; and

(d) the date at which any person ceased to be a debenture-holder.

(2) (a) Every company having more than fifty debenture-holders shall, unless the register of debenture-holders is in such a form as in itself to constitute an index, keep an index (which may be in the form of a card index) of the names of the debenture-holders of the company and shall, within fourteen days after the date on which any alteration is made in the register of debenture-holders make the necessary alteration in the index.

(b) The index shall, in respect of each debenture-holder, contain a sufficient indication to enable the entries relating to that holder in the register to be readily found.

(3) If default is made in complying with sub-section (1) or (2), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [3][*five hundred rupees*].

(4) Sub-sections (1) to (3) shall not apply with respect to debentures which *ex facie*, are payable to the bearer thereof.

NOTES

Companies Act, 1956

This section "provides for a register and an index being maintained in respect of debenture-holders similar to the register and index of members having regard to the importance of debentures as a means of financing the operations of companies at the present day." (*Notes on clause* 145 of the Companies Bill, 1953).

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1. The words "distinguishing each debenture by its member" omitted by the Depositories Act, 1996 (w.e.f. 20-9-1995).
2. Ins. by Depositories Related Laws (Amendment) Act, 1997 (w.e.f. 15-1-1997).
3. The words "fifty rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 62 (w.e.f. 13-12-2000).

Depositories Act, 1996 and Depository Related Laws (Amendment) Act, 1997

Sub-section (1)(b) was amended by omitting the words "distinguishing each debenture by its number" by the Depositories Act, 1996 (w.e.f. 20-9-1995). The said words were restored and the words "except where such debentures are held with a depository" were inserted by the Depositories Related Laws (Amendment) Act, 1997 (w.e.f.15-1-1997). The section was amended as securities held in a depository mode are fungible.

As per section 11 of the Depositories Act, 1996 the depository shall maintain a register and index of beneficial owners in the manner provided in this section. Also refer to section 152A.

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 50 rupees to 500 rupees under sub-section (3).

Penalty for default [Sub-section (3)]

A register and an index of the register are required to be maintained by a company in respect of debenture holders in the manner specified in this section. For any contravention of this provision the company and every officer of the company who is in default are punishable with fine upto to Rs. 500.

This is not a continuing offence as in the case of default of the maintenance of the Register of Members under section 150.

Compoundable Offence.—The offence is compoundable under section 621A.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of maintenance of registers. The relevant paragraph 1 of the Form prescribed under Rule 3 of the Companies (Compliance Certificate) Rules, 2001 states :

"Paragraph 1.— **The company has kept and maintained all registers as stated in Annexure "A' to this certificate, as per the provisions and the rules made thereunder and all entries therein have been duly recorded."**

Register and Index of Debenture-holders under Section 152 [*Item (f) of 'Statutory Registers'*]

Prescribed Check List

Check whether:

(i) the company has maintained separate registers for each type of debentures and entered therein the particulars prescribed in sub-section (1) of section 152 *i.e.* (a) the name and address, and the occupation, if any, of each debenture holder, (b) the debentures held by each holder, distinguishing each debenture by its number except where such debentures are held with a depository, and the amount paid or agreed to be considered as paid on those debentures; (c) the date on which each person was entered in the register as a debenture holder and (d) the date at which any person ceased to be a debenture holder;

(ii) an index of debenture holders is maintained unless the register of debenture holders is in such a form as in itself constitutes an index, where the number of debenture holders is more than 50. The index can be in the form of a card index;

(iii) every alteration made in the register of debenture holders has been recorded in the index within 14 days;

(iv) list of beneficial owners (in case of debentures held in depository) is also kept by the company.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

[1][**S. 152A. Register and index of beneficial owners to be of debenture-holder.**—The register and index of beneficial owners maintained by a depository under section 11 of the Depositories Act, 1996, shall be deemed to be an index of members and register and index of debenture holders, as the case may be, for the purposes of this Act.]

NOTES

Depositories Act, 1996

This section was inserted by the Depositories Act, 1996 with effect from 20-9-1995 (being the date of promulgation of the Ordinance) providing that the register and index of beneficial owners maintained by a depository under section 11 of the Depositories Act, 1996 shall be deemed to be a register of members or debentureholders, as the case may be, for the purposes of this Act. The amendment was considered necessary as securities held in a depository mode are fungible.

Section 11 of the Depositories Act, 1996 provides that every depository shall maintain a register and an index of beneficial owners in the manner provided in sections 150, 151 and 152 of the Companies Act, 1956.

S. 153. Trusts not to be entered on register.—No notice of any trust, express, implied or constructive, shall be entered on the register of members or of debenture-holders [2][* * * *].

NOTES

Eng. Act, 1948 : Sec. 117
Eng. Act, 1985 : Sec. 360

Previous Act : Secs. 33, 40

Depositories Act, 1996

Under section 9(2) of the Depositories Act, 1996, the provisions of section 153 shall not apply to the securities held by a depository on behalf of the beneficial owners (investors).

Scope and Object of the section

What the section means is that a company shall not record in its register of members or debenture-holders anything to show that as between the members or debenture-holders whose name is entered in the register and any other person, there is any kind of relationship as trustee and beneficiary. The register is not to show and the company is not to take notice of any such relationship.

The object of the section is (1) to relieve the company from any obligation to take notice of equitable interests in its shares, that is to say, to take notice of rights of third parties in respect of the shares registered in the names of any members; (2) to preclude any person claiming an equitable interest in shares from treating the company as a trustee in respect thereof. The effect is that a beneficiary who is not entered as a holder of shares has no connection with or rights in the company in which any shares are held in trust for him. This does not, however, prevent a company from recognising a trust of which it ac-

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1. Ins. by the Depositories Act, 1996 (w.e.f. 20-9-1995).
2. The words "or be receivable by the Register" have been omitted by section 6 of the Companies (Amendment) Act, (LIII of 1963) (w.e.f. 1-1-1964).

tually has notice, though it must not enter it on the register. The provision will equally apply to debentures.

The section does not prevent entering the name of any person under disability such as a minor acting through a guardian. Such an entry will only intimate the fact of the member being a member or other person under disability.

The object of the section has, however, been thus interpreted by judicial decisions:—"It seems to me extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relations between trustees and their *cestui que trust* in respect of shares of the company. If a trustee is on the company's register as a holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company has nothing whatever to do; they can look only to the man whose name is on the register." *Per* LORD COLERIDGE, C.J., *In re, Perkins,* (1890) 24 QBD 613. In the same case LORD ESHER M.R., put it: "the law has given the company the right to say we do not care whether you are a *cestui que trust* or not; if you are, we have a right to take no notice of you." Also see *Pender v. Lushington,* (1877) 6 Ch 70.

It would appear that these and other judicial decisions following them have gone further than warranted by the language of the section.

It is, however, important to note that though as between the company and the trustee and the *cestui que trust,* the *cestui que trust* is not recognised, and the trustee treated for all purposes as the owner of the shares, the relationship and the rights *inter se* between the trustee and the *cestui que trust* are not affected thereby. *Cf. Hardoon v. Belilios,* 1901 AC 118. Where shares were held by two directors of a company in trust for another company and were receiving sitting fees from the former, they were not accountable to the latter company for such fees. *Dover Coalfields Extension Ltd., Re,* (1908) 1 Ch 65 (CA).

The provision in the articles of a company that not more than a given percentage of shares should be held by non-Bermudians was held to apply only to registered shareholders and not to the beneficial owners of the shares. Since the registered holder was a Bermudian company, the provision was held to be not violated. *Bermuda Cablevision Ltd. v. Calico Trust Co. Ltd.,* (1998) 2 WLR 82.

Miscellaneous situations in which notice must or may be taken

Having regard to the actual wording of the section, it only says that no notice of any trust etc., shall be entered on the register of members or of debenture-holders so that the register being notice to persons dealing with the company as regards the ownership of any shares or debentures may not be affected by the entry of any kind of trust. The company itself may not properly refuse to take notice of or recognise any trust brought to its notice otherwise than by entry in the register or to act in accordance with the terms of such notice.

If apart from the entry in the register of members, the company has notice of any trust or equitable interest in the shares held by any member, the directors cannot register a transfer of such shares, and if they do so, they will be personally liable to any third party affected. *Societe Generale de Paris v. Tramways Union,* (1884) 14 QBD 424 **affirmed** in (1885) 11 App Cas 20 (HL). Third parties affected are not also prevented from taking legal action against the registered shareholder and the company will be bound by the result of such action. The company will not be liable where shares are transferred in breach of the terms of a will, *e.g.*, in this case, of a will of which the company's president was one of the trustees and which had been registered with the company. *Simpson v. Molson's Bank,* 1895 AC 270. Provisions in the articles prohibiting notice of trusts do not operate to prevent an equitable owner of shares obtaining a court order to protect his equitable interest. *McGrattan v. McGrattan,* (1986) CLY 2304 (CA) (Ireland).

In a decision of the Madras High Court it has been held that the section does not prevent the managing director of a company from contending that the shares held by his wife

were only held by her as benamidar for him. *Parameswari S. v. Kamadhenu Metal Rolling Mills,* AIR 1971 Mad 293.

Though as per terms of this section no notice of any trust is to be entered in the register of members, the section does not prevent the company taking notice of a trust which is brought to its notice from other evidence. See *Parameswari S. v. Kamdhenu Metal Rolling Mills Ltd., (Supra).* The court can also take notice of any trust affecting the matter of any shares before it. *Dharwar Bank v. Mahomed Hayat,* (1931) 1 Com Cases 199, 203 : AIR 1931 Bom 269, *e.g.*, the court may serve upon a company a stop notice preventing all dealings with certain shares unless under proper notice to the claimant. *Societe Generale de Paris v. Tramways Union Co.,* (1885) 11 App Cas 20 (HL) **affirming** (1884) 14 QBD 424 (CA).

A company which gives credit or makes a loan to a shareholder with knowledge that he is not the beneficial owner of the shares is not protected by this section or by any provision in the Articles of Association similar to Regulation 6 of Table A. *Mackereth v. Wigan Coal & Iron Co. Ltd.,* (1916) 2 Ch 293 (Ch D).

Application for transfer of Stock Holding on behalf of Mutual Fund.—Where a company refused to register a transfer of shares in favour of the Stock Holding Corporation of India to be held by it on behalf of a Mutual Fund, the Company Law Board upheld the decision of the company because such transfer would be in violation of S. 153 of the Companies Act which forbids companies from entering notice of trust in the register of members, and being in statutory violation, section 22A(3)(c) [*since omitted*] of the Securities Contracts (Regulation) Act, 1956 was attracted to justify the refusal. It is submitted with respect that a different interpretation of section 153 is also possible. The section does not prohibit trust holdings to be registered. It only says that notice of trust shall not be posted on the register, the policy behind it being that for all purposes of the Companies Act, the registered holder is the real holder. He will not be allowed to hide himself behind the trust and say that he was not the real owner. The observation of the CLB that section 153 has become diluted because companies are bound to take notice of trust holdings under S. 187C [*since omitted*] is no doubt true but the section has not thereby become a redundant provision. It has become only qualified to the extent of trust holdings which come within the scope of the relevant provisions and, apart from them, the provision retains its full vitality. Either way the decision of the company does not seem to be justifiable. The company could only say that it would not be bound by the relationship between the Mutual Fund and its Depository Corporation. *Bharat Petroleum Corpn. Ltd. v. Stock Holding Corpn. of India Ltd.,* (1995) 82 Com Cases 539 (CLB—Bom). Because of the disability caused by this and another **unreported** decision (*Stock Holding Corporation of India v. National Power Corporation Ltd.* (CP No. 3/111/95)) the Company Law Board held in *Canara Bank v. Power Grid Corporation of India Ltd.,* (1996) 3 Comp LJ 360 (CLB) that the operator of a mutual fund should be allowed to apply in its representative capacity for change of name by seeking rectification of the register of members of the company (Public Sector in this case) in which bonds were held in the name of a mutual fund. The Bombay High Court had held in *Stockholding Corpn. of India Ltd. v. Bharat Petroleum Corpn. Ltd.,* (1998) 91 Com Cases 862 : (1997) 3 Comp LJ 112 (Bom) **affirming** *Bharat Petroleum Corpn. Ltd. v. Stockholding Corpn. of India Ltd.,* (1995) 82 Com Cases 539 (CLB—Bom) that trust holdings were not to be registered.

Rights and liabilities of nominees and beneficial shareholder

It may be known to the company that a particular member is merely a trustee or legal mortgagee of the shares entered against his name, the company can recover from him the calls and enforce other obligations of membership against him to their full extent and not merely to the amount of the trust estate or mortgage money, *Royal Bank of India's* case, (1869) 4 Ch App 252; *Weikersheim's* case, (1873) 8 Ch App 831. *Chapman and Barker's* case, (1867) LR 3 Eq 361; *Muir v. City of Glasgow Bank,* (1879) 4 App Cas 337 (HL); *Leifchild's* case, (1865) LR I Eq 231 at 235, 236. Also see *Murshidabad Loan Office Ltd. v. Satish Chandra Chakravarti,* (1943) 13 Com Cases 159 : AIR 1943 Cal 440.

But whatever amount the member on the register may be called upon to pay, he is entitled to be indemnified against the same by the real owner. The right accrues to him as soon as he has been called upon to pay. *Hardoon v. Belilios,* (1901) AC 118 (PC); *Hemming v. Maddick,* (1872) 7 Ch App 395; *Hughes-Hallet v. Indian Mammoth Gold Mines Co.,* (1882) 22 Ch D 561; *Butler v. Cumpston,* (1868) LR 7 Eq 16; *James v. May,* (1873) LR 6 HL 328; *Cruse v. Paine,* (1869) 4 Ch App 441; *Chapman and Barker's* case, (1867) LR 3 Eq 361 (trusts for the company); see *Re, European Society Arbitration Acts, ex p., Liquidators of the British Nation Life Assurance Association,* (1878) 8 Ch D 679 at 708 (CA) (enforcement against the beneficiary through and in name of trustee). A person holding shares as a trustee is accountable to the beneficiary, *Rooney v. Stanton,* (1900) 17 TLR 28 (CA); *Hughes Hallett v. Indian Mammoth Gold Mines Co.,* (1882) 22 Ch D 561; *Re, National Financial Co., ex p., Oriental Commercial Bank,* (1868) 3 Ch App 791. He can assign his right of indemnity to the liquidator who can then enforce it in his right. *Hemming v. Maddick,* (1872) 7 Ch App 395; *Massey v. Allen,* (1878) 9 Ch D 164, *Heritage Paine,* (1876) 2 Ch D 594. The company may also sue him to enforce the rights of the nominee holder. *Hardoon v. Belilios,* (1901) AC 118.

The articles of a company may supplement this section by providing that the company is not bound to accept or preserve notices of equitable interests and that such notices shall not affect the company or its officers or agents with any trust. *Societe Generale de Paris v. Walker,* (1885) 11 App Cas 20 at 30 (HL); *Simpson v. Molson's Bank,* (1895) AC 270 (PC). Probably, even where the articles contain no such provision, the company is not bound to accept notices of equitable interests, but may treat a registered shareholder as the absolute owner of shares registered in his name. Such provisions do not operate to prevent an equitable owner of shares obtaining a court order to protect his equitable interests, *McGrattan v. McGrattan,* (1986) CLY 2304 (CA) (Ireland).

Where a company has a right of lien or charge on its shares, the company will be affected with notice of any interests that third parties may acquire in those shares. After receiving such notice, the company's interest in those shares will be postponed in priority to that of the third party. *Mackereth v. Wigan Coal and Iron Co. Ltd.,* (1916) 2 Ch 293; *Bradford Banking Co v. Briggs Son & Co. Ltd.,* (1886) 12 App Cas 29 HL, **applying** the principle of *Hopkinson v. Rolt,* (1861) 9 HL Cas 514; and see *Bank of Africa v. Salisbury Gold Mining Co.,* (1892) AC 281 (PC).

Notice to the company may affect the position of the company, but not as between two or more parties who have acquired interests in respect of the same set of shares. *Roots v. Williamson,* (1888) 38 Ch D 485; *Moore v. North Western Bank,* (1891) 2 Ch 599. The principle of *Dearle v. Hall,* (1828) 3 Russ I does not apply, *Societe Generale de Paris v. Walker,* (1885) 11 App Cas 20, 30 (HL).

Admission of trust as member

Department's view.—The following note has been issued by the Department of Company Law Administration: "It has been brought to the notice of the Government of India that in the share registers of some companies, trustee or trustees described as such are entered as members. Government are advised that under the relevant provisions of the Companies Act, 1956, shares in a company, being the property of a trust can be held in the names of its trustees being individuals, corporations, companies or societies registered under the Societies Registration Act, 1860, without the addition of the statement that they are trustees. Shares cannot be held in the name of the trust as such unless it is a separate legal entity such as a registered society. Companies are requested that wherever necessary their share registers should be rectified so as to comply with law as explained above." (*Press Note,* dated 25th June, 1957, issued by Department of Company Law Administration).

Shares held on behalf of HUF

Shares cannot be directly allotted to a family of persons, but they can be allotted to any member of the family as a representative. In the case of a Hindu undivided family, representative capacity is vested in the manager (*karta*) of the family. He can hold shares on behalf of the family. Such shares do not become a trust holding, and even if they do, the

company is not bound to take notice of the trust. *Vickers Systems International Ltd. v. Mahesh P. Keswani,* (1992) 73 Com Cases 317 (CLB).

§ See also Notes under s. 41, *ante.*

Secretarial Practice Notes : Trusts not to be entered

Check that no notice of trust was entered on the Register of Members or of Debenture-holders.

[1][**S. 153-A. Appointment of public trustee.**—[(1)][2] The Central Government may, by notification in the Official Gazette, appoint a person as public trustee to discharge the functions and to exercise the rights and powers conferred on him by or under this Act.]

[3][(2) The provisions of this section shall not apply on and after the commencement of the Companies (Amendment) Act, 2000.]

NOTES

Companies (Amendment) Act, 2000

Sub-section (2) has been inserted by the Companies (Amendment) Act, 2000 to provide that provisions of this section shall not apply w.e.f. the day Amendment Act comes into force (i.e. 13-12-2000). Similar changes have also been made in sections 153B, 187B and 187C.

As a result, the power of the Central Government to appoint public trustee is withdrawn. The trustees will now directly exercise voting rights [instead of by the Public Trustee] in respect of the shares held by a trust in a company.

S. 153-B. Declaration as to shares and debentures held in trust.—(1) Notwithstanding anything contained in section 153, where any shares in, or debentures of, a company are held in trust by any person (hereinafter referred to as the trustee), the trustee shall, within such time and in such form as may be prescribed, make a declaration to the public trustee.

(2) A copy of the declaration made under sub-section (1) shall be sent by the trustee to the company concerned, within twenty-one days, after the declaration has been sent to the public trustee.

(3) (a) If a trustee fails to make a declaration as required by this section, he shall be punishable with fine which may extend to five thousand rupees and in the case of a continuing failure, with a further fine which may extend to one hundred rupees for every day during which the failure continues.

(b) If a trustee makes in a declaration aforesaid any statement which is false and which he knows or believes to be false or does not believe to be true, he shall be punishable with imprisonment for a term which may extend to two years and also with fine.

(4) The provisions of this section and section 187-B shall not apply in relation to a trust—

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1. Ins. by Act 53 of 1963, s. 7 (w.e.f. 1-1-1964).
2. Section 153A of the Companies Act, renumbered as sub-sec. (1) and Sub-section (2) inserted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 63 (w.e.f. 13-12-2000).
3. Sub-section (2) inserted by the Companies (Amendment) Act 2000 (53 of 2000) s. 63 (w.e.f. 13-12-2000).

(a) where the trust is not created by instrument in writing; or

(b) even if the trust is created by instrument in writing, [4][where the value of the shares in, or debentures of, a company, held in trust]:

(i) does not exceed one lakh of rupees, or

(ii) exceeds one lakh of rupees but does not exceed either five lakhs of rupees or twenty-five per cent of the paid-up share capital of the company, [5][whichever is less, or]

[6][(c) where the trust is created, to set up a Mutual Fund or Venture Capital Fund or such other fund as may be approved by the Securities and Exchange Board of India established under sub-section (1) of section 3 of the Securities and Exchange Board of India Act, 1992 (15 of 1992).]

[7][*Explanation*.—The expression "the value of the shares in, or debentures of, a company" in clause (b) means,—

(i) in the case of shares or debentures acquired by way of allotment or transfer for consideration, the cost of acquisition thereof, and

(ii) in any other case, the paid-up value of the shares or debentures.]

[8][*(5) The provisions of this section shall not apply on and after the commencement of the Companies (Amendment) Act, 2000*].

NOTES

Companies (Amendment) Act, 2000

Section ceased to be operative.—Sub-section (5) has been inserted by the Companies (Amendment) Act, 2000 to render the provisions of the section inoperative w.e.f. the date of commencement of the Act (i.e. 13-12-2000). Similar changes have also been made in sections 153A, 187B and 187C. As a result, the requirements of exercise of voting right by public trustee in respect of certain trusts, and declaration to be filed by the ostensible or beneficial owner have been dispensed with.

Notes under this section are retained in the interest of knowledge for the pending matters.

Companies (Amendment) Act, 1963

These two sections (sections 153-A and 153-B) were inserted by Amendment Act of 1963. The Statement of Objects and Reasons appended to the Bill and changes made by Select Committee are reproduced below: "In order to prevent the use of voting rights attached to shares held by trusts for the advancement of personal interests of the donors, it is considered necessary to regulate the exercise of such rights in suitable cases. For this purpose, it is proposed to empower the Central Government to appoint a person to exercise voting rights in respect of trusts with significant shareholding, when necessary, with a view to securing proper management of the company in the interests of the shareholders." (Statement of Objects and Reasons).

"Proposed section 153B(2).—The Committee feel that a trustee should send to the company concerned a copy of the declaration made by him under sub-section (1) of section 153B within a fixed period of 21 days.

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4. Subs. by Act 31 of 1965, s. 16, for certain words (w.e.f. 15-10-1965).
5. Subs. by the Companies (Amendment) Act, 1996, s. 6, (w.e.f. 1-3-1997) for the words 'whichever is less'.
6. Ins. by Companies (Amendment) Act, 1996, s. 6 (w.e.f. 1-3-1997).
7. The *Explanation* has been added by section 16 of the Companies (Amendment) Act 31 of 1965 (w.e.f. 15-10-1965).
8. Sub-section (5) inserted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 64 (w.e.f. 13-12-2000).

Proposed section 153B(3).—The Committee consider that failure to make a declaration of the trust to the public trustee should be punishable only with fine and that making a false statement in the declaration knowingly should be punishable more severely with imprisonment. The clause has accordingly been suitably amended." (Para 15 of the *Report of Select Committee*).

As regards the object and scope of these sections and of section 187-A the following extracts from the Finance Minister's statement at various stages of the Bill are sufficiently explanatory:—

"While Government have no intention to interfere with the position of trust's equities, it has often happened that certain types of trusts hold large amounts of equities and the people who are in management of these trusts use those equities for the purpose of having control. Various provisions that we have in regard to limiting the amount of control by excessive accretion of equity capital in the hands of any single group of persons are all defeated by the fact that these shares are held by trusts undoubtedly intended for good purposes but incidentally being used for the purpose of keeping their control over the company. I have no intention to labour this point, because it is clear. In fact, my Hon. friend Shri Tyagi, as Chairman of Direct Taxes Administration Enquiry Committee has drawn attention to this fact of trust funds being invested and utilised for furthering donor's business interests. The provision now is that in the case of such trusts where the clear intention is known—it is not overall charitable or educational trusts, Government, if it so desires, may appoint a person to exercise the voting rights in order to safeguard trust's right attached to such shares and the trustees shall not exercise their voting rights. The amendment exempts genuine trusts created for safeguarding family interests or charitable or educational trusts and where the amounts invested in the shares of any single company by trust exceeds one lakh of rupees, the operation of the law comes in.

* * * * *

An officer appointed by the Central Government would be entitled to receive all books, all notices of the meetings, copies of the resolutions and accounts and other documents as if he was a member of the company and he will use his proxy for the benefit of the company's general interest rather for the benefit of any particular individual concern." (*Lok Sabha* Debates, dated 28th November, 1963, Vol. XXII, pages 2003-2004).

When the Select Committee was examining witnesses with reference to the provisions of the Bill, the Finance Minister explained the underlying object of these provisions to the witnesses thus—

"The intention is only this; that the holding of securities by trusts should not be used by a group of persons for the purpose of augmenting their own voting rights. That is the main intention. It is not a question of divesting anybody of any rights. I do not see how the identification of the rights of the person who exercises the right to vote and that of the trust can be equated. Here nothing is sought to be taken away, except that you do not exercise the vote direct but exercise it through a public trustee.....

It is a known fact that a very large amount of holding of equities is in possession of trusts, be they private or public or charitable trusts. All these trusts are controlled by a person or by a group of persons. Those persons who control the trusts, again are people who control companies or seek to control them through their securities. What is sought here is that the merging of the two elements of control does not become a big one. Therefore, we say that the right exercised by a person who is a trustee exercising the rights of the trust as shareholder, though not recognised by company law, shall be transferred on to a public trustee....the overall intention of the Government is that the aggregate of the voting rights of an individual who controls the trust and the property of the trust as such which he handles, is not used for some purpose not wholly necessary in the interests of the trust....We do not want to interfere with the ordinary right of a person who is managing a trust as a shareholder. But there should not be an aggregation of these voting rights merely because of the two personalities coalescing at some stage.' (*Explanations given by the Finance Minister* during the examination of witnesses by the Select Committee on 6th December, 1963 Evidence Vol. I, pages 12-13).

Again during the debates on the Bill after the report of the Select Committee, the Finance Minister further explained the underlying purpose of these provisions as follows: The public trustee will step into the position where the holding of a trust in one company's share is a little above one lakh in some cases and five lakhs in all others, and having stepped into that position, he can, in the case of good trustees, authorise the trustees themselves to act on his behalf. Often times, shareholders do not exercise their rights. Dumb creatures in this world are often shareholders; they never exercise their rights. The public trustee could permit a trustee to do it. Provision has been made for that. But

when he finds that it is not wise to do so—he will have the information at his disposal—he will exercise it, if necessary, for the purpose of preserving the interest of the trust. The real thing is that normally we say that the public trustee shall not vote except where he has to defend the rights of the trust. [*Lok Sabha Debates* on the Companies (Amendment) Bill as reported by the Select Committee, 16th December, 1963, Vol. XXIV, pages 4949-50].

"The votes in regard to equity holdings of trusts are misused for the purpose of concentration of economic power. What we would like to do is to free those votes completely. It will be open to the trustees to sell the shares or limit them to the extent that is mentioned or to invest in Government securities, house property or have widespread coverage even in regard to shares and not have any concentration which helps him to use his votes as a trustee along with his own to get power over a particular company.

"My purpose is not to get the right over these equity shares. Nobody wants to get the right or to get anything out of the trusts. Trust's money can be invested within the limits of the law in each company so that it does not add to the power of the individual. If the holding of any particular trust is higher than this limit, then we have to immobilise and freeze it. Supposing the trusts' interest are to be safeguarded, the trustee can approach the public trustee and say: my interests are to be safeguarded, what do you do about it? If the public trustee feels that the trustee is a good person, all right he says: I give you the proxy; you can act and you are only going to safeguard the interests of your trusts. But if he is not like that, if he thinks that there is ulterior intention or he suspects the *bona fides* of the trustees, he shall give his proxy to the one of his officers to go and exercise the vote, if he thinks it necessary in the interest of the trust. But the normal thing for the public trustee would be not to act. Abnormally, when something comes to his notice he acts either on the volition of the trustee or on his own volition. There is no intention of the Government to interfere with the property right; they only want that there is no misuse of the voting right because the trust has created certain equity shares and it adds to the aggregate economic power in the hands of the trustee who has some interests in these companies. I think I have made the position very clear. It does not have anything to do with the trust laws." [*Lok Sabha Debates* on the Companies (Amendment) Bill, dated 16th December, 1963, Vol. XXIV, pages 5000-5001].

Companies (Amendment) Act, 1965

Explanation to sub-section (4) of section 153B was inserted to clarify the doubt, *vide* clause 16 of the Companies (Second Amendment) Bill, 1964, thus: "A doubt has arisen as to how the value of shares and debentures should be calculated for purposes of section 153B(4). The explanation sought to be inserted by this clause makes the position clear".

It may be noted that while section 153 says that no notice of any trust shall be entered in the Register, section 153-B requires, on pain of severe penalty, that every person to whom the Section applies, holding shares or debentures in trust for any other person or for any charitable or other purpose, should make a declaration to the public trustee appointed under the Act, and should also send a copy of such declaration, to the company concerned, within twenty-one days after the making of the declaration. Thus, though no notice of any trust shall be entered in the register, the company is statutorily to be given notice of the trust.

Though sub-section (2) requires a copy of the declaration to be sent to the company concerned within twenty-one days after the declaration is sent to the public trustees, no penalty is provided for not sending the copy or withholding knowledge of the declaration from the company.

Depositories Act, 1996

Under section 9(2) of the Depositories Act, 1996, the provisions of section 153B shall not apply to the securities held by a depository on behalf of the beneficial owners (investors).

Companies (Amendment) Act, 1996

Clause (c) in sub-section (4) was inserted by the Amendment Act of 1996 (w.e.f. 1-3-1997).

The requirements of declaration as to shares and debentures held in trust does not apply to cases where the trust is created to set up a Mutual Fund, or Venture Capital Fund or any other fund which may be approved for this purpose by SEBI.

Object of section

This section seeks to curb cases of trusts which are created to enable individuals to derive personal advantages by way of control over companies. The intention of the provisions relating to trusts (sections 153B, 187A and 187B) is not to interfere in the affairs of genuine trusts but to prevent the holding of securities by trusts to be used by a group of persons for the purpose of aug-

menting their own voting rights. *New Bank of India v. Union of India,* (1981) 51 Com Cases 375 (Del).

Trust not coming within the scope of sections 153-B and 187-B

Section 153-B read with section 187-B does not apply to any trust (1) implied or constructive or to obligations in the nature of trust. It applies only where shares are held under an express trust created in writing. *New Bank of India Ltd. v. Union of India,* (1981) 51 Com Cases 375 (Delhi) (2), unless the amount of the trust's monies invested in the shares or debentures of any single company exceeds one lakh of rupees and even where it exceeds one lakh of rupees if it does not exceed five lakhs of rupees or twenty-five per cent of the paid-up share capital of the company, whichever is less; that is to say, if the investment by trust in a company, is within one lakh of rupees, even though the entire share capital, *i.e.*, cent per cent is owned by the trust, the section does not apply to it. If the amount invested is more than one lakh of rupees, the section will apply where the investment exceeds 25 per cent of the paid-up share capital of the company concerned. But so long as the amount invested does not exceed 25 per cent of the paid-up share capital of the company, a trust may invest up to five lakhs of rupees in that company's shares or debentures. In all these cases, the trust will not come within the scope of sections 153-B and 187-B. Where the investment exceeds five lakhs of rupees these sections will apply, whatever may be the percentage of such investment to the company's paid-up share capital, even if it be one per cent, or even half per cent of it or one-tenth per cent.

When shares are pledged with banks as security against loans obtained by the company, no trust is created. *New Bank of India Ltd. v. Union of India,* (1981) 51 Com Cases 375 (Del).

Another exemption has been added by the amendment of 1996. The exemption is in favour of trusts created to set up a mutual fund or venture capital fund or such other fund as may be approved by the Securities and Exchange Board of India. The exception became necessary to facilitate the functioning of depository system. The problem became highlighted in decisions like *Canara Bank v. National Thermal Power Corporation Ltd.,* (1996) 4 Comp LJ 214 (CLB) and *Stock Holding Corporation of India Ltd. v. Bharat Petroleum Corporation Ltd.,* (1998) 91 Com Cases 862 : (1997) 3 Comp LJ 112 (Bom) where refusal to register shares in favour of stock holding corporation on behalf of their constituent shareholders was held to be justified because it was in essence a trust holding. The Bombay High Court affirmed the decision in *Bharat Petroleum Corpn. Ltd. v. Stock Holding Corpn. of India Ltd.,* (1995) 82 Com Cases 539 (CLB-Bom).

Note should also be taken of the consequential amendments to S. 111 and the addition of a new section, namely S. 152A, by the Depositories Act, 1996.

Penalty for default and compoundability [Sub-section (3), Cls. (a), (b)]

If a trustee fails to make a declaration as required by this section, he is liable to fine which may extend to five thousand rupees and, if the failure continues, to a further fine which may extend to one hundred rupees for every day during which the failure continues. If a trustee makes in a declaration any statement which is false and which he knows or believes to be false or does not believe to be true, he is punishable with imprisonment for a term which may extend to two years and also with fine. The offence under clause (a) is compoundable while the offence under clause (b) providing for compulsory imprisonment is not compoundable under section 621A.

"Trust money invested in shares or debentures of a company" [Sub-section (4)]

This does not refer merely to the actual money with which shares or debentures are acquired by a trust but also covers the value of shares or debentures obtained by the trust as gift from any person or on allotment of bonus shares issued by the company".

Few debentures issued prior to the commencement of the Act carried, voting rights, and section 117 specifically states that after the commencement of the Act a Company will not issue debentures carrying voting rights.

Value of shares

Department's Clarification.—Where these shares are obtained by gift or as bonus shares and such shares are quoted on a Stock Exchange, market value should be taken as the basis for their valuation. Where they are not quoted the face-value may have to be adopted. (*Circular letter,* dated 22-2-1964 issued by the Dept. of Company Affairs). This clarification does not hold good after insertion of the Explanation by the Amendment Act of 1965. For the purpose of ascertaining the value of shares under sub-section (4), the paid-up value of bonus shares as also the shares obtained by gift will now be taken into account.

Trust holding in more than one company, limits to be declared in reference to each particular company

Department's Clarification.—For the purpose of clause (b) of sub-section (4) of section 153, the shares in or debentures of every company held in trust by a trustee have to be treated separately. Thus, where a trustee of a trust holds shares in more than one company, the limits specified in the said clause (b) should be applied in relation to each such company. (*Department's F.No.* 8/1/(35B)/65-CL-V).

Declaration should be by all the trustees

Department's view.—The fact that the resolution (authorising *inter alia*, the enquiry of the declaration under section 153B by the some of the trustees) has been passed by all the trustees does not detract from the necessity of a declaration of the names of all the trustees by all the trustees.

It is not intelligible why if the trustees names are included in the trust deed itself, the declaration should be made by only some of them.

As a declaration means the personal affirmation, in terms of the Act, of the status of trustee by each one of the trustees concerned, it may be pointed out to the trustees once again that the need for a declaration signed by all the trustees cannot be dispensed with and should therefore be complied with by the trustees without further delay. (*Press Note*, dated 21-12-1972).

This direction by the Company Law Board does not, however, imply that the trustees must sign the declaration personally. It may be signed by an agent of the trustees, duly authorised in this behalf.

Applicability of section

Trusts.—The section as it stands, applies to any trust, public or private other than Mutual Fund, Venture Capital Fund or any Fund approved by SEBI whose investments come within its scope, and it applies to such investments in any company, whether public or private.

The word 'trust' occurring in this section is to be understood in the same sense and meaning ascribed to it under section 3 of the Indian Trusts Act, 1882. *New Bank of India Ltd. v. Union of India*, (1981) 51 Com Cases 375 (Del).

Section 25 Companies.—Shares held by a company which is granted exemptions under S. 25 are not held by the company in trust for anyone. The provisions of this section and section 187-B are, therefore, not attracted.

Section applicable to equity and preference shares

Department's Clarification.—Subject to the exemption limits specified in sub-section (4) of section 153B the declaration under sub-section (1) is required to be made by the trustee concerned to the Public Trustee. Since the said section does not draw any distinction between equity and preference shares and applies equally to both kinds of shares, it is immaterial for the purpose of the section whether the preference shares are participating preference shares and whether they carry any voting rights or not. Both preference and equity shares have therefore to be taken into account for the purpose of declaration under sub-section (1) and the exemption limits under sub-section (4) of the section. (*Letter No.* 8/4(153B)/64-PR, dated 24-12-1965).

Relationship with section 187-C

This section must be read with sec. 187-C, which widens the scope of this section and requires every person holding beneficial interest in any shares as well as the *benamidar* for such person to make declaration of over beneficial holding to the company, and the company to take notice of the same in its Register.

Guidelines for Creation of trust for disposal of odd lot shares

Department's Circular.—As you are aware the investors of companies often get allotment of shares in lots which are not marketable and they are confronted with the problem of selling these shares at the market rates quoted for shares in marketable lots. With a view to explore ways and means and to minimise the difficulties of investors in this regard the Department has examined this problem in consultation with Chambers of Commerce and Securities Exchange Board of India (SEBI). The Chambers of Commerce and some of the major companies were of the view that the problem could be solved if the companies, as a measure of servicing their investors voluntarily create the position of an independent Trustee to receive shares from individual investors for being disposed of on their behalf and after realising the sale proceeds in marketable parcels make over the

sales realisation less brokerage and service charges to the investors. You are, therefore, requested to advise your constituents to create such Trusts in order to provide the service to the investors in the matter of disposing odd lot shares of the company held by them.

2. The following broad guidelines should be observed by the companies while appointing a Trustee:

(i) The trustee shall be selected and appointed by the company and such a person should be responsible, trustworthy and unconnected with the day to day management of the company.

(ii) The trustee shall only sell the shares of the company in odd lots and shall not deal with shares of other companies.

(iii) The company may provide certain initial funds to start the operation and ultimately the trustee will reimburse the funds so provided out of the brokerage and service charges realised from the investors, out of surplus so generated in due course.

(iv) During the period the trustee holds odd lot shares on behalf of the investors, the company shall send all the rights and bonus shares to him for and on behalf of the original holders.

(v) Soon after the shares are consolidated into a marketable lot, the trustee shall contact the recognised prominent brokers dealing in particular shares of the company for disposing of the same. But the trustee shall not engage himself in any manipulation of market rates with regard to the shares of the company.

(vi) The books of the trustee shall be maintained from day to day on the basis of the transactions entered into by him in respect of odd lot shares and shall be open for scrutiny by the Registrar of Companies.

3. The companies in their own interest will closely monitor and maintain a surveillance on the books of the trustee in regard to the share transactions in odd lot on behalf of the investors. Any complaint against the misconduct by the trustees can be sent by the investors to the Investor Protection Cell in the Department of Company Affairs, Shastri Bhawan, Dr. R.P. Road, New Delhi or to the nearest office of the Registrar where the registered office of the company is located.

4. The above methodology to deal with the problems of investors on voluntary basis instead of prescribing any specific provision in the Companies Act is indicative of the confidence that Department reposes in the fair dealing by the companies towards their investors and it is expected that the future voluntary self-regulation will be modelled on the basis of successes of this exercise. You are requested to give a wide publicity of this scheme among your constituents and work closely with them to make the scheme a success. [*Issued by the Ministry of Law, Justice & Company Affairs, Department of Company Affairs vide Circular No.* 11/93; *F. No.* 1/21/92-CL-V, dated 8-10-1993].

Department's Press Note.—The marketing of odd lots of shares causes problem to the investors and the attention of the Government has been drawn to the problem relating to the disposal of such shares. The Stock Exchanges have imposed restrictions on dealing in such shares as only the dealings are made in marketable lots. With a view to explore ways and means and to minimise the difficulties of the investors in this regard, the Department consulted the Chambers of Commerce, Stock Exchanges and SEBI on the subject. The Department has carefully considered the various views expressed on the subject and it is felt that all listed companies establish a trust specially for acquisition of odd lot shares.... (2) Pending the disposal of the shares held by the trustees, they shall be entitled to attend and vote at the meetings and the shareholders shall authorise them to do so. Provisions of section 187C of the Companies Act, shall apply and necessary declarations will be filed by the trustees with the Registrar of Companies. (3) The companies creating such trust shall give the intimation to the shareholders of odd lots shares by issue of suitable advertisement and publicity in the media about the establishment of such trusts. [*Press Note No.* 7/93, dated 14-10-1993]

Destruction of Records in the Offices of Public Trustees

The Government promulgated the following Rules "The Office of the Public Trustee (Destruction of Records) Rules, 1984."

§ For the text of the Rules, see *Appendix* 34.

Secretarial Action Points for holding shares or debentures in trust for others

1. Note that no notice of trust, express, implied or constructive, will be recorded in the Register of members.

2. Make a declaration to the public trustee in Form I of the Trustees (Declaration of Holdings of Shares and Debentures) Rules, 1964 to the effect that the shares or debentures are held in trust for others within 60 days from the date of holding of such shares or debentures.

3. Send a copy of the declaration to the company within 21 days of the sending of the declaration to the public trustee.

4. Note that declaration of trust will not be necessary in the following cases:—

(a) where the trust is not created by an instrument in writing;

(b) even where the trust is created by an instrument in writing, the trust money in the shares or debentures of the company concerned;

(i) does not exceed Rs. 1 lakh; (ii) exceeds Rs. 1 lakh but does not exceed either Rs. 5 lakhs or 25% of the paid-up capital of the company concerned, whichever is less [section 153B].

(c) where trust created or set up as Mutual Fund, Venture Capital Fund or any other Fund approved by SEBI.

5. Notify any change in the holdings declared to the Public Trustee in Form II of the Trustees (Declaration of Holdings of Shares and Debentures) Rules, 1964 within 30 days from the date of any such change [Rule 4 of the aforesaid Rules].

6. Note that the voting rights in respect of the shares held in trust shall be exercised by the public trustee where the declaration of trust has been filed.

7. Note that particulars of shares or debentures held by a person in trust for a director are entered in the Register of Directors' shareholdings under section 307.

8. Where beneficial interest in shares is held by some other person, the member should send a declaration in Form I of the Companies (Declaration of Beneficial Interest in Shares) Rules, 1975 within 30 days of the entry of name in the Register of Members of the company.

9. In case of Stock Holding Corporation of India Ltd., the declaration of beneficial interest shall be made in respect of the shares or debentures held by it as such on or before 31st March, company-wise by the 15th May every year and where an extraordinary general meeting of the company is convened in which shares are held by the said company, such a declaration should be made at least 15 days before the date of the meeting [Rule 3(b) provisions to the Trustees (Declaration of Holding of Shares and Debentures) Rules, 1964].

10. The said corporation should notify any change in its holding on or before 31st March or by the 15th May of the year.

Relevant Rules and Prescribed Form.—For Rules and Forms relating to declaration of trustee share holdings, refer the Trustees (Declaration of Holdings of Shares and Debentures) Rules, 1964, reproduced in *Appendix* 16.

S. 154. Power to close register of members or debenture-holders.—(1) A company may, after giving not less than seven days, 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 or the register of debenture-holders for any period or periods not exceeding in the aggregate forty-five days in each year, but not exceeding thirty days at any one time.

(2) If the register of members or of debenture-holders is closed without giving the notice provided in sub-section (1), or after giving shorter notice than that so provided, or for a continuous or an aggregate period in excess of the limits specified in that sub-section, the company, and every officer of the company who is in

default, shall be punishable with fine which may extend to [1][*five thousand rupees*] for every day during which the register is so closed.

NOTES

Eng. Act, 1948 : Sec. 115
Eng. Act, 1985 : Sec. 358

Previous Act : Sec. 37

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 500 rupees to 5000 rupees under Sub-section (2).

Scope of section

The section extends to the registers of both members and debenture-holders.

The section applies to all companies, public and private.

Closure of register

A company is not bound to close its register even for a day. But if it does choose to close, the provisions of the section will have to be complied with. The Madras High Court has been of the view that the section is mandatory at least to this extent that if the company chooses to close its register of members it would have to comply with the requirements of this section. *Talyar Tea Co. v. Union of India,* (1991) 71 Com Cases 95 (Mad); *Gibson v. Barton,* (1875) LR 10 QB 329.

The provision made by this section is an enabling one. There is no compulsion on the company to close its register of members or any other book for any period. If, however, the company intends to close its register of members, failure to comply with the provisions of this section will attract the penalty provided thereon. Although the provisions of sec. 163(2) state that the books mentioned therein are required to be kept open for inspection, except when they are closed under this section there is no obligation on the company to keep the books closed from inspection. The power in this section is intended for the convenience of the company in order to enable the register of members to be brought up to date for the purpose of calculating dividend and bonus, etc. However, even if the register of members is closed, the company is obliged to make certain entries during the period of closure, such as entries relating to registration of probates and letters of administration, notices of change of name and address and court orders, such as changing orders, etc. *Killick Nixon Ltd. v. Dhanraj Mill Pvt. Ltd.,* (1983) 54 Com Cases 432 (Bom–DB).

The closure of the register is cloaked with the right to refuse the transfer of shares/debentures. Record date is an alternate for closing the registers. The purpose of closing the registers is to get the registers updated and to fix a cut-off date for the purpose of payment of dividend or issue of rights and bonus shares. This purpose can also be achieved by taking a record date for a day. This will have the advantage of keeping in abeyance the mandatory provisions of notice in the newspaper under section 154.

Advertisement in newspaper

The closing must be advertised in a newspaper. The word 'newspaper' should be taken in its popular sense. "The Daily Official List of Stock Exchange Ltd.", is not a newspaper. It was accordingly held that the notification of the closure of the register of members was ineffective and therefore it would not have the effect of preventing parties from lodging their transfers or preventing the CLB from ordering such transfers to be registered. *Talyar Tea Co. v. Union of India,* (1991) 71 Com Cases 95 (Mad).

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1. The words "five hundred rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 65 (w.e.f. 13-12-2000).

Where the resolution for closure of the register was not published and another resolution was passed for making a further issue of shares, the validity of this resolution was not affected though the resolution was set aside on other grounds. The court observed that the default in making the publication could be taken into account as an evidence of *mala fides* in resolving for a further issue. *Jadabpore Tea Co. Ltd. v. Bengal Doars National Tea Co. Ltd.*, (1984) 55 Com Cases 160 (Cal).

Notice of closure must specifically refer to register of members, debenture-holders

Department's Clarification.—It appears that some companies are in the habit of issuing notices in the newspapers regarding closure of "transfer books" apparently pursuant to section 154 of the Companies Act without, however, making any reference in the notice either to the aforesaid section or to the closure of the register of members or of debenture-holders. The notices issued by some other companies, on the other hand refer to the closure of 'transfer books' besides the register of members and/or debenture-holders. This divergence in the practice followed by companies in this regard is likely to create confusion in the minds of the shareholders. As section 154 specifically refers only to the register of members and of debenture-holders, it is considered desirable that notices issued by companies pursuant to the section should expressly refer to the closure of the said registers only. The "transfer books" or "share transfer books" of a company, not being statutory documents, any notice of their closure under section 154 is neither necessary, nor would it be in order, if the said books are different from the Register of members or of debenture-holders. (*Circular No.* 8/57/(154)-64-PR, dated 30-3-1965).

Reduction in Notice Period for fixing the Book closure/Record date

SEBI Circular No. CFD/DIL/SE/43/2003, dt. 20-11-2003.—Please refer to the earlier circular of ref. No. SMDRP/CIR-07/99 dated April 09, 1999, wherein it was provided that listed companies have to give prior intimation of 30 days to the stock exchanges, about their book-closure/record date for dematerialised securities and a notice period of 42 days in case of securities in physical form. The stock exchanges were advised to make the necessary amendments in the listing agreement and bye-laws.

SEBI has been receiving representations from various quarters for the reduction of the notice period further. In view of the major structural changes/developments in the secondary markets, SEBI has decided to reduce the notice period further in phases to ensure that there is minimum discomfort to the market players.

In the first phase, the said notice period may be reduced to 15 calendar days in case of demat scrips and to 21 calendar days in case of physical scrips. SEBI would consider further reduction in the notice period after seeking feedback from the market place.

Requirements as to listed companies

Companies that are listed on a recognised Stock Exchange are required to give Notice of the closure of transfer books to the Stock Exchange. The following is the provision in the Standard Listing Agreement which every listed company has to execute:

Clause 15.—The Company agrees that it will not close its Transfer Books on such days (or, when the Transfer Books are not to be closed, fix such date for the taking of a record of its shareholders or debenture-holders) as may be inconvenient to the Exchange for the purpose of settlement of transactions, of which due notice in advance shall have been given by the Exchange to the Company.

Clause 16.—The Company agrees to close its transfer books for purposes of declaration of dividend or issue of right or bonus shares or issue of shares for conversion of debentures or of shares arising out of rights attached to debentures or for such other purposes as the Exchange may agree to or require and further agrees to close its transfer books at least once a year at the time of the annual general meeting if they have not been otherwise closed at any time during the year and to give to the Exchange the notice in advance of at least forty-two days, or of as many days as the Exchange may from time to time reasonably prescribe, stating the dates of closure of its transfer books (or, when the transfer books are not to be closed, the date fixed for taking a record of its shareholders or debenture holders) and specifying the purpose or purposes for which the transfer books are to be closed (or the record is to be taken) and to send copies of such notices to the other recognised stock exchanges in India.

§ For the text of the Standard Listing Agreement, refer *Appendix* 252.

Penalty for default [Sub-section (2)]

For non-compliance or contravention of the section as to closure of register of members, the company and every officer of the company who is in default is punishable with fine which may extend to Rs. 5,000 for every day during which the register is so closed.

Compoundable Offence.—The offence is compoundable under section 621A.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of the matters specified under Rule 3 of the Companies (Compliance Certificate) Rules, 2001. Paragraph 5 under Rule 3 relates to closure of register of members on debenture-holders and reads as follows:

***Paragraph-5.*—The company closed its Register of Members and/or Debenture-holders from..... to..... and necessary compliance of section 154 of the Act has been made.**

Closure of Register of Members/Debenture-holders

Prescribed Check List

Check whether:

(i) In case the Register of members or debenture-holders was closed during the year, *Check whether* :

(a) the period for which it was closed and the dates thereof did not exceed, in the aggregate, forty five days in a year and not for more than thirty days at any one time.

(b) not less than seven days' previous notice was given by advertisement in some newspaper circulating in the district in which the registered office of the company is situated, to close the register;

(ii) Check whether the company has kept foreign register of members or debenture holders; if so, whether an advertisement has been given in some newspaper circulating in the district wherein the foreign register is kept where the company closes its register of members/debenture holders.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

Further Ensure that the listing conditions are complied with.

S. 155. [1][* * * *]

S. 156. [1][* * * *]

NOTES

Editorial Note: Although sections 155 and 156 have been repealed and assimilated in the amended section 111 w.e.f. 31-5-1991, but the notes under section 155 have been retained in the commentary under S. 111(4) for the sake of convenience because all pending cases have to be decided under this section and the case law developed over the years will be relevant for purposes of amended section 111.

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1. Secs. 155 and 156 Omitted by the Companies (Amendment) Act, 1988 (w.e.f. 31-5-1991), *vide* GSR dt. 31-5-1991.

Before its omission S. 155 stood as under:

S. 155. Power of Court to rectify register of members.—(1) If—

[2][(a) the name of any person—

(i) is without sufficient cause, entered in the register of members of a company, or

(ii) after having been entered in the register is, without sufficient cause, omitted therefrom; 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 reject the application or order rectification of the register; and in the latter case, may direct the company to pay the damages, if any, sustained by a party aggrieved.

In either case, the court in its discretion may make such order as to costs as it thinks fit.

(3) On an application under this section, the court—

(a) 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

(b) generally, may decide any question which it is necessary or expedient to decide in connection with the application for rectification.

(4) From any order passed by the Court on the application, or on any issue raised therein and tried separately, an appeal shall lie on the grounds mentioned in section 100 of the Code of Civil Procedure, 1908 (V of 1908)—

(a) if the order be passed by a District Court, to the High Court;

(b) if the orders be passed by a single Judge of a High Court consisting of three or more Judges, to a Bench of that High Court.

[3][(5) The provisions of sub-sections (1) to (4) shall apply in relation to the rectification of the register of debenture-holders as they apply in relation to the rectification of the register of members.]

NOTES

Eng. Act, 1948 : Sec. 116
Eng. Act, 1985 : Sec. 359

Previous Act : Sec. 38

§ For Notes see under section 111(4).

Foreign registers of members or debenture-holders

S. 157. Power for company to keep foreign register of members or debenture-holders.—(1) A company which has a share capital or which has issued debentures may, if so authorised by its articles, keep in any State or country outside India a branch register of members or debenture-holders resident in that State or country (in this Act called a "foreign register").

(2) The company shall, within [4][thirty days] from the date of the opening of any foreign register, file with the Registrar notice of the situation of the office where such register is kept; and in the event of any change in the situation of such office or of its discontinuance, shall, within [4][thirty days] from the date of such change or discontinuance, as the case may be, file notice with the Registrar of such change or discontinuance.

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2. Subs. by Act 65 of 1960, s. 36.
3. Ins. by Act 65 of 1960, s. 36.
4. The words "thirty" and "thirty days" were substituted for the words "fourteen" and "one month" by s. 62 and Schedule to the Companies (Amendment) Act 31 of 1965 (w.e.f. 15-10-1965).

(3) If default is made in complying with the requirements of sub-section (2), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [5][*five hundred rupees*] for every day during which the default continues.

NOTES

Eng. Act, 1948 : Sec. 119
Eng. Act, 1985 : Sec. 362, Sch. 14, Part I, Sch. 14, Part II Para 1

Previous Act : Sec. 41

§ See Notes under section 158.

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 50 rupees to 500 rupees under sub-section (3).

Penalty for default [Sub-section (3)]

A company which has a share capital or which has issued the debentures may, if so authorised by its articles, keep in any State or country outside India a branch register of members or debenture holders resident in the State or country as provided under section 157. Failure to give notice to the Registrar of the situation of the office where the foreign register is kept or of the change in the situation, within 30 days of opening of the register, will attract penalty by way of fine for the company and every officer of the company who is in default, which may extend to Rs. 500 for every day during which the default continues.

Compoundable Offence.—The offence is compoundable under section 621A.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of maintenance of registers. The relevant paragraph 1 of the Form prescribed under Rule 3 of the Companies (Compliance Certificate) Rules, 2001 states :

"*Paragraph 1.*— **The company has kept and maintained all registers as stated in Annexure "A' to this certificate, as per the provisions and the rules made thereunder and all entries therein have been duly recorded."**

Foreign Registers of Members or Debenture holders under Section 157

Prescribed Check List [*Item (g) of 'Statutory Registers'*]

Check whether the Articles authorise for keeping a foreign register of members or debenture holders. If yes, check whether:

(i) notice of the situation of the office where registers are kept has been filed with the Registrar within 30 days from the date of the opening of any foreign register;

(ii) notice of the change, if any, in the situation of such office or of its discontinuance was filed with the Registrar within 30 days from the date of such change or discontinuance;

(iii) a duplicate of every foreign register has been kept at the registered office and changes in the register duly entered from time to time;

(iv) the above registers are kept open for inspection and extracts/copies thereof are supplied on receipt of requisition with the prescribed fees.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

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5. The words "fifty rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 61 (w.e.f. 13-12-2000).

Further ensure that the provisions of Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations 2000 are not violated.

Documents Involved: 1. Foreign Register, 2. Articles, 3. Notice of situation of foreign office, 4. Minutes of Board Meeting.

S. 158. Provisions as to foreign registers.—(1) A foreign register shall be deemed to be part of the company's register (in this section called the " principal register") of members or of debenture-holders, as the case may be.

(2) A foreign register shall be kept, shall be open to inspection and may be closed, and extracts may be taken therefrom and copies thereof may be required, in the same manner, *mutatis mutandis,* as is applicable to the principal register under this Act, except that the advertisement before closing the register shall be inserted in some newspaper circulating in the district wherein the foreign register is kept.

(3) (a) The Central Government may, by notification in the Official Gazette, direct that the provisions of clause (b) shall apply, or cease to apply, to foreign registers kept in any State or country outside India.

(b) If a foreign register is kept by a company in any state or country to which a direction under clause (a) applies for the time being, the decision of any competent Court in that State or country in regard to the rectification of the register shall have the same force and effect as if it were the decision of a competent Court in India.

(4) The company shall—

(a) transmit to its registered office in India a copy of every entry in any foreign register as soon as may be after the entry is made; and

(b) keep at such office a duplicate of every foreign register duly entered up from time to time.

(5) Every such duplicate shall, for all the purposes of this Act, be deemed to be part of the principal register.

(6) Subject to the provisions of this section with respect to duplicate registers, the shares or debentures registered in any foreign register shall be distinguished from the shares or debentures registered in the principal register and in every other foreign register; and no transaction with respect to any shares or debentures registered in a foreign register shall, during the continuance of that registration, be registered in any other register.

(7) The company may discontinue the keeping of any foreign register; and thereupon all entries in that register shall be transferred to some other foreign register kept by the company in the same part of the world or to the principal register.

(8) Subject to the provisions of this Act, a company may, by its articles, make such regulations as it thinks fit in regard to its foreign registers.

(9) If default is made in complying with sub-section (4), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [6][*five hundred rupees*].

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6. The words "fifty rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 67 (w.e.f. 13-12-2000).

NOTES

Eng. Act, 1948 : Sec. 120. Previous Act : Secs. 42, 42-A.
Eng. Act, 1985 : Sch. 14, Part II, Paras 2-7.

Companies Act, 1956

As suggested by the Company Law Committee, the two Sections 157 and 158 are now made applicable to all foreign countries instead of being confined to the United Kingdom and Burma, and the provisions are extended to the register of debenture-holders also. (*Clauses* 150/151 of the Companies Bill, 1953)

Sub-section (3), further enacts that the Central Government may by notification direct that in regard to rectification of any foreign register the decision of a competent Court in the foreign state or country concerned shall have the same force and effect as the decision of a competent Court in India.

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 50 rupees to 500 rupees under sub-section (9).

Penalty for default [Sub-section (9)]

For failure to transmit to its registered office in India a copy of every entry made in the foreign register and keep duplicate copy of every foreign register in the company's office, the company and every officer of the company who is in default are punishable with fine which may extend to five hundred rupees.

Compoundable Offence.—The offence is compoundable under section 621A.

Model regulations as per Table A.—For model regulations in the Articles of Association pertaining to this section, see Regulation 69 of Table A.

Secretarial Practice Notes

§ See Practice Notes under Section 157.

Annual Returns

S. 159. Annual return to be made by company having a share capital.—(1) Every company having a share capital shall, within [7][sixty] days from the day on which each of the annual general meetings referred to in section 166 is held, prepare and file with the Registrar a return containing the particulars specified in Part I of Schedule V, as they stood on that day, regarding—

(a) its registered office,

(b) the register of its members,

(c) the register of its debenture-holders,

(d) its shares and debentures,

(e) its indebtedness,

(f) its members and debenture-holders, past and present, and

(g) its directors, managing directors [8][* * * *], [9][managers and secretaries], past and present:

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7. The word "sixty" was substituted for the word "forty-two" by s. 62 and the Schedule to the Companies (Amendment) Act XXXI of 1965 (w.e.f. 15-10-1965).
8. The words "managing agents, secretaries and treasurers" omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 68 (w.e.f. 13-12-2000).
9. Subs. by Act 65 of 1960, s. 38 for "and Manager".

[10][*Provided* that if [11][any of the five] immediately preceding returns has given as at the date of the annual general meeting with reference to which it was submitted, the full particulars required as to past and present members and the shares held and transferred by them, the return in question may contain only such of the particulars as relate to persons ceasing to be or becoming members since that date and to shares transferred since that date or to changes as compared with that date in the number of shares held by a member.

Explanation.—Any reference in this section or in section 160 or 161 or in any other section or in Schedule V to the day on which an annual general meeting is held or to the date of the annual general meeting shall, where the annual general meeting for any year has not been held, be construed as a reference to the latest day on or before which that meeting should have been held in accordance with the provisions of this Act.]

(2) The said return shall be in the form set out in Part II of Schedule V or as near thereto as circumstances admit [12][and where the return is filed even though the annual general meeting has not been held on or before the latest day by which it should have been held in accordance with the provisions of this Act, the company shall file with the return a statement specifying the reasons for not holding the annual general meeting]:

Provided that where the company has converted any of its shares into stock and given notice of the conversion to the Registrar, the list referred to in paragraph 5 of Part I of Schedule V shall state the amount of stock held by each of the members concerned instead of the shares so converted previously held by him.

NOTES

Eng. Act, 1948 : Sec. 124 Previous Act : Sec. 32(1)(2)
Eng. Act, 1985 : Sec. 363

Companies Act, 1956

Filing of annual return with registrar.—The provisions as to Annual Return are improved on lines of the English Act. The annual Return now covers the register of debenture-holders also.

"The detailed provisions contained in Section 32(2) of the existing Act have been taken over and incorporated in Schedule V. The Schedule as recommended by the Company Law Committee embodies all the provisions contained in the corresponding Schedule of the English Act *viz.*, the Sixth Schedule. The annual return will cover the register of debenture-holders also". (*Notes on clause* 152 of Bill).

The section and the Schedule V are based on the following suggestions of the Company Law Committee: "We suggest that section 32 of the Act should be revised on the lines of section 124, read with section 126 of the English Companies Act, 1948, subject to the following modifications. The annual return form, "Form E" should be brought in line with the provisions of Schedule VI of the English Companies Act, which provides *inter alia* that the annual return should also contain a list of registered debenture-holders and information about their occupations and the occupation of other directors." (*Company Law Committee Report;* 1953 : Para 41).

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10. Ins. by Act 65 of 1960, s. 38.
11. Subs. by the Companies (Amendment) Act, 1988 for the words "any of the two", s. 22 w.e.f. 15-6-1988 *vide* GSR No. 559(E), dt. 10-6-1988.
12. Ins. by Act 65 of 1960, s. 38.

Companies (Amendment) Act, 1960

The purpose of the amendments is thus stated in the Notes on clauses : "Under the present section, a company could contend that if it makes default in holding the annual general meeting it could not be penalised for not filing the annual returns and accounts, which is only consequential. To deal with such defaults conveniently, it is proposed to make provisions in the section requiring every company (a), where the annual general meeting for any year has not been held, to file the annual returns within forty-two days from the latest date on which the annual meeting should have been held in accordance with the provisions of the Act, and (b) to state the reasons for not holding the annual general meeting.

In order to avoid burdensome work of a repetitive character, it is also proposed to make a provision which will dispense with the filing of bulky annual returns every year".

The Report of the Companies Act Amendment Committee, on whose recommendation the amendments were made, had remarked, as follows: "The section contemplates the preparation and filing with the Registrar of an annual return within 42 days from the day on which the annual general meeting is held under section 166. This provision has been sought to be interpreted as meaning that, if no annual general meeting is held, the failure to file the annual return cannot be penalised under the Act. Companies may purposely avoid or postpone the holding of an annual general meeting in order to avoid criticism of the conduct of the company's affairs by the management. If thereby the management is also released from the obligation to submit annual returns, it would appear to place a premium on mismanagement.....

As the section stands, every company having a share capital is required to file with the Registrar every year a formal return containing the numerous particulars enumerated in Section 159(1). In order to avoid burdensome and mechanical clerical work of a repetitive character, we would suggest that Note (1) appearing under item 5 in Part II of Schedule V dealing with annual returns should be made a proviso to sub-section (1)". (*Report*, para 65).

Companies (Amendment) Act, 1988

Particulars once in six years.—Earlier, once in every three years, the annual return was required to give full particulars of members and the returns for the intervening 2 years were required to contain only the changes in the list of shareholders. Sub-section (1) has been amended by Amendment Act of 1988 to require full particulars of all the shareholders once in every six years. Clause 22 of the Notes on clauses reads as follows: "without sacrificing the purpose which the returns under section 159 are meant to serve, this clause provides for the filing of the annual return containing full particulars once in every six years, as against once in every three years, as at present."

Companies (Amendment) Act, 2000

The terms "managing agents, secretaries and treasurers" have been omitted by the Amendment Act, 2000. The amendment is of consequential nature.

Failure to file return, disqualification of director [Sec. 274(1)(g)]

Clause (g) to sub-section (1) of section 274 has been inserted by the Companies Amendment Act, 2000. The effect of the amendment is that a director of a public company which has, among other things, failed to file its annual accounts and returns for three consecutive financial years shall not be eligible for appointment as director of any other public company until the expiry of five years from the date of default.

Disqualification of Directors under sec. 274(1)(g) Rules, 2003

Disqualifications under clause (g) of sub-section (1) of section 274.—(a) Whenever a company fails to file the annual accounts and annual returns, as described in sub-clause (A) of clause (g) of sub-section (1) of section 274, persons who are directors on the last due date for filing the annual accounts and the annual returns for any continuous three

financial years commencing on and after the first day of April, 1999, shall be disqualified. [*Rule 3*].

§ For full text of the Rules, see *Appendix* 44 and see Notes under section 274(1)(g) *post.*

Government companies exempt.—Sec. 274(1)(g) shall not apply to a government company. [vide *Notification No. GSR 829(E), dt. 21-10-2003*].

§ See also notes under section 274(1)(g), *post.*

Filing of annual returns and balance sheet

Department's Circular I.—Apart from providing periodical information to the Registrar, from the point of view of the company, the annual return is intended to provide evidence for determination of questions pertaining to the rights of individuals to attend the general meetings and to vote thereon etc. If annual returns as on the date of the general meetings are not filed, the purpose behind these annual returns would not be fulfilled. However, this Section, as amended, does not require a company that has filed an annual return as on the latest date on or before which the meeting should have been held but has not been held, to file a second annual return when the annual general meeting has been held. Attention is also invited to the explanation under Section 159(1) which will apply also to Sections 160 and 161. (*Department's File No.* 8/16(1)/61-PR).

Department's Circular II.—These are recurring documents required to be filed every year by every company. These do not require elaborate scrutiny at filing stage except to ensure that the fee is paid enclosures referred to herein are available along with the accounts of subsidiaries and other supporting documents like profit and loss account/director's report/auditors report, etc. in the manner required. Compliance of these requirements be checked at the filing stage itself and the documents be straightway taken on record. (para XI) [*Circular No.* 1/95; *F.No.* 14/6/94—CL-V, dated 16-2-1995].

Time for submission of return

The time-limit for submitting the annual return to the Registrar is sixty days from the date of annual general meeting. As per *Explanation* to sub-section (1), in case the AGM is not held, the 60 days will be computed from the date on which AGM was due to be held in accordance with the provisions of sections 166 and 210.

Filing of annual return where AGM not held

Whether the annual general meeting had been held or not the annual return made upto the due date must be filed within sixty days of the last date on or before which the meeting should have been held; and where the meeting had not been held, the return must specify the reasons for not holding the meeting.

That fact that no general meeting was held is no justification for not complying with the requirements of this section. A person who could have called the meeting cannot, by not calling the meeting, rely on his own default, and say that because no meeting was held, he could not file the annual return, See *State of Bombay v. Bhandhan Ram Bhandani,* AIR 1961 SC 186 : (1961) 31 Com Cases 1; *State v. Tonk Calico Printers (Private) Ltd.,* (1963) 2 Comp LJ 87 (Raj–DB); *India Nutriments Ltd. v. Registrar of Companies, Madras,* (1964) 34 Com Cases 160 (Mad); *Saraswathi Printers Ltd. v. State,* (1960) 30 Com Cases 523 Raj); *Park v. Lawton,* (1911) 1 KB 588 **distinguishing** *Dorte v. South African Super Aeration Ltd.,* (1904) 20 TLR 425 (DC), where the defendant was not a party to the default.

Filing of annual return on micro film

Section 610A permits filing of the Annual Return on floppy etc. and shall be admissible in evidence in any proceedings, subject to the conditions specified therein.

Filing of annual return where company not functioning

The fact that the company did not function is also no excuse. See *Madan Gopal Dey v. State of West Bengal,* (1969) 39 Com Cases 119 : AIR 1968 Cal 79. See also *Registrar of Companies, Orisa v. Utkal Distributors Private Ltd.,* (1978) 48 Com Cases 768 (Orissa); *Nagamani Transports Pvt. Ltd. v. ROC (Madras),* (1966) 36 Com Cases 7 (Mad). Those

who are prosecuting a person under this section would have to show that he was a director at the material time and was also an officer in default. *Bipin Behari Nayak v. ROC,* (1988) 63 Com Cases 271 (Orissa).

The forwarding to the Registrar of a list and summary not satisfying the requirements of the Act is not sufficient compliance with the section. *Briton Medical and General Life Assn., Re,* (1888) 39 Ch D 61 cited in *Lakshmana Mudaliar v. Emperor,* (1932) 2 Com Cases 387 : AIR 1932 Mad 497.

Universal application

The provisions of sections 159, 161, 166, 210 and 220 are of universal application and therefore the directors of a private company are as much liable for any default as those of a public company. *Registrar of Cos. v. F.S. Cabral,* (1988) 63 Com Cases 126 (Bom).

Date for filing annual return after which additional fee leviable

Department's Clarification.—On a query to Department "In cases of default or delay in holding the annual general meeting, what is the date on which the annual returns and balance sheet of a company should be deemed to be due for filing with the Registrar of Companies, for the purpose of charging additional fees pursuant to section 611(2) of the Companies Act? Should it be the 42nd day (Now 60 days) after the day in which the company should ordinarily have held its annual general meeting under the provisions of the Act OR should it be only the 42nd day after the day on which the company actually held the Annual General Meeting?

The Department expressed the following view: "Having regard to the decision in *Hirjee Mills* case [*State of Bombay v. Bhandhan Ram Bhandani,* AIR 1961 SC 186 : (1961) 31 Com Cases 1], in which the Supreme Court held that the default either under section 32(3) or under section 134(1) of the Indian Companies Act, 1913 occurred after the expiry of 21 days from the last day on which the annual general meeting should have been held within the year, the Department is of the view that a company should be deemed to have defaulted in the matter of filing documents under section 159 even if these are filed within 42* days (Now 60 days) of the holding of the annual general meeting where such a meeting has been held after the due date. The clarification made in the Explanation to sub-section (1) of section 159 of the Act and the provision enabling the company to file annual returns even where the annual general meeting has not been held in sub-section (2) of the said section will strengthen this view. Penal fees should accordingly be levied on such documents wherever they are tendered after 1st February, 1961." (*Department File No.* 81/16(1)/61-PR).

Department's Clarification.—If the Annual Return is filed as on the last date on which the Annual General Meeting should have been held, there appears to be no necessity to file another Annual Return if the Annual General Meeting is held subsequently. (*Letter No.* 8/16 (159)/61-PR, dated 25-2-1961).

Annual return as *prima facie* evidence

Where the question was whether the petitioner was holding the specific number of shares for the purposes of S. 397, the CLB held that the facts disclosed in the annual return showing that he had the specific number was a *prima facie* evidence of his right to maintain the petition. *Rashmi Seth (Mrs.) v. Chemon (India) P. Ltd.,* (1995) 82 Com Cases 563 (CLB).

Applicability of section to foreign companies

The provisions of this section have been made applicable to foreign companies by "The application of Section 159 to Foreign Companies Rules, 1975", subject to the modifications as contained in those Rules. For the text of the Rules and Forms, see *Appendix* 30.

Department's Clarification.—The provisions of section 159 are not applicable to a foreign company not holding any share capital in India and whose shareholders are non-Indians and are living outside India. (*Letter No.* 8/20/75-CL-V, dated 6th November, 1975).

Penalty for default.—See S. 162 and Notes thereunder.

Default under this section independent offence

"The defaults under sections 159, 166, 210 and 220 of the Companies Act, are separate offences." [*Circular No.* 2 of 1985, dated 25-3-1985 : For text of the Circular see under section 166].

Content and Form of Annual Return

Schedule V, being the format of Annual Return for a company having a share capital has been revised and substituted by Notification G.S.R. No. 389(E), dated 15-5-1995.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of the matters specified under Rule 3 of the Companies (Compliance Certificate) Rules, 2001. Paragraph 2 under Rule 3 relates to filing of Forms and Returns with the ROC, RD, Central Government, CLB and other authorities and reads as follows:

***Paragraph 2.*—The company has duly filed the forms and returns as stated in Annexure "B" to this certificate, with the Registrar of Companies, Regional Director, Central Government, Company Law Board or other authorities within the time prescribed under the Act and the Rules made thereunder.**

Annual Return [*Item (a) of 'Periodical Returns'*]

Prescribed Check List

Check whether:

(i) the annual return has been duly filed with the ROC within 60 days of the holding of the annual general meeting;

(ii) where annual general meeting has not been held, the return was filed within 60 days from the date on which the annual general meeting ought to have been held [along with reasons for not holding the AGM];

(iii) the return has been duly signed and the requisite certificates have been attached as per section 161;

(iv) in case of a company whose shares are listed on a recognised stock exchange, the return is also signed by a secretary in whole-time practice.

Note : (i) In case of an adjourned annual general meeting, check whether the annual return incorporates the date of the original meeting.

(ii) detailed guidance can be had from the Institute's publication "Guidance Note on Signing of Annual Return".

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

Check further—

(a) whether a certificate to the effect that the whole of the amounts envisaged in clauses (a) to (c) of section 205C(2) remaining unpaid or unclaimed for a period of 7 years from the date they became payable have been credited to the Investor Education and Protection Fund was attached to the Annual Return?

(b) whether there was any direction of Central Government under Sec. 213?

(c) whether where the public company has defaulted in filing annual returns and accounts for 3 continuous financial years, section 274(1)(g) has been complied with?

Documents Involved: 1. Annual Return with its annexures, 2. Register of Members/Debenture-holders, 3. Register of Charges and other relevant registers, 4. Notice of the annual general meeting.

S. 160. Annual return to be made by company not having a share capital.—(1) Every company not having a share capital shall, within [1][sixty] days from the day on which each of the annual general meetings referred to in section

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1. The word "sixty" was subs. for the word "forty-two" by s. 62 and the Schedule to the Companies (Amendment) Act 31 of 1965 (w.e.f. 15-10-1965).

166 is held, prepare and file with the Registrar a return[2] stating the following particulars as they stood on that day:—

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

[3][(aa) the names of members and the respective dates on which they became members and the names of persons who ceased to be members since the date of the annual general meeting of the immediately preceding year, and the dates on which they so ceased;]

(b) all such particulars with respect to the persons who, at the date of the return were the directors of the company, [4][* * * *], [5][its manager and its secretary] as are set out in section 303.

(2) There shall be annexed to the return a statement containing particulars of the total amount of the indebtedness of the company as on the day aforesaid in respect of all charges which are or were required to be registered with the Registrar under this Act or under any previous companies law, or which would have been required to be registered under this Act if they had been created after the commencement of this Act.

NOTES

Eng. Act, 1948 : Sec. 125
Eng. Act, 1985 : Sec. 364

Companies (Amendment) Act, 1960

The Companies (Amendment) Act, 1960 made changes in this section on the lines as adopted in section 159. See Notes under that section.

Companies (Amendment) Act, 2000

The terms "managing agents, secretaries and treasurers" have been omitted by the Companies Amendment Act, 2000. The amendment is of consequential nature.

Exemption to section 25 Companies

The provisions of section 160(2)(aa) do not apply to section 25 companies. (*S.O. No.* 1578, dated 1-7-1961) and to mutual benefit societies notified under section 620A.

Secretarial Practice Notes : Annual return by company not having a share capital

Where the company has no share capital, whether the Return in Form 21-A stating the prescribed particulars along with a statement about the indebtedness of the company in respect of charges had been filed within 60 days from the date of the annual general meeting or the latest day on which such meeting ought to have been held.

S. 161. Further provisions regarding annual return and certificate to be annexed thereto.—(1) The copy of the annual return filed with the Registrar under section 159 or 160, as the case may be, shall be signed both by a director and by the [6][* * * *] manager or secretary of the company, or where there is no

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2. Form No. 21A of the Companies (Central Government's) General Rules & Forms, 1956 is the prescribed form of return relevant to the section.
3. Ins. by Act 65 of 1960, s. 39.
4. The words "managing agents, its secretaries and treasurers" omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 69 (w.e.f. 13-12-2000).
5. Subs. by Act 65 of 1960, s. 39 for, "and its manager".
6. Omitted by the Companies (Amendment) Act, 1988 the words "managing agent, secretaries and treasurers", s. 23(a)(i) w.e.f. 15-6-1988 *vide* GSR No. 559(E), dt. 10-6-1988.

[6a][* * * *] manager or secretary, by two directors of the company, one of whom shall be the managing director where there is one:

[7][*Provided* that where the annual return is filed by a company whose shares are listed on a recognised stock exchange, the copy of such annual return shall also be signed by a secretary in whole-time practice.]

(2) There shall also be filed with the Registrar along with the return a certificate signed by [8][the signatories] of the return, stating—

(a) that the return states the facts as they stood on the day of the annual general meeting aforesaid, correctly and completely, [9][* * * *];

[10][(aa) that since the date of the last annual return the transfer of all shares and debentures and the issue of all further certificates of shares and debentures have been appropriately recorded in the books maintained for the purpose; and]

(b) in the case of a private company also, (i) that the company has not, since the date of the annual general meeting with reference to which the last return was submitted, 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 (ii) that, where the annual return discloses the fact that the number of members of the company exceeds fifty, the excess consists wholly of persons who under sub-clause (b) of clause (iii) of sub-section (1) of section 3 are not to be included in reckoning the number of fifty.

NOTES

Eng. Act, 1948 : Sec. 127 Previous Act : Sec. 32(3)

Companies Act, 1960

"The proposed amendment gives effect to the recommendation in para 66 of the Report that, while filing the annual return with the Registrar, the management should certify that proper record of transfer of all shares or debentures, and the issue of all further certificates since the date of the last annual return has been kept in the books mentioned for the purpose". (*Notes on Clauses* of Companies Bill, 1959).

Companies (Amendment) Act, 1988

Signature of secretary in whole time practice on listed company's returns.—The annual return is required to be signed by a director and manager or secretary of the company. In case there is no manager or secretary, the return is required to be signed by two directors, including managing director, if any. As per changes made by the Amendment Act of 1988, the return is also required to be signed by a secretary in whole-time practice, in the case of a company whose shares are listed on a recognised stock exchange. The term 'secretary in whole-time practice' has been defined in section 2(45A). The practis-

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6a. Omitted by the Companies (Amendment) Act, 1988 the words "managing agent, secretaries and treasurers", s. 23(a)(i) w.e.f. 15-6-1988 *vide* GSR No. 559(E), dt. 10-6-1988.
7. Ins. by the Companies (Amendment) Act, 1988, s. 23(a)(ii) w.e.f. 15-6-1988 *vide* GSR No. 559(E), dt. 10-6-1988.
8. Subs. by the Companies (Amendment) Act, 1988, s. 23(b) w.e.f. 15-6-1988 *vide* GSR No. 559(E) dt. 10-6-1988 for the words. "both the signatories"
9. The word "and" omitted by Act 65 of 1965, s. 40.
10. Ins. by Act 65 of 1960, s. 40.

ing secretary will have to verify the position stated in the return by inspecting the relevant records of the company.

It may be noted that in case of a listed company, the annual return should be signed by a secretary in whole-time practice, in addition to its certification by the company secretary, if any.

Certificates regarding annual return under Sub-section (2)

Department's view.—The certificate required under sub-section (2) of Section 161 should be insisted upon in respect of all annual returns filed after the 28th December, 1960, no matter when the annual general meeting was held. (*Letter No.* 8/16(1)/61-PR, dated 25-2-1961).

Mandatory ceiling on certification of annual returns

ICSI's Clarification.—"In terms of Notification No. 2 of August, 1989, a mandatory ceiling of 30 listed companies whose annual return a company secretary in whole-time practice can sign under section 161 of the Act has been prescribed for a calendar year commencing from 1st January, 1989. This notification becomes effective from 1st October, 1989. It is hereby clarified that:

(a) A company secretary in whole-time practice, who has already signed annual returns of 30 listed companies on 1st October, 1989, shall not sign any more annual returns for the calendar year 1989.

(b) Where a company secretary in whole-time practice has already signed the annual return of some companies, he may undertake to sign annual return of such more number of companies as to restrict the total number of companies to 30 for the calendar year 1989.

(c) Where a company secretary in whole-time practice has already signed the annual returns of more than 30 listed companies as on 1st October, 1989, in spite of our recommendatory guidelines issued earlier, he shall not undertake to sign annual return of any other listed company for the calendar year 1989. But he should report to the Institute on or before 31st October, 1989, the number of companies in excess of the mandatory ceiling of 30 annual returns which he has signed as on 1st October, 1989, for calendar year 1989.

Members in whole-time practice are advised to note the above clarification with a view not to invite any action for professional misconduct". [*Clarification*, dated 11-8-1989 : (1989) Chartered Secretary 701]

Amendment of annual return

Where an error in the annual return is discovered after it has been accepted for filing by the Registrar, it is not possible to recover the document for amendment. A revised return after incorporating amendments should be filed enfaced with a note in the following terms:

> "This revised return is filed by way of amendment of the return filed on..... (date) and is rendered necessary by reason of the earlier return..... [give explanation]."

Penalty for default.—Refer S. 162 and Notes thereunder.

ICSI's Guidance Note on Compliance Certificate

See Notes under section 159.

S. 162. Penalty and interpretation.—(1) If a company fails to comply with any of the provisions contained in section 159, 160 or 161, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [1][*five hundred rupees*] for every day during which the default continues.

(2) For the purposes of this section and sections 159, 160 and 161, the expressions "officer" and "director" shall include any person in accordance with whose

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1. The words "fifty rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 70 (w.e.f. 13-12-2000).

directions or instructions the Board of Directors of the company is accustomed to act.

NOTES

Eng. Act, 1948 : Sec. 128 Previous Act : Sec. 32(5)

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 50 rupees to 500 rupees under sub-section (1).

Failure to file return, disqualification of director [Sec. 274(1)(g)]

Clause (g) to sub-section (1) of section 274 has been inserted by the Companies Amendment Act, 2000. The effect of the amendment is that a director of a public company which has, among other things, failed to file its annual accounts and returns for three consecutive financial years, becomes disqualified from being appointed as director of any other company until the expiry of five years from the date of default.

§ See also notes under section 274(1)(g) *post.*

Shadow director [Sub-section (2)]

Note that "officer" and "director" for purposes of Sections 159, 160, 161 and 162 include any person in accordance with whose directions or instructions the Board of directors is accustomed to act. (See Notes under Section 7). Such a person can, as a director, sign the annual return under Section 159 or 160, and the certificate under Section 161, and he will be an officer in default within the meaning of Section 162.

Default due to reason beyond control

Where the default was due to reasons beyond the control of the company and its directors and officers, it is hard to fasten criminal liability on them. *In re, Bank of Deccan Ltd.,* (1960) 30 Com Cases 284 : AIR 1960 Ker 15. But they cannot take advantage of their own failure to hold the annual general meeting as a pretext for not submitting the returns. See *State v. Tonk Calico Printers (Private) Ltd.,* (1963) 2 Comp LJ 87 (Raj—DB), where all the previous authorities have been reviewed, See also *Registrar of Companies, Orissa v. Utkal Distributors Private Ltd.,* (1978) 48 Com Cases 106 (Orissa).

Default in calling meeting

A person charged with an offence under section 159 for failure to file the annual return, cannot avail of the defence that the meeting had not been called when he himself is responsible for the default in calling the meeting. *State of Bombay v. Bandhan Ram Bhandani,* (1961) 31 Com Cases 1 : AIR 1961 SC 186 **followed** in *Dulal Chandra Bhar v. State of W.B.,* (1962) 32 Com Cases 1143 (Cal); *India Nutriments Ltd. v. ROC, Madras,* (1964) 34 Com Cases 160 (Mad).

Company not functioning

The fact that the company did not function is also no excuse. *Madan Gopal Dey v. State of West Bengal,* (1969) 39 Com Cases 119 : AIR 1968 Cal 79. See also *Sukhbir Saran Bhatnagar v. ROC,* (1972) 42 Com Cases 408 (Delhi); *Kalaimagal Corporation Ltd. v. The Asst. ROC,* 1987 LW (Cri) 501, 507 (Mad); *Dhanalaxmi Chemical Industries Private Ltd. v. Asst. ROC,* 1988 LW (Cri) 180, 183 (Mad). It was, however, held in the case of *Calculating Business Machines (Pvt.) Ltd. v. State of Bihar,* (1983) 54 Com Cases 100 (Pat), that as the company admittedly was not carrying on any business since its incorporation and had requested the Registrar of Companies to strike off its name from the Register as defunct, there would be no *mens rea* on the part of the Company and its directors in not submitting the annual returns as required under Section 159 and a conviction of the company or its directors under Section 162 would not be warranted. The fact that the company has become defunct will be no defence where the directors have done

nothing to get the company struck off from the register. *Nagamani Transports Pvt. Ltd. v. ROC, Madras,* (1966) 36 Com Cases 7 (Mad).

Documents lodged in Court

The fact that the company's documents are lodged in court in connection with pending proceedings is no excuse because the directors could have taken the permission of the court for inspection of the documents for preparing the return. A supervisory director is definitely a person responsible for default, but other directors cannot say that they were mere figure-heads. If they have been attending the company's meetings they would have to share the blame. *Arcot Citizen Bank Ltd, In re,* (1957) 27 Com Cases 550 : AIR 1957 Mad 675.

Jurisdiction

The offence is committed at the place where the documents have to be filed with ROC and, therefore, the courts of that place have jurisdiction. *Nagamani Transports Pvt. Ltd. v. ROC, Madras,* (1966) 36 Com Cases 7 (Mad).

Default not mere technical offence

The underlying object of the section is to protect the interest of the general public and particularly safeguard those of the shareholders. The Act imposes a definite duty upon the directors. If these duties are not properly carried out, the directors would be substantially penalised. It was never intended that these sanctions should only be imposed in cases where fraud, or dishonesty was suspected or proved. *Bhagirath Chandra Das v. Emperor,* (1947) 17 Com Cases 93 : AIR 1948 Cal 42. A director who has committed the default before acceptance of his resignation is punishable (*ibid*). Where a default has been committed and it is proved to the satisfaction of the court that the person being prosecuted is an officer in default, the court cannot let him off under the Probation of Offenders Act 1958. The court has to impose the penalty contemplated in this Section. The offence under the Section is not merely a technical offence. *Registrar of Companies, Punjab v. Himprastha Financier Pvt. Ltd.,* (1974) 44 Com Cases 154 (P&H)(DB).

The proceedings under the Companies Act to recover a fine are a criminal cause or matter. *R. v. Tyler and International Commercial Co.,* (1891) 2 QB 588. For any disobedience of court orders, the person concerned can be committed to prison for contempt of court. *George Dowman Ltd., Re,* The Times, July 26, 1960.

Where none of the directors sent any reply, all of them were held to be in default. *Assistant Registrar of Companies v. Southern Machinery Works Ltd.,* (1986) 59 Com Cases 670 (Mad).

Prosecution for default

In the event of a default under this section the liability of the company to be prosecuted is clear, but no director would be held liable unless it is proved that he was responsible for the default. *Ramacast Ltd. v. Asst. ROC,* (1988) 63 Com Cases 805 (Cal); or was an officer in default within the meaning of S. 5 as re-enacted by the amendment of 1988. The company is a necessary party. Without the company being prosecuted alongwith its officer(s), the proceedings will not servive. *Ajit Kumar Sarkar v. ROC,* (1979) 49 Com Cases 909 (Cal).

Where there was no material to show how the director in question was connected with the default in filing the annual return, his acquittal was held to be justified. *Registrar of Companies v. Bipin Behari Nayak,* (1996) 86 Com Cases 641 (Ori). The prosecution of a person who ceased to be a director on the last day on which the annual return was to be submitted was quashed. *Jayesh R. Mor v. State of Gujarat,* (2000) CLC 486 (Guj).

The person accused under the section can be exempted by the Magistrate under S. 313 of Cr.P.C. from being personally examined in the matter. *Bilaspur Spinning Mills Ltd. v. Asst. ROC,* (1988) 63 Com Cases 882, 884 (Cal).

Cognizance of an offence can be taken by the Magistrate on the written complaint of ROC who is a public servant without examining the ROC upon oath, as per section 200 of Cr PC, 1973. *National Cotton Mills Ltd. v. AROC,* (1984) 56 Com Cases 222 (Cal).

High Court's power for quashing complaint.—The High Court to which an application has been made for quashing a complaint should not enter into the debatable area, even if there are two versions, where the allegations in the complaint and the documents annexed to it make out a *prima facie* case. The High Court should not make meticulous scrutiny of the case before trial to find out whether the case would end in conviction or acquittal. The power of quashing should be sparingly exercised. *Shashi Sood v. Asst. ROC,* (2001) 44 CLA 297 : (2001) 41 CLA 338 (Cal).

Whether offence of continuing nature

There is a conflict of views between High Courts as to whether offences punishable under this Section are of a continuing nature or not. Failure to file the annual return has been held not to be a continuing offence in *National Cotton Mills v. Asstt. ROC, (W.B.),* (1984) 56 Com Cases 222 (Cal)(DB) [**Overruling** *Ajit Kumar Sarkar v. Asst. ROC, (infra)*]; *Shivalik Ice Factory and Cold Storage (Pvt.) Ltd. v. ROC,* (1988) 64 Com Cases 113, 115 (P&H); *Kalaimagal Corporation Ltd. v. Asst. ROC,* 1987 LW (Cri) 501, 507 (Mad); *Chandra Spinning & Weaving Mills v. ROC,* (1990) 69 Com Cases 117, 137 (Kar); *Eastern Paper Mills Ltd. v. State,* (1988) 1 Cal LR (HC) 179 (Cal—DB); *Nripendra Kumar Ghosh v. ROC,* (W.B.), (1985) 58 Com Cases 672 (Cal) and *Central Manbhum Coal Co. (P.) Ltd. v. Assistant ROC, (W.B.),* (1986) 59 Com Cases 176 (Cal); *Pravin Jha v. State of U.P.,* (2000) 3 Comp LJ 426 : (2001) 30 SCL 387 : (2001) 106 Com Cases 554 (All).

The **opposite view** has been taken in *Ajit Kumar Sarkar v. Assistant ROC,* (1979) 49 Com Cases 909 (Cal) [**Overruled** in *National Cotton Mills v. Asst. ROC, (Supra)*]; *Luxmi Printing Works v. Asst. ROC,* (1990) 69 Com Cases 442, 445, 450 (Cal—DB) and *Sudarsan Chits (India) Ltd. v. ROC,* (1986) 59 Com Cases 261 (Ker); *Rani Joseph v. ROC,* (1995) 2 KLT 14 (Ker—DB). *Sugga Eng. Works P. Ltd. v. State,* (1990) 4 Corpt LA 95 (Del); *Dhanlakshmi Chemical Industries P. Ltd., Re,* (1988) LW (Cri) 181; *Kalaimagal Corporation Ltd., Re,* (1987) LW (Cri) 501; *Asst. ROC v. Premier Synthetics (P.) Ltd.,* (1997) 89 Com Cases 732 (Mad).

In *Nripendra Kumar Ghosh, (Supra),* Calcutta High Court took the view that the offence of not filing the annual return as required by S. 159 was committed once and for all when the default occurred and that there was no further continuance. The court held that even though this section provides for a fine for every day for which the default continues that amounts only to levy of a penalty on an enhanced scale to enforce compliance with the duty laid down by S. 159 and that there is nothing in the wording of S. 162 which makes this offence a continuing one as is the case with offences under Ss. 234, 372 and 598. In our view this judgment and the others which hold that the offence is not a continuing one are with respect clearly wrong.

In *State of Bihar v. Deokaran Nenshi,* AIR 1973 SC 908, the Supreme Court defined a continuing offence as follows at para 5 p. 909: "Continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves penalty the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and therefore constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

Applying the test laid down by the Supreme Court, it is clear that offences punishable by this section are continuing offences. To the same effect, *Kuldip Singh v. State*, (1990) 68 Com Cases 625 (Del); *Luxmi Printing Works v. Asst. ROC*, (1990) 69 Com Cases 442, 445, 450 (Cal).

A person cannot be prosecuted for the same offence twice. The accused was initially prosecuted and acquitted for offences under S. 156 read with S. 162 for the period from 1956-60. He was later prosecuted in 1956 and 1959. The second prosecution was quashed. It makes no difference that the offence is a continuing one. The case would have been different if he had been prosecuted for the subsequent period from 1960 onwards. *Soma Veerappa v. State of Madras*, (1963) 33 Com Cases 1028 (Mad).

Mens rea

Under S. 5 of the Act, before its amendment in 1988, the expression "Officer who is in default" meant any officer of the company who was knowingly guilty of the default, non-compliance, failure, refusal or contravention mentioned in a particular provision, or who knowingly and wilfully authorised or permitted such defaults, non-compliance, failure, refusal or contraventions. See *Thomas V. M. v. ROC*, (1980) 50 Com Cases 247 (Ker); *ROC v. Utkal Industries (Pvt.) Ltd.*, (1978) 48 Com Cases 106 (Ori). Also see *Public Prosecutor v. BVA Lury & Co.*, (1941) 11 Com Cases 331 (Mad); *Lakshmana Mudaliar v. Emperor*, (1932) 2 Com Cases 387 (Mad). However, under section 5, as amended by Amendment Act of 1988, *mens rea* is not a relevant factor and officers identified therein are taken to be 'officers in default'. See Notes under S. 5.

The section, as it stands, makes mere failure punishable. It is a clear indication that *mens rea* is ruled out. *Kalaimagal Corporation Ltd. v. The Asst. ROC*, (1987) LW (Cri) 501, 508 (Mad); *Sukhbir Saran Bhatnagar v. ROC*, (1972) 42 Com Cases 408 (Del). A director's contention that he signed the accounts without looking at the annexures and, therefore, his signature should be taken to be *non-est factum*, i.e., the signature did not carry his mind, was not accepted. *Ashok Kumar Oswal v. Panchsheel Textile Mfg. & Trading Co. P. Ltd.*, (2002) 110 Com Cases 800 (CLB—PB).

Payment of additional fee for delay in filing is no exoneration of liability.—The payment of additional fee for delay in filing will bring to an end the continuing liability being incurred by the company and its officers is not to be equated to and termed as punishment or fine. It does not exonerate the company and its officers from the liability which has already been incurred for the delay. Hence, there was no illegality in the criminal prosecution initiated against the directors of defaulting company. *Flora International Ltd. v. ROC*, 2003 CLC 1222.

Plea of time bar to be raised at trial stage

It has been held that the plea of time bar should always be raised at the trial stage. Such a plea cannot be appropriately raised directly in the High Court for quashing proceedings under section 482 of the Criminal Procedure Code, 1973. *Sanjeev Kumar Gupta v. ROC*, (1990) 2 Comp LJ 70 (Del).

Joint trial

Where in the course of one and the same transaction several offences are committed, S. 220 of Cr.P.C. 1973 would authorise all the offences to be joined together for the purpose of a single trial. The promoter directors of a company were charged with multiple defaults in submission of annual returns, in calling AGM and in placing annual accounts at the meeting, it was held that the defaults and omissions constituted a series of acts so connected as to form the same transaction and the offences were liable to be tried jointly. *Madan Gopal Dey v. State of West Bengal*, (1969) 39 Com Cases 119 : AIR 1968 Cal 79.

Every default under the Act is not economic offence

The Karnataka High Court held in *F.J. Heredia v. ROC*, (2001) 104 Com Cases 230 : (2000) CLC 2228 : (2001) 40 CLA 234 (Kar) that all the defaults under the Companies

Act are not in the nature of economic offences. Some of the offences may be such that they can be tried by the Special Courts for economic offences, e.g., defaults in connection with deposits but the offences of failure to hold an AGM and file balance sheet and profit and loss account with the Registrar are not economic offences. The Court ordered the closure of the prosecution before the Special Court. The Court **applied** the directions of the Supreme Court in *Common Cause, a Registered Society v. UOI,* AIR 1996 SC 1619 : (1998) 94 Com Cases 776.

Penalty for default [Sub-section (1)]—If default is made in complying with the provisions of section 159, 160 or 161 (relating to annual return to be made by a company having share capital) the company and every officer of the company who is in default will be punishable with fine up to Rs. 500 for every day of default.

Compoundable offence.—The offence is compoundable under section 621A.

General Provisions regarding registers and returns

S. 163. Place of keeping, and inspection of, registers and returns.—(1) The register of members commencing from the date of the registration of the company, the index of members, the register and index of debenture-holders, and copies of all annual returns prepared under sections 159 and 160 together with the copies of certificates and documents required to be annexed thereto under sections 160 and 161, shall be kept at the registered office of the company:

[1][*Provided* that such registers, indexes, returns and copies and certificates and documents or any or more of them may, instead of being kept at the registered office of the company, be kept at any other place within the city, town or village in which the registered office is situate, if—

(i) such other place has been approved for this purpose by a special resolution passed by the company in general meeting, [2][and]

[3][* * * *]

(iii) the Registrar has been given in advance a copy of the proposed special resolution].

[4][(1-A) Notwithstanding anything contained in sub-section (1), the Central Government may make rules for the preservation and for the disposal, whether by destruction or otherwise, of the registers, indexes, returns, and copies of certificates and other documents referred to in sub-section (1).]

(2) The registeres, indexes, returns, and copies of certificates and other documents referred to in sub-section (1) shall, except when the register of members or debenture-holders is closed under the provisions of this Act, be open during business hours (subject to such reasonable restrictions, as the company may impose, so that not less than two hours in each day are allowed for inspection) to the inspection—

(a) of any member or debenture-holder, without fee; and

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1. Ins. by Act 65 of 1960, s. 41.
2. Ins. by Act 31 of 1965, s. 17 (w.e.f. 15-10-1965).
3. Clause (ii) omitted by section 17 of the Companies (Amendment) Act (XXXI of 1965) (w.e.f. 15-10-1965).
4. Ins. by Act 65 of 1960, s. 41.

(b) of any other person, on payment of [5][such sum as may be prescribed[6]] for each inspection.

(3) Any such member, debenture-holder or other person may—

(a) make extracts from any register, index, or copy referred to in sub-section (1) without fee or additional fee, as the case may be; or

(b) require a copy of any such register, index or copy or of any part thereof, on payment of [7][such sum as may be prescribed[8]] for every one hundred words or fractional part thereof required to be copied.

(4) The company shall cause any copy required by any person under clause (b) of sub-section (3) to be sent to that person within a period of ten days, exclusive of non-working days, commencing on the day next after the day on which the requirement is received by the company.

(5) If any inspection, or the making of any extract required under this section is refused, or if any copy required under this section is not sent within the period specified in sub-section (4), the company, and every officer of the company who is in default, shall be punishable, in respect of each offence, with fine which may extend to [9][five hundred rupees] for every day during which the refusal or default continues.

(6) The [10][*Central Government*] may also by order[11], compel an immediate inspection of the document, or direct that the extract required shall forthwith be allowed to be taken by the person requiring it, or that the copy required shall forthwith be sent to the person requiring it, as the case may be.

NOTES

Eng. Act, 1948 : Sec. 113
Eng. Act, 1985 : Sec. 356

Previous Act : Sec. 36

General Note : As and when the Companies (Second Amendment) Act, 2002 (11 of 2003) comes into force, the power under this section shall become transferred to the Central Government to be exercised by it in place of the Company Law Board. The commentary should be read keeping this change in mind.

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5. Subs. by the Companies (Amendment) Act, 1988, for the words "a fee of one rupee" s. 67 w.e.f. 15-7-1988 *vide* G.S.R. No. 781(E) *dt.* 13-7-1988.
6. The prescribed fee is Re. Ten *vide* GSR 782(E) dt. 13-7-1988 under new Rule 21A(4) of Companies (Central Govt.) General Rules and Forms, 1956 inserted w.e.f. 15-7-1988.
7. Subs. by the Companies (Amendment) Act, 1988, for the words "six annas" s. 67 w.e.f. 15-7-1988 *vide* G.S.R. No. 781(E) *dt.* 13-7-1988.
8. The prescribed fee is Re. One *vide* GSR 782(E) dt. 13-7-1988 under Rule 21A(5) of Companies (Central Govt.) General Rules & Forms, 1956 inserted w.e.f. 15-7-1988.
9. The words "fifty rupees" substituted by the Companies (Amendment) Act, 2000, (53 of 2000) s. 71 (w.e.f. 13-12-2000).
10. **Subs. for "Company Law Board" by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 21. Earlier subs. by Companies (Amendment) Act, 1988, (w.e.f. 31-5-1991) *vide* GSR *dt.* 31-5-1991, for the word "Court".**
11. Application for order to be made in Form No. 1 of CLB Regulations, 1991 with fee of Rs. 100/- *vide* GSR 219(E), dt. 2-3-2000 w.e.f. 1-4-2000 under CLB (Fees on Applications & Petitions) Rules, 1991. For texts see *Appendix* 6.

Companies Act, 1956

This section corresponds to section 36 of the Indian Companies Act of 1913. The provisions have been generalised so as to be applicable not only to the register of members but also to the register of debenture-holders and annual returns including the documents etc. annexed to those returns. (*Clause* 156 of the Bill).

Companies (Amendment) Act, 1960

The proviso to sub-section (1) and sub-section (1-A) were inserted by the Amendment Act of 1960.

Companies (Amendment) Act, 1965

Proviso to sub-section (1) was amended by the Amendment Act of 1965 to simplify the procedure contemplated in section 163 under which a company is required *inter alia* to give notice in newspapers of their intention to maintain registers, indexes, returns and copies of certificates and documents at places other than the registered office of the company. It is felt that this requirement entails avoidable expenditure on the companies concerned, and should not be insisted upon. In any case, notice of such intention has to be given to Registrars of Companies. This would suffice. (*Clause* 18 of the Bill).

Companies (Amendment) Act, 1988

The absolute monetary ceilings have been substituted by ceilings which can be prescribed by the Central Government. The powers which were hitherto exercised by Court under sub-section (6) have been vested in the Company Law Board. (*Clause* 67 of the Bill).

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 50 rupees to 500 rupees under sub-section (5).

Companies (Second Amendment) Act, 2002 [11 of 2003]

The powers of Company Law Board under this section have been conferred on the Central Government. Consequential changes have accordingly been made in the section. As per the Bill, the powers of CLB under this section were initially proposed to be transferred to the Tribunal constituted under section 10FB. Notes on Clauses of the Bill stated thus:

Notes on Clause.—This clause seeks to amend sections 144 and 163 of the Companies Act, 1956. The existing provisions contained in sections 144 and 163 of the Act, *inter alia*, empower the Company Law Board to compel an immediate inspection of copies of instruments creating charges and documents or taking extract thereof. It is now proposed to confer these powers upon the Tribunal. These amendments are of consequential nature. (*Clause 16 of the Companies (Amendment) Bill, 2001*).

Place of keeping the register [Sub-section (1)]

Note that while the registers and returns may be kept at a place other than the registered office, if a special resolution with previous notice to the Registrar has approved of the change of place, the changed place can only be within the geographical limits of the city, town or village where the registered office is situate and not outside. The latitude is given only to keep them at a convenient and safe place within the city, town or village itself.

Location of shares

Shares are regarded as situate in the locality where the register of members is kept; that is to say, in the locality of the registered office of the company, *Erie Beach Co. Ltd. v. Attorney General of Ontario,* AIR 1930 PC 10; *Brassard v. Smith,* 1925 AC 371, **followed** in *R. Viswanathan v. R. S. Abdul Wajid,* AIR 1963 SC 1.

Inspection during closure of register [Sub-section (2)]

Although section 163(2) provides that during the period of closure of registers, the shareholders and debenture holders and others are not entitled to an inspection of the same, there is no bar against companies keeping the register of members open for inspection even during the period of closure, if they choose to do so. *Killick Nixon Ltd. v. Dhanraj Mills Pvt. Ltd.*, (1983) 54 Com Cases 432 (Bom).

Inspection of documents by members or trustees : Supply of Copies [Sub-section (3)]

The right of inspection is a statutory right given by the Act and cannot be objected to on the ground of any *mala fide* motive on the part of the member seeking inspection nor simply by denying the membership of the applicant. Where certain documents were demanded from the company for proving membership, the company was not permitted without producing these documents to go on saying that the applicants were not members. *Jai Bhagwan v. Friends Flour Mills P. Ltd.*, (1991) 70 Com Cases 171 (P&H).

Where shares are registered in the names of trustees as members, the beneficiaries are not entitled to inspect the documents or exercise rights which the trustees as shareholders can exercise, though they may compel the trustees to use their votes as the beneficiaries instruct, even to the extent of altering the articles of association, if the trust shares be sufficient for the purpose. *Re, Butt (Deceased)*, (1952) 1 All ER 167 (CA).

In the case of a corporate body or the Government, a person appointed or authorised in a manner similar to that prescribed for a representative under Section 187 or 187A, will be entitled to inspect.

As regards taking copies it has to be noted that while making extracts is allowed, taking of copies is not. If copies are required, they will have to be applied for and obtained on payment of the prescribed charges [sub-section (3)(b)]. See *Balaghat Gold Mining Co.*, (1901) 2 KB 665 **overruling** *Boord v. African Consolidated Land and Trading Co.*, (1898) 1 Ch 596. The copies can be demanded of only such part or parts of the register as can be identified without reference to anything which is not in the register. *Re, Performing Right Society Ltd.*, (1978) 3 All ER 972 (CA), where the applicant unsuccessfully sought the names of a particular class of members.

A solicitor cannot claim lien upon the register. *Capital Fire Insurance Assn., Re*, (1883) 24 Ch D 408 (CA).

The company was not permitted to refuse inspection of the register by a shareholder only because he was the solicitor of the parties who were engaged in litigation against the company although it was stated on affidavit that the inspection was required in the interest of his client and not in the interest of the company or any member of the company as such, *R. v. Wilts and Berks Canal Navigation*, (1874) 29 LT 922; **Contrast** *R. v. Liverpool, Manchester and Newcastle-upon-Tyne Rly. Co.*, (1852) 21 LJ QB 284, where the court took notice of the fact that the member in question was not proceeding *bona fide* for the purpose of enforcing the rights of a shareholder.

A person seeking copies of the document is not required to disclose his purpose. His statutory right cannot be denied even if his purpose is hostile to the company. *H.B. Stockholdings Ltd. v. Jaiprakash Industries Ltd.*, (2003) 52 CLA 263 (CLB). The company cannot ask a member seeking inspection to state the objects for which he wants it. *Holland v. Dickson*, (1888) 37 Ch D 669; *Davies v. Gas Light and Coke Co.*, (1909) 1 Ch 248; **affirmed** (1909) 1 Ch 708; notwithstanding *R. v. Wilts and Berks Canal Co.*, (1874) 29 LT 922 where inspection for getting addresses of members for the purpose of canvassing was held to be not an improper object.

The fact that the person seeking inspection is actuated by motives hostile to the company is no defence to his legal right to inspect. *Mutter v. Eastern and Midlands Rly. Co.*, (1888) 38 Ch D 92 (CA); *Bloxam v. Metropolitan Rly. Co.*, (1868) 3 Ch App 337.

Supply of Copies [Sub-section (4)]

Where a requisition for supply of copies has been made under sub-s. (3)(*b*), the company has to send to the person concerned the requisite material within a period of 10 days. The counting is to be taken by excluding the non-working days and is to commence from the day next to the day on which the requisition has been received by the company. *Nutech Agro Ltd. v. Ch. Mohan Rao,* (2002) 111-CC-75 : (2002) CLC 748 : (2002) 49 CLA 339 (AP).

Debenture-holders' right of inspection

Explaining the limits of debenture-holders' right of inspection (Mrs.) SUJATA MANOHAR, J of the Bombay High Court observed in *Narotamdas T. Toprani v. Bombay Dyeing & Mfg. Co. Ltd.,* (1990) 68 Com Cases 300 (Bom) that "the right of debenture-holder of inspecting the company's records is extremely limited. Under S. 118 a debenture-holder has been given a right to inspect the debenture-trust deed and to obtain a copy (thereof). Under S. 163(2), the register of members, the register of debenture-holders and indexes of such registers, copies of all annual returns together with copies of certificates and documents annexed thereto can be inspected by a debenture-holder. Under the articles of the defendant company in this case a debenture holder is also entitled to receive a copy of the Profit and Loss Account and Balance-Sheet of the company. A debenture-holder is, therefore, not entitled to a detailed inspection of the records, registers and books of account of the company. I am not prepared to draw an adverse inference against the company for not showing to the plaintiff the fixed assets register and the two ledger accounts, of which the plaintiff had asked for inspection."

Effect of liquidation

In the event of liquidation of the company, a proper custodian of the register is the liquidator and not debenture-holder's receiver. *Engel v. South Metropolitan Brewing and Bottling Co.,* (1892) 1 Ch 442. Even otherwise this section ceases to be applicable when the company is in liquidation. *Kent Coalfields Syndicate, Re,* (1898) 1 QB 754 (CA).

Jurisdiction

The powers under sub-section (6) were originally exercised by the Court and have been vested in the Company Law Board by the Amendment Act of 1988.

Preservation of records [Sub-section (1A)]

In pursuance of the power conferred by sub-section (1A) the Central Government has framed Rules for preservation and disposal of records, *viz.*, Companies (Preservation and Disposal of Records) Rules, 1966. For text of Rules see *Appendix* 17.

Fees for inspection of documents, etc. [Sub-sections (2) and (3)]

The fee payable in pursuance of the following provisions of the Act, shall be—

(1) Clause (b) of sub-section (2) of section 163 ...rupees ten.

(2) Clause (b) of sub-section (3) of section 163 ...rupee one.

[*See rule 21A of the Companies (Central Government's) General Rules and Forms, 1956, Appendix* 1].

Mode of calculation of inspection fee.—Certain members of a company demanded inspection and copies of the company's register of members. There were about 3,800 members in the company. The court said that each member would have a folio sheet. The company would have to prepare 3,800 copies of folios in order to satisfy the demand. The company can charge Re. 1 for every hundred words. This would mean Rs. 2,280 for preparing copies of folios. The members were accordingly directed to pay charges of Rs. 2,280 for typed copies and wait for six months or pay Rs. 3,800 and take xerox copies within two weeks. *Fomento Resorts and Hotels Ltd. v. Mahendra G. Wadhwani,* (1996) 85 Com Cases 1 (Bom).

Penalty for default [Sub-section (5)]

If a company refuses inspection of register and index of members/debenture holders and annual returns prepared under sections 159 and 160 and of documents annexed to them, or the making of any extract thereof, or if any copy thereof is not sent within the period specified, the company and every officer of the company who is in default are punishable in respect of each offence with fine up to Rs. 500 for every day of default.

Where the default is due to causes beyond the control of the company and its officers, such as non-availability of books and papers due to their having been seized and carried away by the police, the default is not punishable. *Bank of Deccan Limited, In re,* (1960) 30 Com Cases 284 : AIR 1960 Ker 15.

The court refused to quash a complaint which was filed because of the failure of the company to supply the requisite copy to a shareholder who had paid for the copy and also for postage. *Nutech Agro Ltd. v. Ch. Mohan Rao,* (2002) 111 Com Cases 75 (AP).

Compoundable Offence.—The offence is compoundable under section 621A.

Petition before CLB [Sub-section (6)]

An aggrieved person can make an application under sub-section (6) to the Regional Bench of Company Law Board seeking an order for compelling inspection of the document or direction that the extract required shall forthwith be sent to the person requiring it, as the case may be, in Form No. 1 of Annexure II to the CLB Regulations, 1991 with an application fee of Rs. 500/- and accompanied by the following documents:

(1) Documentary evidence, if any, showing the refusal of the company to give inspection to the petitioner.

(2) Affidavit verifying the petition.

(3) Bank draft evidencing payment of application fee.

(4) Memorandum of appearance in Form No. 5 of Annexure I with a copy of the Board's resolution or the executed Vakalatnama, as the case may be.

§ For text of the Company Law Board Regulations, 1991 refer *Appendix* 3.

Power to order supply of copies whether discretionary

Under the [English] Companies Act, 1985 this power is vested in the court. The question arose before the Court of Appeal in *Pelling v. Families Need Fathers Ltd.,* (2002) 1 BCLC 645 : (2001) EWCA Cir 1280 : (2002) 2 All ER 440 (CA) as to whether the court has to order supply of copies or whether it has a discretion to refuse an application for such an order. Their Lordships said : The provision [s. 356(6)] empowers the court to make the order where a refusal in contravention of the law has been established, but whether the power will be exercised depends on the proper discretionary considerations affecting it in the light of the facts found by the court. As a general rule, the court will make a mandatory order to give effect to the legal right to be supplied with a copy of the register on request, but it is not a matter of unqualified right. There may be something special in the circumstances of the case which leads the court to refuse to make the usual order. Although the scope of the residual discretion to refuse such an order may be narrow, it does exist. There will be cases in which it will be pointless for the court to make an order, where, for example, it is no longer necessary to make one, because the request has been complied with after the application is issued but before it is heard, or where the request is physically impossible to comply with because the register has been destroyed or lost. There are other circumstances in which the court is entitled to refuse to make an order or to make one in unqualified terms. It is common, for example, for a court to decline to exercise its discretion to make a mandatory or prohibitory order when the person against whom it is sought has offered the other side or the court an undertaking which meets the justice of the case. Nor is the court deprived of its discretion to refuse to make an order under s. 365(6) because of the criminal penalties to which the company is exposed under sub-s. (5) if it refuses a request for a copy of the register. Those penalties

underscope the importance both of the right and of the obligation of the company to give effect to it, but they do not expressly or impliedly deprive the court of the discretion clearly conferred by s. 356(6). The making of an order under sub-section will not contravene the provisions of the [English] Data Protection Act, 1984.

As to the duty of the court in exercising its discretion, their Lordships said : In exercising its discretion under s. 356 (6) of the 1985 Act, the court can cater both for the applicant's wish to gain access to the register for the purpose of legitimately communicating with members and for the company's proper and understandable concerns about the detrimental effect of an unqualified order for disclosure of the names and addresses of the members. Such a reconciliation can be achieved by attaching relevant and reasonable terms and conditions to the exercise of the discretion. **Citing** *Phonographic Performance Ltd. v. AEI Redifussion Music Ltd.,* (1999) 2 All ER 299 at 314 : (1999) 1 WLR 1507 at 1523 on the consequences of the failure to balance the relevant factors fairly in the scale. It is possible to provide a practical and fair solution either by making an order in favour of the applicant on terms as to the confidentiality and use of the information made available, or by declining to make an order for inspection on the company giving a suitably-worded undertaking to facilitate communication with members by acting as a postbox for mail between the applicant and the members.

Their Lordships concluded by saying : [At p. 652] : In its ordinary and natural meaning the word 'may' is apt to confer a discretion or power. It is true that there are certain situations where a discretionary power is conferred for the purpose of enforcing a right and is coupled with an obligation or duty to exercise a power, when required to do so, for the benefit of the person who has the right (see *Julius v. Lord Bishop of Oxford,* (1880) 5 App Cas 214 at 223, 241, [1874-80] All ER Rep 43 at 47-48, 57). This is not such a case. The use of 'may' in sub-s (6) is in striking contrast to the mandatory force of 'shall' in other parts of the same section, such as sub-s. (3). In *O'Brien v. Sporting Shooters Association of Australia (Victoria),* (1999) 3 VR 251 at 255 BYRNE J rejected the submission that the court had no discretion under the similarly-worded provision in s. 1303 of the Australian Corporation Law. It was submitted to him that the word 'may' in that section was not permissive, but merely signified that the jurisdiction of the court to make an order did not arise unless there had been a refusal or contravention of the Corporations Law. He held (at 255) that the drafting of the Law was such that—

'the word "may" means exactly that. It means that the court is empowered to make the order where a refusal in contravention of the Law has been established. Whether the power will be exercised must depend upon the proper discretionary considerations affecting the power in the light of the facts as are found by the court.'

The statutory discretion must be exercised judicially in accordance with established legal principles and having regard only to relevant considerations. As a general rule, the court will make a mandatory order to give effect to a legal right. But, as stated by LORD EVERSHED MR in *Armstrong v. Sheppard & Short Ltd.,* (1959) 2 All ER 656 at 656 : (1959) 2 QB 384 at 396, 'it is not a matter of unqualified right.'

Model regulations as per Table A.—For model regulations pertaining to this section in the Articles of Association, see regulation 95 of Table-A.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of maintenance of registers. The relevant paragraph 1 of the Form prescribed under Rule 3 of the Companies (Compliance Certificate) Rules, 2001 states :

***"Paragraph 1.*— The company has kept and maintained all registers as stated in Annexure "A' to this certificate, as per the provisions and the rules made thereunder and all entries therein have been duly recorded."**

• Registers and Returns under Section 163 [*Item (h) of 'Statutory Registers'*]

Prescribed Check List

Check whether:

(i) the register of members, the index of members, the register and index of debenture holders, contracts entered into by a company for the appointment of a manager, managing director and copies of annual returns prepared u/s 159 and 160 together with the copies of certificates and documents required to be annexed u/s 160 and 161 are kept at the registered office of the company;

(ii) if the above registers and returns instead of being kept at the registered office of the company, are being kept at any other place within the city, town or village in which the registered office is situate; whether the other place has been approved by a special resolution and the Registrar was given an advance copy of the proposed special resolution;

(iii) the above registers and returns are kept open for inspection by any member or debenture holder without fee, and by any other person on payment of Rs. 10/- or such other fee as may be prescribed, during business hours subject to such reasonable restrictions as the company may impose;

(iv) copy of such register etc. or extract thereof is supplied within a period of ten days against any request received on payment of Re. 1 for every 100 words or fractional part thereof or such other fee as may be prescribed.

• **Register of Inspection [*Item (a) of 'Other Registers'*].**—See Notes under sec. 209.

• **Register of Destruction of Records/Documents [*Item (q) of 'Statutory Registers*]**

Prescribed Check List

Check whether:

(i) the records and documents are being kept in the company at least for the periods stated in the Companies (Preservation and Disposals of Records) Rules, 1966;

(ii) the company has maintained a register in the prescribed form and has entered particulars of documents destroyed as per rule 4 of the aforesaid Rules.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

Documents Involved: 1. Register of Members/Debenture-holders with index, 2. Minutes of Board/General Meeting, 3. Form 23, 4. CLB Order, if any, 5. Register of Documents Destroyed.

S. 164. Registers etc., to be evidence.—The register of members, the register of debenture-holders, and the annual returns, certificates and statements referred to in sections 159, 160 and 161 shall be *prima facie* evidence of any matters directed or authorised to be inserted therein by this Act.

NOTES

Eng. Act, 1948 : Sec. 118
Eng. Act 1985 : Sec. 361

Previous Act : Sec. 40

Rule of *prima facie* evidence

The registers and other documents referred to in the section are not conclusive evidence but only *prima facie* evidence. Evidence may be let in to prove that entries therein are not correct; *Stadmed P. Ltd. v. Kshetra Mohan Saha,* (1969) 39 Com Cases 741 (Cal).

The presumption, that the register of members would be, *prima facie*, evidence of matters directed or authorised to be inserted therein by the Act, would not be available

where the register maintained is not the prescribed register, but only what was called the "Share account register". *Manabendra Shah (H.H.) v. O.L., Indian Electrim Tools Corpn. Ltd.*, (1977) 47 Com Cases 356 at 364 (Del).

The operation of the rule of *prima facie* evidence is confined to matters directed or authorised to be inserted in the register. The register also operates as a *prima facie* evidence in the winding up of the company for the purpose of preparing the list of contributories. Though the register is not conclusive evidence, the courts take it to be as final as is possible without violating the provisions of the Act. LORD CAIRNS said:

> "But it is perfectly clear that you cannot make the register absolutely conclusive. Many cases can be pointed out, without difficulty, in which the register is not conclusive. If names are put upon the register without any authority the owners of those names are in no way responsible. There are also cases, especially those pointed out in s. 35 [of the English Act], where there has been a default, in the performance, by the executive of the company, of its duty in removing names after the owners of those names have ceased to be shareholders; there again the register is not conclusive. Again, under the same section, there is a class of cases which is thus described, namely, where the name of any person is, without sufficient cause, entered in, or omitted from, the register of members of the company; in that case the register is not conclusive" (*supra*).

Reese River Silver Mining Co. v. Smith, (1869) LR 4 HL 64, 80; *Ballies* case, (1898) 1 Ch 110. *Re, Briton Medical and General Life Association*, (1888) 39 Ch D 61. Even if there are some inaccuracies or omissions in the register, it does serve as evidence to start with. *Wills v. Murray*, (1850) 4 Exch 843; *Bain v. Whitehaven and Furness Junction Rly. Co.*, (1850) 3 HL Cas 1.

The effect of a *prima facie* evidence is only to create a presumption of truth but this presumption is rebuttable. *Prafulla Kumar Rout v. Orient Engineering Works P. Ltd.*, (1986) 60 Com Cases 65 (Ori). A person whose name is there in the register or is omitted from the register, may adduce evidence to show that his name ought not to have been there or that his name ought to have been there. *Carmarthen Rly. Co. v. Wright*, (1858) 1 F&F 282; *Portal v. Emmens*, (1876) 1 CPD 201, 212; **affirmed** (1876) 1 CPD 664 (CA); *Hallmark's* case, (1878) 9 Ch D 329 (CA); *Spitzel v. Chinese Corpn.*, (1899) 80 LT 347 (conditional membership). But, where steps are not taken for rectification of the register of members at the appropriate time, the register may become conclusive evidence.

Any document or book which is purporting to be a register of members will be within the scope of this section as *prima facie* evidence although statutory requirements have not been regularly complied with. *Re, Printing, Telegraph and Construction Co. of the Agence Havas, ex p., Cammell*, (1894) 2 Ch 392 (CA).

As regards balance-sheet, profit and loss account and audit report, the Court "may presume" their genuineness, if they are certified copies granted by the Registrar. [Cf. the Commercial Documents Evidence Act (XXX of 1939) Schedule Part II, Clause 21.]

Company estopped by contents of register

Where a company registered the transfer of shares, endorsed the share certificates in favour of the petitioner and entered his name in the register of members, its attempt subsequently to undo the registration because of non-cancellation of stamps was foiled by the CLB. The company was estopped from questioning validity of the transfer on the ground of non-cancellation of stamps. *Kshounish Chowdhury v. Kero Rajendra Monolithics Ltd.*, (2002) 1 Comp LJ 552 (CLB—PB).

Once the company has registered a transfer, it could not seek rectification of the register of members on the ground of non-cancellation of adhesive stamps. *Radhe Shyam Tulsian v. Panchmukhi Investment Ltd.*, (2002) 1 Comp LJ 355 : (2002) 46 CLA 187 (CLB—PB).

Annual return as *prima facie* evidence

Where the question was whether the petitioner was holding the specific number of shares for the purposes of S. 397, the CLB held that the facts disclosed in the annual return showing that he had the specific number was a *prima facie* evidence of his right to maintain the petition. *Rashmi Seth (Mrs.) v. Chemon (India) P. Ltd.*, (1995) 82 Com Cases 563 (CLB). Another case in which such presumption was drawn is *M.S. Madhusoodanan v. Kerala Kaumudi P. Ltd.*, (2003) 117 Com Cases 19 : 2004 CLC 117 (SC), where an annual return is a proof of the details which are mandatorily required to be contained therein.

COMPANY MEETINGS AND PROCEEDINGS

General Notes

PROTECTION of investors is one of the primary themes of the Companies Act. The chief source of capital formation is individual savings. Those who save will invest and if their investment is safeguarded and assured of adequate return they will save and invest more. Self-help is said to be the best protection. Where this is lacking, outside agencies may provide protection, which is essentially peripheral and cannot be a complete answer. The Companies Act provides the shareholders a forum of self-protection and then leaves them to a large extent to take care of themselves. The forum is the general meeting of shareholders. One meeting is compulsory every year. Other meetings are left to the choice of the management or to a given percentage of shareholders to exercise their power to compel the company to convene a meeting. Lest the forum becomes an empty ritual, a number of important managerial decisions are required to be approved by the shareholders. For this purpose, they must have adequate information supplied to them well in advance of the date of the meeting. The right to information has been given a special status by providing that denial of information would be an act which can be used to activate the machinery of investigation [s. 237] or to provide a ground for conviction for statutory violations and disqualification under s. 203 or as constituting an act of oppression under s. 397 or mismanagement under s. 398. When members are fully equipped with information, only then they will be able to fulfil the underlying purpose for requiring companies to hold meetings, which is that the members shall be able to attend in person so as to debate and vote on matters affecting the company. The members should be adequately represented at the meeting in the shape of quorum. They should have a free and fair opportunity of considering matters that come before the meeting. For this purpose, the Act permits members to measure their strength by shareholdings and to exercise their voting potential in person or through an agent known as proxy. They can use the forum for their most crucial power, — appointment and removal of directors, *i.e.* to constitute management of their own choice. They can also have auditors of their own confidence who may safeguard them from possible manipulations in the highly complicated and technical subject of company accounts. Constituting the management and approval of accounts are vital matters. In order to enable shareholders to exploit their full strength freely many fetters on voting power which used to have crippling effect have been removed. All shareholders having voting rights are put in one class. There can be no disproportionate voting rights. The Amendment of 2000 has permitted companies to issue equity shares with voting rights or with differential rights as to dividend, voting or otherwise [Sec. 86]. Members have also the right to propose their resolutions and to demand their circulation. [Sec. 188].

The business of the meeting is conducted in the shape of resolutions proposed and passed. Some resolutions require simple majority and some special majority of those present and voting. By insertion of a new section 192A, by the Amendment Act, 2000, the Central Government has acquired the power in respect of only listed companies to prescribe certain business which shall be transacted only through postal ballot. Resolutions once adopted become binding upon the company and all its members. The records of proceedings and of resolutions have to be maintained in the shape of minutes books.

Secretarial Standards on General Meetings issued by the Council of ICSI (SS-2) [w.e.f. 1-5-2002]

These Standards seek to prescribe a set of principles for the convening and conduct of General Meetings and matters relating thereto. In the initial years, adherence by a company to the Secretarial Standards will be recommendatory

These principles may not be applicable to any meetings convened on the directions of the Court or CLB or other authority, unless the directions themselves so prescribe.

The Secretarial Standards set out the principles under the following major heads:—

1. Convening a Meeting [*Sec. 171*]
2. Frequency of Meetings [*Secs. 165, 166 and 169*]
3. Quorum [*Sec. 174*]
4. Presence of Directors and Auditors [*Secs. 166, 231, 292-A and 383-A*]
5. Chairman [*Sec. 175*]
6. Voting [*Secs. 177 and 179*]
7. Proxies [*Sec. 176*]
8. Conduct of Poll [*Secs. 180, 184 and 185*]
9. Withdrawal of Resolutions [*Sec. 189*]
10. Rescinding of Resolutions [*Sec. 189*]
11. Modifications to Resolutions [*Sec. 189*]
12. Reading of Report/Certificate [*Secs. 230 and 383-A*]
13. Distribution of Gifts [*Sec. 171*]
14. Adjournment of Meetings [*Sec. 166*]
15. Minutes [*Sec. 193*]
16. Recording in the Minutes [*Sec. 193*]
17. Preservation of Minutes and other Records [*Sec. 193*]
18. Disclosure [*Sec. 217*]

For the Secretarial Standards laid down by the ICSI, see under the relevant sections.

For full text of the Secretarial Standards, see *Appendix 311(SS-2).*

Meetings and Proceedings

S. 165. 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 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".

(2) The Board of Directors shall, at least twenty-one days before the day on which the meeting is held, forward a report (in this Act referred to as "the statutory report"[1]) to every member of the company:

Provided that if the statutory report is forwarded later than is required above, it shall, notwithstanding that fact, be deemed to have been duly forwarded if it is so agreed to by all the members entitled to attend and vote at the meeting.

(3) The statutory report shall set out—

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1. Form No. 22 of the Companies (Central Government's) General Rules & Forms, 1956, is the prescribed form of statutory report relevant to the section.

(a) the total number of shares allotted, distinguishing 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) an abstract of the receipts of the company and of the payments made thereout, up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company, showing separately any commission or discount paid or to be paid on the issue or sale of shares or debentures;

(d) the names, addresses and occupations of the directors of the company and of its auditors; and also, if there be any, of its [2][* * * *] manager, and secretary; and the changes, if any, which have occurred in such names, addresses 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 in the latter case with the particulars of the modification or proposed modification;

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

[3][(g) *the arrears, if any, due on calls from every director and from the manager; and*]

[4][(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 manager.*]

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

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2. The words 'managing agents, secretaries and treasurers' omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 72 (w.e.f. 13-12-2000).

3. Clause (g) substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 72 (w.e.f. 13-12-2000), prior to its substitution it stood as under:

"(g) the arrears, if any, due on calls from every director; from the 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; from the secretaries and treasurers; where they are a firm from every partner therein; and where they are a private company, from every director thereof; and from the manager, and".

4. Clause (h) substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 72 (w.e.f. 13-12-2000), prior to its substitution it stood as under:

"(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; to the secretaries and treasurers; where they are a firm to any partner therein; and where they are a private company, to any director thereof; or to the manager.

After the statutory report has been certified as aforesaid, the auditors of 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 and the receipts and payments of the company [5][* * * *], certify it as correct.

(5) The Board 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.

(6) The Board shall cause 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.

(7) 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.

(8) 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.

(9) If default is made in complying with the provisions of this section, every director or other officer of the company who is in default shall be punishable with fine which may extend to [6][*five thousand rupees*].

(10) This section shall not apply to a private company.

NOTES

Eng. Act, 1948 : Sec. 130 (Repealed) Previous Act : Sec. 77

Companies (Amendment) Act, 2000

(1) Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 500 rupees to 5000 rupees under sub-section (9).

(2) Ommission of reference managing agents... etc.—The terms "managing agents, secretaries and treasurers" have been omitted by the Amendment Act, 2000. The amendment is of consequential nature.

Scope of section

This is a special kind of meeting. It is to be held only "once" in the lifetime of a public company in the manner provided in this section. Failure to hold such a meeting renders the company liable to be wound up under Section 433(b).

Disclosure of the extent to which the underwriting contract, if any, has not been performed, under clause (f) of sub-section (3), will put shareholders in the know of things.

The notice convening the meeting should state it to be the statutory meeting. *Gardner v. Iredale,* (1912) 1 Ch 700.

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5. The words "on capital account" omitted by Act 65 of 1960, s. 42.
6. The words "five hundred rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 72 (w.e.f. 13-12-2000).

English law

The requirement of statutory meeting as prescribed by S. 130 of the English Act of 1948 was abolished by repealing that provision by the 1980 Act and therefore companies governed by English law are no longer required to hold a statutory meeting.

Statutory meeting not required by private company converted into public company

Department's Clarification.—The provisions of sections 149 and 165 of the Companies Act, 1956 relating to the certificate of commencement of business and the statutory meeting would not be applicable to a private company which has converted itself into a public company. (*Department's File No.* 44/50-CL-IV/62).

Private company [Sub-section (10)].—This section does not apply to a private company. Therefore it is not required to hold a statutory meeting. However, the exemption in sub-section (10) does not extend to any private company which is a banking company. (*Vide* section 49, Banking Regulations Act, 1949).

Companies registered under Part IX.—The provisions of this section shall apply to public companies registered under Part IX, *vide* section 578 (*Department's Circular No.* 24/75, dated 20-11-1975).

Government Companies exempted.—This section does not apply to a Government Company. *Notification*: GSR 578(E), dated 16-7-1985. See Notes under S. 620.

Penalty for default.—If there is failure to hold statutory meeting as provided in section 165, or default in delivering the statutory report to Registrar, every director or other officer of the company who is in default is punishable with fine upto Rs. 5,000.

Compoundable Offence.—The offence is compoundable under section 621A.

Prescribed Form.—For Form of Statutory Report, see Form No. 22 given in *Appendix* 1.

ICSI Guidance Note on Compliance Certificate (August, 2003)

***Statutory Meeting (in case of a Public Company)**

Check List

Check whether:

(i) the meeting has been held within the period not less than one month nor more than six months from the date at which the company is entitled to commence business;

(ii) the notice of meeting and statutory report in Form No. 22 containing the prescribed particulars and duly certified as correct by two directors including the managing director, if any and by the auditors were sent to all the members at least 21 days before the meeting and also to ROC forthwith after copies thereof were sent to the member;

(iii) any resolution was passed at a meeting for which no notice was sent to members, etc.;

(iv) other requirements of a general Meeting *e.g.*, quorum, notice, preparation and signing of minutes, *etc.*, were complied with.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

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* This matter is not directly referred to in the 33 paragraphs appended to the Form prescribed under the Companies (Compliance Certificate) Rules. The Check List given by the ICSI under the head 'Check List for other Compliances' [*Item 2(a)*] is for the guidance of CSP who may, in the course of his scrutiny, come across non-compliance with regard to this matter. CSP need not qualify such non-compliance.

Secretarial Standards on General Meetings issued by the Council of ICSI (SS-2)

These Standards seek to prescribe a set of principles for the convening and conduct of General Meetings and matters relating thereto. In the initial years, adherence by a company to the Secretarial Standards will be recommendatory

These principles may not be applicable to any meetings convened on the directions of the Court or CLB or other authority, unless the directions themselves so prescribe.

Secretarial Standard [Para 2]

2. Frequency of Meetings

2.1 ***Statutory Meeting***

Every public company having a share capital and every public company limited by guarantee and having a share capital should, after one month but not later than six months from the date on which it is entitled to commence business, hold a Meeting called the Statutory Meeting.

For full text of the Secretarial Standard, see *Appendix* 311.

Check further whether:

(i) the statutory meeting was held within 6 months and after one month from the date the company was entitled to commence business?

(ii) the notice of meeting and statutory report in Form 22 containing the prescribed particulars and duly certified as correct by two directors including the managing director, if any, and by the auditors was sent to all members and also to Registrar 21 days before the meeting?

(iii) the delay in holding the statutory meeting by shorter notice was condoned unanimously by members entitled to attend and vote at the meeting if the report was sent less than 21 days before the meeting?

(iv) the prescribed number of members consented thereto as required by section 171 if notice was given less than 21 days before the meeting? (Form 22-A]

(v) the list of members with prescribed particulars was kept open at the meeting?

(vi) other requirements of a general meeting like quorum, notice, intimation to stock exchange, if listed, preparation and signing of minutes after meeting, were complied with?

(vii) no resolution was passed at the meeting for which there was no notice?

Documents Involved: 1. Minutes of Board Meeting, 2. Copy of the Statutory Report, 3. Minutes of Statutory Meeting, 4. Attendance Register, 5. Proxy Register, 6. Forms 22 and 22A (Regarding shorter notice, if applicable), 7. Notice of Statutory Meeting.

S. 166. Annual general meeting.—[1][(1) Every company shall in each year hold in addition to any other meetings a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it; and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next:

Provided that 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:

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1. Subs. by Act 65 of 1960, s. 34 for sub-section (1).

Provided further that the Registrar may, for any special reason, extend the time within which any annual general meeting (not being the first annual general meeting) shall be held, by a period not exceeding three months.]

(2) Every annual general meeting shall be called for a time during business hours, on a day that is not a public holiday, and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situate [2][* * * * *]:

[3][*Provided* that the Central Government may exempt any class of companies from the provisions of this sub-section subject to such conditions as it may impose:

Provided further that—

(a) a public company or a private company which is a subsidiary of a public company, may by its articles fix the time for its annual general meetings and may also by a resolution passed in one annual general meeting fix the time for its subsequent annual general meetings; and

(b) a private company which is not a subsidiary of a public company, may in like manner and also by a resolution agreed to by all the members thereof, fix the times as well as the place for its annual general meeting.]

NOTES

Eng. Act, 1948 : Sec. 131 Previous Act : Sec. 76
Eng. Act, 1985 : Secs. 366 and 367

Companies (Amendment) Act, 1960

The object of the amendments is thus stated in the Notes on clauses:—"The provisions of Section 166 are not effective against delay in the holding of annual general meetings on the one hand, and on the other, cause unnecessary inconvenience to non-profit making and certain other companies in that they cannot hold annual general meetings at a time and place more convenient to their members, in view of the rigid requirements of the present section. It is proposed to remove these defects from the section on the lines suggested in para 69 of the Report."

Scope of section

It will be noted that the first annual general meeting is required to be held within eighteen months of a company's incorporation, and there is no provision for granting an extension of time in this case, as in the case of subsequent annual general meetings. [Second proviso to sub-section (1)(c)].

In this section, the expression 'year' not being defined in the Act, means 'calendar year' as defined in the General Clauses Act. See also *Gibson v. Barton,* (1875) LR 10 QB 329; *Park v. Lawton,* (1911) 1 KB 588. It follows from this that the holding of an annual general meeting in each calendar year is a statutory necessity. But the effect of second proviso to sub-section (1) will be that in those cases where an extension of time not exceeding three months is granted by the Registrar, the rule will stand modified to the extent of the period of time granted by him within the terms provided by that proviso. For, as pointed out by LORD MACMILLAN in *Madras & Southern Maratha Railway v. Bez-*

2. The words "and notices calling the meeting shall specify it as the annual general meeting" omitted by Act 65 of 1960, s. 43.
3. Ins. by Act 65 of 1960, s. 43.

wada Municipality, AIR 1944 PC 71, the object of the proviso is to except cases not falling within the general enactment.

Delay in holding first AGM

The first AGM was postponed by a company beyond the prescribed period of 18 months. The meeting was proposed to be held on the last day of the 18 month period. It was postponed under the mistaken notion that the meeting, if held, would be against the spirit of a judgment in some other case. The failure was held to be a continuing default. There was no justification for the postponement of a statutory requirement. The company was directed to hold its first AGM. *T.V. Mathew v. Nadukkara Agro Processing Co. P. Ltd.*, (2002) 1 Comp LJ 289 : (2002) 108 Com Cases 130 : (2002) 46 CLA 101 (Ker).

Annual general meeting on public holiday [Sub-section (2)]

No annual general meeting of any company shall be held on a public holiday. The prohibition is, however, not extended to extraordinary general meetings.

There is no contravention of S. 166(2) if an adjourned meeting accidently comes to be held on a public holiday. (*Department's Letter No.* 8/16(1)/61-PR, dated 19th May, 1961).

For the definition of 'public holiday' see Section 2(38).

Date of AGM can be fixed by articles of association [Sub-section (2)]

Department's Circular.—Section 166(2) of the Companies Act, 1956 does not now make it absolutely obligatory on every company to hold its annual general meeting only on a day which is not a public holiday. In this connection, attention is invited to the provisions contained in the second proviso to sub-section (2) of section 166 of the Companies Act which enable a company to fix by its articles of association or by a resolution passed in one annual general meeting the time of its annual general meetings generally or any subsequent such meeting. (*Letter No.* 8/5(166)/65-PR, dated 21-1-1963).

Bank closing days are not holidays

Department's Circular.—On the 30th of June and 31st of December of each year banks do not transact business as these two days are utilised for half yearly closing of accounts. These days will not be treated as public holidays for the purpose of Section 166 and an Annual General Meeting may validly be held on either of these days. (*Letter No.* 8/166/80-CL-V, dated 2-3-1981). This circular should now be taken in the light of the Direct Tax Laws (Amendment) Act, 1987 which requires a uniform accounting year, to be from April, 1 to March, 31. Consequently, therefore, the banks now observe their closing days for accounting purposes on April, 1 and Sept., 30 each year. These two days are not public holidays and the circular is not relevant now.

Meeting during 'business hours' [Sub-section (2)]

Department's Clarification.—In section 166, "Every annual general meeting shall be called for a time during business hours ...." means that a time should be fixed in the notice for the meeting to be commenced. "For" shows that a specific point of time must be indicated. A specific point of time is contemplated and this can only be the starting point in the circumstances. If the duration of the meeting were to be covered, the appropriate language would have to be different and would have borne an express reference to a 'period' rather than a 'time'. Since it is clear that the starting point of the meeting should be within the business hours, it is equally clear that the duration is left to the meeting itself, according to the speed with which it is in a position to go through its agenda. The meeting is expected to be in full control of its proceedings under the guidance of its chairman and determine when it will end its session and for how many hours depending on the need, it may like to sit in a day and if necessary for how many days continuously it may sit to complete the consideration of its agenda. These are details for which the law cannot provide and hence it makes provision only in relation to the starting point of the meeting which should be fixed in the notice of the meeting to fall within the usual business hours of the company. The law does not choose to define business hours for a company as this could be best left to the convenience of each company. Each company has its own schedule of business hours and this is well known to the public with whom it deals. Hence no practical difficulty has ever been felt on this score. [*Department's File No.* 34/1/75-CL-III].

Place and time of holding annual general meeting [Sub-section (2)]

Note that the power of the Registrar to extend the time for holding the meeting is reduced from six months to three months by the Companies Amendment Act, 1960. Another change to be noted is that the date of holding a subsequent annual general meeting may be fixed by a resolution passed at the preceding annual general meeting or the arti-

cles themselves may contain a provision as to when annual general meetings are to be held. Note, however, that the proviso 2(a) only enables the fixing of the time for future annual general meetings and not the place where they are to be held. So the requirements of Sections 171 and 172 as regards notice of every annual general meeting cannot be dispensed with in any event. Note also the use of the word 'shall' in Section 170(1) which says that Sections 171 to 176 shall apply to all public companies; section 172 requires that the notice of the meeting should specify the place of the meeting also.

An annual general meeting can be held only in the city, town or village where the registered office of the company is situate, and not elsewhere or out of business hours.

This section does not prevent the articles of association from prescribing any time-limit for holding annual general meeting so long as the two mandatory conditions in the section are fulfilled. The articles can, therefore, lay down that annual general meeting shall be held before 31st March each year. *Balakrishna Maheswari v. Uma Shanker Mehrotra,* (1947) 17 Com Cases 216, 228 : AIR 1947 All 361.

A meeting date will usually be fixed to accord with the convenience of participants. Where the directors of a company deliberately attempted to convene an annual general meeting on a date which prevented shareholders from exercising their voting powers, they were restrained from doing so. Where the articles provided that meetings should be held in the month of August and in keeping with that provision meetings were generally held on the 3rd or 4th Monday of every August, but when in one year differences arose between the management and a big shareholder and a meeting was fixed on 3rd August, at which date it would have been too difficult for the big shareholder to exercise his voting rights on recently purchased shares, the court stayed the meeting and ordered that it should not be held before August 13, because by that time the big shareholder's right would accrue to him. *Cannon v. Trask,* (1875) 20 Eq 669.

A default in this respect can be remedied by an action before the ordinary civil courts having territorial jurisdiction and not by an application to the High Court. *M.G. Doshit v. Reliance Petro Chemicals Ltd.,* (1994) 79 Com Cases 830 (Guj). Any direction by a court that the annual general meeting may be held simultaneously at three different cities is invalid, because the section clearly requires that the meeting must be held either at the registered office or at some other place within the same city, town or village where the registered office is situated. *Dinekar Rai D. Desai v. R. P. Bhasin,* (1986) 60 Com Cases 14 (Del—DB).

It must be noted that there is no restriction as regards other general meetings which may be held at such place and at a time of any day as may be considered convenient to the company. But they should not be held at a place which will be more expensive or inconvenient to the shareholders than if they were held at the registered office of the company. In fixing the time and place the Board of directors should act in a *bona fide* manner and not with a view to deter shareholders from attending.

In a case where the general meeting of an insurance company fell to be held at such place "as may be determined by the directors" the court refused to interfere upon the decision being made to transfer the venue from London to Liverpool even though there were important matters to be discussed at the meeting and the majority of shareholders would find London more convenient. It would have been different if fraud had been alleged. *Martin v. Walker,* (1918) 145 LT Jo 377. The appointment of additional directors was held to be *prima facie* illegal as the meeting was held at a different place from the place mentioned in the notice and individual notices were not sent nor any notice of change of venue was given. It was unlikely without any notice of change of venue that 80 per cent. shareholders would have attended the meeting. *Sikkim Bank Ltd. v. RS Chowdhury,* (2000) 102 Com Cases 387 (Cal).

The scheme of the section is that if the first annual general meeting is held within 18 months of the company's formation it will satisfy the requirements of the section even though it is not held in the year of incorporation or the year following. But as regards

subsequent annual general meetings, it will be an offence, if one is not held in each calendar year; and it is not enough that they are held within the fifteen months of each other, that is to say, no calendar year should pass without an annual general meeting being held during its course. For instance, it will not satisfy the provisions of the section, if an annual general meeting is held, say, in December of a year and the next annual general meeting in January, of the year next after the one following. *Cf. Smedley v. Registrar of Companies,* (1919) 1 KB 97.

Dual offences involved.—The date on which the AGM is to be held is determined by two factors of time:

(1) The meeting must be held in each year. *Alexander Ward & Co. Ltd. v. Samyang Navigation Co. Ltd.,* (1975) 1 WLR 673 (HL); and

(2) The meeting must not be held later than 15 months from the date of the previous AGM.

These two requirements are cumulative and separate: failure to comply with either constitutes an offence for which the company and every officer in default is liable to a fine. There is a dual responsibility: the holding of the meeting in the calendar year and within the period of 15 months after the preceding general meeting: Where a company held a general meeting on March 21, 1916 and, as no general meeting was held in 1917, and director was charged for not holding the meeting in 1917, it was held that two offences were committed: (1) not holding the meeting within the calendar year; and (2) not holding the meeting within 15 months of the preceding one, and each default was liable to be dealt with separately. *Smedley v. ROC,* (1919) 1 KB 97.

Place for holding adjourned annual general meeting [Sub-section (2)]

The requirement of section 166(2) that every annual general meeting shall be held either at the registered office of the company or at some other place within the city in which the registered office is situated shall apply in case of adjourned annual general meetings also. Though the Board has the power to hold the adjourned meeting at any place other than the place where the annual general meeting was held, the Board should ensure that, as far as possible, the meeting is held at the same place where the original meeting was held and if it was not possible to hold it at that place, the adjourned meeting should be held at the registered office or at any other place within the city in which the registered office is situated.

Implication of 'time' under sub-section (2)

Department's view.—A query was raised before this department: "The exact significance and the meaning of the word 'time' in the second proviso to sub-section (2) may please be clarified. Does it denote the hour at which the meeting will begin or the duration of the meeting?

The Department expressed the view that the 'time' in the second proviso to sub-section (2) of the section indicates only the hour and the date of the commencement of the meeting. (*Department's File No.* 8/16(1)/61-PR).

AGM within postal or municipal limits permissible [Sub-section (2)]

Department's Clarification.—"A question has been raised whether the Annual General Meeting of a company can be held at a place within the postal limits of the city in which the Registered Office of the Company is situated though the postal limits are wider than the municipal limits of the city. The matter has been carefully examined by the Department. It has been observed that as a result of rapid urbanisation, cities frequently tend to expand beyond municipal limits and in view of this, the expression "Every annual general meeting shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated", used in section 166(2) may be taken to mean both the postal limits and local body limits of the city in which the registered office of the company is situated and where the two do not coincide, the wider of the two. A company can, therefore, hold its, AGM at any place within the postal limits of the city in which its registered office is situated, if it is more convenient to its shareholders. (*Circular No.* 1/1/80-CL-V, dated 16-2-1981). The term "postal limits" may be construed to mean the city postal delivery area officially accepted by the postal authorities. (*Letter No.* 2/M-1594/74, dated 29-4-1988).

Annual general meeting, a statutory requirement

The annual general meeting must be called, whether or not the annual accounts are ready for consideration at the meeting. "There is a clear statutory duty on the directors to call the meeting whether or not the accounts the consideration of which is only one of the matters to be dealt with at an annual general meeting are ready or not." *Re, El Sombrero Ltd.*, (1958) 3 All ER 1 at 6 (1958) 28 Com Cases 619 (Ch D). *In re, Brahmanbaria Loan Co.*, (1934) 4 Com Cases 282 : AIR 1934 Cal 624; *ROC v. Radhika Prasad Nanda*, (1978) 48 Com Cases 243 (Ori); *Nungambakkam D.S. Nidhi Ltd. v. ROC*, (1972) 42 Com Cases 632 (Mad); *Dalmia Cement (Bharat) Ltd. v. ROC*, AIR 1954 Mad 276. If the annual accounts (*i.e.*, the balance-sheet and profit and loss account) are not ready for being laid before the meeting, as required by Section 210(1), the proper course to follow is to hold the meeting within the prescribed period and then adjourn it to a suitable date, say a month later for considering the accounts. See *Sudhir Kumar Seal v. Asst. ROC*, (1979) 49 Com Cases 462 (Cal); *M.D. Mundhra v. Asst. ROC*, (1980) 50 Com Cases 346 (Cal); *Sunil Dev v. Delhi & District Cricket Assn.*, (1994) 80 Com Cases 174 (Del).

Section 166 of the Companies Act means to say that there shall be a general meeting held once at least in every year, *i.e.*, at least one meeting per year. Where a meeting called on 30th December, 1934 was adjourned to the 31st March, 1935 and the next meeting was held on 28th January, 1936 it was held that Section 166 was not complied with and the company was rightly convicted of an offence. *Sree Meenakshi Mills Co. v. Asst. Registrar, Madurai*, (1938) 8 Com Cases 175, 176 : AIR 1938 Mad 640. The holding of an extraordinary general meeting will not do; only an annual general meeting must be held. *Emperor v. Nasurbhai Abdullah Bhai Lalji*, AIR 1923 Bom 194.

The fact that the company did not function is no excuse. *Madan Gopal Dey v. State of West Bengal*, (1969) 39 Com Cases 119 : AIR 1968 Cal 79 or that its management was taken over by the Government, *Hindusthan Co-operative Insurance Society Ltd., Re*, (1961) 31 Com Cases 193 : AIR 1961 Cal 443.

Where the directors were not permitted to function on account of disturbances and confusion at a meeting, it was held they acted in a prudent and reasonable manner in abandoning the meeting. The meeting could not be said to have been held or even commenced merely because some copies of the balance-sheet and agenda had been distributed to some shareholders, and that abandonment of the meeting was not illegal. An annual general meeting can be called only by the directors. The congregation of the shareholders after the directors had decided that it was impossible to hold the meeting and abandoned the meeting, could not legitimately be characterised as the annual general meeting of the company. As the meeting had not commenced at all, the previous directors continued in office and could not be restrained from exercising the functions of directors of the company. As for the prayer that the court should appoint a chairman, it was held that the High Court had ample jurisdiction to issue necessary and appropriate directions both to direct a company to perform its statutory duty and also to enable the company to perform it. The High Court could appoint a chairman as prayed for by the company for a fresh meeting to be convened by the board of directors. As the direction prayed for was not for calling a meeting but only to appoint an independent chairman to preside over and conduct the proceedings of the meeting to be called by the directors, the interdict in section 186 of the Companies Act, 1956, was not applicable. *Selvaraj (V.) v. Mylapore Hindu Permanent Fund Ltd.*, (1968) 38 Com Cases 153 at 163, 164 : AIR 1968 Mad 378.

Annual General Meeting held beyond statutory time and its validity

On an examination of the scheme of Section 166 and Section 210(2)(b), the court observed that an Annual General Meeting held beyond time cannot be said to be void or illegal if the Registrar's permission is obtained, because the meeting must be held. It is not true to say that once the time for holding the meeting has expired, the meeting can never be held. Ss. 166, 167 and 168 make the failure to hold an Annual General Meeting

within time punishable with penalty. The court has no power to extend the date of holding of the meeting and if the Central Government (now CLB) does not do so under s. 167 the directors will be visited with an increasing penalty without any chance to mitigate the offence. Ss. 166, 167 and 168 do not say that Annual General Meeting held after the prescribed time is void. Therefore, the meeting can be held and it will be valid even after the time fixed for holding it has expired. Otherwise the position in law would become impossible. See *Hungerford Investment Trust Ltd. v. Turner Morrison & Co. Ltd.*, ILR (1972) 1 Cal 286.

If there is a delay in holding the annual general meeting beyond the time permitted by a combined reading of sections 166 and 210, including any extension granted by the Registrar of Companies, the company and every officer of the company in default shall be punishable with fine stipulated in section 168. However, this does not affect the validity of the annual general meeting itself. Consequently, all the resolutions passed at the annual general meeting for the approval of the accounts and the directors' report, declaration of dividend, appointment of directors and auditors at the meeting are valid.

Convening of AGM or other general meeting

Subject to the provisions in the articles, any general meeting of the company can be called only on the authority of a resolution of the Board of directors, and if the managing director, manager, secretary or other officer calls a meeting without such authority, it will not be effectual unless the Board ratifies the effect before the meeting is held. *Re, Haycraft Gold Reduction and Mining Co.*, (1900) 2 Ch 230; See also *British Asbestos Co. Ltd. v. Boyd*, (1903) 2 Ch 439 and *Hooper v. Kerr Stuart & Co. Ltd.*, (1990) 83 LT 729. As the matter is one relating to affairs of internal management in respect of which any irregularity can always be ratified by proper resolutions of the Board, no invalidity will arise, in case of such ratification. See *Boschoek Proprietary Co. Ltd. v. Fuke*, (1906) 1 Ch 148.

A meeting can be called in accordance with a decision of the Board and it is not necessary that such a decision should first be confirmed at the next meeting and then only acted upon. *Karnataka Bank Ltd. v. A.B. Datar*, (1993) 2 Kar LJ 230 at 243, 244 : (1994) 79 Com Cases 417 (Kar).

Holding of AGM by private company [Sub-sec. (2) proviso]

In the case of a private company, which is not subsidiary of a public company, both the time and place of the meeting may be fixed either by the articles or by a preceding annual general meeting or by resolution agreed to by all the members. It must, however, be noted that whatever may be the mode in which the time and place of holding the meeting are fixed, notice of each meeting must be given to all the members and it cannot be dispensed with.

Application for extension before expiry of period [Sub-section (1) (Second Proviso)]

Department's Clarification.—As regards extension of time by the Registrar, the Department's view is that the Registrar should consider the grant of extension only in cases where the application for extension is made before the expiry of the period laid down in sub-section (1). [*Company News & Notes*, dated 1-7-1963].

The application should be accompanied by a resolution of the Board of directors giving full information as to why the company is unable to comply with the statutory requirements. The application should be signed by a director or the secretary.

No application fee is payable by the company for making an application to ROC to seek extension of time.

Extension of time by Registrar for holding AGM [Sub-section (1), Second Proviso]

On a combined reading of the provisions of sections 166 and 210 of the Companies Act, it is clear that the annual general meeting should be held on the earliest of the following dates:—

(a) 15 months from the date of the last annual general meeting;

(b) the last day of the calendar year;

(c) 6 months from the close of the financial year.

There may be instances where the company is able to hold its annual general meeting within 15 months of the date of the last such meeting but experiences genuine difficulty in holding the meeting within 6 months of the close of the financial year as required by section 210. In such cases, the Registrars have been advised to grant extension under section 166, even in cases where the period prescribed under section 166 is not likely to be exhausted to enable the company to hold its annual general meeting beyond the period of six months prescribed under section 210 but within 9 months of the close of the financial year. Thus, the Registrar of Companies is empowered to grant extension of time by 3 months only from the earliest of the dates when the company is required to hold the annual general meeting.

The Annual General Meeting should be held whether the accounts are ready or not. The Central Government does not have the power to extend the time for holding the Annual General Meeting. This power is vested only with the Registrar. An application before the Central Government for extension of time must not, therefore, be entertained. *Nungambakkam Dhanarakshaka Saswatha Nidhi Ltd. v. Registrar of Companies,* (1972) 42 Com Cases 632 (Mad); *Coal Mktg. Co. of India (P.) Ltd., Re,* (1967) 37 Com Cases 720 : AIR 1968 Cal 119. The Central Government also does not have the power under S. 166 read with S. 171 to hold that the meeting of a company was illegal and void. Such a matter can be taken up only in a regular civil suit. *Ravinder Kumar Jain v. Punjab Registered (Iron & Steel) Stockholders Association Ltd.,* (1978) 48 Com Cases 401 (P&H). Condonation of delay would *ipso facto* condone the delay in filing of accounts and no prosecution would be possible during the extended period. *Ramanujam Appalaswamy, Re,* (1941) 11 Com Cases 177 : AIR 1941 Mad 504.

The liberal policy of granting extension of time to companies to enable them to call their annual general meetings on the ground that the audit of their accounts has not been completed or that their accounts have not yet been compiled or cast for submission to the auditors or for other similar reasons indicating slackness, negligence or deliberate default on the part of the managements or the auditors of companies can no longer be justified. The law contemplates that the permissible interval between two consecutive annual general meetings should not be lightly extended.

Failure to get annual accounts audited, no excuse for extension of time

Department's views.—The Government has decided that delay in the completion of the audit of the annual accounts of a company should not ordinarily constitute a 'special reason' justifying the grant of extension of time for holding its annual general meeting. Companies are, therefore, requested to take all suitable steps to ensure that their annual accounts are audited in good time so that their annual general meetings may be called within the statutory time-limit. (*Press Note,* dated the 29th January, 1959).

Special reason for extension of time regarding AGM

Department's Clarification.—Following query was raised before the Department: "Situations arise when a company is able to comply with the time limit in Section 166 but not with that in Section 210. In such cases, no extension is either necessary or possible for the purpose of section 166, and it follows that the provision for extension beyond the period of six months in section 210 becomes infructuous.

Illustration

A company's accounts are closed on 31st May, 1960 and the annual general meeting is held in, say January, 1961. The next annual general meeting can be held any time before March, 1962 and, therefore, there is no question of any application of extension of time under section 166, but as the accounting year ends on 31st May, 1961, the accounts have to be presented before 30th November, 1961. In this case, there is no possibility of the six months being extended because no application can be made under section 166.

The Department expressed the following view: "If there are special reasons justifying an extension of the period of six months referred to in section 210 an extension of time under section 166 would be given on the basis of those special reasons. (*Department's File No.* 8/16(1)/61-PR.)

No extension for laying accounts before AGM

Department's Clarification—*Query.*—The period of six months allowed to hold annual general meeting is too short. It is hoped that the administration would be lenient and grant extension of time.

The Department expressed the view that the Registrar has no power to grant any extension under section 210 and the accounts should be laid in the General Meeting within six months of the close of the Financial Year. Subject to this, power has been conferred under section 166 for extension of time to hold an annual general meeting upto three months only, and that too for special reasons only. It is expected that the companies should so organise their business and office that they will be able to hold their annual general meeting within the statutory period. (*Department's File No.* 8/16(1)/61-PR).

Extended AGM going beyond calendar year does not obviate AGM for that year

Department's Clarification.—The question whether the second proviso to sub-section (1) of 166 of the Companies Act, 1956 empowers the Registrar of Companies to grant extension not exceeding 3 months, though the company concerned may not be able to hold its Annual General Meeting in a particular calendar year, has been considered by the Company Law Board. The Company Law Department (*Vide* its Letter dated 13-1-1971, No. 34/11/69-CL-III) is of the view that the Registrar can "grant extension of time, for special reasons, up to a maximum period of three months, even if such extension allows the company to hold its annual general meeting beyond the calendar year."

This means that according to the Department, the statutory requirement that every company shall *in each year* hold an annual general meeting need not be complied with if the Registrar in the exercise of his discretionary power under the second proviso extends the time-limit for holding an annual general meeting from fifteen to eighteen months after the previous annual general meeting had been held. It is submitted that the proviso is confined to extending the time for holding the next annual general meeting by a period not exceeding three months and does not in any manner affect or modify the statutory requirement in the first part of sub-section (1) that every company shall hold in each year (*i.e.* calendar year) an annual general meeting. This part of sub-section (1) has been adopted from the first part of sub-section (1) of Section 131 of the English Companies Act of 1948, which runs as follows:—

"Every company shall in each year hold a general meeting as its annual general meeting, in addition to any other meetings and specify the meeting as such in the notices calling it....."

A close and careful reading of sub-section (1) shows that the second proviso is concerned only, with the second part of the sub-section, which deals with interval of time between two annual general meetings and extension of it and has no relation or affinity whatsoever with the first part of the sub-section which lays down a general principle as regards the holding of annual general meetings on the lines adopted in the English Act.

When the language of the first portion of the sub-section is plain and clear there is no room for reading any qualification with reference to proviso unconnected with it. It would appear that in the light of the above explanation the view of the Department requires reconsideration. If in the exercise of his powers under the second proviso any anomalies are met with, that will be a case for legislative amendment and not interpretation *ab inconvenient.*

Sections 166 and 210 when read together clearly suggested that the AGM should be held on the earliest of the three relevant dates prescribed under these two sections, i.e. 6 months after the close of the financial year, 15 months from the previous AGM and the last day of the next calendar year, whichever is earlier. Otherwise one or the other section is bound to be breached (*File No.* 8/16(1)/61-PR, dated 19-5-1961).

Extension of time for AGM where annual audited accounts are not ready

Department's Clarification I.—"From the strictly legal point of view, the time within which the Annual General Meeting of a company is required to be held by a company is no doubt governed solely by S. 166 of the Companies Act and the date on which an Annual General Meeting is required to be held has no direct relationship with the financial year of the company. Accordingly, the Registrar's power to grant extension of time under the second proviso to S. 166(1) does not become exercisable if the 'extension' sought by the company is for holding the meeting falling within the time limits mentioned in the said S. 166 and is asked for solely on the ground that it has not been able to prepare the accounts for the period mentioned in S. 210(3). Notwithstanding the legal position aforesaid, the Board is of the view that for administrative and practical consideration where a company approaches for the grant of extension of time for holding the annual general meeting in terms of the proviso to S. 166(1) of the Act the Registrar of Companies may continue to grant the required extension for the holding of Annual General Meeting beyond the period of six months from the closing of the financial year of the company as contemplated under S. 210 even though the time limit for the holding of such a meeting as prescribed under S. 166 may not have been reached. It is considered that apart from facilitating the smooth working of companies such a practice would be administratively desirable as well. It was also in this context that the Department had earlier advised the field offices and companies which sought clarification on the point that Ss. 166 and

210 should be read together and if a breach of the provisions of one or the other of the two sections is to be avoided an annual general meeting should be held on the earlier of the three relevant dates prescribed under these two sections (*vide Circular No.* 8/16(1)/61-PR, dated 25-2-1961). However, when it comes to determining for purposes of legal proceedings or levy of additional fee as to whether there has been a default in holding the Annual General Meeting it would no doubt be necessary for the Registrars to construe the provisions of S. 166 strictly in the manner indicated above. For this purpose the financial year of the company or the provisions of S. 210 is not relevant. In other words, where a company holds its Annual General Meeting within the time prescribed under S. 166, though such a meeting has been held after the expiry of six months from the close of its financial year and the company files its annual return within 42 days [*now 60 days*] of the holding of the said meeting, no action should be taken against the company for default of S. 159 or 166 nor would additional fee be levied in such a case in respect of the filing of the annual return and audited accounts." (*Letter No.* 8/45/166/64-PR, dated 12-1-1965).

Department's Clarification II.—The views expressed in the letter No. 8/45/166/64-PR, dated 12-1-1965 [*printed above*] have been reiterated and confirmed in the following circular: "This Department has received a reference from the Regional Director, Madras about the confirmation of the views contained in this Department's letter No. 8/45/166/64-PR, dated the 12th January, 1965 [*printed above*] which *inter alia* stated that for the purpose of section 159 of the Companies Act, 1956, the time within which the Annual General Meeting is required to be held is governed solely by S. 166 and S. 210 of the said Act is not relevant in such cases. This Department has since carefully considered the matter and do not see any sufficient reason to review the above views which are again reiterated and confirmed." (*Circular No.* 2/79, dated 15-9-1979 (*F. No.* 8/35/(159/166) /78-CL-V, *& No.* 24/38/78-CL-III)).

Time-limits for holding AGM under S. 166 read with S. 210

Departments Circular.—A query was raised to the Department: "Under the amended provisions of Section 166, an annual general meeting is required to be held in each year and within a period of fifteen months from the date of the previous meeting. In this section, no reference has been made to the period of the financial year of the company within which the meeting is to be held. The amended section 210, however, requires that the balance sheet made upto a date not more than six months preceding the date of the meeting has to be laid before the annual general meeting. It is possible that a company may comply with the provisions of Section 166 as amended, but fail to comply with the provisions of Section 210 as amended. It seems that both the amended sections will have to be read together particularly in view of Section 173 and particularly also, in view of the fact that Section 210(1) requires the Board of directors to lay such balance sheet before the annual general meeting. The power of extension has been granted under the amended Section 166 and not under the amended Section 210. The exercise of such power under Section 210, therefore, requires some clarification. It appears that though Registrars may give extension of time under Section 166, they have no power to give any extension of time under Section 210 in the sense that the company may lay before the annual general meeting a balance sheet made upto more than six months prior to the date of the meeting. So also the Registrars' offices are maintaining default cards which are at present worked out on the considerations as required by the un-amended Act, namely holding the annual general meeting within fifteen months from the date of the previous meeting and within nine months from the close of the financial year. It requires some thought as to the method in which the default cards should now be maintained and the way in which the default notices should be issued, that is to say, whether separate default notices should be issued for defaults under the amended section 166 and amended section 210 or a combined default notice, having in view all the requirements of the amended provisions of the Act, is to be issued."

The Department expressed the following views: Sections 166 and 210 when read together clearly suggested that the annual general meeting should be held on the earliest date of the three relevant dates prescribed under these two sections, *i.e.*, 6 months after the close of the financial year, 15 months from the previous annual general meeting and the last day of the next calendar year, whichever is earlier. Otherwise one or the other section is bound to be breached. Occasions may, however, arise where a company experiences genuine difficulty in being able to hold its annual general meeting within 6 months of the close of the financial year though it can hold it within the time limit prescribed under Section 166. The Registrars should be departmentally instructed that in such cases they should, on the merits of each case, allow extensions under Section 166, even though the periods prescribed under that section are not likely to be exceeded, so that the company can take advantage of the extension and is enabled to hold its annual general meeting beyond the period of 6 months prescribed under Section 210 and upto nine months of the financial year (as in that case the company shall be able to add the period of extension to the prescribed period of 6 months), even though the meeting is held within the time prescribed under Section 166. (*Department's File No.* 8/16(1)/61-PR).

Placing of accounts of foreign business in annual general meetings

Department's Clarifications.—A query was raised before the Department: "Section 166(1) and Section 210 of the Companies Act, as amended, require that the accounts of a company should be placed before the Annual General Meeting within six months from the date of closing and the Registrar has been

given power to extend the said period by three months only. Practical difficulties are, however, felt in complying with the provisions in cases where the entire activities of a company are confined to a foreign country, while the registered office of the company is situate in the Indian Union. In such cases and specially in cases where voluminous business transactions are involved, it is almost impossible to complete audit in the foreign country and in India within a period of nine months, particularly as foreign Government do not easily permit transmission of the books of account and other relevant papers to the Indian Union for audit.

It is, therefore, desirable that in these cases the time-limit to place the accounts before the general meeting from the date of closing should be extended to twelve months."

The Department expressed the following view: "In regard to audit of foreign branches normally if an audit is done by a qualified auditor of the country and a certificate given, that should be acceptable for preparation of consolidated accounts in India and hence, there appears to be no need for granting any further extension in such cases. There is also the power of the Central Government or the Registrar to relax these provisions. (*Department's File No.* 8/16(1)/61-PR).

Where annual accounts are not ready or available

PALMER'S COMPANY LAW (21st Edn.) gives the following Practice Notes which may well be followed: "Where accounts are not available in time for them to be considered at an annual general meeting to be held within fifteen months of the last meeting as provided in Section 131 (corresponding sections of Indian Act are 166, 167 and 168) the usual practice is to hold the meeting within the statutory time-limit, transact all business other than the consideration of the accounts and then to adjourn the meeting to some future date when the accounts will be ready. Similarly a company should not fail to comply with section 131 in regard to the requirement that an annual general meeting should be held in every year simply because the accounts are not available in any one year. It should hold the meeting at the end of the year in question and adjourn to some future date early in the following year when the accounts will be available. In these circumstances the annual return should be made up by reference to the date of the first meeting and not the date of the adjourned meeting. In fixing the date of the adjourned meeting, regard must be had to the time-limit imposed by section 148(1) (Corresponding to Indian section 210)."

The non-laying of the accounts before the AGM within the statutory period would not invalidate the meeting. *Sunil Dev v. Delhi and District Cricket Assn.*, (1994) 80 Com Cases 174 (Del).

Laying of annual audited accounts before AGM necesary before filing with ROC

Department's views.—In this connection, the circular issued by the Department of Company Affairs should also be noted. It says "it has come to the notice of this Department that a company sent to a Registrar of Companies for filing under section 220 of the Companies Act, 1956, its balance-sheet and profit and loss account which had been laid before a general meeting and not an annual general meeting. In this context, the question arose for consideration as to whether the Registrar of Companies could take the document on record in view of the prior provisions of sub-section (1) of Section 210 read with sub-section (1) of Section 220 of the Act, requiring the balance-sheet and profit and loss account to be laid before the company at an annual general meeting, before submitting it to the Registrar for filing. The Department is advised that the balance-sheet and profit and loss account are required to be laid at an annual general meeting and not at any other general meeting. In case the annual accounts are not ready for laying at the appropriate annual general meeting, it is open to the company concerned to adjourn the said annual general meeting to a subsequent date when the annual accounts are expected to be ready for laying. This may be done by a suitable resolution adjourning the said annual general meeting to a specific date or to a date to be specified later on. The Department has given a warning that, in future, balance-sheets and profit and loss accounts which are not laid before an annual general meeting of the company but submitted to the Registrar of Companies for filing under Section 220 of the Companies Act, would not be taken on record by him. The question of launching prosecution would be considered in such cases". (*Circular No.* 35/9/72-CL-III, *Department of Company Affairs*, dated 2nd February, 1974).

The above circular is being relied on by several companies for following a procedure which is clearly contrary to the intention of the provisions of this section and Section 210. The combined reading of this section and Section 210, requires compliance with the following where Annual General Meetings and the placing of accounts before shareholders is concerned:

(1) There must be one meeting held in each calendar year.

(2) Not more than 15 months must elapse between one general meeting and another.

(3) The period of 15 months may be extended to 18 months by the Registrar.

(4) Except in the case of the first Annual General Meeting, the accounts must relate to a period beginning with the day immediately after the perjod for which they were last submitted and ending with a day which must not precede the day of the meeting by more than six months or six months and the extension granted by the Registrar under Section 166 *i.e.* a maximum period of 9 months.

Adjourned AGM for laying of accounts must be held within extended time

Department's Clarification.—"I am directed to invite your attention to this Department's Circular No. 4 of 1974, dated February 2, 1974, [*printed above*] and to say that the defaults under sections 159, 166, 210 and 220 of the Companies Act, 1956, are separate offences. A plea has been raised that in accordance with the aforesaid Circular dated February 2, 1974, it is possible for a company to adjourn the annual general meeting in case the accounts are not ready, without complying with the requirements of section 210 of the Act. In this connection, it may be stated that it is mandatory on the part of the Board of Directors of the company to lay the accounts at every annual general meeting within the statutory period, as laid down in sub-section (3) thereof. In case the annual general meeting is held in accordance with the provisions of section 166 of the Act, and the accounts are not placed thereat, the same not being ready, it is no doubt open to the company concerned to adjourn the said annual general meeting to a subsequent date for laying the accounts but then, the adjourned annual general meeting must itself be held within the statutory period (including the period of extension thereof, if any allowed, as provided in section 166(1). That being so, procedure of adjourning the annual general meeting cannot be so adopted as to bypass the provisions of section 210 of the Act. Thus, in case the accounts are not placed at the annual general meeting or the adjourned annual general meeting, in either case, within the statutory period laid down in sub-section (3) of section 210 of the Act, the delinquent directors are liable for prosecution under sub-section (5) thereof. In this connection, a reference may be made to a decision of the Division Bench of the Calcutta High Court in *Bejoy Kumar Karnani v. Assistant Registrar of Companies, (W.B),* (1985) 58 Com Cases 293 (Cal), wherein it has been held that if the said Circular dated February 2, 1974, is to be literally construed divorced of the provisions of sections 166 and 210 of the Act, such adjournments may go on *ad infinitum* and in such an event not only the provisions of section 166 but also the provisions of sections 168 and 210 of the Act would be rendered nugatory, leading to chaos and confusion in the matter of enforcement of the relevant provisions of the Act by the Registrar of Companies." (*Circular No.* 8/1(210/220)/85-CL-V, No. 2 of 1985, dated 25th March, 1985).

In view of the Department of Company Affairs also *vide Circular No.* 2/85, dated 25-3-1985, it is not possible for a company to adjourn Annual General Meeting in case accounts are not ready without complying with the requirements of S. 210. The *Circular No.* 35/9/72-CL-III, dated 2-2-1974 of Department of Company Affairs cannot be taken for support for bypassing obligations of S. 210.

Adjourned AGM must be held within maximum time-limit

The adjourned annual general meeting must be held within the maximum time-limit allowed by this section. In *Mundhra (M.D.) v. Asst. Registrar of Companies, (W.B.),* (1980) 50 Com Cases 346 (Cal)(DB); *Bejoy Kumar Karnani v. Asst. Registrar of Companies, (W.B.),* (1985) 58 Com Cases 293 (Cal); *Subal Dutta & Sons Pvt. Ltd. v. Asst. Registrar of Companies, W.B.,* (1986) 59 Com Cases 822 (Cal).

As regards adjourning the annual general meeting and placing the annual accounts see also *Sudhir Kumar Seal & Others v. Asst. Registrar of Companies, West Bengal,* (1979) 49 Com Cases 462 (Cal).

Effect of adjournment on filing of accounts

As per section 220(2), as amended by Amendment Act of 1988, a company is required to file the balance sheet etc. with the Registrar even if the Annual General Meeting is held in time and is adjourned for any reason without adoption thereof or the AGM for any year has not been held.

Consideration of accounts of more than one year at AGM

The scheme of the Companies Act contemplates that there shall be at least one annual general meeting in the course of one year. The Annual General Meeting shall be in relation to the financial year as defined under Section 210(4) and the business to be transacted at the annual general meeting must be in respect of the financial year. On that account, it is not open to the company to submit accounts for consideration at an annual general meeting of the Company in respect of more than one year. For consideration of the Balance-Sheet and Accounts of the Company, there must be an Annual General Meeting and the accounts must be considered at such meeting or at an adjourned annual general meeting.

Holding of two AGMs on the same day

There is no provision in the Act prohibiting the holding of two AGMs on the same day. If the articles do not contain any provision to the contrary, AGM for the current year as also for the previous year can be held on the same day. There should, however, be separate notices for each meeting, and they should be held at different timings.

Cancelling or postponing of convened meeting

Where an annual general meeting or other general meeting is convened for a particular date and notice issued to the members, can the Board of Directors cancel or postpone the holding of the meeting on that date? According to a decision of SATISH CHANDRA, J., of the Allahabad High Court (*Rajpal Singh v. State of U.P.*, (1968) 1 Comp LJ 21), the Board has the power, though it cannot be exercised except for *bona fide* and proper reasons. The more proper course would be for the Board not to arrogate to itself such power, but to hold the convened meeting and then have the matter decided at the meeting.

In *Smith v. Paringa Mines Ltd.*, (1906) 2 Ch 193, it was held that once a notice of the meeting is given, it cannot be adjourned by a subsequent notice. The Board of Directors does not have this power. The proper course will be to hold a meeting and resolve the adjournment of it to any future convenient date.

The power of the directors to call a meeting is not exhausted after the issue of the notice. Their power continues to enable them to postpone the date of the meeting. Some shareholders of the company proposed a resolution for removing the directors of the company at the meeting. The board of directors postponed the date of the meeting on a legal advice that the proposed resolutions were not valid. On the face of things, the court found no impropriety in the postponement and, therefore, refused to interfere in the functioning of the directors. It was a banking company. The balance of convenience was not in favour of staying the functioning of the company through its board of directors. All the involved issues should better be settled on merits in a civil suit. *Johny Chandy v. Catholic Syrian Bank Ltd.*, (1995) 84 Com Cases 520 : AIR 1995 Ker 362.

Where some shareholders assembled at the appointed place and time of an annual general meeting and took up the first item of business, *viz.*, electing the chairman, and the minutes stated that the meeting was adjourned, it was held that the meeting must be deemed to have been held though no resolutions were recorded. *V.S. Mathew v. H.S. Mathur*, 1977 Tax LR NOC 153 (All). Where a meeting was called by directors who had not been properly appointed the court may intervene to cancel a meeting if there is evidence of irregularity. *Harben v. Phillips*, (1883) 23 Ch D 14 (CA).

An adjournment of AGM under a court order and its reconvening also under court order would not require a fresh notice and the business notified for the original meeting can be validly taken up at the adjourned meeting. *S.P. Arora v. Roshanara Club*, (1992) 8 Corpt LA 31 (Del). For some technical points about the effects of adjournment and the holding of adjourned meeting see Notes under s. 175.

Voting rights and date of meeting.—Where the annual general meeting is held after the prescribed time, voting rights are to be determined as at the date of the meeting and

not as they would have been, if the meeting had been held within the prescribed time. See *Musselwhite v. C.H. Musselwhite and Sons Ltd.*, (1962) 1 All ER 201 (Ch D) : (1962) 32 Com Cases 804. See GORE BROWN ON COMPANIES, Vol. 2 Para 21.4 (44th Edn.)

Voting rights as on last day for holding AGM.—There is, however, a contrary decision of the Kerala High Court in *C.M. Varkeychan v. T.V. Mathew*, (2002) 108 Com Cases 159 : (2002) 1 Comp LJ 292 : (2002) 46 CLA 100 (Ker—DB) that the right to vote is to be reckoned as on the last day for holding the meeting (i.e. as on the date when the meeting ought to have been held). Persons who became members thereafter by virtue of a Government order were not entitled to vote at the postponed meeting.

Default in holding AGM and filing accounts.—The fact of not holding the annual general meeting cannot be pleaded in defence to a prosecution for failure to file the balance-sheet etc. under Section 220. Each of them is an independent requirement and default to comply with either constitutes a separate offence punishable separately. For review of the judicial authorities on this subject, see *ROC v. R.P. Nanda*, 1977 Tax LR 1610 (Orissa); *Smedley v. ROC*, (1919) 1 KB 97.

Default under Ss. 166 and 210, Registrars duty to launch prosecution

Department's instructions.—It is noticed that where the companies have defaulted under Section 166 and/or 210 of the Companies Act, that is, where they have not held the annual general meeting and/or have not placed the balance sheet and the profit and loss account before the annual general meeting, prosecutions are rarely launched. The fact that the complaint has to be filed in the court of the first class Magistrate having territorial jurisdiction over the place at which the Registered Office of the company is situate, which is at a place other than the Headquarters of the Registrar of Companies, need not prevent the Registrar of Companies from enforcing the penal provisions of the Act in this regard. Therefore, the Registrars should in future ensure that prosecutions for defaults under Section 166 and/or 210 are launched in all cases where merits warrant such action. The fact that such launching of prosecutions outside the headquarters of the Registrars would involve expenditure should not deter from following this procedure in future. (*Circular No.* 24/72, dated 24-7-1972).

Companies not able to hold AGM for fear of violence, not a class

Department's view.—The Company Law Board is of the view that considering the fact that only a few companies having registered offices in Calcutta are having some difficulties in holding the annual general meeting and many others, with registered offices at Calcutta, have not experienced any such difficulty, it is not possible to treat them as a 'class of companies' within the meaning of proviso to subsection (2) of Section 166 and grant them exemption under the aforesaid provisions. The "companies which desire to hold meeting in terms of Section 166(2) but are unable to do so on account of apprehending violence to the management" do not constitute a 'class of companies' based on any objective criteria distinguishing them from other companies similarly situated. Nor can be entire city of Calcutta be treated as a 'disturbed area' as is not even suggested that all companies with registered offices at Calcutta should be exempted. (*Extract from File No.* 34/5/70-CL-III, dated 15-1-1971).

Relief against default

Relief was allowed under s. 633 against liability for default in not holding the meeting in time, the default being due to the fact that because of industrial unrest in the company, directors and executives were prevented from entering the company's premises. *Tapan Kumar Chowdhury v. ROC*, (2003) 114 Com Cases 631 (2003) 55 CLA 80 : (2004) 50 SCL 283 (Cal).

Adjourned AGM and tenure of additional directors

The requirement of s. 166 for holding AGM within fifteen months of the preceding AGM is independent of s. 210 requiring presentation of annual accounts at the AGM. The tenure of additional directors would end on the date on which an AGM following their appointment is held. The presentation of annual accounts has no relevance to the duration of their appointment. But where the AGM has been stayed or deferred at the orders of the CLB, there is no default in holding AGM and consequently the nominee director will remain in office till the stay order is vacated or the meeting is actually held. *Ador-Samia Ltd. v. Indocan Engineering Systems Ltd.*, (2000) 100 Comp Cas 370 : (1999) 35 CLA 224 (CLB–PB).

An additional director holds office till the last day on which the next annual general meeting should have been held. After that day he ceases to be a director. *Dushyant D. Anjaria v. Wall Street Finance Ltd.*, (2001) 105 Com Cases 655 : (2001) 3 Comp LJ 40 : (2001) 34 SCL 242 (Bom).

Adjourned AGM, whether can be held on public holiday and notice necessary

Department's Clarifications.—The following issues arising out of the sections 166(2) and 174(4) need clarification:

Issues

(a) Is it necessary that notice of the adjourned general meeting is to be given to the members of a company?

(b) If the adjourned meeting falls on a holiday will there be any contravention of Section 166(2), when the meeting is held on the holiday?

(c) Is it contemplated by Section 174(4) that a meeting of the Board of Directors is to be convened to fix another date for adjourned general meeting and, if so, is it necessary that notice thereof should be given to the members and what will be the period of such notices?

Clarifications

(a) Not necessary, unless the date of the adjourned General Meeting is not decided at the original meeting itself.

(b) There is no contravention of Section 166(2) if the adjourned meeting comes to be accidentally held on a holiday.

(c) If the Board of Directors fix another date for the adjourned General Meeting, a notice is to be given to the members in accordance with the provisions of the Act governing notices of General Meetings. (*Department's File No.* 8/16/(1)/61-PR).

In case of default in holding AGM, Company Law Board may, by order, call the meeting on the application of any member under section 167.

Central Government's power of exemption

Under the first proviso to sub-section (2), the Central Government may exempt any class of companies from the provisions of sub-section (2). It may be noted that no such exemption can be given in case of an individual company.

Exemption to Government companies

The modification made in this section in relation to Government companies *vide* Notification SRO 355, dated 7-1-1957, as amended, is as follows:

"(i) In *proviso* to clause (e) of sub-section (1), for the word 'Registrar', the words "Central Government" shall be substituted;

(ii) In sub-section (2) for the words "some other place within the city, town or village in which the registered office of the company is situate", the words "such other place as the Central Government may approve in this behalf" shall be substituted."

Exemption to section 25 companies

Section 166(2) does not apply to section 25 companies, provided that the time, date and place of each annual general meeting are decided upon beforehand by the Board of Directors having regard to the directions, if any, given in this regard by the Company in general meeting. (*S.O. No.* 1578, dated 1-7-1961).

Penalty for default.—The default under this section is punishable under S. 168.

Compoundable Offences.—The offence is compoundable under section 621A. See Notes thereunder.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of the matters specified under Rule 3 of the Companies (Compliance Certificate) Rules, 2001.

Paragraph relates to filing of forms and returns and reads thus :

***Paragraph 2.*—The company has duly filed the forms and returns as stated in Annexure "B" to this certificate, with the Registrar of Companies, Regional Director, Central Government, Company Law Board or other authorities within the time prescribed under the Act and the Rules made thereunder.**

Prescribed Check List

Compliance Certificate under Section 383A [*Item (c) of 'Periodical Returns*]

Check whether :

(i) the company to which proviso to sub-section (1) of section 383A is applicable has filed with the ROC a certificate from a PCS in Form appended to the Companies (Compliance Certificate) Rules, 2001 within 30 days from the date of annual general meeting.

(ii) in case the annual general meeting of the company is not held for the year, the aforesaid Compliance Certificate has been filed with the ROC within 30 days from the latest day on or before which that meeting should have been held.

Paragraph 6 under Rule 3 relates to annual general meetings and minutes thereof, and reads as follows:

***Paragraph-6.*—The annual general meeting for the financial year ended on ..... was held on ..... after giving due notice to the members of the company and the resolutions passed thereat were duly recorded in Minutes Book maintained for the purpose.**

Prescribed Check List

Annual General Meeting [*Item (a)*]

Check whether:

(i) first annual general meeting was held within 18 months from the date of incorporation of the company;

(ii) subsequent annual general meetings have been held in each year (calendar year) and the gap between two successive annual general meetings has not been more than 15 months or the period extended by the ROC;

(iii) the provisions of section 210 have been complied with;

(iv) meetings have been called during business hours on a day not being a public holiday and held at the registered office of the company or at any place in the same city, town or village;

(v) provisions of sections 171 to 193 and other requirements e.g., notice, quorum, chairman, proxy, attendance, placing and reading of Auditors' report, placing instruments of proxy, proxy register and register of directors' shareholdings, conduct of meeting and preparation and signing of minutes etc., were complied with.

Note : Provisions of section 171 to 186 do not apply to private companies if the Articles of Association so provide.

Sending of notices etc. to the members [*Item (b)*] **See sec. 171**

Minutes Books of Proceedings of General Meetings [*Item (c)*]

See under sec. 193

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

Secretarial Standards on General Meetings issued by the Council of ICSI (SS-2)

These Standards seek to prescribe a set of principles for the convening and conduct of General Meetings and matters relating thereto. In the initial years, adherence by a company to the Secretarial Standards will be recommendatory

These principles may not be applicable to any meetings convened on the directions of the Court or CLB or other authority, unless the directions themselves so prescribe.

§ For full text of the Secretarial Standard, see *Appendix* 311.

Secretarial Standard [Paras 2 and 4]

2. Frequency of Meetings

2.1. *Statutory Meeting [see sec. 165]*

2.2. *Annual General Meeting*

Every company should, in each year, hold a Meeting called the Annual General Meeting

Every Company should hold its first Annual General Meeting within eighteen months of the date of incorporation and thereafter in each year within six months of the close of the financial year, with an interval of not more than fifteen months between two successive Meetings. The aforesaid period of six months or interval of fifteen months may be extended by a period not exceeding three months with the prior approval of the Registrar of Companies

2.3. *Extra-ordinary General Meeting [See sec. 169]*

4. Presence of Directors and Auditors

4.1 *Directors*

4.1.1 The Directors of the company should attend all Meetings of the company, particularly the Annual General Meeting, and should be seated with the Chairman.

If any Director is unable to attend the Meeting for reasons beyond his control, the Chairman should explain such absence at the Meeting.

4.1.2 The chairman of the Audit Committee, where such a Committee exists, should attend the Annual General Meeting.

4.2 *Auditors*

While the Auditors of the company are entitled to attend the Annual General Meeting, the Auditors, represented by the proprietor or a partner, as the case may be, should attend the Meeting if there are any reservations, qualifications or adverse remarks in the Auditor's Report.

4.3 *Practising Company Secretary*

The Practising Company Secretary who has given the Compliance Certificate should attend the Annual General Meeting.

Secretarial Standard [Para 14]

14. Adjournment of Meetings

14.1 A duly convened Meeting should not be adjourned arbitrarily by the Chairman. The Chairman may adjourn a Meeting with the consent of the Members and shall adjourn a Meeting if so directed by the Members.

Meetings may be adjourned for want of requisite Quorum. The Chairman may adjourn a Meeting in the event of disorder or other like causes, where it becomes impossible to conduct the Meeting and complete its business.

14.2 If a Meeting is adjourned sine-die or for a period or thirty days or more, a Notice of the adjourned Meeting should be given in accordance with the provisions contained hereinabove relating to Notice.

14.3 If a Meeting is adjourned for a period of less than thirty days, in the case of listed companies with more than 5,000 Members, Notice thereof specifying the day, date, time and venue of the Meeting should be published immediately in a newspaper having a wide circulation within such States of India where more than 1,000 Members reside.

14.4 If a Meeting, other than a requisitioned Meeting, stands adjourned for want of Quorum, the adjourned Meeting should be held on the same day, in the next week at the same time and place or on such other day and at such other time and place as may be determined by the Board. In the case of listed companies with more than 5,000 Members, Notice thereof specifying the day, date, time and venue of the Meeting, should be published immediately in a newspaper having a wide circulation within such States of India where more than 1,000 Members reside.

If, at an adjourned Meeting, a Quorum is not present within half an hour from the time appointed, the Members present, being not less than two in number, will constitute the Quorum.

14.5 If, within half an hour from the time appointed for holding a requisitioned Meeting, a Quorum is not present, the Meeting shall stand dissolved.

14.6 At an adjourned Meeting, only the unfinished business of the original Meeting should be considered.

Any Resolution passed at an adjourned Meeting would be deemed to have been passed on the date of the adjourned Meeting and not on any earlier date.

Documents Involved: 1. Minutes of Board/General Meeting, 2. Notice of Meeting, 3. Articles, 4. Form 22A for shorter notice, if any, 5. Register of Proxies, 6. Annual Report.

[1][*S. 167. Power of Central Government to call annual general meeting.—(1) If default is made in holding an annual general meeting in accordance with section 166, the Central Government may, notwithstanding anything contained in this Act or in the articles of the company, 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 directions as the Central Government thinks expedient in relation to the calling, holding and conducting of the meeting.*

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1. Subs. by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 22. Prior to it substitution it stood as under:

"S. 167. Power of [1][Company Law Board] to call annual general meeting.

(1) If default is made in holding an annual general meeting in accordance with section 166, the [1][Company Law Board] may, notwithstanding anything in this Act or in the articles of the company, 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 directions as the [1][Company Law Board] thinks expedient in relation to the calling, holding and conducting of the meeting.

Explanation.—The directions that may be given under this sub-section may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(2) A general meeting held in pursuance of sub-section (1), shall subject to any directions of the [1][Company Law Board], be deemed to be an annual general meeting of the company."

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1. Subs. by the Companies (Amendment) Act, 1988, (w.e.f. 31-5-1991) *vide* GSR *dt.* 31-5-1991, for the words "Central Government".

* In Form No. 1 of CLB Regulations, 1991 with fee of Rs. 500/- *vide* GSR 219(E), dt. 2-3-2000, w.e.f. 1-4-2000 under CLB (Fees on Applications & Petitions) Rules, 1991, see *Appendix* 6

Explanation.—The directions that may be given under this sub-section may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(2) A general meeting held in pursuance of sub-section (1) shall, subject to any directions of the Central Government, be deemed to be an annual general meeting of the company:

Provided that in the case of revival and rehabilitation of sick industrial companies under Chapter VIA, the provisions of this section shall have effect as if for the words "Central Government", the word "Tribunal" had been substituted.]

NOTES

Note : As and when the Companies (Second Amendment) Act, 2002 (11 of 2003) comes into force, the power under this section shall become transferred to the Central Government to be exercised by it in place of the Company Law Board. In the case of revival or rehabilitation of a sick industrial company, the power under this section is to be exercised by the Tribunal. The commentary should be read keeping this change in mind.

Companies (Amendment) Act, 1988

The powers under this section were originally exercised by the Central Government and delegated to Regional Directors, under section 637. These powers have been conferred on the Company Law Board by the Amendment Act of 1988.

A Commissioner cannot be appointed for exercising power under this section on behalf of the court (now CLB). *A.M. Zacharia v. Majestic Kuries and Loans (P.) Ltd.*, (1987) 62 Com Cases 865 (Ker).

Companies (Second Amendment) Act, 2002 [11 of 2003]

The powers of Company Law Board under this section except in respect of a sick industrial company have been conferred on the Central Government. In the case of revival or rehabilitation of a sick industrial company, the powers have been conferred on the Tribunal constituted under section 10FB. Consequential changes have accordingly been made in the section.

As per the Bill, the powers were initially proposed to be transferred to the Tribunal. Notes on Clauses of the Bill stated thus:

Notes on Clause.—This clause seeks to substitute section 167 of the Companies Act, 1956 which confers power on the Company Law Board to call a general meeting in case of default of holding such meeting. It is now proposed to confer the said power upon the Tribunal. This amendment is of consequential nature. (*Clause* 17 of the Companies (Amendment) Bill, 2001).

Scope of section

In case of default in holding an annual general meeting, as required by Section 166, the Company Law Board may exercise the power to call or direct the calling of the annual general meeting but only on the application of a member.

The underlying policy is to exercise the power only where the management is found to be unwilling to convene an annual general meeting of the company, with a view to keeping the shareholders in the dark about the affairs of the company or where the management is unable to convene the meeting on account of party faction or other like reason (*Vide* 4th *Annual Report*, year ended 31st March, 1960).

Where the directors were restrained by a court order from functioning as such and it had thereby become beyond their control to call a meeting, it was held that they were entitled to be relieved under Section 633. *S.L. Kapur v. ROC*, (1964) 1 Comp LJ 211 (Orissa). This would not have been so where the court restraining an AGM had no juris-

diction to do so. *R. Venkataswami Naidu v. South India Viscose Ltd.*, (1986) 60 Com Cases 142, 153 (Mad). See also *Incab Industries Ltd., Re*, (1996) 4 Comp LJ 482 (CLB), *Mukesh Sood v. Incab Industries Ltd.*, (1996) 4 Comp LJ 482 (CLB) and *Anuradha Mukherji v. Incab Industries Ltd.*, (1996) 4 Comp LJ 482 (CLB), where directions were issued for calling and holding of meetings for all the gap years.

According to a decision of the Supreme Court no AGM is necessary for the period during which a company remains under acquisition under a State legislation, which was ultimately struck down by the Supreme Court. *Madras Race Club v. Dr. K.R. Lakshmanan*, (1997) 88 Com Cases 754 (Mad). A **contrary** decision of the CLB in, *Lakshmanan (K.R.) v. Madras Race Club*, (1997) 2 Comp LJ 266 (CLB—SB) that an AGM was necessary for each and every successive year was set aside.

Default can be said to have been made in holding the meeting only after the expiry of the period mentioned in the second proviso to sub-section (1) of section 166. Where the ROC refuses to extend time under s. 166 and no member is available for invoking the CLB jurisdiction under s. 167, it would seem that the company can approach a Civil Court against the order of the ROC. If the Court finds that the decision of the ROC was wrong penal consequences would not follow. The company may hold the meeting and fulfill all the formalities.

In *S.L. Kapur v. ROC*, (*Supra*) the directors approached the court after having failed to convince the Registrar to grant extension of time. They put forward certain reasons for not being able to hold the meeting within the time. S. BARMAN J. observed [(1964) 1 Comp LJ 211 at p. 213] : "In the circumstances stated in the petition I am satisfied that the delay in holding the annual general meeting and placing the balance-sheet, profit and loss account and directors' and auditors' report before the said meeting and forwarding copies thereof to the members was due to unavoidable reasons and that neither the company nor any of its directors who constitute the interim board, are individually responsible for the delay which was due to circumstances entirely beyond their control."

Where the directors have already called an AGM, it would be an abuse of the processes to come before the CLB praying for an order under this section. *Swadeshi Polytex Ltd., Re*, [*Company Petition* 9/167/97-CLB, dated 2-12-1997] (CLB—N. Delhi).

A member can apply but not company for calling AGM

As to who can apply for an order for holding a meeting, the Company Law Board in its decision in *Cannanore Whole Body CT Scan and Research Centre P. Ltd. v. Saibunnisa S.V.*, (1998) 93 Com Cases 99: (1998) 16 SCL 635 : (1998) 3 Comp LJ 518 : (1998) 29 CLA 446 (CLB—SB) stated the effect of the provisions as follows : [at p. 102] "It is clear that a member and not the company is empowered to invoke the provisions of s. 167. The present application does not satisfy the requirements of the provisions of s. 167(1). It is *ab initio* defective. The application becomes bad in law. The company cannot seek directions against itself. The Company Law Board cannot in the exercise of its inherent powers act in violation of law. The discretion has to be exercised according to the known principles of law. The application filed by the company is not in consonance with the provisions of s. 167 of the Act. The defect cannot be rectified by impleading a member subsequently. This will circumvent the provisions of s. 167. The Bench has no jurisdiction to allow the impleading application."

An applicant whose membership has been disputed by the company by showing that he has transferred his entire shareholding, has no *locus standi* to make an application under the section. *M. Sampath v. AKMN Cylinders P. Ltd.*, (1998) 29 CLA 455 (CLB—SB).

One member constituting a meeting

For one member to be deemed to constitute a meeting, the direction of the Central Government (now Company Law Board) is necessary; otherwise, at least two persons are necessary for a meeting. *Cf. State of Kerala v. West Coast Planter's Agencies Ltd.*, (1958) 28 Com Cases 13 (Ker). Literally, the word "meeting" means a coming together of two or more persons, and generally more than one person will be necessary to consti-

tute a meeting. There may, however, be cases where the constitution of a company may be such as, for instance, where one person holds all the equity shares, or all the preference shares so that there can be no meeting of more than one voting shareholder or one member of a particular class of shares. In such cases, it must be presumed that the Act has also contemplated positions where a meeting of two or more persons will not be possible in the strict sense and the word "meeting" must be taken to have been used in the sense of including one shareholder only. *Cf. East v. Bennet Bros. Ltd.,* (1911) 1 Ch 163; *Re, London Flats Ltd.,* (1969) 2 All ER 744 : (1970) 1 Comp LJ 28 (Ch D).

§ "Detailed notes on this subject are given under S. 174 under the heading "Quorum and Single member meeting" and also under S. 186 under the heading "Single member constituting a meeting".

Power of CLB to call meeting

This section provides clearly what should be done when default occurs in holding the annual general meeting within the stipulated time. Only the Central Government (now Company Law Board) has the power to order the convening of a meeting after the statutory time has elapsed. *Nungambakkam Dhanarakshaka Saswatha Nidhi Ltd. v. ROC,* (1972) 42 Com Cases 632 (Mad); *Dinekar Rai D. Desai v. R.P. Bhasin,* (1986) 60 Com Cases 14, 21 (Del). Default takes place when the time set by S. 166 expires and not on the expiry of the time prescribed by the articles of the company. *Balakrishan Maheshwari v. Uma Shankar Mehrotra,* (1947) 17 Com Cases 216, 229 : AIR 1947 All 361.

The Company Law Board ordered a meeting to be called where the time for holding the annual general meeting had lapsed. The meeting, if held by the company out of time, would not have been a valid meeting. The order of the CLB was necessary to ensure the validity of the meeting. The CLB directed that the business of the meeting should be restricted to the ordinary routine business of the AGM and that the special business appended to the notice of the meeting should be dropped. Such special businesses were re-appointment of certain directors and mortgaging of the company's assets. These points had become the subject-matter of a pending case before the Principal Bench. *Taihan Electric Wire Co. Ltd. v. TDP Copper Ltd.*, (1999) 96 Com Cases 415 : (1998) 29 CLA 26 : (1998) 2 Comp LJ 351 : (1998) 16 SCL 167 (CLB–NB).

Where a meeting was called but could not commence business because directors abandoned it before any business was taken up, this was held to be default in holding the meeting. The power under this section became excercisable. *Selvaraj (V.) v. Mylapore Hindu Permanent Fund Ltd.,* (1968) 38 Com Cases 153 (Mad). Where the company's business came to a close because of non-cooperative attitude on the part of directors due to differences among them and annual accounts and returns could also not be filed, it was held by the CLB that it could direct the company to call, hold and conduct its AGM to transact its normal business. *Yogendra H. Desai v. Spatial Holodynamics (India) Ltd.,* (2003) 52 CLA 31 (CLB). The successive failure on the part of the company to call and hold its AGM (since 1999) was taken note of by the CLB because such a prolonged default could not be in the interests of the company or its members. The CLB ordered a meeting to be called. The Madras High Court did not allow an appeal against such order as no question of law was invovled. *S. Mohan v. Commission & Management of the Muthialpet Benefit Fund Ltd.,* (2003) 41 SCL 91 (Mad).

An adjourned general meeting for laying and adoption of accounts could not be held for want of quorum. The articles required personal presence of members. The Company Law Board felt that the meeting for laying and adoption of accounts should be validated and regularised in whatever form it could be held. The quorum was accordingly fixed to be the number of members actually present even if it were to be a single member meeting whether present in person or by proxy. *Gates Corporation d/b/a The Gates Rubber Co. v. Anand Gates (India) P. Ltd.*, (1999) 3 Comp LJ 419 : (1999) 98 Com Cases 708 : (1999) 22 SCL 76 (CLB).

The remedy of a member complaining that an annual general meeting was held in violation of the articles of the company is to move the Court and not the Central Government (now CLB) to rectify the action of the company. The CLB has power to direct a company to call a meeting under Section 167 but not to rectify violation of the articles if any committed by the company. *Prakasam (R.) v. Sree Narayana Dharma Paripalana Yogam,* (1980) 50 Com Cases 611 (Ker).

Where notice was given and agenda was published and the meeting was also held, the mere fact that some of the resolutions passed at the meeting had been challenged would not mean that default was made in holding the annual general meeting. There cannot be a meeting of one member of a company. However, before one man may be deemed to constitute a valid meeting, it requires a direction of the Central Government (now CLB), in this behalf, *Star Tile Works Ltd. v. N. Govindan,* AIR 1959 Ker 254.

In *Paulose (M.V.) v. City Hospital P. Ltd.,* (1998) 15 SCL 49 : (1998) 28 CLA 46 (CLB–N. Del) the CLB postponed the implementation of a consent order for holding AGM in connection with a petition under Ss. 397 and 398 because there was a dispute about voting rights pending before the High Court. The CLB observed in general that consent orders are as much enforceable as contested orders and that even if the CLB does not have the power to review its orders it may exercise its inherent power to make such orders as may be necessary to prevent abuse of process and to meet the ends of justice. The terms of a consent order cannot be changed either in appeal or review. It would require a fresh consent of the parties to make any modifications.

Power cannot be used to help defaulting persons.—The power under the section cannot be used to enable persons responsible for the omission to escape the consequences of their default. The petition was filed by the holding company. It pleaded administrative difficulties and other factors which were beyond its control. The Company Law Board rejected the petition saying that the circumstances pleaded in the petition did not make it impracticable for the company to call a meeting without the intervention of the CLB. *National Dairy Development Board v. Indian Immunologicals Ltd.,* (2002) 108 Com Cases 909 : (2002) 47 CLA 17 (CLB).

No power to give directions where meeting not called by CLB.—The Company Law Board has power to give directions in respect of the conduct of a meeting only when the meeting has been convened under its directions, but not where a meeting has been called by the company itself. The Company Law Board did not allow an application for an order for rectification of minutes of the meeting. *Shankar Sundaram v. Amalgamations P. Ltd.,* (2002) 108 Com Cases 885 : (2002) 1 Comp LJ 388 : (2002) 47 CLA 32 (2002) CLC 701 (CLB—Chennai).

Infructuous orders.—The applicant was seeking directions for holding a meeting which was earlier adjourned. The company had issued a notice for reconvening the adjourned meeting. The meeting was actually held also. Thus the application had become infructuous. Since the meeting was not held under the directions of CLB, the directions sought to rectify the minutes of the AGM could not be issued. *Shankar Sundaram v. Amalgamations P. Ltd., (Supra).*

Where over-all purposes would be served in calling meeting.—A director shareholder was not able to hold a meeting of the Board of directors because of the indifference and non-cooperative attitude of the other directors. He resigned from the post and filed an application seeking CLB order for a meeting. The ROC reported that the company had filed its annual documents with him up to 1997 and thereafter no annual accounts appeared to have been filed. That indicated that the company had come to a standstill postion. The company also closed down its business activities. The CLB said : In view of the facts and circumstances, if no direction was given under section 167 for holding annual general meeting, it would be very much against the interest of the shareholders, creditors and public at large. It was also to be found that the criteria laid down under section 167 for giving permission for holding an annual general meeting had been fulfilled.

It would thus be just and proper to direct the company to call, hold and conduct the annual general meeting in respect of the financial years from 1998 to 2001 which has been long overdue to transact the normal business of the company. *Yogendra H. Desai v. Spatial Holodynamics India P. Ltd.*, (2002) 39 SCL 185 (CLB—Mum).

Power to appoint chairman.—In the ordinary course of things the power to order a meeting to be called would include the power to appoint a chairman for the conduct of the meeting. *Ananthalakshmi v. Tiffin's Barytes, etc. Ltd.*, (1951) 21 Com Cases 294, 296 : AIR 1952 Mad 60. This is quite obvious from the section itself which says that the Company Law Board may give such ancillary or consequential directions as it thinks expedient in relation to the calling, holding and conducting of the meeting.

Although the Supreme Court will not ordinarily interfere with the appointment made by the High Court (Now CLB), it may substitute the High Court's appointee, if the facts and circumstances of the case so warrant. *Naresh Kumar Parti v. T.R. Tuli*, (1987) Supp SCC 437.

The AGM to be presided over by the chairman appointed by the court need not be adjourned in order to give notice of such appointment to members whose rights and manner of voting are not affected in any way, in the absence of such notice. *Ananthalakshmi Ammal v. Hindustan Investment & Financial Trust*, (1951) 21 Com Cases 210 : AIR 1951 Mad 927.

Where the requirements of the exercise of power under s. 167 do not exist and, therefore, the Company Law Board does not have the power to order calling of a meeting, the incidental power of giving directions for conduct of meeting and appointment of chairman cannot be exercised. A default can be said to take place when more than fifteen months have passed between two meetings. In the present case there was no such default. The main power of ordering a meeting to be called under s. 167 was not exercisable and, therefore, incidental powers could also not be exercised. The tussel between the shareholders was over continuation or replacement of the managing director-cum-chairman. This was already the subject-matter of a pending suit in the High Court and, therefore, if the CLB also passed an order, there could be contradictory rulings. This was one additional ground on which the CLB restrained itself from exercising the power. *National Textile Corpn. (UP) Ltd. v. Swadeshi Polytex Ltd.*, (1998) 92 Com Cases 315 : (1998) 1 Comp LJ 349 : (1998) 28 CLA 238 : (1998) 15 SCL 421 (CLB—NB).

Order of CLB and year of meeting

A general meeting held in pursuance of this section is, subject to any directions of the CLB, deemed to be an annual general meeting of the company [s. 167(2)]. Where however a meeting so held is not held in the year in which the default in holding the company's annual general meeting occurred, the meeting is not to be treated as the annual general meeting for the year in which it is held, unless at that meeting the company resolves that it is to be so treated. In effect, this means that, provided appropriate notice is given, the meeting may be treated as the annual general meeting for both years. For example, if default is made in holding the annual general meeting for 1999 and in 2000 the CLB orders a meeting to be held, the meeting will be treated as the meeting for 1999 (and the annual general meeting for 2000 will have to be held later in that year) or the company may resolve that it shall be treated as the annual general meetings for 1999 and 2000. In the latter case, a copy of the resolution must be forwarded to the Registrar within 30 days [S. 192(1)]. See English Companies Act, 1985, Sec. 367(4) and SHACKLETON ON THE LAW AND PRACTICE OF MEETINGS, p. 117 [9th Edn. 1997].

Application before CLB

Application by a member of the company under the section be made to the concerned Regional Bench of the Company Law Board in Form No. 1 of Annexure II to the CLB Regulations, 1991 with an application fee of Rs. 500/- (w.e.f. 1-4-2000), accompanied by the affidavit verifying the application.

§ For text of the Company Law Board Regulations, 1991 refer *Appendix* 3.

Secretarial Action Points for holding annual general meeting at the instance of the CLB

1. Where the meeting is not held by the company in accordance with section 166, a member may apply to the CLB for calling an annual general meeting.

2. The member should make an application to the regional bench of the CLB depending on the situation of the registered office of the company, by petition in Form I in Annexure II of the CLB Regulations, 1991, with the annexures specified in the said regulations. The petition should be accompanied by an affidavit duly notarised by the notary public or sworn before the Oath Commissioner.

3. The petition should be presented in original with two copies thereof to the Bench Officer of the Bench concerned. A copy of the petition should be delivered to ROC.

4. Upon receipt of the order of the CLB, hold the annual general meeting as per the directions of the CLB. Such directions may provide that even one member present in person or by proxy shall constitute meeting.

Secretarial Practice Notes : Power of Company Law Board to call AGM

(a) Whether the Company Law Board had called or directed calling an annual general meeting of the company in exercise of the powers conferred under this section?

(b) If so, whether the directions of the Company Law Board have been complied with?

Documents Involved: (1) Order of Company Law Board, (2) Minutes of general meeting.

S. 168. Penalty for default in complying with section 166 or 167.—If default is made in holding a meeting of the company in accordance with section 166, or in complying with any directions of the [1][*Tribunal or the Central Government, as the case may be*] under sub-section (1) of section 167, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [2][fifty thousand rupees], [3][and in the case of continuing default, with a further fine which may extend to [4][two thousand five hundred rupees] for every day after the first during which such default continues.]

NOTES

Previous Act : Sec. 76(2)

Note : As and when the Companies (Second Amendment) Act, 2002 (11 of 2003) comes into force, the power under this section shall be exercised by the Central Government/Tribunal, as the case may be , to be exercised by it in place of the Company Law Board. The commentary should be read keeping this change in mind.

[The reference to the 'Central Government' in this section before the amendment was inadvertent, as the powers were exercible by the CLB under section 167(1). See Notes under section 167]

§ See Notes under section 167.

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1. **Subs. for "Central Government" by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 22.**
2. The words "five thousand rupees" substituted by the Companies (Amendment) Act, 2000, (53 of 2000) s. 73 (w.e.f. 13-12-2000).
3. Ins. by Act 65 of 1960, s. 44.
4. The words "two hundred and fifty rupees" substituted by the Companies (Amendment) Act, 2000, (53 of 2000) s. 73 (w.e.f. 13-12-2000).

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount.

(1) from 5,000 rupees to 50,000 rupees fine for default in complying with section 166 or 167.

(2) from 250 rupees to 2,500 rupees for every day after the first during which such default continues.

Companies (Second Amendment) Act, 2002 [11 of 2003]

The powers of Company Law Board under section 167 have been conferred on the Central Government and, in respect of a sick industrial companies on the Tribunal. Consequential changes have accordingly been made in this section. Notes on Clauses of the Bill stated thus:

Notes on Clause.—This clause seeks to amend section 168 of the Companies Act, 1956. The existing provisions contained in the section relate to the penalty for default in complying with the provisions of section 166 or 167 of the Act. The reference to Central Government is proposed to be substituted by the Tribunal in the said section 168. This amendment is of consequential nature. (*Clause* 18 *of the Companies (Amendment) Bill, 2001*).

Penalty for default in complying with sections 166 and 167

The penalty for default was enhanced from five hundred rupees under the previous Act to five thousand rupees under the present Act; and further penalty was added for continuing default, by the Amendment Act (XLV of 1960). The penalty has further been enhanced by way of fine from Rs. 5000 to Rs. 50,000 and in case of continuing default, from Rs. 250 to Rs. 2500 by the Companies (Amendment) Act, 2000.

Where the books of a company have been seized by the police and produced in the Criminal Court, the default is beyond the control of the company and should not be punished. *In re, Bank of Deccan Ltd.*, (1960) 30 Com Cases 284 : AIR 1960 Ker 15; *State v. Linkers (P.) Ltd.*, (1970) 40 Com Cases 17 : AIR 1968 Pat 445. Accordingly relief was allowed under Section 633 against liability for not preparing the accounts in time and getting them audited. As against this it has been held to be no ground for not holding a general meeting that the account books were in court and therefore annual accounts could not be prepared. *Brahmanberia Loan Co. Ltd., Re,* AIR 1934 Cal 624 : (1934) 4 Com Cases 282. See also *Ramachandra & Sons v. State,* (1967) 2 Comp LJ 92 (All); *PSNSA Chettiar & Co. v. ROC,* (1966) 1 Comp LJ 17 (Mad); *Nungambakkam D. S. Nidhi Ltd. v. ROC,* (1972) 42 Com Cases 632 (Mad).

There should be one meeting corresponding to each calendar year. Where the AGM called for one year (1934) happened to be adjourned to the next year (1935) and then no meeting was held in that year (1935) thinking that that meeting was enough, the court held that the default inviting penal consequences under the section had taken place. *Sree Meenakshi Mills Co. v. Asst. Registrar, Madura,* (1938) 8 Com Cases 175, 176 : AIR 1938 Mad 640. Further it is only an AGM which will fulfil the requirement of the section and not an extraordinary general meeting. *Emperor v. Nasurbhai Abdullahbhai Lalji,* AIR 1923 Bom 194, *Contra: Laxmi Narain v. Emperor,* AIR 1920 All 537.

It is no excuse that the company was not functioning, *Madan Gopal Dey v. State of W.B.*, (1969) 39 Com Cases 119 : AIR 1968 Cal 79 or its management was taken over by the Government. *Hindustan Co-op. Insurance Society Ltd., Re,* (1961) 31 Com Cases 193 : AIR 1961 Cal 443. But where there were only two members and directors of a private company and during the period when a meeting ought to have been held one was confined to bed because of serious illness, a failure to hold the meeting in time was held to be not a wilful default. *Kastoor Mal Banthiya v. State,* AIR 1951 Ajmer 39. Similarly on the appointment of a provisional liquidator no responsibility for calling an AGM remained in existence. *New Era Mfg. Co. Ltd., Re,* (1965) 2 Comp LJ 309 (Ker).

While mere default is enough to punish the company, in the case of an officer it must be shown that he was knowingly a party to default. *Asst. Registrar of Joint Stock Companies v. Krishnan Nambiar,* (1958) 28 Com Cases 255 (Ker); *V.K.R. St. Kasi Viswanatha Chettiar, Re,* (1941) 11 Com Cases 341 (Mad). The directors of a company cannot be allowed to escape the performance of their duties under the Companies Act by the mere plea that they had no real control over the affairs of the company and therefore they did not wilfully permit the default. It is their duty not to be mere passive spectators of what is going on but to see and make the necessary attempt that the statutory requirements are carried out, and where this has not been done, the courts can and would legitimately infer that the defaults though not expressly authorised were still wilfully permitted. *Saraswati Printers Ltd. v. State,* (1960) 30 Com Cases 523 (Raj); *Gibson v. Barton,* (1875) 10 QBD 329 (director here was a *de facto* charge of management). All these cases should now be taken in the light of the new concept of "officer in default" as evolved by section 5 under the Amendment Act of 1988.

Subsequent Board not liable for default of preceding Board

The Board of directors of a company failed to convene the annual general meeting in spite of direction of the company Judge. Subsequently, another Board of Directors was elected. The Board so elected can neither be disqualified nor be held liable for failure of previous Board to hold the annual general meeting which was directed to be called by the order of the company Judge. *Dinkar Rai D. Desai v. R.P. Bhasin,* (1982) 3 Comp LJ 198 (Del).

Penalty for a defaulting director has nothing to do with the time during which he continued to hold office without being elected. *Kundra (B.R.) v. Motion Pictures Association,* (1976) 46 Com Cases 339 (Del).

Private company.—The provision is applicable to private companies as well. *Registrar of Companies v. F. S. Cabral,* (1988) 63 Com Cases 126 Bom.

Registrar's duty to launch prosecution for defaults under sections 166 and 210

Department's circular.—It is noticed that where the companies have defaulted under section 166 and/or 210 of the Companies Act, that is, where they have not held the Annual General Meeting and/or have not placed the balance sheet and the profit and loss account before the Annual General Meeting, prosecutions are rarely launched. The fact that the complaint has to be filed in the court of the first class Magistrate having territorial jurisdiction over the place at which the Registered Office of the company is situate, which is at a place other than the Headquarters of the Registrar of Companies, need not prevent the Registrar of Companies from enforcing the penal provisions of the Act in this regard. Therefore, the Registrars should in future ensure that prosecutions for defaults under section 166 and/or 210 are launched in all cases where merits warrant such action. The fact that such launching of prosecutions outside the headquarters of the Registrars would involve expenditure should not deter from following this procedure in future. (*Circular No.* 24/72, dated 24-7-1972).

Prosecution for default, how ROC will meet defence that meeting was in fact held

Departments' instruction to Registrars.—In a prosecution for not holding the Annual General Meeting when the company and/or its officers take the plea that the Annual General Meeting was held, the Registrars of Companies should make every effort to establish in such a case, that the Annual General Meeting was not held. For this purpose, they should call for, from the company—

(i) its minute books;

(ii) its despatch register, etc. showing despatch of the notices of the annual general meeting; and

(iii) any other document in the custody or control of the company showing that the Annual General Meeting was held.

Registrars of Companies may also cite one or more shareholders of the company as witnesses for the purpose.

The procedure indicated above is illustrative and not exhaustive. Registrars of Companies may take, such further steps as may be necessary, according to the facts of any particular case, to establish that the Annual General Meeting was not held. (*Circular No.* 42(57)-CL-II/60, dated 25-2-1960).

Penalty for default

If default is made in holding the meeting of the company in accordance with section 166 or in complying with any directions of the Company Law Board under section 167(1), the company and every officer of the company who is in default are punishable with fine which may extend to Rs. 50,000 and in case of continuing default, with a further fine which may extend to Rs. 2,500 for every day after the first during which the default continues.

Continuing offence

The offence under this section is a continuing offence. *Dhanalaxmi Chemical Industries Private Ltd. v. Asst. ROC,* 1988 LW (Cri) 180, 184 (Mad). The offence comes to an end only when the directors actually perform their duty of convening the meeting which was in default. *T.V. Mathew v. Nadukara Agro Processing Co. Ltd.,* (2002) 108 Com Cases 130 : (2002) 46 CLA 101 (Ker).

Also see section 162 and Notes thereunder.

Offence compoundable.—The offence is compoundable under section 621A.

S. 169. Calling of extraordinary general meeting on requisition.—(1) The Board of directors of a company shall, on the requisition of such number of members of the company as is specified in sub-section (4), forthwith proceed duly to call an extraordinary general meeting of the company.

(2) The requisition shall set out the matters for the consideration of which the meeting is to be called, shall be signed by the requisitionists, and shall be deposited at the registered office of the company.

(3) The requisition may consist of several documents in like form, each signed by one or more requisitionists.

(4) The number of members entitled to requisition a meeting in regard to any matter shall be—

(a) in the case of a company having a share capital, such number of them as hold at the date of the deposit of the requisition, not less than one-tenth of such of the paid-up capital of the company as at that date carries the right of voting in regard to that matter;

(b) in the case of a company not having a share capital, such number of them as have at the date of deposit of the requisition not less than one-tenth of the total voting power of all the members having at the said date a right to vote in regard to that matter.

(5) Where two or more distinct matters are specified in the requisition, the provisions of sub-section (4) shall apply separately in regard to each such matter; and the requisition shall accordingly be valid only in respect of those matters in regard to which the condition specified in that sub-section is fulfilled.

(6) If the Board does not, within twenty-one days from the date of the deposit of a valid requisition in regard to any matters, proceed duly to call a meeting for the consideration of those matters on a day not later than forty-five days from the date of the deposit of the requisition, the meeting may be called—

(a) by the requisitionists themselves;

(b) in the case of a company having a share capital, by such of the requisitionists as represent either a majority in value of the paid-up share

capital held by all of them or not less than one-tenth of such of the paid-up share capital of the company as is referred to in clause (a) of sub-section (4), whichever is less; or

(c) in the case of a company not having a share capital, by such of the requisitionists as represent not less than one-tenth of the total voting power of all the members of the company referred to in clause (b) of sub-section (4).

Explanation.—For the purposes of this sub-section, the Board shall, in the case of a meeting at which a resolution is to be proposed as a special resolution, be deemed not to have duly convened the meeting if they do not give such notice thereof as is required by sub-section (2) of section 189.

(7) A meeting called under sub-section (6) by the requisitionists or any of them—

(a) shall be called in the same manner, as nearly as possible, as that in which meetings are to be called by the Board; but

(b) shall not be held after the expiration of three months from the date of the deposit of the requisition.

Explanation.—Nothing in clause (b) shall be deemed to prevent a meeting duly commenced before the expiry of the period of three months aforesaid, from adjourning to some day after the expiry of that period.

(8) Where two or more persons hold any shares or interest in a company jointly, a requisition, or a notice calling a meeting, signed by one or some only of them shall, for the purposes of this section, have the same force and effect as if it had been signed by all of them.

(9) Any reasonable expenses incurred by the requisitionists by reason of the failure of the Board duly to call a meeting shall be repaid to the requisitionists by the company; 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

Eng. Act, 1948 : Sec. 132
Eng. Act, 1985 : Sec. 368

Previous Act : Sec. 78

Extraordinary general meeting convened by directors

The directors have the power to convene an Extraordinary General Meeting on their own motion whenever they think it appropriate in the interests of the company. *Pergamon Press v. Maxwell*, (1970) 2 All ER 809; *Ram Prasad Somani v. Bank of Rajasthan Ltd.*, (2001) 44 CLA 80 : (2001) CLC 954 : (2001) 34 SCL 750 (Raj).

On the power of directors to call an extraordinary general meeting the following statement appears in SHACKLETON ON THE LAW AND PRACTICE OF MEETINGS, 119 (9th Edn., 1997 by IAN SHEAMAN). "The directors have the powers to convene an extraordinary meeting on their own motion whenver they think it appropriate in the interest of the company. *Currie v. Cowdenbeath Football Club*, (1992) BCLC 1029, Art. 37 of Table A of Companies (Tables A to F) Regulations, 1985 [English] confers such a power.

"Whenever shareholders consent has to be obtained, it will be necessary to convene an extraordinary general meeting for the purpose (unless, which is often impracticable, the

matter can be dealt with as a special business at the annual general meeting). Section 142 of the 1985 Act" provides that where the net assets of a public company are half or less of the amount of the company's called-up share capital, the directors of the company shall, not later than 28 days from the earliest day on which that fact is known to a director of the company, duly convene an extraordinary general meeting of the company for a date not later than 56 days from that day. The purpose of the meeting is to consider which steps, if any, should be taken to deal with the situation."

Extraordinary General Meeting: Who are entitled to requisition

An Extraordinary General Meeting may be called on requisition of members holding at least one-tenth of the paid-up capital carrying voting rights or in the case of a company without share capital, one tenth of the voting power in respect of the matter for the consideration of which the meeting is to be called.

Every shareholder of the company has the right, subject to compliance with the provisions of the Act, to requisition an extraordinary general meeting. He cannot be restrained by injunction from calling the meeting and is not bound to disclose his reasons nor are the reasons of the resolutions subject to judicial review. *Life Insurance Corporation of India v. Escorts Ltd.*, (1986) 59 Com Cases 548 : AIR 1986 SC 1370. **Followed** in *S. Varadarajan v. Venkateswara Solvent Extraction P. Ltd.*, (1994) 80 Com Cases 693 (Mad).

Where the articles of a company provided in accordance with the provisions of S. 181 that members who had not paid calls on their shares would not be entitled to vote, it was held that they could not therefore requisition a meeting, nor vote at it and if they did so the proceedings would be invalid. *Kuldip Singh Dhillon v. Paragaon Utility Financiers P. Ltd.*, (1986) 60 Com Cases 1075 (P&H).

For purpose of calculating the number of members required for signing a requisition or notice to call an extraordinary general meeting under section 169, the signature of any one of joint holders will be sufficient and be treated as good as the signature of all of them [Section 169(8)].

The documents for requisition need not be signed by all the requisitionist provided that they clearly indicate that the meeting is being called by all of them. *Dalex Mines Ltd. (NPL) v. Schmidt*, (1974) 38 DLR (3d) 17 BC (Canada).

A requisition for an extraordinary general meeting drafted by one shareholder who has the *locus standi* and signed by the prescribed number of shareholders has been held to be valid. *B.G. Somayaji v. Karnataka Bank Ltd.*, (1995) 83 Com Cases 649 : AIR 1995 Kant 344.

The right of members to requisition a meeting is not lost only because a receiver has been appointed in respect of their shares. *Balkrishan Gupta v. Swadeshi Ploytex Ltd.*, (1985) 58 Com Cases 563 : AIR 1985 SC 520.

Although the section refers to "members" in the plural, the provisions of the section will be satisfied if one member holding the requisite number of shares or voting rights makes the requisition. (Under the General Clauses Act, words in the plural include the singular).

Preference shareholders have voting power only as regards matters relating to the preference shareholders [*Cf.* section 86(2)]. They have no voting right and therefore no right to requisition in respect of other matters.

Once a valid requisition has been submitted, the directors can act upon it and it remains their obligation to call the meeting even if some of the requisitionists have withdrawn their consent or ceased to be members.

The requisition may consist of several documents in like form, each signed by one or more requisitionists, although very minor differences in language will not matter, *Cf. Fruit and Vegetable Growers' Assn. Ltd. v. Kekewich*, (1912) 2 Ch 52.

Position of Institutional Shareholder.—An institutional shareholder, like the Life Insurance Corporation, has the same rights as every other shareholder to requisition an extraordinary general meeting for the purpose of considering removal of a certain number of directors. The institution cannot be restrained from doing so on the ground that reasons for the proposed removals have not been stated, or that the institution being the "State" for the purposes of Part III of the Constitution or an instrumentality of the State it has not given reasons for moving the resolution. *Life Insurance Corporation of India v. Escorts Ltd.*, (1986) 59 Com Cases 548 at 635-636 : AIR 1986 SC 1370.

Agenda for requisitioned meeting and its validity

Where an extraordinary meeting is called by directors, agenda has to be specified by them. Similarly if the meeting is requisitioned by shareholders, they have to set out the agenda for which they consider the meeting to be necessary.

If a requisition consists of two or more distinct matters, its validity has to be determined in respect of each such matter [Sub-section (5)]. The requisition in respect of matters which do not have the support of the qualifying shareholders is not valid. *Queens Kuries and Loans Pvt. Ltd. v. Sheena Jose*, (1993) 76 Com Cases 821 (Ker).

Where a requisition satisfies the requirements of this section, the mere fact that some of the resolutions referred to in the requisition cannot be put to the meeting for any reason does not relieve the directors of their obligation to call the meeting. *Isle of Wight Railway Co. v. Tahourdin*, (1883) 25 Ch D 320. If the directors convene a meeting to consider only a part of the agenda, the requisitionist can reject such a meeting and would be justified in calling a meeting of their own to consider the whole of the agenda. In this case the shareholders of a company required the directors to call a general meeting (a) to appoint a committee to enquire into the working expenses of the company and to require the directors to act on its recommendations, and (b) to remove any of the present directors and to fill any vacancy in the Board. The Court of Appeal held that all the objects of proposal (a) could be carried out in a legal way and, in relation to proposal (b), that a general meeting had power to remove directors, that a notice of a proposal to remove "any of the directors" was sufficiently distinct and that the general meeting could fill up vacancies. The requisition was therefore valid.

In *Cricket Club of India v. Madhav L. Apte*, (1975) 45 Com Cases 574 a learned Judge of the Bombay High Court stated that, though the resolution proposed for consideration at the general meeting required to be called by the requisitionists, is repugnant to the provisions of the Companies Act and illegal, the meeting should nonetheless be called by the Board of directors if the requisition satisfies the requirements of the Section. This does not seem to stand to reason. Where the resolution is obviously illegal and invalid, there is no reason why the Board of directors should not, on that ground, decline to act on the requisition. Judicial opinion outside India is also against that view.

It has been observed that if the objects for which a meeting is requisitioned cannot be legally carried into effect in any manner then the directors are justified in refusing to act on the requisition, *Isle of Wight Railway Co. v. Tahourdin*, (1883) 25 Ch D 320, 324 (CA). The requisitionists cannot convene a meeting themselves following such a justified refusal. *Queensland Press Ltd. v. Academy Instruments No. 3 Pty. Ltd.*, (1988) 2 QdR 575 : 11 ACLR 419 (SC). If one of several objects cannot be legally effected then the directors are justified in omitting that object from the agenda. *Turner v. Berner*, (1978) 1 NSWLR 66 : 3 ACLR 272 (SC).

It has been held that the court will relieve the directors of their obligation to comply with a requisition if it is clear that the purpose of the meeting is something other than the passing of the resolutions contained in the requisition. *Humes Ltd. v. Unity APA Ltd. (No. 1)*, (1987) VR 467 (Aust) : 11 ACLR 641 (SC).

Further, pending the holding of a requisitioned meeting, there is no rule to preclude the directors from exercising their powers in such a way as to render nugatory the stated pur-

pose of the requisitionists, provided the directors are not otherwise abusing their powers. *Shield Development Co. Ltd. v. Snyder,* (1976) 3 WWR 44, (British Columbia, Canada). For a consideration of the circumstances in which the court can interfere in the directors' discretion in calling or refusing to call a meeting, see *Pergamon Press Ltd. v. Maxwell,* (1970) 2 All ER 809 (Ch D) and the decision of the Bombay High Court in *Escorts Ltd. v. Union of India,* (1985) 57 Com Cases 241 (Bom) and on appeal to Supreme Court, *Life Insurance Corporation v. Escorts Ltd.,* (1986) 59 Com Cases 548 : AIR 1986 SC 1370. Citing all these authorities but without considering them individually, ARUMUGHAM J of the Madras High Court in *Sivaraman (B.) v. Egmore Benefit Society Ltd.,* (1992) 75 Com Cases 198 (Mad), came to the conclusion that the court would not compel the directors to call an extraordinary general meeting on the basis of a requisition which was devised to throw out recently and validly elected directors and which disclosed no impropriety or misdeeds in the election. It seems that the learned judge was influenced by the facts that the meeting was being sought by persons who failed to get elected as directors.

The word "valid" clearly indicates that the requisition which was made must be valid and lawful. The requisition must be for carrying out a valid purpose. A requisition for the purpose of removing all the directors recently elected at the annual general meeting and electing others in their place is not a valid requisition. *Sivaraman (B.) v. Egmore Benefit Society Ltd.,* (1992) 75 Com Cases 198, 221, 224 (Mad). The principle of this case has found an illustration and application in an English decision. The case is *Rose v. McGivern,* (1998) 2 BCLC 593 (Ch D). A requisition for an extraordinary general meeting was opposed by the directors of a guarantee company, known as Royal Automobile Club, on the ground that the proposed resolutions would be either invalid or unworkable or inoperative. The court did not compel the directors to call the meeting as requisitioned. Stating the reasons, the court said that one of the resolutions failed to identify which persons were to be elected as directors, the exact size of the new board, or which members of the old board were to be removed. An omnibus resolution in the form as proposed would lack the necessary specificity to constitute the subject-matter of a valid resolution. It would be an invalid resolution if it was put and passed at an extraordinary general meeting. The second resolution was linked with the first for its implementation and would fail because if the resolution could not be passed there would be nothing left to be implemented. An extraordinary general meeting could not be summoned to give directions to the company's directors to do something which even otherwise they were competent to do. The court referred [(1998) 2 BCLC 593 at 601] to cases where the notices were described as 'artfully framed' and 'tricky' [see *Kaye's* case (1898) 1 Ch 358 at 369 and *Baillie's* case (1915) 1 Ch 503 at 515]. However, although the court will in practice be more astute to scrutinise notices which are said to be artfully misleading, that does not mean that a notice will be saved simply because the misleading is artless. A case where a notice convening a meeting was held to be invalid, although the court expressly accepted that the directors who prepared the notice were not guilty of any vice or malice may be found in an Australian decision, *Bain and Company Nominees Proprietary Ltd. v. Grace Bros Holdings Ltd,* (1983) 1 ACLC 816 (Aust.). Such a proposition is supported by an observation of FRY LJ in *Isle of Wight Rly Co. v. Tahourdin,* (1883) 25 Ch D 320 at 334 where he said: 'If the object of a requisition to call a meeting were such, that in no manner and by no machinery could it be legally carried into effect, the directors would be justified in refusing to act upon it.' That proposition has been cited with **approval** and **followed** in three Australian cases, namely by NEEDHAM J in *Turner v. Berner,* (1978) 1 NSW LR 66 (Aust.), by MCLELLAND J in *NRMA v. Parker,* (1986) 11 ACLR 1 at 5 (Aust.) and by RYAN J in *Queensland Press Ltd. v. Academy Instruments (No. 3) Pty Ltd.,* (1987) 11 ACLR 419 at 422 (Aust.).

Without considering the effect of the Supreme Court decision in *LIC v. Escorts Ltd.,* (*Supra*) where it was clearly held that it is not necessary to disclose grounds for removing directors either in the notice requisitioning the meeting or in the special notice, the Kerala High Court has held in *Queens Kuries Loans P. Ltd v. Sheena Jose,* (1993) 76 Com Cases

821 (Ker) that special notice for removal of a director must disclose grounds for removal. Where this is not done the requisition is not valid and a valid meeting cannot be held. However, in this case even the special notice as required by S. 284 for removing a director was not given.

Where a requisitioned meeting was called only to interfere with a pending petition under S. 391 and in an attempt to prevent sanction by the Court of a scheme of amalgamation, the holding of such meeting could be restrained by the Court. *Centron Industrial Alliance Ltd. v. Pravin Kantilal Vakil,* (1985) 57 Com Cases 12 (Bom). In appeal the Division Bench allowed the meeting, which was admittedly properly requisitioned, to be held for the limited purpose of considering a resolution re-negotiating with the transferee company the proposed share exchange ratio in the scheme of amalgamation. The decision of the single Judge refusing permission to examine alternative schemes and withdrawal of the petition was affirmed. *Pravin Kantilal Vakil v. Rohini Ramesh Save,* (1985) 57 Com Cases 31 (Bom—DB).

A meeting convened by the directors on requisition or, on their default, by the requisitionists themselves, cannot transact any business other than the business for which it has been expressly convened, though any thing auxiliary or incidental, may also be discussed. But in a Scottish case, *Ball v. Metal Industries Ltd.,* 1957 Scottish Cases 315 it was held that where sufficient notice of an additional business has also been given the meeting could deal with such additional business also.

The written requisition calling on the directors to convene an extraordinary general meeting must specify the business to be transacted at it (*i.e.*, removal of a director) and if the requisitionists call the meeting themselves on the directors' failure to do so, the agenda of the extraordinary general meeting cannot include matters which did not appear in the original requisition. *Patent Wood Keg Syndicate Ltd. v. Pearse,* (1906) 50 Sol Jo 650 : (1906) WN 164. Members other than the requisitionists have no right to have resolutions put on the agenda for a requisitioned extraordinary general meeting, but the directors who convene the meeting may put their own business on the agenda. *Ball v. Metal Industries Ltd., (Supra).*

A company cannot be restrained by injunction from discharging its statutory duties in respect of the convening of meetings. *Cumbrian Newspapers Groups Ltd. v. Cumberland and Westmorland Herald Newspapers and Printing Co. Ltd.,* (1987) 2 Comp LJ 39 : (1986) 2 All ER 816 : 1986 BCLC 286 (Ch D).

Effect of failure of company to list in agenda.—The petitioners, a group of exporters, who were members of the Apparel Export Promotion Council Ltd., requisitioned an extraordinary general meeting of the company under s. 169 for the purpose of considering certain matters listed in the requisition. The company did not list those items in the agenda for the extraordinary general meeting. They filed a writ petition.

It was held that the petitioners had a remedy available under section 186 which permits "any member" and there was no bar. Simply because the petitioner was a requisitionist under section 169, it did not cease to be a member. The issues which were sought to be raised were issues which would impinge on the statutory provisions of the garment policy and any such change or deviation in the policy as desired could be considered on the administrative side by the executive committee and representations made to the Government in that regard. *Malvika Apparels v. Union of India,* (2002) 112 Com Cases 335 (Delhi).

Directors duty to call meeting on requisition [Sub-section (1)]

The directors should proceed to call the meeting within 21 days and the meeting should actually be held within 45 days. See *Windward Islands (Enterprises) UK Ltd.,* (1986) 3 Comp LJ 325 : 1983 BCLC 293 (Ch D).

Where a shareholder's requisition was not acted upon because of an irregularity in the notice and a meeting was also not called even in response to a subsequently rectified notice because of a pending contempt proceeding, the directors were ordered by the CLB, on the dismissal of the contempt proceedings, to act on the valid requisition and call an extraordinary general meeting. *Shoe Specialities P. Ltd., Re,* (1995) 83 Com Cases 727 (CLB). **Affirmed** on appeal in *Shoe Specialities Ltd. v. Standard Distilleries & Breweries P. Ltd.,* (1997) 1 Comp LJ 243 : (1997) 90 Com Cases 1 (Mad—DB); *Shamsuddin (A.K.M.A.) v. Shoe Specialities (P.) Ltd.,* (1997) 1 Comp LJ 243 (Mad—DB).

Where in response to a requisition for an extraordinary general meeting, the directors notified the meeting to be held 6 months after the date of requisition and the petitioner applied for an order for a meeting to be held within time, the court granted the necessary order because the purpose of the petitioner being to remove directors, the latter might have done something by gaining time to suppress the value of the shares. *McGuiness v. Bremner plc.,* (1988) BCLC 673 (CS).

Meeting should be called by the directors. The secretary of the company does not have the power to call it by himself by issuing notices. Unless he is specifically authorised either by the board of directors or by the articles, any meeting called by him and the business done at it would be null and void. *Al Amin Seatrans Ltd. v. Owners and Party interested in Vessel M V "Loyal Bird",* AIR 1995 Cal 169; *State of Wyoming Syndicate, Re,* (1901) 2 Ch 431. But the directors may ratify the secretary's act before meeting. *Hooper v. Kerr Stuart & Co. Ltd.,* (1900) 83 LT 729. The directors can also ratify a meeting called by a *de facto* director. *Transport Ltd. v. Schonberg,* (1905) 21 TLR 305 **following** *British Asbestos Co. Ltd. v. Boyd,* (1903) 2 Ch 439.

Where the notice given by the directors did not mention the date of requisition but was otherwise valid, the court said that the notice was not to be avoided on such a technical ground. It is not possible for any body to imagine all the possible technical objections and to cover them in advance. *Topandas Mohanlal Advani v. Yeotmal Electric Supply Co.,* (1940) 10 Com Cases 133 : AIR 1940 Sind 87. Irregularity can be set right at any moment by going through the proper processes. *Bentley Stevens v. Jones,* (1974) 2 All ER 653.

Stay of requisitioned meeting.—A meeting was requisitioned by some shareholders during the pendency of a company petition which was ready for hearing. The relief sought was covered by the pending company petition. The CLB held that the meeting sought to be requisitioned could not be allowed because it would defeat the order of *status quo* issued in the petition. The notice of requisition was ordered to remain stayed till final disposal of the petition. *J.P. Srivastva & Sons (Rampur) P. Ltd. v. Gwalior Sugar Co. Ltd.,* (2002) 4 Comp LJ 476 : (2002) 40 SCL 687 (CLB—ND).

Meeting by requisitionists on directors' failure

The power which the statute gives to requisitionists to convene a meeting if directors default in doing so is conferred on them as *quasi* officials of the company. Accordingly, they would be restrained by the court should they deliberately attempt to call the meeting in circumstances under which many shareholders would be unable to exercise their votes. *Adams v. Adhesives Pty. Ltd.,* (1932) 32 SR (NSW) 398 (Australia). If the requisitionists are in a position to call the meeting, they cannot ask the court to place an order upon the directors for calling a meeting. *MacDougall v. Gardiner,* (1875) 10 Ch App 606. Similarly it has been held that a requisitionist cannot approach the CLB under Sec. 186 for an order for calling an E.G.M. without first trying to call a meeting himself. *B. Mohandas v. AKMN Cylinders P. Ltd.,* (1998) 93 Com Cases 532 : (1998) 16 SCL 658 : (1998) 3 Comp LJ 116 (CLB—SB).

A shareholder possessing the requisite shareholding has a right to call the meeting. He cannot be restrained from doing so by means of an injunction. He is not bound to disclose his reasons for the resolution which he wants to propose at the meeting. Those reasons are also not subject to judicial review. A single member is competent to requisition and

call a meeting if he is qualified to do so by his shareholding. Plurality of members would be needed only when a single member is not holding the requisite number of shares. *S. Varadarajan v. Venkateswara Solvent Extraction P. Ltd.*, (1994) 80 Com Cases 693 (Mad), **following** *LIC v. Escorts Ltd.*, (1986) 59 Com Cases 548, 636 (SC).

An extraordinary general meeting presided over by a person who was not a member of the company and which was not attended by at least two members was held to be not valid. *Bhankerpur Simbhaoli Beverages P. Ltd. v. P. R. Pandya*, (1996) 86 Com Cases 842 (P&H).

If the Board of directors fail to proceed to call a meeting within 21 days of the requisition, the requisitionists or a majority in value of them or any number of them holding one-tenth of the paid-up share capital or voting power even though they are less than the majority of the requisitionists, may call the meeting. Such meeting shall be held within three months of the date of the requsition.

Where a company expressed its inability to convene a meeting on a requisition because of a stay order issued by a court and the requisitionists themselves called a meeting and applied to the court to appoint a chairman to conduct the meeting and to direct the company that it should make the records relating to the agenda available at the meeting, the court refused to oblige, on the ground that holding the meeting would be a contempt of the court which had issued the stay order and further that the proper course for the requisitionists would have been to request that court to call the meeting. *Chaudhary (A.D.) v. Mysore Paper Mills Ltd.*, (1976) 46 Com Cases 548 (Kant).

If the notice of meeting called by the requisitioning members is defective, they may call a further meeting by issuing a *fresh notice. A fresh notice of requisition to the company is not necessary. Gold-Rex Kirkland Mines Ltd. v. Morrow,* (1944) OR 415 (HC) (Canada).

Evidence of holding of requisitioned meeting

After receiving the requisition, the company should call a Board meeting and the Board would call a general meeting in accordance with the requisition. Where a meeting of this kind was alleged to have been held but there was no reference as to when the requisition notice was received or when the Board meeting was convened for consideration of the requisition and how the company issued a notice, the minutes book showed no record, nor the company's minutes book was produced before the court, the statutory presumption of validity under section 195 was not available. It had, therefore, to be held that no meeting was at all held and the so-called appointments of directors at the time were not valid. *V.G. Balasundaram v. New Theatre Carnatic Talkies P. Ltd.*, (1993) 77 Com Cases 324 (Mad).

Explanatory statement not necessary in requisitionist's notice

It is clear that the obligation to annex explanatory statement to the notice of the meeting is only on the company when it calls a meeting to transact special business. When requisitionists call for an extraordinary general meeting under section 169 there is no obligation on the requisitionists to annex an explanatory statement to the notice of the meeting. There is no warrant for imposing such an obligation on the requisitionists. Therefore, there is no merit in the contention that the requisition notice and the notice of the meeting were bad and that they contravened the provisions of the Companies Act. *S. Vardarajan v. Venkateswara Solvent Extraction P. Ltd.*, (1992) 2 Mad LJ 130 at 138 : (1994) 80 Com Cases 693 (Mad). See also the Supreme Court decision in *Life Insurance Corporation of India v. Escorts Ltd.*, (1986) 59 Com Cases 548 : AIR 1986 SC 1370.

Where an extraordinary general meeting is called on requisition for proposing a resolution for removal of directors, the shareholders who requisition the meeting do not have to give any reasons for their resolution, nor they have to attach any explanatory statement. The company also is not bound to attach any such explanation unless the company gives its own notice. As long as it merely forwards the requisitionists' notice, it does not have

to attach any explanatory statement. The role of the company on receiving a requisition is to act only as a channel of communication for convening the meeting. In convening a requisitioned meeting the company plays the limited role of forwarding the material as received by it from the requisitionists to all the members. The CLB found no legal infirimity in the notice issued by the company. *Vijay M. Porwal v. Pentokey Organy (India) Ltd.*, (1996) 87 Com Cases 331 (CLB—NR). **Followed** in *Karedla Surayanarayana v. Ramadas Motor Transport Ltd.*, (1999) 98 Com Cases 518 (CLB–PB) so as to hold that when a meeting is requisitioned and the company forwards the requisitionist agenda to the members with the notice, the company has not to comply with the requirement of explanatory statement.

Explanatory statement by banking company.—In the case of a banking company, it has been held that the letter containing reasons sent to the Reserve Bank recommending removal, should have been attached to the notice of the meeting containing the draft of the resolution for removing two directors. A notice of meeting without giving explanatory statement of the reasons for the proposed removal of the directors was held to be not valid. The meeting was restrained from being held. The court also found that the balance of convenience was in favour of the directors whose removal was proposed. *B. G. Somayaji v. Karnataka Bank Ltd.*, (1995) 83 Com Cases 649 : AIR 1995 Kant 344. The matter came before the Supreme Court in *P. Rajan Rao v. B. G. Somayaji*, (1995) 83 Com Cases 662 (SC). The Supreme Court vacated the injunction on the holding of the meeting because the company undertook to circulate the necessary explanatory statement alongwith the notice of the meeting.

Venue of meeting

It may be noted that the Act does not require that a general meeting other than an annual general meeting must be held only at the registered office or in the city, town or village where the registered office is situate. In a case where the general meeting of an insurance company fell to be held at such place "as may be determined by the directors" the court refused to interfere upon the decision being made to transfer the venue from London to Liverpool even though there were matters of moment to be discussed at the meeting and the majority of shareholders would find London more convenient. It would have been different if fraud had been alleged. *Martin v. Walker*, (1918) 145 LT Jo 377. But, unless the meeting is held in or near the place of the registered office, the purpose of the requisition may be defeated if the Board of directors choose to hold the meeting at a far off place to which the requisitionists or other members may not have access except at a great expense.

Where a meeting is called by the requisitionists themselves, and the registered office is not made available to them for holding the meeting, they may hold the meeting elsewhere. See *Rathnaveluswami Chettiar v. Manickavelu Chettiar*, (1951) 21 Com Cases 93 : AIR 1951 Mad 542. One of the factors to be considered was stated by the Rajasthan High Court in *Ram Prasad Somani v. Bank of Rajasthan Ltd.*, (2001) 44 CLA 80 : (2001) CLC 954 : (2001) 34 SCL 750 (Raj) as follows : "A company may have its registered office at a particular place at the time of incorporation. But with the passage of time and expansion, the shareholders may grow into large number and reside outside the place of registered office of the company. In this case also, it was stated that more than 70 per cent of the shareholders were from Mumbai and only 0.634 per cent were residing at Udaipur in Rajasthan. The discretion of the Board of directors in holding the meeting at a particular place is expected to be exercised in a reasonable manner and in case it is found that the decision was taken by the Board of directors in a *mala fide* manner, it could be challenged before the appropriate Forum. Here in this case, when there was no pleading to the effect that the Board of directors had *mala fide* or with some ulterior motive decided to hold meeting at Mumbai, the court did not go into this matter."

Requisitioning meeting to remove director

Where a meeting was validly requisitioned in the sense of there being requisite voting power for a requisition as well as for the agenda of removing a director, but a special notice which was requisite for resolution for proposing to remove a director was not given, it was held that though the meeting was valid, the resolution passed to remove the director was invalid. *Queens Kuries and Loans P. Ltd. v. Sheena Jose,* (1993) 76 Com Cases 821 (Ker). **Followed** in *Bhankerpur Simbhaoli Beverages (P.) Ltd. v. Sarabhjit Singh,* (1996) 86 Com Cases 842 (P&H), where also notice was not given to concerned director and proceedings became invalidated.

Where a meeting was sought to be requisitioned on the ground that the directors elected at the previous meeting were not properly so elected and that they should be removed and the requisitionists should be declared to have been elected in their place, it was held that an extraordinary general meeting could not be called for that purpose. The requisitionists produced no evidence of dislodging the presumption under section 195 created by recorded minutes that the proceedings were proper and there was nothing in the scrutineers' report to show any manipulation of the poll. *B. Sivaraman v. Egmore Benefit Society Ltd.,* (1992) 75 Com Cases 198 (Mad). A number of cases cited to the court including that of the Supreme Court in *LIC v. Escorts Ltd.,* (1986) 59 Com Cases 548 (SC) were brushed aside by listing them under the remark that they were factually different. The decision of the court is fully meritorious. The matters raised were in the nature of a civil dispute, *viz.*, whether the meeting was properly held and conducted. This could not be decided by a subsequent meeting.

A requisition for an extraordinary general meeting for removal of all the existing directors has been held to be not a requisition for circulation of members' resolution under s. 188. The company was held to be not entitled to a declaration that the requirements for circulation of a member's resolution should be satisfied. *Ernakulam Financiers and Kuries P. Ltd. v. Joseph Chandy,* (1998) 93 Com Cases 275 : (1998) 16 SCL 665 : (1998) 3 Comp LJ 128 : (1998) 30 CLA 11 (CLB—SB).

Interim relief.—The holding of a requisitioned meeting to remove a director at the place proposed was prohibited by the local authorities. The shareholders were divided into rival groups. One of the groups got the stay vacated and proceeded with the meeting without any further intimation to the members of the rival group. The director, who was removed from his office at the meeting, moved the court for an interim relief on the ground that the meeting was not valid. The trial court refused to grant any relief. On a writ petition, the High Court ordered reinstatement of the director to his office pending the disposal of the suit and also granted appropriate interim relief. *Suryaji Rao v. New Phaltan Sugar Works Ltd.,* (1995) 19 Corpt LA 331 (Bom).

There must be a very strong case to justify grant of interim injunction to restrain a shareholders meeting. *Trans-Mountain Pipe Line Co. Ltd. v. Inland Natural Gas Co.,* (1983) 49 BCLR 126 (Canada).

Reimbursement of expenses [Sub-section (9)]

The expenses of the requisitionists, incurred by reason of the failure of the Board to call the meeting, will have to be paid to them by the company and the directors who are in default, will have to recoup the loss to the company in this connection. The sub-section provides only one mode of reimbursing the company the amount of the expenses paid by it to the requisitionists. The provision of one mode does not however debar the right to recover by other lawful means such as recovery by suit, or exercise of a power of lien over the shares of the defaulting directors, if such power is given by the articles.

Default by the Board and penalty

Sub-section (1) makes it obligatory on the part of the Board of Directors of the company to forthwith proceed to call an extraordinary general meeting. Sub-section (6) empowers the requisitionists to call the meeting of their own, in case the Board does not

proceed in the matter. A view may be taken that since alternative remedy of convening the meeting lies with the requisitionists, no action can be taken for the default on the part of the Board of Directors of the Company.

The Karnataka High Court in *Anantha R. Hegde v. Captain (Ex.) T.S. Gopala Krishna,* (1996) 3 Comp LJ 333 (Karn) held that refusal on the part of the directors to call a meeting on requisition does not amount to any offence either under this section or under section 628, 629 or 629-A. The requisitionist have their own alternative of calling a meeting by themselves under sub-section (6). On facts, the requisition was falling short of the mandatory requirement. The court had to face the argument built on the following observation of the Bombay High Court in *Cricket Club of India v. Madhav. L. Apte,* (1975) 45 Com Cases 574 (Bom) "As the requisition for the meeting satisfied the procedural and numerical requirement of the section and was therefore valid, the executive committee of the club would appear to be bound and liable to call the meeting." CHINAPPA J. concluded that even then the only consequence of the directors' failure would be that sub-s. (6) would come into play.

1. Ensure that the requirement of requisite number of members is satisfied for each matter specified in the requisition.

2. Ensure that the requisition, duly signed by all the requisitionists, is deposited at the registered office of the company.

3. Ensure that the Board of directors proceed duly to convene a meeting within 21 days of the deposit of the requisition by the members.

4. If the Board of directors fail to call a meeting so as to be held within 45 days of the deposit of the requisition—

(a) the requisitionists may call the meeting themselves;

(b) in the case of a company having a share capital, by such of the requisitionists who represent a majority in value of the paid-up capital or not less than one-tenth of the paid-up capital of the company;

(c) in the case of a company not having a share capital, by such of the requisitionists as represent not less than one-tenth of the voting power of all the members of the company.

5. Ensure that if called by requisitionists, the meeting is held within 3 months of the deposit of the requisition.

6. Ensure that all reasonable expenses incurred in holding the meeting are reimbursed by the company to the requisitionists.

7. Send 6 copies of the notice of the meeting to all the stock exchanges where the shares of the company are listed.

8. Hold the general meeting and transact the business mentioned in the notice.

9. File in Form 23 the resolutions specified in section 192 with ROC within 30 days of the passing thereof, by paying the requisite fee.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of the matters specified under Rule 3 of the Companies (Compliance Certificate) Rules, 2001. Paragraph 7 under Rule 3 relates to extra ordinary general meetings and minutes thereof, and reads as follows:

Paragraph-7.—.....**extra ordinary meeting(s) was/ were held during the financial year after giving due notice to the members of the company and the resolutions passed thereat were duly recorded in the Minutes Book maintained for the purpose.**

Extra-ordinary General Meeting

Prescribed Check List

Check whether :

(i) requirements relating to notice, attendance, Chairman, quorum, proxy, proxy register/instruments of proxy and proper conduct of Meeting as well as maintenance of minutes of a general meeting have been complied with;

(ii) in case of meetings on requisition,

(a) the requisition has set out the matters for consideration and has been signed by members holding not less than 1/10th of the paid-up capital with voting rights or 1/10th of the total voting power, as the case may be;

(b) the Board, within 21 days of deposit of a valid requisition has proceeded to call a Meeting on a day within 45 days from the date of deposit of such requisition;

(c) in case the Meeting has been called by requisitionists,

(i) reasonable expenses incurred by them have been reimbursed by the company and this sum has been recovered from the defaulting directors.

(ii) the meeting has been held within three months from the date of deposit of the requisition.

Note : 1. The check list with regard to giving due Notice and recording of minutes as far as applicable will be the same as given under paragraph 6(b) and 6(c) above PCS should also ensure compliance of the aforesaid checklists under paragraph 6 and 7, as far as applicable, with respect to holding of adjourned annual or extraordinary general meeting

2. Some matters requiring approval of shareholders have been listed in Appendix-3 to the Guidance Note.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

Secretarial Standards on General Meetings issued by the Council of ICSI (SS-2)

These Standards seek to prescribe a set of principles for the convening and conduct of General Meetings and matters relating thereto. In the initial years, adherence by a company to the Secretarial Standards will be recommendatory.

These principles may not be applicable to any meetings convened on the directions of the Court or CLB or other authority, unless the directions themselves so prescribe.

Secretarial Standard [Para 2]

2. Frequency of Meetings

2.1. ***Statutory Meeting [See sec. 165]***

2.2. ***Annual General Meeting [See sec. 166]***

2.3. ***Extra-ordinary General Meeting***

Items of business of an urgent nature which need to be transacted before the next Annual General Meeting should be considered at an Extra-Ordinary General Meeting.

§ For full text of the Secretarial Standard, see *Appendix* 311.

Documents Involved: (1) Minutes of General Meeting, (2) Requisition, (3) Register of Members, (4) Notice of Meeting, (5) Attendance Register, (6) Form 23.

S. 170. Sections 171 to 186 to apply to meetings[1].—(1) The provisions of sections 171 to 186—

(i) shall, notwithstanding anything to the contrary in the articles of the company, apply with respect to general meetings of a public company, and of a private company which is a subsidiary of a public company; and

(ii) shall, unless otherwise specified therein or unless the articles of the company otherwise provide, apply with respect to general meetings of a private company which is not a subsidiary of a public company.

(2) (a) Section 176, with such adaptations and modifications, if any, as may be prescribed, shall apply with respect to meetings of any class of members, or of debenture-holders or any class of debenture-holders, of a company, in like manner as it applies with respect to general meetings of the company.

(b) Unless the articles of the company or a contract binding on the persons concerned otherwise provide, sections 171 to 175 and sections 177 to 186 with such adaptations and modifications, if any, as may be prescribed, shall apply with respect to meetings of any class of members[2], or of debenture-holders[3] or any class of debenture-holders[4], of a company, in like manner as they apply with respect to general meetings of the company.

NOTES

Scope of section

The gist of the present section is this:—

(1) The provisions of sections 171 to 186 apply to all public companies and private companies which are subsidiaries of public companies.

(2) In the case of other private companies also the provisions of these sections will apply unless in any particular section it is specifically stated that the application of any provision to such private company is not intended (such as section 182) or unless the articles of a given private company make other provisions in respect of any of the matters covered by these sections. By making special provision in its own articles, a private company which is not subsidiary of a public company may exclude the application to itself of the provisions of any of these sections (excepting provisions in any of these sections expressly made applicable to all private companies such as sub-section (1) of section 174). See *Sree Rama Vilas Press & Publications P. Ltd., Re,* (1992) 73 Com Cases 275 (Ker).

Provision as to meetings of private companies [Sub-section (1)(ii)]

By virtue of clause (ii) of sub-section (1), a private company which is not subsidiary of a public company may (notwithstanding anything in sections 171 to 186) by its articles, provide:

(1) its own regulations as regards length of period of notice for calling meetings;

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1. R. 7 of Companies (Central Government's) General Rules & Forms, 1956 is relevant for the section.
2. Annexure B of the said Rules.
3. Annexure C of the said Rules.
4. Annexure D of the said Rules.

(2) prescribe what the notice should contain, to whom all it should be given, and so on;

(3) rules as to the quorum, chairman, proxies, method of voting, demand for poll, taking of poll, right to vote, etc.

They should not, however, be inconsistent with any provisions of the Act applying to such company.

Where a private company adopts its own regulations covering the matters dealt with in sections 171 to 186, then it need to observe only those regulations. Hence, unless those special provisions of the articles so require, it is not necessary for a private company to issue an explanatory statement containing all material particulars about a resolution to be proposed at a meeting. *Sree Rama Vilas Press and Publications P. Ltd., Re,* (1992) 73 Com Cases 275 (Ker) and *K. Meenakshi Amma v. Shree Rama Vilas Press and Publications P. Ltd.,* (1992) 73 Com Cases 275 (Ker) [tagged together]. **Affirmed** in *K. Meenakshi Amma v. Shreerama Vilas Press and Publications P. Ltd.,* (1992) 73 Com Cases 285 (Ker—DB).

Provisions as to class meetings [Sub-section (2)]

Section 176, with such adaptations and modifications as may be prescribed, [*i.e.*, by Rule made by the Central Government—*Cf.* section 2(33)] will apply to meeting of any class or classes of members, such as those of preference shareholders, to all meetings of debenture-holders and to meetings of any class of debenture-holders.

The other sections 171 to 175 and 177 to 186 will apply to such class of meetings to the extent to which the article of the company concerned (whether public or private) or any contract binding on the person concerned do not otherwise provide.

Relevant Rules.—For rules prescribed with regard to meetings of any class of members of a company, meetings of debenture-holders and any class of debenture-holders, see Rule 7 of the Companies (Central Government's) General Rules and Forms, 1956 and Annexures B, C and D thereto, printed in *Appendix* 1.

ICSI Guidance Note on Compliance Certificate (August, 2003)

Check List

(b) Meeting of Class of Shareholders [*Item 2(a)*]

Check whether:

(i) the Meeting has been convened after duly complying with the provisions under relevant section and rule 7 of the Companies (Central Government's) General Rules and Forms, 1956 *e.g.*, for reduction of capital, for variation of rights of shareholders as directed by Court*;

(ii) the applicable provisions (*e.g.* those under section 102/106) have been duly complied with;

(iii) subject to directions of the Court*, requirements relating to notice, attendance, Chairman, quorum, proxy, proxy register/instruments of proxy and conduct of Meeting as well as maintenance of minutes of a general Meeting have been complied with.

(c) Meeting of Creditors and Others [*Item 2(b)*]

Check whether :

(i) the Meeting has been convened after duly complying with rule 7 of the Companies (Central Government's) General Rules and Forms, 1956, the

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* **Power transferred to the National Company Law Tribunal from the commencement of the Companies (Second Amendment) Act, 2002 (11 of 2003).**

terms of agreement or the directions of Court/CLB[1] *e.g.* Meetings convened in sections 391/394 or sections 397/398.

(ii) as directed by the Court[1], requirements relating to notice, attendance, Chairman, quorum, proxy, proxy register/instruments of proxy and conduct of Meeting as well as maintenance of minutes of a general Meeting have been complied with.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

This matter is not directly referred to in the 33 paragraphs appended to the Form prescribed under the Companies (Compliance Certificate) Rules. The Check List given by the ICSI under the head 'Check List for other Companies' is for the guidance of CSP who may, in the course of his scrutiny, come across non-compliance with regard to this matter CSP need not qualify such non-compliance.

S. 171. Length of notice for calling meeting.—(1) A general meeting of a company may be called by giving not less than twenty-one day's notice in writing.

(2) A general meeting may be called after giving shorter notice than that specified in sub-section (1), if consent[2] is accorded thereto—

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

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

Provided that where any members of a company are entitled to vote only on some resolution or resolutions to be moved at a meeting and not on the others, those members shall be taken into account for the purposes of this sub-section in respect of the former resolution or resolutions and not in respect of the latter.

NOTES

Eng. Act, 1948 : Sec. 133
Eng. Act, 1985 : Sec. 369

Previous Act : Sec. 78

Companies Act, 1956

Recommendation of Company Law Committee.—This gives effect to the recommendations of the Company Law Committee in paras 75(i) and 78 of their Report, that ["twenty-one days" notice should be given for all meetings of a company. A shorter notice will be permissible in the case of an annual general meeting, only when all the members entitled to attend and vote agree to it in writing, and in the case of other general

1. **Power transferred to the National Company Law Tribunal from the commencement of the Companies (Second Amendment) Act, 2002 (11 of 2003).**
2. Form 22-A of the Companies (Central Government's) General Rules & Forms, 1956 is the prescribed form of consent by shareholders.

meetings only when members holding 95 per cent of the voting powers so agree.] (*Report* : Para 75) and that "the extension of the period of notice from fourteen to twenty-one days is necessary to enable shareholders to combine and canvass for proxies, if they so desire. The present period of fourteen days is too short for all the processes that are involved before the shareholders can canvass opinion in favour of or against a particular resolution proposed to be considered at any meeting of the company". (*Report* : Para 78 at page 59).

Note that the length of notice for calling any kind of general meeting and for passing any kind of resolution ordinary or special is now twenty-one days.

Not less than 21 days [Sub-section (1)]

This has been construed as meaning 21 clear days, *i.e.*, excluding both the date on which the notice is served and the date of the meeting. *Nagappa Chettiar (N.V.R) v. Madras Race Club,* (1949) 19 Com Cases 175 : AIR 1951 Mad 831; *Hector Whaling Ltd., Re,* (1937) 7 Com Cases 22 : (1936) Ch 208 (Ch D); *Railway Sleeper Supply Co.,* (1885) 29 Ch D 204. In *Securities and Futures Commission v. Stock Exchange of Hong Kong Ltd.,* (1992) LRC (Comm) 575 (Hong Kong High Court) it was held that the words 'not less than 21 days' notice' meant 21 clear days and did not include the day of the meeting itself or a fraction of any day. That conclusion was consistent with the natural and ordinary meaning of the words and with the law of England. Accordingly, the Exchange had failed to give sufficient notice of the extraordinary meeting. To this has to be added the time for effecting service of the notice of the meeting vide section 53(2)(b) and notes thereunder. The gap should be of twenty one clear whole days. *Pioneer Motors P. Ltd. v. Municipal Council, Nagarcoil,* AIR 1967 SC 684; *Bharat Kumar Dilwali v. Bharat Carbon and Ribbon Manufacturing Co. Ltd.,* (1973) 43 Com Cases 197 (DB—Delhi). In the case of newspaper advertisement of a notice the period of 21 clear days begins from the day after the issue of the newspaper. *Sneath v. Valley Gold Ltd.,* (1893) 1 Ch 477 (CA).

A company cannot curtail by its articles of association the 21 days notice required to be given under the Act. *Hector Whaling Ltd., Re,* (1937) 7 Com Cases 22 : (1936) Ch 208 (Ch D).

Notices of meeting posted on Aug. 31 and Sept. 1 would be deemed to be delivered on Sept. 2 and 3. They are ineffective for a meeting to be held on Sept. 21. *Balwant Singh Sethi v. Sardar Z.H. Singh Anand,* (1988) 63 Com Cases 310 (Bom). Where notices are posted in time the fact that some members received them late (in this case only one member received late) will not affect the validity of the notice or the meeting. *Calcutta Chemicals Co. Ltd. v. Dhiresh Chandra Roy,* (1985) 58 Com Cases 275 (Cal).

Service of notice of a meeting will be deemed to have been effected only when it is posted in a letter containing the same. It is not stated at which post office or box the letter has to be posted. Presumably, it has to be posted at or near the place of the registered office of the company. The provisions in the section will not be satisfied if the posting is made deliberately at any far off place, with a view to delay delivery.

In the case of notice of a general meeting sent to a member by post, service under the present section shall be deemed to have been effected at the expiry of 48 hours after it is posted. This means that even if it can be proved that in fact service was effected or could be effected only after the expiry of forty-eight hours, that will not affect the service being treated as good service. Previously the provision was that such notice should be deemed to have been effected 'at a time at which the letter would be delivered in the ordinary course of post.' The effect of this provision is that if notice of a general meeting is sent by post, it must be posted at such time as to give 21 clear days notice as required by section 171, plus 48 hours in addition. If for instance, a general meeting is to be held at 3 P.M. on the 5th April, service of the notice of the meeting will be deemed to have been duly effected if it had been despatched by post at any time before 3 P.M. on 13th March. This will satisfy the requirement of 21 days clear notice plus the 48 hours for transmission by post.

A notice returned unserved cannot, however, be presumed to be good service where there are circumstances of suspicion negativing the presumption, *Promila Bansal (Mrs.) v. Wearwell Cycle Co. (India) Ltd.*, (1978) 48 Com Cases 202 (Del). It is for the person who alleges non-receipt of the notice to establish to the satisfaction of the court that the notice was in fact not given. *Peninsular Life Assurance Co., Re,* (1936) 6 Com Cases 32 (Bom).

The presumption as to deemed delivery was not raised when at the time of posting the post office was, within the knowledge of the company, on strike. *Bradman v. Trinity Estate plc.*, 1989 BCLC 757 (Ch D).

The word 'may' in sub-section (1) does not mean that notice can be dispensed with, if so thought fit. As sub-section (2) shows, the length of notice may be shorter in the cases specified therein. But notice is necessary in the case of all meetings.

Meeting not to be invalidated on technical grounds.—While the requirement of notice of 21 days has been held to be directory, that of stating the business to be transacted at the meeting has been held to be mandatory. In this case, notices were put in transit through courier well before 21 days. Shareholders also received the notice well in advance and no prejudice was shown to have occured to them. An advance notice is considered necessary to enable shareholders to canvas views and take informed decisions. Meetings are not to be invalidated on technical grounds. The ground put forth by the complaining shareholder was that he received the notice on 19th for the meeting which was going to be held on the 30th. Nine days after receiving notice and three days before the date of the meeting, he applied for an injunction to stay the meeting becasue he did not want a particular item to be considered. The court did not oblige him with a stay order. Nine days gap was considered to be a material delay in making the application. *Somalingappa Shiva Putrappa Mugabasav v. Shree Renuka Sugars Ltd.*, (2002) 110 Com Cases 371 (Kant).

Requirement as to period of notice whether directory or mandatory

In *Shailesh Harilal Shah v. Matushree Textile Ltd.*, AIR 1994 Bom 20, PENDSEY J. of the Bombay High Court held that the requirement of the section as to length of notice is directory only and not mandatory, because otherwise it would have been very difficult for large public companies to function effectively. A couple of shareholders cannot be permitted to defeat the interest of the large body of shareholders by saying that the duration of the notice was not sufficient even if the short notice does not indicate any prejudice to the complaining shareholders. The notice was deficient in this case by a day. The resolutions for the appointment of a director and rights issue were unanimously passed. The Bombay High Court **did not agree** with the view expressed by the Madras High Court in *Nagappa (N.V.R.) Chettiar v. The Madras Race Club,* AIR 1951 Mad 813 : (1949) 19 Com Cases 175, where while examining the contention that the shareholders can dispense with, by agreement, the duration of the notice, it was observed that the agreement must be of all the members and it was not enough that the members present at the meeting, either expressly or impliedly, consented to or acquiesced in shortening the period of notice. According to the Division Bench, an express consent of all the members to waive the length of notice must be established and even if the members present at the meeting agreed to waive the defect, that would not cure the defect and the meeting would not be valid. This view was **not followed** in two Calcutta decisions. The first decision is *Surajmull Nagarmull v. Shew Bhagwan Jalan,* ILR (1973) 1 Cal 207. Examining the ambit of section 171(2) of the 1956 Act, the court held that the notice of short duration in breach of provisions of sub-section (1) of section 171 of the 1956 Act does not necessarily lead to voiding of the meeting and rendering the proceedings illegal, ineffective and void. The court held that consent referred need not necessarily be obtained before calling any meeting and the consent may be obtained before or after calling of the meeting and also at the meeting. The consent need not be express or in writing and may be implied and inferred from the conduct of the members. The court then examined the provisions of

section 171 (1956 Act) and held that the provision is clearly directory and not mandatory. This decision was considered and followed by Division Bench of the Calcutta High Court in *Calcutta Chemical Co. Ltd. v. Dhiresh Chandra Roy,* (1985) 58 Com Cases 275 (Cal). An identical view was also taken by Delhi High Court in the decision reported in *Maharaja Exports v. Apparels Exports Promotion Council,* (1986) 60 Com Cases 353 (Del). In the judgment of the Bombay High Court, the Calcutta decision lays down the correct law and the view of the Madras High Court is very technical and would lead to a very drastic problem in running the affairs of the public limited companies. It hardly requires to be stated that the public limited companies have got large number of shareholders and if a couple of shareholders are permitted to challenge the legality of the proceedings of the meetings on the ground of insufficiency of notice, and that too without indicating any prejudice, then it would be impossible to efficiently run the administration of public limited companies.

A point already emphasised by the Courts has again been re-emphasised in *Somalingappa Shiva Putrappa Mugabasav v. Shree Renuka Sugars Ltd.,* (2002) 110 Com Cases 371 (Kant), namely that the requirement of 21 days' notice is directory.

The Punjab & Harayana High Court took the view that the provisions are mandatory and the period of notice connot be curtailed except on the ground mentioned in the section itself. *Kuldeep Singh Dhillon v. Paragon Utility Financiers Pvt. Ltd.,* (1988) 64 Com Cases 19.

Meetings held on shorter notice [Sub-section (2)]

In the case of an annual general meeting, where all the members entitled to vote consent, the meeting may be held on shorter notice or without any formal notice, as the consent itself will tantamount to taking notice or dispensing with the need for being given any notice. In the case of other general meetings, if holders of not less than 95% of the paid-up share capital carrying votings rights, or in the case of a company having no share capital, holders of 95% of the total voting power accord their consent, the meeting may be called and held on shorter notice than 21 clear days, but it is necessary to give notice of the meeting to all the shareholders including the absent ones.

In all cases where consent is given for holding a general meeting on shorter notice, whether the consent is given by all the shareholders or 95% or more of them, as the case may require, all the shareholders in the register must be furnished with a copy of the agenda of the business to be transacted at the meeting, and in the case of the annual general meeting or any other meeting where the annual accounts and directors' report and auditor's report are to be laid, copies of those documents must be sent to all the shareholders as required by section 219. The obtaining of the consent referred to in sub-section (2) cannot dispense with these requirements.

Nor can a meeting already irregularly held be validated by obtaining the consent *ex post facto*. What is provided by sub-section (2) being a concession, cannot be extended beyond its limits.

For the format in which the consent of the shareholders may be obtained refer Form No. 22A given in *Appendix* 1.

It is also important to note that only the requirement as regards the length of the notice being 21 days, is dispensed with by such consent, and not the necessity to call and hold the meeting. The formality of calling and holding the meeting for transacting the business for which it is convened is necessary in all cases, except where the resolution to be passed is agreed to by all the members, as stated in Section 192(4)(b).

Where an annual general meeting or other general meeting of a company to which provisions of this Section apply is called and held otherwise than in accordance with such provisions, any resolution passed at such meeting will not be effective unless the same is ratified by all the shareholders according their consent or by a subsequent general meeting ratifying the irregularly passed resolution.

The word consent means that the members have agreed to a shorter notice. It has been held that agreement must relate to the specific resolution or resolutions to be adopted at the meeting and those agreeing must appreciate that they are giving their consent to a short notice. *Pearce Duff & Co. Ltd.*, (1960) 3 All ER 222 (Ch D). In this case, a company sent to its members notice of an extraordinary general meeting to pass a resolution (number one) but omitted to give the full 21 days' notice. It later wished to add resolution number two and the shareholders at the meeting signed a consent to short notice of resolution number two. Subsequently, the company obtained the written consent of every shareholder to both resolutions. The court held that for a valid short notice under the section, the members had to appreciate that the resolution was being passed on short notice and to agree to its being so passed with that consideration in their minds. In this case, those who signed the consent to resolution number two did not have it in mind that the notice for resolution number one was defective; that consent, therefore, did not cure the matter. However, in view of the subsequent 100 per cent. consent, the court would not hear any of the shareholders to say that the resolution had not been validly passed.

All these cases relating to consent to short notice are based upon the principle as stated by YOUNGER, L.J. in *Express Engineering Works, Re,* (1920) 1 Ch 466, 471 that "if you have all the shareholders present, then all the requirements in connection with a meeting of the company are observed". Sub-section (2) extends this principle further still and equates 95% unanimity with unanimous consents.

The modern view seems to be that it is not essential for a resolution to be formally passed at a meeting to become effective. The members present agreeing on the proposition is sufficient. In fact, such unanimous assent would be sufficient even though no meeting is held. This is akin to directors passing a resolution by circulation. See *Parker & Copper v. Reading,* (1926) 1 Ch 975.

In two decisions of the Madras High Court and Patna High Court respectively, *Re, Self-Help Private Industrial Estate Private Ltd.,* (1972) 42 Com Cases 605 (Mad) and *In re, Parikh Engineering and Body Building Co. Ltd.,* (1975) 45 Com Cases 157 (Pat), it has been held by two learned Judges that where for want of proper or sufficient notice or other defect in procedure a special resolution is not effective, subsequent consent obtained from shareholders holding 95% or more of the paid-up share capital or voting power, as the case may require, will validate the resolution. [For critical comments, see Notes, under Section 189. *Post.*] Similarly, a resolution for reduction of capital to which all the members signified consent not at a formally constituted meeting but by means of circulation of a written resolution has been recognised as effective, although the Court cautioned against the practice being followed in future. *Re, Barry Artist Ltd.,* 1985 BCLC 283 (Ch D).

Where all the members entitled to attend are present and waive the formality of a notice, a resolution passed at such meeting would be good even though the meeting was not convened for that particular purpose. *Machell v. Nevinson,* (1809) 11 East 84n. *Re, Oxted Motor Co.,* (1921) 3 KB 32. Also see *Re, Express Engineering Works,* (1920) 1 Ch 466. Where YOUNGER LJ observed: "if you have all the shareholders present, then all the requirements in connection with a meeting of the company are observed." This principle has been extended to a situation where all members were present but some abstained. In *Re, Bailey Hay & Co. Ltd.,* (1971) 3 All ER 693 : (1972) 42 Com Cases 442, the company had five shareholders. An extraordinary general meeting of the company was called by a notice which was one day short of the notice period required by the company's articles, though all five shareholders attended. At the meeting, a resolution for voluntary winding up of the company was adopted. Three of the shareholders abstained from voting on the resolution, but over five years later questioned its validity. BRIGHTMAN J. held that the acquiescence of these shareholders must be taken as an assent to the resolutions so that the resolution should be deemed to have been passed with the unanimous assent of all the shareholders. BRIGHTMAN J. said [(1971) 1 WLR 1357 at p. 1367]: "The conclusion is that they outwardly accepted the resolution to wind up as decisively as if they had

positively voted in favour of it. If corporators attend a meeting without protest, stand by without protest while their fellow-members purport to pass a resolution, permit all persons concerned to act for years on the basis that the resolution was duly passed and rule their own conduct on the basis that the resolution is an established fact, I think it is idle for them to contend that they did not assent to the purported resolution".

A person who is present and who votes at the meeting, will not be entitled to challenge the resolution on the ground of an invalidity in the notice. In *Re, British Sugar Refining Co.*, (1857) 3 K&J 408.

For a statement of reasons why shareholders have been given the option to agree to a shorter notice, see *Surajmull Nagarmull v. Shew Bhagwan Jalan,* ILR (1973) 1 Cal 207.

Public Trustee cannot give consent under section 171(2)

Department's circular.—This Board has been advised that under section 187B [*Since Omitted*] of the Act the Public Trustee exercises the rights and powers exercisable at a meeting of a company by the trustee as a member of that company. The Public Trustee does not take the place of the trustee who is a member of the company except at a meeting. Since the right of a member to give consent under sub-section (2) of Section 171 is not a right exercisable at a meeting of the company, that right cannot be exercised by the Public Trustee. (*Letter No.* 8/31(187B)/66-CL-V, dated 4-7-1965).

Notice after adjournments

Since an adjournment is only a continuation of the meeting, the notice for the first meeting holds good for all the adjournments, *Kerr v. Wilkie,* (1806) 1 LT 501; *Scadding v. Lorant,* (1851) 3 HL Cas 418. Where, however, a meeting was adjourned independently under a court injunction and could be held again only after the court permitted it, it was held that notwithstanding in section 171, the reconvened meeting could validly take up the same agenda, election of office bearers in this case, as was notified in the notice of the original meeting. *S.P. Arora v. Roshanara Club,* (1992) 8 Corpt LA 31 (Del). If, however, the meeting is adjourned *sine die,* a fresh notice must be given. No new business can be introduced unless notice of such meeting is given. *R. v. Grimshaw,* (1847) 11 Jur 965.

Unauthorised convening of meeting

A general meeting convened by the Secretary or a Director without the authority of the Board will be invalid, but it will be valid, if, before the meeting is held, the Board ratifies the act, *Hooper v. Kerr, Stuart & Co.*, (1900) 83 Law Times 729.

A meeting convened by or under the authority of a Board which was subsequently found to have been irregularly constituted, was however held to be not invalidated for that reason. *Boschoek Proprietary Co. Ltd. v. Fuke,* (1906) 1 Ch 148.

Restricted voting rights

The proviso has reference to such resolution as those for instance relating to preference shareholders alone or redeemable preference shareholders alone. [See section 87(2)].

Jurisdiction for challenging validity of notice

Where a person wants to challenge the election of a director there is nothing in the Companies Act to prevent such a challenge by an ordinary suit in a civil court. There can be no petition in such a matter under the section. *Niranjan Singh v. Edward Ganj Public Welfare Association,* (1977) 47 Com Cases 285 (P&H) **affirmed** in *sub-nom Niranjan Singh v. Edward Ganj Public Welfare Assn.*, (1981) 51 Com Cases 475 (P&H—DB). Similarly no petition under this section is maintainable for a declaration that a meeting was illegal. The only remedy in such cases is to file a regular civil suit. *Ravinder Kumar Jain v. Punjab Registered (Iron & Steel) Stockholders Association Ltd.*, (1978) 48 Com Cases 401 (P&H).

Exemption to section 25 companies

Sub-section (1) applies to section 25 companies with the modification that a general meeting may be called by giving a notice in writing of not less than 14 days (*S.O. No.* 1578, dated 1-7-1961).

Private company.—A private company which is not subsidiary of a public company may, however, provide differently by its articles [see section 170(i), (ii)], provided it does not contravene the other provisions of the Act.

Modification in relation to class meetings etc.—Refer to Annexures B, C and D of the Companies (Central Government's) General Rules and Forms, 1956, (*Appendix* 1) regarding modification of this section in applicability to meetings of a class of shareholders, meetings of debenture-holders, and meetings of a class of debenture-holders.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of the matters specified under Rule 3 of the Companies (Compliance Certificate) Rules, 2001. Paragraph 6 under Rule 3 relates to annual general meetings and minutes thereof, and reads as follows:

Paragraph-6.—**The annual general meeting for the financial year ended on ..... was held on ..... after giving due notice to the members of the company and the resolutions passed thereat were duly recorded in Minutes Book maintained for the purpose.**

Prescribed Check List

Annual General Meeting [*Item (a)*]

See under sec. 166

Sending of Notices, etc. to the Members [*Item (b)*]

Check whether:

(i) a copy of the balance sheet, auditors' report, Boards' report along with a copy of the compliance certificate and other specified documents including notice of the meeting were sent to members, trustees of debenture-holders, auditors, etc. free of cost at least 21 clear days before the meeting. If sent less than 21 clear days before the meeting, whether such shorter period was agreed to by all the members. If any directions were received from the Central Government for circulation of the cost audit report to the members along with the notice of the annual general meeting, whether the same has been complied with;

(ii) in case the shares of the company are listed on a stock exchange ensure that the company has supplied a copy of the complete and full balance sheet and profit and loss account and the directors report to shareholder as provided under clause 32 of the listing agreement though abridged accounts could be sent pursuant to section 219 (1)(b)(iv) in Form 23AB;

(iii) a copy of the unabridged annual report was sent to members, debenture-holders and depositors on demand, without charge, within 7 days of the requisition.

Minutes Books of Proceedings of General Meetings [*Item (c)*]

See sec. 193

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

Secretarial Standards on General Meetings issued by the Council of ICSI (SS-2)

These Standards seek to prescribe a set of principles for the convening and conduct of General Meetings and matters relating thereto. In the initial years, adherence by a company to the Secretarial Standards will be recommendatory.

These principles may not be applicable to any meetings convened on the directions of the Court or CLB or other authority, unless the directions themselves so prescribe.

Secretarial Standard [Para 1]

1. Convening a Meeting

1.1 *Authority*

A General Meeting should be convened on the authority of the Board.

The Board of its own accord or on the requisition of Members should, either at a Meeting of the Board or by passing a resolution by circulation, convene or authorize the convening of a General Meeting.

If, on a requisition having been made in this behalf, the Board fails to call a Meeting, the requisitionists may themselves call the Meeting in the same manner, as nearly as possible, as that in which Meetings are to be called by the Board.

1.2 *Notice*

1.2.1 Notice in writing of every Meeting should be given to every Member of the company. Such Notice should also be given to the Directors and Auditors of the company, to the Practising Company Secretary who has given the Compliance Certificate, to Debenture Trustees, if any, and, wherever applicable or so required, to other specified recipients.

Notice should be given to all persons entitled to receive such Notice, at the address provided by them in India or outside India. In the case of joint-shareholders, the Notice should be given to the person whose name appears first in the Register of Members or in the records of the depository, as the case may be.

On receipt of intimation of death of a Member, the Notice of a Meeting should be sent to the surviving first joint-holder or to the nominee of the sole shareholder or to the person entitled to a share in consequence of the death of the Member. In case of insolvency of a Member, the Notice should be sent to the assignees of the insolvent or to the person entitled to a share in consequence of the insolvency of the Member.

Notice should be given by hand or by post and should also be placed on the website, if any, of the company.

1.2.2 The Notice should specify the day, date, time and venue of the meeting with complete address.

Meetings should commence during business hours, on a working day, at the Registered Office of the company or at some convenient place within the city, town or village in which the Registered Office is situated.

If the venue of the Meeting is not a prominent place, a site map of the venue should be enclosed with the Notice.

The Notice should prominently contain a statement that a Member entitled to attend and vote is entitled to appoint a Proxy to attend and vote instead of himself and that, except in the case of a private company and a company not having a share capital where the Articles may provide otherwise, a Proxy need not be a Member.

1.2.3 The Notice should clearly specify the nature of the Meeting and the business to be transacted thereat. In respect of items of Special Business, each such item should be in the form of a Resolution and should be accompanied by an explanatory statement which should set out all such facts as would enable a member to take an informed

decision on the matter. In respect of items of Ordinary Business, Resolutions are not required to be specified in the Notice except where the appointment of Auditors has to be made by a Special Resolution, or where the Auditors or Directors to be appointed are other than the retiring Auditors or directors, as the case may be.

All Resolutions and the explanatory statement should be framed in simple and intelligible language so as to enable Members to understand the meaning, scope and implications of the proposed items of business.

The nature of the concern or interest, if any, of Directors in any item of business or in a proposed Resolution should be disclosed in the explanatory statement, along with the extent of such concern or interest where the item relates to transactions with any other company.

Where reference is made to any document, contract, agreement or the Memorandum of Association and Articles, the relevant explanatory statement should state that such documents are available for inspection and such documents should be so made available for inspection for not less than two hours during business hours at the Registered Office of the company and copies thereof should also be made available at the head/corporate office of the company, if such office is situated elsewhere, and also at the Meeting.

In all cases relating to the appointment or re-appointment of Directors, details of each such Director should be given, including age, qualifications, experience, date of first appointment on the Board, shareholding in the company, relationship with other Directors of the company, other Directorships, membership/ Chairmanship of committees of other Boards and the number of Meetings of the Board attended during the year.

In the case of appointment/re-appointment or varying of the terms of remuneration of managerial personnel of the company, their personal resume, terms and conditions of appointment/re-appointment including full details of remuneration sought to be paid and the remuneration last drawn by such person should be stated in the explanatory statement.

1.2.4 Notice and accompanying documents should be sent at least twenty-one days in advance of the Meeting.

Where the Notice also is to be published in a Newspaper, it should appear at least twenty-one days before the date of the Meeting and such Notice need not be accompanied by an explanatory statement.

1.2.5 Notice and accompanying documents may be given at a shorter period of time if consent in writing, in the prescribed form, is given thereto by, in the case of an Annual General Meeting, all the Members entitled to vote at the Meeting and, in the case of any other Meeting, Members holding ninety-five percent of the paid-up share capital carrying voting right or, where the company has no share capital, ninety five percent of the total voting power.

Consent for shorter Notice may be given before or at the Meeting.

1.2.6 In the case of listed companies with more than 5,000 Members, an abridged version of the Notice, listing the items of business and the day, date, time and venue of the Meeting, should be published in a newspaper having a wide circulation within such States of India where more than 1,000 Members reside.

1.2.7 No business should be transacted at a Meeting if Notice in accordance with this Standard has not been given.

1.2.8 No items of business other than those specified in the Notice should be taken up for consideration at the Meeting.

No Resolution shall be valid if it is passed in respect of an item of business not contained in the Notice convening the Meeting.

Where Special Notice is required of any Resolution and Notice of the intention to move such Resolution is received by the company at least fourteen days before the Meeting, such item of business should be placed for consideration at the Meeting after giving Notice of the Resolution to Members in the manner specified.

Any amendment to the Notice, including the addition of any item of business, can be issued provided the Notice of Amendment is sent to all persons entitled to receive the Notice of the Meeting and is sent within the time limit prescribed for giving of the original Notice.

1:2.9 The Notice should be accompanied by an attendance slip and a proxy form with clear instructions for filling, stamping, signing and depositing the proxy form.

1.2.10 A Meeting convened upon due Notice should not be postponed or cancelled.

If, for reasons beyond the control of the Board, a Meeting cannot be held on the date originally fixed, the Board may defer the Meeting. The Meeting should be reconvened after giving not less than seven days fresh Notice published in a newspaper having a wide circulation within such States of India where more than 1,000 Members reside.

Secretarial Standard [Para 13]

13. Distribution of Gifts

No gifts, gift coupons, or cash in lieu of gifts should be distributed to Members at or in connection with the Meeting.

§ For full text of the Secretarial Standard, see *Appendix* 311.

Documents Involved: (1) Articles, (2) Notice, (3) Form 22A.

S. 172. Contents and manner of service of notice and persons on whom it is to be served.—(1) Every notice of meeting of a company shall specify the place and the day and hour of the meeting, and shall contain a statement of the business to be transacted thereat.

(2) Notice of every meeting of the company shall be given—

(i) to every member of the company, in any manner authorised by sub-sections (1) to (4) of section 53;

(ii) to the persons entitled to a share in consequence of the death or insolvency of a member, by sending it through the post in a pre-paid letter addressed to them by name, or by the title of representatives of the deceased, or assignees of the insolvent, or by any like description, at the address, if any, in India supplied for the purpose by the persons claiming to be so entitled, or until such an address has been so supplied, by giving the notice in any manner in which it might have been given if the death or insolvency had not occurred; and

(iii) to the auditor or auditors for the time being of the company, in any manner authorised by section 53 in the case of any member or members of the company:

[1][*Provided* that where the notice of a meeting is given by advertising the same in a newspaper circulating in the neighbourhood of the registered office of the company under sub-section (3) of section 53, the statement of material facts referred to in section 173 need not be annexed to the notice as required by that section but it shall be mentioned in the advertisement that the statement has been forwarded to the members of the company.]

(3) The accidental omission to give notice to, or the non-receipt of notice by, any member or other person to whom it should be given shall not invalidate the proceedings at the meeting.

NOTES

Eng. Act, 1948 : Table A, Regns. 50, 51
Eng. Act, 1985 : Tables A-F, Regns. 38, 39

Previous Act : Regn. 116 of Table A

Companies Act, 1956

For recommendation of Company Law Committee, see Legislative changes before section 165 under the "General Notes".

Companies (Amendment) Act, 1960

The proviso to sub-section (2) was inserted by the Amendment Act, 1960. Notes on clauses explain the amendment, thus: "The amendment seeks to make it unnecessary for companies to incur heavy costs in publishing the explanatory statements required under section 173 along with the notices advertised in newspapers." (*Clause* 49 of the Bill).

Contents of valid notice

A valid notice must state the date, time, place and purpose of the meeting. It must be issued on the authority of the Board of Directors under the name of an authorised official. It must be sent in the prescribed manner to every person entitled to receive it. If the time of holding the meeting and other essential particulars required by the section are not specified in the notice, the meeting will be invalid, and all resolutions passed thereat will be of no effect. *Prachi Insurance Co. Ltd. v. Chaudhury Madhusudandas,* (1964) 2 Comp LJ 157 (Orissa). **Followed** in *Eastern Linkers Private Limited v. Dina Nath Sodhi,* (1984) 55 Com Cases 462 (Del). A good notice must fairly disclose the purpose for which the meeting is called, must be open, and free from trickiness and must be in a language understood by common people. *Kaye v. Croydon Tramways Co.,* (1898) 1 Ch 358 (CA). The appointment of additional directors was held to be *prima facie* illegal as the meeting was held at a different place from the place mentioned in the notice and individual notices were not sent nor any notice of change of venue was given. It was unlikely without any notice of change of venue, that 80 per cent. shareholders would have attended the meeting. *Sikkim Bank Ltd. v. R.S. Chowdhury,* (2000) 102 Com Cases 387 (Cal).

Where a notice convening a meeting does not specify a particular business to be transacted thereat, the meeting cannot deal with that matter. *Pacific Coast Coal Mines Ltd. v. Arbuthnot,* 1917 AC 607. Consequently if a resolution is passed without the notice fairly disclosing it, it will be void. *Kaye v. Croydon Tramways Co., (Supra).*

But where an item of business not mentioned in the notice was taken up under the caption 'any other business' with the permission of the chair, the transaction was held to be valid and that even if something was wrong it could have been ratified subsequently. *Sunil Dev v. Delhi & District Cricket Assn.,* (1994) 80 Com Cases 174 (Del).

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1. Ins. by Act 65 of 1960, s. 45.

re-election, he should vacate the chair pending the election, unless on a show of hands he is re-elected without any controversy.

The meeting may appoint a temporary or provisional chairman to run the meeting until the chairman proper is elected.

Any objection to the appointment of a chairman should be made immediately because otherwise any irregularity in the nomination may become cured by acquiescence. *Cornwall v. Woods,* (1846) 4 Notes of Cases 555.

Appointment of Chairman by Courts

The Supreme Court is of the view that the order of a High Court appointing a particular person as the chairman to preside over an AGM should not be interfered with. But in this particular case because of the peculiar facts and circumstanses and the needs of justice the Supreme Court ordered the appointment of a retired Supreme Court judge with the consent of the parties instead of the representative of a financial institution appointed by the High Court [now CLB]. *Naresh Kumar Parti v. T.R. Tuli,* 1987 (Supp) SCC 437.

Appointment of observer instead of chairman by CLB.—Where a resolution was withdrawn by the chairman and the business remained incomplete and the petitioners who requisitioned the meeting asked the CLB for appointment of a chairman, the CLB said : "Therefore, according to them, to ensure that the meeting is properly held, an independent person should chair the proposed meeting. We find that there is justification in the prayer of the petitioners in view of what happened in the EOGM held on 7 August, 2000. However, instead of appointing an independent person as chairman of the meeting, we propose to appoint an observer to observe the proceedings of the meeting and report. Accordingly, we appoint Shri C.R. Mehta, former member of the Company Law Board, as an observer, who will send a report to us on the proceedings of the meeting. Since this meeting convened on 24 November, 2000, has been deferred ***sine die,*** we give the following directions in regard to holding of this EGM. [at p. 101, *PIK Securities P. Ltd. v. United Western Bank P. Ltd.,* (2001) 4 Comp LJ 81 : (2001) 44 CLA 184 : (2001) 33 SCL 671 (CLB—PB—N. Del)] [Detailed directions were provided].

Removal of Chairman

A chairman who has been elected by the meeting can be removed by the meeting. *Booth v. Arnold,* (1895) 1 QB 571. The usual procedure would be for a member to propose a vote of no confidence in the chair and this move should be seconded by another member. The chairman would have the right to make a representation against the removal. The matter should then be put to vote. If he loses the vote, he should relinquish the chair. Where the appointment is under the provisions of the company's articles, that appointment being not made by the members, the meeting cannot remove him unless it is due to bad faith, partiality or abuse of authority.

The articles of a company may govern the point and may provide for a challenge to be made to a ruling of the chairman. The chairman should vacate the chair while the challenge to his ruling is debated.

Non-member Chairman

Under section 175(1), the members can elect one of themselves to be chairman of the meeting. The shareholders do not have the power to elect as chairman, a person who is not a member. However, the Articles can provide "otherwise" and may permit a non-member to be the chairman. Reference may be made to Art. 50 of Table A which stipulates that the chairman, if any, of the Board shall preside as chairman at every general meeting of the company. It should be noted that appointing a person who is not a member as chairman of the meeting could lead to absurd results. Under Art. 54 of Table A, the chairman has a "second or casting vote" in the case of equality of votes. Thus, a person who is not a shareholder will become entitled to a second or casting vote and that too without having the first vote.

There are authorities to the effect that where the chairman holds only non-voting shares or is not a member at all, he does not have a casting vote. *Halcyon Heights Estates Ltd., Re,* [1980-84] LRC (Comm) 583 at 588.

Hampel Committee Report (UK)

On the obligation and role of chairman of the Board of directors, the Hampel Committee has, *inter alia*, recommended as follows: "Management has an obligation to provide the board with appropriate and timely information and the chairman has a particular responsibility to ensure that all directors are properly briefed. This is essential if the board is to be effective (3.4). Separation of the roles of chairman and chief executive officer is to be preferred, other things being equal, and companies should justify a decision to combine the roles (3.17). Whether or not the roles of chairman and chief executive officer are combined, a senior non-executive director should be identified in the annual report, to whom concerns can be conveyed (3.18)".

Chairman's casting vote

The chairman of a meeting has a casting vote in Board meetings and general meetings, if specifically empowered by the articles of the company. There is no common law right to a casting vote *Nell v. Longbottom,* (1894) 1 QB 767; *Bishop of Chickester v. Harward,* (1787) 1 T Rep 650.

If there is no provision in the articles for a casting vote, an ordinary resolution on which there is an equality of votes is deemed to be dropped. Sometimes, two persons form a joint venture company on the basis of exactly equal control. In such a case, it is important for no one to have a casting vote: *Re, Medefield Pty. Ltd.,* (1977) 2 ACLR 406 (Aust); *Daniels v. Fielder,* (1988) 52 DLR (4th) 424 (Canada).

If the articles of the company have been drafted on the lines of Article 54 of Table A, the chairman is permitted to exercise his casting vote either on a show of hands or on a poll. But, it is submitted that casting vote cannot be exercised on a poll as it would tantamount to breach of the provisions of s. 87 which states that voting rights on a poll can be exercised only in proportion to the paid-up value of equity shares. Where a meeting is presided over by a person who is not a voting member, he cannot as chairman assume the right to a casting vote in the event of an equality of votes. *Weakley v. Amalgamated Union of Engineering Works, The Times,* June 12, 1975. **(unreported).**

The chairman has a discretion as to how he uses the casting vote or whether he uses it at all. It is generally regarded as impolitic to employ it where there is an exact division of opinion at a representative meeting, for if (without the casting vote) there is no *majority* in favour of a proposed motion, the preservation of the *status quo* would appear desirable. If the chairman elects to cast his second vote, it is not incumbent upon him to use it in the same way as his first vote. See *R. v. Bradford Metropolitan Council,* (1989) 3 All ER 140.

Position, power, duty and responsibility of Chairman

"The chairman has *prima facie* authority to decide all questions which arise at a meeting, and which require decision at the time, but a member by submitting to his ruling and voting upon a resolution which the chairman allows to be put is not precluded from maintaining by litigation that he was wrong. *Henderson v. Bank of Australasia,* (1890) 45 Ch D 330. The entry in the minute book of the chairman's decision is, however, *prima facie* evidence of the correctness of the decision, and the onus of displacing that evidence is on those who impeach it, and if there is delay in commencing proceedings, very strict proof will be required that the entry in the minute book is wrong. *Indian Zoedone Co.,* (1884) 26 Ch D 70 (CA); *Ayre v. Skelsey Adamand Cement Co.,* (1905) 21 TLR 464 (CA), **affirming** (1904) 20 TLR 587; *Rebello v. Co-operative Navigation Co.,* AIR 1925 Bom 105.

persons who, on account of the transferee's names not having been registered in their place still remained in the register of members it was not an accidental omission. The expression 'accidental' implies absence of intention or deliberate design. The Company has only to prove on record that the notice has been sent on the addresses furnished by members. The non-receipt of the notice under no circumstances invalidates the holding of meeting or the proceeding thereof. See *Maharaja Exports v. Apparels Export Promotion Council,* (1986) 60 Com Cases 353 (Del). Modern Articles usually provide that the accidental omission to give notice to a member, or his failure to receive it, shall not invalidate the proceedings at the meeting. This has been held to include the accidental failure of the company or its agents to put a notice to the member into the post, but not a deliberate omission to send out the notices to certain members in consequence of a misinterpretation of the articles of association. See *Re, West Canadian Collieries Ltd.,* (1962) 1 All ER 26 (Ch D); *Royal Mutual Benefit Bldg. Society v. Sharman,* (1963) 2 All ER 242. See PENNINGTON'S COMPANY LAW, 6th edn. 1990, p. 623: 7th Edn., 1995, p. 832. This principle may not apply when the person to whom the notice was not given is nevertheless present at the meeting. *Oxted Motor Co. Ltd.,* (1921) 3 KB 32. It is however, necessary that persons assembling without notice must actually give their consent to the assembly to be regarded as a meeting of members or should waive for the purpose of that meeting their right to the notice. Both these things be done expressly or by acquiescence. *Barcon v. Potter,* (1914) 1 Ch 895.

If there be any circumstance suggesting that the omission was intentional, it will not be excused as accidental. In *Gajanan Narayan Patil v. Dattatraya Waman Patil,* (1990) 3 SCC 634, non-service of notice in the case of a co-operative society upon the expert co-opted nominee members and nominees of financial institutions rendered the meeting invalid.

Deliberate omission to give notice, act of oppression

In *Martin Castolino v. Alpha Omega,* (2001) 104 Com Cases 687 at p. 699 : (2001) 41 CLA 271 : (2001) 33 SCL 210 (CLB), the CLB found that the certificate of posting produced by the respondents was a fabricated one. It is the right of a shareholder to receive notice of general body meetings and if a company deliberately does not send notices, the shareholders can complain of oppression/mis-management. In this case, the complaint of non-receipt of notice is not by a member holding a few odd shares but by members holding 60 per cent shares in the company and who can, with such a shareholding, decide the outcome of the proposals in the meeting. Therefore, the meeting held without notice to the petitioners has to be declared as invalid as also the resolutions passed thereat. There is no other evidence to show that the other shareholder, viz., the wife of the fifth respondent, was given a notice. Of the four then existing members, three members holding 70 per cent. shares were not given notice of this meeting and, normally, there would not have been a quorum at that meeting but for the induction of new members by transfer of shares in the board meeting. At that meeting the Board approved the splitting of the share certificate comprising 9,998 shares jointly held in the names of the second and the sixth respondents. They were split into two certificates of 9,900 and 98 shares. Ninety eight shares were transferred from joint names to the individual name of the sixth respondent. Two share certificates each comprising one share in the same joint names were also transferred to the seventh and eighth respondents, being the family of the second respondent. While the court agreed with the respondents that article 13 permits *inter se* transfers among family members and that shareholders right to transfer cannot be challenged, yet, in the present case, the subsequent events reveal that the petitioners were right in contending that the transfers were made only with an oblique motive of ensuring presence of a quorum in general body meetings.

Notice of meeting during postal strike

Where a meeting was summoned in spite of the fact that on account of the postal strike notices could not be served on all the members, the court granted an *ex parte* stay order

on the application of a shareholder. The court said that the postal strike was itself an evidence of the fact that the posting of notices could not be deemed to have been effective service on all the shareholders, *Bradman v. Trinity Estates Ltd.*, 1989 BCLC 757 (Ch D).

Conditional and common notice

A notice for a second meeting to be held only if a resolution was passed at the first meeting is a conditional notice and is therefore bad. *Alexander v. Simpson,* (1889) 43 Ch D 139. For contrary view, see *Tiessen v. Henderson,* (1899) 1 Ch 861.

A common notice of two different meetings appears to be a proper notice. *Israel v. Atlas Engineering Co.,* (1889) 10 NSW EQ 277 (Australia). Also see *Re, Fenner Institute of Preventive Medicine,* (1899) 15 TL R 394.

Manner of service

Service of notice on members must be effected in the manner provided by section 53, except where service by advertisement is sufficient [*Cf.* section 257(1-A) proviso].

Notices sent under certificate of posting despite earlier complaints of non-receipt of the notices of the meetings were held to be not proper service of notice. *Tarlok Chand Khanna v. Rajkumar Kapoor,* (1983) 54 Com Cases 12 (Del). Service of the notice by registered post on a person, though refused to be accepted by him is a valid service in terms of section 27 of the General Clauses Act. *Joginder Singh Palta v. Time Travels Pvt. Ltd.,* (1984) 56 Com Cases 103 (Cal).

Requirements for listed companies under Listing Agreement

The Standard Listing Agreement requires compliance of certain requirements by the listed companies.

§ For text see clauses 31, 32 and 33 of the Standard Listing Agreement [*Appendix* 252].

Private company can make its own regulation.—A private company which is not subsidiary of a public company, may by its articles make its own regulations as regards the matter in this section [See section 170(1)(ii)], provided they do not contravene the other provisions of this Act applying to them.

Jurisdiction for questioning validity of service.—The validity of a notice can be questioned in a regular civil suit and not by way of a company petition. *Niranjan Singh v. Edward Ganj Public Welfare Association,* (1977) 47 Com Cases 285 (P&H).

Modification in relation to class meetings etc.: Refer to Annexures B, C and D of the Companies (Central Government's) General Rules and Forms, 1956, (See *Appendix* 1) regarding modification of this section in applicability to meetings of a class of shareholders, meetings of debenture-holders, and meetings of a class of debenture-holders.

Check list on issue of notice of general meeting

1. Ensure that at least 21 clear days' notice is given in writing *i.e.* excluding both the date of service of notice and the date of the meeting.

2. Ensure that where the notice is sent by post, service is effected at least 48 hours before the period of 21 clear days. Under section 53, service is deemed to be effected at the expiry of 48 hours after the notice is posted.

3. Ensure that notice of the meeting is given to all the members, the trustees for the holders of the debentures and the auditors of the company and the legal representatives of the deceased/insolvent members.

4. Ensure that 6 copies of the notice are sent to all the stock exchanges where the shares of the company are listed.

5. Ensure that where a general meeting is called by shorter notice, consent for shorter notice is accorded thereto in Form 22A:—

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

(b) in the case of any other meeting, by members of the company holding:—

(i) if the company has a share capital, at least 95 per cent of the paid-up share capital of the company entitled to vote at the meeting;

(ii) if the company is without share capital, at least 95 per cent of the total voting power exercisable at the meeting.

6. Ensure that the notice specifies the place, the day and the hour of the meeting and the business to be transacted thereat.

7. Ensure that the explanatory statement is annexed to the notice in respect of every item of special business.

8. Ensure that the explanatory statement to the notice gives all material facts concerning each such item, the nature of interest of every director and manager in the item and where the item requires approval to any document, the time and place of inspection of the document.

9. Ensure that where any item of special business affects any other company, the extent of shareholding interest in that other company of every director and manager of the company where it is at least twenty per cent of the paid-up capital of the company.

10. Ensure that where an item of business consists of according approval to any document, the time and place where the document can be inspected is specified in the explanatory statement in accordance with S. 163(2).

Secretarial Practice Notes : Service of notice

Check whether:

(i) the notice specified the place the day and the hour of the meeting and a statement of the business to be transacted thereat?

(ii) the notice was sent to all members, entitled to vote, their legal representatives if deceased or assignees of the insolvent, (if such information received) and the auditor(s) of the company in specified manner?

(iii) an explanatory statement was annexed to the notice of a general meeting in respect of every business to be transacted at the meeting other than those specified as ordinary business items in case of annual general meeting?

(iv) such explanatory statement contained—(a) all material facts concerning each such item, (b) the nature of interest, if any, in such business, of every director and manager, (c) if the business relates to or affects any other company, the extent of shareholding interest of every director and manager in such other company, (d) if such item required approval, to any document, the time and place where the document could be inspected?

Documents Involved: (1) Articles, (2) Minutes of Board/General Meeting, (3) Notice and Explanatory Statement.

S. 173. Explanatory statement to be annexed to notice.—(1) For the purposes of this section—

(a) in the case of an annual general meeting, all business to be transacted at the meeting shall be deemed special, with the exception of business relating to (i) the consideration of the accounts, balance-sheet and the reports of the Board of Directors and auditors, (ii) the declaration of a dividend, (iii) the appointment of directors in the place of those retiring, and (iv) the appointment of, and the fixing of the remuneration of, the auditors; and

(b) in the case of any other meeting, all business shall be deemed special.

(2) Where any items of business to be transacted at the meeting are deemed to be special as aforesaid, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning each such item of business, including in particular [1][the nature of the concern or interest], if any, therein, of every director, [2][* * * *] and the manager, if any:

[3][*Provided* that where any item of special business as aforesaid to be transacted at a meeting of the company relates to, or affects, any other company, the extent of shareholding interest in that other company of every director, [2][* * * *] and the manager, if any, of the first-mentioned company shall also be set out in the statement if the extent of such shareholding interest is not less than twenty per cent of the paid-up share capital of that other company.]

(3) Where any item of business consists of the according of approval to any document by the meeting, the time and place where the document can be inspected shall be specified in the statement aforesaid.

NOTES

Eng. Act, 1948: Table A, Regn. 52 Previous Act : Regn. 50 of Table A

Companies Act, 1956

Recommendation of Company Law Committee.—This follows the following recommendations of the Company Law Committee: "We also make it obligatory for the directors to set out in the notice of meeting, where special business is to be transacted all material facts concerning such business. It is not enough, in our view, merely to state the nature of the business; in order to assist the shareholders to appreciate the importance of such business, it is also necessary that all material facts concerning it should be circulated in advance". (*Report:* para 76).

"Whenever special business is to be transacted before a general meeting, a statement setting out all material facts concerning the business should be circulated to the members along with the notice of the general meeting, so that the shareholders reading the notice may be able to understand what is intended to be discussed at this meeting. The nature of the interest, if any, of any director or managing agent or any partner or director or a managing agent or any partner or director of a managing agency, firm or company in any such special business should also be indicated in the circular". [*Report* : para 75 (ii)].

The reason for incorporating Regulation 50 of the Table A of First Schedule of the previous Act, as a statutory provision in the Act itself is thus stated by the Company Law Committee.

"Regulation 50 defines what would be deemed to be the special business transacted at a general meeting of the company. Under this regulation, all business transacted at an extraordinary general meeting is deemed to be special business whereas all business, except the following transacted at an ordinary meeting, would be so deemed:—

(a) the sanction of dividend;

(b) consideration of the accounts, balance-sheets, director's reports and auditor's report;

(c) election of directors and other officers in place of those retiring by rotation;

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1. Subs. by Act 65 of 1960, s. 46 for "the nature and extent of the interest".
2. The words "the managing agent, if any, the secretaries and treasurers, if any" omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 74 (w.e.f. 13-12-2000).
3. Ins. by Act 65 of 1960, s. 46.

(d) fixation of the remuneration of auditor.

We recommend that this regulation should be made compulsory so that the provisions of the Act relating to the manner in which all such special business has to be carried on may apply compulsorily to all companies and may not be varied by the articles of the association of a particular company". (*Report*: para 239).

Companies (Amendment) Act, 1960

The amendments in this section have been inserted by the Joint Committee for the following reason:—"The Committee think that the phraseology of section 173(2) of the Act should be brought in line with that of section 299 thereof. The Committee further feel that the disclosure of the extent of shareholding interest in the company of a director, managing agent, if any, secretaries and treasurers under section 173(2) of the Act need be set out in the statement only where the extent of shareholding is twenty per cent, or more," [*Report*: para 40]

Companies (Amendment) Act, 2000

The terms "managing agents, secretaries and treasurers" have been omitted by the Amendment Act, 2000. The amendment is of consequential nature.

Special and ordinary business

At an annual general meeting, four items constitute ordinary business:

(i) consideration of accounts and reports of the Board of directors and auditors;

(ii) declaration of dividend;

(iii) appointment of directors in the place of those retiring;

(iv) appointment of auditors and fixing their remuneration.

At the annual general meeting, all other business is *special business*. At an extraordinary general meeting every business is special business.

It should be noted that "special business" does not require special resolution unless specifically required by the Act. See Notes under section 189.

The appointment of directors in the place of those retiring is an item of ordinary business to be transacted at the annual general meeting of a company, *vide* section 173(1)(a). The retirement of directors as contemplated by the said section may be by rotation, efflux of time or otherwise. If, therefore, an additional director appointed by the Board of directors ceases to hold office under section 260 and if such director is to be re-appointed as director at the annual general meeting, the provisions of section 173(1)(a) would become attracted in the matter. (*Letter No.* 8/53(173)/65-CL-V, dated 1-9-1965). Also see *Gopal Vyas v. Sinclair Hotels & Transportation Ltd.*, (1990) 68 Com Cases 516 (Cal).

If, in addition to the consideration of the annual accounts, any further matter is proposed to be considered it will be special business. So also, anything other than the declaration of dividends and any matter relating to audit, other than the appointment of the auditors and fixing their remuneration, will be special business.

The appointment of an auditor under S. 224A requires special resolution. However, such appointment does not become "special business" under S. 173(1)(b) and hence explanatory statement is not necessary for an auditor's appointment under S. 224A.

Re-appointment of the retiring auditor or appointment of a different auditor in the place of the retiring auditor is not special business and does not require an explanatory statement.

Requirements of the section

Department's Clarification.—On a query to Department: "Under Section 173, for any item of business to be treated as special business a statement is to be annexed setting out material facts concerning such item.

1. It has been suggested that annexation of the relevant particulars is sufficient compliance with the law and no specific mention in the notice that the item is a special item is necessary.
2. It has been enquired whether the explanatory statement for any such special item is a part of the notice itself.

The Department expressed the following views: 1. Mention of full relevant particulars in the explanatory statement annexed to the notices would be sufficient compliance with the law. 2. The second presumption is confirmed. (*Department's File No.* 8/16(1)/61-PR).

Private company can make its own regulations

As regards matters in this section, a private company which is not subsidiary of a public company, may make its own provision by its articles. [See section 170(1) (ii)], provided they do not contravene the other provisions of the Act, applying to them.

Object and scope of section

Requirement as to explanatory statement mandatory.—"The object of enacting section 173 is to secure that all facts which have a bearing on the question on which the shareholders have to form their judgment are brought to the notice of the shareholders so that the shareholders can exercise an intelligent judgment. The provision is enacted in the interests of the shareholders so that the material facts concerning the item of business to be transacted at the meeting are before the shareholders and they also know what is the concern or interest of the management in any item of business, the idea being that the shareholders may not be duped by the management and may not be persuaded to act in the manner desired by the management unless they have formed their own judgment on the question after being placed in full possession of all the material facts and apprised of the interest of the management in any particular action being taken. Having regard to the whole purpose and scope of the provision enacted in section 173, I am of the opinion that it is mandatory and not directory and that any disobedience to its requirements must lead to the nullification of the action taken." *Sheth Mohanlal Ganapatram v. Shri Sayaji Jubilee C. & J. Mills Co.,* (1964) 34 Com Cases 777 (Guj) **approvingly** referred to *Firestone Tyre & Rubber Co. v. Synthetics and Chemicals Ltd.,* (1971) 41 Com Cases 377 (Bom). Both these cases were **relied** on in *Balasundaram (V.G.) v. New Theatres Carnatic Talkies,* (1993) 77 Com Cases 324 (Mad).

The averments in the proceeding challenging the notice should be sufficient to cover a plea that the explanatory statement appended to the notice of the meeting about the special business is insufficient or misleading. *Laljibhai C. Kapadia v. Lalji B. Desai,* (1973) 43 Com Cases 17 : AIR 1972 Bom 276.

Where a notice convening a meeting does not specify a particular business to be transacted therein, the meeting cannot deal with that matter. *Pacific Coast Coal Mines Ltd. v. Arbuthnot,* 1917 AC 607. If a resolution is passed without the notice fairly disclosing it, it will be void. *Kaye v. Croydon Tramways Co.,* (1898) 1 Ch 358. Where the explanatory statement is vague and tricky, or insufficient and misleading, the related resolution is bad in law. *Centron Industrial Alliance Ltd. v. Pravin Kantilal Vakil,* (1985) 57 Com Cases 12 (Bom).

It is not the function of an explanatory statement to travel beyond the scope of proposed resolution. Material facts have to be given but not detailed particulars. *East India Commercial Co. P. Ltd. v. Raymon Engineering Works Ltd.,* AIR 1966 Cal 232. In the case of large companies, not more than 5% of the members are present at the meeting. (This is all the more in respect of extraordinary general meetings). Therefore, it is essential to see that the explanatory statements sent out by the Board are perfectly fair and, as far as possible, give all the information reasonably necessary to enable the recepients to decide how to vote. *Re, Dorman Long & Co. Ltd.,* (1934) Ch 635 : (1935) 5 Com Cases 30.

The object of the notice is to enable the members to understand and appreciate the nature of the business or items of business proposed to be considered at the meeting and make up their mind whether to go to and attend and vote at the meeting or abstain from

voting, *Cf. Re, Pearce Duff & Co. Ltd.,* (1960) 3 All ER 222 : (1961) 31 Com Cases 251 (Ch D). **Following** this case and trying to locate the intention of the legislature in *Meenakshi Amma K. v. Sree Rama Vilas Press & Publications P. Ltd.,* (1992) 73 Com Cases 285 (Ker—DB) the Court said [at p. 292]: "The intention behind the provisions contained in section 173 of the Companies Act has to be understood in a meaningful manner. Of course, if a transaction of business has not been sufficiently notified or which is substantially different from the notification, it would be invalid. Beyond that on technicalities the meeting should not be invalidated. It is clear from the notice that the transaction of business to be carried out in the meeting is the election of the Board of directors and managing director. That was the only transaction scheduled in the meeting and for which alone the meeting was called. The notice was found to be valid by the company court. All proceedings for the conduct of the election were supervised by the company court and the parties had opportunities before the company court to raise points against the validity of the notice. Even before the holding of the meeting, the company court has considered it and found it to be valid". **Affirming** *Sree Rama Vilas Press and Publications P. Ltd., Re,* (1992) 73 Com Cases 275 (Ker).

In *V.G. Balasundaram v. New Theatre Carnatic Talkies,* (1993) 77 Com Cases 324 at 346 (Mad) it was held that the section was applicable to a private company which had not excluded the application of the section. The articles of the company pre scribed special resolution for appointment ofdirectors. This required an explanatory statement to be appended to the notice for the resolution. That being not there, the appointment of the director in question was held to be not valid. The amendment of the articles to provide for the appointment of three, instead of only two, directors was also held to be invalid because the requirements of the section were not satisfied.

True information of the nature of business

The requirement of the section is that the shareholders should be informed truly of the nature of the business to be transacted at the General Meeting. This should not be lost sight of. In construing the provisions of this section too rigid an interpretation should not be made so as to hamper the conduct of business. The explanatory statement is a business document and must be used in a commonsense business way. *Sitaram Jaipuria v. Banwarilal Jaipuria,* AIR 1972 Cal 105 (DB), **followed** in *Meenakshi Amma K. v. Sreerama Vilas Press & Publications P. Ltd.,* (1992) 73 Com Cases 285, 291 (Ker—DB)*. Though the explanatory statement may not contain the full details, if it is not a tricky one or misleading one and even if it could have been more explicit, it does not stand condemned. *Gopal Das Gujarati v. Titagarh Paper Mills Co. Ltd.,* (1980) 60 Com Cases 920 (Cal). A very minor defect arising out of "strict non-conformity" (sic) with the provisions of subsection (3) might not render an amendment of the articles null and void. *Joseph Michael v. Travancore Rubber and Tea Co. Ltd.,* (1986) 59 Com Cases 898 (Ker—DB).

The explanatory statement is a part of the notice and cannot be read *de hors* of the same. While it is necessary that an explanatory statement should be annexed to the notice in respect of any item of business which are special, it is not necessary to include in it the text of the resolution or the draft of the resolution to be proposed at the meeting. Its purpose is that the members should be informed of the nature of the business to be transacted at the general meeting. *Rajiv Nag v. Quality Assurance Institute (India) Ltd.,* (2000) 39 CLA 183 at 188 : (2000) 28 SCL 187 : (2000) 4 Comp LJ 385 : (2001) 106 Com Cases 178 (CLB—NB).

Tricky notice

A notice which discloses nothing and merely offers inspection at the registered office of the company, is a tricky notice. *Shalagram Jhajharia v. National Co. Ltd.,* (1965) 35 Com Cases 706 (DB)(Cal). As to whether a notice is tricky and misleading, the question

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* The court **affirmed** the decision of single judge in *Meenakshi Amma* case, (1992) 73 Com Cases 275 (Ker).

is one of fact, depending on the facts of each case (*ibid*). A tricky notice could be one which suppresses or conceals or withholds material and true facts from the knowledge of the members or makes directly or indirectly a false suggestion. *Bimal Singh Kothari v. Muir Mills Co. Ltd.*, (1952) 22 Com Cases 248 (Cal). In *Kaye v. Croydon Tramways Co.*, (1898) 1 Ch 358, a notice convened an extraordinary general meeting of the company to approve the sale of its undertaking to another company without disclosing that the members would have to approve the receipt by their directors of a large payment from the purchasing company. The meeting was held and the resolution adopted but the Court of Appeal held that it was ineffective because it was a notice of tricky nature. See also *Baillie v. Oriental Telephone & Electric Co. Ltd.*, (1915) 1 Ch 503. In *Pacific Coast Coal Mines Ltd. v. Arbuthnot*, 1917 AC 607 (PC) it was felt that the uninformative notice in the case had been particularly inappropriate for the members who had appointed as their proxies at the meeting the directors who wanted the resolution adopted and who would benefit from it. Similarly where the views of CLB as to the prejudicial nature of the terms of the appointment of sole selling agents were not brought to the notice of shareholders while seeking their approval for an extension of the appointment for another term, the resolution was held to be a tricky one. *Firestone, Tyre and Rubber Co. v. Synthetics & Chemical Ltd.*, (1971) 41 Com Cases 377 (Bom). See also *Goyal (M.R.) v. Usha International Ltd.*, (1998) 1 Comp LJ 58 : (1997) 27 CLA 187 (Del) where a notice for allotment of shares to promoters on preferential basis was alleged to be tricky but particulars were given to substantiate the allegation.

Insufficient notice of special business

"Provisions in the articles requiring special business to be specially notified and any other directions in the articles must be followed. If the notice is misleading the court will restrain the holding of the meeting, or restrain the directors from acting on resolutions passed on insufficient notice, until confirmed by the company at a meeting properly notified. The transaction of business which has not been sufficiently notified or which is substantially different from that notified is invalid, but want of notice of some business does not invalidate such business as has been properly notified". (HALSBURY'S LAWS OF ENGLAND, 4th Edn., Para 564): [1988 Reissue Vol. 7(1), para 691, page 497 : 1996 Reissue, Vol. 7(1), para 663, p. 499]. See also *Carruth v. Imperial Chemical Industries*, (1937) 2 All ER 422 (HL).

While it is necessary that an explanatory statement should be annexed to the notice, in respect of any items of business, which are special, it is not necessary to include in it the text of the resolutions or draft of the resolution to be proposed at the meeting. See *Betts & Co. Ltd. v. Macnaghten*, (1910) 1 Ch 430; *Kalinga Tubes Ltd. v. Shanti Prasad Jain*, (1964) 1 Comp LJ 117 (Ori—DB). Where the directors report sent with the notice mentioned certain special business not referred to in the notice, the notice and the report together were held to be sufficient notice of the special business. *Boschoek Proprietary Co. Ltd. v. Fuke*, (1906) 1 Ch 148.

In *C. V. Raman v. T. S. Shivabasavaswamy*, (1950) 55 Mys HCR 107, it was held that the words: "to decide the question of subjecting the bank to voluntary liquidation," could not be taken to mean that a special resolution to that effect was going to be passed.

Notices are sometimes accompanied by circulars explaining the contents, the purport and the nature of the business to be transacted. The courts have adopted the view that all such papers including the notice should be read as one document. *Tiessen v. Henderson*, (1899) 1 Ch 861, 867; *Moorgate Mercantile Holdings Ltd., Re*, (1980) 1 All ER 40. In *Tiessen's* case, (*Supra*) it was emphasised that the notice of a meeting and accompanying circular must give sufficient information also from this angle that it will enable shareholders to decide whether they should attend the meeting or not. KEKEWICH J. Said [(1899) 1 Ch 861 at pp. 866-7]: "A shareholder may properly and prudently leave matters in which he takes no personal interest to the decision of the majority. But in that case he is content to be bound by the vote of the majority; because he knows the matter about

which the majority are to vote at the meeting. If he does not know that, he has not a fair chance of determining in his own interest whether he ought to attend the meeting, make further inquairies, or leave others to determine the matter for him, "See also *Young v. South African & Australian Exploration & Development Syndicate,* (1896) 2 Ch 268.

For example, in *Teede & Bishop Ltd., Re,* (1901) 70 LJ Ch 409 the notice stated that the purpose of the meeting was to consider the question of voluntary winding up with a view to a reconstruction. The shareholders who assembled adopted a resolution merely for voluntary winding up. That resolution was held to be ineffective because a shareholder might not have troubled himself to consider a reconstruction but could have gone to attend the meeting which was going to resolve upon the complete winding up of the company. Where the notice specified several separate resolutions, one of those being to wind up the company, and others (which were *ultra vires*) being concerned with the sale of the undertaking and consequent reorganisation, the winding up resolution was effective and others were void. *Thomson v. Henderson's Transvaal Estates Ltd.,* (1908) 1 Ch 765; *Willaire Systems plc. Re,* 1987 BCLC 67. It is, therefore, clear that if a particular resolution is to be effective only if some other proposed resolutions become effective, either they must be worded accordingly or they must be set out as a single resolution: and the notice must be drafted accordingly. A recent development in this connection has been to make it a duty of directors to give to shareholders such information as would enable them to make informed decisions about the matters to be brought before the meetings. *Residues Treatment & Trading Co. Ltd. v. Southern Resources Ltd.,* (1988) 14 ACLR 375 (Aust); *Darvall v. North Sydney Brick & Tile Co. Ltd.,* (1988) 14 ACLR 717 (Aust); *Gaxvic v. Axmith,* (1961) 31 DLR (2d) 65 (Canada). The earlier position was that only so much information would be sufficient as would enable shareholders to understand the gravity of the matter and not to prepare arguments for and against the matter.

Directors can go beyond mere giving information to shareholders and offer them positive advice to support resolutions sponsored by them and the expenses incurred in mobilising shareholders' support can be recouped from company funds provided that the power is exercised in good faith in the interest of the company and not merely for electioneering purposes. *Campbell v. Australian Mutual Provident Society,* (1908) 77 LJ PC 117 (PC); *Peel v. London & North Western Rly. Co.,* (1907) 1 Ch 5 (CA); *Gething v. Kilner,* (1972) 1 WLR 337; *Advance Bank of Australia Ltd. v. FAI Insurance Australia Ltd.,* (1987) 12 ACLR 118 (Aust). In *Dawson International plc. v. Coats Patrons plc.,* (1989) BCLC 233 (CS), LORD CULLEN said, at pp. 243, 244: 'If..... directors take it upon themselves to give advice to current shareholders, ... they have a duty to advise in good faith and not fraudulently, and not to mislead whether deliberately or carelessly. If they fail to do so the affected shareholders may have a remedy, including the recovery of what is truly the personal loss sustained by them as a result.'

Sometimes it becomes a part of their legal duty to inform the shareholders by means of a circular sent along with the notice of the proposed resolution explaining that the resolution is necessary to enable the company to perform its legal obligation. A case of this kind is to be found in *Northern Counties Securities v. Jackson & Steeple,* (1974) 2 All ER 625. Here an agreement was made by a company with other parties, the fulfilment of which required the company to pass a certain resolution. As the result of a litigation, the company was ordered by the court to perform the agreement, and the directors were ordered to recommend the shareholders to vote in favour of the resolution. Instead, they circulated to the shareholders' counsel's opinion, to the effect that the shareholders could vote as they wished. It was held that the meeting could not proceed since the circulars did not comply with undertakings given by the company to the court.

Disclosure of material facts

The objects of enacting section 173 is to secure that all facts which have a bearing on the question on which shareholders have to form their judgment are brought to the notice of the shareholders so that the shareholders can exercise an intelligent judgment. There-

fore, the material facts concerning the item of business to be transacted must be placed before the shareholders. The provisions contained in section 173 are mandatory and not directory and any disobedience of the provisions in that section must lead to the nullification of the action taken *Vardhaman Publishers Ltd. v. Mathrubhumi Printing and Publishing Co. Ltd.*, (1991) 71 Com Cases 1, 24 (Ker) **following** *Firestone Tyre and Rubber Co. v. Synthetics and Chemicals Ltd.*, (1971) 41 Com Cases 377 (Bom). The case of *Vardhman Publishers* (*Supra*) was **reversed** on appeal on other grounds in *Mathrubhumi Printing and Publishing Co. Ltd. v. Vardhaman Publishers Ltd.*, (1992) 73 Com Cases 80 (DB—Ker).

Where neither the notice nor the explanatory note disclosed material facts pertaining to a resolution, the resolution would be invalid and ineffective. But if a shareholder is aware of the facts he cannot reasonably complain of insufficiency of the notice or any irregularity. If he is present at meeting he must point out to the Chairman about the irregularity before the meeting proceeds with the agenda. *Kalinga Tubes Ltd. v. Shanti Prasad Jain*, (1964) 1 Comp LJ 117 (Ori—DB) **affirmed** by the Supreme Court in *Shanti Prasad Jain v. Kalinga Tubes Ltd.*, (1965) 35 Com Cases 351 (SC). See *Shailesh Harilal Shah v. Matushri Textiles Ltd.*, (1994) 2 Comp LJ 291 : (1995) 81 Com Cases 5 : AIR (1994) Bom 20; *Parshuram Dataram Shamdasani v. Tata Industrial Bank Ltd.*, AIR 1928 PC 180. See also *Maharani Lalitha v. Indian Motor Co.*, (1962) 32 Com Cases 207: AIR 1962 Cal 127 (DB) **followed** in *Hungerford Investment Trust Ltd. v. Turner Morrison & Co. Ltd.*, ILR (1972) 1 Cal 286. Material facts will not necessarily include the reasons. *Laljibhai C. Kapadia v. Lalji B. Desai*, (1973) 43 Com Cases 17. Also see *K. Meenakshi Amma v. Sree Rama Vilas Press and Publications Pvt. Ltd.*, (1992) 73 Com Cases 285 (Ker—DB). Where the explanation stated that the directors' fee would include a small percentage of the subsidiary's profits but did not disclose that it would be in the region of £45,000, it was held to be not a proper disclosure and the resolution was invalid. *Baillie v. Oriental Telephone Co.*, (1915) 1 Ch 503 (CA).

Only such material facts, *i.e.*, facts, which shareholders have a right to know and which are likely to influence their decision at the meeting need be included. Non-inclusion of facts not having a direct bearing on the matter to be considered at the meeting will not affect the validity or sufficiency of the notice. See *Sitaram Jaipuria v. Banvarilal Jaipuria*, AIR 1972 Cal 105 (DB). Where the proposal for shareholders approval was the sale of a unit of the company the court said that "the material facts could comprise of the reasons for the sale, whether sale would affect the interest of the company, to whom the sale is being effected, the consideration for the sale, how and by whom the consideration was assessed, whether the directors have any interest in the sale, whether all statutory clearances have been obtained, etc. These material facts, we feel, would enable the shareholders to decide on the issue." *Mendonca (B.A.) v. Philips (India) Ltd.*, (2000) 37 CLA 137 at 147 : 2000 CLC 1922 : (2000) 3 Comp LJ 129 : (2001) 106 Com Cases 526 (CLB—PB).

In this connection the view of the Supreme Court of U.S.A. in *T.S.C. Industries v. Northway*, (1976) 426 US 438 quoted in HAMILTON'S CORPORATIONS, 1979 Supplement page 24 may also be noted: "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." According to that Court while all facts which a reasonable shareholder might consider appropriate need not necessarily be material facts the standard that it was adopting was that 'under all circumstances the omitted fact would have assumed significance in the deliberations as regards his voting".

By 'material facts' is not meant the giving of elaborate reasons or detailed particulars as regards the items of business to be discussed, but only such essential facts as will give a clear idea of the nature of item. *Cf. Laljibhai Kapadia v. Lalji Desai*, (1973) 43 Com Cases 17. See also *Sitaram Jaipuria v. Banwarilal Jaipuria*, (*Supra*).

'Material facts' are facts which, by reason of their relevance and bearing, influence shareholders in making up their minds one way or the other as regards approving or not approving the motion proposed to be moved at the meeting, in respect of which the explanatory statement is annexed. The fact should be disclosed fairly and in a manner not to mislead the shareholders.

The pecuniary interest of a director in the subject-matter of a special resolution to be taken up for consideration of the meeting is a material fact. *Tiessen v. Henderson,* (1899) 1 Ch 861.

Where in respect of any item of business relating to an agreement or other transaction, a copy of the agreement or document disclosing the transaction is also sent along with the notice of the meeting it cannot be contended that the explanatory statement has not set out the material facts relating to that item of business. See *National Co. Ltd. v. Shaligram Jhajharia,* 1979 Tax LR 1629 (Cal—DB).

In the view of a learned Judge of the Calcutta High Court, as the subject-matters dealt with by the notice relate essentially to internal management, the provisions of the section cannot be considered to be mandatory in the sense that a breach thereof will necessarily have the effect of invalidating the meeting or the proceedings of the meeting. In considering the consequences of failure to comply with the requirements of the Section, the Court will have to consider the facts and circumstances of each case and be guided by the principles of justice. *Surajmull Nagarmull v. Shew Bhagwan Jalan,* ILR (1973) 1 Cal 207. This view cannot be said to be without force.

Supreme Court ban on sale of property—a material fact

The company was in liquidation. It was injuncted by the Supreme Court from alienating, charging or encumbering any of its immovable assets except with the leave of the Supreme Court. The resolution of the shareholders was needed under S. 293(1)(a) for disposing of the company's property. The explanatory statement sent to the shareholders alongwith the resolution did not mention the Supreme Court injunction. The resolution was held to be void. The agreement of sale made on the strength of such a resolution was equally void. Specific performance of such an agreement could not be ordered. A suit for compensation for the breach of the agreement was also not allowed. *Sunil Mills Ltd. v. Official Liquidator of Shri Ambica Mills Ltd.,* (1999) 1 Comp LJ 423 (Guj); *Y.S. Spinners Ltd. v. Official Liquidator of Shri Ambica Mills Ltd.,* (1999) 1 Comp LJ 442 : (2000) 100 Com Cases 547 (Guj).

Disclosures under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997

Where a special resolution is intended for allotment of shares in a manner which will come within the scope of the above regulations, for example, as here, allotment on preferential basis to promoters, disclosures prescribed by the SEBI Regulations, would also have to be made. A complaint about the inadequacy of such disclosures lies before the SEBI itself. The SEBI Act, 1992, provides in S. 15Y and S. 20A that Civil Courts would have no jurisdiction. In this case the main thrust of the plaintiff was that the notice in question calling an extraordinary general meeting was in violation of the guidelines issued by SEBI and a case was already pending before appellate tribunal on the same matter and in consequence thereof the jurisdiction of the other courts would have been barred but for the fact that the notice in question was questioned not only under SEBI Regulations but also because of non-compliance with the requirement of S. 173 of the Companies Act, 1956. But no relief was allowed by way of an injunction because the plaintiffs were holding the minimal number of shares and they had produced no material to show any decline in the value of the shares because of the new proposals while the loss to the company by reason of an injunction would have been irrepairable. *Goyal (M.R.) v. Usha International Ltd.,* (1998) 93 Com Cases 634 : (1998) 1 Comp LJ 58 : (1997) 27 CLA 187 (Del).

Explanatory statement regarding special resolution

Department's view.—Where a special resolution does not on the face of it, disclose all material facts relating thereto, the Registrars have been instructed to obtain, in exercise of the powers conferred on them by Section 234 copies of the statement prescribed by Section 173(2), and any other information necessary to see that the resolution is complete in accordance with the law. (*Press Note,* dated the 25th July, 1956).

Notice as to appointment of directors, etc.

In the case of additional directors appointed by the Board under section 260, in view of the fact that they hold office only up to the date of the next annual general meeting and not vacate their office at the meeting, it is clear that their office is held only as a temporary one and there is no question of filling any vacancy at the annual general meeting in their case; and the expression 'in the place of those retiring' cannot obviously apply to such directors. If they are to be appointed by the company in general meeting, the procedure laid down in section 257 will have to be followed. In such a case the business of appointing them afresh by the company at the annual general meeting will be 'special business' within the meaning of this section and the procedure prescribed for such business must be followed.

In the case, however, of persons appointed under section 262 by filling casual vacancies, as the vacancies related to the places of directors appointed by the company in general meeting, the re-appointments will only be ordinary business and not come under special business, as according to the wording of section 262 (2) the person appointed to fill a casual vacancy, would be in the same position as the person whose place he filled.

There is no provision of law that a director already co-opted should be shown in the notice of the annual general meeting to have been co-opted as against a particular vacancy, *Sriram (TR) v. K.M. Duraibabu,* (1994) 13 Corp LA 115, 122 (Mad—DB).

Where the notice set out that one of the purposes of the meeting was to elect directors and that one of the retiring directors was offering himself for reelection, it was held that the notice contained sufficient specification of the general nature of the business to bring it within the competence of the meeting to elect directors up to the number permitted by the articles and not merely to reelect the retiring director. *Choppington Collieries Ltd. v. Johnson,* (1944) 1 All ER 762 (CA).

Improper rejection of candidature and stay of meeting

The nomination of a candidate for directorship was brought to the company's office on the last day of the fourteenth day of the notice period. The company refused to accept it because the company's cash receiving hours closed at 3.30 p.m. whereas the notice was presented one minute late at 3.31 p.m. The court ruled that the rejection was improper under s. 257 because the section had not prescribed any timing for filing of the notice on the last day. One of the questions was the effect of the improper rejection on the validity of the meeting. The candidate obtained an injunction restraining the company from holding its AGM unless his candidature for directorship was accepted. The company appealed against the decision. It was held by a Division Bench of the Madras High Court that the decision of the single judge was to be rectified to this extent that the respondent would have to comply with the provision of section 257 if he wished to submit himself as a candidate for election. The order of the single judge gave the impression as if the company was directed to accept the candidature without complying with section 257. The Division Bench also observed that in a particular case it has to be decided according to the facts and circumstances whether the whole meeting would be stayed or whether the consideration of a particular item of business is to be stayed. *Oriental Benefit and Deposit Society Ltd. v. Bharat Kumar K. Shah,* (2001) 103 Com Cases 947 at 950 : (2001) 30 SCL 246 (Mad—DB).

Minor inaccuracy and conduct of shareholders

Where a meeting was called to cancel a share premium account and the court found that the circular on which resolutions for cancellation were based was inaccurate, the court said that it would be reluctant to confirm a resolution passed on the strength of an inaccurate circular. A heavy onus is placed on the company to show that any inaccuracy could not have influenced the minds of reasonable shareholders. On the facts the court found that the reasonable shareholders were not influenced by the inaccuracy and therefore confirmed the cancellation of the share premium account. *Re, European Home Products plc.*, 1988 BCLC 690 (Ch D).

In reference to the conduct of the shareholders the law has all along been as laid down by the Privy Council in *Parshuram Dattaram Shamdasani v. Tata Industrial Bank Ltd.*, AIR 1928 PC 180 that where a shareholder shows by his conduct that he was already aware of the special business to be transacted at the meeting he cannot question the validity of such business on the ground that the notice given to him was not sufficient. **Relied** upon by MISRA, J. of the Orissa High Court in *Kalinga Tube Ltd. v. Shanti Prasad Jain*, (1964) 1 Comp LJ 117 at 138 (Orissa)(DB).

Where the shareholders were already aware of the facts which required disclosure in the explanatory statement under S. 173, it was held that the meeting was not to be invalidated on this technical ground that no explanatory statement was sent with the notice of the meeting. On the facts, however, the court was of the view that such sufficient explanation was there with the notice as would satisfy the requirements of the section. The notice carried the narrative of the events of a defective appointment of a director, his resignation and his appointment as additional director and waiver of recovery of remuneration already paid. *C. R. Priyachandrakumar v. Puraswalkam Permanent Fund Ltd.*, (1995) 83 Com Cases 150 (Mad).

In a case before the Bombay High Court the notice carried the explanation that a special resolution of the shareholders was needed because the company might have surplus amounts which might have to be used for inter corporate loans beyond the prescribed limits. The complaint was that this information was too vague and tricky. The court held that there was no occasion for complaint because all the complaining shareholders were in touch with the reality of the situation. They were aware of the nature of the business. Their conduct in staying away from the meeting was further destructive of their *bona fides*. The court saw no reason to nullify the resolutions. *Shailesh Hari Lal Shah v. Matushree Textiles Ltd.*, AIR 1994 Bom 20.

Where fresh proxy forms were issued with the notice of adjourned meeting and the proxy forms filed at the original meeting were also used at the adjourned meeting, the court held this to be a permissible practice. The shareholders who were present at the meeting and participated in it, were not allowed to question the validity of the adjournment. *Kothari Industrial Corpn. Ltd. v. Maxwell Dyes and Chemicals P. Ltd.*, (1996) 85 Com Cases 79 (Mad), **affirmed** by Division Bench in *Maxwell Dyes and Chemicals P. Ltd. v. Kothari Industrial Corpn. Ltd.*, (1996) 85 Com Cases 111 (Mad—DB).

Where articles are sought to be altered

Where a special resolution is sought to be passed adopting a new set of articles in lieu of the existing articles, a question arises as to whether a copy of the entire set of new articles proposed to be adopted should be sent to every member or whether it will be sufficient if the notice explains the terms of the resolution. It would appear that, though a copy of the entire set of new articles need not be sent along with the notice, sufficient particulars must be furnished of any alteration of rights, duties and powers, substantial changes in the remuneration of directors, or other managerial personnel and other matters which ought properly to be brought to the notice of shareholders or are likely to affect the financial position of the company. It is not sufficient if the new set of articles are merely made available for inspection at the registered office. It will be a tricky device if there is mere offer of inspection at the registered office of the company, for few shareholders have ei-

ther the time or inclination to go to the registered office; and further the offer of inspection is illusory in the case of shareholders living in far away places as they will have to incur heavy expenses if they want to avail of the opportunity. *Cf. Shalagram Jhajharia v. National Co. Ltd.,* (1965) 35 Com Cases 706 (Cal). See also *Bimal Singh Kothari v. Muir Mills Co. Ltd.,* (1952) 22 Com Cases 248 : AIR 1952 Cal 645; *Nagappa Chettiar (N.V.R.) v. Madras Race Club,* (1949) 19 Com Cases 175 (Mad); *Narayanlal Bansilal v. Maneckji Petit Mfg. Co.,* AIR 1931 Bom 354 : (1931) 1 Com Cases 377 and Notes under Section 172 ante and see further: *Normandy v. Ind. Coope & Co.,* (1908) 1 Ch 84, 102; See also, *Grant v. United Kingdom Switchback Ry.,* (1888) 40 Ch D 135; *Southall v. British Mutual, etc., Soc.,* (1871) 6 Ch App 614.

Where articles were amended without giving with the notice an explanatory statement under s. 173 and a director was appointed on the basis of the amended article, the amendment and the appointment were both held to be void. *Balasundaram (V.G.) v. New Theatres Carnatic Talkies P. Ltd.,* (1993) 77 Com Cases 324 (Mad).

Director's interest in other companies [Sub-section (2)—proviso]

The shareholding interest to be set out in the statement is the aggregate shareholding interest of all the directors, etc., where it is not less than twenty per cent of the paid-up capital of the other company. The proviso should not be taken to mean that unless the individual shareholding interest of each of the directors or manager, etc., is twenty per cent or more, it need not be set out.

Director's concern or interest in the resolution

"Concern or interest" is not limited to the director's or manager's personal financial concern or interest only. It includes interest which may arise out of fiduciary relationship also. For a full discussion and review of the case law on the subject see *Firestone Tyre and Rubber Co. v. Synthetics & Chemicals Ltd.,* (1971) 41 Com Cases 377 (Bom). What is required is a full and frank disclosure without reservation or suppression, as, for instance, where a son or daughter or father or mother or brother or sister is concerned in any contract or matter, the shareholders ought fairly to be informed of it and the material facts disclosed to them. A restricted narrow interpretation will defeat the purpose of the explanatory note.

In the *Firestone* case cited above in reference to appointment of sole-selling agents the CLB had pointed out to the company that certain aspects of the appointment were prejudicial and that the same should be kept in mind while renewing the appointment for a fresh term. It thus became the duty of the directors to disclose the views of the CLB to the shareholders in the notice for the meeting at which the approval of the shareholders was sought for the extension of the period. The CLB views would have had a very material impact upon the shareholders in formulating their opinion one way or the other. Since this vital information was not conveyed with the notice it could not be said in the present case that the shareholders were given a full and fair opportunity to examine the resolution properly and therefore the resolution fell in the category of what has been described by LINDLEY MR as resolution obtained by trick in *Kaye v. Croydon Tramways Co.,* (1898) 1 Ch 358.

When a contract in which the directors are personally interested is to be considered at a meeting, the notice should give particulars as to such interest of the directors. *Kaye v. Croydon Tramways Co.,* (1898) 1 Ch 358; *Tiessen v. Henderson, (Supra); Baillie v. Oriental Telephone & Electric Co. Ltd.,* (1915) 1 Ch 503 (CA). In *Pacific Coast Coal Mines Ltd v. Arbuthnot,* (1971) AC 607 (PC), certain shareholders and directors entered into an agreement between themselves and the company under which an action against the directors was dismissed, certain shares were exchanged for debentures, and the capital of the company was reduced. The agreement was approved at a shareholders' meeting, but the notice convening the meeting did not state the effect of the agreement. Four years later, certain shareholders claimed that the issue of debentures was invalid. The HOUSE

OF LORDS held that the resolution approving the agreement was ineffective owing to the absence of notice of the contents of the agreement.

In *Baillie v. Oriental Telephone & Electric Co. Ltd.*, (*supra*) it was held that in such circumstances a notice would not be effective unless it 'substantially put the shareholders in the position to know what they were voting about'. Fullness and frankness in the resolution are important in situations of possible conflict of interest. In this case the facts were: An extraordinary general meeting was convened to pass special resolutions authorising directors of a company to retain remuneration received by them as directors of a subsidiary. Neither the notice nor an accompanying circular stated the amount involved—£51,976 between the years 1907 and 1914— although the circular stated the basis on which the remuneration was calculated. The resolutions were set aside as invalid.

It is not enough merely to refer to "special business" without giving some indication of the matters to be transacted. *Wills v. Murray*, (1850) 4 Ex Reps 843. In brief, the company should give a clear explanation of important proposals which are placed before shareholders, and in return it is entitled to expect that shareholders will approach matters as practical men of business and that they know the relevant law. *Cf.* SHACKLETON ON THE LAW AND PRACTICE OF MEETINGS, 122 (8th Edn., 1991): p. 130 (9th Edn., 1997).

Explanatory statement to be annexed to notice

Department's Clarification of scope of sub-section (2) and proviso.—Where any items of special business are to be transacted at the annual general meeting or any other meeting, an explanatory statement setting out the material facts concerning each such item of business, including in particular the nature of the concern or interest, if any, therein of every director, etc., shall be attached to the notice of the meeting. The proviso to s. 173(2) further provides that the explanatory statement must disclose the shareholding interest of any director, etc., in any other company where the special business to be transacted relates to or affects such other company and the interest of the director, etc., in that company is not less than 20% of its paid-up capital.

The Department has recently come across several cases where the letter and the spirit of law in this regard have not been substantially complied with by several company managements. In some cases, the Department found that important material facts relating to the appointment of sole selling agents under s. 294 of the Companies Act such as the nature of services to be rendered by the sole selling agents to the company, the rate of commission or other remuneration to be paid to the sole selling agents, etc., were not set out in the respective explanatory statements attached to the notices of the meetings. It was also noticed in certain other cases that the management did not include in the explanatory note a summary of the important material facts but, instead, had indicated in the explanatory note that the material documents in question were available for inspection at the registered offices of the companies concerned.

The Department is of the view that apart from the practices vitiating in certain circumstances, the validity of the resolutions passed, the sending of a notice which does not give a sufficiently full disclosure of the important facts relating to resolutions to be voted upon by shareholders cannot be said to conform to good company practice.

It is hardly necessary to emphasize that notices for general meetings which are not accompanied by proper explanatory statements defeat the very purpose for which such statements were prescribed by law; nor can it be said that such purpose is served by the opportunity afforded to shareholder for inspection of the material documents at the registered office of the company especially where a large body of shareholders may reside at great distance from the registered office. (*Circular No.* F. 12(59)—CL-VI/63, dated 17-10-1963).

Explanatory statement and requisitioned meeting

Section 173(2) of the Companies Act, 1956 does not require the shareholder requisitioning a meeting to disclose the reasons for the resolutions which he proposes to move at the meeting. *Life Insurance Corporation of India v. Escorts Ltd.*, (1966) 59 Com Cases 548 : AIR 1986 SC 1370. **Following** the Supreme Court decision, the Madras High Court laid down as follows: "It is clear that the obligation to annex explanatory statement to the notice of the meeting is only on the company when it calls for a meeting to transact special business. When requisitionists call for an extraordinary general meeting under section 169 there is no obligation on the requisitionists to annexe an explanatory statement to the notice of the meeting. There is no warrant for imposing such an obligation on the

requisitionists. Therefore, there is no merit in the contention that the requisition notice and the notice of the meeting were bad and that they contravene the provisions of the Companies Act." *S. Vardarajan v. Venkateswara Solvent Extraction P. Ltd.*, (1994) 80 Com Cases 693 (Mad).

Where the notice for a requisitioned meeting proposed the removal of existing directors and their replacement by a set of new directors, the court said that the directors were not bound to call a meeting on the basis of such an agenda which failed to identify which persons were to be elected as directors, what would be the exact size of the new board or which members of the old board were to be removed. An omnibus resolution in the form as proposed would lack the necessary specificity to constitute the subject-matter of a valid resolution. It would be an invalid resolution if it was put and passed at an extra-ordinary general meeting. *Rose v. Mc Givern*, (1998) 2 BCLC 593 (Ch D).

§ For a full treatment of the case see notes under S. 169.

Explanatory statement to set out material facts of each item of special business

Department's Clarification.—In case of a resolution relating to the appointment of a Managing or whole-time director, important material facts to the proposed resolution should be discussed in the explanatory statements. For example: The remuneration payable, academic/technical qualifications and business experience should be disclosed in the notice and a mere reference to a document which may be available for inspection at registered office, may not be a due compliance with the requirements of the section.

The Department has issued the following detailed circular in this regard: "Notwithstanding the Department of Company Law Administration's circular letter No. F. 12(59)-CL-VI/63, dated 17th October, 1963, [*printed above*] the Board has again come across some instances where the letter and spirit of law in regard to the proper compliance of the provision of Section 173(2) which provide that where any items of special business are to be transacted at the annual general meeting or any other meeting, an explanatory statement setting out the *material facts* concerning each such item of business, shall be attached to the notice of the meeting, have not been observed by the company managements.

"It has been noticed that important material facts such as those relating to the quantum of remuneration payable, academic/technical qualifications and business experience of the proposed appointee, the necessity of his appointment, etc., were not set out in the respective explanatory statements attached to the notices of the meetings at which the appointments of managing/whole-time/technical directors or payment of remuneration to them were to be considered. It has also been noticed in some cases that instead of disclosing the details of the quantum of remuneration payable in the explanatory statement itself, the latter merely indicated that relevant documents/agreements relating to the appointments and/or remuneration were available for inspection at the registered office of the companies concerned.

"The Company Law Board is of the view that such explanatory statements which do not give a sufficiently full disclosure of the important facts, material to the proposed resolution cannot be said to conform to the provisions of the law and are in any case contrary to good company practice. It is hardly necessary to emphasize that notices for general meetings which are not accompanied by proper explanatory statements defeat the very purpose for which such statements were prescribed by law". (*Circular No.* 1(38)-CL-VI/65, dated 21-10-1965).

Requirements of Explanatory Statement under SEBI Regulations/Guidelines

Certain business transactions require disclosure of specific particulars in the related explanatory statements.

Buy-back of securities.—For buy-back of securities under section 77A, see section 77A and Schedule I to SEBI (Buy-back of Securities) Regulations, 1998 (*Appendix* 176) and Schedule I to "Private Limited Company and Unlisted Public Limited Company (Buy-back of Securities) Rules, 1999 (*Appendix* 12).

Issue of sweat equity shares.—For issue of sweat equity shares under section 79A, see section 79A(1)(b) and Schedule to SEBI (Issue of Sweat Equity) Regulations, 2002 (*Appendix* 175) and Rule 4(1) of Unlisted Companies (Issue of Sweat Equity Shares) Rules, 2003 (*Appendix* 45).

Employees Stock Option/Stock Purchase Scheme.—For issue of securities under ESOS, see para 6.2 of SEBI (ESODS & ESPS) Guidelines, 1999 (*Appendix* 174). For issue of

shares under ESPS, see para 17.2 of the said Guidelines as to the contents of the relevant explanatory statements.

Preferential issue of shares.—For the disclosure to be made in the explanatory statement relating to preferential issue of shares under section 81A, see Chapter XIII of SEBI Guidelines, 2000 and Unlisted Public Companies (Preferential Allotment Rules, 2003 (*Appendix* 45).

Private companies: Requirement as to explanatory note to be annexed

A private company can adopt its own regulations over the matters covered by the section. In a case before the Kerala High Court the articles of a private company provided about the period of notice and the matters to be specified. It was held that this being a specific provision, only this was applicable to the conduct of a special business at the meeting. On the facts also there was no irregularity. The notice contained all the material facts about the business to be transacted at the meeting, namely, the election of the managing director and directors, the order to convene the meeting was passed after hearing all the parties and approved by the court and the meeting was convened by the chairman appointed by the court and not by the company. The meeting could not be called in question for want of proper notice. *Sree Rama Vilas Press and Publications P. Ltd., Re,* (1992) 73 Com Cases 275 (Ker); **affirmed** in *K. Meenakshi Amma v. Sree Rama Vilas Press and Publications P. Ltd.,* (1992) 73 Com Cases 285 (Ker—DB).

Modification in relation to class meetings etc.—Refer to Annexures B, C and D of the Companies (Central Govt.'s) General Rules and Form 1956, (See *Appendix* 1) regarding modification of this section in applicability to meetings of a class of shareholders, meetings of debenture-holders, and meetings of a class of debenture-holders.

Secretarial Practice Notes.—See Practice Notes under section 172.

S. 174. Quorum for meeting.—(1) Unless the articles of the company provide for a larger number, five members personally present in the case of [1][public company (other than a public company which has become such by virtue of section 43-A*), and two members personally present in the case of any other company,] shall be the quorum for a meeting of the company.

(2) Unless the articles of the company otherwise provide, the provisions of sub-sections (3), (4) and (5) shall apply with respect to the meetings of a public or private company.

(3) If within half an hour from the time appointed for holding a meeting of the company, a quorum is not present, the meeting, if called upon the requisition of members, shall stand dissolved.

(4) In any other case, the meeting shall stand adjourned to the same day in the next week, at the same time and place, or to such other day and at such other time and place as the Board may determine.

(5) If at the adjourned meeting also, a quorum is not present within half an hour from the time appointed for holding the meeting, the members present shall be a quorum.

NOTES

Previous Act : Regn. 51 of Table A

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1. Subs. by Act 31 of 1965, s. 18 for certain words (w.e.f. 15-10-1965).

* S. 43A Inoperative.—The concept of deemed public companies [S. 43-A Companies] has been abolished by the Companies Amendment Act, 2000 (53 of 2000), s. 12 (w.e.f. 13-12-2000).

Companies (Amendment) Act, 1965

Sub-section (1) was amended by Amendment Act, 1965 for the following reasons:

This clause seeks to remove a practical difficulty in respect of section 43A public companies where there may be less than five members. It is, therefore, proposed to modify section 174 and provide for two members to form a quorum. (*Clause* 19 of the Bill).

Requirements as to quorum

"Quorum" means the minimum number of persons required to be present at a meeting for transacting corporate business. In the absence of a quorum the proceedings of the meeting will be a nullity.

The provision contained in this section may be overridden by the articles of a company to the extent of providing a larger quorum. No company can provide a smaller quorum. For purposes of quorum, only members present in person can be counted and not proxies, nor can a company by its articles or otherwise provide for proxies being counted for purposes of quorum.

As regards sub-sections (3), (4) and (5) a company may make provisions in its own articles in variance with them.

Where the total number of members of a company becomes reduced below the quorum fixed for a meeting, it would appear that the rule as to quorum will be satisfied, if all the members of the company, though less than the quorum fixed under the articles, are present (*Cf.* PALMER'S COMPANY LAW, Para 56-03 (24th Edn., 1987 : para 7.605, 25th Edn., 1992); *Re, Express Engineering Works,* (1920) 1 Ch 466; *Re, Oxted Motor Co. Ltd.,* (1921) 3 KB 32.

If no quorum is present, then there is no meeting and the proceedings are invalid. *Re, Romford Canal Co.,* (1883) 24 Ch D 85; *Traco Enterprises Ltd. v. Alexander,* AIR 1964 Ker 273; *Cambrian, etc. Co., Re,* (1875) 31 LT 773.

Shareholders special agreement as to quorum

Where the shareholders agreement signed by all the shareholders classified the shares giving special rights, it was held that such an agreement must be taken to have the same effect as if the special rights have been set out as class rights in the articles. One of the special provisions was that a meeting of shareholders could not be quorate unless a B shareholder or his proxy was present. There were only three shareholders. Of them, two were holding a majority and all the B shares (minority) were held by the third shareholder. The proposal was to remove him from directorship but a meeting without his presence was not possible. The two shareholders constituting majority applied to the court for an order summoning a meeting and to validate it without the presence of B. An appeal against this order was allowed. The Court of Appeal said that quorum provisions with respect to B shares constituted a class right designed to protect B so that he could not be removed from office as a director of the company. The provision relating to calling of meetings by court was never intended to have the effect of overriding a class right. *Harman v. BML Group Ltd.,* (1994) 2 BCLC 674 (CA). The court **distinguished** it from *El. Sombrero Ltd., Re,* (1958) 3 All ER 1: (1958) 28 Com Cases 619 (Ch D) because in that case the decision was that a provision in the articles as to a general minimum quorum of members did not have the effect of creating special class rights and therefore this could be overridden by court order so as to validate a meeting without the requisite quorum.

Presence of quorum at the time of decision

It must be a "quorum of effective members, *i.e.*, members qualified to take part in and to decide upon questions brought before the meeting" and such a quorum must be present when such questions are being decided; merely being present at the beginning of a meeting is not sufficient. *Henderson v. Lontit & Co. Ltd.,* (1894) 21 Rettie 674 : 31 Scottish Law Reports 555, quoted in STROUD'S JUDICIAL DICTIONARY 3rd Edn., Vol. 3, page 2430. But it has been held in *Re, Hartly Baird Ltd.,* (1954) 3 All ER 695 : (1955) 25 Com

Cases 386 (Ch D) that the quorum required is the quorum to be present at the time of beginning to consider the business; and it need not be present throughout or at the time of taking the vote on any resolution. See also Regulation 49 in Table A which requires the quorum to be present at the time when the meeting proceeds to do business.

In *Re, London Flats Ltd.,* (1969) 2 All ER 744 (Ch D) : (1970) 1 Comp LJ 28. PLOWMAN J., held that where at the time of transacting business, the number of members is less than the quorum fixed for the meeting, the business cannot be transacted; it will be a nullity. In this case one of two shareholders called a meeting to appoint a liquidator. One of the shareholders proposed himself as liquidator. The other left the room in protest before a vote, and reduced the meeting to a position where only one member was present, although a quorum of two was prescribed in the articles. The remaining shareholder then appointed himself as liquidator. The appointment was a nullity. "Should it be the law that minority shareholders, realising that they cannot defeat a resolution by the constitutional process of voting against it, should be able to frustrate the wishes of the majority by walking out of the meeting?" [*Editors Note*—1969 JBL].

In the AMERICAN ENCYCLOPAEDIC DICTIONARY OF BUSINESS (Prentice Hall : New York), at page 520, the view expressed is as follows:— "A quorum must be present not only to begin a meeting, but to transact business. Thus, if, during the meeting a number of stockholders depart, leaving less than a quorum present the meeting must be discontinued by adjournment. However, if a meeting is once organised and all the parties have participated, no person or faction, by withdrawing capriciously and for the sole purpose of breaking the quorum, can render the subsequent proceedings invalid". If any shareholders withdraw for the purpose of breaking a quorum, because of whim, caprice, chagrin or other *mala fide* motives, the proceedings of the meeting will not be vitiated for want of quorum.

This appears to be the correct view to follow.

Non-members' presence.—The presence of non-members at a meeting will not by itself invalidate a meeting unless they have taken part in the proceedings, *Carruth v. Imperial Chemical Industries Ltd.,* 1937 AC 707 : (1938) 8 Com Cases 181 (HL); *Quin v. National Society,* (1921) 2 Ch 318.

Position of director who is not shareholder

A director who is not a member of a company cannot propose or second a resolution and his presence cannot be counted for the purpose of quorum. He can, however, be present at the meeting and with the permission of the chairman, he can speak on specific matters.

Presumption as to quorum

A quorum will always be presumed, unless it is questioned at the meeting or the records show that a quorum was not, in fact, present.

Third parties not affected for want of quorum

If there be any irregularity as to quorum, third parties without notice will not be affected. *County of Gloucester Bank v. Rudry Merthyr Steam & House Coal Colliery Co.,* (1895) 1 Ch 629.

Representatives of corporate bodies, trusts and others as quorum

The representative of a body corporate appointed under section 187 or the representative of the President or a Governor of a State under section 187-A is a member personally 'present' for purposes of counting a quorum. *Re, Kelantan Coconut Estates Ltd.,* 1920 WN 274. And if two or more corporate bodies who are members of a company are represented by a single individual, each of the bodies corporate will be treated as personally present through that individual representing it. If, for instance, he represents three corporate bodies, his presence will be counted as three members being present in person for purpose of quorum. *Macleod (Neil) & Sons Ltd., Petitioners,* 1967 Scottish Law Times

46. This also appears to be reasonable, since the purpose of prescribing a minimum quorum is to have the benefit of a required minimum for deliberations. For this purpose, a person representing two different bodies is supposed to act in accordance with the instructions of his principals, and, therefore, he theoretically carries with him two sets of opinions on the resolutions.

The representative may be selected by the Board of directors or where the company is in winding up, by its liquidator. *Hillman v. Crystal Bowl Amusements Ltd.,* (1973) 1 All ER 379 (CA).

A foreign company, though not a company under the Indian Companies Act, holding shares in an Indian company, can also make use of the provision by authorising a representative to attend meetings.

A person so appointed can exercise the same powers as that corporation whom he represents could exercise if it were an individual shareholder. This includes the power to speak at the meeting and to vote on a show of hands and on a poll. He is entitled to only one vote on a show of hands even if he acts in the dual capacity of a member and a corporation representative. *Kelantan Coconut Estates Ltd., Re, (Supra).*

Whether such a person has to attend the meeting in person or he can appoint a proxy, will depend upon the terms and scope of authority given to him.

Where one of the two persons required to be present in person for a quorum was absent in America and was represented by her attorney, it was held that a quorum was not present. *Harris Ltd., Re,* 1956 SC 207 (Scott). Also see *Re, Bowling & Welby's Contract,* (1895) 1 Ch 663.

A company's articles provided that two or more members present in person or by proxy should form a quorum. One member was personally present and, in addition to his personal ownership, he acted for two trusts of which he was the first named trustee and also held a proxy for another shareholder. He formally moved the resolution and thereafter, as proxy for another member, seconded the motion, it was *held,* there was no quorum, *Prain & Sons Ltd., Re,* 1947 SC 325 (Scotland). See also *Re, Sanitary Carbon Co.,* (1877) WN 223.

On the other hand, in a case where the articles required three members to be personally present as a quorum and two persons attended the meeting, one as an individual member and also as a trustee, it was held that as this person attended in a dual capacity a quorum was present, *McLeod (Neil) & Sons, (Supra).*

Note the observations on these Scottish cases in SHACKELTON'S ON THE LAW AND PRACTICE OF MEETINGS, 143 (9th Edn. 1997): The above cases are not easy to reconcile; the meeting in Prain's case probably failed to attain validity because it was in effect a meeting of one person and hence, in principle, incapable of existence, whereas in *McLeod's* case this objection could not apply as two people were physically present. In *Prain's* case, LORD MONCRIEFF thought that "a meeting at which only one member is present to play multiple parts may be thought to be nothing other than a pantomime."

Joint holders and Quorum

Even if the articles do not make any specific provisions, any joint holder present at a meeting will be entitled to exercise voting power and will be counted for quorum. But only one of the several joint holders will be entitled to exercise voting power. For the purposes of the quorum, joint shareholders will be collectively regarded as one shareholder.

There is, however, an Australian ruling which has been cited by the Punjab High Court in *Jarnail Singh v. Bakshi Singh,* (1960) 30 Com Cases 192 : AIR 1960 Punjab 455. Where TEKCHAND J. said [at p. 196]: "Our attention has also been drawn to an Australian case *Transcontinental Hotel Ltd., In re,* 1947 SASR 49, referred to in Volume I of PALMER'S COMPANY PRECEDENTS, p. 488 (17th edn.) in the footnote. In that case the

articles of association of a limited company required that a quorum of two members should be personally present at a meeting of the company to pass a special resolution. It was held that the presence of two persons who were registered as joint holders was a sufficient compliance with the articles of association. In other words, for purposes of quorum, two joint holders were treated as two members of the company. See also HORSLEY'S MEETINGS, para 2005, page 200 [2nd Edn. 1983 by W. JOHN TAGGART].

§ See also Notes under s. 41.

Quorum and single member meeting

The word "meeting" literally means a coming together of two or more persons and generally more than one person will be necessary to constitute a meeting, *MacLeod (Neil) & Sons Ltd.*, 1967 SC 16, 21 (Scot). There may, however, be cases where the constitution of a company may be such as, for instance, where one person holds all the equity shares, or all the preference shares so that there can be no meeting of more than one voting shareholder or one member of a particular class of shares. In such cases, it must be presumed that the Act contemplates positions where a meeting of two or more persons will not be possible in the strict sense and the word "meeting" must be taken to have been used in the sense of a function which can be performed by one person also as effectively as by two or more. *East v. Bennet Bros. Ltd.*, (1911) 1 Ch 163; see also *London Flats, Re,* (1969) 2 All ER 744 (Ch D). *State of Kerala v. West Coast Planters Agencies Ltd.*, (1958) 28 Com Cases 13 : AIR 1958 Ker 41. A single member even though he may hold many proxies does not constitute a meeting, except when otherwise provided in the Act as in S. 167(1) *Explanation* and section 186(1) *Explanation*. See *Daimler Co. v. Continental Tyre & Rubber Co. Ltd.*, (1916) 2 AC 307.

Apart from the exceptional cases, the common law of meeting is that there shall be at least two persons to constitute a meeting and that a single member cannot do so. *Sharp v. Dawes,* (1876) 2 QBD 26 (CA); **followed** in *London Flats Ltd., Re,* (1969) 2 All ER 744. The use of the expression 'members' also shows that more than one member is expected to be present. One individual alone does not constitute a meeting even if he represents two or more members, for example, by being both a member and a proxy for another member. *Re, Sanitary Carbon Co.,* (1877) WN 223; *Re, N.J. Shanley Contracting Ltd.,* (1979) 124 SJ 239 or by being a member both in his own right and as trustee for another. *James Prain & Sons Ltd., petitioners,* 1947 SC 325. Where the factual position was that only one member attended, the meeting was held to be not validly constituted though the company's minutes book showed that another member was also present but that other member had denied it and the records showed that he had no notice of the meeting nor any presumption of notice was applicable. *Bhankerpur Simbhaoli Beverages P. Ltd. v. Sarabhjit Singh,* (1996) 86 Com Cases 842 (P&H). Therefore, a single member cannot generally constitute a meeting except in special circumstances as described above or where there is an express statutory provision.

The views of the Department on this issue are also that a single person cannot by himself constitute a quorum at the adjourned AGM. [*Letter No.* 8/16(1)/61-PR, dated 19-5-1961].

The decision in *L. Opera Photographic Ltd., Re,* 1989 BCLC 763 (Ch D) : (1989) 1 WLR 634, is another example of a situation in which the presence of a single member can constitute a valid meeting. A company had an issued share capital of 100 shares, 51 were held by the applicant and 49 by the respondent. The articles provided that a necessary quorum for a meeting of the directors or the shareholders was two. The applicant and the respondent fell out and the applicant summoned a meeting to remove the respondent from office as director, and since the respondent did not attend, the meeting could not be held because of lack of quorum. The applicant sought an order that the court [*here in India it would be CLB*] make an order convening a meeting of the company at which one member shall constitute a quorum for the purpose of considering a resolution that the respondent be removed from office as director. The court granted the order. The court

said that the quorum requirements in the company's articles of association could not be treated as conferring on the respondent a form of veto to prevent the holding of shareholders' meeting to consider removing him from office of director. Accordingly since the applicant had a majority of the shares and possessed a statutory right to remove the respondent from office, but it was impracticable to hold a meeting because of the quorum requirements, the court would make the order sought.

In a two member-two director company, where one was refusing to attend and the business could not be done, the court ordered a meeting to be called for the purpose of appointing new directors with a single member attending the meeting. *Sticky Fingers Restaurant Ltd., Re,* 1992 BCLC 84 (Ch D). A similar order was sought in *Woven Rugs Ltd. Re,* (2002) 1 BCLC 324 (Ch D). A new company was created by the parties through which they wanted to transact the loan transaction with a bank for making new premises. A meeting of the new company became necessary for appointing an additional director. It could not be held because one of the directors refused to attend. The articles prescribed a quorum of two. A notice for requisitional meeting was served, the agenda being to remove the defaulting director and to appoint a new director. Even this process could not mature into a meeting. An application was then made to the court for an order calling the meeting and for holding it with only one member present. The court found no proof of any agreement that there would be no removal of a member from directorship. It could not, therefore, be said that exclusion from Board would not be fair. The claimant was entitled to the order sought for enforcing his rights as a member.

It is observed in PALMER that the provisions relating to quorum do not constitute a minority right. They do not enable the minority by absenting themselves from the meetings permanently to frustrate the wishes of the majority. If in these circumstances, it is unlikely that a quorum will ever be reached, an application may be made to the court for an order that a meeting should be convened and one member present in person or by proxy should constitute a quorum. PALMER'S COMPANY LAW 844, (para 56.03, 24th Edn., 1987: para 7.605, 25th Edn., 1992); *HR Paul & Son Ltd.,* (1973) 118 SJ 166. Also see *El Sombrero Ltd.,* (1958) Ch 900; *Re, Opera Photographic Ltd.,* (1989) BCLC 763.

§ Also see Notes under section 167 under the heading 'One member constituting a meeting' and under S. 186 under heading 'Single member constituting a meeting'.

Quorum of members entitled to vote [Sub-section (1)]

The quorum of five members personally present in the case of a public company and two members in the case of a private company means a quorum of members entitled to vote in respect of the items of business on the agenda of the meeting. As members who hold only preference shares are under the Act entitled only to vote in respect of matters affecting such shares as per section 87, they cannot be treated as members for a quorum at any general meeting in regard to items of business in respect of which they have no voting right under the Act. *Henderson v. Lonttit & Co. Ltd.,* (1894) 21 Rettie 674 : 31 Scottish Law Reports 555; *Young v. South African etc.,* (1896) 2 Ch 268.

Preference shareholders, when counted for quorum

Department's view.—Preference shareholders cannot, therefore, be counted as members for determining quorum except in respect of items of business, if any, where they have right to vote under the Act. The Department of Company Affairs also holds a similar view (*Company News & Notes,* June 16, 1964 issue). The text of the Circular is: "If business proposed to be transacted at a general meeting does not include any item or resolution proposed to be passed, which directly affects the rights of the preference shareholders, their presence should not be taken into account for purposes of determining the quorum but where the subject-matter includes any resolution in which the rights of preference shareholders are directly affected, their presence should be taken into account for the purpose of the quorum." (*Company News & Notes,* dated 16-6-1964).

Adjourned for want of quorum [Sub-section (4)]

The words 'to such other day and such other time and place as the directors may determine' do not give discretion to the directors to fix time and place, so far as the annual

general meeting is concerned, in any manner contrary to the provisions of sub-section (2) of section 166.

Where the directors do not exercise their discretion and the provision as to automatic adjournment to the next week takes force, the court cannot interfere in the matter even in the exercise of its inherent powers. *Ashok Mathew Zacharia (Dr.) v. Majestic Kuries & Loans (P.) Ltd.,* (1987) 62 Com Cases 865 (Ker). If at the reassembled meeting also the quorum is not present, then according to this sub-section as many members as are actually present shall constitute the quorum. It would seem that in the light of *Daimler Co. Ltd. v. Continental Tyre and Rubber Co. (Great Britain),* (1916) 2 AC 307, 325, it is sufficient if at the adjourned meeting one member is present in person and one by proxy. It would appear, as a matter of construction, that under such a provision two members present by proxy would constitute a meeting, and that even one member may be sufficient for this purpose, since, the plural "members" includes the singular "member". *Jarvis Motors (Harrow) Ltd. v. Carabott,* (1964) 3 All ER 89 : (1964) 34 Com Cases 921.

Though the meeting is bound to wait for half an hour, it may at its choice wait longer and proceed with business when the quorum is complete. There would be nothing wrong in it. Where the chairman came later than half an hour and called the meeting to order and the quorum was complete on his arrival, the court said that there was no infirmity in the meeting. *Janaki Printers P. Ltd. v. Nadar Press Ltd.,* (2000) 36 CLA 357 : (2001) 103 Com Cases 546 : (2000) 3 CLJ 285 (CLB—PB).

This sub-section applies only to meetings which are adjourned for want of quorum and not to meetings adjourned under S. 256(4). *Cardamom Marketing Co. (Travancore) Ltd. v. N. Krishna Iyer,* (1982) 52 Com Cases 299 (Ker—DB).

An adjourned meeting under sub-section (4) is merely a continuation of the original meeting. *Scadding v. Lorant,* (1851) 3 HLC 418; *McLaren v. Thomson,* (1917) 2 Ch 261. Therefore no notice is necessary. But if the Board of directors fix another date for the adjourned general meeting, a notice is to be given to the members in accordance with the provisions of the Act governing notices of general meetings. [*Department's File No.* 8/16/(1)/61-PR].

Modification in relation to class meetings, etc.—Refer to Annexures B, C and D of the Companies (Central Govt.'s) General Rules and Forms 1956, regarding modification of this section in applicability to meetings of a class of shareholders, meetings of debenture-holders, and meetings of a class of debenture-holders.

Note that in case of a meeting of a class of shareholders of a public company, (Annexure-B), presence by proxy is also to be counted for the purposes of quorum.

Model regulations as per Table A.—For model regulations in Articles of Association pertaining to this section, see Regulation 49 of Table-A and the Notes thereunder. Notice the words "at the time when the meeting proceeds to business" and their interpretation above. For a company limited by guarantee and not having share capital, see Regulations 6 and 7 of Table-C.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of maintenance of registers. The relevant paragraph 1 of the Form prescribed under Rule 3 of the Companies (Compliance Certificate) Rules, 2001 states :

"Paragraph 1.— **The company has kept and maintained all registers as stated in Annexure "A' to this certificate, as per the provisions and the rules made thereunder and all entries therein have been duly recorded."**

Register of Shareholders' Attendance [*Item (c) of 'Other Registers*]

Prescribed Check List

The register is optional register and should be maintained as good secretarial practice. However, if the register is not maintained, the CSP should not qualify his certificate.

Check whether the company has maintained a register of shareholders' attendance at the general meetings or has kept the attendance slips collected from the members at the meeting.

For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38. For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

Secretarial Standards on General Meetings issued by the Council of ICSI (SS-2)

These Standards seek to prescribe a set of principles for the convening and conduct of General Meetings and matters relating thereto. In the initial years, adherence by a company to the Secretarial Standards will be recommendatory. These principles may not be applicable to any meetings convened on the directions of the Court or CLB or other authority, unless the directions themselves so prescribe.

Secretarial Standard [Para 3]

3. Quorum

Quorum should be present throughout the Meeting.

A minimum of five Members personally present and entitled to vote, in the case of a public company, and two Members personally present and entitled to vote, in the case of a private company, shall be the Quorum for a General Meeting. Where the requirements for Quorum as prescribed in the Articles are more stringent, the Quorum should conform to such requirements.

A Meeting must be constituted of at least two individuals present in person. The quorum requirement of five Members in the case of a public company will be fulfilled where a person acting as an authorized representative of five bodies corporate is present in the Meeting along with another Member personally present.

Since Members need to be personally present at a Meeting to constitute the quorum, Proxies are to be excluded for determining the Quorum. However, a duly authorized representative of a body corporate or the representative of the President of India or the Governor of a State is deemed to be a Member personally present and enjoys all the rights of a Member present in person.

§ For full text of the Secretarial Standard, see *Appendix* 311.

S. 175. Chairman of meeting.—(1) Unless the articles of the company otherwise provide, the members personally present at the meeting shall elect one of themselves to be the chairman thereof on a show of hands.

(2) If a poll is demanded on the election of the chairman, it shall be taken forthwith in accordance with the provisions of this Act, the chairman elected on a show of hands exercising all the powers of the chairman under the said provisions.

(3) If some other person is elected chairman as a result of the poll, he shall be chairman for the rest of the meeting.

NOTES

Appointment and Election of Chairman

In the absence of any provision in the articles of a company as regards the election of a chairman of its general meetings, the common law rule is that the candidate for the office of chairman should not preside over the election: and where an outgoing chairman seeks

Where a notice was given by directors in response to a requisition, the notice being otherwise valid, it was held that the mere fact that the notice did not mention the date on which the requisition was received was not a ground for setting aside the notice. It would be too technical a matter. One cannot imagine before hand all possible technical grounds. *Topandas Mohanlal Advani v. Yeotmal Electric Supply Company,* (1940) 10 Com Cases 133 : AIR 1940 Sind 87.

Strict construction of notice of meeting

The notice of a general meeting must fairly and intelligently convey the purposes for which the meeting is called. It should not be misleading or equivocal. A benevolent construction is not to be applied in construing the notice. *Biswanath Prasad Khaitan v. New Central Jute Mills,* (1961) 31 Com Cases 125 (Cal). Each shareholder as and when he receives the notice of the meeting should have a fair warning of what was to be submitted to the meeting, so as to enable him to decide to leave the matter to the majority or to attend the meeting. *Tiessen v. Henderson,* (1899) Ch 861.

The fact that the shareholders at the meeting appointed another person as the chairman instead of the acting chairman does not have the effect of carrying the meeting beyond the agenda. *Seth Sobhag Mal Lodha v. Edward Mills Co. Ltd.,* (1972) 42 Com Cases 1 (Raj).

Notices are not scrutinised with a view to criticising them excessively. The true test would appear to be the meaning which they would convey to ordinary minds; the court does not examine them to find defects in them. *Henderson v. Bank of Australasia,* (1890) 45 Ch D 330. Notices are not to be construed with excessive strictness. They are to be read and construed as an ordinary businessman would read and construe them. *Young v. South African Syndicate,* (1896) 2 Ch 268, *Alexander v. Simpson,* (1890) LR 43 Ch D 147. The courts are now adopting the view that what was at one time a sufficient notice for a businessman, should now be tested in reference to individuals generally because shareholdings have become wide spread and all shareholders are not businessmen. *Mara Development Ltd., Re,* (1976) 1 ACLR 470 (Aust). Where the resolution is to alter or adopt new articles of association, it may not be sufficient merely to give notice of this with an offer for inspection of the new articles. It is necessary to give express notice of the proposed alterations *e.g.*, by pointing out the difference between the old and the new articles. In *Nagappa Chettiar (NVR) v. Madras Race Club,* (1949) 19 Com Cases 175 (Mad), the notice said that a print of the articles would follow; this was sent 6 days later and was held sufficient. Where a notice mentioned only one proposal to change a particular article but really certain important proposals (like alteration in the indemnity given to the directors and officers and the power conferred on the managing agents being continued) were not mentioned in the notice such a notice was held to be invalid. *Narayanlal Bansilal v. Maneckji Petit Mfg. Co.,* AIR 1931 Bom 354 : (1931) 1 Com Cases 377.

The provisions of the section are mandatory and, must be strictly complied with in order to ensure that the resolutions passed at the meeting are valid. Non-compliance invalidates the resolutions. *Asansol Electric Suppy Co. v. Chunnilal Daw,* AIR 1972 Cal 19. But see also *Calcutta Chemical Co. Ltd. v. Dhiresh Chandra Roy,* (1985) 58 Com Cases 275 (Cal), where it was held that in view of s. 172(3) it cannot be urged that the provisions of S. 171 are mandatory and that short notice given to any member will render the entire meeting void and of no legal consequence even if that member has suffered no prejudice.

A Managing Director of a Company who is not a shareholder cannot challenge the regularity of a meeting on the ground that no notice of the meeting was served on him. *Joginder Singh Palta v. Time Travels Pvt. Ltd.,* (1984) 56 Com Cases 103 (Cal).

Notice in case of death or insolvent member [Sub-section (2)(ii)]

When a shareholder dies it becomes the duty of the legal representatives to furnish their address for a notice to be sent and if they fail to send the intimation to the company, the

company whould be entitled to serve at the address which is recorded with it. Such a notice would be deemed to have been served as if the death of the member had not occurred. *Canara Bank Ltd. v. T.P.R. Thampi,* (1972) 42 Com Cases 473 (Ker); *Tricumdas Mills v. Haji Saboo,* (1902) 4 Bom LR 215 (Bom); *Allen v. Gold Reefs of West Africa,* (1900) 1 Ch 656.

In case of insolvent members also notices can be sent to the registered address of the member unless a company has a notice to the contrary. In the absence of an express provision in the articles of a company, a person adjudicated as an insolvent cannot be debarred from attending and voting at a general meeting so long as he remains a member. *Morgan v. Gray,* (1953) Ch 83 : (1953) 1 All ER 213; *Birch v. Sullivan,* (1958) 1 All ER 56.

§ See also Notes under S. 53 under heading "Effect of death and insolvency".

Notice to auditors [Sub-section (2)(iii)]

The provision that the auditors should be given notice of general meeting is based on the suggestion of Company Law Committee and is in keeping with Section 231 and therefore a notice of every meeting has to be sent to auditors also, but as in the case of every other person, so in the case of auditors, an accidental omission to give notice or non-delivery of it, does not affect the validity of the meeting. *Maneckchowk & Ahmedabad Mfg. Co. Ltd., Re,* (1970) 40 Com Cases 819 (Guj).

Notice to joint holders

Although notice of general meetings and other documents are required to be served only on the senior or first named of joint holders, the joint holders are individually entitled to be present and take part in the debate at such meetings and vote on resolutions decided on a show of hands (except that where Regulation 57 of Table A of Schedule I or an Article similar thereto has been adopted by the company, the voting right is not exercisable otherwise than in accordance therewith); but on a poll the voting right can be exercised only by all of them acting together.

The provision in Article 57 in Table A is that 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.

Notice to shareholders residing abroad

Notices need not be given to members who are residents abroad whether in enemy or friendly countries. *Union Hill Silver Co. Ltd., Re,* (1870) 22 LT 400; *Smyth v. Darley,* (1849) 2 HL Cas 789; *Young v. Ladies Imperial Club,* (1920) 2 KB 523; *Anglo-International Bank Ltd., Re,* (1944) 14 Com Cases 86: (1943) Ch 233 (CA) [Enemy territory].

Section 53 provides that the responsibility of the company is to send notices to members who have given their addresses in India.

Notice to preference shareholders

Department's views.—Even though the language of Sec. 172(2)(i) using the words 'every member' seems to suggest that notices of general meeting are required to be given even to preference shareholders, the Department is of the view that where the meeting does not discuss any matter in which such shareholders have any voting rights, such shareholders may not be allowed to take part in the discussions in the meeting, although they have a right to attend the meeting (*Company News & Notes,* July 16, 1964).

"Accidental omission" [Sub-section (3)]

This means that the omission must not be designed or deliberate. Failure to send notice to a member (under the belief that it will not reach him at the address mentioned in the register of members) is deliberate and not accidental, even if the belief is based on a mistaken impression. *Musselwhite v. C.H. Musselwhite & Sons Ltd.,* (1962) 1 All ER 201 (Ch D); (1962) 32 Com Cases 804. Where notice was deliberately not given to certain

In *Mahaliram Santhalia v. Fort Gloster Jute Mfg. Co. Ltd.*, (1954) 24 Com Cases 311, 316, 317 : AIR 1955 Cal 132. P.B. MUKHERJEE J. restated the basics as follows: "The results of my review of the authorities on this point show that the courts have evolved certain well-defined principles which regulate company meetings. Primarily the articles of association and the company statute provide the matrix of the company law on the point. Secondly, 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. The court is hardly a substitute for the company in this respect except in specified cases provided by statute and these again are mostly cases where the company itself finds it difficult to manage its own affairs as in liquidation or schemes or where in public interest the court has to interfere or sanction as in cases of fraud by the majority on the minority or cases of amalgamation or reduction. This is the rule of domestic forum applied to company jurisprudence. The third principle which the courts have evolved as a corollary of the first two principles is that *prima facie* the decision of the chairman at such company meetings is allowed to stand until it is proved to be in breach of the articles or the statute. The burden of proving the chairman's decision to be wrong rests with the party challenging his decision and it is not for those who rely on his decision to bring evidence in the first instance to show that the chairman was right. This is the rule of convenience and of practical wisdom. It is of great practical utility. The chairman, by virtue of his position and the nature of his duties, has to decide on the spot all emergent questions that arise at the meeting and it will be mere folly to reduce the *prima facie* authority of his verdict. The burden of holding and conducting company meetings and recording votes cast therein and for taking decisions at such meetings is the primary responsibility of the company's shareholders and their chosen directors and not of this court." [(1954) 24 Com Cases 311 at 316, 317].

An incorrect statement by the chairman of the effect of, or of what is intended to be done under, a resolution confirming an agreement will not modify or affect the confirmation of the agreement; *Salisbury Gold Mining Co. v. Hathorn*, (1897) AC 268.

The general power of the chairman and its concomitant limitations have been summarised by LORD WARK in *Melville v. Graham-Yool*, an **unreported** case referred to in (1936) Scot LT 54 as follows: "Where a chairman frustrates the business of a meeting by wilfully and without good reason preventing that business from being considered, the meeting may in view of his gross violation of duty supersede him as chairman and go on to transact the business. But if in good faith the chairman gives a decision upon a matter of difficulty, such as has arisen in connection with the notice in this case, I am not prepared to hold that his decision can be ignored and overturned there and then. In my opinion in such a case his decision must stand until it is set aside by the Court, or by a general meeting properly convened for that purpose."

In *National Dwellings Society v. Sykes*, (1894) 3 Ch 159, CHITTY J. said, at p. 162: 'Unquestionably it is the duty of the chairman, and his function, to preserve order, and to take care that the proceedings are conducted in a proper manner, and that the sense of the meeting is properly ascertained with regard to any question which is properly before the meeting.' But he has no power to stop or adjourn a meeting at his will. *Second Consolidated Trust Ltd. v. Ceylon Amalgamated Tea and Rubber Estates*, (1943) 2 All ER 567; *Narayanan Chettiar (S.R.M.S.T.) v. Kaleeswarar Mills Ltd.*, (1951) 21 Com Cases 351 : AIR 1952 Mad 515. See BUCKLEY'S COMPANIES ACTS, 14th Edn., pages 388-9.

But where there is serious disorder, the chairman has an inherent power to adjourn. *John v. Rees*, (1969) 2 All ER 274 (Ch D).

The Chairman is especially charged with the responsibility of ascertaining the presence of a quorum and the number of members prescribed as competent to transact business. While in the case of legislative bodies a quorum is presumed to be present until the ques-

tion is raised, in the case of a company where the law requires a quorum, it is the duty of the chairman to see whether a quorum is present before proceeding with the business.

He cannot arbitrarily dissolve or adjourn a meeting, and if he prematurely closes a meeting or purports to adjourn it, his act will be irregular and it will be open to the meeting to select another chairman and proceed with the business. *Seth Sobhag Mal Lodha v. Edward Mills Ltd.,* (1972) 42 Com Cases 1 (DB)(Raj); *Narayanan Chettiar's case, (Supra).* See *National Dwelling Society Ltd. v. Sykes,* (1894) 3 Ch 159.

He should not use the 'closure' to prevent discussion or the proper hearing of minority shareholders, but after they have had sufficient opportunity of stating their case, he may, with the consent of the meeting, apply the closure and put the question to vote. See *Wall v. London and Northern Assets Corporation,* (1898) 2 Ch 469. He may be called upon to decide difficult questions, and must decide them to the best of his ability.

His decisions upon points of order and on any incidental questions are to be taken as *prima facie* correct, and he may, with the support of a majority apply closure to a discussion after it has been reasonably debated. See *Wall v. London and Northern Assets Corporation,* (1898) 2 Ch 469; *Indian Zoedone Co.,* (1884) 26 Ch D 70.

Among other matters, he must decide who is entitled to vote at the meeting and if he acts in good faith, he is protected from liability in damages for refusing on mistaken grounds, to allow voting to a shareholder.

Chairman's powers under common law

In addition to the powers given to him under the Act he has also certain common law powers; such as (1) the power to bring the discussion on any question to a close, (2) the power to adjourn a meeting, if it is necessary, in his opinion, under any circumstances. He must not abuse these powers, by acting in a *mala fide* manner. Like any other member he has an ordinary vote. But as regards the use of a second or casting vote, there is no such right at common law and it cannot be exercised, unless the articles of the company specially confer it on him as per Regulation 74(2) of Table A of Schedule I. For a more detailed discussion of the position and powers of the chairman, see PALMER'S COMPANY PRECEDENTS, Part II, 17th Edn., pages 489 to 491. See also *Nell v. Longbottom,* (1894) 1 QB 767.

If there are no specific provisions in the Articles, the details of the proceedings must be regulated by the persons present and by the chairman, and if his decision is quarrelled with, it must be regulated by the majority of those present. *Wandsworth & Putney Gaslight Co. v. Wright,* (1870) 22 LT 404.

The decision of chairman given at one stage of a meeting is final and binding on the chairman or his successors at a later stage. *Narayanan Chettiar (S. RM. S.T.) v. Kaleeswarar Mills Ltd.,* (1951) 21 Com Cases 351 : AIR 1952 Mad 515. Where the articles of a company so provide, the chairman's decision as to the validity of a vote may be conclusive. *Wall v. Exchange Investment Corporation,* (1926) Ch 143 and the court will be reluctant to interfere in the exercise of this power by the chairman, unless bad faith or fraud is established. *Wall v. London & Northern Assets Corp. (No. 2),* (1899) 1 Ch 550. The decision of the chairman as to the validity of proxies is final, particularly when he has come to the conclusion that the objections to the proxies have no substance. *Re, Swadeshi Polytex Ltd.,* (1988) 63 Com Cases 709 (Del); *Narain Chettiar's* case, (1951) 21 Com Cases 351 at 371 (Mad). The objections as to proxies were rejected because there was no evidence to support the allegation that proxy forms were manipulated, interpolated or fraudulantly created. *Sriram (TR) v. K.M. Duraibabu,* (1994) 13 C.L.A. 115 at 120 (Mad—DB).

Where there is a dispute over entitlement to vote which arises at the time the chairman of a general meeting has to be elected, and a person assumes control as a chairman, his ruling as to who was allowed to vote is not unchallengeable. When the matter comes before the court question whether the ordinary shareholders and the preference shareholders

were entitled to vote would be determined by the court itself. In this case the ordinary shareholders whom shares were allotted for transferring a business to the company, but the business was not valued in terms of cash so that nothing could be said as to the extent to which the allottees had paid for their shares, the chairman excluded them from voting and the preference shareholders passed the necessary resolutions, the same were held to be valid because their dividends being in arrears, they had become competent to vote on all matters affecting the company *Bradford Investments Ltd., Re,* 1991 BCLC 224 (Ch D).

The Chairman cannot enlarge voting rights while ordering a poll linking them with the personal presence of a member. *McMillan v. Le Roi Mining Co. Ltd.,* (1906) 1 Ch 331.

Chairman must be impartial/disinterested

Impartiality.—In order to fulfil his duty properly, he must observe strict impartiality, even though he must be personally strongly opposed to any matter. He must give a reasonable chance to the members present to discuss any proposed resolutions, and ensure that all views are adequately aired. But discussion must be kept within reasonable limits and he should not hesitate to stop a discussion on any resolution, after it has been reasonably debated. While he should take care to see that the minority is not stifled or oppressed in any way, he must bow to the majority vote in respect of all matters where he has to take a decision. *Cf. Wall v. London and Northern Assets Corporation,* (1898) 2 Ch 469 (CA).

Absence of interest.—In *Nagappa Chettiar v. Madras Race Club,* (1949) 19 Com Cases 175, 197 (Mad), one of the disputes related to the election of 12 members of the Managing Committee of the Race Club. There were 24 nominations and 19 actually contested the election. Objections were raised at the meeting on the applicability of a certain rule and the chairman gave a ruling in favour of the validity of the nominations including his own. Thus, the chairman of the meeting was himself a candidate for election to the Managing Committee. The High Court held that it was immaterial that the ruling of the chairman was correct or incorrect. The chairman was in the position of a *quasi*-judicial officer and there was a clear conflict between his duty and his interest. In the normal course, he should have vacated the chair and another member to occupy the chair but this was not done. The maxim that no man shall be a judge in his own cause is elementary and of universal application. The court held that the meeting was not legal and the members were not duly elected.

The above decision was **distinguished** by the Calcutta High Court in *Bengal and Assam Investors Ltd. v. J.K. Eastern Industries P. Ltd.,* (1957) 27 Com Cases 86 : AIR 1956 Cal 658. The company had two groups of shareholders—J group having 45% of the shares and S group having 55%. The minority group was in a position of control and the chairman belonged to this group. A meeting was requisitioned by the majority at which resolutions were to be proposed for the removal of certain directors who belonged to the minority including the chairman himself. An application was filed under section 186 for the conduct of the meeting. The chairman could not be a judge in his own cause and **reliance** was placed on the judgment of the Madras High Court in the *Madras Race Club* case cited above. The Calcutta High Court **distinguished** the judgment of the Madras High Court and held that in a shareholders' meeting the chairman's power is limited and cannot decide on the resolutions proposed at the meeting; the resolutions will have to be voted on by the shareholders. In the present case, as the shareholding was not equal and so the possibility of a casting vote was remote. The decision of the Calcutta High Court was **followed** by DHANUKA J., in *Kishore Y. Patel v. Patel Engineering Co. Ltd.,* (1994) 79 Com Cases 53 : AIR 1992 Bom 114.

Discussion at general meeting

Defamatory matters.—The Chairman at times stops the discussion of important matters relating to any business included in the agenda of meeting, on the ground that it would be defamatory of the management or any of the directors or other person; or,

where any suit or other legal proceeding is pending in any court with reference to the matter under discussion, that it is *'sub judice'* and cannot be discussed. Such gagging is illegal and unwarranted. For, statements made by a shareholder at general meeting of a public company, and pertaining to any matter in the agenda are privileged and protected unless they are proved to be untrue and malicious.

Sub-judice matters.—As regards the oft-quoted objection that 'the matter is *sub judice'* and ought not to be allowed to be discussed, the following observations of LORD DENNING M.R. are an effective answer:—

"It is commonly supposed that once a writ is issued, it puts a stop to discussion. If any one wishes to canvass the matter in the press or in public, it cannot be permitted. It is said to be *'sub judiced'*. I venture to suggest that it is complete misconception. The sooner it is corrected, the better. If it is a matter of public interest, it can be discussed at large without fear of thereby being any contempt of court. Criticisms can continue to be made and can be repeated. Fair comment does not prejudice fair trial. That was well pointed out by SALMON L.J. in *Thomson v. Times Newspapers Ltd.,* (1969) 3 All ER 648 (CA). The law says and says emphatically—that the issue of a writ is not to be used so as to be a muzzle to prevent discussion..... And LORD REID has said that 'gagging writ' ought to have no effect. *Attorney General v. Times Newspapers Ltd.,* (1973) 3 All ER 54. Matters of public interest should be and are open to discussion, notwithstanding the issue of a writ.

"So here I would hold that a discussion of company affairs at a company meeting is not a contempt of court. Even if a writ has been issued and these affairs are the subject of litigation, the discussion of them cannot be stopped by the magic words 'sub judice'.... The shareholders can discuss the company affairs quite freely without fear of offending the court.... The shareholders of a public company should be free to discuss the company affairs at the company meeting. If a shareholder feels that there has been or may be abuses by those in control of the company, he should be at liberty to give voice to them. *Wallersteiner v. Moir,* (1974) 3 All ER 217 at 230 *et seq* (CA).

Privilege to express views

As shareholders and directors of a company have a common interest as well as a common duty in respect of matters relating to the company, a general meeting of a company will be a privileged occasion, and any statement made at the meeting is protected in the absence of malice. The privilege, however, will not extend to publishing the same outside the meeting, such as broadcasting, reporting in newspapers etc. And no question of fair comment will arise, unless the matter was one of public interest.

Some points to be noted about adjournment of meetings

1. A meeting properly convened cannot be cancelled or adjourned at the pleasure of the chairman or the Board of Directors, except as provided by the articles and in accordance therewith;
2. But the chairman may adjourn a meeting when it is impossible, by reason of disorder or other like cause, to conduct the meeting and complete its business;
3. If the chairman attempts to adjourn improperly or for *mala fide* motives against the wishes of the majority, the meeting may elect another chairman and proceed with the business; *National Dwelling Society Ltd. v. Sykes,* (1894) 3 Ch 159;
4. Where the articles provide that the chairman may, with the consent of meeting, adjourn the meeting, he may, in his discretion refuse to adjourn, even though meeting may resolve to do so. (*Salisbury Gold Mining Co. v. Hathorn,* 1897 App Cas 268); but if the articles provide that he shall adjourn, he has no discretion but must adjourn, if so resolved by the meeting.

   The Supreme Court has held: 'A properly convened meeting cannot be postponed. The proper course to adopt is to hold the meeting as originally intended, and then adjourn it to a more suitable date. If this course be not adopted, mem-

bers will be entitled to ignore the notice of postponement, and, if sufficient to form a quorum, hold the meeting as originally convened and validly transact the business thereat. Even if the relevant rules do not give the chairman power to adjourn the meeting, he may do so in the event of disorder. Such an adjournment must be for no longer than the Chairman considers necessary and the Chairman must as far as possible communicate his decision to those present. *Chandrakant Khare v. Shantaram Kale,* (1989) 65 Com Cases 121 (SC). The meeting in question was not that of a company but of a municipal corporation. See also *Smith v. Paringa Mines Ltd.,* (1906) 2 Ch 193.

In respect of the matter of adjournment, a poll may be taken, if demanded by the prescribed number of shareholders or if the chairman so desires.

Even if the articles do not contain any provisions as to adjournment, the chairman may adjourn on his own authority, if by doing so, the business of the meeting can be facilitated *e.g.* to take a poll. In cases of persistent disorder, the chairman is empowered to adjourn the meeting. *John v. Rees,* (1969) 2 All ER 274;

5. Of course, section 174 provides for adjournment or dissolution as the case may require, in case of want of quorum;
6. An adjourned meeting is a continuation of the original meeting, and no new notice need be given except in cases provided by the articles; cited with **approval** by Delhi High Court in *S.P. Arora v. Roshanara Club,* (1992) 8 Corpt LA 31 at 34 (Del), the court holding that where the meeting of a club called for election of office bearers was adjourned under a court order and was reconvened under court order, the originally notified business done at the reconvened meeting was valid **following** *Watrap S. Subramania Aiyer v. United India Life Insurance Company Ltd.,* (1928) 55 Mad LJ 385; *Scadding v. Lorant,* (1851) 3 HL Cas 418; *McLaren v. Thomson,* (1917) 2 Ch 261 (CA). An adjourned ordinary meeting cannot be an extraordinary meeting. *Wills v. Murray,* (1850) 4 Exch 843. It is sometimes provided that the members present at the adjourned meeting shall form a quorum but such a provision does not apply to a meeting of a special class of shareholders, *Hemans v. Hotchkiss Ordnance Co.,* (1899) 1 Ch 115 (CA). Similarly, if a meeting is reconstituted subsequent to the taking of a poll on a motion for adjournment which is lost, the reconstituted meeting is the same meeting. *Jackson v. Hamlyn,* (1953) 1 All ER 887;
7. At an adjourned meeting, only such business as is left uncompleted at the original meeting, can be dealt with unless new notice is properly given as required by sections 171, 172 and 173;
8. Resolutions passed at adjourned meeting are, for all purposes, to be treated as passed on the date on which they were in fact passed [Section 191]. See Section 381(a)(b) of the English Companies Act, 1985 which in this respect rectified the difficulties caused by the decision in *Neuschild v. British Equatorial Oil Co.,* (1925) 1 Ch 346. Shareholders who moved for an adjournment of the meeting cannot be heard to object to it. *Viswanathan (B.N.) v. Tiffin's Barytes Asbestos & Paints Ltd.,* (1953) 23 Com Cases 29, 47 (Mad—DB)
9. Proxies or revocations thereof required to be deposited before the meeting, cannot be deposited between the original and adjourned meetings. [*Shaw v. Tati Concessions Ltd.,* (1913) 1 Ch 292; *Spiller v. Mayo (Rhodesia) Development Co. (1908) Ltd.,* 1926 WN 78].

Powers of the chairman *vis-a-vis* the conduct, validity and adjournment of meetings

The extent to which the chairman of a meeting can lawfully adjourn the meeting is a question of very strategic importance in the conduct of meetings. The law on this point is a mixture of two currents according to one of which a meeting cannot be adjourned without its own consent and according to the other a very practical residuary power lies with

the chairman to adjourn where an orderly meeting is not possible. In between these two extreme principles there are many things the settlement of which essentially depends upon the facts as they eventually emerge at the meeting. One example is *Seth Sobhagh Mal Lodha v. Edward Mills Co. Ltd.,* (1972) 42 Com Cases 1 (Raj). A meeting was called to appoint a managing director. The proposed candidate claimed that he was the chairman of the meeting but this was objected to by some shareholders. Thereupon he acting as the chairman dissolved the meeting and left the meeting hall with his supporters. The rest of the members continued the meeting, elected a chairman and appointed another person as the managing director. The question of the validity of this appointment arose and the answer depended wholly upon the fact whether the meeting was lawfully adjourned. L.S. MEHTA, J. after review of cases observed as follows:

"It is settled law that when once a meeting is called, no chairman can arbitrarily dispose of it. Its continuance or dispersion rests entirely on the will of the shareholders. It is mentioned in the LAW AND PRACTICE OF MEETINGS BY FRANK SHACKLETON, 3rd edition, page 69, [: 9th Edn., 1997, paras 6.12 and 14.29] that if a chairman should vacate the chair or adjourn the meeting regardless of the views of the majority, those remaining, even if a minority, can appoint a chairman and conduct the business left unfinished by the former chairman. See *Catesby v. Burnett,* (1916) 2 Ch 325 (Ch D). This point was also considered by a Division Bench of this court in *Deodutt Sharma v. Zahoor Ahmed Zaid,* AIR 1960 Raj 25, 37-38. "Similar views were expressed in *Stoughlon v. Reynolds,* (1736) 2 Stragge 1044, in *National Dwelling Society v. Sykes,* (1894) 3 Ch 159 (Ch D) and in *Catesby v. Burnett,* (1916) 2 Ch 325 (Ch D) quoted, *supra.*

"The above cases clearly established the principle that where a meeting is unlawfully adjourned by the chairman thinking that he is not likely to succeed in his object, the remaining members do possess the right to continue the meeting and conduct the business left untransacted by the chairman." (1972) 42 Com Cases 1 at 18 (Raj).

On the other hand in *United Bank of India Ltd. v. United India Credit and Development Co. Ltd.,* (1977) 47 Com Cases 689 (Cal), it was held that every chairman has the right to make a *bona fide* adjournment. SALIL K. ROY CHOUDHARY, J. found one example from F.N. ROGGERS QCA, PRACTICAL ARRANGEMENT OF ECCLESIASTICAL LAW as quoted by MEGARRY, J. in *John v. Rees,* (1969) 2 All ER 274: This "by no means interferes with the right which every chairman has to make a *bona fide* adjournment, whilst a poll or other business is proceeding, if circumstances of violent interruption make it unsafe, or seriously difficult for the voters to tender their votes; nor of adjourning the place of polling, if the ordinary place used for that purpose be insufficient, or greatly inconvenient. In most of such cases, the question will turn upon the intention and effect of the adjournment, if the intention and effect were to interrupt and procrastinate the business, such an adjournment would be illegal; if, on the contrary, the intention and effect were to forward or facilitate it, and no injurious effect were produced, such an adjournment would, it is conceived, be generally supported."

And then again at page 293 it is observed as follows [See (1969) 2 All ER 274 at 293]: "If, then, the chairman has this inherent power and duty, what limitations, if any, are there upon its exercise? First, I think that the power and duty must be exercised *bona fide* for the purpose of forwarding and facilitating the meeting, and not for the purpose of interruption or procrastination. Second, I think that the adjournment must be for no longer than the necessities appear to dictate. If the adjournment is merely for such period as the chairman considers to be reasonably necessary for the restoration of order, it would be within his power and his duty; a longer adjournment would not".

In *Byng v. London Life Assn. Ltd.,* 1989 BCLC 400 : (1989) 1 All ER 560 (CA), the matter was of an amalgamation which required an alteration of the company's memorandum of association. Matters of this kind spread politics among members. They attend meetings on such occasions in large numbers. The meeting called for the occasion was attended by a large number of shareholders who wanted to oppose the amalgamation. The

meeting was over-crowded and the venue of the meeting was too small to accommodate the over enthusiastic attendance. The members were spread into adjoining rooms with the provision of a sound system which broke down resulting in utter confusion. An alternative venue was arranged and it was resolved to adjourn the meeting to meet again in the afternoon at the new venue. Some members opposed this move. Several points of validity were raised and this brought about the laying down of the following propositions:

Assembly in one room not necessary

In order that a meeting be validly constituted it is not necessary for all the members to be physically present in the same room. A valid meeting can taken place even if the attending shareholders are at different places provided that all steps are taken to address the shareholders sitting at places different from the main venue where the meeting is to be held and that there should be adequate audio-visual links to enable the members in all the locations to see and hear what was going on in the other rooms. On the facts, since the audio-visual arrangement did not work at the morning meeting, the meeting was incapable of transacting any business. However, it was still a valid meeting so as to enable the chairman to exercise his powers under the Companies Act, and the articles of association of the particular company. The Court had to face formidable cases like *Harben v. Phillips,* (1884) 23 Ch D 14, where a meeting which had excluded through lack of notice persons entitled to attend was held to be invalid for all purposes and was also not capable of adjourning itself; *Portuguese Consolidated Copper Mines Ltd., Re,* (1889) 42 Ch D 160, where a Board meeting of which inadequate notice was given was held to be not capable of adjourning itself and the Canadian case of *McLaren v. Jisken,* (1881) 28 GV 352 (cited by the Court at p. 408) where an inquorate meeting adjourned itself and the reassembled meeting and the business done at it were both held to be invalid. As against it, the Court found a New Zealand authority, *Hetcher v. New Zealand Glue Co. Ltd.,* (1911) 31 NZLR 129, NZSC, to the effect that an inquorate meeting was valid for the purposes of approving the annual return and adjournment.

Did the chairman have power to adjourn the meeting

Supposing that the meeting was valid, did the chairman have the power to adjourn it? The articles of the company enabled the chairman to adjourn a meeting only with its consent, and, therefore, the chairman had to obtain consent of the meeting before pronouncing its adjournment. The Court noted the state of common law on the point and found that a chairman has no general right to adjourn a meeting at his own will and pleasure [*National Dwellings Society v. Sykes,* (1894) 3 Ch 159 at 162] but that it is clearly established that a chairman has such power when unruly conduct prevents the continuation of business, [*John v. Rees,* (1969) 2 All ER 274 at 290-291]. The Court also found it to be established that when in an orderly meeting a poll is demanded on a motion to adjourn and such poll cannot be taken forthwith, the chairman has power to suspend the meeting with a view to its continuance at a later date after the result of the poll is known, *Jackson v. Hamlyn,* (1953) 1 All ER 887. The Court said that though the power of the chairman to stand over the proceedings to another time may not be a power of adjournment, but it appears that there is a residual power in the chairman to take such steps as would, in the ordinary usage of the word, amount to an adjournment. [*R. v. D'Oyly',* (1840) 12 Ad & El 139, 159 : 113 ER 763, 771]. The conclusion of the Court on this point was that but for the provision in the articles the chairman would have had the power of adjournment because it was impossible for him, in the circumstances as they developed, to give to the members an equal opportunity of debating and voting. On the facts of the case the Court said that "in any circumstances where there is a meeting at which the view of the majority cannot be validly ascertained, the chairman has a residual common law power to adjourn so as to give all persons entitled a reasonable opportunity of voting and speaking at the meeting". [1989 BCLC 400 at 411.]

Was the power of adjournment fairly exercised

The third question before the Court was whether the power of adjournment was validly exercised? The Court said that the chairman's decision to adjourn would be invalid not only if taken in bad faith but also if he failed to take into account relevant factors, or took into account irrelevant factors, or reached a conclusion which no reasonable chairman could have reached having regard to the purpose of his power to adjourn. The Court said that on the facts the chairman failed to take into account the following relevant factors: [at p. 413] the attempts by the members to adjourn the meeting *sine die,* their objections to the adjournment until the afternoon, that the members present at the morning meeting who could not attend the afternoon meeting would be unable to vote since it was too late for them to deposit proxies, that it was not urgent for the meeting to proceed that afternoon given that the deadline for the completion of the merger was not until 31st March, 1989 and finally that it would have been possible to terminate the meeting and reconvene it at a later date.

For testing the reasonableness of the conduct of the chairman, the Court said that the test would be the same which is applicable on judicial review in accordance with the principles of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.,* (1947) 2 All ER 680. This was the approach adopted by UTHWATT, J. in *Second Consolidated Trust Ltd. v. Ceylon Amalgamated Tea and Rubber Estates Ltd.,* (1943) 2 All ER 567, where he held that a chairman's decision was invalid on the ground that he had failed to take into account a relevant factor.

A similar position developed in the Australian case of *Bell Resources Ltd. v. Turn Bridge Pty. Ltd.,* (1988) 13 ACLR 429 (Aust.) where also the venue of the meeting was likely to prove to be too small and therefore Board of directors purported to cancel the notice summoning the meeting and instead summoned the meeting at the next day at a different hotel. It was held that Board of directors had no power to do so and some persons who assembled at the place next day did not constitute the Annual General Meeting of the company.

Position of private company

A private company which is not subsidiary of a public company may make its own provision by its articles, as regards the matter provided by this section, [See section 170(1)(ii)], provided they do not contravene the other provisions of this Act applying to them.

Duty of chairman to answer questions at general meetings

The chairman of the annual general meeting is expected to act reasonably and reply to all reasonable questions raised by the shareholders relating to accounts or any other matter relating to the agenda if the information is available at the meeting. The chairman, however, has a right to exclude from the discussions anything which he thinks is irrelevant to the proceedings or detrimental to the interest of the company. This can be inferred from the provisions of s. 193(5) which enables the chairman to eliminate such matters from the minutes of the meeting.

Irregularities in procedure and interference by court at general meetings

Where there is no fraud or where the individual or corporate rights of members are not affected, irregularities in general meetings may be treated as matters of domestic concern or 'in-door management' as they are usually called so as not to enable the Court to interfere, the principle being that such irregularities or defects can be cured by calling a fresh meeting duly observing all the formalities. This is based on the well-known rule enunciated in *Foss v. Harbottle.* Also it may be appreciated that such irregularities may be waived if all those entitled to object, assent to the waiver. See *Re, Bailey Hay & Co. Ltd.,* (1971) 3 All ER 693 (Ch D).

In *re Indian Zoedone Company,* (1884) 26 Ch D 70, 77 (CA) the LORD CHANCELLOR SELBORNE observes : "The minutes in the books are to be received, not as conclusive, but as *prima facie* evidence of resolutions and proceedings at general meetings; and also it may be added, and I think correctly that the chairman, who presides at such meetings and has to receive the poll and declare its results, has *prima facie* authority to decide all emergent questions which necessarily require decision at the time, his decision of those questions will naturally govern, and properly govern the entry of the minute in the books; and, though in no sense conclusive, it throws the burden of proof upon the other side, who may say, contrary to the entry in the minute-book, following the decision of the chairman, that the result of the poll was different from that there recorded." That represents the main principle which should guide these courts in granting an interlocutory injunction in these matters cited with **approval** in *Mahaliram Santhalia v. Fort Gloster Jute Mfg. Co.,* (1954) 24 Com Cases 311 at 314, 315 : AIR 1955 Cal 132.

Where the requisitionists-members conducted the meeting at a place near to the registered office, as the premises of the registered office were locked by the managing director, this was nothing more than an irregularity. *Rathnavelusami Chettiar (M.R.S.) v. MR.S. Manickavelu Chettiar,* (1951) 21 Com Cases 93 (Mad).

Chairman's power of expulsion

The Chairman has powers to expel a member from the meeting if he seriously interferes with the conduct of the meeting. Expulsion must be made only after the member concerned has been warned of his conduct and its consequences. Minimal force must be used. If possible, the approval of the majority can be obtained for the expulsion.

Chairman's liability for wrong decision

A chairman who erroneously but *bona fide* decides that a shareholder is not entitled to vote is not liable to the shareholder for damages. *Bluechel & Smith v. Prefabricated Bldgs. Ltd.,* (1945) 2 WWR 309 (Canada). Where his decision is *bona fide* and without malice, it would be most inequitable to hold that he was to be mulcted in damages, though a court subsequently finds that his decision was wrong upon a question of law. *Ramnarain and Amritsar Cotton Mills Ltd. v. Ramkishen,* 1911 Punj Re No. 46 : 10 IC 515. The court said that he is neither wholly a ministerial nor a judicial officer. In this case he had in all good faith excluded a member from voting or contesting for directorship.

Chairman's power to withdraw resolution

A special resolution was tabled at an extraordinary general meeting. The chairman unilaterally withdrew the resolution without taking the members into confidence and then prevented them from expressing their opinion on the subject matter of the resolution. The CLB ordered that the members had the right to elect a new chairman and conduct the business of the meeting pertaining to the resolution. *PIK Securities Ltd. v. United Western Bank (P) Ltd.,* (2001) 4 Comp LJ 81 : (2001) CLA 184 (CLB).

Chairman's power as to amendments to resolution

Any amendment to a resolution which fairly arises and which is specified in the notice of the meeting and which is within the scope of the notice may be proposed and passed at the meeting. The Chairman has no right to refuse to put such an amendment before the meeting. *Torbock v. Lord Westbury,* (1902) 2 Ch 871; *Betts & Co. Ltd. v. Macnaghten,* (1910) 1 Ch 430; See *Henderson v. Bank of Australasia,* (1890) 45 Ch D 330 (CA) where the chairman refused to put the amendment and the resolution was set aside. The Court said : "Amendment which was moved was definite, and that the chairman was wrong in refusing to put it to the meeting as the Chairman after consulting the solicitor of the company had deliberately ruled that no amendment could be put."

In permitting an amendment, the Chairman has in reference to special resolutions to keep this legal requirement in mind that there has to be a complete identity between the

substance of the resolution as it was notified to the members and as it was passed at the meeting. *Moorgate Mercantile Holdings Ltd., Re,* (1980) 1 All ER 40.

Generally a resolution or an amended resolution is to be moved by one voter and seconded by another, but if the chairman chooses, he may put it to vote without these formalities. *Horbury Bridge Coal, Iron Waggon Co.,* (1879) 11 Ch D 109, 117 (CA).

§ For further details as to amendments, see Notes under S. 189, *post.*

Publication of chairman's speech etc. in newspapers/magazines

Department's Circular.—"There is no statutory requirement for publishing the Chairman's speech in newspapers/magazines by the companies. It is, however, noticed that certain companies publish full text of the speech of their Chairman read over in the Annual General Meetings. It is felt that both from the point of view of economy in expenditure as also saving newsprint, which is imported out of scarce foreign exchange resources, such publication of Chairman's speech in newspapers/magazines be avoided". (*Circular No.* 3/91 CL-V, dated 15-2-1991).

Chairman's declaration as to result of voting

When voting takes place by show of hands, the Chairman's declaration as to the result of voting is a conclusive evidence that the resolution was passed or not passed as the case may be, *E.D. Sasoon United Mills, Re,* AIR 1929 Bom 38; *Re, Gold Co.,* (1879) 11 Ch D 701, 719 (CA); *Re, Hadleigh Castle Gold Co. Ltd., Re,* (1900) 2 Ch 419; **followed** in *Arnot v. United African Lands Ltd.,* (1901) 1 Ch 518 (CA), and, in effect, **overruling** *Young v. South African Syndicate,* (1896) 2 Ch 268; *Graham's Morocco Co., Re,* 1932 SC 269. But this may not be so in the following two cases: (a) when a poll is demanded, *Harben v. Phillips,* (1883) 23 Ch D 14, 23 and (b) as stated by the Calcutta High Court in *Dhakeshwari Cotton Mills v. Nil Kamal Chakravarthy,* (1937) 7 Com Cases 417 : AIR 1937 Cal 645 that when the declaration is without taking a count of the number or proportion of the votes recorded in favour or against the resolution. Further the formalities such as the showing of hands must be complied with even when the motion is unopposed. *Citizen Theatre, Re,* 1946 SC 14 (Scot).

§ See also Notes under S. 178, *post.*

Modification in relation to class meetings, etc.—Refer to Annexures B, C and D of the Companies (Central Govt's) General Rules and Forms, 1956, (See *Appendix* 1) regarding modification of this section in applicability to meetings of a class of shareholders, meetings of debenture-holders, and meetings of a class of debenture-holders.

Model regulations as per Table A.—For model regulations in Articles of Association pertaining to this section, see Regulations 50 to 54 of Table-A and the Notes thereunder. See regulation 54 which gives to the Chairman a casting vote. For a company limited by guarantees and not having share capital, see Regulations 8 to 13, of Table C.

Secretarial Standards on General Meetings issued by the Council of ICSI (SS-2)

These Standards seek to prescribe a set of principles for the convening and conduct of General Meetings and matters relating thereto. In the initial years, adherence by a company to the Secretarial Standards will be recommendatory. These principles may not be applicable to any meetings convened on the directions of the Court or CLB or other authority, unless the directions themselves so prescribe.

Secretarial Standard [Para 5]

5. Chairman

5.1 *Appointment*

5.1.1 Where the Articles so provide, the Chairman of the Board should take the chair and conduct the Meeting. if there is no Chairman or if he is not present within fifteen minutes after the time appointed for holding the Meeting, or if he is unable to act as Chairman of the Meeting, the Directors present should elect one of themselves to be

the Chairman of the Meeting. If the Directors are unable to do so or if no director is willing to take the chair, the members present shall elect one of themselves to be the Chairman of the Meeting.

5.1.2 In the absence of any express provision contained in the Articles, the Members personally present at the Meeting shall elect one of themselves to be the Chairman of the Meeting.

The Chairman should ensure that the Meeting is duly constituted in accordance with the Act and the Articles or any other applicable laws, before it proceeds to transact business. The Chairman should then conduct the Meeting in a fair and impartial manner and ensure that only such business as has been set out in the Notice is transacted.

5.2 The Chairman should explain the objective and implications of each Resolution before the Resolution is put to vote.

5.3 The Chairman should provide a fair opportunity to Members who are entitled to vote to raise questions and/or offer comments and ensure that these are answered.

5.4 The Chairman should not propose any Resolution in which he is deemed to be concerned or interested nor should he participate in the discussion or vote on any such Resolution.

If the Chairman is interested in any item of business, he should entrust the conduct of the proceedings in respect of such item to the Vice-Chairman, if there is one, or to any dis-interested Director or to a Member and resume the Chair after that item of business has been transacted. A person who so takes the Chair can exercise his casting vote in the event that a vote on such item of business results in a tie.

§ For full text of the Secretarial Standard, see *Appendix* 311.

S. 176. Proxies.—(1) Any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person (whether a member or not) as his proxy to attend and vote instead of himself; but a proxy so appointed shall not have any right to speak at the meeting:

Provided that, unless the articles otherwise provide—

(a) this sub-section shall not apply in the case of a company not having a share capital;

(b) a member of a private company shall not be entitled to appoint more than one proxy to attend on the same occasion; and

(c) a proxy shall not be entitled to vote except on a poll.

(2) In every notice calling a meeting of a company which has a share capital, or the articles of which provide for voting by proxy at the meeting, there shall appear with reasonable prominence a statement that a member entitled to attend and vote is entitled to appoint a proxy, or where that is allowed, one or more proxies, to attend and vote instead of himself, and that a proxy need not be a member.

If default is made in complying with this sub-section as respects any meeting, every officer of the company who is in default shall be punishable with fine which may extend to [1][*five thousand rupees*].

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1. The words "five hundred rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 75 (w.e.f. 13-12-2000).

[2][(3) Any provision contained in the articles of a public company or of a private company which is a subsidiary of a public company, which specifies or requires a longer period than forty-eight hours before a meeting of the company, for depositing with the company or any other person any instrument appointing a proxy or any other document necessary to show the validity or otherwise relating to the appointment of a proxy in order that the appointment may be effective at such meeting, shall have effect as if a period of forty-eight hours had been specified in or required by such provision for such deposit].

(4) If for the purpose of any meeting of a company, invitations to appoint as proxy a person or one of a number of persons specified in the invitations are issued at the company's expense to any member entitled to have a notice of the meeting sent to him and to vote thereat by proxy, every officer of the company who knowingly issues the invitations as aforesaid or wilfully authorises or permits their issue shall be punishable with fine which may extend to [3][*ten thousand rupees*]:

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

(5) The instrument appointing a proxy shall—

(a) be in writing; and

(b) be signed by the appointer or his attorney duly authorised in writing or, if the appointer is a body corporate, be under its seal or be signed by an officer or an attorney duly authorised by it.

(6) An instrument appointing a proxy, if in any of the forms set out in Schedule IX, shall not be questioned on the ground that it fails to comply with any special requirements specified for such instrument by the articles.

(7) Every member entitled to vote at a meeting of the company, or on any resolution to be moved thereat, shall be entitled during the period beginning twenty-four hours before the time fixed for the commencement of the meeting and ending with the conclusion of the meeting, to inspect the proxies lodged, at any time during the business hours of the company, provided not less than three days' notice in writing of the intention so to inspect is given to the company.

NOTES

Eng. Act, 1948 : Sec. 136
Eng. Act, 1985 : Sec. 372

Previous Act : Regn. 65 of Table A

Companies Act, 1956

Recommendation of Company Law Committee.—The section gives effect, broadly, to the following recommendations of the Company Law Committee : The provisions relating to proxies constitute one of the least satisfactory, features of the Act of 1913. The

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2. Subs. by Act 65 of 1960, s. 47 for sub-s. (3).
3. The words "one thousand rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 75 (w.e.f. 13-12-2000).

only reference to this subject in the Act is in sub-sections (1)(c), (d), (2)(e), (f) and (g) of section 79, and in Regulations 63 to 67 of Table "A".

Our recommendations broadly follow the provisions of section 136 and section 137(2) of the English Companies Act, 1948. The principal changes which we recommended are as follows:—

"(a) any member of a company should be able to appoint another person whether he is a member or not, to attend and vote for him at a meeting of the company; a proxy should also have the authority to demand or join in demanding a poll;

(b) a proxy should not, however, have the right to speak except in a private company, and his right to vote on behalf of his principal should be confined to voting on a poll;

(c) on a poll taken at a meeting of a company or a meeting of any class of members of the company, a member entitled to more than one vote or his duly appointed proxy, need not use all his votes or cast all the votes he uses in the same way;

(d) every notice of a general meeting served on a member should indicate clearly that he is entitled to appoint a proxy to attend and vote for him, and that the proxy need not be a member of the company;

(e) every member of a company should be entitled to lodge the instrument appointing a proxy with the company at any time within forty-eight hours before the meeting, and any provision in a company's articles to the contrary should be void;

(f) invitations to appoint proxies should not be sent to the members of a company at its expense and any officer of the company who knowingly or wilfully contravenes the provision should be liable to a penalty;

(g) an instrument appointing a proxy should be in writing under the hand of the member or of his attorney duly authorised or if the member is a body corporate, either under seal or under the hand of an officer or an attorney duly authorised. If the instrument is in the form set out in Regulation 67 of Table "A" it should not be called in question by a company;

(h) every member of a company should be entitled to inspect the proxies lodged with the company at any time during the period commencing twenty-four hours after the proxies, have to be lodged and ending on the conclusion of the general meeting to which they relate.

We trust these recommendations will go far to improve the position relating to proxies under the present Act. It will be noticed that we have gone further than the provisions of section 136 of the English Act in providing for inspection of proxies by shareholders after previous notice to the company. We consider this provision necessary, as many articles of association contain clauses saying that no objection can be taken to the validity of a vote except at the meeting. In such cases, it is only reasonable that, if the shareholders want to object to any votes being recorded through proxies at a meeting, they should have some opportunity of examining these proxies and filing their objections". (*Report* : para 77, pages 57, 58)

Companies (Amendment) Act, 1960

Sub-section (4) was amended by the Amendment Act of 1960 to clarify that the company shall not require that an instrument appointing a proxy shall be deposited with the company earlier than 48 hours before the time for holding the meeting (*Clause* 50 of the Bill).—

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount—

(1) from 500 rupees to 5,000 rupees under sub-section (2).

(2) from 1,000 rupees to 10,000 rupees under sub-section (4).

Exceptions: Where no right to appoint proxy [Sub-section (1), proviso]

Sub-section (1) does not apply to a company not having a share capital unless the articles of such a company enable its members to attend and vote by proxy. There can be no proxy voting in the case of such company.

In the case of any private company (whether subsidiary of a public company or otherwise), a member cannot appoint more than one proxy for any one meeting unless its articles expressly enable the appointing of more than one proxy.

A third exception stated in the proviso is that the proxy shall not be entitled to vote except on a poll.

Deposit of proxies [Sub-section (3)]

The Section as amended by the Act of 1960 makes it clear that "a company shall not require that an instrument appointing a proxy shall be deposited with the company earlier than forty-eight hours before the time for holding the meeting". (*Notes on clauses*).

Where Article 61 of Table A or other similar provision is adopted by a company a proxy can be deposited 48 hours before the time fixed for the meeting or adjourned meeting in relation to which the proxy is given. The ruling in *McLaren* case (*infra*) was that a proxy could not be deposited 48 hours before an adjourned meeting in case the original meeting was adjourned, as an adjourned meeting was only a continuation of the original meeting. [See *McLaren v. Thomson,* (1917) 2 Ch 261.]

This position was changed by English Companies Act, 1948 [now s. 372(5) of 1985 Act]. The new provision is that a deposit of proxy may be made forty-eight hours before a meeting or adjourned meeting, thereby indicating that a proxy may be deposited either before original meeting or the adjourned meeting. The words 'or the adjourned meeting' have been brought into Art. 61 of Table A of our Act, but not into this section. If a Company's article contain a provision parallel to Art. 61, proxies can be submitted before the adjourned meeting also. In other cases the ruling in *McLaren v. Thomson,* (*Supra*) will carry its pursuassive value. Article 61 further provides that "in the case of a poll, not less than 24 hours before the time appointed for the taking of the poll; and in default the instrument of proxy shall not be treated as valid".

There is nothing in law to exclude Sunday in the computation of the 48 hours and therefore a proxy delivered on Sunday for a meeting to be held 48 hours later on Tuesday would be valid provided the receipt of the proxies at the time stated could be identified in some way. *K.P. Chackochan v. Federal Bank,* (1989) 66 Com Cases 953, 975 (Ker).

Where a poll is ordered and the meeting is postponed to a particular date, the postponement does not tantamount to an adjournment of the meeting, but is only a continuation of the original meeting and unless the articles provide otherwise fresh proxies cannot be lodged 48 hours before the postponed meeting where the postponement is only for taking a poll. Where a resolution to adjourn the meeting was lost on poll and the directors re-convened the meeting after 9 days, it was held that the re-convened meeting was a continuation of the original meeting and that there had been no adjournment. The proxies which were not valid for the original meeting (because of late lodgement) remain to be invalid for the re-convened meeting as well. *Jackson v. Hamlyn,* (*infra*).

The adjournment of a meeting merely for the purpose of taking a poll is not such an adjournment as will permit the deposit of further proxies during the interval. The articles may, however, permit the lodging of proxies at or before taking poll. See *Shaw v. Tati Concessions Ltd.,* (1913) 1 Ch 292.

No public company or private company, which is subsidiary of a public company, can make any provision requiring that proxies should be deposited earlier than 48 hours before the meeting at which they are to be used. Other private companies are free to make their own regulations by their articles. See *Jackson v. Hamlyn,* (1953) 1 All ER 887.

There is nothing, however, preventing a company fixing, by its articles, a shorter period for depositing proxies, or even permitting proxies being deposited just before the commencement of the meeting. The only restriction is that the period for lodging proxies cannot be extended to a time more than 48 hours before the meeting. (*Ibid*).

It is true that under the present provisions of the Companies Act, 1956, more than forty-eight hours need not be given for the lodging of proxies. But that is not the same thing as saying that if more than forty-eight hours is given for the lodging of proxies it renders the meeting irregular. *Jamnalal Ramlal Kimtee v. Konda Lakshman Bapuji,* (1961) 31 Com Cases 315, 321 (AP—DB).

A proxy properly lodged before a meeting will be valid for an adjournment of the meeting. In the case of a public company, more than one proxy may be appointed by a member having more than one vote. It is also common practice to make out alternative proxies *i.e.*, in favour of A or, in his absence, B so that if A is for any reason prevented from attending, B may attend and vote under the proxy.

§ See also Notes under Articles 61 of Table A of First Schedule.

Issue of proxy at company's expense [Sub-section (4)]

The directors of a company have a duty as well as a right to advise the members of the prudence or propriety of any proposed resolution and may use the company's money for the purposes of securing proxies in their own favour. In *Peel v. London and North Western Railway Co.,* (1907) 1 Ch 5 (CA) in considering the question whether the directors ought not to seek to influence the votes of the shareholders, BUCKLEY LJ observed : "It is proper that the directors should circulate amongst the shareholders in the company information for the purpose of guiding their judgment in questions of policy, and should endeavour to influence them in that matter..... In my opinion it is not only within their power, but it is their manifest duty so to do. It is their duty, they knowing the proper working of the railway undertaking, if a question of policy of this sort is started, to say to the shareholders, "In our view the policy which is suggested is wrong. We offer you our reasons for thinking so, and we ask you to support us by your vote in the interests of the undertaking in defeating the policy which is suggested....."

This subject has been adequately dealt with in HALSBURY'S LAWS OF ENGLAND, (4th Edn., 1988 Reissue Vol. 7(1) Para 703, page 506 : 1996 Reissue, Vol. 7(1), para 676, p. 508) which reads as follows : "The directors may pay out of the company's funds the cost of printing and stamping proxy papers and of posting them to the members, if in so doing, they are acting in good faith in the interests of the company; *Peel v. London and North Western Rly. Co., (Supra).* If for the purpose of any meeting of a company invitations to appoint as proxy a person or one of a number of persons specified in the invitation are issued at the company's expense to some only of the members entitled to be sent a notice of the meeting and to vote at it by proxy, every officer of the company who knowingly and wilfully authorises or permits their issue as aforesaid is liable to be penalised. However, an officer is not so liable by reason only of the issue to a member at his request in writing of a form of appointment naming the proxy or of a list of persons willing to act as proxy if the form or list is available on request in writing to every member entitled to vote at the meeting by proxy."

Form of proxy [Sub-section (6)]

For form of proxy, see Schedule IX. Note that an instrument of proxy need not be in either of the forms given in Schedule IX. The advantage of its being in any of those forms is that the appointment of a proxy made in any of such forms cannot be questioned on the ground that it has not complied with any special requirements contained in the articles of a company. Where it is not in any such forms, it may be questioned if it does not comply with the requirements of the articles of the company.

Where a company in accordance with its articles has adopted a proxy form of its own and wants its members to use only that form, it has been held that even then members can

use the form prescribed by Sch. IX. *General Commerce v. Apparel Export Promotion Council,* (1990) 69 Com Cases 158 (Del).

It is not necessary that the proposed proxy should actually be "named", if he is sufficiently described for all business purposes. *Bombay-Burmah Trading Corporation v. Dorabji Cursetji Shroff,* (1905) AC 213.

Deposit of Proxy Form by Fax.—On the question whether a proxy form can be filed through fax, a beginning has been made with a creditors meetings (S. 500). It has been held that a creditor can attend a meeting through a proxy by sending the proxy nomination by fax. *A Debtor (No. 2021 of 1995), ex parte, Re,* (1996) 1 BCLC 538 (Ch D); *IRC v The Debtor,* (1996) 1 BCLC 538 (Ch D). It was also held that a proxy form would be deemed to be signed if it carried same distinctive or personal mark placed by the creditor, that is to say, signed by electronic devices or by a rubber stamp (*ibid*). In order to avoid any dispute or controvercy the original proxy form should be sent immediately after fax transmission. It would also be advisable to have an authority in the company's articles to accept faxed proxy forms.

Members appointing proxy advised to fill date of meeting

Department's instructions.—It has been alleged that, in some cases, the shareholders while appointing the proxies have failed to fill in the date of the meeting and that this has enabled certain unscrupulous company managements to make use of such forms even at meetings subsequent to the ones for which the said instruments of proxies were actually intended and executed. This Department would, therefore, emphasise the imperative need to fill in the date of the meetings for which the proxies are executed so as to obviate any possible misuse of the proxy forms, as alleged in some quarters. (*Circular letter No.* 2/52/58-PR, dated 25-10-1958.)

Signing of proxy

In the case of a proxy, the name signed in the proxy form should be the same as that in the register of members. If the name is different the proxy may be rejected, unless authority for using such different signature is produced with the proxy.

In the case of joint trustees or joint members all must sign the proxy, unless the articles enable one joint shareholder to sign proxies.

Where the name in the register of members is as attorney, executor administrator or guardian, papers showing the authority to sign a proxy, should accompany the proxy.

If a company rejects an unsigned proxy form, the shareholder should be informed.

Attestation of proxy

The Articles of Association of some companies contain provisions to the effect that the member's signature on the proxy requires attestation. If the proxy is in one of the forms prescribed by Schedule IX, omission to obtain attestation of the signature will not invalidate the proxy. If the proxy is not in accordance with Schedule IX and the company's Articles provide for attestation the proxy would be invalid if the provisions of the Articles relating to proxies are not complied with. See *Harben v. Phillips,* (1883) 23 Ch D 14.

When attestation is required, a proxy-holder cannot be an attesting witness to his own proxy form. *Parrot, Ex p., Cullen,* (1891) 2 QB 151.

Member's/Director's right to inspect proxy documents [Sub-section (7)]

The sub-section provides for inspection of proxies during the meeting and for a period of twenty-four hours before its commencement, and the inspection is to be only during business hours. It is not clear whether, when a meeting is held outside business hours, proxies can be inspected during the meeting. Probably not, because the express provision is that inspection is to be made during business hours.

A director has right to inspect proxies lodged with the company. *Armstrong v. Landmark Corporation Ltd.,* (1967) NSWR 13 (Australia).

The court has power to compel the company to give certified copies of proxy forms filed with it so as to enable the complaining member to have this question decided as to who is the right proxy of a member. *Swadeshi Polytex Ltd. v. V.K. Goel,* (1988) 63 Com Cases 688 (Del—DB).

Rights of proxy

A proxy is ordinarily entitled to vote only on a poll but the articles of any company may provide for a proxy voting by show of hands also. A proxy is not, as of right, entitled to speak at a meeting, though he may be permitted to do so. There is, however, no provision preventing a proxy putting questions in writing and sending the same to the chairman for an answer.

A proxy can demand or join in a demand for a poll. A member holding a proxy for another member may, on a poll, vote in respect of his own holding in a manner contrary to that of the person whom he represents by a proxy: *Foerster v. Newlands West (Grigualand) Dimond Mines Ltd.,* (1902) 18 TLR 497.

Section 176 cannot be evaded by granting to a proxy a power-of-attorney with the authority to address the company in general meeting and to vote as an individual member may as if he were present. This is implicit in the provisions of the section. The proxy must be in the form set out in Schedule IX so that even if a power-of-attorney is given to a proxy, authorising him to speak at a meeting or vote on a show of hands, the power-of-attorney will be regarded as a proxy and the holder will not be entitled to exercise these rights.

When a shareholder holding the majority of shares authorises an agent to vote for him in respect of the shares so held, the agent acquires no interest, legal or beneficial in the shares. The title and controlling interest of the holder never passes to the agent. *CIT v. Jeewanlal Ltd.,* (1953) 23 Com Cases 446 : AIR 1953 SC 473.

A proxy may be given the right to vote as and when he chose. Accordingly where a proxy was authorised to vote in connection with a scheme of arrangement, it was held that he could as well vote on a motion to postpone the scheme. *Waxed Papers Ltd., Re.* (1937) 2 All ER 481 (CA).

Mistake in proxy

While mistakes in a proxy, which affect the exercise of the voting right in any way will render it invalid, a mistake which is not likely to mislead anybody and which does not affect the proper exercise of the voting right in any way, does not render the votes cast by a proxy-holder in exercise of his right of proxy invalid; *e.g.*, where the proxy form described the meeting as AGM when in fact it was an extraordinary general meeting. *Oliver v. John Dalgleish,* (1963) 3 All ER 330 : (1964) 34 Com Cases 623 (Ch D).

By a printer's error, the date of a meeting was left blank and several proxies were returned by shareholders duly executed and stamped but without filling in the blanks. The Secretary subsequently filled in the date of the meeting and lodged the proxies with the company. These were held valid. *Ernest v. Loma Gold Mines Ltd.,* (1897) 1 Ch 1.

Proxy by nominees

Where shares are held by nominee companies on behalf, for example, of customers of banks, such companies will, on request, execute separate proxies in favour of parties nominated by the customer in respect of his holding. Even though the shares of the nominee company are shown in one account in the company's register of members, several persons may thus be represented at the meeting.

Proxy by creditors in winding up

Creditors in the winding up of a company may vote by proxy. [Section 500].

Proxy by constituted attorney and right to attend and vote at meetings

A shareholder may give irrevocable power of attorney to a person to cast votes on his behalf in the general meeting and also sign proxy forms on his behalf as constituted attorney. The constituted attorney's position is that of a proxy and he can attend and vote at the meeting. If the shareholder himself attends the meeting, the power of attorney shall stand revoked thereby. *Cousins v. International Bricks Co. Ltd.,* (1931) 2 Ch 90 at 101 : (1932) 2 Com Cases 108 (CA); *Tata Iron and Steel Co. Ltd. Re,* AIR 1928 Bom 80.

Proxy by joint holders

In the case of joint shareholders, a proxy form to be valid must be executed by all the joint holders. A proxy, being in the nature of an instrument appointing an agent creates a contractual relationship which can be effective only when all the principals jointly execute it or when it is executed by one of them acting under the authority of all.

Revocation of proxy and change of instructions

The relationship between a shareholder and his proxy is that of principal and agent. A proxy can at any time be revoked. *Narayanan Chettiar (S. Rm. S.T.) v. Kaleeswara Mills Ltd.,* (1951) 21 Com Cases 351 : AIR 1952 Mad 515; *In re, Tata Iron & Steel Co.,* AIR 1928 Bom 80. Revocation cannot be assumed. Written notice thereof is necessary. *Swadeshi Polytex Ltd. v. V.K. Goel,* (1988) 63 Com Cases 688 (Del).

Where a shareholder, who having given proxy, personally attends and votes at the meeting the proxy is revoked thereby. In *Cousins v. International Bricks Co. Ltd.,* (1931) 2 Ch 90 at 101 : (1932) 2 Com Cases 108 (CA), it was held that there was nothing in the articles of a company to deprive a shareholder who was present at a meeting of the right to vote in person, even though he had given a proxy to some other person to vote for him at the same meeting; the fact that the proxy was not revoked in the manner laid down in the articles did not prevent the member recording his vote in person to the exclusion of the proxy holder. Shareholders' mere presence at the meeting will not have the effect of revocation. *Narayanan Chettiar's* case, (*Supra*).

Revocation can also be effected by a determination of the authority by the donor himself prior to the meeting or by deposit of another instrument in substitution for the former instrument *R. v. Wait,* (1823) 11 Price 518.

The death of a shareholder after he appoints a proxy also revokes the authority of the proxy, but not until the company has notice of the death.

As a rule a proxy is not revoked unless written notice of the revocation by death, insanity, transfer of shares or act of revocation has been received by the company before the meeting or adjourned meeting.

It is not necessary that the proxy holder should also be notified. *Narayanan Chettiar (S. Rm. S.T.) v. Kaleswari Mills Ltd. (Supra).*

Thus where the revocation was communicated not before the meeting but before the poll, it was held that the revocation was too late and the votes cast by the proxy were valid. *Spiller v. Mayo (Rhodeshia) Development Co. (1908) Ltd.,* 1926 WN 78. This is on the basis that an adjournment for the purpose of a poll is a continuation of the same meeting. This would not be so where the adjournment is for any other purpose.

Regulation 63, Table A provides that a vote given by a shareholder in accordance with the terms of an instrument of proxy shall be valid notwithstanding the revocation of the proxy, provided no intimation in writing of the revocation has been received at the office or by the chairman of the meeting before the vote is given. *K.P. Chackochan v. Federal Bank,* (1989) 66 Com Cases 953, 973. A second proxy lodged after the expiry of the prescribed time cannot be treated as revoking the earlier proxy by constructive notice. *Tata Iron & Steel Co. Re,* AIR 1928 Bom. 80.

If there are two or more proxies given by the same shareholder in respect of the same shares, the proxy bearing the latest date will supersede the earlier ones. *Swadeshi Polytex Ltd., Re,* (1988) 63 Com Cases 709 (Del). If the proxies bear no date or bear the same date, both the proxies would be ineffective (*ibid*). In *Tata Iron & Steel Co. Re,* AIR 1928 Bom 80, CRUMP J., in respect to proxies which were undated, observed: "I can understand that an omission to state the date of the meeting may be a serious defect, but as for date of execution I can only say *de minimis.* This was quoted with **approval** in *Firestone Tyre & Rubber Co. v. Synthetics Chemicals Ltd.,* (1971) 41 Com Cases 377 (Bom).

In a contested situation, shareholders may be sent a proxy card containing a revocation of any earlier proxy lodged by them. They are invited to sign and send the card to the company. In that event, subject to anything to the contrary in the company's articles:

(a) a properly completed proxy in that card which is lodged before the deadline for proxies will be effective to revoke an earlier proxy; and to authorise a new proxy;
(b) a completed proxy in the later form lodged after the deadline but handed in at the registered office before the start of the meeting or adjourned meeting will be effective to revoke the earlier proxy. It will not be sufficient for constituting a new proxy because of the time factor.
(c) where Table A, article 63 applies, the above-mentioned form of revocation will be an effective revocation up to the time of the poll (in the case of a poll taken otherwise than on the same day as the meeting or adjourned meeting) but, again, will not be operative as a proxy.

Without following any particular formality, a shareholder is entitled to change his instructions to his proxy-holder at any time before the vote is cast. The situation often arises where a company sends out forms by which the chairman is appointed as the member's proxy. Letters are then received at the office which change the instructions given on the previously lodged proxies. The chairman should not ignore such instructions.

Private company

As the section does not apply to a private company, which is not subsidiary of a public company, such a company may by its articles prohibit voting by proxy and may make its own regulations as regards proxy voting. Where as per the articles of a private company voting by proxy is permitted, subject to any restriction contained in its articles, proxies may be deposited at any time, even at the meeting itself.

A member cannot appoint more than one proxy for any one meeting unless the articles of a private company unable such appointment.

Proxy in blank

A proxy signed in blank as to the name of the appointee, or as to the date of the meeting and delivered with authority to fill up the blank, is not open to objection if, when deposited with the company, the blank has been duly filled up. It is not a deed and there is, therefore, no objection to the blank being filled up by the agent of the appointee, even though appointed by parol. The instrument in such circumstances is not complete until it is filled up, and when filled up the only question is whether it is duly stamped. (PALMER'S COMPANY PRECEDENTS, 17th Edn., Part I, page 507). When a duly completed and signed proxy form has been lodged with the company, the latter cannot object to its validity on the ground that the shareholder signed the form in blank and sent it to his agents who completed the entries. Any such objection can be raised only by the shareholder and not by the company. *Virendra Kumar Goel v. Raghu Raj,* 1987 Tax LR 1775 (Del).

The articles of a company required the member to indicate the number of votes he was authorising his proxy to use. He filed certain proxy forms which did not contain this information and the same were held to be invalid, *Davey v. Inyaminga Petroleum,* (1954) 3 SA 133. Other particulars of the forms such as the name of the appointee and the date of the meeting, etc. can be filled afterwards by any person authorised by the shareholder. *Sadgrove v. Bryden,* (1907) 1 Ch 318.

Rate of Stamp duty on Proxy

Notification No. S.O. 130(E), dated 28-1-2004.—Indian Stamp Act, 1899 has been amended (w.e.f. 1-3-2004). The amended rate of stamp duty is as follows:

Art. 52. Proxy empowering any person to vote at any one election of the members of a district or local board or of a body of Municipal Commissioners, or at any one meeting of (*a*) members of an incorporated company or other body corporate whose stock or funds is or are dividend into shares and transferable, (*b*) a local authority, or (*c*) proprietors, members or contributors to the funds of any institution.	Fifteen paise

The rate of stamp duty on proxy earlier (w.e.f. 1-6-1976) was thirty paise *vide Notification No. S.O.* 198E, 199E, dated 16-3-1976.

The rate of Stamp duty varies from state to state. For the Schedule of Stamp duty refer, K. KRISHNAMURTHY – INDIAN STAMP ACT, 1899, (8th Edn.) 2002.

Stamp duty and unstamped proxy

Stamp duty on proxy is must under the Stamp Act, and an unstamped proxy will be ignored. It must be noted that a proxy is available only for the meeting to which it relates and it cannot be used for more than one meeting. (See the language of Article 52 of the Stamp Act). Observations to the contrary in the case of *Narayanan Chettiar v. Kaleeswara Mills Ltd.*, (1951) 21 Com Cases 351 : AIR 1952 Mad 515, do not seem to state the law correctly. [See article 'PROXY VOTING AT COMPANY MEETING' by A. RAMAIYA In (1967) 1 Comp LJ 30 (Journal section)]. The following passage in this articles explains the position :

"Where a proxy is not duly stamped or effectively cancelled by signing and dating or initialling and dating or in any other effective manner as required by section 12 of the Stamp Act, the proxy will have to be ignored. The decision of the Madras High Court in *Narayanan Chettiar v. Kaleeswar Mills Ltd., (Supra)* wherein it is stated that the Chairman of a general meeting should not reject proxies not duly stamped but should refer them to the Collector for decision under section 31 of the Stamp Act and postpone the declaration of the result of the voting on the poll taken at the meeting, until the decision of the Collector was obtained (which, for ought we know, might take weeks or even months, having regard to the exigencies of official business), ignores the fact that not only it is not the duty or within the powers of the chairman of a company meeting to make any reference to the Collector under the Stamp Act, but he is bound to declare the result of any poll taken at a general meeting as expeditiously as possible. In this connection it may also be noted that sub-section (2) of section 180 of the Companies Act, 1956 requires a poll to be taken within 48 hours of the time of demand therefor, thereby indicating that expeditious action in the matter of taking poll is necessary."

Proxies executed by shareholders in a State though bearing the stamps of another State (Maharashtra, in this case) are valid. *Firestone Tyre & Rubber Co. v. Synthetics and Chemicals Ltd.*, (1971) 41 Com Cases 377, 458 (Bom).

The Chairman of a meeting is entitled to accept unstamped proxies. If the company wishes subsequently to use them in evidence, it may have them stamped. On the other hand if the chairman decides to reject the proxies he does not have to allow time for them to be stamped. Accordingly where the chairman accepted unstamped proxies, and objection was taken several days after the meeting it was not sustainable and that the votes cast by the proxy-holders were validly accepted. *Marx v. Estate and General Investment Ltd.*, (1975) 3 All ER 1064 (Ch D). In another case it was held on the facts that objections as to the validity of votes cast by holders of proxies on which stamps remained uncancelled were not sustainable and the receiver was right in treating their votes as valid. *M.G. Mohanraj v. Mylapore Hindu Permanent Fund Ltd.*, (1990) 1 Comp LJ 87 (Mad). A proxy form on which stamps have been affixed but not cancelled is an unstamped proxy and is unenforceable in law. *T.M. Shanmugam v. Mylapore Hindu Permanent Fund Ltd.*, (1990) TLNJ 52, 63 (Mad). See also *Tata Iron & Steel Co. Ltd., Re,* AIR 1928 Bom 80; *Firestone Tyre & Rubber Co. v. Synthetics & Chemicals Co. Ltd., (Supra).*

Even though the Stamp Act precludes stamping a proxy after execution, so long as it is properly stamped at execution, its operative parts *e.g.* the name of the proxy-holder, the date of the meeting at which the proxy is to be used, may be filled in afterwards by any person authorised to do so. *Sadgrove v. Bryden,* (1907) 1 Ch 318. To be valid, a proxy executed outside India must be properly stamped within three months after it has been first received in India. *Saudagar Singh v. Gurdip Singh Gill,* (1980) 50 Com Cases 591 (P&H—DB).

§ For a detailed study on the subject refer "K. KRISHNAMURTHY—INDIAN STAMP ACT, 8th Edn., 2002".

No proxy voting by post

In a recent decision of the Allahabad High Court, A. N. VERMA, J. has expressed the view that the provisions of this section are wide enough to permit the casting of votes by proxies by post. *Kunwar Brij Bhushan v. Dehradun Tea Co. Ltd.*, (1982) 52 Com Cases 271 (All). With great respect to the learned Judge it is submitted that this view is not tenable, for section 176 only enables a member to appoint a proxy *'to attend and vote'* instead of himself. A proxy has no power or authority to vote without attending in person.

It is to be noted that a proxy to be effective must actually be received by the company within the specified time. If it is delayed in the post, there is no provision by which its receipt is deemed to be other than the actual time of receipt.

General proxy

A general proxy to attend all general meetings of a company will be treated as a general power-of-attorney and must be stamped as such, otherwise it will be ineffective.

Voting by show of hands by proxy

Where the articles of a private company provide for voting by show of hands by a proxy, the Chairman in counting the number of votes, must count the votes of each person who holds proxies as a single vote and not count a vote for each of the members whose proxies he holds. *Ernest v. Loma Gold Mines Ltd.*, (1897) 1 Ch 1.

Validity of proxies

It is for the Chairman to decide as to the validity of the proxies and his decision will stand unless it is proved to the court to be wrong. *Indian Zoedone Co., Re.* (1884) 26 Ch D 70. *Dawson v. Hormasji*, (1932) 2 Com Cases 399 : AIR 1932 Rang 154. This matter cannot be decided by scrutineers. *T.M. Shanmugam v. Mylapore Hindu Permanent Fund Ltd.*, 1990 TLNJ 52, 63 (Mad).

Proxy and representative of a company

A proxy has to be distinguished from the representative of a company appointed under S. 187 to represent his company at meetings. Accordingly where a company purchased shares which could not be registered in its name and remained in the name of the sellers and the latter appointed a person on behalf of the buyer company to act in its interest at the company meetings, his votes were rejected. He could not be the representative of a company whose shares purchased were not yet registered and he was not appointed as a proxy by the registered shareholder. See *Coachcraft Ltd. v. SVP Fruit Co Ltd.*, (1980) 28 ALR 319 (PC).

§ See also Notes under S. 187 under the heading "Position of Representative".

Penalty for default

If default is made in complying with sub-section (2), for omitting to state in notice of meeting that a member is entitled to appoint proxy who need not be a member every officer of the company who is in default shall be punishable with fine which may extend to five thousand rupees.

For the purpose of any meeting, issuing invitation at company's expense to appoint named person as proxy every officer of the company knowingly issuing such invitation or wilfully authorising or permitting its issue shall be punishable with fine which may extend to ten thousand rupees as per sub-section (4).

For refusing to members inspection of proxies at any time during business hours, as per sub-section (7) the company and every officer who is in default, shall be punishable under section 629A, with fine upto five thousand rupees and where the contravention is a continuing one, with a further fine upto five hundred rupees for every day of default.

Compoundable offence.—Offences under this section are compoundable as per section 621A.

Modification in relation to class meetings etc.—Refer to Annexures B, C and D of the Companies (Central Govt.'s) General Rules and Forms, 1956, (See *Appendix* 1) regarding modification of this section in applicability to meetings of a class of shareholders, meetings of debenture-holders, and meetings of a class of debenture-holders. Note that the form of proxy is appended to the relevant Annexures.

Model regulations as per Table A.—For model regulations pertaining to this section in the Articles of Association, see Regulations 61 to 63 of Table-A.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of maintenance of registers. The relevant paragraph 1 of the Form prescribed under Rule 3 of the Companies (Compliance Certificate) Rules, 2001 states :

Paragraph 1.— **The company has kept and maintained all registers as stated in Annexure "A' to this certificate, as per the provisions and the rules made thereunder and all entries therein have been duly recorded.**

Register of Proxies [*Item (d) of 'Other Registers'*]

The register is optional register and should be maintained as good secretarial practice. However, if the register is not maintained, the CSP should not qualify his certificate.

Prescribed Check List

Check whether the register of proxies containing details of proxies lodged in respect of every general meeting is maintained.

For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

Secretarial Standards on General Meetings issued by the Council of ICSI (SS-2)

These Standards seek to prescribe a set of principles for the convening and conduct of General Meetings and matters relating thereto. In the initial years, adherence by a company to the Secretarial Standards will be recommendatory. These principles may not be applicable to any meetings convened on the directions of the Court or CLB or other authority, unless the directions themselves so prescribe.

Secretarial Standard [para 7]

7. Proxies

7.1 *Notice of Right to Appoint*

Every Notice calling a Meeting of a company which has a share capital or the Articles of which provide for voting at a Meeting by proxy, should prominently contain a statement that a Member entitled to attend and vote is entitled to appoint a proxy to attend and vote instead of himself and that, unless the Articles provide otherwise a proxy need not be a Member.

7.2 *Form of Proxy*

7.2.1 An instrument appointing a proxy should be either in the Form specified in the Articles or in any of the Forms set out in the Act.

If the Articles do not provide a form for 'two way voting' as per the format set out in *Annexure* 'A', the Articles should be amended so as to provide accordingly.

7.2.2 An instrument of Proxy duly filled, stamped and signed, is valid only for the Meeting to which it relates including any adjournment thereof.

7.3 *Stamping of Proxies*

An instrument of Proxy is valid only if it is properly stamped. Unstamped or inadequately stamped proxies or proxies upon which the stamps have not been cancelled are invalid.

7.4 *Execution of Proxies*

7.4.1 In addition to the Member appointing a Proxy, the Proxy-holder also should sign the instrument of Proxy.

7.4.2 An authorised representative of a body corporate or of the President of India or of the Governor of a State, holding shares in a company, may appoint a proxy under his signature.

7.5 *Proxies in Blank and Incomplete Proxies*

7.5.1 A proxy form which does not state the name of the proxy should not be considered valid.

7.5.2 If an undated proxy, which is otherwise complete in all respects, is lodged within the prescribed time limit, it should be considered valid.

If a company receives multiple proxies for the same holdings of a Member, which are either not dated or bear the same date without specific mention of time, all such multiple proxies should be treated as invalid.

7.6 *Deposit of Proxies*

7.6.1 Proxies should either be deposited with the company in person or received through post not later than forty-eight hours before the commencement of the Meeting at which they are to be used and a proxy should be accepted even on a holiday if the last date by which it could be accepted is a holiday.

Proxies may be accepted at a shorter period, being not less than twenty-four hours before the commencement of the Meeting, if the Articles so provide.

7.6.2 A Member who has not appointed a Proxy to attend and vote on his behalf at a Meeting may appoint a Proxy for any adjournment of the Meeting, not later than forty-eight hours before the time of such adjourned Meeting.

7.7 *Revocation of Proxies*

7.7.1 If a proxy had been appointed for the original Meeting and such Meeting is adjourned, any Proxy given for the adjourned Meeting revokes the Proxy given for the original Meeting.

7.7.2 A proxy later in date revokes any proxy/proxies dated prior to such proxy.

7.7.3 A proxy is valid until written notice of revocation has been received by the company before the commencement of the Meeting or adjourned Meeting, as the case may be.

A Proxy need not be informed of the revocation of the Proxy issued by the Member. Even an undated letter of revocation of Proxy should be accepted. Unless the Articles provide otherwise, a notice of revocation should be signed by the same person who had signed the Proxy.

7.8 *Inspection of Proxies*

7.8.1 Requisitions, if any, for inspection of proxies should be received in writing from a Member at least three days before the commencement of the Meeting.

7.8.2 Proxies should be made available for inspection during the period beginning twenty-four hours before the time fixed for the commencement of the Meeting and ending with the conclusion of the Meeting.

7.8.3 A fresh requisition, conforming to the above requirements, should be given for inspection of Proxies in case the original Meeting is adjourned.

7.9 *Record of Proxies*

7.9.1 All Proxies received by the Company should be recorded chronologically in a register kept for that purpose.

7.9.2 In case any Proxy entered in the register is rejected, the reasons therefor should be entered in the remarks column.

§ For full text of the Secretarial Standard, see *Appendix* 311.

S. 177. Voting to be by show of hands in first instance.—At any general meeting, a resolution put to the vote of the meeting shall, unless a poll is demanded under section 179, be decided on a show of hands.

NOTES

Eng. Act, 1948 : Table A, Regn. 58 Previous Act : Regn. 56 of Table A

Voting by show of hands

"Unless the articles otherwise provide, questions arising at a general meeting are to be decided, in the first instance, by a show of hands. This is the common law rule which, unless excluded, applies automatically. *Horbury, Bridge Co.,* (1879) 11 Ch D 109. In taking a vote by show of hands, the duty of the chairman, unless the articles otherwise provide, is to count the hands held up and to declare the result accordingly, without regard to the number of votes that a member possesses and without regard to proxies, whether held by members for other members or by non-members for members. PALMERS COMPANY LAW, 7095 (25th Edn., 1992, para 7.610). In a voting on a show of hands, proxies cannot be counted unless the articles make express provision therefor. *Ernest v. Loma Gold Mines Ltd.,* (1897) 1 Ch 1, 5 (CA) **overruling** *Bidwell Bros, Re,* (1893) 1 Ch 603.

The procedure usually followed is that a resolution is proposed either by the chairman or some other member and is seconded by some one who is member (including the chairman if he had not proposed the resolution). Unless the articles so require, seconding is not essential. A proposal put to the meeting is open to discussion and after the discussion is closed, the chairman puts the resolution to vote and after counting the numbers for and against, declares the result. In the meantime, if a poll is demanded, the procedure prescribed in the sections next following is followed.

The above statement (RAMAIYA'S COMPANIES ACT) was cited with **approval** by the Bombay High Court at p. 766 in *Jetu Jacques Taru Lalvani v. JBA Printing Inks Ltd.,* (1997) 88 Com Cases 759 (Bom). Special resolutions were passed at an extraordinary general meeting for changing articles of the company on the eve of its becoming a public company under operation of law and also for increasing capital partly by capitalisation of profits and partly by making rights issue. The petitioning shareholder who represented

the minority interest was present at the meeting and was opposed to the resolution. The resolution was passed by show of hands. The petitioner had not asked for a poll. He was not allowed subsequently to question the validity of the resolution.

However, a poll can be demanded without going through the formality of a show of hands, *Holmes v. Keyes (Lord),* (1958) 2 All ER 129 (CA).

A proposal is usually called "a motion" and when once it has been submitted to the meeting for discussion, it cannot be withdrawn without the consent of the meeting. *Horbury Bridge Coal Co.*, (1879) 11 Ch D 109. In *Berar Trading Co. Ltd. v. Gajanan Gopal Rao Dixit,* (1972) 42 Com Cases 48 (Bom), it was held, following the above English case, that for a proposal to be admitted it is not necessary, that it should be seconded. But there is nothing in the Companies Act to prevent a company making regulations in this respect.

Note however that under section 176(1) proviso, the articles may provide for proxies voting by show of hands also.

Unless the articles of a company otherwise provide, neither a transferee of shares nor a person entitled to any shares by transmission by operation of law, will be entitled to vote before being registered as a member.

Where shares are pledged to a bank or any other person, the pledger and not the pledgee will have the right to vote, unless the pledgee's name has been registered in the company's register as the holder of the shares.

Insolvent shareholder's right to vote

Notwithstanding that he has no longer any beneficial interest in the shares and the dividends are payable only to his trustee in bankruptcy, an insolvent shareholder so long as he remains in the register of a company as a member, is entitled to exercise the votes which are attributed to his status as member. *Morgan v. Gray,* (1953) 1 All ER 213 (Ch D). *Cf.* also *Birch v. Sullivan,* (1958) 1 All ER 56 (Ch D). Only the property of the insolvent—property as defined in section 2 (d) of the Provincial Insolvency Act and section 2(e) of the Presidency Towns Insolvency Act—vests in the Receiver or Assignee.

For the manner of counting votes, see section 189.

Outsiders present at meetings

An outsider may be permitted to attend a meeting of shareholders, even though he has no legal right to be present. But if objection is taken to his presence, the matter will have to be put to vote at the meeting and decided in the same way as any other question.

Joint holder

Even if the articles do not make any specific provisions, any joint holder present at a meeting will be entitled to exercise voting power. But only one of the several joint holders will be entitled to exercise voting power.

Voting rights of minor

If the shares held by a minor are fully paid the minor will be entitled to vote at the meeting of the company in which he is a shareholder. The voting rights on shares are regulated by the company's articles and by the provisions of s. 87(1) of the Act. Section 87(1) provides that any member of a company limited by shares and holding any equity share capital shall have the right to vote on every resolution put before the meeting and his voting right on a poll shall be in proportion to his share in the paid-up equity share capital of the company. Since no distinction has been made out in case of minors, minors will also be entitled to vote in general meetings of the company both on a show of hands and on a poll. (It goes without saying that if the minor is not able to exercise his rights personally, because of something like tender years, he can do so through the next friend.)

Private company

A private company, which is not, subsidiary of a public company, if it makes its own provisions by its articles as regards the matters in this section, is not bound to follow the provisions of this section. [See section 170(1)(ii)].

Modification in relation to class meetings, etc.—Refer to Annexures B, C and D of the Companies (Central Govt.'s) General Rules and Forms, 1956, [See *Appendix* 1] regarding modification of this section in applicability to meetings of a class of shareholders, meetings of debenture-holders, and meetings of a class of debenture-holders.

Secretarial Practice Notes : Voting by show of hands

Check that if poll was not demanded at any general meeting, voting in the first instance was done by show of hands.

Secretarial Standards on General Meetings issued by the Council of ICSI (SS-2)

These Standards seek to prescribe a set of principles for the convening and conduct of General Meetings and matters relating thereto. In the initial years, adherence by a company to the Secretarial Standards will be recommendatory. These principles may not be applicable to any meetings convened on the directions of the Court or CLB or other authority, unless the directions themselves so prescribe.

Secretarial Standard [para 6]

6. Voting

6.1 *Proposing a Resolution*

6.1.1 Every Resolution should be proposed by a Member and seconded by another Member entitled to vote thereon.

Every Member holding equity shares and, in certain events as specified in the Act, every Member holding preference shares, shall be entitled to vote on a Resolution.

6.1.2 A Director should not propose any Resolution in which he is deemed to be concerned or interested nor should he participate in the discussion or vote on any such Resolution

6.2 *On Show of Hands*

Every Resolution should, in the first instance, be put to vote on a show of hands.

Every Member entitled to vote on a Resolution and present in person shall, on a show of hands, have only one vote irrespective of the number of shares held by him. Unless the Articles otherwise provide, a Proxy cannot vote on a show of hands.

6.3 *By Poll*

6.3.1 A Member present in person or by proxy shall, on a poll, have votes in proportion to his share of the paid up equity capital of the company, subject to differential rights as to voting, if any, attached to certain shares as stipulated in the Articles or by the terms of issue of such shares.

While a proxy cannot speak at the Meeting, he has the right to demand or join in the demand for a poll.

6.4 *Casting Vote*

If the Articles so provide, the Chairman shall have a casting vote.

§ For full text of the Secretarial Standard, see *Appendix* 311.

S. 178. Chairman's declaration of result of voting by show of hands to be conclusive.—A declaration by the chairman in pursuance of section 177 that on a show of hands, a resolution has or has not been carried, or has or has not been carried either unanimously or by a particular majority, and an entry to that effect in the books containing the minutes of the proceedings of the company, shall be conclusive evidence of the fact, without proof of the number or proportion of the votes cast in favour of or against such resolution.

NOTES

Eng. Act, 1948 : Table A, Regn. 58
Eng. Act, 1985 : Table A, Regn. 47

Previous Act : Regn. 56 of Table A

Conclusiveness of chairman's declaration of result

The provision here that the chairman's declaration shall be conclusive evidence only means that, in the absence of fraud, the entry in the minutes books is conclusive as between the parties bound by the minutes. [See *Kerr v. Mottram (John) Ltd.*, (1940) 2 All ER 629 (Ch D) : (1940) 10 Com Cases 241]; see also *Arnot v. United African Mines Ltd.*, (1901) 1 Ch 518 (CA); *Hadleigh Castle Gold Mines Ltd., Re,* (1900) 2 Ch 419; *E D Sassoon United Mills, Re,* AIR 1929 Bom 38. But this may not be so in the following two cases: (a) when a poll is demanded and (b) where the declaration is without taking a count of the number or proportion of the votes recorded in favour or against the resolution. *Dhakeshwari Cotton Mills v. Nil Kumar Chakravorty,* (1937) 7 Com Cases 417 : AIR 1937 Cal 645. Further, the formalities such as the showing of hands must be complied with even when the motion is unopposed. *Citizen Theatres, Re,* 1946 SC 14 (Scot).

The declaration is not conclusive where the declaration on the face of it or according to the facts proved showed that the statutory majority had not voted in favour of the resolution. *Caratal (New) Mines Ltd., Re,* (1902) 2 Ch 498; *Clark & Co. Ltd., Re,* (1911) 48 SCLR 154 (Scotland). The declaration of the chairman that a special resolution has been passed is not conclusive so as to preclude a shareholder from disputing the validity of the resolution by legal proceedings on the ground that the resolution has not been carried by the statutory majority. *Young v. S. African & Australian Explanation Syndicate,* (1896) 2 Ch 268.

Further, the chairman's declaration in a voting on a show of hands is conclusive evidence of only the fact of the passing etc., of the resolution. It does not prevent the legality or validity of the resolution being questioned.

Chairman's decision on a resolution will not be conclusive if the resolution was not in accordance with the notice of the meeting. *Betts & Co. v. MacNaghten,* (1910) 1 Ch 430.

The chairman's declaration may be disputed where it is inaccurate on the face of it or where fraud is shown. If there is only a mistake and no fraud, the proper course is to call another meeting. *R. v. St. Pancras (Vestrymen),* (1839) 11 Ad & El 15. The Court will intervene on proper evidence, if the votes are improperly excluded, *Indian Zoedone Co.,* (1884) 26 Ch D 70 (CA).

The chairman's ruling that a resolution has been carried by show of hands must be challenged at that very time. It cannot be challenged subsequently. *Arnot v. United African Lands Ltd.*, (1901) 1 Ch 518 (CA). If the decision of the chairman is challenged, it becomes the duty of the chairman to reascertain the true position, *R. v. St. Pancras Vestrymen,* (1839) 11 Ad & El 15. If the challenge shows that there was a mistake in his declaration, he can have the mistake rectified by another vote and, if the meeting is already dispersed, by calling another meeting (*Ibid*). Chairman can himself order another vote where if he feels some element of uncertainty about the result of the voting on the first count. If the chairman had said that the motion was carried but was in doubt whether

he was wrong or right he was entitled immediately to have the votes counted again. *Hickman v. Kent and Romney Marsh Sheepbreeders Assn.*, (1920) 36 TLR 528.

But if there is a fraud or improper exclusion of votes, the resolution can be struck down as invalid by a court of law. *Indian Zoedone Co.*, (1884) 26 Ch D 70 (CA); *Pender v. Lushington*, (1877) 6 Ch D 70; *Young v. South African and Australian Exploration and Development Syndicate*, (1896) 2 Ch 268.

***En bloc* voting on resolutions**

When there are two or more resolutions to be considered, the chairman may put them to voting *en bloc*, if no shareholder is demanding that they should be voted on separately. Where, however, it is a matter for the appointment of more than one directors, *en bloc* voting would have to fulfil the requirements of S. 263. *R.E. Jones Ltd., Re*, (1933) 50 TLR 31.

§ For the method and manner of counting votes, see section 189.

Private company.—A private company, which is not subsidiary of a public company, if it makes its own provisions by its articles as regards the matters in this section, is not bound to follow the provisions of this section. [See section 170(1)(ii)].

Modification in relation to class meetings etc.—Refer to Annexures B, C and D of the Companies (Central Govt's) General Rules and Forms, 1956, [See *Appendix* 1] regarding modification of this section in applicability to meetings of a class of shareholders, meetings of debenture-holders, and meetings of a class of debenture-holders.

Model regulations as per Table A.—For model regulations in the Articles of Association pertaining to this section, see Regulations 55 to 60 of Table A. Note Regulation 57 pertaining to voting by joint-members. For a company limited by guarantee and not having share capital, see Regulations 14 to 18 of Table-C.

S. 179. Demand for poll.—(1) Before or on the declaration of the result of the voting on any resolution on a show of hands, a poll may be ordered to be taken by the chairman of the meeting of his own motion, and shall be ordered to be taken by him on a demand made in that behalf by the person or persons specified below, that is to say,—

[1][(a) in the case of a public company having a share capital, by any member or members present in person or by proxy and holding shares in the company—

(i) which confer a power to vote on the resolution not being less than one-tenth of the total voting power in respect of the resolution, or

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1. Subs. by the Companies (Amendment) Act, 1988, for clauses (a) to (d), s. 24 w.e.f. 15-6-1988 *vide* GSR No. 559(E) dt. 10-6-1988.
"(a) in the case of a public company, by at least five members having the right to vote on the resolution and present in person or by proxy,
(b) in the case of a private company, by one member having the right to vote on the resolution and present in person or by proxy if not more than seven such members are personally present, and by two such members present in person or by proxy if more than seven such members are personally present,
(c) by any member or members present in person or by proxy and having not less than one-tenth of the total voting power in respect of the resolution, or
(d) by any member or members present in person or by proxy and holding shares in the company conferring a right to vote on the resolution, being shares on which an aggregate sum has been paid-up which is not less than one-tenth of the total sum paid-up on all the shares conferring

(ii) on which an aggregate sum of not less than fifty thousand rupees has been paid-up,

(b) in the case of a private company having a share capital, by one member having the right to vote on the resolution and present in person or by proxy if not more than seven such members are personally present, and by two such members present in person or by proxy, if more than seven such members are personally present,

(c) in the case of any other company, by any member or members present in person or by proxy and having not less than one-tenth of the total voting power in respect of the resolution.]

(2) The demand for a poll may be withdrawn at any time by the person or persons who made the demand.

NOTES

Eng. Act, 1948 : Sec. 137
Eng. Act, 1985 : Sec. 373

Companies (Amendment) Act, 1988

Earlier, the Act provided that a poll can be ordered by the Chairman of the meeting on demand made by the person or persons specified below:

(a) in the case of a public company by at least five members having the right to vote on the resolution and present in person or by proxy,

(b) in the case of a private company, by one member having the right to vote on the resolution and present in person or by proxy if not more than seven such members are personally present, and by two such members present in person or by proxy if more than seven such members are personally present,

(c) by any member or members present in person or by proxy and having not less than one-tenth of the total voting power in respect of the resolution, or

(d) by any member or members present in person or by proxy and holding shares in the company conferring a right to vote on the resolution, being shares on which an aggregate sum has been paid-up which is not less than one-tenth of the total sum paid-up on all the shares conferring that right.

This section has been amended by Amendment Act of 1988 *vide* clause 24 of Notes on clauses, which stated 'Considering the vastness of the country and wide dispersal of shareholding, this clause seeks to ensure that shareholders having some minimum specified interest should alone demand poll'. Now, even a single member having one-tenth of the voting power or holding shares up to the paid-up value of Rs. 50,000 can demand a poll, in case of a public company. Earlier, at least five members could demand a poll, in case of a public company.

Demand for poll

As a vote by show of hands is only a rough and ready method of taking the sense of a meeting, it is often a very inadequate means of ascertaining the wishes of the whole constituency of a company. Hence the provisions for taking a poll. When a poll is demanded and ordered to be taken the show of hands goes for nothing. When a poll is duly demanded it must be taken, and in such case, the meeting is deemed to subsist and continue until the poll is taken. In the case of public company where proxy is held by a single person for five or more members, there is nothing in the Act to prohibit his demanding a poll in his capacity of proxy for all those members.

Upon taking a poll, the right to vote and the number of shares each voter holds will be determined, if any question arises, by reference to the register of members.

The poll may be demanded by the members, whether present in person or by proxy, even when the resolution has not been put to vote by show of hands. *Berar Trading Co. Ltd. v. Gajanan Gopal Rao Dixit,* (1972) 42 Com Cases 48 (Bom). The Chairman may also order for taking the poll *suo motu*, even though there is no demand of poll by any member. *Second Consolidated Trust Ltd. v. Ceylon Amalgamated Tea & Rubber Estates Ltd.,* (1943) 2 All ER 567. In this case a resolution was taken to be carried because all the members present at the meeting unanimously desired it, but they did not constitute a quorum and if the chairman had held a poll and taken into account the proxies which were in his possession the result would have been different, it was held that the chairman was in the wrong in not holding a poll where the proxy votes could be counted and the sense of the meeting properly ascertained.

When a poll is demanded, it must be taken immediately by the Chairman and meeting will be deemed to continue till the result is announced, *Holmes v. Lord Kees,* (1958) 2 All ER 129 : (1958) 28 Com Cases 419 (CA); *Shaw v. Tati Concessions Ltd.,* (1913) 1 Ch 292.

In *MacDougall v. Gardiner,* (1875) 1 Ch D 13 (CA), the chairman adjourned the meeting without accepting the demand for poll by certain members. The court refused to take cognizance of a complaint made by the members in this regard. As provided in Article 54 of Table A of Schedule I, any business other than that upon which poll is demanded can be proceeded with, pending the taking of the poll.

Validity of business where demand for poll not honoured.—Where the chairman refused to order poll even after a valid demand for poll had been made, the CLB held that the business on the agenda for which poll was demanded and which was carried through by show of hands became invalid. *Namita Gupta v. Cachar Native Joint Stock Co. Ltd.,* (1999) 98 Com Cases 655 : (1999) 34 CLA 287 : (2000) 6 Comp LJ 511 (CLB—PB).

Voting on poll

On a poll, the member or his proxy has as many votes as the number of his shares, unlike in the case of voting by show of hands under which each member has only one vote. The voting by way of a poll is truly representative of the shareholding control by members in a company and is often resorted to in matters of controversial nature affecting their rights *e.g.*, election of directors.

Where the preference shareholders have a right to vote on any resolution, their voting right on a poll shall be in the same proportion as the capital paid-up in respect of the preference shares bear to the total paid-up equity capital of the company, [see section 87(2)].

Persons who were not present at the voting by show of hands have the right to be admitted to cast their votes and the exclusion of any qualified voter may invalidate the poll, *R. v. St. Mary, Lambeth, Rector of,* (1838) 8 A & E 356.

But the validity of the poll would not be affected if the excluded members had been permitted to vote it would have brought about no change in the verdict of the poll. *Ex Parte, Mawby,* (1854) 3 E & B 718, though the aggrieved members may have a right of personal action for the denial against those responsible for it. *Pender v. Lushington,* (1877) 6 Ch D 70. The rules may provide that no objection to any vote shall be entertained except at the meeting or poll at which the vote is cast. In such a case every vote which is permitted to be cast will be valid for all purposes, though it might in fact be irregular. *Colonial Gold Reef Ltd. v. Free State Rand Ltd.,* (1914) 1 Ch 382.

In order to ascertain whether a person has the right to vote or not, the chairman has to go by the register of members which "furnishes the only means of ascertaining whether you have a lawful meeting or lawful demand for poll, or of enabling scrutineers to strike and votes" *Pender v. Lushington, (supra).* The Chairman is not concerned whether the shares are held beneficially or as a trustee.

Members desiring to vote on a poll must attend personally or through proxy and record their votes at the time and place fixed by the chairman. Neither they can vote by post nor by leaving voting papers signed by them at the office of the company. These facilities can be provided only by special rules on the subject in the articles. *McMillan v. Le Roi Mining Co.*, (1906) 1 Ch 331. If the company has many shareholders, scrutineers are appointed by the chairman with the assent of the meeting for assuring fair and efficient poll.

Group of resolutions

Each resolution must be put to the poll separately. *Blair Open Hearth Furnace Co. Ltd. v. Reigart*, (1913) 108 LT 665, and the result announced must indicate the number of votes cast in favour or against each resolution. If a group of resolutions are to be voted on, it is proper for each resolution to be submitted for a vote separately and a poll vote *en bloc* is not valid. *Patentwood Key Syndicate v. Pearse*, (1906) WN 164. However, a group of resolutions may be taken up *en bloc* only if the meeting so agrees or no shareholder requires the chairman to put them separately. *R.E. Jones Ltd., Re*, (1933) 50 TLR 31. In case of demand for poll, the chairman must act *bona fide* and ascertain the wishes of the members. *Second Consolidated Trust Ltd. v. Ceylon Amalgamated Tea Estates Ltd.*, (1943) 2 All ER 567 (Ch D).

Conduct of poll

If a poll is demanded on the question of election of the chairman, it shall be taken forthwith. [Section 175(2)]. A poll demanded on the question of adjournment of the meeting be also taken forthwith. A poll demanded on any other question may be taken up by the chairman at any time within 48 hours from the time the demand was made [S.180]. The chairman may fix the time of taking the poll and ensure that all the members wishing to exercise their voting power have had the opportunity. The chairman would have to decide the time, place and the hour of the poll taking into account the particular circumstances, the nature and significance of the matter being voted on and the reasons for the demand of a poll on the motion. Section 180 prescribes the outside limit of 48 hours. He should take a decision in this respect forthwith and make an announcement accordingly. When the poll is ordered to take place at the later date, the meeting is not concluded until the result of the poll is known and the matter for which a poll was demanded is disposed of according to the result of the poll. Unless there are some rules in the articles to the contrary, a poll may be taken immediately after a demand. *Chillington Iron Co., Re*, (1885) 29 Ch D 159 or the chairman may prefer that the rest of the matters on the agenda be disposed of first and then a poll may be taken. Chairman has to fix the time of opening and closure of the poll, which must be a reasonable period depending upon the number and situation of the voters and other relevant factors.

The chairman should fix the hours during which the poll is to be held; if he does not do so, then, if the poll is not completed on the day on which it is commenced, it must be continued subsequently. *M.K. Srinivasan v. W.S. Subramanya*, AIR 1932 Mad 100 : (1932) 2 Com Cases 147; *Rebellow v. Co-op. Navigation Co.*, AIR 1925 Bom 105. A chairman should not close down the poll on account of a disturbance. The poll should be resumed after the disturbance is taken care of (*ibid*). When the closing time for a poll has been fixed, the chairman cannot prolong the matter beyond that time. Where no time for closing the poll is fixed, the chairman cannot close it while voters are pouring in. He has to give them the opportunity by continuing the poll. *Shaw v. Tati Concessions*, (1913) 1 Ch 292. It may be closed a reasonable time after votes have stopped coming in, although if any voter is improperly excluded the poll will be invalidated. *R. v. Lambeth*, (1838) 8 A & E 356. Where the articles provided that in the case of a demand for a poll the same would be held at a time and place to be fixed by directors within seven days from the meeting, it was held that an immediate poll in such circumstanses was illegal, *British Flax Producers Co. Ltd.*, (1889) 60 LT 215. The later date for taking the poll would be a continuation and enlargement of the same meeting, and no fresh proxies could be lodged

between the two dates. *Shaw v. Tati Concessions, (Supra).* Such a provision is possible only in the case of a private company which is not the subsidiary of a public company.

The person appointed to conduct the poll, unlike the chairman of a meeting, need not be a shareholder of the company. His functions in no way resemble those of a chairman of a meeting and are purely ministerial. *M.K. Srinivasan v. W.S. Subramania Aiyar,* AIR 1932 Mad 100 : (1932) 2 Com Cases 147 at 154. See also *Harben v. Philips,* (1883) 23 Ch D 14. It is submitted that the chairman of a meeting need not be a shareholder of the company. Art. 50 of Table A states that the chairman, if any, of the Board shall preside as chairman at every general meeting of the company. But the chairman of the Board need not be a shareholder and such a person would be entitled to be the chairman at any general meeting as well.

§ See also Notes under S. 175 under the heading "Non-member Chairman".

Withdrawal of a demand of poll [Sub-section (2)]

Once a valid demand for a poll has been received, [sub-section (2) gives this facility that those who presented the demand may withdraw it at any moment], the results of voting by show of hands becomes irrelevant and have no effect. *Anthony v. Seger,* (1789) 1 Hagg Cons at 13. Therefore, the effect of withdrawal is that the earlier passing of the resolution on show of hands also becomes nullified. *R. v. Cooper,* (1870) LR 5 QB 457. The chairman would have to submit the matter again to a vote on show of hands. This may create a problem because some members may have left thinking that the poll would take care of the matter. They may not be there when the second show of hands takes place. The chairman has, therefore, to ensure that no injustice would result to such members and that a fresh demand for a poll is not prevented. *Montogomerie's Brewery v. Spencer,* (1899) 5 ALR 112. It should better be provided in the articles that in such an eventuality, the original resolution would be reinstated, *R.v. Wimbledon Local Board,* (1882) 8 QBD 459 (CA). The demand for a poll cannot be withdrawn once the chairman declares that a poll will be taken and adjourns the meeting for that purpose fixing the time and hour of poll. *R. v. Mayor of Dover,* (1903) 1 KB 668.

The section permits the privilege of withdrawing the demand "at any time". It would, therefore, seem to follow that even if the meeting had been adjourned for taking a poll, the demand for poll may still be withdrawn. The rule in *R. v. Mayor of Dover,* (1903) 1 KB 668 may not apply.

Private company.—A private company, which is not subsidiary of a public company, if it makes its own provisions by its articles as regards the matters in this section, is not bound to follow the provisions of this section. [See section 170 (1)(ii)]. The need for modification of the provisions of the section and those of Table A in the case of private companies is specially necessary because such companies usually have small membership. See *Siemens Brothers & Co. Ltd. v. Burns,* (1918) 2 Ch 324 (CA); *Marks v. Financial News Ltd.,* (1919) 35 TLR 681.

Modification in relation to class meetings etc.—Refer to Annexures B, C and D of the Companies (Central Govt.'s) General Rules and Forms, 1956, [see *Appendix* 1] regarding modification of this section in applicability to meetings of a class of shareholders, meetings of debenture-holders, and meetings of a class of debenture-holders.

Secretarial Standards on General Meetings issued by the Council of ICSI (SS-2)

These Standards seek to prescribe a set of principles for the convening and conduct of General Meetings and matters relating thereto. In the initial years, adherence by a company to the Secretarial Standards will be recommendatory. These principles may not be applicable to any meetings convened on the directions of the Court or CLB or other authority, unless the directions themselves so prescribe.

Secretarial Standard [para 6]

6. Voting

6.1 ***Proposing a Resolution [See sec. 177]***

6.2 ***On Show of Hands [See sec. 177]***

6.3 ***By Poll***

6.3.1 A Member present in person or by proxy shall, on a poll, have votes in proportion to his share of the paid up equity capital of the company, subject to differential rights as to voting, if any, attached to certain shares as stipulated in the Articles or by the terms of issue of such shares.

While a proxy cannot speak at the Meeting, he has the right to demand or join in the demand for a poll.

6.4 ***Casting Vote***

If the Articles so provide, the Chairman shall have a casting vote.

§ For full text of the Secretarial Standard, see *Appendix* 311.

S. 180. Time of taking poll.—(1) A poll demanded on a question of adjournment shall be taken forthwith.

(2) A poll demanded on any other question (not being a question relating to the election of a chairman which is provided for in section 175) shall be taken at such time not being later than forty-eight hours from the time when the demand was made, as the chairman may direct.

NOTES

Scope of section

Sub-sec. (1) provides that a poll being demanded on a question of 'adjournment' shall be taken forthwith. It appears that it refers to adjournment of the meeting and the chairman is obliged to order the poll forthwith if so demanded. The demand for poll for adjournment for consideration of any resolution proposed in the meeting will fall under subsection (2).

Where a poll is taken, the meeting is regarded as continuing, until the ascertainment of the result of the poll. *Holmes v. Keyes,* (1958) 2 All ER 129 : (1958) 28 Com Cases 419 (Ch D) at 135. A poll is only part of the meeting and for the purpose of taking it, the meeting is treated as continuing until the poll is closed. *Shaw v. Tati Concessions Ltd.,* (1913) 1 Ch 292. See also *Jackson v. Hamlyn,* (1953) 1 All ER 887 (Ch D); *Holmes v. Keyes,* (1958) 2 All ER 129 (Ch D); *Spiller v. Mayo (Rhodesia) Development Co. (1908) Ltd.,* (1926) WN 78 (Ch D); *M.K. Srinivasan v. W.S. Subramania Iyer, (infra).* A meeting reconstituted after a poll is continuance of the same meeting and the poll itself is part of the meeting. *Jackson v. Hamlyn,* (1953) 1 All ER 887 (Ch D).

A member, though he was not present at the meeting when the poll was ordered to be taken, may vote personally on the poll. *Cf. Campbell v. Maund,* (1836) 5 Ad & El 1 : (1835-42) All ER Reprint p. 648.

Though the chairman may fix the time of taking the poll, he cannot, as long as votes are coming in, close the poll on the ground that the period of time allotted by him is over; but after waiting for a reasonable time, if no more voters are turning up, he may declare the poll closed. If he improperly excludes a voter, the poll will be invalidated. See *Shaw v. Tati Concessions Ltd.,* (1913) 1 Ch 292 except where the position is such that the excluded members votes would have made no difference to the result of the vote. *Ex Parte, Mawby,* (1854) 3 E & B 718.

Where there is breakdown of the arrangement of the poll on the date fixed, that does not put an end to the duty to taking of the poll, even if the forty-eight hours period would have expired by then. The chairman should in such circumstances, appoint and notify another date for the poll, and give an opportunity to the voters to have the poll taken on that date. He cannot refuse to grant the poll. *Cf. M.K. Srinivasan v. W.S. Subramania Iyer,* (1932) 2 Com Cases 147 : AIR 1932 Mad 100.

In the case of a poll, a power given to the chairman is not to be exercised according to his own wishes but must be exercised *bona fide* to ascertain the real sense of the meeting. *Second Consolidated Trust Ltd. v. Ceylon Amalgamated Tea, etc. Estates Ltd.,* (1943) 2 All ER 567 (Ch D).

Compliance of requirements of Articles

Where the articles provided for the poll to be taken immediately, it was held that this meant 'as soon as practicable'. *Jackson v. Hamlyn,* (1953) Ch 557. The word "forthwith" is likely to be given the same meaning. Where the articles provided that 'a poll shall be taken in such manner as the chairman shall direct', the order of the chairman directing the poll to be taken then and there, after it was demanded, was held to be valid. *Chillington Iron Co. Re,* (1885) 29 Ch. D 159. Where the articles provided that the poll was to be taken at a time and place to be agreed by the directors within seven days, it was held that the Chairman's direction for taking the poll then and there, was invalid. *British Flex Producers Co. Ltd., Re,* (1889) 60 LT 215.

Private Company.—A private company which is not subsidiary of a public company if it makes its own provisions by its articles as regards the matters in this section is not bound to follow the provisions of this section. [See section 170(1)(ii)].

Modification in relation to class meetings, etc.—Refer to Annexures B, C and D of the Companies (Central Govt.'s) General Rules and Forms, 1956, [See *Appendix* 1] regarding modification of this section in applicability to meetings of a class of shareholders, meetings of debenture-holders, and meetings of a class of debenture-holders.

Secretarial Standards on General Meetings issued by the Council of ICSI (SS-2)

These Standards seek to prescribe a set of principles for the convening and conduct of General Meetings and matters relating thereto. In the initial years, adherence by a company to the Secretarial Standards will be recommendatory. These principles may not be applicable to any meetings convened on the directions of the Court or CLB or other authority, unless the directions themselves so prescribe.

Secretarial Standard [Para 8]

8. Conduct of Poll

8.1 When a poll is demanded on any Resolution, the Chairman should get the validity of the demand verified and should order the poll forthwith if it is demanded on the question of appointment of the Chairman or adjournment of the Meeting and, in any other case, within forty eight hours of the demand for poll.

8.2 In the case of a poll which is not taken forthwith, the Chairman should announce at the Meeting the date, venue and time of taking the poll to enable Members to have adequate and convenient opportunity to exercise their vote. The Chairman should also announce that any Member who so desires may be present at the time of counting of votes.

A Member who did not attend the Meeting can participate and vote in the poll.

8.3 Each Resolution on which a poll is demanded should be put to vote separately.

One ballot paper may be used for two or more items for which poll has been ordered.

8.4 The Chairman should appoint two scrutineers to ensure that the scrutiny of the votes cast on a poll is done fairly, accurately and properly. At least one of the two scrutineers should be a Member who is present at the Meeting and is not an officer or employee of the company.

Based on the scrutineers' report, the Chairman should declare the result of the poll, with details of the number of votes cast for and against the Resolution and the final result as to whether the Resolution has been carried or not.

8.5 The result of the poll should be displayed on the notice board of the company at its Registered Office and its Corporate/Head Office, if such office is situated elsewhere, and also placed on the website, if any, of the company. In the case of listed companies with more than 5,000 Members, the result of the poll should also be published in a leading newspaper circulating in the neighbourhood of the Registered Office of the Company.

§ For full text of the Secretarial Standard, see *Appendix* 311.

S. 181. Restriction on exercise of voting right of members who have not paid calls, etc.—Notwithstanding anything contained in this Act, the articles of a company may provide that no member shall exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid, or in regard to which the company has and has exercised any right of lien.

NOTES

Restriction on voting rights

Exercise of voting rights by a member may be restricted only when an article, such as Regulation 59 of Table A of Schedule I, provides for restriction of voting right. The articles cannot make any provision for restricting the voting right of a member unless the amount due from him is due in respect of any shares held by him and is presently payable, that is to say, payable at the time when the voting right is sought to be exercised. Such members cannot also sign a requisition for an extraordinary general meeting. A meeting called on requisition of shareholders who had not paid their calls was accordingly held to be invalid. *Kuldip Singh Dhillon (Col.) v. Paragaon Utility Financiers (P.) Ltd.*, (1986) 60 Com Cases 1075 (P&H).

Where the articles of a company do not contain any provision restricting the exercise of voting right of members, a member cannot be prevented from voting, even though calls or other sums payable by him have not been paid or the company has, or has exercised, any right of lien over his shares. *Pasari Flour Mills Ltd., Re,* (1962) 32 Com Cases 896 : AIR 1961 MP 340. But where the articles contain any such provision, and shares forfeited for non-payment of calls have been re-allotted, the new allottee being liable for the balance remaining unpaid on the shares, will not be entitled to vote, so long as any calls presently payable on the shares remain unpaid. *New Balkis Eersteling Ltd. v. Randt Gold Mining Co.*, 1904 AC 165; *Randt Gold Mining Co. v. Wainwright,* (1901) 1 Ch 184.

A call is due and payable only when the notice of the call is issued. A mere resolution of the Board of Directors to make a call is not enough. The very word 'call' implies a calling, *i.e.*, a notice calling for the amount payable. *Cf. Stadmed Private Ltd. v. Kshetra Mohan Saha,* (1969) 39 Com Cases 741 : AIR 1968 Cal 572 (DB); *C.P. Gnanasambandam v. Tamilnad Transports (Coimbatore) (P.) Ltd.*, (1971) 41 Com Cases 26 (Mad).

Position when shares allotted for consideration other than cash

When shares are allotted for a consideration other than cash the whole consideration becomes due at once at the moment of allotment. In a case on the point, the business transferred to the company in consideration for the allotment of some of the ordinary

shares was not independently valued in contravention of section 103 of the 1985 Act. [S. 75 of the Indian Act]. As allottees of the shares, the ordinary shareholders were liable to the company for the nominal value of the shares. That sum became due and payable immediately upon the shares being allotted. Articles of the company prevented a member from voting in respect of any of the shares for which he was registered even though money was only owing in respect of some of them, and accordingly the ordinary shareholders were held to be not entitled to vote. Section 181 of Indian Act enables companies to contain in their articles provisions of the above kind. *Bradford Investments Ltd., Re,* 1991 BCLC 224 (Ch D).

Private company.—By virtue of section 170, a private company, which is not subsidiary of a public company, may provide by its articles that the provisions of this section shall not apply to it, but shall apply with such qualifications as it may think fit. It may, for instance, provide that any shareholder indebted to the company shall not exercise any voting right in respect of shares over which the company has a lien.

§ For details as to the meaning of payment of calls, see Notes under S. 91 and as to the exercise of the right of lien on shares, see Notes under S. 108, *ante.*

Modification in relation to class meetings, etc.—Refer to Annexures B, C and D of the Companies (Central Govt.'s) General Rules and Forms, 1956, [See *Appendix* 1] regarding modification of this section in applicability to meetings of a class of shareholders, meetings of debenture-holders, and meetings of a class of debenture-holders.

Secretarial Practice Notes : Restrictions on exercise of voting rights

Check that members are not restricted in exercising their voting rights on the grounds other than those set out in section 181.

S. 182. Restrictions on exercise of voting right in other cases to be void.—A public company, or a private company which is a subsidiary of a public company, shall not prohibit any member from exercising his voting right on the ground that he has not held his share or other interest in the company for any specified period preceding the date on which the vote is taken, or on any other ground not being a ground set out in section 181.

NOTES

This section is consequential to section 181, and makes it plain that a public company or a private company which is a subsidiary of a public company should not put any restriction on voting except the one specified in section 181. (*Clause* 174 of the Bill).

This section makes it clear that a public company or a private company which is subsidiary of a public company shall not put any restriction on voting except the one specified in section 181.

Private company.—Other private companies are not restricted by this section and they may prescribe further conditions or requirements for exercising voting rights. They may, for instance, provide that only holders of shares for a specified period before the meeting, may exercise voting rights. But this does not extend to private banking companies (*vide* section 49 of the Banking Regulations Act, 1949).

Exercise of voting rights by shareholders at general meetings

Right to vote is personal right.—"The right to vote is every member's personal right. He may exercise it as he likes. He may split his votes both for and against the resolution. He has a right to have his votes recorded." In the same vein, JESSEL MR further observed [at p. 75]: ".... a man may be actuated in giving his vote by interests entirely adverse to the interests of the company as a whole. He may think it more for his particular interest that a certain course may be taken which may be in the opinion of others very adverse to

the interests of the company as a whole, but he cannot be restrained from giving his vote in what way he pleases because he is influenced by that motive." *Pender v. Lushington* (1877) 6 Ch D 70. See also *North West Transportation Co. Ltd. v. Henry Beatty,* (1887) 12 App Cas 589 (PC). Also widely quoted is LORD MAUGHAM'S remark in *Carruth Imperial Chemical Industries Ltd.,* (1937) 2 All ER 422: (1937) AC 707 at p. 765: "..... the shareholders' vote is a right of property, and *prima facie* may be exercised by a shareholder as he thinks fit in his own interest." *Imperial Chemical Industries Ltd., Re,* (1938) 8 Com Cases 181 : 106 LJ Ch 129 (HL).

While the common law rule regarding voting at general meetings is that every shareholder may use his voting rights in his own best interests or as he thought fit— even though such voting may be detrimental to the interests of the company, it is a firmly established rule of law that shareholders having majority voting power cannot use that power for passing any resolution in fraud of the minority shareholders or so as to discriminate between the majority and minority of the shareholders. Any resolution voted for by them should be *bona fide* for the benefit of the 'company as a whole', the words 'the company as a whole' meaning both the company as a commercial entity and also the corporators as a general body. The majority shareholders cannot use their votes either to defraud the company or gain for themselves or any other person an unfair advantage to the exclusion of the minority shareholders. For a learned discussion on this subject see the judgment of EVERSHED M.R. in *Greenhalgh v. Arderne Cinemas,* (1950) 2 All ER 1120 (CA).

In *Clemens v. Clemens Bros. Ltd.,* (1976) 2 All ER 268 (Ch D) where a 55% shareholder attempted to weaken the voting power of 45% holder of shares by passing resolutions for the issue of further shares to herself and her supporters, FOSTER J., **following** a dictum of LORD WILBERFORCE in *Re, Westbourne Galleries Ltd.,* (1972) 2 All ER 492 : (1971) 41 Com Cases 754 (HL) set aside the resolutions and attempted to give shape to the dictum in the form of a principle as follows:—

> "In my judgment the majority shareholder is not entitled as of right to exercise her votes.....in any way she pleases. To use the phrase of LORD WILBERFORCE, the right is subject to equitable considerations.....which may make it unjust or inequitable to exercise it in a particular way."

This clearly limits a shareholder's right of voting further than has judicially been recognised so far and awaits confirmation by higher judicial authorities. According to FOSTER J. the exercise of voting right by a shareholder in a particular way may be restrained if on equitable considerations such exercise is unjust or inequitable.

Subject to any regulations in the articles, a bankrupt is entitled to vote so long as the shares remain registered in his name, but he must exercise his vote in accordance with the directions of the persons beneficially entitled to his shares. *Wise v. Lansdell,* (1921) 1 Ch 420; *Morgan v. Gray,* (1953) 1 All ER 213. During a state of war, the right of an alien enemy to vote is suspended and cannot be exercised by him. *Robson v. Premier Oil and Pipe Line Co. Ltd.,* (1915) 2 Ch 124.

Where a company gave an undertaking to the Court which involved the company in general meeting passing a resolution for the issue and allotment of shares, a shareholder voting against that resolution would not be in contempt of court. *Northern Counties Securities Ltd. v. Jackson & Steeple Ltd.,* (1974) 2 All ER 625.

Agreement as to voting.—A shareholder may enter into an agreement with a purchaser or mortgagee of shares to vote according to the directions of the purchaser or mortgagee and such an agreement may be enforced by a mandatory injunction. *Greenwell v. Porter,* (1902) 1 Ch 530; *Puddephatt v. Leith,* (1916) 1 Ch 200. Such an agreement, however, is not binding on a third party into whose hands the shares may come. *Greenhalgh v. Mallard,* (1943) 2 All ER 234.

The House of Lords held that that part of an agreement between shareholders by which they agreed to bind themselves, but not their successors, as to their voting behaviour on the creation of new shares was enforceable and was not tainted by the unenforceability of another agreement between the parties which sought to restrict the statutory power of the company to issue fresh capital. *Russell v. Northern Bank Developments Corpn Ltd.*, 1992 BCLC 1016 : (1993) 3 Comp LJ 45 (HL).

§ See also Notes under S. 87 under the heading 'Shareholders voting agreements'.

Shares under transfer.—An unpaid vendor of shares who remains the registered holder of the shares after the contract of sale retains the *prima facie* right to vote in respect of the shares. *Musselwhite v. C.H. Musselwhite & Son Ltd.*, (1962) 1 All ER 201: (1962) 32 Com Cases 804. Where shares are sold, but the name of the transferee is not entered in the register of members, the transferor is in the position of a constructive trustee for the transferee and must vote according to his directions. *E.D. Sassoon & Co. Ltd. v. K.A. Patch*, Per PRATT, J. (1943) 45 Bom LR 46, **approved** in *Mathalone R. v. Bombay Life Assurance Co. Ltd.*, AIR 1953 SC 385 : (1954) 24 Com Cases 1 and **followed** in *Killick Nixon Ltd. v. Bank of India Ltd.*, (1985) 57 Com Cases 831 (Bom).

Other instances of restrictions

It is no longer possible to restrict the voting rights of a shareholder on the ground that he does not have a particular number of shares, *Pasari Flour Mills Ltd., Re*, (1962) 32 Com Cases 896 : AIR 1961 MP 340 or that the shareholder is interested in the subject-matter of the vote. *Burland v. Earle*, (1902) AC 83 PC or that non-trading members would not be given a right to vote. *Mohanlal Chandumall v. Punjab Co. Ltd.*, (1962) 32 Com Cases 937 : AIR 1961 Punj 485 or that he has not been a member of the company for the period specified in the company's articles. *A. Anantalakshmi Ammal v. Hindustan Investment & Financial Trust Ltd.*, (1951) 21 Com Cases 210 (Mad); *B.N. Viswanathan v. Tiffin's Barytes Asbestos and Paints Ltd.*, (1953) 23 Com Cases 29 (Mad) or that a member in question has become insolvent or has mortgaged his shares, when in fact his name is still there in the register. *Wise v. Lansdell*, (1921) 1 Ch 420. Court cannot invalidate a vote even if the exercise of the voting right was detrimental to the company's interest or because of conflicting interest as member-director. *East Pant Du United Lead Mining Co. v. Merryweather*, (1864) H & M 254 : 13 WR 216.

Where a shareholder is aggrieved because of deprivation of his voting rights, he can question the validity of the deprivation but no other shareholder can do so on his behalf. *B.N. Vishwanathan's* case, (*Supra*).

Although, therefore, the court will not examine the motives of a shareholder who by his vote has procured the passing of a resolution, it will look at the effect of the resolution and will interfere if satisfied that the minority has been overborne by improper or corrupt influence, *Re, London and Mercantile Discount Co.*, (1865) LR 1 Eq 277, or that the effect of the resolution was to preclude investigation of a fraud committed by those whose votes enabled the resolution to be carried, *Atwool v. Merryweather*, (1868) LR 5 Eq 464n. Contrast the earlier proceedings in the same matter, where the resolution so carried was for a reference to arbitration: *East Pant Du United Lead Mining Co. v. Merryweather*, (1864) 2 Hem & M 254, or that its effect was to deprive the minority of their share in the company's assets, *Menier v. Hooper's Telegraph Works*, (1874) 9 Ch App 350; *Mason v. Harris*, (1879) 11 Ch D 97, 107; *Cook v. Deeks*, (1916) 1 AC 554 : AIR 1916 PC 161, or that the passing of the resolution was brought about by unfair or improper means or was illegal or fraudulent or oppressive towards the opposing minority, *North-West Transportation Co. v. Beatty*, (1887) 12 App Cas 589, 594. See BUCKLEY'S COMPANIES ACTS, 971 (14th Edn., Vol I).

Duty towards voiceless fellow shareholder

MELLISH LJ said in the *Monier v. Hooper's Telegraph Works*, (1874) 9 Ch App. 350. "No right of a shareholder to vote in his own selfish interests or to ignore the interests of

the company entitles him with impunity to injure his voteless fellow shareholders by depriving the company of a cause of action and stultifying the purpose for which the company was formed."

Law in U.S.A. as to exercise of voting rights

As regards exercise of voting rights by shareholders, the law as recognised by judicial decisions in USA is as follows: "A shareholder may exercise wide liberality of judgment in the matter of voting, and it is not objectionable that his motive may be for personal profit, or determined by whims or caprice, so long as he violates no duty owed to his fellow-shareholders. *Heel v. Standard G. & E. Co.,* 17 Del Ch 214. The ownership of voting stock imposes no legal duty to vote at all. A group of shareholders may without impropriety, vote their respective shares so as to obtain advantages of concerted action. They may lawfully contract with each other to vote in the future in such way as they or a majority of their group from time to time determine. *Ringling Bros.—Barnum & Bailey Combined Shows v. Ringling,* (1947) 29 Del Ch 610. It is also a condition that the exercise of voting right by a shareholder does not violate any rule of law or public policy." (*ibid*).

Duty of shareholder in exercise of voting rights

The point to be noted is that the voting right of a shareholder should not only be opposed to any rule of law or public policy but should also not violate any duty owed to other shareholders.

According to the law in U.K. which is also the law in India, a shareholder owes a duty not only to his fellow-shareholders but also to the company and he should not exercise his voting right in such manner as to appropriate either the company's property or that of the other shareholders. The expression 'the benefit of the company as a whole' discussed *supra*, includes not only the company, but also the interests of the shareholders in the company.

Of course the use of voting rights to pass a resolution contrary to public policy will in all cases be invalid, even if passed unanimously. *Elliott v. Richardson,* (1870) LR 5 CP 744.

Where the company had given an undertaking to the court which involved its directors calling a general meeting and recommending the shareholders by circular to vote in favour of the resolution to be proposed at it, the directors were entitled to exercise their votes as shareholders at the meeting as they thought fit: *Northern Counties Securities Ltd. v. Jackson and Steeple Ltd.,* (1974) 2 All ER 625, 635, 637.

In a contract for purchase of shares by a company one of the conditions was approval by the company's shareholders and the company and its merchant banker under took to use their best endeavour to ensure fulfilment of the condition. But circumstances so changed that the purchase was no longer in the interest of the company. The question was whether the company and its banker were still bound to advise the shareholders to approve the purchase. It was held that the covenant of "best endeavour" did not oblige the directors to give bad advice. On the contrary, they were now under a duty to advise the shareholders against the acquisition and to use their power to ensure that the purchase was not approved. *Rackham v. Peek Foods Ltd.,* 1990 BCLC 895 (Ch D).

Voting by joint shareholders

Joint shareholders must concur in voting unless the articles provide to the contrary. *Lumbers v. Fretz,* (1929) 1 DLR 51 : 63 OLR 190 (Canada). Article 57 of Table A makes this provision that 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. The article further says that for this purpose, seniority shall be determined by the order in which the names stand in the register of members. Joint holders have a right to instruct the company as to the order in which their names are to appear in the register. *T.H. Saunders & Co. Ltd., Re,* (1908) 1 Ch 415; *Burns v. Simens Bros. Dynamo Works Ltd.,* (1919) 1 Ch 225.

Exercise of voting rights of directors who are also shareholders

In the case of director-shareholders, as they stand in fiduciary relationship to the company, the rule is more exacting than in the case of other shareholders.

A director who is also a shareholder may at any general meeting of the company vote in his own best interests in the same way as any other shareholder, and need not be influenced by the fact of his being a director, though, in common honesty, he is expected to vote only in the manner he expressed himself earlier at the Board meeting when the business or agenda for the general meeting came up for consideration by the directors at a Board meeting: see Notes under section 291 under the heading "Voting right of directors at general meetings".

Modification in relation to class meetings, etc.—Refer to Annexures B, C and D of the Companies (Central Government's) General Rules and Forms, 1956, [See *Appendix* 1] regarding modification of this section in applicability to meetings of a class of shareholders, meetings of debenture-holders, and meetings of a class of debenture-holders.

Secretarial Practice Notes.—See Practice Notes under Section 181.

S. 183. Right of member to use his votes differently.—On a poll taken at a meeting of a company, a member entitled to more than one vote, or his proxy, or other person entitled to vote for him, as the case may be, need not, if he votes, use all his votes or cast in the same way all the votes he uses.

NOTES

Eng. Act, 1948 : Sec. 138
Eng. Act, 1985 : Sec. 374

Object of section

This is based on section 138 of the English Act and the reason for a provision like this is thus stated in BUCKLEY'S COMPANIES ACT, 380, (14th Edn., Vol. I, p. 380). This section has been "enacted mainly to meet the difficulties of trustee and nominee shareholders. Where, for instance, a trust corporation holds shares in a company as trustee of a number of trusts, it may be inappropriate for it to use all its votes in the same way, for it may be governed in its voting by the wishes or interests of the beneficiaries under the several trusts. It is only on a poll that this distributive method of voting is possible, for on a show of hands no member can register more than one vote."

A holder of shares can, therefore, distribute his votes on the shares for and against the same resolution in any manner he chooses. If the shares are different, the votes can be different and the holder need not be precluded by any doctrine of convenience or inconvenience or propriety that he cannot vote both "yes" and "no" on the same resolution. As owner of the specific property in each specific share he can distribute his votes on the shares he holds in any manner he chooses. The way he votes cannot take away the legal right in each share carrying the right to vote. *Mahaliram Santhalia v. Fort Gloster Jute Manufacturing Co. Ltd.*, (1954) 24 Com Cases 311 at 322 : AIR 1955 Cal 132.

Private company.—A private company which is not subsidiary of a public company if it makes its own provisions by its articles as regards the matters in this section, is not bound to follow the provisions of this section. [See section 170(1)(ii).]

Modification in relation to class meetings, etc.—Refer to Annexures B, C and D of the Companies (Central Govt.'s) General Rules and Form, 1956, [See *Appendix* 1] regarding modification of this section in applicability to meetings of a class of shareholders, meetings of debenture-holders, and meetings of a class of debenture-holders.

S. 184. Scrutineers at poll.—(1) Where a poll is to be taken, the chairman of the meeting shall appoint two scrutineers to scrutinise the votes given on the poll and to report thereon to him.

(2) The chairman shall have power, at any time before the result of the poll is declared, to remove a scrutineer from office and to fill vacancies in the office of scrutineer arising from such removal or from any other cause.

(3) Of the two scrutineers appointed under this section, one shall always be a member (not being an officer or employee of the company) present at the meeting, provided such a member is available and willing to be appointed.

NOTES

Previous Act : Regn. 59 of Table A

Appointment of scrutineers

This section is new and is based on general company practice. "If the company has many shareholders it is not unusual to appoint a scrutineer or two to take the poll, and some articles of association expressly require such appointment. In a small company, the poll is often taken by the chairman". (PALMER'S COMPANY PRECEDENTS, 16th Edn., page 470). Here the section prescribes a detailed procedure.

Scrutineers appointed for a meeting cannot decide whether any proxy was good or bad. It is for the chairman to decide this. The scrutineers are only to assist the chairman in connection with the poll. *T.M. Shanmugam v. Mylapore Hindu Permanent Fund Ltd.*, 1990 TNLJ 52, 63 (Mad). Generally scrutineers are appointed by chairman with the assent of the meeting and sometimes chairman himself acts as a scrutineer. It is for the chairman to decide as to the validity of the proxies and his decision will stand final unless it is found to be wrong by a court. *Indian Zoedone Co.*, (1884) 26 Ch D 70 (CA). In *Dawson v. Harmosji*, AIR 1932 Rang 154, it was held that the scrutineers had no *locus standi* to file a petition as to the validity of proxies.

The chairman should assure that the scrutineers should be independent persons and not interested in the subject-matter of the vote. Thus, where two shareholders who were candidates for election as directors were appointed scrutineers, their election was set aside on the ground that there was a conflict of their personal interest in getting elected with their duty as scrutineers to assure a fair and free poll. *Wandsworth & Putney Gaslight Co. v. Wright*, (1870) 22 LT 404; *Dickson v. Murray*, 28 UCR (Ch) 533.

Private company.—A private company which is not subsidiary of public company if it makes its own provisions by its articles as regards the matters in this section, is not bound to follow the provisions of this section. [See section 170(1)(ii).]

Modification in relation to class meetings, etc.—Refer to Annexures B, C and D of the Companies (Central Government's) General Rules and Forms, 1956, [See *Appendix* 1] regarding modification of this section in applicability to meetings of a class of shareholders, meetings of debenture-holders, and meetings of a class of debenture-holders.

Secretarial Standards on General Meetings issued by the Council of ICSI (SS-2)

These Standards seek to prescribe a set of principles for the convening and conduct of General Meetings and matters relating thereto. In the initial years, adherence by a company to the Secretarial Standards will be recommendatory. These principles may not be applicable to any meetings convened on the directions of the Court or CLB or other authority, unless the directions themselves so prescribe.

Secretarial Standard [Para 8]

8. Conduct of Poll

8.1 [*See sec. 180*]

8.2 [*See sec. 180*]

8.3 [*See sec. 180*]

8.4 The Chairman should appoint two scrutineers to ensure that the scrutiny of the votes cast on a poll is done fairly, accurately and properly. At least one of the two scrutineers should be a Member who is present at the Meeting and is not an officer or employee of the company.

Based on the scrutineers' report, the Chairman should declare the result of the poll, with details of the number of votes cast for and against the Resolution and the final result as to whether the Resolution has been carried or not.

§ For full text of the Secretarial Standard, see *Appendix* 311.

S. 185. Manner of taking poll and result thereof.—(1) Subject to the provisions of this Act, the chairman of the meeting shall have power to regulate the manner in which a poll shall be taken.

(2) The result of the poll shall be deemed to be the decision of the meeting on the resolution on which the poll was taken.

NOTES

Eng. Act, 1948 : Table A Regn. 59
Eng. Act, 1985 : Table A Regn. 46

Previous Act : Regn. 57 of Table A

Private company

A private company which is not subsidiary of a public company if it makes its own provisions by its articles as regards the matters in this section is not bound to follow the provisions of this section [See section 170(1)(ii)].

Poll how taken

In taking the poll it is usual to prepare a list of members as entered in the register, showing the number of shares and number of votes opposite each name, with additional columns for recording the votes polled "for" and "against" the resolution. If several resolutions are to be voted upon, sufficient columns should be provided for recording the votes on each resolution. A "remarks" column is also usual and necessary for recording reasons for rejection of votes, votes given by proxy etc.

"At the time appointed for taking the poll, the members who vote personally will come up to the voting table and write their names down on sheets of paper headed 'For' or 'Against' the motion, as the case may be. A member voting as proxy for another will write down his own name and also that of the person whose proxy he is *e.g.*, 'John Smith, by W. Jones, his proxy'. However, sometimes it is arranged that a member signing his own name shall be deemed to vote for himself and for all whose proxy he is. (*Cf.* PALMER'S COMPANY PRECEDENTS, 496, (17th Edn.).

In the absence of any provisions in the articles, there is no hard and fast rule for taking poll in any particular manner. The only requirement is that it should be such as to be fair and not give room for any injustice or foul play in the manner of taking the poll.

A poll need not necessarily be by ballot. It may be by show of hands. There is nothing forbidding the exercise of recording of the voting rights of each person by show of hands. See *in re, River Steam Navigation Co. Ltd.*, (1967) 2 Comp LJ 106 (Cal); See also *Major Mella Singh v. President, Jullunder Club Ltd.*, (1969) 39 Com Cases 1018 (P&H).

Chairman's declaration as to rating of votes at poll

It is possible for the chairman in the exercise of the power conferred on him by sub-sec. (1) for regulating the manner of poll, to permit casting of votes by post and to appoint a sub-committee to examine the validity of proxy forms and to invite such proxy holders, after the decision as to their validity, to cast their votes and then to declare the result. Consequently the court did not allow any injunction against this process to an aggrieved director whose election was likely to be affected by the process adopted by the chairman. *Kunwar Brij Bhushan v. Dehradun Tea Co. Ltd.*, (1982) 52 Com Cases 271 (All). In *McMillan v. Le Roi Mining Co. Ltd.*, (1906) 1 Ch 331 it was held that unless there is a provision to that effect in a company's articles, ballot papers cannot be allowed to be sent to the members by post and to be returned by them under their signature to the office of the company.

The chairman's declaration as to the result of voting is of course conclusive unless fraudulent. *Arnot v. United African Lands*, (1901) 1 Ch 518; *Caratal (New) Mines Ltd., Re*, (1902) 2 Ch 498; *Wall v. Exchange Investment Corpn.*, (1926) 1 Ch 143.

§ See also Notes under section 175.

Chairman's decision as to confidentiality of voting at poll

In reference to a non-company meeting it was held that those who organised a poll were entitled to know how people voted so that the validity of the votes can be scrutinised. There was therefore no basis for arguing that at common law there is a requirement of confidentiality for poll votes. Unless the chairman is bound by some rules over the matter, his discretion prevails. *Harrhaus & Co. Gambh v. Law Debenture Trust Corpn. Plc.*, 1988 BCLC 640 (QBD).

Important points for conducting poll:

The following points should be borne in mind when conducting a poll:

1. The Articles of every public limited company normally contain a provision for a demand for a poll by the shareholders. In the case of a public company limited by shares, a poll can be demanded by any member or members holding shares not less than one-tenth of the total voting power in respect of the particular resolution or holding shares on which an aggregate sum of not less than fifty thousand rupees has been paid-up. In the case of other public companies, by members having not less than one-tenth of the total voting power in respect of the resolution; in the case of a private company having a share capital, by one member if seven members are present and by two, where more than seven are present.
2. A poll should be demanded forthwith after the show of hands.
3. A poll is an appeal to the whole constituency and is taken in order to ascertain the wishes of the General Body of persons qualified to vote and to give others, besides those who are present when the poll is demanded, power to come in to exercise their right of voting.
4. When a poll is demanded, the show of hands goes for nothing, and the decision of the meeting depends on the result of the poll. In contemplation of law the meeting continues until the poll has been taken.
5. A poll may be taken at the meeting forthwith and normally should be taken forthwith after the other agenda is finished. When a poll has been granted and the Chairman has fixed some future period for taking it, the meeting should transact in the meantime some other business.
6. A poll in respect of election of the Chairman or adjournment of the meeting is to be taken forthwith, otherwise the poll is to be taken *within 48 hours* from the demand for poll.

7. A voter may vote at the poll even though not present when the poll was demanded. To exclude a voter may invalidate the poll.
8. The poll is to be regarded as part of the proceedings of the meeting and appointing a subsequent day for taking or completion of the poll is not an adjournment of the meeting.
9. As to scrutiny, the Chairman appoints two scrutineers to count the votes at a poll and report to the Chairman. Out of the two scrutineers, one should be a shareholder. It is for the Chairman to decide as to the validity of proxies in the computation of votes and his decision will stand unless it is proved in the the court to be wrong. Scrutineers must be independent persons and not having personal interest in the subject-matter of the resolutions, *e.g.* appointing a candidate for directorship as a scrutineer.
10. The votes having been taken, the Chairman or scrutineers will enter them in the list of votes, in the column 'For' or 'Against', as the case may be. If on reference to the books or otherwise, a vote tendered is for any reason found to be invalid, *e.g.*, because the voter is in arrears of calls or because the instrument of proxy is not duly stamped or was not deposited in time, the Chairman or scrutineers will reject the same and put a note in the column of observations stating the reason for rejection. See PALMER'S COMPANY PRECEDENTS, 17th Edn., Part I, pages 494-496.
11. The demand for poll is on the increase and it is in the interest of every company to hold its meetings on Monday, Tuesday or Wednesday so that the poll can be taken by Friday the latest. This is necessitated because of the unfortunate wording of section 180(2) of the Companies Act which casts upon the Chairman an obligation to take poll "not later than 48 hours from the time when the demand was made".

Modification in relation to class meetings etc.—Refer to Annexures B, C and D of the Companies (Central Government's) General Rules and Forms, 1956, [See *Appendix* I] regarding modification of this section in applicability to meetings of a class of shareholders, meetings of debenture-holders, and meetings of a class of debenture-holders.

Secretarial Standards on General Meetings issued by the Council of ICSI (SS-2)

These Standards seek to prescribe a set of principles for the convening and conduct of General Meetings and matters relating thereto. In the initial years, adherence by a company to the Secretarial Standards will be recommendatory. These principles may not be applicable to any meetings convened on the directions of the Court or CLB or other authority, unless the directions themselves so prescribe.

Secretarial Standard [Para 8]

8. Conduct of Poll

See also sec. 180

8.5 The result of the poll should be displayed on the notice board of the company at its Registered Office and its Corporate/Head Office, if such office is situated elsewhere, and also placed on the website, if any, of the company. In the case of listed companies with more than 5,000 Members, the result of the poll should also be published in a leading newspaper circulating in the neighbourhood of the Registered Office of the Company.

§ For full text of the Secretarial Standard, see *Appendix* 311.

[1][*S. 186. Power of Tribunal to order meeting to be called.—(1) If for any reason it is impracticable to call a meeting of a company, other than an annual general meeting, in any manner in which meetings of the company may be called, or to hold or conduct the meeting of the company in the manner prescribed by this Act or the articles, the Tribunal may, either of its own motion or on the application of any director of the company, or of any member of the company who would be entitled to vote at the meeting,—*

(a) order a meeting of the company to be called, held and conducted in such manner as the Tribunal thinks fit; and

(b) give such ancillary or consequential directions as the Tribunal thinks expedient, including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the provisions of this Act and of the company's articles.

Explanation.—The directions that may be given under this sub-section may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(2) 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

Eng. Act, 1948 : Sec. 135 Previous Act : Sec. 79(3)
Eng. Act, 1985 : Sec. 371

General Note : As and when the Companies (Second Amendment) Act, 2002 (11 of 2003) comes into force, the power under this section shall become transferred to the Tribunal to be exercised by it in place of the Company Law Board. The commentary should be read keeping this change in mind.

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1. **Subs. by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 24. Prior to its substitution it stood as under:**

"S. 186. Power of [1][Company Law Board] to order meeting to be called.

(1) If for any reason it is impracticable to call a meeting of a company, other than an annual general meeting, in any manner in which meetings of the company may be called, or to hold or conduct the meeting of the company in the manner prescribed by this Act or the articles, the [1][Company Law Board] may, either of its own motion or on the application[2] of any director of the company, or of any member of the company who would be entitled to vote at the meeting,—

(a) order a meeting of the company to be called, held and conducted in such manner as the [1][Company Law Board] thinks fit; and

(b) give such ancillary or consequential directions as the [1][Company Law Board] thinks expedient, including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the provisions of this Act and of the company's articles.

Explanation.—The directions that may be given under this sub-section may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(2) 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."

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1. 'Company Law Board' was substituted for the 'Court' by the Companies (Amendment) Act (XLI of 1974), s. 14 (w.e.f. 1-2-1975).
2. In Form No. 1 OF CLB Regulations, 1991 with fee of Rs. 500/- *vide* GSR 219(E), dt. 2-3-2000 w.e.f. 1-4-2000 under CLB (Fees on Application & Petition) Rules, 1991, see *Appendix* 6.

Companies (Amendment) Act, 1974

'Company Law Board' was substituted for 'Court' by the Companies (Amendment) Act, 1974, in sections 17, 18, 79, 141 and 186. For the reasons which prompted the amendment, see Notes under section 17.

The amendment conferring powers on the CLB does not take away the power of the court to exercise control over any extraordinary general meeting of a company in respect of which a proceeding is pending in the court. *Meenakshi Amma (K.) v. Sreerama Vilas Press and Publications (P.) Ltd.,* (1992) 73 Com Cases 285, 295 (DB—Ker).

Companies (Second Amendment) Act, 2002 [11 of 2003]

The powers of the Company Law Board under this section have been conferred on the Tribunal constituted under Part 1B of the Act. Consequential changes have accordingly been made in the section. Notes on Clauses of the Bill stated thus:

Notes on Clause.—This clause seeks to substitute section 186 of the Companies Act, 1956. The existing provisions contained in the section empower the Company Law Board to order for calling a meeting other than the annual general meeting if, for any reason, it is impracticable to call such a meeting of a company. It is proposed to confer this power upon the Tribunal. This amendment is of consequential nature. (*Clause 19 of the Companies (Amendment) Bill, 2001*).

***Quasi*-judicial power of CLB**

As the Company Law Board will be exercising *quasi*-judicial powers as regards matters coming under its jurisdiction in cases arising under the above sections, the judicial decisions referred to in the Notes under that section will be taken into consideration by the Company Law Board also as authorities for guidance in the disposal of cases coming before it.

Who can apply

The Company Law Board can exercise this power of its own motion or on the application of any director of the company or of any such member of the company who would be entitled to vote at the meeting. It is not necessary that the director or a member should apply in the name, or on behalf of, the company. *Smt. Jain v. Delhi Flour Mills Co. Ltd.,* (1974) 44 Com Cases 228 (Del). In this case the court pointed out that where the purpose for which an order for a meeting is desired can be fulfilled either under S. 169 by requisitioning a meeting or under S. 167 by asking CLB to order an AGM to be held, the jurisdiction of this section will not be available. It was also pointed out that there is no jurisdiction under the section to order rectification of the register of members and to give a direction as to who should exercise voting rights at the meeting. This section cannot also be made use of where the troubles are not due to an impracticability of a meeting but about the ownership of shares. Such disputes can be sorted out in a civil suit and then the holding of a meeting may become quite possible. *Murarka Paint & Varnish Works (P.) Ltd. v. Mohanlal Murarka,* (1961) 31 Com Cases 301 (Cal). An order under this section was not allowed for calling a meeting to a 55% group of shareholders who had already served notices on the company for requisitioning a meeting with the agenda of removing the chairman and directors, the court saying that it was not possible before-hand to say that merely because that the chairman and the Board of directors belonged to the rival 45% group, they would make it impracticable for the meeting to go on. *Bengal and Assam Investors Ltd. v. J. K. Eastern Industries (P.) Ltd.,* (1957) 27 Com Cases 86 : AIR 1956 Cal 658.

An order directing a meeting to be called was passed on the petition of a director, who was found competent to apply. The order was held to be not illegal. The petition was supported by a member having a substantial number of shares. The agenda was removal of a director. The court observed as follows : "The only question to determine in a petition u/s. 186 is whether the director or the member, who has moved the application is *bona fide* and is in the larger interest of the company or not. If the deadlock is not removed, then it will go against the interest of the company. Such decisions are to be given

upon consideration of all the relevant facts and circumstances of a case and there is no strait jacket formula." *Devendra Kumar Budhia v. Bihar Foundry & Castings Ltd.*, 2003 CLC 857 (Jhar).

Power confined to calling extraordinary meeting

The section gives power and jurisdiction to the Company Law Board only in the case of meetings other than annual general meetings. As regards the annual general meeting, power is vested also in the CLB under section 167.

In *Rangachari (R.) v. S. Suppiah,* AIR 1976 SC 73 : (1975) 45 Com Cases 641 UNTWALIA J delivering the judgment of the Supreme Court emphasised that the exact boundaries of the power under the section must be kept in mind and he stated those boundaries in the following words [at pp. 644, 645]: "The plain meaning of section 186 is that the court may order a meeting of the company to be called, held and conducted in such manner as the court thinks fit in any one or more of the following contingencies:

(i) If for any reason it is impracticable to call a meeting of the company other than an annual general meeting.

(ii) If for any reason it is impracticable to hold the meeting of the company in the manner prescribed by the Act or the articles.

(iii) If for any reason it is impracticable to conduct the meeting of the company in the same manner.

On the occurring of any one or more of the said contingencies the court has to order the calling of a meeting of the company and its holding and conducting in such manner as the court thinks fit. The use of the word "and" between the words "held" and "conducted" in clause (a) of sub-section (1) clearly shows that the court has no power to make any order regarding the holding and conducting of any meeting which has already been called without ordering a meeting of the company to be called in place of the meeting already called. If an order under clause (a) has been made such ancillary or consequential directions as the court thinks expedient could be given under clause (b), including a direction within the meaning of the explanation appended thereto. The language of sub-section (2) further fortifies the above interpretation of sub-section (1) and makes any meeting called, held and conducted in accordance with an order under sub-section (1) to be a meeting of the company duly called, held and conducted. The use of the word "or" in the first part of sub-section (1) may be disjunctive or conjunctive in the manner we have interpreted above. But, undoubtedly, the order under clause (a) has got to be for all the three purposes and not merely for holding or conducting of the meeting." [(1975) 45 Com Cases 641 at 644, 645 (SC)]. The decision of the Madras High Court [O.S. Appeal No. 64/1974] was **reversed**.

Where the Board of directors of a company applied to the court (now CLB) to appoint a chairman to supervise and preside over an adjourned annual general meeting, called by the Board, and issue directions for conducting the meeting, the Court held that it had power to do so. *V. Selvaraj v. Mylapore Hindu Permanent Fund Ltd.*, (1968) 38 Com Cases 153 (Mad). See also *Dinkar Rai D. Desai v. R.P. Bhasin,* (1986) 60 Com Cases 14 (Del—DB); *Ananthalakshmi Ammal (A.) v. Tiffin's Barytes, Asbestos & Paints Ltd.*, (1951) 21 Com Cases 294 (Mad).

The power of a court supervising a scheme sanctioned under S. 392 (1) to call a general meeting of the company is not taken away by this section. *Gupta (S.K.) v. Jain (K.P.),* (1979) 49 Com Cases 342 : AIR 1979 SC 734; *Indian Hardware Industries Ltd. v. Gupta S.K.*, (1981) 51 Com Cases 51 (DB)(Delhi); *Meenakshi Ammal (K.) v. Sreerama Vilas Press and Publications P. Ltd.,* (1992) 73 Com Cases 285, 295 (Ker—DB). The CLB cannot exercise power under this section to call an extraordinary general meeting when dealing with a petition under Sections 397 and 398. *Gover Rustom Irani v. Property Co. P. Ltd.*, 1976 Tax LR 1682 (Cal); *Dinkar Rai D. Desai v. R.P. Bhasin,* (1986) 60 Com Cases 14 (Del—DB). Before the amendment of 1988 this power was with the court and

the courts had formulated the view that it could be exercised only within the framework of the Act and not under inherent powers conferred by the Civil Procedure Code. *Ashok Mathew Zacharia (Dr) v. Majestic Kuries and Loans (P.) Ltd.*, (1987) 62 Com Cases 865 (Ker). **Followed** in *Kishore Y. Patel v. Patel Engineering Co. Ltd.*, (1994) 79 Com Cases 53 (Bom). The Court also **followed** *B and A Investor v. JKE Industries*, AIR 1956 Cal 658 and *Rangachari (R.) v. S. Suppiah*, (1975) 45 Com Cases 641 : AIR 1976 SC 73.

The power to call meetings is not intended to vary the substantive voting rights of shareholders so as to resolve a deadlock. The power can be used to circumvent a vacuum caused by a quorum provision but not to enable a 50 per cent shareholder to be outvoted. *Ross v. Telford*, (1998) 1 BCLC 82 (CA).

Exercise of inherent powers: Power to appoint chairman

The Bombay High Court in its decision in *Kishore Y. Patel v. Patel Engineering Co. Ltd.*, (1994) 79 Com Cases 53 : AIR 1992 Bom 114 expressed the view that the decision in *Selvaraj V. v. Mayalapore Hindu Permanent Fund Ltd.*, (*supra*), was expressly or at any rate by necessary implication **overruled** by a subsequent judgment of the Madras High Court in *Menon (T.M.) v. Universal Films (India) P. Ltd.*, (1982) 52 Com Cases 371 (Mad). In this case, an extraordinary general meeting of the shareholders of the company was scheduled to be held and an application was filed under rules 9 and 11(b) of the Companies (Court) Rules, 1959 for appointment of an independent chairman of Court's choice to conduct the said meeting. One of the items on the agenda was to consider the resolution for removal of the respondent and his wife as directors of the company. The question before the Court was as to whether the application was at all maintainable under the law. The High Court of Madras, after referring to the Supreme Court judgment in *J. Rangachari's* case, (*Supra*) [Where also the application was for the appointment of an independent chairman] held that the application made to the Court was not maintainable as the Court could not exercise its inherent power and induct an outsider in a company meeting which was duly convened beyond what could not be done even under section 186 of the Act.

The facts of the case [*Kishore Y. Patel's* case] were that one faction of shareholders became powerful through share purchases. The members of that faction held an extraordinary general meeting and appointed five directors from their group. The plaintiffs' group filed actions to prevent them from acting. The Bombay High Court passed strictures against plaintiffs. A meeting presided over by a person appointed by the court ratified and confirmed the appointment of those directors. The plaintiffs' group called an extraordinary general meeting for removing them from office and filed a suit for securing appointment through court of a fit person to preside over the meeting, and to restrain any member of the rival group to be chairman. They also instituted a High Court proceeding for a decree of repayment of amount claimed by them, to restrain the newly appointed directors from chairing the meeting and for appointment of an independent chairman. No such relief was allowed. No meeting can be called by any authority and no directions can be given except in accordance with the relevant provisions of the Act and the requirements of the relevant provisions were not satisfied. The court is required by law to restrict itself to the statutory provisions. It is for the shareholders to decide as to which particular individual or group enjoys the confidence of the majority. It is not within the powers of a court to issue a declaration and disqualify one or the other individual from chairing a meeting of the company irrespective of the facts and the prevailing situation. The court also pointed out that even if it had inherent power to provide relief of the kind sought, it would not do so in view of the history of litigation and rival proceedings for similar reliefs. *Kishore Y. Patel v. Patel Engineering Co. Ltd.*, (1994) 79 Com Cases 53 : AIR 1992 Bom 114.

§ See also Notes under s. 10 under the heading "Inherent Powers of Civil Court" where the case has been discussed in detail.

It has to be noted that the situations in which there was reluctance in ordering the appointment of a chairman were cases in which a meeting had already been called or convened by the directors. Apart from a situation like that, courts/CLB have been appointing chairmen along with an order for a meeting. In *Kishore Y. Patel's* case itself an earlier meeting was presided over by a court appointee. In *Sree Rama Vilas Press & Publications P. Ltd.,* (1992) 73 Com Cases 285 (Ker—DB), for example, the meeting was called and presided over by a chairman appointed by the court. Section 186 also does not mince any words in conferring upon the CLB the power to order the manner of conducting the meeting and to pass any ancillary or consequential orders.

When meeting "Impracticable"

The finding that it is impracticable to convene a meeting is a condition precedent to the exercise of jurisdiction conferred by this section. *Edward Ganj Public Welfare Assn. Ltd., Re,* (1977) 47 Com Cases 283 (P&H). The impracticability of calling a meeting must be determined primarily in the light of the Articles of the company. The Act should be looked into only when the Articles are silent on a particular matter or in conflict with the provisions of the Act. While determining the impracticability, the Courts used to decide the validity or otherwise of a meeting already held. *Balkrishna Maheshwari v. Uma Shanker Mehrotra,* (1947) 17 Com Cases 216 : AIR 1947 All 361 (FB). The case of impracticability of calling the statutory meeting of a company under section 165 also comes under the present section.

"Impracticable" in this section should be interpreted in a reasonable manner and from the common sense point of view of ordinary businessmen, taking into account the circumstances of each case. As WYNN PARRY, J., observed in *In re, El. Sombrero,* (1958) 3 All ER 1 : (1958) 28 Com Cases 619 (Ch D) the court (in India CLB) will examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be called, held or conducted as the case may be. In this case the applicant held 900 shares in a company. The respondents, who were the only directors, held 50 shares each. No general meeting of the company had ever been held. The applicant asked the court (In India CLB) under this section to convene a meeting under the section. This was opposed by the respondents. It was held that this was a case in which the court ought to exercise its discretion: firstly, because if the court were to refuse to do so it would prevent the applicant from exercising his right as the majority shareholder to remove the directors and, secondly, because the respondents were failing in their duty to call an annual general meeting, which they were under a statutory duty to do. Also see *Rayfield v. Hands,* (1958) 2 All ER 194 : (1958) 28 Com Cases 460 (Ch D); *Commissioner v. Deputy Commissioner,* 41 CWN 1972. A meeting was therefore directed to be held, notwithstanding the opposition of some members. But, it may refuse to call a meeting if it is satisfied that a meeting so called is likely to override class rights. *BML Group Ltd. v. Harmon,* (1994) 1 WLR 893 (CA).

Some other example are: *Indian Spinning Mills v. Jung B. Rama,* AIR 1953 Cal 355 : (1952) 22 Com Cases 162 (Cal) [Requisitioning a meeting would have led to endless litigation]. *In re, Malhati Tea Syndicate Ltd.,* (1951) 21 Com Cases 323; *Jain (Smt.) v. Delhi Flour Mills Co. Ltd.,* (1974) 44 Com Cases 228 (Del); (uncertainty about the constitution of the Board) *Re, Lothian Jute Mills Co. Ltd.,* (1951) 21 Com Cases 290; (Board of directors divided into factions) *Bengal and Assam Investors Ltd. v. J.K.E. Industries,* AIR 1956 Cal 658 : (1957) 27 Com Cases 86 (impracticable from business point of view). See also *Pasari Flour Mills Ltd. v. Vidisha,* (1962) 32 Com Cases 896 : AIR 1961 MP 340 (a meeting may be impracticable yet not impossible); *Baptist Church Trust Assn. v. Members C.L.B.,* (1986) 60 Com Cases 381 (Cal). [Rival groups holding meetings at separate places and appointing separate sets of office bearers]; *Motion Pictures Assn., Re,* (1974) 44 Com Cases 298 (Del) (Dispute as to directorship); *M.K. Srinivasan v. W.S. Subrahmanya Ayyar,* (1932) 2 Com Cases 147 : AIR 1932 Mad 100 (Usurpation of shareholders powers by directors).

The expression "impracticable" is sufficient to include a case in which it is impracticable owing to the terms of the articles and the state of the shareholding in the company to get a quorum present. Thus where one of the only two director-shareholders who was holding 51% shares wanted to remove his fellow director who did not attend the meeting to frustrate him because the articles required quorum of two, the court [here it would have to be CLB] ordered a meeting to be called with the presence of one as sufficient quorum. *Opera Photographic Ltd., Re,* 1989 BCLC 763; *HR Paul & Sons Ltd.,* (1973) 118 Sol J 166. In a subsequent case the court said that these cases merely showed that a minority shareholder could not be allowed to use quorum tactics to prevent a majority shareholder exercising his or her rights, and were inapplicable to the present case. Here there was a potential deadlock at company meetings arising from an equal division of shares between two shareholders. Section 371 of the English 1985 Act is a procedural section, not one designed to affect shareholder voting rights, and the court accordingly has no jurisdiction under those provisions to make an order to allow one shareholder to override the wishes of the other. *Ross v. Telford,* (1998) 1 BCLC 82 (CA).

In *Edinburgh Workmen's Houses Improvement Co. Ltd., Re,* (1935) SC 56 (Scotland) a quorum of 13 shareholders personally present was required. The LORD PRESIDENT stated: "I think the expression impracticable ... to *conduct* the meeting of the company in a manner prescribed by the articles' is sufficient to cover a case in which it is impracticable, owing to the terms of the articles and the state of the shareholding in the company, to get a quorum present. On the facts placed before us it is impracticable in present circumstances to get a meeting with the appropriate quorum. I suggest, therefore, that ... we order a meeting of the company at which the special resolutions may be proposed and passed, which meeting shall be held and conducted under the provision that the quorum shall be five shareholders personally present." An order was accordingly made to that effect. See also *M.R.S. Rathnavelusami Chettiar v. M.R.S. Manickavelu Chettiar,* AIR 1951 Mad 542 : (1951) 21 Com Cases 93, where impracticability could be said to have come into being by the managing director locking the registered office and thus preventing the members from holding a meeting.

In another two member-two director company the court (under this section CLB) used its discretionary power to order a meeting of members to be held, where one was refusing to attend, so as to allow the appointment of additional directors for carrying on the management pending the resolution of a dispute which was to be reviewed by the court in forthcoming proceedings on the basis of "unfair prejudice" *Sticky Fingers Restaurant Ltd., Re,* 1992 BCLC 84 (Ch D). In the case of a company in which there are only two-members, both of them are also the only directors of the company, if one director refuses to attend board meetings, it becomes impossible for the company to call an extraordinary general meeting. In a situation like this, the Company Law Board in *Pucci Dante v. Rafeeque Ahmed,* (1999) 95 Com Cases 566: (1999) 1 Comp LJ 513 : (1999) 32 CLA 38 (CLB—SB), directed the calling of an extraordinary general meeting. The parties were at daggers drawn. They had exchanged legal notices. It was impossible that they would be able to sit together at a board meeting to draw an agenda for the extraordinary general meeting.

The power under this section is discretionary and must be exercised only when the normal machinery of management fails and the court (now the Company Law Board) finds (i) that to call a meeting is impracticable, and (ii) that to leave the parties to follow their own remedies will put the company in jeopardy. *Bengal and Assam Investors Ltd. v. J.K. Eastern Industries Pvt. Ltd.,* (1957) 27 Com Cases 86 : AIR 1956 Cal 658.

Where, as a practical matter, the desired meeting cannot be conducted and where to refuse the application will result in injustice to the applicants and put a premium on nonperformance of a statutory duty, an order under this section will be made. *Re, EL. Sombrero Ltd.,* (1958) 3 All ER 1 : (1958) 28 Com Cases 619 (Ch D); *Rayfield v. Hands,* (1958) 2 All ER 194 (Ch D). The word "impracticable" is more limited than the word "impossible" (*ibid*). The word 'impractical' does not mean impossible. In *Re Canadian Javelin Ltd. and Boon-Stracham Coal Co.,* (1976) 69 DLR (3d) 439 (Que. SC) (Canada).

Where there was a legitimate dispute as to which of the members had the authority to call a meeting, the court directed a meeting to be held and to decide the issues at the meeting. *Peasant Party of Ontario v. Zorkin,* (1981) 38 OR (2d) 1 (Ont. HC) (Canada). Where the register of members was destroyed by enemy action and it was impossible to ascertain the names and addresses of most members, the meeting was directed to be convened by giving notice in the ordinary way to those members whose names and addresses were known and by advertisement to all others. *Payne v. Coe,* (1947) 1 All ER 841 (Ch D).

In another case, where there was only one surviving member, the Court ordered a meeting to be called. *Jarvis Motors (Harrow) Ltd. v. Carabott,* (1964) 3 All ER 89 : (1964) 34 Com Cases 921 (Ch D). The power of the CLB was invoked to call a meeting where the company had no duly constituted board of directors. A meeting was necessary for putting the company on rails by removing impediments which had come in the way of proper functioning. *Amrit Kaur Puri v. Kapurthala Flour, Oil and General Mills Co. P. Ltd.* (1997) 1 Comp LJ 147 (CLB—PB).

Provision of procedural nature

The section is a procedural section plainly intended to enable company business which needed to be conducted at a general meeting to be so conducted so that the company could manage its affairs without being frustrated by the impracticability of calling or conducting a general meeting in the manner prescribed by the articles and the Act. Where there was a majority shareholder and no class rights attaching to particular classes of shares which the convening of a general meeting was designed to override, the court in exercising its discretion under the section would consider whether the company was in a position to manage its affairs properly and would also take into account the ordinary right of the majority shareholder to remove or appoint a director in exercise of his majority voting power. The fact that quorum provisions in the articles requires two members"attendance is not in itself sufficient to prevent the court making an order under the section to break a deadlock in favour of a majority shareholder who was seeking a proper order, such aas the appointment of a director, which he had the right to procure in ordinary circumstances. It was held that the court could in the circumstances order a meeting to be called and conducted with only one member present for the single act of enabling the appointment of a new director. *Union Music Ltd. v. Watson,* (2003) 1 BCLC 453 (CA).

Demise of members, directors.—Where after the demise of the last members and directors of the company, no body was left to take care of the company and its annual accounts and returns could not be filed, it was held, on the petition of the widow of one of them, that it was just and proper to order the holding of an extraordinary general meeting of the company to enable the company to put itself on working rails. *Kaushalaya Atmaram Manghiramalini v. Hotel Hiramani P. Ltd.,* (2001) 29 SCL 109 (CLB—Mum).

Factionalised company.—A guarantee company formed for abolition of vivisection (prevention of cruelty on animals), having a huge membership base of 9,000 and 50,000 donors, became factionalised because, as the court noted, "[q]uestions relating to animal rights gave rise to passionate expressions of opinion by word and conduct". A radical minority of members wanted to adopt a confrontational and hardline approach for campaigning to promote the company's objects. A great majority wanted to adopt peaceful and moderate methods. The climax was reached at an extraordinary general meeting which degenerated into a near riot, at which it was impossible for any orderly business to be conducted and which eventually had to be stopped by the police. Accordingly, an order for a meeting to be called by the court was held to be justified. The object of the meeting was to amend the articles of the company to allow voting by proxy whereas the original constitution required members' personal presence. The court also passed incidental orders to the effect that only the members of the executive committee would attend the meeting and the rest would vote by post. This became necessary because the conduct of the minority at the annual general meeting had been disgraceful and intolerable and was likely to have the effect of frightening away many of the peaceful members who

constituted the majority. *British Union for the Abolition of Vivisection, Re,* (1995) 2 BCLC 1 (Ch D).

Requisitionist's ability to call meeting.—Where a shareholder had the requisite number of shares to requisition a meeting and, on directors' failure to do so, to call the meeting himself and, instead of doing this he applied to the Company Law Board for calling extraordinary general meeting, the CLB turned down his request because he could have himself called the meeting and he could not say that it was impracticable for him to call and conduct a meeting. *B. Mohandas v. AKMN Cylinders P. Ltd.*, (1998) 93 Com Cases 532 : (1998) 16 SCL 658 : (1998) 3 Comp LJ 116 (CLB—SB). In another ruling concerning the same company, namely, *M. Sampath v. AKMN Cylinders P. Ltd.*, (1998) 3 Comp LJ 109 : (1998) 26 SCL 649 : (1998) 29 CLA 455 : (1999) 98 Com Cases 777 (CLB—SB), it was found that the applicant had disposed of his shares and the transfer had already been registered. He had lost his *locus standi* to proceed with the application.

In case the extraordinary general meeting is not convened by the Board of directors under section 169, and it is impracticable to call the meeting by the requsitionists themselves in the absence of list of members for giving notice of the meeting, the CLB may exercise its powers under this section.

Powers of Company Law Board : Guidance from judicial rulings

In exercising its powers the Company Law Board will be guided by the following judicial rulings, laid down while the power was being exercised by the Court (before the Amendment Act of 1974).

The directions contained in the section as regards calling, holding and conducting the meeting were held not in any way to abridge or limit the general powers of the Court (now CLB) to give such further orders and directions as may be necessary for the ends of justice. *Pt. Ram Roop Sharma v. C.R.E. Wood & Co. (Private) Ltd.,* (1958) 28 Com Cases 68 (Punj).

As to the circumstances under which the Court (now CLB) could exercise its power under this section, it was said in *In re, Clive Mills Co. Ltd.,* (1964) 34 Com Cases 731 (Cal) that the power under the section is a very wide and extraordinary power, which should be used sparingly and with great caution, because it is for the company to manage its own affairs including the calling of a general meeting and the Court (now CLB) will intervene, if at all, only if it is satisfied that it is impracticable to call or hold the meeting. Where shareholders themselves are in a position to requisition an extraordinary general meeting but without availing themselves of that procedure, make an application under this section, the same would not be entertained. See also *Bengal & Assam Investors Ltd. v. J.K. Eastern Ind. (P.) Ltd.,* (1957) 27 Com Cases 86 : AIR 1956 Cal 658; *Ruttonjee & Co. Ltd., Re,* (1970) 40 Com Cases 491 (Cal).

The main principles that should guide the Court as regards ordering a meeting to be called were thus indicated in *Ruttonjee & Co. Ltd., Re,* (1970) 40 Com Cases 491 (Cal):

1. The Court would not ordinarily interfere with the domestic management of a company which should be conducted in accordance with the articles.
2. The discretion granted under section 186 should be used sparingly with caution so that the Court does not become either a shareholder or director of the Company trying to participate in the internecine squabbles of the company.
3. The word 'impracticable' means impracticable from a reasonable point of view.
4. The Court should take a common sense view of the matter and must act as a prudent man of business.
5. A prudent man of business has not a sensitive officious view of intervention in case of every rivalry between two groups of directors; prudence demands that

the Court should ordinarily keep itself aloof from participating in quarrels of rival groups of directors or shareholders.

6. But where the meeting can be called only by the directors and there are serious doubts and controversy as to who are directors or where there is a possibility that one or other or both the meetings called by the rival groups of directors may be invalid, the Court ought not to expose the shareholders to uncertainties and should hold that a position has arisen which makes it "impracticable" to convene a meeting in any manner in which meetings of the company may be called.
7. The Court should exercise its power under section 186, when, upon considering all the facts and circumstances of a case, it can with a reasonable approach to certainty or even *prima facie* that a meeting called in the manner in which meetings are ordinarily called under the Act or under the articles, would be invalid.
8. Before the Court exercises its discretion under section 186, the Court must be satisfied when a director or a member moves an application, that it has been made *bona fide* in the larger interests of the company for removing a deadlock otherwise irremovable.

Where on account of the death of certain members of a company no director was validly in office, the CLB proceeded as follows: "In my considered opinion, in the present case, there is need for interference to the limited extent of (*a*) recognising the legal heirs of deceased members as the members of the company; and (*b*) electing a Board of directors by the general body of shareholders. In order to achieve the above 2 purposes, an EGM needs to be called. Since the general meeting cannot transact the business of registering the transfer of shares and since Board of directors have to be elected by the AGM of the company and further the AGM could be convened only by a duly constituted Board of directors, there is need to constitute an interim Board till the AGM is held. I am of the opinion that a notice for the EGM cannot be given to individual members as it may amount to recognising or not recognising certain persons as members. Hence, it is appropriate to call this meeting by a public notice. It is advisable to appoint an independent chairman who will consider and decide the eligibility of the persons as members/proxies to attend and vote at the meeting. The Board constituted by the meeting shall be entrusted with the books, records, papers and other properties of the company, but the Board shall function to the limited extent of registering the transmission of shares belonging to deceased members and shall after fulfilling the necessary formalities call the annual general meeting for the limited purpose of electing the Board of directors. The Board of directors thus appointed by the EGM shall cease to hold office on the conclusion of the AGM". *Kapurthala Flour Oil & General Mills Co. P. Ltd., Re,* (1992) 8 Corpt LA 11 at 15 (CLB).

Power of CLB after calling the meeting

Power under the section can be exercised only when, in the opinion of the Company Law Board, it is found impracticable to call a meeting of the company (not being an annual general meeting). After a meeting has been called, the Company Law Board has no power to come and intervene for the purpose of appointing a chairman, regulating the proceedings or advising their course or conduct. If a meeting already convened by the company has become disorderly or otherwise impossible to be proceeded with, the proper course is to apply to the Company Law Board to exercise its powers under this Section. See *R. Rangachari v. S. Suppiah,* (1975) 45 Com Cases 641 : AIR 1976 SC 73. See also *Bengal & Assam Investors v. J.K. Eastern Industries,* (1957) 27 Com Cases 86 : AIR 1956 Cal 658; *Re, Edward Ganj Public Welfare Assn. Ltd.,* (1977) 47 Com Cases 283 (P&H). **Following** the case of *R. Ranghachari, (Supra)* the Madras High Court has held that in exercise of its inherent powers under R. 9 of the Companies (Court) Rules, 1959, the Court cannot induct an outsider as an observer in a meeting of the company which

had been convened previously. *Menon T.M. v. Universal Film (India) Pvt. Ltd.*, (1982) 52 Com Cases 371 (Mad).

There is no power under this section to call a meeting for the purpose of removing a director without observing the formalities of Section 284. *Ruttonjee & Co. Ltd., Re,* (1970) 40 Com Cases 491 (Cal); *Murarka Paint's* case (*Supra*). A meeting was not ordered under this section at the instance of a shareholder who had filed a suit in the name of the company against a director for his removal and he wanted a meeting for the purpose of ascertaining the wishes of shareholders on his proceedings. *Murarka Paints & Varnish Works (P.) Ltd. v. Mohanlal Murarka,* (1961) 31 Com Cases 301 : AIR 1961 Cal 251.

Where directors prolonged their tenure of office by not calling an AGM at which they would have retired, it was held that a meeting could be ordered under this section to enable shareholder to exercise their franchise to elect directors. *B. R. Kundra v. Motion Pictures Assn.*, (1976) 46 Com Cases 339 (Del). Where, however, there is no such usurpation of office and the mere purpose of shareholders seeking an order under this section is to appoint new directors, which is ordinarily a function to be performed at the AGM, an order under this section is not likely to be made. *Pasari Flour Mills Ltd., Re,* (1962) 32 Com Cases 896 : AIR 1961 MP 340 where a company has been restrained by a court order from holding any general meeting, it was held that the jurisdiction under this section could not be used for holding a meeting which would have the effect of rendering the existing court order ineffective. *A. D. Chaudhary v. Mysore Paper Mills Ltd.*, (1976) 46 Com Cases 548 (Kar).

Power to give ancillary directions [Sub-section (1)(b)]

The power to give ancillary directions is not confined to cases where the meeting itself was convened by the CLB under clause (a). The powers under clauses (a) & (b) are independent. An independent chairman can be appointed and ancillary direction can be given in respect of a meeting convened by the company itself. *S. Suppiah v. Century Flour Mills Ltd.*, (1975) 45 Com Cases 450, 454 (Mad).

Order of the Company Law Board calling a meeting can also prescribe the business to be transacted at the meeting. *Motion Pictures Association, In re,* (1974) 44 Com Cases 298 (Del); *Baptist Church Trust Association v. Member, CLB,* (1986) 60 Com Cases 381 (Cal).

Where a shareholder-director sought an order for a meeting and also a declaration that his co-director-shareholder had caused the company to make disposition of company property without the consent of his co-director and for a collateral purpose and also at a time when his duty and interest conflicted, the court refused to make this declaration. Even the substantive law did not support the proposition that the consent of all the directors is necessary for such a disposition. Furthermore, one shareholder cannot by himself by-pass the rule in *Foss v. Harbottle,* (1843) 2 Hare 461 : 67 ER 189 and file an action on the allegation that the assets were sold by directors for a collateral purpose. As for the conflict of duty and interest, the court said that this would require an allegation that there was a fraud on the minority and that the wrongdoers were in control, which was not the case (here). *Downs Wine Bar Ltd., Re,* 1990 BCLC 839 (Ch D).

The directions that may be issued cannot override the provisions of the company's articles as to special quorum or any special rights, such as weighted voting rights or any agreement signed by all the shareholders which has the effect of being a part of the articles. If, for example, any such agreement provides that a particular member's presence would be necessary for constituting a valid meeting, this cannot be overriden by any order in connection with calling of meetings. *Harman v. BML Group Ltd.*, (1994) 2 BCLC 674 (CA).

An example of ancillary order is to be found in *British Union for the Abolition of Vivisection, Re,* (1995) 2 BCLC 1 (Ch D). The above Union with vast membership became divided into radical and moderate members and that made the holding of meetings diffi-

cult and on occasions impossible. At one of the meetings passions rose so high that police intervention became necessary to prevent breach of peace from taking place. A meeting was ordered to be called with this ancillary order that only the members of the executive committee would attend the meeting and the rest of the members would exercise their voting rights by *post*. The court was depriving them of the advantage of being present at the meeting to hear the oral debate on the matter. But as against this disadvantage, was the advantage of all the members of having a fair opportunity with full information to vote freely on an important topic (introduction of voting by proxy by changing articles) affecting the constitution of their Union.

There should not be any variation of or deviation from the directions, even if the variation or deviation is unanimously agreed to by the parties concerned. *Re Motion Picture Assn.*, (1974) 44 Com Cases 298 (Del). In this case, the meeting was ordered for moving a special resolution fixing the number of office bearers at 16, which was unanimously increased to 18. The amended resolution though unanimously passed was held void. The court further ordered another meeting to be called as it found that it was not possible to resolve the deadlock about the affairs of the company in any other manner. Where two agendas were proposed by two factional groups, the court directed that both the agendas should be considered and, if thought fit, resolutions might be passed in accordance with the agendas, with or without modifications as may be proposed at the meeting. See *Diwan Singh v. Minerva Films Ltd.*, (1958) 38 Com Cases 191 (Punj).

Single member constituting a meeting [Sub-section (1), Expln.]

Except in such case, as is mentioned in the *Explanation* to sub-section (1), a single member cannot constitute a meeting. (*Cf. Re, London Flats Ltd.*, (1970) 1 Comp LJ 28 : (1969) 2 All ER 744 (Ch D).

A private company pleaded inability to hold a Board meeting because it was a two shareholder – two director company and one of them had died. An application was made to the Company Law Board by the sole surviving director for a direction that an extraordinary general meeting be convened with the surviving shareholder constituting as quorum. The CLB adopted the alternative method of meeting the predicament. It directed that the son of the deceased member be deemed to be a member for purposes of transmission and convening of meeting. There would be no need then of invoking s. 186 for directing a meeting with one shareholder present. *Debashish Dutta v. B.G. Somadder & Sons P. Ltd.*, (2002) 38 SCL 154 : (2002) 49 CLA 363 (CLB).

But see Notes under section 167 *ante* as to "one member constituting a meeting".

Conditional order for a meeting

In England the power to order a meeting is vested in the court. In *Sticky Fingers Restaurant Ltd., Re,* (1992) BCLC 84 (Ch D), the company had two member-directors holding in the ratio of 66 : 34. The minority shareholder refused to attend board meetings alleging financial irregularities and praying to the court for relief by asking the majority shareholder to buy him out. In the meantime a Board meeting was urgently needed for approval of annual accounts and for taxation returns. The majority shareholder applied for order of the court to enable him to hold a single member meeting for appointing new directors. The court allowed him to do so subject to the proviso that each of the new directors appointed pursuant to the court's order would be restrained from acting as a director until he had delivered to the minority shareholder's solicitors an undertaking that pending the outcome of the unfair prejudice petition he would not exercise his right to exclude the minority shareholder-director from his directorship or interfere in his day to day conduct of the business or effect any alteration in the constitution or capital of the company.

Power to order meeting *vis-a-vis* unfair prejudice petition

In a husband-wife company the husband was the majority shareholder. Their personal and business relations broke down. The husband requisitioned and called an extraordi-

nary general meeting to remove his wife from directorship. The meeting could not be held. The wife would not attend. Quorum would not be there. He applied to the court for an order calling a meeting with a direction that a single member attending would constitute quorum. The wife presented a petition for prevention of unfair prejudice and the question was whether pending such proceedings a meeting could be ordered to be held. The court said that the mere existence of an unfair prejudice petition at the date of the hearing of an application for a meeting is not an inevitable bar to the making of an order for a meeting. But decidely it is something which should be taken into account in considering whether to exercise the discretion to make an order. On the facts as they developed it was impracticable to hold a meeting. An order was accordingly made for a meeting to be called and held with one member attending. *White-Church Insurance Consultants Ltd., Re,* (1993) BCLC 1359 (Ch D). As to the meaning of the word "impracticable" the court **followed** its own earlier decision in *Paragon Group v. Burnell,* (1990) 3 All ER 923 **affirmed** by the Court of Appeal, *Paragon Group v. Burnell,* (1991) 2 All ER 388 (CA).

Application before CLB

Application be made before the concerned Regional Bench of Company Law Board in Form No. 1 of Annexure II to the CLB Regulations, 1991 with an application fee of Rs. 500/- and accompanied by the following documents:

(1) Evidence in proof of status of the applicant.
(2) Affidavit verifying the petition.
(3) Bank draft evidencing payment of application fee.
(4) Memorandum of appearance in Form No. 5 of Annexure I with a copy of the Board's resolution or the executed Vakalatnama, as the case may be.

§ For text of the Company Law Board Regulations, 1991, refer *Appendix* 3.

Secretarial Practice Notes : Power of CLB to order meeting to be called

Check whether:

(i) any application for calling a meeting was made by any director or a member to the Company Law Board?
(ii) a meeting was ordered to be called by the Company Law Board? If so, whether the directions given by the Company Law Board had been complied with?
(iii) Form No. 21 of Companies General Rules & Forms has been filed with ROC, along with CLB's order, within 30 days of receipt of the order?

Documents Involved: 1. Company Law Board's Order, 2. Minutes of General Meeting.

S. 187. Representation of corporations at meetings of companies and of creditors.—(1) A body corporate (whether a company within the meaning of this Act or not) may—

(a) if it is a member of a company within the meaning of this Act, by resolution of its Board of Directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of the company, or at any meeting of any class of members of the company;

(b) if it is a creditor (including a holder of debentures) of a company within the meaning of this Act, by resolution of its directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of any creditors of the company held in pursuance of this Act or of any rules made thereunder, or in pursuance of the provisions contained in any debenture or trust deed, as the case may be.

(2) A person authorised by resolution as aforesaid shall be entitled to exercise the same rights and powers (including the right to vote by proxy) on behalf of the body corporate which he represents as that body could exercise if it were [1][an individual member], creditor or holder of debentures of the company.

NOTES

Eng. Act, 1948 : Sec. 139
Eng. Act, 1985 : Sec. 375

Previous Act : Sec. 80

Scope of section

The section applies to any body corporate, as defined in section 2(7). That definition excludes corporations sole, co-operative societies and other corporate bodies which the Central Government may, by notification, specifically exclude. Such corporate bodies as Financial and Investment Corporation, the Life Insurance Corporation etc., and foreign companies and corporations, besides companies incorporated under this Act come under this section.

It may be noted that the scope of the present section is wider than section 80 of the previous Act, as it applies to all bodies corporate (whether a company within the meaning of this Act or not). Further, it enables the person authorised, to act as the representative of the body corporate at any meeting of the company and exercise all the rights and powers which an individual member of the company may have.

It is necessary for this power to be exercised that the company's name is in the register of members of the company whose meetings are to be attended. Thus where a company purchased shares of another company but that other company did not register the company as shareholder and the seller of the shares whose name remained in the register appointed a representative on behalf of the purchaser-company, it was held that he was neither a representative nor a proxy and his votes could be rejected. *Coachcraft Ltd. v. S.V.P. Fruit Co. Ltd.*, (1980) 28 Aust LR 319 (PC).

A company which is holding shares in another company can attend the meetings of the other through a representative. Only one such representative can be appointed irrespective of the amount of shareholding. There is neither any need for nor any question of joint representatives. *Manoj Kumar Sonthalia v. Nariman Point Building Service and Trading P. Ltd.*, (1995) 84 Com Cases 559 (Mad).

Foreign company

A foreign company can also make use of this provision or it may appoint a representative by means of a power of attorney. *CEPT v. Jeewanlal Ltd.*, (1951) 21 Com Cases 239 (Cal).

Take over under I (D&R) Act

A company whose management has been taken over under the Industries (Development and Regulation) Act does not loose its voting rights to be exercised through a representative. *Balkrishan Gupta v. Swadeshi Polytex Ltd.*, (1985) 58 Com Cases 563 : AIR 1985 SC 520.

Company under liquidation

In the case of a body corporate which is in liquidation, the liquidator will be the 'governing body' and may, where he is not himself able to be present, appoint a representative. See *Hillman v. Crystal Bowl Amusements Ltd.*, (1973) 1 All ER 379 (CA).

Section applies to general meetings only

The meetings referred to in this section are meetings of the company, such as annual general meetings, and not Board meetings. A company, which is a shareholder of another

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1. Subs. by Act 65 of 1960, s. 48 for "a member".

company, cannot as of right send its authorised representative to attend a Board meeting of the company in which the shares are held. There is, however, nothing to prevent the authorised representative from contesting an election to the Board. *Dinkar Rai D. Desai v. R.P. Bhasin,* (1982) 3 Comp LJ 198 (Del); *Motion Pictures Assn., Re,* (1984) 55 Com Cases 375 (Del).

Authorisation of representative

Unless an authenticated copy of resolution of the Board of Directors or other governing body of the body corporate authorising a person by name or description to attend any meeting of the company is filed, no one claiming to represent the body corporate is entitled to attend or otherwise take part in the meeting. The resolution must specify the company and the meeting or meetings at which the representative is to act. An authorisation issued generally to any person or persons to attend any general meeting of any company of which the body corporate is a member, will not be sufficient.

On receipt of notice of any general meeting of a company of which the body corporate is a member, the Board of Directors of the body corporate will decide either by circular or at a meeting of the Board whether, having regard to the agenda in the notice of the general meeting of the company, a representative on behalf of the body corporate should attend or not. It is not enough to pass a resolution authorising any person or one or other of several persons to attend as its representative at any general meeting of any company of which the body corporate is a member. There must be specific authorisation and the authorisation must be conferred in advance. Accordingly where a person attended a meeting purporting to be the representative of the company and company subsequently ratified its act by a Board resolution, his vote was nevertheless held to be void. *Tata Iron & Steel Co. Ltd., Re,* AIR 1928 Bom 80.

If any person claims to be the representative of a body corporate, proof of his identity and of the resolution authorising him to act may be required where any doubt is raised. The company is not bound to accept as genuine any paper produced by an alleged representative except on satisfactory proof of it, unless the paper is directly received from the office of the Board of the body corporate and there is no room for doubting its genuineness.

The genuineness of the appointment of the representative depends upon the fact that the resolution was properly passed and not on the sufficiency of the evidence of its passing which the representative is able to tender at the meeting. *Colonial Gold Reef Ltd. v. Free State Rand Ltd.,* (1914) 1 Ch 382; *Nand Prasad v. Arjun Prasad,* (1959) 29 Com Cases 552 : AIR 1959 Pat 293.

Position of representative

Again, as a body corporate can only authorise its representative to act as such representative at any meeting of the company, and exercise the rights and powers as an individual member, he may not be eligible to be appointed as a director of the company in the same way as an individual member may be, or exercise other rights of a member such as signing a requisition for a meeting, receiving dividends, etc. The authority of the representative does not extend further than representing the body corporate at the general meeting.

A representative appointed under this section is a member personally present for the purpose of quorum and voting by show of hands, and is not merely in the position of a proxy appointed by a shareholder. He will also have the right to speak. He may also, instead of being present in person, appoint a proxy [Sec. 187 (2)]. The corporation itself may appoint a proxy as provided by section 176(5)(b). But if it also appoints a representative and the representative attends the meeting, his attending will have the effect of cancelling the proxy. *Kelantan Coconut Estates Ltd.,* (1920) 64 Sol J 700.

If there is an authority letter to be a representative, the formalities of appointing a proxy are not necessary. The meeting in this case was that of a debtor company which was attended by a representative of a lender company. *Maneckchowk & Ahmedabad Mfg. Co. Ltd., Re,* (1970) 40 Com Cases 819 (Guj).

The question whether the presence of a person authorised in the manner provided by this section is 'attendance in person' for purposes of section 319(2) has been left undecided by the Supreme Court in case of *Arjun Prasad v. Shantilal Shankerlal Shah,* (1962) 32 Com Cases 149 : AIR 1962 SC 1192. But as a company is not a natural person who can speak except through an agency, there is no reason why the presence of a representative authorised in the manner provided by this section should not be held to be the 'presence in person' of the company or corporate body.

Can a donee of general power of attorney act as representative at general meetings

Department's view.—The donee of a general power of attorney cannot be equated with that of a representative appointed by a body corporate under Section 187. If the member concerned desires to appoint the donee as proxy, he can do so but in that case, the donee can act only in the same way as any other proxy. (*Secretary's Reply to point raised by the Maharashtra Chamber of Commerce on* 29-7-1963, *File No.* 2/30/63-PR.)

Power of appointing representative vested in Board of directors

The power of appointing a representative being a discretionary power of the Board of directors cannot be delegated to the managing director, manager or any other person.

It would appear that a fresh resolution is necessary for representation at each meeting of the company and no permanent representative or one for a period of time can be appointed.

Where a proxy is appointed by a Corporation, authority from the Board of directors should accompany the proxy.

The appointment is to be made "by a resolution of its Board of directors" and the seal of the company is not, therefore, necessary for such authorisation. The resolution is, however, often attested by directors under the seal of the company. The certified copy of the resolution is often retained by the company of which the body corporate is a member as evidence of the representative's right to be present and vote at the meeting.

When the resolution of the Board refers to the appointee as the holder of an office such as director, secretary or assistant secretary, it is usual for the person attending the meeting, to have, in addition to a copy of the resolution, a certification from the body corporate that he is the holder of that particular office.

Where the body corporate appoints several persons as alternative representatives, only one of the alternates must attend and vote at the meeting. In the case of any dispute, the vote of the apparently senior alternate must be accepted.

Secretarial Action Points

1. Ensure that a Board resolution is passed authorising such person or persons for acting as the company's representative at general meeting of companies; where a company is a member of several companies, it may not be practicable to convene a Board meeting to authorise a person or persons for each such meeting and therefore, an omnibus resolution may be passed authorising certain persons to act as its representatives at all meetings of companies in which it is a member.

2. Send the certified copy of the Board resolution along with the specimen signature of the representative, duly attested, to the concerned company.

3. The person authorised will exercise the same rights as a member of a company including the right of appointing a proxy.

[1][**S. 187-A. Representation of the President and Governors in meetings of companies of which they are members.**—(1) The President of India or the Governor of a State, if he is a member of a company, may appoint such person as

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1. Ins. by Act 65 of 1960, s. 49.

he thinks fit to act as his representative at any meeting of the company or at any meeting of any class of members of the company.

(2) A person appointed to act as aforesaid shall, for the purposes of this Act, be deemed to be a member of such a company and shall be entitled to exercise the same rights and powers (including the right to vote by proxy) as the President or, as the case may be, the Governor could exercise as a member of the company.]

NOTES

Companies (Amendment) Act, 1960

This section was inserted by the Companies (Amendment) Act (LXV of 1960), with a view to extend the rights given to a Corporation by section 187 to the President of India or the Governor of a State where shares in any company are held in their names (Notes on *clauses* : clause 51).

Representation of President and Governors at meetings

Unlike in the case of representative appointed by bodies corporate to represent them at meetings of a company, a representative appointed by the President or the Governor of a State, though the appointment is for acting as representative at meetings of the company, is deemed to be a member for all purposes of this Act. Subject to any restrictions in the terms of his appointment, it would seem that such representative may be eligible for appointment to the office of director, give valid discharge for dividend amounts paid to him on behalf of his principal and exercise all the rights of membership. The words "for purposes of this Act" used in this section indicate that, unlike a representative under section 187 who is to act only at meetings, he has a larger status. Sub-section (2) says that he shall be deemed to be a member of the company.

The power to appoint a representative being a discretionary power of the President or Governor of a State, as he thinks fit, it would appear that it cannot be delegated.

The appointment must be duly authenticated in accordance with the Rules under Article 77(2) and (3) or Article 166(2) and (3), as the case may be, of the Constitution of India.

[2][**S. 187-B. Exercise of voting rights in respect of shares held in trust.**—(1) Save as otherwise provided in section 153-B but notwithstanding anything contained in any other provisions of this Act or any other law or any contract, memorandum or articles, where any shares in a company are held in trust by a person (hereinafter referred to as trustee), the rights and powers (including the right to vote by proxy) exercisable at any meeting of the company or at any meeting of any class of members of the company by the trustee as a member of the company shall—

(a) cease to be exercisable by the trustee as such member, and

(b) become exercisable by the public trustee.

(2) The public trustee may, instead of himself attending the meeting, and exercising the rights and powers, as aforesaid, appoint as his proxy an officer of Government or the trustee himself to attend such meeting and to exercise such rights and powers in accordance with the directions of the public trustee:

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2. Ins. by Act 53 of 1963, s. 8 (w.e.f. 1-12-1964).

Provided that where the trustee is appointed by the public trustee as his proxy, the trustee shall be entitled, notwithstanding anything contained in any other provisions of this Act, to exercise such rights and powers in the same manner as he would have been but for the provisions of this section.

(3) The public trustee may abstain from exercising the rights and powers conferred on him by this section if in his opinion the objects of the trust or the interests of the beneficiaries of the trust are not likely to be adversely affected by such abstention.

(4) If for any reason the trustee considers that the public trustee should not abstain from exercising the rights and powers conferred on him by this section and the exercise of such rights and powers is necessary in order to safeguard the objects of the trust or the interests of the beneficiaries of the trust, he may by writing communicate his views in this behalf to the public trustee but the public trustee may in his discretion either accept such views or reject the same.

(5) No suit, prosecution or other legal proceedings shall lie against the public trustee at the instance of the trustee or any person on his behalf or any other person on the ground that the public trustee has abstained from exercising the rights and powers conferred on him by this section.

(6) In order to enable the public trustee to exercise the rights and powers aforesaid, the public trustee shall also be entitled to receive and inspect all books and papers under this Act, which a member is entitled to receive and inspect.]

[3][*(7) The provisions of this section shall not apply on and after the commencement of the Companies (Amendment) Act, 2000.*]

NOTES

Section Inoperative after Enforcement of Companies (Amendment) Act, 2000 (w.e.f. 13-12-2000)

Sub-section (7) inserted by the Amendment Act, 2000 (w.e.f. 13-12-2000) renders the provisions of section 187B inoperative after the enforcement of the Amendment Act.

The amendment of section 187B is consequential to the amendments with similar effect made in section 153B relating to declaration as to shares and debentures held in trust and section 153A relating to the appointment of public trustee by the Central Government and rights and powers exercisable by him. After the enforcement of the Act, voting rights in relation to the shares held by a trust will be exercised directly by the trust itself.

Note : The literature on the subject has been retained in the interest of knowledge for handling pending matters.

Companies (Amendment) Act, 1963

Reasons for vesting voting rights in public trustees.—The object of the section is, thus, stated in the Statement of Objects and Reasons: "In order to prevent the use of voting rights attached to shares held by trusts for the advancement of personal interests of the donors, it is considered necessary to regulate the exercise of such rights in suitable cases. For this purpose it is proposed to empower the Central Government to appoint a person to exercise voting rights in respect of trusts with significant share holding, when necessary, with a view to securing proper management of the company in the interests of the shareholders."

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3. Sub-section (7) inserted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 76 (w.e.f. 13-12-2000).

As regards the scope of this section, the Finance Minister, when moving the Bill for being taken into consideration stated "Regarding the trusts some significant changes have been made by the Select Committee. One is the appointment of a person as a public trustee and the second is the new provision 187-B whereby the public trustee alone becomes entitled to exercise the voting rights attached to shares held by trusts which fall within the scope of these provisions. The public trustee, however, is not precluded from granting proxies to the trusts himself and on such a proxy being given the trustee can exercise the rights of a shareholder as though this provision is not in existence but in accordance with any instructions that the public trustee may give. That enables such a trustee who gets a proxy from the public trustee to be not a mere dumb voter as invariably proxy holders are but take an active part in any proceedings of the meeting of the company. Further, the trustee can bring to the notice of the public trustee in writing that the interests of the trust are likely to be affected and, therefore, voting rights in respect of those shares which are held by him should be exercised in a particular manner. It will be open for the public trustee to employ the trustee himself or any other Government officer as his proxy and to accept the advice given or not to accept it. But the public trustee would be warned and he will take his decision having in view the given warning." (*Lok Sabha Debates,* dated 13th December, 1963, Vol. XXII, page 4656).

Report of Select Committee.—The following is the report of the Select Committee on the changes made by it in this section:—

Clause 8: (Original Clause 7).— The Committee feel that the appointment of a person as public trustee should appropriately find a place not in proposed new section 187-B but in a separate section immediately after section 153 of the Act.

"The Committee further consider that on the appointment of the public trustee the rights and powers of every trustee to whom proposed section 187-B applies, exercisable by the trustee in meetings of the company, should become exercisable by the public trustee but the public trustee instead of himself exercising those rights and powers may appoint any officer of Government or the trustee himself as his proxy; such officer of Government or the trustee should, however, exercise those rights and powers in accordance with the directions of the public trustee but where the trustee is appointed as the proxy, the trustee should be entitled to exercise the rights and powers in the same manner as he would have been but for the provisions of the proposed section.

"It has also been provided in the proposed section that the public trustee may abstain from exercising his rights and powers under this section if in his opinion the interests of the trust would not be adversely affected thereby : the trustee, however, may communicate his views to the public trustee that there should be no abstention by the public trustee in the matter of exercising the voting rights and the public trustee may in his discretion either accept those views or reject the same."

Depositories Act, 1996

Under section 9(2) of the Depositories Act, 1996, the provisions of section 187B shall not apply to the securities held by a depository on behalf of beneficial owners (investors).

Scope of section

The scope of this section is very limited. It does not substitute the public trustee as a shareholder in place of the trustee who holds the shares. The only effect is to vest the right of voting attached to such shares in the public trustee. *CIT v. Indian Hotels Co. Ltd.,* (1983) 53 Com Cases 500, 509 (Bom).

Salient points to be noted in this section

(1) As regards shares held in trust by trustees, which come within the scope of section 153-B, the rights and powers of the trustee, so far as they relate to any meetings of the company or any class meetings, are exercisable only by the public trustee as if he were a member of the company.

Other rights of the trustee of the trust in respect of the shares, such as the right to receive dividends, transfer of any shares by way of sale, pledge etc., are not affected, and the public trustee is not concerned with them.

(2) The public trustee is entitled to receive notices of meetings of the company and such balance-sheets and other documents as any member is entitled to receive; and he may also have the right to inspect books and papers of the company to the same extent as a member.

(3) Having regard to the interests of the trust and of the beneficiaries, the public trustee will use his own discretion and decide whether or not to attend any meetings, and whether or not to appoint a proxy to attend and vote at any meetings.

If he appoints a proxy, he can either appoint an officer of Government or the trustee of the trust but not any other person.

If an officer of Government is appointed as proxy, such proxy will have the same rights as any other proxy appointed by a member under the Act. Such proxy cannot speak or take part in any debate, or vote in a show of hands.

But, if the trustee of the trust is appointed as proxy then unlike other proxies, the trustee-proxy is entitled to speak and partake in the debate and vote on a show of hands.

In the case of any proxy—whether it be a Government officer or the trustee of the trust, the rights and powers should be exercised in accordance with the directions of the public trustee. The company, however, will not be concerned with them.

(4) The trustee of the trust may, in the interests of the trust or of the beneficiaries, communicate to the public trustee his own views and request him to so act as to give effect to them. But the public trustee may accept or reject them at his discretion.

(5) No suit or other legal proceeding will lie against the public trustee in respect of anything done or omitted to be done by him in the exercise of his rights and powers under this section.

The appointment of a person as a public trustee cannot be challenged in a company petition, though shareholder may show that the trust under which the voting rights have become vested in the public trustee was not a valid trust; he may even show that a provision of the Companies Act which deprives him of his voting rights is *ultra vires* the Constitution. *Public Trustee v. Rajeshwar Tyagi,* (1973) 43 Com Cases 371, 375 (Del).

Note that the provisions of section 187-B do not apply to trusts excluded by sub-section (4) of section 153-B.

Section 187-B does not apply to implied or constructive trusts or obligations in the nature of trust. It applies only where shares are held under an express trust created in writing. *New Bank of India Ltd. v. Union of India,* (1981) 51 Com Cases 375 (Delhi).

Immunity of public trustee [Sub-section (5)]

The sub-section gives protection to the public trustee only in cases of his abstaining to exercise the rights and powers under the section. If he improperly exercises the rights and powers conferred on him by this section and loss or injury is caused to anybody thereby, he is apparently not protected from prosecution or civil action unless he has acted in good faith, in which case he will be protected by section 635-A.

Public trustee cannot give consent to shorter notice under Section 171(2)

Department's view.—This Board has been advised that under Section 187B of the Act the Public Trustee exercises the rights and powers exercisable at a meeting of a company by the trustee as a member of that company. The Public Trustee does not take the place of the trustee who is a member of the company except at a meeting. Since the right of a member to give consent under sub-section (2) of Section 171 is not a right exercisable at a meeting of the company, that right cannot be exercised by the Public Trustee. (*Letter No.* 8/31(187B)/66-CL-V, dated 4-7-1965.)

Holding of shares in a company in trust by a society

Section 187B applies "where any shares in a company are held in trust by a person". A society registered under the Societies Registration Act, 1860 is a 'person'. If such a society holds share in a company in *trust,* the section would become attracted but not otherwise. (Shares in a company may be held in the name of such a society. Section 5 of the Act of 1860 does not affect the position). [See *Circular No.* 8/55 (187B)/64-PR, dated 9-9-1964]

[1][**S. 187-C. Declaration by persons not holding beneficial interest in any share.**—(1) Notwithstanding anything contained in section 150, section 153-B or section 187-B, a person, whose name is entered, at the commencement of the Companies (Amendment) Act, 1974, or at any time thereafter, in the register of members of a company as the holder of a share in that company but who does not hold the beneficial interest in such share, shall, within such time and in such form as may be prescribed, make a declaration to the company specifying the name and other particulars of the person who holds the beneficial interest in such share.

(2) Notwithstanding anything contained elsewhere in this Act, a person who holds a beneficial interest in a share or a class of shares of a company shall, within thirty days from the commencement of the Companies (Amendment) Act, 1974, or within thirty days after his becoming such beneficial owner, whichever

1. Inserted by the Companies (Amendment) Act, (41 of 1974), s. 15 (w.e.f. 1-2-1975).

is later, make a declaration to the company specifying the nature of his interest, particulars of the person in whose name the shares stand registered in the books of the company and such other particulars as may be prescribed.

(3) Whenever there is a change in the beneficial interest in such shares the beneficial owner shall, within thirty days from the date of such change, make a declaration to the company in such form and containing such particulars as may be prescribed.

(4) Notwithstanding anything contained in section 153 where any declaration referred to in sub-section (1), sub-section (2) or sub-section (3) is made to a company, the company shall make a note of such declaration, in its register of members and shall file, within thirty days from the date of receipt of the declaration by it, a return in the prescribed form with the Registrar with regard to such declaration.

(5) (a) If any person, being required by the provisions of sub-section (1), sub-section (2) or sub-section (3), to make a declaration, fails, without any reasonable excuse, to do so, he shall be punishable with fine which may extend to one thousand rupees for every day during which the failure continues.

(b) If a company fails to comply with the provisions of this section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one hundred rupees for every day during which the default continues.

(6) Any charge, promissory note or any other collateral agreement, created, executed or entered into in relation to any share, by the ostensible owner thereof, or any hypothecation by the ostensible owner of any share, in respect of which a declaration is required to be made under the foregoing provisions of this section, but not so declared, shall not be enforceable by the beneficial owner or any person claiming through him.

(7) Nothing in this section shall be deemed to prejudice the obligation of a company to pay dividend in accordance with the provisions of section 206, and the obligation shall, on such payment, stand discharged.]

[2][*(8) The provisions of this section shall not apply to the trustee referred to in section 187B on and after the commencement of the Companies (Amendment) Act, 2000.*]

NOTES

Companies (Amendment) Act, 2000

Section Inoperative with effect from 13-12-2000.—Sub-section (8) has been inserted in section 187C by the Amendment Act, 2000. It renders the provisions of section 187C inoperative with effect from 13-12-2000 in reference to the trustees mentioned in section 187B.

This modification is consequential to amendments made to the similar effect in section 153A (appointment of public trustee and powers and rights exercisable by him), section

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2. Sub-section (8) inserted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 77 (w.e.f. 13-12-2000).

153B (declaration as to shares and debentures held in trust) and section 187B (exercise of voting rights in respect of shares held in trust).

Note : The literature on the subject has been retained in the interest of knowledge for handling pending matters.

Effect of *Benami* Transactions (Prohibition) Act, 1988

Section 187C has to be read in the light of the above Act which prohibits *benami* transactions except as provided in S. 3(2) therein: Any claim to enforce any right in a *benami* property or any defence in respect thereto has been substantially curtailed by section 4 of the Act. For text of that Act, see (1989) 65 Com Cases 135 (St).

For the text of the *Benami* Transactions (Prohibition) Act, 1988, see *Appendix* 289.

Companies (Amendment) Act, 1974

Object and scope of section.—The object and scope of this section and section 187-D are thus stated in the Notes on Clauses: "By section 187-C it is made obligatory that all *benami* holdings of shares in existence at the commencement of the Amendment Act must be declared both by the *benamidar* and the beneficial owner and failure to do so will be punishable. Likewise, all beneficial interest in shares in future also to be declared and with a view to check any possible evasion of the proposed legislation, it is provided that the *benami* holdings of shares must be reported both by the *benamidar* and the beneficial owner within specified time and failure to do so is made punishable. All collateral agreements entered into, or instruments executed in connection with *benami* holdings, which are not so reported, cannot be enforced by the beneficial owner or any person claiming through him.

By the new section 187-D, a provision for investigation is proposed for the purpose of ensuring compliance with section 187-C.

It is expected that the provisions of this clause will be helpful as a check upon any possible evasion of the provisions relating to take-over.

Clause 14—It will be seen from the Notes on Clauses that the object of the section is only to ensure the disclosure of all *benami* transactions in shares and not affect the legal rights as regards the holding of beneficial interest in shares in any way.

It may be noted that both the *benamidar* and the beneficial owner or each of them, is required to make a declaration to the company, and the company will have to note them in the register of members and file a return in prescribed form to the Registrar within 30 days of receipt of each declaration. This will involve an intolerable burden of administrative work for each company. In a company with large number of shareholders numerous declarations may be received and almost every day a return will have to be sent to the Registrar along with a filing fee. The subject matter is one with which it has no concern and which is outside its own business affairs. There is no reason why the company should be asked to bear the expenses of such additional work.

Depositories Act, 1996

Under section 9(2) of the Depositories Act, 1996, the provisions of section 187C shall not apply to the securities held by a depository on behalf of beneficial owners (investors).

Restoration of declaration of trust

A company omitted from its records a declaration of trust holdings filed under S. 187C, without even so much as making a reference to the beneficial owners of the shares to find out the real position of the holding. The court also found that there was no sufficient cause for omitting the declaration. The court said that the petition for restoration of the declaration was maintainable and that the beneficiaries must be heard before recording change in respect of beneficial interest. *Anam Premkumar Reddy v. India Fruits Ltd.*, (1996) 85 Com Cases 625 : (1995) 19 Corp LA 166 (AP).

Where the section does not apply

Sub-sections (1), (2) and (3) presuppose that ownership of the shares vests in person other than the person entitled to beneficial interest in the shares. The section does not apply in a civil suit where the title to the shares is in dispute. *Khajamiya Miransaheb Mujahid v. Peerapasha Miransaheb Mujahid*, (1987) 61 Com Cases 106 (Kar). Where shares are gifted away, they become the property of the donee. Hence the provisions relating to declaration of beneficial interest are not applicable (*ibid*).

Rules not applicable to Banks keeping shares as security deposit by Stock Exchange.—Some references have been received from certain Banking Companies asking for clarification in regard to the application of the above rules to the Banks with which the Stock Exchanges deposit shares of their members as security deposit. This Department has since carefully considered the matter in consultation with the Department of Legal Affairs and is of the view that the provisions of the above section and the rules

made thereunder will not be applicable to such Banks as they are keeping the shares lodged with them by the Stock Exchanges as Security Deposit in accordance with the notification issued under the Securities Contracts (Regulation) Act, 1956. (*Circular No.* 34/76, dated 28-9-1976).

SEBI (Depositories and Participants) Regulations, 1996

Notification No. SO 345(E), dated 16-5-1996.—For SEBI Regulations relating to Depositories and Participants, their Registration, certificate of commencement of business, rights and obligation of depositories, participants, issuers, manner of surrender of certificates of security and creation of pledge or hypothecation, inspection, procedure for action in case of default and for relevant form, see *Appendix* 201.

SEBI (Costodian of Securities) Regulations, 1996

For SEBI Regulations relating to Custodian of Securities, their registrations, general obligations and responsibilities of Custodians, Inspection and Audit, procedure for action in case of default and for relevant form see *Appendix* 202.

When duty to declare arises [Sub-sections (1) and (2)]

As regards sub-section (1), it has to be noted that only in cases where the holder of a share admits or a competent court finds that he is only an ostensible holder on behalf of some other person, it becomes his duty to file the prescribed declaration with the company. Simply because another person claims to be the beneficial owner, no duty is cast upon him to make any declaration or denial. Neither the company nor the Registrar can settle the dispute.

Where he admits that some other person or persons are exclusively or jointly with him the owners of the beneficial interest in the shares held by him, then the duty comes to him to make a declaration as ostensible holder under sub-section (1), and, where he is joint owner another declaration as beneficial owner of a joint or fractional interest, along with any other specified person or persons.

Where one company provided money to another company to enable the latter to invest the money in shares and the latter was not to hold any beneficial interest in such shares, the company's refusal to register such shares on the ground that the declaration under S. 187C was not made was held to be not justified. The declaration had to be made only after registration. The question of declaration arises only when the name of the buyer was entered in the register of members. The CLB said that the obligation under the section to file a declaration was a post registration obligation. *Hemangini Finance & Leasing P. Ltd. v. Tamilnad Mercantile Bank Ltd.,* (1996) 86 Com Cases 875 (CLB—Mad).

The duty of an ostensible owner holding shares on behalf of others or on behalf of both himself and others, to make a declaration in terms of sub-section (1) in Form No. 1 (See *Appendix* 18) may be said to arise in the following classes of cases:—

(1) *Benami* **shareholding.**—Where shares are held in his name *benami* for any other person or persons.

(2) **Individual shareholding.**—Where shares are held in trust for any other person or persons, in his individual name or jointly in the names of himself and others. Unless there is a known beneficiary or beneficiaries in existence, there is no duty to make the declaration.

(3) **Legal or juristic person.**—The beneficiary may be a living human being or legal or juristic person like a body corporate or a Hindu idol. In all cases the person in whose name the shares are held for the benefit of others has the duty to make the declaration as required by sub-section (1).

(4) Joint shareholding

Department's view.—A question has been raised as to whether shares held in joint names, for the sake of convenience and easy transmission to survivors in the case of death of any of the holders would attract the provisions of Section 187C. On this, the view of the Department is that in the case of registered joint holders of shares, no trustee-beneficiary relationship arises *inter se* in the eye of law. (*Circular No.* 8/18/75-CL-V, dated 31-3-1975).

(5) Public Charitable Trust

Department's view.—The provisions of the section and the rules are also not applicable to shares owned by Public Charitable Trusts held in the name of trustees, since there is no distinctive individual beneficial interest in the case of this kind of shareholding. (*Circular No.* 8/18/75-CL-V, dated 31-3-1975).

(6) Partnership Firms.—Where in the case of partnership firms, shares are acquired in the names of one or more or other partners, the partners will have to file a declaration both under sub-section (1) and under sub-section (2), because they have also beneficial interest in the shares held by them on behalf of all the partners.

Department's view.—A partnership firm is not a person capable of being a member within the meaning of Section 41 of the Companies Act, 1956 and since a partnership is not a legal entity by itself but only a compendious way of describing the partners constituting the firm, it is necessary that the names of all the members of the partnership firm should be entered in the Register of Members in order that the right of the partnership as a whole to the shares in question may prevail. The holding of shares by only one or more partners on behalf of other partners of a firm should not, therefore, ordinarily arise. However, where in a given case, the name or names, of only one or some of the partners is entered in the Register of Members while the intention is that the partnership as a whole should have the right of membership in respect of the shares in question, it is obviously necessary for such partners who hold shares not only for themselves but for the benefit of all partners constituting the firm whose names are not entered in the Register of Members, to comply with the rules under Section 187C. (*Circular No.* 8/18/75-CL-V, dated 31-3-1975).

(7) Hindu Undivided Family.—In the case of a joint Hindu family, where the *Karta* or manager of the family holds shares on behalf of the family, and not as his separate property, he will have to make declarations, one under sub-section (1) as ostensible owner and another as one of the beneficial owners constituting the coparcenary. Though no member of the coparcenary can point to shares as his property, yet all the coparceners have a right to enjoy the *usufruct* of the shares in common with others.

Department's view.—In a Clarification issued by the Department of Company Affairs [*Vide Circular No.* 8/18/75-CL-V, dated 31-3-1975], the Department has expressed its view as follows: "As regards shares belonging to a Hindu Undivided Family held by the *Karta* of the family having regard to the peculiar position of the *Karta* and to the peculiar character of the interest which accrues to the coparceners in the joint estate it is not possible to postulate separate legal and beneficial interests in respect of such shares as between the *Karta* and the other members of the family. Hence, the Rules under reference do not apply. However, where the person who is in the position of *Karta* happens to have any special relation with any person who is a member of the Hindu family in respect of shares not comprised in the family estate, section 187C and the Rules thereunder will apply".

(8) Agents and Principals.—Where shares are acquired by agents in their own names on behalf of their principals, they are bound to make declaration under sub-section (1) while their principals should declare under sub-section (2).

(9) Guardian of minors.—In the case of guardians etc. of minors, lunatics and other persons under disability, the guardian or other person will have to make the declaration under sub-section (1) and under sub-section (2), declaring on their own behalf in the one case and on behalf of their ward in the declaration under sub-section (2).

Department's view.—The rules are applicable to shares held by a guardian in his own name without reference to the minor's name in the Register of Members, but if the name of the minor as such appears, being represented by guardian the provisions of Section 187C will not be attracted. (*Circular No.* 8-18-75-CL-V, dated 31-3-1975).

(10) Bank.—In cases where shares are transferred to a Bank and the transfer has been registered in the Company's register of members whatever may be the purpose for which the transfer has been effected,—if the Bank holds the shares not on its own behalf but on behalf of another person as the real owner the Bank must make the declaration under sub-section (1) while the real owner must declare as beneficiary under sub-section (2).

Department's view.—The rules are applicable if shares stand in the name of a Bank in the Register of Members of a company, while the rights, pertaining to the shares are exercisable by some other person or persons whose names do not appear in the register, there is such as a clear separation of the legal and beneficial interests in the shares. (*Circular No.* 8/81/75-CL-V, dated 31-3-1975).

(11) Registered member, executor under will.—Where the name entered in the Register of Members is that of the executor under a will or an administrator to whom letters of administration have been granted is clear from the entry, the rules will not be applicable; but if that fact is not thus clear, the disclosure required by the Rules will have to be made. (*Circular No.* 8/18/75-CL-V, dated 31-3-1975).

(12) Position of shares under blank transfer.—In the case of a blank transfer or any other transfer, unless and until the transferee is ascertained and his name registered, there is no obligation on the part of the transferor to make a declaration simply because the shares continue to stand in his name until the transferee's name is registered. Sub-section (1) applies and can apply only in cases where the transferee who is the beneficial owner by purchase, comes to be known.

(13) Transfers not registered.—The position in the case of a transfer which is not registered or is refused registration, is that the transferor in whose name the shares stand becomes trustee for the transferee in respect of the shares and both must make declaration respectively under sub-sections (1) and (2) as ostensible owner and beneficiary respectively.

(14) Apprehension as to hinderance in trading.—As regards shares traded on the Stock Exchanges the following clarification is given by the Department in the *Notification No.* GSR 53 E, referred to above:

Department's Clarification.—An apprehension has been expressed that the Rules will hinder trading in shares of companies listed on the stock exchanges. On this, the Department's view is that the Rules apply to completed transfers where the names of the transferor and the transferee are known, and where the physical possession of shares passes, along with formal documents executed by both transferor and the transferee and presented to the company concerned in terms of section 108 of the Companies Act, 1956. It is well settled that until that stage, the person who deals in such shares on the stock exchange through a stock broker without executing the prescribed form of transfer deed, gets only the equity in respect of the consideration paid by him, which is enforceable in the event of the company's non-registration of the transfer of shares against the purported transferor of the shares, and until that stage, the property in the shares, a species of goods transferable only in the manner contemplated by the law does not pass. In view of this legal position, the apprehension expressed is not tenable. In this view of the matter, in the case of any shares traded on the stock exchange without the transfer deed prescribed under section 108 of the Act duly executed both by the transferor and the transferee, there is no legal transfer of shares for the purposes of giving rise to the relationship of the trustee and beneficiary as between the transferor and the unknown transferee. (*Circular No.* 5/75, dated 31-3-1975).

(15) Shares held in official capacity.—The Rules are not applicable to shares held by official designations only, *e.g.* Court Receiver, Official Liquidator, Administrator General, Income-tax or Wealth Tax Commissioner, Custodian of Evacuee or enemy properties etc. since no title to the shares vests in the officials who deal with the property under special judicial or statutory authority. (*Circular Letter No.* 8/18/75-CL-V, dated 31-3-1975.)

(16) *Benamidar* or beneficial owner.—In all cases, 'beneficial interest' (the expressions 'beneficial right' and 'beneficial ownership' may also be taken to mean the same) means an interest in the *usufruct* of fruits of the property concerned and implies the right to enjoy the same, and, as applied to shares, it means the right to receive dividend and other rights associated with the ownership of the shares. In the case of a *benami* holding of shares, the holder *i.e.* the holder in name of the shares in question has no title to or right of ownership, while the real owner is entitled to all the benefits accruing from the shares.

This, however, is only with reference to the *benamidar* or ostensible owner and the real owner. But, from the point of view of the company, the Companies Act recognises only the registered holder of the shares, that is, the person in whose name the shares stand in the company's register and he is the only person lawfully entitled to enjoy the rights associated with the shares, such as voting, receiving dividend etc., receiving bonus shares etc. If he is not the beneficial owner, he will have to vote according to the directions of the beneficial or real owner, receive and hand over the dividends, bonus shares etc. as per directions of the real owner.

But the company is not concerned with the relationship *inter se* between them.

(17) Mutual Fund or Venture Capital Fund.—In case of a mutual fund being a trust, if the shares are held in the name of the trustee, the requirements of the section are not applicable, in view of newly inserted s. 153B(4)(c).

Duty of beneficial holder to declare [Sub-section (2)]

Strictly interpreted, this sub-section requires that all shareholders of all companies who hold beneficial interest in the shares they hold—very few do not hold beneficial interest in the shares they hold—should make the declaration called for. But what the sub-section actually intends is only to require the beneficial owners of shares held in the names of other persons as nominees for their benefit, to make the declaration.

Consequences of failure to declare

Failure to make the declaration, while subjecting the defaulter whether he be the ostensible owner or beneficial owner to heavy penalty, also debars the beneficial owner and persons claiming through him from enforcing any agreement, charge or promissory note created in his favour by the ostensible owner. Sub-section (6) which provides for the declaration is not clearly drafted. The wording of the provision is such that even where the ostensible owner defaults, the beneficial owner is deprived of his remedy against the ostensible owner for no fault of his. Instead of the confused wording, if the following simple provision is made it will effectively serve the purpose:—

(6) "No right in relation to any share in respect of which a declaration is required to be made but not made by the beneficial owner, shall be enforceable by him or by any person claiming through him."

The barring of the right is only so long as the default in making the declaration continues. There is no reason why the declaration should not be made even after the time-limit prescribed by sub-sections (1) and (2), as the liability to punishment for default has no relevance for this purpose.

One other point to be noted in connection with the declarations made by the ostensible and beneficial owners is that the company is required to make a note of the declarations made in the register of members and also submit a return of the declarations so made to the Registrar. Both the note made in the company's register of members, and the return filed with the Registrar are open to inspection by members of the public under sections 163 and 610, respectively.

In cases where a person claims beneficial interest in certain shares and the ostensible holder disputes the claim, it is not clear what the company should do under sub-section (4), except simply recording the dispute, and filing a return to that effect with the Registrar.

Since sections 187C(2) and 308 are closely connected, it follows that unless irreproachable and incontrovertible materials are available to hold *prima facie* contravention of the provisions, the court will not be justified in taking cognizance of the same and make a roving enquiry. *Ramakrishnan (P.R.) v. Mounaguruswami,* (1985) 57 Com Cases 477, 488 (Mad). *Benami* shareholders cannot depose in prosecutions against the ostensible owner under section 187C(2) unless they have made their declarations under section 187C(1) (*ibid*).

Omission to declare validity of transfer not affected.—The mere omission to make a declaration as required by section 187C will not make the transfer of the shares in question to be invalid. *Muthu v. Adaikappa Chettiar,* (1987) 2 Mad LJ 454, 477 (Mad—DB).

Penalty for default [Sub-section (5)]

Two kinds of penalty provisions are included. One refers to those who have to make a declaration and makes them punishable for their failure without any reasonable excuse with fine extending up to one thousand rupees for every day during which the failure continues. The second refers to the company which has to comply with the provisions of the section but does not do so and makes punishable the company and every defaulting officer with fine extending up to one hundred rupees for every day during which the default continues.

Compoundable Offence.—The offence is compoundable under section 621A.

Obligation to pay dividend not affected [Sub-section (7)]

Sub-section (7) was inserted by the Joint Committee for the following reason : "A point was raised in the Joint Committee that, in view of the provisions of section 187-C, the companies may be dragged into Court for the determination of the person to whom the dividend is to be paid, and as a result of such litigation, payment of dividends may be indefinitely delayed. The Committee feel that with a view to allaying these apprehensions, it might be clarified that the obligation of the companies to pay dividends will become discharged, if dividends are paid to the registered shareholders in accordance with the provisions of section 206." (*Report*: para 25.)

Applicability to private trusts

Department's Clarification.—The question has since been raised whether provisions of section 187-C are applicable to private trusts. Private Trusts are governed by the Indian Trusts Act, 1882. That Law contemplates the existence of two clear interests namely, the legal interest which vests in the trustees and beneficial interest which vests in the beneficiaries. This dichotomy is envisaged by section 187-C of the Companies Act, 1956, as well, which lays down that a person whose name is entered in the Register of Members of a company as the holder of a share in that company but does not hold the beneficial interest in such shares shall make a declaration specifying the name and other particulars of the person who holds the beneficial interest in such shares. The dichotomy is kept up in the other sub-sections of this section as well. Where the legal interest vests in trustees, it is only to be expected that the names of trustees would find a place in the Register of Members of a company. It is, therefore, the duty of the trustees to make the declaration as the persons legally entitled and to specify the persons for whom they hold the shares. It is not possible to limit the application of section 187-C, on its own terms to the type of constructive trust arising under section 82 of the Indian Trusts Act and if that is the sense to be attributed to the word *'benami'* occurring in the Statement of Objects and Reasons and the Notes on Clauses preceding the Act, 1956 it is of little relevance at the present state to control the clear language of the relevant statutory provisions. Hence, non-compliance with the requirements of section 187-C of the Companies Act, in cases of private trusts, will amount to an infringement of the law which will attract the consequences laid down in it. (*Circular No.* 12/75, dated 7-6-1975.)

Guidelines for Creation of trust for disposal of odd lot shares

Department's Circular.—As you are aware the investors of companies often get allotment of shares in odd lots which are not marketable and they are confronted with the problem of selling these shares at the market rates quoted for shares in marketable lots. With a view to explore ways and means and to minimise the difficulties of investors in this regard, the Department has examined this problem in consultation with Chambers of Commerce and Securities Exchange Board of India (SEBI). The Chambers of Commerce and some of the major companies were of the view that the problem could be solved if the companies, as a measure of servicing their investors voluntarily create the position of an independent Trustee to

receive shares from individual investors for being disposed of on their behalf and after realising the sale proceeds in marketable parcels make over the sales realisation less brokerage and service charges to the investors. You are, therefore, requested to advise your constituents to create such Trusts in order to provide the service to the investors in the matter of disposing odd lot shares of the company held by them.

2. The following broad guidelines should be observed by the companies while appointing a Trustee:

(i) The trustee shall be selected and appointed by the company and such a person should be responsible, trustworthy and unconnected with the day to day management of the company.

(ii) The trustee shall only sell the shares of the company in odd lots and shall not deal with shares of other companies.

(iii) The company may provide certain initial funds to start the operation and ultimately the trustee will reimburse the funds so provided out of the brokerage and service charges realised from the investors, out of surplus so generated in due course.

(iv) During the period the trustee holds odd lot shares on behalf of the investors, the company shall send all the rights and bonus shares to him for and on behalf of the original holders.

(v) Soon after the shares are consolidated into a marketable lot, the trustee shall contact the recognised prominent brokers dealing in particular shares of the company for disposing of the same. But the trustee shall not engage himself in any manipulation of market rates with regard to the shares of the company.

(vi) The books of the trustee shall be maintained from day to day on the basis of the transactions entered into by him in respect of odd lot shares and shall be open for scrutiny by the Registrar of Companies.

3. The companies in their own interest will closely monitor and maintain a surveillance on the books of the trustee in regard to the share transactions in odd lot on behalf of the investors. Any complaint against the misconduct by the trustees can be sent by the investors to the Investor Protection Cell in the Department of Company Affairs, Shastri Bhawan, Dr. R.P. Road, New Delhi or to the nearest office of the Registrar where the registered office of the company is located.

4. The above methodology to deal with the problems of investors on voluntary basis instead of prescribing any specific provision in the Companies Act is indicative of the confidence that Department reposes in the fair dealing by the companies towards their investors and it is expected that the future voluntary self-regulation will be modelled on the basis of successes of this exercise. You are requested to give a wide publicity of this scheme among your constituents and work closely with them to make the scheme a success. [*Circular No.* 11/93; *F. No.* 1/21/92-CL-V, dated 8-10-1993].

Press Note No. 7/93, dated 14-10-1993.—The marketing of odd lots of shares causes problem to the investors and the attention of the Government has been drawn to the problem relating to the disposal of such shares. The Stock Exchanges have imposed restrictions on dealing in such shares as only the dealings are made in marketable lots. With a view to explore ways and means and to minimise the difficulties of the investors in this regard, the Department consulted the Chambers of Commerce, Stock Exchanges and SEBI on the subject. The Department has carefully considered the various views expressed on the subject and it is felt that all listed companies establish a trust specially for acquisition of odd lot shares.

2. Pending the disposal of the shares held by the trustees, they shall be entitled to attend and vote at the meetings and the shareholders shall authorise them to do so. Provisions of Section 187C of the Companies Act shall apply and necessary declarations will be filed by the trustees with the Registrar of Companies.

3. The companies creating such trust shall give the intimation to the shareholders of odd lots shares by issue of suitable advertisement and publicity in the media about the establishment of such trusts.

Government companies exempted.—This Section does not apply to a Government Company. *Notification*: GSR 232, dated 31-1-1978. See also Notes under s. 620.

Relevant Rules and Forms.—For Rules and Forms under the section see the Companies (Declaration of Beneficial Interest in Shares) Rules, 1975 in *Appendix* 18.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of the matters specified under Rule 3 of the Companies (Compliance Certificate) Rules, 2001. Paragraph 2 under Rule 3 relates to filing of Forms and Returns with the ROC, RD, Central Government, CLB and other authorities and reads as follows:

***Paragraph* 2.—The company has duly filed the forms and returns as stated in Annexure "B" to this certificate, with the Registrar of Companies, Regional Director, Central Government, Company Law Board or other authorities within the time prescribed under the Act and the Rules made thereunder.**

Particulars of Beneficial Interest in Shares

Prescribed Check List

Check whether copies of Form-I and Form-II along with Form-III under the Companies (Declaration of Beneficial Interest in Shares) Rules, 1975* have been filed with the ROC, wherever applicable.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

These rules have been prescribed under sec. 187-C which has ceased to be operative on the commencement of the Companies (Amendment) Act, 2000, w.e.f. 13-12-2000.

[1][**S. 187-D. Investigation of beneficial ownership of shares in certain cases.**—Where it appears to the Central Government that there are good reasons so to do, it may appoint one or more Inspectors to investigate and report as to whether the provisions of section 187-C have been complied with regard to any share, and thereupon the provisions of section 247 shall, as far as may be, apply to such investigation as if it were an investigation ordered under that section.]

NOTES

§ See Notes under section 187C.

Companies (Amendment) Act, 2000

This section empowered the Central Government to appoint an inspector to investigate and report as to whether the provisions of section 187C were complied with. Section 187C has been rendered inoperative by the Companies Amendment Act, 2000. Accordingly section 187D is now redundant and is relevant only to the appointment of an inspector made before the enforcement date of Companies Amendment Act, 2000.

Note : The literature on the subject has been retained in the interest of knowledge for handling pending matters.

Scope of section

The provisions of section 247, to the extent applicable, shall apply to an order of investigation made by the Central Government under this section. This is *suo motu* power of the Central Government, to investigate ownership of shares in a company. On receipt of investigation report, the Government may file prosecution under sub-section (5) of section 187C, in case of default.

Government Companies exempted.—This section does not apply to a Government Company. *Notification*: GSR 578(E), dated 16-7-1985. See also Notes under Section 620.

S. 188. Circulation of members' resolutions.—(1) Subject to the provisions of this section, a company shall, on the requisition in writing of such number of members as is hereinafter specified and (unless the company otherwise resolves) at the expense of the requisitionists,—

(a) give to members of the company entitled to receive notice of the next annual general meeting, notice of any resolution which may properly be moved and is intended to be moved at that meeting;

(b) circulate to members entitled to have notice of any general meeting sent to them any statement of not more than one thousand words with respect to the matter referred to in any proposed resolution, or any business to be dealt with at that meeting.

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1. Ins. by Act 41 of 1974, s. 15 (w.e.f. 1-2-1975).

(2) The number of members necessary for a requisition under sub-section (1) shall be—

(a) such number of members as represent not less than one-twentieth of the total voting power of all the members having at the date of the requisition a right to vote on the resolution or business to which the requisition relates; or

(b) not less than one hundred members having the right aforesaid and holding shares in the company on which there has been paid-up an aggregate sum of not less than one lakh of rupees in all.

(3) Notice of any such resolution shall be given, and any such statement shall be circulated, to members of the company entitled to have notice of the meeting sent to them, by serving a copy of the resolution or statement on each member in any manner permitted for service of notice of the meeting; and notice of any such resolution shall be given to any other member of the company by giving notice of the general effect of the resolution in any manner permitted for giving him notice of meetings of the company :

Provided that the copy shall be served, or notice of the effect of the resolution shall be given, as the case may be, in the same manner and, so far as practicable, at the same time as notice of the meeting, and where it is not practicable for it to be served or given at that time, it shall be served or given as soon as practicable thereafter.

(4) A company shall not be bound under this section to give notice of any resolution or to circulate any statement unless—

(a) a copy of the requisition signed by the requisitionists (or two or more copies which between them contain the signatures of all the requisitionists) is deposited at the registered office of the company—

(i) in the case of a requisition requiring notice of a resolution, not less than six weeks before the meeting;

(ii) in the case of any other requisition, not less than two weeks before the meeting; and

(b) there is deposited or tendered with the requisition a sum reasonably sufficient to meet the company's expenses in giving effect thereto :

Provided that if, after a copy of a requisition requiring notice of a resolution has been deposited at the registered office of the company, an annual general meeting is called for a date six weeks or less after the copy has been deposited, the copy, although not deposited within the time required by this sub-section, shall be deemed to have been properly deposited for the purposes thereof.

(5) The company shall also not be bound under this section to circulate any statement if, on the application[2] either of the company or of any other person who

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2. In Form No. 1 of CLB Regulations, 1991 with fee of Rs. 50/- under CLB (Fees on Applications & Petitions) Rules, 1991, see *Appendix* 6.

claims to be aggrieved; the [3][*Central Government*] is satisfied that the rights conferred by this section are being abused to secure needless publicity for defamatory matter; and the [3][*Central Government*] may order the company's costs on an application under this section to be paid in whole or in part by the requisitionists, notwithstanding that they are not parties to the application.

(6) A banking company shall not be bound to circulate any statement under this section, if, in the opinion of its Board of Directors, the circulation will injure the interests of the company.

(7) Notwithstanding anything in the company's articles, the business which may be dealt with at an annual general meeting shall include any resolution of which notice is given in accordance with this section, and for the purposes of this sub-section, notice shall be deemed to have been so given, notwithstanding the accidental omission, in giving it, of one or more members.

(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 fine which may extend to [4][fifty thousand rupees].

NOTES

Eng. Act, 1948 : Sec. 140
Eng. Act, 1985 : Secs. 376, 377

General Note : As and when the Companies (Second Amendment) Act, 2002 (11 of 2003) comes into force, the power under this section shall become transferred to the Central Government to be exercised by it in place of the Company Law Board. The commentary should be read keeping this change in mind.

Companies Act, 1956

Duty of company to circulate members' resolution.—Excepting sub-section (5) which is specially added, the section reproduces the provisions of section 140 of the English Act.

Recommendations of Company Law Committee.—The section is based on the following recommendation of the Company Law Committee: "Section 78 of the Act of 1913 deals with the right of shareholders to requisition a general meeting. We consider that this section should be supplemented by a suitable adaptation of the provisions of section 140 of the English Companies Act, 1948, which empowers a specified number of shareholders to make use of the administrative machinery of a company to introduce resolution on their own account at the annual general meeting and to inform other members of the purpose for which the resolutions are proposed to be introduced or the reasons for opposing any resolution submitted by the directors for consideration at the general meeting. The number of members necessary for a requisition under this section is: (a) a number representing not less than one-twentieth of the total voting rights of all the members having a right to vote at the meeting to be requisitioned; or (b) not less than 100 persons holding shares in the company on which there has been paid-up an average sum per member of not less than a hundred pounds". (*Report* : Para 76).

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3. Subs. for "Company Law Board" by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 25. Earlier subs. by the Companies (Amendment) Act, 1988, (w.e.f. 31-5-1991) *vide* GSR *dt.* 31-5-1991, for the word "Court".
4. The words "five thousand rupees" substituted by the Companies (Amendment) Act, 2000, (53 of 2000) s. 78 (w.e.f. 13-12-2000).

Companies (Amendment) Act, 1988

Jurisdiction conferred on CLB.—Earlier the powers under sub-section (5) were exercisable by the Court, which have now been conferred on the Company Law Board by the Companies (Amendment) Act, 1988 (w.e.f. 31-5-1991).

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 5,000 rupees to 50,000 rupees under sub-section (8).

Companies (Second Amendment) Act, 2002 [11 of 2003]

The powers of the Company Law Board under this section have been conferred on the Central Government. As per the Bill, the powers of CLB under sections 188 and 196 were initially proposed to be conferred on the Tribunal constituted under section 10FB. Consequential changes have accordingly been made in the section. Notes on Clauses of the Bill stated thus:

Notes on Clause.— This clause seeks to amend sections 188 and 196 of the Companies Act, 1956 relating to circulation of member's resolutions and inspection of minute books of general meetings, respectively. Sub-section (5) of section 188 of the Companies Act, 1956 provides that the company shall not be bound to circulate any statement if the Company Law Board is satisfied that the rights conferred by this section are being abused to secure needless publicity for defamatory matter and the Company Law Board may order the company's cost to be paid to the requisitionists. It is proposed to confer this power upon the Tribunal.

Section 196 of the Companies Act, 1956 confers power upon the Company Law Board to compel an immediate inspection of the minute books or direct that the copy required shall forthwith be sent to the person requiring it. It is proposed to confer this power upon the Tribunal.

These amendments are of consequential in nature. (*Clause 20 of the Companies (Amendment) Bill, 2001*).

Scope of section

The section deals with members' resolutions intended to be moved at an annual general meeting or at any other meeting, after circulation to members in each case, of the text of the proposed resolution with explanatory statement, if any, not exceeding one thousand words, in respect of the resolution or other business. It may be noted that it does not in any way affect the right of members to move any resolutions at an annual general meeting or other meeting which can properly be moved at such meeting.

The object of the section is to confer on shareholders an important right to give, through the company machinery, publicity among all the members of the company for resolutions which they intend to propose or for statements which they want to make at the annual general meeting.

Unless one or more shareholders satisfy the requirements of sub-section (2) they have no right to move any resolution, ordinary or special, at annual general meeting or at any extraordinary general meeting or insist on the company including such resolution in the agenda for the meeting. *Pedley v. Inland Waterways Association Ltd.*, (1977) 1 All ER 209 : 1978 Tax LR 2218 (Ch D). According to this decision, resolutions requiring special notice under section 190 (English section 142) must also comply with the requirements of section 188 (English section 140). But it has been held distinguishing this case in *Gopal Vyas v. Sinclair Hotels and Transportation Ltd.*, AIR 1990 Cal 45 : (1990) 68 Com Cases 516 that in view of the clear cut provision in sections 257 and 284 enabling a shareholder to inform the company by special notice of his intention to propose a candidate for appointment to directorship or removal of director from office, these enabling provisions cannot be whittled down by the requirements of section 188 about the circulation of members' resolutions. See also PALMER'S COMPANY LAW, 841 (24th Edn., 1987) where the practical problems created

by the decision in the *Pedley's* case are highlighted. But **following** the *Pedley* case and without reference to the *Gopal Vyas* case it was held by the High Court of Delhi in *Amar Nath Malhotra v. MCS Ltd.,* (1993) 76 Com Cases 469 (Delhi), involving a special notice for the removal of the company's auditor, that the shareholders' right to propose a resolution at a meeting does not dispense with the requirements of S. 188, requiring a set procedure for circulation of a shareholders' resolution.

The case of *Pedley v. Inland Waterways Assn. Ltd.,* (1977) 1 All ER 209 (Ch D) has been **followed** by the High Court of Delhi in *Amar Nath Malhotra v. MCS Ltd.,* (1993) 76 Com Cases 469 (Delhi) so as to hold that a resolution for the removal of an auditor, of which a special notice has to be given, cannot dispense with the requirements of s. 188 to the effect that the resolution must not be circulated unless it is proposed by members coming up to the figures (one-twentieth holding or 100 members) specified in sub-section (2) and that consequently, therefore, a single member not coming up to the specified figure of voting power cannot move a resolution proposing the removal of an auditor. It appears that the ruling of the Calcutta High Court in *Gopal Vyas v. Sinclair Hotels and Transportation Ltd.,* AIR 1990 Cal 45 : (1990) 68 Com Cases 516, which is **contrary** to the *Pedley* decision was not brought to the notice of the court. In *Karnataka Bank Ltd. v. A.B. Datar,* (1994) 79 Com Cases 417 (Kar), the court negatived the contention that section 188 has to be read along with section 284 and the requirements of section 188 also should be complied with, while seeking the removal of director under section 284. The court, after an elaborate discussion, observed as follows: "A comparative view of the two sections shows that section 284 is an independent provision providing for removal of directors and it is available to any shareholder for moving a resolution for removal of a director in the meetings called by the company and there is nothing to insist on compliance of provisions in section 188(2). Therefore, *prima facie* the view of the law to be taken having regard to the provisions of the two sections would be to hold that Section 284 of the Companies Act is not subject to section 188 of the Companies Act and it is independent of that section." The Court cited (at pp. 440-441) passages from RAMAIYA'S GUIDE TO THE COMPANIES ACT, 12th Edn., 1992 from the matter appearing under the heading "Scope of section" (p. 835 of 12th Edn.). **Followed** in *Prakash Roadlines Ltd. v. Vijay Kumar S. Narang,* (1995) 83 Com Cases 569 (Kar).

§ For a critical note on *Pedley's* case see Notes under S. 190.

The company, however, is not prevented from including any member's resolution in the agenda if it thinks that the resolution may properly be moved provided that notice of it is given to the shareholders as in the case of other business at the meeting.

Where one or more members want to move a resolution at the next annual general meeting or want to circulate a statement among the members in respect of any resolution to be moved by whosoever it may be at any general meeting (whether it is the annual general meeting or any other general meeting), the procedure in this section has to be followed.

The company cannot, however, be required as per terms of this section to give notice of member's resolutions to be moved at any meeting other than the annual general meeting. In such case, resort is to be had to section 169.

Members, however, complying with the provisions of this section may require the company to circulate any statement in respect of any resolution or matter which will be coming before the general meeting concerned (including annual general meeting).

The question whether the requirements of a valid notice have been complied with or not is a question of fact and therefore is not capable of being adjudicated under writ jurisdiction under Art. 226 of the Constitution. *Naresh Kumar Jain v. Union of India,* (1997) 90 Com Cases 445 at 454.

Requisition received from lesser number than specified

If the company receives notice of any resolution or statement to be circulated from certain number of members which is less than the specified number of members, such statement may be circulated by the company to all members entitled to receive notice of general meeting. However, circulation of such resolution will not be under S. 188 but will be the exercise of the directors' ordinary power of notifying resolutions.

Where the consenting shareholder did not sign as a requisitionist but gave their power to a single shareholder to represent them at the meeting, it was not a sufficient compliance with the requirements of this section. *Naresh Kumar Jain v. Union of India,* (1997) 90 Com Cases 445, 453 (Del).

Penalty for default [Sub-section (8)]

For default made in complying with the provisions of this section, every officer of the company who is in default is punishable with fine which may extend to fifty thousand rupees.

Compoundable offence.—The offence is compoundable under section 621A.

Application before CLB

Application under sub-section (5) be made to the Regional Bench of Company Law Board in Form No. 1 of Annexure to the CLB Regulations, 1991 with a fee of Rs. 50/- and accompanied by the following documents:

(1) Affidavit verifying the application.

(2) Bank draft evidencing payment of application fee.

(3) Memorandum of appearance in Form No. 5 of Annexure I or duly executed Vakalatnama.

§ For text of the Company Law Board Regulations, 1991 refer *Appendix* 3.

Check list for circulation of members' resolutions

1. Ensure that the requisition is given in writing duly signed by the following members:—

(a) members representing at least 1/20th of the voting power; or

(b) at least 100 members holding shares of the paid-up value of Rs. 1 lakh.

2. Ensure that a copy of the requisition signed by the requisitionists is deposited at the registered office of the company—

(a) in case of a requisition requiring notice of a resolution, at least 6 weeks before the meeting;

(b) in any other case, at least 2 weeks before the meeting.

3. Ensure that the expenses for circulation of the requisition by the company are tendered by the requisitionists.

4. Ensure that the notice of the requisition is given to all the members entitled to receive the notice of the meeting.

5. Circulate a statement of not more than 1000 words to the said members on the subject-matter referred to in the proposed resolution.

6. Ensure that if an annual general meeting is convened after the deposit of the requisition within six weeks or earlier after the deposit of the notice, the copy of the requisition is forwarded to the members even though the time-limit of six weeks notice is not complied with.

7. Note that a banking company is not bound to circulate any statement under this section, if in the opinion of its Board of directors, the circular will injure the interests of the company.

8. Forward 6 copies of the notice circulated to the members to all the stock exchanges where the shares of the company are listed.

Secretarial Practice Notes : Circulation of members' resolutions

Where any requisition from members was received for circulation of resolutions intended for the general meeting, check whether:

(i) it was received from members representing at least 1/20th voting power to 100 members who hold shares of the paid-up value of Rs. 1 lakh?

(ii) a copy of the requisition duly signed by all of them had been received at the registered office of the company—(i) where notice of a resolution was required six weeks before the meeting, and (ii) in any other case at least two weeks before the meeting?

(iii) a reasonably sufficient amount to meet the company's expenses in giving effect to the requisition was deposited or tendered?

(iv) the notice and statement were circulated in accordance with the provisions of the Act for sending notice of general meeting?

Documents Involved : 1. Requisition, 2. Notice and Statement, 3. Despatch Register, 4. Minutes of Board/General Meeting, 5. Order of CLB, if any.

S. 189. Ordinary and special resolutions.—(1) A resolution shall be an ordinary resolution when at a general meeting of which the notice required under this Act has been duly given, the votes cast (whether on a show of hands, or on a poll, as the case may be), in favour of the resolution (including the casting vote, if any, of the chairman) by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy, exceed the votes, if any, cast against the resolution by members so entitled and voting.

(2) A resolution shall be a special resolution when—

(a) the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution;

(b) the notice required under this Act has been duly given of the general meeting; and

(c) the votes cast in favour of the resolution (whether on a show of hands, or on a poll, as the case may be) by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy, are not less than three times the number of the votes, if any, cast against the resolution by members so entitled and voting.

NOTES

Eng. Act, 1948 : Sec. 141 Previous Act : Sec. 81
Eng. Act, 1985 : Sec. 378

Companies Act, 1956

Recommendation of Company Law Committee.—The section gives effect to the following recommendation of the Company Law Committee:—"The Indian Companies Act, 1913, envisages three types of resolutions at a general meeting—an ordinary resolution, a special resolution and an extraordinary resolution. The purposes for which an extraordinary resolution is required under the Act are amongst others: (a) to remove a director (section 87-G), (b) to wind up a company voluntarily, when it cannot continue in business by reason of its liabilities (section 203); (c) to sanction an arrangement between

a company and its creditors (section 215); and (d) to sanction certain acts to be done by the liquidator in voluntary winding up. We see no reason why the extraordinary resolutions in these cases cannot be replaced by special resolutions. In our view, company meeting will be rendered much simpler by the abolition of extraordinary resolutions, and their replacement by special resolutions, except where we have recommended an ordinary resolution, wherever the present Act provides for the former. Also in view of the fact that a uniform notice period of 21 days has been recommended for all resolutions, there is no purpose now in providing for extraordinary resolutions." (*Report* : Para 78).

Ordinary resolutions

Where it is provided that "the company in general meeting may" do some act, this means that an ordinary resolution is required to be passed. An ordinary resolution is the basic way in which the sense of a company general meeting is given specific and formal shape. It requires a simple majority of the members who, being present and entitled to vote on the resolution, do vote. There is no definition in the Act (English) of "ordinary resolution". It means a resolution which requires a simple majority of the persons who, being present and entitled to vote upon the resolution, do vote. LORD UPJOHN in *Bushell v. Faith,* (1970) 1 All ER 53 (HL) **affirming** (1969) 1 All ER 1002 (CA) said: "An ordinary resolution is in the first place passed by a bare majority on a show of hands by the members entitled to vote who are present personally or by proxy and on such a vote each member has one vote regardless of his shareholding. If a poll is demanded then for an ordinary resolution still only a bare majority of votes is required. But whether a share or class of shares has any vote upon the matter and, if so, what is its voting power upon the resolution in question depends entirely upon the voting rights attached to that share or class of shares by the articles of association." Speaking of the effect of the resolution in *North-West Transportation Co. Ltd. v. Beatty,* (1887)12 AC 589 (PC). SIR RICHARD BAGGALLAY said, at p. 593: 'Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the company.'

Special resolutions

A special resolution is one which has been passed by a majority of not less than three-fourths of such members as, being entitled so to do, vote in person or (where proxies are allowed) by proxy at a general meeting of which notice specifying the intention to propose the resolution as a special resolution has been duly given. For a resolution to be good as special resolution must be passed *modo et forma* as per the requirements of the Act, that is, on proper notice and by the statutorily specified majority. See *Baillie v. Oriental Telephone Co.,* (1915) 1 Ch 503 (CA). This definition requires the following characteristics:

(1) the specified majority, *i.e.* 75 per cent of those voting must be in favour of the resolution;

(2) the resolution in the form in which it is to be passed should be set out in the notice convening the meeting;

(3) the notice must state that the resolution is to be proposed as special resolution an ommission to do so would invalidate the resolution. *MacConnell v. E. Prill & Co. Ltd.,* (1916) 2 Ch 57.

(4) proper notice of 21 days is given for holding the meeting; and

(5) explanatory statement under section 173(2) was annexed to the notice for conducting special business. A special resolution is a most useful part of the mechanism of a company. It is by the instrumentality of a "special resolution"

that many of the most important things which a company is empowered to do are ordained to be done. In defining the requisite steps for such a resolution, the aim of the legislature seems to have been to secure that every important change shall be made only after due deliberation, and with the sanction, active or passive, express or tacit, of the greater body of the shareholders of the company.

Manner of counting votes

The section provides for a double counting as regards voting in respect of each resolution and says that, for a resolution to be considered passed, the votes cast in favour of a resolution should exceed the number of votes cast against the resolution. Thus voting for and voting against must both be counted, all those remaining neutral, not being counted either way.

In the case of a special resolution, the votes cast for the resolution must be not less than three times those cast against the resolution, those remaining neutral being ignored. The object of requiring a majority of three-fourths of the votes whether on a show of hands or on a poll, for special resolution is to protect the minority interests in important matters relating to the company's affairs.

All references to extraordinary resolutions in existing articles, agreements, etc., are to be construed as references to special resolutions. (*Vide* section 651).

Disclosure of material facts relating to special resolutions

Department's instructions.—"Where a special resolution does not, on the face of it, disclose all material facts relating thereto, the Registrars have been instructed to obtain, in exercise of the powers conferred on them by section 234 of the Act, copies of the statement prescribed by section 173(2), and any other information necessary to see that the resolution is in complete accordance with the law". (*Press Note* issued on 25th July, 1956).

Amendments to special/ordinary resolutions and resolutions requiring special notice

The question often arises as to how far a resolution can be amended at a meeting. An amendment fairly arising on a resolution which is specified in the notice of the meeting may be proposed and the chairman has no right to refuse to put it before the meeting. But an amendment which is not germane to the motion under consideration or comprises matters unrelated to it, or indirectly introduces matters already disposed of at the meeting will be disallowed.

"Sometimes several amendments are proposed to one motion, in which case the chairman will have to exercise his discretion very carefully in allowing them and in arranging their order. He should get them all put into writing and see how far they are consistent with one another. *Prima facie* they ought to be put in the order in which they are proposed, but the nature of them will often make it more desirable to arrange them so that they may not clash. After any motion or amendment has been accepted by the meeting no amendment inconsistent with it should be submitted, as the acceptance of the prior proposal negatives the inconsistent amendment. The amendments should be disposed of before the original motion. If the chairman improperly refuses to submit an amendment to the meeting, the resolution actually carried will be invalidated. *Henderson v. Bank of Australasia,* (1890) 45 Ch D 330 (CA)"; GORE BROWNE ON COMPANIES, 44th Edn., 1986, Para 21.13. The amendments must not be, in substance, a direct negative of the resolution. *T.H. Vakil v. Bombay Presidency Radio Club Ltd.,* (1946) 16 Com Cases 8, 10 : AIR 1945 Bom 475.

Position of amendment as to special resolutions

As regards special resolutions, the provisions of sub-section (2) are mandatory, and must be strictly complied with, and although there is some doubt as to the extent to which they can be amended, the better view is that any such resolution should be passed substantially in the form in which it appears in the notice of the meeting, and no amendment committing the meeting to anything more onerous than the originally proposed resolution itself can validly be made. This view is supported by the requirement of the section that

"the intention to propose the resolution as a special resolution has been duly specified in the notice calling the meeting", as this clearly points to the necessity of bringing home to the shareholders the nature and scope of the subject-matter of the resolution.

By amendment is not, however, meant any mere verbal change in the phraseology or mode of expression of a resolution, such as the substitution of more apt words, only a change in the pith or substance or subject-matter of the particular resolution as proposed in the notice of the meeting, and explained in the Explanatory note annexed to it.

Amendment of special resolution

The members present at the meeting have a right to make amendments on a motion or a resolution provided that the same is within the scope of the notice and explanatory statement. However, the following aspects should be considered regarding the proposed amendment:—

(a) The amendment should be within the scope of the resolution and the explanatory statement, where applicable.

(b) The amendment should not commit the meeting to anything more than the resolution itself.

(c) The amendment should be in accordance with the spirit and substance of the resolution.

Where the notice of meeting states that the resolution is to be passed with or without modification, as may be thought fit, it would appear that amendments not affecting the resolution in substance will not be considered irregular. *Betts & Co. Ltd. v. MacNaghten,* (1910) 1 Ch 430.

As a rule, however, in regard to special resolutions, they cannot be validly passed otherwise than on the terms or wording in which they were expressed or explained in the notice convening the meeting; in other words special resolutions cannot be amended in variance with the explanatory statement annexed to the notice of the meeting, unless, from the shareholders' point of view, the amendment in any case only seeks to modify, or make less onerous, something in the resolution itself.

In *Moorgate Mercantile Holdings Ltd., Re,* (1980) 1 All ER 40 (Ch D) where notice of a special resolution for cancelling the share premium account of £1,356,000.00, on account of losses incurred had been given and at the meeting the resolution was amended to the effect that the share premium account be reduced to £ 321.17 by cancelling an amount of £ 1,356,579.31, as a sum of £ 321.17 which had subsequently accrued but had been mistakenly added to the amount proposed to be cancelled, and the resolution was unanimously passed, SLADE, J. held that the resolution was invalid as there was a variation in the amount resolved to be cancelled. The learned Judge summarised the principles relating to notices of, and the subsequent amendment of, special resolutions, as follows:

(1) If a notice of the intention to propose a special resolution is to be a valid notice for the purpose of section 141(2), [Indian Act, S. 189(2)] it must identify the intended resolution by specifying either the text or the entire substance of the resolution which it is intended to propose. In the case of a notice of intention to propose a special resolution, nothing is achieved by the addition of such words as "with such amendments and alterations as shall be determined on at such meeting".

(2) If a special resolution is to be validly passed in accordance with section 141(2), [Indian Act, Section 189(2)] the resolution as passed must be the same resolution as that identified in the preceding notice; the phrase "the resolution" in section 141(2) [Indian Act, S. 189(2)] means "the aforesaid resolution".

(3) A resolution as passed can properly be regarded as "the resolution" identified in a preceding notice, even though (i) it departs in some respects from the text of a resolution set out in such notice (for example, by correcting those gram-

matical or clerical errors which can be corrected as a matter of construction, or by reducing the words to more formal language), or (ii) it is reduced into the form of a new text, which was not included in the notice, provided only that in either case there is no departure whatever from the substance.

(4) However, in deciding whether there is complete identity between the substance of a resolution as passed and the substance of an intended resolution as notified, there is no room for the court to apply the *de minimis* principle or a "limit of tolerance". The substance must be identical. Otherwise, the condition precedent to the validity of a special resolution as passed which is imposed by section 141(2), [Indian Act, S. 189(2)], namely that notice has been given "specifying the intention to propose the resolution as a special resolution," is not satisfied.

(5) It necessarily follows from the above propositions that an amendment to the previously circulated text of a special resolution can properly be put to and voted on at a meeting if, but only if, the amendment involves no departure from the substance of the circulated text, in the sense indicated in propositions (3) and (4) above.

(6) References to notices in the above propositions are intended to include references to circulars accompanying notices. In those cases where notices are so accompanied, the notices and circulars can and should ordinarily be treated as one document.

(7) All the above propositions may be subject to modification where all the members, or a class of members, of a company unanimously agree to waive their rights to notice under section 141(2) [Indian Act, Section 189(2) and Section 192]. See Section 143(4)(d) and *Pearce, Duff & Co. Ltd., Re,* (1960) 3 All ER 222 and *Re, Duomatic Ltd.,* (1969) 1 All ER 161. See also *Willaire Systems plc.,* 1987 BCLC 67 where in reference to a special resolution for reduction of capital, it was stated that the court's order can correct an error in the resolution if it is insignificant, if no one will be prejudiced by the correction, and if it is clear how it should be corrected.

In *Re, Maneckchowk and Ahmedabad Manufacturing Co. Ltd.,* (1970) 40 Com Cases 819 (Guj), D.A. DESAI, J., of the Gujarat High Court has expressed the view that, in spite of the use of the words "has been duly specified" the provisions of clause (a) are only directory and not mandatory, while those of clauses (b) and (c) are undoubtedly mandatory. The reasoning does not appear to be convincing as the object of the provision requiring the notice of the meeting to specify the intention to propose a resolution as a special resolution is to inform all shareholders of the nature of the resolution proposed so that they may decide for themselves whether to attend the meeting in person or by proxy, and approve or oppose the resolution.

Position of amendment as to ordinary resolutions

As regards an ordinary resolution, however, even where the notice sets out the exact terms of the proposed resolution, it seems that an amendment may be proposed and adopted at a meeting, provided that it comes within the scope of the notice and does not commit the meeting to anything more onerous than the resolutions originally proposed. See PALMER'S COMPANY PRECEDENTS, Part I, 17th Edn., pages 862, 863; *MacConnell v. (E.) Prill & Co. Ltd.,* (1916) 2 Ch 57.

The amendment should not be more burdensome either on the company or on its members, as for instance, when the amendment sought to reduce the remuneration specified in the notice. *Torbock v. Westbury (Lord),* (1902) 2 Ch 871. This seems to be based on the principle that some shareholders might have "abstained from attending the meeting, being satisfied that the management, *as it was proposed,* was advantageous to them, and being quite content to exercise no voice about it". *Clinch v. Financial Corporation,* (1868) LR 5 Eq 481. *Cf. Betts & Co.'s* case (*supra*). Thus where the proposal was to resolve for re-

construction and winding up and the meeting adopted a resolution for winding up only, *Teede & Bishop, Re,* (1901) 70 LJ Ch 409 and where the proposal was to appoint a specified person as liquidator and the meeting appointed another, *Trench Tubeless Tyre Co., Re,* (1900) 1 Ch 408, resolutions were held to be valid.

Refusal to allow amendment

An amendment need not be seconded, and if a proper amendment to a proposed resolution is not allowed to be put, the resolution is irregular and liable to be impeached. *Henderson v. Bank of Australasia,* (1890) 45 Ch D 330. If an amendment is improperly refused, all subsequent proceedings as regards that particular question are invalidated. *T.H. Vakil v. Bombay Presidency Radio Club Ltd.,* (1946) 16 Com Cases 8, 12 : AIR 1945 Bom 475.

The same reasoning will apply in the case of a resolution requiring special notice. (See section 190).

General rules as regards amendments

The time for moving an amendment is after the original resolution has been seconded and put by the chairman of the meeting.

If any member puts forward any irregular amendment, the chairman will point out the irregularity and decline to put the amendment to the meeting. If an amendment is duly moved and seconded, the debate both on the original motion and the amendment may proceed concurrently, and at the conclusion of the debate, the amendment is first put to vote, and then the original resolution, as amended, if the amendment has been affirmed and without the amendment if the amendment has been rejected.

Where several amendments are moved they should be dealt with as far as possible, in the order in which they are related to the original motion.

If an amendment is carried, it should be incorporated in the original motion which is then, as amended, put before the meeting for further debate, and the next amendment (if any) can then be moved. Where an amendment to an amendment is moved, the same rules with necessary changes to suit the circumstances of the case, will have to be followed.

Rules of debate

The usual rules of debate are:—

(i) Usual practice is for a resolution or an amended resolution to be moved by one voter and seconded by another, but if the chairman chooses he can put it to the vote without these formalities. *Re, Horbury Bridge Coal, Iron and Waggon Co.,* (1879) 11 Ch D 109, 117 (CA);

(ii) The proposer is allowed to speak twice on his motion, once when moving, it and then in reply to the debate;

(iii) A person who moves an amendment has no right of reply;

(iv) All others entitled to speak, may speak only on each motion;

(v) No one can propose or second more than one amendment to any one motion;

(vi) A proposer may withdraw his motion or amendment;

(vii) An amendment cannot be moved to a motion which has already been passed with or without amendment.

Withdrawal of resolution in AGM

An ordinary resolution circulated to the members with the notice of the annual general meeting may be withdrawn by the chairman before the same is moved in the meeting for consideration.

Rescission or cancellation of resolutions

A meeting which has passed a valid resolution upon a certain issue cannot at the same meeting or adjourned meeting extinguish the effect of that resolution by a second resolution purporting to rescind or reverse the first.

It is not only a matter of common sense, but also a rule affecting all meetings that a course of conduct resolved upon by a body of men after following the proper procedure cannot be undone or reopened by a subsequent motion without following the procedure by which the resolution was passed. All procedural acts can be nullified only by the same procedure which is necessary for doing such acts.

It is possible for a resolution at a meeting to be passed rescinding matters transacted at a previous meeting. Whether such rescission can be validly effected or not depends upon the circumstances. Among the factors to be considered are the nature of the original resolution passed, the character and composition of the meeting and the status of the resolving body, as well as the regulations which govern its proceedings. If specific provisions are made for the rescission of resolutions, the prescribed procedure must be strictly observed because otherwise the purported rescission will be ineffective. [*Rex v. Trade Urban District Council,* (1913) Ir KB 59].

It is a matter of common knowledge that in many cases where companies happen to pass procedurally incompetent or unlawful resolutions, they are not only not compellable to implement such resolutions but have a right to rescission or cancel them by convening another meeting. See *John v. Rees,* (1969) 2 WLR 1294 (rescission of invalid resolution). It is open to the institution to have its own laws or to a company to provide in its articles a procedure for cancellation of resolutions. Where there is such a provisions it must be strictly followed. *See,* for example, *Mayer v. Burslem Local Board,* (1875) 39 JPN 437.

Furthermore, where the mere passing of a resolution creates vested rights in favour of a person or a class of persons, such resolution can be cancelled either with the consent of the affected class or sanction of the court.

Moving two or more resolutions together

Although it is desirable, for the sake of avoiding confusion and mixing up, to move each resolution separately, there is nothing illegal, if the chairman so chooses, to move two or more resolutions *en bloc,* unless any member requires that each resolution should be put to vote separately or unless a poll is demanded in respect of any. The only case where each resolution is required to be moved separately is that provided by section 263 which requires that as regards the appointment of directors at a general meeting of a public company or a private company which is subsidiary of a public company, unless in the case of any such meeting it has first been agreed without any dissenting vote, that two or more persons may be appointed as directors by a single resolution.

Where notice has been given of several resolutions, each resolution must, if any member so requires, be put separately, although if the meeting, unanimously adopts all the resolutions, it may be, this would not be material.

Passing valid and invalid resolutions together

Where a resolution otherwise valid is combined as a part of the same transaction with an *ultra vires* or invalid resolution, the whole transaction would be void. *Imperial Bank of China, India and Japan,* (1866) 1 Ch App 339, 347 except where the valid portion is severable from the invalid without damaging its efficacy. *Thomson v. Henderson's Transvaal Estates Ltd.,* (1908) 1 Ch 765 (CA), where a special reconstruction scheme was bad, but the resolution to wind up was good; **following** *Cleve v. Financial Corpn.,* (1873) LR 16 Eq 363, 378, and *Re, Irrigation Co. of France, ex parte, Fox,* (1871) 6 Ch App 176.

Wording of resolutions

Resolutions, whether they embody the decisions of the directors or are those passed at general meeting, should be expressed clearly and in precise terms, and not vaguely. As far as possible, the minutes should be fully detailed.

Meaning of motion and resolution

Most matters come before a meeting by way of a motion recommending that the meeting may express approval or disapproval or take certain action or order something to be done. A motion is a proposal, and a resolution is the adoption of a motion duly made and seconded. But every motion need not be followed by a resolution, as where a motion is made for adjournment of the meeting.

A motion whether it is passed for the closure of discussion or adjournment, etc. can be passed by an ordinary resolution unless there is a specific provision in the articles. A proxy appointed to vote on a substantive resolution can also vote on a motion relating to that resolution. *Waxed Papers Ltd., Re,* (1937) 2 All ER 481.

Matters for which a special resolution is required by the Act

It is commonly thought that "special business" can only be transacted by means of a special resolution. This is a misapprehension. Section 173(1)(a) states that apart from the four items mentioned therein, all business to be transacted at an Annual General Meeting is special business. All business at any other meeting is also deemed to be special business. A special resolution is required for transacting business only where it is specifically so required by the Act. All other business can be transacted by an ordinary resolution.

The intention to propose a resolution as a special resolution can be given either in the notice of the meeting itself or in some *"other intimation"* given to the members of the resolution. However, where the special resolution is in respect of special business under section 173(1), inclusion of the notice in any *"other intimation"* will not be permissible as the explanatory statement under section 173(2) has to be annexed only to the notice of the meeting.

The purpose of requiring a majority of three-fourths of the members voting in person or by proxy, for a special resolution is to protect the minority interests in very important matters relating to the Company's affairs.

A special resolution is required for the following:—

1. To alter the provisions of the memorandum, to change the objects of the company, and to change the place of the registered office from one State to another. [Section 17].
2. To change the name of the company (also requires approval of the Central Government) [Section 21].
3. To omit the word "Limited" or "Private Limited" from the name of the company [Section 21].
4. Change of name of charitable or other non-profit company by omitting the word or words "Limited" or "Private Limited". [Section 25(3)].
5. To alter or add to the articles [Section 31].
6. To purchase the Company's own shares or specified securities [Section 77A(2)].
7. To issue sweat equity shares [Section 79A].
8. To issue further shares without pre-emptive rights [section 81(1)] to non-members [section 81(1-A)] or to convert loans or debentures into shares [Section 81(3)].
9. To determine that any portion of the share capital not already called up shall not be called up except in the event of, and for the purpose of, winding up the company [Section 99].

10. To reduce the share capital (this requires authorisation by the articles and confirmation by the Court) [Section 100].
11. Approval of variation of rights of special classes of shares [Section 106].
12. To remove the registered office of the company outside the local limits of the State, Town, or Village in which it is situated [Section 146].
13. To commence any new line of business [Section 149(2A).]
14. To keep registers and returns at any other place than within city, town or village in which the registered office is situated [Section 163].
15. To authorise the payment of interest on the paid-up amount of share capital raised for the purpose of defraying the expenses of construction of any work or building or the provisions of any plant that cannot be made profitable for a lengthy period [Section 208(2)].
16. To appoint auditors in the case of a company in which the Central and/or any State Government, and/or public financial institution or institutions together hold twenty-five per cent or more of its subscribed capital [Section 224A].
17. To request the Government to investigate the affairs of the company and to appoint inspectors for the purpose [Section 237].
18. To appoint sole selling or buying or purchasing agent in the case of companies having paid-up share capital of rupees fifty lakhs or more [Section 294-AA].
19. To fix remuneration of directors, where the articles require such resolution [Section 309(1)].
20. To sanction remuneration to directors other than managing or whole-time directors on percentage of profit basis in certain instances [Section 309(4)] and renewal under sub-section (7)].
21. To consent to a director or his relative or partner or firm or private company holding an office or place of profit, except that of managing director, manager, banker, or trustee for debenture-holders of the company [Section 314].
22. To make the liability of any director or manager unlimited where so authorised by the articles [Section 323].
23. To make inter-corporate loans and investments or guarantee/security to be given, etc., if the aggregate amount thereof, exceeds the limit of 60 per cent of the company's paid-up share capital and free reserves or 100 per cent of its free reserves, whichever is more (S. 372A).
24. To apply to a Court to wind-up the company [Section 433(a)].
25. To wind-up the company voluntarily [Section 484(1)(b)].
26. To bind the company by arrangement made under Section 517.
27. For various other matters pertaining to the winding up of the company. [See sections 433(a), 494(1)(b), 507, 512(1), 546(1)(b), 550(1)(b)].
28. To alter the constitution of a company registered under Part IX [Section 579(1)].

Special resolutions to be passed by a Producer Company [see Chapter IX-A inserted by the Companies (Amendment) Act, 2002 (1 of 2003)

1. To alter the objects specified in the Memorandum. [Section 581-H].
2. To amend the Articles [Section 581-I]
3. To apply for registration as Producer Company by multi-State Co-operative Society [Section 581-J(2)].
4. To make donations or subscriptions in any institution or individual. [Section 581ZH].
5. To invest in a non-producer company in excess of the specified limit [Section 581-ZL(4) proviso]

6. To dispose of investments made under secs. 581-ZL(3) and (4) [Section 581-ZL(6)].

An ordinary resolution is required for the following:

1. To change name of a company registered with a name identical with or similar to the name of any other registered company with prior approval of Central Government. [Section 22(1)(a)]
2. To vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus. [Section 61].
3. To issue share at a discount [Section 79(2)].
4. To issue of further shares by resolution passed by simple majority with the Central Government approval [Section 81(1A)(b)].
5. To alter share capital which includes—
   (i) increase its share capital by such amount as it thinks fit;
   (ii) consolidating and dividing all or any of its share capital into shares of larger amount than its existing shares;
   (iii) converting all or any of its fully paid-up shares into stock and reconverting that stock into fully paid-up shares of any denomination;
   (iv) sub-dividing its shares into shares of smaller amount;
   (v) cancelling shares not taken up by any person. [Section 94(2)].
6. To increase the nominal amount of its capital and to make reserve shares on registration by an unlimited company having share capital. [Section 98].
7. To re-issue or cancel re-deemed debentures [A company is deemed to have re-issued redeemed debentures if the company has passed a resolution intending not to cancel such redeemed debentures]. [Section 121(1)].
8. To adopt statutory report in statutory meeting. [Section 165].
9. For
   (i) consideration of accounts, balance-sheets and reports of Board of Directors and auditors;
   (ii) declaration of a dividend;
   (iii) appointment of directors in place of those retiring; and
   (iv) appointment of and the fixing of remuneration of auditors. [Section 210 read with Ss. 173 & 225]
10. To authorise representative(s) to inspect books of accounts of subsidiaries. [Section 214(1)].
11. To appoint statutory auditors to fix their remuneration. [Section 224(1)].
12. To appoint another auditor in place of a retiring auditor [Section 224(2)(c)].
13. To remove the statutory auditor [Section 224(5)].
14. To fill casual vacancy of an auditor caused by resignation. [Section 224(6) proviso].
15. To appoint director liable to retire by rotation [Section 255]
16. To fill the vacancy caused by retirement of director at AGM [Section 256(3)].
17. To appoint directors other than retiring directors. [Section 257(1)].
18. To increase or reduce the number of its directors within the limits fixed by the articles. [Section 258].
19. To appoint managerial personnel and fix their remuneration [Section 269 and Sch. XIII].
20. To remove a director (not being a director appointed by the Central Government in pursuance of Section 408) before the expiry of his period of office. [Section 284(1)].

21. To impose restrictions and conditions on the exercise by the Board of any of the powers specified in section 292(1) [Section 292(5)].
22. To authorise the Board to—
    (i) sell, lease or dispose of any or whole of the undertaking of the company;
    (ii) remit or allow time for repayment of debt due by a director;
    (iii) invest amount of compensation received in respect of compulsory acquisition;
    (iv) borrow money (except temporary loan) exceeding in the aggregate of the paid-up capital of the company and its free reserves;
    (v) contribute to charitable and other funds not directly relating to the business of the company in excess of rupees fifty thousand or five per cent of its average net profits, whichever is greater. [Section 293(1)].
23. To approve appointment of sole selling agent for any area in the first general meeting held after such appointment by Board. [Section 294(2) & (2A)].
24. To fix remuneration of directors including whole-time director or managing director. [Section 309(1)].
25. To appoint alternate director in the absence of power under Articles. [Section 313(1)].
26. To voluntarily wind-up when the time fixed by articles for the continuance of the company has expired or when the event depending on which company is to be dissolved has occurred. [Section 484(1)(a)].
27. To appoint liquidator and to fix the remuneration, in a members' voluntary winding up. [Section 490(1)].
28. To sanction the continuance of the Board of Directors' power in a members' voluntary liquidation after liquidator's appointment. [Section 491].
29. To fill any vacancy in the office of liquidator (in a voluntary winding up). [Section 492(1)].
30. To nominate a person to be liquidator on creditors' voluntary winding up. [Section 502(1)].
31. To appoint committee of inspection in a creditors' voluntary winding up. [Section 503(2) read with Section 500].
32. To consider and pass the accounts laid in a creditors voluntary winding up [Section 508].
33. To register an "existing company" under the Companies Act, 1956. [Section 565(1) Proviso (v)].
34. Matters which require members' approval by ordinary resolution under the Articles.

Ordinary resolutions to be passed by a Producer Company

(1) For—

(a) approval of budget and adoption of annual accounts of the Producer Company; [Section 581-S(1)(a)]

(b) approval of patronage bonus; [Section 581-S(1)(b)]

(c) issue of bonus shares; [Section 581-S(1)(c)]

(d) declaration of limited return and decision on the distribution of patronage; [Section 581-S(1)(d)]

(e) specify the conditions and limits of loans that may be given by the Board to any director; and [Section 581-S(1)(e)]

(f) approval of any transaction of the nature as is to be reserved in the articles for approval by the Members. [Section 581-S(1)(f)]

(2) To adopt Articles in AGM [Section 581-ZA(3)]

(3) To appoint directors in AGM [Section 581-ZA(3)]

(4) To issue bonus shares [Section 581-ZJ)

(5) To provide loans or advances to director or his relative [Section 581-ZK proviso]

(6) To transfer part or whole of its assets to another Producer Company [Section 581-ZN(1)(a)].

(7) To divide itself into two or more producer companies [Section 581-ZN(1)(b)].

(8) For amalgamation or merger [Section 581-ZN(2)].

For re-converison of a Producer Company to inter-state co-operative society a resolution has to be passed by not less than *two-third of its members,* present and voting [Section 581-ZS(1)(a)].

Passing special resolutions under SEBI Regulations/guidelines

Under SEBI Regulations/Guidelines special resolutions are required to be passed in respect of the following matters:

- For preferential allotment of shares under section 81A, see Chapter XIII of SEBI (DIP) Guidelines, 2000
- For investment in securities by FIIs beyond the prescribed ceilings, see SEBI (Foreign Institutional Investors) Regulations, 1995.
- For offer of shares to employees under ESOS/ESOP, see SEBI (Employees Stock Option Scheme and Employees Stock Purchase Scheme Guidelines, 1999.

Passing ordinary resolution under SEBI Regulations

For sale, transfer, etc. of its assets by the target company, issue of securities with voting rights, etc., see Reg. 23 of SEBI (Substantial Regulations of Shares and Takeovers) Regulations, 1997.

Different majority or different quorum

If the Act has said that something may be done by special resolution, it is not competent for the company to prescribe a different majority. *Ayre v. Skelsey's Adamant Cement Co. Ltd.,* (1904) 20 TLR 587 **affirmed** in (1905) 21 TLR 464 (CA). There is however nothing to prevent the Articles from requiring a special quorum at a meeting to consider a special resolution.

Defective Special Resolutions

In two decisions of the Madras High Court and Patna High Court respectively, *Re, Self Help Private Industrial Estate Private Ltd.,* (1972) 42 Com Cases 605 (Mad) and *In re, Parikh Engineering and Body Building Co. Ltd.,* (1975) 45 Com Cases 157 (Pat), it has been held by two learned Judges that where for want of proper or sufficient notice or other defect in procedure a special resolution is not effective, subsequent consent obtained from shareholders holding 95% or more of the paid-up share capital or voting power, as the case may require, will validate the resolution. With great respect, it is submitted that there is no provision anywhere in the Act, warranting the view that the consent of members holding 95% voting rights or voting power can validate a defective special resolution. Section 172(2) only provides that a general meeting may be called by giving shorter notice than 21 clear days if consent is accorded for holding such meeting in shorter time. It does not dispense with the necessity of calling and holding the meeting or authorise the obtaining of consent letter from individual members as substitute for holding a meeting. Nor does Section 192(4) recognise any resolution other than a resolution agreed to by all the members, as effective substitute for a special resolution. Where then is the power to validate a defective resolution by subsequent consent?

Where the resolution did not specify the intention to alter articles, the decision of an article which provided that a certain shareholder would be a permanent managing director was held to be void, though all other requirements of a special resolution were satisfied. *M.S. Madhosoodanan v. Kerala Kaumudi P. Ltd.,* (2003) 117 Com Cases 19 : 2004 CLC 117 (SC).

Requirements of section mandatory.—The Madras High Court in its decision in *V.G. Balasundaram v. New Theatres Carnatic Talkies,* (1993) 77 Com Cases 324 (Mad) has reiterated the earlier position taken by it in cases like *Self Help Private Industrial Estates P. Ltd., Re,* (1972) 42 Com Cases 605 (Mad) and *Parikh Engg. & Body Building Co., Re,* (1975) 45 Com Cases 157 (Pat) that the requirements of section 189 are mandatory and that, therefore, a special resolution would not be effective if there was no sufficient or proper notice or if there was some other defect in the procedure. Applying this to the facts of the case the court held that where the articles of the company required a special resolution for the appointment of directors, compliance with the requirements of section 189 as to notice of a special resolution was necessary and an appointment made without such compliance was ineffective.

Ratification of irregularly passed resolutions

A resolution, whether special or ordinary, which has not been passed after giving sufficient notice or is otherwise irregular, may be ratified or validated by a subsequently passed valid resolution. *In Re, Parikh Engineering and Body Building Co. Ltd.,* (1975) 45 Com Cases 157 (Pat). But there can be ratification or validation of a resolution only where the resolution originally passed was *bona fide*. See also *Sri Balasaraswathi Ltd. v. Parameswara Aiyar,* (1956) 26 Com Cases 298, 308 : AIR 1957 Mad 122 (ratification of director's irregular acts).

Where a resolution has been invalidly passed, but has been acted upon, it is to be regarded as effective and the company and its members cannot set up its invalidity against its creditors. *Pacific Coast Coal Mines v. Arbuthnot,* (1917) AC 607; *Millers' Dale and Ashwood Dale Lime Co.,* (1885) 31 Ch D 211. See also *Ho Tung v. Man On Insurance Co. Ltd.,* (1902) AC 232.

An irregular special resolution confirmed at another irregular meeting would not give it a touch of validity. *Gujranwala Trading Co. Ltd., Re,* (1934) 4 Com Cases 73 (Lah). It is further necessary to show that those who are ratifying or acquiescencing into it came to know of the full purport of the resolution and had a full opportunity to consider and to enquire about it. *Phosphate of Lime Co. Ltd. v. Green,* (1871) LR 7 CP 43.

Unanimous assent amounting to resolution

Where all the members of a company who are entitled to vote on the matter actually agree to a particular decision then the decision is binding and effective without meeting. In *Baroness Wenlock v. River Dee Co.,* (1883) 36 Ch D 675 COTTON LJ said at pp. 681-2: "the court would never allow it to be said that there was an absence of resolution when all the shareholders, and not only a majority, have expressly assented to that which is being done."

In *Parker & Cooper Ltd. v. Reading,* (1926) Ch 975 ASTBURY J. observed: "I do not think it matters in the least whether that assent is given at different times or simultaneously." In *George Newman & Co.,* (1895) 1 Ch 674 the Court of Appeal held that [at p. 686]: "Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried and duly recorded." In this case George Newman had used the company's money for his own house improvement. His contention that the payment had been ratified because all the shareholders excepting

those who are minors had approved the same. The Court of Appeal held that there had been no effective ratification.

Where it can be shown that all shareholders, who have a right to attend and vote at a general meeting, assent to some matter which a general meeting could carry into effect, that assent is as good and binding as a resolution would be. *Re, Duomatic Ltd.*, (1969) 1 All ER 161 : (1969) 2 Comp LJ 81 (Ch D). This ruling was **followed** in *Wright v. Atlas Wright (Europe) Ltd.*, (1999) 2 BCLC 301 (CA) where it was observed that the statutory procedural requirements of a shareholders' resolution at a general meeting for the award of a long term contract could be waived where the sole shareholder consented to the agreement. The court said that the correct approach was to consider the purpose and underlying rationale of the formality at issue and, in the instant case, it was clear that genuine consent was given by the company's sole shareholder for an act which was within company's powers. The underlying intention of s. 319(3) [UK Act] was to require the unequivocal approval of the shareholders to a long term contract and s. 319(5) was intended to ensure that there was a proper opportunity for shareholders to consider the agreement. Section 319(3) was clearly susceptible to the *Duomatic* principle and, as a mere back up formality, section 319(5) could be waived by the class whom it was designed to protect, i.e. shareholders.

In *Salomon v. Saloman & Co. Ltd.*, (1897) AC 22, 57, LORD DAVEY expressed the rule as: '.... the company is bound in a matter *intra vires* by the unanimous agreement of its members'. Unanimous assent without meeting has been accepted as effective in circumstances where the Companies Acts say that there should be a special resolution (*Ho Tung v. Man On Insurance Co. Ltd.*, (1902) AC 232 (PC); *Cane v. Jones*, (1981) 1 All ER 533). (*Re, Oxted Motor Co. Ltd.*, (1921) 3 KB 32; *Re, N.J. Shanley Contracting Ltd.*, (1980) 124 SJ 239). Where, however, additional procedures are prescribed, it is doubtful whether a decision taken without following those procedures could be effective, even if there were an express agreement to waive the procedures *e.g.* S. 284, relating to removal of directors.

In *Re, Duomatic Ltd.*, (*Supra*) BUCKLEY J. held that it is only necessary to have the agreement of those who can vote on the matter and in this form the principle has come to be known as the '*Duomatic* principle'. Unanimous agreement without meeting is not effective if the persons who give the assent could not have made the decision at a meeting, for example, because there are not enough of them to form a quorum, or there is only one person, who could not constitute a meeting *Re, New Cedos Engineering Co. Ltd.*, (1994) 1 BCLC 797 (Ch D). The Chancery Court said that the *Duomatic* principle was held to be not applicable where a meeting of directors became necessary to reject or approve a transmission of shares and no director being validly in office, appointments were made by a single shareholder who though was the only registered member at that time he was not the only corporator (others being still unregistered). The court continued to say that there is nothing in that *Duomatic* principle which would have enabled a single registered member to do things informally without a meeting if he was not competent to do them formally at a meeting, the time for rejecting the transfer of shares having expired.

The decision in *Duomatic Ltd. Re,* (1969) 2 Ch 365 was **applied** in *Deakin v. Faulding (No. 2) Specialist Group International Ltd.*, The Times, Aug. 29, 2001 (Ch D). In an action brought by the company to recover business that had been paid to a director, the court ruled on the power of shareholders to assent to a company dealing. The articles of association of the company contained a requirement that directors were only entitled to such remuneration as was determined by an ordinary resolution of the shareholders. The company had issued only two shares, one held by the mother as a nominee for her son and the other by the son. It was held that where all the shareholders, including the beneficial owners of shares held by a nominee, who had the right to vote at a general meeting of a company, assented to a matter which could be effected at a general meeting; such assent would have the same effect as a resolution passed at a general meeting. The mother held

her share as nominee for her son who, as beneficial owner, was entitled to assent to the payment of the bonus.

In *Torvale Group Ltd. Re*, (1999) 2 BCLC 605; *Hunt v. Edge & Rellison Trustees Ltd.*, (1999) 2 BCLC 605 (Ch D) the court tried to capture the essence of the *Duomatic* principle. The court said that the essence of the *Duomatic* principle is that where a statute or a company's articles of association provide that a course of action can only be taken by a certain group and in accordance with a prescribed procedure, then, provided the group members had agreed to that course the prescribed procedure would not normally be treated as being of the essence. This is particularly so where the court is satisfied that the sole purpose of the procedure was to provide protection for the members of that relevant group and the prescribed procedure enabled the majority to bind the minority in relation to the course of action. The court had to consider the application of this principle to a case in which the articles of the company provided that no charge could be created on the company's assets except with the previous sanction of the shareholders of preferred ordinary shares. The company had issued two debentures to the trustees of the company's retirement benefit scheme for which the trustees loaned an equal amount to the company. The company had also taken loans from its bank and a debenture with a prior right had been given to the bank. That bank brought about the appointment of an administrative receiver. The receiver was not able to find any resolution of requisite shareholders for creation of the charge under the debentures issued to trustees. The court also found no evidence of the way in which the concerned group of share-holders had given its assent. The court could not validate the debentures under the *Duomatic* principle. The debentures were, however, validated under sec. 35A of English Companies Act, 1985 because, the four out of five trustees were not aware that the directors were exceeding their powers and were thus acting in good faith. The court cited comments on the *Duomatic* principle from the judgement in *R.W. Peak (Kingslynn) Ltd. Re*, (1998) BCC 596 and *Demite Ltd. v. Pratec Health Ltd.*, (1998) BCC 638.

Where the number of members goes below the number required for a quorum at a members' meeting then decisions may be taken by unanimous assent. So if a company has only one member, decisions may be taken by that member alone. *East v. Bennett Brothers Ltd.*, (1911) 1 Ch 163, where one person held all the preference shares of a company and a decision taken by him was as effective as a decision taken by a meeting of preference shareholders. It is doubtful whether this principle can be applied where the decision must be taken with formalities which can be followed only if a meeting is held.

The principle of unanimous assent can play a role only in small and private companies, rather than large companies with members throughout the country or even the world. In *Re, Express Engineering Works Ltd.*, (1920) 1 Ch 466, a resolution passed at a meeting of directors (5 in number) all of whom were also the only members of the company, was regarded as a shareholders' resolution. WARRINGTON LJ said, at pp. 470-1:

> "It happened that these five directors were the only shareholders of the company, and it is admitted that the five, acting together as shareholders, could have issued these debentures. As directors they could not but as shareholders acting together they could have made the agreement in question. It was competent to them to waive all formalities as regards notice of meetings, etc., and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question. Inasmuch as they could not in one capacity effectually do what was required but could do it in another, it is to be assumed that as businessmen they would act in the capacity in which they had power to act. In my judgment they must be held to have acted as shareholders and not as directors, and the transaction must be treated as good as if every formality had been carried out."

Where all the members of a company are directors, the principle expressed in *Re, Express Engineering Works Ltd.* is that directors' meetings are *de facto* members' meetings. The principle has also been applied to companies in which all the members are also companies and they have appointed directors as representatives at meetings. In such a case also a meeting of all the directors is a *de facto* meeting of all the members. *Bobbie Pins Ltd. v. Robertson*, (1950) NZLR 301; *Multinational Gas & Petrochemical Co. v. Multinational Gas & Petrochemical Services Ltd.*, (1983) Ch 258.

The same principle was **applied** where out of six members who were also directors, only five members attended the meeting and passed a resolution for allotment of shares. The allotment was held to be valid though the articles provided that matters as to increase of capital and allotment were to be done at a general meeting with the participation of all the members. *Damodara Reddy (P.V.) v. Indian National Agencies Ltd.*, (1945) 15 Com Cases 148, 152, 153 : AIR 1946 Mad 35.

The principle of unanimous assent therefore requires that all persons who are entitled to assent must be given the opportunity to do so, though it would seem that the assent of all joint holders of shares is not required since one joint holder can assent on behalf of the other or others. *Re, Gee & Co. (Woolwich) Ltd.*, (1975) Ch 52.

Another requirement was stated by OLIVER J in *Halt Garage (1964) Ltd. Re,* (1992) 3 All ER 1016 at 1037: 'No doubt the effectiveness even of a resolution in general meeting will depend on its *bona fides.* Fraud opens all doors and the court will not uphold or permit the fraudulent exercise of a power." Essentially, by "fraudulent", the courts here mean the misappropriation of assets of the company by the shareholders to the fraud of the company's creditors. This limitation was expressed by SLADE L.J. in *Rolled Steel Products (Holdings) Ltd. v. British Steel Corp,* (1985) 3 All ER 52 at 86 as follows: "The clear general principle is that any act which falls within the corporate capacity of a company will bind it if it is done with the unanimous consents of all the shareholders or is subsequently ratified by such consents... This last-mentioned principle certainly is not an unqualified one. In particular, it will not enable the shareholders of a company to bind the company itself to a transaction which constitutes a fraud on its creditors. See BRENDA HANNINGAM, LIMITATIONS ON A SHAREHOLDER'S RIGHT TO VOTE 2000 JBL 493 at pp. 496-497 under the heading "UNANIMOUS CONSENT BY SHAREHOLDERS".

It has been held that the consent of all the members of a company is as good as a special resolution and acquiescence by shareholders with knowledge of the matter is as good as actual consent. Thus where both the shareholders of the company which was under administration assented by their conduct to a change in the objects, the change was held to be valid so far as the special resolution requirement was concerned but its validity was otherwise doubtful because s. 4 of the [English] Companies Act, 1985 may not allow the adoption of a wholly new object for a wholly different business. *Home Treat Ltd., Re,* (1991) BCLC 705 (Ch D).

The same principle was extended to the situation in which all the members of a company were either individuals who were directors or were corporations. In such a situation a meeting of all the directors was regarded a *de facto* meeting of all the members *Bobbie Pins Ltd. v. Robertson,* (1950) NZLR 301; *Multinational Gas & Petrochemcial Co. v. Multinational Gas & Petrochemical Services Ltd.*, (1983) 2 All ER 563.

The provision of a pension for a retired director with the approval of all shareholders was held to be valid against the liquidator of the company although there had been no Board or general meeting confirmation. *Horsely & Weight Ltd., Re,* (1982) 3 All ER 1045 (CA).

Article 53 of Table A of the English Act of which there seems to be no parellel in the Indian Act, recognises the possibility of such resolutions by providing as follows:

> "A resolution in writing executed by or on behalf of each member who would have been entitled to vote upon it if it had been proposed at a general meeting at which he was present shall be as effectual as if it had been passed at a general meeting duly convened and held and may consist of several instruments in the like form each executed by or on behalf of one or more members."

In Australia it has been said that company law does not demand that members' decisions must be taken at a meeting if the company's constitution does not make that requirement to be necessary. *Perseus Mining NL v Landbrokers (Perth) Pty. Ltd.*, (1972) WAR 12 (Aust). Where a company's shares are held on trust, it has been held that for establishing unanimous assent without a meeting, it must be shown that the assent of the

trustee was obtained because he is the registered member and the assent of the beneficial owner is not sufficient. *Action Waste Collections Pty. Ltd.* (1976) 2 ACLR 253 (Aust); *Poliwka v. Heven Holdings Pty. Ltd.*, (1992) 8 ACSR 747 (Aust).

The Supreme Court of Canada has been of the view that if the registered holder of the shares is a mere nominee who has to vote as instructed by the beneficial owner, then the beneficial owner's assent must be proved. *Walton v. Bank of Nova Scotia,* (1965) 52 DLR (2d) 506, 510 (Canada).

In *Re, New Cedos Engineering Co. Ltd.*, (1994) 1 BCLC 797, the court's view was that it is inequitable to allow a company to rely on a mere irregularity of procedure when exactly the same decision would have been reached if the correct procedure had been followed. A similar view was taken by the New Zealand Court of Appeal in *Westpac Securities Ltd. v. Kensington,* (1994) 2 NZLR 555, 563.

In *Bailey, Hay & Co. Ltd., In re,* (1971) 3 All ER 693. There were only 5 shareholders, two of whom held between themselves 50% of the voting power and they passed the resolution. Shareholders who abstained from voting on the resolution and allowed it to be passed with knowledge of their power to stop it must be deemed to have assented to the resolution which, accordingly, was held valid.

Need for amendment as to unanimous Consent.—The Company Law Board Review Steering Group of United Kingdom recommend that the law on unanimous consent without meeting should be codified in the next Companies Act. They also recommend that decisions on matters for which formalities are prescribed which ensure that information is delivered to members before they decide should be capable of being taken by unanimous consent without observing the formalities. They say that unanimous consent is usually used in small companies where the members already know relevant information. See *Modern Company Law for a Competitive Economy : Final Report,* Vol. 1 (URN 01/942) (London DTI, 2001), paras 7.17 to 7.26 (Sec. 21.9.7).

Resolution by agreement of all shareholders

In the absence of a resolution, ordinary or special, where all the shareholders agree in writing in respect of any matter which is not illegal or *ultra vires*, the company is bound by the same. "It is established law that a company is bound in a matter, *intra vires* the company by the unanimous consent of all its corporators". *In re Bailey, Hay & Co. Ltd.*, (1971) 3 All ER 693 (Ch D) : (1972) 42 Com Cases 442; *Parker & Cooper Ltd. v. Reading,* 1926 Ch 975. *In re, Express Engineering Works Ltd.,* (*Supra*); *Oxted Motor Co. Ltd. Re,* (*Supra*). This is particularly true of small companies. *Attorney General for Canada v. Standard Trust Co.,* (1911) AC 498 (PC); *Innes & Co. Ltd. Re,* (1903) 2 Ch 254 (CA). But no consent of all the shareholders can validate anything *ultra vires* the company. See *Attorney General's Reference, (No. 2 of 1982),* (1984) 2 All ER 216 : 1984 BCLC 60 (CA). An *ultra vires* resolution can be set aside at the action of any member. *Dhakeshwari Cotton Mills Ltd. v. Nilkamal Chakkravarthy,* (1937) 7 Com Cases 417, 422 : AIR 1937 Cal 645. Thus a grant of a sum of money by the directors to the widow of a deceased managing director was held to be not proper unless authorised by the instrument which regulated the company, or by the shareholders at a properly convened meeting, that is, a meeting convened by a notice disclosing the intention to make the proposal. *Lee Behrens & Co., Re,* (1932) 2 Com Cases 588 (Ch D).

Similarly, a unanimous resolution was not allowed to be questioned on the ground that the meeting was not adequately represented, *Mohanlal Chandumal v. Punjab Co. Ltd.*, (1962) 32 Com Cases 937 : AIR 1961 Punj 485. But a resolution passed at a meeting attended by shareholders who were in arrears of their calls was held to be of no effect. *Hind Iran Bank Ltd. v. Raizada Jagan Nath Bali,* (1959) 29 Com Cases 418 (Punj).

In *Cane v. Jones,* (1981) 1 All ER 533 the court recognised the possibility of informal acts of shareholders being regarded as equivalent to resolutions at duly convened meetings, where the decisions were taken unanimously. Similarly, a resolution for reduction

of capital to which all the members signified consent not at a formally constituted meeting but by means of circulation of a written resolution has been recognised as effective, although the Court cautioned against the practice being followed in future. *Re, Barry Artist Ltd.,* 1985 BCLC 283 (Ch D).

As such resolutions are passed by the unanimous consent of all the corporators or members, there is no question of any minority interests being adversely affected. But in the case of such resolutions the benefit of a discussion or debate or exchange of views which will be available at a meeting cannot be had.

Alteration of articles by unanimous agreement

When all the shareholders interested in a company entered into an agreement which modified the articles of association, but was not drafted as a resolution nor passed at a general meeting, the articles could nevertheless, be deemed to be effectively modified. This is on the basic principle of company law that all the shareholders of a company acting together can do anything *intra vires* the company. Section 31(1) does not undermine that principle but merely lays down the procedure whereby some only of the shareholders can validly alter the articles. *Cane v. Jones,* (1981) 1 All ER 533 (Ch D).

In *Re, Barry Artist Ltd.,* 1985 BCLC 283 (Ch D) the Court sanctioned a reduction of capital approved by a similar method but deprecated the practice and cautioned against it being followed in future.

In the Australian case of *Herrman v. Simon,* (1990) 4 ACSR 81 (Aust) it was emphasised that inability to question decisions taken unanimously without meeting depends on the fact that the members have waived the right to hold a meeting. In that case, the members of a company unanimously agreed without meeting to alter its articles without realising that they were altering class rights, for which the articles required a special procedure. The alteration was held to be ineffective. MEAGHER J.A. said that in order to make a decision by unanimous agreement without meeting, members had to waive their right to insist on a properly convened meeting but waiver could not be effective unless given with full knowledge and consent—in this case the members did not know that they had any rights to be waived and so their waiver was ineffective.

Secretarial Standards on General Meetings issued by the Council of ICSI (SS-2)

These Standards seek to prescribe a set of principles for the convening and conduct of General Meetings and matters relating thereto. In the initial years, adherence by a company to the Secretarial Standards will be recommendatory. These principles may not be applicable to any meetings convened on the directions of the Court or CLB or other authority, unless the directions themselves so prescribe.

Secretarial Standard [Paras 9, 10 and 11]

9. **Withdrawal of Resolutions**

   Resolutions for items of business which are likely to affect the market price of the securities of the company should not be withdrawn.

10. **Rescinding of Resolutions**

    A Resolution passed at a Meeting should not be rescinded other than by a Resolution passed at a subsequent Meeting.

11. **Modifications to Resolutions**

    Modifications to any Resolution which do not change the purpose of the Resolution materially may be proposed, seconded and adopted by the requisite majority at the Meeting and, thereafter, the amended Resolution should be duly proposed, seconded and put to the vote.

    No amendment to any proposed Resolution should be made if it in any way alters the substance of the Resolution as set out in the Notice. Grammatical and clerical errors may be corrected or words translated into more formal language and, if the precise text of the Resolution was not included in the Notice, it may

be corrected into a formal Resolution, provided there is no departure from the substance as stated in the Notice.

§ For full text of the Secretarial Standard, see *Appendix* 311.

S. 190. Resolutions requiring special notice.—(1) Where, by any provision contained in this Act or in the articles, special notice is required of any resolution, notice of the intention to move the resolution shall be given to the company not less than [1][fourteen days] before the meeting at which it is to be moved, exclusive of the day on which the notice is served or deemed to be served and the day of the meeting.

[2][(2) The Company shall, immediately after the notice of the intention to move any such resolution has been received by it, give its members notice of the resolution in the same manner as it gives notice of the meeting, or if that is not practicable, shall give them notice thereof, either by advertisement in a newspaper having an appropriate circulation or in any other mode allowed by the articles, not less than seven days before the meeting.]

NOTES

Eng. Act, 1948 : Sec. 142
Eng. Act, 1985 : Sec. 379

Companies Act, 1956

Recommendation of Company Law Committee.—This section is based on the following suggestion of the Company Law Committee: "Following the provisions of section 142 of the English Companies Act, 1948, we also suggest that in certain cases, which we have indicated in the Annexure of our Report and in the Addendum attached to it, a special notice as defined in this section, should be required. A special notice of a resolution to be moved at a meeting of a company requires that the intention to move the resolution should be given to the company not less than twenty-eight days before the meeting at which it is moved, and the company must give its members notice of any such resolution at the same time and in the same manner as it gives notice of the meeting, or if that is not practicable, shall give them notice by advertisement in a newspaper having an appropriate circulation or in any other mode allowed by the articles, not less than twenty-one days before the meeting. Under the English Act, a special notice is required in the case of a resolution to remove a director (section 184) or to dispense with a director's age limit (section 185), or to propose the appointment of an auditor other than the retiring auditor." (*Report* : Para 78).

When special notice is required

Special notice is required by the following provisions of the Act:

(1) to fill a casual vacancy in the office of auditor [ss. 224(5)(a), (6)(a) and (7)],
(2) to reappoint as auditor a retiring auditor who was appointed by the directors to fill a casual vacancy [s. 224(5)(a) and (6)(a)],
(3) to remove an auditor [s. 225],
(4) to appoint as auditor a person other than a retiring auditor [s. 225],
(5) to stand for directorship by a person other than retiring director fourteen days notice required under s. 257(1),
(6) to remove a director [s. 284],

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1. Subs. by Act 65 of 1960, s. 50, for "twenty-eight days".
2. Subs. by Act 65 of 1960, s. 50 for Sub-ss. (2) & (3).

(7) to appoint a person to fill the vacancy caused by the dismissal of a director under s. 284 at the same meeting [s. 284(5)].

The articles of a company may add additional matters in respect of which special notice is required.

Relationship between special notice and circulation of members' resolution

In *Pedley v. Inland Waterways Association Ltd.*, (1977) 1 All ER 209 : 1978 Tax LR 2218 (Ch D). SLADE J. expressed the view that the right under this section cannot be exercised by individual members and any resolution and notice in respect thereof contemplated by the section can be effective only if the requirements of Section 188 are complied with. That is to say the procedure prescribed by Section 188 should be followed. With great respect to the learned Judge, SLADE J., it is submitted that his view requires reconsideration as according to the recommendation of the Cohen Committee on which the notice procedure provided in this section was based, any member may give notice of the intended resolution to the company (Report, page 67). There is no reason why any restriction not expressly provided should be read into the section whose language is plain and clear.

The *Pedley* ruling has been **followed** by the High Court of Delhi in *Amar Nath Malhotra v. MCS Ltd.*, (1993) 76 Com Cases 469 (Delhi) so as to hold that a resolution for the removal of an auditor, of which a special notice has to be given, cannot dispense with the requirements of s. 188 to the effect that the resolution must not be circulated unless it is proposed by members coming up to the figures (one-twentieth holding or 100 members) specified in sub-section (2) and that consequently, therefore, a single member not coming up to the specified figure of voting power cannot move a resolution proposing the removal of an auditor.

But it has been held in *Gopal Vyas v. Sinclair Hotels and Transportation Ltd.*, AIR 1990 Cal 45 : (1990) 68 Com Cases 516 that in view of the clear cut provisions in sections 257 and 284 enabling a shareholder to inform the company by a fourteen days notice of his intention to propose a candidate for appointment to directorship or removal of director from office, these enabling provisions cannot be whittled down by the requirements of section 188 about the circulation of members' resolutions.

It appears that the ruling of the Calcutta High Court in *Gopal Vyas v. Sinclair Hotels and Transportation Ltd.*, (*Supra*), which is **contrary** to the *Pedley* decision was not brought to the notice of the Delhi High Court in *Amarnath Malhotra's* case.

In *Karnataka Bank Ltd. v. A.B. Datar,* (1994) 79 Com Cases 417 (Kar), the court negatived the contention that section 188 has to be read along with section 284 and the requirements of section 188 also should be complied with, while seeking the removal of director under section 284. The court, after an elaborate discussion, observed as follows: "A comparative view of the two sections shows that section 284 is an independent provision providing for removal of directors and it is available to any shareholder for moving a resolution for removal of a director in the meetings called by the company and there is nothing to insist on compliance of provisions in section 188(2). Therefore, *prima facie* the view of the law to be taken having regard to the provisions of the two sections would be to hold that section 284 of the Companies Act is not subject to section 188 of the Companies Act and it is independent of that section." **Followed** in *Prakash Roadlines Ltd. v. Vijay Kumar S. Narang,* (1995) 83 Com Cases 569 (Kar).

See also PALMER'S COMPANY LAW, 841 (24th Edn., 1987) where the practical problems created by the decision in the *Pedley's* case are highlighted.

Notice of intention to move the resolution is to be given to the company not less than 14 days before the meeting (both the date of service or deemed service and date of meeting, being excluded).

The words 'appropriate circulation' mean circulation appropriate or proper in the circumstances of the case.

The company has then to give notice to the members either individually or by newspaper advertisement having appropriate circulation or as otherwise prescribed by the articles, not less than seven days before the meeting.

The object of giving special notice of a resolution is to invite the special attention of the company and, through the company, of members to it, so that they may appreciate that there is something special in it, which requires their attention.

Even in cases where the company itself, *i.e.*, the Board of directors have to move a resolution either for the removal of a director or the removal of an auditor or appointment of a new auditor in the place of a retiring auditor or any other matter specified in the section the special notice may be required to be given to the company. In such a case the company may give the required special notice by including it in the notice of the meeting itself or give a fourteen days' notice afresh to the shareholders as provided in the section.

Penalty for default.—Since the section does not contain any specific penalty for a failure to comply with its requirements, it would seem that the general penalty under S. 629A is leviable, *i.e.* a fine of Rs. 5000 and in cases of continuing defaults, Rs. 500 for every day of default

Compoundable Offence.—The offence is compoundable under section 621A.

Secretarial Practice Notes : Resolutions requiring special notice

Where special notice was required of any resolution check whether:

(i) notice of the intention to move the resolution was received at the company 14 days before the day of the meeting?

(ii) whether notice of the resolution was given to members in terms of section 53 ? Or whether an advertisement was given not less than 7 days before the meeting in a newspaper of proper circulation?

(iii) whether provisions of articles in this regard, if any, had been complied with?

(For items requiring special notice refer sections 225 and 284)

Documents Involved: 1. Minutes of Board/General Meeting, 2. Notice, 3. Advertisement Cuttings, 4. Articles.

S. 191. Resolutions passed at adjourned meetings.—Where a resolution is passed at an adjourned meeting of—

(a) a company;

(b) the holders of any class of shares in a company; or

(c) the Board of directors of a company;

the resolution shall, for all purposes, be treated as having been passed on the date on which it was in fact passed, and shall not be deemed to have been passed on any earlier date.

NOTES

Eng. Act, 1948 : Sec. 144
Eng. Act, 1985 : Sec. 381

Scope of section

In spite of the use of the words 'for all purposes' in the section, the view of the learned editor of BUCKLEY'S COMPANIES ACT (14th Edn.) is that, except as regards meeting of the three classes mentioned in the section, the present section does not affect the legal

fiction of continuity of the original meeting and all adjournment or any legal consequences resulting therefrom (page 393).

According to the plain language of the present section, a resolution passed at an adjourned meeting is not to be taken as passed on the date of the original meeting. The section clearly overrides the rule of common law that a resolution passed at an adjourned meeting must be deemed to have been passed at the original meeting.

Secretarial Standards on General Meetings issued by the Council of ICSI (SS-2)

These Standards seek to prescribe a set of principles for the convening and conduct of General Meetings and matters relating thereto. In the initial years, adherence by a company to the Secretarial Standards will be recommendatory. These principles may not be applicable to any meetings convened on the directions of the Court or CLB or other authority, unless the directions themselves so prescribe.

Secretarial Standard [Para 14]

14. Adjournment of Meetings

§ *See under sec. 166*

§ For full text of the Secretarial Standard, see *Appendix* 311.

S. 192. Registration of certain resolutions and agreements.—(1) A copy of every resolution [1][together with a copy of the statement of material facts annexed under section 173 to the notice of the meeting in which such resolution has been passed] or agreement to which this section applies shall, within [2][thirty] days after the passing or making thereof, be printed or typewritten and duly certified under the signature of an officer of the company and filed[3] with the Registrar who shall record the same.

(2) Where articles have been registered [4][a copy of every resolution referred to in sub-section (1) which has the effect of altering the articles and a copy of every agreement referred to in that sub-section] for the time being in force shall be embodied in or annexed to every copy of the articles issued after the passing of the resolution or the making of the agreement.

(3) Where articles have not been registered, a printed copy of every [5][resolution or agreement referred to in sub-section (1)] shall be forwarded to any member at his request, on payment of one rupee.

(4) This section shall apply to—

(a) special resolutions;

(b) resolutions which have been agreed to by all the members of a company, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as special resolutions;

(c) any resolution of the Board of directors of a company or agreement executed by a company, relating to the appointment, re-appointment

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1. Ins. by Act 65 of 1960, s. 51.
2. Subs. by Act 31 of 1965, s. 62 and Sch., for "fifteen" (w.e.f. 15-10-1965).
3. Form No. 23 of the Companies (Central Government's) General Rules & Forms, 1956 is the prescribed form for Registration of Resolutions/Agreement.
4. Subs. by Act 65 of 1960, s. 51, for "a copy of every such resolution or agreement".
5. Subs. by Act 65 of 1960, s. 51, for "such resolution or agreement".

or renewal of the appointment, or variation of the terms of appointment, of a managing director;

(d) [6][* * * *]

(e) resolutions or agreements which have been agreed to by all the members of any class of shareholders but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by some particular majority or otherwise in some particular manner; and all resolutions or agreements which effectively bind all the members of any class of shareholders though not agreed to by all those members; [7][* * * *]

[8][(ee) resolutions passed by a company—

(i) according consent to the exercise by its Board of directors of any of the powers under clause (a), clause (d) and clause (e) of sub-section (1) of section 293;

(ii) approving the appointment of sole selling agents under [9][section 294, or section 294-AA];

(f) resolutions requiring a company to be wound up voluntarily passed in pursuance of sub-section (1) of section 484; and

[10](g) copies of the terms and conditions of appointment of a sole selling agent appointed under section 294 or of a sole selling agent or other person appointed under section 294-AA.]

(5) If default is made in complying with sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [11][*two hundred rupees*] for every day during which the default, continues.

(6) If default is made in complying with sub-section (2) or (3), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [12][*one hundred rupees*] for each copy in respect of which default is made.

(7) For the purposes of sub-sections (5) and (6), the liquidator of a company shall be deemed to be an officer of the company.

NOTES

Eng. Act, 1948 : Sec. 143
Eng. Act, 1985 : Secs. 380 and 572

Previous Act : Sec. 82

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6. Clause (d) omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 79 (w.e.f. 13-12-2000)., prior to its omission it stood as under :—
"(d) any agreement relating to the appointment, re-appointment or renewal of the appointment of a managing agent or secretaries and treasurers for a company, or varying the terms of any such agreement, executed by the company."
7. The word "and" omitted by Act 65 of 1960, s. 51.
8. Ins. by Act 65 of 1960, s. 51.
9. Subs. by Act 41 of 1974, s. 16, for "section 294." (w.e.f. 1-2-1975).
10. Ins. by Act 41 of 1974, s. 16 (w.e.f. 1-2-1975).
11. The words "twenty rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 79 (w.e.f. 13-12-2000).
12. The words "ten rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 79 (w.e.f. 13-12-2000).

Companies (Amendment) Act, 1960

The amendments are intended "to make the records of the Registrar self-contained, and to provide an opportunity to him to scrutinise special resolutions and certain other important resolutions passed by the general body or the Board of directors of companies" (*Notes on clauses* : Clause 53).

Clause (ee) of sub-section (4) has been added as recommended by the Companies Act Amendment Committee on the suggestion of the Department of Company Law Administration "in view of the importance of the resolution and in order to enable the Registrar to see whether the financial arrangements purporting to be approved by resolutions are in the interests of the company." (*Report* : Para 79).

Companies (Amendment) Act, 1974

As per clause (ee)(ii) and clause (g) as amended by the Amendment Act, 1974, not only copies of resolutions but also copies of the terms and conditions of appointment of both sole selling agents and sole buying or purchasing agents should be filed.

'Other person appointed under section 294-AA' will include the 'buying agents', if any, appointed under sub-section (8) of section 294-AA. That means that the terms and conditions of such appointment of buying agents will have to be disclosed.

Companies (Amendment) Act, 2000

(1) Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount
(1) from 20 rupees to 200 rupees under sub-section (5).
(2) from 10 rupees to 100 rupees under sub-section (6).

(2) Omission of terms "managing agents", etc.—The terms "managing agents, secretaries and treasurers" in clause (d) of sub-section (4) have been omitted by the Amendment Act, 2000. The amendment is of consequential nature.

Resolution altering articles [Sub-section (2)]

Department's view.—Under sub-section (2) copy of each resolution having the effect of altering the articles must be annexed to (or embodied in) any copy of the articles of the company which may be issued at a date subsequent to the date of the passing of the resolution. Both the requirements should be fulfilled irrespective of whether the resolution is subsequently acted upon or whether the necessary approval of the Central Government to the implementation of the resolution is applied for or obtained or not. However, the company need not embody or annex a copy of the resolution in or to its articles till it has received clearance to the proposal contained in it, provided it does not issue any copy of the articles subsequent to the passing of the resolution [*Letter No.* 8/35(192)/61-PR, dated 31-1-1962.]

Unanimous Resolution [Sub-section (4)(b)]

This refers to 'resolutions agreed to by all the members, of a company'. Resolutions agreed to by all members may not always have the same legal effect as resolutions—ordinary or special, passed at general meeting. Where the Act requires a transaction to be carried out at a general meeting, the condition will not be satisfied by a resolution agreed to and signed by all the members. For, in such a case the benefits of discussion and consultation are absent.

Where the Act requires a power to be exercised in general meeting, it will not be in order for a company to dispense with the holding of such meeting and act on the consent of all the members.

As regards sub-section (4)(b), the following comment may also be noted:—

This paragraph is difficult to understand. It seems to assume that where the Act requires a special or extraordinary resolution for any purpose, that purpose may also be effected by a 'resolution agreed to by all the members of the company.' There is nothing elsewhere in the Act to justify this assumption. On the contrary, the Act expressly requires certain important powers conferred upon companies to be exercised by special or extraordinary resolution, and by section 141 (corresponding to section 189 of the Indian Act) elaborately prescribes what the formalities required for passing such a resolution are to be. Where it intended that these powers should also be exercisable by "resolution

agreed to by all the members" without compliance with any of the prescribed formalities, one would certainly have expected to find this intention clearly expressed, either in the sections conferring the powers or as a further proviso to section 141 and not left to be implied, if such an implication be possible, from the present section". (BUCKLEY'S COMPANIES ACTS, 12th Edn., page 337). In spite of the view expressed above, it is fairly clear from clause (b) that it is possible for all the members of a company without a meeting, to agree to a resolution which will not be less effective than that passed as a special resolution.

See exhaustive notes on "resolution by agreement of all members" and " Unanimous assent without resolution" under section 189, *ante.*

Where the assertion was that the sale of the shares in a company was an improper exercise of the powers of the directors both because it was effected otherwise than in the interests of the company and at a substantial undervalue, the submission was that even on the assumption the claim must fail because the sale was authorised by all the sharehlders. The legal basis is demonstrated by the line of cases commencing with *Salomon v. A Salomon & Co. Ltd.,* (1897) AC 22 at 57 and continuing with *A-G for Canada v. Standard Trust,* (1911) AC 498, *Re Express Engineering Works,* (1920) 1 Ch 466, *Re Duomatic Ltd.,* (1969) 1 All ER 161 : (1969) 2 Ch 365, *Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd.,* (1983) BCLC 461 : (1983) Ch 258, *West Mercia Safetywear v. Dodd,* (1988) BCLC 250 and *Official Receiver v. Stern,* (2002) 1 BCLC 119. In *Salomon v. A Salomon & Co. Ltd.* LORD DAVEY pointed out that a company is bound in a matter *intra vires* by the unanimous agreement of its members. But, subsequent decisions show that there are exceptions to such a principle. *First,* the transaction must be *bona fide* or honest. This is demonstrated by the qualification of VISCOUNT HALDANE in *A-G for Canada v. Standard Trust,* (1911) AC 498 at 505 that 'the case was not...a cloak under which a conspiracy to defraud was concealed', by YOUNGER LJ in *Re Express Engineering Works,* (1920) 1 Ch 466 at 471 that 'no fraud is alleged in respect of this transaction', and by Lawton LJ in *Multinational Gas v. Multinational Services,* (1983) BCLC 461 at 468 : (1983) Ch 258 at 268 that the members must act in good faith. Thus, in *Re Duomatic Ltd.,* (1969) 1 All ER 161 at 171 : (1969) 2 Ch 365 at 372 BUCKLEY J cited with approval the view of ASTBURY J in *Parker and Cooper Ltd. v. Reading,* (1926) Ch 975 at 984 that the transaction must be both *intra vires* and honest. The *second* exception, which may be merely an exemplification of the first, is that the transaction so authorised must not be likely to jeopardise the company's solvency or cause loss to its creditors. The existence of this exception is demonstrated by a number of cases. Its origin may be traced to the dicta of Cumming-Bruce and Templeman LJJ in *Re Horsley & Weight.* (1982) Ch 442 at 454-456. In *Nicholson v. Permakraft (NZ) Ltd.,* (1985) 1 NZLR 242 at 250 COOKE J, with whom the other members of the Court of Appeal in New Zealand agreed, considered that where the transaction in question was likely to cause loss to creditors or threaten the continued existence of the company then the unanimous assent of the shareholders is not enough to justify a breach of duty to the creditors. In such a case—'Concurrence by the shareholders prevents any complaint by them, but compounds rather than excuses the breac has against the creditors.' In *Kinsela v. Russell Kinsela Proprietary Ltd. (in liq),* (1986) 4 NSWLR 722 at 732 the Court of Appeal for New South Wales **approved and applied** that dictum. STREET CJ said: 'It is legally logical and acceptable to recognise that, where directors are involved in a breach of their duty to the company affecting the interests of shareholders, then shareholders can either authorise that breach or ratify it in retrospect. Where, however the interests at risk are those of creditors there is no reason in law or logic to recognise that the shareholders can authorise the breach. Once it is accepted, as in my view it must be, that the directors' duty to a company as a whole extends in an insolvency context to not prejudicing the interests of creditors...the shareholders do not have the power or authority to absolve the directors from that breach.' An earlier statement to the like effect was **approved** by DILLON LJ in *West Mercia Safetywear v. Dodd,* (1988) BCLC 250 at 252 and by the Court of Appeal in *Official Receiver v. Stern,* (2002) 1 BCLC 119 at 129 para [32]. See *Bowthorpe Holdings Ltd. v. Hills,* (2003) 1 BCLC 226 (Ch D).

Resolution or agreement of appointment of managing director [Sub-section (4)(c)]

A resolution of the Board of directors, appointing or reappointing a managing director is required to be filed with the Registrar but not that of the appointment of a manager or whole-time director though the contract of appointment of a manager or whole-time director should be made available for inspection by a member [section 302(7)].

Though ordinarily resolutions of the Board of directors are not open to inspection by members who are entitled only to inspect minutes of proceedings of general meetings, in respect of the matter of appointment, re-appointment, etc., of a managing director, the resolutions of the Board, specified in this section, are by the section made available for inspection at the office of the Registrar.

The clause apparently applies only to resolutions of the Board and agreements executed by the company. If the managing director is appointed by a resolution of the company in general meeting instead of by a resolution of the Board, the section does not in terms require the filing of such resolution, unless the resolution is to be construed as an agreement, on account of its being communicated to and accepted by the appointee.

Again, as regards the appointment, etc., of any other director, including a whole-time director, the section does not require a resolution or agreement relating to such director also to be filed. Similarly a resolution for the appointment of a manager does not require to be filed.

Resolution of class of shareholders [Sub-section (4)(e)]

§ Instances of such resolutions are those pertaining to matters in sections 106 and 391.

Registrar's discretion to refuse registration

Ordinarily the Registrar has no authority to enquire into the validity of a meeting and the resolutions passed at it, see *Golconda Industries (P.) Ltd. v. R.O.C.*, (1968) 38 Com Cases 165 (Del-FB) and he is even compellable to register documents filed with him in fulfilment of the requirements of different provisions of the Companies Act. See *Radiant Chemical Co. Ltd., In re,* AIR 1943 Pat 278 : (1943) 13 Com Cases 186 (resolution for converting a private company into a public company.) But even so his role is not merely that of a mechanical agent to receive documents with one hand and to file them with the other. On occasions he may have to exercise his discretion. Accordingly where the documents like memorandum containing unlawful clauses or a resolution containing matters in violation of law are filed, he may refuse registration. *Pioneer Mutual Benefit and Friend-in-Need Society Ltd. v. Asst. Reg. of Joint Stock Cos.*, (1933) 3 Com Cases 37 : AIR 1933 Mad 129.

When a resolution passed in a general meeting has not been held to be invalid by any court, no *mandamus* can issue to the Registrar not to take on record the resolution as that will amount to preventing a statutory authority from performing his statutory function. *Karlapudi Venkateswara Rao v. ROC,* (1977) 47 Com Cases 641 (Mad).

§ See also Notes under s. 33, *ante.*

Filing of Resolutions and Agreements and Harmonisations in the Practices by ROCs

Department's Instructions.—It is noticed that various ROCs have developed certain practices in their working over the years which has resulted in dealing with the same issue differently by different ROCs. It is desirable that there should be a common approach to such practices followed by all offices. Some of these instances are given below:—

Explanatory Statement to Notice of Meeting

Some of the ROCs are calling for a copy of the notice of the general meeting in which special resolution is passed, at the time of filing Form No. 23. There is no such requirement under the law and such a notice need not be called, as a matter of course. However, a copy of the Explanatory statement should be insisted upon in view of the mandatory requirements of section 192(1) of the Act. (para xvii(c)). [*Circular No.* 1/95; *F.No.* 14/6/94-CL-V, dated 16-2-1995].

Penalty for default [sub-sections (5) and (6)]

Filing of resolutions [Sub-section (5)].—If any default is made in complying with section 192(1) as regards filing with the Registrar a copy of the resolution/agreement to

which this section applies within thirty days of the passing of the resolution or making of an agreement, the company and every officer of the company who is in default are punishable with fine up to Rs. 200 for every day of default.

Resolution altering articles [Sub-section (6)].—If any default is made in complying with section 192(2) or (3) and copies of the resolutions or of the agreements referred to therein are not annexed to the Articles or are not forwarded to any member at his request on payment of prescribed fee, the company and every officer of the company who is in default are punishable with fine up to Rs. 100 for every day of default.

Compoundable offence.—The offences are compoundable under section 621A.

Prescribed forms.—Form No. 23 in *Appendix* 1 prescribes the manner in which copies of resolutions and agreements are to be certified and filed with the Registrar.

Filing fee concession.—As per the proviso to sub-section (1) of section 611 in the case of resolutions to be filed under this section, not more than one fee is payable where the resolutions are passed in the same meeting and are filed with the Registrar at the same time.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of the matters specified under Rule 3 of the Companies (Compliance Certificate) Rules, 2001. Paragraph 2 under Rule 3 relates to filing of Forms and Returns with the ROC, RD, Central Government, CLB and other authorities and reads as follows:

***Paragraph 2.*—The company has duly filed the forms and returns as stated in Annexure "B" to this certificate, with the Registrar of Companies, Regional Director, Central Government, Company Law Board or other authorities within the time prescribed under the Act and the Rules made thereunder.**

Registration of Resolutions and Agreements

Prescribed Check List [*Item (2)(f) of 'Other Important Returns'*]

Check whether copies of resolutions and agreements required to be filed along with Form No. 23 with the ROC under section 192 have been filed within 30 days after the passing of the resolution or the making of the agreement.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

Check further —a typewritten or printed copy of every resolution/agreement together with an explanatory statement if any, in Form 23 duly signed by an officer had been filed with the Registrar within 30 days after passing or making thereof.

(i) a copy of resolution which has the effect of altering articles and agreement were embodied in or annexed to every copy of articles issued thereafter where articles have been registered.

(ii) a request thereof was received from a member along with payment of one rupee? If so, whether a printed copy of such resolution agreement/Articles was sent to such members.

Documents Involved: 1. Minutes of Board/General Meeting, 2. Form 23, 3. Notice of meeting.

[1][*S. 192A. Passing of resolutions by postal ballot**.—*(1) Notwithstanding anything contained in the foregoing provisions of this Act, a listed public com-*

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1. Inserted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 80 (w.e.f. 15-6-2001), *vide* Notfn. SO 523(E), dt. 15-6-2001.

* Companies (Passing of the Resolution by Postal Ballot) Rules, 2001 have been prescribed *vide* Notfn. GSR 337(E), dt. 10-5-2001. For the text of the Rules, See *Appendix* 41.

pany may, and in the case of resolutions relating to such business as the Central Government may, by notification, declare to be conducted only by postal ballot, shall, get any resolution passed by means of a postal ballot, instead of transacting the business in general meeting of the company.

(2) Where a company decides to pass any resolution by resorting to postal ballot, it shall send a notice to all the shareholders, along with a draft resolution explaining the reasons therefor, and requesting them to send their assent or dissent in writing on a postal ballot within a period of thirty days from the date of posting of the letter.

(3) The notice shall be sent by registered post acknowledgment due, or by any other method as may be prescribed by the Central Government in this behalf, and shall include with the notice, a postage pre-paid envelope for facilitating the communication of the assent or dissent of the shareholder to the resolution within the said period.*

(4) If a resolution is assented to by a requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf.

(5) If a shareholder sends under sub-section (2) his assent or dissent in writing on a postal ballot and thereafter any person fraudulently defaces or destroys the ballot paper or declaration of identity of the shareholder, such person shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

(6) If a default is made in complying with sub-sections (1) to (4), the company and every officer of the company, who is in default shall be punishable with fine which may extend to fifty thousand rupees in respect of each such default.

Explanation.—For the purposes of this section, "postal ballot" includes voting by electronic mode.]

NOTES

Parliament Standing Committee Report

The Parliamentary Standing Committee in its 64th Report on the Companies (Second Amendment) Bill, 1997 observed as follows on the corresponding clause 75 of the Bill:

Government's view on Postal Ballot.—Postal Ballot includes Electronic Voting. Experience of several decades have shown that most of the shareholders who reside in far flung areas are unable to attend Annual or Extraordinary General Meetings. By Postal Ballot shareholders can take part in decision making of the company. The concept of Postal Ballot was also recommended by Working Group set up by Government to propose a new Bill to re-enact Companies Act, 1956 and also by Kumar Mangalam Birla Committee on Corporate Governance. The provisions of Postal Ballot will be prescribed only on issues where participation of every shareholder is essential e.g., investment proposals, appointment of directors, etc. as proposed in the report of Kumar Mangalam Birla Committee. The procedure for postal ballot as prescribed by Government will provide for appointment of scrutinisers, electronic voting and other safeguards against destruction of postal ballot received from shareholders of the company.

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* Companies (Passing of the Resolution by Postal Ballot) Rules, 2001 have been prescribed *vide* Notfn. GSR 337(E), dt. 10-5-2001. For the text of the Rules, See *Appendix* 41.

Committee's Recommentation.—The Committee recommends that Clause 75 may be amended in such manner that suggestions as agreed to by the Government are incorporated therein and rules should be framed subsequently to take care of the accepted suggestions. [*Para 16.27*].

The Committee also recommends with regard to the items on which Postal Ballot is proposed to be prescribed the same may be included in the new Section 192A itself. [*Para 16.28*]

The recommendation at para 16.28 above is, however, not reflected in this section.

Companies (Amendment) Act, 2000

This section has been inserted by the Companies (Amendment) Act, 2000. It came into force from 15-6-2001 as notified *vide* Noftn. SO 523(E), dt. 15-6-2001. It provides for voting through postal ballot including voting by electronic mode. It confines itself to resolutions proposed to be passed by a listed company. Assent/dissent in writing is not obligatory. The Central Government has been empowered to specify the business which shall be conducted only through postal ballot. As per the Statement of Objects and Reasons appended to the Companies (Second Amendment) Bill, 1999, the section seeks "to prescribe voting through postal ballot in case of only important items with effect from such date as may be notified by the Government to ensure good corporate governance".

Working Group on the Companies Act, 1956

The Working Group constituted by the Department of Company Affairs in its report submitted to the Central Government on 12-2-1997 did not find favour with the introduction of postal ballot and instead recommended for strengthening the role of proxies, thus:

"4.26 The Group debated about postal ballot. Although there are arguments in its favour, the Group concluded that postal ballot was not feasible in the present context. The basic reason is the state of postal infrastructure in India. To ensure that every shareholder can exercise his or her ballot rights, the notice of the meeting and the resolutions must reach at least a month before the date of the general meeting. Even so, one cannot guarantee that shareholders in small towns will receive the papers in time, if at all. The logistics of postal ballot in today's scenario are quite horrendous. Ballots will have to be sent by registered post which is costly. Even that will not ensure that the ballots reach in time. The upshot is bound to be needless altercations between the shareholders and management.

4.27 Feasibility is not the only issue. At present, management can — and often does — introduce amendments to a motion after hearing the views of shareholders at the general meeting. Under postal ballots, this will not be possible. Hence, a seemingly better system may actually turn out to be more inflexible than proxies.

4.28 However, the Group also felt that the system of proxies could be improved upon to give more say to shareholders. Taking everything into consideration, the Group recommends that:

Given the present state of postal services, postal ballots should not be introduced as a substitute to the current system. At the same time, the role of proxies should be strengthened by permitting two rights : to vote in show of hands and to speak at general meetings.

Kumaramanglam Committee on Corporate Governance

The Committee on Corporate Governance set up by SEBI on 7-5-1999 under the chairmanship of Shri Kumaramanglam Birla in its report suggested that Department of Company Affairs may implement its recommendation on postal ballot as follows :

Rationale.—Voting at the general meetings of companies is the most valuable and fundamental mechanism by which the shareholders accept or reject the proposals of the Board of directors as regards the structure, the strategy, the ownership and the manage-

ment of the corporation. Voting is the only mechanism available with the shareholders for exercising an external check on the Board and the management.

Under the present framework of the Companies Act, 1956, a company is required to obtain the approval of its shareholders for various important decisions such as increase in its authorised capital, shifting of registered office, change in the name, amalgamation and reconstitution, buy-back of shares, further issue of shares, etc. Since the shareholders of any large public listed company are scattered throughout the length and breadth of the country, they are unable to physically attend the general meetings of the company to exercise their right to vote on matters of vital importance. The system of voting by proxy has also not proved very effective.

With a view to strengthening shareholder democracy, it is felt that all the shareholders of a company should be given the right to vote on certain critical matters through a postal ballot system, which has also been envisaged in the Companies Bill, 1997.

Listing agreement.—As per clause 49-VII suggested for incorporation in the Listing Agreement by SEBI on the basis of the recommendations of Kumara Mangalam Committee on 'Corporate Governance', a report on corporate governance is to be given by listed companies in their annual reports. The mandatory list of items for conclusion on the company's report on corporate goverance is at *Annexure* 2 to the Committee's Report. One of the *non-mandatory* requirements listed at *Annexure* 3 relates to 'Postal Ballot'.

Postal Ballot.—Currently, although the formality of holding the general meeting is gone through, in actual practice only a small fraction of the shareholders of that company do or can really participate therein. This virtually makes the concept of corporate democracy illusory. It is imperative that this situation which has lasted too long needs an early correction. In this context, for shareholders who are unable to attend the meetings, there should be a requirement which will enable them to vote by postal ballot for key decisions.

Items requiring voting by postal ballot.—Some of the critical matters which should be decided by this system are:

1. matters relating to alteration in the memorandum of association of the company like changes in name, objects, address of registered office etc.;
2. sale of whole or substantially the whole of the undertaking;
3. sale of investments in the companies, where the shareholding or the voting rights of the company exceeds 25%;
4. making a further issue of shares through preferential allotment or private placement basis;
5. corporate restructuring;
6. entering a new business area not germane to the existing business of the company;
7. variation in the rights attached to class of securities;
8. matters relating to change in management.

Procedure for postal ballot.—Where a resolution is to be passed in relation to any of the aforesaid items through postal ballot:

1. The Board of directors shall appoint a designated-person to conduct, supervise and control the exercise of postal ballot. This person may be the Company Secretary, a retired judge or any person of repute who, in the opinion of the Board, can conduct the voting process in a fair and transparent manner.
2. All communications in this regard shall be made by and addressed directly to the said designated-person.
3. A notice containing a draft of the resolution and the necessary explanatory statement shall be sent to all members entitled to vote requesting them to send

their assent or dissent within a period of thirty days from the date of posting of the letter.

4. The notice shall be sent under certificate of posting and shall include with the notice, a pre-paid postage envelope for facilitating the communication of the assent or the dissent of the shareholders to the resolutions within the said period.

5. The envelope by post will be received directly by the post office through Post Box No., which will be obtained by the designated-person in advance and will be indicated on each pre-paid envelope to be used by the members for sending the resolution.

6. The designated-person shall ascertain the will of the shareholders based on the response received and the resolution shall be deemed to have been duly passed if approved by members not less in number, as prescribed by law.

7. The designated-person shall thereafter give a report to the Chairman and on the basis of such report, the Chairman shall declare the results of the poll.

Prescribed Rules.—Companies (Passing of the Resolution by Postal Ballot) Rules, 2001 have been prescribed *vide* Notfn. GSR 337(E), dt. 10-5-2001, For the text of the Rules and Press Note, dt. 23-5-2001 issued thereunder, see *Appendix* 41.

Press Release, dt. 19-6-2001.—The Government has issued a Notification enforcing Section 80 of the Companies (Amendment) Act, 2000 relating to passing of resolution by postal ballot by shareholders with effect from June 15, 2000. In this connection, the Companies (Passing of Resolution by Postal Ballot) Rules, 2001 has already been notified in the Gazette of India on May 10, 2001.

Postal ballot resolution shall apply to alteration in the object clause of Memorandum, articles of associations, buy-back of own shares, change in place of registered office, sale of whole or substantially whole of undertaking of a company, giving loans or extending guarantee or providing security in excess of the limit, election of director, power to compromise or make arrangement with creditors and members, variation in the rights attached to class of shares or debentures or other securities. [*PIB Press Release, dt. 19-6-2001*].

Companies (Passing of the Resolution by Postal Ballot) Rules, 2001

Press Release, dt. 23-5-2001.—The Government has promulgated the Companies (Passing of the Resolution by Postal Ballot) Rules, 2001 to regulate voting by shareholder by postal or electronic mode instead of voting personally by presenting for transacting business in a general meeting of the company. A notification to this effect has been issued in the Gazette of India under Section 192A read with clauses (a) and (b) of sub-section (1) of Section 642 of the Companies Act, 1956 by the Department of Company Affairs (DCA). The rules have come into force with immediate effect.

1. The Rules define requisite majority with regard to Special Resolution which means votes cast in favour of the business is three times more than the votes cast against, with regard to ordinary resolution, votes cast in favour is more than the votes cast against.

2. The Rules shall apply to listed companies and in case of resolutions relating to such businesses as are specified under rule 4. The list of businesses in which the resolutions may be passed through Postal Ballot will cover alteration in the Object Clause of Memorandum, alteration of Articles of Associations in relation to deletion or insertion of provisions defining private company, buy-back of own shares by the company, issue of shares with differential voting rights as to voting or divided or otherwise, change in place of Registered Office outside local limits of any city, town or village, sale of whole or substantially the whole of undertaking of a company, giving loans or extending guarantee or providing security in excess of the limit prescribed, election of a director, power to compromise or make arrangements with creditors and members and variation in the rights attached to the class of shares or debentures or other securities.

3. Procedure to be followed for conducting business through Postal Ballot will require a company to make a note below the notice of General Meeting for understanding of members that the transactions at serial number(s) require consent of shareholders through Postal Ballot. The board of directors shall appoint one scrutinizer, who is not in employment of the company, may be a retired judge or any person of repute who, in the opinion of the board can conduct the Postal Ballot voting process in a fair and transparent manner. The scrutinizer will be in position for 35 days (excluding holidays) from the date of issue of Notice for Annual General Meeting. He is to submit his final report on or before the said period. The

scrutinizer will be willing to be appointed and he is available at the Registered Office of the company for ascertaining the requisite majority.

4. The scrutinizer shall maintain a register to record the consent or otherwise received, including electronic media, mentioning the particulars of name, address, folio number, number of shares, nominal value of shares, whether the shares have voting, differential voting or non-voting rights and the scrutinizer shall also maintain record for Postal Ballot which are received in defaced or mutilated form. The Postal Ballot and all other papers relating to Postal Ballot will be under the safe custody of the scrutinizer till the Chairman considers, approves and signs the minutes of the meeting. Thereafter, the scrutinizer shall return the Ballot Papers and other related papers/register to the company so as to preserve such Ballot Papers and other related papers/register safely till the resolution is given effect to. Consent or otherwise relating to issue will be strictly treated as if the reply from the member has not been received. [*PIB Press Release issued on 23-5-2001*].

Departments Clarification of the Rules, General Circular No. 16/2001, dt. 24-7-2001.—Section 192A (1) of the Companies Act, 1956 was inserted by the Companies (Amendment) Act, 2000 which came into force with effect from 13th December, 2000. The provisions of the section give all listed companies an option of passing shareholder's resolution through postal ballot. Further, they are necessarily required to get certain businesses as notified by the Central Government vide notification number GSR 337(E) dated 10th May, 2001 to be passed through postal ballot.

The Companies (Passing of the Resolution by Postal Ballot) Rules, 2001 which were notified on 10th May, 2001 mention transactions to be transacted through postal ballot. Pursuant to section 2 of the Companies (Amendment) Act, 2000 a notification number S.O.523(E) dated 15th June, 2001 was published indicating the date from which the provisions of section 192A shall come into force i.e. 15th June, 2001.

The Department has received a number of queries from the professionals, Chamber of Commerce & Industry, corporate sectors etc. on the above subject. The points raised have been carefully examined and Department's views thereon are indicated below:—

1. The Companies (Passing of the Resolution by Postal Ballot) Rules, 2001 read with section 192A shall apply to notices calling meetings of the shareholders approved by the Board of Directors after 15th June 2001.

2. According to the provisions of section 192A, it is not mandatory for the company to release an advertisement giving the date of completion of despatch of postal ballots. However, as a measure of Good Corporate Governance companies in their own interest may release an advertisement for publishing the date of completion of despatch of postal ballots.

3. A specimen postal ballot form and items to be included in the calendar of events for conducting voting through postal ballot are enclosed for the use and convenience of the companies. The concerned companies must ensure that the postal ballots are serially numbered and have distinguishing water marks in order to avoid printing of any duplicate ballot papers.

4. The companies are required to specify the last date by which the postal ballot must be received by the company keeping in view the provisions contained in Rule 5(f) of the Companies (Passing of the Resolution by Postal Ballot) Rules, 2001 and the instructions at serial number 5 of the specimen postal ballot form.

5. It is clarified that voting right on postal ballot shall be in proportion to the shareholders share of the paid up equity share capital of the company.

6. The company secretary along with one of the functional directors should be made responsible for the entire postal ballot process by means of an appropriate board resolution. The resolution should be passed in the Board Meeting in which notice required to be sent to the shareholder under section 192A (2) is approved by the Board. A copy of the board resolution should be despatched alongwith item to be included in the calendar of events within one week of passing of the Board resolution to the concerned Registrar of Companies for information.

7. A query has been raised whether Companies (Passing of Resolution by Postal Ballot) Rules, 2001 is applicable only in respect of list of businesses as notified under rule 4 of the said rule. It is hereby clarified that the Central Government may at any time include or delete the items to be transacted through postal ballot, therefore, the procedure as specified in the rules has to be followed for any business to be transacted through postal ballot.

8. A query has also been raised whether passing of all resolution in respect of ordinary and special business other than those covered under rule 4 of the said Rules can be treated as sufficient compliance of provisions of section 166 of the Companies Act, 1956 and also whether the company is required to convene a general meeting in case the resolutions are to be passed through postal ballot. While the companies are required to hold annual general meetings which is a mandatory requirement under section 166 of the Companies Act, 1956 it is hereby clarified that any listed company which intends to transact such businesses as notified under rule 4 of the said Rules has to do so only in the general meeting along with other ordinary businesses and special business, if any. The companies are required to send notice only in

respect of item to be transacted through postal ballot well in advance so that the reply is received from the shareholders before the date of the general meeting. This will enable the scrutinizer to be in a position to make an entry in the appropriate register maintained for the purpose and make it available to the Chairman of the general meeting who shall declare the results in the general meeting. The date of passing of the resolution will be the date of the General Meeting.

XYZ LIMITED

Registered Office .....

Postal Ballot Form

1. Name(s) of Shareholder(s) _____
   (in block letters) _____
   (including joint holders, if any) _____
2. Registered address of the sole/first named shareholder _____
3. Registered folio No./DP ID No./Client ID No.* _____
   (*. Applicable to investors holding shares in dematerialized form)
4. Number of shares held _____
5. I/We hereby exercise my/our vote in respect of the ordinary/special resolution to be passed through postal ballot for the business stated in the notice of the Company by sending my/our assent or dissent to the said resolution by placing the tick (_/) mark at the appropriate box below.

Item No.	No. of shares		
		I/We assent to the resolution	
		I/We dissent to the resolution	

Place:

Date:

_____

(Signature of the shareholder)

Instructions

1. A member desiring to exercise vote by postal ballot may complete this Postal Ballot Form and send it to the company in the attached self-addressed envelope. Postage will be borne and paid by the company. However, envelopes containing postal ballots, if sent by courier at the expenses of the registered shareholder will also be accepted.
2. The self-addressed envelope bears the address of the scrutineer appointed by the Board of Directors of the company.
3. This form should be completed and signed by the shareholder. In case of joint holding, this form should be completed and signed (as per the specimen signature registered with the company) by the first named shareholder and in his absence, by the next named shareholder.
4. Unsigned Postal Ballot Form will be rejected.
5. Duly completed Postal Ballot Form should reach the company not later than the close of working hours on ---------- (day)---------- (date). Postal Ballot Form received after this date will be strictly treated as if the reply from the member has not been received.
6. Voting rights shall be reckoned on the paid up value of shares registered in the name of the shareholders on the date of despatch of the notice.

Items to be included in the calendar of events

1. Date of Despatch of notice of Meeting in which the business as notified by the Central Government will also be transacted through Postal Ballot.
2. Date of completion of despatch of notice along with Postal Ballot.

3. Date of appointment of scrutinizer.
4. Date on which consent given by the scrutinizer to act as scrutinizer.
5. Last date for receiving Postal Ballot papers by scrutinizer.
6. Date of signing of the minutes book by the Chairman in which the results of ballot is recorded.
7. Date of returning the Ballot papers, register required to be maintained by the scrutinizer under rule 5(e) of the Companies (passing of the resolutions by postal ballot) Rules, 2001 and other related papers to the Chairman by the Scrutinizer.
8. Date of Board resolution authorising one of the functional directors and the secretary to be responsible for the entire poll process.
9. Date of handing over the ballot papers to the designated authority.

[*General Circular No. 16/2001, dt. 24-7-2001 by Deptt. of Company Affairs, File No. 1/15/2000-CL-V*]

Sweat Equity issue to promoters, postal ballot

Regulation 6 of SEBI (Issue of Sweat Equity) Regulations, 2002 requires that issue of sweat equity shares to promoters shall be approved by a simple majority of shareholders in a general meeting. The Regulation also suggests in its proviso that companies should adopt for this purpose the method of passing the resolution by postal ballot. It should be noted that the Central Government's list of items for which postal ballot is compulsory under the Rules prescribed by it does not contain this item.

Objects of section

The section enables members to exercise their voting right sitting at home through postal ballot which they might not have otherwise done because of their inability to attend meetings or to appoint proxies.

Members of a listed company are widely dispersed and there is very poor attendance at general meetings. The meetings are normally attended by promoters, their friends and associates who collect proxies and by and large, resolutions are passed unanimously and without any dissent. Most of the public shareholders are only interested in capital appreciation of their shares and are not interested in attending general meetings. Further, general meetings are required to be held during working hours and shareholders find it difficult to attend meetings. In view of the provisions made in this section, it would now be possible for all the shareholders of a listed company to exercise their right to vote in case of important resolutions.

***Non obstante* clause [sub-section (1)]**

Sub-section (1) starts with *non obstante* clause. Thus, the provisions contained in sections 51, 53, 87, 171-185 and 189 will apply to postal ballot resolution only to the extent of application. No general meeting shall be held or convened and instead, resolution shall be deemed to be duly passed based on the assents and dissents recorded by the shareholders on the postal ballots.

Members may have lost the forum of discussion but that is not a real loss because even otherwise they do not attend. The management of the company may not be able to orally support the* resolution to modify or withdraw it, but even that would not be of any consequence because a resolution on items specified for postal ballot has to be very specific.

Power of Central Government [Sub-section (1)]

The Central Government is empowered to specify, by notification, the resolutions relating to the business to be conducted by postal ballot by listed companies. Under sub-section (3), the Central Government is also empowered to prescribe any other method for

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* SEBI allowed use of postal ballot in and for the purposes of acquisition of shares in a company. *Punjab State Industrial Development Corpn. Ltd. v. SEBI*, (2001) 43 CLA 209 : (2001) 32 SCL 631 (SAT) for detail see Notes in SEBI (Substantive Acquisition of Shares and Take Overs) Regulations, 1997 in *Appendix* 177.

sending notice to shareholders, than by Registered A.D. post. Registered AD post charges are likely to involve heavy cost to the company. That is why notices by certificate of posting have been permitted under the Rules. The company has to maintain the record of despatch and the scrutineers will receive back the ballots.

Notice to members [Sub-section (2)/(3)]

The notice has to be sent by the company to all the members and has to contain (i) draft resolution explaining the reasons thereof, (ii) postal ballot for giving assent or dissent, in writing, by members, and (iii) postage prepaid envelope for communicating assents or dissents to the resolution to the company within 30 days of the despatch of the notice. These provisions are in addition to the compliance of the relevant provisions of sections 171(1), 172(2) and 173(2).

Passing of resolution by postal ballot [Sub-section (4)]

Only those assents/dissents are to be considered which have been sent by the members within 30 days prescribed under sub-section (2).

Sub-section (4) makes a deeming provision that if a resolution is assented by requisite majority of shareholders by means of postal ballot, it shall be deemed to have been passed at a general meeting convened in that behalf. The requisite majority will depend upon whether the proposed resolution is ordinary or special. Although not stated, it appears that the resolution shall be deemed to have been passed on the date of expiry of a period of 30 days specified in sub-section (2).

Requisite majority.—Sub-section (4) provides that a resolution shall be deemed to have been duly passed, if the same is assented to by "a requisite majority of the shareholders" by means of postal ballot. Normally, in case of a general meeting, every member present has one vote in case of show of hands and, in case of poll, the voting right of the members present in person or by proxy is in proportion to his share of the paid-up capital of the company *vide* sections 87, 176, 177 and 179. A resolution is to be deemed to have been passed according to the requisite majority on the basis of the ballots received back by the scrutineers.

Penalty for default [Sub-section 5]

Sub-section (5) provides for penalty by way of imprisonment up to six months or fine without any limit, or both, against any person who fraudulently defaces or destroys the ballot paper or declaration of identity of the shareholder.

Sub-section (6) provides for penalty for non-compliance of the provisions of sub-sections (1) - (4) by way of fine up to Rs. 50,000/- for each default to be paid by the company and its officers in default.

Compoundable offence.—Both the offences are compoundable under section 621A.

ICSI Guidance Note on Compliance Certificate (August, 2003)

Passing of Resolutions by Postal Ballot under Section 192A by a Listed Company

Check List

Check whether :

(i) the company has passed any resolution by resorting to postal ballot;

(ii) the company has passed the resolution only by postal ballot in respect of following business as declared by the Central Government to be conducted by means of a postal ballot;

— alteration in the object clause of memorandum;

— alteration of articles of association in relation to insertion of provisions defining private company;

— buy-back of own shares by the company under sub-section (1) of section 77A;

— issue of shares with differential voting rights as to voting or dividend or otherwise under sub-section (ii) of clause (a) of section 86;

— change in place of registered office outside local limits of any city, town or village as specified in sub-section (2) of section 146;

— sale of whole or substantially the whole of undertaking of a company as specified under sub-clause (a) of section (1) of section 293;

— giving loans or extending guarantee or providing security in excess of the limit prescribed under sub-section (1) of section 372A;

— election of a director under proviso to sub-section (1) of section 252 of the Act;

— variation in the rights attached to a class of shares or debentures or other securities as specified under section 106.

(iii) the company had sent a Notice to all the shareholders;

(a) by registered post acknowledgment due or under certificate of posting and has published an advertisement in a leading English Newspaper and in one vernacular Newspaper circulating in the State in which the registered office of the company is situated, about having despatched the ballot paper;

(b) along with a draft resolution explaining the reasons therefor and requesting them to send their assent or dissent in writing on a postal ballot within a period of thirty days from the date of posting of the letter;

(c) along with a postage pre-paid envelope for facilitating the communication of assent or dissent of the shareholder to the resolution within the said period.

(iv) the appointment of Scrutinizer is in order i.e. w.r.t. Board resolution;

(v) postal Ballot papers from the shareholders were received within thirty days form the date of issue of Notice;

(vi) the Board resolution making the Company Secretary and one of the functional director responsible for the entire Postal Ballot process was delivered to ROC within one week of passing such resolution;

(vii) the company has sent the notice of resolution to be passed by Postal Ballot by Registered post Acknowledgement Due or under Certificate of Posting;

(viii) the resolution passed without modification;

(ix) the resolution passed was assented to by the requisite majority; and

(x) the Register of Postal Ballot, Postal Ballot forms and other documents were maintained and preserved till the resolution was given effect to.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

This matter is not directly referred to in the 33 paragraphs appended to the Form prescribed under the Companies (Compliance Certificate) Rules. The Check List given by the ICSI under heading *'Check List for Other Compliances'*—'2. *Statutory Meetings/Class Meetings' [Item (d)]* is for the guidance of CSP who may, in the course of his scrutiny, come across non-compliance with regard to this matter. CSP need not qualify such non-compliance.

S. 193. Minutes of proceedings of general meetings and of Board and other meetings.—[1][(1) Every company shall cause minutes of all proceedings of every general meeting and of all proceedings of every meeting of its Board of directors or of every committee of the Board, to be kept by making within [2][thirty] days of the conclusion of every such meeting concerned, entries thereof in books kept for that purpose with their pages consecutively numbered.

(1-A) Each page of every such book shall be initialled or signed and the last page of the record of proceedings of each meeting in such books shall be dated and signed—

(a) in the case of minutes of proceedings of a meeting of the Board or of a committee thereof, by the chairman of the said meeting or the chairman of the next succeeding meeting;

(b) in the case of minutes of proceedings of a general meeting, by the chairman of the same meeting within the aforesaid period of [2][thirty] days or in the event of the death or inability of that chairman within that period, by a director duly authorised by the Board for the purpose.

(1-B) In no case the minutes of proceedings of a meeting shall be attached to any such book as aforesaid by pasting or otherwise.]

(2) The minutes of each meeting shall contain a fair and correct summary of the proceedings thereat.

(3) All appointments of officers made at any of the meetings aforesaid shall be included in the minutes of the meeting.

(4) In the case of a meeting of the Board of directors or of a committee of the Board, the minutes shall also contain—

(a) the names of the directors present at the meeting; and

(b) in the case of each resolution passed at the meeting, the names of the directors, if any, dissenting from, or not concurring in, the resolution.

(5) Nothing contained in sub-sections (1) to (4) shall be deemed to require the inclusion in any such minutes of any matter which, in the opinion of the chairman of the meeting—

(a) is, or could reasonably be regarded as, defamatory of any person;

(b) is irrelevant or immaterial to the proceedings; or

(c) is detrimental to the interests of the company.

Explanation.—The chairman shall exercise an absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes on the grounds specified in this sub-section.

(6) If default is made in complying with the foregoing provisions of this section in respect of any meeting, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [3][*five hundred rupees*].

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1. Subs. by Act 65 of 1960, s. 52.
2. The word "thirty" was substituted for the word "fourteen" by the Companies (Amendment) Act (XXXI of 1965), s. 62 (w.e.f. 15-10-1965).
3. The words "fifty rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 81 (w.e.f. 13-12-2000).

NOTES

Eng. Act, 1948 : Sec. 145
Eng. Act, 1985 : Sec. 382

Previous Act : Sec. 83

Companies Act, 1956

Recommendation of Company Law Committee.—The provisions of this section embody the suggestions of the Company Law Committee in para 79 of their *Report*: "Our attention was drawn to the failure on the part of the management of some companies to record in the minutes a fair summary of the proceedings of general meetings, inclusive of material questions asked and replies given and comments made. This, in our view, is not a healthy practice and should be discouraged by positive provisions inserted in the section. In view of the fact that general meetings are usually very sparsely attended, a practice has grown up of circulating the minutes of such meetings to all shareholders. It is, therefore, essential that these minutes should contain a brief but authentic record of all that happens at general meetings, so that the absentee shareholders may be in a position to form some reliable idea of what transpired at these meetings. We, therefore, recommend that the provisions of this section should be so amended as to provide explicitly that the minutes of the general meetings should contain a fair summary of the proceedings of such meetings and, in particular, of all material questions asked or comments made. We further recommend that such minutes should not be circulated or advertised at the expense of a company, unless they contain the matters mentioned above. It will be necessary for the chairman of the meeting to decide what is fair summary of its proceedings or what questions asked or comments made would be deemed to be material for the purposes of the meeting, but a statutory obligation to cast the minutes in a particular manner will, we trust, be a useful safeguard against the manipulation by dishonest and unscrupulous persons.

"As regards the minutes of directors' meeting, the only recommendation that we make is that they should record the names of those directors, if any, who dissent from any decisions arrived at these meetings. Some witnesses questioned the desirability of such a provision. They argued that the decisions taken by a Board of Directors partook of the nature of a collective decision, and if it was made obligatory to record the views of dissentient directors, differences on a board might be encouraged. We have given due consideration to this point of view, but are unable to accept it. The concept of the collective responsibility of directors, however, attractive in theory, is warranted neither by the facts about company management in this or other countries nor by the fundamental postulates of company law. On the contrary, we feel that our suggestion will promote rather than hinder the sense of responsibility among directors and will provide a useful check on the errant elements among them, who now find it easy to hide the undue influence which they exercise over the affairs of companies under the cloak of unanimity." (*Report* : Para 79).

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 50 rupees to 500 rupees under sub-section (6).

Scope of section

The expression 'minute' means the official recording of the proceedings of a meeting. In the plural, "minute" indicate the official record report of the meetings of a company.

Note that minutes of proceedings of committees of directors are also to be maintained.

It is obligatory to keep the minutes book at the registered office of the company, except that it may be removed for the purpose of a board meeting held outside the registered office. [*File No.* 8/16(1)/61-PR]

All appointment of officers made at a meeting of the general body or Board of Directors or committees of the board—also are to be included in the respective minutes.

Where the allegation was that a requisitioned meeting was held and the directors appointed but neither the regular minutes books nor any other book which was supposed to

contain the record of the meeting was produced, it was held that the only conclusion was that no such meeting was ever held. *Balasundaram (V.G.) v. New Theatres Carnatic Talkies P. Ltd.*, (1993) 77 Com Cases 324 (Mad).

It has been held in an English case that all resolutions of the board need not be in the shape of formal resolutions passed at a meeting and recorded in minutes, though they ought to be so recorded to the extent it is possible recorded in minutes, though they ought to be so recorded. *H.L. Bolton & Co. Ltd. v. T.J. Graham & Sons Ltd.*, (1956) 3 All ER 624 (CA).

Duty to maintain Minute Books

The Board of directors is duty-bound in the management of the affairs of the company to ensure that statutory records and other records of the company are maintained in accordance with the provisions of law. If, however, the directors are in a position to explain that the responsibility for the maintenance of the minutes books etc. were delegated or otherwise entrusted to any particular director or officer of the company and that they *bona fide* believed that the said minutes books, etc., were being kept in a proper and safe manner by the said director or officer of the company, then in that case, they might not be held responsible for the loss or non-maintenance of the minutes books. It is the duty of each and every director to explain as to why he should not be held responsible for the loss, non-maintenance and non-availability of the minutes books in the facts and circumstances of each case. A director cannot escape liability merely by pleading that he was not directly responsible for the loss of the minutes books and other records. He has to show that he had in the usual circumstances reposed confidence in other directors and/or officers of the company who were entrusted with the responsibility of maintaining the minutes books and that there was no occasion for him to warrant any inquiry into the fact that the minutes books were not properly kept or were in danger of being lost and that he acted in a *bona fide* manner and in the interests of the company. *Technical Consultancy House P. Ltd. v. Kuldip Raj Narang*, (1989) 66 Com Cases 410 at 423, 424 (Del). In an English case the general duty of directors in this respect has been stated as follows: "Directors ought to place on record, either in formal minutes or otherwise, the purport and effect of their deliberations and conclusions; and if they do this insufficiently or inaccurately they cannot reasonably complain of inferences different from those which they allege to be right." *Liverpool Household Stores Asson. Re*, (1890) 59 LJ Ch. 616 at 619.

Right of members to obtain copies of or inspect minutes of Board Meeting

Department's views.—The Companies Act contains no provision either specifically permitting or prohibiting inspection by/or supply of copies to the shareholders of a company of the minutes of the meetings of the Board. This Department is of the view that unless the articles of association provide to the contrary, a shareholder has no right of inspection or of obtaining copies of the minutes of its Board meetings. (*Letter No.* 8/15(169)/63-P.R., dated 11-2-1963).

Minutes kept in loose-leaf form

The amendments made by Amending Act (65 of 1960) are intended to ensure the authenticity of the minutes of proceedings of general meetings and of the proceedings of the Board of Directors of a company (*Notes on Clauses* : Clause 54).

The Joint Committee on the Bill stated:

"That some definite period should be prescribed within which the minutes of proceeding of every general meeting and that of the Board of directors or of its committee should be entered in books kept for that purpose, and they have accordingly suggested fourteen days as the period for doing so.

"They also feel that it would be reasonable if each page of such books is initialled or signed.

"In the case of the minutes of the proceedings of a general meeting, it has been specified that either they should be signed within fourteen days of the meeting by the chairman

of the meeting, or, in the event of his inability to do so, by a director duly authorised by the board for the purpose.

The Committee strongly feel that minutes of proceedings should in no case be attached to the minutes books referred to above by pasting or otherwise." (*Report* : Para 38).

With a view to ensure the accuracy and authenticity of the minutes of proceedings of general meetings, and board meetings the amended section requires:—

(1) that all minutes should be entered in books with pages consecutively numbered, within thirty days of each meeting, and

(2) that every page of the book should be initialled and the last page of the recorded proceedings should be dated and signed by the chairman;

(a) that in the case of a Board or Committee meeting, by the chairman of the meeting or of the next succeeding meeting; and

(b) that in the case of a general meeting by the chairman of the same meeting within thirty days of the meeting.

In no case should loose sheets containing the proceedings be attached or pasted in the books.

The minute book must be a bound book and must be hand-written. It cannot be a loose leaf binder and type written. *Amal Kumar Mukherjee v. Clarian Advertising Services Ltd.*, (1982) 52 Com Cases 315 (Cal). However, the Delhi High Court in *Edward Keventer Successors Pvt. Ltd. v. Krishna Kumar Sud,* (1968) 38 Com Cases 507 (Del) accepted in evidence a minutes book which contained the resolution in dispute typed on a loose sheet and pasted to a leaf of the Minute Book as the resolution having been duly pasted. The learned judges obviously overlooked sub-section (1-B) which specifically prohibits pasting. But in *Gluco Series (P.) Ltd., In re,* (1987) 61 Com Cases 227 (Cal) the Calcutta High Court has held that the minutes of a meeting which were found pasted in the minute book could not be regarded as evidence, since this section had been violated. The Company Law Board has observed that the maintenance of minutes books in loose sheets is permissible. *Ashok Kumar Oswal v. Panchsheel Textile Mfg. & Trading Co. P. Ltd.*, (2002) 110 Com Cases 800 (CLB—PB).

The Supreme Court of India has, however, not decided the point about the maintenance of Minutes in looseleaf typewritten form and companies have been left guessing as to how judges will interpret this practice.

Department's Clarification I.—The Department of Company Affairs (Company Law Board) has by its *Letter No.* 16047/TA/VII, dated 16th December 1972, stated: ".....that on a strict interpretation of the Companies Act 1956, the Minutes of Proceedings of the meetings shall not be attached to the Minutes Book by pasting or otherwise. However, without prejudice to the strict legal position the Department of Company Affairs are agreeable to permit the loose-leaf minute books, provided the Company takes appropriate safeguards against interpolation of the leaves in the books such as serial numbering of pages, authentication of each page of the book, safe custody of the key, if any, to the loose-leaf register. The company should also arrange for the loose leaf minutes to be bound into books at regular intervals of say six months".

Department's Clarification II.—The Department has received representations from a number of companies pointing out that if the word 'books' were to be interpreted strictly to mean only bound books, some of the companies would be bound to discontinue their previous practice of keeping the minutes in loose-leaves which were bound up at suitable intervals and they would be forced to have the minutes written out by hand in the bound books. This, according to them, would be a retrograde step and would be detrimental to the expeditious and neat recording of the minutes. The Department has decided that it would refrain from taking any action against a company which maintained its minutes in the loose-leaf form, provided it complied with the other procedural requirements of the section and at the same time took all possible safeguards against manipulation or interpolation of the minutes and bound up the loose-leaves in books at reasonable intervals, say six months. (*Extract from the Fifth Annual Report* Year ended March 31, 1961.)

Form in which minutes are to be recorded

Department's Clarification.—As to the form in which the minutes are to be recorded the Department has clarified as follows: With reference to the correspondence resting with year *Letter No.* F. 1563/Comm/10, dated the 23rd February, 1971, on the above subject I am directed to say that suggestion that minutes of the general and board meetings may be (i) type-written and then pasted in bound minutes book or loose-leaves and (ii) entered by chemical process, have been duly considered in the Department. The Department's views in the matter are that (i) section 193(1B) is against the pasting of the minutes in the minute book. Minutes of the general and board meetings cannot, therefore, by type-written and then pasted in bound minute book or in loose leaves, and (ii) entering of minutes in the bound minute book by a chemical process which does not amount to attachment to any book by pasting or otherwise is permissible provided on the mechanical impression of the minutes the original signature of the Chairman is given on each page. (*Letter No.* 10(41)/70-CL-TJT, dated 27-5-1971).

Serial numbering, locking device and binding into volumes after regular intervals

Department's Clarification.—For the sake of convenience, the Department does not propose to take objection to minutes being kept in the loose-leaf form where they are already being so maintained. But it is necessary that the pages should be serially numbered and there should be proper locking device to ensure security and proper control to prevent irregular removal of the loose-leaves. However, at regular intervals, say at six months, the loose-leaf books should be bound up to the stage the minutes have been entered. (*Department's File No.* 8/16(1)61-PR).

Minutes books preferably bound but field officers advised not to insist upon it

Department's Clarification.—In view of the provisions of sub-section (1B) of section 193, which prohibits attachment of the minutes of a meeting in the minutes book by pasting or otherwise every company has, apparently to maintain the minutes in a bound book only. However, this provision is not incapable of a different interpretation. Maintenance of minute books in loose-leaf form, whereby loose-leaves which were serially numbered could be taken out and re-inserted after the proceedings had been typed on them would not, strictly speaking, amount to 'attachment' within the meaning of the sub-section. In view of this and also in view of the fact that the use of loose-leaf forms for minute books is a convenient modern technique for neat and expeditious recording of the minutes, especially for big companies where the minutes may run into many pages, Field Officers are advised not to insist on minutes being kept in a bound book. No general advice in this regard need, however, be issued by them to the business community, on the contrary companies which may approach the Field Officers in the matter may be given the suggestion that it would be preferable for them to keep bound minute books. No action, however, need be taken if a company is found to be keeping loose-leaf books, unless there is any interpolation in the minutes. (*Department's File No.* 8/16/(1)/61-PR).

Evidentiary value.—For the evidentiary value of minutes see notes under Ss. 194 and 195 and *B Sivaraman v. Egmore Benefit Society Ltd.*, (1992) 75 Com Cases 198 (Mad). Discussed under the above sections.

Drafting minutes

Minutes should commence with the name of the body concerned and the date, time and place of the meeting, and contain a record of the names of the members present or a note of the list, attendance sheets or other documents where their names may be found.

Minutes should be accurate, clear and unambiguous, concise, record the narrations vital to understand the proceedings and the full text of all resolutions and avoid comments and expressions of opinion. It should contain a substance of the discussion at the meeting leading to the resolution. A record of just the resolution passed without recording the substance of the discussion will not qualify the test laid down in sub-section (2). The names of the proposers and seconders of motions are usually shown, but there is no need to record details of voting.

Pre-prepared minutes.—It has been observed that the use of pre-prepared minutes of Board and shareholders meetings is not improper provided that the meeting did deal with the business indicated in the draft minutes. *R. (on the Application of Inland Revenue Commissioners) v. Kingston Crown Court*, (2001) 4 All ER 721, QBD (Admin. Ct.)

Contents of minutes.—Minutes should contain a record of the names of the members present. A practice is sometimes adopted in the case of a Board or committee to procure the members' signatures at the head of the first sheet to be used for the minutes. This practice will obviate the need of having a separate book for recording the attendance of

members and at the same time furnish a record which can be used as evidence of the presence of any particular person at the meeting.

In cases where directors arrive after the start of the proceedings or leave before their conclusion, it is the usual practice to record in the minutes that a director joined or left a meeting during the proceedings.

The records of the meeting of the Board need not necessarily be in the form of resolutions so long as the minutes show the substance of the decision arrived at. *Re, Land Credit Co.*, (1869) LR 4 Ch 473.

The dissent of the member, if any, be recorded.

Writing of minutes within thirty days

Department's Clarification.—How can it be ensured that minutes have been written up within 14 days (*now thirty days*) of the meeting? When should minutes be circulated among the members of the Board of Directors—whether after they have been finalised—or before? If before finalisation, should all these take place within the 14 days' (*now within thirty days*) period?

The details as to when and how the minutes of the meetings of the Board of Directors as well as of the general meeting may be written up may be left to the managements of companies, who are expected to fulfil the requirements of the section. The Department of Company Law Administration or the Registrars of Companies can hardly undertake an investigation or enquiry to ascertain that each company is complying with the law in this respect. Section 196 of the Act confers a right on shareholders to have inspection of the minutes book of general meetings and if a complaint is made that a shareholder has not found the minutes written up within the prescribed time, action can be taken under section 193(6) in suitable cases. Where the Registrar of Companies has reason to suppose that the minutes have not been written up in due time, he can (where such action is really justified) independently find an excuse to call for the minutes book in exercise of his powers under section 234(3A). As regards the minutes of the Board meetings, in view of the provisions of section 193(1A)(a), it is likely that they would be written up before the next meeting of the Board in any case. These minutes are in the nature of confidential papers and unless any complaints are received, the matter may be left to the good sense of the directors and no interference need be made in what really is a domestic affair of the company. [*Department's File No.* 2/25/61-PR].

Entries in the minute book must be made witnin thirty days. In *Toms v. Cinema Trust Ltd.*, (1915) WN 29, it was held that the director whose remuneration was increased could not recover the additional remuneration as such increase was not recorded in the minute book uptil 12 Months of the meeting.

Correction of error(s) in minutes

One of the purposes of reading the minutes of a previous meeting is to offer an opportunity to make corrections of mis-statements or errors, if any, that may have crept into the record. The manner of correcting depends upon the importance of the matter to be corrected. The Chairman may informally direct the correction of simple mistakes. If a dispute arises as to the correctness of a statement, motion or resolution recorded in the minutes, it may be necessary to put the matter to vote in order to determine how the minutes should read. If the correction involves a revision of the minutes of the previous meeting, the proper procedure is for the minutes of the current meeting to record the corrections so made.

If there be something recorded at an earlier meeting which is not acceptable at a later meeting, proper procedure is to pass a subsequent minute rescinding the terms of the old minutes. The old minutes should not be deleted or crossed out at the confirmatory meeting. *Cf. Re, Cawley & Co.*, (1889) 42 Ch D 209 (CA).

In the case of Board Meetings it is the usual practice with companies, to circulate the draft prints for comments by directors. Taking into account the time limit for recording the Minutes (and signing the copy by the chairman) within thirty days, it should be ensured from the practical point of view that the comments are received sufficiently early for the same to be considered and the draft as amended are recorded in Minutes Book within time limit. As otherwise, the comments by way of amendments to the Minutes has

to be processed at the next meeting and where the amendment are expected to be large, such procedure might not be considered advisable in practice.

Consistently with the requirements of the section, the Board of Directors is competent to rectify the minutes of an earlier meeting. Accordingly, the amended resolutions recorded in the minutes were taken to be good evidence under s. 194. The matter arose out of the directors' refusal to accept a bulk transfer of shares. *Gordon Woodroffe Ltd. v. Trident Investment and Portfolio Services P. Ltd.*, (1994) 79 Com Cases 764 (CLB—Mad).

Confirming minutes of prior Board Meeting

Where, at a board meeting, the minutes or the proceedings or a prior board meeting are merely recorded as 'read and confirmed', such recording has not the effect of ratifying the resolutions passed at the prior meeting. It only means that the proceedings at the prior meeting stated in the minutes are correctly expressed or recorded. See *Parmeshwari Prasad Gupta v. Union of India,* (1974) 44 Com Cases 1 : AIR 1973 SC 2389. 'Ratification implies a decision, express or implied, by way of approval or acceptance of what was done at the prior meetings'.

Departments Clarification.—In the view of the Department, (A) it is not obligatory for a company to wait for the next Board meeting in order to have the minutes signed of the meeting already held. Such minutes may be signed by the chairman of the meeting at any time before the next meeting is held. (B) The course of confirming the minutes of any board meeting by the members of the board at the next meeting is not contemplated by the law. (C) Since as stated the confirmation of minutes of a Board meeting is not required, the question of postponing action on the resolutions already passed by the Board for want of such confirmation would not arise. Since by such postponement of action, legal consequences are liable to be incurred, it would serve to indicate why the law does not contemplate confirmation of the minutes of any Board meeting as such. (D) Where there is a practice of presenting the minutes of a meeting for confirmation by the Board of Directors at the next meeting, it may be noted that if such minutes have already been signed by the Chairman of the meeting concerned, the minutes attract the presumptions contained in section 195 of the Act and as such it will be possible to have any alteration in the minutes only by way of fresh resolutions of the Board meeting in which the minutes of the meeting in question are discussed. Even if the minutes have not been signed but have been approved by the Chairman of the meeting concerned, the same position as indicated above will prevail. In order that any change in such minutes may be effected, the only way open is to adopt fresh resolutions in modification on the footing that the minutes as recorded on the approval of the Chairman stand. (*Letter No.* 8/2 (Misc)/75-CL-V, dated 5-5-1975).

Confirmation of minutes not necessary

Decisions once arrived at do not need confirmation and the practice adopted of confirming minutes has no legal significance. A statement to this effect in SHACKLETON ON THE LAW AND PRACTIC OF MEETINGS, 7th Edition, p. 83 [: 9th Edn., para 8.03, p. 87] has been cited by the Karnataka High Court in *Karnataka Bank Ltd. v. A.B. Datar,* (1994) 79 Com Cases 417 at p. 436. "At a vestry meeting it was the usual procedure to read over at the next meeting the resolutions of the preceding one. At the second of two meetings there was considerable diversity of opinion as to the votes admitted at the first meeting, but judgment was to the effect that there was no necessity for the confirmation by the second vestry of what was legally done at the first. If the first was a legal vestry the election thereat was legal. *Mawley v. Barbet* (1803) 2 Esp 687. However, confirmation of the minutes as an accurate record of the decisions made at the previous meeting is usually obtained by submitting them to the chairman of the next meeting for signature. If they have not been previously circulated he will ask the secretary to read them, and, if the meeting confirms (usually on a show of hands) that they are a correct record, he will sign them. If they have previously been circulated, he will sign them without their being read out if the meeting so agrees. The chairman who signs the minutes at the next meeting need not necessarily have been present at the meeting of which the minutes are a record. His action in signing them is merely to record that they are a correct record of the business transacted." [See SHACKLETON 9th Edn., 1997, p. 87]. Accordingly, a company can implement its resolutions without waiting for their confirmation at the next meeting. A director by voting at a subsequent meeting for the confirmation of the minutes does not

make himself responsible for acts done at a Board meeting at which he was not present. *Burton v. Bevan,* (1908) 2 Ch 240; *Re, Lands Allotment Co.,* (1894) 1 Ch 616.

Period within which minutes to be signed

Department's view.—Recently the Department had an occasion to consider the question whether a Chairman of one Board meeting or a Committee of the Board should cause minutes of all proceedings of every meeting of its Board within 30 days of the conclusion of every such meeting as per sub-section (1) of section 193 of the Companies Act, or whether it can be legally contended that the Chairman of the next Board meeting to be held within the meaning of section 285 of the Companies Act, can validly sign such minutes.

2. The question has been examined in consultation with the Department of Legal Affairs and this Department has been advised that clause (b) of section 193(1A) shows (i) what is to be done and (ii) the period within which it is to be done. Clause (a) of section 193(1A) on the other hand shows only what is to be done but is silent regarding the period within which it is to be done. However, regarding the period within which it is to be done there is a clue. There is an indication from the fact that section 193(1A)(a) provides that in the case of minutes of the meeting of the Board of Directors every page of every such book is required to be initialled or signed and the last page of the record of proceedings of each page of such book is required to be dated and signed either by the Chairman of the said meeting or the Chairman of the next succeeding meeting. Thus section 193(1A)(a) gives option to Chairman of the meeting of the Board of Directors or the Chairman of the next succeeding meeting of the Board of Directors to initial or sign every page of every book and to date and sign the last page of the record of the proceedings of the meeting. Section 285 of the Act shows that next succeeding meeting can be held within three months. The company has got absolute option under the Act by virtue of section 285 to hold its Board meeting at interval of not exceeding three months subject to fulfilments of the other condition. If this option is meant to be fully and really exercised by the company after any Board meeting is held, either the Chairman of the meeting the minutes of which are required to be signed or the Chairman of the next Board meeting can sign the minutes. Thus it cannot be insisted upon that the minutes of the Board meeting have to be signed within 30 days. Insistence can be made only as to the writing of the minutes within the period of 30 days from the date of the meeting held.

3. The above views may please be kept in view while taking up the matters with the companies or at the time of inspection under section 209A of the Companies Act, 1956 (*Circular No.* 25/76 dated 1st September, 1976).

Chairman's signature.—The chairman of the next succeeding meeting need not necessarily have been present at the meeting of which the minutes are a record. His action in signing them is merely to record that they are a correct record of the business transacted. If the chairman refuses to sign, a record should be made in the minutes to the effect that the minutes of the previous meetings were correct.

This section requires the minutes of the proceedings of the meeting of the Board of directors to be signed by the chairman of the said meeting or by the chairman of the next succeeding meeting. It does not require that all the members of the Board of directors should sign the same. *Prafulla Kumar Rout v. Orient Engg. Works P. Ltd.,* (1986) 60 Com Cases 65 at 72 (Ori).

Where a chairman was appointed by the court to preside over a meeting of the Board of directors because of a conflict of interests among its members, the court said that the minutes prepared or approved by him were to be accepted as authentic and not the minutes prepared by the secretary of the company. *Nazir Hoosein v. Darayas Bhattena,* (2000) 37 CLA 414 : (2000) 4 SLT 680 (SC).

Exemption to section 25 companies.—Section 193 applies to section 25 companies subject to the modification that minutes may be recorded within 30 days of the conclusion of every meeting in case of companies where the articles of association provide for confirmation of minutes by circulation (*S.O. No.* 1578, dated 1-7-1961).

Penalty for default.—For default made in complying with the provisions of this section in respect of maintenance of minutes of proceedings of any meeting, the company and every officer of the company who is in default is punishable with fine which may extend to five hundred rupees.

Compoundable offence.—The offence is compoundable under section 621A.

ICSI Guidance Note on Compliance Certificate (August, 2003)

The ICSI has issued a Check List for issue of Compliance Certificate under proviso to Sec. 383A(1) in respect of maintenance of registers. The relevant paragraph 1 of the Form prescribed under Rule 3 of the Companies (Compliance Certificate) Rules, 2001 states :

"Paragraph 1.— **The company has kept and maintained all registers as stated in Annexure "A' to this certificate, as per the provisions and the rules made thereunder and all entries therein have been duly recorded."**

Minutes Book of Class Meeting/Creditors Meeting [*Item (j)*]

Prescribed Check List

Check whether company has held class meetings, debenture holders meetings or creditors meeting. If yes, whether minutes book in respect of these meetings has been properly maintained.

Paragraph 4 under Rule 3 relates to meetings of Board of Directors and minutes thereof and reads as follows:

Paragraph 4.—**The Board of directors duly met.....times on..... (dates) in respect of which meetings proper notices were given and the proceedings were properly recorded and signed including the circular resolutions passed in the minutes book maintained for the purpose.**

Prescribed Check List

(a) Meetings of Directors

See under sec. 285.

(b) Minutes Book of Meetings of Directors

Check whether:

(i) minutes books for Board and Committee Meetings are maintained in accordance with the provisions of section 193;

(ii) the proceedings of each Meeting are entered within 30 days of the Meeting;

(iii) each page of the minutes book is consecutively numbered;

(iv) each page of individual minutes is duly initialled or signed and the last page of each such minutes is dated and signed by the Chairman of the same Meeting or of the next succeeding Meeting;

(v) names of directors present at the Meeting are recorded in the minutes;

(vi) leave of absence granted is recorded;

(vii) nature of interest of a director in any transaction and also his abstaining from discussion/voting on resolution are recorded;

(viii) names of directors dissenting from or not concurring with the resolution are recorded;

(ix) minutes have not been attached or pasted to the minutes book;

(x) minutes are maintained in loose leaf form; if so whether safeguards against manipulation have been taken and the leaves are bound at reasonable intervals, say six months/one year; and

(xi) the fact that documents or drafts placed before the Meeting is recorded in the minutes.

Paragraph 6 under Rule 3 relates to annual general meetings and minutes thereof, and reads as follows:

Paragraph 6.—**The annual general meeting for the financial year ended on..... was held on..... after giving the due notice to the members of the company and the resolutions passed thereat were duly recorded in Minutes Book maintained for the purpose.**

Prescribed Check List

(a) Annual General Meeting

See Sec. 166.

(b) Sending of notices, etc. to the members

See Sec. 171.

(c) Minutes Books of Proceedings of General Meetings

Check whether:

(i) minutes books are properly maintained

— the proceedings of each general meeting have been entered within 30 days of the meeting;

— the pages of the minutes book are consecutively numbered. Each page is duly initialled or signed and the last page of the record of proceedings of each meeting is dated and signed by the Chairman of the meeting within 30 days of the meeting,

— in the event of death/inability of the Chairman to sign minutes of the general meeting, the Board resolution has been passed authorising any director to sign within that period;

— the minutes are not attached or pasted. All erasures or alterations are duly authenticated;

— the minutes are maintained in loose leaf form; if so whether safeguards against manipulation have been taken and the pages are bound at reasonable intervals, say six months/one year; and

— the fact that documents or drafts placed before the meeting is recorded in the minutes.

(ii) minutes books have been kept at the registered office of the company and kept open during business hours for inspection of members and also, inspection is allowed to any member without charge during business hours subject to such reasonable restrictions as the company may, by Articles or in general meeting impose;

(iii) check if copies of minutes of general meetings were furnished within 7 days of the receipt of request on payment of Re. 1 for every 100 words or fractional part thereof or such other fee as may be prescribed.

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

Check further—

(i) that the minutes of each meeting contain a fair and correct summary of the proceedings thereat and all appointments of officers made at the meetings are included therein.

(ii) that the minutes of general meetings contain the number of members attending the meeting in person and those by proxy.

(iii) copies of minutes of general meetings are forwarded to the stock exchanges where the shares of the company are listed.

(iv) that the report of proceedings of general meeting is neither circulated nor advertised at the expense of the company unless matters required by section 193 are contained therein [section 197].

Documents Involved: 1. Minutes of Board/Committee/General Meeting, 2. Agenda and Notices of Meeting. 3. Attendance Register.

Secretarial Standards on Meetings of the Board of Directors issued by the Council of ICSI (SS-1) [w.e.f. 13-12-2001]

These Standards seek to prescribe a set of principles for the convening and conduct of meetings of the Board of Directors and matters relating thereto. In the initial years, adherence by a company to this Secretarial Standards will be recommendatory.

The principles enunciated in the Standards for Meetings of the Board of Directors are equally applicable to Meetings of Committees, unless otherwise stated therein or otherwise stipulated by any other applicable guidelines, Rules or Regulations.

Secretarial Standard [Paras 8, 9 and 10]

8. Minutes

8.1 Within seven days from the date of the Meeting of the Board or Committee or of an adjourned Meeting, the draft Minutes thereof should be circulated to all the members of the Board or the Committee, as the case may be, for their comments.

The Directors should forward their comments on the draft Minutes within 15 days from the date of circulation thereof, so that the Minutes are finalised and entered in the Minutes Book within the specified time limit of thirty days.

8.2 The Minutes of proceedings of a Meeting should be entered in the Minutes Book within thirty days from the conclusion of the Meeting.

In case a Meeting is adjourned, the Minutes should be entered in respect of the original Meeting as well as the adjourned Meeting within thirty days from the date of the respective Meetings. In respect of a Meeting adjourned for want of Quorum, a statement to that effect should be recorded in the Minutes Book by the Chairman or any Director present at the Meeting.

8.3 The date of entering the Minutes should be specified in the Minutes Book by a Director or the Secretary.

8.4 The Chairman should initial each page of the Minutes, sign the last page of the Minutes and append to such signature the date on which he has signed the Minutes.

While the law requires that Minutes of the proceedings should be entered in the Minutes Book within thirty days of the Meeting, there is no prescribed time limit within which such Minutes have to be signed. They could be signed beyond a period of thirty days if the succeeding Meeting is held after a period of thirty days from the date of the earlier Meeting. However, it is also not obligatory to wait for the next Meeting in order to have the Minutes of the previous Meeting signed. Such Minutes may be signed by the Chairman of the Meeting at any time before the next Meeting is held.

The Minutes of Meetings of the Board can be inspected only by the Directors. While the Auditor or Cost Auditor of the company or Secretary in whole-time practice appointed by the company can also inspect the Minute Books in the course of audit or certification, a member of the company has no right to inspect the Minutes of Meetings of the Board or any Committee thereof. Officers of the Registrar of Companies, or other Government or regulatory bodies duly authorised in this behalf under law, during the course of an inspection, can also inspect the Minutes.

8.5 Minutes should not be pasted or attached to the Minutes Book.

8.6 Minutes, if maintained in loose-leaf form, should be bound at intervals coinciding with the financial year of the company.

The pages of the Minutes Book should be serially numbered and there should be proper locking device to ensure security and proper control to prevent irregular removal of the loose leaves.

8.7 **Extracts of the Minutes should be given only after the Minutes have been duly signed. However, certified copies of any Resolution passed at a Meeting may be issued even pending signing of the Minutes by the Chairman, if the draft of that Resolution had been placed at the Meeting and was duly approved.**

8.8 **Minutes of an earlier Meeting should be noted at the next Meeting.**

8.9 **Any alteration, other than grammatical or minor corrections, in the Minutes as entered, should be made only by way of express approval taken in the subsequent Meeting in which such Minutes are sought to be altered.**

8.10 **The Minutes of Meetings of any Committee should be circulated to the Board along with the agenda for the meeting of the Board next following such Meeting of the Committee and should be noted at the Board Meeting.**

If the Minutes of Meetings of any Committee are pending noting by the Committee at the time of circulating the Agenda for the Meeting of the Board, such Minutes should be circulated to the Board in draft form.

9. **Recording in the Minutes**

9.1 **In addition to the names of Directors present at the Meeting, the names of persons in attendance and the names of invitees, if any, should be recorded in the Minutes.**

9.2 **Apart from the Resolution or the decision, the Minutes should mention the brief background of the proposal and the rationale for passing the Resolution or taking the decision.**

9.3 **The names of the Directors who dissented or obtained from the decision should be recorded. Similarly, the fact that on interest Director did not participate in the discussion or vote should be recorded in the Minutes.**

9.4 **Wherever any approval of the Board or of the Committee is taken on the basis of certain papers laid before the Board or the Committee, proper identification by initialling of such papers by the Chairman or any Director should be made and a reference thereto should be made in the Minutes.**

10. Preservation of Minutes and Other Records

10.1 **The Minutes of all Meetings should be preserved permanently.**

10.2 **Where, under a scheme of arrangement, a company has been merged or amalgamated with another company, the Minutes of all Meetings of the Board and Committees of the transferor company should be preserved permanently by the transferee company, notwithstanding the fact that the identity of the transferor company may not survive such arrangement.**

10.3 **Office copies of Notices, Agenda and Notes on Agenda and other related papers should be preserved in good order for as long as they remain current or for ten years, whichever is later, and may be destroyed thereafter under the authority of the Board.**

§ For full text of the Secretarial Standards, see *Appendix* 311.

Secretarial Standards on General Meetings isued by the Council of ICSI (SS-2) [Paras 15, 16 and 17]

15. Minutes

15.1 **Minutes should contain a summary of the proceedings of the Meeting, recorded fairly, correctly, completely and in unambiguous terms, and should be written in third person and past tense.**

15.2 **The Minutes should be entered and signed within thirty days from the conclusion of the Meeting.**

In case a Meeting is adjourned, Minutes should be entered in respect of the original Meeting as well as the adjourned Meeting within thirty days from the dates of the respective Meetings.

The pages of the Minutes book should be consecutively numbered. The Minutes should be dated and signed by the Chairman of the Meeting within a period of thirty days or, in the event of death or inability of the Chairman within that period, by a Director who was present in the Meeting, authorized by the Board for the purpose.

15.3 The Chairman should initial each page of the Minutes, sign the last page of the Minutes and append to such signature the date on which he has signed the Minutes.

15.4 Minutes, once entered in the Minutes Book, should not be altered. However, minor errors may be corrected and initialled by the Chairman even after the Minutes have been signed.

15.5 Minutes should not be pasted or attached to the Minutes Book.

15.6 Minutes, if maintained in loose-leaf form, should be bound at reasonable intervals.

15.7 Minute Books should be kept at the Registered Office of the company.

16. Recording in the Minutes

16.1 The name of the Chairman of the Meeting and the names of Directors including the Chairman of the Audit Committee, if any, present at the Meeting should be recorded.

16.2 The number of members required to form the quorum and the fact that the required Quorum was present should be recorded.

16.3 The number of members present in person and through representatives and Proxies should be recorded.

16.4 The presence, at the Annual General Meeting of the Auditor and the Practising Company Secretary who has given the Compliance Certificate, should be recorded.

16.5 If the Chairman was interested in an item of business at the Meeting, the fact that he vacated the Chair and requested the Vice-Chairman, if any, or some other Director or Member to Chair the meeting to transact such business should be recorded.

17. Preservation of Minutes and other Records

17.1 Minutes Book to record Minutes of Meetings should be kept separately from those books used to record Minutes of any other meetings and should be kept at the Registered Office of the Company.

17.2 The Minutes of all Meetings should be preserved permanently.

Minutes can be inspected by any Member. The Auditor or Cost Auditor of the company or Practising Company Secretary appointed by the company can also inspect the Minutes Book in the course of audit or certification.

17.3 Where, under a scheme of arrangement, a company has been merged or amalgamated with another company, the Minutes of all Meetings of the transferor company shoud be preserved permanently by the transferee company, notwithstanding the fact that the identity of the transferor company may not survive such arrangement.

17.4 Office copies of Notice and supporting papers relating to the Notice should be preserved in good order for as long as they remain current or for ten years, whichever is later, and may be destroyed thereafter, on the authority of the Board.

[1][**S. 194. Minutes to be evidence.**—Minutes of meetings kept in accordance with the provisions of section 193 shall be evidence of the proceedings recorded therein.]

NOTES

Eng. Act, 1948 : Sec. 145
Eng. Act, 1985 : Sec. 382

Previous Act : Sec. 83(2)

Production of minutes book for *prima facie* evidence

The only way to prove that a particular resolution was passed at a meeting of the Board of Directors of a company is that the minutes book in which the said resolution was recorded as having been passed, should be produced in court as that alone can form evidence of that fact under section 194. *Escorts Ltd. v. Sai Auto,* (1991) 72 Com Cases 483 (Del); *British Provincial Life and Fire Assurance Society,* (1863) 33 LJ 84. If the books of a company show a transaction of forfeiture of shares, which would not be valid without a resolution of directors, the court will, in the absence of other evidence, presume that such a resolution has been passed. *Knight's* case, (1867) 2 Ch App 321; *Fire Proof Doors Ltd.,* (1916) 2 Ch 142. **Following** the *Knight's* case, (*supra*) the Madhya Pradesh High Court has held in *Gwalior Brewary Ltd. v. Central Bank of India,* 1967 MPLJ 795 (MP) that where a resolution of the Board of Directors is not available at the expected places like the minutes books of the company or the office of the Registrar where it ought to have been filed under S. 192 the resolution can be proved by any other evidence.

A letter written by the secretary of the company was presumed to have been written with the authority of the directors although no minute was shown conferring that authority. *Johnson v. Lyttle's Iron Agency,* (1877) 5 Ch D 687, 691. Where the transaction is in favour of a director, he would not have the benefit of this presumption and would have to prove the transaction either by the minute or otherwise. *Liverpool Household Stores Association, Re,* (1890) 59 LJ Ch 616, 619. "Directors," said KEKEWICH J, "ought to place on record, either in formal minutes or otherwise, the purport and effect of their deliberations and conclusions; and if they do this insufficiently or inaccurately they cannot reasonably complain of inferences different from those which they allege to be right." (at 619).

Entries in a company's books also afford *prima facie* evidence of a resolution though not supported by any minutes to that effect. But where a director is a party to transaction or the transaction is alleged by him and there is no support in the minutes books that will be a material factor running against the principle of *prima facie* evidence. *Rotherham, etc., Co., Re,* (1883) 25 Ch D 103, 109 (CA).

Where an entry of allotment of shares to a director was made in the minutes of a meeting at which he was present but he signed the minutes at next meeting, this was held to be a sufficient evidence of his agreement to take shares. *Llanharry Hemantite Iron Ore Co. Ltd., Re,* (1864) 4 De GJ & Sm 426. This presumption was not raised in the case of director who was not present at the next meeting and denied knowledge of it. *Tothill's* case, (1865) 1 Ch App 85.

Where the minutes book was lost, its contents could be proved by secondary evidence. *Ross v. Machar,* (1885) 8 OR 417 (Canada).

There is no reason why minutes recorded in loose leaves fastened together between two covers, though they are not recorded in books kept as required by section 193, should not be received in evidence on proper proof. But see **contra** *Hearts of Oak Assurance Co. Ltd. v. Flower* (*James*) & *Sons,* 1936 Ch 76 : (1936) 6 Com Cases 76.

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1. Subs. by Act 65 of 1960, s. 53.

The section does not bar the receiving in the evidence of minutes kept otherwise than in accordance with this section. Such minutes may be proved *aliunde. Re, Fire-proof Doors Ltd.,* (1916) 2 Ch 142. Where the question was whether a requisitioned meeting was really held and the minutes book was not produced to show when notice of requisition was received, when Board meeting was called to consider the matter, when notices were issued, no presumption was drawn that the alleged special resolution passed for appointing a third director was valid. *V.G. Balasundaram v. New Theatres Carnatic Talkies P. Ltd.,* (1993) 77 Com Cases 324 at 350-351 (Mad).

The articles of a company may provide that the minutes of any meeting kept in accordance with the provisions of section 193 shall be conclusive evidence of the facts stated therein. Such a provision is not inconsistent with the section. But evidence of fraud may be let in to displace the conclusive nature of the facts, see *Kerr v. Mottram (John) Ltd.,* (1940) 10 Com Cases 241 : (1940) 2 All ER 629 (Ch D) or it may be shown that the minutes were on their face wrong. *Betts & Co. Ltd. v. Macnaghten,* (1910) 1 Ch 430; *Caratal (New) Mines Ltd., Re,* (1902) 2 Ch 498.

The principle is fairly well settled on this point. In *In re Indian Zoedone Company,* (1884) 24 Ch D 70, the LORD CHANCELLOR SELBORNE observes at page 77 :— "The minutes in the books are to be received, not as conclusive, but as *prima facie* evidence of resolutions and proceedings at general meetings; and also it may be added and I think correctly that the chairman, who presides at such meetings and has to receive the poll and declare its result, has *prima facie* authority to decide all emergent questions which necessarily require decision at the time, his decision of those questions will naturally govern, and properly govern the entry of the minute in the books; and, though in no sense conclusive, it throws the burden of proof upon the other side, who may say, contrary to the entry in the minute-book, following the decision of the chairman, that the result of the poll was different from that there recorded.' cited with **approval** in *Mahaliram Santhalia v. Fort Gloster Jute Mfg. Co.,* (1954) 24 Com Cases 311 at 314 : AIR 1955 Cal 132.

Minutes book not conclusive evidence

The fact that the proceedings at a meeting are entered in the minutes book is not conclusive that the proceedings were regular and does not preclude the court from enquiring into the validity of the notice convening the meeting. *Betts & Co. v. Macnaghten,* (1910) 1 Ch 430; *Knights'* case, (1867) 2 Ch App 321. The minutes, being only *prima facie* evidence in the absence of the word "conclusive", may be contradicted by other evidence. *Tothills'* case, (1865) 1 Ch App 85; *Imperial Land Credit Corporation,* (1868) 16 WR 1191. This enables other evidence to be brought in which will, of course, be considered along with the matter stated in the minutes. *Pyle Works (No. 2),* (1891) 1 Ch 173. Where there was no proof of payment of Rs. 10 lakhs as consideration for transfer of shares and there was no proof of such payment till the date of decision or of any completed transaction for the transfer, it was held that inspite of the record of the transaction in the minutes the circumstances against it were so formidable and so forceful that the statement about the transfer had necessarily to be declared as not reflecting the correct legal position. *Mani (M.S.) v. Madhusoodhan,* (1991) 5 Corpt LA 187 at 208 (Ker—DB). If the minutes are signed by the Chairman they are to be taken as *prima facie* correct. *Indian Zoedone Co.,* (1884) 26 Ch D 70. Thus in *Sivaraman (B.) v. Egmore Benefit Co. Ltd.,* (1992) 75 Com Cases 198 (Mad) the court held that minutes book showing the election of certain persons as directors was *prima facie* evidence of proper and due election and the burden of proof was on those who questioned the validity of election to prove that fact.

The company or its Board speak through their resolutions. If the inquiry is as to what decision was taken by the Board, the court will place more reliance on the terms of the minutes of Board meetings, than on the contents of any letter conveying such decision. *Babulal Choukhani v. Western India Theatres Ltd.,* AIR 1957 Cal 709 : (1958) 28 Com Cases 565. Thus where a minute book was produced from proper custody and the signatures of the chairman, since deceased, were identified by a witness acquainted with the

handwriting, it was held that this was a sufficient proof of the resolution recorded in the minutes book and it was wrong for the lower court to have required the company to prove the existence of the resolution. *Edward Keventer Successors (P.) Ltd. v. Krishan Kumar,* (1968) 38 Com Cases 507, 511 (Del). It is not necessary that the writer of the minutes book or its signatory should be personally examined. *National Mineral Development Corpn. Ltd. v. Stressed Concrete Construction Ltd.,* 1984 Tax LR NOC 35 (Kant).

In an action for the enforcement of a service agreement approved at a meeting of directors, it was held that although the signature of the chairman is only meant for the purpose of verifying the accuracy of the entry, it did operate as an admission of the contract. *Jones v. Victoria Graving Dock Co.,* (1877) 2 Q.B.D. 314. See also *Orion Insurance Co. v. Sphere Drake Insurance* (1992) 1 Lloyd's Rep. 239, C.A. It is necessary for the making of a contract that the matter was communicated to the other party. *Powell v. Lee* (1908) 99 L.T. 284.

Minutes of directors' meetings are *prima facie* evidence only and "other evidence is admissible, though the existence of a minute is a circumstance to be considered in judging of its weight". *Re Pyle Works* (No. 2) (1891) 1 Ch. 173, 184.

A director who has signed the minutes cannot claim subsequently that the minutes were not properly recorded, particularly when he had made no protest on writing. *Varghese (P.K.) v. J.T.V. Metal Finishers (Pvt.) Ltd.,* (1988) 63 Com Cases 644 (Kar).

It is necessary for the section to come into play that the minutes book should be in proper shape and in accordance with statutory requirements. A loose leaf binder and type written minute book is not a minute book and not admissible in evidence. *Amal Kumar Mukherjee v. Clarian Advertising Services Ltd.,* (1982) 52 Com Cases 315 (Cal). But see decision of the High Court of Delhi in *Edward Keventor Successors (P.) Ltd. v. Krishan Kumar,* (*Supra*), where typed loose sheets were accepted in evidence. For further details, see Notes under s. 193, *ante.*

A man may be held to be a member although no allotment is entered in the minutes. *Great Northern Salt and Chemical Works, Re,* (1890) 44 Ch D 472. Similarly where a resolution of the Board of directors fixing the quorum of a meeting was passed, it was allowed to be proved though not entered in the minutes book. *Fire-proof Doors Ltd., Re,* (*Supra*).

S. 195. Presumptions to be drawn where minutes duly drawn and signed.—Where minutes of the proceedings of any general meeting of the company or of any meeting of its Board of directors or of a committee of the Board [1][have been kept in accordance with the provisions of section 193], then, until the contrary is proved, the meeting shall be deemed to have been duly called and held, and all proceedings thereat to have duly taken place, and in particular, all appointments of directors or liquidators made at the meeting shall be deemed to be valid.

NOTES

Eng. Act, 1948 : Sec. 145 Previous Act : Sec. 83(3)
Eng. Act, 1985 : Sec. 382

Presumption as to minutes

The presumption was drawn and the minutes were received in evidence without the need for the secretary or any other person who had personal knowledge of the passing of

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1. Subs. by Act 65 of 1960, s. 54 for certain words.

the resolution to testify to the fact. *Edward Keventer Successors Pvt. Ltd. v. Krishna Kumar Sud,* (1968) 38 Com Cases 507 (Del).

Where a resolution properly recorded in a minutes book is filed with the Registrar under this section for registration, he cannot be prevented by the issue of a writ of *mandamus* from accepting and recording the same unless the validity of resolution is under question in a legal proceeding or resolution has already been held to be void. *Karlapudi Venkateswara Rao v. ROC,* (1977) 47 Com Cases 641 (Mad). This is the direct result of the presumption created by the section when minutes are duly drawn and signed. Accordingly the contents of the minutes are presumed to be true and heavy burden of proof lies on those who are alleging the contents to be not true to prove that fact. *F.A.C. Rebello v. Co-op. Navigation & Trading Co. Ltd.,* AIR 1925 Bom 105; *Ram Singh v. Malha,* AIR 1935 Lah 157; *Killick Nixon Ltd. v. Dhanraj Mills (P.) Ltd.,* (1983) 54 Com Cases 432 (Bom); *B. Sivaraman v. Egmore Benefit Society Ltd., (infra).*

The presumption under the section is not available to the minutes of an extraordinary general meeting held on requisition. Thus where the records of such a meeting showed that two members were present but evidence showed that only one was present, it was held that evidence would prevail over the presumption and that therefore the meeting attended by one member only was not valid. *Bhankerpur Beverages (P.) Ltd. v. Sarabhjit Singh,* (1996) 86 Com Cases 842 (P&H).

Where the minutes of an earlier meeting were signed by the chairman and by all the members present, the fact that the minutes of a subsequent meeting carried the signature only of the chairman, was held to be not sufficient to overthrow the presumption of validity created by the section because the authentication satisfied the legal requirement, nor it was sufficient proof of the fact that the subsequent minutes must have been forged. The mode of signature upon minutes should satisfy the legal requirements and any person subsequently coming into power in the company may change the mode of signature in all other respects. *Surjit Malhan and B.K. Malhan v. John Tinson and Co.,* ILR (1985) HP 135 at 163.

A cursory perusal of this section regarding the presumption to be drawn where minutes of the company duly drawn and signed, clearly proves that the presumption arising in this section is a rebuttable one by adducing contrary evidence, that if a proper minutes book is kept and proceedings of meetings are duly recorded, it shall be deemed that the meeting has been duly called, held and all proceedings thereat have duly taken place and the consequent appointment of director or directors has been validly made. If the minutes are not recorded or signed within the prescribed period, then it is to be presumed that it is not properly kept and it will not be receivable in evidence. *B. Sivaraman v. Egmore Benefit Society Ltd.,* (1992) 75 Com Cases 198, 216 (Mad). This ruling was **followed** in *Micromeritics Engineers P. Ltd. v. S. Munusamy,* (2002) 50 CLA 245 (Mad) : (2002) 38 SCL 846. The court said : [at p. 257]. "As far as the presumption under section 195 is concerned, it would apply where there is compliance of the provisions of section 193. Under section 193, the entries of minutes of a Board meeting have to be made in the book kept for that purpose with its pages consecutively numbered, and the same has to be done within 30 days of the conclusion of the meeting. Section 193 also provides that each page of the minutes book shall be initialled or signed and last page of the minutes shall be dated and signed by the chairman of the Board meeting. The appellants have not produced the original minutes book and only a copy of the minutes book was produced before the CLB and a perusal of the copy of the minutes book shows that no page numbers were given and there were no initials as required under section 193. Therefore, the requirements of section 193 were not complied with and, hence, the presumption under section 195 could not be drawn".

No such presumption was drawn where neither the minutes book was produced nor any other book which was supposed to contain the proceedings of the meeting was produced.

Balasundaram (V.G.) v. New Theatres Carnatic P. Ltd., (1993) 77 Com Cases 324 at 350 (Mad).

Where a meeting was held to resolve upon an amalgamation and the minutes of the meeting as duly recorded were filed which showed the passing of the requisite resolution by poll, it was held that there was the presumption of validity by virtue of the provisions in sections 193, 194 and 195 and that there was no substance in the objection that the absence of the chairman at the time of polling nullified the proceedings. This would require a positive proof so as to overthrow the effect of the presumption of validity. *Tata Oil Mills Co. Ltd., Re,* (1994) 81 Com Cases 754 (Bom); *Hindustan Lever Ltd., Re,* (1994) 81 Com Cases 754 (Bom). The matter went before the Supreme Court in *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.*, (1995) 83 Com Cases 30 : AIR 1995 SC 470 where however this point was not raised.

Minutes books kept and maintained in the normal course of business is evidence of proceedings at the meeting. The minutes book created the presumption that the meeting of the Board of directors was duly called and held and all the proceedings at the meeting took place duly in accordance with the requirements of the Act. *M.S. Madhusoodanan v. Kerala Kaumudi P. Ltd.*, (2003) 117 Com Cases 19 2004 CLC 117 (SC).

Where the minutes book of a company which is properly recorded and maintained carries the minute of a resolution showing the appointment of a director but some shareholders challenge the validity of the appointment, burden would be upon them to prove that the appointment was not valid. The court would start with the presumption under S. 194 that the minutes constitute *prima facie* evidence of the proceedings recorded in them. On the facts of the case, no proof was offered to dislodge the presumption. *C.R. Priyachandrakumar v. Puraswalkam Permanent Fund Ltd.*, (1995) 83 Com Cases 150 (Mad).

The presumption being rebuttable, where a controversy is raised, evidence of conclusive nature to establish the points stated in the minute in question would become necessary. At the interlocutory stage, the trial court was held to be not justified in expressing doubts upon the genuineness of the minutes and discard them. *B D A Breweries v. Cruickshank & Co.*, (1996) 85 Com Cases 325 at p. 374 (Bom).

§ See Notes under section 194, *ante* where the subject has been dealt with in detail.

Implementation of resolutions without confirmation of next meeting.—The Karnataka High Court in *Karnataka Bank Ltd. v. A.B. Datar,* (1994) 99 Com Cases 417 at 436 held that a company can implement its resolutions immediately and does not have to wait for their confirmation at the next meeting.

S. 196. Inspection of minute books of general meetings.—(1) The books containing the minutes of the proceedings of any general meeting of a company held on or after the 15th day of January, 1937, shall—

(a) be kept at the registered office of the company, and

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

(2) Any member shall 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 sub-section (1), on payment of [1][such sum as may be pre-

1. Subs. by the Companies (Amendment) Act, 1988, for the words "six annas", s. 67 w.e.f. 15-7-1988 *vide* G.S.R. 781(E) dt. 13-7-1988.

scribed[2]] for every one hundred words or fractional part thereof required to be copied.

(3) If any inspection required under sub-section (1) is refused, or if any copy required under sub-section (2) is not furnished within the time specified therein, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [3][five thousand rupees] in respect of each offence.

(4) In the case of any such refusal or default, the [4][*Central Government*] may, by order[5], compel an immediate inspection of the minute books or direct that the copy required shall forthwith be sent to the person requiring it.

NOTES

Eng. Act, 1948 : Sec. 146
Eng. Act, 1985 : Sec. 383

Previous Act : Sec. 83

General Note : As and when the Companies (Second Amendment) Act, 2002 (11 of 2003) comes into force, the power under this section shall become transferred to the Central Government to be exercised by it in place of the Company Law Board. The commentary should be read keeping this change in mind.

Companies (Amendment) Act, 1988

Jurisdiction conferred on CLB.—Earlier, power under sub-section (4) was exercisable by the Court and has now been conferred on Company Law Board by the Companies (Amendment) Act, 1988, w.e.f. 31-5-1991. The absolute monetary ceiling has been substituted by the ceiling which may now be prescribed by the Central Government (*vide clause* 67 of the Bill).

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 500 rupees to 5,000 rupees under sub-section (3).

Companies (Second Amendment) Act, 2002 [11 of 2003]

The powers of Company Law Board under this section have been conferred on the Central Government. Consequential changes have accordingly been made in the section. As per the Bill, the powers of the CLB under this section were initially proposed to be transferred to the Tribunal constituted under section 10FB. Notes on Clauses of the Bill stated thus:

Notes on Clause.—This clause seeks to amend sections 188 and 196 of the Companies Act, 1956 relating to circulation of member's resolutions and inspection of minute books of general meetings, respectively. Sub-section (5) of section 188 of the Companies Act, 1956 provides that the company shall not be bound to circulate any statement if the Company Law Board is satisfied that the rights conferred by this section are being abused to secure needless publicity for defamatory matter and the Company Law Board may order the company's cost to be paid to the requisitionists. It is proposed to confer this power upon the Tribunal.

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2. The prescribed fee is Re one *vide* GSR 782(E), dt. 13-7-1988 under Rule 21A of Companies (Central Govt.) Rules and Forms, 1956 inserted w.e.f. 15-7-1988.
3. The words "five hundred rupees" substituted by the Companies (Amendment) Act, 2000, (53 of 2000) s. 82 (w.e.f. 13-12-2000).
4. **Subs. for "Company Law Board" by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 25. Earlier subs. by the Companies (Amendment) Act, 1988, (w.e.f. 31-5-1991) *vide* GSR dt. 31-5-1991, for the word "Court".**
5. Application for order to be made in Form No. 1 of CLB Regulations 1991 with fee of Rs. 50/- under CLB (Fees on Applications & Petitions) Rules, 1991. For texts see *Appendix* 6.

Section 196 of the Companies Act, 1956 confers power upon the Company Law Board to compel an immediate inspection of the minute books or direct that the copy required shall forthwith be sent to the person requiring it. It is proposed to confer this power upon the Tribunal.

These amendments are of consequential in nature. (*Clause* 20 of the Companies (Amendment) Bill, 2001)".

Scope of section

A separate book should be kept for minutes of general meetings because of the right of inspection available to members of the company in respect of minutes of general meetings.

A member is entitled to a copy of the minutes of proceedings of a general meeting within seven days after requesting for it.

The right to inspect or be furnished with a copy of the minutes accrues only after their entry in the books kept for the purpose within thirty days of the conclusion of the meeting as provided in section 193. Default in entering the minutes in the books within the time-limit provided under sub-section (6) of that section is punishable.

Minutes are usually open to the inspection of any member on request. It has been held however that beneficiaries under a trust settlement are not entitled to inspect the minutes of meetings of trustees nor the agenda prepared for such meetings. *Londonderry's Settlement, Peat v. Welsh,* (1965) Ch 918.

Under the common law directors have a right to inspect the Board minutes. It has been held in a Scottish case, that for such an inspection a director may be accompanied by his professional adviser, *McCusker v. McRae,* 1966 SC 253 (Scot). *Cf.* SCKELTON ON THE LAW AND PRACTICE OF MEETINGS [9th Edn., p. 250].

A member aggrieved by company's refusal to allow inspection or to supply copies of the minutes of general meeting can seek redressal by filing a petition before the Company Law Board.

Right of members to obtain copies of or inspect minutes of Board meetings

It should be noted that the members' right of inspection or to require a copy of the minutes of proceedings of a general meeting does not extend to minutes of Board meetings. The creditors or members of the public have no such right of inspection.

Department's views.—The Companies Act contains no provision either specifically permitting or prohibiting inspection by/or supply of copies to the shareholders of a company of the minutes of the meetings of the Board. This Department is of the view that, unless the articles of association provide to the contrary, a shareholder has no right of inspection or of obtaining copies of the minutes of its Board meetings. (*Letter No.* 8/15(169)/63-P.R., dated 11-2-1963).

Court's views.—The reason behind this was expressed as early as in 1859 as follows: 'It is highly proper that an inspection of the books containing the proceedings of directors should be obtained on special occasions and for special purposes: but the business of such companies could hardly be conducted if anyone, by buying a share, might entitle himself at all times to gain a knowledge of every commercial transaction to which the directors engage, the moment that an entry of it is made in their books... the proposed daily and hourly inspection and publication of all their proceedings... would probably ere long be found very prejudicial to shareholders.' *R. v. Marquirita Mining Co.,* (1859) 1 E&E 289.

Motive for inspection

A contractual or statutory right of inspection can be exercised whatever the motive or interest of the member may be. Any rule by a committee which took away the right of inspection or taking copies conferred by the articles is *ultra vires. Rameswar Lal Nath v. Calcutta Wheat and Seed Association Ltd.,* (1938) 8 Com Cases 78 : AIR 1939 Cal 89.

Place of keeping the minute books [Sub-section (1)(a)]

Department's view.—On a query to the Department: "It is submitted that section 196 should provide for the keeping of the Board Minutes and the Minutes of the shareholders' meeting at any other place in the same city where the Registered Office of the company is situated by a resolution of the board in the same manner as for Register of Members etc. under section 163 and the Books of Accounts under section 209. The Department expressed the following view:

"As the minute books of the meeting of the Board of Directors or of the general meeting of a company are primary documents and are evidence of the proceedings recorded therein and where minutes are duly drawn and signed, presumptions, as specified, in section 195 of the Act, are required to be drawn until the contrary is proved, it has been provided in the Act that the minute books should be kept at the registered office of the company." [*Department's File No.* 8/16(1)/61-PR].

Copy of minutes on payment [Sub-section (2)]

The right to take extracts is impliedly negatived where the Act gives a right to have copies on payment. *Balaghat Gold Mining Co.*, (1901) 2 K B 665 (CA); *Rameswar Lal Nath v. Calcutta Wheat & Seed Assn. Ltd.*, AIR 1939 Cal 89 : (1938) 8 Com Cases 78.

Prescribed Fee

Earlier, a member was entitled to a copy of the minutes of general meetings on payment of six annas for every one hundred words. As per Amendment Act of 1988 the prescribed fee is rupee one *vide* Rule 21A of the Companies (Central Government's) General Rules and Forms, 1956 w.e.f. 15-7-1988.

Penalty for default [Sub-section (3)]

If any inspection of the minute books by any member is refused, or if any copy thereof required by him is not furnished within the time specified in section 196(2), the company and every officer of the company who is in default are punishable with fine which may extend to Rs. 5,000 in respect of each offence.

Compoundable Offence.—The offence is compoundable under section 621A.

Petition before CLB

Petition under sub-section (4) be made to the Regional Bench of Company Law Board in Form No. 1 of Annexure II to the CLB Regulations, 1991 with a fee of Rs. 50/-and accompanied by the following documents:

(1) Documentary evidence, if any, showing the refusal of the company to give inspection to the petitioner.

(2) Affidavit verifying the petition.

(3) Bank draft evidencing payment of application fee.

(4) Memorandum of appearance in Form No. 5 of Annexure I with copy of Board Resolution or the executed Vakalatnama, as the case may be.

§ For text of the Company Law Board Regulations, 1991 refer *Appendix* 3.

Secretarial Practice Notes : Inspection of minutes book of general meetings

Check whether:

(i) minutes of general meeting were kept at the registered office of the company?

(ii) inspection as required was facilitated during business hours?

(iii) copies of minutes of general meeting, if requested, on payment of requisite fee were furnished within 7 days?

(iv) any order passed by CLB.

Documents Involved: 1. Minutes of General Meeting, 2. Correspondence with Members, 3. Order of CLB, if any.

S. 197. Publication of reports of proceedings of general meetings.—(1) No document purporting to be a report of the proceedings of any general meeting of a company shall be circulated or advertised at the expense of the company, unless it includes the matters required by section 193 to be contained in the minutes of the proceedings of such meeting.

(2) If any report is circulated or advertised in contravention of sub-section (1), the company, and every officer of the company who is in default, shall be punishable, in respect of each offence, with fine which may extend to *[*five thousand rupees*].

NOTES

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 500 rupees to 5,000 rupees under sub-section (2).

Publications of proceedings of general meetings [Sub-section (1)]

Discourses at meetings and circulars are prerogative if without spite. *Lawless v. Anglo-Egyptian Cotton & Oil Co.*, (1869) LR 4 QB 262; *Quartz Hill Consolidated Gold Mining Co. v. Beall*, (1882) 20 Ch D 501 (CA).

Where any reports of general meetings are published at the expense of the company, all matters required by section 193 to be included in the minutes of the proceedings of the meeting, are to be included in the publication.

A usage has now become almost universal among public companies in this country of publishing in newspapers at the expense of the company the written speech of the Chairman in extenso, and saying, in a footnote, that it does not purport to be a report of the proceedings of the meeting. Also refer to Notes under section 217.

Refer to *Department's Circular No.* 3/91, dated 15-2-1991 on publication of Chairman's Speech in Newspapers/Magazines in the Notes under section 175.

§ See also Notes under section 192.

Penalty for default [Sub-section (2)]

If any report of the general meeting is circulated or advertised in contravention of sub-section (1), the company and every officer of the company in default is punishable, in respect of each offence, with fine which may extend to five thousand rupees.

Compoundable offence.—The offence is compoundable under section 621A.

Secretarial Practice Notes : Publication of proceedings of general meetings

Ensure that the report of proceedings of a general meeting was neither circulated nor advertised at the expense of the company unless matters required by section 193 were contained therein?

Documents Involved: 1. Minutes of Board/General Meeting, 2. Annual Report.

*[1][*Prohibition of Simultaneous Appointment of Different Categories of Managerial Personnel*

S. 197-A. Company not to appoint or employ certain different categories of managerial personnel at the same time.—Notwithstanding anything contained in this Act or any other law or any agreement or instrument, no company shall,

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* The words "five hundred rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 83 (w.e.f. 13-12-2000).

1. Subs. by Act 65 of 1960, s. 54.

after the commencement of the Companies (Amendment) Act, 1960, appoint or employ at the same time, or after the expiry of six months from such commencement, continue the appointment or employment at the same time, of more than one of the following categories of managerial personnel, namely:—

(a) Managing director,

(b) [2][* * * *],

(c) [2][* * * *], and

(d) manager.]

NOTES

Companies (Amendment) Act, 1960

This section was inserted by the Companies (Amendment) Act (LXV of 1960):

"This is to stop a company from employing more than one type of managerial personnel simultaneously, which is needless and expensive." (*Notes on Clauses* : Clause 59). The section applies to all companies, public and private.

Companies (Amendment) Act, 2000

The terms "managing agents, secretaries and treasurers" have been omitted by the Amendment Act, 2000. The amendment is of consequential nature.

Scope of section

Only managerial personnel coming within the definitions given in section 2(24) or (26) are affected by the provisions of this section. If a director or other person is appointed to or entrusted with or has the management of less than the whole or substantially the whole affairs of a company, such as a sectional or factory manager or chief executive, he will apparently not come within the prohibition of this section.

As the methods of management by 'a director-in-charge' or committee of directors or agent under a power-of-attorney have now come into vogue, the section may have to be suitably amended so as to include such categories of managerial personnel also.

Management after abolition of managing agents and secretaries and treasurers

After abolition of the system of management by managing agents or secretaries and treasurers, there is no reason why the Board of Directors should opt only for one or other of two modes of management, namely by managing director or manager. The Board may directly manage or by means of committees of its own or by appointing department executives directly under the Board's superintendence and control and direction or by appointing agents under power-of-attorney or in such other manner as the nature or variety of the company's business may require.

No prohibition against having whole-time director and manager simultaneously

Under the section there is a legal prohibition only against simultaneous appointment or employment of managing director and manager. There is no legal prohibition against having whole-time director and manager simultaneously or managing director and whole-time director simultaneously.

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2. Clauses (b) and (c) omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 84 (w.e.f. 13-12-2000), prior to their omission they stood as under:—
"(b) [managing agent]"
"(c) [secretaries and treasurers, and]"

Employment and Appointment

On a query to the Department: "It is requested that the Government would give proper interpretation of the word 'employment' which has been used in addition to the word 'appointment' in—

(i) Section 197A prohibiting simultaneous appointment or employment or continuation of the appointment or employment of different categories of managerial personnel.

(ii) Section 267 debarring certain persons from appointment or employment as the managing or whole-time director of a company, or debarring continuation of such appointment or employment;

(iii) Section 316(1) which restricts the number of companies, of which one person may be appointed as the managing director.

The Department expressed the following view: "Appointment is the initial step taken to bring about the stage of employment while employment is a continuing state of relationship. No subtle difference need be drawn between these two terms in so far as the provisions of the Companies Act are concerned. The addition of the word 'employment' was presumably intended to ensure that with the initial act of appointment and the continuing state of employment were brought within the scope of these sections." (*Department's File No.* 8/16(1)61-PR.)

Director-in-charge

In the case of a director-in-charge, unlike in the case of managing director who is statutorily invested with powers of management [*vide* definition in section 2(26)], his powers depend upon the extent of powers delegated to him by the Board. There is no presumption that a director-in-charge has any powers of management, except when functioning as a member of the Board along with the other directors. One consequence of this is that third parties dealing with the company cannot presume, without further enquiry, that a director-in-charge has any powers of management at all.

Composition of Board of Directors of Listed Companies.—For Notes see under section 252 and section 292A, *post.*

Divisional, executive, assistant or special directors

In PALMER'S COMPANY LAW (para 60-48, p. 907, 24th Edn., 1987) : (p. 804, 25th Edn., 1992), a new kind of managerial personnel is referred to under the above heading and described as follows:—"Some companies include in their articles of association an article empowering the directors to appoint a person as a 'special', [divisional] 'executive', or 'assistant director' and so limiting the rights and liabilities of the person appointed that he is not deemed to be a director within the meaning of section 741(1) of 1985 Act (corresponding to section 2(13) of our Act). The article empowering directors to make such appointments will authorise the directors to define and limit the powers, authorities and discretions of the person appointed, provided that an executive director shall not be deemed to be a member of the Board or any committee thereof, that he shall not attend Board meetings except at the invitation of the Board and, when present at a Board meeting by invitation, he shall not be entitled to vote.

"The purpose of such appointment is to enhance the status of the person appointed in his relationships with other members of the company's staff and customers so that in these relationships he can call himself a director, *e.g.*, sales director. Furthermore, the executive director becomes, in effect, a trainee director for eventual recruitment to full directorial status.

"If 'executive' "assistant" or 'special directors' are not directors within the meaning of section 741(1), the requirements of the Act in regard to register of directors 'register of directors' interests' etc., do not apply to these appointments. Care must be taken to ensure that a person appointed under such an article does not hold himself out to be director within the meaning of the Act in his dealings with third parties."

According to the Department of Company Affairs, also, such designations are not desirable as they give a wrong impression to the public that they are full-fledged directors under the Companies Act. (*Circular No.* 2/82, dated 20-1-1983). The department's view

has been again **re-emphasised** by a further *Circular No.* 11 of 1990, dated 29-5-1990 : (1990) 68 Com Cases 83 (St).

This kind of practice, whatever its merits under the British law, will if allowed, in this country, only lead to evasion of sections 198, 268, 269, 309, 310 and other provisions requiring approval of Central Government and put a premium on fraudulent management of companies, to the detriment of shareholders and the public interest. To describe persons who are not directors as 'executive directors' or 'special directors' is nothing but an attempt to mislead shareholders, creditors, and the public and to exempt them from the provisions relating to directors is to put a premium on irresponsible management. Such directors will be in the very enviable position of enjoying all the privileges of directors without their responsibilities, or liabilities and without subjecting their appointment or remuneration to Central Government's approval.

In the view of PROFESSOR GOWER also, the practice of describing executives as "associate directors" or "special directors" is a 'potentially misleading' practice. (PRINCIPLES OF MODERN COMPANY LAW, 5th Edition, 1992, page 143 : 6th Edn., 1997, p. 182).

Non-executive directors

A non-executive director does not undertake to devote his whole working time to the company. He also receives a smaller amount of money by way of his remuneration or fee. An executive director is in the nature of a wholetime director and, therefore, agrees to devote his wholetime of working hours to the company. He has a significant personal interest in the company as his source of income. There is a belief that non-executive directors can be effective in ensuring that the board of a company acts in the interests of the company and not in the interest of a member or members of the board. It has been suggested that "non-executive directors are commonly appointed to fulfil one or more of the following roles:

(a) to watch and keep a check on the executive directors;

(b) to provide the view of an impartial outsider;

(c) to bring the benefit of their experience to the company;

(d) to act as a figurehead (particularly in the case of a non-executive chairman) or ambassador;

(e) to add credibility to the company, particularly with outside investors." COMPANY DIRECTORS : LAW AND LIABILITY BY NEIL SINCLAIR, p. 129 [1998 Edn].

The Bank of England has sponsored an organisation to promote the appointment of non-executive directors.—"The practice of appointing non-executive directors, also known as part-time outside or independent directors, is growing, particularly in public limited companies. If a non-executive director qualifies as a director within the meaning of section 741(1), [S. 2(13) Indian Act] he has, in principle, the same obligations and is subject to the same liability as any other director. This applies, in particular to his fiduciary duty to the company and to the possibility of disqualification under the statutory provisions or the articles. A non-executive director has the duty to keep himself informed about the business activities and financial status of his company, to attend Board meetings with fair regularity and to check on the activities of the full-time directors and leading executives. If he fulfils these duties conscientiously, the court may be inclined to adopt towards his obligation to exercise skill, care and diligence as a director a different standard from that which it would apply to a full-time director." In applying the standards of duties no distinction is to be drawn between executive and non-executive directors. On the facts, the two non-executive directors were found to be negligent in failing to carry out their duties as directors and in signing blank cheques which allowed the executive director to act as he pleased in completing those cheques. The three defendants were held liable to compensate the company for its loss and an inquiry was ordered as to damages. *Dorchester Finance Co. Ltd. v. Stebbing,* 1989 BCLC 498 Ch D, see, E. J. JACOBS, NON-

EXECUTIVE DIRECTORS, 1987 JBL 269 and PALMER'S COMPANY LAW, 907, 908 (24th Edn., 1987); (p. 8042, 25th Edn., 1992). In *Wimbledon Village Restaurant Ltd. Re*, (1994) BCC 753, a non-executive director came in for criticism where among other defaults there was a default in filing accounts.

The Court of Appeal in *Bishopsgate Investment Management Ltd. (in liq) v. Maxwell (No. 2)*, (1994) 1 All ER 261 held that a non-executive director was liable to account to the company for the loss which he caused by participating in a transfer of the company's assets to another company with which his family was connected. The court said that even if he "had made enquires and received reassuring answers from other directors whom he was reasonably entitled to trust, he whould not have escaped liability for a transfer which was in fact for a purpose outside the powers entrusted to the board".

Where an individual has agreed to provide exclusive consultancy services to one company it would be a breach of that contractual undertaking to accept a non-executive directorship with a competitor because all directors, whether executive or non-executive, have managerial responsibilities, and, therefore, would come within the scope of the prohibition. *Euro RSCG SA v. Conram*, The Times, Nov. 2, 1992.

"The following criteria are submitted for the purposes of determining whether or not the non-executive director has discharged his duties.

—Has he done what he was specifically asked to do?

—To the extent that the problem arises as a consequence of the primary fault of other directors, was it reasonable for the non-executive director concerned to rely on his co-directors to discharge the relevant function?

—Was it reasonable for the non-executive director concerned to assume that his co-directors were carrying out their tasks properly?" COMPANY DIRECTORS : LAW AND LIABILITY, by NEIL SINCLAIR, p. 1.29 (1998 Edn.).

Cadbury's Report for Corporate Governance.—The Cadbury Code, which has to be observed by all listed companies in England, states that a company's board 'should include non-executive directors of sufficient calibre and number for their views to carry significant weight in the board's decisions'. The Code observes that there should be at least three non-executive directors. The directors' report of a listed company must identify which of its directors are independent non-executive and give short biographical notes for them, Report also recommends:

(1) Directors' service contracts should not exceed three years without shareholders' approval. (Para 4.33).

(2) Directors' total emoluments and those of the chairman and highest paid UK director should be fully disclosed and split into their salary and performance-related elements. The basis on which performance is measured should be explained. (Para 4.32).

(3) Executive directors' pay should be subject to the recommendations of a remuneration committee made up wholly or mainly of non-executive directors. (Para 4.34).

Departmental view as to varying descriptions

In the view of the Department there is no objection to the use of any nomenclature provided the articles make clear what that nomenclature means. The use of American terms like 'President' and 'Vice President' has gained currency these days. It is necessary for the company using these terms to clarify what they mean in the context of the nomenclature of Managing Director as prescribed by Companies Act, 1956 and what their powers and duties are. (*Company News and Notes* : December 2, 1963).

Adoption of new nomenclature and need for close watch by Registrar of Companies

Department's view.—There is no objection to the adoption by companies of the American nomenclature of President and Vice-President for designating their managerial personnel provided that in their

Articles of Association, it is made clear what these terms precisely mean in the context of company Management by clearly defining their duties and powers. It is also essential that the company concerned should make it quite clear to the prospective investors if and when a public issue is contemplated by it, or in its public announcements, what such nomenclature means in terms of the conventional nomenclature of managing director, executive director etc. ordinarily used by companies.

Registrars should keep a note of all companies adopting such new nomenclature. They should be watchful to ensure that all the statutory provisions relating to managing directors are complied with by companies which designate their managerial personnel as President/Vice-President and that the provisions of section 197A are not infringed in any way. (*Letter No.* 14/37/63-PR, dated 23-9-1963.)

Managing director is principal officer for tax purposes

A verification for income-tax purposes was signed by the company's managing director on its behalf. The verification contained false particulars. It was held that the managing director is a principal officer for tax purposes and, therefore, he could be proceeded against because the word "person" as used in section 277 of Income-tax Act, is not restricted to the assessee only. *M.R. Pratap v. V.M. Muthukrishnan, ITO,* (1992) 74 Com Cases 400 : AIR 1994 SC 674. **Affirming** *Pratap (M.R.) v. V.M. Muthukrishnan I.T.O.,* (1984) 56 Com Cases 408 (Mad).

See also Notes under section 5 under the heading "Income-tax" and under section 291 under the heading "Liability under Income-tax Returns".

Effect of contravention of section

In *R.S. Mathur v. H.S. Mathur,* AIR 1968 All 241 it has been held that this section prohibits only the company, and the persons appointed or whose employment is continued in contravention of the section are not punishable under section 629-A. But the legal effect of such appointment is that it is not valid, as the provision is clearly mandatory.

Secretarial Practice Notes : Simultaneous appointment of managerial personnel

Ensure that no appointment was made at the same time of both managing director and manager.

MANAGERIAL REMUNERATION

General Notes

IN MANY respects the corporate reality is different from the theories and doctrines of company law. The dominant theory of company administration is that shareholders are the ultimate controllers. But the reality is that they are the farthest from those who manage and control. The gap between management and the shareholder is occupied by Government agencies and statutory controls. Shareholders are in practice not able to prevent the executives, who are only notionally chosen by them, from enriching themselves through high remuneration at the cost of shareholders' dividends. Abnormally high executive reward is also capable of causing dissatisfaction in other sectors of employment where there are no surpluses to be distributed. The legislature, therefore, took upon itself through the Companies Act and other administrative controls through rule-making power, the responsibility of controlling managerial remuneration.

The Act first prescribes an over-all limit in terms of a percentage of profits beyond which remuneration cannot go. Thus remuneration is linked with profitability. This method combines two virtues. It is a control and also an incentive for high profitability. To make these restrictions really effective, the categories of managerial personnel have been reduced. Now they are of only two kinds, the ordinary and the managing. Within the ceiling they may share the amount in any way but managing/wholetime directors and managers have been restricted to the specified percentages.

The Companies Act is an example of a tug-of-war between political power and economic power. Self-control or self-discipline is indeed the best. Where that is lacking, enforced discipline steps in. People who are subjected to such discipline try to escape. They view it in the light of an encroachment upon their freedom and struggle to get out of it. Escape-routes are discovered in no time. Main-stream remuneration was kept to a nominal amount and side and fringe benefits, popularly known as perquisites (perks) were inflated as they were not required to have any link with profits. The legislature imposed further restrictions and provided that even such benefits would be included in the ceiling. In the same vein, tax-free payments were prohibited so that the shareholders may know how much is being really paid to their management.

Further, ceilings are linked with the concept of "profit". "Profit" is not a legal term. It belongs to the commercial and accountants' world. But the concept is not new to company law. It has been all along a part of company legislation because of the insistence that dividends can be paid only out of profits. Even so the term has never been defined, nor is it possible to do so. Law could hardly do anything more than prescribe that depreciation shall be first provided. For the rest it is the freedom of the business world subject only to the protection that may filter through the scrutiny of professionals like accountants and auditors. But that is a profit for the purposes of dividends. For the purposes of directors' remuneration, in addition to that, profit has to be taken in accordance with the provisions of sections 349 and 350. Section 309 carries some further procedural restrictions. Remuneration must be fixed either in accordance with the provisions in the articles or an agreement. In the absence of any such agreement or provisions, no remuneration is payable. Managerial remuneration has been subjected to the ceilings of Sch. XIII. Provision has also been made for cases in which a company has no profits or its profits are inadequate. Compensation for loss of office is also regulated.

Managerial Remuneration, etc.

[1]**[S. 198. Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits.**—(1) The total managerial remuneration payable by a public company or a private company which is a subsidiary of a public company, to its directors and its [2][* * * *] manager in respect of any financial year shall not exceed eleven per cent of the net profits of that company for that financial year computed in the manner laid down in sections 349 [3][and 350], except that the remuneration of the directors shall not be deducted from the gross profits:

[4][* * * *]

(2) The percentage aforesaid shall be exclusive of any fees payable to directors under sub-section (2) of section 309.

(3) Within the limits of the maximum remuneration specified in sub-section (1), a company may pay a monthly remuneration to its managing or whole-time director in accordance with the provisions of section 309 or to its manager in accordance with the provisions of section 387.

[5][(4) Notwithstanding anything contained in sub-sections (1) to (3), but subject to the provisions of section 269, read with Schedule XIII, if, in any financial year, a company has no profits or its profits are inadequate, the company shall not pay to its directors, including any managing or whole-time director or manager, by way of remuneration any sum [exclusive of any fees payable to directors under sub-section (2) of section 309], except with the previous approval of the Central Government[6]].

Explanation.—For the purposes of this section and sections 309, 310, 311 [7][* * * *] 381 and 387, "remuneration" shall include,—

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1. Subs. by Act 65 of 1960, s. 56.
2. The words "managing agents and secretaries and treasurers or" omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 85 (w.e.f. 13-12-2000).
3. The figures and word ", 350 and 351" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 85 (w.e.f. 13-12-2000).
4. The proviso omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 85 (w.e.f. 13-12-2000)., prior to its omission it stood as under :—
"Provided that nothing in this section shall affect the operation of sections 352 to 354 and 356 to 360."
5. Subs. by the Companies (Amendment) Act, 1988, s. 25, for the words "(4) Notwithstanding anything contained in sub-sections (1) to (3), if in any financial year, a company has no profits or its profits are inadequate, the company may, subject to the approval of the Central Government, unless such approval has been obtained under any other provision of this Act, pay to its directors (including any managing or whole-time director) or manager, or if there are two or more of them holding office in the company, to all of them together by way of minimum remuneration, such sum not exceeding fifty thousand rupees per annum [exclusive of any fees payable to directors under sub-section (2) of section 309] as it consider reasonable:
Provided that where a monthly payment is being made or is proposed to be made to any managing or whole-time director or the manager or to any one or more of them and the Central Government is satisfied that for the efficient conduct of the business of the company the minimum remuneration of fifty thousand rupees per annum is or will be in sufficient, the Central Government may by order sanction an increase in the minimum remuneration to such sum, for such period and subject to such conditions, if any, as may be specified in the order, w.e.f. 15-6-1988 *vide* G.S.R. No. 559(E) dt. 10-6-1988.
6. Form 25-A and Rules 20A of the Companies (Central Govt's) (General Rules & Forms, 1956 are relevant for the section.
7. The figures "348, 352" omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 85 (w.e.f. 13-12-2000).

(a) any expenditure incurred by the company in providing any rent-free accommodation or any other benefit or amenity in respect of accommodation free of charge, to any of the persons specified in sub-section (1);

(b) any expenditure incurred by the company in providing any other benefit or amenity free of charge or at a concessional rate to any of the persons aforesaid;

(c) any expenditure incurred by the company in respect of any obligation or service which but for such expenditure by the company, would have been incurred by any of the persons aforesaid; and

(d) any expenditure incurred by the company to effect any insurance on the life of, or to provide any pension, annuity or gratuity for, any of the persons aforesaid or his spouse or child.]

NOTES

Companies Act, 1956

Recommendation of Company Law Committee.—The whole section except the proviso to sub-section (4) was inserted by the Joint Committee on the Original Bill explaining the position as follows: "The Committee consider that there should be an over-all maximum for the managerial remuneration payable to the directors, and manager. The limit has been fixed at 11 per cent of the net profits, inclusive of any monthly payments made by way of remuneration but exclusive of fees payable to directors for attending the meetings of the Board of directors. It has been made clear that the operation of clauses 351 to 354 and 356 to 360 will not be affected by the provisions contained in this clause.

The Committee also consider that if in any financial year a company earns no profits or the profits are inadequate, it may pay to any director including a managing or wholetime directors, its managing agent or secretaries and treasurers, if any, and its manager, if any, or if there are two or more of them holding office in the company, to all of them together, a minimum remuneration not exceeding fifty thousand rupees per annum. New sub-clause (4) makes the necessary provision." (*Report* : Para 75).

Companies (Amendment) Act, 1960

The whole section has been amended. The notes on clauses (Clause 60) are stated as follows : "The changes suggested in section 198 are intended partly to clarify the overriding character of the substantive provisions of the section, which deal with overall maximum managerial remuneration, and partly to emphasize that the maximum is only in respect of managerial remuneration and not payment for other services rendered in conformity with express provisions elsewhere in the Act. It is proposed to clarify the meaning of remuneration in relation to the managerial personnel."

Companies (Amendment) Act, 1988

See Notes under the heading "Application for approval of minimum remuneration [Sub-section (4)]".

Companies (Amendment) Act, 2000

Following changes have been brought in by the Amendment Act, 2000 :

(1) The reference to managing agents/secretaries and treasurers in sub-section (1) of section 198 has been omitted. The amendment is of consequential nature.

(2) The omission of reference to section 351 is also of consequential nature as the section 351 is omitted by the Amendment Act, 2000.

(3) The omission of the proviso is also of consequential nature as sections 352 to 354 and 356 to 360 have been omitted by the Amendment Act of 2000.

(4) The reference to sections 348 and 352 in sub-section (4) of section 198 is omitted as these sections have also been omitted by the Companies Amendment Act, 2000.

Monthly remuneration to managing, whole-time director or manager [Sub-sec. (3)]

Within the limits of maximum remuneration a managing or wholetime director may be paid on monthly basis. The payment by way of remuneration on monthly, quarterly or yearly basis to any other director would require approval of the Central Government and payment by way of commission would require special resolution. See Note under section 309(4).

Departments' Clarification.—When a private limited company becomes a deemed public company by virtue of section 43A and it has earned inadequate profits, the company can pay the minimum remuneration after obtaining the approval of the Central Government under section 198(3) and the application for the purpose has to be made within a reasonable time from the date of company becoming a public company under section 43A (*Letter No.* 32/13/75-CL-III, dated 25-6-1975).

Application for approval of minimum remuneration [Sub-section (4)]

Changes made by Companies (Amendment) Act, 1988.—Under sub-section (4), in case of loss or inadequacy of profits, the approval of the Central Government is required for payment of minimum remuneration to a managerial personnel subject to the provisions of section 269 and Schedule XIII. Section 269 has now dispensed with the requirement of prior approval of Central Government for appointment of managerial personnel so long as the appointment and remuneration are in accordance with Schedule XIII. Accordingly, consequential amendment has been made in sub-section (4) by the Amendment Act of 1988. Approval of the Central Government under sub-section (4) is now not required in such cases. It should, however, be ensured that the appointment made and remuneration paid is strictly in accordance with Schedule XIII, otherwise approval of the Central Government under sections 269 and 309, besides approval under section 198(4) for payment of minimum remuneration, would have to be obtained by following the prescribed procedure.

Department's Clarification.—The following Departmental Clarification regarding the amendments made by the Companies (Amendment) Act, 1988 may be noted:

In the event of loss or inadequacy of profits, approval of the Central Government is not required for payment of remuneration if:

(a) the appointment had been made in accordance with the terms and conditions specified in Schedule XIII; and

*(b) the resolution passed in the general meeting provided for a cut of 10% of the salary proposed to be paid, in terms of paragraph 2 of Part III of Schedule XIII to the Act. [This requirement was deleted *vide Notification No.* GSR 510(E), dated 14-7-1993].

An application under this sub-section should not be construed as being made under the provisions of sub-section (1) of this section or sections 309 and 310. The matter should be considered taking into account the provisions of this sub-section and the financial position of the company. *Hind Ceramics Ltd. v. CLB,* (1972) 42 Com Cases 610 (Cal). Changes made by Amendment Act of 1988 be noted.

Central Government approval under sub-section (4)

The section requires previous approval of the Central Government for payment of minimum remuneration in the event the company has not earned profits or its profits are inadequate. The profits can only be known at the end of the financial year, after accounts are audited. The company may seek previous approval of the Central Government with-

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* The provision for 10% reduction in salary had been deleted from the revised sch. XIII (w.e.f. 1993). The present Schedule, in Sec. II of Part II itself provides 'minimum remuneration'.

out waiting for the financial year to end, otherwise payment made to the managerial personnel will not be in accordance with the law. The Government generally agrees for payment of minimum remuneration for a period of five years, at a time.

Such approval of the Central Government is not required where the payment is within the limits as specified in Schedule XIII.

Approval of the Central Government will now be required by companies in regard to managerial remuneration only if the remuneration is in excess of the limits (related to the effective capital of the company) specified in section II of Part II of the Schedule XIII.

"For obtaining the approval of the Central Government in this regard, Form No. 25A has been prescribed and the application should be made in that form. Where the remuneration asked for is far in excess of 11 per cent of the average net profits for the three previous years, the company should indicate full justification for such sanction. Along with the application one set of last two years' annual accounts, one copy of the memorandum and articles of association and a copy of the Board's resolution authorising the making of the application should be furnished." (*Departmental Instruction*).

A copy of application together with a copy of each document enclosed therewith shall be forwarded by the Company to the Registrar of Companies concerned simultaneously with application to Central Government. *Vide* Rule 20-A of the Companies (Central Government's) General Rules and Forms, 1956 [See *Appendix* 1].

Revised Form for application

Department's Circular.—The following circular issued by the Department with reference to the new substituted form may be noted: "The formats for making applications to the Central Government under sections 314(1B)/269/198(4)/309(3)/311/ 387/388 and 310/311/388 of the Companies Act, 1956, have since been revised, *vide Notification* GSR No. 510(E), dated 24th May, 1990, with a view to facilitating expeditious disposal of the subject applications by the Central Government. The intention is that once the applications are made in the revised formats, duly completed in all respects, there may not be any need to call for any additional particulars from the applicant companies.

2. You are requested to advise your constituent-companies to adopt the revised formats which will come into force with effect from 1st August, 1990. It may be ensured that complete particulars are furnished in the applications and any additional information, not covered in the formats, is furnished by the applicant companies in their covering letters". (*Circular No.* 10 of 1990, dated 28-5-1990 : (1990) 68 Com Cases 83 (St)).

Power of approval *quasi*-judicial

The power vested in the Central Government is *quasi*-judicial and must be exercised with due regard to principles of natural justice. No administrative guidelines could be allowed to interfere with the exercise of the duty to act judicially. *Cibatul Ltd. v. Union of India,* (1980) 50 Com Cases 437 (DB—Guj); *Mahindra & Mahindra Ltd. v. Union of India,* (1983) 53 Com Cases 337 (Bom). The above decision in Cibatul was **relied** on by a Division Bench of Delhi High Court where according to facts the appointment of a manager was approved subject to certain conditions and the candidate's application for relaxation of those conditions was dismissed without any reason and on the cryptic ground that it was a matter of Government policy, the decision was set aside being in violation of natural justice. *Bennett, Coleman & Co. Ltd. v. Union of India,* (1993) 78 Com Cases 666 (Del—DB).

§ See also Notes under s. 269, *post.*

Remuneration for non-managerial services of directors

It must be noted that in the case of a director, remuneration paid for services other than for his services as director, for instance, for services as a technician, does not come within the section. See section 309 which was amended as regards remuneration of directors in 1960 and 1965. *Cf. Ramaben A. Thanawala v. Jyoti Ltd.,* (1957) 27 Com Cases 105 : AIR 1958 Bom 214. The provision is intended to cover only such payments as will add to the cost of management. *Sudarsanam (A.R.) v. Madras Purasawalkam Hindu*

Janopakara Saswatha Nidhi Ltd., (1985) 57 Com Cases 776 (Mad). The section also does not apply to remuneration for professional services paid in accordance with S. 309(1). *R. Gac Electrodes Ltd. v. Union of India*, (1982) 52 Com Cases 288 (Ker); *Ruby Mills Ltd. v. Union of India*, (1985) 57 Com Cases 193 (Bom); *Mahindra & Mahindra Ltd. v. Union of India*, (1983) 53 Com Cases 337 (Bom).

§ See also Notes under Ss. 309 and 310, *post.*

'Remuneration'

The definition of the term 'Remuneration' is based on the following recommendation of the Companies Act Amendment Committee: "A question has been raised whether the word "remuneration" in sections 198(1), 309 and 348 would include perquisites such as rent-free accommodation in the plains or in hill-stations, free motor car, free passage, free education of children and pensionary benefits. These perquisites, undoubtedly have a money value and in some cases might be converted into their money equivalent. From the point of view of the company for their services and the cost of providing them has an effect on a company's profits exactly similar to the payment of the monthly cash salary. On the other hand, from the point of view of the recipient, they form part of the consideration for his services and the position is more advantageous to him than if the money equivalent of the perquisites has been paid in cash and expended by him for the various amenities provided. The existing provisions are, however, capable of being construed as referring to cash payment alone. In our view, there is no reason in principle for ignoring these perquisites evaluating the remuneration. It was represented before us by the Associated Chambers of Commerce of India, that if the remuneration referred to in section 198 extends beyond amount actually paid in cash to a director, it should certainly not extend beyond items included in the director's total income for income-tax purposes. It is difficult in the context of these sections, to distinguish between, for example, the value of a motor car provided for a director's private use (which is taxable) and the value of a home leave passage to a director who is not a citizen of India (which, subject to certain Rules, is not taxable). The considerations which apply to a taxing statute are not necessarily the same as those which should apply to an Act such as the Companies Act and, in any case, the proviso to section 198(4) empowers the Central Government to take into account all factors such as the value of the perquisites in fixing any increased minimum remuneration thereunder. If the provisions of sections 198(1), 309 to 311, 348, 381 and 387 fixing ceilings on the remuneration of various categories of managerial personnel are to be effective, any evasion thereof by the grant of perquisites or benefits having a money value should be checked." (*Report*: Para 67).

The term is defined to include any expenditure incurred by the company on rent-free accommodation and other benefits and amenities.

If the manager or any director enjoys any benefit or amenity without the company incurring any expenditure therefor, such benefit or amenity may not be included in the managerial remuneration.

If the company has its own buildings in which any of the managerial personnel is allowed to reside free, strictly speaking the company does not incur any expenditure therefor, and the rent-free quarters may not be included in the remuneration. But the definition only uses the word "includes". So that, other items may be included in the remuneration, though not mentioned in the explanation.

Where the managing director continues to occupy his own premises the expenditure incurred for repairs and maintenance may be borne by the company and such expenditure will not be included as forming part of the managing director's remuneration as defined in this section and S. 269.

§ For notes in detail see Notes under S. 269.

Stock option – not remuneration.—The word "expenditure" would mean something that is paid out or something is gone irretrievably. *Indian Molasses Co. Pvt. Ltd. v. CIT,* AIR 1959 SC 1049. The language used in the Explanation to Section 198 under the Companies Act, 1956 is similar to Section 40A(5) of the Income Tax Act, 1961. It was held that the difference between the market rate of interest and concessional rate of interest cannot be treated as "expenditure" to calculate the ceiling limit under Section 40A(5). By charging a lower rate, the company has not incurred any "expenditure". *CIT v. Vazir Sultan Tobacco Co. Ltd.,* (1988) 173 ITR 290 (AP).

Consideration paid to director for abstaining from doing specified act

The provisions of this section have no application when consideration is paid to any director for abstaining from doing a specified act which is not the part of the duty of the director concerned. e.g. compensation payable to the ex-managing director under an agreement to restrain him from competing with the company for a reasonable period after cessation, will not be considered as remuneration to such director.

Guidelines on Schedule XIII relating to managerial appointments and remuneration

The Government has substituted Schedule XIII w.e.f. 1-2-1994. This Schedule deals with the subject of managerial appointments and remuneration. For text of Guidelines see Schedule XIII and for notes thereunder refer to section 269, *post,* where all important Department's Circulars, Clarifications and Instructions have been incorporated.

§ See also Notes under sections 309 and 310 where detailed notes appear on "Directors' Remuneration".

Managerial remuneration linked to effective capital of a company

Press Release dt. 6-03-2000.—The Central Government (Department of Company Affairs) has issued a notification allowing payment of remuneration to managerial personnel in the event of absence or inadequacy of net profits of the company, ranging between Rs. 75,000 and Rs. 2,00,000 per month depending upon the effective capital of the company.

The notification provides that where in any financial year during the currency of tenure of the managerial person a company has no profits or its profits are inadequate, it may pay remuneration to a managerial person by way of salary, dearness allowance, perquisites and any other allowances, not exceeding ceiling limit of Rs. 24,00,000 per annum or Rs. 2,00,000 per month. This will be calculated on the basis of the effective capital of a company being less than Rs. 1 crore at Rs. 75,000 monthly remuneration. If the effective capital of a company is Rs. 1 crore or more but less than Rs. 5 crores then the monthly remuneration payable to managerial person will not exceed Rs. 1,00,000. In the case of effective capital of the company being Rs. 5 crores or more but less than Rs. 25 crores the monthly managerial remuneration shall not exceed Rs. 1,25,000. In the case of effective capital of a company being Rs. 25 crores or more but less than Rs. 100 crores the monthly managerial remuneration shall not exceed Rs. 1,25,000. In the case of effective capital of a company being Rs. 25 crores or more but less than Rs. 100 crores the monthly managerial remuneration shall not exceed Rs. 1,50,000. In the case of effective capital of a company being Rs. 100 crores or more, the monthly managerial remuneration shall not exceed Rs. 2,00,000.

The Gazette notification has been issued under sub-section (1) of section 641 of the Companies Act, 1956. The notification amends Schedule-XIII (Part II, section II) of the Companies Act, 1956. [*PIB Press Release, New Delhi, dated 6-3-2000*]. [*Section II(1) substituted by Notfn. No. GSR 36(E), dt. 16-1-2002*].

Private companies exempted.—The section does not apply to a private company, which is not subsidiary of a public company.

Government companies exempted.—This Section does not apply to a Government Company. *Notification*: GSR 235, dated 31st January, 1978. See Notes under Section 620.

Model Regulation as per Table A.—For model regulations in the articles of association pertaining to this section, see Regulation 65 of Table-A. Note that the directors do not have any right to remuneration in absence of an article like this. For a company limited by guarantee and not having share capital, see regulations 19 and 20 of Table-C.

Secretarial Practice Notes :

(a) Check that in case of companies having profits, the overall managerial remuneration was within the limit of 11 per cent of net profits of the company as computed in the manner laid down in sections 349 and 350.

Schedule XIII. If not, whether the approval of the Central Government under this section has been obtained.

Secretarial Action Points for payment of managerial remuneration

1. Ensure that the overall managerial remuneration does not exceed 11% of the net profits of the company for the financial year, exclusive of fees payable to directors for attending meetings of the Board [Section 198(1)].

2. Ensure that the net profits are computed in accordance with the provisions of sections 349 and 350 of the Companies Act, 1956 [Section 198(1)].

3. Ensure that the payment of remuneration to managerial personnel is determined by the articles of the company or by a resolution passed by the company in general meeting [Section 309(1)].

4. Ensure that the remuneration payable to directors is inclusive of remuneration payable to a director for services rendered in any other capacity, unless the services rendered are or of professional nature and the director possesses the requisite professional qualification.

ICSI Guidance Note on Compliance Certificate (August, 2003)

Remuneration of Directors†

Check List

Check whether:

(i) the payment of remuneration to directors was within the limits provided under sections 198 and 309 of the Act;

(ii) 'net profit' has been computed in accordance with the provisions of sections 349 & 350;

(iii) the remuneration paid to managing director/whole-time director was in accordance with the provisions of the Articles, Schedule XIII to the Companies Act, 1956, resolution passed by the shareholders in general meeting and/or approval of the Central Government;

(iv) remuneration paid, if any, has been recovered in case of approval by the Central Government was either not obtained or denied;

(v) special resolution was passed for payment of remuneration by way of commission to directors who are not whole-time/ managing directors;

(vi) increase in the remuneration was effected with Central Government's approval in accordance with section 310;

(vii) no other remuneration was paid to a director in any other capacity except as permitted;

(viii) no tax free payment was made;

(ix) compensation for loss of office, if any, has been paid within the limits specified in sub-section (4) of section 319;

(x) the amount of remuneration by way of fee for each meeting of the Board of directors or a committee thereof has not exceeded [.....] fee as may be prescribed*;

Note : The aforesaid requirements do not apply to private companies.

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† This matter is not directly referred to in the 33 paragraphs appended to the Form prescribed under the Companies (Compliance Certificate) Rules. The Check List given by the ICSI is for the guidance of CSP who may, in the course of his scrutiny, come across non-compliance with regard to this matter. CSP need not qualify such non-compliance.

* **See Rule 10-B of Companies (Central Government's) Rules and Forms, 1956 for fee prescribed by Notfn. No. GSR 580(E), dt. 24-7-2003 [w.e.f. 24-7-2003]**

§ For the text of the Companies (Compliance Certificate) Rules, 2001, see *Appendix* 38.

§ For the full text of the Guidance Notes on Compliance Certificate and for Specimen Compliance Certificate Form as issued by ICSI see *Appendix* 312.

S. 199. Calculation of commission, etc., in certain cases.—(1) Where any commission or other remuneration payable to any officer or employee of a company (not being a director, [1][* * * *] or a manager) is fixed at a percentage of, or is otherwise based on, the net profits of the company, such profits shall be calculated in the manner set out in sections 349 [2][*and 350*].

(2) Any provision in force at the commencement of this Act for the payment of any commission or other remuneration in any manner based on the net profits of a company, shall continue to be in force for a period of one year from such commencement; and thereafter shall become subject to the provisions of sub-section (1).

NOTES

Companies (Amendment) Act, 2000

Following changes have been brought in by the Amendment Act of 2000 :

(1) The reference to managing agents/secretaries and treasurers in sub-section (1) of section 199 has been omitted. The amendment is of consequential nature.

(2) Omission of reference to section 351 is also of consequential nature as the same section 351 is omitted by the Amendment Act, 2000.

Scope of section

This section applies to the case of officers and employees other than a manager, managing director, who are remunerated on a percentage basis and deals with the manner of calculation of net profits for that purpose.

Note also that the section applies only to cases of officers and other employees, of the company and not to other persons. As to who are 'officers' and 'employees' see Notes under section 2(30).

Any existing method of calculation contrary to sub-section (1), is not to continue after the expiry of one year after the commencement of this Act.

But note that the section applies only to cases of payment of commission or other remuneration at a percentage of the net profits. It has no application to cases where commission is payable with reference to the amount or volume of sales, purchases, turnover, etc.

Schedule XIII (Part II) provides for payment of commission to managerial personnel, of not more than 1% of the net profits, subject to the prescribed ceiling.

Applicability of section to private companies

Department's View.—It appears from the records connected with the legislation of the Companies Act, 1956 that present Section 199 (included in clause 296) of the Companies Bill, 1953 as (introduced in Parliament) was intended to be made applicable to all companies, whether public or private. The words now appearing in Section 199 within brackets, *viz.*, "(not being a director, the managing agent, secretaries & treasures or a manager)" did not occur in the clause as introduced but were inserted in consequence of

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1. The words 'managing agents', 'secretaries and treasurers' omitted, by the Companies (Amendment) Act, 2000 (53 of 2000), s. 86 (w.e.f. 13-12-2000).
2. The words and figures, "350 and 351" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 86 (w.e.f. 13-12-2000).

the introduction of the provisions which now appear as Section 198 by the Joint Committee. Therefore a private company simpliciter will be well advised to act in accordance with the provisions of Section 199, not only in respect of its non-managerial staff but also in respect of its managerial personnel, such as directors, managing agents, etc. (*"Important Clarifications Part I"*, pp. 44/45, Published by the Association of Company Secretaries and Executives.)

Secretarial Practice Notes : Commission etc. payable to any officer or employee

Check whether any commission or other remuneration fixed at a percentage of net profit was payable to any employee? If so, check that the net profit for this purpose was calculated in the manner set-out in sections 349 and 350.

S. 200. Prohibition of tax-free payments.—(1) No company shall pay to any officer or employee thereof, whether in his capacity as such or otherwise, remuneration free of any tax, or otherwise calculated by reference to, or varying with, any tax payable by him, or the rate or standard rate of any such tax, or the amount thereof.

Explanation.—In this sub-section, the expression "tax" comprises any kind of income-tax including super-tax.

(2) Where by virtue of any provision in force immediately before the commencement of this Act, whether contained in the company's articles, or in any contract made with the company, or in any resolution passed by the company in general meeting or by the company's Board of directors, any officer or employee of the company holding any office at the commencement of this Act is entitled to remuneration in any of the modes prohibited by sub-section (1), such provision shall have effect during the residue of the term for which he is entitled to hold such office at such commencement, as if it provided instead for the payment of a gross sum subject to the tax in question, which, after deducting such tax, would yield the net sum actually specified in such provision.

(3) This section shall not apply to any remuneration—

(a) which fell due before the commencement of this Act, or

(b) which may fall due after the commencement of this Act, in respect of any period before such commencement.

NOTES

Eng. Act, 1948: Sec. 189
Eng. Act, 1985 : Sec. 311, CP 15

Companies Act, 1956

Disclosure of actual payment.—"The intention underlying this clause is that the actual amount paid should be made known to the shareholders and other persons concerned" (*Notes on clause* 299 of Bill). The Company Law Committee on whose recommendation this section has been enacted stated as follows : "Following the provisions of section 189 of the English Companies Act, 1948 we further recommend that no remuneration payable by the company to any officer, employee or servant of the company, should be tax-free. As the Cohen Committee pointed out, the principal objection to the practice of making tax-free payment is that it creates a class of persons who are immune from any future increase in taxation. Further, this practice has the effect of making it difficult for shareholders to assess the burden imposed on a company by its salaries and wages bill." (*Report* : Para 88).

Exceptions to section

Notwithstanding anything contained in this section, it is provided by section 10(6)(vii)(a)(ii) of the Income-tax Act, 1961, that in the case of a foreign technician of the class specified therein and employed by a company, the tax on his income chargeable under the head "Salaries" may be paid by the company for a period of sixty months following the expiry of a tax-free period of thirty-six months from the date of his arrival in India.

Secretarial Practice Notes : Prohibition of tax-free payments

Check that remuneration free of tax was not paid to any officer or employee.

S. 201. Avoidance of provisions relieving liability of officers and auditors of company.—(1) Save as provided in this section, any provision, whether contained in the articles of a company or in an agreement with a company or in any other instrument, for exempting any officer of the company or any person employed by the company as auditor from, or indemnifying him against, any liability which, by virtue of any rule of law, would otherwise attach to him in respect of any negligence, default, misfeasance, breach of duty or breach of trust of which he may be guilty in relation to the company, shall be void:

Provided that a company may, in pursuance of any such provision as aforesaid, indemnify any such 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 discharged or in connection with any application under section 633 in which relief is granted to him by the Court.

(2) [1][* * * *]

NOTES

Eng. Act, 1948 : Sec. 205
Eng. Act, 1985 : Sec. 310

Previous Act : Sec. 86-C

Companies (Amendment) Act, 2000

Sub-section (2) has been omitted as it has become redundant after the abolition of the system of managing agents/secretaries and treasurers. The amendment is of consequential nature.

Indemnity against expenses of defence [Proviso to sub-section (1)]

The object of the proviso is to enable a company to indemnify against liability incurred in defence any of its officers in the event only of his having been found by a competent Court to be innocent or to have acted *bona fide i.e.*, honestly and not in any other case.

Mere insolvency of an officer does not necessarily mean that he was dishonest. *Doss (D.) v. C.P. Connell,* AIR 1938 Mad 124 : (1937) 7 Com Cases 429. It was accordingly held that (at a time when an undischarged insolvent could act as director) trusting an undischarged insolvent with employees' security money which he misappropriated, was not necessarily an act of negligence and the company could indemnify his fellow directors for expenses of defence. The court added that the director in question must be knowingly guilty of breach of duty or must be reckless about his duty. *Cf. Re, City Equitable Fire Insurance Co. Ltd.,* 1925 Ch 407. No protection or indemnity can be claimed against *ul-*

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1. Sub-section (2) omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 87 (w.e.f. 13-12-2000), prior to its omission it stood as under:—

'(2) Nothing contained in the proviso to sub-section (1) shall apply to the constituted attorney of the managing agent of a company, unless such attorney is, or is deemed to be, an officer of the company.'

tra vires acts. *Viscount of Royal Court of Jersey v. Shelton,* (1986) LRC (Comm) 693 : (1986) 1 WLR 985 (PC). It would be seen that a resolution passed by shareholders in general meeting relieving a director from any of his fiduciary or statutory duties in future would be void.

As the proviso to sub-section (1) only says that the company may indemnify any officer or auditor against any liability incurred by him, it would appear that the company cannot spend its own funds or give financial help to any officer for defending him in any criminal or civil proceeding. It can only indemnify him in cases where he had succeeded and thereby shown to a competent Court that his act or conduct was *bona fide* or justified in the circumstances of the case.

Expenses incurred by directors, etc., in connection with civil or criminal cases

Department's Circular.—Companies sometimes placed funds at the disposal of their managerial personnel for defending themselves in criminal proceedings institutied against them. Section 201 specifically provides that any provision whether contained in the articles of a company or in an agreement with a company or in any other instrument, for exempting any *officer* of the company or any person employed by the company as auditor from, or indemnifying him against, any liability which, by virtue of any rule of law, would otherwise attach to him in respect of any negligence, default, misfeasance breach of duty or breach of trust of which he may be guilty in relation to the company, shall be void. It has also been laid down in the proviso to sub-section (1) of the said section that a company may, in pursuance of any such provision, indemnify any such officer or auditor against any liability incurred by them in defending any proceeding whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or discharged or in connection with any application under Section 633 of the Act in which relief is granted to him by the Court. Thus, it is not permitted to a company to make its funds available to the managing directors etc. in connection with any *civil* or *criminal* case instituted against them *unless* they are found by a competent court to be innocent and the question of reimbursement will arise only after the termination of the proceeding in favour of the officers of the company concerned. [*Circular No.* 8 of 1972, dated 8-5-1972.]

Officer

For the definition of 'officer' see section 2(30). Note, however, that the definition is only inclusive and does not exclude other persons who may properly be considered officers, such as an authorised agent, a divisional or sectional manager, an assistant secretary, etc. Under a parallel provision in the Bermudan Companies Act, 1981, it has been held that an auditor is an officer of the company when appointed under the Companies Act and, therefore, is entitled to the benefit of the provision for indemnity under the section. The court pointed out where an auditor is merely retained to conduct and carry out an audit function, without appointment as an auditor, he will not be an officer within the meaning of the section. *Mutual Reinsurance Co. Ltd. v. Post Marwick Mitchell & Co.,* (1997) 1 BCLC 1 (CA).

Indemnity against liability incurred in management

Liability incurred in the course of ordinary and proper management is something different from the liability arising from breaches of duty as contemplated by this section. In the ordinary course of things directors being agents are entitled to an indemnity under S. 223 of the Indian Contract Act in respect of all liabilities incurred in managing the business of the company in good faith. *James v. May,* (1873) LR 6 HL 328. An agent of a company was allowed indemnity in respect of a libel action arising out of a report made by him for the benefit of the company. *Tomlinson v. Liquidators of Scottish Amalgamated Silks Ltd.,* 1935 SC 1 (HL). In this case the article contained a provision for indemnifying a director against all costs, losses and expenses which he might incur to become liable to by reason of anything done by him as such director, the House of Lords held that this would not apply to costs incurred by a director in successfully defending proceedings attributing certain acts to him which he had not does but which would have been contrary to his duties as a director. See also *Famatina Development Corpn. Ltd., Re,* (1914) 2 Ch 271 (CA). No express provision is necessary for this purpose though articles commonly so provide. A clause providing for indemnity was held capable of covering liability for *ultra*

vires acts but not dishonest acts. *Viscount of the Royal Court of Jersey v. Shelton*, (1986) 1 WLR 985 (PC).

In addition to the indemnity which arises by implication in the agency relationship, a more extensive indemnity can be provided under the articles or by an express contract. *Pyle Works (No. 2), Re*, (1891) 1 Ch 173, 184.

A Council entered into a joint venture agreement with a company. It nominated some of its officers as directors of the joint venture company. Its officers were entitled to the benefit of an indemnity clause under which the Council had to compensate them for any loss incurred while functioning properly. This clause was held to be not enforceable against the Council because the joint venture business was *ultra vires* the Council. It lacked the capacity to make any such nomination. Section 201 applies (S. 310 of the English 1985 Act) only to companies. Any such clause in a contract of a company would have been void. The Council was not a company and, therefore, clause was as such valid. *Burgoine v. London Borough of Waltham Forest*, (1997) 2 BCLC 612 : (1997) BCC 347 (Ch D).

Insurance against directors' liability

The section does not prevent a company from taking out an insurance policy for its own protection against loss caused to it by its directors. It also appears that a director can take out a policy to recompensate the loss he suffers because of his liability to the company. The premium for such policy may be paid by the company itself. This will not go against the section since the company does not agree to indemnify the directors against his liability to it, but merely agrees to meet the expense of procuring an undertaking from the insurer to do so. See also Sch. I, Table A, Art. 99, *infra*.

Whether a policy of insurance against possible liability for which directors cannot be indemnified under s. 310 of English 1989 Act (corresponding to this section) can be legally taken out is thus explained in FARRAR'S COMPANY LAW, 440 (3rd Edn., 1991). "Much attention in recent years has focused on the effect of s 310 [English CA 1969] on directors' and officers' liability insurance which on a strict interpretation of the section might well have been found to be void. On a liberal interpretation, however, policies would be unaffected by the section. The uncertainty has now been resolved by the English CA 1989, s. 137 which makes clear that s. 310 does not prevent a company from purchasing or maintaining for any officer or auditor insurance 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."

A decision from Jersey on exemption from liability

A clause in the articles of a company was worded in a manner apt to exonerate a director who innocently participated in an *ultra vires* act and to excuse him from liability which would otherwise have lain upon him to reimburse the company for any loss thereby occasioned. The plain purpose seemed to be to give blanket exoneration for any mistake not tainted by dishonesty. The clause was held to be not illegal as purporting to widen the objects clause of the Memorandum of Association. An Article exonerating a director from personal liability for loss incurred through an *ultra vires* act did not have the indirect effect of validating that act. The act remained *ultra vires* notwithstanding that the company was precluded from suing the director. The Article did not have the effect of ratifying the act. The Articles was restricted to declaration as to persons who could not be sued for the loss. *Viscount (The) v. Shelton*, (1986) LRC (Comm) 693 (PC on appeal from Jersey). Their Lordships **did not follow** *Cullerne v. London and Suburban General Permanent Building Society*, (1890) 25 QBD 485, 63 LTNS 511.

Provision for indemnity against costs

The company's articles provided for indemnity to a director against any liability for in carrying out his duties. The company joined the director as a defendant in a proceeding

against it. The company sought costs against the director, but its action was struck out. The director then sought to recover his costs from the company in terms of the company's articles. The court said that the articles of association of a company are a statutory contract between a company and its members and are not automatically binding as between a company and its officers as such. However, the articles could be expressly or impliedly incorporated into the contract between the company and a director if the director accepted his appointment 'on the footing of the articles'. Although relatively little might be required to incorporate the articles by implication, there was in fact no evidence as to the basis on which the director in question had accepted his appointment as a director of the company and there was nothing to suggest that he knew of the relevant article or that there might be relevant provisions in the company's constitution, when he accepted his appointment. In those circumstances, where there was a real issue as to the incorporation of the article into any contract between the director and the company, the court would confine itself to making such costs order as was appropriate in exercising its discretion under s. 51 of the Supreme Court Act 1981, leaving the director to bring any claim under the relevant article separately. *Globalink Telecommunications Ltd. v. Wilmbury Ltd.*, (2003) 1 BCLC 145 (QBD).

Secretarial Practice Notes : Relieving liability of officers and auditors

Check that in the articles of the company or in an agreement with the company or in any other instrument, there was no provision for indemnifying any officer or employee of the company or auditor against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust of which he may be guilty in relation to the company.

Prevention of Management by Undesirable Persons

S. 202. Undischarged insolvent not to manage companies.—(1) If any person, being an undischarged insolvent,—

(a) discharges any of the functions of a director, or acts as or discharges any of the functions of the [1][* * * *] manager, of any company; or

(b) directly or indirectly takes part or is concerned in the promotion, formation or management of any company;

he shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to [2][*fifty thousand rupees*], or with both.

(2) In this section, "company" includes—

(a) an unregistered company; and

(b) a body corporate incorporated outside India, which has an established place of business within India.

NOTES

Eng. Act, 1948 : Sec. 187
Eng. Act, 1985 : Sec. 302

1. The words 'managing agents', 'secretaries and treasurers' omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 88 (w.e.f. 13-12-2000).
2. The words "five thousand rupees" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 88 (w.e.f. 13-12-2000).

Companies (Amendment) Act, 2000

(1) *Penalty enhanced.*—The Amendment Act of 2000 enhanced the penalty amount from 5,000 rupees to 50,000 rupees under sub-section (1).

(2) The terms "managing agents, secretaries and treasurers" used in sub-section (1) have been omitted by the Amendment Act, 2000. The amendment is of consequential nature.

Object and Scope of section

The object of the section is to prevent an undischarged insolvent from discharging the functions of a director, or manager, whether he is or is not styled as a director, managing agent etc. and also from taking part in the formation, etc., of a company.

Note that in the case of managing or whole-time director, even if at any time in his life he was an insolvent or had suspended payment or compounded with his creditors he is disqualified to act as managing or whole-time director. (Section 267).

The expression "body corporate incorporated outside India" will also include any company coming under section 3(2).

An order of disqualification was held to be not proper where a man was guilty of managing a company while still an undischarged insolvent but who was discharged subsequently and had carried on business successfully. *R. v. Young (Stephen Kenneth),* 1990 BCC 549 (CA).

The offence under the section is that of strict liability. It does not require any *mens rea* for an order of disqualification. Thus it would be no defence for the person in question to show that he mistakenly believed that he was discharged from his insolvency by efflux-ion of time. *R. v. Brockley,* (1994) 1 BCLC 606 (CA).

Takes part or concerned in the management [Sub-section (1)(b)]

In *R v. Campbell* [1984] BCLC 83 the Court of Appeal upheld the appellant's conviction for breach of an order under S. 188 of the Companies Act 1948, by which he was prohibited from taking part in or being concerned in the management of a company. His role in the new appointment was described as that of 'a management consultant'. BELDAM J said (at p. 84): "The thrust of this appeal is that in the circumstances of this case an independent person such as a management consultant, who is not a director or officer of a company, cannot commit this offence since he does not control the decision-making process." The court (at 85) approved the distinction drawn by the judge in his summing up : "between managing certain specific aspects of the company's activities such as production, sales, trading and the like, and the central management of the affairs of the company, that is to say the matters normally undertaken by the directors or officers of the company." They also rejected (at p. 85) a submission that he should have directed the jury that 'advising on financial and managing restructuring of the company' could not constitute the offence. "In the opinion of this court, if he had done so it would have been a misdirection for, as we shall show, advising on financial management and restructuring of a company may well amount to being concerned indirectly in the management of the company. It is the business of the directors to manage the business of the company ... and in advising directors on financial and management structure, a person may well be concerned directly or indirectly in the management of that company." 'When I say it is a question of degree that does not mean that you have not got to decide it ... In this case you have to say whether this defendant's conduct is proved to be and thus clearly is on the side of taking part in the management. Not merely being consulted and giving advice when called upon, but actually standing beside [the managing director] and giving him such continuous advice which is so continuously put into effect that he can only be described as taking part.' [at p. 87].

In *Re Clasper Group Services Ltd.* [1989] BCLC 143 the functions of the employee concerned were 'too lowly' for him to come within the section. He was the son of the

controlling shareholder, but according to the evidence (at p. 149) : "He appears never to have risen much above the status of an office boy and messenger, although he was provided with some management training."

Some assistance may also be found in the words of SHAW LJ in *Re a Company* [1980] Ch 138 at 144. This case was concerned with s. 441 of the [English] Companies Act 1948, which gave certain powers to the High Court where it was shown that a person while an officer of a company had 'committed an offence in connection with the management of the company's affairs'. He said : "The expression "manager" should not be too narrowly construed. It is not to be equated with a managing or other director or a general manager. As I see it, any person who in the affairs of the company exercises a supervisory control which reflects the general policy of the company for the time being or which is related to the general administration of the company is in the sphere of management. He need not be a member of the Board of directors. He need not be subject to specific instructions from the Board. If he fulfils a function which touches the central administration of the company, that is sufficient in my view to constitute him an "officer" or "manager" of the company for the purposes of section 441 of the Act."

The fullest discussion was in an Australian judgment of ORMISTON J in *Comr for Corporate Affairs v. Bracht* (1989) 7 ACLC 40 in the Supreme Court of Victoria, in which he reviewed a number of authorities including the two Court of Appeal cases [*referred above*]. The respondent, Bracht, had been involved in negotiating credit facilities on behalf of the company and had held discussions with the company's bank manager as to the obtaining of bank guarantees. The magistrate had dismissed the charges apparently on the grounds that the director to whom Mr. Bracht reported had 'effective or ultimate control'. Having referred to *R v. Campbell* and the dicta of SHAW LJ in *Re a Company,* the judge said (at 47-48) : "There must be an element of decision making, which affects the corporate enterprise as a whole, but those responsible need not form part of the Board, nor even need they be executives directly communicating with the Board. Nevertheless, in the ordinary course of affairs, it is only in a large company that persons outside this latter category, so far removed from the power of control exercised by the directors, may be engaged in the "management" of a company. In a small company like the present the actions of those directly answerable to the directors may amount to "management", for, even if those people are also engaged in routine activities of a kind not normally associated with management, it is sufficient if powers and functions are delegated to those persons which are likely in their performance to have a significant effect on the business and financial standing of the company. As it is a protective section, protective at least of the creditors and shareholders, then it must have been designed to prevent the participation in management of those who might put the solvency or the probity of the corporation's administration at risk. Persons not given any significant discretion or advisory role in decision making could not therefore be intended as an object of the prohibition. It may be difficult to draw the line in particular cases, but in my opinion the concept of "management" for present purposes, comprehends activities which involve policy and decision making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of that corporation, to the extent that the consequences of the formation of those policies or the making of those decisions may have some significant bearing on the financial standing of the corporation or the conduct of its affairs.

He understood the expression 'take part in' to connote 'active participation' (at 48) : "Such participation would have to be real and direct, but not necessarily in a role in which ultimate control is exercised, although it would have to be more than the administrative carrying out of the orders of others responsible for a company's management."

As to the expression 'being concerned in' he said (at 49) : "In the present section I would see the prohibition as covering a wide range of activities relating to the management of a corporation, each requiring an involvement of some kind in the decision-making processes of that corporation. That involvement must be more than passing, and certainly not of a kind where merely clerical or administrative acts are performed. It re-

quires activities involving some responsibility, but not necessarily of an ultimate kind whereby control is exercised. Advice given to management, participation in its decision making processes, and execution of its decisions going beyond the mere carrying out of directions as an employee, would suffice."

All these authorities were reviewed in *Market Wizard Systems (UK) Ltd., Re* (1998) 2 BCLC 282 (Ch. D) where a person was under an order of prohibition and he was taken in to the company for the purpose of aid and advise in restructuring the company and the court held that this amounted to a violation of the prohibition.

Offences of strict liability

Two of the directors were convicted for taking part in management inspite of their insolvency to the extent to which they remained involved in the running of an associated company. One of them contended that whilst she was involved in various activities associated with the company to include publicity, promotion and design, she was not involved in staffing decisions and did not make financial decisions or contracts on behalf of the company. The other contended that the trial judge should have given a direction to the jury to the effect that her evidence that she believed that she was not directly or indirectly managing the company amounted to a defence. The court held that the offences under the section were offences of strict liability. The issue of whether a defendant had been concerned in the management of a company is a question of fact for the jury and was not dependent upon a defendant's belief as to the propriety of her actions. *R. v. Doring (Petra),* (2002) EWCA Crim 1695, The Times, June 27, 2002, Bux CA (Crim Div). The court **applied** *R. v. Brockley (Frank),* (1994) BCC 131 : 1994 CLY 406.

Penalty for default [Sub-section (1)].—If a person who is an undischarged insolvent discharges the functions of a director, etc., he is punishable with imprisonment for a term which may extend to two years or with fine which may extend to fifty thousand rupees.

Compoundable offence.—The offence is compoundable under section 621A.

Secretarial Practice Notes : Insolvent not to manage companies

Ensure that the company was not managed by any director or manager who is an undischarged insolvent.

S. 203. Power to restrain fraudulent persons from managing companies.—(1) Where—

(a) a person is convicted of any offence in connection with the promotion, formation or management of a company; or

(b) in the course of winding-up a company it appears that a person—

(i) has been guilty of any offence for which he is punishable (whether he has been convicted or not) under section 542; or

(ii) has otherwise been guilty, while an officer of the company, of any fraud or misfeasance in relation to the company or of any breach of his duty to the company ;

the [1][*Court or the Tribunal, as the case may be*] may make an order[2] that the person shall not, without the leave of the [1][*Court or the Tribunal, as the case may be*], be a director of, or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a com-

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1. Subs. for "Court" by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 26.
2. Application for the order to be made by petition under Rule 11(8) of the Companies (Court) Rules, 1959.

pany, for such period not exceeding five years as may be specified in the order.

(2) In sub-section (1), the expression "the Court",—

(a) in relation to the making of an order against any person by virtue of clause (a) thereof, [3][*includes the Court or the Tribunal by which he is convicted, as well as any Court or Tribunal having jurisdiction to wind up*] the company as respects which the offence was committed; and

(b) in relation to the granting of leave, means any [4][*Court or Tribunal*] having jurisdiction to wind-up the company as respects which leave is sought.

(3) A person intending to apply for the making of an order under this section by the [5][*Court or the Tribunal having jurisdiction to wind up a company*] shall give not less than ten days' notice of his intention to the person against whom the order is sought, and at the hearing of the application, the last mentioned person may appear and himself give evidence or call witnesses.

(4) An application for the making of an order under this section by the [5][*Court or the Tribunal having jurisdiction to wind up a company*] may be made by the Official Liquidator, or by the liquidator of the company, or by any person who is or has been a member or creditor of the company.

(5) On the hearing of any application for an order under this section by the Official Liquidator, or the liquidator, or of any application for leave under this section by a person against whom an order has been made on the application of the Official Liquidator or liquidator, the Official Liquidator or liquidator shall appear and call the [6][*attention of the Court or the Tribunal as the case may be*] to any matters which seem to him to be relevant, and may himself give evidence or call witnesses.

(6) An order may be made by virtue of sub-clause (ii) of clause (b) of sub-section (1), notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the order is to be made [7][* * * *].

(7) If any person acts in contravention of an order made under this section, he shall, in respect of each offence, be punishable with imprisonment for a term, which may extend to two years, or with fine which may extend to [8][fifty thousand rupees], or with both.

(8) The provisions of this section shall be in addition to, and without prejudice to the operation of, any other provision contained in this Act.

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3. **Subs. for the words "includes the Court by which he is convicted, as well as any Court having jurisdiction to wind-up" by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 26.**
4. **Subs. for "Court" by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 26.**
5. **Subs. for "Court having jurisdiction to wind-up a company" by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 26.**
6. **Subs. for "attention of the Court" by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 26.**
7. Certain words omitted by Act 31 of 1965, s. 19 (w.e.f. 15-10-1965).
8. The words "five thousand rupees" subs. by the Companies (Amendment) Act, 2000, (53 of 2000) s. 89 (w.e.f. 13-12-2000).

NOTES

Eng. Act, 1948 : Sec. 188
Eng. Act, 1985 : Secs. 295-299 and Sch. 12

Note : As and when the Companies (Second Amendment) Act, 2002 (11 of 2003) comes into force, the power under this section shall become exercisable either by the Court or the Tribunal. The commentary should be read keeping this change in mind.

Companies Act, 1956

Recommendation of Company Law Committee.—This section was enacted on the following recommendation of the Company Law Committee:

Object of section.—"To the list of disqualifications set out in the Act of 1913, we would add the disqualifications provided for in section 188 of the English Companies Act, 1948. The effect of this section is that a person guilty of an offence mentioned in it may be disqualified for a maximum period of five years from being concerned with or taking part in the management of a company without the leave of the Court having jurisdiction to wind it up. This disqualification may be imposed by any Court before whom a person is convicted of any offence in connection with the promotion, formation or management of a company or by any Court in course of winding up of a company, if it appears to it that the person has carried on the business of a company with the intention to defraud creditors, or for any fraudulent purpose, or has been otherwise guilty of any fraud in relation to the company, or has otherwise been guilty while an officer of the company of any breach of his duty to the company whether he has been convicted of any offence or not." (*Report* : Para 94).

Companies (Amendment) Act, 2000

Penalty enhanced.—The Amendment Act of 2000 enhanced the penalty amount from 5,000 rupees to 50,000 rupees under sub-section (7).

Companies (Second Amendment) Act, 2002 [11 of 2003]

This section has been amended by the Companies (Second Amendment) Act, 2002 so as to confer the power exercisable under this section on the Tribunal also. Notes on clauses of the Bill stated thus :

Notes on clause.—This clause seeks to amend section 203 of the Companies Act, 1956 relating to power to restrain fraudulent person from managing companies. The provisions, contained in the said section *inter alia,* empower the Court to make an order that a person convicted of any offence in connection with the promotion, formation or management of a company or guilty of an offence punishable under section 542 of that Act shall not, without the leave of the Court, be a director of a company or take part in the promotion, formation or management of a company for such period not exceeding five years, as may be specified in the order. It is proposed to confer the said power upon the Tribunal. This amendment is of consequential nature. [*Clause 21 of the Companies (Amendment) Bill, 2001*].

Scope of section

The object and the purpose of the Act is to protect the public from the activities of unfit directors, it is not meant to assist office holders in proceedings. It is in the public interest to encourage *Carecraft* proceedings to reduce the costs of litigation and to make unfit directors recognise their wrongdoing and face the consequences. *Official Receiver v. Cooper* [1999] B.C.C. 115 (Ch. D.). See *Carecraft Construction Co. Ltd., Re,* [1994] 1 WLR 172.

The section is very wide and an order passed under it may even disqualify a person starting a private company of his own consisting of none but himself and a nominee of his as member.

Note that an order under this section will not only disqualify a person for the office of director. [*Cf.* section 274(1)(f)] but also where he is already a director, vacate him from the office. [Section 283(1)(j)].

It has been held in an English case that a disqualification imposed under this section on the occasion of the conviction of a person, must date from the date of the conviction and not from the date of the discharge of the person from prison or any other date. *R. v. Bradley,* (1961) 1 All ER 669.

On the same principal where an order is made under clause (b) of sub-section (1), the disqualification will take effect from the date of the order, and not from any date subsequent thereto, by reason of the disqualified person having preferred an appeal and failed in the appeal, unless the Appellate Court had granted stay, in which case the order will take effect from the date of dismissal of the appeal. (*ibid*).

Under English law persistent default in filing annual returns with the Registrar has been held to be not so serious as to bring the case within the scope of this section. *Arctic Engineering Ltd. (No. 2), In re,* (1988) 1 Comp LJ 267 : 1986 BCLC 253: (1986) 2 All ER 246 (Ch D). Under section 274(1)(g) of Companies Act, 1956 a director of a public company which has not filed annual returns for any continuous three financial years shall not be capable of being appointed as a director of any other public company. [S. 274(1)(g)(A)].

An order which does not debar a person from the activities specified in sub-s. (1) [*i.e.* be a director or take part in the promotion, formation or management of a company] cannot be regarded as an order of disqualification under the section. *Gower Enterprises Ltd. (No. 2), Re,* (1995) 2 BCLC 201 (Ch D). For guidance as to the form of order see *Seagull Manufacturing Co. Ltd., Re,* (1996) 1 BCLC 51 (Ch D); *Official Receiver v. Slinn,* (1996) 1 BCLC 51 (Ch D). It has been held by the Court of Appeal that there is no jurisdiction to pass a disqualification order restricting it to the holding of a directorship only. The Court has to make it clear that the order applies to the holding of all the positions listed in the Company Directors Disqualification Act, 1986, S. 1(1) [English]. *R. v. Ward,* The Times, Aug. 10 (CA).

Disqualification of small shareholders' director

Under rule 5(vi) of the Companies (Appointment of Small Shareholders' Director) Rules, 2001, a person is disqualified from being appointed as a small shareholders' director of a company if an order disqualifying him for appointment as director has been passed by a Court in pursuance of section 203 and is in force, unless the leave of the Court has been obtained for his appointment in pursuance of that section. On being so disqualified, he shall vacate his office of director [rule 6(vii) *ibid*].

Circumstances in which disqualification order can be made [Sub-section (1)]

Where the conduct of a director was such that it showed unfitness because it was clear that the company was insolvent, creditors were kept at bay by issuing cheques which the company could not honour, failure to put into place an adequate system of management, Crown debts increased inexorably year by year, accounts and returns were not filed promptly and the company was allowed to continue to trade past the point where it should have ceased doing so, the director was disqualified for a period of two years. *Pamstock Ltd., Re,* (1994) 1 BCLC 716 (Ch D). This ruling was **approved** by the Court of Appeal in *Westmid Packing Services Ltd. Re* (1998) 2 BCLC 646 : (1998) 2 All ER 124 (CA).

Non-observance of duties connected with privilege of limited liability.—An English case decided under section 300 of 1985 Act, *Majestic Recording Studios Ltd., Re,* 1989 BCLC 1 (Ch D), provides an example of the type of conduct which can bring about a restraint order. A person was the director of 5 companies which went into liquidation on account of insolvency within 5 years. His co-director did not involve himself in the financial side of the companies' affairs. Annual accounts and returns were not filed for various periods during the life of each of the companies and in the case of three, even

statements of affairs were not issued, and one of them was trading while insolvent already. It was held that the fellow director who had shirked his responsibility as a director by leaving everything to others and had failed to appreciate the duties attendant on conducting business with limited liability, was not fit to be concerned in the management of a company. He was restrained for a period of three years. The fact that he was a director in a company carrying on communication business and that company was somewhat better and he was also running an estate agency was not considered to be of any importance because the communication business was not very successful and he could carry on the estate agency without the benefit of limited liability. The other director was restrained for a period of five years subject to this relaxation that he would be permitted to manage M Ltd., because he had been managing this company in a very proper way and his departure might *jeopardise* the future of the company and the jobs of its employees. See also *J & B Lynch (Builders) Ltd., Re,* 1988 BCLC 376, where the number of companies involved was taken into account; *Stanford Services Ltd., Re,* 1987 BCLC 607, where three companies involved. The court cited the following observation at 619: "The public is entitled to be protected, not only against the activities of those guilty of more obvious breaches of commercial morality, but also against someone who has shown in his conduct of more than one company..... a failure to appreciate or observe the duties attendant on the privilege of conducting business with the protection of limited liability." The purpose of disqualification proceedings is to protect the public and not to punish the respondent director for his misconduct. *Churchill Hotel (Plymouth) Ltd., Re,* 1988 BCLC 341 (Ch D); *Rolus Properties Ltd., Re,* (1988) 4 BCC 446 : *D.J. Matthews (Joinery Design) Ltd., Re,* (1987) 4 BCC 513.

Where a company continued trading even when it was insolvent and the director in question failed to fulfil his responsibility of assuring that a reasonably clear picture of the company's financial position and trading profitability was presented, he failed in his essential duty so as to merit an order of disqualification. The general irresponsibility was also accompanied by the specific irresponsibility towards Crown debts and the failure to file the company's accounts for two consecutive years. *Secretary of State for Trade and Industry v. Laing,* (1996) 2 BCLC 324 (Ch D).

Errors, miscalculations and commercial misjudgment.—Directors' zeal and passion to keep their company alive may lead to errors and miscalculations about which it has been held that this should not be taken to be a conduct showing lack of probity in the conduct of affairs so as to merit disqualification. On the facts, the court said, it may be that in January 1984 the director in question should have reached the conclusion that the company was doomed, but the directors immersed in day-to-day struggles to keep the company afloat cannot be expected to have wholly dispassionate minds. Although the decision to continue trading so as to liquidate the company's stock rather than go into liquidation benefitted the ordinary creditors to a greater extent than the Crown for its debts, this was not the type of misjudgment meriting disqualification. *CU Fittings Ltd., Re,* 1989 BCLC 556 (Ch D). If the company's insolvency has been caused by the directors following the advice of an apparently competent professional adviser, or by the company's financial and accounting responsibilities being attended to by a professionally qualified accountant appointed to the Board for that purpose, the court will not disqualify the other directors if they relied in good faith on the adviser or the accountant. See *Douglas Construction Services Ltd.,* (1988) BCLC 397 and *Cladrose Ltd., Re,* (1990) BCLC 204 (Ch D) Financing of unprofitable trade with the money collected for the Crown by way of taxes, has, however, been held to be a serious error. *Churchill Hotel (Plymouth) Ltd., Re,* 1988 BCLC 341 (Ch D).

In *ECM (Europe) Electronics Ltd., Re,* (1992) BCLC 814 (Ch D), the managing director of a company which went into voluntary liquidation was sought to be disqualified on certain grounds: (1) failure to file accounts for one year; (2) excessive remuneration; (3) lack of co-operation with administrative receivers; (4) misuse of the company's name; (5) unjustified payments of company money to his wife; (6) shareholders' meetings held

without notice; (7) prohibited loan to himself; (8) disbursement of company money without benefit to company; (9) payments constituting voidable preferences. The court found that the managing director was not grossly negligent or totally incompetent. In the view of the court, points (1) to (6) raised no serious case of lack of commercial probity or a serious failure of duties. Point No. (9) would require an intention to prefer of which there was no evidence. As for points (7) and (8) the managing director could be criticised for making irregular use of company funds notwithstanding that he had paid back all the sums he had been required to. The application for disqualification was dismissed.

Summing up the emerging principles on the subject in *Mc Nulty' Interchange Ltd., Re,* 1989 BCLC 709 Ch D, Sir NICOLAS BROWNE—WILKINSON VC said: "A director should only be disqualified where his conduct was dishonest, in breach of standards of commercial morality or grossly incompetent. Commercial misjudgment does not justify disqualification." On the facts the court disqualified the director in question for 18 months because his conduct, at a time when he was not able to market any product of the company, in incurring debts, receiving remuneration and not paying excise duties, etc., was a culpable conduct. The court found support in the following observations of HOFFMANN, J. in *Dawson Print Group Ltd., Re,* 1987 BCLC 601 at 604 (Ch D): There must be some conduct which if not dishonest is at any rate in breach of standards of commercial morality, some really gross incompetence which persuades the court that it would be a danger to the public if he were to be allowed to continue to be inved in the management of companies, before a disqualification order is made. The potential harm to the public may be seen by examination of the facts of some of the cases. The public stand to lose considerable sums, both as direct creditors and as indirect creditors because of unpaid taxes. Further, poor performance by directors may undermine confidence in business generally, causing excessive caution which in turn may contribute to a recession in the economy. See also *Lo-Line Electric Motors Ltd., Re,* 1988 BCLC 698 : (1988) 2 All ER 692; *Douglas Construction Services Ltd., Re,* 1988 BCLC 397 (Ch D), in both these cases the situation was that of commercial misjudgment; *Bath Glass Ltd., Re,* 1988 BCLC 329 (Ch D), see also *ECM (Europe) Electronics Ltd., Re, (Supra)*, the conduct must be of sufficiently serious nature and of gross incompetence, *Rolus Properties Ltd., Re,* (1988) 4 BCC 446. Where the directors increased withdrawal from the already overdrawn overdraft account in the expectation that Christmas sales would help them to tide over, but it turned out to be a miscalculation, two-year term of disqualification was imposed. *City Pram & Toy Co. Ltd. Re,* (1998) BCC 537 (Ch. D).

The court refused to disqualify a director who remained in office but was not able to influence the policy of the board. The court said, that the companies legislation did not impose on directors a statutory duty to ensure that their company did not trade while insolvent or at a loss; they might properly take the view that it was in the interests of the company and its creditors to trade out of its difficulties. In this case a director who, believing there was no reasonable prospect of avoiding an insolvent liquidation, protested against further trading and used such influence as he had to bring it to an end. The court said that he was not necessarily a person whose failure to resign had to lead to his disqualification. The district judge, having correctly addressed the question as to how far the director personally was responsible for the company's insolvency and for its continuing to trade whilst insolvent was entitled to decline to disqualify him. *Secretary of State for Trade and Industry v. Taylor,* (1997) 1 WLR 407 (Ch D). It has been added that once it becomes apparent that the board will pay no attention to the director's views, remaining on the board is dangerous because it may create the impression that his purpose was simply to continue to draw directors' fees. *Re, A Company (No. 004803),* The Times, December 2, 1996. [1997 PALMER IN COMPANY January p. 4]

A director of two companies which were put under administration made contributions from the companies funds to a charity, the latter contributing to still another charity and from this charity scholarships were awarded to cover the costs of education of the director's children. He had not disclosed this fact. It was held that his conduct with respect to

the matter, given *inter alia* that he had relied on professional advice, *albeit* bad, was not such as to make him to be a director of a company. But his conduct in receiving consultancy fees from one of the companies without disclosing it and without getting it authorised through proper procedure made him unfit to be a director. His conduct in bringing about excessive payment to be made for acquisition of shares under a transaction which was of highly doubtful propriety made him unfit to be a director. *Dominion International Group plc. (No. 2) Re,* (1996) 1 BCLC 572 (Ch D).

Probity and competence.—Those of the directors who master minded the company's meteroic rise and who were also responsible for its collapse were held unfit to be concerned in the management of a company. The court said that in determining the question whether the respondents' conduct as directors of the company rendered them 'unfit to be concerned in the management of a company', it was important to bear in mind that the purpose of the legislation in approaching particular fact situations was and remained to raise the standard of conduct of company directors. It was established that the standard to be applied was an objective one. The relevant standard has been more frequently described as a standard of 'probity and competence' rather than being stated in the traditional terms of care, skill and diligence. If conduct below the relevant standard was proved to have occurred the court would be under a duty to impose disqualification even if satisfied that there was no present reason to disqualify, that the director had recognised his past errors, and that he was not at the date of the hearing unfit. There was a clear thread in the authorities that the misconduct has to be serious before a disqualification order can be imposed. A director might be in breach of duty if he left to others matters for which the board as a whole had to take responsibility. A proper degree of delegation and division of responsibility by the Board is permissible but not a total abrogation of responsibility since this would undermine the collegiate or collective responsibility of the Board of directors which is of fundamental importance to corporate governance. *Landhurst Leasing plc* (1999) 1 BCLC 286 (Ch D); *Secy. of State for Trade and Industry v. Ball,* (1999) 1 BCLC 286 (Ch D).

Company running in losses.—It has been held continuing to trade a company that was making losses did not necessarily mean that the directors were unfit but that to do so over a protracted period thereby running up large losses was unjustifiable. When considering the salary treatment of directors the test was not whether the directors were worth what they paid themselves but whether the company could afford it. *Secretary of State v. Lubrani,* (1997) 2 BCLC 115.

Commercial morality.—The respondent-director had carried on business in the clothing trade for 15 years, through a succession of companies, four of which had gone into insolvent liquidation. The director allowed the last of these companies to incur further liabilities, when he knew it was insolvent, and paid a salary to himself and his wife without accounting for PAYE and National Insurance contributions. He claimed to be winding down the company's affairs with a view to paying all creditors and acting in effect as a liquidator. It was held, disqualifying him from a director for five years, that his conduct was contrary to commercial morality. Liquidators were required by the law for good reason to be independent and qualified to act. Inaccuracies in the statement of affairs, failure to maintain statutory books, to keep accounting records, and to file accounts had occurred in this case. Although individually these did not justify disqualification, these together with his disregard of his creditors' interests and those of the Crown justified his disqualification, under s. 6 of the Company Directors' Disqualification Act, 1986. *Ipcon Fashions, Re,* (1989) 5 BCC 773 (Per HOFFMANN J.)

Allotment of shares to maintain control

It has been held that allotment of shares by a director to himself and his supporter in order to maintain his control of the company constitutes evidence of unfitness and a good ground for making a disqualification order. *Looe Fish Ltd., Re,* (1993) BCLC 1160 (Ch D).

Violation of statutory provisions and other irregularities

In *A & C Group Services Ltd., Re,* (1993) BCLC 1297 (Ch D) three directors were disqualified. Their company went into creditors' winding up with a huge deficiency and they failed to provide adequate explanation of the circumstances resulting in trading losses. They failed to ensure sufficient accounting records. One of them operated his director's loan account in violation of the Act. Another director caused the company to incur expenditure for a purpose apparently unconnected with its normal trading activities. All of them failed to exercise proper stewardship of the company's affairs; they retained crown money, enjoyed undue remuneration. The main culprit was disqualified for six years and his companious for two years. In another case of the same kind involving breach of accepted commercial morality and statutory violations leading to the insolvency of a series of companies, taking of loans by withholding crown money, disqualification orders were passed. One of them was disqualified for two years only. To begin with he was a main customer of the companies but he played the role of a shadow director and had also agreed to become a director, and that being so he had also to accept the responsibilities of a director. *Swift 736 Ltd., Re,* (1993) BCLC 1 (Ch D); on appeal *sub-nom, Swift 736 Ltd., Re,* (1993) BCLC 896 (CA), period of disqualification increased from 3 to 5 years.

A director of an insolvent company was not ordered to be disqualified simply because his company had preferred a creditor and he might have authorised that transaction. It had to be shown that he personally intended that the preference be given. He was not to be held responsible for the desire of his co-directors to prefer. *Re, Living Images Ltd.,* 1995 CLY 588 (DC).

Where the company's transactions were found to constitute a fraudulent preference, a five-year disqualification was imposed upon the director who formulated such transactions. *Funtime Ltd. Re,* (2000) 1 BCLC 247 (Ch D).

It has also been held that a disqualification order should not be imposed in every case in which a director has been found to be in breach of duty. In this case a payment had been made by the director in question to a creditor which had prejudiced the position of general creditors but subsequent events showed that the creditors were not in fact prejudiced. The charge that the director was unfit for management did not stand and, therefore, his appeal against disqualification order was allowed. *Deadduck Ltd. In Liquidation,* (2000) 1 BCLC 148 (Ch D); *Baker v. Secretary of State for Trade and Industry,* (2000) 1 BCLC 148 (Ch D).

Where the director misrepresented the nature of the company's business when registering the company for VAT and failed to cooperate in the administration of liquidation which was brought about for failure to maintain proper accounting records, it was held that his actions were deliberate and charges against him were sufficient to justify his disqualification. *CEM Connections Ltd. Re,* 2000 BCC 912 (Ch. D). *Godwin Warren Controls Systems plc Re,* 1993 BCLC 80, failure to disclose interest, a statutory violation. This case was considered in *Secretary of State for Trade & Industry v. Reynard,* The Times July 10, 2001 (Ch D), conduct of the director in the witness box may do not more than illuminate but even so would be relevant to the misconduct alleged against him. An appeal against this decision was **dismissed** in *Secretary of State for Trade and Industry v. Reynard,* (2002) ECWA Civ 497, The Times May 8, 2002 : 2002 CLY 26 (CA). Their Lordships observed that the words "a person's conduct as a director" would include his conduct in the disqualification proceedings.

Importance of Accounting Records.—The importance of maintenance of proper accounting records was highlighted in *Firedart Ltd., Re,* (1994) 2 BCLC 340 Ch D; *Official Receiver v. Fairall,* (1994) 2 BCLC 340 Ch D. The court said that the absence of accounting records is one of the most crucial factors for disqualifying a director. Without proper accounting records the directors may continue trading even when the company is insolvent. Proper accounts can give an advance warning as to the real state of affairs and

as to proper level of remuneration. See also *Deadduck Ltd. Re*, (2000) 1 BCLC 148 (Ch D).

The director in question was called upon to disclose documents concerning preparation and auditing of statutory accounts of numerous companies. He alleged that he was the victim of a fraud by a fellow director. The court said that before any order could be made there was the need to determine that the documents on the basis of which the disclosure was sought were relevant to the allegations made against the director. The court awarded costs to the respondents for complying with the court's orders. *Skyward Builders plc*, (2002) 2 BCLC 750 (Ch. D).

Selling property at substantially low price.—Selling the company's assets to a new company formed by themselves at a substantially lower price than the company paid for them, attracted a disqualification order; *Keypak Homecare Ltd. (No. 2)*, 1990 BCLC 440 (Ch D). See also *T & D Services Ltd., Re*, 1990 BCC 592.

Misapplication of corporate funds.—Where a director permitted companies to go on trading when they were insolvent and also made drawings from the companies, 12 years disqualification was considered to be appropriate. *Official Receiver v. Stern (No. 2)*, (2002) 1 BCLC 119 : [2001] EWCA Civ 1787 (CA).

Demerger without consideration.—The fact that a director had professional advisers who failed to draw attention to the impropriety of transactions may negate a finding of unfitness or be a mitigating factor in the period of disqualification to be imposed. Leaving all relevant judgments to professional advisers may results in failure to fulfil duties and thereby attract disqualification. The director in this case was entitled to rely on professional advice. But he asked no questions and simply did what he was told and thus abdicating all responsibility. It was plain that he was acting on the instructions of the dominating figure in the management. He knew that the company's assets were being transferred for no consideration but did not sit to consider whether this was in the best interests of the company. In those circumstances, he could not seek refuge in the fact that professional advisors were involved in the transaction. This rendered him unfit to be involved in the management. The minimum bracket of two-year period of disqualification was awarded. *Bradcrown Ltd. Re*, (2001) 1 BCLC 547 (Ch. D); *Official Receiver v. Ireland*, (2001) 1 BCLC 547 (Ch. D).

Gross incompetence.—In *Sevenoaks Stationers (Retail) Ltd., Re*, (1991) 3 All ER 578 : 1991 BCLC 325 (CA), the alleged conduct which made the director in question as "unfit to be concerned in the management of a company" included failing to keep proper accounting records of one of the companies, failing, in respect of two companies, to ensure that annual returns were filed with the Registrar, failing, in respect of all the five companies, to ensure that audited accounts were prepared and delivered to the Registrar, entering into loans, guarantee, etc. transactions with knowledge that the companies were in severe financial difficulties, causing some companies to continue to trade while insolvent and failing to pay crown debts. Disqualification order was sustained but the period of seven years as inflicted by the Chancery Division, *Sub-nom*, 1990 BCLC 668 (Ch D) was reduced to five years taking note of the fact that there was no element of personal benefit, but rather serious personal detriment to the director from the trading. If incompetence is relied upon by the authorities it must be shown that the respondent was guilty of incompetence to a high degree. A universal standard was to be applied, but subject to the circumstances of each individual case. A director could be found unfit even though no breach of a formal legal duty could be established. *Barings plc (Secretary of State v. Baker (No. 5) Re* (1999) 1 BCLC 433 : (1999) 1 All ER 1017. An appeal against this decision was **dismissed** in *Barings Plc Re, (No. 5)*, (2000) 1 BCLC 523 (CA); *Secy. of State for Trade & Industry v. Baker (No. 5)*, (2000) 1 BCLC 523 (CA).

Irresponsible trading.—Where there was a large accumulated deficit which was certainly not any smaller, taking that together with lengthy history of dishonoured cheque and statutory and other demands for payments, it seemed to the court that taking an over-

draft in those circumstances amounted to trading with knowledge that there was no reasonable prospect that the company would ever be able to pay all its debts, the directors were accordingly declared to be guilty of irresponsible trading. *Richborough Furniture Ltd. Re,* (1996) 1 BCLC 507 (Ch D); *Synthetic Technology Ltd., Re,* (1993) 1 BCLC 549 at 562 (where the directors took unwarranted risks with creditors' money by continuing to trade); *Saver Ltd. Re* 1999 BCC 221 (Ch D) (ruining nine companies in a row leaving uncovered debts and heavy losses, nine years disqualification). In *Secretary of State for Trade and Industry v. Creegan,* (2002) 1 BCLC 99 : [2001] EWCA Civ 1742 (CA), there was allegation but no proof that the director in question knew or ought to have known that there was no reasonable prospect of meeting of creditors' claims at the material time when he caused the company to go on trading and incur liability.

Where there was evidence of trading on Crown debts and though the director inactive, he continued to draw remuneration and failed to carry out the functions that might reasonably be expected of him, he could be declared unfit. A director who was unable to carry out the required role should resign. It was not an excuse to suggest that one's duties as a director had been delegated to a spouse who was actively involved in running the company..On liquidation a director is under a duty to volunteer all relevant information to the liquidator. *Galeforce Pleating Co. Ltd. Re* (1999) 2 BCLC 704. (Ch D).

Trading when financial position unsatisfactory

It was apparent from the director's own evidence that the position of the company was unsatisfactory and was steadily worsening. The company sought no further professional advice nor prepared any financial projections as to likely future income, outgoings or cash flow. The directors' decision to carry on paying a combined salary per month while the performance of the company sharply deteriorated was culpable. In all these circumstances the disqualification order was held to be appropriate. *Amaron Ltd. Re,* (2001) 1 BCLC 562 (Ch. D); *Secretary of State for Trade & Industry v. Lubrani,* (2001) 1 BCLC 562 (Ch. D).

Unfitness for management.—In *Linvale Ltd., Re,* (1993) BCLC 654 (Ch D) between a period of 5 years two brothers had been concerned in the management of three companies successively each of which had gone into insolvent liquidation. When the first company ceased trading, it was immediately replaced by the second company carrying on a similar business, and third similarly replaced the second. The court found that they were by no means highly educated and were ignorant of financial matters in any technical sense, but were intelligent enough to have realised that they were incurring debts that in probability they would be unable to pay and using for their own purposes money that ought to have been made over to the Crown. Accounts were unsatisfactory and there was a very substantial deficiency in the case of each company. Accordingly they were regarded to be unfit for being concerned in the management of a company. Each was disqualified for 5 years.

Unfitness for management was held to be in evidence in *Secretary of State for Trade and Industry v. Van Hangel,* (1995) 1 BCLC 545 (Ch D) on the following grounds: (1) misapplication of the funds of the company's clients. The attitude of the directors revealed a complete absence of appreciation of the obligations which they owed as directors with respect to the welfare of the company's clients. They took no steps to ensure that the functions for which they were responsible were properly carried out. One of the directors did take some steps to deal with his concern about the use of the client's money by the company. About him the court observed that, while with the benefit of hindsight, those steps might be seen to be inadequate, his conduct did not indicate that he was unfit for management; (2) inability to maintain proper accounts of the clients' trust money which the court described to be in chaotic state; (3) payment of excessive remuneration than what the company could reasonably afford. A director in setting salaries of the board must keep in mind what the company can afford as well as what is the going rate for the job elsewhere; (4) failure to file accounts. The director had not bothered to consider his

responsibility for preparation of accounts and he did not have any comprehension of what his responsibilities were. Although there was only one default during the period of his directorship, he should have appreciated that because of the history of the company for past defaults, he should be vigilant to ensure that as financial director no further lapses occured.

In *Park House Properties Ltd. Re,* (1997) 2 BCLC 530 (Ch D), a director with his two co-directors was held to be unfit because he continued trading without preparing and filing previous year's accounts and even after it had become certain that the company would not be able to pay back went on increasing the debt burden of the company and also unpaid taxes.

The court has to evaluate the facts brought before it for determining whether a reasonable director should have concluded that the company should not have traded beyond a particular point. It has been held that an appellate court is in as good a position as the trial judge to draw any such inferences from the primary facts or to make an evaluation of such facts as the trial judge and, therefore, the appellate court can interfere in a finding of fact. The trial judge has also to make this further evaluation as to whether or not the conduct of the director shows unfitness to take part in the management of the affairs of the company. In this respect also the appellate court is equally competent and should not shrink in making a decision even if it is disagreeing with the trial judge, though, of course, it would be very slow to interfere in the findings of the trial judge. In this case, the appellate court interfered in the findings of the trial judge because it felt that the evidence relating to the misuse of the company's bank account and continuing to trade at the creditors' risk showed unfitness. The director was disqualified for a period of two years. *Hitco 2000 Ltd., Re,* (1995) 2 BCLC 63 (Ch D). The Court of Appeal can interfere in the matter of the evaluation of the primary facts. Where the court finds that despite the director's shortcomings in the past, he was unlikely to reoffend, a disqualification order is not necessary. *Secretary of State for Trade v. Gray,* (1995) 1 BCLC 276 (CA).

Although the prudent course for a director who found that the company was trading at the risk of creditors and that his advice and recommendations were going unheeded was to resign, his failure to do so did not necessarily make him unfit to be concerned in the management of a company. The question in each case was the extent to which he was responsible for the way in which the company was run, for it becoming insolvent and for it continuing to trade while insolvent. On the facts, the court did not interfere with the district judge's finding that the respondent was not personally responsible for the company's insolvency and for its continued trading while insolvent. *Secretary of State for Trade and Industry v. Gash,* (1997) 1 BCLC 341 (Ch D). *Grupo Torras SA v. Al Sabah (No. 6),* 2001 Lloyd's Rep Bank 36 (CA), the person in question was a solicitor. Having been appointed as a director of a foreign company in England, it became his duty to take steps to familiarise himself with fiduciary duties imposed by English Law on directors, and, even if he was not aware of the legal position, he had given assistance in transactions which were suggestive of fraud.

Unfit non-executive director.—A senior bank official was appointed on behalf of a bank as a non-executive director of a company and its wholly owned subsidiary. The holding company purchased shares in the subsidiary through bank loans. The subsidiary company made interest free loans to its holding company to enable it to pay back interests and loans. The subsidiary became starved and went into creditors' voluntary winding up. The non-executive director was disqualified for three years. The court said that where senior employees of major banks accept appointment as directors of client companies of those banks, those dealing with the client company were entitled to expect that they would exercise the competence required by the Companies Act in relation to the affairs of the company of which they accept office as directors. The degree of competence required by the Act extends at least to a requirement that a director who was a corporate financier should be prepared to read and understand the statutory accounts of the holding company of the company of which he was a director, more so if he was also a director of that

holding company, and satisfy himself that transactions between the holding company and subsidiary were properly reflected in the statutory accounts of the subsidiary. In addition, he should have appreciated that the loan made by the subsidiary to the holding company constituted a breach of the provisions of the Act against financing the purchase of one's own shares. *Re, Continental Assurance Co. of London v. Burrows,* (1997) 1 BCLC 48 (Ch D).

A finding of unfitness could be made where a non executive director had remained inactive and had failed to carry out the functions that one might reasonably expect of such a person. Although he honestly believed that he was not a director of the company, that belief was thoroughly unreasonable since he was a professional man who made his living by holding nominee directorships. Accordingly, he was not released from his duty to inform himself about the affairs of the company. Since he had been totally inactive in the performance of any of his duties as a non-executive director of the company he was liable not only for failure to ensure the keeping of proper accounting records but also for the false representations to the companies registry and its creditors and for continuing its business for as long as it did. He was therefore unfit to be concerned in the management of a company and should have been disqualified. *Kaytech International plc, Re* (1999) 2 BCLC 351 (CA).

Fitness of non-executive director.—In another case on the fitness of non-executive director, *Stephenson Cobbold Ltd. Re,* (2000) 2 BCLC 614 (Ch D); *Secretary of State for Trade & Industry v. Stephenson,* (2000) 2 BCLC 614 (Ch D), the court said that the mere fact that a director was a signatory of the company's cheques which were used for making improper payments putting the company into insolvent liquidation, did not by itself show that he was unfit to be a director. Signing cheques alone is not an involvent into the company's financial affairs. A cheque signatory is not a finance director. Signing blank cheques also does not by itself demonstrate unfitness for directorship. The court **distinguished** the case from the decision in *Hitco 2000 Ltd. Re,* (1995) 2 BCLC 63. The company in the *Stephenson* case (*supra*) had professional accountants who were keeping the company's books and prepared monthly management accounts. By reason of this feature of the company, the court said that very cogent evidence was required to enable the court to record a finding that a non-executive director had caused the company to operate a policy of not paying crown debts simply because he was a cheque signatory. The court distinguished on this point the decision in *Secretary of State for Trade & Industry v. McTighe,* (1996) 2 BCLC 477.

Poor accounting records and payments to selective creditors.—In *New Generation Engineers Ltd. Re,* (1993) BCLC 435 (Ch D) it was found that the accounting records were inadequate as they did not disclose with reasonable accuracy the financial position of the company. This was due to the directors' inability to monitor the company's financial position as they lacked accounting knowledge and failed to obtain proper professional guidance. This by itself was considered to be sufficient to make them unfit to be concerned in the management of the company. There was still another allegation that the directors had adopted a policy of only paying those creditors who pressed for payment or who needed to be paid to keep the company's business going. This allegation was also made out and was considered by the court to be sufficient to make the directors unfit for management. The allegation of fraudulent preference was not established on facts because the payment in question was made in good faith for the benefit of the company. *Structural Concrete Ltd. Re,* The Times, July 5, 2000 (Ch D), another case in which disqualification was merited because of selective payments. In *GSAR Realisations Ltd. Re,* (1993) BCLC 409 (Ch D) a similar treatment was given to creditors who did not press for repayment of their debts. The directors did not co-operate with the Secretary of State and failed to produce a statement of affairs. The company was permitted to trade even after it had become insolvent. A three years disqualification was awarded. Where the insolvent liquidation of the company was brought about by the way in which the business and assets of another company were acquired through the company's two subsidiaries by con-

cealing the directors' interests, both the directors were held to be deserving disqualification. *Goodwin Warren Control Systems plc.,* (1993) BCLC 80: (1992) BCC 557 (Ch D). There is no express or implied requirement that the conduct has to be the same or similar in the other companies to that alleged in the lead company. *Secretary of State for Trade and Industry v. Ivens,* (1997) BCC 396 (Ch D). The Court of Appeal **affirmed** this decision in *sub-nom* The Times, September 24, 1997 (CA) (UK).

The policy of not paying the creditors who did not press for payment because that was the only way in which the companies could be kept in a trading position despite insolvency and persistent refusal to co-operate with the liquidator or official receiver in breach of statutory duty was viewed as sufficiently serious to merit disqualification and superadded to this was the fact of removing the assets from the reach of the creditors ultimately leaving them unpaid and uncared for, it fell into the top bracket for disqualification. The director in question was disqualified for a period of twelve years (the maximum period under the Indian provision is 5 years). *Secretary of State for Trade and Industry v. McTighe (No. 2),* (1996) 2 BCLC 477 (CA).

A director who was convicted of failure to keep proper books of account was fined £ 1,000 and also disqualified for one year. *R.v. Victory (Kevin),* (1999) 2 Cr. App. Rep. (S) 102.

A new provision has been added by the Companies (Amendment) Act, 2000 to section 274 of the Companies Act, 1956, according to which a director of a public company, which has failed to file its annual return and annual accounts for a consecutive period of 3 years, is disqualified from being appointed as a director of any other public company for a period of 5 years from the date of default.

Conduct in collateral companies.—In considering the relevance of the director's conduct with respect to his participation in the management of companies (collateral companies) other than the 'lead' company, the requirements are that (a) there should be a nexus between the two companies in the sense that the director is a director (*de facto*, shadow or properly appointed) of the relevant companies, (b) there is evidence of unfitness in connection with the director's management of the lead company, which must have gone into insolvency, and (c) the evidence of his conduct in connection with the collateral companies should assist the court in reaching a conclusion of unfitness in connection with the lead company. There is no requirement that the conduct has to be the same or similar in the collateral companies to that alleged in the lead company or that the collateral companies should also be insolvent. *Secretary of State for Trade and Industry v. Ivens,* (1997) 2 BCLC 344 (Ch D).

Disqualifying companies being used as directors.—In England there is no prohibition on a company being appointed as a director. The persons behind such companies may misuse them and question of disqualifying such companies may arise. In a case of this kind, the court said : it was useful to be able to disqualify companies from acting as directors to enable directors who were unfit to be effectively challenged. There was no reason in law to prevent such an action against companies. The companies were simply the tools of the individuals and, in line with the seriousness of the failures involved, the companies would be disqualified from acting as directors for a period of 15 years. *Official Receiver v. Brady,* (1999) BCC 258 (Ch D).

Non-payment of Crown Debts.—Non-payment of Crown debts was adopted as a temporary policy to extricate the company from insolvency by paying other claimants. This discriminatory policy, though it continued for a short term, was held to merit a disqualification order for the minimum period of two years. *Verby Print for Advertising Ltd. v. Secy. of State of Trade & Industry,* (1998) 2 BCLC 23 (Ch D).

In *Trading at the expense of revenue Amaron Ltd. Re (No. 2),* (2001) 1 BCLC 562 (Ch D); *Secretary of State for Trade & Industry v. Lubrani (No. 2),* (2001) 1 BCLC 562, the court found that the directors were causing the company to trade unfairly at the expense of the Revenue. The fact that the Revenue had accepted an arrangement for monthly

payments did not give rise to any form of estoppel since the Revenue might well have reluctantly accepted that any payment was better than nothing. The disqalification was, therefore, merited on this count.

In *Hopes (Heathrow) Ltd. Re,* (2001) 1 BCLC 575 (Ch D); *Secretary of State for Trade & Industry v. Dyer,* (2001) 1 BCLC 575 (Ch D), it was held that it was open to the court to find that a director was at fault in permitting the company to trade by operating a policy of not paying crown moneys even though he did not know that the company was actually insolvent at the time or that he operated such a policy before the company was actually insolvent. His denial of such a policy, though uncontradicted from the side of the secretary, did not amount to overthrowing of the fact shown by the secretary that the company paid creditors who were in a position to put commercial pressure on it rather than pay the crown because it took a less aggressive attitude. Use of crown money for prolonging the business of an insolvent company was held to be a ground for disqualification. Disqualification period of 12 years was considered to be appropriate. *Official Receiver v. Stern (No. 2),* (2002) 1 BCLC 119 : [2001] EWCA Civ 1787 (CA).

Where it was clear that the Customs and Excise had suffered a detriment by reason of the amounts received for the sale of equipment being converted from a floating charge over assets to a fixed charge over book debts and thus paid to the bank free of liability for VAT which would otherwise have been payable if the sales had taken place under an administrative receivership or liquidation, it was held that the directors' actions in arranging the sales were not of such a high degree of incompetence as to lead to the conclusion that they were unfit to be involved in the management of a company. They had acted in the *bona fide* interests of the company and its creditors, they had obtained the best price for the goods, they were not motivated by their own interests and there was no evidence to show that they were motivated to benefit the bank, they had informed one of the prospective administrative receivers what they were doing and had not been advised to desist, and they were entitled to believe that the recipients of the money, namely the administrative receivers and/or the liquidator, would account for the VAT. Accordingly, their appellants' appeal was allowed and the disqualification orders set aside. *Secretary of State for Trade & Industry v. Walker,* (2003) 1 BCLC 363 : 2003 EWHC 75.

Meaning of 'management' for purposes of this section.—The person who is disqualified under the section is restrained, without the leave of the court, from being "a director of or in any way, whether directly or indirectly, be concerned or take part in..... management of a company." It has been said that acting as a management consultant advising on financial management and restructuring of a company may amount to being concerned in the management of a company. *R. v. Campbell,* 1984 BCLC 83. In this case it was held that the words "in any way, whether directly or indirectly, be concerned or take part in" is a comprehensive phraseology designed to make it impossible for persons to be part of the management. The term "management" for this purpose should mean activities which influence policy or decisions of managerial nature affecting the company as a whole or substantially as a whole. *Commissioner for Corporate Affairs (Vic) v. Bracht,* (1988) 14 ACLR 728 (Aust). Routine duties of clerical or administrative nature associated with management will not be sufficient to prove that a person contravened a disqualification order.

Disqualifying *de facto* and shadow director

In *Tasbian Ltd., Re (No. 3),* (1991) BCLC 792 (Ch D), the Tasbian company never traded at a profit. It was substantially financed by a company which appointed one 'N' as an advisor to the company with respect to the business affairs of Tasbian. He was also appointed as a consultant to Tasbian. The company was put on compulsory winding up. The question was that of entertaining an application for disqualifying N. The court said that the dividing line between an advisor and a shadow director is a difficult one to draw but on the facts there was this question whether he was a director of Tasbian and, therefore, within the reach of the [English] Directors Disqualification Act, 1986. The particular section of the Act under which he could have been proceeded against also prescribed two years outer limit for complaint which had expired. It was held that as the Secretary of State had given a satisfactory explanation for not being able to seek a disqualification

order within the stipulated two years period and there was no evidence that N was prejudiced by the delay, the allegations were sufficiently serious to warrant a disqualification order and that justified the granting of an extension order. This case was **followed** in *Moorgate Metals Ltd., Re,* (1995) 1 BCLC 503 (Ch D) and applied to disqualify two persons one of whom was disqualified and therefore was acting virtually as director without appointment and carrying on the affairs of the company through other director who was on record. Both were disqualified, one as *de facto* and one as *de jure* director. They had brought the company to the state of insolvent liquidation by wrong investments, inadequate accounting records and excessive remuneration.

The definition of the concept of shadow director has to be construed in accordance with the purpose of the legislation. The definition is meant to identify those, other than professional advisors, with real influence over the corporate affairs and not necessarily over the whole field of the company's corporate activities. The question whether a particular communication can constitute a direction or instruction has to be answered in the light of all the evidence. It is not necessary for this purpose to prove the understanding or expectation of either the giver or receiver. Such evidence might be relevant but would not be conclusive in itself. Non-professional advice could also be within the category. All these shared the common feature of "guidance". It would be sufficient to show that properly appointed directors had cast themselves in a subservient role or surrendered their discretion in the face of 'directions or instructions' from the alleged shadow director. This would not be necessary to show in all cases. The instructions or directions do not have to extend to all the corporate activities of the company. It is also not necessary to show any degree of compulsion in excess of what is implicit from the words 'accustomed to act." It is also not necessary for the shadow director to lurk in the shadow. *Secretary of State for Trade and Industry v. Deverell,* (2000) 2 WLR 907 : (2001) CLC 905 : (2002) 111 Com Cases 303 : (2000) 2 BCLC 133 (CA).

In order to establish that a person is a 'shadow director' there has to be proof of a pattern of conduct in which a *de jure* director of a company was accustomed to act on the instructions or directions of the alleged shadow director and in order to establish that a person was a *de facto* director it is necessary to show that he undertook functions in relation to the company which could properly be discharged only by a director. The test for a shadow director is not satisfied if all that can be shown is that a *de jure* director acted on the instructions or directions of the alleged shadow director in relation to one event at the end of the company's life. The fact that the respondent's son, as the director of the old company, caused it to cease trading and took no steps to stop the new company taking the benefit of its contracts, as the result of the influence of the respondent, as the sole shareholder of both companies, did not establish either that the son, as the *de jure* director, was accustomed to act as a director of the company on the instructions or directions of his father, or that the respondent undertook functions in relation to the company which could properly be discharged only by a director. *Secretary of State for Trade and Industry v. Becker,* 2003 1 BCLC 555 (Ch D).

A *de facto* director was disqualified in *Sykes (Butchers) Ltd. (In Liq) Re,* (1998) 1 BCLC 110 (Ch D) because there was proof enough that he ordered the repayment of an overdraft to relieve the guarantors as against other creditors whose claims were also overdue.

In *Secretary of State for Trade & Industry v. Tjolle,* (1998) 1 BCLC 333 at 335 (Ch D), a proceeding against the alleged *de facto* director did not succeed. Stating the reasons, the Court said that the use of the title 'director' with added words did not make *K* a *de facto* director, because she was not in fact directing the company. There was clear evidence of *K's* lack of involvement in anything financial. Her attendance at the meeting of 10 December did not make her a *de facto* director. *K* was a manager, but she did not form part of the real corporate governance of the company. There was no function she performed that could only properly be discharged by a director. Nor did she accept the responsibilities of an office; no one could properly do so who did not have access to the company's

financial position in reasonable detail. In relation to the first charge *K* was not in a position to 'permit' the company to trade and until the company went down she in fact did not know that it was hopelessly insolvent. In relation to the second charge, it was not *K's* actions which caused the loss to creditors.

Meaning of *de facto* director.—The word director for the purposes of the section would include a situation in which a person has acted as a director even though not validly appointed or even if there has been no appointment at all. For a person to be regarded as a *de facto* director, there must be clear evidence to show that he was the sole person directing the affairs of the company or, if there were other person who were true directors that he acted on an equal footing with such persons in directing the affairs of the company. Applying this principle to the facts of the case the court said that where it is not clear whether what the particular person did was referrable to an assumed directorship or to some other capacity such as shareholder or consultant, the person in question is to be given the benefit of doubt. *Richborough Furniture Ltd., Re,* (1996) 1 BCLC 507 (Ch D).

Where a body corporate is a director of a company whether *de facto*, *de jure* or shadow, it would not follow as a matter of course that the directors of such a body corporate would *ipso facto* be regarded as the shadow directors of the other company. Specific proof would have to be offered that the board of directors of the other company was being instructed by a particular director in the conduct of the company's affairs. *Secretary of State for Trade and Industry v. Laing,* (1996) 2 BCLC 324 (CA). The Court of Appeal adopted a wide interpretation of the concept of 'shadow director'. Any person exerting real influence over the affairs of a company (apart from a professional adviser) might be so regarded. It was not necessary that the Board of directors be subservient to such a person or to have surrendered its discretionary powers to him—*Secretary of State for Trade and Industry v. Deverell,* (2000) 2 WLR 907 : (2001) CLC 905 : (2002) 111 Com Cases 303 : (2002) 2 BCLC 133 (CA). In ascertaining whether an individual is a *de facto* director of a company the crucial question is whether he had assumed the status and functions of a company director so as to make himself responsible as if he were a *de jure* director. In the present case the respondent had been deeply and openly involved in the company's affairs from the outset, and although he had done his best to avoid being seen to act as a director, using his office as that of *de jure* secretary and his professional status as a camouflage, on some very important occasions he openly acted as a director. Accordingly, he was a *de facto* director of the company and therefore a director for the purposes of s. 6 of the Directors Disqualification Act, 1986 [English]. *Kaytech International Plc Re,* (1999) 2 BCLC 351 (CA); *Secy. of State for Trade & Industry v. Kaczer,* (1999) 2 BCLC 351 (CA).

The Secretary of State sought an order disqualifying a director from acting as a director on the basis that he had acted as a *de facto* director of a company, which subsequently went into receivership. At first instance it was held that he had only acted as a *de facto* director for a period of four days, which was not sufficient to justify disqualification. The Secretary of State appealed. His appeal was allowed. The court said that the Secretary of State had discharged the burden of showing that the judge below had erred. There was a mismatch between the judge's findings and the conclusions drawn. It was most significant that the director had signed a letter on company notepaper as "joint managing director" and the fact that the bank mandate included him as a signatory was also indicative of his status. It was also relevant that he had dealt directly with the company's biggest customer and its creditors. All this showed that he had been acting as a director. *Secretary of State for Trade and Industry v. Jones,* (1999) BCC 336 (Ch D). The court **followed** *Tasbian Ltd. (No. 2), Re* (1991) BCLC 59, (1990) CLY 474.

The expression "*de facto* director" has been held not to include a wife who acted in a secretarial role in a company controlled by her husband. She was merely acting as a dutiful spouse trying to help her husband. She was not liable to be disqualified. *Red Label Fashions Ltd. Re,* (1999) BCC 308 (Ch D). Another attempt to disqualify a lady director failed in *CEM Connections Ltd. Re,* 2000 BCC 917. All that she had done was signing a

form signifying her consent to sign as a director. The court said that whilst signing the form was a *prima facie* evidence that the person had consented to act as a director, there was strong evidence that she was not aware of the true nature of any of the forms she had signed.

§ See also Notes under S. 7 under the heading "Position of Shadow Directors".

Husband and wife company.—Where a husband and wife were both directors of a number of companies that became insolvent, it was held to be no defence in the case of the wife for her to say that the marital responsibilities should absolve her from her responsibilities as a company director. The court said that persons who voluntarily accept positions as directors must fulfil their responsibilities under company law. *Swift 736 Ltd., Re,* 1993 BCLC 896 (CA), See also *Samuel Sherman Plc. Re,* (1991) 1 WLR 1070, 1084-6.

Length of disqualification [Sub-section (1)]

The period of disqualification runs from the date the order is made, even if a sentence of imprisonment is passed at the same time. In relation to disqualification for non-compliance with the reporting requirements, it has been said that it is not right to impose the maximum period of disqualification irrespective of the degree of blame involved, even though the person disqualified can seek leave of the court to act, and the longer periods of disqualification should be reserved for serious cases, for example, where defaults have been made for a dishonest purpose or deliberately or in large numbers.

The length of disqualification order depends upon whether the dependents conduct was deliberate or whether he had subsequently taken remedial measures or whether he was the innocent victim of the frauds committed by others when he was appointed with proper care and on basis of competence. See *Civica Investments Ltd., Re,* 1983 BCLC 456 (Ch D) and *Rolus Properties Ltd., Re,* (1986) 4 BCC 446. The period of disqualification has to reflect the gravity of the offence. A discount could be allowed if a director admitted what might otherwise have taken a great deal of time and expense to prove. The period of disqualification should be fixed by starting with an assessment of the correct period to fit the gravity of the conduct, and then allowing for any mitigating factors. *Westmid Packing Ltd. Re,* (1998) 2 BCLC 646 : (1998) 2 All ER 646 (CA). **Approving** *Civica Investments Ltd. Re (Supra).*

In disqualifying three directors for periods of between two and nine years the court compared the relative responsibilities of a director who controlled the company, with a director who held only one share but managed the business and also with a director who was the wife of the controller and who occupied a non executive role for few months and had no direct involvement. *Peppermint Park Ltd, Re* [1998] BCC 23.

A long period of disqualification extending up to nine years was ordered in an English case (under S. 203 of Indian Act the order cannot exceed five years period) where a person, whose conduct had driven two companies into insolvent liquidation, organised a third company to meet the same fate. *Travel Mondial (UK) Ltd., Re,* 1991 BCLC 120 (Ch D). *Peppermint Park Ltd., Re* (1998) BCC 23 (Trading inspite of insolvency, disqualification of nine years). Where the directors of two companies which went into insolvent liquidation used the Crown debts to finance the business and one of them showed a greater irresponsibility in not monitoring financial affairs, and though they had drawn no personal benefit, they were ordered to be disqualified, one who was innocent of the matters, for 4 years and the other who deserved full term of 10 years, for 7 years because he was already 68 and by the expiry of the term he would be 75 and, therefore, generally not fit for being concerned in the management of any company. *Re, Melcast (Wolverhampton) Ltd.,* 1991 BCLC 288 (Ch D).

In another case, disqualifying a director for three years, the court said that whenever the application was heard, if it appeared to the court that his conduct as director of insolvent companies had made him unfit, then the statutory condition was satisfied and the court had jurisdiction to make a disqualification order. Although this was not one of the

most serious cases since there had been no personal dishonesty by the respondent, notwithstanding the evidence relating to the better management of the latest company, there had been sufficient misconduct in the past to require a period of disqualification in the public interest. *Matthews (D.J.) (Joinery Design), Re,* (1988) 4 BCC 513 [*per* PETER GIBSON J]; *Churchil Hotels (Plymouth) Ltd., Re,* 1988 BCLC 341.

A full-term disqualification was imposed upon a person who as a director of four companies all of which had become insolvent and there was evidence of a failure to keep proper accounts, sales of property at undervalue to himself at a time when he must have known of the company's insolvency. *T & D Services (Timber Preservation and Damp Proofing Contractors), Re,* 1990 BCC 592. Seven year disqualification was inflicted upon a director where the accounts and records of the finance company and the four operating companies were insufficient to enable the office holders of the companies to determine what had happened to the assets of those companies. His companions were disqualified for a period of three years. *Secretary of State for Trade and Industry v. Arif,* (1997) 1 BCLC 34 (Ch D).

The Court of Appeal in *Sevenoaks Stationers (Retail) Ltd., Re,* (*Infra*) has suggested the following formula for determining the length of disqualification:

(a) In determining the length of a disqualification order under s. 6 of the Company Directors Disqualification Act, 1986 the top bracket of disqualification should be reserved for serious cases. The minimum bracket of two to five years should be reserved for cases which were relatively not serious and the middle bracket of six to ten years should apply to serious cases that did not deserve the maximum sentence.

(b) It was of paramount importance that a director facing a disqualification order should know the charges that he has to meet.

(c) Non-payment of Crown debts should not be treated as automatic grounds for disqualification.

(d) As the judge in this case had taken into consideration matters which he should not have done this was an appropriate case in which the court could review the exercise of his discretion and would reduce the sentence to three years **followed** in *Re, Tansoft Ltd.,* 1991 BCLC 339 (Ch D) where failure to keep accounting records and to file annual return was considered to be in the middle range of seriousness inviting seven years disqualification.

§ For another statement of factors in considering the length of disqualification see, *Secretary of State for Trade & Industry v. Reynard,* (2002) 2 BCLC 625 (CA).

A director was disqualified for 12 years (under the English Act) for false invoicing, deliberate failure to pay VAT, deliberate attempt to deceive Customs & Excise. *Official Receiver v. Doshi,* (2001) 2 BCLC 235 (Ch D).

In *City Investment Centres Ltd., Re,* 1992 BCLC 956 (Ch D), **following** the principles stated in *Sevenoaks Stationers (Retail) Ltd., Re,* 1991 BCLC 325 : (1991) 3 All ER 578 (CA), the maximum term of disqualification was awarded to a person who controlled certain companies working as their shadow director, engaged in various activities connected with the over-the-counter market, whose all the five companies eventually went into insolvent liquidation, and he would not care about their insolvency. One of his companion director demonstrated negligence in a very marked degree so as to make him unfit. He described himself as a compliance director and yet failed to perform even his own obligations as a director, but because there was no question of personal gain in his case; a third director also showed negligence and woeful ignorance of the duties attached to the office of a company director, but no question of personal gain, these two were awarded lesser penalty.

In *Austinsuite Furniture Ltd., Re,* 1992 BCLC 1047 (Ch D), a group of companies went into insolvent liquidation of one kind or another. In all the cases the companies were un-

dercapitalised. Money due to the Crown by way of taxes was retained and used in business. Transactions in the nature of transfer of business were entered into for creating misleading impression of the companies' creditworthiness. The deposits of customers were subjected to risks by employing them in an insolvent company. In reference to the leader of the group the court said that even accepting that he had brought ruin on himself and bearing in mind certain matters of mitigation which showed that he did not act with a selfish disregard for those who gave credit to his companies, he nevertheless acted with a degree of irresponsibility and lack of understanding of the duties of a director or the willingness to discharge those duties, which amounted to a serious want of probity requiring and making it necessary that he should be disqualified for a long period. His co-director, who was a young man, and about whom it was understandable that he should have placed reliance on the older members of the Board, some of whom had accountancy qualifications, a lenient view was taken but he had to be disqualified because he accepted the office as a director and collected deposits from customers at a time when there could have been no certainty that the company would be able to manufacture the furniture for which the customers paid and his sale of a car in fraud of the hire-purchase company, he was guilty of conduct showing serious lack of probity. About the third director the observation of the court was that he was irresponsible in accepting the appointment as a director with no adequate commercial experience. He was disqualified for three years. The fourth director remained incharge of the factory and although he had fallen short of the duties which are today expected of a director, his conduct was not such as to merit disqualification. See also *Deaduck Ltd. Re*, (2000) 1 BCLC 148 (Ch D).

The Court of Appeal in its decision in *Westmid Packing Services Ltd., Re* (1998) 2 BCLC 646 (CA) listed the relevant factors. A wide variety of matters, including the former director's age and state of health, the length of time he has been in jeopardy, whether he has admitted the offence, his general conduct before and after the offence, and the periods of disqualification of his co-directors that may have been ordered by other courts, may be relevant and admissible in determining the appropriate period of disqualification. We **disagree** with the view (that any period of *de facto* disqualification is irrelevant) expressed by CHADWICK J in *Secretary of State for Trade and Industry v. Arif* [1997] 1 BCLC 34 at 45. The same matters may be relevant to an application under s 17, together with particulars of the responsibilities which the disqualified director wishes to be allowed to assume. The court considered *Re Barings plc*, (1997) 1 BCLC 16 (Ch D); *Secretary of State for Trade and Industry v. Baker*, (1997) 1 BCLC 16 (Ch D) which was about discovery of evidence and the privilege claimed by the Secretary of State was not allowed.

Appeal against length of disqualification

Although there is no express power of appeal under the Company Directors' Disqualification Act, 1986 [English] the right of appeal would be there in any case. The Court of Appeal would interfere with the exercise of the judge's discretion in setting aside the length of disqualification on the well established principles as to the basis on which an appellate court would interfere in judge's discretion. On facts, the period of disqualification was enhanced from three years to five. *Secretary of State for Trade and Industry v. Ettinger*, (1993) BCLC 896 (CA); *Swift 736 Ltd., Re*, (1993) BCLC 896 (CA). An appeal against an order of disqualification was allowed and the period was reduced from 6 to 3 years. The court said that the purpose of disqualification is not merely punitive, it also reflects the risk posed to the public in the fact of undesirable persons occupying positions of management. The Court, however, felt that an arithmetical comparison of the disqualification period with the period of imprisonment provided in different provisions of the Act is inappropriate. *R. v. Evans (Andrew)*, December (1999) 10 CL 69. Ten years period of disqualification was reduced to three years because of the relatively minor role played by the director in question at the end of the scheme. *R. v. Edwards (Anthony Glen)*, (1998) 2 Cr App. R. (S) 213. (CA—Crim. Div). See also *R. v. Millard (Ray)*, (1994) 15 Cr. App. R. (S.) 445. *Migration Services International Ltd. Re*, (2000) 1 BCLC 666 (Ch

D); *Official Receiver v. Webster*, (2000) 1 BCLC 666 (Ch D), eleven year disqualification reduced to eight years. The court considered the impact of absence of contrition and proceedings before industrial tribunal.

In *R. v. Green and Green*, (1981) 3 Cr App R (S) 22 one of the things taken into account in deciding to quash disqualification orders was that this was not a case of the creation of a "fraudulent vehicle" and that the collapse of the company was partly due to adverse economic conditions. In *Re, Civica Investments Ltd.*, (1983) BCLC 456, NOURSE J. emphasised that longer periods of disqualification should be reserved for cases where the "defaults and conduct of the person in question was of a serious nature, for example, where defaults were made for some dishonest purpose, or wilfully and deliberately." In *R. v. Kazmi*, (1984) 7 Cr App R (S) 115 much emphasis was placed on "penalties" for dishonest conduct. In *Blacklager Ltd.*, VINELOTT J., February 26, 1987 (Ch D), **unreported,** a "reckless disregard" of the financial position of the companies involved led to a disqualification order for six years. In *V.A.B. Plating*, HOFFMAN J., April 11, 1986, **unreported,** an eight year disqualification was imposed because the director had "consciously and deliberately been living at the expense of his creditors." In *BBK Interiors*, June 2, 1987 (Ch D) **unreported.** HARMAN J. imposed a disqualification order for 13 years where there was a "deliberate course of conduct guaranteed to cause the maximum loss to the Government and maximum damage to the good image of business generally and to the office of company director."

Insider trading.—Full-period (maximum possible under the Act) disqualification was imposed upon a person who was convicted for insider dealing. The severity of the disqualification was necessary to indicate judicial disapproval of a chairman of a public company indulging in such an illegal practice. He sold his shares through a friend three days before his resignation and announcement of poor results. *R v. Goodman*, (1994) 1 BCLC 349 (CA).

Offence in connection with management, etc.

An order on the ground of an offence in connection with management, etc. restraining the director can be passed by the court which convicted him. The provision does not confine the jurisdiction to offences in connection with the affairs of the company where the person in question is then working. *R. v. Austen*, (1985) 1 BCC 99, 528. In this case the question was whether the offence must pertain to the field of management. The offences there were against third parties, not against the company which the accused was managing. Even so the court regarded them to be "in connection with the management of a company". Accordingly, where a director was carrying on insurance business through a company without authorisation under Insurance Companies Act, 1982 (English), he was held to be guilty of an offence in connection with management of a company warranting disqualification for five years as ordered by the trial court. *R. v. Georgiou*, (1988) 4 BCC 322; *R. v. Kemp*, 1988 BCLC 217. A fraudulent preference has been held to be an offence in connection with management so as to warrant a disqualification order. *Re, Time Utilising Business Systems Ltd.*, 1990 BCLC 568.

The conduct in question has been taken to mean the conduct as a director irrespective of the fact whether he was properly appointed or not. *Eurostem Maritime Ltd., Re*, 1987 PCC 190; *Lo-Line Electric Motors Ltd., Re*, 1988 BCLC 698. In an application under the section, the court was willing to take into account the age of the person and the fact that he was unlikely to find any employment outside the corporate field but because of the series of offences involving frauds to the magnitude of £ 300,000, the court did not reduce the maximum term of disqualification which is possible under the provision. *R. v. Austen*, (1985) 1 BCC 99, 528.

In *R. v. Goodman*, (1993) 2 All ER 789 (CA) the Court of Appeal stated that the correct test to be applied in determining whether an offence is "in connection with the management of a company" is whether the offence has some relevant factual connection with the management of the company and not, whether the offence related to the management of a company, such as keeping accounts or filing returns or has been committed in the course of managing a company. The director in this case transferred his shareholding

under a gift deed to a friend who further resold them. This was done just only three days before he resigned his position as a director-chairman and the declaration of the financial results showing loss. Both these things reduced the value of the shares. The conduct of the director amounted to be an offence in connection with management and, therefore, his conviction under [English] Company Securities (Insider Dealing) Act, 1985 and disqualification under [English] Company Directors, Disqualification Act, 1986 were upheld.

Matters of evidence

Where the Official Receiver applied for a disqualification order against the director of a company, the Official Receiver's report and the documents annexed to it were held to be admissible as evidence of the truth of the matters stated therein. This has been specifically provided in the rules and, apart from this statutory provision, that would have been a hearsay evidence. They constitute *prima facie* evidence only. The court has, in assessing the weight to be given to such statements, to consider the source of the Official Receiver's information as well as other evidence and all the circumstances. *Moonbeam Cards Ltd., Re,* (1993) BCLC 1099 (Ch D); *Homes Assured Corporation Plc., Re,* (1994) 2 BCLC 71 (Ch D); *Official Receiver v. Dobson,* (1994) 2 BCLC 71 (Ch D); *Sulton Glassworks Ltd. Re,* (1997) 1 BCLC 26 (Ch D); *Secretary of State for Trade and Industry v. Ashcroft,* (1997) 3 WLR 319 (CA), affidavit evidence. *Barings plc (In Administration) (No. 2) Re* (1998) 1 BCLC 590 (Ch D); *Secretary of State for trade and Industry v. Baker (No. 2),* (1998) 1 BCLC 590 (Ch D), (affidavit based on hearsay evidence allowed for initiating proceedings).

The report of an inspector under an investigation of affairs is not hearsay evidence because inspectors act in a statutory fact finding capacity. Such a report can be used as the basis for a disqualification order. The court has a discretion to evaluate the weight of the evidence in the light of all the surrounding circumstances. The pendency of a civil proceeding or the likelihood of such a proceeding for damages over the same subject-matter is not a ground for staying disqualification proceedings. A public interest proceeding should not have to await the outcome of parallel civil proceedings for compensation for wrong to private interest. *Rex Williams Leisure plc. Re,* (1993) BCLC 568 (Ch D) : (1993) 2 All ER 741, **affirmed** by the Court of Appeal in *Rex Williams Leisure plc., Re,* (1994) 4 All ER 27 : (1995) 3 Comp LJ 179 : (1994) 2 BCLC 555 (CA). Another case in which such compelled evidence was used for the purposes of disqualification proceeds is *Secretary of State for Trade and Industry v. McCormick,* (1998) 2 BCLC 18 (Ch D). Where the secretary of State claimed privilege from the disclosure of the administrators' report, the court disallowed the privilege because the discovery was necessary for fairness and also for saving costs. *Barings Plc Re* (1998) 1 BCLC 16 (Ch D); *Secretary of State for Trade and Industry v. Baker* (1998) 1 BCLC 16 (Ch D). The court **did not follow,** *Secretary of State for Trade and Industry v. Houston (No. 2)* 1995 SLT 196 (Scott) and *Secretary of State for Trade and Industry v. Sananes,* (1994) BCC 375 where inspection and discovery was not allowed.

Since the proceedings under this section are civil proceedings the appropriate standard of proof is the balance of probabilities. But this fact has to be noted that an order of disqualification is a substantial encroachment upon individual freedom of action and that it might expose the individual to serious charges of moral turpitude, and, therefore, it is necessary that some cogent evidence should be demanded before taking the allegations as proved. Applying this principle to the specific allegation in this case that a payment had been made to a creditor with intention to prefer him, the court said that it would be necessary to show that the director acted in a way which was blameworthy before he could be disqualified. The evidence produced showed that the director was gambling with the creditors' money rather than making the company's position secure for the benefit of creditors. The order of disqualification was made accordingly. *Living Images Ltd., Re,* (1996) 1 BCLC 348 (Ch D). *Verby Print for Advertising Ltd. v. Secretary of State for Trade & Industry* (1998) 2 BCLC 23 (Ch D), where also the standard of proof applicable to civil proceedings was adopted.

The disqualification proceedings, being in the nature of civil proceedings, one subject to the general rule excluding evidence of general reputation of the persons sought to be disqualified. None of the exceptional situations justifying reception of character evidence were applicable in the case. *Dawes & Henderson Agencies Ltd. (In liquidation), Re,* (1997) 1 BCLC 329 (Ch D). The Court of Appeal considered this case in *Westmid Packing Services Ltd. Re* (1998) 2 BCLC 646 (CA) and held that the court, with the assistance of the parties, should adopt a practical and flexible approach to case management, so as to confine the evidence to that which was probative. Detailed or repetitive evidence of the director's general reputation should not be allowed.

Evidence for other proceedings.—It has been held that the rule against double jeopardy does not apply so as to bar the use of evidence in disqualification proceedings where such evidence had earlier been used against the director in criminal proceedings unless the circumstances are such as to render the disqualification proceedings an abuse of process—*Re Channel Yacht Brokers Ltd.*, (1998, **unreported** but noted in (2000) 7 Butterworths Disqualification Newsletter 5. It has been held that reliance on matters raised in an earlier disqualification proceeding does not constitute an abuse of process. *Secretary of State for Trade & Industry v. Tillman*, (1999) BCC 703.

Powers under the Companies Act which are meant to enable the liquidator to obtain information concerning the trading of the company and other powers under which the liquidator of a company or the official receiver were to ensure that the assets of the company were got in, realised and distributed among the company's creditors, cannot be used by them for bringing disqualification proceedings or to discover evidence which was to be used in directors disqualification proceedings once the disqualification proceedings had commenced. *Pantmaenog Timber Co. Ltd. Re,* November 23, 2000 The Times (Ch D).

Entries in banker's books and record of meetings with the branch manager were held to be good evidence because it was plain that the bank would have a record of those meetings, their disclosure was likely to support the applicant's case in the disqualification proceedings and their disclosure was necessary in order to dispose of the case fairly. *Howglen Ltd. Re,* (2001) 2 BCLC 695 (Ch D).

Evidence from wrongful dismissal proceedings.—The principle that judicial findings made in earlier proceedings were inadmissible as evidence of the facts on which they were based in subsequent proceedings between one of the parties and another person was not confined to cases in which the earlier decision was made in criminal proceedings. Accordingly the factual findings and conclusions of the trial judge in the wrongful dismissal proceeding were not admissible in the disqualification proceedings as evidence of the facts so found in those proceedings. The court **applied** the principles of law stated in *Hollington v. F. Hewthorn & Co. Ltd.*, (1943) 2 All ER 35 and *Three Rivers DC v. Bank of England (No. 3)*, (2001) 2 All ER 513. A collateral attack on the factual findings and conclusion of the judge in an earlier decision of a court of competent jurisdiction would only be an abuse of the process of the court if the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings and it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or to permit relitigation would bring the administration of justice into disrepute. In the present case the factual findings and conclusions of the trial judge in the earlier action were not binding on the parties to the later proceedings because the Secretary of State was not a party or privy to a party to those proceedings. It should not be unfair to the Secretary of State that he should be required to prove the serious allegations he made with respect to the respondent's conduct and it would not be unfair to the respondent that the Secretary of State should prove his case by legally admissible evidence.

Evidence under compulsion.—Evidence given under compulsion in insolvency proceedings has been allowed to be used in disqualification proceedings. It does not necessarily involve a breach of right to a fair trial under Article 6(1) of the Human Rights Convention. The issue of fair trial is one which has to be considered in the round having

regard to all the relevant factors, including the fact that disqualification proceedings are not criminal proceedings. *Westminister Property Management Ltd. Re,* (2000) 2 BCLC 396 (Ch D & CA).

Expert evidence.—In a case in which expert evidence was adduced, the court said that the evidence of an expert as to what he would have done as director in a given situation is of little assistance to the court. The evidence of an expert as to what a director's duty in a given particular case should be is inadmissible. *Barings plc (No. 5) Re* (1999) 1 BCLC 433 : (1999) 1 All ER 1017 (Ch D); *Secy of State for Trade and Industry v. Baker (No. 5),* (1999) 1 BCLC 433 : (1999) 1 All ER 1017 (Ch D). An appeal against this decision was rejected in *Barings Plc Re (No. 5); Secy. of State for Trade & Industry v. Baker (No. 5),* (2000) 1 BCLC 523 (CA).

Investigation report of inspector.—The report of the inspector who conducted investigation of the affairs of the company was held to be usable for disqualification proceedings but not the inspector's own notes, drafts, internal materials etc. *Astra Holdings plc Re,* (1998) 2 BCLC 44 (Ch D).

Official Receiver's power of investigation.—It has been held that it was logical that an application under s. 7(1)(b) of the [English] Company Directors Disqualification Act be made by the official receiver in the case of a director of a company wound up by order of the court because, in his position of liquidator, the official receiver would have investigated the causes of the company's failure and could make a report to the court as the result of his investigation.

But the court has no power to make an order on the application of the official receiver under s. 236 of the Insolvency Act for the solicitors and accountants to produce documents held by them relating to the company, since the sole purpose of the application was to obtain documents for use as evidence in proceedings against the respondent under the Disqualification Act. *Pantmaeong Timber Co. Re,* (2001) 2 BCLC 555 : *Official Receiver v. Meade-king,* (2001) 2 BCLC 555.

Interference with findings of fact.—The Court of Appeal refused to interfere with the findings of a trial judge that a particular director was unfit because of a failure to properly supervise a more junior employee and should therefore be disqualified. The appellate court should be reluctant to interfere with the findings of a trial judge on a primary fact—*Secretary of State for Trade and Industry v. Baker (No. 6), The Independent,* March 9, 2000 (CA).

Proceeding on appointment of administrative receiver.—Where disqualification proceedings were commenced in reliance on the appointment of Administrative Receiver, the court allowed the appeal of the director concerned to this extent that the validity of the appointment be determined as a preliminary issue in the disqualification proceedings. *Secretary of State for Trade and Industry v. Jabble,* (1998) 1 BCLC 598 (CA).

Amendment of pleadings

An amendment may be allowed to be made in an appropriate case to facilitate the addition of a lead company, but it would not be allowed where the addition of the lead company would alter the fundamental forces and nature of the complaint against the director in question. *Diamond Computer Systems Ltd. v. Brown,* (1997) 1 BCLC 174 (Ch D). The Secretary of State's application for leave to amend for including a new ground of unfitness was refused where the allegations were raised at a very late stage of the proceedings. *Stephenson Cobbold Ltd. Re,* (2000) 2 BCLC 814 : *Secretary of State for Trade & Industry v. Stephenson,* (2000) 2 BCLC 614.

Offences under Factories Act

A conviction for certain offences under the Factories Act, 1948 was held not to attract the power under section 203 for the purposes of disqualifying the convicted managing

director from management, etc., of companies. The offences did not involve any fraud, etc., and the punishment was by way of fine or imprisonment, if fine was not paid.

The court said that "It is necessary for a disqualification order under s. 203 that the offence of which a person has been convicted must involve at least one of the ingredients, namely, in this case a conduct which involved fraud. A breach of technical nature under the Factories Act, 1948 would not be sufficient to warrant a restraint order under the section. Even otherwise the court has discretion in the matter. An order of disqualification is not mandatory. It is open to the court to hold that it is not necessary that the person concerned be debarred from participation in management". *Salaam M. Bavazier v. Mohd. Azgaruddin*, (1998) 93 Com Cases 609 : AIR 1995 AP 312.

Grant of leave by court [Sub-section (1)]

Where a person was convicted for unlawful issue of letters of invitation to the public to subscribe for shares and this meant a disqualification for five years for being appointed to any managerial position in companies, the Privy Council held that leave should not have been granted to such a person even in reference to a few specified companies. Their Lordships observed that in the rapidly changing economy, financial and social circumstances it is necessary that directors and managers of companies should show a sense of social responsibility and act with utmost candour. The court should be very cautious in granting leave to a person who has already been convicted. *Quek v. Attorney General*, (1987) LRC (Comm) 747.

Where a director had failed to ensure that the company kept proper accounts or that it was adequately capitalised with the result that it traded at the expense of its creditors, he was disqualified for two years but the court granted him leave to act as a director of the new company formed by him on the undertaking that he would adopt the system of administering the company with monthly Board meetings attended by a representative of the auditors. *Re, Chartmore Ltd.*, 1990 BCLC 673 (Ch D).

Leave was granted to the disqualified director to work in the company on unpaid non-executive positions. *Secretary of State for Trade and Industry v. Baker (No. 5); sub nom. Barings Plc (No. 5). Re,* (1999) 1 BCLC 433 : (1999) 1 All ER 1017 (Ch D); *Secretary of State for Trade and Industry v. Callins* [2000] 2 BCLC 223 (CA), the director seeking leave wished merely to be concerned in or to take part in the management of a company.

The Court of Appeal gave leave to the disqualified director in *TLL Realisations Ltd* [1999, **unreported** but noted in [2000] 46, *C.C.H. Company Law Newsletter* at 6 : PALMER IN COMPANY 1998 Nov] to act in a managerial capacity in respect of a particular company under specified conditions.

The court granted leave to a director (whose previous company had become insolvent) to act as a director of a new company with a similar name to its unsuccessful predecessor, requiring him to give assurances that the capital base of the new company would be maintained and that there would be no purchase or redemption of the company's shares for the next two year unless the transaction was approved by an independent director. *Bonus Breaks Ltd., Re,* (1991) BCC 546.

Leave was granted to function as a director to the person disqualified during the whole period of disqualification for the reasons that his presence was not a danger to the public and the companies were in need of an independent director. The court imposed this condition that the company's solicitor should be appointed as a further director and should remain as a director during the period of disqualification. *Secretary of State for Trade and Industry v. Palfreman,* (1995) 2 BCLC [CS (OH)]. A disqualified director successfully appealed against refusal of permission to continue to act as a director in respect of a named company. Ten protective undertakings were given by the director to ensure that the public were protected. *Re, Gibson Davies & Co. Ltd.*, (1995) BCC 11. The court said that the leave will be given only where there is a need for it and that must be the need of

the company for the director's services not the director's need to work. Adequate protection of the public must be provided.

In an application under s. 216 of the [English] Insolvency Act, 1986 for permission to act as director, the court granted the permission because there was no evidence to show that the applicant was misusing the name or assets of the companies. He was also granted the permission to act as a director of five dormant companies. *Lightning Electrical Contractors Ltd.*, (1996) 2 BCLC 302 (Ch D). Where there had been no allegation of dishonesty or lack of probity, all the creditors had been fully repaid, it was held that the balance was in favour of granting leave. The Act gives the court an unfettered discretion, which should not be limited so as to exclude consideration of an applicant's personal non-business purpose. *Shuttleworth v. Secretary of State for Trade and Industry, The Times*, February 9, 1999, (Ch. D.).

The period of *de facto* disqualification during the pendency of the proceedings can be a relevant consideration for granting leave to a disqualified person for taking part in the management of a particular company or companies. *Secretary of State for Trade and Industry v. Arif*, (1997) 1 BCLC 34 (Ch D).

The purpose of disqualification is protective rather than penal. Leave is not to be too freely given. Legislative policy required the disqualification of unfit directors to minimise the risk of harm to the public, and the courts must not by granting leave prevent the achievement of the policy objective. 'Leave' included 'conditional leave'. The court has power to grant leave on such terms as it thought fit. The court considered *Tech Textiles Ltd. Re*, (1998) 1 BCLC 259 (Ch D); ARDEN J proceeded as follows : Explaining the reason at pp. 268-269 (Ch D):

> The public for this purpose includes all relevant interest groups, such as shareholders, employees, lenders, customers and other creditors. The process of considering whether the public is adequately protected if leave is given involves considering a number of factors. The court must look at the grounds on which unfitness was found, and in particular whether the applicant had misappropriated any assets or acted knowingly in breach of duty. The court must also have regard to the view that the court took as to the character of the applicant, in particular his honesty, reliability and willingness to accept advice. The previous career of the applicant may also be relevant. Obviously it would also be relevant if the applicant had a previous disqualification order made against him but that has not been suggested in this case.
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> As regards the company of which the applicant is to become a director, the court must consider the nature of the company's business, the size of the company, its financial position, the number of directors, the number of its employees and creditors and so on, and the risks involved in the company's particular business so far as it can make any assessment of this. It must also look to see whether there is a potential for the matters which were held to constitute unfitness to recur.
>
> In many cases the applicant proposes that measures be put in place to protect the public and avoid recurrence, including the appointment of solicitors or accountants as directors, and the institution of a system for producing regular financial information. In *Re Chartmore Ltd.* [1990] BCLC 673, for instance, the applicant offered to give an undertaking that the company would have monthly board meetings and that these would be attended by a representative of the auditors, who would then and there check such matters as the liabilities to the Crown. HARMAN J gave leave for the applicant to act as a director of the company in question (not the same one as he had been a director of at the time of the events giving rise to his disqualification) for one year (only). There was another director in that case. In *Secretary of State for Trade and Industry v. Palfreman* [1995] 2 BCLC 301 the court imposed a condition that a solicitor should be appointed a director.
>
> Likewise in *Re Gibson Davies Ltd.* [1995] BCC 11, extensive safeguards were offered, in particular, to ensure that the applicant could not be the sole signatory on cheques or financial agreements, to subordinate directors' loans, to prevent security being granted over the company's assets to the applicant, to limit the applicant's emoluments, to procure compliance with filing requirements, to institute specified accounting controls, to prepare monthly management accounts and to submit them to the auditors, and to instruct the company's auditors to report in writing to the directors on any matter of concern relating to the management or financial control of the company and in default of prompt and appropriate action by the directors, to bring the matters to the attention of the Secretary of State's solicitors. Mr Ritchie informed me that this safeguard could be onerous for the Secretary of State and that the Secretary of State would prefer not to have this safeguard. On the basis of the safeguards offered in *Re Gibson Davies Ltd.*, and the evidence as to the need for the applicant to act as a director, the court gave leave to act as a director.

There are also other matters to which the court should in my view have regard. However, this is not in any way a comprehensive list. For instance the court should take into account the director's conduct since the matters which gave rise to the established grounds occurred, in particular since the proceedings for disqualification were begun. Thus if he has acted as a director while the proceedings were pending it will be relevant to see whether the companies have carried on business satisfactorily, for instance whether they are trading profitably, have complied with their obligations under the Companies Acts or other relevant legislation (such as fiscal legislation) and have paid liabilities as they fall due.

The Court has to asses the weight to be attached to the reasons suggested by the applicants for leave. *Secretary of State for Trade and Industry v. Callins,* [2000] 2 BCLC 223 (CA). Leave should not be granted in circumstances in which the effect of its grant would be to undermine the purpose of the disqualification order. The improprieties which had led to and required the making of a disqualification order and the need to protect the public from any repetition of the conduct in question has to be kept in mind when considering whether a grant of leave should be made. In this case there was no need to prevent the person in question from being a director to protect the public from dishonesty or impropriety. He was not in the position of executive responsibility. *Barings plc (No. 4) Re,* (1999) 1 BCLC 262 : (1999) 1 All ER 1017 (Ch); *Secy of State for Trade and Industry v. Baker,* (1999) 1 BCLC 262 : (1999) 1 All ER 1017 (Ch D). Another case in which the Court granted conditional leave is *Dawes & Harderson Ltd. Re,* (1999) 2 BCLC 317 (Ch D). The Court granted leave subject to the conditions that the director would remain the owner of all the shares in the new company, that it would not be converted into a limited company and would have no subsidiary which was a limited company.

Where the leave of the Court is necessary for the purpose of restoring a director for winding up purposes, it was held that it would have to be granted by the winding up Court. *Britania Homes Centres Ltd. Re,* Times, June 27, 2000 (Ch D).

Leave in the context of foreign companies

The court did not grant leave to a disqualified director in order to enable him to manage six foreign companies because there was not much evidence before it to enable him to decide whether the disqualification order applied in the context of foreign companies also. *Westminster Property Management Ltd. (No. 2) Re,* (2002) BCC 937 (CA); *Officer Receiver v. Stern (No. 2),* (2002) BCC 937 (CA).

Duties of directors in context of disqualification proceedings

The court restated the duties of directors in the context of disqualification proceedings in *Barings plc [No. 5] Re* (1999) 1 BCLC 433 : (1999) 1 All ER 1017 (Ch D); *Secy of State for Trade and Industry v. Baker (No. 5),* (1999) 1 BCLC 433 : (1999) 1 All ER 1017 (Ch D). It said :

The primary purpose of the jurisdiction under the Act was to protect the public against the future conduct in the management of companies by persons whose past records as directors of companies which became insolvent show that they are a danger to others. Unfitness might be shown by conduct which is dishonest (including conduct showing a want of probity or integrity) or by conduct which is merely incompetent. Where, as in the instant case, the Secretary of State's case was based solely on allegations of incompetence (no dishonesty of any kind being alleged against any of the respondents), the burden was on the Secretary of State to satisfy the court that the conduct complained of demonstrated incompetence of a high degree. The competence of the respondent was assessed in the context of and by reference to the role in the management of the company which was in fact assigned to him or which he in fact assumed, and by reference to his duties and responsibilities in that role. For example, where the respondent was an executive director the court assessed his conduct by reference to his duties and responsibilities in that capacity.

While the requisite standard of competence did not vary according to the nature of the company's business or to the respondent's role in the management of that business, and in that sense it might be said that there is a 'universal' standard, that standard has to be

applied to the facts of each particular case. The court, whilst taking full account of the demands made upon a respondent by his management role, would determine incompetence in whatever circumstances and at whatever level of management it occurred, from the chairman of the board down to the most junior director. In that sense there is an element of 'universality' in the court's approach.

It is possible to envisage a case where a respondent has shown himself so completely lacking in judgment as to justify a finding of unfitness, notwithstanding that he has not been guilty of misfeasance or breach of duty. Conversely the fact that a respondent might have been guilty of misfeasance or breach of duty did not necessarily mean that he was unfit. The statement of duties occurs (1999) 1 BCLC 433 at 486-489 (Ch D) as follows:

1. 'Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them' (see *Re Westmid Packing Services Ltd.* [1998] 2 BCLC 646 at 653, [1998] 2 All ER 124 at 130. Later in the judgment LORD WOOLF MR said ([1998] 2 BCLC 646 at 654, [1998] 2 All ER 124 at 131): 'It is of the greatest importance that any individual who undertakes the statutory and fiduciary obligations of being a company director should realise that these are inescapable personal responsibilities.'

2. This does not mean, of course, that directors cannot delegate. Subject to the articles of association of the company, a Board of directors may delegate specific tasks and functions. Indeed, some degree of delegation is almost always essential if the company's business is to be carried on efficiently : to that extent there is a clear public interest in delegation by those charged with the responsibility for the management of a business. As the EARL OF HALSBURY LC put it in *Dovey v. Corey* [1901] AC 477 at 486 : 'The business of life could not go on if people could not trust those who are put in a position of trust for the express purpose of attending to details of management.' In the same case, LORD DAVEY said ([1901] AC 477 at 492, [1895-9] All ER Rep 724 at 726) : 'I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill, and competence he had no reason for suspicion.'

3. But just as the duty of an individual director as formulated by the Court of Appeal in *Re Westmid Packing Services Ltd. (Supra)* does not mean that he may not delegate, neither does it mean that, having delegated a particular function, he is no longer under any duty in relation to the discharge of that function, notwithstanding that the person to whom the function has been delegated may appear both trustworthy and capable of discharging the function. As SIR RICHARD SCOTT V-C said when making a disqualification order: 'Overall responsibility is not delegable. All that is delegable is the discharge of particular functions. The degree of personal blameworthiness that may attach to the individual with the overall responsibility, on account of a failure by those to whom he has delegated particular tasks, must depend on the facts of each particular case. Sometimes there may be a question whether the delegation has been made to the appropriate person; sometimes there may be a question of whether the individual with overall responsibility should have checked how his subordinates were discharging their delegated functions. Sometimes the system itself, in which the failures have taken place, is an inadequate system for which the person with overall responsibility must take some blame.'

4. It is not in dispute in the instant case that where delegation has taken place the board (and the individual directors) will remain responsible for the delegated function or functions and will retain a residual duty of supervision and control. As SIR RICHARD SCOTT V-C made clear in the passage quoted above, the precise extent of that residual duty will depend on the facts of each particular case, as will the question whether it has been breached. These are matters which are in dispute in the instant case. It is the Secretary of

State's case (denied by the respondents) that each of the respondents was incompetent in failing to discharge his individual duties as a director.

5. Directors' duties of skill, care and diligence have been exhaustively analysed by the Supreme Court of New South Wales in *Daniels v. Anderson* (1995) 16 ACSR 607 (Aust.) Of particular materiality in the instant case is the following passage in the judgment (at 668) : 'A person who accepts the office of director of a particular company undertakes the responsibility of ensuring that he or she understands the nature of the duty a director is called upon to perform. That duty will vary according to the size and business of the particular company and the experience or skills that the director held himself or herself out to have in support of appointment to the office. None of this is novel. It turns upon the natural expectations and reliance placed by shareholders on the experience and skill of a particular director ... The duty includes that of acting collectively to manage the company.'

6. Where there is an issue as to the extent of a director's duties and responsibilities in any particular case, the level of reward which he is entitled to receive or which he may reasonably have expected to receive from the company may be a relevant factor in resolving that issue. It is not that the fitness or otherwise of a respondent depends on how much he is paid. The point is that the higher the level of reward, the greater the responsibilities which may reasonably be expected (*prima facie,* at least) to go with it. As Sir RICHARD SCOTT V-C said when making a disqualification order (see *Re Barings plc, Secretary of State for Trade and Industry v. Baker* [1998] BCC 583 at 586): '[Counsel for the respondent] made the point that if an efficient system is in place, or if the individual in question has good reason for believing there to be an efficient system in place, the delegation within the system of functions to be discharged in accordance with the system by others cannot be the subject of serious criticism if, in the event, the persons to whom responsibilities are delegated fail properly to discharge their duties. That may be so up to a point in theory, but the higher the office within an organisation that is held by an individual, the greater the responsibilities that fall upon him. It is right that that should be so, because status within an organisation carries with it commensurate rewards. These rewards are matched by the weight of responsibilities that the office carries with it, and those responsibilities require diligent attention from time to time to the question whether the system that has been put in place and over which the individual is presiding is operating efficiently, and whether individuals to whom duties, in accordance with the system, have been delegated are discharging those duties efficiently.'

7. In summary, the following general propositions can be derived from the authorities to which [reference was made] in relation to the duties of directors* :

[1] Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.

[2] Whilst directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions.

[3] No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the director's role in the management of the company.

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* Including *Re Brazilian Rubber Plantations and Estates Ltd.* [1911] 1 Ch 425, *Re City Equitable Fire Insurance* [1925] Ch 407, [1924] All ER Rep 485, *Re Norman Holding Co. Ltd.* [1991] BCLC 1, *Re D'Jan of London Ltd., Copp v. D'Jan* [1994] 1 BCLC 561, *Bishopsgate Investment Management Ltd. (in liq) v. Maxwell (No. 2)* [1993] BCLC 1282, *Martin v. Webb* 110 US 7, *Briggs v. Spaulding* 141 US 132, *Rankin v. Cooper* 149 F 1010, *Atherton v. Anderson* 99 F 2nd 883 and *Fedeal Deposit Insurance Corp v. Bierman* 2 Fed Rep (3rd Series) 1424.

[An **appeal** by one of the directors was **dismissed**, [2000] 1 BCLC 523].

Stay of proceedings on undertaking

An undertaking by the director concerned in terms of what would have been a disqualification order, namely, staying away from management, liability for costs and debts, and thereby to avoid a disqualification order was not accepted. It would require a statutory amendment to that effect. *Secretary of State for Trade and Industry v. Davies (No. 2),* 1997 BCC 488 (Ch D). Another similar case in which stay of proceedings was refused inspite of undertaking is *Blackspur Group Plc., Re,* (1997) 1 WLR 711 : (1997) 2 BCLC 96 (Ch D). An appeal against this decision was **dismissed** in *Blackspur Group Plc Re* (1998) 2 BCLC 676 (CA); *Secretary of State for Industry v. Davies* (1998) 2 BCLC 676 (CA).

A disqualification proceeding was stayed during the period of a pending criminal trial, a stay being necessary to prevent prejudice. *Abermeadown Ltd Re,* May 15th 1998 QBD : 1998 Current Law, Para 62, October 1998. *Atlantic and Computer Systems Plc.,* (1997) 1 WLR 711 (Ch D).

A director successfully resisted proceedings brought by the Securities and Futures Authority and subsequently disqualification proceedings were launched against him on substantially the same charges, but even so his application for stay was dismissed. It was observed that the court would stay proceedings on the ground of abuse of process where to allow them to continue would bring the administration of justice into disrepute among right thinking people. In this case there was no such chance. SFA proceedings questioned his care and skill as a prudent manager whereas in this case the question was whether his conduct showed that he had fallen far short of the level of competence required of a director. *Barings plc (No. 3) Re,* (1999) 1 BCLC 226 : (1999) 1 All ER 311, 226 (Ch D & CA); *Secy of State for Trade and Industry v. Baker (No. 3),* (1999) 1 BCLC : (1999) 1 All ER 311 226 (Ch D & CA).

It was not unlawful for the secretary of State to seek a statement of unfit conduct on the part of the director who had filed an undertaking amounting to an acceptance of the alleged misconduct. Such statement may be necessary in public interest and also for use in any possible future proceedings. *Re Blackspur Group plc. (No. 3), Secretary of State for Trade and Industry v. Davies (No. 2),* (2002) 2 BCLC 263 (Ch D & CA).

As to duty to explain documents produced to officers acting under official authorisation, see *Attorney General's Reference (No. 2 of 1988) Re,* (1999) 3 WLR 961 (CA).

Restoration of civil proceeding

Disqualification proceedings were stayed to wait for the outcome of related criminal proceedings which resulted in a conviction because the director admitted his guilt. The civil proceedings for disqualification were then restored. It was held that such restoration was not abuse of process, nor there was application of the doctrine of double jeopardy because the resumed proceeding was of civil nature. It cannot result in a conviction. It results only in a civil judgment of unfitness for management purposes. The parties are different in the two proceedings. There are different interests and different statutory provisions. *Secretary of State for Trade and Industry v. Rayna,* (2001) 2 BCLC 48 (Ch D).

Postponement hearing pending criminal proceedings.—The question in an application was whether the hearing of the application for disqualification order should be postponed pending the determination of criminal proceedings. The court said : The court has the power to intervene to prevent injustice where the continuation of one set of proceedings might prejudice the fairness of the trial of other proceedings. While s. 20(2) of the 1986 Act precluded only the use of statements made in disqualification proceedings 'by or on behalf of the prosecution', the responsibility for doing justice in criminal proceedings lay primarily with the criminal court. Section 20(2) of the Company Directors Disqualification Act, 1986 provides a layer of protection in almost all cases in which there were disqualification proceedings and criminal proceedings arising out of the same circumstances. In the instant case, the attention of the registrar had not been brought to s. 20

in its amended form. There was nothing to indicate that the disqualification proceedings would be unfair. Any anxiety as to the fairness of the criminal trial was dispelled by s. 20(2). Furthermore, there was nothing in the general law or in art. 6 of the European Convention on Human Rights which made it objectionable for a prosecuting authority to obtain helpful ideas from what was said in other proceedings concerning the same subject matter. Accordingly, the stay ought not to have been granted because it was not necessary to prevent unfairness to the respondents. *Secretary of State for Trade and Industry v. Crane,* (2001) 2 BCLC 222 (Ch D).

A company became insolvent. The Secretary of State decided not to take disqualification proceedings against a director of the company because a criminal court was seized of the matter and was likely to make a disqualification order. The director was convicted of fraudulent trading, but the criminal court was neither invited to make nor it did make of its own a disqualification order. The Secretary of State then commenced proceedings. The question arose whether they should be struck out as abuse of process. The court did not agree with the theory of abuse of process because there was no decision by the criminal court on the point of disqualification. The Secretary of State had not abandoned the proceedings. His idea of not launching them was due to an expectation which did not come out to be true. Thus, he could change his position in the light of the circumstances. *Denis Hilton Ltd. Re,* (2002) 1 BCLC 302 (Ch D).

Leave to work as general manager during period of disqualification

Where a person, disqualified for two years (being the minimum under the [English] Directors' Disqualification Act, 1986 because a company very much his personal and in which his money was also lost became insolvent within two years of creation, procured an employment, the court allowed him to work on his appointment, namely, the general manager of a limited company. The court said that it would not grant him an order to act as a director during the period of the disqualification. *Cargo Agency Ltd., Re,* 1992 BCLC 686 (Ch D).

Leave of court to use old name.—Where a husband and wife company went into insolvent liquidation and certain of the company's assets and liabilities were transferred to a new company which was given a similar name because the husband-wife team wanted to carry on the business of the new company and this required leave of the court under the (English) Insolvency Act, 1986, it was held that a disqualification order under the Insolvency Act is something different from that under the Company Directors Disqualification Act, 1986. The court granted the leave on a finding that there was no risk to the creditors of the old company and no more than a normal risk to the creditors of a new company and there was no other ground to justify the refusal of leave. *Penrose v. Official Receiver,* (1996) 1 BCLC 389 (Ch D). Where the leave to use the old name was not granted, rather the directors were told not to use that name and yet they continued trading in the prohibited name, it was held that they committed an offence of strict liability and, therefore, it was not necessary to prove an intention or knowledge to defraud or deceive. The conviction was not set aside. The directors in question were directed to render community services as a part of their sentence. This order was held to be not wrong in principle and was rather appropriate in the circumstances of the case. *R.V. COLE* Re (1998) 2 BCLC 234 (CA).

Leave in company's interest.—Where a company was run entirely by the director and his wife, the court said that it was unreal to distinguish whether leave to manage the company's affairs was needed in the interest of the company or in the interest of the disqualified director. The court did not grant leave because the company had collapsed at the cost of the creditors and the result of the disqualified director's coming back to management would have been trading at the creditors' costs while himself being protected by limited liability and enjoying the benefit of lower charges on tax. *Secretary of State for Trade & Industry v. Barnett* (1998) 2 BCLC 64 (Ch D).

Commercial approach in granting leave.—A disqualified director applied under s. 17 the Company Directors Disqualification Act, 1986 for leave to act as a director of four named companies. The company explained the commercial approach as follows: There was a good chance that the companies would suffer if the application was not allowed, with severe consequences for the employees of those companies. The public interest had to be the primary issue of concern rather than the interests of the individual, but in this case the protection of the public was safeguarded by various measures. The companies were required to settle inter-company debts within 120 days and supporting those with invoices, to produce regular management accounts every quarter and to have a financial expert on board. If any terms were broken the order would be discharged. As to costs, a discount of 10 per cent would be made because some of the Secretary of State's arguments against the applicant did not stand up to cross examination. *Secretary of State for Trade and Industry v. Rosenfield,* [1999] BCC 413 (Ch D).

Costs of application for relief

If the director in question does not make a request to the court for leave in the same proceeding and applies for it separately, an order for costs would follow the principle applicable to all civil litigation. *Secretary of State for Trade and Industry v. Worth,* (1994) 2 BCLC 113 (CA).

Jurisdiction of the Court [Sub-section (2)]

Though an order under sub-section (1) may be made either by the Court trying the offence or by the winding up Court, the application for leave to act as director, etc., can be granted only by the Court having jurisdiction in winding-up and not by any other Court.

Requirement of 10 days' notice [Sub-section (3)]

It has been held in England under the Company Directors' Disqualification Act, 1986 that failure to give 10 days' notice constitutes an irregularity which does not necessarily affect the validity of proceedings commenced without adequate notice being given. A shorter notice is not likely to cause any substantial prejudice because the ten-day notice period does not provide the recipient with anything like adequate time to be able to do much to protect his interest and, further, the notice does not have to state the grounds on which the application is sought. Since in some cases there is no period of limitation within which the disqualification order must be sought, the applicant can, if rejected, can start proceedings again and give the appropriate notice. *Secretary of State for Trade and Industry v. Langridge,* 1991 BCLC 543 (CA). Earlier to this the Chancery Court had held in *Jaymer Management Ltd., Re,* 1990 BCLC 617 (Ch D) that the period of notice was a mandatory requirement and the court would lack jurisdiction to hear an application for disqualification where such a period of notice had not been given.

Order on consent basis without full trial

The directors in question were prepared to accept that their conduct made them unfit to be concerned in the management of a company. The question was whether the court had jurisdiction to deal with the matter summarily without full hearing. The court said that it is a condition precedent to the making of a disqualification order that the court is satisfied that the conduct of a director in relation to a particular company or companies made him unfit to be concerned in the management of a company. There is therefore no scope in disqualification proceedings for the parties to reach an agreement and then ask the court to embody their agreement in a consent order. But at the same time it has to be acknowledged that the court has no means to control the way in which either party conducts its case. Accordingly, by analogy with other situations, such as a plea of guilty in criminal proceedings, inheritance proceedings and restrictive trade practices proceedings, in which the court has to be satisfied of certain matters and yet in the exercise of its discretion in appropriate case, the court can dispense with a full hearing. So also in disqualification proceedings, the court may deal with the application summarily without requiring a full trial and without requiring the parties to contest every point, provided some evidence is

presented to the court which establishes unfitness and which should not be bare admission unsupported by evidence. If the court considers that the evidence produced substantially affects the seriousness of the matter, the court can refuse to deal with the matter summarily and require a full trial. In the case before the court the evidence was undisputed and was also of convincing nature, a disqualification order was passed but of a relatively short period of two years. *Carecraft Construction Co. Ltd., Re,* (1993) 4 All ER 499 (Ch D). The Court of Appeal referred to this case in *Secretary of State for Trade and Industry v. Rogers,* (1996) 2 BCLC 513 (CA) and upheld an order of disqualification passed on the basis of admitted and agreed facts. The court said that it was not necessary for the judge to make a finding of dishonesty since the case had been presented on agreed facts which did not disclose dishonesty. That part of the order which recorded a finding of dishonesty was quashed. It has been held that where disqualification proceedings use the *Carecraft* procedure the agreed statement of facts must be unequivocal. There must be no need for the court to make secondary inferences of fact because that would defeat the very purpose of this cost saving procedure. *Re, P.S. Banarse & Co.,* The Times, November 1, 1996 : [1997 PALMER IN COMPANY, January p. 3].

Statement of facts agreed between parties.—It is the duty of the judge to accept the agreed statement of facts as is shown in an agreement between the Secretary of State and the parties. In a case in which the judge accepted evidence outside the agreement, it was held on appeal that the judge erred in principle in taking account of evidence outside the agreed statement of facts. A judge has no power to require the Secretary of State to rely on any particular piece of evidence and the judge is in a position similar to that of a judge in a criminal case where the prosecution has accepted a plea of guilty. The judge could indicate disapproval, but could not compel the prosecution to present a case to the jury. *SIG Security Services Ltd., Re, sub nom, Official Receiver v. Bond,* [1998] BCC 978 (Ch D) (Companies Court).

Period of Limitation

The Company Directors Disqualification Act, 1986 of England provides two years period from the date of the event within which an application must be made. It runs from the date when one of the events defining when a company becomes insolvent first occurs and the subsequent happening of another of the events mentioned in the Act does not start the two-year-period running anew. However, where a company again becomes insolvent after an earlier period of insolvency has been cured following the appointment of an administrative receiver, the two-year period could revive if there is another of the events mentioned in the Act. *Tasbian Ltd. (No. 1), Re,* 1991 BCLC 54 (CA). See also *Crestjoy Products Ltd., Re,* 1990 BCLC 677 (CA). **Followed** in *Secretary of State for Trade and Industry v. Cleland,* (1997) 1 BCLC 437 (Ch D). Where the court emphasised that some good reason must be shown for leave to be granted for bringing disqualification proceedings after the expiry of the two-year limit. Examples of such reasons were listed by the same court in *Probe Data System Ltd. (No. 2), Re,* 1990 BCLC 574 (Ch D). Disqualification proceedings commenced outside the two year limitation period were allowed to continue because no undue hardship was shown to be caused to the respondent director and the delay had been caused by the need to gain access to documents held by the Serious Fraud Office (SFO) which was conducting an investigation into possible criminal matters. *Re, Blackspur Group plc,* (1995) BCC 835. The burden will be on the applicant to show why leave should be granted. The matters which would have to considered will include the gravity of the allegations, the reasons for the delay, the extent, if any, to which the respondents may have contributed to the delay and any reason why the respondents would be unfairly prejudiced by the delay which has occurred. The issue with respect to which the respondent would direct his case is whether allegations are sufficiently grave to require to be adjudicated on notwithstanding the expiry of the two year period and not whether they are well founded. *Probe Data Systems Ltd. (No. 3),* (1992) BCLC 405 at 416. **Followed** in *Secretary of State for Trade and Industry v. Cleland,* (1997) 1 BCLC 437 (Ch D).

Where the court offices are closed on last day of doing an act with respect to period prescribed, the period is extended to the next day on which the court offices are opened. *Phillipp & Lion Ltd., Re,* (1994) 1 BCLC 739 (Ch D).

In granting extension of time the court has to take into account the following matters:

(1) the length of the delay;
(2) the reasons for delay;
(3) the strength of the case against the director; and
(4) the degree of prejudice caused to the director by the delay.

Before applying these balancing factors the court has to see, whether if extension is allowed there would be good enough evidence to lead to an order of disqualification. There should be evidence of the exact nature of the misconduct and that must be of such a serious nature that in the view of the court it would merit automatic disqualification. The circumstances showed that the Secretary of State could have launched the proceedings within the time prescribed by the Parliament. *Polly Pack International Plc. (No. 2), Re,* (1994) 1 BCLC 574 (Ch D).

Delay in presenting application

An inordinate delay in filing an application for disqualifying a director will go in favour of the director. He is likely to be prejudiced by such delay, for he may have spent time and money in procuring directorship in other companies and he may then face a disqualification order in respect of all his companies. *Noble Trees Ltd., Re,* (1993) BCLC 1185 (Ch D). In another case where an application for extension of time was negatived, the court said that the court must be satisfied that there is a good reason for allowing an extension keeping in mind that disqualification involves a substantial interference with the rights of the individual. *Copecrest Ltd., Re,* (1993) BCLC 1118 (Ch D). However the Court of Appeal **reversed** this decision and held in *Secretary of State for Trade and Industry v. McTighe,* (1994) 2 BCLC 284 (CA); *Copecrest Ltd., Re,* (1994) 2 BCLC 284 (CA) that the conduct of director in question can be taken into account in determining whether extension of time should be allowed or not. **Applied** in *Secretary of State for Trade and Industry v. Cleland,* (1997) 1 BCLC 437 (Ch D).

The onus is on the Official Receiver to show good reasons why extension of time should be granted. This onus cannot be discharged perfunctorily by showing that the time has been missed only by a few days. The court refused to grant extension of time. *Cedar Developments Ltd., Re,* (1994) 2 BCLC 714 (Ch D).

Where there was sufficient evidence that there was an arguable case because the director in question had acted as a *de facto* or shadow director, delay was excused. As regards assessing the effect of the delay, the court has to take into consideration the length of the delay, the reasons for the delay, the strength of the case and the degree of prejudice caused to the director by the delay. *Tasbian Ltd., Re (No. 3), Official Receiver v. Nixon,* (1993) BCLC 297 (CA).

The Court of Appeal permitted disqualification proceedings to be brought out of time and the substitution of Secretary of State as the applicant instead of the official receiver. *Official Receiver v. Pafundo,* (2000) BCC 164.

Delay in prosecuting proceeding.—Taking note of the difference between an ordinary civil litigation and a disqualification proceeding under the section, the court said that disqualification cases are *sui generis*. The court held that inordinate and inexcusable delay having prolonged the time during which the proceedings against the respondent were pending for more than two years, the proceedings deserved to be struck out. *Manlon Trading Ltd., Re,* (1995) 5 Comp LJ 608 : (1995) 1 All ER 988 (Ch D). See also *Abermeadow Ltd. Re,* (2000) 2 BCLC 824 (Ch D), another case in which effects of delay in prosecution were considered.

Striking out proceedings.—In proceedings instituted for disqualifying a company director, it was admitted by the Treasury Solicitor that certain documents, which had been

taken from the company by the liquidator had been lost. The director in question applied for striking out of the proceedings because he was deprived of the benefit of inspecting those documents. Refusing the application, the court said that the negligence of someone in the liquidator's office in losing the documents should not produce a consequence so severe that it could not be compensated for at the substantive hearing but should result in the immediate and drastic sanction of striking out the action. *Dexmaster Ltd., Re,* (1995) 2 BCLC 430 (Ch D).

The Court of Appeal held in *Manlon Trading Ltd., Re,* (1995) 1 BCLC 570 (CA) that principles applicable to civil litigation should be followed in the matter of striking out. However, the proceedings under the section being for protection of public interest, this fact has to be balanced against the prejudice caused to the defendant by any inordinate and inexcusable delay. Where a fair trial is not possible, the court should strike out the proceedings. Where the proceedings are not commenced until towards the end of the two-year period of limitation, greater diligence would be needed in dealing with such a proceedings. The prejudice caused by delay in commencing and also delay in pursuing the proceedings has to be taken into account because the businessman who is under attack may not, for example, be able to get any further directorships. On appeal from *Manlon Trading Ltd., Re,* (1995) 1 BCLC 84 (Ch D). To the same effect, *Official Receiver v. B. Ltd.,* (1994) 2 BCLC 1 (Ch D). The Court refused to strike out disqualification proceedings notwithstanding a 12 month interval between the start of the trial and its resumption. The Court was confident that, with the availability of transcripts to assist recollection, the case could be disposed of fairly when the proceedings were resumed. *Re Rocksteady Ltd.,* April 19, 2000, **unreported** but noted in Current Law Week August 11 2000).

The Court of Appeal considered the legitimacy of proceedings brought against a director who had featured in earlier unsuccessful proceedings with regard to another company. The essential question was whether the authorities were acting fairly. But because different issues arose, it was held that the present disqualification proceedings could not be set aside by invoking *res judicata. Launchexcept Ltd. Re,* (2000) 1 BCLC 36 (Ch D and CA).

The court refused to strike off proceedings where, though the interval between the initial hearing and the resumption was substantial. It could not be said that there was a serious risk that the trial could not fairly be completed or that the Registrar, assisted by the transcript of the evidence already presented, would not have sufficient recollection of the witnesses and evidence to be able fairly to balance that evidence against the evidence presented on the resumption of the hearing. Judges of all levels have to deal with and are trained to deal with interruptions in the hearing of litigation and there was no reason to presume that the Registrar would not be able to think himself back into the case and recollect what had occurred before him at the earlier hearing. *Rocksteady Services Ltd. Re, Secretary of State for Trade & Industry v. Staton,* (2001) 1 BCLC 84 (Ch D).

European Convention on Human Rights and disqualification proceedings (Delay)

In another case on the effect of delay, the proceedings were not struck out because the accused was not likely to be prejudicial, even though violation of Art. 6.1 of the European Conventions on Human Rights, 1950 was not ruled out. *Rock Services Ltd. Re,* PTA-A 2000/6050/A3, April 28, 2000 [PETER GIBSON J] : Current Law, p. 7, September, 2000 (CA). An application for striking out the proceedings was rejected as premature as the proceedings had not yet been determined and in any event the decision was subject to appeal. The Court could not be called upon to determine before hand whether there would be a fair trial or whether violation of s. 6 of the European Convention on Human Rights, 1950 would be involved. The court observed that respect for private life has to be balanced against the need for public confidence in company management. Any damage to reputation can be taken care of by an action in defamation. *WGS v. United Kingdom,* (2000) BCC 719. It has been held that Article 6 of the European Convention on Human Rights, 1950 would not apply to disqualification proceedings since they are regulatory in nature. *DC v. United Kingdom,* (2000) BCC 710 (President, EC HR). Explaining the matter further, the court said: The proceedings concerned were classed as civil in UK law

and disqualification was a regulatory rather than a criminal matter so that Art. 6 did not apply. Exclusion of the character evidence was not unfair as it had been excluded on the grounds that it was not probative of the matters in issue. The use of compulsorily obtained statements was not unfair either, given the civil nature of the proceedings in the instant case and the fact that their use had not been challenged at the hearing. The Court **distinguished** *Saunders v. United Kingdom* (1998) 1 BCLC 362; *Rocksteady Services Ltd. Re,* 2001 CP Rep 1 (CA); *Secretary of State for Trade & Industry v. Staton,* 2001 CP Rep 1 (CA), on the point that the Registrar could still choose to discontinue the proceedings if he felt that the delay had affected his ability to conduct the trial fairly.

Evidence given under compulsion in insolvency proceedings has been allowed to be used in disqualification proceedings because it does not necessarily involve a breach of the right to a fair trail under s. 6(1) of the Human Rights Convention, the important fact being that disqualification proceedings are not criminal proceedings. *Westminister Property Management Ltd. Re,* (2000) 2 BCLC 396 (Ch D & CA); *Official Receiver v. Stern,* (2000) 2 BCLC 396 (Ch D/CA).

Where it was true that 10 years had elapsed since the alleged disqualifying events in question and 8 years had elapsed since the proceedings were commenced, it was held that there was no violation of the guilty director's Convention Rights because the very large proportion of the undoubtedly long time which had elapsed since the proceedings were commenced was due to the various actions taken by the director. Those actions were taken not to obtain but to avoid a fair trial. *Blackspur Group plc Re,* (2001) 1 BCLC 653 (Ch D); *Secretary of State for Trade & Industry v. Eastaway,* (2001) 1 BCLC 653 (Ch D).

Stay or suspension of disqualification order

The High Court and the Court of Appeal have power under their inherent jurisdiction to stay or suspend an order of disqualification pending an appeal by the director. In exercising this power the court should keep in mind that the whole purpose of the [English] Company Directors Disqualification Act, 1986 is to protect the public from the future activities of those who have shown themselves to be unfit to act as company directors. The extent to which that protection may reasonably be foregone pending the appeal is as relevant as any questions of hardship to the director or the merits of his appeal. Hence, the power to stay the order should be exercised only in exceptional circumstances. *Secretary of State for Trade and Industry v. Bannister,* (1995) 2 BCLC 271 (CA).

Revival of application after striking out

There is nothing in the Company Directors Disqualification Act, 1986 and Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules, 1987 which is inconsistent with the court's discretion to admit a further pleading or amendment to a pleading. The effect therefore is that when an application for disqualifying a director has been struck out, the official receiver's second report could be used to revive it and the report could be put in and read with the application. *Jazzgold Ltd., Re,* (1994) 1 BCLC 38 (Ch D).

Nature of proceedings and costs of litigation

The prohibition on self incrimination does not operate in the context of director disqualification proceedings. The proceedings are regulatory and not criminal in nature. Human Rights did not therefore apply. *Re Westminster Property Management Ltd.,* [2000] 2 BCLC 396 Ch D & CA. It has been reiterated that disqualification regime is designed to protect the public and not to punish the guilty directors. *R. v. Evans* (2000) BCC 901 (CA). Disqualification proceedings in the companies court could be brought against a company director who was already the subject of a disqualification order made in a criminal court. A disqualification order made in criminal proceedings is penal in nature whereas an order made in the companies court has the primary aim of protecting the public. *Cedarwood Productions Ltd., Re,* [2001] EWCA Civ 1083, *The Times,* July 12, 2001 (CA) court **applied** *R. v. Evans (Andrew)* [2000] BCC 901 : [1999] CLY 623.

The court had to consider the question of costs in *Southbourne Sheet Metal Co. Ltd., Re,* 1992 BCLC 361 (Ch D). The Secretary of State applied for withdrawal of complaint

on learning from director's evidence and explanations that the matter should not be proceeded with. The court said that a disqualification proceeding is of hybrid character, not a prosecution, not a penal proceeding, not an ordinary civil proceedings and so little guidance can be had from other spheres of law as to how the court should proceed in dealing with costs. The director's conduct created to begin with a genuine ground of complaint. The court made no order as to costs. Where the Secretary of State withdraws an application for a disqualification order, the party proceeded against is, in the absence of special circumstances, entitled to a normal order that the Secretary of State should pay his costs. *Southbourne Sheet Metal Co. Ltd. (No. 2),* (1993) BCLC 135 (CA). Costs were awarded against the secretary of state for filing an application on the basis of unfounded and misconcieved allegations of misconduct. *Secretary of State for Trade and Industry v. Blake,* (1997) 1 BCLC 728 (Ch D). The Secretary of State was ordered to bear the burden of costs when the proceedings became substantially lengthened by reason of the unsuccessful attack on one of the directors proceeded against. *Sykes (Butchers) Ltd; Secy of State for Trade & Industry v. Richardson* (1998) 1 BCLC 110 Ch. D; *Tech Textiles Ltd. Re,* (1998) 1 BCLC 259 (Ch D); *Secretary of State for Trade and Industry v. Vane,* (1998) 1 BCLC 259 (Ch D), where also the costs were awarded against the Secretary of State because one of the grounds turned out to be false. The court **applied** *Elgindata Ltd Re,* 1993 BCLC 119.

Application in relation to two companies

An application has been held to be not defective if it seeks the disqualification of a director in respect of two companies. The court said that there was nothing in the 1986 Act which imposed a limit on the number of lead companies on which the applicant for a disqualification order could rely. Imposing a maximum on the number of lead companies would not advance the cause of public protection and permitting a number of lead companies would not give rise to any unfair procedure. *Surrey Leisure Ltd., Official Receiver v. Keam,* (1999) 2 BCLC 457 (CA) **Affirming** *Surrey Leisure Ltd., Official Receiver v. Keam,* (1999) 1 BCLC 731 (Ch D).

Amendment of defective order under Slip Rule

Where an order of disqualification happened to be defective, because it did not comprehend all the points on which the director proceeded against has to be disqualified, it was held that the power of the court to rectify accidental slips in orders (Slip Rule) would apply to disqualification orders also. Accordingly slip rule could be applied to convert an order which on its face was a nullity into an order which would be valid on its face and to correct an error which was caused by an error of law rather then an oversight. *Brian Sheridan Cars Ltd., Re,* (1996) 1 BCLC 327 (Ch D); *Official Receiver v. Sheridan,* (1996) 1 BCLC 327, (Ch D). An order which was defective because it omitted to specify some of the matters required by the Act was held to be a valid order and was allowed to be rectified. *Official Receiver v. Hannan,* (1997) 2 BCLC 473 (CA).

Jurisdiction

The winding up court has the jurisdiction to deal with the matter and continues to have jurisdiction to hear the case even though the winding up is concluded. *Working Project Ltd., Re,* (1995) 1 BCLC 226 (Ch D); *Fosterdown Ltd., Re,* (1995) 1 BCLC 226 (Ch D); *Davies Flooring (Southern) Ltd.,* (1995) 1 BCLC 226 (Ch D); *Lichfield Freight Terminal Ltd. Re,* (1997) 2 BCLC 109 (Ch. D). There is no jurisdiction to disqualify a person on the basis of his conduct in a company registered in Scotland, but that conduct could be taken into account in the ongoing case for disqualification in the matter of an English company. *Secy. of State for Trade and Industry v. Forsyth,* (2000) 2 BCLC 249 (Ch D).

Disqualification of directors residents abroad

§ For notes on disqualification of directors resident abroad see Notes under s. 478 under the heading "Matters of jurisdiction".

Penalty for default.—If a person acts in contravention of an order made under this section, in respect of each offence, he is punishable with imprisonment for a term which may extend to two years, or with fine which may extend to fifty thousand rupees or with both.

Compoundable offence.—The offence is compoundable under section 621A.

A person who acts as a director in disregard of the previous disqualification order may be disqualified for the full statutory period. *Official Receiver v. Vass*, (1999) BCC 516 (Ch D).

Secretarial Practice Notes : Restraining fraudulent persons

If there had been an order from the Court restraining any person to be director of, or in any way concerned with the management, ensure that the order was complied with.

Restriction on appointment of firm or body corporate to office

S. 204. Restriction on appointment of firm or body corporate to office or place of profit under a company.—[1][(1) Save as provided in sub-section (2), no company shall, after the commencement of this Act, appoint or employ any firm or body corporate to or in any office or place of profit under the company, other than the office of [2][* * * *] trustee for the holders of debentures of the company, for a term exceeding five years at a time:

Provided that the initial appointment or employment of a firm or body corporate to or in any office or place of profit as aforesaid may, with the approval of the Central Government, be made for a term not exceeding ten years.]

[3][(2) * * * * *]

(3) Any firm or body corporate holding at the commencement of this Act any office or place of profit under the company shall, unless its term of office expires earlier, be deemed to have vacated its office immediately on the expiry of five years from the commencement of this Act.

(4) Nothing contained in sub-section (1) shall be deemed to prohibit the re-appointment, re-employment, or extension of the term of office, of any firm or body corporate by further periods not exceeding five years on each occasion:

Provided that any such re-appointment, re-employment or extension shall not be sanctioned earlier than two years from the date on which it is to come into force.

(5) Any office or place in a company shall be deemed to be an office or place of profit under the company, within the meaning of this section, if the person

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1. Subs. by Act 65 of 1960, s. 57.
2. The words "managing agents and secretaries and treasurers or", have been omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 90 (w.e.f. 13-12-2000).
3. Sub-section (2) omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 90, (w.e.f. 13-12-2000) prior to its omission it stood as under :—

'(2) Sub-section (1) shall not apply to the appointment or employment of a firm or body corporate as a technician or a consultant,—

(i) unless the firm or a body corporate aforesaid is already the managing agent or secretaries and treasurers of the company; or

(ii) unless a partner in the firm aforesaid, or a director or member of the body corporate aforesaid being a private company, or a director of the body corporate aforesaid not being a private company, is—

already the managing agent of the company;

or a member of the firm a director or member of the private company, or a director of the body corporate not being a private company, which firm, private company or body corporate is already the managing agent or the secretaries and treasurers of the company.'

holding it [4][obtains from the company anything] by way of remuneration, whether as salary, fees, commission, perquisites, the right to occupy free of rent any premises as a place of residence, or otherwise.

(6)This section shall not apply to a private company, unless it is a subsidiary of a public company.

NOTES

Companies (Amendment) Act, 1960

The changes in sub-section (1) of section 204 by Amendment Act (65 of 1960) seek to exclude trustees, appointed by the holders of debentures of the company from the scope of the sub-section, so as to ensure that they may continue in office until the purposes of the trust have been fulfilled, and also to empower the Central Government to extend the initial period of appointment of a firm or body corporate to any place of profit from 5 years to 10 years in appropriate cases. The amendment of sub-section (5) is of a clarificatory nature.

Companies (Amendment) Act, 2000

(1) The terms "managing agents, secretaries and treasurers" have been omitted by the Amendment Act, 2000. The amendment is of consequential nature.

(2) Sub-section (2) has been omitted. The effect of the omission is that from the date of enforcement of Amendment Act, 2000 a firm or a body corporate cannot be appointed as a technician or consultant of the company.

Scope of Section

Where an appointment of firm or body corporate is made without fixing any period, it means that at the end of the maximum period fixed by the section the appointment will expire, and if it is to continue, a re-appointment will be required. By making an appointment for an indefinite duration, the section cannot be defeated. It is open to a company to reappoint for 5 years at a time, and thereby retain the employment for a number of years.

The appointment of a firm or body corporate as an agent for sale or purchase on commission will however come within the restriction. See *Shalagram Jhajharia v. National Co. Ltd.*, (1967) 1 Comp LJ 29 (Cal).

Technician or consultant

The terms "Technician or consultant" occurred in sub-section (2) before the omission of that sub-section by the Amendment Act, 2000. The expression 'technician' or 'technical adviser' is also not defined in the Act. But the expression 'technician' is defined in the Income-tax Act, 1961, section 10(vii) (b), Explanation as follows:

"Technician" means a person having specialised knowledge and experience in—

(i) constructional or manufacturing operations, or in mining or in the generation or distribution of electricity or any other form of power; or

(ii) industrial or business management techniques.

'Consultant' is an expression apparently meaning that the person consulted is to give to the company the benefit of his knowledge and experience. *Cf. Pocock v. A.D.A.C. Ltd.*, (1952) 1 All ER 294 (KBD).

Allowance of five year period [Sub-section (3)]

This sub-section is so worded as not to save from its application any firm or body corporate. The result is that all firms and bodies corporate holding office or place of profit

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4. Subs. by Act 65 of 1960, s. 57.

under a company shall be deemed to have vacated their office on the expiry of five years from the commencement of this Act, if such office does not expire earlier.

Appointment not to contain provision for reappointment [Sub-section (4)]

Where the original appointment itself makes provision for re-appointment after five years, it contravenes the provisions of this sub-section. See *Shalagram Jhajharia v. National Co. Ltd.*, (1965) 35 Com Cases 706 (Cal—DB). The provisions of this sub-section should be specifically brought to the notice of the shareholders so that they may see for themselves whether the appointment does not carry a term for re-appointment or for a renewal two years before the expiry of the running terms. *Shalagram Jhajharia v. National Co. Ltd.*, (1967) 1 Comp LJ 29 (Cal).

Perquisites [Sub-section (5)]

Any benefit or advantage, having a money value, which the holder of an office under the company derives from the company's spending on his behalf will come under the term. For instance, where a director is prosecuted for an offence or sued for damages in tort, breach of contract, etc. and the company expends for the proceeding, that expense will form part of the perquisite, though not to the whole extent, at least to the extent to which, if the company had not spent, he himself would have spent. *Cf. Rendell v. Went*, (1964) 2 All ER 464 (HL).

Private company exempted

This section does not apply to a private company, unless it is a subsidiary of a public company.

Private banking company not exempted.—The exemption under sub-section (6) does not extend to private banking companies (*vide* section 49 of Banking Regulations Act, 1949).

Consequences of contravention

Contravention of the section is punishable under section 629-A, a new provision introduced by the Companies (Amendment) Act, 1960. Continued employment or appointment is rendered void by reason of the contravention and the offence will be a continuing one. The offence is compoundable under section 621A.

Appointment terminable at will

Department's Circular.—The Company Law Board had occasion to study an instance where a body corporate had been appointed by a company to render secretarial and other services to the latter. The contract of appointment was silent on the question of the tenure of the appointment, and only mentioned that the appointment was terminable at the will of the company. On an examination of the case, it has been decided that the appointment of any firm or body corporate to an office or place of profit under a company by a contract or arrangement terminable at will and/or without the approval of Central Government, is in contravention of section 204(1) of the Companies Act, 1956 and prosecution for the same lies under section 629A of the said Act. Since the appointment is in contravention of section 204(1), it should also be treated as void under section 23 of the Indian Contract Act and the company should be asked to recover the remuneration paid, in addition to the liability to prosecution under section 629A. (*Circular No.* 19 of 1975, dated 12-9-1975).

Appointment of Non-resident, FEMA, 1999

Before making any appointment under this section, please see section 6 of FEMA Act, 1999 and the Regulations framed under that Act.

Foreign Exchange Management (Establishment in India of a Branch or Office or Other Place of Business) Regulations, 2000 [For text, see *Appendix* 124]

(i) In terms of these Regulations, establishment of a branch or liaison office or project office or any other place of business in India by any entity resident outside India other than a banking company requires approval of Reserve Bank. The application for permission should be made to Reserve Bank, Central Office in Form FNC 1. A banking company registered or incorporated outside India has been permitted to open a branch or office in India if it has obtained necessary permission under the Banking Regulation Act, 1949.

(ii) In terms of regulation No. 4, persons who are citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, Iran or China require approval of Reserve Bank for opening of a branch or office or a place of business in India.

(iii) The list of permissible activities which can be undertaken by a branch or a liaison office have been specified in the Schedules. A project or site office has been permitted to undertake activities relating and incidental to execution of project in India.

(iv) Authorised dealers have been permitted to allow remittance of profit by a branch and remittance of surplus after completion of the project by the project office subject to terms and conditions specified in regulation No. 7. [*See Annexure II to AD (MA Series) Circular No. 11, dated 16-5-2000 issued by RBI*].

§ For the provisions of FEMA, 1999 see *Appendix* 101.

Secretarial Practice Notes : Restriction on appointment to office or place of profit

(a) Check that no firm or body corporate was appointed or employed in any office or place of profit under the company except as a trustees for the holders of debentures of the company for a period not exceeding five years at a time.

(b) If initial appointment was made for a term exceeding five years but not exceeding ten years, check whether approval of the Central Government obtained?

Documents Involved: 1. Agreement, 2. Annual Report, 3. Order of Central Government, 4. Minutes of Board/General Meeting.

[1][S. 204A. Restrictions on the appointment of former managing agents, or secretaries and treasurers to any office.— * * * * *]

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1. Section 204-A omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 91 (w.e.f. 13-12-2000), prior to its omission it stood as under:—

'[1][S. 204-A. **Restrictions on the appointment of former managing agents or secretaries and treasurers to any office.**—(1) Except with the previous approval[2] of the—

(a) company in general meeting, and

(b) Central Government,

no company shall, during a period of five years from the commencement of the Companies (Amendment) Act, 1974, appoint as secretary, consultant or adviser or to any other office, by whatever name called,—

(i) any individual, firm or body corporate who, or which, had at any time after the 15th day of August, 1960, been holding office as the managing agents or secretaries and treasurers of the company, or

(ii) any associate of the managing agents or secretaries and treasurers as aforesaid:

Provided that where any such appointment has been made before the commencement of the Companies (Amendment) Act, 1974, no such appointment shall be continued by the company after a period of six months from such commencement unless such appointment has been approved by the company in general meeting and the Central Government before the expiry of the said period.

(2) (a) Where—

(i) any individual, firm or body corporate, who, or which, had at any time after the 15th day of August, 1960, been holding office as the managing agents or secretaries and treasurers of the company, or

(ii) any associate of the managing agents or secretaries and treasurers as aforesaid;

has been appointed by such company at any time during a period of five years preceding the 3rd day of April, 1970, or at any time after that date, as its secretary, consultant or adviser, or to any other office under it, by whatever name called, the Central Government may, if it appears to it that there is good reason for so doing, require the company to furnish to it such information as it may consider necessary, with regard to the terms and conditions of the appointment of such individual, firm or body corporate as secretary, consultant or adviser or as the holder of such other office, for the purpose of determining whether or not such terms and conditions are prejudicial to the interest of the company.

[Footnote No. 1 contd.]

[Footnote No. 1 contd.]

(b) If the company refuses or neglects to furnish any such information, the Central Government may appoint a competent person to investigate and report on the terms and conditions of appointment to any of the offices referred to in clause (a) and the provisions of section 240A shall, so far as may be, apply, to such investigation, as they apply to any other investigation made under any other provision of this Act.

(c) If, after perusal of the information furnished by the company, or, as the case may be, the report submitted by the person appointed under clause (b), the Central Government is of opinion that the terms and conditions of appointment to any of the offices referred to in clause (a) are prejudicial to the interests of the company, it may, by order, make such variations in those terms and conditions as would, in its opinion, no longer render such terms and conditions of appointment prejudicial to the interests of the company.

(d) As from such date as may be specified by the Central Government in the order aforesaid, the appointment referred to in clause (a) shall be regulated by the terms and conditions as varied by that Government.

(3) For the purposes of this section, the expression "appointment" includes "re-appointment", "employment" and "re-employment".]'

1. This section was added by the Companies (Amendment) Act (XLI of 1974), s. 17 (w.e.f. 1-2-1975).
2. Form No. 23A of the Companies (Central Govt's) General Rules & Forms, 1956 is the prescribed form of application to the Central Government.