Sectionwise Amendments At A Glance

Changes made by the Companies (Amendment) Act, 2001, The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Companies (Amendment) Act, 2002 and the Companies (Second Amendment) Act, 2002

I. The Companies (Amendment) Act, 2001 (57 of 2001) (w.e.f. 23-10-2001)

The Act has replaced the Companies (Amendment) Ordinanace, 2001 (Ord. 7 of 2001) promulgated on 23rd October, 2001. The Act received the assent of the President on 22nd December, 2001, but has deemed to have come into force on 23rd October, 2001 by virtue of sub-section (2) of section 1 of the Act. The Statement of Object and Reasons annexed to the Companies (Third Amendment) Bill, 2001, replacing the Companies (Amendment) Ordinance, 2001 (Ord. 7 of 2001) explain the intendment and purposes of the Amendment Act, as follows :

Statement of Object and Reasons.—*1. For a considerable time, the market sentiment has been very weak. Because of the recent developments in the United States of America and other places, the situation has become worse.*

2. Section 77A of the Companies Act, 1956 permits a company to purchase its own shares or other specified securities (hereafter referred to as 'buy-back') subject to the provisions contained in that section. The Ministry of Finance (Department of Economic Affairs) has suggested that the provisions for buy-back by companies should be liberalised with a view to improving the market sentiment. Liberalisation has also been supported by the Securities and Exchange Board of India, financial institutions and some others.

3. In view of the above, it was decided to liberalise certain provisions of section 77A of the Companies Act, 1956 relating to buy-back and for this purpose, the Companies (Amendment) Ordinance, 2001 (Ord. 7 of 2001) was promulgated on the 23rd October, 2001 so as to, inter alia,—

(a) provide that if the buy-back was to the extent of or less than ten per cent of the total paid-up capital and free reserves of the company and such buy-back had been authorised by means of a resolution passed at its Board meeting, such buy-back shall not require special resolution to be passed by a general meeting as required by clause (b) of sub-section (2) of section 77A which prohibits a company to purchase its own shares or other specified securities unless a special resolution is passed in general meeting of the company authorising such buy-back;

(b) provide that no offer of buy-back referred to in (a) above shall be made within a period of three hundred and sixty-five days recknoned from the date of the preceding offer of buy-back;

(c) reduce the time limit from twenty-four months specified under sub-section (8) of section 77A of the Companies Act, 1956 to six months for issue of the same kind of shares.

4. The Bill seeks to replace the said Ordinance.

Amendment as to Buy-back of Shares

S. 77A **Buy-back of Shares**

(a) under sub-section (2)(b) proviso any buy-back made to the extent of or less than ten per cent of the total paid-up capital and free reserves of the company which had been authorised by means of a resolution passed at its Board meeting, shall not require special resolution to be passed by a general meeting under of sub-section (2)(b) of section 77A.

(b) under sub-section (6) no offer of buy-back be made within a period of three hundred and sixty-five days recknoned from the date of the preceding offer of buy-back;

(c) under sub-section (8) time limit reduced from twenty-four months to six months for issue of the same kind of shares.

II. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

As per changes made by the above Act, clause (vii) has been inserted in sub-sec. (1) of Sec. 4A of the Act to provide that a Securitisation or reconstruction company which has obtained a certificate of registration under sec. 3(4) of the above Act, shall be a public financial institution.

S. 4A **Securitisation Companies or Reconstruction Companies Registered with RBI to be Public Financial Institutions**

Clause (vii) has been inserted in sub-sec. (1) of Sec. 4A of the Act providing a securitisation or reconstruction company which has obtained a certificate of registration under sec. 3(4) of the above Act, to be a public financial institution.

III. Companies (Amendment) Act, 2002 (1 of 2003)

Chapter IXA-Transformation of cooperatives into Companies

Chapter IXA (section 581A-581ZT) which has been introduced to facilitate transformation of cooperatives in the form of companies, provides the procedure for incorporation and management of cooperatives on incorporation or transformation as a company under the Companies Act, 1956. Regulatory provisions have been laid down in regard to holding of general meetings raising of capital and members' rights, accounts and audit, loans to members and investments, amalgamation, merger or division of the producer companies, reversing producer company into interstate co-operative society etc.

Companies (Amendment) Act, 2002 (1 of 2003) (w.e.f. 6-2-2003)

The Companies (Amendment) Act, 2002 has incorporated a new Part IXA in the Companies Act, 1956 to provide regulatory framework for the incorporation of co-operatives whose objects extend to more then one state, and for regulating their functioning on the line of companies formed under the Act. The Statement of Objects and Reasons appended to the Companies (Second Amendment) Bill, 2001 stated thus:

Statement of Objects and Reasons.—*During the last decade, changes have taken place in the Indian economy, in the communication and transportation infrastructures, as well as in the method of commerce, banking and international trade. Liberalization of the economy is in the process of changing the terms of trade between rural and urban, labour and industry, finance and commerce. Biotechnology, the information revolution, computerization can all be used to raise the standard of living of the rural masses and ultimately link this economy with regional, national and global demand. Institutions are needed to link the rural economy with the emerging new opportunities. Rural producers are at a potentional disadvantage given their generally limited assets, resources, education and access to advanced technology. In the present competitive scenario, if cooperative enterprises are to continue to serve rural producers, they require an alternative to the institutional form presently available under Law.*

2. Keeping all this in view Government constituted a Committee consisting of experts led by Dr. Y.K. Alagh, Economist, former Union Minister to examine and make recommendations with regard to (a) framing a legislation which would enable incorporation of cooperatives as companies and conversion of existing cooperatives into companies and (b) ensuring that the proposed legislation accommodates the unique elements of cooperative business within a regulatory framework similar to that of companies. The Committee had a series of meeting during which it interacted with, and received responses from various cooperatives, institutes and individuals.

3. On the basis of the recommendations of the Committee the present Bill has been prepared with the main objective of facilitating formation of cooperative business as companies and to convert existing business into companies. The salient features of the Bill are:

(i) to offer a statutory and regulatory framework that creates the potential for producer-owned enterprises to compete with other enterprises on a competitive footing. The Companies Act envisages and provides for various forms of Companies including private limited, public limited, trusteeship companies and nidhis, each with specific and appropriate provisions applicable to them;

(ii) to provide for the formation and registration of producer companies which include the mutual assistance and co-operative principles within the more liberal regulatory framework afforded by the Company Law with suitable adaptations;

(iii) to provide an opportunity to cooperative institutions to voluntarily transform themselves into the new form of producer companies;

(iv) Under the Bill conversion of co-operatives to producer companies is purely voluntary;

(v) Member equity may not be publicly traded, but may only be transferred, with the approval of the producer company's Board of Directors. Producer companies would not be vulnerable to the takeover by multinationals or other companies;

(vi) The conversion option by co-operative society to producer company can be exercised only if two-thirds of the Members of the concerned society vote in favour of a resolution to that effect;

(vii) The new form of Company is designated as "producer company" to indicate that only certain categories of persons can participate in the ownership of such Companies. The members of the Producer Company have necessarily to be "primary producers", that is persons engaged in an activity connected with, or relatable to, primary produce;

(viii) The objects of a producer company have been defined to include, among other things, production, processing, manufacture and sale of primary produce as well as allied matters.

4. The Bill seeks to achieve the above objects

IV. Companies (Second Amendment) Act, 2002 (11 of 2003).—The latest developments and innovations in Corporate laws required that the Companies Act, 1956 and other related laws concerning winding up of companies should be remodelled in line with the international practices in this field. Government constituted a Committee consisting of experts under the chairmanship of Justice V. BALAKRISHNA ERADI, retired Supreme Court Judge to examine the law relating to insolvency and winding up of companies.

2. The Committee examined Companies Act, 1956 and also other laws having a bearing on the subject such as Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), Recovery of Debts due to Banks and Financial Institutions Act, 1993 and Securities Contracts (Regulation) Act, 1956; it also considered laws on corporate insolvency prevailing in industrially advanced countries. The Committee held wide ranging hearings and consultations on the subject.

3. On the basis of the recommendations of the Committee the present Bill has been prepared with the main objective of facilitating or expediting revival/rehabilitation of sick companies and protection of workers interests and where necessary, winding up of companies. The salient features of the Bill are as follows :—

(i) A National Company Law Tribunal will be set up. The powers and jurisdiction presently being exercised by various bodies viz., Company Law Board or Board for Industrial and Financial Reconstruction or Appellate Authority for Industrial and Financial Reconstruction or High Courts will now be consolidated and entrusted to the Tribunal. Thus, multiplicity of litigation before various courts or quasi-judicial bodies or forums regarding revival or rehabilitation or merger or amalgamation or winding up will be avoided as all these matters will be heard and decided by the proposed National Company Law Tribunal;

(ii) All the parties will be bound by the Tribunal's orders and in case of non-availability of a workable proposal for revival or rehabilitation etc. the Tribunal can decide the matter on merits including introduction of its own scheme;

(iii) *The Tribunal shall work through Benches. There shall be ten special benches which will deal with the matters relating to revival or reconstruction or rehabilitation or winding up of companies;*

(iv) *This will reduce the entire process which is presently taking several years in winding up of the companies to about two years or so;*

(v) *Stripping of assets of sick companies will be avoided;*

(vi) *Since individual affidavits will be filed with National Company Law Tribunal which will have powers of contempt of Court, there will be an in-built seriousness;*

(vii) *There will be a fund known as Rehabilitation and Revival Fund which will be used to make primarily;*

(a) *interim payment of the dues of workmen of the company which has been declared sick or is under liquidation;*

(b) *protection of the assets of sick companies;*

(c) *revival and rehabilitation of sick companies.*

(viii) *'Industrial Undertaking' in terms of sickness does not include:*

(a) *small scale industrial undertakings, as defined in clause (j) of section (3) of the Industrial (Development and Regulation) Act, 1951;*

(b) *Public Sector Undertakings, unless a reference is made by the Central Government and/or State Government, as the case may be.*

(ix) *As a result of this enactment everyone including workers, creditors, investors and the economy as a whole will stand to benefit.*

5. *The Bill seeks to achieve the above objectives.*

6. *The Notes on clauses explain, in detail, provisions of the Bill.*

Amendments at a Glance—

A. New Definitions:

S. 2 (1B) ***Appellate Tribunal***

It means the National Company Law Appellate Tribunal.

S. 2 (19AA) ***Industrial Company***

It means a company which owns one or more industrial undertakings.

S. 2 (19AB) ***Industrial undertaking***

It means an undertaking pertaining to any industry carried on in a factory/unit by any company but does not include a small scale industrial undertakings.

S. 2 (29A) ***Net Worth***

It means the sum total of the paid-up capital and free reserves after deducting the provisions or expenses as may be prescribed.

S. 2 (31AA) ***Operating Agency***

It means any group of experts and includes Public Financial institutions, State Level Institutions, Scheduled Banks or any person specified as operating agency by the Tribunal.

S. 2 (46AA) ***Sick Industrial Company***

It means an industrial company which has accumulated losses in any financial year equal to 50% or more of its average net worth during 4 preceding years; or has failed to repay its debts within any 3 consecutive quarters on demand made in writing by a creditor.

S. 2 (46AB) ***State Level Institution***

It means any State Financial Corporation or State Industrial Development Corporation.

S. 2 (49A) ***Tribunal***

It means the National Company Law Tribunal constituted under section 10FB.

B. National Company Law Tribunal (Tribunal): Constitution function and powers

The National Company Law Tribunal, which has been set up, will have the powers and functions presently being exercised by various bodies viz., the Company Law Board, or the Board for Industrial and Financial Reconstruction or the High Courts; all these have now been consolidated and vested in Tribunal. Thus, the multiplicity of legal or other proceedings before various courts or quasi-judicial authorities or forums regarding merger, amalgamation and reconstruction etc. of companies, winding up of companies and revival or rehabilitation of sick industrial companies will be avoided, as all these matters will now be heard and decided by the Tribunal.

S. 10FB ***Constitution of National Company Law Tribunal***

The Central Government shall constitute the Tribunal by notification in the official gazette.

S. 10FC ***Composition of Tribunal***

The Tribunal shall consist of a President and not exceeding 62 Judicial and Technical Members to be appointed by the Government.

S. 10FD ***Qualifications for appointment of President and Members***

The President of the Tribunal shall be a person who has been or is qualified to be a Judge of a High Court; and the Judicial and Technical Members shall be persons with prescribed qualifications and experience as specified.

S. 10FE ***Term of office of President and Members***

The President and the Members of the Tribunal shall hold office for 3 years subject to the retirement age of 67 years in case of the President and 65 years in the case of Members.

S. 10FF **Financial and administrative powers of Member Administration**

The Central Government may designate any Judicial or Technical Member as Member Administration who shall exercise the financial and administrative powers, provided that the Member Administration may delegate such powers to any officer of the Tribunal.

S. 10FG **Salary, allowances, and other terms and conditions of service of President, Members, etc.**

The President and Members of the Tribunal shall be entitled to such salary and allowances as may be prescribed.

S. 10FH **Vacancy in Tribunal**

In case of any vacancy in the office of the President of the Tribunal by reason of his death, resignation or otherwise, the seniormost Member shall act as President.

S. 10FI **Resignation of President and Member**

The President or a Member of the Tribunal may resign his office by giving notice in writing to the Central Government.

S. 10FJ **Removal and suspension of President or Member**

The Central Government may remove the President or any Member of the Tribunal from his office in consultation with the Chief Justice of India, in certain circumstances.

S. 10FK **Officers and employees of Tribunal**

The Central Government shall provide the Tribunal with such staff, as it may deem fit.

S. 10FL **Benches of Tribunal**

The President of the Tribunal shall constitute Benches of the Tribunal consisting of one Judicial and one Technical Member. In addition to such Benches, there shall be a Principal Bench of the Tribunal at New Delhi, to be presided over by the President and other Benches shall be presided over by the Judicial Member. Where necessary, a single Member Bench may also be constituted to deal with specified matters.

The President shall, for the disposal of cases relating to rehabilitation, restructuring or winding up of the companies, constitute at least 10 Special Benches consisting of 3 or more Members.

The matters will be decided according to the majority decision, but if the Members are equally divided the case shall be referred to the President for hearing by one or more of the other Members of the Tribunal.

S. 10FM **Order of Tribunal**

The Tribunal may pass orders after hearing the parties and a copy of every order shall be sent to all the parties concerned. The Tribunal may rectify any mistake in the order within two years from the date of the order.

S. 10FN **Power to review**

The Tribunal has been empowered to review its own orders.

S. 10FO **Delegation of powers**

The Tribunal is empowered to delegate its powers to any Member or any of its employees or any person authorised by the Tribunal to manage any industrial company, as it may deem necessary.

S. 10FP **Power to seek assistance of Chief Metropolitan Magistrate (CMM) and District Magistrate (DM)**

The Tribunal or any operating agency may seek assistance of CMM or DM to take into custody any property, books of account or any other document of a sick industrial company.

C. National Company Law Appellate Tribunal (Appellate Tribunal)

Provisions have been made in the Act to set up an Appellate Tribunal to which an appeal may be preferred against any order or decision of the Tribunal.

S. 10FQ **Appeal from order of Tribunal**

Any person aggreived by an order or decision of the Tribunal may prefer an appeal to the Appellate Tribunal which may be disposed of, as far as possible, within 6 months. However, no appeal shall lie from an order or decision made by the Tribunal with the consent of the parties. Though not so specifically stated in the section. The appeal may lie on any question of fact or law, as the case may be).

S. 10FR **Constitution of Appellate Tribunal**

The Appellate Tribunal shall consist of a Chairperson and not more than two Members. The Chairperson shall be a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court. A Member of the Appellate Tribunal shall be a person who is qualified for appointment as Judicial Member, and the other Member shall be a person with special knowledge and experience in matters relating to economics, industry, law etc.

S. 10FS **Vacancy in Appellate Tribunal, etc.**—*Any vacancy in the office of Chairperson of the Appellate Tribunal shall be filled in by the appointment of senior-most Member to act as Chairperson.*

S. 10FT **Term of office of Chairperson and Members**

The Chairperson and Members of the Appellate Tribunal shall hold office for a term of 3 years, at a time, subject to the retire-

ment age of 70 years in case of Chairperson and 67 years in case of its Members.

S. 10FU **Resignation of Chairperson and Members**

The Chairperson or a Member of the Appellate Tribunal may resign his office by giving notice addressed to the Central Government.

S. 10FV **Removal and suspension of Chairperson and Members of Appellate Tribunal**

The Chairperson or any Member of the Appellate Tribunal may be removed from his office in consultation with the Chief Justice of India in certain circumstances.

S. 10FW **Salary, allowances and other terms and conditions of service of Chairperson and Members**

The Chairperson and Members of the Appellate Tribunal shall be entitled to the salary and allowances as may be prescribed.

S. 10FX **Selection Committee**

The Chairperson and Members of the Appellate Tribunal as also the President and Members of the Tribunal shall be appointed by the Government on the recommendations of the Selection Committee consisting of the Chief Justice of India or his nominee as Chairperson and Secretaries in the Ministry of Finance, Ministry of Labour, Department of Legal Affairs/Legistive Department and Department of Company Affairs, as members.

S. 10FY **Chairperson, etc., to be public servants**

Chairperson, President, Members, Officers and staff of the Appellate Tribunal and of the Tribunal shall be deemed to be public servants under section 21 of IPC.

S. 10FZ **Protection of action taken in good faith**

No suit, prosecution and other legal proceedings shall lie against the Appellate Tribunal, Tribunal, their presiding officers, Members and the staff in the discharge of their functions under this Act.

S. 10FZA **Procedure and powers of Tribunal and Appellate Tribunal**

The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down in Code of Civil Procedure, but shall be guided by the principles of natural justice and they may regulate their own procedure. Any order made may be enforced as if it were a decree made by a Court in a suit.

S. 10G **Power to punish for contempt**

The Appellate Tribunal shall have the power to punish for contempt of itself.

S. 10GA	***Staff of Appellate Tribunal***

The Central Government shall provide officers and staff to the Appellate Tribunal and their salaries and allowances shall be prescribed by the Government.

S. 10GB	***Civil Court not to have jurisdiction***

Jurisdiction of Civil Court has been barred in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act.

S. 10GC	***Vacancy in Tribunal or Appellate Tribunal not to invalidate acts or proceedings***

Existence of any vacancy or defect in the constitution of the Tribunal or Appellate Tribunal shall not invalidate any proceedings before it.

S. 10GD	***Right to legal representation***

The applicant or appellant may either appear in person or through their authorised representative who may be a Chartered Accountant or Company Secretary or Cost Accountant or Legal Practitioner or any officer to present the case before the Tribunal and the Appellate Tribunal, as the case may be.

S. 10GE	***Limitation***

The Limitation Act, 1963 shall apply to an appeal made to the Appellate Tribunal.

S. 10GF	***Appeal to Supreme Court***

An appeal shall lie before the Supreme Court against any decision or order of the Appellate Tribunal, within 60 days, or within extended period of 60 days on any question of law arising out of the said order or decision.

S. 635B	***Protection to employees during investigation***

Appellate powers of the Court in sub-sections (3) and (4) have been conferred on the Appellate Tribunal.

D. Powers of the erstwhile Company Law Board vested in the Tribunal

Powers of the Company Law Board, which stands dissolved on the commencement of the Companies (Second Amendment) Act, 2002 (vide section 10FA), have been vested in the National Company Law Tribunal constituted under sub-section (1) of section 10FB.

S. 58A	*Deposits not to be invited without issuing an advertisement.*
S. 58AA	*Small depositors.*
S. 80A	*Redemption of irredeemable preference shares, etc.*

S. 111	*Power to refuse registration and appeal against refusal.*
S. 111A	*Rectification of register on transfer.*
S. 117C	*Liability of company to create security and debenture redemption reserve.*
S. 168	*Penalty for default in complying with section 166 or 167 (CG or NCLT).*
S. 186	*Power to order meeting to be called.*
S. 203	*Power to restrain persons from managing companies (Court or NCLT).*
S. 235	*Investigation of the affairs of the company.*
S. 236	*Application by members to be supported by evidence and power to call for security.*
S. 237	*Investigation of company's affairs in other cases.*
S. 241	*Inspector's report.*
S. 247	*Investigation of ownership of company.*
S. 250	*Imposition of restriction upon shares and debentures and prohibition of transfer of shares or debentures in certain cases.*
S. 251	*Saving for legal advisers and bankers.*
S. 269	*Appointment of managing or whole-time director or manager to require Government approval only in certain cases.*
S. 304(2)(b)	*Inspection of register of directors (CG or NCLT).*
S. 307(9)	*Inspection of register of directors' shareholding (CG or NCLT).*
S. 388B	*Reference to Tribunal of cases against managerial personnel.*
S. 388C	*Interim order in connection with cases u/s. 388-B.*
S. 388D	*Findings in connection with cases u/s. 388-B.*
S. 388E	*Power of Central Government to remove management personnel on the basis of Tribunal's decision.*
S. 396	*Power of Central Government to provide for amalgamation of companies in national interest.*
S. 397-409	*Prevention of Oppression and Mismanagement.*
S. 410	*Appointment of Advisory Committee.*
S. 610	*Inspection, production and evidence of documents kept by Registrar.*
S. 614	*Enforcement of duty of company to make returns, etc., to Registrar.*

S. 637A	*Power of Central Government or Tribunal to accord approval, etc. subject to conditions and to prescribed fees on applications.*
S. 640A	*Exclusion of time required in obtaining copies of orders of court or Tribunal.*
Sch. XI	*Form in which section 539 to 544 are to apply to cases where an application is made u/s. 397, 398.*

E. Powers of the Court conferred on the Tribunal

Powers of the High Court under the Act have been conferred on the National Company Law Tribunal constituted under sub-section (1) of section 10FB.

S. 75(1)(c)	*Return as to allotments.*
S. 100	*Special Resolution for reduction of share capital.*
S. 101	*Application to Tribunal for confirming order, objections by creditors, and settlement of list of objecting creditors.*
S. 102	*Order confirming reduction and powers of Tribunal on making such order.*
S. 103	*Registration of order and minute of reduction.*
S. 104	*Liability of members in respect of reduced shares.*
S. 107	*Rights of dissentient shareholders.*
S. 203	*Power to restrain persons from managing companies (Court or NCLT).*
S. 243	*Application for winding-up of company or an order under section 397 or 398.*
S. 318(3)(d)	*Compensation for loss of office to managing/whole-time director/manager.*
S. 391	*Power of compromise or make arrangements with creditors and members.*
S. 392	*Power of Tribunal to enforce compromises and arrangements.*
S. 394	*Provisions for facilitating reconstruction and amalgamation of companies.*
S. 394A	*Notice to be given to Central Government for applications under sections 397 and 398.*
S. 395	*Power and duty to acquire shares of shareholders dissenting from scheme or contract approved by majority.*
S. 424	*Application of sections 421 to 423 to receivers & managers.*
S. 425	*Modes of Winding up.*
S. 426	*Liability as contributories of present and past members.*
S. 427	*Obligations of directors and managers whose liability is unlimited.*

S. 433	Circumstances in which company may be wound up.
S. 434(1)(b) & (c)	Company when deemed unable to pay its debts.
S. 439	Provisions as to applications for winding up.
S. 439A(new)	Statement of affairs to be filed on winding up of a company.
S. 440	Right to present winding up petition where company is being wound up voluntarily.
S. 441	Commencement of winding up by Tribunal.
S. 441D(new)	Application of Fund.
S. 442 Omitted	Power of Tribunal to stay or restrain proceedings against company.
S. 443	Powers of the Tribunal on hearing petition.
S. 444	Order of winding up to be communicated to the Official Liquidator and Registrar.
S. 446	Suits stayed on winding up order.
S. 446A(new)	Responsibility of directors and officers to submit to the Tribunal audited books and accounts.
S. 448	Appointment of Official Liquidator.
S. 450	Appointment and powers of provisional liquidator.
S. 451	General provisions as to liquidators.
S. 453	Receiver not to be appointed of assets with liquidator.
S. 454	Statement of affairs to be made to Official Liquidator.
S. 455(2) & (3)	Report by official liquidator
S. 456	Custody of company's property.
S. 457	Powers of Liquidator
S. 458	Discretion of liquidator.
S. 458A	Exclusion of certain time in computing period of limitation.
S. 459	Provision for legal assistance to liquidator.
S. 460	Exercise and control of liquidator's powers.
S. 461	Books to be kept by liquidator.
S. 462	Audit of liquidator's account.
S. 463	Control of Central Government over liquidators.
S. 464	Appointment and composition of committee of inspection.
S. 465	Constitution and proceedings of committee of inspection.

S. 466	*Power of Tribunal to stay winding up.*
S. 467	*Settlement of list of contributories and application of assets.*
S. 468	*Delivery of property to liquidator.*
S. 469	*Payment of debts due by contributory and extent of set-off.*
S. 470	*Power of Tribunal to make calls.*
S. 471	*Payment into bank of moneys due to company.*
S. 472	*Moneys and securities paid into bank to be subject to order of Tribunal.*
S. 473	*Order on contributory to be conclusive evidence.*
S. 474	*Power to exclude creditors not proving in time.*
S. 475	*Adjustment of rights of contributories.*
S. 476	*Power to order costs.*
S. 477	*Power to summon persons suspected of haring property of company, etc.*
S. 478	*Power to order public examination of promoters, directors, etc.*
S. 479	*Power to arrest absconding contributory.*
S. 480	*Saving of existing powers.*
S. 481	*Dissolution of company.*
S. 490	*Power of company to appoint and fix remuneration of liquidators.*
S. 492	*Power to fill vacancy in office of liquidator.*
S. 494	*Power of liquidator to accept shares, etc., as consideration for sale of property of company.*
S. 497	*Final meeting and dissolution.*
S. 502	*Appointment of liquidator.*
S. 503	*Appointment of committee of inspection.*
S. 504	*Fixing of liquidator's remuneration.*
S. 506	*Power to fill vacancy in office of liquidator.*
S. 507	*Application of section 494 to a creditors' voluntary winding up.*
S. 509	*Final meeting and dissolution.*
S. 511A	*Application of section 454 to voluntary winding up.*
S. 512	*Powers and duties of liquidator in voluntary winding up.*
S. 515	*Power of Tribunal to appoint and remove liquidator in voluntary winding up.*
S. 517	*Arrangement when binding on company and creditors.*
S. 518	*Power to apply to Tribunal to have questions determined or powers exercised.*

S. 519	*Application of liquidator to Tribunal for public examination of promoters, directors, etc.*
S. 531	*Fraudulent preference.*
S. 531A	*Avoidance of voluntary transfer.*
S. 533	*Liabilities and rights of certain fraudulently preferred persons.*
S. 535	*Disclaimer of onerous property in case of a company which is being wound up.*
S. 536	*Avoidance of transfers, etc., after commencement of winding up.*
S. 537	*Avoidance of certain attachment, executions, etc., in winding up.*
S. 538	*Offences by officers of companies in liquidation.*
S. 540	*Penalty for frauds by officers.*
S. 542	*Liability for fraudulent conduct of business.*
S. 543	*Power of Tribunal to assess demages against delinquent directors, etc.*
S. 544	*Liability under sections 542 and 543 to extend to partners or directors in firm or company.*
S. 545	*Prosecution of delinquent Officers and members of company.*
S. 546	*Liquidator to exercise certain powers subject to sanction.*
S. 547	*Notification that a company is in liquidation.*
S. 549	*Inspection of books and papers by creditors and contributories.*
S. 550	*Disposal of books and papers of company.*
S. 551	*Information as to pending liquidations.*
S. 553	*Voluntary Liquidator to make payments into Scheduled Bank.*
S. 555	*Unpaid dividends and undistributed assets to be paid into the Companies Liquidation Account.*
S. 556	*Enforcement of duty of liquidator to make returns, etc.*
S. 557	*Meetings to ascertain wishes of creditors or contributories.*
S. 558	*Tribunal or person before whom affidavit may be sworn.*
S. 559	*Power of Tribunal to declare dissolution of company void.*
S. 560	*Power of Registrar to strike defunct company off register.*
S. 581	*Suits stayed on winding up order.*
S. 582	*Meaning of unregistered company.*
S. 583	*Winding up of unregistered companies.*
S. 587	*Suits, etc. stayed on winding up order.*
S. 588	*Directions as to property in certain cases.*
S. 589	*Provisions of Part cumulative.*

S. 610	*Inspection, production & evidence of documents kept by Registrar.*
S. 614	*Enforcement of duty of company to make returns, etc., to Registrar.*
S. 626	*Application of fines.*
S. 627	*Production and inspection of books where offence suspected.*
S. 632	*Power to require limited company to give security for costs.*
S. 635	*Enforcement of orders of one Tribunal by other Tribunals.*
S. 635-B	*Protection of employees during investigation by Inspector or pendency of proceeding before Tribunal in certain cases.*

It may be noted that the powers of the High Court under sections 119, 203 and 633 as also the powers of Magistrate's court under sections 621-625 have remained unaltered.

F. Power of erstwhile Company Law Board now vested in the Central Government. Powers of the Company Law Board, which stands dissolved on the commencement of the Company (Second Amendment) Act, 2002, have been vested in the Central Government, as per official amendments moved while passing of the Bill in the Lok Sabha.

S. 17	*Special Resolution and Confirmation by required for alteration of Memorandum.*
S. 18(4)	*Alteration to be registered within three months.*
S. 19	*Effect of failure to register.*
S. 43 proviso	*Consequences of default in complying with conditions constituting a company a private company.*
S. 49(10)	*Investments of Company to be held in its own name.*
S. 79	*Power to issue shares at a discount.*
S. 113(1) & (3)	*Limitation of time for issue of certificates.*
S. 117B(4)	*Appointment of debentures trustees and duties of debenture trustees.*
S. 118(3)	*Right to obtain copies of and inspect trust deed.*
S. 141	*Rectification of register of charges.*
S. 144(4)	*Right to inspect copies of instruments creating charges and company's register of charges.*
S. 163(6)	*Place of keeping, and inspection of, registers and returns.*
S. 167	*Power to call annual general meeting.*
S. 168	*Penalty for default in complying with section 166 or 167 (CG or NCLT).*

S. 188(5)	*Circulation of members' resolution.*
S. 196(4)	*Inspection of minute books of general meetings.*
S. 219(4)	*Right of member to copies of balance sheet and auditors' report.*
S. 225(3) proviso	*Provisions as to resolutions for appointing or removing auditors.*
S. 284 (4) proviso	*Removal of directors.*
S. 304(2)(b)	*Inspection of the register.*
S. 307(9)	*Register of directors.*
S. 621A	*Composition of certain offences.*

G. Powers and functions relating to revival and rehabilitation of sick industrial companies vested in the Tribunal

The Board for Industrial and Financial Reconstruction (BIFR) and the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) have been dissolved on repeal of the Sick Industrial Companies (Special Provisions) Act, 1985 by the Sick Industrial Companies (Special Provisions) Repeal Act, 2002, and the powers and functions relating to revival and rehabilitation of sick industrial companies have been conferred to the National Company Law Tribunal constituted under sub-section (1) of section 10FB.

S. 424A <u>*Reference to Tribunal*</u>

The Board of Directors of a sick industrial company shall make a reference to the Tribunal within 180 days from the date when it comes to know of the relevant facts giving rise to causes of such reference. Reference may also be made to Tribunal by the Central Government or the Reserve Bank of India or a State Government or a Public Financial Institution or a State Level Institution or a Scheduled Bank. A Government company may make a reference to the Tribunal with the previous approval of the Government.

S. 424B <u>*Inquiry into working of sick industrial companies*</u>

The Tribunal may make an inquiry to determine whether the industrial company has become sick and it may require any operating agency to make a report on the revival scheme. The Tribunal shall complete its inquiry within 60 days which may be extended to 90 days. During the course of inquiry, the Tribunal may appoint special director(s) on the Board of the sick company.

S. 424C <u>*Powers of Tribunal to make suitable order on completion of inquiry*</u>

In case the Tribunal is satisfied that a company has become a sick industrial company, it may allow the company to make its net worth exceed the accumulated losses or make repayment of debts within a reasonable time. In case it is not practicable, the Tribu-

nal may direct an operating agency to prepare a scheme for its revival.

S. 424D ***Preparation and sanction of schemes***

The operating agency will prepare a scheme within 60 days providing for one or more measures specified in this section. The copy of the scheme, with modification, if any, shall be sent in draft to the company and be published in the newspapers for inviting suggestions and objections. The scheme may, thereafter, be sanctioned within 60 days by the Tribunal.

S. 424E ***Rehabilitation by giving financial assistance***

The sanctioned scheme may provide for financial assistance or reliefs and concessions and a copy of the scheme shall be circulated for seeking the consent of the Person required to provide financial assistance within 60 days from the date of such circulation. On receipt of the consent, the Tribunal may sanction the scheme and the same will be binding on the parties concerned.

S. 424F ***Arrangement for continuing operations, etc., during inquiry***

The sick industrial company or the Central Government or the State Government etc. intending to provide financial assistance may apply to the Tribunal for continuing the operations of the company or suggesting a scheme for its financial reconstruction. The application will be disposed of by the Tribunal within 60 days.

S. 424G ***Winding up of sick industrial company***

In case the Tribunal is of the opinion that the sick industrial company is not likely to become viable, it may record its finding and order winding up of the company. The Tribunal may appoint any officer of the operating agency as the liquidator of the company.

S. 424H ***Operating agency to prepare complete inventory, etc.***

The Tribunal may direct the operating agency to prepare an inventory of the assets and liabilities, books of account, list of shareholders and creditors, etc., as may be specified in the order.

S. 424I ***Direction not to dispose of assets***

The Tribunal may direct any sick industrial company not to dispose of its assets at the stage of preparation or consideration of the scheme.

S. 424J ***Power of Tribunal to call for periodic information***

The Tribunal may call for any information from the company as to the steps taken by it to make its net worth positive or make repayment of its debts.

S. 424K ***Misfeasance proceedings***

The Tribunal may direct any person who has taken part in the management of the sick company to restore the money or property

to the company, if he has been found guilty of any misfeasance or breach of trust in relation to such company.

S. 424L **Penalty for certain offences**

Whoever violates any provision of Part VIA of the Act or makes a false statement or gives false evidence is liable for punishment by way of imprisonment upto 3 years or fine not exceeding Rs. 10 lakhs.

H. Levy and collection of cess

As per sections 441A to 441F inserted in the Act, every company shall pay a levy by way of cess (not less than 0.005% and not more than 0.1% of the value of annual turnover or annual gross receipt, whichever is more), to the Central Government within 3 months from the close of every financial year. Out of the proceeds thereof, the rehabilitation and revival fund shall be created by the Central Government for the purposes of rehabilitation, revival, or protection of assets of sick industrial companies. In case of non-payment of cess by a company, the same shall be recovered as arrears of land revenue.

The Tribunal may also impose penalty not exceeding 10 times of the amount in arrears.

I. Measures taken for speedy winding up of Companies

(1) The mode of winding up "subject to the supervision of the Court" has been done away with and consequential changes have made in sections 318, 425, 494, 522 to 527, 531, 531A, 536, 538, 547, 549 and 583.

(2) In section 434(1)(a), the sum of Rs. 500 has been replaced by Rs. One lakh. As a result, the petition for winding up of a company can be filed where the dues of a creditor exceeds Rs. One lakh.

(3) Winding up proceedings of a company cannot be transferred now to a District Court and the provisions of sections 435-438 relating thereto have been omitted.

(4) As per section 439A, it is mandatory for the company filing a petition for its winding up before the Tribunal to also submit its statement of affairs. Similarly, in case the company wants to contest the petition for its winding up filed by any other person, it is also required to file the statement of affairs.

(5) The provisions of section 442 have been omitted which empowered the Court to stay or restrain proceedings against the company at any time after presentation of a winging up petition.

(6) Under section 446A, directors and other officers of a company shall ensure that books of account of the company are completed and audited upto the date of winding up order, at the cost of the company. Failure to do so, makes the directors and officers of the company liable for punishment for a term upto one year and fine upto Rs. 1 lakh.

(7) Under section 448, the Tribunal may appoint the liquidator from a panel of professional firms or bodies corporate. It is also open to the Tribunal to appoint

a whole time or part time officer of the Central Government as the liquidator of the company. Consequential changes have been made in this behalf by omitting section 513.

(8) Under section 457, specific period has been prescribed for the liquidator in regard to appointment of valuers etc. to assess the value of company's assets, for inviting bids for sale of assets, and provision has been made for issue of notice to ex-director for submission of statement of affairs, for calling any person for recording his statement relating to the affairs of the company, etc.

(9) Section 459 authorises the liquidator, albeit with the sanction of the Tribunal, to appoint a Chartered Accountant or Company Secretary or Cost Accountant apart from a Legal Practitioner to assist him in the performance of his duties.

(10) The reference to section 545 has been omitted in section 621, so as to bring the prosecution of delinquent officers and members of a company in voluntary winding up within the scope of section 621. (See clause 107 of Notes on Clauses of the Companies (Amendment) Bill, 2001).

K. Total Powers at a Glance of National Company Law Tribunal (NCLT) after the Changes made by the Companies (Amendment) Act & (Second Amendment) Act, 2002 (11 of 2003)

Section No.	Powers with NCLT	Subject Matter
Sec. 58A(9)	NCLT	To direct the company to make repayment of the matured deposits
Sec. 58AA(1)	NCLT	Intimation of default made by the company in repayment of small deposits or part thereof or any interest thereupon
Sec. 100 to 104	NCLT	Reduction of share capital;
Sec. 107	NCLT	Rights of dissentient shareholders to have variation cancelled;
Sec. 111	NCLT	Power to refuse registration and appeal against refusal;
Sec. 111A	NCLT	Rectification of register on transfer;
Sec. 117C(4)	NCLT	Redemption of debentures forthwith by payment of principal and interest;
Sec. 186	NCLT	Calling an extraordinary general meeting;
Sec. 203	NCLT	Power to restrain persons from managing companies (Court or NCLT);
Sec. 235	NCLT	Investigation of the affairs of a company;
Sec. 236	NCLT	Application by members to be supported by evidence;
Sec. 237(b)	NCLT	Investigation of company's affairs in other cases;
Sec. 241(2)(dd)	NCLT	Inspectors report;
Sec. 243	NCLT	Application for winding up of a company or an order u/s 397or 398;
Sec. 247	NCLT	Investigation of ownership of company;
Sec. 250	NCLT	Imposition of restriction on shares & debentures;
Sec. 251	NCLT	Saving for legal advisers & bankers;
Sec. 269(7)	NCLT	Reference where appointment made in contravention of the requirements of Schedule XIII
Sec. 269(8)	NCLT	Issue of notice to managing/whole-time director/manager to comply with the requirements of Schedule XIII;

Section No.	Powers with NCLT	Subject Matter
Sec. 269(9)	NCLT	Order declaring that contravention of the requirements of Schedule XIII has taken place
Sec. 318(3)(d)	NCLT	Compensation for loss of office to managing/whole-time director/manager;
Sec. 388-B	NCLT	Reference of cases against managerial personnel;
Sec. 388-C	NCLT	Interim order in connection with cases u/s 388-B;
Sec. 388-D	NCLT	Findings in connection with cases u/s 388-B;
Sec. 388-E	NCLT	Power of CG to remove managerial personnel on the basis of findings in connection with cases u/s 388-B;
Sec. 391	NCLT	Power to compromise or make arrangements with creditors & members;
Sec. 392	NCLT	Power to enforce compromises & arrangements;
Sec. 394	NCLT	Provisions for facilitating reconstruction & amalgamation of companies;
Sec. 394A	NCLT	Notice to be given to CG for application u/s 391 & 394;
Sec. 395	NCLT	Power & duty to acquire shares of shareholders dissenting from scheme or contract approved by majority;
Sec. 396(3A)	NCLT	Preferring an appeal from assessment of compensation made by prescribed authority;
Sec. 397	NCLT	Application for relief in cases of oppression;
Sec. 398	NCLT	Application for relief in cases of mismanagement;
Sec. 400	NCLT	Notice to be given to CG of applications u/s 397,398;
Sec. 401	NCLT	Right of CG to apply u/s 397,398;
Sec. 402	NCLT	Power on application u/s 397,938;
Sec. 403	NCLT	Interim order;
Sec. 404	NCLT	Effect of alteration of memorandum or articles of company by order u/s 397,398
Sec. 405	NCLT	Addition of respondents to application u/s 397,398;

Section No.	Powers with NCLT	Subject Matter
Sec. 407	NCLT	Consequences of termination of modification of certain agreements;
Sec. 408	NCLT	Power to prevent oppression or mismanagement;
Sec. 409	NCLT	Power to prevent change in Board of Directors likely to affect company prejudicially;
Sec. 410	NCLT	Appointment of advisory committee;
Sec. 424	NCLT	Application of sections 421 to 423 to receivers & managers
Sec. 424A	NCLT	Reference by Sick Industrial Company for revival and rehabilitation;
Sec. 424B	NCLT	Inquiry into working of Sick Industrial Companies
Sec. 424C	NCLT	Power to make suitable order on completion of inquiry;
Sec. 424D	NCLT	Power to sanction the scheme of revival and rehabilitation of Sick Industrial Companies
Sec. 424E	NCLT	Rehabilitation by giving financial assistance;
Sec. 424F	NCLT	Arrangement for continuing operations, etc., during inquiry
Sec. 424G	NCLT	Winding up of sick industrial company
Sec. 424H	NCLT	Power to prepare complete inventory through the operating agency;
Sec. 424I	NCLT	Directions not to dispose of assets;
Sec. 424J	NCLT	Power to call for periodic information;
Sec. 424K	NCLT	Power to direct repayment restoration money or property or any part thereof etc. by way of compensation in respect of the misapplication, retainer, misfesance of breach of trust
Sec. 424L	NCLT	Penalty for certain offences.
Sec. 425	NCLT	Modes of winding up;
Sec. 426	NCLT	Liability as contributories of present and past members;
Sec. 427	NCLT	Obligations of directors & managers whose liability is unlimited;

Section No.	Powers with NCLT	Subject Matter
Sec. 433	NCLT	Circumstances in which company may be wound up;
Sec. 434(1)(b)	NCLT	Company when deemed unable to pay its debts (Court or NCLT);
Sec. 434(1)(c)	NCLT	Company when deemed unable to pay its debts;
Sec. 439	NCLT	Provisions as to applications for winding up;
Sec. 440	NCLT	Right to present winding up petition where company is being wound up voluntarily;
Sec. 441	NCLT	Commencement of winding up;
Sec. 443	NCLT	Powers on hearing petition;
Sec. 444	NCLT	Order for winding up;
Sec. 446	NCLT	Suits stayed on winding up order;
Sec. 448	NCLT	Appointment of Official liquidator;
Sec. 450	NCLT	Appointment & powers of provisional liquidator;
Sec. 451	NCLT	General provisions as to liquidators;
Sec. 453	NCLT	Receiver not to be appointed of assets with liquidator;
Sec. 454	NCLT	Statement of affairs to be made to Official Liquidator;
Sec. 456	NCLT	Custody of company's property;
Sec. 457	NCLT	Powers of liquidator;
Sec. 458	NCLT	Discretion of liquidator;
Sec. 458A	NCLT	Exclusion of certain time in computing periods of limitation;
Sec. 459	NCLT	Provision for legal assistance to liquidator;
Sec. 460	NCLT	Exercise & control of liquidator's powers;
Sec. 461	NCLT	Books to be kept by liquidator;
Sec. 462	NCLT	Audit of liquidator's accounts;
Sec. 463	NCLT	Control of CG over liquidators;
Sec. 464	NCLT	Appointment & composition of committee of inspection;

Section No.	Powers with NCLT	Subject Matter
Sec. 465	NCLT	Constitution & proceedings of committee of inspection;
Sec. 466	NCLT	Power to stay winding up;
Sec. 467	NCLT	Settlement of list of contributories & application of assets;
Sec. 468	NCLT	Delivery of property to liquidator;
Sec. 469	NCLT	Payment of debts due by contributory & extent of set off;
Sec. 470	NCLT	Power to make calls;
Sec. 471	NCLT	Payment into bank of moneys due to company;
Sec. 472	NCLT	Moneys & securities paid into Bank to be subject to order;
Sec. 473	NCLT	Order on contributory to be conclusive evidence;
Sec. 474	NCLT	Power to exclude creditors not proving in time;
Sec. 475	NCLT	Adjustment of rights of contribuories;
Sec. 476	NCLT	Power to order costs;
Sec. 478	NCLT	Power to order public examination of promoters, directors etc.
Sec. 479	NCLT	Power to arrest absconding contributory;
Sec. 480	NCLT	Saving of existing powers;
Sec. 481	NCLT	Dissolution of company;
Sec. 490	NCLT	Power of company to appoint & fix remuneration of liquidators;
Sec. 492	NCLT	Power to fill vacancy in office of liquidator;
Sec. 494	NCLT	Power of liquidator to accept shares etc., as consideration for sale of property of company;
Sec. 497	NCLT	Final meeting and dissolution;
Sec. 502	NCLT	Appointment of liquidator;
Sec. 503	NCLT	Appointment of committee of inspection;
Sec. 504	NCLT	Fixing of liquidator's remuneration;
Sec. 506	NCLT	Power to fill vacancy in office of liquidator;

Section No.	Powers with NCLT	Subject Matter
Sec. 507	NCLT	Application of section 494 to a creditors' voluntary winding up;
Sec. 509	NCLT	Final meeting & dissolution;
Sec. 511-A	NCLT	Application of section 454 to voluntary winding up;
Sec. 512	NCLT	Powers and duties of liquidator in voluntary winding up;
Sec. 515	NCLT	Power to appoint & remove liquidator in voluntary winding up;
Sec. 517	NCLT	Arrangement when binding on company & creditors;
Sec. 518	NCLT	Power to apply to have questions determined or powers exercised;
Sec. 519	NCLT	Application of liquidator for public examination of promoters, directors, etc.
Sec. 531	NCLT	Fraudulent preference;
Sec. 531-A	NCLT	Avoidance of voluntary transfer;
Sec. 533	NCLT	Liabilities & rights of certain fraudulently preferred persons;
Sec. 534	NCLT	Effect of floating charge;
Sec. 535	NCLT	Disclaimer of onerous property in case of a company which is being wound up;
Sec. 536	NCLT	Avoidance of transfers etc., after commencement of winding up;
Sec. 537	NCLT	Avoidance of certain attachments, executions, etc., in winding up;
Sec. 538	NCLT	Offences by officers of companies in liquidation;
Sec. 540	NCLT	Penalty for frauds by officers;
Sec. 541	NCLT	Liability where proper accounts not kept;
Sec. 542	NCLT	Liability for fraudulent conduct of business;
Sec. 543	NCLT	Power to assess damages against delinquent directors, etc.
Sec. 544	NCLT	Liability u/s 542 & 543 to extend to partners or directors in firm or company;

Section No.	Powers with NCLT	Subject Matter
Sec. 545	NCLT	Prosecution of delinquent officers & members of company;
Sec. 546	NCLT	Liquidator to exercise certain powers subject to sanction;
Sec. 547	NCLT	Notification that a company is in liquidation;
Sec. 549	NCLT	Inspection of books & papers by creditors & contributories;
Sec. 550	NCLT	Disposal of books & papers of company
Sec. 551	NCLT	Information as to pending liquidations;
Sec. 553	NCLT	Voluntary liquidator to make payments into Scheduled Bank;
Sec. 555	NCLT	Unpaid dividends & undistributed assets to be paid into the Companies Liquidation Account;
Sec. 556	NCLT	Enforcement of duty of liquidator to make returns;
Sec. 557	NCLT	Meetings to ascertain wishes of creditors or contributories;
Sec. 558	NCLT	Before whom affidavit may be sworn;
Sec. 559	NCLT	Power to declare dissolution of company void;
Sec. 560	NCLT	Power to wind up defunct company struck off by Registrar;
Sec. 581	NCLT	Suits stayed on winding-up order;
Sec. 581ZP(3)	NCLT	Appeal to NCLT against the order of ROC striking off the name of Producer Company;
Sec. 582	NCLT	Meaning of unregistered company;
Sec. 583	NCLT	Winding up of unregistered company;
Sec. 587	NCLT	Suits etc., stayed on winding up order;
Sec. 588	NCLT	Directions as to property in certain cases;
Sec. 589	NCLT	Provisions of Part cumulative;
Sec. 610	NCLT	Inspection, production & evidence of documents kept by Registrar;
Sec. 614	NCLT	Enforcement of duty of company to make returns, etc., to Registrar.
Sec. 626	NCLT	Application of fines;

Section No.	Powers with NCLT	Subject Matter
Sec. 632	NCLT	Power to require limited company to give security for costs;
Sec. 635	NCLT	Enforcement of orders (CLB or NCLT)
Sec. 635-B	NCLT	Protection of employees during investigation by Inspectors or pendency of proceeding in certain cases;
Sec. 637-A	NCLT	Power to accord approval etc., subject to conditions & to prescribe fees on applications;
Sec. 640-A	NCLT	Exclusion of time required in obtaining copies of orders;
Schedule XI	NCLT	Form in which section 539 to 544 are to apply to cases where an application is made u/s 397, 398;

L. Total Powers at a Glance with Central Government (CG) after the changes made by the Companies (Second Amendment) Act, 2002

Section No.	Powers with Cent. Govt.	Subject Matter
Sec. 8	Cent. Govt.	Power of Central Government to declare an establishment not to be branch office
Sec. 17	Cent. Govt.	Change of place of registered office from one state to another;
Sec. 18(4)	Cent. Govt.	Extension of time for filing the order of shifting of registered office;
Sec. 19	Cent. Govt.	Revival of order of shifting of registered office;
Sec. 21	Cent. Govt.	Application for change of name (delegated to ROC)
Sec. 22(1)(a)	Cent. Govt.	Application for rectification of name (delegated to ROC)
Sec. 22(1)(b)	Cent. Govt.	Application for rectification of name on Central Government's direction (delegated to ROC)
Sec. 25	Cent. Govt.	Application for a Licence (delegated to Regional Director)
Sec. 43 proviso	Cent. Govt.	Consequences of default in complying with conditions constituting a private company;

Section No.	Powers with Cent. Govt.	Subject Matter
Sec. 49(10)	Cent. Govt.	Direction to inspect Register of Investments;
Sec. 79	Cent. Govt.	Power to issue shares at a discount;
Sec. 81(1A)(b)	Cent. Govt.	Application for preferential allotment of share
Sec. 81(3) proviso (a)	Cent. Govt.	Application for approving the issue of debentures or raising of loans where they do not conform to the Public Companies (Terms of Issue of Debentures and Raising of Loans with Option to Convert such Debenture or Loans into Shares) Rules, 1977
Sec. 89(4)	Cent. Govt.	Application for exemption from terminating disproportionately excessive voting rights
Sec. 94A(2)	Cent. Govt.	Application by public financial institutions for increase of share capital on conversion of loan into shares
Sec. 108)1D)	Cent. Govt.	Application for extension of time (delegated to ROC);
Sec. 108A	Cent. Govt.	Application for approval of the Central Government for acquisition of shares;
Sec. 108B	Cent. Govt.	Intimation to the Central Government of the proposal to transfer shares
Sec. 108C	Cent. Govt.	Application for approval of the Central Government for transfer of shares of foreign companies
Sec. 113(1)	Cent. Govt.	Extension of time for issue of certificates;
Sec. 114(1)	Cent. Govt.	Application to issue share warrants
Sec. 117B(4)	Cent. Govt.	Debenture trustee to ask for restriction to be imposed on the company;
Sec. 118(3)	Cent. Govt.	Right to obtain copies of trust deed;
Sec. 141	Cent. Govt.	Rectification of register of charges;
Sec. 144(4)	Cent. Govt.	Inspection of copies of instruments creating charges and register of charges;
Sec. 149(2-B)	Cent. Govt.	Application for commencement of new business without passing special resolution
Sec. 163(6)	Cent. Govt.	Inspection of registers and returns;
Sec. 166(2) 1st proviso	Cent. Govt.	Application for exempting any class of companies from the provision of sub-section (2) of section 166

Section No.	Powers with Cent. Govt.	Subject Matter
Sec. 167	Cent. Govt.	Direct the calling of an annual general meeting except by a sick industrial company;
Sec. 168	Cent. Govt.	Penalty for default in complying with section 166 or 167(CG or NCLT);
Sec. 188(5)	Cent. Govt.	Restriction on circulation of statement with respect to any proposed resolution;
Sec.196 (4)	Cent. Govt.	Inspection of minute books;
Sec. 198(4)	Cent. Govt.	Previous approval of the Central Government for payment of remuneration to Directors including Managing or Whole-time Director or Manager any sum exclusive of any fees payable to Directors under Section 309(2)
Sec. 204(1) proviso	Cent. Govt.	Application for approval of appointing firm or body corporate to any office or place of profit for more than 10 years;
Sec. 205(1)(c)	Cent. Govt.	Application for declaring dividend without providing for depreciation
Sec. 205(2)(c)	Cent. Govt.	Application for approving the basis of calculating depreciation
Sec. 205A(3)	Cent. Govt.	Application for approving declaration of dividend out of reserves not in accordance with the provisions of prescribed rules
Sec. 208(3)	Cent. Govt.	Application to pay interest out of capital
Sec. 211(1)	Cent. Govt.	Application for approving the form of balance-sheet other than mentioned in Part I of Schedule VI
Sec. 211(4)	Cent. Govt.	Application for approving the modifications with regard to matters to be stated in the balance-sheet or profit and loss account
Sec. 212(8)	Cent. Govt.	Application for exemption from any provisions of the section
Sec. 213(1)	Cent. Govt.	Application for extension of financial year of the holding or subsidiary company
Sec. 219	Cent. Govt.	Directing copy of balance-sheet or auditors' report to be furnished forthwith;
Sec. 224(4)	Cent. Govt.	Giving notice of the fact that no auditors are appointed or re-appointed at the A.G.M. (delegated to the Regional Director);
Sec. 224(7)	Cent. Govt.	Application for approving the removal of the auditor before the expiry of his term of office
Sec. 225(3) proviso	Cent. Govt.	Restricting copies of representation of the auditor to be removed to be sent out;
Sec. 233B(2)	Cent. Govt.	Application for appointment of Cost Auditors

Section No.	Powers with Cent. Govt.	Subject Matter
Sec. 237(a)	Cent. Govt.	Application to appoint inspectors in certain cases
Sec. 241(2)(b)(c)	Cent. Govt.	Application to get a copy of the investigation report by any other person
Sec. 243	Cent. Govt.	Application for obtaining authorisation to file a petition for winding up
Sec. 247(1)	Cent. Govt.	Application to order investigation into the ownership of a company
Sec. 247(5) Second Proviso	Cent. Govt.	Application by the company to obtain a copy of the investigation report
Sec. 248(1)	Cent. Govt.	Application to order investigation into the ownership of any share
Sec. 259	Cent. Govt.	Application for increasing the number of directors of a company
Sec. 268	Cent. Govt.	Application to the Central government for amendment of provision relating to the appointment or re-appointment of a managing or whole time director or non-rotation director.
Sec. 269	Cent. Govt.	Application for appointment, re-appointment and remuneration payable to managerial personnels
Sec. 274(2)	Cent. Govt.	Application to remove certain disqualification of directors by Gazetted Notification
Sec. 284(4) proviso	Cent. Govt.	Restricting copies of representation of the director to be removed to be sent out;
Sec. 294AA	Cent. Govt.	Application for approval to the appointment or re-appointment of sole selling agents.
Sec. 294AA	Cent. Govt.	Application for approval to the appointment or re-appointment of sole buying or purchasing agents.
Sec. 295(1)	Cent. Govt.	Application for approving loans to be given to directors
Sec. 297(1) proviso	Cent. Govt.	Application for approval for entering into contracts
Sec. 300(3)	Cent. Govt.	Application to permit interested directors to participate or vote in Board's proceedings by a Gazetted Notification
Sec. 304(2)(b)	Cent. Govt.	Inspection of register of directors (CG or NCLT);
Sec. 307(9)	Cent. Govt.	Inspection of register of directors' shareholding (CG or NCLT);

Section No.	Powers with Cent. Govt.	Subject Matter
Sec. 309(1) Proviso	Cent. Govt.	Application to exempt from remuneration of directors any sum received for rendering professional services
Sec. 309(3) proviso	Cent. Govt.	Previous approval of the Central Government for payment of remuneration exceeding 5% of the net profit for one such director or 10% for all of them together;
Sec. 309(5B)	Cent. Govt.	Application to waive the recovery of remuneration received in excess of prescribed limits from a director
Sec. 310, 311, 388	Cent. Govt.	Application for increasing the remuneration of director, managing or whole time director or manager
Sec. 314(1B)	Cent. Govt.	Application for prior consent for holding any office or place of profit
Sec. 314(2)(b) & (2D)	Cent. Govt.	Application for waiving any sum refundable to the Company
Sec. 316(4)	Cent. Govt.	Application to permit appointment of one person as managing director of more than two companies
Sec. 385(2)	Cent. Govt.	Application to remove any disqualification by a Gazetted Notification
Sec. 386(4)	Cent. Govt.	Application to permit appointment of one person as manager of more than two companies
Sec. 388E(5)	Cent. Govt.	Application for permitting appointment of another person to the post of the removed managerial personnel
Sec. 396	Cent. Govt.	Application to provide for amalgamation of companies in national interest
Sec. 396-A	Cent. Govt.	Application for permitting disposal of books and papers of an amalgamated company
Sec. 399(4)	Cent. Govt.	Application to authorise any member(s) of the company to apply to the Company Law Board in case of oppression and mismanagement
Sec. 408(4)	Cent. Govt.	Application for removal of any director appointed by Company Law Board and appoint another person in his place
Sec. 496(1)(a)	Cent. Govt.	Application to call a general meeting beyond three months by the liquidator appointed by the members in members voluntary winding-up (delegated to the Regional Director)
Sec. 508(1)(a)	Cent. Govt.	Application to call a general meeting beyond three months by the liquidator appointed by the creditors in creditors voluntary winding-up (delegated to the Regional Director)

Section No.	Powers with Cent. Govt.	Subject Matter
Sec. 551(1)	Cent. Govt.	Application by the liquidator to get exemption from filing information regarding proceedings and position of liquidation (delegated to the Regional Director)
Sec. 555(7)(b)	Cent. Govt.	Application to claim payment of unpaid dividend from company's Liquidation Account (delegated to the Regional Director)
Sec. 555(9)(a)	Cent. Govt.	Application to remit interest on unpaid dividend either in part or in whole (delegated to the Regional Director)
Sec. 572	Cent. Govt.	Application for change of name for the purpose of registration (delegated to the ROC)
Sec. 581ZL(4) proviso	Cent. Govt.	Investment by a producer company in excess of the limits
Sec. 610(1) Proviso (i) & (ii)	Cent. Govt.	Application to inspect prospectus after 14 days of its publication (delegated to the Regional Director)
Sec. 620A	Cent. Govt.	Declaration as Nidhi or Mutual Benefit Society
Sec. 621-A	Cent. Govt.	Composition of certain offences;
Sec. 635-B	Cent. Govt.	Intimation to be given before discharging/punishing/ dismissing/removing/demoting any of the company's employee in the course of investigation
Sec. 637A	Cent. Govt.	Power to accord approval subject to condition and prescribe fees on application (CG or NCLT)
Sec. 637AA	Cent. Govt.	Power to fix a limit with regard to remuneration
Sec. 637B	Cent. Govt.	Application for condonation of delay in making any application to the Central Government or filing any document with the Registrar of Companies
Sec. 640B	Cent. Govt.	Forms of, and procedures in relation to applications made to Central Government;
Sec. 641	Cent. Govt.	Power to alter schedules;
Sec. 642	Cent. Govt.	Power to make rules;
Sec. 643	Cent. Govt.	Power to make rules for all matters relating to the winding-up of the companies;

M. Powers at a Glance remaining with Court after the Changes made by the Companies (Amendment) Act 2002 & (Second Amendment) Act, 2002

Section No.	Powers vested with Court	Subject Matter
Sec. 81(7)	Court	Appeal to court if the terms and conditions of conversion of debentures or loans into shares are not acceptable to the company.
Sec. 237(A)(Ii)	Court	Investigation of company's affairs;
Sec. 424L(2)	Court	No court to take congnizance of any offence under sub-section (1) except on a complaint in writing of an officer of the NCLT or NCLAT or any officer of the Cent. Govt.
Sec. 581ZN(16)	Court	Appeal to the High Court by any member or creditor or employee aggrieved by the transfer of assets, division, amalgamation a merger of producer companies;
Sec. 581ZS(1)	Court	Reconversion of producer companies to interstate co-operative society
Sec. 621	Court	Offences against Act cognizable only on complaint by Registrar, Shareholder, Government
Sec. 630(2)	Court	Penalty for wrongful withholding of property
Sec. 633(3)	Court	Power of court to grant relief in certain cases

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THE COMPANIES (AMENDMENT) ACT, 2002
(1 OF 2003†

An Act further to amend the Companies Act, 1956

BE it enacted by Parliament in the Fifty-third Year of the Republic of India as follows:—

1. Short title and commencement.—(*1*) This Act may be called the Companies (Amendment) Act, 2002.

(*2*) It shall come into force on such date as the Central Government may, by notification in the Official Gazzette, appoint

STATEMENT OF OBJECTS AND REASONS*

During the last decade, changes have taken place in the Indian economy, in the communication and transportation infrastructures, as well as in the method of commerce, banking and international trade. Liberalization of the economy is in the process of changing the terms of trade between rural and urban, labour and industry, finance and commerce. Biotechnology, the information revolution, computerization can all be used to raise the standard of living of the rural masses and ultimately link this economy with regional, national and global demand. Institutions are needed to link the rural economy with the emerging new opportunities. Rural producers are at a potentional disadvantage given their generally limited assets, resources, education and access to advanced technology. In the present competitive scenario, if cooperative enterprises are to continue to serve rural producers, they require an alternative to the institutional form presently available under Law.

2. Keeping all this in view Government constituted a Committee consisting of experts led by Dr. Y.K. Alagh, Economist, former Union Minister to examine and make recommendations with regard to (a) framing a legislation which would enable incorporation of cooperatives as companies and conversion of existing cooperatives into companies and (b) ensuring that the proposed legislation accommodates the unique elements of cooperative businesses within a regulatory framework similar to that of companies. The Committee had a series of meeting during which it interacted with, and received responses from various cooperatives, institutes and individuals.

3. On the basis of the recommendations of the Committee the present Bill has been prepared with the main objective of facilitating formation of cooperative business as companies and to convert existing business into companies. The salient features of the Bill are:

(*i*) to offer a statutory and regulatory framework that creates the potential for producer-owned enterprises to compete with other enterprises on a competitive footing. The Companies Act envisages and provides for various forms of Companies including private limited, public limited, trusteeship

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† As passed by Lok Sabha on 10-12-2002 and Rajya Sabha on 17-12-2002 and enforced w.e.f. 6-2-2003 *vide* Notification No. S.O. 135(E), dt. 5-2-2003.

* As appended to the Companies (Second Amendment) Bill, 2001 introduced in Lok Sabha on 31-8-2001 and which was passed as the Companies (Amendment) Act, 2002 by Lok Sabha on 10-12-2002 and Rajya Sabha on 17-12-2002.

companies and *nidhis*, each with specific and appropriate provisions applicable to them;

(*ii*) to provide for the formation and registration of producer companies which include the mutual assistance and co-operative principles within the more liberal regulatory framework afforded by the Company Law with suitable adaptations;

(*iii*) to provide an opportunity to cooperative institutions to voluntarily transform themselves into the new form of producer companies;

(*iv*) Under the Bill conversion of co-operatives to producer companies is purely voluntary;

(*v*) Member equity may not be publicly traded, but may only be transferred, with the approval of the producer company's Board of Directors. Producer companies would not be vulnerable to the takeover by multinationals or other companies;

(*vi*) The conversion option by co-operative society to producer company can be exercised only if two-thirds of the Members of the concerned society vote in favour of a resolution to that effect;

(*vii*) The new form of Company is designated as "producer company" to indicate that only certain categories of persons can participate in the ownership of such Companies. The members of the Producer Company have necessarily to be "primary producers", that is persons engaged in an activity connected with, or relatable to, primary produce;

(*viii*) The objects of a producer company have been defined to include, among other things, production, processing, manufacture and sale of primary produce as well as allied matters.

4. The Bill seeks to achieve the above objects.

2. Insertion of new Part IXA.—In the Companies Act, 1956 (1 of 1956), after Part IX, the following Part shall be inserted namely:—

'PART IXA

CHAPTER I

PRODUCER COMPANIES

S. 581A. Definitions.—In this Part, unless the context otherwise requires,—

(a) "active Member" means a member who fulfils the quantum and period of patronage of the Producer Company as may be required by the articles;

(b) "Chief Executive" means an individual appointed as such under sub-section (1) of section 581W;

(c) "limited return" means the maximum dividend as may be specified by the articles;

(d) "Member" means a person or Producer institution (whether incorporated or not) admitted as a Member of a Producer Company and who retains the qualifications necessary for continuance as such;

(e) "inter-State co-operative society" means a multi-State co-operative society as defined in clause (k) of section 3 of the Multi-State Co-operative Societies Act, 1984 (51 of 1984) and includes any co-operative society registered under any other law for the time being in force, which has, subsequent to its formation, extended any of its objects to more than one State by enlisting the participation of persons or by extending any of its activities outside the State, whether directly or indirectly or through an institution of which it is a constituent;

(f) "mutual assistance principles" means the principles set out in sub-section (2) of section 581G;

(g) "officer" includes any director or Chief Executive or Secretary or any person in accordance with whose directions or instructions part or whole of the business of the Producer Company is carried on;

(h) "patronage" means the use of services offered by the Producer Company to its Members by participation in its business activities;

(i) "patronage bonus" means payments made by a Producer Company out of its surplus income to the Members in proportion to their respective patronage;

(j) "primary produce" means—

(i) produce of farmers, arising from agriculture (including animal husbandry, horticulture, floriculture, pisciculture, viticulture, forestry, forest products, re-vegetation, bee raising and farming plantation products), or from any other primary activity or service which promotes the interest of the farmers or consumers; or

(ii) produce of persons engaged in handloom, handicraft and other cottage industries;

(iii) any product resulting from any of the above activities, including by-products of such products;

(iv) any product resulting from an ancillary activity that would assist or promote any of the aforesaid activities or anything ancillary thereto;

(v) any activity which is intended to increase the production of anything referred to in sub-clauses (i) to (iv) or improve the quality thereof;

(k) "producer" means any person engaged in any activity connected with or relatable to any primary produce;

(l) "Producer Company" means a body corporate having objects or activities specified in section 581B and registered as Producer Company under this Act;

(m) "Producer institution" means a Producer Company or any other institution having only producer or producers or Producer Company or Producer Companies as its member whether incorporated or not having any of the objects referred to in section 581B and which agrees to make use of the services of the Producer Company or Producer Companies as provided in its articles;

(n) "withheld price" means part of the price due and payable for goods supplied by any Member to the Producer Company; and as withheld by the Producer Company for payment on a subsequent date.

CHAPTER II

INCORPORATION OF PRODUCER COMPANIES AND OTHER MATTERS

S. 581B. **Objects of Producer Company.**—(1) The objects of the Producer Company shall relate to all or any of the following matters, namely:—

(a) production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of the Members or import of goods or services for their benefit:

Provided that the Producer Company may carry on any of the activities specified in this clause either by itself or through other institution;

(b) processing including preserving, drying, distilling, brewing, vinting, canning and packaging of produce of its Members;

(c) manufacture, sale or supply of machinery, equipment or consumables mainly to its Members;

(d) providing education on the mutual assistance principles to its Members and others;

(e) rendering technical services, consultancy services, training, research and development and all other activities for the promotion of the interests of its Members;

(f) generation, transmission and distribution of power, revitalisation of land and water resources, their use, conservation and communications relatable to primary produce;

(g) insurance of producers or their primary produce;

(h) promoting techniques of mutuality and mutual assistance;

(i) welfare measures or facilities for the benefit of Members as may be decided by the Board;

(j) any other activity, ancillary or incidental to any of the activities referred to in clauses (a) to (i) or other activities which may promote the principles of mutuality and mutual assistance amongst the Members in any other manner;

(k) financing of procurement, processing, marketing or other activities specified in clauses (a) to (j) which include extending of credit facilities or any other financial services to its Members.

(2) Every Producer Company shall deal primarily with the produce of its active Members for carrying out any of its objects specified in this section.

S. 581C. **Formation of Producer Company and its registration.**—(1) Any ten or more individuals, each of them being a producer or any two or more producer institutions, or a combination of ten or more individuals and producer institutions, desirous of forming a Producer Company having its objects specified in section 581B and otherwise complying with the requirements of this Part and the provisions of this Act

in respect of registration, may form an incorporated Company as a Producer Company under this Act.

(2) If the Registrar is satisfied that all the requirements of this Act have been complied with in respect of registration and matters precedent and incidental thereto, he shall, within thirty days of the receipt of the documents required for registration, register the memorandum, the articles and other documents, if any, and issue a certificate of incorporation under this Act.

(3) A Producer Company so formed shall have the liability of its Members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them and be termed a company limited by shares.

(4) The Producer Company may reimburse to its promoters all other direct costs associated with the promotion and registration of the company including registration, legal fees, printing of a memorandum and articles and the payment thereof shall be subject to the approval at its first general meeting of the Members.

(5) On registration under sub-section (1), the Producer Company shall become a body corporate as if it is a private limited company to which the provisions contained in this Part apply, without, however, any limit to the number of Members thereof, and the Producer Company shall not, under any circumstance whatsoever, become or be deemed to become a public limited company under this Act.

***S. 581D. Membership and voting rights of Members of Producer Company.**—(1) (a) In a case where the membership consists solely of individual members, the voting rights shall be based on a single vote for every Member, irrespective of his shareholding or patronage of the Producer Company.*

(b) In a case where the membership consists of Producer institutions only, the voting rights of such Producer institutions shall be determined on the basis of their participation in the business of the Producer Company in the previous year, as may be specified by articles:

Provided that during the first year of registration of a Producer Company, the voting rights shall be determined on the basis of the shareholding by such Producer institutions.

(c) In a case where the membership consists of individuals and Producer institutions, the voting rights shall be computed on the basis of single vote for every Member.

(2) The articles of any Producer Company may provide for the conditions, subject to which a Member may continue to retain his membership, and the manner in which voting rights shall be exercised by the Members.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), any Producer Company may, if so authorised by its articles, restrict the voting rights to active Members, in any special or general meeting.

(4) No person, who has any business interest which is in conflict with business of the Producer Company, shall become a Member of that Company.

(5) A Member, who acquires any business interest which is in conflict with the business of the Producer Company, shall cease to be a Member of that Company and be removed as a Member in accordance with articles.

***S. 581E. Benefits to Members.**—(1) Subject to provisions made in articles, every Member shall initially receive only such value for the produce or products pooled*

and supplied as the Board of Producer Company may determine, and the withheld price may be disbursed later in cash or in kind or by allotment of equity shares, in proportion to the produce supplied to the Producer Company during the financial year to such extent and in such manner and subject to such conditions as may be decided by the Board.

(2) Every Member shall, on the share capital contributed, receive only a limited return:

Provided that every such Member may be allotted bonus shares in accordance with the provisions contained in section 581ZJ.

(3) The surplus if any, remaining after making provision for payment of limited return and reserves referred to in section 581ZI, may be disbursed as patronage bonus, amongst the Members, in proportion to their participation in the business of the Producer Company, either in cash or by way of allotment of equity shares, or both, as may be decided by the Members at the general meeting.

S. 581F. Memorandum of Producer Company.—The memorandum of association of every Producer Company shall state—

(a) the name of the company with "Producer Company Limited" as the last words of the name of such Company;

(b) the State in which the registered office of the Producer Company is to situate;

(c) the main objects of the Producer Company shall be one or more of the objects specified in section 581B;

(d) the names and addresses of the persons who have subscribed to the memorandum;

(e) the amount of share capital with which the Producer Company is to be registered and division thereof into shares of a fixed amount;

(f) the names, addresses and occupations of the subscribers being producers, who shall act as the first directors in accordance with sub-section (2) of section 581J;

(g) that the liability of its members is limited;

(h) opposite to the subscriber's name the number of shares each subscriber takes:

Provided that no subscriber shall take less than one share;

(i) in case the objects of the Producer Company are not confined to one State, the States to whose territories the objects extend.

S. 581G. Articles of association.—(1) There shall be presented, for registration to the Registrar of the State to which the registered office of the Producer Company is, stated by the memorandum of association, to be situate—

(a) memorandum of the Producer Company;

(b) its articles duly signed by the subscribers to the memorandum.

(2) The articles shall contain the following mutual assistance principles, namely:—

(a) the membership shall be voluntary and available, to all eligible persons who, can participate or avail of the facilities or services of the Producer Company, and are willing to accept the duties of membership;

(b) each Member shall, save as otherwise provided in this Part, have only a single vote irrespective of the share holding;

(c) the Producer Company shall be administered by a Board consisting of persons elected or appointed as directors in the manner consistent with the provisions of this Part and the Board shall be accountable to the Members;

(d) save as provided in this Part, there shall be limited return on share capital;

(e) the surplus arising out of the operations of the Producer Company shall be distributed in an equitable manner by—

(i) providing for the development of the business of the Producer Company;

(ii) providing for common facilities; and

(iii) distributing amongst the Members, as may be admissible in proportion to their respective participation in the business;

(f) provision shall be made for the education of Members, employees and others, on the principles of mutuality and techniques of mutual assistance;

(g) the Producer Company shall actively co-operate with other Producer Companies (and other organisations following similar principles) at local, national or international level so as to best serve the interest of their Members and the communities it purports to serve.

(3) Without prejudice to the generality of the foregoing provisions of sub-sections (1) and (2), the articles shall contain the following provisions, namely:—

(a) the qualifications for membership, the conditions for continuance or cancellation of membership and the terms, conditions and procedure for transfer of shares;

(b) the manner of ascertaining the patronage and voting right based on patronage;

(c) subject to the provisions contained in sub-section (1) of section 581N, the manner of constitution of the Board, its powers and duties, the minimum and maximum number of directors, manner of election and appointment of directors and retirement by rotation, qualifications for being elected or continuance as such and the terms of office of the said directors, their powers and duties, conditions for election or co-option of directors, method of removal of directors and the filling up of vacancies on the Board, and the manner and the terms of appointment of the Chief Executive;

(d) the election of the Chairman, term of office of directors and the Chairman, manner of voting at the general or special meetings of Members, procedure for voting, by directors at meetings of the Board, powers of the Chairman and the circumstances under which the Chairman may exercise a casting vote;

(e) the circumstances under which, and the manner in which, the withheld price is to be determined and distributed;

(f) the manner of disbursement of patronage bonus in cash or by issue of equity shares, or both;

(g) the contribution to be shared and related matters referred to in sub-section (2) of section 581ZI;

(h) the matters relating to issue of bonus shares out of general reserves as set out in section 581ZJ;

(i) the basis and manner of allotment of equity shares of the Producer Company in lieu of the whole or part of the sale proceeds of produce or products supplied by the Members;

(j) the amount of reserves, sources from which funds may be raised, limitation on raising of funds, restriction on the use of such funds and the extent of debt that may be contracted and the conditions thereof;

(k) the credit, loans or advances which may be granted to a Member and the conditions for the grant of the same;

(l) the right of any Member to obtain information relating to general business of the company;

(m) the basis and manner of distribution and disposal of funds available after meeting liabilities in the event of dissolution or liquidation of the Producer Company;

(n) the authorisation for division, amalgamation, merger, creation of subsidiaries and the entering into joint ventures and other matters connected therewith;

(o) laying of the memorandum and articles of the Producer Company before a special general meeting to be held within ninety days of its registration;

(p) any other provision, which the Members may, by special resolution recommend to be included in articles.

S. 581H. Amendment of memorandum.—(1) A Producer Company shall not alter the conditions contained in its memorandum except in the cases, by the mode and to the extent for which express provision is made in this Act.

(2) A Producer Company may, by special resolution, not inconsistent with section 581B, alter its objects specified in its memorandum.

(3) A copy of the amended memorandum, together with a copy of the special resolution duly certified by two directors, shall be filed with the Registrar within thirty days from the date of adoption of any resolution referred to in sub-section (2):

Provided that in the case of transfer of the registered office of a Producer Company from the jurisdiction of one Registrar to another, certified copies of the special resolution certified by two directors shall be filed with both the Registrars within thirty days, and each Registrar shall record the same, and thereupon the Registrar from whose jurisdiction the office is transferred, shall forthwith forward to the other Registrar all documents relating to the Producer Company.

(4) The alteration of the provisions of memorandum relating to the change of the place of its registered office from one State to another shall not take effect unless it is confirmed by the Company Law Board on petition.

S. 581-I. Amendment of articles.—(1) Any amendment of the articles shall be proposed by not less than two-third of the elected directors or by not less than one-third of the Members of the Producer Company, and adopted by the Members by a special resolution.

(2) A copy of the amended articles together with the copy of the special resolution, both duly certified by two directors, shall be filed with the Registrar within thirty days from the date of its adoption.

***S. 581J. Option to inter-State co-operative societies to become Producer Companies.**—(1) Notwithstanding anything contained in sub-section (1) of section 581C, any inter-State co-operative society with objects not confined to one State may make an application to the Registrar for registration as Producer Company under this Part.*

(2) Every application under sub-section (1) shall be accompanied by—

(a) a copy of the special resolution, of not less than two-third of total members of inter-State co-operative society, for its incorporation as a Producer Company under this Act;

(b) a statement showing—

(i) names and addresses or the occupation of the directors and Chief Executive, if any, by whatever name called, of such co-operative; and

(ii) list of members of such inter-State co-operative society;

(c) a statement indicating that the inter-State co-operative society is engaged in any one or more of the objects specified in section 581B;

(d) a declaration by two or more directors of the inter-State co-operative society certifying that particulars given in clauses (a) to (c) are correct.

(3) When an inter-State co-operative society is registered as a Producer Company, the words "Producer Company Limited" shall form part of its name with any word or expression to show its identity preceding it.

(4) On compliance with the requirements of sub-sections (1) to (3), the Registrar shall, within a period of thirty days of the receipt of application, certify under his hand that the inter-State co-operative society applying for registration is registered and thereby incorporated as a Producer Company under this Part.

(5) A co-operative society formed by producers, by Federation or Union of co-operative societies of producers or co-operatives of producers, registered under any law for the time being in force which has extended its objects outside the State, either directly or through a union or federation of co-operatives of which it is a constituent, as the case may be, and any Federation or Unions of such co-operatives, which has so extended any of its objects or activities outside the State, shall be eligible to make an application under sub-section (1) and to obtain registration as a Producer Company under this Part.

(6) The inter-State co-operative society shall, upon registration under sub-section (1), stand transformed into a Producer Company, and thereafter shall be governed by the provisions of this Part to the exclusion of the law by which it was earlier governed, save in so far as anything done or omitted to be done before its registration as a Producer Company, and notwithstanding anything contained in any other law for the time being in force, no person shall have any claim against the co-operative institution or the company by reason of such conversion or transformation.

(7) Upon registration as a Producer Company, the Registrar of Companies who registers the company shall forthwith intimate the Registrar with whom the erstwhile inter-State co-operative society was earlier registered for appropriate deletion of the society from its register.

S. 581K. Effect of Incorporation of Producer Company.—Every shareholder of the inter-State co-operative society immediately before the date of registration of Producer Company (hereafter referred to as the transformation date) shall be deemed to be registered on and from that date as a shareholder of the Producer Company to the extent of the face value of the shares held by such shareholder.

S. 581L. Vesting of undertaking in Producer Company.—(1) All properties and assets, movable and immovable, of, or belonging to, the inter-State co-operative society as on the transformation date, shall vest in the Producer Company.

(2) All the rights, debts, liabilities, interests, privileges and obligations of the inter-State co-operative society as on the transformation date shall stand transferred to, and be the rights, debts, liabilities, interests, privileges and obligations of, the Producer Company.

(3) Without prejudice to the provisions contained in sub-section (2), all debts, liabilities and obligations incurred, all contracts entered into and all matters and things engaged to be done by, with or for, the society as on the transformation date for or in connection with their purposes, shall be deemed to have been incurred, entered into, or engaged to be done by, with or for, the Producer Company.

(4) All sums of money due to the inter-State Co-operative Society immediately before the transformation date, shall be deemed to be due to the Producer Company.

(5) Every organisation, which was being managed immediately before the transformation date by the inter-State Co-operative Society shall be managed by the Producer Company for such period, to such extent and in such manner as the circumstances may require.

(6) Every organisation which was getting financial, managerial or technical assistance from the inter-State Co-operative Society, immediately before the transformation date, may continue to be given financial, managerial or technical assistance, as the case may be, by the Producer Company, for such period, to such extent and in such manner as that company may deem fit.

(7) The amount representing the capital of the erstwhile inter-State Co-operative Society shall form part of the capital of the Producer Company.

(8) Any reference to the inter-State Co-operative Society in any law other than this Act or in any contract or other instrument, shall be deemed to be reference to the Producer Company.

(9) If, on the transformation date, there is pending any suit, arbitration, appeal or other legal proceeding of whatever nature by or against the inter-State co-operative society, the same shall not abate, be discontinued or be in any way prejudicially affected by reason of the incorporation of the Producer Company under section 581C or transformation of the inter-State co-operative society as a Producer Company under section 581I, as the case may be, but the suit, arbitration, appeal or other proceeding, may be continued, prosecuted and enforced by or against the Producer Company in the same manner and to the same extent as it would have, or may have been continued, prosecuted and enforced by or against the inter-State co-operative society as if the provisions contained in this Part had not come into force.

S. 581M. Concession, etc., to be deemed to have been granted to Producer Company.—*With effect from the transformation date, all fiscal and other concessions, licences, benefits, privileges and exemptions granted to the inter-State Co-operative Society in connection with the affairs and business of the inter-State Co-operative Society under any law for the time being in force shall be deemed to have been granted to the Producer Company.*

S. 581N. Provisions in respect of officers and other employees of inter-State co-operative society.—*(1) Notwithstanding anything contained in section 581-O, all the directors in the inter-State co-operative society before the incorporation of the Producer Company shall continue in office for a period of one year from the transformation date and in accordance with the provisions of this Act.*

(2) Every officer or other employee of the inter-State co-operative society (except a director of the Board, Chairman or Managing Director) serving in its employment immediately before the transformation date shall, in so far as such officer or other employee is employed in connection with the inter-State co-operative society which has vested in the Producer Company by virtue of this Act, become, as from the transformation date, an officer or, as the case may be, other employee of the Producer Company and shall hold his office or service therein by the same tenure, at the same remuneration, upon the same terms and conditions, with the same obligations and with the same rights and privileges as to leave, leave travel concession, welfare scheme, medical benefit scheme, insurance, provident fund, other funds, retirement, voluntary retirement, gratuity and other benefits as he would have held under the erstwhile inter-State co-operative society if its undertaking had not vested in the Producer Company and shall continue to do so as an officer or, as the case may be, other employee of the Producer Company.

(3) Where an officer or other employee of the inter-State co-operative society opts under sub-section (2) not to be in employment or service of the Producer Company, such officer or other employee shall be deemed to have resigned.

(4) Notwithstanding anything contained in the Industrial Disputes Act, 1947 (14 of 1947) or in any other law for the time being in force, the transfer of the services of any officer or other employee of the inter-State co-operative society to the Producer Company shall not entitle such officer or other employee to any compensation under this Act or under any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority.

(5) The officers and other employees who have retired before the transformation date from the service of the inter-State co-operative society and are entitled to any benefits, rights or privileges, shall be entitled to receive the same benefits, rights or privileges from the Producer Company.

(6) The trusts of the provident fund or the gratuity fund of the inter-State co-operative society and any other bodies created for the welfare of officers or employees shall continue to discharge functions in the Producer Company as was being done hitherto in the inter-State co-operative society and any tax exemption granted to the provident fund or the gratuity fund would continue to be applied to the Producer Company.

(7) Notwithstanding anything contained in this Act or in any other law for the time being in force or in the regulations of the inter-State co-operative society, no director of the Board, Chairman, Managing Director or any other person entitled to manage the whole or substantial part of the business and affairs of the inter-State co-operative society shall be entitled to any compensation against the inter-State co-operative society or the Producer Company for the loss of office or for the premature termination of any contract of management entered into by him with the inter-State co-operative society.

CHAPTER III

MANAGEMENT OF PRODUCER COMPANY

***S. 581-O. Number of directors.**—Every Producer Company shall have at least five and not more than fifteen directors.*

Provided that in the case of inter-State Co-operative Society incorporated as a producer Company, such Company may have more than fifteen directors for a period of one year from the date of its incorporation as a Producer Company.

***S. 581P. Appointment of directors.**—(1) Save as provided in section 581N, the Members who sign the memorandum and the articles may designate therein the Board of Directors (not less than five) who shall govern the affairs of the Producer Company until the directors are elected in accordance with the provisions of this section.*

(2) The election of directors shall be conducted within a period of ninety days of the registration of the Producer Company.

Provided that in the case of an inter-State Co-operative Society which has been registered as a Producer company under sub-section (4) of section 581J in which at least five directors [including the directors continuing in office under sub-section (1) of section 581N] hold office as such on the date of registration of such company, the provisions of this sub-section shall have effect as if for the words "ninety days", the words "three hundred and sixty-five days" had been substituted.

(3) Every person shall hold office of a director for a period not less than one year but not exceeding three years as may be specified in the articles.

(4) Every director, who retires in accordance with the articles, shall be eligible for re-appointment as a director.

(5) Save as provided in sub-section (2), the directors of the Board shall be elected or appointed by the Members in the annual general meeting.

(6) The Board may co-opt one or more expert directors or an additional director not exceeding one-fifth of the total number of directors or appoint any other person as additional director for such period as the Board may deem fit:

Provided that the expert directors shall not have the right to vote in the election of the Chairman but shall be eligible to be elected as Chairman, if so provided by its articles:

Provided further that the maximum period, for which the expert director or the additional director holds office, shall not exceed such period as may be specified in the articles.

***S. 581Q. Vacation of office by directors.**—(1) The office of the director of a Producer Company shall become vacant if—*

(a) he is convicted by a Court of any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than six months;

(b) the Producer Company, in which he is a director, has made a default in repayment of any advances or loans taken from any company or institution or any other person and such default continues for ninety days;

(c) he has made a default in repayment of any advances or loans taken from the Producer Company in which he is a director;

(d) the Producer Company, in which he is a director—

(i) has not filed the annual accounts and annual return for any continuous three financial years commencing on or after the 1st day of April, 2002; or

(ii) has failed to, repay its deposit or withheld price or patronage bonus or interest thereon on due date, or pay dividend and such failure continues for one year or more;

(e) default is made in holding election for the office of director, in the Producer Company in which he is a director, in accordance with the provisions of this Act and articles;

(f) the annual general meeting or extraordinary general meeting of the Producer Company, in which he is a director, is not called in accordance with the provisions of this Act except due to natural calamity or such other reason.

(2) The provisions of sub-section (1) shall, as far as may be, apply to the director of a producer institution which is a member of a Producer Company.

S. 581R. Powers and functions of Board.—(1) Subject to the provisions of this Act and articles, the Board of directors of a Producer Company shall exercise all such powers and to do all such acts and things, as that company is authorised so to do.

(2) In particular and without prejudice to the generality of the foregoing powers, such powers may include all or any of the following matters, namely:—

(a) determination of the dividend payable;

(b) determination of the quantum of withheld price and recommend patronage to be approved at general meeting;

(c) admission of new Members;

(d) pursue and formulate the organisational policy, objectives, establish specific long-term and annual objectives, and approve corporate strategies and financial plans;

(e) appointment of a Chief Executive and such other officers of the Producer Company, as may be specified in the articles;

(f) exercise superintendence, direction and control over Chief Executive and other officers appointed by it;

(g) cause proper books of account to be maintained; prepare annual accounts to be placed before the annual general meeting with the auditor's report and the replies on qualifications, if any, made by the auditors;

(h) acquisition or disposal of property of the Producer Company in its ordinary course of business;

(i) investment of the funds of the Producer Company in the ordinary course of its business;

(j) sanction any loan or advance, in connection with the business activities of the Producer Company to any Member, not being a director or his relative;

(k) take such other measures or do such other acts as may be required in the discharge of its functions or exercise of its powers.

(3) All the powers specified in sub-sections (1) and (2) shall be exercised by the Board, by means of resolution passed at its meeting on behalf of the Producer Company.

Explanation.—For the removal of doubts, it is hereby declared that a director or a group of directors, who do not constitute the Board, shall not exercise any of the powers exercisable by it.

S. 581S. **Matters to be transacted at general meeting.**—(1) The Board of directors of a Producer Company shall exercise the following powers on behalf of that company, and it shall do so only by means of resolutions passed at the annual general meeting of its Members, namely:—

(a) approval of budget and adoption of annual accounts of the Producer Company;

(b) approval of patronage bonus;

(c) issue of bonus shares;

(d) declaration of limited return and decision on the distribution of patronage;

(e) specify the conditions and limits of loans that may be given by the Board to any director; and

(f) approval of any transaction of the nature as is to be reserved in the articles for approval by the Members.

S. 581T. **Liability of directors.**—(1) When the directors vote for a resolution, or approve by any other means, anything done in contravention of the provisions of this Act or any other law for the time being in force or articles, they shall be jointly and severally liable to make good any loss or damage suffered by the Producer Company.

(2) Without prejudice to the provisions contained in sub-section (1), the Producer Company shall have the right to recover from its director—

(a) where such director has made any profit as a result of the contravention specified in sub-section (1), an amount equal to the profit so made;

(b) where the Producer Company incurred a loss or damage as a result of the contravention specified in sub-section (1), an amount equal to that loss or damage;

(3) The liability imposed under this section shall be in addition to and not in derogation of a liability imposed on a director under this Act or any other law for the time being in force.

S. 581U. **Committee of directors.**—(1) The Board may constitute such number of committees as it may deem fit for the purpose of assisting the Board in the efficient discharge of its functions:

Provided that the Board shall not delegate any of its powers or assign the powers of the Chief Executive, to any committee.

(2) A committee constituted under sub-section (1) may, with the approval of the Board, co-opt such number of persons as it deems fit as members of the committee:

Provided that the Chief Executive appointed under section 581W or a director of the Producer Company shall be a member of such committee.

(3) Every such committee shall function under the general superintendence, direction and control of the Board, for such duration, and in such manner as the Board may direct.

(4) The fee and allowances to be paid to the members of the committee shall be such as may be determined by the Board.

(5) The minutes of each meeting of the committee shall be placed before the Board at its next meeting.

***S. 581V. Meetings of Board and quorum.**—(1) A meeting of the Board shall be held not less than once in every three months and at least four such meetings shall be held in every year.*

(2) Notice of every meeting of the Board of directors shall be given in writing to every director for the time being in India, and at his usual address in India to every other director.

(3) The Chief Executive shall give notice as aforesaid not less than seven days prior to the date of the meeting of the Board and if he fails to do so, he shall be punishable with fine which may extend to one thousand rupees:

Provided that a meeting of the Board may be called at shorter notice and the reasons thereof shall be recorded in writing by the Board.

(4) The quorum for a meeting of the Board shall be one-third of the total strength of directors, subject to a minimum of three.

(5) Save as provided in the articles, directors including the co-opted director, may be paid such fees and allowances for attendance at the meetings of the Board, as may be decided by the Members in the general meeting.

***S. 581W. Chief Executive and his functions.**—(1) Every Producer Company shall have a full time Chief Executive, by whatever name called, to be appointed by the Board from amongst persons other than Members.*

(2) The Chief Executive shall be ex officio director of the Board and such director shall not retire by rotation.

(3) Save as otherwise provided in articles, the qualifications, experience and the terms and conditions of service of the Chief Executive shall be such as may be determined by the Board.

(4) The Chief Executive shall be entrusted with substantial powers of management as the Board may determine.

(5) Without prejudice to the generality of sub-section (4), the Chief Executive may exercise the powers and discharge the functions, namely:—

(a) do administrative acts of a routine nature including managing the day-to-day affairs of the Producer Company;

(b) operate bank accounts or authorise any person, subject to the general or special approval of the Board in this behalf, to operate the bank account;

(c) make arrangements for safe custody of cash and other assets of the Producer Company;

(d) sign such documents as may be authorised by the Board, for and on behalf of the company;

(e) maintain proper books of account; prepare annual accounts and audit thereof; place the audited accounts before the Board and in the annual general meeting of the Members;

(f) furnish Members with periodic information to appraise them of the operation and functions of the Producer Company;

(g) make appointments to posts in accordance with the powers delegated to him by the Board;

(h) assist the Board in the formulation of goals, objectives, strategies, plans and policies;

(i) advise the Board with respect to legal and regulatory matters concerning the proposed and on going activities and take necessary action in respect thereof;

(j) exercise the powers as may be necessary in the ordinary course of business;

(k) discharge such other functions, and exercise such other powers, as may be delegated by the Board.

(6) The Chief Executive shall manage the affairs of the Producer Company under the general superintendence, direction and control of the Board and be accountable for the performance of the Producer Company.

S. 581X. **Secretary of Producer Company.**—(1) Every Producer Company having an average annual turnover exceeding five crore rupees in each of three consecutive financial years shall have a whole-time secretary.

(2) No individual shall be appointed as whole-time secretary unless he possesses membership of the Institute of Company Secretaries of India constituted under the Company Secretaries Act, 1980 (56 of 1980).

(3) If a Producer Company fails to comply with the provisions 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 five hundred rupees for every day during which the default continues:

Provided that in any proceedings against a person in respect of an offence under this sub-section, it shall be a defence to prove that all reasonable efforts to comply with the provisions of sub-section (1) were taken or that the financial position of the company was such that it was beyond its capacity to engage a whole-time secretary.

S. 581Y. **Quorum.**—Unless the articles require a larger number, one-fourth of the total membership shall constitute the quorum at a general meeting.

S. 581Z. **Voting rights.**—Save as otherwise provided in sub-sections (1) and (3) of section 581D, every Member shall have one vote and in the case of equality of votes, the Chairman or the person presiding shall have a casting vote except in the case of election of the Chairman.

CHAPTER IV

GENERAL MEETINGS

S. 581ZA. Annual General Meetings.—*(1) Every Producer 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 Producer Company and that of the next:*

Provided that the Registrar may, for any special reason, permit extension of the time for holding any annual general meeting (not being the first annual general meeting) by a period not exceeding three months.

(2) A Producer Company shall hold its first annual general meeting within a period of ninety days from the date of its incorporation.

(3) The Members shall adopt the articles of the Producer Company and appoint directors of its Board in the annual general meeting.

(4) The notice calling the annual general meeting shall be accompanied by the following documents, namely:—

(a) the agenda of the annual general meeting;

(b) the minutes of the previous annual general meeting or the extraordinary general meeting;

(c) the names of candidates for election, if any, to the office of director including a statement of qualifications in respect of each candidate;

(d) the audited balance-sheet and profit and loss accounts of the Producer Company and its subsidiary, if any, together with a report of the Board of Directors of such Company with respect to—

(i) the state of affairs of the Producer Company;

(ii) the amount proposed to be carried to reserve;

(iii) the amount to be paid as limited return on share capital;

(iv) the amount proposed to be disbursed as patronage bonus;

(v) the material changes and commitments, if any, affecting the financial position of the Producer Company and its subsidiary, which have occurred in between the date of the annual accounts of the Producer Company to which the balance-sheet relates and the date of the report of the Board;

(vi) any other matter of importance relating to energy conservation, environmental protection, expenditure or earnings in foreign exchanges;

(vii) any other matter which is required to be, or may be, specified by the Board;

(e) the text of the draft resolution for appointment of auditors;

(f) the text of any draft resolution proposing amendment to the memorandum or articles to be considered at the general meeting, along with the recommendations of the Board.

(4) The Board of directors shall, on the requisition made in writing, duly signed and setting out the matters for the consideration, made by one-third of the Members entitled to vote in any general meeting, proceed to call an extraordinary general meeting in accordance with the provisions contained in sections 169 to 186 of this Act.

(5) 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 at the registered office of the Producer Company or at some other place within the city, town or village in which the registered office of the Company is situate.

(6) A general meeting of the Producer Company shall be called by giving not less than fourteen days prior notice in writing.

(7) The notice of the general meeting indicating the date, time and place of the meeting shall be sent to every Member and auditor of the Producer Company.

(8) Unless the articles of the Producer Company provide for a larger number, one-fourth of the total number of members of the Producer Company shall be the quorum for its annual general meeting.

(9) The proceedings of every annual general meeting along with the Directors' Report, the audited balance-sheet and the profit and loss account shall be filed with the Registrar within sixty days of the date on which the general meeting is held, with an annual return along with the filing fees as applicable under the Act.

(10) In the case where a Producer Company is formed by Producer institutions, such institutions shall be represented in the general body through the Chairman or the Chief Executive thereof who shall be competent to act on its behalf:

Provided that a Producer institution shall not be represented if such institution makes a default or failure referred to in clauses (d) to (f) of sub-section (1) of section 581Q.

CHAPTER V

SHARE CAPITAL AND MEMBERS RIGHTS

S. 581ZB. Share capital.—(1) The share capital of a Producer Company shall consist of equity shares only.

(2) The shares held by a Member in a Producer Company, shall as far as may be, be in proportion to the patronage of that company.

S. 581ZC. Special user rights.—(1) The producers, who are active Members may, if so provided in the articles, have special rights and the Producer Company may issue appropriate instruments to them in respect of such special rights.

(2) The instruments of the Producer Company issued under sub-section (1) shall, after obtaining approval of the Board in that behalf, be transferable to any other active Member of that Product Company.

Explanation.—For the purposes of this section, the expression "special right" means any right relating to supply of additional produce by the active Member or any other right relating to his produce which may be conferred upon him by the Board.

S. 581ZD. Transferability of shares and attendant rights.—(1) Save as otherwise provided in sub-sections (2) to (4), the shares of a Member of a Producer Company shall not be transferable.

(2) A Member of a Producer Company may, after obtaining the previous approval of the Board, transfer the whole or part of his shares along with any special rights, to an active Member at par value.

(3) Every Member shall, within three months of his becoming a Member in the Producer Company, nominate, in the manner specified in articles, a person to whom his shares in the Producer Company shall vest in the event of his death.

(4) The nominee shall, on the death of the Member, become entitled to all the rights in the shares of the Producer Company and the Board of that Company shall transfer the shares of the deceased Member to his nominee:

Provided that in a case where such nominee is not a producer, the Board shall direct the surrender of shares together with special rights, if any, to the Producer Company at par value or such other value as may be determined by the Board.

(5) Where the Board of a Producer Company is satisfied that—

(a) any Member has ceased to be a primary producer; or

(b) any Member has failed to retain his qualifications to be a Member as specified in articles,

the Board shall direct the surrender of shares together with special rights, if any, to the Producer Company at par value or such other value as may be determined by the Board:

Provided that the Board shall not direct such surrender of shares unless the Member has been served with a written notice and given an opportunity of being heard.

CHAPTER VI

FINANCE, ACCOUNTS AND AUDIT

***S. 581ZE. Books of account.**—(1) Every Producer Company shall keep at its registered office proper books of account with respect to—*

(a) all sums of money received and expended by the Producer Company and the matters in respect of which the receipts and expenditure take place;

(b) all sales and purchase of goods by the Producer Company;

(c) the instruments of liability executed by or on behalf of the Producer Company;

(d) the assets and liabilities of the Producer Company;

(e) in case of a Producer Company engaged in production, processing and manufacturing, the particulars relating to utilisation of materials or labour or other items of costs.

(2) The balance sheet and profit and loss accounts of the Producer Company shall be prepared, as far as may be, in accordance with the provisions contained in section 211.

***S. 581ZF. Internal audit.**—Every Producer Company shall have internal audit of its accounts carried out, at such interval and in such manner as may be specified in articles, by a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Institute of Chartered Accountants Act, 1949 (38 of 1949).*

***S. 581ZG. Duties of auditor under this Part.**—Without prejudice to the provisions contained in section 227, the auditor shall report on the following additional matters relating to the Producer Company, namely:—*

(a) the amount of debts due along with particulars of bad debts if any;

(b) the verification of cash balance and securities;

(c) the details of assets and liabilities;

(d) all transactions which appear to be contrary to the provisions of this Part;

(e) the loans given by the Producer Company to the directors;

(f) the donations or subscriptions given by the Producer Company;

(g) any other matter as may be considered necessary by the auditor;

S. 581ZH. **Donations or subscription by Producer Company.**—A Producer Company may, by special resolution, make donation or subscription to any institution or individual for the purposes of—

(a) promoting the social and economic welfare of Producer Members or producers or general public; or

(b) promoting the mutual assistance principles:

Provided that the aggregate amount of all such donation and subscription in any financial year shall not exceed three per cent. of the net profit of the Producer Company in the financial year immediately preceding the financial year in which the donation or subscription was made:

Provided further that no Producer Company shall make directly or indirectly to any political party or for any political purpose to any person any contribution or subscription or make available any facilities including personnel or material.

S. 581ZI. **General and other reserves.**—(1) Every Producer Company shall maintain a general reserve in every financial year, in addition to any reserve maintained by it as may be specified in articles.

(2) In a case where the Producer Company does not have sufficient funds in any financial year for transfer to maintain the reserves as may be specified in articles, the contribution to the reserve shall be shared amongst the Members in proportion to their patronage in the business of that company in that year.

S. 581ZJ. **Issue of bonus shares.**—Any Producer Company may, upon recommendation of the Board and passing of resolution in the general meeting, issue bonus shares by capitalisation of amounts from general reserves referred to in section 581ZI in proportion to the shares held by the Members on the date of the issue of such shares.

CHAPTER VII

LOANS TO MEMBERS AND INVESTMENTS

S. 581ZK. **Loan, etc., to Members.**—The Board may, subject to the provisions made in articles, provide financial assistance to the Members of the Producer Company by way of—

(a) credit facility, to any Member, in connection with the business of the Producer Company, for a period not exceeding six months;

(b) loans and advances, against security specified in articles to any Member, repayable within a period exceeding three months but not exceeding seven years from the date of disbursement of such loan or advances:

Provided that any loan or advance to any director or his relative shall be granted only after the approval by the Members in general meeting.

S. 581ZL. Investment in other companies, formation of subsidiaries, etc.—*(1) The general reserves of any Producer Company shall be invested to secure the highest returns available from approved securities, fixed deposits, units, bonds issued by the Government or Co-operative or Scheduled Bank or in such other mode as may be prescribed.* ***

(2) Any Producer Company may, for promotion of its objectives acquire the shares of another Producer Company.

(3) Any Producer Company may subscribe to the share capital of, or enter into any agreement or other arrangement, whether by way of formation of its subsidiary company, joint venture or in any other manner with any body corporate, for the purpose of promoting the objects of the Producer Company by special resolution in this behalf.

(4) Any Producer Company, either by itself or together with its subsidiaries, may invest, by way of subscription, purchase or otherwise, shares in any other company, other than a Producer Company, specified under sub-section (2), or subscription of capital under sub-section (3), for an amount not exceeding thirty per cent. of the aggregate of its paid up capital and free reserves:

Provided that a Producer Company may, by special resolution passed in its general meeting and with prior approval of the Central Government, invest in excess of the limits specified in this section.

(5) All investments by a Producer Company may be made if such investments are consistent with the objects of the Producer Company.

(6) The Board of a Producer Company may, with the previous approval of Members by a special resolution, dispose of any of its investments referred to in sub-sections (3) and (4).

(7) Every Producer Company shall maintain a register containing particulars of all the investments, showing the names of the companies in which shares have been acquired, number and value of shares; the date of acquisition; and the manner and price at which any of the shares have been subsequently disposed of.

(8) The register referred to in sub-section (7) shall be kept at the registered office of the Producer Company and the same shall be open to inspection by any Member who may take extracts therefrom.

CHAPTER VIII

PENALTIES

S. 581ZM. Penalty for contravention.—*(1) If any person, other than a Producer Company registered under this Part, carries on business under any name which contains the words "Producer Company Limited", he shall be punishable with fine which may extend to ten thousand rupees for every day during which such name has been used by him.*

(2) If a director or an officer of a Producer Company, who wilfully fails to furnish any information relating to the affairs of the Producer Company required by a Member or a person duly authorised in this behalf, he shall be liable to imprisonment for a term which may extend to six months and with fine equivalent to five per cent. of the turnover of that company during preceding financial year.

(3) If a director or officer of a Producer Company—

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* **Producer Companies (General Reserve) Rules, 2003** *vide* GSR 641(E), dt. 7-8-2003.

(a) makes a default in handing over the custody of books of account and other documents or property in his custody to the Producer Company of which he is a director or officer; or

(b) fails to convene annual general meeting or other general meetings,

he shall be punishable with fine which may extend to one lakh rupees, and in the case of a continuing default or failure, with an additional fine which may extend to ten thousand rupees for every day during which such default or failure continues.

CHAPTER IX

AMALGAMATION, MERGER OR DIVISION

S. 581ZN. Amalgamation, merger or division, etc., to form new Producer Companies.—(1) A Producer Company may, by a resolution passed at its general meeting,—

(a) decide to transfer its assets and liabilities, in whole or in part, to any other Producer Company, which agrees to such transfer by a resolution passed at its general meeting, for any of the objects specified in section 581B;

(b) divide itself into two or more new Producer Companies.

(2) Any two or more Producer Companies may, by a resolution passed at any general or special meetings of its Members, decide to—

(a) amalgamate and form a new Producer Company; or

(b) merge one Producer Company (hereafter referred to as "merging company") with another Producer Company (hereinafter referred to as "merged company").

(3) Every resolution of a Producer Company under this section shall be passed at its general meeting by a majority of total Members, with right of vote not less than two-thirds of its Members present and voting and such resolution shall contain all particulars of the transfer of assets and liabilities, or division, amalgamation, or merger, as the case may be.

(4) Before passing a resolution under this section, the Producer Company shall give notice thereof in writing together with a copy of the proposed resolution to all the Members and creditors who may give their consent.

(5) Notwithstanding anything contained in articles or in any contract to the contrary, any Member, or any creditor not consenting to the resolution shall, during the period of one month of the date of service of the notice on him, have the option,—

(a) in the case of any such Member, to transfer his shares with the approval of the Board to any active Member thereby ceasing to continue as a Member of that company; or

(b) in the case of a creditor, to withdraw his deposit or loan or advance, as the case may be.

(6) Any Member or creditor, who does not exercise his option within the period specified in sub-section (5), shall be deemed to have consented to the resolution.

(7) A resolution passed by a Producer Company under this section shall not take effect until the expiry of one month or until the assent thereto of all the Members and creditors has been obtained, whichever is earlier.

(8) The resolution referred to in this section shall provide for—

(a) the regulation of conduct of the Producer Company's affairs in the future;

(b) the purchase of shares or interest of any Members of the Producer Company by other Members or by the Producer Company;

(c) in the case of purchase of shares of one Producer Company by another Producer Company, the consequent reduction of its share capital;

(d) termination, setting aside or modification of any agreement, howsoever arrived between the company on the one hand and the directors, secretaries and manager on the other hand, apart from such terms and conditions as may, in the opinion of the majority of shareholders, be just and equitable in the circumstances of the case;

(e) termination, setting aside or modification of any agreement between the Producer Company and any person not referred to in clause (d):

Provided that no such agreement shall be terminated, set aside or modified except after giving due notice to the party concerned:

Provided further that no such agreement shall be modified except after obtaining the consent of the party concerned;

(f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property, made or done by or against the Producer Company within three months before the date of passing of the resolution, which would if made or done against any individual, be deemed in his insolvency to be a fraudulent preference;

(g) the transfer to the merged company of the whole or any part of the undertaking, property or liability of the Producer Company;

(h) the allotment or appropriation by the merged company of any shares, debentures, policies, or other like interests in the merged company;

(i) the continuation by or against the merged company of any legal proceedings pending by or against any Producer Company;

(j) the dissolution, without winding-up, of any Producer Company;

(k) the provision to be made for the Members or creditors who make dissent;

(l) the taxes if any, to be paid by the Producer Company;

(m) such incidental, consequential and supplemental matters as are necessary to secure that the division, amalgamation or merger shall be fully and effectively carried out.

(9) When a resolution passed by a Producer Company under this section takes effect, the resolution shall be a sufficient conveyance to vest the assets and liabilities in the transferee.

(10) The Producer Company shall make arrangements for meeting in full or otherwise satisfying all claims of the Members and the creditors who exercise the option, within the period specified in sub-section (4), not to continue as the Member or creditor, as the case may be.

(11) Where the whole of the assets and liabilities of a Producer Company are transferred to another Producer Company in accordance with the provisions of sub-section (9), or where there is merger under sub-section (2), the registration of the first mentioned Company or the merging company, as the case may be, shall stand cancelled and that Company shall be deemed to have been dissolved and shall cease to exist forthwith as a corporate body.

(12) Where two or more Producer Companies are amalgamated into a new Producer Company in accordance with the provisions of sub-section (2) and the Producer Company so formed is duly registered by the Registrar, the registration of each of the amalgamating companies shall stand cancelled forthwith on such registration and each of the Companies shall thereupon cease to exist as a corporate body.

(13) Where a Producer Company divides itself into two or more Producer Companies in accordance with the provisions of clause (b) of sub-section (1) and the new Producer Companies are registered in accordance with the provisions of sub-section (8), the registration of the erstwhile Producer Company shall stand cancelled forthwith and that Company shall be deemed to have been dissolved and cease to exist as a corporate body.

(14) The amalgamation, merger or division of companies under the foregoing sub-sections shall not in any manner whatsoever affect the pre-existing rights or obligations and any legal proceedings that might have been continued or commenced by or against any erstwhile company before the amalgamation, merger or division, may be continued or commenced by, or against, the concerned resulting company, or merged company, as the case may be.

(15) The Registrar shall strike off the names of every Producer Company deemed to have been dissolved under sub-sections (11) to (14).

(16) Any member or creditor or employee aggrieved by the transfer of assets, division, amalgamation or merger may, within thirty days of the passing of the resolution, prefer an appeal to the High Court.

(17) The High Court shall, after giving a reasonable opportunity to the person concerned, pass such orders thereon as it may deem fit.

(18) Where an appeal has been filed under sub-section (16), the transfer of assets, division, amalgamation or merger of the Producer Company shall be subject to the decision of the High Court.

CHAPTER X

RESOLUTION OF DISPUTES

S. 581ZO. Disputes.—(1) Where any dispute relating to the formation, management or business of a Producer Company arises—

(a) amongst Members, former Members or persons claiming to be Members or nominees of deceased Members; or

(b) between a Member, former member or a person claiming to be a Member, or nominee of deceased Member and the Producer Company, its Board of directors, office-bearers, or liquidator, past or present; or

(c) between the Producer Company or its Board, and any director, office bearer or any former director, or the nominee, heir or legal representative of any deceased director of the Producer Company,

such dispute shall be settled by conciliation or by arbitration as provided under the Arbitration and Conciliations Act, 1996 (26 of 1996) as if the parties to the dispute have consented in writing for determination of such disputes by conciliation or by arbitration and the provisions of the said Act shall apply accordingly.

Explanation.—For the purposes of this section, a dispute shall include—

(a) a claim for any debt or other amount due;

(b) a claim by surety against the principal debtor, where the Producer Company has recovered from the surety amount in respect of any debtor or other amount due to it from the principal debtor as a result of the default of the principal debtor whether such debt or amount due be admitted or not;

(c) a claim by Producer Company against a Member for failure to supply produce as required of him;

(d) a claim by a Member against the Producer Company for not taking goods supplied by him.

(2) If any question arises whether the dispute relates to formation, management or business of the Producer Company, the question shall be referred to the arbitrator, whose decision thereon shall be final.

CHAPTER XI

MISCELLANEOUS PROVISIONS

S. 581ZP. Strike off name of Producer Company.—*(1) Where a Producer Company fails to commence business within one year of its registration or ceases to transact business with the Members or if the Registrar is satisfied, after making such inquiry as he thinks fit, that the Producer Company is no longer carrying on any of its objects specified in section 581B, he shall make an order striking off the name of the Producer Company, which shall thereupon cease to exist forthwith:*

Provided that no such order cancelling the registration as aforesaid shall be passed until a notice to show cause has been given by the Registrar to the Producer Company with a copy to all its directors on the proposed action and reasonable opportunity to represent its case has been given.

(2) Where the Registrar has reasonable cause to believe that a Producer Company is not maintaining any of the mutual assistance principles specified, he shall strike its name off the register in accordance with the provisions contained in section 560 of this Act.

(3) Any Member of a Producer Company, who is aggrieved by an order made under sub-section (1), may appeal to the Company Law Board within sixty days of the order.

(4) Where an appeal is filed under sub-section (3), the order striking off the name shall not take effect until the appeal is disposed of.

S. 581ZQ. Provisions of this Part to override other laws.—*The provisions of this Part shall have effect notwithstanding anything inconsistent therewith contained in this Act or any other law for the time being in force or any instrument having effect by virtue of any such law; but the provisions of any such Act or law or instrument in so far as the same are not varied by, or are inconsistent with, the provisions of this Part shall apply to the Producer Company.*

S. 581ZR. Application of provisions relating to private companies.—*All the limitations, restrictions and provisions of this Act, other than those specified in this Part, applicable to a private company, shall, as far as may be, apply to a Producer Company, as if it is a private limited company under this Act in so far as they are not in conflict with the provisions of this Part.*

CHAPTER XII

RECONVERSION OF PRODUCER COMPANY TO INTER-STATE CO-OPERATIVE SOCIETY

581ZS. Reconversion of Producer Company to Inter-State Co-operative Society.—*(1) Any Producer Company, being an erstwhile inter-State Co-operative society, formed and registered under this Part, may make an application—*

(a) after passing a resolution in the general meeting by not less than two-third of its Members present and voting; or

(b) on request by its creditors representing three-fourth value of its total creditors,

to the High Court for its re-conversion to the inter-State co-operative society.

(2) The High Court shall, on the application made under sub-section (1), direct holding meeting of its Members or such creditors, as the case may be, to be conducted in such manner as it may direct.

(3) If a majority in number representing three-fourths in value of the creditors, or Members, as the case may be, present and voting in person at the meeting conducted in pursuance of the directions of the High Court under sub-section (2), agree for re-conversion, if sanctioned by the High Court, be binding on all the Members and all the creditors, as the case may be, and also on the company which is being converted:

Provided that no order sanctioning re-conversion shall be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251, and the like.

(4) An order made by the Court under sub-section (3) shall have no effect until a certified copy of the order has been filed with the Registrar.

(5) A copy of every such order shall be annexed to every copy of the memorandum of the company issued after the certified copy of the order has been filed as aforesaid, or in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

(6) 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 one hundred rupees, for each copy in respect of which default is made.

(7) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the Court thinks fit, until the application is finally disposed of.

(8) Every Producer Company which has been sanctioned re-conversion by the High Court, shall make an application, under the Multi-State Co-operative Societies Act, 1984 (51 of 1984) or any other law for the time being in force for its registration as multi-State co-operative society or co-operative society, as the case may be, within six months of sanction by the High Court and file a report thereof to the High Court and the Registrar of companies and to the Registrar of the co-operative societies under which it has been registered as a Multi-State Co-Operative Society or co-operative society, as the case may be.

S. 581ZT. Power to modify Act in its application to Producer Companies.—*(1) The Central Government may, by notification in the Official Gazette, direct that any of the provisions of this Act (other than those contained in this Part) specified in the said notification—*

(a) shall not apply to the Producer Companies or any class or category thereof; or

(b) shall apply to the Producer Companies or any class or category thereof with such exception or adaptation as may be specified in the notification.

(2) A copy of every notification proposed to be issued under sub-section (1), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.

THE COMPANIES (SECOND AMENDMENT) ACT, 2002 (11 OF 2003)

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THE COMPANIES (SECOND AMENDMENT) ACT, 2002 (11 of 2003)*

(Act No. 11 of 2003)

An

ACT

further to amend the Companies Act, 1956.

BE it enacted by Parliament in the Fifty-third Year of the Republic of India as follows:—

S. 1. Short title and commencement

(*1*) This Act may be called the Companies (Second Amendment) Act, 2002 (11 of 2003).

(*2*) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint :

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the commencement of that provision.

STATEMENT OF OBJECTS AND REASONS

Statement of Objects and Reasons dated 21-08-2001 appended to The Companies (Amendment) Bill, 2001 which was passed as The Companies (Second Amendment) Act, 2002 (11 of 2003)

The latest developments and innovations in Corporate laws required that the Companies Act, 1956 and other related laws concerning winding up of companies should be remodelled in line with the international practices in this field. Government constituted a Committee consisting of experts under the chairmanship of Justice V. BALAKRISHNA ERADI, retired Supreme Court Judge to examine the law relating to insolvency and winding up of companies.

2. The Committee examined Companies Act, 1956 and also other laws having a bearing on the subject such as Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), Recovery of Debts due to Banks and Financial Institutions Act, 1993 and Securities Contracts (Regulation) Act, 1956; it also considered laws on corporate insolvency prevailing in industrially advanced countries. The Committee held wide ranging hearings and consultations on the subject.

3. On the basis of the recommendations of the Committee the present Bill has been prepared with the main objective of facilitating or expediting revival/rehabilitation of sick companies and protection of workers interests and where necessary, winding up of companies. The salient features of the Bill are as follows :—

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* As passed by Lok Sabha on 10-12-2002 and Rajya Sabha on 17-12-2002 and received the assent of the President on 13-1-2003.

(*i*) A National Company Law Tribunal will be set up. The powers and jurisdiction presently being exercised by various bodies *viz.*, Company Law Board or Board for Industrial and Financial Reconstruction or Appellate Authority for Industrial and Financial Reconstruction or High Courts will now be consolidated and entrusted to the Tribunal. Thus, multiplicity of litigation before various courts or *quasi*-judicial bodies or forums regarding revival or rehabilitation or merger or amalgamation or winding up will be avoided as all these matters will be heard and decided by the proposed National Company Law Tribunal;

(*ii*) All the parties will be bound by the Tribunal's orders and in case of non-availability of a workable proposal for revival or rehabilitation etc. the Tribunal can decide the matter on merits including introduction of its own scheme;

(*iii*) The Tribunal shall work through Benches. There shall be ten special benches which will deal with the matters relating to revival or reconstruction or rehabilitation or winding up of companies;

(*iv*) This will reduce the entire process which is presently taking several years in winding up of the companies to about two years or so;

(*v*) Stripping of assets of sick companies will be avoided;

(*vi*) Since individual affidavits will be filed with National Company Law Tribunal which will have powers of contempt of Court, there will be an in-built seriousness;

(*vii*) There will be a fund known as Rehabilitation and Revival Fund which will be used to make primarily;

(*a*) interim payment of the dues of workmen of the company which has been declared sick or is under liquidation;

(*b*) protection of the assets of sick companies;

(*c*) revival and rehabilitation of sick companies.

(*viii*) 'Industrial Undertaking' in terms of sickness does not include:

(*a*) small scale industrial undertakings, as defined in clause (*j*) of section (3) of the Industrial (Development and Regulation) Act, 1951;

(*b*) Public Sector Undertakings, unless a reference is made by the Central Government and/or State Government, as the case may be.

(*ix*) As a result of this enactment everyone including workers, creditors, investors and the economy as a whole will stand to benefit.

5. The Bill seeks to achieve the above objectives.

6. The Notes on clauses explain, in detail, provisions of the Bill.

ARUN JAITLEY

NEW DELHI

The 21st August, 2001

***S. 2. Amendment of section 2**

In section 2 of the Companies Act, 1956 (1 of 1956) (hereinafter referred to as the principal Act),—

"(*a*) after clause (1A), the following clause shall be inserted, namely:—

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* **Enforced w.e.f. 1-4-2003 vide Notification No. S.O. 344(E), dt. 31-3-2003 in order to initiate necessary steps to establish NCLT and make it operational.**

'(1B) "Appellate Tribunal" means the National Company Law Appellate Tribunal constituted under sub-section (1) of section 10FR;';

(*b*) after clause (19A), the following clauses shall be inserted, namely:—

'(19AA) "industrial company" means a company which owns one or more industrial undertakings;

(19AB) "industrial undertaking" means any undertaking, pertaining to any industry carried on in one or more factories or units by any company, as defined in clause (aa) of section 3 of the Industries (Development and Regulation) Act, 1951 (65 of 1951) but does not include a small-scale industrial undertaking as defined in clause (j) of that section;';

(*c*) after clause (29), the following clause shall be inserted, namely:—

'(29A) "net worth" means the sum total of the paid-up capital and free reserves after deducting the provisions or expenses as may be prescribed.

Explanation.—For the purposes of this clause, "free reserves" means all reserves created out of the profits and share premium account but does not include reserves created out of revaluation of assets, write back of depreciation provisions and amalgamation;';

(*d*) after clause (31A), the following clause shall be inserted, namely:—

'(31AA) "operating agency" means any group of experts consisting of persons having special knowledge of business or industry in which the sick industrial company is engaged and includes public financial institution, State level institution, scheduled bank or any other person as may be specified as the operating agency by the Tribunal;';

(*e*) in clause (33), for the words "*High Courts*", the words "*the Tribunal*" shall be substituted;

(*f*) after clause (46A), the following clauses shall be inserted, namely:—

'(46AA) "sick industrial company" means an industrial company which has—

(i) the accumulated losses in any financial year equal to fifty per cent. or more of its average net worth during four years immediately preceding such financial year; or

(ii) failed to repay its debts within any three consecutive quarters on demand made in writing for its repayment by a creditor or creditors of such company;

(46AB) "State level institution" means any of the following institutions, namely:—.

(a) the State Financial Corporations established under section 3 or section 3A and institutions notified under section 46 of the State Financial Corporations Act, 1951 (63 of 1951);

(b) the State Industrial Development Corporations registered under this Act;';

(*g*) after clause (49), the following clause shall be inserted, namely:—

'(49A) "Tribunal" means the National Company Law Tribunal constituted under sub-section (1) of section 10FB;'.

S. 3. Amendment of section 10E

In section 10E of the principal Act, in sub-section (1A), for the words "*conferred on it*", at both the places where they occur, the words, brackets and figures "*conferred on it before the commencement of the Companies (Second Amendment) Act, 2002 (11 of 2003)*" shall be substituted.

S. 4. Amendment of section 10F

In section 10F of the principal Act, after the words "*any decision or order of the Company Law Board*", the words, brackets and figures "*made before the commencement of the Companies (Second Amendment) Act, 2002 (11 of 2003)*" shall be inserted.

S. 5. Insertion of new section 10FA

After section 10F of the principal Act, the following section shall be inserted, namely:—

"*S. 10FA. Dissolution of Company Law Board.—(1) On and from the commencement of the Companies (Second Amendment) Act, 2002 (11 of 2003), the Board of Company Law Administration constituted under sub-section (1) of section 10E shall stand dissolved.*

(2) On the dissolution of the Company Law Board, the persons appointed as Chairman, Vice-Chairman and members and officers and other employees of that Board and holding office as such immediately before such commencement shall vacate their respective offices and no such Chairman, Vice-Chairman and member and officer and other employee shall be entitled to claim any compensation for the premature termination of the term of his office or of any contract of service:

Provided that every officer or other employee, who has been, immediately before the dissolution of the Company Law Board, appointed on deputation basis to that Board shall, on such dissolution, stand reverted to his parent cadre, Ministry or Department, as the case may be:

Provided further that every officer and other employee of the Company Law Board employed on regular basis by that Board, shall become, on and from the dissolution of the Board, the officer and employee, respectively, of the Central Government with the same rights and privileges as to pension, gratuity and other like benefits as would have been admissible to him if the rights in relation to that Board had not been transferred to, and vested in, the Central Government and shall continue to do so unless and until his employment in the Central Government is duly terminated or until his remuneration, terms and conditions of employment are duly altered by that Government:

Provided also that notwithstanding anything contained in the Industrial Disputes Act, 1947 (14 of 1947), or in any other law for the time being in force, the transfer of the services of any officer or other employee employed in the Company Law Board, to the Central Government shall not entitle such officer or other employee to any compensation under this Act or under any other law for the time being in force and no such claim shall be entertained by any court, tribunal (including the Tribunal under this Act) or other authority:

Provided also that where the Company Law Board has established a provident fund, superannuation fund, welfare fund or other fund for the benefit of the officers and other employees employed in that Board, the monies relatable to the officers and other employees whose services have been transferred by or under this Act to the Central Government shall, out of the monies standing, on the dissolution of the Company Law Board to the credit of such provident fund, superannuation fund, welfare fund or other fund, stand transferred to, and vest in, the Central Government and

such monies which stand so transferred shall be dealt with by that Government in such manner as may be prescribed.

(3) All matters or proceedings or cases pending before the Company Law Board on or before the constitution of the Tribunal under section 10FB, shall, on such constitution, stand transferred to the National Company Law Tribunal and the said Tribunal shall dispose of such cases in accordance with the provisions of this Act.".

***S. 6. Insertion of new Parts 1B and 1C**

After Part 1A of the principal Act, the following Parts shall be inserted, namely:—

'PART 1B

NATIONAL COMPANY LAW TRIBUNAL

*S. 10FB. **Constitution of National Company Law Tribunal.**—The Central Government shall, by notification in the Official Gazette, constitute a Tribunal to be known as the National Company Law Tribunal to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.*

*S. 10FC. **Composition of Tribunal.**—The Tribunal shall consist of a President and such number of judicial and Technical Members not exceeding sixty-two, as the Central Government deems fit, to be appointed by that Government, by notification in the Official Gazette.*

*S. 10FD. **Qualifications for appointment of President and Members.**—(1) The Central Government shall appoint a person who has been, or is qualified to be, a Judge of a High Court as the President of the Tribunal.*

(2) A person shall not be qualified for appointment as Judicial Member unless he—

(a) has, for at least fifteen years, held a judicial office in the territory of India; or

(b) has, for at least ten years been an advocate of a High Court, or has partly held judicial office and has been partly in practice as an advocate for a total period of fifteen years; or

(c) has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government or a State Government [including at least three years of service as a Member of the Indian Company Law Service (Legal Branch) in Senior Administrative Grade in that service]; or

(d) has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government (including at least three years of service as a Member of the Indian Legal Service in Grade I of that service).

(3) A person shall not be qualified for appointment as Technical Member unless he—

(a) has held for at least fifteen years a Group 'A' post or an equivalent post under the Central Government or a State Government [including at least three years of service as a Member of the Indian Company Law Service (Accounts Branch) in Senior Administrative Grade in that service]; or

(b) is, or has been, a Joint Secretary to the Government of India under the Central Staffing Scheme, or any other post under the Central Government

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* Enforced w.e.f. 1-4-2003 vide Notification No. S.O. 341(E), dt. 31-3-2003 only to set in motion all preliminary steps required for establishment of NCLT, thereafter a separate Notification regarding constitution of NCLT will be issued.

or a State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India for at least five years and has adequate knowledge of, and experience in, dealing with problems relating to company law; or

(c) is, or has been, for at least fifteen years in practice as a chartered accountant under the Chartered Accountants Act, 1949 (38 of 1949); or

(d) is, or has been, for at least fifteen years in practice as a cost accountant under the Costs and Works Accountants Act, 1959 (23 of 1959); or

(e) is, or has been, for at least fifteen years working experience as a Secretary in whole-time practice as defined in clause (45A) of section 2 of this Act and is a member of the Institute of the Companies Secretaries of India constituted under the Company Secretaries Act, 1980 (56 of 1980); or

(f) is a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty years in, science, technology, economics, banking, industry, law, matters relating to industrial finance, industrial management, industrial reconstruction, administration, investment, accountancy, marketing or any other matter, the special knowledge of, or professional experience in, which would be in the opinion of the Central Government useful to the Tribunal; or

(g) is, or has been, a Presiding Officer of a Labour Court, Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947 (14 of 1947); or

(h) is a person having special knowledge of, and experience of not less than fifteen years in, the matters relating to labour.

Explanation.—For the purposes of this Part,—

(i) "Judicial Member" means a Member of the Tribunal appointed as such under sub-section (2) of section 10FD and includes the President of the Tribunal;

(ii) "Technical Member" means a Member of the Tribunal appointed as such under sub-section (3) of section 10FD.

S. 10FE. Term of office of President and Members.—*The President and every other Member of the Tribunal shall hold office as such for a term of three years from the date on which he enters upon his office but shall be eligible for re-appointment:*

Provided that no President or other Member shall hold office as such after he has attained,—

(a) in the case of the President, the age of sixty-seven years;

(b) in the case of any other Member, the age of sixty-five years.

Provided further that the President or other Member may retain his lien with his parent cadre or Ministry or Department, as the case may be, while holding office as such.

S. 10FF. Financial and administrative powers of Member Administration.—*The Central Government shall designate any Judicial Member or Technical Member as Member Administration who shall exercise such financial and administrative powers as may be vested in him under the rules which may be made by the Central Government:*

Provided that the Member Administration shall have authority to delegate such of his financial and administrative powers as he may think fit to any other officer of the

Tribunal subject to the condition that such officer shall, while exercising such delegated powers continue to act under the direction, superintendence and control of the Member Administration.

S. 10FG. Salary, allowances and other terms and conditions of service of President and other Members.—*The salary and allowances and other terms and conditions of service of the President and other Members of the Tribunal shall be such as may be prescribed:*

Provided that neither the salary and allowances nor the other terms and conditions of service of the President and other Members shall be varied to their disadvantage after their appointment.

S. 10FH. Vacancy in Tribunal.—*(1) In the event of the occurrence of any vacancy in the office of the President of the Tribunal by reason of his death, resignation or otherwise, the senior-most Member shall act as the President of the Tribunal until the date on which a new President, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.*

(2) When the President is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member or, as the case may be, such one of the Members of the Tribunal, as the Central Government, may, by notification, authorise in this behalf, shall discharge the functions of the President until the date on which the President resumes his duties.

(3) If, for reason other than temporary absence, any vacancy occurs in the office of the President or a Member, the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Tribunal from the stage at which the vacancy is filled.

S. 10FI. Resignation of President and Member.—*The President or a Member of the Tribunal may, by notice in writing under his hand addressed to the Central Government, resign his office:*

Provided that the President or a Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of the term of office, whichever is the earliest.

S. 10FJ. Removal and suspension of President or Member.—*(1) The Central Government may, in consultation with the Chief Justice of India, remove from office the President or any Member of the Tribunal, who—*

(a) has been adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(c) has become physically or mentally incapable of acting as such President or Member of the Tribunal; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as such President or Member of the Tribunal; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest:

Provided that no such President or a Member shall be removed on any of the grounds specified in clauses (b) to (e) without giving him reasonable opportunity of being heard in respect of those charges.

(2) The President or a Member of the Tribunal shall not be removed from his office except by an order made by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court in which such President or a Member had been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

(3) The Central Government may suspend from office the President or Member of the Tribunal in respect of whom a reference has been made to the Judge of the Supreme Court under sub-section (2) until the Central Government has passed orders on receipt of the report of the Judge of the Supreme Court on such reference.

(4) The Central Government may, by rules, regulate the procedure for the investigation of misbehaviour or incapacity of the President or a Member referred to in sub-section (2).

***S. 10FK. Officers and employees of Tribunal.**—(1) The Central Government shall provide the Tribunal with such officers and other employees as it may deem fit.*

(2) The officers and other employees of the Tribunal shall discharge their functions under the general superintendence of the Member Administration.

(3) The salaries and allowances and other terms and conditions of service of the officers and other employees of the Tribunal shall be such as may be prescribed.

***S. 10FL. Benches of Tribunal.**—(1) Subject to the provisions of this section, the powers of the Tribunal may be exercised by Benches, constituted by the President of the Tribunal, out of which one shall be a Judicial Member and another shall be a Technical Member referred to in clauses (a) to (f) of sub-section (3) of section 10FD:*

Provided that it shall be competent for the Members authorised in this behalf to function as a Bench consisting of a single Member and exercise the jurisdiction, powers and authority of the Tribunal in respect of such class of cases or such matters pertaining to such class of cases, as the President of the Tribunal may, by general or special order, specify:

Provided further that if at any stage of the hearing of any such case or matter, it appears to the Member of the Tribunal that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President of the Tribunal or, as the case may be, referred to him for transfer to such Bench as the President may deem fit.

(2) The President of the Tribunal shall, for the disposal of any case relating to rehabilitation, restructuring or winding up of the companies, constitute one or more Special Benches consisting of three or more Members, each of whom shall necessarily be a Judicial Member, a Technical Member appointed under any of the clauses (a) to (f) of sub-section (3) of section 10FD, and a Member appointed under clause (g) or clause (h) of sub-section (3) of section 10FD.

Provided that in case a Special Bench passes an order in respect of a company to be wound up, the winding up proceedings of such company may be conducted by a Bench consisting of a single Member.

(3) If the Members of a Bench differ in opinion on any point or points, it shall be decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President of the Tribunal for hearing on such point or points

by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of Members of the Tribunal who have heard the case, including those who first heard it.

(4) There shall be constituted, such number of Benches, as may be notified by the Central Government.

(5) In addition to the other Benches, there shall be a Principal Bench at New Delhi presided over by the President of the Tribunal.

(6) The Principal Bench of the Tribunal shall have powers of transfer of proceedings from any Bench to another Bench of the Tribunal in the event of inability of any Bench from hearing any such proceedings for any reason:

Provided that no transfer of any proceedings shall be made under this sub-section except after recording the reasons for so doing in writing.

S. 10FM. Order of Tribunal.—(1) The Tribunal may, after giving the parties to any proceeding before it, an opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the parties.

(3) The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

S. 10FN. Power to review.—The Tribunal shall have power to review its own orders.

S. 10FO. Delegation of powers.—The Tribunal may, by general or special order, delegate, subject to such conditions and limitations, if any, as may be specified in the order, to any Member or officer or other employee of the Tribunal or other person authorised by the Tribunal to manage any industrial company or industrial undertaking or any operating agency, such powers and duties under this Act as it may deem necessary.

S. 10FP. Power to seek assistance of Chief Metropolitan Magistrate and District Magistrate.—(1) The Tribunal or any operating agency, on being directed by the Tribunal may, in order to take into custody or under its control all property, effects and actionable claims to which a sick industrial company is or appears to be entitled, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any property, books of account or any other document of such sick industrial company, be situate or be found, to take possession thereof, and the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, shall, on such request being made to him,—

(a) take possession of such property, books of account or other documents; and

(b) cause the same to be entrusted to the Tribunal or the operating agency.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use or cause to be used such force as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority on any ground whatsoever.

PART 1C

APPELLATE TRIBUNAL

S. 10FQ. Appeal from order of Tribunal.—(1) Any person aggrieved by an order or decision of the Tribunal may prefer an appeal to the Appellate Tribunal.

(2) No appeal shall lie to the Appellate Tribunal from an order or decision made by the Tribunal with the consent of parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order or decision made by the Tribunal is received by the appellant and it shall be in such form and accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid if it is satisfied that the appellant was prevented by sufficient cause from not filing the appeal in time.

(4) On receipt of an appeal preferred under sub-section (1), the Appellate Tribunal shall, after giving parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and parties to the appeal.

(6) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

S. 10FR. Constitution of Appellate Tribunal.—(1) The Central Government shall, by notification in the Official Gazette, constitute with effect from such date as may be specified therein, an Appellate Tribunal to be called the "National Company Law Appellate Tribunal" consisting of a Chairperson and not more than two Members, to be appointed by that Government, for hearing appeals against the orders of the Tribunal under this Act.

(2) The Chairperson of the Appellate Tribunal shall be a person who has been, a Judge of the Supreme Court or the Chief Justice of a High Court.

(3) A Member of the Appellate Tribunal shall be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty-five years in, science, technology, economics, banking, industry, law, matters relating to labour, industrial finance, industrial management, industrial reconstruction, administration, investment, accountancy, marketing or any other matter, the special knowledge of, or professional experience in which, would be in the opinion of the Central Government useful to the Appellate Tribunal.

S. 10FS. Vacancy in Appellate Tribunal etc.—(1) In the event of the occurrence of any vacancy in the office of the Chairperson of the Appellate Tribunal by reason of his death, resignation or otherwise, the senior-most Member of the Appellate Tribunal shall act as the Chairperson of the Appellate Tribunal until the date on which a new Chairperson appointed in accordance with the provisions of this Act to fill such vacancy enters upon his office.

(2) When the Chairperson of the Appellate Tribunal is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member or, as the case may be, such one of the Member of the Appellate Tribunal, as the Central Government may, by notification, authorise in this behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

(3) If, for reason other than temporary absence, any vacancy occurs in the office of the Chairperson or a member, the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Appellate Tribunal from the stage at which the vacancy is filled.

S. 10FT. Term of office of Chairperson and Members.—The Chairperson or a member of the Appellate Tribunal shall hold office as such for a term of three years from the date on which he enters upon his office, but shall be eligible for re-appointment for another term of three years:

Provided that no Chairperson or other Member shall hold office as such after he has attained,—

(a) in the case of the Chairperson, the age of seventy years;

(b) in the case of any other Member, the age of sixty-seven years.

S. 10FU. Resignation of Chairperson and Members.—The Chairperson or a Member of the Appellate Tribunal may, by notice in writing under his hand addressed to the Central Government, resign his office:

Provided that the Chairperson or a Member of the Appellate Tribunal shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

S. 10FV. Removal and suspension of Chairperson and Members of Appellate Tribunal.—(1) The Central Government may, in consultation with the Chief Justice of India, remove from office the Chairperson or any Member of the Appellate Tribunal, who—

(a) has been adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(c) has become physically or mentally incapable of acting as such Chairperson or Member of the Appellate Tribunal; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as such Chairperson or Member of the Appellate Tribunal; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest:

(2) The Chairperson or a Member of the Appellate Tribunal shall not be removed from his office except by an order made by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court in which such Chairperson or Member had been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

(3) The Central Government may suspend from office the Chairperson or a Member of the Appellate Tribunal in respect of whom a reference has been made to the Judge of the Supreme Court under sub-section (2) until the Central Government has passed orders on receipt of the report of the Judge of the Supreme Court on such reference.

(4) The Central Government may, by rules, regulate the procedure for the investigation of misbehaviour or incapacity of the Chairperson or a Member referred to in sub-section (2).

S. 10FW. Salary, allowances and other terms and conditions of service of Chairperson and Members.—(1) The salary and allowances and other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal shall be such as may be prescribed.

(2) The salary, allowances and other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal shall not be varied to their disadvantage after appointment.

S. 10FX. Selection Committee.—(1) The Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be appointed by the Central Government on the recommendations of a Selection Committee consisting of—

(a) Chief Justice of India or his nominee.....	Chairperson;
(b) Secretary in the Ministry of Finance and Company Affairs.....	Member;
(c) Secretary in the Ministry of Labour.....	Member;
(d) Secretary in the Ministry of Law and Justice (Department of Legal Affairs or Legislative Department).....	Member;
(e) Secretary in the Ministry of Finance and Company Affairs (Department of Company Affairs).....	Member.

(2) The Joint Secretary in the Ministry or Department of the Central Government dealing with this Act shall be the Convenor of the Selection Committee.

(3) The Central Government shall, within one month from the date of occurrence of any vacancy by reason of death, resignation or removal of the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal and six months before the superannuation or end of tenure of the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal, make a reference to the Selection Committee for filling up of the vacancy.

(4) The Selection Committee shall recommend within one month a panel of three names for every vacancy referred to it.

(5) Before recommending any person for appointment as the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal, the Selection Committee shall satisfy itself that such person does not have financial or other interest which is likely to affect prejudicially his functions as such Chairperson or Member of the Appellate Tribunal or President or Member of the Tribunal, as the case may be.

(6) No appointment of the Chairperson and Members of the Appellate Tribunal and President and Members of the Tribunal shall be invalidated merely by reason of any vacancy or any defect in the constitution of the Selection Committee.

*S. 10FY. **Chairperson, etc., to be public servants.**—The Chairperson, Members, officers and other employees of the Appellate Tribunal and the President, Members, officers and other employees of the Tribunal shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).*

*S. 10FZ. **Protection of action taken in good faith.**—No suit, prosecution or other legal proceedings shall lie against the Appellate Tribunal or its Chairperson, Member, officer or other employee or against the Tribunal, its President, Member, officer or other employee or operating agency or liquidator or any other person authorised by the Appellate Tribunal or the Tribunal in the discharge of any function under this Act for any loss or damage caused or likely to be caused by any act which is in good faith done or intended to be done in pursuance of this Act.*

*S. 10FZA. **Procedure and powers of Tribunal and Appellate Tribunal.**—(1) The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.*

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) reviewing its decisions;

(g) dismissing a representation for default or deciding it ex parte;

(h) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and

(i) any other matter which may be prescribed by the Central Government.

(3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send in case of its inability to execute such order, to the court within the local limits of whose jurisdiction,—

(a) in the case of an order against a company, the registered office of the company is situate; or

(b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

(4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code (45 of 1860) and the Tribunal and the Appellate Tribunal shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

S. 10G. **Power to punish for contempt.**—The Appellate Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of itself as the High Court has and may exercise, for this purpose under the provisions of the Contempt of Courts Act, 1971 (70 of 1971), shall have the effect subject to modifications that—

(a) the reference therein to a High Court shall be construed as including a reference to the Appellate Tribunal;

(b) the reference to Advocate-General in section 15 of the said Act shall be construed as a reference to such law officers as the Central Government may specify in this behalf.

S. 10GA. **Staff of Appellate Tribunal.**—(1) The Central Government shall provide the Appellate Tribunal with such officers and other employees as it may think fit.

(2) The officers and other employees of the Appellate Tribunal shall discharge their functions under the general superintendence of the Chairperson of the Appellate Tribunal.

(3) The salaries and allowances and other conditions of service of the officers and other employees of the Appellate Tribunal shall be such as may be prescribed.

S. 10GB. **Civil Court not to have jurisdiction.**—(1) No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force.

S. 10GC. **Vacancy in Tribunal or Appellate Tribunal not to invalidate acts or proceedings.**—No act or proceeding of the Tribunal or the Appellate Tribunal shall be questioned or shall be invalid merely on the ground of existence of any vacancy or defect in the establishment of the Tribunal or the Appellate Tribunal, as the case may be.

S. 10GD. **Right to legal representation.**—The applicant or the appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any officer to present his or its case before the Tribunal or the Appellate Tribunal, as the case may be.

Explanation.—For the purposes of this section,—

(a) "chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 (38 of 1949) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(b) "company secretary" means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Companies Secretaries Act, 1980 (56 of 1980) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(c) "cost accountant" means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 (23 of

1959) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(d) "legal practitioner" means an advocate, a vakil or any attorney of any High Court, and includes a pleader in practice.

***S. 10GE. Limitation.**—The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to an appeal made to the Appellate Tribunal.*

***S. 10GF. Appeal to Supreme Court.**—Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such decision or order:*

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.'.

S. 7. Substitution of new section for section 17.

For section 17 of the principal Act, the following section shall be substituted, namely:—

*"S. 17. **Special resolution and confirmation by Central Government required for alteration of memorandum.**—(1) A company may, by special resolution, alter the provisions of its memorandum so as to change the place of its registered office from one State to another, or with respect to the objects of the company so far as may be required to enable it—*

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

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

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

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

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

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

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

(2) The alteration of the provisions of memorandum relating to the change of the place of its registered office from one State to another shall not take effect unless it is confirmed by the Central Government on petition.

(3) Before confirming the alteration, the Central Government must be satisfied—

(a) that sufficient notice has been given to every holder of the debentures of the company, and to every other person or class of persons whose interests will, in the opinion of the Central Government, be affected by the alteration; and

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

Provided that the Central Government may, in the case of any person or class of persons, for special reasons, dispense with the notice required by clause (a).

(4) The Central Government shall cause notice of the petition for confirmation of the alteration to be served on the Registrar who shall also be given a reasonable opportunity of appearing before the Central Government and state his objections and suggestions, if any, with respect to the confirmation of the alteration.

(5) The Central Government may make an order confirming the alteration on such terms and conditions, if any, as it thinks fit, and may make such order as to costs as it thinks proper.

(6) The Central Government shall, in exercising its powers under this section, have regard to the rights and interests of the members of the company and of every class of them, as well as to the rights and interests of the creditors of the company and of every class of them.

(7) The Central Government may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Central Government for the purchase of the interests of dissentient members; and may give such directions and make such orders as it thinks fit for facilitating or carrying into effect, any such arrangement:

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

S. 8. Amendment of sections 18, 19, 43 and 49

In sections 18, 19, 43 and 49 of the principal Act, for the words "*Company Law Board*", wherever they occur, the word "*Central Government*" shall be substituted.

S. 9. Amendment of sections 55A and 58A

In sections 55A and 58A of the principal Act, for the words "*Company Law Board*", wherever they occur, the word "*Tribunal*" shall be substituted.

S. 10. Amendment of section 58AA

In section 58AA of the principal Act,—

(a) for the words "*Company Law Board*", wherever they occur, the word "*Tribunal*" shall be substituted.

(b) in sub-section (3), in the first proviso, for the words "*the Board*", the words "*the Tribunal*" shall be substituted.

S. 11. Amendment of section 75

In section 75 of the principal Act, in sub-section (*1*), in clause (*c*), in sub-clause (*ii*), for the word "*Court*", the word "*Tribunal*" shall be substituted.

S. 12. Amendment of section 79

In section 79 of the principal Act,—

(a) for the words "*Company Law Board*", wherever they occur, the words "*Central Government*" shall be substituted;

(b) in sub-section (2), in clause (*ii*), in the proviso, for the words *"unless that Board is of opinion"*, the words *"unless the Central Government is of opinion"* shall be substituted;

(c) after sub-section (3), the following proviso shall be inserted, namely:—

"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.".

S. 13. Amendment of section 80A

In section 80A of the principal Act,—

(a) in sub-section (1), in the proviso, for the words *"Company Law Board"*, the word *"Tribunal"* shall be substituted;

(b) in sub-section (2), for the words *"any court"*, the words *"any court or the Tribunal"* shall be substituted.

S. 14. Amendment of sections 100 to 104 and 107

In sections 100 to 104 and 107 of the principal Act, for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 15. Amendment of sections 111 and 111A

In sections 111 and 111A of the principal Act, for the words "*Company Law Board*", wherever they occur, the word "*Tribunal*" shall be substituted.

S. 16. Amendment of section 113

In section 113 of the principal Act, for the words "*Company Law Board*", wherever they occur, the words "*Central Government*" shall be substituted.

S. 17. Amendment of section 117B

In section 117B of the principal Act,—

(a) in sub-section (4), for the words "*Company Law Board*", wherever they occur, the words "*Central Government*" shall be substituted;

(b) after sub-section (4), the following proviso shall be inserted namely:—

Provided that in the case of revival and rehabilitation of a sick industrial company under Part VIA, the provisions of this section shall have effect as if for the words "Central Government", the word "Tribunal" had been substituted.'

S. 18. Amendment of section 117C

In section 117C of the principal Act, for the words "*Company Law Board*", at both the places where they occur, the word "*Tribunal*" shall be substituted.

S. 19. Amendment of section 118

In section 118 of the principal Act, for the words "*Company Law Board*", the words "*Central Government*" shall be substituted.

S. 20. Substitution of new section for section 141

For section 141 of the principal Act, the following section shall be substituted, namely:—

"S. 141. Rectification by Central Government of register of charges.—(1) The Central Government, 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 mis-statement 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.".

S. 21. Amendment of sections 144 and 163

In sections 144 and 163 of the principal Act, for the words "*Company Law Board*", the word "*Central Government*" shall be substituted.

S. 22. Substitution of new section for section 167

For section 167 of the principal Act, the following section shall be substituted, namely:—

"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.

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.'.

S. 23. Amendment of section 168

In section 168 of the principal Act, for the words "*Central Government*", the word "*Tribunal or the Central Government, as the case may be*" shall be substituted.

S. 24. Substitution of new section for section 186

For section 186 of the principal Act, the following section shall be substituted, namely:—

*"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.".

S. 25. Amendment of sections 188 and 196

In sections 188 and 196 of the principal Act, for the words "*Company Law Board*" wherever they occur, the word "*Central Government*" shall be substituted.

S. 26. Amendment of section 203

In section 203 of the principal Act,—

(a) in sub-section (1), for the word "*Court*", at both the places where it occurs, the words "*Court or the Tribunal, as the case may be*" shall be substituted;

(b) in sub-section (2),—

(i) in clause (*a*), for the words "*includes the Court by which he is convicted as well as any Court having jurisdiction to wind up*", the words "*includes the Court or the Tribunal by which he is convicted,*

as well as any Court or Tribunal having jurisdiction to wind up" shall be substituted;

(ii) in clause (*b*), for the word "*Court*", the words "*Court or Tribunal*" shall be substituted;

(c) in sub-section (3) and (4), for the words "*Court having jurisdiction to wind up a company*", the words "*Court or the Tribunal having jurisdiction to wind up a company*" shall be substituted;

(d) in sub-section (5), for the words "*attention of the Court*", the words "*attention of the Court or the Tribunal, as the case may be,*" shall be substituted.

S. 27. Amendment of sections 219 and 225

In sections 219 and 225 of the principal Act, for the words "*Company Law Board*", wherever they occur, the words "*Central Government*" shall be substituted.

S. 28. Amendment of section 227

In section 227 of the principal Act, in sub-section (3), after clause (f), the following clause shall be inserted, namely:—

"(g) whether the cess payable under section 441A has been paid and if not, the details of amount of cess not so paid.".

S. 29. Amendment of sections 235 and 236

In sections 235 and 236 of the principal Act, for the words "*Company Law Board*", wherever they occur, the word "*Tribunal*" shall be substituted.

S. 30. Amendment of section 237

In section 237 of the principal Act, in clause (b), in the opening portion, for the words "*if in the opinion of the Company Law Board*", the words "*in its opinion or in the opinion of the Tribunal*" shall be substituted.

S. 31. Amendment of section 241

In section 241 of the principal Act, in sub-section (2), in clause (dd), for the words "*Company Law Board*", the word "*Tribunal*" shall be substituted.

S. 32. Amendment of Section 243

In section 243 of the principal Act, for the word "*Court*", at both the places where it occurs, the word "*Tribunal*" shall be substituted.

S. 33. Amendment of Sections 247, 250, 251 and 269

In sections 247, 250, 251 and 269 of the principal Act, for the words "*Company Law Board*", wherever they occur, the word "*Tribunal*" shall be substituted.

S. 34. Amendment of section 284

In section 284 of the principal Act, in sub-section (4), in the proviso, for the words "*Company Law Board*", the words "*Central Government*" shall be substituted.

S. 35. Amendment of sections 304 and 307

In sections 304 and 307 of the principal act, for the words "*Company Law Board*", the words "*Central Government or Tribunal, as the case may be*" shall be substituted.

S. 36. Amendment of Section 318

In section 318 of the principal Act, in sub-section (3), in clause (*d*), for the words "*or subject to the supervision of Court*", the words "*order of the Tribunal*" shall be substituted.

S. 37. Amendment of section 349

In section 349 of the principal Act, in sub-section (4), after clause (o), the following clause shall be inserted, namely:—

"*(p) amount paid as cess under section 441A.*"

S. 38. Amendment of Chapter IVA of Part VI

In Part VI of the principal Act, in Chapter IVA, for the words "*Company Law Board*", wherever they occur, the word "*Tribunal*" shall be substituted.

S. 39. Amendment of section 391

In section 391 of the principal Act,—

(*a*) for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted;

(*b*) sub-section (7) shall be omitted;

(*c*) below sub-section (7), the portion beginning with the words "*The provisions of*" and ending with the words "*the application*" shall be omitted.

S. 40. Substitution of new section for section 392

For section 392 of the principal Act, the following section shall be substituted, namely:—

"*S. 392. **Power of Tribunal to enforce compromise and arrangement.**—(1) Where the Tribunal makes an order under section 391 sanctioning a compromise or an arrangement in respect of a company, it—*

(a) shall have power to supervise the carrying out of the compromise or an arrangement; and

(b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

(2) If the Tribunal aforesaid is satisfied that a compromise or an arrangement sanctioned under section 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made under section 433 of this Act.

(3) The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of the Companies (Amendment) Act, 2001 sanctioning a compromise or an arrangement.".

S. 41. Amendment of section 394

In section 394 of the principal Act,—

(a) for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted;

(b) in the first proviso to sub-section (1), the words "*the Company Law Board or*" shall be omitted.

S. 42. Amendment of Sections 394A and 395

In sections 394A and 395 of the principal Act, for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 43. Amendment of section 396

In section 396 of the principal Act, for the words "*Company Law Board*", at both the places where they occur, the word "*Tribunal*" shall be substituted.

S. 44. Amendment of Chapter VI of Part VI

In Part VI of the principal Act, in Chapter VI, for the words "*Company Law Board*", wherever they occur, the word "*Tribunal*" shall be substituted.

S. 45. Amendment of Section 410

In section 410 of the principal Act,—

(a) for the words *"Company Law Board"*, the word *"Tribunal"* shall be substituted;

(b) for the words *"or Board"*, the words *"or the Tribunal"* shall be substituted.

S. 46. Substitution of new section for section 424

For section 424 of the principal Act, the following section shall be substituted, namely:—

*S. 424. **Application of sections 421 to 423 to receivers and managers appointed by Tribunal and managers appointed in pursuance of an instrument.**—The provisions of sections 421 to 423 shall apply to the receiver of, or any person appointed to manage, the property of a company, appointed by the Tribunal or to any person appointed to manage, the property of a company under any powers contained in an instrument, in like manner as they apply to a receiver appointed under any powers contained in an instrument.".*

S. 47. Insertion of new Part VIA

After Part VI of the principal Act, the following Part shall be inserted, namely:—

'PART VIA

REVIVAL AND REHABILITATION OF SICK INDUSTRIAL COMPANIES

*S. 424A. **Reference to Tribunal.**—(1) Where an industrial company, has become a sick industrial company, the Board of directors of such company shall make a reference to the Tribunal and prepare a scheme of its revival and rehabilitation and submit the same to the Tribunal along with an application containing such particulars*

as may be prescribed for determination of the measures which may be adopted with respect to such company:

Provided that nothing contained in this sub-section shall apply to a Government company:

Provided further that a Government company may, with the prior approval of the Central Government or a State Government, as the case may be, make a reference to the Tribunal in accordance with the provisions of this sub-section and thereafter all the provisions of this Act shall apply to such Government company.

(2) The application under sub-section (1) shall be accompanied by a certificate from an auditor from a panel of auditors prepared by the Tribunal indicating—

(a) the reasons of the net worth of such company being fifty per cent or less than fifty per cent.; or

(b) the default in repayment of its debt making such company a sick industrial company,

as the case may be.

(3) Without prejudice to the provisions of sub-section (1), the Central Government or the Reserve Bank or a State Government or a public financial institution or a State level institution or a scheduled bank may, if it has sufficient reasons to believe that any industrial company has become, for the purposes of this Act, a sick industrial company, make a reference in respect of such company to the Tribunal for determination of the measures which may be adopted with respect to such company:

Provided that a reference shall not be made under this sub-section in respect of any industrial company by—

(a) the Government of any State unless all or any of the industrial undertakings belonging to such company are situated in such State;

(b) a public financial institution or a State level institution or a scheduled bank unless it has, by reason of any financial assistance or obligation rendered by it, or undertaken by it, with respect to such company, an interest in such company.

(4) A reference under sub-section (1) or sub-section (3) shall be made to the Tribunal within a period of one hundred and eighty days from the date on which the Board of directors of the company or the Central Government or the Reserve Bank of India or a State Government or a public financial institution or a State level institution or a scheduled bank, as the case may be, come to know, of the relevant facts giving rise to causes of such reference or within sixty days of final adoption of accounts, whichever is earlier.

(5) The Tribunal may, on receipt of a reference under sub-section (1), pass an order as to whether a company in respect of which a reference has been made has become a sick industrial company and such order shall be final.

***S. 424B. Inquiry into working of sick industrial companies.**—(1) The Tribunal may make such inquiry as it may deem fit for determining whether any industrial company has become a sick industrial company—*

(a) upon receipt of a reference with respect to such company under section 424A; or

(b) upon information received with respect to such company or upon its own knowledge as to the financial condition of the company.

(2) The Tribunal may, if it deems necessary or expedient so to do for the expeditious disposal of an inquiry under sub-section (1), require by order any operating agency to enquire into the scheme for revival and make a report with respect to such matters as may be specified in the order.

(3) The operating agency shall complete its inquiry as expeditiously as possible and submit its report to the Tribunal within twenty-one days from the date of such order:

Provided that the Tribunal may extend the said period to forty days for reasons to be recorded in writing for such extension.

(4) The Tribunal shall conclude its inquiry as expeditiously as possible and pass final orders in the proceedings within sixty days from the commencement of the inquiry:

Provided that the Tribunal may extend the said period to ninety days for reasons to be recorded in writing for such extension.

Explanation.—For the purposes of this sub-section, an inquiry shall be deemed to have commenced upon the receipt by the Tribunal of any reference or information or upon its own knowledge reduced to writing by the Tribunal.

(5) Where the Tribunal deems it fit to make an inquiry or to cause an inquiry to be made into any industrial company under sub-section (1) or, as the case may be, under sub-section (2), it may appoint one or more persons who possess knowledge, experience and expertise in management and control of the affairs of any other company to be a special director or special directors on the board of such industrial company on such terms and conditions as may be prescribed for safeguarding its financial and other interest or in the public interest.

(6) The special director or special directors appointed under sub-section (5) shall submit a report to the Tribunal within sixty days from the date of appointment of such director or directors about the state of affairs of the company in respect of which reference has been made under sub-section (1) and such special director or directors shall have all the powers of a director of a company under this Act, necessary for discharge of his or their duties.

(7) The Tribunal may issue such directions to a special director appointed under sub-section (5) as it may deem necessary or expedient for proper discharge of his duties.

(8) The appointment of a special director referred to in sub-section (5) shall be valid and effective notwithstanding anything to the contrary contained in any other provision of this Act or in any other law for the time being in force or in the memorandum and articles of association or any other instrument relating to the industrial company, and any provision regarding share qualification, age limit, number of directorships, removal from office of directors and such like conditions contained in any such law or instrument aforesaid, shall not apply to any special director or directors appointed by the Tribunal.

(9) Any special director appointed under sub-section (5), shall—

(a) hold office during the pleasure of the Tribunal and may be removed or substituted by any person by order of the Tribunal;

(b) not incur any obligation or liability by reason only of his being a director or for anything done or omitted to be done in good faith in the discharge of his duties as a director or anything in relation thereto;

(c) not be liable to retirement by rotation and shall not be taken into account for computing the number of directors liable to such retirement;

(d) not be liable, to be prosecuted under any law for anything done or omitted to be done in good faith in the discharge of his duties in relation to the sick industrial company.

S. 424C. Powers of Tribunal to make suitable order on completion of inquiry.—*(1) If after making an inquiry under section 424B, the Tribunal is satisfied that a company has become a sick industrial company, the Tribunal shall, after considering all the relevant facts and circumstances of the case, decide, as soon as may be, by an order in writing, whether it is practicable for the company to make its net worth exceed the accumulated losses or make the repayment of its debts referred to in clause (b) of sub-section (2) of section 424A within a reasonable time.*

(2) If the Tribunal decides under sub-section (1) that it is practicable for a sick industrial company to make its net worth exceed the accumulated losses or pay its debt referred to in that sub-section within a reasonable time, the Tribunal shall, by order in writing and subject to such restrictions or conditions as may be specified in the order, give such time to the company as it may deem fit to make its net worth exceed the accumulated losses or make repayment of the debts.

(3) If the Tribunal decides under sub-section (1) that it is not practicable for a sick industrial company to make its net worth exceed the accumulated losses or make the repayment of its debts referred to in clause (b) of sub-section (2) of section 424A, within a reasonable time and that it is necessary or expedient in the public interest to adopt all or any of the measures specified in section 424D in relation to the said company it may, as soon as may be, by order in writing, direct any operating agency specified in the order to prepare, having regard to such guidelines as may be specified in the order, a scheme providing for such measures in relation to such company.

(4) The Tribunal may,—

(a) if any of the restrictions or conditions specified in an order made under sub-section (2) are not complied with by the company concerned, or if the company fails to revive in pursuance of the said order, review such order on a reference in that behalf from any agency referred to in sub-section (3) of section 424A or on its own motion and pass a fresh order in respect of such company under sub-section (3);

(b) if the operating agency specified in an order made under sub-section (3) makes a submission in that behalf, review such order and modify the order in such manner as it may deem appropriate.

S. 424D. Preparation and sanction of schemes.—*(1) Where an order is made under sub-section (3) of section 424C in relation to any sick industrial company, the operating agency specified in the order shall prepare as expeditiously as possible and ordinarily within a period of sixty days from the date of such order, having regard to the guidelines framed by the Reserve Bank of India in this behalf, a scheme with respect to such company providing for any one or more of the following measures, namely:—*

(a) the financial reconstruction of such industrial company;

(b) the proper management of such industrial company by change in, or take over of, the management of such industrial company;

(c) the amalgamation of—

(i) such industrial company with any other company; or

(ii) any other company with such industrial company (hereafter in this section, in the case of sub-clause (i), the other company, and in the

case of sub-clause (ii), such industrial company, referred to as "transferee company");

(d) the sale or lease of a part or whole of any industrial undertaking of such industrial company;

(e) the rationalisation of managerial personnel, supervisory staff and workmen in accordance with law;

(f) such other preventive ameliorative and remedial measures as may be appropriate;

(g) repayment of debt;

(h) such incidental, consequential or supplemental measures as may be necessary or expedient in connection with or for the purposes of the measures specified in clauses (a) to (g):

Provided that the Tribunal may extend the said period of sixty days to ninety days for reasons to be recorded in writing for such extension.

(2) The scheme referred to in sub-section (1) may provide for any one or more of the following, namely :—

(a) the constitution, name and registered office, the capital, assets, powers, rights, interests, authorities and privileges, duties and obligations of the sick industrial company or, as the case may be, of the transferee company;

(b) the transfer to the transferee company of the business, properties, assets and liabilities of the sick industrial company on such terms and conditions as may be specified in the scheme;

(c) any change in the Board of directors, or the appointment of a new Board of directors, of the sick industrial company and the authority by whom the manner in which and the other terms and conditions on which, such change or appointment shall be made and in the case of appointment of a new Board of directors or of any director, the period for which such appointment shall be made;

(d) the alteration of the memorandum or articles of association of the sick industrial company or, as the case may be, of the transferee company for the purpose of altering the capital structure thereof, or for such other purposes as may be necessary to give effect to the reconstruction or amalgamation;

(e) the continuation by or against the sick industrial company or, as the case may be, the transferee company of any action or other legal proceeding pending against the sick industrial company immediately before the date of the order made under sub-section (3) of section 424C;

(f) the reduction of the interest or rights which the shareholders have in the sick industrial company to such extent as the Tribunal considers necessary in the interests of the reconstruction, revival or rehabilitation or repayment of debt of such sick industrial company or for the maintenance of the business of such industrial company;

(g) the allotment to the shareholders of the sick industrial company, of shares in such company or, as the case may be, in the transferee company and where any shareholder claims payment in cash and not allotment of shares, or where it is not possible to allot shares to any shareholder, the payment of cash to those shareholders in full satisfaction of their claims—

(i) in respect of their interest in shares in the sick industrial company before its reconstruction or amalgamation; or

(ii) where such interest has been reduced under clause (f) in respect of their interest in shares as so reduced;

(h) any other terms and conditions for the reconstruction or amalgamation of the sick industrial company;

(i) sale of the industrial undertaking of the sick industrial company free from all encumbrances and all liabilities of the company or other such encumbrances and liabilities as may be specified, to any person, including a co-operative society formed by the employees of such undertaking and fixing of reserve price for such sale;

(j) lease of the industrial undertaking of the sick industrial company to any person, including a co-operative society formed by the employees of such undertaking;

(k) method of sale of assets of the industrial undertaking of the sick industrial company such as by public auction or by inviting tenders or in any other manner as may be specified and for the manner of publicity therefor;

(l) issue of the shares in the sick industrial company at the face value or at the intrinsic value which may be at discount value or such other value as may be specified to any industrial company or any person including the executives and employees of such sick industrial company;

(m) such incidental, consequential and supplemental matters as may be necessary to secure that the reconstruction or amalgamation or other measures mentioned in the scheme are fully and effectively carried out.

(3) (a) The scheme prepared by the operating agency shall be examined by the Tribunal and a copy of the scheme with modification, if any, made by the Tribunal shall be sent, in draft, to the sick industrial company and the operating agency and in the case of amalgamation, also to any other company concerned, and the Tribunal may publish or cause to be published the draft scheme in brief in such daily newspapers as the Tribunal may consider necessary, for suggestions and objections, if any, within such period as the Tribunal may specify:

(b) The complete draft scheme shall be kept at the place where registered office of the company is situated or at such places as mentioned in the advertisement.

(c) The Tribunal may make such modifications, if any, in the draft scheme as it may consider necessary in the light of the suggestions and objections received from the sick industrial company and the operating agency and also from the transferee company and any other company concerned in the amalgamation and from any shareholder or any creditors or employees of such companies :

Provided that where the scheme relates to amalgamation, the said scheme shall be laid before the company other than the sick industrial company in the general meeting for the approval of the scheme by its shareholders and no such scheme shall be proceeded with unless it has been approved, with or without modification, by a special resolution passed by the shareholders of the transferee company.

(4) the scheme may thereafter be sanctioned, within sixty days by the Tribunal (hereinafter referred to as the sanctioned scheme) and shall come into force on such date as the Tribunal may specify in this behalf:

Provided that the Tribunal may extend the said period of sixty days to ninety days for reasons to be recorded in writing for such extension:

Provided further that different dates may be specified for different provisions of the scheme.

(5) The Tribunal may, on the recommendations of the operating agency or otherwise, review any sanctioned scheme and make such modifications as it may deem fit or may by order in writing direct any operating agency specified in the order, having regard to such guidelines including the guidelines framed by the Reserve Bank of India in this behalf in order to prepare a fresh scheme providing for such measures as the operating agency may consider necessary.

(6) When a fresh scheme is prepared under sub-section (5), the provisions of sub-sections (3) and (4) shall apply in relation thereto as they apply to in relation to a scheme prepared under sub-section (1).

(7) Where a sanctioned scheme provides for the transfer of any property or liability of the sick industrial company in favour of any other company or person or where such scheme provides for the transfer of any property or liability of any other company or person in favour of the sick industrial company, then, by virtue of, and to the extent provided in, the scheme, on and from the date of coming into operation of the sanctioned scheme or any provision thereof, the property shall be transferred to, and vest in, and the liability shall become the liability of, such other company or person or, as the case may be, the sick industrial company.

(8) The sanction accorded by the Tribunal under sub-section (4) shall be conclusive evidence that all the requirements of this scheme relating to the reconstruction or amalgamation, or any other measure specified therein have been complied with and a copy of the sanctioned scheme certified in writing by an officer of the Tribunal to be a true copy thereof, shall, in all legal proceedings (whether in appeal or otherwise), be admitted as evidence.

(9) A copy of the sanctioned scheme referred to in sub-section (8) shall be filed with the Registrar within the prescribed time by the company in respect of which such scheme relates.

(10) On and from the date of the coming into operation of the sanctioned scheme or any provision thereof, the scheme or such provision shall be binding on the sick industrial company and the transferee company or, as the case may be, the other company and also on the shareholders, creditors and guarantors and employees of the said companies.

(11) The creditors of a sick industrial company may also prepare a scheme for revival or rehabilitation of such sick industrial company and submit the same to the Tribunal for its sanction:

Provided that no scheme shall be submitted by the creditors to the Tribunal unless such scheme has been approved by atleast three-fourth in value of creditors of the sick industrial company.

(12) All the provisions relating to the preparation of scheme by the operating agency and sanction of such scheme by the Tribunal shall, as far as may be, apply to the scheme referred to in sub-section (11).

(13) The scheme referred to in sub-section (11) if sanctioned by the Tribunal shall be binding on all the creditor and on other concerned.

(14) If any difficulty arises in giving effect to the provisions of the sanctioned scheme, the Tribunal may, on the recommendation of the operating agency or otherwise, by order, do anything, not inconsistent with such provisions, which appears to it to be necessary or expedient for the purpose of removing the difficulty.

(15) The Tribunal may, if it deems necessary or expedient so to do, by order in writing, direct any operating agency specified in the order to implement a sanctioned scheme with such terms and conditions and in relation to the sick industrial company as may be specified in the order.

(16) Where the whole of the undertaking of the sick industrial company is sold under a sanctioned scheme, the Tribunal may distribute the sale proceeds to the parties entitled thereto in accordance with the provisions of section 529A and other provisions of this Act.

(17) The Tribunal may monitor periodically the implementation of the sanctioned scheme.

***S. 424E. Rehabilitation by giving financial assistance.**—(1) Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to the sick industrial company, the scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority (any Government, bank, institution or other authority required by a scheme to provide for such financial assistance being hereafter in this section referred to as the person required by the scheme to provide financial assistance) to the sick industrial company.*

(2) Every scheme referred to in sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation or within such further period, not exceeding sixty days, as may be allowed by the Tribunal, and if no consent is received within such period or further period, it shall be deemed that consent has been given.

(3) Where in respect of any scheme the consent referred to in sub-section (2) is given by every person required by the scheme to provide financial assistance, the Tribunal may, as soon as may be, sanction the scheme and on and from the date of such sanction the scheme shall be binding on all concerned.

(4) On the sanction of the scheme under sub-section (3), the financial institutions and the banks required to provide financial assistance, shall designate by mutual agreement a financial institution and a bank from amongst themselves which shall be responsible to disburse financial assistance by way of loans or advances or guarantees or reliefs or concessions or sacrifices agreed to be provided or granted under the scheme on behalf of all financial institutions and banks concerned.

(5) The financial institution and the bank designated under sub-section (4) shall forthwith proceed to release the financial assistance to the sick industrial company in fulfillment of the requirement in this regard.

(6) Where in respect of any scheme consent under sub-section (2) is not given by any person required by the scheme to provide financial assistance, the Tribunal may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit.

***S. 424F. Arrangement for continuing operations, etc., during inquiry.**—(1) At any time before completion of the inquiry under section 424B, the sick industrial company or the Central Government or the Reserve Bank of India or a State Government or a public financial institution or a State level institution or a scheduled bank or any other institution, bank or authority providing or intending to provide any*

financial assistance by way of loans or advances or guarantees or reliefs, or concessions to such industrial company may make an application to the Tribunal—

(a) agreeing to an arrangement for continuing the operations of the sick industrial company; or

(b) suggesting a scheme for the financial reconstruction of the sick industrial company.

(2) The Tribunal may, within sixty days of the receipt of the application under sub-section (1), pass such orders thereon as it may deem fit.

S. 424G. Winding up of sick industrial company.—(1) Where the Tribunal, after making inquiry under section 424B and after consideration of all the relevant facts and circumstances and after giving an opportunity of being heard to all concerned parties, is of the opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record its findings and order winding up of the company.

(2) For the purpose of winding up of the sick industrial company, the Tribunal may appoint any officer of the operating agency, if the operating agency gives its consent, as the liquidator of such industrial company and the officer so appointed shall for the purpose of the winding-up of such sick industrial company be deemed to be, and have all the powers of, the official liquidator under this Act.

(3) Notwithstanding anything contained in sub-section (2), the Tribunal may cause to be sold the assets of the sick industrial company in such manner as it may deem fit and pass orders for distribution in accordance with the provisions of section 529A, and other provisions of this Act.

(4) Without prejudice to the other provisions contained in this Act, the winding up of a company shall, as far as may be, concluded within one year from the date of the order made under sub-section (1).

424H. Operating agency to prepare complete inventory, etc.—Where for the proper discharge of the functions of the Tribunal under this Part, the circumstances so require, the Tribunal may, through any operating agency, cause to be prepared—

(a) with respect to a company a complete inventory of—

(i) all assets and liabilities of whatever nature;

(ii) all books of account, registers, maps, plans, records, documents of title or ownership of property and all other documents of whatever nature relating thereto;

(b) a list of shareholders and a list of creditors showing separately in the list of creditors, the secured creditors and unsecured creditors;

(c) a valuation report in respect of the shares and assets in order to arrive at the reserve price for the sale of a part or whole of the industrial undertaking of the company or for fixation of the lease rent or share exchange ratio;

(d) an estimate of reserve price, lease rent or share exchange ratio;

(e) proforma accounts, where no up-to-date audited accounts are available.

S. 424-I. Direction not to dispose of assets.—The Tribunal may, if it is of opinion, that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, by order, direct such company not to dispose of, except with the prior approval of the Tribunal, any of its assets during

the period of inquiry under section 424B or during the period of preparation or consideration of scheme under section 424C.

***S. 424J. Power of Tribunal to call for periodic information.**—On receipt of reference under section 424A, the Tribunal may call for any periodic information from the company as to the steps taken by the company to make its net worth exceed the accumulated losses or to make repayment of its debts referred to in that section, as the case may be, and the company shall furnish such information.*

***S. 424K. Misfeasance proceedings.**—(1) If, in the course of scrutiny or implementation of any scheme or proposal, it appears to the Tribunal that any person who has taken part in the promotion, formation or management of the sick industrial company or its undertaking, including any past or present director, manager or officer or employee of the sick industrial company—*

(a) has misapplied or retained, or become liable or accountable for, any money or property of the sick industrial company; or

(b) has been guilty of any misfeasance, malfeasance or non-feasance of breach of trust in relation to the sick industrial company,

the Tribunal may, by order, direct him to repay or restore the money or property or any part thereof, with or without interest, as it thinks just, or to contribute such sum to the assets of the sick industrial company or the other person, entitled thereto by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Tribunal thinks just, and also report the matter to the Central Government for any other action which that Government may deem fit.

(2) If the Tribunal is satisfied on the basis of the information and evidence in its possession with respect to any person who is or was a director or an officer or other employee of the sick industrial company, that such person by himself or alongwith others had diverted the funds or other property of such company for any purpose other than a bona fide purpose of the company or had managed the affairs of the company in a manner highly detrimental to the interests of the company, the Tribunal shall by order, direct the public financial institutions, scheduled banks and State level institutions not to provide, during a period of ten years from the date of the order, any financial assistance to such person or any firm of which such person is a partner or any company or other body corporate of which such person is a director (by whatever name called).

(3) No order shall be made by the Tribunal under this section against any person unless such person has been given an opportunity for making his submissions.

(4) This section shall apply notwithstanding that the matter is one for which the person may be criminally liable.

***S. 424L. Penalty for certain offences.**—(1) Whoever violates provisions of this Part or any scheme, or any order, of the Tribunal or the Appellate Tribunal or makes a false statement or gives false evidence to the Tribunal or the Appellate Tribunal, any attempts to tamper the records of reference or appeal filed under this Act, shall be punishable with simple imprisonment for a term which may extend to three years or shall be liable to fine not exceeding ten lakhs rupees.*

(2) No court shall take cognizance of any offence under sub-section (1) except on a complaint in writing of an officer of the Tribunal or the Appellate Tribunal or any officer of the Central Government authorised by it or any officer of an operating agency as may be authorised in this behalf by the Tribunal or the Appellate Tribunal, as the case may be.'.

S. 48. Amendment of section 425

In section 425 of the principal Act, in sub-section (1),—

(i) in clause (*a*), for the word *"Court"*, the word *"Tribunal"* shall be substituted;

(ii) in clause (*b*), the word *"or"* occuring at the end shall be omitted;

(iii) clause (*c*) shall be omitted.

S. 49. Amendment of sections 426 and 427

In sections 426 and 427 of the principal Act, for the word *"Court"*, the word *"Tribunal"* shall be substituted.

S. 50. Amendment of heading and sub-heading before section 433

In the heading and sub-heading before section 433 of the principal Act, for the word *"Court"*, the word *"Tribunal"* shall be substituted.

S. 51. Substitution of new section for section 433

For section 433 of the principal Act, the following section shall be substituted, namely:—

S. 433. Circumstances in which company may be wound up by Tribunal.—*A company may be wound up by the Tribunal,—*

(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;

(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;

(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(d) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two;

(e) if the company is unable to pay its debts;

(f) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up;

(g) if the company has made a default in filing with the Registrar its balance sheet and profit and loss account or annual return for any five consecutive financial years;

(h) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

(i) if the Tribunal is of the opinion that the company should be wound up under the circumstances specified in section 424G:

Provided that the Tribunal shall make an order for winding up of a company under clause (h) on application made by the Central Government or a State Government.".

S. 52. Amendment of section 434

In section 434 of the principal Act, in sub-section (*1*),—

(*i*) in clause (*a*), for the words "*five hundred rupees*", the words "*one lakh rupees*" shall be substituted;

(*ii*) in clause (*b*), for the words "*any Court*", the words "*any Court or Tribunal*" shall be substituted;

(*iii*) in clause (*c*), for the word "*Court*", at both the places where it occurs, the word "*Tribunal*" shall be substituted.

S. 53. Omission of heading before section 435 and sections 435 to 438.

Heading occurring before section 435 and sections 435 to 438 of the principal Act shall be omitted.

S. 54. Amendment of section 439

In section 439 of the principal Act,—

(*i*) for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted;

(*ii*) in sub-section (*1*) after clause (*f*), the following clause shall be inserted namely:—

(g) in a case falling under clause (h) of section 433, by the Central Government or a State Government;

(*iii*) in sub-section (5), for the word, brackets and letter "*and (f)*", the brackets, letters and word "*(f) and (g)*" shall be substituted.

S. 55. Insertion of new section 439A

After section 439 of the principal Act, the following section shall be inserted, namely:—

"S. 439A. Statement of affairs to be filed on winding up of a company.—(1) Every company shall file with the Tribunal a statement of its affairs alongwith the petition for winding up.

(2) Where a company opposes a petition for its winding up, it shall file with the Tribunal a statement of its affairs.

(3) The statement of affairs referred to in sub-section (1) or sub-section (2) shall be accompanied by—

(a) the last known addresses of all directors and company secretary of such company;

(b) the details of location of assets of the company and their value;

(c) the details of all debtors and creditors with their complete addresses;

(d) the details of workmen and other employees and any amount outstanding to them;

(e) such other details as the Tribunal may direct."

S. 56. Substitution of new sections for sections 440 and 441

For sections 440 and 441 of the principal Act, the following sections shall be substituted, namely:—

"S. 440. Right to present winding up petition where company is being wound up voluntarily.—(1) Where a company is being wound up voluntarily, a petition for its winding up by the Tribunal may be presented by—

(a) any person authorised to do so under section 439; or

(b) the Official Liquidator.

(2) The Tribunal shall not make a winding up order on a petition presented to it under sub-section (1), unless it is satisfied that the voluntary winding up cannot be continued with due regard to the interests of the creditors or contributories or both.

"S. 441. Commencement of winding up by Tribunal.—(1) Where, before the presentation of a petition for the winding up of a company by the Tribunal, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the Tribunal, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the Tribunal shall be deemed to commence at the time of the presentation of the petition for the winding up.".

S. 57. Insertion of new sections 441A, 441B, 441C, 441D, 441E and 441F

After section 441 of the principal Act, the following shall be inserted, namely:—

Levy by way of cess and formation of Rehabilitation and Revival Fund

"S. 441A. Levy and collection of cess on turnover or gross receipts of companies.—(1) There shall be levied and collected, for the purposes of rehabilitation or revival or protection of assets of the sick industrial company, a levy by way of cess at such rate not less than 0.005 per cent. and not more than 0.1 per cent. on the value of annual turnover of every company or its annual gross receipt, whichever is more as the Central Government may, from time to time, specify by notification in the Official Gazette.

(2) Every company shall pay to the Central Government the cess referred to in sub-section (1) within three months from the close of every financial year.

(3) Every company shall furnish, in such form as may be prescribed, to the Central Government and the Tribunal the details of its turnover and gross receipt with payment of cess under sub-section (1)

(4) The Central Government may, by rules made in this behalf, specify the manner in which the cess shall be paid under sub-section (2).

"S. 441B. Crediting proceeds of cess to Consolidated Fund of India.—The proceeds of the cess levied and collected under section 441A shall first be credited to the Consolidated Fund of India and the Central Government may, if Parliament by appropriation made by law in this behalf so provides, pay to the Tribunal, from time to time, out of such proceeds (after deducting the cost of collection), such sums of money as it may think fit for being utilised for the purposes of the Fund.

"S. 441C. Rehabilitation Fund.—(1) There shall be formed for the purposes of rehabilitation or revival or protection of assets of a sick industrial company, a Fund to be called the Rehabilitation and Revival Fund.

(2) There shall be credited to the Fund—

(a) all amounts paid under section 441B;

(b) any amount given as grants by the Central Government for the purposes of this Fund;

(c) any amount given to the Fund from any other source;

(d) any income from investment of the amount in the Fund.

(e) amount refunded by the company under section 441G.

"S. 441D. Application of Fund.—The Fund shall be applied by the Tribunal for the purpose of—

(a) making interim payment of workmen's dues pending the revival or rehabilitation of the sick industrial company; or

(b) payment of workmen's dues due to the workmen, referred to in sub-section (3) of section 529, of the sick industrial company, or

(c) protection of assets of sick industrial company; or

(d) revival or rehabilitation of sick industrial company;

which in the opinion of the Tribunal are necessary or expedient for the said purposes.

"S. 441E. Power to call for information.—The Central Government or Tribunal may require any company to furnish for the purposes of rehabilitation or revival or protection of assets of sick industrial companies, such statistical and other information in such form and within such period as may be prescribed.

"S. 441F. Penalty for non-payment of cess.—(1) If any cess payable by a company under section 441A is not paid in accordance with the provisions of that section, it shall be deemed to be in arrears and the same shall be recovered by the Tribunal in such manner as may be prescribed.

(2) The Tribunal may, after such inquiry as it deems fit, impose on the company, which is in arrears under sub-section (1), a penalty not exceeding ten times the amount in arrears:

Provided that before imposing such penalty, such company shall be given a reasonable opportunity of being heard, and if, after such hearing, the Tribunal is satisfied that the default was for any good and sufficient reason, no penalty shall be imposed under this sub-section."

"S. 441G. Refund of fund in certain cases.—(1) Where the fund has been applied by the Tribunal for any of the purposes specified in clauses (a) to (d) of section 441D, such amount of fund shall be recovered from the company after its revival or rehabilitation or out of sale proceeds of its assets after discharging the statutory liabilities and payment of dues to creditors.

(2) The amount referred to in sub-section (1) shall be recovered in the manner as the Tribunal may direct."

S. 58. Amendment of heading before section 442

In the heading before section 442, for the word "*Court*", the word "*Tribunal*" shall be substituted.

S. 59. Omission of section 442

Section 442 of the principal Act shall be omitted.

S. 60. Substitution of new sections for sections 443 and 444

For sections 443 and 444 of the principal Act, the following sections shall be substituted, namely:—

*"S. 443. **Power of Tribunal on hearing petition.**—(1) On hearing a winding up petition, the Tribunal may—*

(a) dismiss it, with or without costs; or

(b) adjourn the hearing conditionally or unconditionally; or

(c) make any interim order that it thinks fit; or

(d) make an order for winding up the company with or without costs, or any other order that it thinks fit:

Provided that the Tribunal shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where the petition is presented on the ground that it is just and equitable that the company should be wound up, the Tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

(3) Where the petition is presented on the ground of default in delivering the statutory report to the Registrar, or in holding the statutory meeting, the Tribunal may—

(a) instead of making a winding up order, direct that the statutory report shall be delivered or that a meeting shall be held; and

(b) order the costs to be paid by any persons who, in the opinion of the Tribunal, are responsible for the default.

*"S. 444. **Order for winding up to be communicated to Official Liquidator and Registrar.**—Where the Tribunal makes an order for the winding up of the company, the Tribunal shall within a period not exceeding two weeks from the date of passing of the order, cause intimation thereof to be sent to the Official Liquidator and the Registrar.".*

S. 61. Amendment of section 446

In section 446 of the principal Act,—

(*a*) in sub-section (*1*), for the word "*Court*" at both the places where it occurs, the word "*Tribunal*" shall be substituted;

(*b*) in sub-section (2), for the words "*The court which is winding up the company*", the words "*The Tribunal*" shall be substituted;

(*c*) sub-section (*3*) shall be omitted.

S. 62. Insertion of new section 446A

After section 446, the following section shall be inserted, namely:—

*"S. 446A. **Responsibility of directors and officers to submit to Tribunal audited books and accounts.**—The directors and other officers of every company shall ensure that books of account of the company are completed and audited up to date of winding up order made by the Tribunal and submitted to it at the cost of the company, failing which such directors and officers shall be liable for punishment for a term not exceeding one year and fine for an amount not exceeding one lakh rupees.".*

S. 63. Substitution of new section for section 448

For section 448 of the principal Act, the following section shall be substituted, namely:—

"S. 448. Appointment of Official Liquidator.—(1) For the purposes of this Act, so far as it relates to the winding up of a company by the Tribunal, there shall be an Official Liquidator who—

(a) may be appointed from a panel of professional firms of chartered accountants, advocates, company secretaries, costs and works accountants or firms having a combination of these profession, which the Central Government shall constitute for the Tribunal; or

(b) may be a body corporate consisting of such professionals as may be approved by the Central Government from time to time; or

(c) may be a whole-time or a part-time officer appointed by the Central Government:

Provided that, before appointing the Official Liquidator, the Tribunal may give due regard to the views or opinion of the secured creditors and workmen.

(2) The terms and conditions for the appointment of the Official Liquidator and the remuneration payable to him shall be:—

(a) approved by the Tribunal for those appointed under clauses (a) and (b) of sub-section (1), subject to a maximum remuneration of five per cent. of the value of debt recovered and realisation of sale of assets;

(b) approved by the Central Government for those appointed under clause (c) of sub-section (1) in accordance with the rules made by it in this behalf.

(3) Where the Official Liquidator is an officer appointed by the Central Government under clause (c) of sub-section (1), the Central Government may also appoint, if considered necessary, one or more Deputy Official Liquidators or Assistant Official Liquidators to assist the Official Liquidator in the discharge of his functions, and the terms and conditions for the appointment of such Official Liquidators and the remuneration payable to them shall also be in accordance with the rules made by the Central Government.

(4) All references to the "Official Liquidator" in this Act shall be construed as reference to the Official Liquidator specified in sub-section (1), or to the Deputy Official Liquidator or Assistant Official Liquidator referred to in sub-section (3), as the case may be.

(5) The amount of the remuneration payable shall—

(a) form part of the winding up order made by the Tribunal;

(b) be treated as first charge on the realisation of the assets and be paid to the Official Liquidator or to the Central Government, as the case may be.

(6) The Official Liquidator shall conduct proceedings in the winding up of a company and perform such duties in reference thereto as the Tribunal may specify in this behalf:

Provided that the Tribunal may—

(a) *transfer the work assigned from one Official Liquidator to another Official Liquidator for the reasons to be recorded in writing;*

(b) *remove the Official Liquidator on sufficient cause being shown;*

(c) *proceed against the Official Liquidator for professional misconduct.'.*

S. 64. Amendment of section 450

In section 450 of the principal Act, for the word "*Court*" wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 65. Amendment of section 451

In section 451 of the principal Act,—

(a) in sub-section (*1*), for the word "*Court*", the word "*Tribunal*" shall be substituted;

(b) in sub-section (2), for the words "*Official Liquidator*", the words, brackets, letter and figures "*the Official Liquidator referred to in clause (c) of sub-section (1) of section 448*" shall be substituted.

S. 66. Amendment of sections 453 to 456

In sections 453 to 456 of the principal Act, for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 67. Amendment of section 457

In section 457 of the principal Act,—

(a) for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted:

(b) in sub-section (*1*), after clause (c), the following clause shall be inserted, namely:—

'(*ca*) *to sell whole of the undertaking of the company as a going concern;*';

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

"*(2A) The liquidator shall—*

(a) appoint security guards to protect the property of the company taken into his custody and to make out an inventory of the assets in consultation with secured creditors after giving them notice;

(b) appoint, as the case may be, valuer, chartered surveyors or chartered accountant to assess the value of company's assets within fifteen days after taking into custody of property, assets referred to in sub-clause (a) and effects or actionable claims subject to such terms and conditions as may be specified by the Tribunal;

(c) give an advertisement, inviting bids for sale of the assets of the company, within fifteen days from the date of receiving valuation report from the valuer, chartered surveyors or chartered accountants referred to in clause (b), as the case may be.

(2B) The liquidator shall, immediately after the order for winding up or appointing the liquidator as provisional Liquidator is made, issue a notice requiring any of the persons mentioned in sub-section (2) of section 454, to submit and verify a statement of the affairs of the company and such notice shall be served by the liquidator.

(2C) The liquidator may apply to the Tribunal for an order directing any person who, in his opinion, is competent to furnish a statement of the affairs under section 439A and 454 and such person shall for the said purpose be served a notice by the liquidator in the manner as may be prescribed.

(2D) The liquidator may, from time to time, call any person for recording any statement for the purpose of investigating the affairs of the company which is being wound up and it shall be the duty of every such person to attend to the liquidator at such time and place as the liquidator may appoint and give the liquidator all information which he may require and answer all such questions relating to winding up of company as may be put to him by the liquidator.

(2E) Every bidder shall, in response to advertisement referred to in clause (c) of sub-section (2A), deposit, his offer in the manner as may be prescribed, with liquidator or provisional liquidator, as the case may be, within forty-five days from the date of the advertisement and the liquidator or provisional liquidator shall permit inspection of property and assets in respect of which bids were invited:

Provided that such bid may be withdrawn within three days before the last day of closing of the bid:

Provided further that the inspection of property shall be open for not more than five days before closing of the bid.

(2F) The advertisement inviting bids shall contain the following details, namely:—

(a) name, address of registered office of the company and its branch offices, factories and plants and the place where assets of the company are kept and available for sale;

(b) last date for submitting bids which shall not exceed ninety days from the date of advertisement;

(c) time during which the premises of the company shall remain open for inspection;

(d) the last date for withdrawing the bid;

(e) financial guarantee which shall not be less than one-half of the value of the bid;

(f) validity period of the bids;

(g) place and date of opening of the bids in public;

(h) reserve price and earnest money to be deposited along with the bid;

(i) any other terms and conditions of sale which may be prescribed.

(2G) The liquidator appointed shall—

(a) maintain a separate bank account for each company under his charge for depositing the sale proceeds of the assets and recovery of debts of each company;

(b) maintain proper books of account in respect of all receipts and payments made by him in respect of each company and submit half yearly return of receipts and payments to the Tribunal.".

S. 68. Amendment of sections 458 and 458A

In sections 458 and 458A of the principal Act, for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 69. Substitution of new section for section 459

For section 459 of the principal Act, the following section shall be substituted, namely:—

"S. 459. Provision for legal assistance to liquidator.—The liquidator may, with the sanction of the Tribunal, appoint one or more chartered accountants or company secretaries or cost accountants or legal practitioners entitled to appear before the Tribunal under section 10GD to assist him in the performance of his duties.".

S. 70. Amendment of sections 460 to 465

In sections 460 to 465 of the principal Act, for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 71. Amendment of heading before section 466

In the heading before section 466 of the principal Act, for the word "*Court*", the word "*Tribunal*" shall be substituted.

S. 72. Substitution of new section for section 466

For section 466 of the principal Act, the following section shall be substituted, namely:—

"S. 466. Power of Tribunal to stay winding up.—(1) The Tribunal may at any time after making a winding up order, on the application either of the Official Liquidator or of any creditor or contributory, and on proof to the satisfaction of the Tribunal that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Tribunal thinks fit.

(2) On any application under this section, the Tribunal may, before making an order, require the Official Liquidator to furnish to the Tribunal a report with respect to any facts or matters which are in his opinion relevant to the application.

(3) A copy of every order made under this section shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the Registrar, who shall make a minute of the order in his books relating to the company.".

S. 73. Amendment of sections 467 to 469

In sections 467 to 469 of the principal Act, for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 74. Substitution of new section for section 470

For section 470 of the principal Act, the following section shall be substituted, namely:—

"S. 470. Power of Tribunal to make calls.—(1) The Tribunal may, at any time after making winding up order, and either before or after it has ascertained the sufficiency of the assets of the company,—

(a) make calls on all or any of the contributories for the time being on the list of the contributories, to the extent of their liability, for payment of any money which the Tribunal considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves; and

(b) make an order for payment of any calls so made.

(2) In making a call, the Tribunal may take into consideration the probability that some of the contributories may, partly or wholly, fail to pay the call.".

S. 75. Amendment of section 471

In section 471 of the principal Act, for the word "*Court*" at both the places where it occurs, the word "*Tribunal*" shall be substituted.

S. 76. Substitution of new section for section 472

For section 472 of the principal Act, the following section shall be substituted, namely:—

"S. 472. Moneys and securities paid into bank to be subject to order of Tribunal.—All moneys, bills, hundis, notes and other securities paid or delivered into the Reserve Bank of India in the course of the winding up of a company by the Tribunal, shall be subject in all respect to the orders of the Tribunal.".

S. 77. Amendment of sections 473 to 477

In sections 473 to 477 of the principal Act, for the word "*Court*" wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 78. Amendment of section 478

In section 478 of the principal Act,—

(*a*) for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted;

(*b*) in sub-section (*3*) and clause (*b*) of sub-section (*6*), for the words "*advocate, attorney or pleader entitled to appear before the Court*", the words, figures and letters "*chartered accountants or company secretaries or cost accountants or legal practitioners entitled to appear before the Tribunal under section 10GD*" shall be substituted;

(*c*) for sub-section (*10*), the following sub-section shall be substituted, namely:—

"(10) An examination under this section may, if the Tribunal so directs, be held before any person or authority authorised by the Tribunal.";

(*d*) in sub-section (*11*), for the words "*exercised by the Judge or officer*", the words "*exercised by the person or authority*" shall be substituted.

S. 79. Amendment of section 479

In section 479 of the principal Act, for the word "*Court*" wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 80. Substitution of new section for section 480

For section 480 of the principal Act, the following section shall be substituted, namely:—

"*S. 480. Saving of existing powers of Tribunal.—Any powers conferred on the Tribunal by this Act shall be in addition to, and not in derogation of, any existing powers instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums.*".

S. 81. Amendment of section 481

In section 481 of the principal Act, for the word "*Court*" at both the places where it occurs, the word "*Tribunal*" shall be substituted.

S. 82. Amendment of section 483

In section 483 of the principal Act, for the words "*any order made, or decision given*", the words, brackets and figures "*any order made or decision given before the commencement of the Companies (Amendment) Act, 2002*" shall be substituted.

S. 83. Amendment of sections 490 and 492

In sections 490 and 492 of the principal Act, for the word "*Court,*", wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 84. Amendment of section 494

In section 494 of the principal Act, in sub-section (5),—

(*a*) for the words "*or subject to the supervision of the Court*", the words "*the Tribunal*" shall be substituted;

(*b*) for the words "*sanctioned by the Court*" the words "*sanctioned by the Tribunal*" shall be substituted.

S. 85. Amendment of section 497

In section 497 of the principal Act,—

(*a*) for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted;

(*b*) for the words "*Official Liquidator*", wherever they occur, the words, brackets, letter and figures "*Official Liquidator referred to in clause (c) of sub-section (1) of section 448*" shall be substituted.

S. 86. Amendment of sections 502 to 504, 506 and 507

In sections 502 to 504, 506 and 507 of the principal Act, for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 87. Amendment of section 509

In section 509 of the principal Act,—

(*a*) for the words "*Official Liquidator*" wherever it occurs, the words, brackets, letter and figures "*Official Liquidator referred to in clause (c) of sub-section (1) of section 448*" shall be substituted;

(*b*) for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 88. Amendment of sections 511A and 512

In sections 511A and 512 of the principal Act, for the word "*Court*" wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 89. Amendment of section 513

In section 513 of the principal Act, after sub-section (3), the following proviso shall be inserted, namely:—

"Provided that, notwithstanding anything contained in any other law for the time being in force a body corporate consisting of such professionals as may be approved by the Central Government from time to time, shall be qualified for appointment as Official Liquidator under section 448".

S. 90. Substitution of new section for section 515

For section 515 of the principal Act, the following section shall be substituted, namely:—

"S. 515. Power of Tribunal to appoint and remove liquidator in voluntary winding up.—(1) If from any cause whatever, there is no liquidator acting, the Tribunal may appoint the Official Liquidator or any other person as a liquidator.

(2) The Tribunal may, on cause shown, remove a liquidator and appoint the Official Liquidator or any other person as a liquidator in place of the removed liquidator.

(3) The Tribunal may also appoint or remove a liquidator on the application made by the Registrar in this behalf.

(4) If the Official Liquidator is appointed as liquidator under the proviso to sub-section (2) of section 502 or under this section, the remuneration to be paid to him shall be fixed by the Tribunal and shall be credited to the Central Government.".

S. 91. Amendment of section 517

In section 517 of the principal Act, for the word "*Court*", at both the places where it occurs, the word "*Tribunal*" shall be substituted.

S. 92. Substitution of new sections for sections 518 and 519

For sections 518 and 519, of the principal Act, the following sections shall be substituted, namely:—

"S. 518. Power to apply to Tribunal to have questions determined or powers exercised.—(1) The liquidator or any contributory or creditor may apply to the Tribunal,—

(a) to determine any question arising in the winding up of a company; or

(b) to exercise, as respects the enforcing of calls, the staying of proceedings or any other matter, all or any of the powers which the Tribunal might exercise if the company were being wound up by the Tribunal.

(2) The liquidator or any creditor or contributory may apply to the Tribunal for an order setting aside any attachment, distress or execution put into force against the estate or effects of the company after the commencement of the winding up.

(3) The Tribunal, if satisfied on an application under sub-section (1) or sub-section (2) that the determination of the question or the required exercise of power or the order applied for will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the applications as it thinks just.

(4) A copy of an order staying the proceedings in the winding up, made by virtue of this section, shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the Registrar, who shall make a minute of the order in his books relating to the company.

*"**S. 519. Application of liquidator to Tribunal for public examination of promoters, directors, etc.**—(1) The liquidator may make a report to the Tribunal stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any officer of the company in relation to the company since its formation; and the Tribunal may, after considering the report, direct that that person or officer shall attend before the Tribunal on a day appointed by it for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as officer thereof.*

(2) The provisions of sub-sections (2) to (11) of section 478 shall apply in relation to any examination directed under sub-section (1) as they apply in relation to an examination directed under sub-section (1) of section 478 with references to the liquidator being substituted for references to the Official Liquidator in those provisions.".

S. 93. Omission of sections 522 to 527

Sections 522 to 527 of the principal Act shall be omitted.

S. 94. Amendment of sections 531 and 531A

In sections 531 and 531A of the principal Act, for the words "*or subject to the supervision of the Court*", the words "*the Tribunal*" shall be substituted.

S. 95. Amendment of sections 533 and 535

In sections 533 and 535 of the principal Act, for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 96. Amendment of section 536

In section 536 of the principal Act, in sub-section (2),—

(a) for the words "*or subject to the supervision of the Court*", the words "*the Tribunal*" shall be substituted;

(b) for the words "*unless the Court*", the words "*unless the Tribunal*" shall be substituted.

S. 97. Substitution of new section for section 537

For section 537 of the principal Act, the following section shall be substituted, namely:—

"S. 537. Avoidance of certain attachments, executions, etc., in winding up by Tribunal.—(1) Where any company is being wound up by the Tribunal—

(a) any attachment, distress or execution put in force, without leave of the Tribunal against the estate or effects of the company, after the commencement of the winding up; or

(b) any sale held, without leave of the Tribunal of any of the properties or effects of the company after such commencement,

shall be void.

(2) Nothing in this section applies to any proceedings for the recovery of any tax or impost or any dues payable to the Government.".

S. 98. Amendment of section 538

In section 538 of the principal Act, in sub-section (*1*),—

(*a*) for the words "*or subject to the supervision of the Court*", the words "*the Tribunal*" shall be substituted;

(*b*) for the words "*by the Court*", the words "*by the Tribunal*" shall be substituted.

S. 99. Amendment of sections 540 and 542

In sections 540 and 542 of the principal Act, for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 100. Substitution of new section for section 543

For section 543 of the principal Act, the following section shall be substituted, namely:—

"S. *543. Power of Tribunal to assess damages against delinquent directors, etc.—(1) If in the course of winding up of a company, it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, manager, liquidator or officer of the company—*

(a) has misapplied, or retained, or become liable or accountable for, any money or property of the company; or

(b) has been guilty of any misfeasance or breach of trust in relation to the company,

the Tribunal may, on the application of the Official Liquidator, or the liquidator, or of any creditor or contributory, made within the time specified in that behalf in sub-section (2), examine into the conduct of the person, director, manager, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the Tribunal thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Tribunal thinks just.

(2) An application under sub-section (1) shall be made within five years from the date of the order for winding up, or of the first appointment of the liquidator in the

winding up, or of the misapplication, retainer, misfeasance or breach of trust as the case may be, whichever is longer.

(3) This section shall apply notwithstanding that the matter is one for which the person concerned may be criminally liable.".

S. 101. Amendment of section 544

In section 544 of the principal Act, for the word "*Court*", the word "*Tribunal*" shall be substituted.

S. 102. Amendment of section 545

In section 545 of the principal Act,—

(*a*) in sub-section (*1*), for the words "*or subject to the supervision of Court*", the words "*the Tribunal*" shall be substituted;

(*b*) for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 103. Amendment of section 546

In section 546 of the principal Act,—

(*a*) *in sub-section (1),*—

(*i*) for the words "*sanction of the Court*", the word "*sanction of the Tribunal*" shall be substituted;

(*ii*) for the words "*or subject to the supervision of the Court*", the words "*the Tribunal*" shall be substituted;

(*b*) *in sub-section (1A),*—

(*i*) for the words "*winding up by the Court*", the words "*winding up by the Tribunal*" shall be substituted;

(*ii*) for the words "*sanction of the Court*", the words "*sanction of the Tribunal*" shall be substituted;

(*c*) in sub-sections *(2)* and *(3),* for the word *"Court",* wherever it occurs, the word *"Tribunal"* shall be substituted.

S. 104. Amendment of section 547

In section 547 of the principal Act, in sub-section (*1*), for the words "*or under the supervision of the Court*", the words "*the Tribunal*" shall be substituted.

S. 105. Amendment of section 549

In section 549 of the principal Act, for the words "*or subject to the supervision of Court*", the words "*the Tribunal*" shall be substituted.

S. 106. Amendment of section 550

In section 550 of the principal Act,—

(*i*) in sub-section (*1*), for clause (*a*), the following clause shall be substituted, namely:—

"(*a*) *in the case of winding up by the Tribunal, in such manner as the Tribunal directs*;";

(*ii*) in sub-section (*3*), in clause (*b*), for the words "*appeal to the Court*", the words "*appeal to the Tribunal*" shall be substituted.

S. 107. Amendment of section 551

In section 551 of the principal Act,—

(*a*) in sub-section (*1*), for clause (*a*), the following clause shall be substituted, namely:—

"(*a*) *in the case of a winding up by the Tribunal, in Tribunal; and*";

(*b*) in sub-section (*2*), for the word "*Court*", the word "*Tribunal*" shall be substituted.

S. 108. Amendment of section 553

In section 553 of the principal Act, for the word "*Court*" wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 109. Amendment of section 555

In section 555 of the principal Act,—

(*a*) in sub-sections (*6*) and (*9*), for the words "*or under the supervision of the Court*", the words "*the Tribunal*" shall be substituted;

(*b*) for the word "*Court*" wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 110. Amendment of section 556

In section 556 of the principal Act, for the word "*Court*", at both the places where it occurs, the word "*Tribunal*" shall be substituted.

S. 111. Amendment of heading before section 557

In the heading before section 557 of the principal Act, for the word "*Court*", the word "*Tribunal*" shall be substituted.

S. 112. Amendment of section 557

In section 557 of the principal Act, for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 113. Amendment of section 558

In section 558 of the principal Act,—

(*a*) in sub-section (*1*), in clause (*a*), for the word "*Court*", the words "*Court or the Tribunal*" shall be substituted;

(*b*) in sub-section (*2*),—

(*i*) for the words "*All Courts*", the words "*All Courts, Tribunals*" shall be substituted;

(*ii*) for the words "*such Court*", the words "*such Court, Tribunal*" shall be substituted.

S. 114. Amendment of sections 559, 560, 581 and 582

In sections, 559, 560, 581 and 582 of the principal Act, for the word "*Court*" wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 115. Amendment of section 583

In section 583 of the principal Act,—

(*a*) in sub-section (*1*), for the words, brackets and figure "*sub-sections (2)*", the words, brackets and figure "*sub-section (3)*" shall be substituted;

(*b*) sub-section (*2*) shall be omitted;

(*c*) in sub-section (*3*), for the words "*or subject to the supervision of Court*", the words "*by the Tribunal*" shall be substituted;

(*d*) in sub-section (*4*), for the word "*Court*", the word "*Tribunal*" shall be substituted;

(*e*) in sub-section (*5*),—

(*i*) in clauses (*a*) and (*b*), for the word "*Court*", the word "*Tribunal*" shall be substituted;

(*ii*) in clause (*c*), for the words "*order of any Court*", the words "*order of any Court or Tribunal*" shall be substituted;

(*iii*) in clause (*d*), for the words "*satisfaction of the Court*", the words "*satisfaction of the Tribunal*" shall be substituted.

S. 116. Amendment of sections 587 to 589

In sections 587 to 589 of the principal Act, for the word "*Court*", wherever it occurs, the word "*Tribunal*" shall be substituted.

S. 117. Amendment of section 610

In section 610 of the principal Act, in sub-section (*2*), for the words "*Company Law Board*", wherever they occur, the word "*Tribunal*" shall be substituted.

S. 118. Amendment of section 614

In section 614 of the principal Act, in sub-section (*1*), for the words "*Company Law Board*", the word "*Tribunal*" shall be substituted.

S. 119. Amendment of section 621

In section 621 of the principal Act, in sub-section (*1*), the brackets, words and figures "*(other than an offence with respect to which proceedings are instituted under section 545)*" shall be omitted.

S. 120. Substitution of new section for section 621A

For section 621A of the principal Act, the following section shall be substituted, namely:—

"*S. 621A. Composition of certain offences.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence punishable under this Act (whether committed by a company or any officer thereof) not being an*

offence punishable with imprisonment only, or with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded by the Central Government on payment or credit, by the company or the officer, as the case may be, to the Central Government of such sum as that the Government may prescribe:

Provided that the sum prescribed shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded:

Provided further that in prescribing the sum required to be paid or credited for the compounding of an offence under this sub-section, the sum, if any, paid by way of additional fee under sub-section (2) of section 611 shall be taken into account.

(2) Nothing in sub-section (1) shall apply to an offence committed by a company or its officer within a period of three years from the date on which a similar offence committed by it or him was compounded under this section.

Explanation.—For the purposes of this section, any second or subsequent offence committed after the expiry of a period of three years from the date on which the offence was previously compounded, shall be deemed to be a first offence.

(3)(a) Every application for the compounding of an offence shall be made to the Registrar who shall forward the same, together with his comments thereon to the Central Government.

(b) Where any offence is compounded under this section, whether before or after the institution of any prosecution, an intimation thereof shall be given by the company to the Registrar within seven days from the date on which the offence is so compounded.

(c) Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, either by the Registrar or by any shareholder of the company or by any person authorised by the Central Government against the offender in relation to whom the offence is so compounded.

(d) Where the composition of any offence is made after the institution of any prosecution, such composition shall be brought by the Registrar in writing, to the notice of the Court in which the prosecution is pending and on such notice of the composition of the offence being given, the company or its officer in relation to whom the offence is so compounded shall be discharged.

(4) The Central Government while dealing with a proposal for the compounding of an offence for a default in compliance with any provision of this Act which requires a company or its officer to file or register with, or deliver or send to, the Registrar any return, account or other document, may, direct, by order, if it or he thinks fit to do so, any officer or other employee of the company to file or register with, or on payment of the fee, and the additional fee, required to be paid under section 611, such return, account or other document within such time as may be specified in the order.

(5) Any officer or other employee of the company who fails to comply with any order made by the Central Government under sub-section (4) shall be punishable with imprisonment for a term which may extend to six months or with fine not exceeding (fifty thousand rupees) or with both.

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973,—

(a) any offence which is punishable under this Act with imprisonment or with fine, or with both, shall be compoundable with the permission of the Court,

in accordance with the procedure laid down in that Act for compounding of offences;

(b) any offence which is punishable under this Act (2 of 1974) with imprisonment only or with imprisonment and also with fine shall not be compoundable.

(7) No offence specified in this section shall be compounded except under and in accordance with the provisions of this section.

S. 121. Amendment of section 626

In section 626 of the principal Act, for the word "*Court*", the words "*Court or Tribunal*" shall be substituted.

S. 122. Amendment of section 627

In section 627 of the principal Act,—

(*a*) in sub-section (*1*), after the words "*a Judge of a High Court in Chambers*", the words "*or Tribunal, as the case may be*" shall be inserted;

(*b*) in sub-section (*3*), after the words "*Judge of the High Court*", the words "*or Tribunal, as the case may be*" shall be inserted.

S. 123. Amendment of section 632

In section 632 of the principal Act, for the word "*Court*", the words "*Court or Tribunal*" shall be substituted.

S. 124. Amendment of section 634A

In section 634A of the principal Act, the following proviso shall be inserted, namely:—

"*Provided that the provisions of this section shall not apply on and after the commencement of the Companies (Second Amendment) Act, 2002 (11 of 2003).*"

S. 125. Amendment of section 635

In section 635 of the principal Act, in sub-section (*4*), for the words "*Company Law Board*", the words "*Company Law Board or Tribunal*" shall be substituted.

S. 126. Amendment of section 635B

In section 635B of the principal Act,—

(*a*) for the words "*Company Law Board*" wherever they occur, the word "*Tribunal*" shall be substituted;

(*b*) for the word "*Court*" at both the places where it occurs, the words "*Appellate Tribunal*" shall be substituted.

S. 127. Substitution of new section for section 637A

For section 637A of the principal Act, the following section shall be substituted, namely:—

"*S. 637A. Power of Central Government or Tribunal to accord approval, etc., subject to conditions and to prescribe fees on applications.—(1) Where the Central Government or Tribunal is required or authorised by any provision of this Act,—*

(a) to accord approval, sanction, consent, confirmation or recognition to or in relation to, any matter; or

(b) to give any direction in relation to any matter; or

(c) to grant any exemption in relation to any matter,

then, in the absence of anything to the contrary contained in such or any other provision of this Act, the Central Government or Tribunal may accord, give or grant such approval, sanction, consent, confirmation, recognition, direction or exemption, subject to such conditions, limitations or restrictions as it may think fit to impose and may, in the case of contravention of any such condition, limitation or restriction, rescind or withdraw such approval, sanction, consent, confirmation, recognition, direction or exemption.

(2) Save as otherwise expressly provided in this Act, every application which may be, or is required to be, made to the Central Government or Tribunal under any provision of this Act—

(a) in respect of any approval, sanction, consent, confirmation or recognition to be accorded by that Government or Tribunal to, or in relation to, any matter; or

(b) in respect of any direction or exemption to be given or granted by that Government or Tribunal in relation to any matter; or

(c) in respect of any other matter,

shall be accompanied by such fee as may be prescribed:

Provided that different fees may be prescribed for applications in respect of different matters or in case of applications by companies, for applications by different classes of companies.".

S. 128. Amendment of heading before section 640A

In the heading before section 640A of the principal Act, for the words "*Court or the Company Law Board*", the words "*Court or the Tribunal*" shall be substituted.

S. 129. Substitution of new section for section 640A

For section 640A of the principal Act, the following section shall be substituted, namely:—

*"S. 640A. **Exclusion of time required in obtaining copies of order of Court or Tribunal.**—Except as expressly provided in this behalf elsewhere in this Act, where by any provision of this Act, any order of the Court or Tribunal is required to be filed with the Registrar, or a company or any other person within a period specified therein, then, in computing that period, the time taken in drawing up the order and in obtaining a copy thereof shall be excluded.".*

S. 130. Substitution of new section for section 643

For section 643 of the principal Act the following section shall be substituted, namely:—

*S. 643. **"Powers of Central Government to make rules relating to winding up.**— (1) The Central Government shall, make rules consistent with the Code of Civil Procedure, 1908 (5 of 1908), providing for all matters relating to the winding up of*

companies, which by this Act, are to be prescribed, and may make rules providing for all such matters as may be prescribed.

(2) In particular, and without prejudice to the generality of the forgoing power, such rule may provide for all or any of the following matters, namely:—

(i) as to the mode of proceedings to be held for winding up a company by the Tribunal;

(ii) for the voluntary winding up of companies, whether by members or by creditors;

(iii) for the holding of meetings of creditors and members in connection with proceedings under section 391;

(iv) for giving effect to the provisions this Act as to the reduction of the capital;

(v) generally for all applications to be made to the Tribunal under the provisions of this Act; and

(vi) the holding and conducting of meetings to ascertain the wishes of creditors and contributories;

(vii) the settling of lists of contributories and the rectifying of the register of members where required and collecting and applying the assets;

(viii) the payment, delivery, conveyance, surrender or transfer of money, property, books or papers to the liquidator;

(ix) the making of calls; and

(x) the fixing of a time within which debts and claims shall be proved.

(3) All rules made by the Supreme Court on the matters referred to in this section as it stood immediately before the commencement of the Companies (Second Amendment) Act, 2002 (11 of 2003), and in force at such commencement, shall continue to be in force, in so far as they are not inconsistent with the provisions of this Act, till such time the rules are made by the Central Government and any reference to the High Court in relation to winding up of a company in such rules shall be construed as a reference to the Tribunal.".

S. 131. Insertion of new section 647A

After section 647 of the principal Act, the following section shall be inserted, namely:—

"S. 647A. *Transfer of winding up proceedings to Tribunal.*—All proceedings (including proceedings relating to arbitration, compromises, arrangements and reconstruction and winding up of a company) pending before the commencement of the Companies (Second Amendment) Act, 2002 (11 of 2003) before any District Court or High Court, under this Act, or the Insurance Act, 1938 (4 of 1938) or any other law for the time being in force other than under the Banking Regulation Act, 1949 (10 of 1949), shall be transferred to the Tribunal from the date to be notified by the Central Government, in the Official Gazette, and the Tribunal may proceed with the matter either de novo or from the stage it was so transferred:

Provided that where the winding up of a company has commenced, subject to the supervision of the District Court or a High Court, before the commencement of the Companies (Second Amendment) Act, 2002 (11 of 2003), such winding up shall continue to be under the supervision of the District Court or the High Court, as the case may be, and the company shall be wound up in the same manner and in the same incidents as if the Companies (Second Amendment) Act, 2002 (11 of 2003) had not been passed".

S. 132. Amendment of Schedule XI to Companies Act, 1956

In Schedule XI to the principal Act, for the words "*Company Law Board*" wherever they occur, the word "*Tribunal*" shall be substituted.

S. 133. Amendment of other enactment

The enactment specified in the Schedule to this Act shall be amended in the manner specified therein.

S. 134. Insertion of new section 651A

After section 651 of the principal Act, the following section shall be inserted, namely:—

"***S. 651A. Reference of winding up of companies in other laws.***—*Unless the context otherwise requires,—*

(a) any reference to the winding up of a company by a Court or High Court or winding up of a company subject to supervision of a Court or High Court in any law (except the Banking Regulation Act, 1949 (10 of 1949)), shall, in so far as it relates to winding up of a company, be construed as winding up of a company by the Tribunal in accordance with the provisions of this Act;

(b) any reference to the Company Law Board in any law, so far as it relates to the Company Law Board, shall be construed as the Tribunal under this Act.

THE SCHEDULE

(*See* section 121)

AMENDMENTS TO THE INSURANCE ACT, 1938

(4 of 1938)

1. Section 2,—

(*a*) in clause (*8*), for "*the Indian Companies Act, 1913*" (7 of 1913), substitute "*the Companies Act, 1956*" (1 of 1956);

(*b*) after clause (*13B*), insert the following:—

'*(13BA) "National Company Law Tribunal" means the National Company Law Tribunal constituted under section 10FB of the Companies Act, 1956 (1 of 1956);*

(13BB) "the National Company Law Appellate Tribunal" means the National Company Law Appellate Tribunal constituted under sub-section (1) of section 10FR of the Companies Act, 1956 (1 of 1956);'

2. Section 53,—

(*a*) for sub-section (*1*), substitute the following, namely:—

"*(1) The Tribunal may order the winding up in accordance with the Companies Act, 1956 (1 of 1956) of any insurance company and the provisions of that Act shall, subject to the provisions of this Act, apply accordingly.*";

(*b*) in sub-section (2), for "*Court*" wherever it occurs, substitute "*Tribunal*".

3. Section 54, for "*Indian Companies Act, 1913*" (7 of 1913), substitute "*Companies Act, 1956*" (1 of 1956).

4. Section 55,—

(*a*) for "*Court*", wherever it occurs, substitute "*Tribunal*";

(*b*) in sub-section (*3*), for "*section 246 of the Indian Companies Act, 1913*" (7 of 1913), substitute "*section 643 of the Companies Act, 1956*" (1 of 1956).

5. Section 56, in sub-section (*2*), in the proviso, in clause (*a*), for "*Court*" at both the places where it occurs, substitute "*Tribunal*".

6. Section 57,—

(*a*) in sub-section (*1*), omit "*or under the supervision of the Court*";

(*b*) for "*Court*" wherever it occurs, substitute "*Tribunal*".

7. Sections 58, 59, 60 and 61, for "*Court*" wherever it occurs, substitute "*Tribunal*".

8. After section 61, insert the following:—

"*S. 61A. Appeal to National Company Law Appellate Tribunal.—(1) Any person aggrieved by an order or decision of the Tribunal may prefer an appeal to the National Company Law Appellate Tribunal.*

(2) No appeal shall lie to the National Company Law Appellate Tribunal from an order made by the Tribunal with the consent of parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order or decision made by the Tribunal is received by the appellant and it shall be in such form and accompanied by such fee as may be prescribed:

Provided that the National Company Law Appellate Tribunal may entertain an appeal after the expiry of said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under sub-section (1), the National Company Law Appellate Tribunal shall, after giving parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The National Company Law Appellate Tribunal shall send a copy of every order made by it to the Tribunal and parties to the appeal.

(6) The appeal filed before the National Company Law Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of the receipt of the appeal.".

9. In section 110, in sub-section (*1*), in clause (*f*), omit "*an insurer or*".

HIGHLIGHTS OF CHANGES MADE BY THE COMPANIES (AMENDMENT) ACT 2002 (1 OF 2003) & THE COMPANIES (SECOND AMENDMENT) ACT, 2002 (11 OF 2003)

Section No.	Effect of Changes	Subject Matter
Sec. 2(1B), 2(19AA), 2(19AB), 2(29A), 2(31AA), 2(46AA), 2(46AB), 2(49A)	Addition of Clauses	Definition of Appellate Tribunal, Industrial Company, Industrial Undertaking, net-worth, Operating agency, Sick Industrial Companies, State level Institutions & National Company Law Tribunal (NCLT)
Sec. 10F	Amendment	Appeal against order of CLB made before the commencement of the Companies Second (Amendment) Act, 2002
Sec. 10FA	Insertion of New Section	Provisions for Dissolution of Company Law Board
Sec. 10FB	Insertion of New Part IB	Provision for National Company Law Tribunal
Sec. 10FC	Insertion of New Part IB	Composition of Tribunal
Sec. 10FD	Insertion of New Part IB	Qualifications for appointment of President and Members
Sec. 10FE	Insertion of New Part IB	Term of office of President and Members
Sec. 10FF	Insertion of New Part IB	Financial and administrative powers of Member Administration
Sec. 10FG	Insertion of New Part IB	Salary, allowances and other terms and conditions of service of President and other Members
Sec. 10FH	Insertion of New Part IB	Vacancy in Tribunal
Sec. 10FI	Insertion of New Part IB	Resignation of President and Member
Sec. 10FJ	Insertion of New Part IB	Removal and suspension of President or Member
Sec. 10FK	Insertion of New Part IB	Officers and employees of Tribunal
Sec. 10FL	Insertion of New Part IB	Benches of Tribunal

Section No.	Effect of Changes	Subject Matter
Sec. 10FM	**Insertion of New Part IB**	Order of Tribunal
Sec. 10FN	**Insertion of New Part IB**	Power to review
Sec. 10FO	**Insertion of New Part IB**	Delegation of powers
Sec. 10FP	**Insertion of New Part IB**	Power to seek assistance of Chief Metropolitan Magistrate and District Magistrate
Sec. 10FQ	**Insertion of New Part IC**	Provision for appeal to Appellate Tribunal
Sec. 10FR	**Insertion of New Part IC**	Constitution of Appellate Tribunal
Sec. 10FS	**Insertion of New Part IC**	Vacancy in Appellate Tribunal etc.
Sec. 10FT	**Insertion of New Part IC**	Term of office of Chairperson and Members
Sec. 10FU	**Insertion of New Part IC**	Resignation of Chairperson and Members
Sec. 10FV	**Insertion of New Part IC**	Removal and suspension of Chairperson and Members of Appellate Tribunal
Sec. 10FW	**Insertion of New Part IC**	Salary, allowances and other terms and conditions of service of Chairperson and Members
Sec. 10FX	**Insertion of New Part IC**	Selection Committee
Sec. 10FY	**Insertion of New Part IC**	Chairperson, etc., to be public servants
Sec. 10FZ	**Insertion of New Part IC**	Protection of action taken in good faith
Sec. 10FZA	**Insertion of New Part IC**	Procedure and powers of Tribunal and Appellate Tribunal
Sec. 10G	**Insertion under New Part IC**	Power of Appellate Tribunal to punish for contempt
Sec. 10GA	**Insertion under New Part IC**	Provision for Staff of Appellate Tribunal
Sec/ 10GB	**Insertion under New Part IC**	Civil Court not to have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered
Sec. 10GC.	**Insertion under New Part IC**	Vacancy in Tribunal or Appellate Tribunal not to invalidate acts or proceedings
Sec. 10GD	**Insertion under New Part IC**	Right to legal representation.

Section No.	Effect of Changes	Subject Matter
Sec. 10GE	Insertion under New Part IC	Applicability of provisions of the Limitation Act, 1963 to an appeal made to the Appellate Tribunal
Sec. 10GF	Insertion under New Part IC	Appeal to the Supreme Court from any order of the Appellate Tribunal
Sec. 17	Substitution from CLB to C. Govt.	Power to confirm alteration of Memorandum of Association for change of place of Registered Office from one State to another;
Sec. 18(4)	Substitution from CLB to C. Govt.	Extension of time for filing the order of shifting of Registered Office
Sec. 19	Substitution from CLB to C. Govt.	Revival of order of shifting of Registered Office
Sec. 43 Proviso	Substitution from CLB to C. Govt.	Consequence of default incomplying with conditions constituting a private company
Sec. 49(10)	Substitution from CLB to C. Govt.	Direction to inspect Register of Investment
Sec. 79	Substitution from CLB to C. Govt.	Power to issue shares at discount
Sec. 102, 104	Substitution from Court to NCLT	Reduction of Share Capital
Sec. 107	Substitution from Court to NCLT	Right of dissentient shareholder to have variation cancelled
Sec. 111	Substitution from CLB to NCLT	Power to refuse registration appeal against refusal
Sec. 111A	Substitution from CLB to NCLT	Rectification of Register of Members on transfer
Sec. 113(1) proviso	Substitution from CLB to C. Govt.	Extension of time for issue of certificate
Sec. 117B(4)	Substitution from CLB to C. Govt.	Debentures trustee to ask for restriction to be imposed on the company
Sec. 117C(4)	Substitution from CLB to NCLT	Redemption of Debentures forthwith by payment of principal and interest
Sec. 118(3)	Substitution from CLB to NCLT	Right to obtain copies of trust deed
Sec. 141	Substitution from CLB to C. Govt.	Rectification of Register of charges
Sec. 144(4)	Substitution from CLB to C. Govt.	Inspection of copies of instruments creating charges and register of charges
Sec. 163(6)	Substitution from CLB to C. Govt.	Inspection of registers and returns
Sec. 167	Substitution from CLB to C. Govt.	Direct the calling of an Annual General Meeting except by Sick Industrial Companies

Section No.	Effect of Changes	Subject Matter
Sec. 168	**Substitution from CLB to NCLT**	Penalty for default in complying with section 166 or 167
Sec. 188(5)	**Substitution from CLB to C. Govt.**	Restriction on circulation of statement with respect to any proposed resolution
Sec. 186	**Substitution from CLB to NCLT**	Calling an Extraordinary General Meeting
Sec. 196(4)	**Substitution from CLB to C. Govt.**	Inspection of Minutes Book
Sec. 203	**Substitution from CLB to NCLT**	Power to restrain persons from managing companies
Sec. 219	**Substitution from CLB to C. Govt.**	Directing copy of balance sheet auditor report to be furnished forthwith
Sec. 225(3) Proviso	**Substitution from CLB to C. Govt.**	Restricting copies of representation of the Auditor to be removed, to be sent out
Sec. 227(3)(g)	**Insertion of New Clause**	Cess payable u/s. 441A whether has been paid and if not, the details of amount of cess not so paid
Sec. 235	**Substitution from CLB to NCLT**	Investigation of the affairs of the companies
Sec. 236	**Substitution from CLB to NCLT**	Application by members to be supported by evidence
Sec. 237(b)	**Substitution from CLB to NCLT**	Investigation of company's affairs in other cases
Sec. 241(2)(dd)	**Substitution from CLB to NCLT**	Inspector's Report
Sec. 243	**Substitution from Court to NCLT**	Application for winding up of a company or an order u/s. 397 or 398
Sec. 247	**Substitution from CLB to NCLT**	Investigation of ownership of company
Sec. 250	**Substitution from CLB to NCLT**	Imposition of restriction on shares and debentures
Sec. 251	**Substitution from CLB to NCLT**	Saving for legal advisers and bankers
Sec. 269)7)	**Substitution from CLB to NCLT**	Reference where appointment made in contravention of the requirements of Schedule XIII.
Sec. 269(8)	**Substitution from CLB to NCLT**	Issue of notice to managing/whole time director/manager to comply with requirement of schedule XIII
Sec. 269(9)	**Substitution from CLB to NCLT**	Order declaring that contravention of the requirements of Schedule XIII has taken place.
Sec. 284(4) proviso	**Substitution from CLB to C. Govt.**	Restricting copies of representation of the director to be removed, to be sent out

Section No.	Effect of Changes	Subject Matter
Sec. 304(2)(b)	Substitution from CLB to NCLT	Inspection of register of directors
Sec. 307(9)	Substitution from CLB to NCLT	Inspection of register of directors' shareholding
Sec. 318(3)(d)	Substitution from Court to NCLT	Compensation of loss of office to managing/whole time director/manager
Sec. 349(4)(p)	Insertion of New Clause	Amount paid access u/s. 441A
Sec. 388B	Substitution from CLB to NCLT	References of cases against managerial personnel
Sec. 388C	Substitution from CLB to NCLT	Interim order in connection with cases u/s. 388B
Sec. 388D	Substitution from CLB to NCLT	Finding in connection with cases u/s. 388B
Sec. 388E	Substitution from CLB to NCLT	Power of C. Govt. to remove managerial personnel on the basis of findings in connection with cases u/s. 388B
Sec. 391	Substitution from Court to NCLT	Power to compromise or make arrangements with creditors and members
Sec. 392	Substitution from Court to NCLT	Power to enforce compromises and arrangements
Sec. 394	Substitution from Court to NCLT	Provisions for facilitating reconstruction and amalgamation of companies
Sec. 394A	Substitution from Court to NCLT	Notice to be given to C. Govt. for application u/s. 391 & 394
Sec. 395	Substitution from Court to NCLT	Power and duties to acquire shares of shareholders dissenting from scheme on contract approved by majority
Sec. 396(3A)	Substitution from CLB to NCLT	Preferring an appeal from assessment of compensation made by prescribed authority
Sec. 397	Substitution from CLB to NCLT	Application for relief in cases of oppression
Sec. 398	Substitution from CLB to NCLT	Application for relief in cases of mismanagement
Sec. 400	Substitution from CLB to NCLT	Notice to be given to C. Govt. of applications u/s. 397, 398
Sec. 401	Substitution from CLB to NCLT	Right of C. Govt. to apply u/s. 397, 398
Sec. 402	Substitution from CLB to NCLT	Power on application u/s. 397, 398
Sec. 403	Substitution from CLB to NCLT	Interim order

Section No.	Effect of Changes	Subject Matter
Sec. 404	**Substitution from CLB to NCLT**	Effect of alteration of memorandum or articles of association of companies by order u/s. 397, 398
Sec. 405	**Substitution from CLB to NCLT**	Addition of respondent to application u/s. 397, 398
Sec. 407	**Substitution from CLB to NCLT**	Consequence of termination or modification of certain agreements
Sec. 408	**Substitution from CLB to NCLT**	Power to prevent oppression of mismanagement
Sec. 409	**Substitution from CLB to NCLT**	Power to prevent change in Board of Directors likely to affect company prejudicially
Sec. 410	**Substitution from CLB to NCLT**	Appointment of Advisory Committee
Sec. 424	**Substitution from Court to NCLT**	Application for sections 421 to 423 to receiver and managers
Sec. 424A	**Insertion of New Part VIA**	Reference by Sick Industrial Company for revival and rehabilitation to NCLT;
Sec. 424B	**Insertion of New Part VIA**	Inquiry into working of Sick Industrial Companies by NCLT;
Sec. 424C	**Insertion of New Part VIA**	Power to make suitable order on completion of inquiry by NCLT;
Sec. 424D	**Insertion of New Part VIA**	Power to sanction the scheme of revival and rehabilitation of Sick Industrial Companies by NCLT;
Sec. 424E	**Insertion of New Part VIA**	Rehabilitation by giving financial assistance by NCLT;
Sec. 424F	**Insertion of New Part VIA**	Arrangement for continuing operations, etc., during inquiry by NCLT;
Sec. 424G	**Insertion of New Part VIA**	Winding up of sick industrial company by NCLT;
Sec. 424H	**Insertion of New Part VIA**	Power to prepare complete inventory through the operating agency by NCLT;
Sec. 424I	**Insertion of New Part VIA**	Directions not to dispose of assets by NCLT;
Sec. 424J	**Insertion of New Part VIA**	Power to call for periodic information by NCLT;
Sec. 424K	**Insertion of New Part VIA**	Power to direct repayment restoration money or property or any part thereof, etc. by way of compensation in respect of the misapplication, retainer, misfesance or breach of trust by NCLT;

Section No.	Effect of Changes	Subject Matter
Sec. 424L	**Insertion of New Part VIA**	Penalty for violation of any provisions of Part VIA or any scheme or any order of Tribunal or Appellate Tribunal.
Sec. 425	**Substitution from Court to NCLT and Omission of Clause (c)**	Modes of winding up Winding up subject to supervision of Court
Sec. 426	**Substitution from Court to NCLT**	Liability as contributories of present and past members
Sec. 427	**Substitution from Court to NCLT**	Obligations of directors and managers who's liability is unlimited
Sec. 433	**Substitution from Court to NCLT and insertion of New Clause (g), (h), (i)**	Circumstances in which company may be wound up
Sec. 434(1)(b)	**Substitution from Court to NCLT**	Company when deemed unable to pay its debts
Sec. 435 to 438	**Omitted**	Transfer proceeding of winding up to district court
Sec. 439	**Substitution from Court to NCLT**	Provision as to application for winding up
Sec. 439A	**Insertion of New Section**	Statement of affairs to be filed on winding up of company
Sec. 440	**Substitution from Court to NCLT**	Right to present winding up petition where company is being wound up voluntarily;
Sec. 441	**Substitution from Court to NCLT**	Commencement of winding up;
Sec. 441A	**Insertion of New Section**	Levy and collection of cess on turnover or gross receipts on companies
Sec. 441B	**Insertion of New Section**	Crediting proceeds of cess to Consolidated Fund of India;
Sec. 441C	**Insertion of New Section**	Rehabilitation Fund;
Sec. 441D	**Insertion of New Section**	Application of Fund;
Sec. 441E	**Insertion of New Section**	Power to call for information;
Sec. 441F	**Insertion of New Section**	Penalty for non-payment of cess;
Sec. 441G	**Insertion of New Section**	Refund of fund in certain cases;
Sec. 442	**Omitted**	Power to stay or restrain proceeding against company

Section No.	Effect of Changes	Subject Matter
Sec. 443	**Substitution from Court to NCLT**	Powers on hearing petition;
Sec. 444	**Substitution from Court to NCLT**	Order for winding up;
Sec. 446	**Substitution from Court to NCLT**	Suits stayed on winding up order;
Sec. 446A	**Insertion of New Section**	Responsibility of directors and officers to submit to NCLT Audited Books & Accounts
Sec. 448	**Substitution from Court to NCLT**	Appointment of Official liquidator;
Sec. 450	**Substitution from Court to NCLT**	Appointment & powers of provisional liquidator;
Sec. 451	**Substitution from Court to NCLT**	General provisions as to liquidators;
Sec. 453	**Substitution from Court to NCLT**	Receiver not to be appointed of assets with liquidator;
Sec. 454	**Substitution from Court to NCLT**	Statement of affairs to be made to Official Liquidator;
Sec. 455(2) & (3)	**Substitution from Court to NCLT**	Report by official liquidator
Sec. 456	**Substitution from Court to NCLT**	Custody of company's property;
Sec. 457	**Substitution from Court to NCLT**	Powers of liquidator;
Sec. 458	**Substitution from Court to NCLT**	Discretion of liquidator;
Sec. 458A	**Substitution from Court to NCLT**	Exclusion of certain time in computing periods of limitation;
Sec. 459	**Substitution from Court to NCLT**	Provision for legal assistance to liquidator;
Sec. 460	**Substitution from Court to NCLT**	Exercise & control of liquidator's powers;
Sec. 461	**Substitution from Court to NCLT**	Books to be kept by liquidator;
Sec. 462	**Substitution from Court to NCLT**	Audit of liquidator's accounts;
Sec. 463	**Substitution from Court to NCLT**	Control of CG over liquidators;
Sec. 464	**Substitution from Court to NCLT**	Appointment & composition of committee of inspection;
Sec. 465	**Substitution from Court to NCLT**	Constitution & proceedings of committee of inspection;
Sec. 466	**Substitution from Court to NCLT**	Power to stay winding up;

Section No.	Effect of Changes	Subject Matter
Sec. 467	**Substitution from Court to NCLT**	Settlement of list of contributories & application of assets;
Sec. 468	**Substitution from Court to NCLT**	Delivery of property to liquidator;
Sec. 469	**Substitution from Court to NCLT**	Payment of debts due by contributory & extent of set off;
Sec. 470	**Substitution from Court to NCLT**	Power to make calls;
Sec. 471	**Substitution from Court to NCLT**	Payment into bank of moneys due to company;
Sec. 472	**Substitution from Court to NCLT**	Moneys & securities paid into Bank to be subject to order;
Sec. 473	**Substitution from Court to NCLT**	Order on contributory to be conclusive evidence;
Sec. 474	**Substitution from Court to NCLT**	Power to exclude creditors not proving in time;
Sec. 475	**Substitution from Court to NCLT**	Adjustment of rights of contributories;
Sec. 476	**Substitution from Court to NCLT**	Power to order costs;
Sec. 477	**Substitution from Court to NCLT**	Power to summon persons suspected of having property of company etc.
Sec. 478	**Substitution from Court to NCLT**	Power to order public examination of promoters, directors etc.
Sec. 479	**Substitution from Court to NCLT**	Power to arrest absconding contributory;
Sec. 480	**Substitution from Court to NCLT**	Saving of existing powers;
Sec. 481	**Substitution from Court to NCLT**	Dissolution of company;
Sec. 483	**Amendment**	Any order made or decision given before the commencement of the Companies Amendment Act, 2002
Sec. 490	**Substitution from Court to NCLT**	Power of company to appoint & fix remuneration of liquidators;
Sec. 492	**Substitution from Court to NCLT**	Power to fill vacancy in office of liquidator;
Sec. 494	**Substitution from Court to NCLT**	Power of liquidator to accept shares etc., as consideration for sale of property of company;
Sec. 497	**Substitution from Court to NCLT**	Final meeting and dissolution;
Sec. 502	**Substitution from Court to NCLT**	Appointment of liquidator;

Section No.	Effect of Changes	Subject Matter
Sec. 503	Substitution from Court to NCLT	Appointment of committee of inspection;
Sec. 504	Substitution from Court to NCLT	Fixing of liquidator's remuneration;
Sec. 506	Substitution from Court to NCLT	Power to fill vacancy in office of liquidator;
Sec. 507	Substitution from Court to NCLT	Application of section 494 to a creditors' voluntary winding up;
Sec. 509	Substitution from Court to NCLT	Final meeting & dissolution;
Sec. 511-A	Substitution from Court to NCLT	Application of section 454 to voluntary winding up;
Sec. 512	Substitution from Court to NCLT	Powers and duties of liquidator in voluntary winding up;
Sec. 513(3) Proviso	Inserted proviso	Professional approved by C. Govt. qualified for appointment as official liquidator u/s. 448
Sec. 515	Substitution from Court to NCLT	Power to appoint & remove liquidator in voluntary winding up;
Sec. 517	Substitution from Court to NCLT	Arrangement when binding on company & creditors;
Sec. 518	Substitution from Court to NCLT	Power to apply to have questions determined or powers exercised;
Sec. 519	Substitution from Court to NCLT	Application of liquidator for public examination of promoters, directors, etc.
Sec. 522 to 527	Omitted	Winding up subject to supervision of Court
Sec. 531	Substitution from or subject to the supervision of the Court to NCLT	Fraudulent preference;
Sec. 531-A	Substitution from or subject to the supervision of the Court to NCLT	Avoidance of voluntary transfer;
Sec. 533	Substitution from Court to NCLT	Liabilities & rights of certain fraudulently preferred persons;
Sec. 534	Substitution from Court to NCLT	Effect of floating charge;
Sec. 535	Substitution from Court to NCLT	Disclaimer of onerous property in case of a company which is being wound up;
Sec. 536	Substitution from Court to NCLT	Avoidance of transfers etc., after commencement of winding up;
Sec. 537	Substitution from Court to NCLT	Avoidance of certain attachments, executions, etc., in winding up;

Section No.	Effect of Changes	Subject Matter
Sec. 538	Substitution from Court to NCLT	Offences by officers of companies in liquidation;
Sec. 540	Substitution from Court to NCLT	Penalty for frauds by officers;
Sec. 542	Substitution from Court to NCLT	Liability for fraudulent conduct of business;
Sec. 543	Substitution from Court to NCLT	Power to assess damages against delinquent directors, etc.
Sec. 544	Substitution from Court to NCLT	Liability u/s 542 & 543 to extend to partners or directors in firm or company;
Sec. 545	Substitution from subject to supervision of Court to NCLT	Prosecution of delinquent officers & members of company;
Sec. 546	Substitution from Court to NCLT	Liquidator to exercise certain powers subject to sanction;
Sec. 547	Substitution from Court to NCLT	Notification that a company is in liquidation;
Sec. 549	Substitution from Court to NCLT	Inspection of books & papers by creditors & contributories;
Sec. 550	Substitution from Court to NCLT	Disposal of books & papers of company
Sec. 551	Substitution from Court to NCLT	Information as to pending liquidations;
Sec. 553	Substitution from Court to NCLT	Voluntary liquidator to make payments into Scheduled Bank;
Sec. 555	Substitution from Court to NCLT	Unpaid dividends & undistributed assets to be paid into the Companies Liquidation Account;
Sec. 556	Substitution from Court to NCLT	Enforcement of duty of liquidator to make returns;
Sec. 557	Substitution from Court to NCLT	Meetings to ascertain wishes of creditors or contributories;
Sec. 558	Substitution from Court to NCLT	Before whom affidavit may be sworn;
Sec. 559	Substitution from Court to NCLT	Power to declare dissolution of company void;
Sec. 560(5) proviso (b)	Substitution from Court to NCLT	Power of winding up a company struck off by Registrar;
Sec. 581	Substitution from Court to NCLT	Suits stayed on winding-up order;
Sec. 581A	Insertion of new Part IXA	Definitions of Producer Company
Sec. 581B	Insertion of new Part IXA	Objects of Producer Company

Section No.	Effect of Changes	Subject Matter
Sec. 581C	**Insertion of new Part IXA**	Formation of Producer Company and its registration
Sec. 581D	**Insertion of new Part IXA**	Membership and voting rights of Members of Producer Company
Sec. 581E	**Insertion of new Part IXA**	Benefits to Members of Producer Company
Sec. 581F	**Insertion of new Part IXA**	Memorandum of Producer Company
Sec. 581G	**Insertion of new Part IXA**	Articles of Association
Sec. 581H	**Insertion of new Part IXA**	Amendment of Memorandum
Sec. 581-I	**Insertion of new Part IXA**	Amendment of Articles
Sec. 581J	**Insertion of new Part IXA**	Option to inter-State co-operative societies to become Producer Companies
Sec. 581K	**Insertion of new Part IXA**	Effect of incorporation of Producer Company
Sec. 581L	**Insertion of new Part IXA**	Vesting of undertaking in Producer Company
Sec. 581M	**Insertion of new Part IXA**	Concession, etc., to be deemed to have been granted to Producer Company
Sec. 581N	**Insertion of new Part IXA**	Provisions in respect of officers and other employees of inter-State co-operative society
Sec. 581O	**Insertion of new Part IXA**	Number of directors
Sec. 581P	**Insertion of new Part IXA**	Appointment of directors
Sec. 581Q	**Insertion of new Part IXA**	Vacation of office by directors
Sec. 581R	**Insertion of new Part IXA**	Powers and functions of Board
Sec. 581S	**Insertion of new Part IXA**	Matters to be transacted at general meeting
Sec. 581T	**Insertion of new Part IXA**	Liability of directors
Sec. 581U	**Insertion of new Part IXA**	Committee of directors
Sec. 581V	**Insertion of new Part IXA**	Meetings of Board and quorum
Sec. 581W	**Insertion of new Part IXA**	Chief Executive and his functions
Sec. 581X	**Insertion of new Part IXA**	Secretary of Producer Company

Section No.	Effect of Changes	Subject Matter
Sec. 581Y	Insertion of new Part IXA	Quorum of Producer Company
Sec. 581Z	Insertion of new Part IXA	Voting rights of Producer Company
Sec. 581ZA	Insertion of new Part IXA	Annual General Meetings
Sec. 581ZB	Insertion of new Part IXA	Share capital of Producer Company
Sec. 581ZC	Insertion of new Part IXA	Special user rights
Sec. 581ZD	Insertion of new Part IXA	Transferability of shares and attendant rights
Sec. 581ZE	Insertion of new Part IXA	Books of account
Sec. 581ZF	Insertion of new Part IXA	Internal audit
Sec. 581ZG	Insertion of new Part IXA	Duties of auditor under this Part
Sec. 581ZH	Insertion of new Part IXA	Donations or subscription by Producer Company
Sec. 581ZI	Insertion of new Part IXA	General and other reserves
Sec. 581ZJ	Insertion of new Part IXA	Issue of bonus shares
Sec. 581ZK	Insertion of new Part IXA	Loan, etc., to Members
Sec. 581ZL	Insertion of new Part IXA	Investment in other companies formation of subsidiaries, etc
Sec. 581ZM	Insertion of new Part IXA	Penalty for contravention
Sec. 581ZN	Insertion of new Part IXA	Amalgamation, merger or division, etc., to form new Producer Companies
Sec. 581ZO	Insertion of new Part IXA	Disputes
Sec. 581ZP	Insertion of new Part IXA	Strike off name of Producer Company
Sec. 581ZQ	Insertion of new Part IXA	Provisions of this Part to override other laws
Sec. 581ZR	Insertion of new Part IXA	Application of provisions relating to private companies
Sec. 581ZS	Insertion of new Part IXA	Reconversion of Producer Company to inter-State co-operative society
Sec. 581ZT	Insertion of new Part IXA	Power to modify Act in its application to Producer Companies

Section No.	Effect of Changes	Subject Matter
Sec. 582	**Substitution from Court to NCLT**	Meaning of unregistered company;
Sec. 583	**Substitution from Court to NCLT**	Winding up of unregistered company;
Sec. 587	**Substitution from Court to NCLT**	Suits etc., stayed on winding up order;
Sec. 588	**Substitution from Court to NCLT**	Directions as to property in certain cases;
Sec. 589	**Substitution from Court to NCLT**	Provisions of Part cumulative;
Sec. 610	**Substitution from Court to NCLT**	Inspection, production & evidence of documents kept by Registrar;
Sec. 614	**Substitution from Court to NCLT**	Enforcement of duty of company to make returns, etc., to Registrar.
Sec. 621A	**Substitution from CLB to C. Govt.**	Composition of certain offences
Sec. 626	**Substitution from Court to NCLT**	Application of fines;
Sec. 627(1)	**Insertion of NCLT**	Production and Inspection of books where offence suspected
Sec. 632	**Substitution from Court to NCLT**	Power to require limited company to give security for costs;
Sec. 634A proviso	**Inserted proviso**	Enforcement of orders of CLB not applicable after the commencement of Companies (Second Amendment) Act
Sec. 635	**Substitution from Court to NCLT**	Enforcement of orders (CLB or NCLT)
Sec. 635-B	**Substitution from Court to NCLT**	Protection of employees during investigation by Inspectors or pendency of proceeding in certain cases;
Sec. 637A	**Substitution from CLB to NCLT**	Power to accord approval etc., subject to conditions & to prescribe fees on applications;
Sec. 640-A	**Substitution from CLB to NCLT**	Exclusion of time required in obtaining copies of orders;
Sec. 643	**Substitution from Supreme Court to C. Govt.**	Powers of C. Govt. to make rules relating to winding up
Sec. 647A	**Insertion of New Section**	Transfer of winding up proceeding to Tribunal;
Schedule XI	**Substitution from CLB to NCLT**	Form in which section 539 to 544 are to apply to cases where an application is made u/s 397, 398;
Sec. 651A	**Insertion of New Section**	Reference of winding of companies in other laws;

CHART I

AT A GLANCE
POWERS TRANSFERRED FROM COMPANY LAW BOARD (CLB) TO NATIONAL COMPANY LAW TRIBUNAL(NCLT) THROUGH COMPANIES (SECOND AMENDMENT) ACT, 2002

Section No.	Powers Transferred from CLB to NCLT	Subject Matter
Sec. 58A(9)	CLB → NCLT	To direct the company to make repayment of the matured deposits
Sec. 58AA(1)	CLB → NCLT	Intimation of default made by the company in repayment of small deposits or part thereof or any interest thereupon
Sec. 80A(1) proviso	CLB → NCLT	To give consent to issue of further redeemable preference shares in line of irredeemable preference shares
Sec. 111	CLB → NCLT	Power to refuse registration and appeal against refusal;
Sec. 111A	CLB → NCLT	Rectification of register on transfer;
Sec. 117C(4)	CLB → NCLT	Redemption of debentures forthwith by payment of principal and interest;
Sec. 168	CLB → NCLT	Penalty for default in complying with section 166 or 167(CG or NCLT);
Sec. 186	CLB → NCLT	Calling an extraordinary general meeting;
Sec. 203	CLB → NCLT	Power to restrain persons from managing companies (Court or NCLT);
Sec. 235	CLB → NCLT	Investigation of the affairs of a company;
Sec. 236	CLB → NCLT	Application by members to be supported by evidence;
Sec. 237(b)	CLB → NCLT	Investigation of company's affairs in other cases;
Sec. 241(2)(dd)	CLB → NCLT	Inspectors report;
Sec. 247	CLB → NCLT	Investigation of ownership of company;
Sec. 250	CLB → NCLT	Imposition of restriction on shares & debentures;
Sec. 251	CLB → NCLT	Saving for legal advisers & bankers;
Sec. 269(7)	CLB → NCLT	Reference where appointment of Managing/Whole-time Director made in contravention of the requirements of Schedule XIII.

Section No.	Powers Transferred from CLB to NCLT	Subject Matter
Sec. 269(8)	CLB → NCLT	Issue of notice to managing/whole-time director/manager to comply with the requirements of Schedule XIII;
Sec. 269(9)	CLB → NCLT	Order declaring that contravention of the requirements of Schedule XIII has taken place.
Sec. 304(2)(b)	CLB → NCLT	Inspection of register of directors (CG or NCLT);
Sec. 307(9)	CLB → NCLT	Inspection of register of directors' shareholding (CG or NCLT);
Sec. 388-B	CLB → NCLT	Reference of cases against managerial personnel;
Sec. 388-C	CLB → NCLT	Interim order in connection with cases u/s 388-B;
Sec. 388-D	CLB → NCLT	Findings in connection with cases u/s 388-B;
Sec. 388-E	CLB → NCLT	Power of CG to remove managerial personnel on the basis of findings in connection with cases u/s 388-B;
Sec. 396(3A)	CLB → NCLT	Preferring an appeal from assessment of compensation made by prescribed authority;
Sec. 397	CLB → NCLT	Application for relief in cases of oppression;
Sec. 398	CLB → NCLT	Application for relief in cases of mismanagement;
Sec. 400	CLB → NCLT	Notice to be given to CG of applications u/s 397,398;
Sec. 401	CLB → NCLT	Right of CG to apply u/s 397,398;
Sec. 402	CLB → NCLT	Power on application u/s 397,938;
Sec. 403	CLB → NCLT	Interim order;
Sec. 404	CLB → NCLT	Effect of alteration of memorandum or articles of company by order u/s 397,398
Sec. 405	CLB → NCLT	Addition of respondents to application u/s 397,398;
Sec. 407	CLB → NCLT	Consequences of termination of modification of certain agreements;
Sec. 408	CLB → NCLT	Power of Government to prevent oppression or mismanagement;
Sec. 409	CLB → NCLT	Power to prevent change in Board of Directors likely to affect company prejudicially;
Sec. 410	CLB → NCLT	Appointment of advisory committee;
Sec. 610(2)	CLB → NCLT	Process compelling production of any document kept by Registrar.
Sec. 614(1)	CLB → NCLT	To pass an order directing a company to make good the default from its failure to make returns etc. to the ROC.
Sec. 637A	CLB → NCLT	Power to accord approval etc., subject to conditions & to prescribe fees on applications;
Sec. 640-A	CLB → NCLT	Exclusion of time required in obtaining copies of orders;
Schedule XI	CLB → NCLT	Form in which section 539 to 544 are to apply to cases where an application is made u/s 397, 398;

CHART II

AT A GLANCE
POWERS TRANSFERRED FROM COURT TO NATIONAL COMPANY LAW TRIBUNAL(NCLT) THROUGH COMPANIES (SECOND AMENDMENT) ACT, 2002

Section No.	Powers Transferred from Court to NCLT	Subject Matter
Sec. 75(1)(c)	COURT → NCLT	Filing return of allotment along with copy of order
Sec. 100 to 104	COURT → NCLT	Reduction of share capital;
Sec. 107	COURT → NCLT	Rights of dissentient shareholders to have variation cancelled;
Sec. 203	COURT → NCLT	Power to restrain persons from managing companies (Court or NCLT);
Sec. 243	COURT → NCLT	Application for winding up of a company or an order u/s 397or 398;
Sec. 318(3)(d)	COURT → NCLT	Compensation for loss of office to managing/whole-time director/manager;
Sec. 391	COURT → NCLT	Power to compromise or make arrangements with creditors & members;
Sec. 392	COURT → NCLT	Power to enforce compromises & arrangements;
Sec. 394	COURT → NCLT	Provisions for facilitating reconstruction & amalgamation of companies;
Sec. 394A	COURT → NCLT	Notice to be given to CG for application u/s 391 & 394;
Sec. 395	COURT → NCLT	Power & duty to acquire shares of shareholders dissenting from scheme or contract approved by majority;
Sec. 424	COURT → NCLT	Application of sections 421 to 423 to receivers & managers;
Sec. 425	COURT → NCLT	Modes of winding up;
Sec. 426	COURT → NCLT	Liability as contributories of present and past members;

Section No.	Powers Transferred from Court to NCLT	Subject Matter
Sec. 427	COURT → NCLT	Obligations of directors & managers whose liability is unlimited;
Sec. 433	COURT → NCLT	Circumstances in which company may be wound up;
Sec. 434(1)(b)	COURT → NCLT	Company when deemed unable to pay its debts (Court or NCLT);
Sec. 434(1)(c)	COURT → NCLT	Company when deemed unable to pay its debts;
Sec. 439	COURT → NCLT	Provisions as to applications for winding up;
Sec. 440	COURT → NCLT	Right to present winding up petition where company is being wound up voluntarily;
Sec. 441	COURT → NCLT	Commencement of winding up;
Sec. 443	COURT → NCLT	Powers on hearing petition;
Sec. 444	COURT → NCLT	Order for winding up;
Sec. 446	COURT → NCLT	Suits stayed on winding up order;
Sec. 448	COURT → NCLT	Appointment of Official liquidator;
Sec. 450	COURT → NCLT	Appointment & powers of provisional liquidator;
Sec. 451	COURT → NCLT	General provisions as to liquidators;
Sec. 453	COURT → NCLT	Receiver not to be appointed of assets with liquidator;
Sec. 454	COURT → NCLT	Statement of affairs to be made to Official Liquidator;
Sec. 455(2) & (3)	COURT → NCLT	Report by official liquidator
Sec. 456	COURT → NCLT	Custody of company's property;
Sec. 457	COURT → NCLT	Powers of liquidator;
Sec. 458	COURT → NCLT	Discretion of liquidator;
Sec. 458A	COURT → NCLT	Exclusion of certain time in computing periods of limitation;
Sec. 459	COURT → NCLT	Provision for legal assistance to liquidator;
Sec. 460	COURT → NCLT	Exercise & control of liquidator's powers;
Sec. 461	COURT → NCLT	Books to be kept by liquidator;
Sec. 462	COURT → NCLT	Audit of liquidator's accounts;
Sec. 463	COURT → NCLT	Control of CG over liquidators;
Sec. 464	COURT → NCLT	Appointment & composition of committee of inspection;
Sec. 465	COURT → NCLT	Constitution & proceedings of committee of inspection;
Sec. 466	COURT → NCLT	Power to stay winding up;

Section No.	Powers Transferred from Court to NCLT	Subject Matter
Sec. 467	COURT → NCLT	Settlement of list of contributories & application of assets;
Sec. 468	COURT → NCLT	Delivery of property to liquidator;
Sec. 469	COURT → NCLT	Payment of debts due by contributory & extent of set off;
Sec. 470	COURT → NCLT	Power to make calls;
Sec. 471	COURT → NCLT	Payment into bank of moneys due to company;
Sec. 472	COURT → NCLT	Moneys & securities paid into Bank to be subject to order;
Sec. 473	COURT → NCLT	Order on contributory to be conclusive evidence;
Sec. 474	COURT → NCLT	Power to exclude creditors not proving their debts or claims in time;
Sec. 475	COURT → NCLT	Adjustment of rights of contributories;
Sec. 476	COURT → NCLT	Power to order costs;
Sec. 477	COURT → NCLT	Power to summons persons suspected of having property of company etc.
Sec. 478	COURT → NCLT	Power to order public examination of promoters, directors etc.
Sec. 479	COURT → NCLT	Power to arrest absconding contributory;
Sec. 480	COURT → NCLT	Saving of existing powers;
Sec. 481	COURT → NCLT	Dissolution of company;
Sec. 490	COURT → NCLT	Power of company to appoint & fix remuneration of liquidators;
Sec. 492	COURT → NCLT	Power to fill vacancy in office of liquidator;
Sec. 494	COURT → NCLT	Power of liquidator to accept shares etc., as consideration for sale of property of company;
Sec. 497	COURT → NCLT	Final meeting and dissolution;
Sec. 502	COURT → NCLT	Appointment of liquidator;
Sec. 503	COURT → NCLT	Appointment of committee of inspection;
Sec. 504	COURT → NCLT	Fixing of liquidator's remuneration;
Sec. 506	COURT → NCLT	Power to fill vacancy in office of liquidator;

Section No.	Powers Transferred from Court to NCLT	Subject Matter
Sec. 507	COURT → NCLT	Application of section 494 to a creditors' voluntary winding up;
Sec. 509	COURT → NCLT	Final meeting & dissolution;
Sec. 511-A	COURT → NCLT	Application of section 454 to voluntary winding up;
Sec. 512	COURT → NCLT	Powers and duties of liquidator in voluntary winding up;
Sec. 515	COURT → NCLT	Power to appoint & remove liquidator in voluntary winding up;
Sec. 517	COURT → NCLT	Arrangement when binding on company & creditors;
Sec. 518	COURT → NCLT	Power to apply to have questions determined or powers exercised;
Sec. 519	COURT → NCLT	Application of liquidator for public examination of promoters, directors, etc.
Sec. 531	COURT → NCLT	Fraudulent preference;
Sec. 531-A	COURT → NCLT	Avoidance of voluntary transfer;
Sec. 533	COURT → NCLT	Liabilities & rights of certain fraudulently preferred persons;
Sec. 534	COURT → NCLT	Effect of floating charge;
Sec. 535	COURT → NCLT	Disclaimer of onerous property in case of a company which is being wound up;
Sec. 536	COURT → NCLT	Avoidance of transfers etc., after commencement of winding up;
Sec. 537	COURT → NCLT	Avoidance of certain attachments, executions, etc., in winding up;
Sec. 538	COURT → NCLT	Offences by officers of companies in liquidation;
Sec. 540	COURT → NCLT	Penalty for frauds by officers;
Sec. 542	COURT → NCLT	Liability for fraudulent conduct of business;
Sec. 543	COURT → NCLT	Power to assess damages against delinquent directors, etc.
Sec. 544	COURT → NCLT	Liability u/s 542 & 543 to extend to partners or directors in firm or company;

Section No.	Powers Transferred from Court to NCLT	Subject Matter
Sec. 545	COURT → NCLT	Prosecution of delinquent officers & members of company;
Sec. 546	COURT → NCLT	Liquidator to exercise certain powers subject to sanction;
Sec. 547	COURT → NCLT	Notification that a company is in liquidation;
Sec. 549	COURT → NCLT	Inspection of books & papers by creditors & contributories;
Sec. 550	COURT → NCLT	Disposal of books & papers of company
Sec. 551	COURT → NCLT	Information as to pending liquidations;
Sec. 553	COURT → NCLT	Voluntary liquidator to make payments into Scheduled Bank;
Sec. 555	COURT → NCLT	Unpaid dividends & undistributed assets to be paid into the Companies Liquidation Account;
Sec. 556	COURT → NCLT	Enforcement of duty of liquidator to make returns;
Sec. 557	COURT → NCLT	Meetings to ascertain wishes of creditors or contributories;
Sec. 558	COURT → NCLT	Before whom affidavit may be sworn;
Sec. 559	COURT → NCLT	power to declare dissolution of company void;
Sec. 560	COURT → NCLT	Power of wind up defunct company struck off by Registrar;
Sec. 581	COURT → NCLT	Suits stayed on winding-up order;
Sec. 582	COURT → NCLT	Meaning of unregistered company;
Sec. 583	COURT → NCLT	Winding up of unregistered company;
Sec. 587	COURT → NCLT	Suits etc., stayed on winding up order;
Sec. 588	COURT → NCLT	Directions as to property in certain cases;
Sec. 589	COURT → NCLT	Provisions of Part cumulative;
Sec. 610	COURT → NCLT	Inspection, production & evidence of documents kept by Registrar;
Sec. 614	COURT → NCLT	Enforcement of duty of company to make returns, etc., to Registrar.
Sec. 626	COURT → NCLT	Application of fines;
Sec. 632	COURT → NCLT	Power to require limited company to give security for costs;
Sec. 635	COURT → NCLT	Enforcement of orders (CLB or NCLT)
Sec. 635-B	COURT → NCLT	Protection of employees during investigation by Inspectors or pendency of proceeding in certain cases;

CHART III

AT A GLANCE
POWERS TRANSFERRED FROM COMPANY LAW BOARD (CLB) TO CENTRAL GOVERNMENT (CG) THROUGH COMPANIES (SECOND AMENDMENT) ACT, 2002

Section No.	Powers Transferred from CLB to C. Govt.	Subject Matter
Sec. 17	CLB → C. Govt.	Change of place of registered office from one state to another;
Sec. 18(4)	CLB → C. Govt.	Extension of time for filing the order of shifting of registered office;
Sec. 19	CLB → C. Govt.	Revival of order of shifting of registered office;
Sec. 43 proviso	CLB → C. Govt.	Consequences of default in complying with conditions constituting a private company;
Sec. 49(10)	CLB → C. Govt.	Direction to inspect Register of Investments;
Sec. 79	CLB → C. Govt.	Power to issue shares at a discount;
Sec. 113(1)	CLB → C. Govt.	Extension of time for issue of certificates;
Sec. 113(3)	CLB → C. Govt.	To correct the default in non-compliance of sub-section (1) of section 113 providing time limit for issue of shares/debenture certificate
Sec. 117B(4)	CLB → C. Govt.	Debenture trustee to ask for restriction to be imposed on the company;
Sec. 118(3)	CLB → C. Govt.	Right to obtain copies of trust deed;
Sec. 141	CLB → C. Govt.	Rectification of register of charges;
Sec. 144(4)	CLB → C. Govt.	Inspection of copies of instruments creating charges and register of charges;
Sec. 163(6)	CLB → C. Govt.	Inspection of registers and returns;
Sec. 167	CLB → C. Govt.	Direct the calling of an annual general meeting except by a sick industrial company;
Sec. 168	CLB → C. Govt.	Penalty for default in complying with section 166 or 167(CG or NCLT);

Section No.	Powers Transferred from CLB to C. Govt.	Subject Matter
Sec. 188(5)	CLB → C. Govt.	Restriction on circulation of statement with respect to any proposed resolution;
Sec.196 (4)	CLB → C. Govt.	Inspection of minute books;
Sec. 219(4)	CLB → C. Govt.	Directing copy of balance-sheet or auditors' report to be furnished forthwith;
Sec. 225(3) proviso	CLB → C. Govt.	Restricting copies of representation of the auditor to be removed to be sent out;
Sec. 284(4) proviso	CLB → C. Govt.	Restricting copies of representation of the director to be removed to be sent out;
Sec. 304(2)(b)	CLB → C. Govt.	Inspection of register of register of directors (CG or NCLT);
Sec. 307(9)	CLB → C. Govt.	Inspection of register of directors' share-holding (CG or NCLT);
Sec. 621-A	CLB → C. Govt.	Composition of certain offences;

CHART IV

TOTAL POWERS AT A GLANCE OF NATIONAL COMPANY LAW TRIBUNAL (NCLT) AFTER THE CHANGES MADE BY THE COMPANIES (AMENDMENT) ACT & (SECOND AMENDMENT) ACT, 2002

Section No.	Powers with NCLT	Subject Matter
Sec. 58A(9)	NCLT	To direct the company to make repayment of the matured deposits
Sec. 58AA(1)	NCLT	Intimation of default made by the company in repayment of small deposits or part thereof or any interest thereupon
Sec. 100 to 104	NCLT	Reduction of share capital;
Sec. 107	NCLT	Rights of dissentient shareholders to have variation cancelled;
Sec. 111	NCLT	Power to refuse registration and appeal against refusal;
Sec. 111A	NCLT	Rectification of register on transfer;
Sec. 117C(4)	NCLT	Redemption of debentures forthwith by payment of principal and interest;
Sec. 186	NCLT	Calling an extraordinary general meeting;
Sec. 203	NCLT	Power to restrain persons from managing companies (Court or NCLT);
Sec. 235	NCLT	Investigation of the affairs of a company;
Sec. 236	NCLT	Application by members to be supported by evidence;
Sec. 237(b)	NCLT	Investigation of company's affairs in other cases;
Sec. 241(2)(dd)	NCLT	Inspectors report;
Sec. 243	NCLT	Application for winding up of a company or an order u/s 397or 398;
Sec. 247	NCLT	Investigation of ownership of company;
Sec. 250	NCLT	Imposition of restriction on shares & debentures;
Sec. 251	NCLT	Saving for legal advisers & bankers;
Sec. 269(7)	NCLT	Reference where appointment made in contravention of the requirements of Schedule XIII.

Section No.	Powers with NCLT	Subject Matter
Sec. 269(8)	NCLT	Issue of notice to managing/whole-time director/manager to comply with the requirements of Schedule XIII;
Sec. 269(9)	NCLT	Order directing that contravention of the requirements of Schedule XIII has taken place.
Sec. 318(3)(d)	NCLT	Compensation for loss of office to managing/whole-time director/manager;
Sec. 388-B	NCLT	Reference of cases against managerial personnel;
Sec. 388-C	NCLT	Interim order in connection with cases u/s 388-B;
Sec. 388-D	NCLT	Findings in connection with cases u/s 388-B;
Sec. 388-E	NCLT	Power of CG to remove managerial personnel on the basis of findings in connection with cases u/s 388-B;
Sec. 391	NCLT	Power to compromise or make arrangements with creditors & members;
Sec. 392	NCLT	Power to enforce compromises & arrangements;
Sec. 394	NCLT	Provisions for facilitating reconstruction & amalgamation of companies;
Sec. 394A	NCLT	Notice to be given to CG for application u/s 391 & 394;
Sec. 395	NCLT	Power & duty to acquire shares of shareholders dissenting from scheme or contract approved by majority;
Sec. 396(3A)	NCLT	Preferring an appeal from assessment of compensation made by prescribed authority;
Sec. 397	NCLT	Application for relief in cases of oppression;
Sec. 398	NCLT	Application for relief in cases of mismanagement;
Sec. 400	NCLT	Notice to be given to CG of applications u/s 397,398;
Sec. 401	NCLT	Right of CG to apply u/s 397,398;
Sec. 402	NCLT	Power on application u/s 397,938;
Sec. 403	NCLT	Interim order;
Sec. 404	NCLT	Effect of alteration of memorandum or articles of company by order u/s 397,398
Sec. 405	NCLT	Addition of respondents to application u/s 397,398;
Sec. 407	NCLT	Consequences of termination of modification of certain agreements;
Sec. 408	NCLT	Power to prevent oppression or mismanagement;
Sec. 409	NCLT	Power to prevent change in Board of Directors likely to affect company prejudicially;
Sec. 410	NCLT	Appointment of advisory committee;

Section No.	Powers with NCLT	Subject Matter
Sec. 424	NCLT	Application of sections 421 to 423 to receivers & managers;
Sec. 424A	NCLT	Reference by Sick Industrial Company for revival and rehabilitation;
Sec. 424B	NCLT	Inquiry into working of Sick Industrial Companies
Sec. 424C	NCLT	Power to make suitable order on completion of inquiry;
Sec. 424D	NCLT	Power to sanction the scheme of revival and rehabilitation of Sick Industrial Companies
Sec. 424E	NCLT	Rehabilitation by giving financial assistance;
Sec. 424F	NCLT	Arrangement for continuing operations, etc., during inquiry
Sec. 424G	NCLT	Winding up of sick industrial company
Sec. 424H	NCLT	Power to prepare complete inventory through the operating agency;
Sec. 424I	NCLT	Directions not to dispose of assets;
Sec. 424J	NCLT	Power to call for periodic information;
Sec. 424K	NCLT	Power to direct repayment restoration money or property or any part thereof, etc. by way of compensation in the respect of the misapplication, retainer, misfesance of breach of trust
Sec. 425	NCLT	Modes of winding up;
Sec. 426	NCLT	Liability as contributories of present and past members;
Sec. 427	NCLT	Obligations of directors & managers whose liability is unlimited;
Sec. 433	NCLT	Circumstances in which company may be wound up;
Sec. 434(1)(b)	NCLT	Company when deemed unable to pay its debts (Court or NCLT);
Sec. 434(1)(c)	NCLT	Company when deemed unable to pay its debts;
Sec. 439	NCLT	Provisions as to applications for winding up;
Sec. 440	NCLT	Right to present winding up petition where company is being wound up voluntarily;
Sec. 441	NCLT	Commencement of winding up;
Sec. 443	NCLT	Powers on hearing petition;
Sec. 444	NCLT	Order for winding up;
Sec. 446	NCLT	Suits stayed on winding up order;
Sec. 448	NCLT	Appointment of Official liquidator;

Section No.	Powers with NCLT	Subject Matter
Sec. 450	NCLT	Appointment & powers of provisional liquidator;
Sec. 451	NCLT	General provisions as to liquidators;
Sec. 453	NCLT	Receiver not to be appointed of assets with liquidator;
Sec. 454	NCLT	Statement of affairs to be made to Official Liquidator;
Sec. 456	NCLT	Custody of company's property;
Sec. 457	NCLT	Powers of liquidator;
Sec. 458	NCLT	Discretion of liquidator;
Sec. 458A	NCLT	Exclusion of certain time in computing periods of limitation;
Sec. 459	NCLT	Provision for legal assistance to liquidator;
Sec. 460	NCLT	Exercise & control of liquidator's powers;
Sec. 461	NCLT	Books to be kept by liquidator;
Sec. 462	NCLT	Audit of liquidator's accounts;
Sec. 463	NCLT	Control of CG over liquidators;
Sec. 464	NCLT	Appointment & composition of committee of inspection;
Sec. 465	NCLT	Constitution & proceedings of committee of inspection;
Sec. 466	NCLT	Power to stay winding up;
Sec. 467	NCLT	Settlement of list of contributories & application of assets;
Sec. 468	NCLT	Delivery of property to liquidator;
Sec. 469	NCLT	Payment of debts due by contributory & extent of set off;
Sec. 470	NCLT	Power to make calls;
Sec. 471	NCLT	Payment into bank of moneys due to company;
Sec. 472	NCLT	Moneys & securities paid into Bank to be subject to order;
Sec. 473	NCLT	Order on contributory to be conclusive evidence;
Sec. 474	NCLT	Power to exclude creditors not proving in time;
Sec. 475	NCLT	Adjustment of rights of contribuories;
Sec. 476	NCLT	Power to order costs;
Sec. 478	NCLT	Power to order public examination of promoters, directors etc.
Sec. 479	NCLT	Power to arrest absconding contributory;
Sec. 480	NCLT	Saving of existing powers;
Sec. 481	NCLT	Dissolution of company;
Sec. 490	NCLT	Power of company to appoint & fix remuneration of liquidators;

Section No.	Powers with NCLT	Subject Matter
Sec. 492	NCLT	Power to fill vacancy in office of liquidator;
Sec. 494	NCLT	Power of liquidator to accept shares etc., as consideration for sale of property of company;
Sec. 497	NCLT	Final meeting and dissolution;
Sec. 502	NCLT	Appointment of liquidator;
Sec. 503	NCLT	Appointment of committee of inspection;
Sec. 504	NCLT	Fixing of liquidator's remuneration;
Sec. 506	NCLT	Power to fill vacancy in office of liquidator;
Sec. 507	NCLT	Application of section 494 to a creditors' voluntary winding up;
Sec. 509	NCLT	Final meeting & dissolution;
Sec. 511-A	NCLT	Application of section 454 to voluntary winding up;
Sec. 512	NCLT	Powers and duties of liquidator in voluntary winding up;
Sec. 515	NCLT	Power to appoint & remove liquidator in voluntary winding up;
Sec. 517	NCLT	Arrangement when binding on company & creditors;
Sec. 518	NCLT	Power to apply to have questions determined or powers exercised;
Sec. 519	NCLT	Application of liquidator for public examination of promoters, directors, etc.
Sec. 531	NCLT	Fraudulent preference;
Sec. 531-A	NCLT	Avoidance of voluntary transfer;
Sec. 533	NCLT	Liabilities & rights of certain fraudulently preferred persons;
Sec. 534	NCLT	Effect of floating charge;
Sec. 535	NCLT	Disclaimer of onerous property in case of a company which is being wound up;
Sec. 536	NCLT	Avoidance of transfers etc., after commencement of winding up;
Sec. 537	NCLT	Avoidance of certain attachments, executions, etc., in winding up;
Sec. 538	NCLT	Offences by officers of companies in liquidation;
Sec. 540	NCLT	Penalty for frauds by officers;
Sec. 541	NCLT	Liability where proper accounts not kept;
Sec. 542	NCLT	Liability for fraudulent conduct of business;
Sec. 543	NCLT	Power to assess damages against delinquent directors, etc.
Sec. 544	NCLT	Liability u/s 542 & 543 to extend to partners or directors in firm or company;

Section No.	Powers with NCLT	Subject Matter
Sec. 545	NCLT	Prosecution of delinquent officers & members of company;
Sec. 546	NCLT	Liquidator to exercise certain powers subject to sanction;
Sec. 547	NCLT	Notification that a company is in liquidation;
Sec. 549	NCLT	Inspection of books & papers by creditors & contributories;
Sec. 550	NCLT	Disposal of books & papers of company
Sec. 551	NCLT	Information as to pending liquidations;
Sec. 553	NCLT	Voluntary liquidator to make payments into Scheduled Bank;
Sec. 555	NCLT	Unpaid dividends & undistributed assets to be paid into the Companies Liquidation Account;
Sec. 556	NCLT	Enforcement of duty of liquidator to make returns;
Sec. 557	NCLT	Meetings to ascertain wishes of creditors or contributories;
Sec. 558	NCLT	Before whom affidavit may be sworn;
Sec. 559	NCLT	Power to declare dissolution of company void;
Sec. 560	NCLT	Power to wind up defunct company struck off by Registrar;
Sec. 581	NCLT	Suits stayed on winding-up order;
Sec. 581ZP(3)	NCLT	Appeal to NCLJ against the order of ROC striking off the name of Producer Company;
Sec. 582	NCLT	Meaning of unregistered company;
Sec. 583	NCLT	Winding up of unregistered company;
Sec. 587	NCLT	Suits etc., stayed on winding up order;
Sec. 588	NCLT	Directions as to property in certain cases;
Sec. 589	NCLT	Provisions of Part cumulative;
Sec. 610	NCLT	Inspection, production & evidence of documents kept by Registrar;
Sec. 614	NCLT	Enforcement of duty of company to make returns, etc., to Registrar.
Sec. 626	NCLT	Application of fines;
Sec. 632	NCLT	Power to require limited company to give security for costs;
Sec. 635	NCLT	Enforcement of orders (CLB or NCLT)
Sec. 635-B	NCLT	Protection of employees during investigation by Inspectors or pendency of proceeding in certain cases;
Sec. 637-A	NCLT	Power to accord approval etc., subject to conditions & to prescribe fees on applications;
Sec. 640-A	NCLT	Exclusion of time required in obtaining copies of orders;
Schedule XI	NCLT	Form in which section 539 to 544 are to apply to cases where an application is made u/s 397, 398;

CHART V

TOTAL POWERS AT A GLANCE WITH CENTRAL GOVERNMENT (CG) AFTER THE CHANGES MADE BY THE COMPANIES (SECOND AMENDMENT) ACT, 2002

Section No.	Powers with Cent. Govt.	Subject Matter
Sec. 8	Cent. Govt.	Power of Central Government to declare an establishment not to be branch office
Sec. 17	Cent. Govt.	Change of place of registered office from one state to another;
Sec. 18(4)	Cent. Govt.	Extension of time for filing the order of shifting of registered office;
Sec. 19	Cent. Govt.	Revival of order of shifting of registered office;
Sec. 21	Cent. Govt.	Application for change of name (delegated to ROC)
Sec. 22(1)(a)	Cent. Govt.	Application for rectification of name (delegated to ROC)
Sec. 22(1)(b)	Cent. Govt.	Application for rectification of name on Central Government's direction (delegated to ROC)
Sec. 25	Cent. Govt.	Application for a Licence (delegated to Regional Director)
Sec. 43 proviso	Cent. Govt.	Consequences of default in complying with conditions constituting a private company;
Sec. 49(10)	Cent. Govt.	Direction to inspect Register of Investments;
Sec. 79	Cent. Govt.	Power to issue shares at a discount;
Sec. 81(1A)(b)	Cent. Govt.	Application for preferential allotment of share
Sec. 81(3) proviso (a)	Cent. Govt.	Application for approving the issue of debentures or raising of loans where they do not conform to the Public Companies (Terms of Issue of Debentures and Raising of Loans with Option to Convert such Debenture or Loans into Shares) Rules, 1977
Sec. 89(4)	Cent. Govt.	Application for exemption from terminating disproportionately excessive voting rights
Sec. 94A(2)	Cent. Govt.	Application by public financial institutions for increase of share capital on conversion of loan into shares

Section No.	Powers with Cent. Govt.	Subject Matter
Sec. 108)1D)	Cent. Govt.	Application for extension of time (delegated to ROC);
Sec. 108A	Cent. Govt.	Application for approval of the Central Government for acquisition of shares;
Sec. 108B	Cent. Govt.	Intimation to the Central Government of the proposal to transfer shares
Sec. 108C	Cent. Govt.	Application for approval of the Central Government for transfer of shares of foreign companies
Sec. 113(1)	Cent. Govt.	Extension of time for issue of certificates;
Sec. 114(1)	Cent. Govt.	Application to issue share warrants
Sec. 117B(4)	Cent. Govt.	Debenture trustee to ask for restriction to be imposed on the company;
Sec. 118(3)	Cent. Govt.	Right to obtain copies of trust deed;
Sec. 141	Cent. Govt.	Rectification of register of charges;
Sec. 144(4)	Cent. Govt.	Inspection of copies of instruments creating charges and register of charges;
Sec. 149(2-B)	Cent. Govt.	Application for commencement of new business without passing special resolution
Sec. 163(6)	Cent. Govt.	Inspection of registers and returns;
Sec. 166(2) 1st proviso	Cent. Govt.	Application for exempting any class of companies from the provision of sub-section (2) of section 166
Sec. 167	Cent. Govt.	Direct the calling of an annual general meeting except by a sick industrial company;
Sec. 168	Cent. Govt.	Penalty for default in complying with section 166 or 167(CG or NCLT);
Sec. 188(5)	Cent. Govt.	Restriction on circulation of statement with respect to any proposed resolution;
Sec.196 (4)	Cent. Govt.	Inspection of minute books;
Sec. 198(4)	Cent. Govt.	Previous approval of the Central Government for payment of remuneration to Directors including Managing or Whole-time Director or Manager any sum exclusive of any fees payable to Director under Section 309(2)
Sec. 204(1) proviso	Cent. Govt.	Application for approval of appointing firm or body corporate to any office or place of profit for more than 10 years;
Sec. 205(1)(c)	Cent. Govt.	Application for declaring dividend without providing for depreciation
Sec. 205(2)(c)	Cent. Govt.	Application for approving the basis of calculating depreciation

Section No.	Powers with Cent. Govt.	Subject Matter
Sec. 205A(3)	Cent. Govt.	Application for approving declaration of dividend out of reserves not in accordance with the provisions of prescribed rules
Sec. 208(3)	Cent. Govt.	Application to pay interest out of capital
Sec. 211(1)	Cent. Govt.	Application for approving the form of balance-sheet other than mentioned in Part I of Schedule VI
Sec. 211(4)	Cent. Govt.	Application for approving the modifications with regard to matters to be stated in the balance-sheet or profit and loss account
Sec. 212(8)	Cent. Govt.	Application for exemption from any provisions of the section
Sec. 213(1)	Cent. Govt.	Application for extension of financial year of the holding or subsidiary company
Sec. 219	Cent. Govt.	Directing copy of balance-sheet or auditors' report to be furnished forthwith;
Sec. 224(4)	Cent. Govt.	Giving notice of the fact that no auditors are appointed or re-appointed at the A.G.M. (delegated to the Regional Director);
Sec. 224(7)	Cent. Govt.	Application for approving the removal of the auditor before the expiry of his term of office
Sec. 225(3) proviso	Cent. Govt.	Restricting copies of representation of the auditor to be removed to be sent out;
Sec. 233B(2)	Cent. Govt.	Application for appointment of Cost Auditors
Sec. 237(a)	Cent. Govt.	Application to appoint inspectors in certain cases
Sec. 241(2)(b)(c)	Cent. Govt.	Application to get a copy of the investigation report by any other person
Sec. 243	Cent. Govt.	Application for obtaining authorisation to file a petition for winding up
Sec. 247(1)	Cent. Govt.	Application to order investigation into the ownership of a company
Sec. 247(5) Second Proviso	Cent. Govt.	Application by the company to obtain a copy of the investigation report
Sec. 248(1)	Cent. Govt.	Application to order investigation into the ownership of any share
Sec. 259	Cent. Govt.	Application for increasing the number of directors of a company
Sec. 268	Cent. Govt.	Application to the Central government for amendment of provision relating to the appointment or re-appointment of a managing or whole time director or non-rotation director.

Section No.	Powers with Cent. Govt.	Subject Matter
Sec. 269	Cent. Govt.	Application for appointment, re-appointment and remuneration payable to managerial personnels
Sec. 274(2)	Cent. Govt.	Application to remove certain disqualification of directors by Gazetted Notification
Sec. 284(4) proviso	Cent. Govt.	Restricting copies of representation of the director to be removed to be sent out;
Sec. 294AA	Cent. Govt.	Application for approval to the appointment or re-appointment of sole selling agents.
Sec. 294AA	Cent. Govt.	Application for approval to the appointment or re-appointment of sole buying or purchasing agents.
Sec. 295(1)	Cent. Govt.	Application for approving loans to be given to directors
Sec. 297(1) proviso	Cent. Govt.	Application for approval for entering into contracts
Sec. 300(3)	Cent. Govt.	Application to permit interested directors to participate or vote in Board's proceedings by a Gazetted Notification
Sec. 304(2)(b)	Cent. Govt.	Inspection of register of directors (CG or NCLT);
Sec. 307(9)	Cent. Govt.	Inspection of register of directors' shareholding (CG or NCLT);
Sec. 309(1) Proviso	Cent. Govt.	Application to exempt from remuneration of directors any sum received for rendering professional services
Sec. 309(3) proviso	Cent. Govt.	Previous approval of the Central Government for payment of remuneration exceeding 5% of the net profit for one such director or 10% for all of them together;
Sec. 309(5B)	Cent. Govt.	Application to waive the recovery of remuneration received in excess of prescribed limits from a director
Sec. 310, 311, 388	Cent. Govt.	Application for increasing the remuneration of director, managing or whole time director or manager
Sec. 314(1B)	Cent. Govt.	Application for prior consent for holding any office or place of profit
Sec. 314(2)(b) & (2D)	Cent. Govt.	Application for waiving any sum refundable to the Company
Sec. 316(4)	Cent. Govt.	Application to permit appointment of one person as managing director of more than two companies

Section No.	Powers with Cent. Govt.	Subject Matter
Sec. 385(2)	Cent. Govt.	Application to remove any disqualification by a Gazetted Notification
Sec. 386(4)	Cent. Govt.	Application to permit appointment of one person as manager of more than two companies
Sec. 388E(5)	Cent. Govt.	Application for permitting appointment of another person to the post of the removed managerial personnel
Sec. 396	Cent. Govt.	Application to provide for amalgamation of companies in national interest
Sec. 396-A	Cent. Govt.	Application for permitting disposal of books and papers of an amalgamated company
Sec. 399(4)	Cent. Govt.	Application to authorise any member(s) of the company to apply to the Company Law Board in case of oppression and mismanagement
Sec. 408(4)	Cent. Govt.	Application for removal of any director appointed by Company Law Board and appoint another person in his place
Sec. 496(1)(a)	Cent. Govt.	Application to call a general meeting beyond three months by the liquidator appointed by the members in members voluntary winding-up (delegated to the Regional Director)
Sec. 508(1)(a)	Cent. Govt.	Application to call a general meeting beyond three months by the liquidator appointed by the creditors in creditors voluntary winding-up (delegated to the Regional Director)
Sec. 551(1)	Cent. Govt.	Application by the liquidator to get exemption from filing information regarding proceedings and position of liquidation (delegated to the Regional Director)
Sec. 555(7)(b)	Cent. Govt.	Application to claim payment of unpaid dividend from company's Liquidation Account (delegated to the Regional Director)
Sec. 555(9)(a)	Cent. Govt.	Application to remit interest on unpaid dividend either in part or in whole (delegated to the Regional Director)
Sec. 572	Cent. Govt.	Application for change of name for the purpose of registration (delegated to the ROC)
Sec. 581ZL (4) proviso	Cent. Govt.	Investment by a producer company in excess of the limits
Sec. 610(1) Proviso (i) & (ii)	Cent. Govt.	Application to inspect prospectus after 14 days of its publication (delegated to the Regional Director)
Sec. 620A	Cent. Govt.	Declaration as Nidhi or Mutual Benefit Society
Sec. 621-A	Cent. Govt.	Composition of certain offences;

Section No.	Powers with Cent. Govt.	Subject Matter
Sec. 635-B	**Cent. Govt.**	Intimation to be given before discharging/punishing/ dismissing/removing/demoting any of the company's employee in the course of investigation
Sec. 637A	**Cent. Govt.**	Power to accord approval subject to condition and prescribe fees on application (CG or NCLT)
Sec. 637AA	**Cent. Govt.**	Power to fix a limit with regard to remuneration
Sec. 637B	**Cent. Govt.**	Application for condonation of delay in making any application to the Central Government or filing any document with the Registrar of Companies
Sec. 640B	**Cent. Govt.**	Forms of, and procedures in relation to applications made to Central Government;
Sec. 641	**Cent. Govt.**	Power to alter schedules;
Sec. 642	**Cent. Govt.**	Power to make rules;
Sec. 643	**Cent. Govt.**	Power to make rules for all matters relating to the winding-up of the companies;

CHART VI

POWERS AT A GLANCE REMAINNG WITH COURT AFTER THE CHANGES MADE BY THE COMPANIES (AMENDMENT) ACT & (SECOND AMENDMENT) ACT, 2002

Section No.	Powers vested with Court	Subject Matter
Sec. 81(7)	Court	Appeal to court if the terms and conditions of conversion of debentures or loans into shares are not acceptable to the company.
Sec. 237(a)(ii)	Court	Investigation of company's affairs;
Sec. 424L(2)	Court	No court to take congnizance of any offence under sub-section (1) except on a complaint in writing of an officer of the NCLT or NCLAT or any officer of the C. Govt.
Sec. 581ZN(16)	Court	Appeal to the High Court by any member or creditor or employee aggrieved by the transfer of assets, division, amalgamation a merger of producer companies;
Sec. 581ZS(1)	Court	Reconversion of producer companies to inter-state co-operative society
Sec. 621	Court	Offences against Act cognizable only on complaint by Registrar, Shareholder, Government
Sec. 630(2)	Court	Penalty for wrongful withholding of property
Sec. 633(3)	Court	Power of Court to grant relief in certain cases

A. RAMAIYA'S
GUIDE TO THE COMPANIES ACT

SIXTEENTH EDITION 2004

TREATISE—PART I

[S. 1 to S. 204]

THE COMPANIES ACT, 1956
(I OF 1956)

(18th January 1956)

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

Be it enacted by Parliament in the Sixth Year of the Republic of India as follows:—

PART I

PRELIMINARY

S. 1. Short title, commencement and extent.—(1) This Act may be called THE COMPANIES ACT, 1956.

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

[2][(3) It extends to the whole of India;

[3][* * * *]

[4][*Provided* [5][* * * *] that it shall apply to the State of Nagaland subject to such modifications, if any, as the Central Government may, by notification in the Official Gazette, specify.]

NOTES

The Principal Act and its Amendments

Companies Act I of 1956 came into force on 1st April, 1956. Subsequently the Act has been amended by the following enactments:

(1) The Companies (Amendment) Act LXV of 1960,

(2) The Companies (Amendment) Act XLIII of 1962,

(3) The Companies (Amendment) Act LIII of 1963,

(4) The Companies (Amendment) Act XXXII of 1964,

(5) The Companies (Amendment) Act LII of 1964,

(6) The Companies (Amendment) Act XXXI of 1965,

(7) The Companies (Amendment) Act XXXIV of 1966,

(8) The Companies (Second Amendment) Act XXXVII of 1966,

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1. 1st April, 1956 *vide* Notification No. SRO 612, dated 8-3-1956, *Gaz. of India*, Extraordinary, 1956, Pt. II, section 3, p. 473.
2. Subs. by Act 62 of 1956, s. 2 and Sch. (w.e.f. 1-11-1956).
3. First Proviso omitted by Act 25 of 1968, s. 2 and Sch. (w.e.f. 15-8-1968).
4. Ins. by Act 31 of 1965, s. 2 (w.e.f. 15-10-1965).
5. The word "further" omitted by Act 25 of 1968, s. 1 and Sch. (w.e.f. 15-8-1968).

(9) The Companies (Amendment) Act XVII of 1967,

(10) The Companies (Amendment) Act XVII of 1969,

(11) The Companies (Amendment) Act LXXX of 1971,

(12) The Companies (Amendment) Act XLI of 1974[6],

(13) The Companies (Amendment) Act 46 of 1977,

(14) The Companies (Amendment) Act 35 of 1985,

(15) The Companies (Amendment) Act 1988 (31 of 1988),[7]

(16) The MRTP (Amendment) Act, 1991,[8]

(17) The Depositories Act, 1996 (22 of 1996) (w.e.f. 20-9-1995)[9],

(18) The Companies (Amendment) Act, 1996 (5 of 1997), (w.e.f. 1-3-1997),

(19) The Depositories Related Laws (Amendment) Act, 1997, (w.e.f. 15-1-1997),

(20) The Companies (Amendment) Act, 1999 (21 of 1999), (w.e.f. 31-10-1998)[10].

(21) The Trade Marks Act, 1999

(22) The Companies (Amendment) Act, 2000 (53 of 2000), (w.e.f 13-12-2000 excepts s. 7 and s. 80)[11].

(23) The Companies (Amendment) Act, 2001 (57 of 2001), (w.e.f 23-10-2001).[12]

(24) The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) (w.e.f. 21-6-2002).[13]

(25) The Companies (Amendment) Act, 2002 (1 of 2003) (w.e.f. 6-2-2003)[14]

(26) The Companies (Second Amendment) Act, 2002 (11 of 2003)[15]

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6. Act came into force on 1st February, 1975.
7. The Act received the assent of the President on 24th May 1988. For the text of the Companies (Amendment) Act, 1988, see [1988] 64 Com Cases 1 (St.).
8. The Act came into force from 27-9-1991.
9. This Act replaced the Depositories Ordinance 1995, which was promulgated on 20-9-1995. The Act received the assent of the President on 10-8-1996, but is deemed to have come into force on 20-9-1995 by virtue of section 1(3) of the Act.
10. This Act has replaced the Companies (Amendment) Ordinance, 1999 re-promulgated on 7-1-1999 with certain modification replacing the earlier Companies (Amendment) Ordinance, 1998 promulgated on 31-10-1998. The Act received the assent of the President on 1-4-1999, but is deemed to have come into force from 31-10-1998 by virtue of sub-section (2) of section 1 of the Act.
11. The provisions of the Companies (Amendment) Act, 2000 came into force on 13-12-2000 except s. 7 (s. 17A of the 1956 Act) which came into force on 1-3-2000 *vide* notification No. SO 176(E) dated 27-2-2001 and s. 80 (192A of the 1956 Act) which came into force on 15-6-2001 *vide* Notification No. SO 523(E) dated 15-6-2001.
12. This Act has replaced the Companies (Amendment) Ordinance, 2001 (Ord. 7 of 2001) promulgated on 23-10-2001. The Act received the assent of the President on 22-12-2001, but is deemed to have come into force on 23-10-2001 by virtue of sub-section (2) of section 1 of the Act.
13. The Act received the assent of the President on 17-12-2002 and published in the Gaz. of India, Extra, Part II, Sec. 1, dt. 18-12-2002. Earlier, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was originally published in the Gaz. of India, Extra., Part. II, Sec. 1, p. 1, dt. 21-6-2002 issued by Ministry of Law Justice and Company Affairs and repromulgated on 21-8-2002 and published in the Gaz. of India, Extra., Part II, sec. 1, p. 1, dt. 21-8-2002.
14. **The Act received the assent of the President on 31-12-2002 and published in the Gaz. of India, Extra, Part II, Sec. 1, dt. 1-1-2003. Provisions of the Act came into force on 6-2-2003 *vide* Notfn. No. S.O. 135(E), dt. 5-2-2003.**
15. **The Act received the assent of the President on 13-1-2003 and published in the Gaz. of India, Extra, Part II, sec. 1, dt. 14-1-2003. Provisions of the sections 2 and 6 of the Amendment Act came into force on 1-4-2003 *vide* Notfn. No. S.O. 344(E), dt. 31-3-2003. See also Press Note 2/2003, dt. 4-4-2003 for the extent of enforcement given on pg. 9, *post*.**

(27) The Election and other Related Laws (Amendment) Act, 2003 (46 of 2003), amending section 293A of the Companies Act, 1956 (46 of 2003) (w.e.f. 11-9-2003).

Besides these, the Adaptation of Laws (No. 3) Order, 1956, the Repealing and Amending Acts XXXVI of 1957, LII of 1964 and of 1978, the Jammu and Kashmir (Extension of Laws) Act LXII of 1956, the Central Laws (Extension to Jammu and Kashmir) Act XXV of 1968 and the Monopolies and Restrictive Trade Practices (Amendment) Act 30 of 1984 have also effected some amendments.

Reference has been made to all important amendments in the Notes under the respective sections. The dates of coming into force of the provisions of these enactments have been noted at appropriate places.

The Monopolies and Restrictive Trade Practices (Amendment) Act, 1991

The amendment to the Companies Act, 1956 was effected by the MRTP (Amendment) Ordinance, 1991[16] subsequently replaced by the MRTP (Amendment) Act, 1991.[13a] Originally, the regulatory provisions relating to acquisition and transfer of shares were contained in section 108A to 108H of the Companies Act. On the recommendations of the Sachar Committee, these provisions were omitted by MRTP (Amendment) Act, 1984 and, instead, incorporated in Chapter III-A (Sections 30-A to 30-G) in the MRTP Act. These sections have now been re-transferred to the Companies Act as Sections 108-A to 108-I by the MRTP (Amendment) Act, 1991. The provisions under the MRTP Act applied in cases where the acquirer or transferee of shares was (or was likely to become) the owner of an undertaking. The re-transferred provisions under the Companies Act apply where the acquirer or transferee of shares is the owner of a dominant undertaking, as defined in section 2(d) of the MRTP Act, 1969.

§ For the text of the MRTP Act, 1969, see *Appendix* 297.

§ For the text of The Competition Act, 2002, see *Appendix* 299.

The Depositories Act, 1996

Certain amendments to the Companies Act, 1956 were effected by the Depositories Ordinance, 1995, subsequently replaced by the Depositories Act, 1996. The amended provisions came into effect from 20-9-1995 when the Ordinance was promulgated by the President. In view of the establishment of depositories to record ownership details in book entry form, consequential changes have been made in the Companies Act, 1956 besides further changes made in other cognate legislations, *viz.*, the Income Tax Act, 1961, the Securities Contracts (Regulation) Act, 1956, the Indian Stamp Act, 1899, the SEBI Act, 1992 and the Benami Transactions (Prohibition) Act, 1988.

The provisions of the Companies Act, which have been subjected to amendment are: section 41 (Definition of member), section 49 (Investments of a company to be held in its own name), section 51 (Service of documents on company), section 83 (Numbering of shares, which has been deleted), section 111 (Power to refuse registration and appeal against refusal), section 111A (Rectification of Register on transfer), section 113 (Limitation of time for issue of share certificates), section 150 (Register of members), section 152 (Register and index of debenture-holders). Apart therefrom certain new provisions have been inserted in the Companies Act, *viz.*, Definition of Securities and Exchange Board of India [section 2(45A)], Adoption of the definition of certain words and expressions defined in the Depositories Act, 1996 (section 2A), Register and index of beneficial owners (section 152A), and clause 9A in Part II of Schedule II to the Companies Act, 1956.

The salient features of the Depositories Act, 1995 have been explained in the Press Note, dated 21-9-1995 issued by the Ministry of Finance, reproduced under *Appendix* 199.

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16. The Act came into force from 27-9-1991.

Companies (Amendment) Act, 1996

Press Note, dated 11-3-1997.—The Companies Act, 1956 was amended through the Companies (Amendment) Act, 1996 (5 of 1997). This Amendment introduced the following changes in the Companies Act:

(1) Allowing companies to alter their memorandum of association in respect of their objects without confirmation of CLB except when change of registered office from one state to another is involved.
(2) Permitting companies to issue redeemable preference shares upto a maximum period of 20 years.
(3) Granting of voting rights to mutual funds, venture capital funds, etc., in respect of their shares in companies.
(4) Debarring companies which default on payment of deposits from raising further deposits or making intercorporate loans/investments.
(5) Empowering the Central Government to prescribe ceiling through notifications for claim of arrears of wages or salary of employees in case of companies under winding up.
(6) Allowing companies to file documents on computer format with ROCs.

Arrears of wages of employees of companies under winding up.—The Amendment Act empowers the Central Government to prescribe the ceiling for claiming arrears of wages or salaries of employees of companies which are being wound up. This ceiling has been raised from Rs. 1,000 to Rs. 20,000 by a Notification GSR No. 80(E) issued on 17th February, 1997.

The Depositories Related Laws (Amendment) Act, 1997

The Depositories Act, 1996 provides, *inter alia*, for a legal framework for the establishment of depositories for dealing in securities. However, the said Act allowed only securities of companies to be dealt in the depository mode. The securities of statutory bodies like the IDBI, UTI, SBI and other public sector and scheduled banks could not be dealt in the depository mode. In order to remove this lacuna and also to give effect to certain consequential changes, the Depositories Related Laws (Amendment) Ordinance, 1997 was promulgated on the 15th January, 1997 (later on replaced by the Amendment Act of 1997) amending the Depositories Act, 1996, the Companies Act, 1956, the Industrial Development Bank of India Act, 1964, the State Bank of India Act, 1955, the State Bank of India (Subsidiary Banks) Act, 1959, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 and the Indian Stamp Act, 1899. In so far as the Companies Act, 1956 is concerned, further consequential amendments were made in sections 83, 111A, 150 and 152 in respect of securities dealt with in the depository mode.

Trade Marks Act, 1999

Section 158 of the Trade Marks Act, 1999 has amended sections 20 and 22 of the Companies Act, 1956 to provide that the name which is identical with or too closely resembles with a registered trade mark or a trade mark which is subject of an application for registration may be deemed to be undesirable. It is also provided that the Central Government may intervene in the matter of change of name of a company which is identical with a registered trade mark on an application made by registered proprietor of the trade mark.

Companies (Amendment) Act, 1999

The following Circular issued by the Department of Companies Affairs shows the purport of the Amendments :

Circular No. 3 of 1999, dated 4-5-1999.—"As you are aware, the Companies Act, 1956, has recently been amended through the Companies (Amendment) Act, 1999 (No. 21 of 1999).

2. The Act is to be deemed to have come into force on 31-10-1998. [It may be recalled that earlier the Companies (Amendment) Ordinance, 1998, had been promulgated by the President on 31-10-1998].

3. This Act repeals the Companies (Amendment) Ordinance, 1999, promulgated on 7-1-1999.

4. The salient features of this Amendment Act are as follows :

— The Infrastructure Development Finance Company Limited has been recognised as one of the public financial institutions.

— Companies have been allowed to buy back their own securities.

— Companies have been enabled to issue "sweat equity"—*i.e.*, shares issued at a discount or for consideration other than cash—for providing know-how or making available rights in the nature of intellectual property rights or value additions.

— Facility for nomination has been provided for the benefit of share/debenture/deposit holders.

— An Investor Education and Protection Fund is to be established.

— National Advisory Committee on Accounting Standards for Companies to be established.

— Companies have been freed from obtaining prior approval of the Central Government for their inter-corporate investment/lending proposals."

Companies (Amendment) Act, 2000 (53 of 2000)

The Companies (Amendment) Act, 2000 (53 of 2000) has brought about changes of far-reaching nature to provide measures for good corporate governance and protection of investors. The Amendment Act has also enhanced the penalties by way of fine by ten times across the board. The Statement of Objects and Reasons annexed to the Companies (Second Amendment) Bill, 1999 explains the intendment and purposes of the Amendment Act, as follows :

Statement of Objects and Reasons : The Government introduced a comprehensive Companies Bill, 1997 in Rajya Sabha on 14-8-1997 and the same was referred to Standing Committee of Parliament for examination and report thereon. The process of examination, however, is not yet over and is still to take some more time. The passing of this Bill is thus likely to be delayed further. It is however considered desirable by the Government that some more important changes in the Companies Act, 1956 are brought about in order to provide immediately certain measures for good corporate governance and for protection of investors. These measures are as follows:—

(*i*) to provide a minimum paid-up capital of Rs. 1 lakh for private companies and Rs. 5 lakh for public companies;

(*ii*) to delete provisions relating to deemed public companies;

(*iii*) to reduce the period for disbursing dividend/interim dividend to shareholders from 42 days to 30 days;

(*iv*) to request the companies to inform Company Law Board within sixty days if the company fails to make repayment of deposits on maturity to small deposit holders and the Company Law Board would be enabled to consider these defaults reported by companies and make an order within thirty days which the company shall be bound to comply with. A company which fails to report or comply with the order of the Company Law Board shall be punishable with imprisonment which may extend to three years and shall also be liable to a fine of not less than Rs. 500 per day during which such default continues;

(*v*) to provide that the Securities and Exchange Board of India be entrusted with powers with regard to all matters relating to public issues and transfers including power to prosecute defaulting companies and their directors;

(*vi*) to include a Directors' Responsibility Statement in the Board's report to highlight the accountability of directors in good corporate governance;

(*vii*) to provide that public listed companies with paid-up capital of Rs. 5 crores or more shall be required to set up an Audit Committee of the Board of Directors as a measure for better corporate governance;

(*viii*) to require companies with paid-up capital of Rs. 10 lakh or more and which do not have whole-time Secretary in their employment to submit a Secretarial Compliance Certificate from a Company Secretary in whole-time practice;

(*ix*) to delete the provisions for appointment of public trustee by the Central Government with a view to enabling the Trust to directly exercise the voting power;

(*x*) to provide that any offer of shares or debentures to more than 50 persons shall be treated as public issue with suitable modification in the case of public financial institutions and non-banking financial companies;

(*xi*) 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;

(*xii*) to empower Regional Director to allow change of registered office of companies from jurisdiction of one Registrar of Companies to another Registrar of Companies within the same State;

(*xiii*) to empower the Comptroller and Auditor-General of India to appoint the auditors in respect of Government Companies and also to provide that shareholders of such companies will fix their remuneration in annual general meeting;

(*xiv*) to provide that in case of a public company which does not file annual account and annual returns continuously for three years, the directors of such company will be debarred from becoming the director of other public companies for five years. Similarly, in case of any public company which fails to repay its depositors on maturity of deposit amount/debentures, dividend and interest on deposits/debentures on due dates, the whole-time directors of defaulting companies as on such date will be debarred from becoming a director of any other public company for a period of five years;

(*xv*) to provide that for purpose of managerial remuneration, the amount of depreciation will be the same as provided in Profit and Loss Account of the Company;

(*xvi*) to provide that no person can hold office of director in more than fifteen companies at a time;

(*xvii*) to provide for appointment of one director as a nominee of small shareholders who constitute a minimum of 1000 in number and having shares of not more than Rs. 20,000 with effect from the date to be specified and subject to such other conditions as may be prescribed by the Central Government;

(*xviii*) to provide penal provisions for increased fine for offences under the Act;

(*xix*) to provide that a shareholder of the company be disqualified for appointment as auditor of the company;

(*xx*) to delete the provisions relating to managing agents, secretaries and treasurers as they have become redundant after abolition of the system of managing agent, secretaries and treasurers;

(*xxi*) to provide that private limited companies shall be excluded in reckoning the number of companies which an auditor can audit.

2. It is expected that the above amendments in a short Bill will ensure better corporate governance, transparency in working of companies and also ensure more effective enforcement by enhancing the penalty/punishment for contravention so as to ensure better compliance of the provisions of the Companies Act, 1956.

3. Notes on clauses explain in detail the provisions of the Bill."

Further changes were introduced in the Bill including, *inter alia,* introduction of new concepts of shelf prospectus, issue of shares with differential right as to dividend and voting, obligations on the part of debenture trustees, besides offer of Indian Depository Receipts (IDRs) passed on recommendations made by the Parliamentary Standing Committee on Home Affairs.

Companies (Amendment) Act, 2001 (57 of 2001) (w.e.f. 23-10-2001)

The Act has replaced the Companies (Amendment) Ordinanace, 2001 (Ord. 7 of 2001) promulgated on 23rd October, 2001. The Act received the assent of the President on 22nd December, 2001, but is deemed to have come into force on 23rd October, 2001 by virtue of sub-section (2) of section 1 of the Act. The Statement of Object and Reasons annexed to the Companies (Third Amendment) Bill, 2001, replacing the Companies (Amendment) Ordinance, 2001 (Ord. 7 of 2001) explain the intendment and purposes of the Amendment Act, as follows :

Statement of Object and Reasons.—1. For a considerable time, the market sentiment has been very weak. Because of the recent developments in the United States of America and other places, the situation has become worse.

2. Section 77A of the Companies Act, 1956 permits a company to purchase its own shares or other specified securities (hereafter referred to as 'buy-back') subject to the provisions contained in that section. The Ministry of Finance (Department of Economic Affairs) has suggested that the provisions for buy-back by companies should be liberalised with a view to improving the market sentiment. Liberalisation has also been supported by the Securities and Exchange Board of India, financial institutions and some others.

3. In view of the above, it was decided to liberalise certain provisions of section 77A of the Companies Act, 1956 relating to buy-back and for this purpose, the Companies (Amendment) Ordinance, 2001 (Ord. 7 of 2001) was promulgated on the 23rd October, 2001 so as to, *inter alia*,—

(*a*) provide that if the buy-back was to the extent of or less than ten per cent of the total paid-up capital and free reserves of the company and such buy-back had been authorised by means of a resolution passed at its Board meeting, such buy-back shall not require special resolution to be passed by a general meeting as required by clause (*b*) of sub-section (2) of section 77A which prohibits a company to purchase its own shares or other specified securities unless a special resolution is passed in general meeting of the company authorising such buy-back;

(*b*) provide that no offer of buy-back referred to in (*a*) above shall be made within a period of three hundred and sixty-five days reckoned from the date of the preceding offer of buy-back;

(*c*) reduce the time limit from twenty-four months specified under sub-section (8) of section 77A of the Companies Act, 1956 to six months for issue of the same kind of shares.

4. The Bill seeks to replace the said Ordinance.

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) (w.e.f. 21-6-2002)

As per changes made by the above Act, clause (vii) has been inserted in sub-sec. (1) of Sec. 4A of the Act to provide that a securitisation or reconstruction company which has obtained a certificate of registration under sec. 3(4) of the above Act, shall be a public financial institution.

§ For the 'overview' and discussion on the aforesaid Act, refer to Notes under sec. 4A, *post.*

§ For the text of the Act, refer *Appendix* 71.

Companies (Amendment) Act, 2002 (1 of 2003) (w.e.f. 6-2-2003)

The Companies (Amendment) Act, 2002 has incorporated a new Part IXA in the Companies Act, 1956 to provide regulatory framework for the incorporation of co-operatives whose objects extend to more than one state, as companies and conversion of existing co-operatives into companies and for regulating their functioning on the lines of companies formed under the Act. The Act received the Assent of the President on 31-12-2002 and was published in Gaz. of India Ext. Part II, Sec. 1, dt. 1-3-2003. The Statement of Objects and Reasons appended to the Companies (Second Amendment) Bill, 2001 stated thus:

Statement of Objects and Reasons.—During the last decade, changes have taken place in the Indian economy, in the communication and transportation infrastructures, as well as in the method of commerce, banking and international trade. Liberalization of the economy is in the process of changing the terms of trade between rural and urban, labour and industry, finance and commerce. Biotechnology, the information revolution, computerization can all be used to raise the standard of living of the rural masses and ultimately link this economy with regional, national and global demand. Institutions are needed to link the rural economy with the emerging new opportunities. Rural producers are at a potentional disadvantage given their generally limited assets, resources, education and access to advanced technology. In the present competitive scenario, if cooperative enterprises are to continue to serve rural producers, they require an alternative to the institutional form presently available under Law.

2. Keeping all this in view Government constituted a Committee consisting of experts led by Dr. Y.K. Alagh, Economist, former Union Minister to examine and make recommendations with regard to (a) framing a legislation which would enable incorporation of cooperatives as companies and conversion of existing cooperatives into companies and (b) ensuring that the proposed legislation accommodates the unique elements of cooperative business within a regulatory framework similar to that of companies. The Committee had a series of meeting during which it interacted with, and received responses from various cooperatives, institutes and individuals.

3. On the basis of the recommendations of the Committee the present Bill has been prepared with the main objective of facilitating formation of cooperative business as companies and to convert existing business into companies. The salient features of the Bill are:

(*i*) to offer a statutory and regulatory framework that creates the potential for producer-owned enterprises to compete with other enterprises on a competitive footing. The Companies Act envisages and provides for various forms of Companies including private limited, public limited, trusteeship companies and *nidhis*, each with specific and appropriate provisions applicable to them;

(*ii*) to provide for the formation and registration of producer companies which include the mutual assistance and co-operative principles within the more liberal regulatory framework afforded by the Company Law with suitable adaptations;

(*iii*) to provide an opportunity to cooperative institutions to voluntarily transform themselves into the new form of producer companies;

(*iv*) Under the Bill conversion of co-operatives to producer companies is purely voluntary;

(*v*) Member equity may not be publicly traded, but may only be transferred, with the approval of the producer company's Board of Directors. Producer companies would not be vulnerable to the takeover by multinationals or other companies;

(*vi*) The conversion option by co-operative society to producer company can be exercised only if two-thirds of the Members of the concerned society vote in favour of a resolution to that effect;

(*vii*) The new form of Company is designated as "producer company" to indicate that only certain categories of persons can participate in the ownership of such Companies. The members of the Producer Company have necessarily to be "primary producers", that is persons engaged in an activity connected with, or relatable to, primary produce;

(*viii*) The objects of a producer company have been defined to include, among other things, production, processing, manufacture and sale of primary produce as well as allied matters.

4. The Bill seeks to achieve the above objects.

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

Statement of Object and Reasons.—The latest developments and innovations in Corporate laws required that the Companies Act, 1956 and other related laws concerning winding up of companies should be remodelled in line with the international practices in this field. Government constituted a Committee consisting of experts under the chairmanship of Justice V. BALAKRISHNA ERADI, retired Supreme Court Judge to examine the law relating to insolvency and winding up of companies.

2. The Committee examined Companies Act, 1956 and also other laws having a bearing on the subject such as Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), Recovery of Debts due to Banks and Financial Institutions Act, 1993 and Securities Contracts (Regulation) Act, 1956; it also considered laws on corporate insolvency prevailing in industrially advanced countries. The Committee held wide ranging hearings and consultations on the subject.

3. On the basis of the recommendations of the Committee the present Bill has been prepared with the main objective of facilitating or expediting revival/rehabilitation of sick companies and protection of workers interests and where necessary, winding up of companies. The salient features of the Bill are as follows :—

(*i*) A National Company Law Tribunal will be set up. The powers and jurisdiction presently being exercised by various bodies *viz.*, Company Law Board or Board for Industrial and Financial Reconstruction or Appellate Authority for Industrial and Financial Reconstruction or High Courts will now be consolidated and entrusted to the Tribunal. Thus, multiplicity of litigation before various courts or *quasi*-judicial bodies or forums regarding revival or rehabilitation or merger or amalgamation or winding up will be avoided as all these matters will be heard and decided by the proposed National Company Law Tribunal;

(*ii*) All the parties will be bound by the Tribunal's orders and in case of non-availability of a workable proposal for revival or rehabilitation etc. the Tribunal can decide the matter on merits including introduction of its own scheme;

(*iii*) The Tribunal shall work through Benches. There shall be ten special benches which will deal with the matters relating to revival or reconstruction or rehabilitation or winding up of companies;

(*iv*) This will reduce the entire process which is presently taking several years in winding up of the companies to about two years or so;

(*v*) Stripping of assets of sick companies will be avoided;

(*vi*) Since individual affidavits will be filed with National Company Law Tribunal which will have powers of contempt of Court, there will be an in-built seriousness;

(*vii*) There will be a fund known as Rehabilitation and Revival Fund which will be used to make primarily;

(*a*) interim payment of the dues of workmen of the company which has been declared sick or is under liquidation;

(*b*) protection of the assets of sick companies;

(*c*) revival and rehabilitation of sick companies.

(*viii*) 'Industrial Undertaking' in terms of sickness does not include:

(*a*) small scale industrial undertakings, as defined in clause (*j*) of section (3) of the Industrial (Development and Regulation) Act, 1951;

(*b*) Public Sector Undertakings, unless a reference is made by the Central Government and/or State Government, as the case may be.

(*ix*) As a result of this enactment everyone including workers, creditors, investors and the economy as a whole will stand to benefit.

5. The Bill seeks to achieve the above objectives.

6. The Notes on clauses explain, in detail, provisions of the Bill.

Enforcement of Companies (Second Amendment) Act, 2002 (11 of 2003)

Notification No. S.O. 344 (E).—In exercise of the powers conferred by sub-section (2) of section 1 of the Companies (Second Amendment) Act, 2002 (11 of 2003) the Central Government hereby appoints the 1st day of April, 2003 as the date on which the provisions of sections 2 and 6 of the said Act shall come into force.

Press Note No: 2/2003, Dt. 4-4-2003.—The Companies (Second Amendment) Act, 2002 (11 of 2003) received the assent of the President of India on 13.1.2003. Government has decided to bring into force the provisions of sections 2 and 6 of the Companies (Second Amendment) Act, 2002 (11 of 2003) with effect from 1.4.2003. Notification has been published in the Official Gazette dated 31st March, 2003 as S.O. 344 (E). This has been notified to enable the Government to initiate necessary steps to establish National Company Law Tribunal and make it operational.

2. For the sake of clarity it is stated that this Notification bringing into effect section 6 of the Companies (Second Amendment) Act, 2002 (11 of 2003) will only set in motion all preliminary steps required for establishment of National Company Law Tribunal. Upon establishment of the same a separate Notification regarding constitution of NCLT will be issued. Till such time jurisdiction of Company Law Board will continue to remain unchanged. [*Issued by Department of Company Affairs (No.1/1/2003-CL.V)*].

Competition Act, 2002 (12 of 2003) (Assented on 13-1-2003)

On the commencement of the Competition Act, 2002, the MRTP Act shall stand repealed and the MRTP Commission shall stand dissolved. For the text of this Act and Rules and Regulations framed thereunder, see Appendix 299 to 302.

All cases pertaining to monopolistic trade practices or restrictive trade practices pending before the MRTP Commission on or before the commencement of the Competition Act, 2002 including such cases in which any unfair trade practice has also been alleged shall, on such commencement, stand transferred to the Competition Commission of India and shall be adjudicated by that Commission in accordance with the provisions of the repealed Act as if that Act had not been repealed. [*See sec. 66 of the Competition Act, 2002*].

Notwithstanding the repeal of the MRTP Act, the expressions 'group', 'same management', 'financial institution', 'dominant undertaking' and 'owner' used in sections 108A to 108G of the Companies Act, 1956 shall have the meanings respectively assigned to them in the repealed Act [*vide* Sec. 108H].

Amending and consolidating Act

The Act is both a consolidating and amending Act. Except in respect of the provisions of Parts VII, VIII, IX, X and XII, where the sections of the previous Act are largely reproduced though with some changes, the amendments of the provisions in the other Parts of the Act are so far-reaching and the wording so different that it cannot be safely as-

sumed without verification that cases cited as authorities on particular provisions of the previous Acts will also hold good as authorities under the present Act.

Nature and scope of Act

The Act for the first time introduced a uniform law relating to companies throughout India, (without making any distinction between the erstwhile Part A, Part B and Part C States). As per Entries 43 and 44 in the List I (the Union List) in the Seventh Schedule of the Constitution. The Companies Act as an Act of the Central Legislature applies to all trading corporations and in the case of non-trading corporations, to those of them whose objects extend to more than one State. The only companies that do not come within the scope of the Act are those corporations other than trading companies whose objects are confined to one State, Universities, Co-operative Societies, and unincorporated trading, literary, scientific and other societies and associations as mentioned in item 32 of the State List in the Seventh Schedule of the Constitution.

Applicability of the Act

The Act applies to the whole of India, subject to the following:

1. Jammu & Kashmir.—By section 620C, the Act applies subject to special provisions made and the notifications issued by the Central Government modifying some of the provisions of the Act in their applicability to Jammu & Kashmir.

2. Goa, Daman and Diu.—By section 620B, the Act applies subject to special provisions made and the notification issued by the Central Government modifying some of the provisions of the Act in their applicability to the Union territory of Goa, Daman and Diu.

3. Sikkim.—Article 371F of the Constitution grants a special status to the State of Sikkim. Clause (n) of the said article provides that any enactment which is in force in a State in India may be extended to Sikkim by the President by public notification. In absence of any such notification extending the present Act to Sikkim, the State continues to be governed by its own Registration of Companies Act (Sikkim), 1961.

The Official Gazette

The expression 'Official Gazette' occurs in several sections in connection with the publication of Rules, Notifications etc. It is not defined in this Act but is defined in s. 3(39) of the General Clauses Act 1897 as including the Gazette of India and the Gazettes of the State Governments. Hence, where any notice, advertisement or other matter is required to be published in the Official Gazette, it may be published either in the Gazette of India or the Gazette of the concerned State according to the nature of the publicity required by the subject-matter.

Construction of the Act

Rules of interpretation are meant to assist the court in advancing the ends of justice. *Shyam Sunder v. Ram Kumar*, AIR 2001 SC 2472. Where the provisions are identically worded, the presumption is that any judicial interpretation of a corresponding provision of the previous Act will equally apply to similar provisions in the present Act. "It is a sound rule of interpretation to take the words of a statute as they stand and to interpret them ordinarily without any reference to the previous state of the law or the subject of the English law upon which it may be founded: but when it is contended that the Legislature intended by any particular amendment to make substantial changes in the pre-existing law, it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended." *Abdur Rahim v. Syed Abu Mohamed,* AIR 1928 PC 16 at 18; *State of Maharashtra v. Nanded Parbhani, Z.L.B.M.V. Operator Sangh,* AIR 2000 SC 725.

It is not a sound principle in interpretation of statutes to lay emphasis on one word disjuncted from its preceding and succeeding words. *Bhagirathi (K) G. Shenoy v. K.P. Balakurayia,* AIR 1999 SC 2143. Where words are not defined in the statute, dictionary

meaning or common parlance meaning can be taken but not when a term is already defined in the Act. *United Bank of India v. Debt Recovery Tribunal,* AIR 1999 SC 1381; *Municipal Board, Saharanpur v. Imperial Tobacco Co. of India Ltd.,* AIR 1999 SC 264.

Where amendments are made in an Act, it is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them. It is also a well-recognized rule of construction that the Legislature does not intend to make a substantial alteration in the law beyond what it explicitly declares either in express words or by clear implication and that the general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched. *Official Liquidator v. Deshpande, (V.M.) (ITO),* (1972) 42 Com Cases 168 (SC). In *Engineering Industry Training Board v. Samuel Talbot Engineers Ltd.,* (1969) 39 Com Cases 320 : (1969) 2 WLR 464 LORD DENNING has observed that Acts of Parliament are no longer construed according to their literal meaning, but according to their object and intent. *State of Bihar v. Bal Mukund Sah,* AIR 2000 SC 1296. Statutes ought not to be treated like **theorems of Euclid,** but rather ought to be interpreted on the basis of a clear conception of their purpose. *Tata Engg. & Locomotive Co. Ltd. v. State of Bihar,* (2000) 5 SCC 346.

Purposive Construction.—The principle of purposive interpretation makes it clear that the provisions of Ss. 18 and 31 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 must be interpreted in such a way that after coming into force of the Act no debt recovery suit by a bank is decided by a civil court, but only by the Tribunal. Purposive construction was called for. *United Bank of India v. Abhijit Tea Co. (P) Ltd.,* (2000) 7 SCC 357. Court must give effect to true object of the Act by adopting a purposive approach. *Chinnama George v. N.K. Raju,* AIR 2000 SC 1565.

Construction of Amending and Consolidating Act.—The present Act is, as the preamble states, both a consolidating and amending Act. The rule for interpreting such an Act is thus laid down in the classical judgment of CHITTY, L. J., in *Thames Conservators v. Smeed, Dean & Co.,* (1897) 2 QB 334: "The Act which we have to construe is a consolidating and amending Act; the general object of such Acts is to present the whole body of the statutory law on the subject in a complete form repealing the former statutes. The principle of interpretation of a codifying Act is laid down by LORD HERSCHELL in *Bank of England v. Vagliano Brothers,* (1891) AC 107, 144; a statute codifying the law is to be interpreted as it stands, and recourse is not to be had to the former law, except upon some special ground, such, for instance, as an ambiguous expression. The same principle applies to such an Act as that which is now before us, but in a less stringent degree. In this Act, clauses of the repealed Acts are found repeated, but often in altered form and with amendments whereby the sense may be to a great measure changed. Speaking generally, I think that the enactments must be dealt with as they now stand, and that a minute critical examination of repealed clauses ought not to be entered upon for the purpose of interpretation except upon special grounds. If there be any doubt as to the proper construction of any provision of this Act, it will undoubtedly be legitimate to consider the previous law which it has consolidated and amended. *Cf. Secretary of State v. Mask & Co.,* AIR 1940 PC 105, 109. It should, however, be borne in mind that where there is a change in the language as used in the present Act, there is no scope for the application of a decision under the previous law; and full weight must be given to the plain words of the provisions of the Act." *Cf. Thomas v. United Butter Co. of France Ltd.,* (1909) 2 Ch 484.

Construction of words leading to anomalous results.—Where the words in a statute, though plain, lead to anomalous results, which cannot be reconciled with the intention and purpose of the enactment, the Court will be justified in departing from the plain meaning where it is satisfied "(1) that there is clear and gross case of anomaly; (2) that Parliament could not have envisaged such anomaly; (3) that the anomaly can be obviated without detriment to the legislative objective; and (4) that the language of the statute is susceptible of the modification required to obviate the anomaly."

As a rule, where the words are plain there is no room for the "anomalies" test, unless it can be demonstrated that the anomalies are such that they produce an absurdity which Parliament could not have intended or destroy the remedy which Parliament provided to combat the mischief. *Stock v. Frank Jones (Tipton) Ltd.,* (1978) 1 All ER 948 (HL). "It is never a safe guide for construction of a section merely to look at certain anomalies that may result from a particular interpretation being put upon the section. It is true that a Court must, if it can possibly do so, give an interpretation to a section which would not result in difficulties in the working of that section. But, on the other hand, many legislations and specially modern legislations, have been so framed and so drafted that some anomaly or other is inevitable and when such anomalies present themselves to the Court, the duty of the Court is to draw the attention of the legislature to the removal of these anomalies and not to remove them itself by giving a construction contrary to the intention of the Legislature". *Walchandnagar Industries Ltd. v. R. K. Motishaw,* (1953) 23 Com Cases 343 : AIR 1953 Bom 285, **followed** in *Killick Nixon Ltd. v. Bank of India,* (1985) 57 Com Cases 831 (Bom—DB).

"It is a well settled principle that where the language is dubious, the construction should be that which favours the right to sue rather than that which bars the right." *Sudarsan Chits (India) Ltd. v. Uma Sharma (Smt.),* (1992) 73 Com Cases 381, 384 (Ker) **following** *Jethmal v. Ambsingh,* AIR 1955 Raj 97 (FB) and *Raghuraj Singh v. Sobhaman,* AIR 1951 All 485 (FB). Efforts should be made to see that each provision in the Act shall have its play. Consequences which are likely to flow from a particular interpretation should be considered while interpreting a statute. *British Airways Plc v. UOI,* AIR 2002 SC 391.

Marginal Notes.—Though in olden days it used to be thought that one could not have any regard to marginal notes in trying to ascertain the meaning of a provision of an Act of Parliament, it was observed by the House of Lords in *Director of Public Prosecutions v. Schildkamp,* (1969) 3 All ER 1640 : (1970) 40 Com Cases 1034 (HL) that it might be useful to 'indicate the main subject with which the section deals though it is a poor guide to the scope of the section (LORD REID) and as VISCOUNT DILHORNE pointed out, it is a convenient indication as to the main intention or purpose of a section. But they warned that it cannot be a guide. In *R. v. Kelt,* (1977) 3 All ER 1099 (CA) LORD SCARMAN **relied** upon this decision. At any rate, there can be no justification for restricting the section by the marginal note. *Emperor v. Sadashiv,* AIR 1947 PC 82. The marginal note cannot certainly control the meaning of the body of the section if the language employed therein is clear. *Western India Theatres Ltd. v. Municipal Corporation, Poona,* AIR 1959 SC 586. Marginal notes have no role to play where the provision in question is not ambiguous. *P. Aisha Potty v. Returning Officer,* AIR 2002 Ker 89.

The Department of Company Affairs in India in clarifying the meaning of section 285 has completely ignored the marginal note to the Section in interpreting its meaning. [See notes under S. 285 *post*]. Also see *Shri Balaji Textile Mills P. Ltd. v. Ashok Kavle,* (1989) 66 Com Cases 654, 665 (Kar) where it was observed that the marginal note does not in any way control the true scope and effect of section 41(2) and MAXWELL ON THE INTERPRETATION OF STATUTES, (12th Edn. by P. ST. J. LANGAN). For further study of the value of marginal notes, see G.P. SINGH–PRINCIPLES OF STATUTORY INTERPRETATION, 155 (9th Edn., 2004).

Headings in Statutes.—The courts are entitled to look at headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, but headings cannot be used to give different effect to clear words in a section. *R. v. Surrey Assessment Committee,* (1947) 2 All ER 276, 278, 279. "It is well settled that the headings prefixed to sections or entries (of a Tariff Schedule) cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in construing the provision

but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision". *Frick India Ltd. v. Union of India,* AIR 1990 SC 689, p. 693. Headings cannot be treated as rigid compartments. *Real Value Appliances Ltd. v. Canara Bank,* AIR 1998 SC 2064 : (1998) 93 Com Cases 26 : (1998) 5 SCC 554. For role of heading see *Forage & Co. v. Municipal Corpn. of Greater Bombay,* AIR 2000 SC 378. A heading by itself does not control the meaning to be given to the goods listed in a Schedule. *Municipal Corporation for the City of Thane v. ASMACO Plastic Industries,* AIR 1998 SC 2440.

Acts in *pari materia*.—Acts are regarded to be in *pari materia* when they deal with the same person or thing or class. It is not enough that they deal with a similar subject-matter. MAXWELL ON INTERPRETATION OF STATUTES, 12th Edition, page 66. The meaning of the phrase *pari materia* has been explained in an American case in the following words: "Statutes are in *pari materia* which relate to the same person or thing, or to the same class of persons or things. The word *par* must not be confounded with the word *simlis*. It is used in opposition to it—intimating not likeness merely but identity. It is a phrase applicable to public statutes or general laws made at different times and in reference to the same subject. *United Society v. Eagle Bank,* (1829) Connecticut 157, p. 470, as cited in CRAIES, Statute Law, p. 134 (7th Edition). **See further,** *Shah & Co., Bombay v. State of Maharashtra,* AIR 1967 SC 1877, pp. 1883, 1884; *The Sirsilk Ltd. v. The Textiles Committee,* AIR 1989 SC 317, p. 330. When the two pieces of legislation are of differing scopes, it cannot be said that they are in *pari materia. State of Punjab v. Okara Grain Buyers Syndicate Ltd., Okara,* AIR 1964 SC 669, pp. 684, 685.

The courts may follow decisions about similar provisions contained in enactments in *pari materia*. The object behind the rule is to avoid contradiction between two statutes dealing with the same subject. The rule is not applicable when two statutes are not in *pari materia. Babu Khan v. Nazim Khan,* AIR 2001 SC 1740.

Words and expressions defined in one statute as judicially interpreted do not afford a guide to construction of the same words or expressions in another statute unless both the statutes are *pari materia* legislations or it is specifically so provided in one statute to give the same meaning to the words as defined in the other statute. *Jagatram Ahuja v. CGT,* AIR 2000 SC 3195 (3201) : (2000) 8 SCC 249.

History of Legislation.—It is not only proper but necessary to consider the history of the section so that an interpretation may be given which accords with the apparent intention of the Legislature, as it may be gathered from that history. *Official Liquidator, S.S.R.S. Nidhi Ltd. v. N. Krishnaswami Iyengar,* (1947) 17 Com Cases 77, 81 (Mad).

Contemporary Legislation in U.K.—The Indian Companies Act, as recodified in 1956, closely followed the U.K. Companies Act, 1948, which was founded on the report of the Cohen Committee. The U.K. Act of 1948 held sway without amendment until the 1960s. But, thereafter it was amended several times till 1985. Now the Principal Act in operation in the U.K. is the Companies Act, 1985, and it is supported by three other enactments, *viz.*, the Companies Securities (Insider Dealing) Act, 1985 now replaced by Part V of the Criminal Justice Act, 1993, the Business Names Act, 1985, and the Companies Consolidation (Consequential Provisions) Act, 1985. This Act has been further affected by other legislative measures, and, in main, by the Insolvency Act, 1986, Company Directors Disqualification Act, 1986 and the Financial Services Act, 1986.

The Companies Act, 1989 has altered and supplemented the existing legislation in many ways, particularly in respect of the contents of Companies annual accounts and group accounts, and the rules relating to the eligibility of appropriately qualified accountants for appointment as auditors of companies and their tenure of office; registration of charges created by companies over their assets at the Companies Registry; and the reversal to the external effect of *ultra vires* rule on the validity of companies contracts.

Thus, the company legislation in the U.K. has grown in quantity and intricacy, and the flow of decisions by the courts elaborating and/or clarifying the statutory provisions of

the Act of 1985, as amended has kept pace. On the other hand, in India the Companies Act of 1956, which was founded on the report of the Company Law Committee (Bhabha Committee) and which had placed considerable reliance on the U.K. Act of 1948, has been amended as many as on 19 occasions till 1997. Now, there is a considerable shift in the concepts and principles underlying the Indian Law from those developed in the U.K. since 1948. Accordingly, full reliance should not be placed on the judicial precedents laid down by the British Courts, while interpreting the provisions of the (Indian) Companies Act, 1956, as amended, except, perhaps, in regard to such of the provisions which remain unaltered since 1956.

Application of English Law.—As regards the applicability of English decisions, it was earlier stated that excepting as regards the special provisions relating to its own management system and Central Government control in several matters, the Indian Act follows the English Act not only in general principles but in the detailed arrangement and expression of various provisions. English authorities, may therefore, be usefully be referred to as a good guide in construing such provisions: *Naresh Chandra Sanyal v. Ramani Kanto Roy,* AIR 1949 Cal 360; *Lovelock & Lewes v. Malabar T. & S. Mills,* (1915) 13 Mad LT 282.

Of late, the courts have, however, observed that while large areas of the company law of both countries are common, it must be borne in mind that inasmuch as the socio-economic aspects of the present Indian Act are different from those of the English Act and having regard to the Directive Principles of State Policy laid down in Part IV of the Constitution, caution is necessary in the application of English case law. See *Madanlal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd.,* (1958) 28 Com Cases 312 : AIR 1958 Bom 491. See also *National Textile Workers' Union v. P.R. Ramakrishnan,* (1983) 53 Com Cases 184 : AIR 1983 SC 75.

Supreme Court's Views.—On this subject the Supreme Court has observed as follows:—"Although the Indian Companies Act is modelled on the English Companies Act, the Indian law is developing on its own lines. Our law is also making significant progress of its own as and when necessary. Where the words used in both the Acts are identical, the English decisions may throw good light and reasons may be persuasive." After quoting with **approval** the following passage from a decision of the Privy Council in *Ramanandi Kuer v. Kalawati Kuer,* AIR 1928 PC 2, wherein it was stated that "where there is positive enactment of the Indian Legislature, the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded", the Court has gone on to observe that the background, conditions and circumstances of the Indian society, the needs and requirements of our country call for a somewhat different treatment. We will have to adjust and adapt, limit or extend, the principles derived from English decisions, entitled as they are to great respect suiting the conditions of our society and the country in general. *Hind Overseas Pvt. Ltd. v. R. P. Jhunjhunwalla,* (1976) 46 Com Cases 91 : AIR 1976 SC 565. The Supreme Court **reversed** the ruling of Calcutta High Court in *Raghunath Prasad Jhunjhunwala v. Hind Overseas P. Ltd.,* (1971) 41 Com Cases 308 (DB).

In the case of *National Textile Workers' Union v. P. R. Ramakrishnan,* (1983) 53 Com Cases 184, 206 : AIR 1983 SC 75, Supreme Court held: "We cannot mechanically accept as valid (what) found favour with the English courts in the last century when the doctrine of *laissez faire* prevailed. It may be that even today in England the courts may be following the same legal rule which was laid down almost a hundred years ago, but that can be no reason why we in India should continue to do likewise.....We have to build our own jurisprudence and though we may receive light from whatever source it comes, we cannot surrender our judgment and accept as valid in our country whatever has been decided in England."

Construction of 'Mandatory' and 'Directory' provisions.—A provision is said to be mandatory where the procedure prescribed by it, if not followed, has the effect of invalidating any action taken contrary to it. On the other hand, a provision is directory if the procedure prescribed by it is intended to be only directive and advisory, any omission or failure to conform to it not resulting in the invalidation of the action taken in disregard of it. In construing whether a provision is mandatory or only directory, the purpose of enacting the provision, its scope of operation and possible effects, its functional importance in the statute where it is enacted will all have to be considered. There is no general rule for determining the mandatory or directory nature of any provision. In this connection the following observation of the Supreme Court may be noted:—"The question whether a particular provision of a statute which on the face of it appears mandatory—in as much as it uses the word "shall" as in the present case—or is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case, and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the Legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory." *Raza Buland Sugar Co. Ltd. v Municipal Board, Rampur,* AIR 1965 SC 895, 899. *Kerala Housing Board v. Rampriya Hotels (P.) Ltd.,* JT 1994 (5) SC 113.

When an Act conferring a power does not mention the conditions or the circumstances in which the power is to be exercised, it will be construed as discretionary and directory. Based on this principle, section 442 of the Companies Act, 1956, which provides that the court 'may stay or restrain' a proceeding against a company after the presentation of a winding up petition, has been held by the Supreme Court to be discretionary and directory. *Official Liquidator v. Dharti Dhan P. Ltd.,* (1977) 47 Com Cases 420, 425 : AIR 1977 SC 740. The use of the word "may" is not decisive. It is permissive or obligatory, depending on the context. *Societe de Traction v. Kamani Engineering Co. Ltd.,* (1963) 33 Com Cases 869, 875 : AIR 1964 SC 558.

Where the word "shall" was replaced by the word "may" by an amendment, this indicated that the unamended provision was mandatory. *State of A.P. v. K. Ramachandran (Dr.),* AIR 1998 SC 1093.

Interpretation of memorandum and articles.—In construing a company's constitution, *i.e.* memorandum and articles, such construction should be adopted as will give commercial efficacy to the company's regulations; but where the words used are unambiguous, their meaning should not be rejected on the ground of inconvenience or that it will lead to absurdity. See *Worcester Corsetry Ltd. v. Witting,* 1936 Ch 640: (1937) 7 Com Cases 296. "The inherent power of the corporators to control the affairs of their company by nominating directors does not become excluded by any contract contained in the article of association." See also *Grundt v. Great Boulder Proprietary Mines Ltd.,* (1948) 1 All ER 21 : (1948) 18 Com Cases 236 (CA); *Holmes v. Keys (Lord),* (1958) 28 Com Cases 419 : (1958) 2 All ER 129 (CA).

As in the case of the interpretation of a statute, so also in the case of interpreting the memorandum and articles of a company, plain words are to be taken in their ordinary meaning. The only exception to the rule is where there is a drafting mistake or inadvertent use of wrong words, leading to absurd consequences. In no other case, even where there is manifest absurdity, interpretation of plain words otherwise than in their ordinary plain meaning, can be justified. See the decision of the HOUSE OF LORDS in *Stock v. Frank Jones (Tipton) Ltd.,* (1978) 1 All ER 948 (HL). As a general rule, where the language is quite clear, no clause in the memorandum or provision in the articles can be construed otherwise than in its plain meaning, even though it may not be in accord with the

intention of the parties. *Scott v. Scott (Frank F.) (London) Ltd.*, (1940) 3 All ER 508 : (1941) 11 Com Cases 127 (CA). The only course is to alter them in accordance with, and within the limits permitted by, the Act.

A liberal construction is to be put upon the words of a document so as to uphold it if possible and carry into effect what appears to be the intention of the parties. *New Zealand Gold, etc. Co. v. Peacock*, (1894) 1 QB 622 (CA).

Both, the memorandum and articles have to be construed subject to the provisions of the Act, since any provision contrary to the Act will be void (S. 9). In considering whether any clause in the memorandum or articles is inconsistent with the Act, provisions in Table A must be borne in mind since these provisions are *prima facie* consistent with the Act. *Trevor v. Whitworth*, (1887) 12 AC 409 (HL); *New Balkis Eersteling v. Randt Gold Mining Co.*, (1904) AC 165 (HL). In *London Financial Association v. Kelk* (1884) 26 Ch D 107 (CA), the court rejected the principles of both liberal and strict construction and held that what the law required was to put a just construction and no other. Clauses in the memorandum giving the company powers to borrow money cannot be construed as independent objects. *Introductions Ltd., Re*, (1969) 1 All ER 887. Such clauses must be regarded as ancillary to the main objects. *German Date Coffee Co., Re*, (1882) 20 Ch D 169 (CA); *Stephens v. Mysore Reefs (Kangundy) Mining Co. Ltd.*, (1902) 1 Ch 745.

§ For further Notes, see under section 13 *post*.

Committee Reports, Draft Bill, Preamble, etc.—In view of the extensive amendments of the previous law, made in the Act, copious extracts from the Reports of the Company Law Committee, the Joint Committee of Parliament etc., have been given under the relevant sections of the Act, not because they have any binding force as regards the interpretation of the provisions concerned, but because they are useful for understanding the circumstances and knowing the reasons underlying the amendments. *Cf. Prathiva Sasmal (Mrs.) v. Agricultural Income-tax Officer*, AIR 1958 Cal 585. See also *Assam Railway & Trading Co. Ltd. v. IRC*, (1934) All ER 646 (HL). While the report of a Select Committee or other Committee on whose report an enactment is based can be looked into "so as to see the background against which the legislation was enacted, the fact cannot be ignored that Parliament may, and often does, decide to do something different to cure the mischief". So we should not be unduly influenced by the Report. *Letang v. Cooper*, (1964) 2 All ER 929, see also *Assam Railways & Trading Co. Ltd. v. IRC*, (*supra*).

When Parliament has enacted a statute as recommended by the Report of a Committee and there is ambiguity or uncertainty in any provision of the statute, the Court may have regard to the Report of the Committee for ascertaining the intention behind the provision. *Black Clawson International Ltd. v. Papierwerke*, (1975) 1 All ER 810 (HL). See also *Davis v. Johnson*, (1978) 1 All ER 1132 (HL). But where the words used are plain and clear, no intention other than what the words convey can be imported in order to avoid anomalies.

Documents or reports preceding a particular piece of legislation can be legitimately taken into consideration for construing the provisions of the Act. *Shrimant Shamrao Smyavanshi v. Prahlad Bhairoba Smyavanshi*, AIR 2002 SC 960.

The significance of preamble in gathering legislative intent was explained in *Amit Das v. State of Bihar*, AIR 2000 SC 2264. The report of the Special Committee (1930-31) which examined the Draft Bill of the Partnership Act, 1932 and made recommendations to the legislature was taken into consideration to construe S. 69(2) of the Partnership Act, 1932. Looking into the report even for purpose of construing was quite permissible because the provision in question was not free from ambiguity. *Haldiram Bhujiawala v. Anand Kumar Deepak Kumar*, AIR 2000 SC 1287.

Statement of Objects and Reasons and Notes on Clauses.—It is well settled that the Objects and Reasons accompanying a Bill, when introduced in Parliament

cannot be used to determine the true meaning and effect of the substantive provisions of the statute. They cannot be used except for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation. *State of West Bengal v. Union of India,* AIR 1963 SC 1241, p. 1247; *Narain Khamman v. Parduman Kumar Jain,* AIR 1985 SC 4; *K.S. Paripoornan v. State of Kerala,* AIR 1995 SC 1012. Interpretation which subserves the object of the Act should be adopted and for this purpose regard can be had to the history of the law and the Statement of Objects and Reasons. *B.R. Enterprises v. State of U.P.,* AIR 1999 SC 1867. Where two interpretations are possible, one that goes in favour of the advancement of the object of the statute and saves its constitutional validity should be adopted. *Githa Hariharan v. RBI,* AIR 1999 SC 1149; *Ahmed Nassar v. State of T.N.,* (1999) 8 SCC 473; *Velamuri Venkata Sivaprasad (d) v. Kothari Venkateswarlu,* J.T. 1999 (9) SC 242.

The Statement of Objects and Reasons as well as the Notes on Clauses of the Bill relating to any particular legislation may be relied upon for construing any of its provisions where the Clauses have been adopted by Parliament without any change in enacting the Bill, but where there have been extensive changes during the passage of the Bill in Parliament, the objects and reasons of the changed provisions may or may not be the same as of the clauses of the original Bill and it will be unsafe to attach undue importance to the Statement of Objects and Reasons or the Notes on Clauses.

So also, as pointed out by the Supreme Court, though the Statement of Objects and Reasons appended to a Bill is not admissible as an aid to the construction of the provisions of an Act as passed, it may be referred to for the limited purpose of ascertaining the objects underlying the legislation and the conditions which necessitated the enactment. *Thangal Kunju Musaliar (A.) v. M. Venkatachalam Pati,* AIR 1956 SC 246. See also *Raja Raja Varman (N.K.) v. K.K. Krishnan Nair,* AIR 1958 Mad 117; *Palanichamy Chettiar v. Reliance Bank of India,* (1956) 2 MLJ 1 and *Kevalchand Sowcar (M.) v. State of Madras,* AIR 1957 Mad 514; *In re, Tarachand Poddar* AIR 1968 Cal 310; *CIT v. Vadilal Lallubhai,* AIR 1973 SC 1016. *Dena Bank v. Ghanshyam,* (2001) 2 LLJ 252 (SC) (Statement of Objects and Reasons taken into consideration).

Interpretation in consonance with purpose and object of the legislation should be preferred. *Uday Mohanlal Acharya v. State of Maharashtra,* AIR 2001 SC 1910.

Travaux Preparatories (Ascertaining draftsman's intentions).—The present trend in the European Economic Community countries and the European Court, however, is to interpret treaties, conventions, statutes etc. by reference to travaux preparatories, that is, all preparatory records such as reports and other historical materials. In view of the United Kingdom also having become a member of the European Community, it is very possible that in future, reference to *travaux preparatories* will be resorted to by the English Courts. Also see *Fothergill v. Monarch Airlines,* (1979) 3 All ER 445 (CA), especially LORD DENNING M.R.'s **dissenting** judgment.

There is no reason why reference to *travaux preparatories* should not be had in the case of interpretation of documents generally where the words are not clear or there is ambiguity or obscurity. In the words of LORD DENNING "when there is any ambiguity or obscurity or any thing that needs clearing up, recourse can be had to the *travaux preparatories*, so as to ascertain what was the meaning intended by the draftsman and signatories to the document. These *travaux preparatories* can be used not only to see what was the mischief sought to be remedied, not only to see what was the purpose or object of the draftsmen but also to find out what they really meant to convey by the words they used." *Fothergill v. Monarch Airlines Ltd.,* (1979) 3 All ER 445 at 451 (CA) (**dissenting** judgment); On appeal to the House of Lords *Fothergill v. Monarch Airlines,* (1980) 2 All ER 696, 705 (HL).

Legislative Intent.—The intention of the law maker has to be ascertained from the language of the statutes. Where the words are clear, explicit and unambiguous, there need be no recourse to any rules of interpretation. The law must be applied as it is expressed

even if some inadvertent consequence is that someone benefits from his own wrong. *State of Kerala v. S.G. Sarvothama Prabhu (Dr.),* AIR 1999 SC 1195. Function of the court is to interpret the statute to ascertain the legislative intent. *Steel Authority of India Ltd. v. National Union Waterfront Workers,* AIR 2001 SC 3527 p. 3542 : (2001) 7 SCC 1. In the absence of clear words indicating legislative intent, it is open to the court, when interpreting any provision, to read it with other provisions of the same statute. *Krishna v. State of Maharashtra,* AIR 2001 SC 695. Legislative intent has to be found out in the words used. In the absence of any ambiguity in the provision, recourse to internal or external aids, is impermissible. *CIT v. Plantation Corpn. of Kerala Ltd.,* (2001) 247 ITR 155 (SC).

Interpretation which subserves the legislative intent should be preferred. *Raipur Development Authority v. Anupam Sahkari Griha Nirman Samiti,* (2000) 4 SCC 357.

Retrospective effect of amendments.—As regards savings and repeals, sections 644 to 658 make specific provision, and the provisions of the Act, are to be applied subject to them. As regards retrospective operation of the amendments effected both by the Act of 1956 and the subsequent Amending Acts, where it is expressly provided that any provision applies with retrospective effect such provision will govern; and in other cases, the guiding principle is: "While provisions of a statute dealing merely with matters of procedure may properly, unless that construction is textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute, are not to be applied retrospectively in the absence of express enactment or necessary intendment"—*Delhi Cloth & General Mills Co. v. I.T. Commrs.,* AIR 1927 PC 242. The following statement of the Supreme Court is to the same effect: "If it is a change in the law of procedure it operates retrospectively, unlike the law relating to vested rights. The reason is that no person has a vested right in any course of procedure. He has only the right of prosecuting or defending in the manner prescribed for the time being, and if by an Act the mode of procedure is altered he has no other right than to proceed according to the altered mode. As regards vested rights, there is no retrospective operation." *Anant Gopal Sheorey v. State of Bombay,* AIR 1958 SC 915.

Provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. *K.C. Arora v. State of Haryana,* AIR 1984 SC 1. "Every statute, it has been said", observed LOPES L.J., "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect." As a logical corollary of the general rule, that retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication, there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary. *Rajgopal Reddy v. Padminichandra,* 1995 AIR SCW 1422. In other words, close attention must be paid to the language of the statutory provision for determining the scope of the retrospectivity intended by Parliament. *Union of India v. Raghubir Singh,* AIR 1989 SC 1933, p. 1948; *K.S. Paripoornan v. State of Kerala,* AIR 1992 SC 1488, 1494 **affirmed** by Constitution Bench. But if the literal reading of the provision giving retrospectivity produces absurdities and anomalies, a case not *prima facie* within the words may be taken to be covered, if the purpose of the provision indicates that the intention was to cover it. *Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama,* AIR 1990 SC 981, p. 985. The inhibition against retrospective construction is not a rigid rule and must vary *secundum materium. Barber v. Pigden,* (1937) 1 All ER (CA) p. 126 (SCOTT, L.J.); *Carson v. Carson,* (1964) 1 All ER 681, p. 687.

Statutory provisions creating or taking away substantive rights are ordinarily prospective; they are retrospective only if, by express words or by necessary implication, the legislature has made them retrospective. As a general rule, an amendment affecting substantive rights would not have retrospective effect and they will affect only the transac-

tions subsequent to the amendment and not apply to antecedent transactions. *CIT v. Ramakrishna Mills (Coimbatore) Ltd.*, (1974) 44 Com Cases 33, 38 (Mad). For instance if a debt due to a company was already barred by limitation, the extended period of limitation given by section 458-A added by the Amendment Act, 1960 will not revive the barred debt.

Retrospective operation cannot be presumed in respect of provisions leading to penal consequences. *Collector of Customs v. East Punjab Traders,* (1998) 9 SCC 115.

Explanation.—An explanation should be read so as to harmonise with and clear up any ambiguity in the main section. It should not be construed as to widen the ambit of the section. *State of Bihar v. Ram Naresh Pandey,* AIR 1957 SC 389. The Supreme Court has stated the object of an *Explanation* to be as follows: (a) to explain the meaning and intendment of the Act itself; (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve; (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful; (d) an *Explanation* cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the *Explanation*, in order to suppress the mischief and advance the object of the Act it can help or assist the court in interpreting the true purport and intendment of the enactment, and (e) it cannot however take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same. *S. Sundaram v. R. Pattabhiraman,* AIR 1985 SC 582.

The role of an explanation has been thus explained by G.P. SINGH in PRINCIPLES OF STATUTORY INTERPRETATION, pp. 194, 195 (9th Edition, 2004) : When a section contains a number of clauses and there is an *Explanation* at the end of the section, it should be seen as to which clause it applies and the clarification contained in it applied to the clause. *Patel Roadways Ltd. v. Prasad Trading Co.,* AIR 1992 SC 1514, p. 1518. An *Explanation* may be added to include something within or to exclude something from the ambit of the main enactment or the connotation of some word occurring in it. Even a negative *Explanation* which excludes certain types of a category from the ambit of the enactment may have the effect of showing that the category leaving aside the excepted types is included within it. *ITO, (First), Salem v. Short Brothers (P.) Ltd.,* AIR 1967 SC 81, p. 83. An *Explanation*, normally, should be so read as to harmonise with and clear up any ambiguity in the main section and should not be so construed as to widen the ambit of the section. *Bihta Co-operative Development and Cane Marketing Union Ltd. v. Bank of Bihar,* AIR 1967 SC 389, p. 393. If on a true reading an *Explanation* widens the scope of the main section, effect must be given to it; *Aphali Pharmaceuticals Ltd. v. State of Maharashtra,* AIR 1989 SC 2227, p. 2238. It is also possible that an *Explanation* may have been added in a declaratory form to retrospectively clarify a doubtful point in law and to serve as a proviso to the main section or *ex abundanti cautela* to allay groundless apprehensions. *Y.P. Chawla v. M.P. Tiwari,* AIR 1992 SC 1360, p. 1362; *Abdul Latif Khan v. Abadi Begum,* AIR 1934 PC 188, p. 191; *Keshavji Raoji and Co. v. Commissioner of Income Tax,* AIR 1991 SC 1806, p. 1818.

When the Explanation added towards the end of the section opens with the words 'for the purpose of this section' or 'nothing in this section' it will *prima facie* indicate that the Explanation applies to all the clauses in the section. *Commissioner of Agricultural Income-tax Kerala v. Plantation Corporation of Kerala Ltd.,* AIR 2000 SC 3714 p. 3717.

Proviso.—The Supreme Court in *S. Sundaram v. R. Pattabhiraman,* AIR 1985 SC 582 discussed at length the case-law relating to the function of a proviso in an enactment. FAZAL ALI J. summed up the position by observing that a proviso may serve four different purposes, namely, (1) Qualifying or excepting certain provisions from the main enactment; (2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enact-

ment workable; (3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and (4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.

Benefit extended by the main part of a rule can be nullified by the proviso. *Hyderabad Asbestos Cement Products v. Union of India,* AIR 2000 SC 314. Proviso must be considered in relation to the main matter particularly in case of penal provisions. *State of Karnataka v. Krishnappa,* AIR 2000 SC 1470.

Parliamentary debates.—The speeches made by the members during the debate are inadmissible in evidence but the speech made by the mover of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation was enacted. *K.P. Varghese v. ITO,* AIR 1981 SC 1922 : (1981) 131 ITR 597 (SC). The Supreme Court **relied** on the speech of the Finance Minister in the following cases: *Addl. CIT v. Surat Art Silk Cloth Manufacturers' Association,* AIR 1980 SC 387 : (1980) 121 ITR I (SC); *Loka Shikshana Trust v. CIT,* (1975) 101 ITR 234 (SC); *Indian Chambers of Commerce v. CIT,* AIR 1976 SC 348.

There is the following pertinent observation on this point in *Gore-Browne on Companies* § 12.18 (44th Edn.) : "The Bill's process through Parliament was not made easier by the House of Lord's decision in *Pepper (Inspector of Taxes) v. Hart,* (1993) 1 All ER 42, which made it clear that courts were entitled to refer to debates in Parliament to assist in the interpretation of legislation. Consequently, the ministers responsible for steering this measure through Parliament were particularly cautious in explaining what are very technical provisions. In the result, whilst the reports of the debates constitute rather amusing reading, they are of little practical assistance in discerning the purport of some of the more tangled provisions."

Statements made by a Minister who moved the Bill in the House of Parliament can be referred to for ascertaining the type of mischief which was sought to be remedied by the legislation but cannot be relied upon for interpreting the provisions. *Narsimha Rao (P.V.) v. State,* (CBI/SPE), (1998) 4 SCC 626 : AIR 1998 SC 2120.

Departmental instructions inadmissible.—The explanatory notes regarding the working of an Act issued by the Government of India for the assistance of their officials are inadmissible, in law, for the purpose of constructing the Act. CRAIES ON STATUTE LAW, 6th edition, p. 131 (cited with **approval** in *J.K. Steel Ltd. v. Union of India,* AIR 1970 SC 1173). However, the Clarificatory Circulars and Press Notes issued by the Government, for the information and guidance of the public are binding on it *i.e.,* to say on the Department of Company Affairs, which administers the Companies Act. Executive instructions or Notifications issued subsequent to a Supreme Court ruling can be relied upon. *Union of India v. V.M. Salgaonkar,* AIR 1998 SC 1367.

Notifications.—Notification has to be read in its entirety and not in parts. *Grasim Industries Ltd. v. State of M.P.,* AIR 2000 SC 66.

***Non obstante* clause.**—The words "notwithstanding anything contained . . .", characterise the *non obstante* clause. It is generally included to give an overriding effect to one clause over another. If there is any inconsistency or departure between the *non obstante* clause and another provision, it is the *non obstante* clause which will prevail. *K. Parasuramaiah v. Pakuri Lakshman,* AIR 1965 AP 220.

Sometimes one finds two or more enactments operating in the same field and each containing a *non obstante* clause stating that its provisions will have effect 'notwithstanding anything inconsistent therewith contained in any other law for the time being in force'. The conflict in such cases is resolved on consideration of purpose and policy underlying the enactments and the language used in them. Another test that is applied is that the later enactment normally prevails over the earlier one. *Sarvan Singh v. Kasturilal,*

AIR 1977 SC 265, pp. 274, 275; *Kumaon Motor Owner's Union v. State of Uttar Pradesh,* AIR 1966 SC 785; *Ashoka Marketing Ltd. v. Punjab National Bank,* AIR 1991 SC 855, pp. 878, 879. It is also relevant to consider as to whether any of the two enactments can be described a special one; in that case the special one may prevail over the more general one notwithstanding that the general one is later in time. *Sanwarmal Kajriwal v. Vishwa Co-operative Housing Society Ltd.,* AIR 1990 SC 1563, p. 1575. *Non obstante* clause in a subsequent general Act would prevail over a conflicting provision in a prior special Act. *State Financial Corporation v. Official Liquidator,* AIR 2000 SC 2642. In case of conflict between two special laws, the later one prevails. *Allahabad Bank v. Canara Bank,* AIR 2000 SC 1535.

The expression 'notwithstanding in any other law' occurring in a section of an Act cannot be construed to take away the effect of any provision of the Act in which that section appears. *Virudhachalam (P.) v. Management of Lotus Mills,* AIR 1998 SC 554 at 561, 562; *Benny T.D. v. Registrar of Co-op. Societies,* AIR 1998 SC 2012.

A *non-obstante* clause has an overriding effect only on Rules and Provisions which were in existance at the time when the enactment was brought into force. The clause cannot be construed to mean that all future Rules and Notifications would also be subject to such a *non obstante* clause. *State of West Bengal v. Madan Mohan Ghosh,* AIR 2002 SC 2273.

Meaning of definition clause.—It is a well established principle of law that a particular term defined in the definition clause or section is subject to anything repugnant in the context of the other provisions of the statute. *Maulana Shamsuddin v. Khushillal,* AIR 1978 SC 1740, 1743.

In the words of WANCHOO, J. : "It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or context. That is why all definitions in statutes generally begin with the qualifying words, similar to the words used in the present case, namely 'unless there is anything repugnant in the subject or context'. Therefore, in finding out the meaning of the word 'Insurer' in various sections of the Act (Insurance Act, 1938) the meaning to be ordinarily given to it is that given in the definition clause. But this is not inflexible and there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word had been used and that will be giving effect to the opening sentence in the definition section, namely 'unless there is anything repugnant in the subject or context'. In view of this qualification, the Court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. *Vanguard Fire and General Insurance Co.Ltd., Madras v. Fraser & Ross,* AIR 1960 SC 971, pp. 974, 975; *Whirlpool Corporation v. Registrar of Trade Marks,* JT (1998) 7 SC 243, p. 252 : (1998) 8 SCC 1.

Where certain crucial words are not defined in the Act, their meaning has to be ascertained by the application of 'subject' and 'object' rule. *Tarlochan Dev Sharma v. State of Punjab,* AIR 2001 SC 2524 at 2529. RC LAHOTI J. said in this case:

"To find the meaning of a word or expression not defined in an enactment the Courts apply the 'subject and object rule' which means ascertain carefully the subject of the enactment where the word or expression occurs and have regard to the object which the Legislature has in view. Forego the strict grammatical or etymological propriety of language, even its popular use; let the subject or the context in which they are used and the object which the Legislature seeks to attain be your lenses through which look for the meaning to be ascribed. "In selecting one out of the various meanings of a word, regard must always be had to the context as it is a fundamental rule that the meanings of words

and expressions used in an Act must take their colour from the context in which they appear. Therefore, when the context makes the meaning of a word quite clear, it becomes unnecessary to search for and select a particular meaning out of the diverse meanings a word is capable of, according to lexicographers. JUDGE LEARNED HAND cautioned 'not to make a fortress out of the dictionary' but to pay more attention to 'the sympathetic and imaginative discovery' of the purpose or object of the statute as a guide to its meaning (See PRINCIPLES OF STATUTORY INTERPRETATION. JUSTICE G.P. SINGH, (9th Edition 2004).

Contemporanea expositio.—The rule of construction by reference to *contemporanea expositio* is a well-established rule for interpreting a statute by reference to the exposition it has received from a contemporary authority. ***K.P. Varghese v. ITO,*** (1981) 131 ITR 597, 612 (SC) **followed** in *J.K. Cotton Spg. & Wvg. Mills Ltd. v. Union of India,* AIR 1988 SC 191. See also ***Deshbandhu Gupta & Co. v. Delhi Stock Exchange Association Ltd.,*** AIR 1979 SC 1049 : (1980) 50 Com Cases 84.

Deeming provisions.—When a person is "deemed to be" something, the only meaning possible is that whereas he is not in reality that something, the Act of Parliament requires him to be treated as if he were. *CIT v. Bombay Trust Corporation,* AIR 1930 PC 54, 55. It is a well settled rule of interpretation that in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate. *CIT v. Teja Singh,* AIR 1959 SC 666.

A note on deeming provisions can never be complete without reference to the following outstanding passage in *East End Dwellings Co. Ltd. v. Finsbury Borough Council,* (1951) 2 All ER 587 (HL), per LORD ASQUITH: "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

The word "deemed" refers to 'what is supposed to be' and not to 'what actually is'. It rather suggests that something is being assumed as true for certain purposes though really it is not so. *A.C. Goel v. First National Bank Ltd.,* (1960) 30 Com Cases 317, 321 : AIR 1960 Punj 476. The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to (give) an artificial construction to a word or a phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain, and what is, in the ordinary sense, impossible. LORD RADCLIFFE in *St. Anbyn v. A.G. (No. 2),* 1952 AC 15 at 53 quoted in *Barclays' Bank Ltd. v. IRC,* (1962) 32 Com Cases 308, 325 : (1960) 2 All ER 817 (HL).

Beneficial Legislation.—A construction which will fructify the legislative intent is to be preferred. *Transport Corpn. of India v. E.S.I. Corpn.,* 2000 (I) LLJ 1 : AIR 2000 SC 238. It is the duty of the court to interpret a beneficial provision so liberally as to give it a wider meaning instead of giving it restrictive meaning which would negate its very object. *Madan Singh Shekhawat v. U.O.I.,* (1999) 6 SCC 459. The Rule of benevolant Contructions cannot be applied to any section and thereby give it a retrospective operation. *Shyam Sunder v. Ram Kumar,* AIR 2001 SC 2472. Something which is not provided in the statute should not be read into it only because it is a beneficial legislation. *Tatoba Bhau Savagare v. Vasantrao Dhindiraj Deshpande,* AIR 2001 SC 4029, p. 4032 : (2001) 8 SCC 501.

Title of Enactment.—The title of an enactment does not determine its nature, e.g., whether it is of beneficial nature, etc. *State of West Bengal v. Madan Mohan Ghosh,* AIR 2002 SC 2273.

Provisions imposing disqualifications.—It would be unwarrented to give such general and broad interpretation to provisions imposing disqualifications as would ignore the essentials of the provision and the intention of the legislature. In such case purposive interpretation would be necessary. *Ranjeet Singh v. Har Mohinder Singh Pradhan,* AIR 1999 SC 1960.

Prescribed Manner.—Where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner *Chandra Kishore Jha v. Mahavir Prasad,* (1999) 8 SCC 266. When a statute specifically provides that a body corporate has to act in a particular manner and in no other manner, it is a mandatory provision which has to be strictly complied with. The Court was examining the law applicable to meeting. *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu,* AIR 1999 SC 2468.

Case-law of a different statute not dealing with a cognate subject, not relevant.—Cases on the construction of one statute are rarely of value in construing another statute, for each case turns on the language with which it is concerned and statutes are not often expressed in the same language. *Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. S.G. Mehta,* AIR 1963 SC 1436. It is hazardous to interpret a word in accordance with its definition in another statute or statutory instrument and more so when such statute or statutory instrument is not dealing with any cognate subject. *M.S. Co. P. Ltd. v. Union of India,* AIR 1985 SC 76.

Construction of documents

Theory of recharacterisation.—It often happens, particularly in hire purchase transactions that a creditor has a right to sell an asset belonging to a debtor and appropriate the proceeds to the payment of a debt. In *Smith, Administrator of Cosslett (Contractors) Ltd. v. Bridgend County Borough Council,* (2002) 1 A.C. 336, LORD HOFFMAN stated that the right to sell an asset belonging to a debtor and appropriate the proceeds to the payment of a debt cannot be anything other than a charge. The Law Commission in the United Kingdom has published a consultation paper in 2002 requiring "recharacterisation" of a transaction. This is necessary to reflect the true nature of the transaction. The House of Lords has used the principle of recharacterisation in two decisions; *In Re bank of Credit and Commerce International SA (No. 8),* (1988) A.C. 214 and *Bruton v. London & Quadrant Housing Trust,* (1999) 3 W.L.R. 150. On the basis of these decisions, it has been observed that the judicial process consists of two stages. *First* is interpretation of the objective, ascertaining the intention of the parties. Thereafter, there is characterisation which is a matter of law and does not depend on the intention of the parties.

S. 2. Definitions.—In this Act, unless the context otherwise requires,—

[1][(1) "abridged prospectus" means a memorandum containing such salient features of a prospectus as may be prescribed;]

[1][*(1A)*] "alter" and "alteration" shall include the making of additions and omissions;

[2][*(1B) "Appellate Tribunal" means the National Company Law Appellate Tribunal constituted under sub-section (1) of section 10FR*;]

(2) "articles" means the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous companies law or of this Act, including, so far as they apply to the company, the regulations contained, as the case may be, in Table B in the Schedule annexed to Act XIX of 1857 or in Table A in the First Schedule annexed to the Indian Companies Act, 1882 (VI of 1882), or in Table A in the First Schedule annexed to the Indian Companies Act, 1913 (VII of 1913), or in Table A in Schedule I annexed to this Act;

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1. New clause (1) inserted and earlier clause (1A) renumbered by Companies (Amendment) Act, 2000 (53 of 2000) w.e.f. 13-12-2000.
2. **Ins. by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 2(a).**

[3][(3) * * * * *]

[4][(4) * * * * *]

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3. Clause (3) omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 2, (w.e.f. 13-12-2000) prior to its omission it stood as under:—

"(3) "associate", in relation to a managing agent, means any of the following, and no others :—

(*a*) where the managing agent is an individual :

any partner or relative of such individual; any firm in which such individual, partner or relative is a partner; any private company of which such individual or any such partner, relative or firm is the managing agent or secretaries and treasurers or a director or the manager; and any body corporate at any general meeting of which not less than one-third of the total voting power in regard to any matter may be exercised or controlled by any one or more of the following, namely, such individual, partner or partners, relative or relatives, firm or firms; and private company or companies;

(*b*) where the managing agent is a firm :

any member of such firm; any partner or relative of any such member; and any other firm in which any such member, partner or relative is a partner; any private company of which the firm first-mentioned, or any such member, partner, relative or other firm is the managing agent, or secretaries and treasurers, or a director, or the manager; and any body corporate at any general meeting of which not less than one-third of the total voting power in regard to any matter may be exercised or controlled by any one or more of the following, namely, the firm first-mentioned, any such member or members, partner or partners, relative or relatives, other firm or firms, and private company or companies;

(*c*) where the managing agent is a body corporate :

(*i*) any subsidiary or holding company of such body corporate; the managing agent or secretaries and treasurers, or a director, the manager or an officer of the body corporate or of any subsidiary or holding company thereof; any partner or relative of any such director or manager; any firm in which such director, manager, partner or relative is a partner [1][* * * *]

(*ii*) any other body corporate at any general meeting of which not less than one-third of the total voting power in regard to any matter may be exercised or controlled by any one or more of the following, namely, the body corporate and the companies and other persons specified in paragraph (i) above; and

[2][(*iii*) any subsidiary of the other body corporate referred to in paragraph (ii) above :

Provided that where the body corporate is the managing agent of the other body corporate referred to in paragraph (ii) above, a subsidiary of such other body corporate shall not be an associate in relation to the managing agent aforesaid; and]

(*d*) where the managing agent is a private company or a body corporate having not more than fifty members :

in addition to the persons, mentioned in sub-clause (c), any member of the private company or body corporate.

Explanation.—If one person is an associate in relation to another within the meaning of this clause, the latter shall also be deemed to be an associate in relation to the former within its meaning".

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1. The word "and" omitted by Act 65 of 1960, s. 2.
2. Ins. by Act 65 of 1960, s. 2.

4. Clause (4) omitted by the Companies (Amendment) Act, 2000, (53 of 2000), s. 2, (w.e.f. 13-12-2000) prior to its omission it stood as under:—

"(3) "associate", in relation to any secretaries and treasurers, means any of the following, and no others :—

(*a*) where the secretaries and treasurers are a firm :

any member of such firm; any partner or relative of any such member; and any other firm in which any such member, partner or relative is a partner; any private company of which the firm first-mentioned, or any such member, partner, relative or other firm is the managing agent, or secretaries and treasurers, or a director, or the manager; and any body corporate at any general meeting of which not less than one-third of the total voting power in regard to any matter may be exercised or controlled by any one or more of the following, namely, the firm first-mentioned, any such member or members, partner or partners, relative or relatives, other firm or firms, and private company or companies;

(*b*) where the secretaries and treasurers are a body corporate:

(*i*) any subsidiary or holding company of such body corporate; the managing agent or secretaries and treasurers, or a director, the manager or an officer of the body corporate or of any subsidiary or holding company thereof; any partner or relative of any such director or manager; any firm in which such director or manager, partner or relative, is a partner; [1][* * * *]

(*ii*) any other body corporate at any general meeting of which not less than one-third of the total voting power in regard to any matter may be exercised or controlled by any one or more of the following, namely, the body corporate and the companies and other persons specified in paragraph (i) above; and

[2][(*iii*) any subsidiary of the other body corporate referred to in paragraph (ii) above :

Provided that where the body corporate is the secretaries and treasurers of the other body corporate referred to in paragraph (ii) above, a subsidiary of such other body corporate shall not be an associate in relation to the secretaries and treasurers aforesaid; and]

[Footnote No. 4 Contd.]

(5) "banking company" has the same meaning as in the Banking Companies Act, 1949 (X of 1949);[5]

(6) "Board of directors" or "Board", in relation to a company, means the Board of directors of the company;

(7) "body corporate" or "corporation" includes a company incorporated outside India but [6][does not include—

(a) a corporation sole;

(b) a co-operative society registered under any law relating to co-operative societies; and

(c) any other body corporate (not being a company as defined in this Act) which the Central Government may, by notification in the Official Gazette, specify in this behalf;]

(8) "book and paper" and "book or paper" include accounts, deeds [7][vouchers,] writings and documents;

[8][(9) "branch office" in relation to a company means—

(a) any establishment described as a branch by the company; or

(b) any establishment carrying on either the same or substantially the same activity as that carried on by the head office of the company; or

(c) any establishment engaged in any production, processing or manufacture,

but does not include any establishment specified in any order made by the Central Government under section 8;]

(10) "company" means a company as defined in section 3;

[9][(10-A)"Company Law Board" means the Board of Company Law Administration constituted under section 10-E;]

[10][(11) "the Court" means,—

(a) with respect to any matter relating to a company (other than any offence against this Act), the Court having jurisdiction under this Act with respect to that matter relating to that company, as provided in section 10;

[**Footnote No. 4 Contd.**]

(c) where the secretaries and treasurers are a private company or a body corporate having not more than fifty members:

in addition to the persons mentioned in sub-clause (b), any member of the private company or body corporate;

Explanation.—If one person is an associate in relation to another within the meaning of this clause, the latter shall also be deemed to be an associate in relation to the former within its meaning".

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1. The word "and" omitted by Act 65 of 1960, s. 2.
2. Ins. by Act 65 of 1960, s. 2.
5. Now the Banking Regulations Act, 1949 (10 of 1949).
6. Subs. by Act 65 of 1960, s. 2 for "does not include a Corporation Sole".
7. The word 'Vouchers' was added by section 3 of Act XXXI of 1965) (w.e.f. 15-10-1965).
8. Subs. by Act 65 of 1960, s. 2
9. This clause was added by section 2 of the Companies Amendment Act (LIII of 1963) (w.e.f. 1-1-1964).
10. Subs. by Act 65 of 1960, s. 2, for cl. (ii).

(b) with respect to any offence against this Act, the Court of a Magistrate of the First Class or, as the case may be, a Presidency Magistrate, having jurisdiction to try such offence;]

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

[11][(12A) "depository" has the same meaning as in the Depositories Act, 1996;

(12B) "derivative" has the same meaning as in clause (aa) of section 2 of the Securities Contracts (Regulation) Act, 1956;]

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

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

[11][(14A) "dividend" includes any interim dividend;]

(15) "document" includes summons, notice, requisition, order, other legal process, and registers, whether issued, sent or kept in pursuance of this or any other Act, or otherwise;

[11][(15A) "employees stock option" means the option given to the whole-time directors, officers or employees of a company, which gives such directors, officers or employees the benefit or right to purchase or subscribe at a future date, the securities offered by the company at a pre-determined price;]

(16) "existing company" means an existing company as defined in section 3;

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

Provided that, in relation to an insurance company, "financial year" shall mean the calendar year referred to in sub-section (1) of section 11 of the Insurance Act, 1938 (IV of 1938);

(18) "Government company" means a Government company within the meaning of section 617;

[12][* * * *]

(19) "holding company" means a holding company within the meaning of section 4;

[11][(19A) "hybrid" means any security which has the character of more than one type of security, including their derivatives;

[13][*(19AA) "industrial company" means a company which owns one or more industrial undertakings;*

(19AB) "industrial undertaking" means any undertaking, pertaining to any industry carried on in one or more factories or units by any company, as defined in clause (aa) of section 3 of the Industries (Development and Regulation) Act,

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11. Inserted by the Companies (Amendment) Act, 2000, (53 of 2000), s. 2 (w.e.f. 13-12-2000).
12. Clause (18-A) added by the Companies Amendment Act (41 of 1974), s. 2 (w.e.f. 1-2-1975) and omitted by M.R.T.P. (Amendment) Act, 30 of 1984 (w.e.f. 1-8- 1984).
13. **Ins. by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 2(5).**

1951 (65 of 1951) but does not include a small-scale industrial undertaking as defined in clause (j) of that section;]

(19B) "information memorandum" means a process undertaken prior to the filing of a prospectus by which a demand for the securities proposed to be issued by a company is elicited, and the price and the terms of issue for such securities is assessed, by means of a notice, circular, advertisement or document;]

(20) [14][* * * *]

(21) "insurance company" means a company which carries on the business of insurance either solely or in conjunction with any other business or businesses;

(22) "issued generally" means, in relation to a prospectus, issued to persons irrespective of their being existing members or debenture holders of the body corporate to which the prospectus relates;

(23) "limited company" means a company limited by shares or by guarantee;

[15][(23A) "listed public companies" means a public company which has any of its securities listed in any recognised stock exchange;]

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

[16][(25) * * * * *]

(26) "managing director" means a director who, by virtue of an agreement with the company or of a resolution passed by the company in general meeting or by its Board of Directors or by virtue of its memorandum or articles of association, is entrusted with [17][substantial powers of management] which would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called :

[18][*Provided* that the power to do administrative acts of a routine nature when so authorised by the Board such as the power to affix the common seal of the company to any document or to draw and endorse any cheque on the account of the

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14. Cl. (20) was omitted by Act (LXII of 1956), sec.2 and Schedule (w.e.f. 1-11-1956).
15. Inserted by the Companies (Amendment) Act, 2000, (53 of 2000), s. 2 (w.e.f. 13-12-2000).
16. Clause (25) omitted by the Companies (Amendment) Act, 2000, (53 of 2000), s. 2 (w.e.f. 13-12-2000) prior to its omission it stood as under:—

"(25) "managing agent" means any individual, firm or body corporate entitled, subject to the provisions of this Act, to the management of the whole, or substantially the whole, of the affairs of a company by virtue of an agreement with the company, or by virtue of its memorandum or articles of association, and includes any individual, firm or body corporate occupying the position of a managing agent, by whatever name called.

[1][*Explanation I.*—For the purposes of this Act, references to "managing agent" shall be construed as references to any individual, firm, or body corporate who, or which, was, at any time before the 3rd day of April, 1970 the managing agent of any company.

Explanation II.—For the removal of doubts, it is hereby declared that notwithstanding anything contained in section 6 of the Companies (Amendment) Act, 1969, this clause shall remain, and shall be deemed always to have remained, in force;]".

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1. Explanations were added by the Amendment Act of 1974, s. 2 (w.e.f. 1-2-1975).
17. Subs. by Act 65 of 1960, s. 2.
18. Ins. by Act 65 of 1960, s. 2.

company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share, shall not be deemed to be included within substantial powers of management :

Provided further that a managing director of a company shall exercise his powers subject to the superintendence, control and direction of its Board of Directors;]

(27) "member", in relation to a company, does not include a bearer of a share-warrant of the company issued in pursuance of section 114;

(28) "memorandum" means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous companies law or of this Act;

(29) "modify" and "modification" shall include the making of additions and omissions;

[19][*(29A) "net worth" means the sum total in the paid-up capital and free reserves after deducting the provisions or expenses as may be prescribed.*

Explanation.—For the purposes of this clause, "free reserves" means all reserves created out of the profits and share premium account but does not include reserves created out of revaluation of assets, write back of depreciation provisions and amalgamation.]

[20][(30) "officer" includes any director, manager or secretary or any person in accordance with whose directions or instructions the Board of directors or any one or more of the directors is or are accustomed to act;];

(31) "officer who is in default" in relation to any provision referred to in section 5, has the meaning specified in that section;

[21][(31A) "option in securities" has the same meaning as in clause (d) of section 2 of the Securities Contracts (Regulation) Act, 1956;]

[22][*(31AA) "operating agency" means any group of experts consisting of persons having special knowledge of business or industry in which the sick industrial company is engaged and includes public financial institution, State level institution, scheduled bank or any other person as may be specified as the operating agency by the Tribunal;*]

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19. **Ins. by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 2(c).**
20. Substituted by the Companies (Amendment) Act, 2000, (53 of 2000), s. 2 (w.e.f. 13-12-2000), prior to its substitution it stood as under:—
"[1][(30) "officer" includes any director, managing agent, secretaries and treasurers, manager or secretary, [2][or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the director is or are accustomed to act,] and also includes—
(a) where the managing agent [3][or the secretaries and treasurers] is or are a firm, any partner in the firm;
(b) where the managing agent or the secretaries and treasurers is or are a body corporate, any director or manager of the body corporate;
[4][* * * *]
but save in sections 477, 478, 539, 543, 545, 621, 625 and 633 does not include an auditor;]"

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1. Subs. by Act 65 of 1960, s. 2
2. Ins. by Act 31 of 1965, s. 3 (w.e.f. 15-10-1965).
3. Subs. by Act 41 of 1974, s. 2 (w.e.f. 1-8-1975).
4. Sub-clause (c) omitted by Act of 1974, s. 2 (w.e.f. 1-8-1975).

21. Inserted by the Companies (Amendment) Act, 2000, (53 of 2000), s. 2 (w.e.f. 13-12-2000).
22. **Ins. by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 2(d).**

(32) "paid-up capital" or "capital paid-up" includes capital credited as paid-up;

(33) "prescribed" means, as respects the provisions of this Act relating to the winding-up of companies except sub-section (5) of section 503, [23][sub-section (3) of section 550, section 552 and sub-section (3) of section 555], prescribed by rules made by the Supreme Court in consultation with [24][*the Tribunal*], and as respects the other provisions of this Act including sub-section (5) of section 503, [23][sub-section (3) of section 550, section 552 and sub-section (3) of section 555], prescribed by rules made by the Central Government;

(34) "previous companies law" means any of the laws specified in clause (ii) of sub-section (1) of section 3;

(35) "private company" means a private company as defined in section 3;

(36) "prospectus" means [25][any document described or issued as a prospectus and includes any] notice, circular, advertisement or other document [26][inviting deposits from the public or] inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate;

(37) "public company" means a public company as defined in section 3;

(38) "public holiday" means a public holiday within the meaning of the Negotiable Instruments Act, 1881 (XXVI of 1881) :

Provided that no day declared by the Central Government to be a public holiday shall be deemed to be such a holiday, in relation to any meeting, unless the declaration was notified before the issue of the notice convening such meeting;

(39) "recognised stock exchange" means, in relation to any provision of this Act in which it occurs, a stock exchange, whether in or outside India which is notified by the Central Government in the Official Gazette as a recognised stock exchange for the purposes of that provision;

(40) "Registrar" means a Registrar, or an Additional, a Joint, a Deputy or an Assistant Registrar, having the duty of registering companies under this Act;

(41) "relative" means, with reference to any person, any one who is related to such person in any of the ways specified in section 6, and no others;

(42) "Schedule" means a Schedule annexed to this Act;

(43) "Scheduled Bank" has the same meaning as in the Reserve Bank of India Act, 1934 (II of 1934);

[27][(44) * * * * *]

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23. Subs. by Act 65 of 1960, s. 2.
24. **Subs. by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 2(e) for the words "High Court".**
25. Subs. by Act 65 of 1960, s. 2.
26. The words "inviting deposits from the public or" were inserted by section 2 of Amendment Act of 1974 (w.e.f. 1-2-1975).
27. Omitted by the Companies (Amendment) Act, 2000, (53 of 2000), s. 2 (w.e.f. 13-12-2000), prior to its omission it stood as under:—

"(44) "secretaries and treasurers" means any firm or body corporate (not being the managing agent) which, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of a company; and includes any firm or body corporate occupying the position of secretaries and treasurers, by whatever name called, and whether under a contract of service or not;

[Footnote No. 27 Contd.]

[28][(45) "secretary" means a Company Secretary within the meaning of clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980, and includes any other individual possessing the prescribed qualifications* and appointed to perform the duties which may be performed by a secretary under this Act and any other ministerial or administrative duties;]

[29][(45-A) "secretary in whole-time practice" means a secretary who shall be deemed to be in practice within the meaning of sub-section (2) of section 2 of the Company Secretaries Act, 1980 and who is not in full-time employment;]

[30][(45AA) "securities" means securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956, and includes hybrids;]

[31][(45B) 'Securities and Exchange Board of India' means the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992].

(46) "share" means share in the share capital of a company, and includes stock except where a distinction between stock and shares is expressed or implied;

[32][(46A) "share with differential rights" means a share that is issued with differential rights in accordance with the provisions of section 86;]

[32][*(46AA) "sick industrial company" means an industrial company which has—*

(i) the accumulated losses in any financial year equal to fifty per cent, or more of its average net worth during, four years immediately preceding such financial year; or

(ii) failed to repay its debts within any three consecutive quarters on demand made in writing for its repayment by a creditor or creditors of such company;

(46AB) "State level institution" means any of the following institutions, namely:—

(a) the State Financial Corporations established under section 3 or section 3A and institutions notified under section 46 of the State Financial Corporation Act, 1951 (63 of 1951);

(b) the State Industrial Development Corporations registered under this Act];

[Footnote No. 27 Contd.]

[1][*Explanation I.*—For the purposes of this Act reference to "secretaries and treasurers" shall be construed as references to any firm or body corporate which was, at any time before the 3rd day of April, 1970, secretaries and treasurers of any company.

Explanation II.—For the removal of doubts, it is hereby declared that notwithstanding anything contained in section 6 of the Companies (Amendment) Act, 1969, this clause shall remain, and shall be deemed always to have remained, in force;]"

1. The Amendments are inserted by sec. 2 of the Amendment Act of 1974 (w.e.f. 1-2-1975).

28. Clause (45) subs. by the Companies (Amendment) Act, 1988, s. 2 w.e.f. 1-12-1988 vide G.S.R. No. 1106(E) dated 29-11-1988 for, "Secretary" means any individual possessing the prescribed qualifications, appointed to perform the duties which may be performed by a secretary under this Act and any other ministerial or administrative duties."

* The Govt. has *vide* G.S.R. No. 1105(E) dt. 29-11-1988 (w.e.f. 1-12-1988) notified Companies (Appointment and Qualifications of Secretary) Rules, 1988.

29. New clause (45-A) inserted by the Companies (Amendment) Act, 1988, s. 2, w.e.f. 15-6-1988 vide GSR No. 559(E), dt. 10-6-1988.

30. Inserted by the Companies (Amendment) Act, 2000, (53 of 2000), s. 2 (w.e.f. 13-12-2000).

31. Ins. by the Depositories Act, 1996 (w.e.f. 20-9-1995).

32. **Ins. by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 2(f).**

(47) "subsidiary company" or "subsidiary" means a subsidiary company within the meaning of section 4;

(48) "total voting power", in regard to any matter relating to a body corporate, means the total number of votes which may be cast in regard to that matter on a poll at a meeting of such body, if all the members thereof and all other persons, if any, having a right to vote on that matter are present at the meeting, and cast their votes;

(49) "trading corporation" means a trading corporation within the meaning of Entries 43 and 44 in List I in the Seventh Schedule to the Constitution;

[33][*(49-A) "Tribunal" means the National Company Law Tribunal constituted under sub-section (1) of section 10FB*].

(50) "variation" shall include abrogation; and "vary" shall include abrogate.

NOTES

"Unless the context otherwise requires"

This qualification, in respect of all the definitions given in this section, must be borne in mind. If the definition of any term given in this section is inappropriate, it should not be adopted. For instance, the term 'manager' in section 424 is different from the 'manager' as defined in section 2(24).

"Includes"

Wherever a definition uses the word "includes" it must be understood as comprising something more than what is defined. It is a word of extension and "is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute." *Cf. Dilworth v. Commissioner of Stamps,* 1899 AC 99 at 105; *Re, Strauss & Co. Ltd.,* (1937) 7 Com Cases 87 at 91 : AIR 1937 Bom 15.

"Abridged Prospectus" [Clause (1)]

This concept was brought into the Companies Act, 1956 by the Amendment Act of 1988. Earlier to the amendment in 1988 the application form for issue of shares was required to be accompanied by a full prospectus. The Amendment Act of 1988 permitted companies to furnish along with the application for shares/debentures an abridged form of prospectus, instead of the full prospectus. However, a copy of the full prospectus has to be furnished on demand.

The abridged prospectus, *i.e.* the memorandum containing salient features of the prospectus accompanying the application forms, shall be as per rules prescribed by the Central Government in this behalf. It is, however, open to a company to attach full prospectus along with the application forms.

The expression 'abridged prospectus' has acquired statutory connotation by virtue of the definition inserted by the Amendment Act, 2000. The definition substantially reproduces the provision of sec. 56(3).

SEBI Guidelines, 2000.—Under clause 1.2.1(*i*) of SEBI (DIP) Guidelines, 2000, 'abridged prospectus' means "the memorandum as prescribed in Form 2A under sub-section (3) of section 56 of the Companies Act, 1956".

"Alter", "Alteration" [Clause (1A)]

The definition of the terms "alter" and "alteration" in clause (1) is identical with the definition of the terms "modify" or "modification" in sub-section (29). This definition is

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33. Ins. by the Companies (Second Amendment) Act, 2002 (11 of 2003), s. 2(g), earlier omitted by Act (XVII of 1967), s. 4 and Sch. (w.e.f. 1-7-1967).

relevant for purposes of sections 16 to 19, 31, 38, 40, 268 and 310. See also notes under section 2(29), *infra*.

"Appellate Tribunal" [Clause (1B)]

Companies (Second Amendment) Act, 2002 (11 of 2003).—The words 'Appellate Tribunal' inserted by Companies (Second Amendment) Act, 2002 refer to the 'National Company Law Appellate Tribunal' constituted under sec. 10FR(1). Any person aggrieved by an order or decision of the National Company Law Tribunal [referred to as 'Tribunal' in clause (49A)] can prefer an appeal to the Appellate Tribunal. [S. 10FQ(1)].

§ See also Notes under **Part IC—Appellate Tribunal** [Sections 10FQ to 10GF] *post*.

"Articles" [Clause (2)]

The articles of association set out regulations for the internal management of the company. Model articles of association are given in Table A of Schedule I to the Act. It is a usual practice to state that the contents of Table A will apply as long as they are not inconsistent with the provisions of the Act. Several provisions of the Act will not be applicable unless authorised by the articles. For example, directors need not take qualification shares, unless so required by the articles. Similarly, the articles may require all directors to retire by rotation (section 255). Great care must, therefore, be taken in drafting articles.

Articles which are inconsistent with the provisions of the Act are void, (S. 9). In considering whether any provision in the articles is inconsistent with the Act, the provisions of Table A have to be borne in mind since these provisions are *prima facie* consistent with the Act. *Trevor v. Whitworth,* (1887) 12 App Cas 409 : [1886-90] All ER Rep 46 (HL); *New Balkis Eersteling Ltd. v. Randt Gold Mining Co.,* [1904] AC 165 (HL).

The articles of a company may be altered either by a special resolution as per section 31 or by an order of the Company Law Board in a proceeding under section 397 or 398 (*See* section 404), or under section 408 [proviso to sub-section (1)].

Associate of managing agent, secretaries and treasurers [Clauses (3) and (4)] Clauses 3 and 4 have been omitted by the Companies (Amendment) Act, 2000 (w.e.f 13-12-2000).

"Banking company" [Clause (5)]

The expression "banking company" is defined in the Banking Regulation Act, 1949 as "any company which transacts the business of banking in India" (section 5(1)(c)) and 'banking' as meaning "the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise" (Section 5(1)(b)). A banking company may also carry on, along with banking business, the several other ancillary businesses enumerated in section 6 of that Act. The definition is relevant for purposes of sections 11, 211, 292, 370, 372, 571 and 616.

"Board of Directors" [Clause (6)]

In actual practice, as also in the articles of several companies, the expression 'the directors' is simply used to denote the Board or Board of Directors or the directors acting as a body.

In this connection, it is necessary to note that the directors can act only as a collective body and except where any functions or powers are conferred on or delegated to individual directors, or committees of directors. A director as such cannot act on behalf of the company and the Board acts by resolutions passed at meetings or by circulation, as the case may be (PALMER'S COMPANY GUIDE, 79 (36th Edn.).

The provisions relating to appointment, removal, powers and duties of directors are contained in sections 291-323 of the Act.

§ See also Notes under section 2(13), *post*.

"Body Corporate or Corporation" [Clause (7)]

The term 'body corporate' is wider than the expression 'company' and is used in several sections of the Act to denote not only a company incorporated in India, but also a foreign company. It includes also a corporation formed under any special law of India or a foreign country, except as expressly excluded by the definition. It includes all public financial institutions mentioned in section 4-A as well as the nationalised banks incorporated under section 3(4) of the Banking Companies Acquisition and Transfer of Undertakings Act, 1970.

The definition seeks to exclude co-operative societies from the definition. The definition also gives power to the Central Government to exclude any other body corporate which is not a company as defined in this Act, from the scope of the Act.

The words "body corporate" are not equivalent to the words "incorporated company". An incorporated company is a body corporate but many bodies corporate are not incorporated companies. *Madras Central Urban Bank v. Corporation of Madras,* (1932) 2 Com Cases 328, 332 (Mad).

Compare the definition of "company" in section 2 (17) of the Income-tax Act, 1961 where any association whether incorporated or not and whether Indian or non-Indian may be declared by general or special order of the Central Board of Revenue to be a company for purposes of that Act.

Aggregate of Persons.—Broadly speaking, the term, while not including any of the bodies specifically excluded by the definition, may include any aggregate of persons which has been or is incorporated under some statute of this or any foreign country and which exists as a legal entity distinct from the members constituting it, and having perpetual succession and common seal.

It is defined in HALSBURY'S LAWS OF ENGLAND as "a collection of individuals united into one body under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several aspects as an individual, particularly of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common and of exercising a variety of political rights, more or less extensive, according to the design of its constitution or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence" 718 (Vol. 9, para 204, 4th Edn.). But the Supreme Court of India has elaborately discussed the nature of a corporation and held that it cannot have the status of a citizen under the Constitution of India. See *State Trading Corporation of India v. CTO,* (1963) 33 Com Cases 1057 : AIR 1963 SC 1811.

The members of a corporate body need not necessarily or only be individuals. Other bodies corporate may be members. The essential characteristic of a corporation is that it has a distinct legal personality and existence, as distinguished from its members, whoever they may be.

Registered Society.—A society registered under the Societies Registration Act has been held by the Supreme Court in *Board of Trustees Ayurvedic and Unani Tibia College, Delhi v. State of Delhi,* AIR 1962 SC 458 not to come within the term 'body corporate' under this Act, though such a society is a legal person capable of holding property and becoming a member of a company. The Calcutta High Court has held that co-operative societies are not within the term "body corporate" in S. 2(7). *S.R. Bhattacharya v. State,* AIR 1970 Cal 557.

Note that for a company to come within the definition, its incorporation as a company either in India or in a foreign country is necessary.

Corporation Sole.—Though a corporation sole (*i.e.* single person constituted as a corporation in respect of some office or function such as a bishopric or other ecclesiastical office or a public trustee), is not a body corporate for purposes of this Act, it is still a le-

gal person, and as such, can be a member of a company. See *Star Tile Works Ltd. v. N. Govindan*, AIR 1959 Ker 254. It is not to be confused with the one-man company which is registered as a company under the Companies Act.

Registered society whether "body corporate"

Department's Circular I.—The question whether a society registered under the Societies Registration Act, 1860, should be considered a "body corporate" within the meaning of section 2(7) of the Companies Act, 1956 has been carefully examined further in consultation with the Ministry of Law as well as in the light of recent judgment of the Supreme Court in *Board of Trustees v. State of Delhi*, AIR 1962 SC 458. It has been decided that such a society should not be deemed to be a "body corporate" within the meaning of the aforesaid provisions of the Companies Act, although such a society can be treated as a "person" having separate legal entity apart from the members constituting it and thereby capable of becoming a member of company under section 41(2) of the Companies Act. The view expressed in para 1 of the *Department's Letter No.* 8/27/56-PR, dated 30-11-1957 to the Registrar of Companies, New Delhi, copy endorsed to all other field officers, may accordingly be deemed to have been modified to the extent stated above.

Department's Circular II.—Consistent with the revised interpretation of the expression "body corporate" as stated above, the said expression occurring in various provisions of the Companies Act, 1956 *viz.*, sections 43A, 293, 303, 372, etc., should be so interpreted as to exclude a society registered under the Societies Registration Act, 1860 from the scope of the expression "body corporate". (*Circular No.* 8/48/2(7)/63-PR, dated 24-11-1962.)

Institution or body which can be regarded body corporate—Department's Circular.—The question whether a particular institution or body other than that specified in sub-clauses (a), (b) and (c) of clause (7) of section 2 is a "body corporate" under the Companies Act, 1956 has to be decided with reference, among other things, to the status, mode of incorporation, constitution, etc., of the institution. It is not possible for the Department to lay down any general definition other than that given in the Act or to furnish a list of bodies which are deemed to be "bodies corporate" under section 2(7). Generally speaking, the Department would consider that any corporate body, *i.e.*, a body which has been or is incorporated under some statute and which has a perpetual succession, a common seal and is a legal entity apart from the members constituting it, will come within the definition of the term "body corporate". The term will not, however, include a society registered under the Societies Registration Act, 1860, or any of the bodies which have been specifically excluded by sub-clauses (a), (b) and (c) of clause (7) of section 2. (*Circular No.* 8(26)/2(7)/63-PR, dated 13-3-1963).

ONGC a body Corporate—Notification.—The Oil and Natural Gas Commission, a body corporate established under section 3 of the Oil and Natural Gas Commission Act, 1959 (43 of 1959) was notified to be a body corporate under s. 7(*c*). [*GSR* 1883, dated 20-12-1965.] The ONGC has now been incorporated as a public company under the Companies Act, 1956 after the repeal of the Oil and Natural Gas Commission Act, 1959.

"Book and paper" [Clause (8)]

In the definition of 'book and paper', the word 'vouchers' was included by the Companies (Amendment) Act, 1965, in order "to make clear that books and papers which are sometimes interpreted to exclude vouchers should include such documents. This is necessary to ensure that they are maintained along with other books and papers, and are available to inspectors for purposes of investigation". (*Notes on clauses*, clause 2 of the Bill). The definition has been amplified for the reason that vouchers can alone explain the details of the transactions recorded in the books of the company. The definition is relevant for purposes of sections 227, 234, 240, 240A and 396A. Also refer to the expression "books of account" used in sections 209 and 209A.

Books and documents statutorily required to be maintained by a company:

(1) Register of investments held in names other than the company's own name (section 49 (7)).

(2) Register of Securities bought back [section 77A(9)].

(3) Copies of instruments of charges created by the company (section 136).

(4) Register of charges (section 143).

(5) Register of members (section 150) and Index of members (section 151).

(6) Register and Index of debenture holders (section 152).

(7) Foreign register of members and of debenture holders (section 157(1)).
(8) Duplicate of register stated in the point 6 above (section 158(4)).
(9) Copies of annual returns together with copies of certificates and documents annexed thereto (section 163).
(10) Books of minutes of proceedings of general meetings (section 193).
(11) Books of minutes of proceedings of directors' meetings (section 193).
(12) Books of account including accounts of branch offices and other cost records, if any (section 209).
(13) Register of contracts etc. in which directors are interested (section 301).
(14) Contracts of terms of appointment of managing director or manager, disclosing interest of directors (section 302).
(15) Register of directors, managing director, manager and secretary (S. 303).
(16) Register of directors' shareholdings (section 307).
(17) Register of investments or loans, guarantee given or security provided [section 372A(5)].
(18) Bank receipts relating to employees' deposits and provident fund amounts (sections 417, 418 and 419).
(19) Register of deposits as required by Rule 7 of the Companies (Acceptance of Deposits) Rules, 1975.
(20) Register of Renewed and Duplicate Certificates under Rule 7 of the Companies (Issue of Share Certificates) Rules, 1960.
(21) Register of documents destroyed under Rule 4 of the Companies (Preservation and Disposal of Records) Rules, 1966.

Books and registers required to be maintained under SEBI guidelines and NBFC directions.—Securities and Exchange Board of India (SEBI) has prescribed maintenance of certain records and registers etc. under the SEBI (Disclosure and Investor Protection) Guidelines, 2000 and under other Rules and Regulations framed by it to regulate the functioning of companies where shares are listed on the Stock Exchange. Likewise, maintenance of certain records and registers has been prescribed for the Non-Banking Financial Companies (NBFCs) under the Directions issued by the Reserve Bank of India.

§ For details see Notes under section 56 and 58A *post*.

"Branch office" [Clause (9)]

The meaning of the word "office" depends upon the context. It generally means a place for transacting business. An "office" is different from a shop of the company. A branch office must also possess the character of an office of the company. *Eastern Distilleries Sugar Factory v. Municipal Council,* (1933) 3 Com Cases 310, 313 (Mad).

The definition seeks to clarify the circumstances in which an establishment should be deemed to be a 'branch office'. . . . Under the definition as amended, any factory located in any town or village, other than the place where the head office is situate will be a 'branch office'. The definition has a bearing on sections 209(2), 227 and 228. Where there is a branch office, summarised returns at quarterly or at shorter intervals may be sent to the registered office or other principal office, instead of the whole accounts of the branch, and the audit of the accounts of the branch need not be done by company's auditor himself but may be done either by another qualified auditor or an accountant, as provided in sub-section (1) of section 228.

The accounts of any office styled as a 'branch office' of a company may escape proper scrutiny, and that is why section 8 empowers the Central Government to declare that under certain circumstances an establishment of a company in any place may not be treated as a 'branch office' and may be treated as an office of the company for all or any of the purposes of this Act. The term 'head office' though it may often be the registered office,

need not necessarily be so. The head office or principal office may be located elsewhere than the registered office, and it is usually the place where the substantial business of the company is carried on and its negotiations conducted. Where the head office is different from the registered office, it will for purposes of the Act, be in the same position as a branch office.

Foreign branch is not foreign concern.—Things done by a company's branch office outside India cannot be said to be done by foreign concern for the purposes of FERA, 1973. A branch office is the part and parcel of the company's life and anything done by it is deemed to be done by the company itself. *Union of India v. G.A. Randarian Ltd.*, (1992) 75 Com Cases 486, 492 (Cal).

Associated companies in foreign country is not branch.—Business conducted by a company of a contracting State through an independent company with the same name and identical management in another contracting State does not amount to maintaining a branch, agency or other establishment in another country. But nevertheless the company pursues its activities in that country through an independent company with the same name and identical management which negotiates and conducts business in its name and that amounts to an extension of the company itself. *SAR Schotte Gmbh v. Parfums Rothschild SARL*, 1992 BCLC 235 (CJEC).

Foreign project sites are not branches.—An outlet of the company can be treated as "establishment" for purposes of section 2(10) of the Act if it has an element of permanency. Where site offices are opened by the company at its various project sites on a temporary basis, *i.e.*, for the duration of the project, they cannot normally be treated as "branches" of the company. (*ICAI's Compendium of Opinion, Vol. XIV*, 1995 Edn., pp. 132-137).

Branches abroad of Indian Companies.—For maintenance of foreign currency account abroad by Indian Companies, see Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2000 reproduced in *Appendix* 114.

Establishment not amounting to branch office—Department's Clarification.—"If the establishment is not a branch office of the company, it will form part of the head office and will be dealt with as such for audit and other purposes." [*Letter No.* 8/16(1)/61-PR, dated 9-5-1961]

Closure of branch/office of Non-banking Financial Companies.—Paragraph 4B of Non-banking Financial Companies Acceptance of Public Deposit (Reserve Bank) Directions, 1998[34] lays down that a non-banking financial company shall not close its branch/office without publishing such intention in any one national level newspaper and in one vernacular newspaper in circulation in the relevant place and without advising the Reserve Bank of India, before ninety days of the proposed closure.

§ See further, Notes under sections 8 and 228 *post*.

"Company" [Clause (10)]

The word 'company' is derived from Latin. Originally, the word referred to an association of persons or merchantmen discussing matters and taking food together. It denotes a group of persons and the effect of registration under the Act is that such a group becomes a corporate body having perpetual succession and a common seal (Section 34). In the memorandum and articles of association of a company, the reference to the word 'association' in this context is meaningful. The memorandum has also got the association clause. The Act, in its several provisions, has given effect to a democratic set-up to the

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34. For text of "Non-banking Financial Companies Acceptance of Public Deposits (RBI) Directions, 1998, see *Appendix* 51.

association called the 'company', the management vesting in its Board of Directors and the ultimate control remaining with the company in general meeting.

In *Life Insurance Corporation of India v. Escorts Ltd.*, (1986) 59 Com Cases 548 : AIR 1986 SC 1370, the Supreme Court described a company as follows: "A company is, in some respects, an institution like a State functioning under its "basic constitution" consisting of the Companies Act and the memorandum of association. Carrying the analogy of Constitutional Law a little further, GOWER describes "the members in general meeting" and the directorate as the two primary organs of a company and compares them with legislative and the executive organs of a parliamentary democracy where legislative sovereignty rests with Parliament, while administration is left to the Executive Government, subject to a measure of control by Parliament through its power to force a change of Government. Like the Government, the directors will be answerable to "Parliament" constituted by the general meeting. But in practice (again like the Government), they will exercise as much control over Parliament as that exercises over them. Although it would be constitutionally possible for the company in general meeting to exercise all the powers of the company, it clearly would not be practicable (except in the case of one or two-man-companies) for day-to-day administration to be undertaken by such a cumbersome piece of machinery. So, the modern practice is to confer on the directors the right to exercise all the company's powers except such as the general law expressly provides must be exercised in general meeting." (GOWER'S PRINCIPLES OF MODERN COMPANY LAW), 187 (4th Edn., 1979), [6th Edn., 1997 by DAVIES AND PRENTICE].

Kinds of company.—The definition of the term "Company", only says that a company means a company as defined in section 3 of the Companies Act, 1956. Section 3 further explains the meaning of the expressions "company", "existing company", "private company" and "public company". Apart from these categories the different kinds of company are: holding company, subsidiary company, foreign company and companies which are limited by guarantee and lastly an unlimited company. Section 4 deals with holding and subsidiary companies, while the meaning of an unlimited company and a company limited by guarantee have been set out in clause (23).

Section 620A enables the Central Government to recognise certain companies as Nidhi or Mutual Benefit Societies. The Companies (Second Amendment) Act, 2002 has also introduced certain new concepts, namely, "Industrial Company" [Sec. 2(19AA)], "Sick Industrial Company" [S. 2 (46AA)] and Producer Company [S. 581A(l)].

The expressions 'holding company' and 'subsidiary company' wherever they occur in the Act, should, however, be taken to include Indian and foreign holding companies and subsidiary companies, according as the nature of the case may require, in view of subsection (5) of section 4.

§ Also refer Notes under section 3, *post*.

"Court" [Clause (11)]

One exception to clause (b) of the definition is that the Court having jurisdiction in winding-up has been given jurisdiction to try offences in respect of one matter, namely, default in submitting statement of affairs. See section 454(5-A).

There is no "Companies Court" separate and distinct from the ordinary courts. The phrase is only a convenient way of describing the relevant jurisdiction of the High Court when it is being exercised under the Companies Act. *In Re, Wool Textile Employers Mutual Ins. Co. Ltd.*, (1955) 25 Com Cases 406, 412 (Ch D). The definition only gives the meaning of the word 'court' wherever it appears in the statute. The jurisdiction of a Companies Court extends only to those matters which are specified in the Act and apart from those matters it has no jurisdiction. An application to compel a company (Stock Exchange) to comply with the requirement of section 257 is not maintainable before a Companies Court. It is a matter for an ordinary Civil Court. *Rajendra Menon (No. 2) v.*

Cochin Stock Exchange Ltd., (1990) 69 Com Cases 256, 257 (Ker), **affirming** *Rajendra Menon (No. 1) v. Cochin Stock Exchange Ltd.*, (1990) 69 Com Cases 231 (Ker).

A Judge presiding over the Companies Court is a "Court" within the meaning of section 340, Cr. P.C., 1973 and is entitled to order prosecution thereunder. *Mohammed Tahir v. Emperor*, (1941) 11 Com Cases 201, 202 (Lah).

§ Also refer Notes under section 10, *post*.

"Debenture" [Clause (12)]

The definition is based on the following observations of the Company Law Committee: "A debenture means a document which either creates or acknowledges a debt. Ordinarily a debenture constitutes a charge on the undertaking of the company or some part of its property, but there may be debentures without any such charge and under the law, it is not necessary that the debentures should create a charge. We have, therefore, brought the definition of debentures, in line with that contained in English Companies Act, 1948, which defines 'debenture' as including 'debenture stock', bonds and other securities of a company, whether constituting a charge on the assets of the company or not." (*Report*: para 27).

"In modern commercial usage, a debenture denotes an instrument issued by the company, normally but not necessarily, called on the face of it a debenture, and providing for the payment of, or acknowledging the indebtedness in a specified sum— say £ 100—at a fixed rate, with interest thereon. It usually, but not necessarily, gives a charge by way of security, and is often, though not invariably, expressed to be one of a series of like debentures" (PALMER'S COMPANY LAW, Para 44-02, 24th Edn. 1987). This passage from PALMER was cited with **approval** in *Chief Controlling Revenue Authority v. The Manager, State Bank of Mysore*, AIR 1988 Kant 1 : (1989) 65 Com Cases 427 (Kar) (FB); CHANDRAKANTARAJ URS J. added (at p. 4). "But the term as used in the modern commercial parlance is of extremely elastic character".

Looking at this variety of the purposes for which the word 'debenture' is used, it appears that it denotes a variety of investments. The clause itself gives a very wide meaning and even after that makes it a definition of inclusion. The types of commercial instruments usually included are—

(1) An instrument evidencing a mortgage. *Knightsbridge Estates Trust Ltd. v. Byrne*, (1940) 2 All ER 401 (HL);

(2) An income-bond providing for repayment of loan out of the company's profit. *Lemon v. Austin Friars Investment Trust Ltd.*, 1926 Ch 1 (CA).

(3) A simple note under which a company undertakes to pay back a loan. *British India Steam Navigation Co. v. IRC*, (1881) 7 QBD 165.

(4) A receipt or deposit certificate containing the date of the payment. *United Dominions Trust Ltd. v. Kirkwood*, (1966) 1 All ER 968 at 988.

In this last mentioned case DIPLOCK LJ said: Looking then at the economic reality of the matter, the learned author adds that what matters is not the name by which the transaction is described, but what are the rights of the parties under the transaction. He said: "Fortunately, it is not necessary to have a precise legal definition of debentures in order to understand the law relating to them. The law is less concerned with whether a transaction creates a debenture than with the security given to the lender by it (if any). The question which usually has to be answered is not whether a document is a debenture, but whether it creates a mortgage, charge or other security, and if so whether the security is a specific or floating charge over the company's property, and to what assets of the company does it attach?"

In *Laxman Bharmaji v. Emperor*, AIR 1946 Bom 18 : (1946) 16 Com Cases 31 the Bombay High Court considered the nature of a debt instrument which was issued by the

company under the name 'patron bonds' and said: "The main features which in our opinion tend conclusively to show that these 'Patron Bonds' and debentures are the acknowledgement of debt, the promise to return it, the fact that they form a series bearing consecutive numbers."

In the ordinary business sense, a 'debenture' is generally understood to be a document usually but not necessarily under seal, acknowledging a debt and securing repayment thereof by mortgage or charge on the company's property or undertaking, and providing that until repayment, interest will be paid thereon at a fixed rate payable usually either half-yearly or yearly on fixed dates. *Laxman Bharmaji v. Emperor,* AIR 1946 Bom 18 : (1946) 16 Com Cases 31; *Edmonds v. Blaina Furnaces Co.,* (1887) 36 Ch 215. *Cf. Levy v. Abercorrio Slate and Slab Co.,* (1887) 37 Ch D 260 (Ch D) and *British India Steam Navigation Co. v. IRC,* (1881) 7 QBD 165. When they are issued to the public they are usually in units of such nominal value at Rs. 1,000 or 5,000 or other amount. But when issued privately they may be for such large amount as to suit the circumstances of the case. For a detailed discussion on the nature of debentures, see *Narendra Kumar Maheshwari v. Union of India,* AIR 1989 SC 2138.

The fact is that the definition of debenture is that it is so wide as to include any security of a company whether constituting a charge on the company's assets or not. *Cf. Pearl Assurance Co. Ltd. v. West Midlands Gas Board,* (1950) 2 All ER 844 (Ch D). As regards the scope of the expression 'debenture' see also *R. v. Findlater* (1939) 1 All ER 82 : (1940) 10 Com Cases 149.

Though the definition includes 'securities' and the word 'securities' in its broad commercial sense includes 'shares', the expression 'debenture' can hardly be intended to include shares also. *Re, Rayner,* (1904) 1 Ch 176. Where a company issued 'notes' to secure a dollar loan, such 'notes' could be treated as debentures, *CIT v. Cochin Refineries Ltd.,* 1982 Tax LR (NOC) 7 (Cal). Debentures are also issued, without security, in which case they are merely promises to pay, ranking in the event of the company being wound-up equally with other unsecured creditors.

Debenture interest is normally payable whether or not the company earns profits.

Under clause (45AA) inserted by the Companies Amendment Act, 2000, the term 'security' carries the same meaning as is assigned to it in sec. 2(*h*) of the Securities (Contracts) Regulation Act, 1956, which *inter alia,* includes debentures and debenture stock.

For provisions relating to debentures as amended by the Companies (Amendment) Act, 1999, see sections 117 to 123.

Debt securities.—The Privy Council while explaining the meaning of the concept of a "debt security" accorded it a wide interpretation. The matter was under New Zealand Securities Act, 1978 dealing with the regulatory power of ROC. *Culverden Retirement Village Ltd. v. ROC,* (1997) 2 WLR 291.

Fixed deposit is not debenture.—The Department has clarified that a fixed deposit receipt may be regarded as a security but not as a debenture within the meaning of this sub-section. The full text of the Department's Clarification is reproduced below:

Text of Department's Clarification.—It was brought to the notice of this Department that a company issued an advertisement in English Daily News Paper inviting "fixed deposits" from the public to carry out its expansion and development plans and that the Registrar of Companies concerned advised the company that inasmuch as such an advertisement partook the nature of a "prospectus" within the meaning of section 2(36), the provisions of sections 56(3) and 60 of the Companies Act, 1956 should have been duly complied with. The company, however, contended that such fixed deposits would not constitute debentures. The point was, therefore, referred to this Department for examination and advice. The question whether such fixed deposit receipts constitute a "debenture" or not within the meaning of section 2(12) of the Companies Act, 1956 has accordingly been examined in consultation with the Ministry of Law. This Department is advised that in view of the inclusive nature of the definition in section 2(12), the position is not entirely free from doubt. It is understood that borrowing against fixed deposit receipts is a recognised method of

raising company finance in some parts of the country and it is felt that it would not be desirable to do anything to disrupt this practice, until instances of widespread abuse of the procedure by companies are brought to the notice of this Department. It has, therefore, been decided that for the present, though a fixed deposit receipt may be regarded as a security, it should not be regarded as "debenture" within the meaning of section 2(12) of the Companies Act, 1956. [*Department's Letter No.* 8/2/58-PR, dated 10-12-1958.]

Meaning of 'Debenture Stock'.—Debenture stock is of the same nature as debentures but instead of each lender having a separate debenture bond, he gets a certificate entitling him to a specified portion of one large loan. Debenture stock is borrowed capital consolidated into one mass which may be divided into and transferable in convenient units of fixed amount. It has been defined as an aggregate of debenture bonds, legally consolidated, out of which portions are held by different persons called stock-holders, and carrying interest. Instead of each bond securing a definite amount, the whole sum secured is treated as a single stock, and certificates are issued to the holders of the several portions, declaring each as being entitled to a definite sum. The position of individual debenture stock holders is similar to that of annuitants and so long as the annual payments due to him are not in arrear, he cannot take any proceedings to interfere with the company's business.

'Debenture Stock' is a debt carrying interest at a fixed rate and it is usually constituted by a deed of covenant with trustees, and the stock-holders obtain certificates of title. Where the principal of the debt is not payable at a fixed time but only in the event of winding up or on the happening of a contingency the stock is known as 'perpetual'. Generally debentures and debenture stock are secured by a floating charge or mortgage on the company's undertaking.

Difference between debenture and debenture stock.—The difference between 'debenture' and 'debenture stock' is that while 'debenture' is the description of an instrument, 'debenture stock' is the description of a debt or sum secured by an instrument. In the words of LORD LINDLEY, it is "borrowed capital consolidated into one mass for the sake of convenience".

Distinction between debenture and loan.—Since a debenture means a document which creates or acknowledges a debt, the distinction between a debenture and a loan can be understood from the following passage: "The substance of a loan is a right in the creditor to demand repayment, and the substance of a debt is a liability upon the debtor to repay the money" Per CHAKARAVARTI J. in *Ram Ratan Karmarkar v. Amulya Charan Karmarkar,* 56 CWN 728 at p. 729. The distinction between loan and debenture has also been recognised under the scheme of the Companies Act inasmuch as section 370 talks of inter-corporate loans while section 372 talks of inter-corporate investments in shares and debentures.

Bearer Debentures.—There is nothing in the Companies Act to prevent the issue of bearer debentures.

The validity of bearer debenture was recognised by the Calcutta High Court in *Calcutta Safe Deposit Co. Ltd. v. Ranjit Mathuradas Sampat,* (1971) 41 Com Cases 1063 : AIR 1971 Cal 79 putting it in the category of negotiable instruments and giving it the benefit of presumptions as to negotiable instruments in section 118 of the Negotiable Instruments Act, 1881. The holder of a bearer debenture had demanded the payment of the principal amount and interest on maturity. The company disputed his right to do so. He filed a creditor's petition for winding-up and the company applied for stay. The court came to the conclusion that it was not open to the company to question his title to the debenture without proving that he was not a holder in good faith.

In England also it has been held that debentures in which a company undertakes to pay the debenture debt and interest to the bearer of the debentures are negotiable instruments, and the title to them can consequently be transferred by mere delivery of the debentures without notification to the company. *Bechuanaland Exploration Co. v. London Trading*

Bank, (1898) 2 QB 658; *Edelstein v. Schuler & Co.*, (1902) 2 KB 144. It is necessary for this principle to apply that the recipient of a bearer debenture should have acted in good faith and without notice. *Venables v. Baring Bros. & Co.*, (1892) 3 Ch 527. The company cannot set-off against such a debenture holder any claim which it might have had against the original allottee of the debenture. *Burrough v. Moss*, (1830) 10 B&C 558; *Montecchi v. Shimcos (U.K.) Ltd.*, (1980) 1 WLR 1180. Loan stock certificates payable to bearer and bearer loan certificates are also in the same category as bearer debentures. In the case of bearer debentures the company does not keep the register of bearer debentureholders but it has to post on the debenture certificates the security, if any which they create on the company's property.

Convertible Debentures.—Debentures, whether secured or unsecured, are also sometimes issued as 'convertible debentures' with the option of being subsequently converted into shares [(*Cf.* Section 81(4)]. The option will be very attractive when the company is progressing and working profitably. It must, however, be borne in mind that the conversion of debentures into shares must not be such as to amount to an unauthorised issue of shares at a discount, which is prohibited by section 79.

Convertible debentures are permitted, as seen from section 81(3)(b)(i) which exempts them from the pre-emptive rights of equity shareholders as provided in sub-sections (1), (1A) and (2) of that section, provided the terms of such debentures satisfy the requirements of the proviso to sub-section (3) therein.

Issue of debentures at Discount.—Debentures may be issued at a discount, but such debentures may not be made convertible into equity shares unless they are made legal by fulfilment of the conditions prescribed for issuing shares at a discount (*vide* section 79).

Debenture Trust Deed.—Debenture stock is generally constituted by a trust deed. The deed contains a covenant for the payment, either at a fixed date or in certain events of a specified capital sum—say Rs. 50 lakhs—which is to be called the stock, and for the payment of interest, and gives to the trustee, security by way of mortgage or charge as in a debenture trust deed. It contains also a provision for the maintenance of a register of the beneficial owners of the stock and for transfers and transmissions and for the issue to the beneficial owners of certificates of title, for meetings of stock holders etc. and it usually reserves to the company the right to redeem before maturity also.

A trust deed for securing any issue of debentures shall be in such form and executed within such period, as may be prescribed (*vide* section 117A). The appointment of debenture trustee before issue of the offer document to the public is a must (*vide* section 117B).

Debentures and debenture stock are often secured by a trust or covering deed, conveying property of the company to the trustees in favour of the debenture holders, charging the property of the company and containing a number of ancillary provisions regulating the respective rights of the company and the debenture holders. Whether there should be a trust deed or not must depend on the circumstances; where the debentures are issued only for a temporary purpose for a short term, such a deed may be dispensed with; but where the transaction is of some magnitude, in particular, where large-scale borrowing by companies from the public is involved, a trust deed is commonly used.

See section 128 and also the Guidelines for Disclosure and Investor Protection issued by the Securities and Exchange Board of India in *Appendix* 162.

§ For detailed study see Notes under sections 117 and 118, *post*.

SEBI (Debenture Trustees) Rules, 1993 and SEBI (Debenture Trustees) Regulations 1993.—SEBI has notified SEBI (Debenture Trustees) Rules 1993 and SEBI (Debenture Trustees) Regulations 1993 dealing with the appointment and functioning etc. of Debenture Trustees in respect of Debenture issues made by the listed companies. Under the said Rules, no person shall act as a debenture trustee unless he holds a certificate granted by SEBI (Rule 3). The regulations aforesaid, *inter alia*, provide for duties, re-

sponsibilities code of conduct (Schedule III) and maintenance of Debenture Trustees (Chapter III). Schedule IV to the SEBI Regulations provides the contents of the Trust deed which has to be accepted by the Debenture Trustee before being to appointed.

§ For text of the Rules and Regulations see *Appendix* 217 and 218.

Debenture, a chose in action.—As regards a debenture, a further thing to be noted is that it is a chose in action *i.e.* an actionable claim as defined under s. 3 of the Transfer of Property Act, 1882 and as such is subject to equities. That is to say, a transferee of a debentures takes it subject to any equitable rights the company may have against the transferor, unless the terms of issue of the debenture expressly provide that repayment will be made to the registered holder, without regard to any equities that may exist between the company and previous holders of the debenture. *Hilger Analytical Ltd. v. Rank Precision Industries Ltd.*, 1984 BCLC 301 (Ch D). In this case the terms of issue allowed the debenture-holder to transfer the debenture free of all equities and as it was so transferred, the company was obliged to register the transfer in spite of equities.

Consumer Forum and issue of Debentures.—It should however be noted that issuing of debentures is not by itself a trade nor a dealing in goods or services so as to attract the provisions of Consumer Protection Act, 1986 or MRTP Act, 1969, relating to restrictive or unfair trade practices. *Director General of Investigations and Registrations v. Deepak Fertilizers Corpn. Ltd.*, (1994) 3 Comp LJ 600 : (1994) 81 Com Cases 342 (MRTPC—FB); [**Affirmed** by the Supreme Court in *R.D. Goyal v. Reliance Industries Ltd.*, (2003) 113 Com Cases 1 (SC); *Arvind Gupta (Dr.) v. SEBI*, (1994) 81 Com Cases 318 (SC); *Morgan Stanley Mutual Fund v. Kartick Das*, (1994) 81 Com Cases 318 (SC).

Unsecured Bonds or Debentures.—Under rule 2(b)(x) of the Companies (Acceptance of Deposits) Rules, 1975 any amount raised by issue of bonds or debentures secured by the mortgage of any immovable property of the company, is not considered to be a deposit for purposes of section 58A. In other words, unsecured bonds or debentures issued by a company or issue of bonds or debentures secured by any movable property will attract the provisions of section 58A and the rules made thereunder.

Stamp Duty on debenture Trust Deed.—A debenture trust deed is not in itself a mortgage or a bond. It is simply a deed of trust by which all the lenders to the company put their trust upon anyone selected by them for the purpose of watching their interests and realising their security. It has to be stamped only as a trust deed and not as a mortgage or a bond. *Chief Controlling Revenue Authority v. State Bank of Mysore*, AIR 1988 Kant 1, 7, 8, 10 : (1989) 65 Com Cases 427 (FB) **following** *Murugharajendra Co. v. Chief Controlling Revenue Authority*, AIR 1974 Kant 60 (FB) and *United Bank of India Ltd. v. Lekharam Sonaram & Co.*, AIR 1965 SC 1591.

Transferability of debentures and Stamp duty.—Debentures are freely transferable. Although under the provisions of section 108, the instruments of transfer for debentures are to be properly stamped, the obligation to deliver to the company an instrument of transfer within 12 months in the case of listed companies and 2 months in the case of non-listed companies from the date of stamping by the prescribed authority, do not apply to debentures. Although unsecured debentures are actionable claims, a special procedure prescribed by s. 130 of the Transfer of Property Act, 1882 for transfer of actionable claims does not apply to transfer of such debentures in view of the exemption given by s. 137 of that Act. For the duty payable on debentures, see Art. 27, Schedule I of the Indian Stamp Act, 1899. *See* K. KRISHNAMURTHY, INDIAN STAMP ACT, 8th Edn., 2002.

With regard to special provisions as to debentures, see sections 117 to 123, *post*.

SEBI Guidelines 2000.—Chapter X of the SEBI Guidelines 2000 deals with "Issue of Debt Instruments".

§ For text of the Guidelines see *Appendix* 162.

Investment in new issue of Shares/Debentures by NRIs, foreigners and foreign companies.—*See* Notes under section 117.

"Depository" [Clause (12A)] (w.e.f. 13-12-2000)

This is a new clause. The definition of 'depository' is by reference to the Depositories Act, 1996, wherein this term is defined in sec. 2(1)(*e*) as follows :—

> '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 SEBI Act, 1992.

Under section 10 of the said Act, a depository shall be deemed to be registered owner for purposes of effective transfer of ownership on behalf of a beneficial owner. However, beneficial owner shall be entitled to all the rights and benefits and subjected to all the liabilities in respect of his securities held by a depository.

The function of a depository is broadly set out in sec. 2(1)(m) of that Act which defines 'service' of a depository to mean any service connected with recording of allotment of securities or transfer of securities in the record of a depository. The definition is relevant to the following provisions of the Companies Act, 1956 :

(a) Definition of member; [s. 41]

(b) Exemption from the requirement that investments made by a company should be held in its own name; [s. 49(5)(c)]

(c) Facility of service of documents on company by a depository through electronic mode or delivery of floppies or discs; [s. 51 (proviso)]

(d) Initial offer of securities of Rs. ten crores or more by a listed company to be in demat format; [s. 68B]

(e) Exemption from the requirement of production of transfer instrument in respect of transfer of securities held by depository; [s. 108(3)]

(f) Right to apply to the Company Law Tribunal if a transfer of security conflicts with the provisions of any law; [s. 111A(3)]

(g) Obligation of company whose shares are dealt with on a depository to intimate details of allotment to the depository; [s. 113(4)]

(h) Register of members/debenture holders maintained by a depository is deemed to be such a register for the purposes of this Act; [s. 152A].

§ See Notes on the sections cited above.

"Derivative" [Clause (12B)]

The definition of 'derivative' has been introduced by the Amendment Act, 2000 pursuant to the recommendations of the Working Group on Re-drafting of the Companies Act, 1956, as set out below:

"Throughout the world, corporate growth has been accompanied by the introduction of various forms of securities : debt-equity hybrids, derivatives, options and shares with differential rights.

No capital market of the size of India remains anchored to the old, three-fold classification of securities : pure debt instruments, ordinary shares and preference shares". [*Para 3.6*]

Alternative form of securities have come into fore due to two fundamental reasons. First, the financing needs of companies have become far too complex to be met by only three types of securities. And, second, because markets are generally efficient enough to understand the implications and risk associated with various instruments. Preventing such flexibility in India not only binds our companies to an archaic world, but also implies that authorities know best what is good for investors. [*Para 3.7*]

The group felt that India's corporate sector as well as its investors should have the same flexibility as their global counterparts in terms of choice of instruments. Hence, it recommends that :

1. Indian companies should be enabled to issue hybrids, derivatives, options, as well as shares and *quasi*-equity instruments with differential rights.
2. For private limited companies and unlisted public companies, the Department of Company Affairs (DCA) would issue guidelines regarding such securities.
3. For public listed companies, SEBI would issue guidelines on the norms and for protection of the interests of investors for such new instruments/securities.

4. Wherever applicable, the guidelines issued by DCA for private and public unlisted companies should be in consonance with SEBI's for public listed companies.
5. In framing such guidelines, both SEBI and the DCA should avoid trying to anticipate what the risk of a potentially new instrument may be. This is because such risks are rarely quantifiable. Instead, both authorities should insist on detailed disclosure of corporate information, and then let the potential investor decide whether or not such an investment makes portfolio sense". [*Para 3.8*]

"For simplicity, 'derivatives' refer to securities that are (a) derived from a basic security such as debt paper, mortgages, equity, loans, etc., and (b) in the nature of options, futures or contracts for differences based on the primary security. Options have vintage and go back to Holland in the 17th Century. They refer to any instrument that carries a "put" or "call" option whereby investors, instead of buying the latent security outright, can enter into a contract to either buy or sell the underlying security at a pre-specified price (the "strike price") on a pre-determined date. Options allow investors to hedge against fluctuations and thus, ensure a much more stable market. "Hybrids" is an omnibus term that allows for any combination of securities, including their derivatives or options. "Shares with differential rights" essentially refers to equity that carry differential voting and/or dividend rights. The simplest and best known example of such an instrument is the preference share."

This provision will enable companies to issue new financial instruments corresponding with the international practices. The investors at the local as well as the global level can take advantage of the wide range of securities which the companies will be able to issue under this provision.

Meaning of 'Derivatives' under SCR Act, 1956

The expression "derivative" has been defined in clause (aa)[35] of section 2 of the Securities Contracts (Regulation) Act, 1956 as under:

"derivative" includes—

(A) a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security;

(B) a contract which derives its value from the prices, or index of prices, of underlying securities.

The expression 'derivatives' was inserted in SCR Act, 1956 by Securities Law (Amendment) Act, 1999. The Department has issued the following Press release giving the reasons and the background to the Amendments:

For a study of the legal principles affecting "derivatives' see STEVEN EDWARDS, LEGAL PRINCIPLES OF DERIVATIVES (2002) JBL 1. The author discusses the concept and meaning of derivatives, legal aspects of contractual relationship involved in them, effect of defaults, capacity, misrepresentation, negligent mis-statement, negligence, unconscionability, undue influence, etc.

Background to the amendment.—The background to this amendment is explained in the following Press Release, dt. 28-10-1999 on Securities (Amendment) Bill, 1999.

"The Bill proposes to expand the definition of securities under the Securities Contract (Regulation) Act, 1956, to include derivatives and instruments of the collective investment schemes. This would enable development and regulation of markets for derivatives of securities and units of collective investment schemes. The Bill also proposes to authorise the Central Government to delegate powers to the Reserve Bank of India (RBI) under the Act. This would enable the Reserve Bank of India to regulate the transactions in Government securities and other related instruments as may be specified by the Government.

In the last few years there have been substantial improvements in the functioning of the capital market. Risks have been reduced by requirement of adequate capitalisation, margining, establishment of clearing corporations in stock exchanges, etc. Systematic improvements have been made by introduction of screen-based trading and depositories to allow book entry transfer of securities and so on. However, these are inadequate advanced

35. Ins. in the Securities Contracts (Regulation) Act, 1956 by Securities Law (Amendment) Act, 1999.

risk management tools. With a view to providing such tools and to strengthen and deepen markets, there is an urgent need to allow derivatives trading in securities for which the infrastructure, rules and regulations are ready. The Securities and Exchange Board of India has already drawn up a detailed regulatory framework under which stock exchanges/clearing corporation/clearing house would be permitted to carry on derivatives trading and settlement. This constitutes a major component of economic reforms process in the securities market. The Bill, therefore, proposes to include derivatives within the ambit of securities in the Securities Contracts (Regulation) Act, 1956, whereby trading in derivatives may be possible within the framework of that Act."

Value of Derivatives.—A derivative is a product whose value is derived from the value of underlying asset, index, a reference rate. The underlying asset can be equity, forex commodity, or any other asset. The expression "derivative" introduced in the Securities Contracts (Regulation) Act is in the nature of a financial derivative;

Financial instrument or Security whose pay-off depends on a more primitive fundamental good, called the "underlying". The value of a primitive asset is determined by its own price level or pay off which is associated with it. For example, the value of a equity share in the price of that instrument, itself; but, the value of a derivative on this equity share being dependent on the price of the latter, is, therefore, derived from it. The gain or loss from the derivative security is, thus dependent on the changes in the price of the underlying asset in the equity share, in this example.

Types of Derivatives.—Derivatives are of many types. Broadly speaking, the financial derivatives in the context of the functioning of companies, are of three types, namely, option, forward contracts and swaps. Swaps may be viewed as series of forward contracts. Accordingly, there are two main types of derivatives—option and forward contracts. Such derivatives are traded on recognised stock exchanges, all the world over. In India, there is no exchange based financial derivatives market, as such.

The LC Gupta Committee appointed by the SEBI to develop appropriate regulatory framework for derivative trading in India deals with this subject in depth. The text of this Report is contained in Chartered Secretary 1997 October issue p. 1203-1208.

Derivatives Contracts

Control of trading and settlement.—SEBI has published Suggestive Bye-laws on this subject for the Regulation and Control of Trading and Settlement of Derivatives Contracts.

§ For the text of the suggestive Bye-laws see *Appendix* 201.

Derivatives Trading in India

SEBI Circular, dt. 16-6-1998:

SEBI has issued the following Circular on this subject : "The Board of SEBI in its meeting held on May 11, 1998 accepted the recommendations of the Dr. L.C. Gupta Committee and approved the phased introduction of derivatives trading in India beginning with Stock Index Futures. The Board also approved the "Suggestive Bye-laws" recommended by the committee for Regulation and Control of Trading and Settlement of Derivatives Contracts. However, Derivatives trading could commence only after necessary amendments to the Securities Contract (Regulation) Act, 1956 are made to enable derivatives instruments to be treated as securities.

The Exchanges fulfilling the eligibility criteria as prescribed in the Committee Report (Chapter 3 of the Suggestive Bye-laws) may apply to SEBI for grant of recognition under section 4 of the Securities Contracts (Regulations) Act, 1956 to start derivatives trading. The derivatives exchange/segment should have a separate governing council and representation of trading/clearing members shall be limited to maximum of 40 per cent of the total members of the Governing Council. The exchange shall regulate the sales practices of its members and will obtain prior approval of SEBI before start of trading in any derivatives contract.

The clearing and settlement of derivatives trades shall be through a SEBI approved Clearing Corporation/House. Clearing Corporations/Houses complying with the eligibility conditions as laid down by the committee (Chapter 5 of the Suggestive Bye-laws) may apply to SEBI for grant of approval.

Derivative Broker/Dealers and clearing members are required to seek registration from SEBI. This shall be in addition to their registration as brokers of existing stock exchanges. Derivative Broker/dealers shall be granted registration under SEBI (Stock Brokers and Sub-Brokers) Rules and Regulations, 1992. The minimum networth for clearing members of the derivatives clearing corporation/house shall be Rs. 300 lacs. The networth of a member shall be computed as follows:

- Capital + Free Reserves
- Less non-allowable assets *viz.*,—

(*a*) Fixed assets; (*b*) Pledged securities; (*c*) Member's card; (*d*) Non-allowable securities (unlisted securities); (*e*) Bad deliveries; (*f*) Doubtful debts and advances*; (*g*) Prepaid expenses, losses; (*h*) Intangible assets; (*i*) 30 per cent of marketable securities.

**Explanation*—Includes debts/advances overdue for more than three months or given to associates.

The trading members shall be required to have qualified approved user and sales person who have passed a Certification Programme approved by SEBI.

The minimum contract value shall not be less than Rs. 1 lakh. Exchanges should also submit details of the futures contract they propose to introduce as prescribed at clause 3.14 of the Suggestive Bye-laws for approval of SEBI.

The initial margin requirement, exposure limits linked to capital adequacy and margin demands related to the risk of loss on the position shall be prescribed by SEBI/Exchange from time to time.

Exchanges willing to start derivatives trading may submit their application to SEBI for its consideration. The proposed Bye-laws of the Exchange and the Clearing Corporation/House shall be in conformity with the Suggestive Bye-laws prescribed by the committee and should be submitted along with application to SEBI for grant of approval. [*Issued by Securities and Exchange Board of India vide F. No. FITTC/DC/Circular 1/98, dated 16-6-1998*]

Foreign Exchange Derivatives Contracts.—Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, 2000, deal with this subject. RBI has also issued certain AD (MA Series) Circulars on the subject.

§ For text of the Regulations refer *Appendix* 125 and for AD (MA Series) Circulars refer *Appendix* 101.

Guidelines for participation by mutual funds in trading in derivative products.—The mutual funds shall be required to adhere to the Guidelines for trading in derivatives. These Guidelines have been issued by SEBI *vide* MFD/CIR/011/061/2000, dated 1-02-2000. For text see *Appendix* 185(5).

"Director" [Clause (13)]

It is not the name by which a person is called but the position he occupies and the functions and duties which he discharges that determine whether in fact he is a director or not. As stated in *Forest of Dean Coal Mining Co., In re,* (1878) 10 Ch D 450 function is everything; name matters nothing. So long as a person is duly appointed by the company to control the company's business, and authorised by the articles to contract in the company's name and on its behalf, he functions as a director.

The Articles of a company may, therefore, designate its directors as governors, members of the governing council or the board of management, or give them any other title, but so far as the law is concerned they are simply directors. See PENNINGTON'S COMPANY LAW, 5th Edn., Page 609. "All that the Act does is to provide that if a person fulfils the functions of a director (whatever they may be) he is to be treated as a director." ROBERT R. PENNINGTON, DIRECTORS' PERSONAL LIABILITY—, 1 (1st Edn., 1986).

The definition, however, presupposes a lawful occupation of the position. Where a person functions as a director without being lawfully appointed, he cannot be treated as a director. See *Dean v. Hiesler*, (1942) 2 All ER 340 (KB).

In the case of associations or other bodies registered as companies under section 25, the members of the executive committee or other governing body are directors for purposes of the Act, though they are not called by that name. In all cases, it is not the name but the position and functions that determine the real status.

An executive of the company, who is designated as executive director, but who is not a member of the Board, is not a director. For a detailed study on "Executive, Assistant or Special Directors" and "Non-executive Directors". See Notes under s. 197A and for their duties, Notes under s. 291.

Director and Manager.—The Andhra Pradesh High Court in *Deen Dayalu, T. v. Sri Bezawada Papi Reddy,* (1984) 2 Comp LJ 396 (AP—DB) held that a director is not a manager or any other managerial personnel.

Director and Servant.—A director is neither an employee nor a servant unless he is working as such in a different capacity, *Lee v. Lee's Air Farming Ltd.,* (1960) 3 All ER 420 (PC). See also *Bchan v. Secretary of State for Employment,* (1997) BCC 145 where the relationship of employment did not exist and also Notes under s. 269 under the heading "Managing Director as employee".

Position of directors where management vested in Central Government

Department's Clarification.—"The word 'director' has been defined in section 2(13) of the Companies Act, 1956, to include any person occupying the position of a director by whatever name called. The scheme of the Companies Act, 1956 shows that the ultimate control and management of the affairs of a company vests in the Board of Directors. Under the Iron and Steel (Taking Over of the Management) Act, 1972, however, the management of the affairs of Indian Iron and Steel Company Limited does not vest in the Board of Management, but vests in the Central Government; and the Board of Management carries on the general superintendence, direction and management of the affairs and business of the undertaking of the company only on behalf of the Central Government as agent thereof. Further, the Board of Management is entitled to exercise in relation to the undertaking of Indian Iron and Steel Company Limited, all the powers of the Board of Directors of a company subject to the direction, control and supervision of the Central Government. In the premises, it follows that no member of the Board of Management occupies the position of a director." [*Department's F. No.* 40/9/75-CL-II, dated 25-11-1975].

§ See further Notes under section 291, *post* and for detailed study see LVV IYER'S HANDBOOK ON COMPANY DIRECTORS, Second Edn., 2003.

"District Court" [Clause (14)]

It is evident from the definition that the District Court should be the principal civil court of original jurisdiction. The Madras City Civil Court has a limited pecuniary jurisdiction; it, therefore, cannot be held to be the principal civil court of original jurisdiction. In the city of Madras, the principal civil court of original jurisdiction will be the original side of the High Court. *Cauveri Spinning & Weaving Mills Ltd., Re,* (1960) 30 Com Cases 21, 23 : AIR 1960 Mad 79.

§ See also Notes under 'Court' Sec. 2(11) *ante.*

"Dividend" [Clause (14A)]

This definition has been inserted by the Companies (Amendment) Act, 2000 to provide that dividend includes interim dividend. The provisions of sections 205, 205A, 205C, 206, 206A and 207 relating to declaration and payment of dividend will also apply to interim dividend to the extent possible. [*See* S. 205(ic)]

As regards differential rights as to dividend in respect of equity shares, see section 86.

Interim dividend.—The new definition only codifies the prevailing position as to declaration of interim dividend. Regulation 86, Table A, Schedule I empowers the Board of directors to pay 'such interim dividend as appears to be justified by the profits of the company'. Since sanction of dividend is the prerogative of the members subject, of course, to such declaration not exceeding the Board's recommendation, interim dividend will require subsequent sanction by members at their annual general meeting. Section 205(1B) has conferred statutory power on the Board of directors to pay interim dividend. It is, therefore, advisable but not necessary that Articles should carry a provision for interim dividend.

§ See also Notes under sections 86, 205, 205A, 205C, 206, 206A and 207.

"Documents" [Clause (15)]

In terms of clause (15), 'document' includes summons, notice, requisition, order, other legal process, and registers, whether issued, sent or kept in pursuance of this or any other Act, or otherwise. This definition of inclusion can be supplemented with the meaning a document as given in sec. 3 of the Evidence Act, 1872 :

"Document means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

The list of items included in a document is further exemplified by section 3(18) of the General Clauses Act, 1897 as follows :

(18) "document" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter;

The definition in s. 29 of the Indian Penal Code, 1860 is more extensive and is accompanied by *Explanations*. It is as follows :

29. "Document".—The word "document" denotes any matters expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.

Explanation 1.—It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

Illustrations

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A cheque upon a banker is a document.

A power of attorney is a document.

A map or plan which is intended to be used or which may be used as evidence, is a document.

Explanation 2.—Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.

Illustration

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature.

"Employees stock option" [Clause (15A)]

This is new clause introduced by the Amendment Act, 2000 pursuant to the recommendations of the Working Group on the Companies Act, 1956 in para 3.20 of its Report :

"*Para 3.20* : In the final analysis, sustained competitiveness by any company hinges upon the quality of its human resources. This, in turn, has much to do with employee loyalty and commitment. A widely acknowledged method of securing greater employee participation, giving the right incentive signals and rewarding loyalty as well as years of service is through Employees' Stock Option (ESOP). In today's competitive world, only the most myopic will insist on making seal-tight distinctions between employees (who should be paid only wages, salaries and bonus) and shareholders (who should get dividends). There is hardly any global corporate giant that does not have ESOP. The Group recommends that:

1. Employee Stock Option (ESOP) should be explicitly incorporated in the new Act. These options can be in the form of warrants or other securities that have pre-specified dates of conversion in the future.
2. This will require amending section 81 of the Act. In order to prevent misuse, ESOP should be permitted up to 5% of the increased capital of a company (*i.e.* existing capital plus proposed issue).

3. The capital market rules for ESOP should be framed by SEBI for public listed companies, and by the Central Government for all other companies.
4. Such rules should allow for buy-back of options according to the principles of buy-back that have been discussed earlier in the chapter.
5. In addition, the Government should consider taxing these options as long term capital gains."

SEBI has issued SEBI (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999 according to which Employee Stock Option Scheme (ESOS) means a scheme under which a company grants option to employees and Employee Stock Purchase Scheme (ESPS) means a scheme under which the company offers shares to its employees as part of a public issue or otherwise. The companies granting option to their employees will have the freedom to determine pricing of issue subject to conforming to the accounting policies specified therein. A permanent employee or a director (whether a whole-time director or not), other than a promoter, is eligible to participate in the ESOS/ESPS.

§ For text of the Guidelines, see *Appendix* 174.

As per definition given under clause (15A), inserted by the Amendment Act, 2000, option to subscribe for securities at a pre-determined price has been given to the whole-time directors, officers or employees. In contrast, under SEBI Guidelines not all, but only permanent employees are eligible; and any director, whether wholetime or not, is eligible Promoters (or employees belonging to promoters group) are not eligible to participate in the ESOS or ESPS, under the SEBI Guidelines.

§ Also refer to Notes under section 77A(5)(d).

"Existing Company" [Clause (16)]

§ See Notes under section 3.

"Financial year" [Clause (17)]

This definition is important for the following sections: Sections 109, 198, 205, 210, 211(2), 212, 213, 217, 227, 293A, 350 and Schedule XIII.

Under section 210(4), the financial year may be less or more than a calendar year, but it shall not exceed 15 months. It can extend to 18 months with the permission of the Registrar.

In the case of banking companies, the financial year closes on 31st March as per section 29 of the Banking Regulations Act, 1949.

A company has to adopt uniform accounting year ending on 31st March for purposes of Income-tax Act. There is no such compulsion under the Companies Act, 1956, and a company can adopt financial year closing on any date in terms of section 210(4) of the Act. It would, however, be in the interest of the company to adopt the financial year ending 31st March every year, both for purposes of the Companies Act and Income-tax Act, to avoid cost, inconvenience and unnecessary paper work.

"Government Company" [Clause (18)]

A Government company means a company within the meaning of section 617. The provisions relating to Government companies are contained in sections 617-620.

§ See Notes under sections 617-620 *post*.

"Group" [Clause (18A)]

Omitted by MRTP (Amendment) Act, 1984, w.e.f. 1-8-1984.

"Holding Company" [Clause (19)]

§ See Notes under section 4, *post*.

"Hybrid" [Clause (19A)]

This clause is a new provision inserted by the Amendment Act, 2000 to define 'hybrid'. Throughout the world, corporate growth has been accompanied by the introduction of various forms of securities like debt-equity hybrids, derivatives, options and shares with differential rights. Hybrids is an omnibus term that allows for any combination of securities, including their derivatives or options.

§ For further notes see under "Securities'. [*Clause (45AA) post*]

"Industrial Company" [Clause (19AA)]

Companies (Second Amendment) Act, 2002 [11 of 2003].—Insertion of the definition of 'industrial company' is consequential to the integration with the Companies Act of certain provisions of SICA, 1985 (since repealed).

This clause adopts the definition of the expression 'industrial company' as it was in clause (e) of sec. 3(1) of SICA, 1985.

The term 'industrial undertaking' is defined in clause (19AB) of section 2 of the Companies Act, 1956.

Ownership of industrial undertaking.—Clause (19AA) has to be read with the definition of 'sick industrial company' in clause (46AA). The term 'industrial company' has been defined in clause (19AA) of section 2 of this Act in terms of ownership of one or more industrial undertakings.

A company which had taken over possession of the assets of an undertaking without change of ownership had not, by that reason alone, become the owner of the industrial undertaking. See *Arun Mica Industries Ltd.*, Appeal No. 73/91 and *Suman Synthetics Ltd.'s* case (Appeal No. 31 of 1988) (AAIFR).

§ See Notes under Sections 424A to 424L, dealing with "Revival and Rehabilitation of Sick Industrial Companies'.

"Industrial undertaking" [Clause (19AB)]

Companies (Second Amendment) Act, 2002 [11 of 2003].—The definition of 'industrial undertaking' as inserted by the Second Amendment Act, 2002 makes a departure from the definition in clause (f) of section 3(1) of SICA (repealed). That clause was as follows:

> "(f) "industrial undertakings" means any undertaking pertaining to a scheduled industry carried on in one or more factories by any company but does not include—
>
> (*i*) an ancillary industrial undertaking as defined in clause (*aa*) of section 3 of the Industries (Development and Regulation) Act, 1951 (65 of 1951); and
>
> (ii) a small scale industrial undertaking as defined in clause (*j*) of the aforesaid section 3".

The term 'scheduled industry' referred in clause (f) was defined in clause (n) of section 3(1) of SICA thus:

> "(*n*) "scheduled industry" means any of the industries specified for the time being in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951)".

Working Group's recommendation

The Working Group on the Companies Act, 1956 notes this limited applicability of SICA and recommended:

"While SICA provides for a comprehensive code for dealing with revival, rehabilitation and winding up of sick or potentially sick companies, it is limited in its application to companies engaged in industries included in First Schedule to the Industries (Development and Regulation) Act, 1951 (IDRA). The Group therefore, recommends that:

"In respect of companies engaged in the activities outside the purview of IDRA, a regime for rehabilitation and revival, similar to that of SICA may be provided for in the Act. Such a step will go a long way in effectively dealing with the problems of sickness of such companies." [*Para 6.6 of the Report*].

This recommendation is reflected in the enlarged definition of 'industrial undertaking' in clause (19AB) of this Act. The provisions relating to revival and rehabilitation of sick industrial companies in sections 424A to 424L inserted by the Second Amendment Act, 2002 will apply to any sick industrial company, whether or not it owns an industry regulated by the IDR Act, 1951.

Secondly, an "ancilliary industrial undertaking" as defined in clause (*aa*) of the IDR Act, 1951 were excluded from the operative provisions of SICA. Such companies have now been brought within the scope of the provisions of sections 424A to 424L.

Thus industrial companies which were hitherto outside the purview of SICA because they did not own a scheduled industry or because they owned ancilliary industrial undertakings have been brought within the fold of the definition of 'industrial company'[clause (19AA)] read with the definition of 'industrial undertaking' in clause (19AB)]. Small scale industrial undertakings will, however, continue to be outside the ambit of the definition of 'industrial undertaking'. Para 3(viii) of the Statement of Objects and Reasons appended to the Companies (Amendment) Bill, 2001 stated:

'Industrial Undertaking' in terms of sickness does not include:

(a) small scale industrial undertakings, as defined in clause (*j*) of section (3) of the Industrial (Development and Regulation) Act, 1951;

(b) Public Sector Undertakings, unless a reference is made by the Central Government and/or State Government, as the case may be.

The word 'units' did not occur in the corresponding clause (f) of sec. 3(1) of SICA. It is also not defined in the IDR Act. Clause (19AB) uses the term 'units' in juxtaposition with the word 'factories' followed by the qualifying expression as defined in clause (c) of sec. 3 of IDR Act.

The definition now given in the Companies Act, makes two changes, it drops connection with scheduled industries and includes other industries also whether inside or outside the First Schedule to the IDR Act. The definition now also includes ancillary industries.

"Information memorandum" [Clause (19B)]

This is a new expression inserted by the Amendment Act, 2000. It is relevant for the purposes of sections 60A and 60B also brought into the Act by the Amendment Act, 2000. It has been developed on the basis of the recommendation of the Working Group. The expressions 'information memorandum' and 'book-building' appear to be synonymous for, the definition of the latter expression is identical to that of the former as shown by the definition of 'book-building' in the working draft on the Companies Bill, 1997. The Working Group observed as follows :

Book-building is an international practice which refers to collecting orders from investment bankers and larger investors based on an indicative price rage. In capital markets with sufficient width an depth, such a pre-issue exercise often allows the issuer to get a better idea of the demand and the final offer price of an Initial Public Offering (IPO). [*Para 3.18*]

The merits and de-merits of book-building-especially in thin or shallow capital markets-requires intensive examination. The invitation and the building up of the book and receiving of advance payments by the book-runner (or book-builder) has connotations that impinge upon his liability vis-a-vis the prospectus definition and prohibitions contained in the Act. Thus, the Group recommends that :

An amendment be made to the definition of 'prospectus' in section 2(36) of the 1956 Act which would

(a) exclude the information memorandum that is issued prior to the prospectus at the time of book-building, but

(b) require that, after formal closure of book-building, such a memorandum be submitted with the formal prospectus to the Registrar of Companies. [*Para 3.19*]

SEBI Guidelines, 2000.—The concept of 'book-building' is not in the Act. SEBI (Disclosure and Investor Protection) Guidelines, 2000 [*vide* Chapter XI] contain Guidelines for book-building. The expression 'book-building' is defined in the Guidelines as follows :

"Book Building" means a process undertaken by which a demand for the securities proposed to be issued by a body corporate is elicited and built up and the price for such securities is assessed for the determination of the quantum of such securities to be issued by means of a notice, circular, advertisement, document or information memoranda or offer document. [*Clause 2.1(v)*]

"India" [Clause (20)]

Omitted by J&K (Extension of Laws) Act 1956, w.e.f. 1-11-1956.

'Issued generally' [Clause (22)]

This is based on the definition, found in the English Act—section 455(1). A drafting improvement has been effected in that definition, making it quite clear that an issue to existing members or debenture-holders and others will also fall within the scope of the definition." [*Notes on sub-clause 18 of the Companies Bill, 1953*].

The definition is relevant for sections 60, 72 and 73. As to the requirements of a prospectus issued generally, see sec. 60. A prospectus issued generally is not the same as a prospectus issued to the public. That term as defined in sec. 67 is apparently narrower.

"Limited company" [Clause (23)]

The definition refers to two kinds of limited companies, namely, limited by shares or limited by guarantee. In the case of guarantee company, the liability of members is limited by a fixed sum, which is specified in the memorandum and beyond which they cannot be called upon to contribute. Section 13(3) requires that if a company is limited by guarantee its memorandum shall specifically state that each member undertakes to contribute to the assets of the company in the event of its being wound up such amount as may be required not exceeding a specified amount. Thus, in a guarantee company, each member's liability is specified in terms of a fixed amount which he will be liable to contribute in the event of winding up of the company for payment of debts and liabilities of the company. Under section 27(2) the articles of such a company must state the number of members with which the company is to be registered. A guarantee company need not have share capital but if it does have, the provisions relating to reduction of share capital under section 100 would also apply. Such a guarantee company cannot, by reason of section 77, purchase its own shares. Lastly, under section 37(1) only a member can participate in the divisible profits and if a third person is given a right to participate in the same, such a stipulation will be void.

§ For Notes on "unlimited company", see section 12, *post*.

"Listed public companies" [Clause (23A)]

Clause (23A) inserted by the Companies Amendment Act, 2000 defines 'listed public companies' as those companies which have any of their securities listed in any recognised stock exchange. This definition is relevant for the purposes of certain sections which are to be administered by SEBI, insofar as they relate to issue of securities, transfer of securities and non-payment of dividend, as per sec. 55A which has also been inserted by the Amendment Act, 2000. Section 621 as amended by the Amendment Act, 2000 empowers SEBI to file a complaint of any offence relating to these matters with the court. The following recommendations of the Working Group may be noted :

International experience shows that a major source of growth of the industrial sector has been the small companies. They have the dynamic entrepreneurial talent to react to opportunities faster than many large corporate entities, and enjoy an innate flexibility thanks to their size and organisation. Moreover, these are typically private limited companies that do not normally access funds from the wider investing public. The Group strongly believes that such private limited companies should enjoy more-freedom under the law, and be governed largely by self-regulation [*Para 2.2*]

Even among public limited companies, a time has come to make an economically meaningful distinction between (i) unlisted and (ii) listed companies. Actions of the former have lesser public impact than the latter. For instance, the bankruptcy of a public non-listed company affects fewer investors and shareholders than a listed company; as a corollary, the financial distrees of a listed company can have negative ripple effects on a relatively thin capital market. Keeping this in mind, the Group felt that public unlisted companies should be regulated to a lesser degree than the listed companies. Hence, the Group recommends that :

The new Act would have a more relevant three-fold classification of companies :

1. Private companies-largely self-governing.
2. Public unlisted companies - lesser government regulations than public listed companies.
3. Public listed companies - greater flexibility in their operations than before, but with stricter compliance norms [*Para 2.3*].

Such a classification under the new Act will enable a neat demarcation of regulatory functions between the SEBI and the Central Government regarding capital market matters. This will not only ensure focused regulation and enforcement by SEBI, but also eliminate needless and often contradictory overlapping jurisdiction on investor protection measures. [*Para 2.4*]

§ See Notes under sec. 554 *post.*

"Manager" [Clause (24)]

Three conditions are to be satisfied before a person may become a "manager" under Section 2(24), *viz.* (a) he must be an individual as opposed to a firm or a body corporate or an association, (b) he must have the management of the whole or substantially the whole of the affairs of the company and (c) he must be subject to the superintendence, control and direction of the Board of directors.

The definition of the word "manager" given in this clause is very wide, and whatever be the nomenclature employed by the parties, if large powers of management of substantially the whole business of the company are vested in a person, then that person becomes the manager. *Ramchandiram Mirchandani v. The India United Mills Ltd.,* AIR 1962 Bom 92. In *Basant Lal v. Emperor,* 1917 Cr LJ 215, it was held that a person who is not in charge of the entire business of a company cannot be deemed to be the manager of the company. A person entrusted with the business of a branch is not a manager but merely an agent whose duties are confined within certain prescribed limits and he cannot have any control over the affairs of the company as a whole. In *Abdul Rahman Khan v. Mufassal Bank Ltd.,* AIR 1926 All 497, it was held that where articles provide that a manager may be appointed and may be given the ordinary powers of a manager, it is reasonable to infer that a person allowed to act as manager was given such powers.

Only one Manager.—It may be noted that a company can have only one manager under the Companies Act, 1956 though it may have more than one managing or whole time director. Unlike a managing director who is entrusted with only substantial powers of management, a manager under the Act has the management of the whole or substantially the whole of the affairs of the company. It therefore follows that only one incumbent can have management of the whole or substantially the whole of the affairs of the company; if there are more than one such person, neither can have the management of the whole or substantially the whole of the affairs of the company.

President—when not Manager.—However, where the President reports to the managing director and is not subject to the superintendence, control and direction of the Board of directors, in view of Section 2(24) which says that a manager in order to be a manager has to be subject to the superintendence, control and direction of the Board, there seems to be an escape route.

Body corporate cannot be Manager.—Under section 384 of the Act, a firm, a body corporate or an association cannot be appointed as a manager. In *CIT (Kerala) v. Alagappa Textiles (Cochin) Ltd.,* (1979) 49 Com Cases 947 : AIR 1980 SC 235, it was held that where substantially the whole of the business of a company has been made over to a financing company, the financing company could not be regarded as a manager since it did not function subject to the superintendence, control and direction of the Board of the financed company and therefore there was no violation of section 384.

Shop-manager is not manager under the Act.—In *R. v. Boal,* (1992) BCLC 872 (CA) the person prosecuted under the Fire Precautions Act, 1971 [English] was the assistant general manager of a book shop. His primary duty was to be the chief buyer and he had been given no managerial training and none in matters of health, safety or fire precautions. He was incharge of the shop while the general manager was away on holiday when an inspector found serious breaches of the fire certificate. He was charged on the basis that he was a manager. It was held that the intended scope of the Act was to fix with criminal liability only those who were in a position of real authority and who were responsible for putting proper procedures in place, namely the decision makers within the company who had both the power and responsibility to decide corporate policy and strategy, and since the person charged was only responsible for day to day running of the bookshop rather than enjoying any sort of governing role relating to the affairs of the company, the defence that he was not manager would have succeeded if raised at the trial. The conviction was accordingly quashed.

Factory manager is not manager under the Act—Department's view.—Factory manager incharge of production not concerned with the buying of raw materials or the selling of finished products and not having control over the company's finances, would not be "manager" within the meaning of section 2(24). [*Department's Clarification,* dated 26-4-1956].

Site manager.—The site manager of a company was held to be not a manager for the purposes of the Control of Pollution Act, 1974 (English). The Court said that a person would only be liable under the Act if it could be shown that he was a decision maker within the company having both the powers and responsibility to decide corporate strategy and policy. *Woodhouse v. Walsall Metropolitan Borough Council,* (1994) 1 BCLC 435 (QBD).

Manager and Managing Director distinguished.—As regards the position of a manager who is also director and that of a managing director, though the officers are seemingly indistinguishable, there is a difference due to the mode of appointment of each. Whereas in the case of a manager who is also appointed director, if for any reason his office of director is vacated, the office of manager held by him is not affected; in the case of a managing director, if he ceases to be director for any reason whatever, his office of 'managing director' also will cease along with it. The very definition of managing director which begins by saying that a 'managing director is a director...' shows that a person cannot be managing director without being director. But manager can continue to be manager whether or not he holds the office of director also.

This subtle distinction will be of no practical significance in most cases, as a manager who is also a director is, as regards his functions, in no way different from a managing director. Further, where a managing director is a whole-time director also, there is no difference between a whole-time director and a managing director, except that as per section 316, a managing director may be managing director of more than one company, while a whole-time director, being whole-time employee, cannot be whole-time director in more than one company.

A further distinction between a 'manager' and 'managing director' is that while a manager by virtue of his office has the management of the whole or substantially the whole of the affairs of a company, a managing director has to be entrusted with such powers of management *albeit* substantial, as may be thought fit. For, a managing director or any

other director has, as director, no powers of management except when acting as one of the Board; and if he is to have any power, it will have to be delegated to him or conferred on him by the memorandum or articles or by an agreement or resolution of the Board or by the company in general meeting.

Management of the whole or substantially the whole.—The Supreme Court has laid down in *CIT, Kerala v. Alagappa Textiles (Cochin) Ltd.*, (1979) 49 Com Cases 947 : AIR 1980 SC 235 that what matters is not that a person is described as a manager but whether he is exercising substantial powers of management. Thus it is not necessary that a manager should be in the employment of the company because an employee may not be a manager and a manager need not be an employee. *Seth Multanimal & Sons Ltd. v. CIT*, (1952) 22 Com Cases 264, 268 (All). There is this common feature between a manager and a managing director that both enjoy substantial powers of management but the source from which this power arises is somewhat different. In the case of manager his power is natural and arises from the fact of his appointment but in the case of managing director it has to be specifically entrusted to him by the Board of directors or by the company. Thus, where the Board of directors told the managing director that he should confine himself to managing the affairs of a single subsidiary, this was held to be a direction binding on the managing director. *Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies*, (1955) 1 All ER 725. The powers of management and, therefore, those of a manager or managing director, do not include the power to purchase the liability of a third person, and still less that of the company's own manager or manager's partner in a private transaction of his own. *Motilal Shivlal v. Bombay Cotton Mfg. Co. Ltd.*, AIR 1915 PC 69.

In *CIT, Kerala v. Alagappa Textiles (Cochin) Ltd.*, (*supra*), it was held that where substantially the whole of the business of a company had been made over to a financing company, such company could not be regarded as a manager since it did not function subject to the 'superintendence, control and direction' of the Board of the borrowing company. A person in charge of a branch of the business and not the entire business is not "manager". *Basantlal v. Emperor*, AIR 1918 Lah 170.

As per the section 197-A, there cannot be both a manager and managing director at the same time in a company.

A manager appointed by the Court under Section 424 is not a Manager under this definition clause.

Department's Clarification.—"A person who is a manager within the meaning of section 2(24) of the Companies Act, 1956 and is also a director of the company, would be a managing director and would be subject to all restrictions applicable to a Managing director under the Act. In this connection, 'Manager' means an individual who has the management of the whole or substantially the whole of the affairs of a company and a director of a company may also be its manager. On the other hand, a 'managing director' means a director who is entrusted with substantial powers of management of the whole or substantially the whole of the affairs of the company. [*Department's F. No.* 8/16(1)/61-PR].

Representative Capacity of Manager, Managing Director.—When the interests of the managing director do not conflict with the interests of the company, the court may allow him to appear in a court and make representation on behalf of the company notwithstanding the fact that he does not hold a power of attorney as required by Order 3 of the Code of Civil Procedure. *Puri Construction Pvt. Ltd. v. N. L. Mehta*, (1982) 2 Comp LJ 765 (Del). A manager or, managing director is vested with representative capacity and persons dealing with him in the ordinary course of business are entitled to assume that he has the necessary authority. *South African Industrial Friendly Co-op. Soc. v. Webber*, (1922) TPD 49.

Other Statutory provisions.—Section 384 requires that only an individual can be a manager and not a firm or a body corporate; section 385 disqualifies certain persons from being appointed as managers; section 386 lays down a number of companies in which a person can be appointed as a manager at the same time; section 387 prescribes remuneration and section 388 declares that provisions of sections 269, 310, 311, 312 and 317 apply

to managers also. Section 388A provides that sections 386, 387 and 388 do not apply to a private company, unless it is subsidiary of a public company.

§ See also Notes under 'Managing Director' [Clause (26)].

"Managing Agent" [Clause (25)]

Companies (Amendment) Act, 2000.—The definition of term "managing agent" has been omitted by the Amendment Act, 2000 (w.e.f. 13-12-2000).

"Managing director" [Clause (26)]

A managing director is a director with powers of management entrusted to him by virtue of an agreement with the Company, or of a resolution passed by the shareholders at their general meeting, or by the Board. It is an essential requirement of his office as "managing director" that he should hold the office of a director. A managing director who is not a director is contradiction in terms. *Shirlaw v. Southern Foundaries Ltd.*, (1940) 10 Com Cases 11 (CA) **affirmed** on appeal *Southern Foundaries Ltd. v. Shirlaw*, (1940) 10 Com Cases 255 : (1940) 2 All ER 445 (HL); *Balchand C. v. Devashola (Nilgiri) Tea Estates Co. Ltd.*, (1972) 42 Com Cases 623 (Mad).

A managing director occupies the dual capacity of being a director as well as employee of the company. Thus for example, the Supreme Court observed that he can be regarded as a principal employer for the purposes of the ESI Act, 1948. *Employees State Insurance Corpn. v. Appex Engineering P. Ltd.*, (1998) 1 Comp LJ 10 : [1998] 1 LLJ 274 (SC). He is not a mere servant, he is an agent of the company with capacity to bind the company within the sphere of management authorised to him. *Happy Home Builders (Karnataka) P. Ltd. v. Delite Enterprises*, (1994) 13 Corpt LA 405 (Kar).

The day to day management is entrusted to the managing director who can exercise powers of management without referring to the Board. It is necessary that the articles must provide for such an appointment being made. *Boschoek Proprietory Co. Ltd. v. Fuke*, (1906) 1 Ch 148.

A managing director who was prosecuted for default under S. 220 contended that he was not liable as he had resigned before the last date for filing accounts. The court held that a managing director combines in himself two capacities, namely, manager and director. The capacity as manager cannot be terminated by merely sending up resignations. It becomes effective only when the company accepts the resignation and relieves him from his duties (on facts held that despite resignation, he continued to be managing director). *Achutha Pai v. ROC*, (1966) 36 Com Cases 598 (Ker). In our view the observation that a managing director holds two offices namely that of manager and of a director is not correct. The concept of a 'manager' as defined by the Act is different from that of managing director. A managing director as defined by the Act is a director who is entrusted with substantial powers of management. It is, however, true that a managing director may resign his office and continue to be an ordinary director. His resignation as managing director becomes effective only when accepted by the company.

A managing director cannot be equated with an ordinary director. Section 2(26) and S. 2(13) show the intention of the legislature to treat the two as separate categories. Therefore, when the term of a managing director expires, he cannot continue as a managing director without being reappointed. *Sishu Ranjan Dutta v. Bhola Nath Paper House Ltd.*, (1983) 53 Com Cases 883, 898 (Cal). A person does not acquire the status of a manager or managing director only on being appointed as a director. *Deen Dayalu, T. v. Sri Bezwada Papi Reddy*, (1984) 2 Comp LJ 396 (AP).

The question whether a managing director, inasmuch as he is both a 'director' and 'employee' should in his capacity of employee be considered a 'servant' or agent of the company is unimportant for purposes of the Companies Act, though it may be relevant for determining whether his remuneration is salary or business income for purposes of the

Income-tax Act. For a discussion of his position as 'servant' or 'agent' see *Ram Prasad v. CIT* (1972) 42 Com Cases 544 : AIR 1973 SC 637; *CIT v. M.S.P. Rajes,* (1993) 77 Com Cases 402 (Kar). See also *Hindustan Vacuum Glass Ltd. v. Union of India,* 1981 Tax LR 2438 (Del); *Southern Foundries (1926) Ltd. v. Shirlaw,* (1940) 10 Com Cases 255 : (1940) 2 All ER 445 (HL); *Union India Sugar Mills Co. Ltd., Re,* (1933) 3 Com Cases 424 : AIR 1933 All 607, managing director regarded an agent and therefore his knowledge as the knowledge of the company; *CIT v. L. Armstrong Smith,* (1946) 16 Com Cases 172 (Bom), remuneration of managing director taxed as salary and not as income from business. *CIT v. B.P. Dalmia,* (1994) 3 Comp LJ 268 (Cal) where also the managing director was viewed as a servant and his remuneration taxable as salary. *CIT v. M.S.P. Rajes,* (1993) 77 Com Cases 402 (Kant).

The Civil Court will not grant an injunction to restrain the company from interfering with a managing director carrying out the duties of managing director who is removed from his office. *Joginder Singh Palta v. Time Travels (P.) Ltd.,* (1984) 56 Com Cases 103 (Cal).

Where, for recovery of dues from the company, a decree was passed against the company as well as its managing director, it was held that the managing director was not the judgment-debtor in his individual capacity and, therefore, he was not liable to be arrested and detained in civil prison for enforcement of the decree. *Maruti Ltd. v. Pan India Plastic P. Ltd.,* (1995) 83 Com Cases 888 (P&H).

Managing or wholetime director, link with nature of duties, not designations

Department's Clarification.—Whether a director is to be regarded as a whole-time director or as a managing director of the company would depend on the nature and extent of the duties entrusted to him and that the designation under which the appointment is made would not make any difference in this regard. Thus, if a director is entrusted with managerial functions, he would be in the position of a Managing Director notwithstanding the fact that he may be designated as a technical adviser or as a technical director of the company. [*Fourth Annual Report* Year ended 31st March, 1960].

Company may have more than one Managing Director

Department's Clarification.—"Section 2(26) defines "Managing director" as a director who is entrusted with substantial powers of management which term refers to the nature of the powers and not the quantum thereof. Section 2(24) of the Companies Act, 1956, on the other hand has defined the word "manager" as an individual who has the management of the whole or substantially the whole of the affairs of a company. Thus the managing director of a company may be entrusted with substantial power of management but not necessarily of the whole or substantially the whole of the affairs of a company. A company may, therefore, have more than one managing director. [*Department's Clarification F. No.* 8/16/(1)/61-PR].

Other Statutory provisions.—Section 269 makes it obligatory for a company having capital of a sum as may be prescribed (w.e.f. 18-9-1990 Rs. Five crores or more) to appoint a managing director or wholetime director or manager. Section 267 disqualifies certain persons from being appointed as managing directors; section 316 prescribes the number of companies in which a person can be appointed as managing director at the same time; section 317 restricts the maximum term of appointment to five years. The remuneration of a managing director is now governed by section 309 and Schedule XIII.

§ See also, Notes under sections 2(24), 269 and 283.

"Member" [Clause (27)]

The expressions 'member', 'shareholder' and 'holder of shares' are interchangeable terms in the case of company having a share capital. *Howrah Trading Co. Ltd. v. CIT,* (1959) 29 Com Cases 282 : AIR 1959 SC 775 **followed** in *Killick Nixon Ltd v. Bank of India,* (1985) 57 Com Cases 831 (Bom).

The bearer of a share warrant may, however, be deemed to be a member for such purposes as may be specified in the articles of a company [*vide* section 115(5)]. *S.D.N. Wadiyar v. Venkateswara Real Estate,* (1990) 68 Com Cases 216.

The expression 'member' is wider in scope than shareholder and signifies persons who are members of all kinds of companies, *e.g.,* company limited by guarantee without share

capital. In the case of companies limited by shares, 'member' includes shareholders of both classes, preference as well as equity shares.

Member under section 41.—The definition of the word 'member' in section 41(2) will not control the meaning of the word 'member' in the context of other provisions *e.g.*, sections 397 and 398. Hence, the clause which is applicable to test whether a member satisfies the requirement of sections 397 and 398 of the Act would be section 2(27) and not the provisions of section 41(2). *Shri Balaji Textile Mills (P.) Ltd. v. Ashok Kavle,* (1989) 66 Com Cases 654, 661, 662 (Kar).

§ For further Notes see Commentary under section 41, *post.*

"Memorandum" [Clause (28)]

§ See Notes under sections 1, 13, 33 and 36 *post.*

"Modify, Modification" [Clause (29)]

Compare 'alter', 'alteration' [Clause (1)] and 'vary', 'variation' [Clause (50)].

The phrase 'shall include' in sec. 2(29) indicates that these words are to be construed broadly in relation to a scheme under s. 391. *S. K. Gupta v. K.P. Jain,* (1979) 49 Com Cases 342 : AIR 1979 SC 734.

"Net worth" [Clause (29A)]

Companies (Second Amendment) Act, 2002 [11 of 2003],—Clause (29A) reproduces the definition of 'net worth' as it existed in clause (*ga*) of S. 3(1) of the repealed SICA, 1985. 'Net worth' is one of the expressions defined in the Act consequent upon integration of the provisions of SICA into this Act. This definition is relevant for the purpose of determining sickness of an industrial company in terms of the extent of erosion in its net worth. Net worth, in accounting, means the excess of the book value of the assets (other than fictitious assets) of an enterprise over its liabilities.[36] The definition of Net Worth in this clause is relevant in the context of 'sick industrial company' as defined in clause (46AA).

§ For detailed Notes refer Sections 424A to 424L dealing with 'Revival and Rehabilitation of Sick Industrial Companies' and also under section 433 under the heading "Winding up of Sick Industrial Companies".

"Officer" [Clause (30)]

Legislative Changes.—The definition of 'officer' given in the Companies Act, 1956 (1 of 1956) was amended by the Companies (Amendment) Act, 1965, following the recommendations contained in the Report of the Commission of Inquiry on the Administration of Dalmia-Jain Companies. In this context, the recommendations of the Daphtary-Sastri Committee are reproduced below:

"The position of directors in relation to the shareholder has been likened to that of a trustee in relation to the beneficiary. Directors are generally under an obligation to see that the company's assets are in a proper state of investment and monies of the company are spent only for purposes which are reasonably incidental to and within the reasonable scope of carrying on the business of the company. They should, therefore, take active and immediate steps to prevent any misappropriation or breach of trust on the part of their co-directors. It goes without saying that a director has positive duties to perform in order to safeguard the interests of the shareholders. A director who is a mere puppet in the hands of another remaining in the background cannot effectively take any action in that regard. The report of the Commission of Inquiry discloses a very sorry state of affairs in this regard to the companies which were under investigation. Paid employees and young and inexperienced relatives were all on the Board of directors, whereas a person who was not on the board wielded authority over them, staying in the background and retaining effective control over the assets and activities of the company. These persons, when it came to fixing responsibility, pleaded helplessness and pointed to the person who controlled their actions and called themselves variously as nominee directors or *benamidar* directors or *dummy* directors, remaining on the

36. See Guidance Note on Terms used in Financial Statements reproduced in Compendium of Guidance Notes, Vol. I, Third Edition (1990) issued by ICAI.

board only to carry out the directions of that other person. Some of these persons were not even aware of the full implication of what they were directed to do and they were mere stooges for the *malpractices* of the mastermind behind them.

"No legislative measure can provide complete safeguard against such clandestine wielding of control over companies. The Companies Act has attempted to cast directors responsibilities on persons who conceal their identities behind dummies but retain full control over the affairs by including within the meaning of director "a person in accordance with whose directions or instructions the Board of directors of a company is accustomed to act" in sections 162, 303, 304, 307, 308, 369, 370, 538, etc. The state of affairs in the companies under investigation shows that this provision is not enough. A provision requiring each and every director to file a declaration through the company with the Registrar, in all cases where he holds the shares on behalf of another, to disclose thereby the person for whose benefit he holds them, might provide some safeguard. A further drastic step may also be considered, and that is to impose a duty on every director to disclose by a declaration the person whose directions he is obliged to carry out and by whom his voting is likely to be controlled, if that other person is not on the Board of directors. The concept of deemed directors must, therefore, be enlarged so as to include "persons in accordance with whose directions or instructions the Board of directors or any one or some of them is or are accustomed to act" in order that the provisions may be effective, and a corresponding amendment should be made in the definition of 'officer' in section 2(30)." (*Report : Para* 24).

Companies (Amendment) Act, 2000.—Clause (30) which defines the term 'officer' has been substituted by the Amendment Act, 2000 (w.e.f. 13-12-2000). It omits reference made in the old clause (30) to managing agent/secretaries and treasurers. The significant change is the exclusion of auditor from the definition of 'officer'. Prior to the amendment, auditor was an officer for the purposes of sections 477, 478, 539, 543, 545, 621, 625 and 633 only.

§ See also Notes under s. 227, *post*.

General notes.—The term 'officer' is a term of wide connotation. As stated in HALSBURY'S LAWS OF ENGLAND (4th Edn. Reissue Vol. 7(1), Para 669, page 479) "Any persons who are regularly employed as part of their business or occupation in conducting the affairs of the company may be 'officers' of the company." The Secretary, accountant and cashier are 'officers' of the company. *Official Liquidator, Golcha Properties P. Ltd. v. P.C. Dhadda,* (1980) 50 Com Cases 175 (Raj). The term has been held to include assistant secretaries, branch managers, etc. *Suryanarayana (M.) v. Vijaya Commercial Bank Ltd.,* (1959) 29 Com Cases 114 : AIR 1958 AP 756; *In re, Hanuman Bank Ltd.,* (1964) 34 Com Cases 640 (Mad) and also marketing manager. *Ravinder Kumar Sangal v. Auto Lamps Ltd.,* (1984) 55 Com Cases 742 (Del). It may also include an agent employed by a company, whether under a power of attorney or otherwise. *Nandlal More v. R. Mirchandani,* (1968) 38 Com Cases 39 (Bom). It also includes other persons in a managerial position and does not exclude subordinate officers in lower ranks discharging managerial functions. See *Re, A Company,* (1980) 1 All ER 284 (CA). A divisional manager of a company, where 32 divisional managers have been employed, is not a principal officer of the company. *VIC Groves & Co. Ltd., Re,* (1964) 34 Com Cases 926 (Ch D).

An adviser of a company may also fall in the category of an officer. *Satyanath T.S. v. J. Thomas and Co.,* (1985) 57 Com Cases 648 (Cal). But it does not include the 'receiver and manager' appointed by or on behalf of the debenture-holders as any act of management by such a person will not be done by virtue of his holding any office under the company. *In re, Johnson (B.) & Co. (Builders) Ltd.,* (1955) 2 All ER 775 : (1955) 25 Com Cases 317 (CA). Similarly it does not include a debenture-trustee, unless an officer of the company is functioning as such. *Central Bank Executor and Trustee Co. Ltd. v. Magna Hard Temp Ltd.,* (1997) 89 Com Cases 40 (AP).

In the case of a company in liquidation the Liquidator or Official Liquidator is an officer of the company, who is looking after the affairs of the company, though not specifically mentioned in clause (30). *In re, P.C. Pothan, Liquidator, Commonwealth Bank Ltd.,* ILR (1966) 1 Ker 1; [*Prahllad Bai Lath v. ROC,* (1979) 49 Com Cases 317 (Ori); *Official Liquidator Baroda Batteries Ltd. v. ROC,* (1978) 48 Com Cases 120 (Guj)]. But a broker is not an officer. *Official Liquidator of the National Live Stock Registration Bank Ltd. v. Velu Mudaliar,* (1938) 8 Com Cases 7, 12 (Mad).

Position of Responsibility—Department's Clarification.—Any person, occupying a position of responsibility as regards any particular duty imposed by the Act, will be an officer in relation to that duty. Text of the Clarification is reproduced hereunder:

Text of Circular.—"Whether or not a person would come within the scope of the term 'Officer' as contemplated in section 2(30) of the Companies Act, 1956 would depend on the facts and circumstances of each particular case and the relevant provisions of the Companies Act. Thus, if in respect of discharge of any particular duty imposed by the Act any person occupies a position of responsibility in a company, he will be deemed to be an 'Officer' in relation to that duty and answerable as such. In this connection, attention is also invited to the definition of Officer who is in default in section 2(31) read with section 5 of the Companies Act, 1956. [*Department's Letter No.* 8/65/2/30/63-PR, dated 7-10-1963].

When Employee becomes officer—Department's Clarification.—The term "officer", as defined under section 2(30) of the Companies Act, 1956 includes an employee if he has been vested with the powers of financial control over one or more fields of operation of a company and, therefore, such an employee should be deemed to be falling under the category of the term "officer". In view of this position, the employees like chief accountant, works manager, sales manager, purchase manager, estate manager, etc., should be deemed to be officers for the purpose of disclosure of debts/loans or advances in terms of Part I of Schedule VI. [*Department's Letter No.* 8/17/2(30)/76-CL-V, dated 23-8-1976].

Director as Officer.—A director is expressly included in the definition of officer, *Pravin Sankalchand Shah v. D.B. Dalal (Official Liquidator),* ((1967) 37 Com Cases 317 (Bom). A director includes a past director and he can be compelled to file statement of affairs under Ss. 451 and 454 if he is still in a position to do so. *Poomuli Manakkal Anujan Nambudiripad v. Official Liquidator,* (1979) 49 Com Cases 81 (Ker); *Devinder Kishore Mehra v. Official Liquidator,* (1980) 50 Com Cases 699 : AIR 1980 Del 174.

Auditor as Officer.—An auditor appointed by a company to fill an office (as distinct from an auditor appointed for a particular purpose) is an officer of the company [under English Act] for the purposes of criminal liability. *R. v. Shacter,* (1960) 1 All ER 61 : (1960) 30 Com Cases 334 (CCA). Under a provision in the Bermudan Companies Act, 1981 (Parallel to s. 201 of our Act, indemnity for officers), 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).

Servant and Officer.—While the definition says that it includes the persons specified therein, it does not say who are all those persons who will come within the term. According to STROUD'S JUDICIAL DICTIONARY 'officer' means a person under a contract of service; a servant of a special status holding an appointment to an office which carries with it an authority to give directions to other servants. Thus, an 'officer' as distinct from a mere employee may be defined as a person who has the power of directing any other person or persons to do anything, the function of a mere employee is only to obey. In such view, there may be very many officers of a company. If in respect of the discharge of any particular duty imposed by the Act, any person occupies a position of responsibility in a company, he will be an officer in relation to that duty and answerable as such.

'In accordance with whose directions is accustomed to act'.—The words in the definition, "or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act" were inserted by the Companies (Amendment) Act of 1965. In respect of this amendment, the Notes on clauses stated: 'As recommended in paragraph 24 of Part II of the Report of the Commission of Inquiry on the administration of Dalmia-Jain Companies, it is proposed to expand the definition of 'Officer' so as to bring within its ambit any person in accordance with whose instructions the Board or any of the directors of a company is accustomed to act.

This is designed to counter the trend whereby dummy directors are appointed on Boards of companies to implement policies of a dubious nature, while masterminds mainly instrumental in evolving these policies remain in the background". [*Clause 3(ii)*].

The definition of 'officer' as contained in the Act brings in the concept of 'deemed' officers *i.e.* to say persons who are not in the employment of the company, but who may be dictating and directing the Board of directors or any one (or more) of the directors of the company.

§ For details, see Notes under section 7.

Holding Company as Officer.—In the case of a subsidiary company, its holding company will also come within the definition of "officer" as it is undoubtedly a person in accordance with whose directions or instructions the Board of directors of the subsidiary company or any director of the subsidiary company is accustomed to act. But it appears that this view is not wholly consistent with the legislative intent. Section 7 explains the concept of a 'person in accordance with whose directions the directors of a company are accustomed to act' and the word person as used in this section seems to refer to an individual person only because the word 'him' is used in reference to such a person in the section. Hence it would appear that a juristic person like a holding company cannot be an officer in relation to its subsidiary. This view is further buttressed by the fact that the clauses (a) and (b) of s. 2(30) which tried to locate an officer in the structure of the now extinct species of "managing agents" or 'secretaries and treasurers" pointed to a partner or a director or manager as an officer.

Likewise, in the case of a person who is a director by reason of his being the representative of a company or other body corporate within the meaning of section 187, the company or other body corporate will also come within the definition.

Definition of term 'Officer' is functional.—The definition is functional and not conceptual. The word 'officer' would have to be taken in the context of his functions. Section 2 in its opening words says that the definitions are to be taken as they are "unless the context otherwise requires". Thus where articles of a company empowered its managing director to remove officers it was held that the context in which the word 'officer' was used here would not include the company's secretary or directors and, therefore, the removal of secretary by the managing director was not proper. *Haryana Seeds Developments Corpn. Ltd. v. J.K. Agarwal,* (1989) 65 Com Cases 95 (P&H).

"Officer who is in default" [Clause (31)]

§ See Notes under section 5 *post*.

"Option in securities" [Clause (31A)] (w.e.f. 13-12-2000)

The definition of the expression 'option in securities' under clause (31A) inserted by the Companies (Amendment) Act, 2000 is by reference to the meaning assigned to that expression under sec. 2(*d*) of the Securities Contracts (Regulation) Act, 1956, which reads as follows :

> "(*d*) "option in securities" means a contract for the purchase or sale of a right to buy or sell, or a right to buy and sell, securities in future, and includes a *teji, a mandi, a teji mandi, a galli,* a put, a call or a put and call in securities."

The Working Group briefly explained the term 'option' as referring "to any instrument that carries a 'put' and 'call' option whereby investors, instead of buying the latent security outright, can enter into a contract to either buy or sell the underlying security at a prespecified price ('strike price') on a pre-determined date. Options allow investors to hedge against fluctuations and, thus ensure a much more stable market." [*Para 3.6*]

"Operating agency" [Clause (31AA)]

Companies (Second Amendment) Act, 2002 [11 of 2003].—This definition of 'operating agency' has been inserted by the Companies (Second Amendment) Act, 2002 (11 of

2003). It adopts the definition as it was given in section 3(1)(i) of SICA, 1985 (*since repealed*), with the addition of the words "group of experts consisting of persons having knowledge of industry in which the sick industrial company is engaged." As per the definition, the group of experts, so specified, may be appointed by the Tribunal as an Operating Agency (OA) apart from other institutions.

Role of operating agency.—The Act provides for timely detection of sickness in industrial companies and for expeditious determination of the preventive, ameleorative, remedial or other measures that would need to be adopted with respect to such companies. For efficient and expeditious performance of its functions, the Tribunal may operate through operating agencies [Sec. 10FQ].

§ For further study see notes under S. 424A to 424L dealing with "Revival and Rehabilitation of Sick Industrial Companies" and also section 433 under the heading "Winding up of Sick Industrial Companies".

"Paid-up capital" [Clause (32)]

The term 'paid-up capital' includes capital credited as paid-up. The words "credited as paid-up" seem to have become necessary as a part of the definition of paid-up capital because of the allotment of shares by way of bonus without any payment and yet an amount equal to them has to be deemed credited to the company's paid-up share capital. The words 'capital credited as paid-up', thus includes bonus issue etc., where no consideration is actually received by the company. Paid-up capital is different from 'Called-up capital' and is arrived at after deducting the unpaid calls from the called-up capital.

The share application money before allotment will not form part of paid-up capital.

In the different works on company law the expression 'paid-up capital' has been taken to mean the amount of issued share capital which has been taken up by shareholders who have agreed to give consideration in cash or kind for the shares issued to them unless those shares are fully paid bonus shares. This statement in PALMER'S COMPANY LAW as cited by Kerala High Court in *SNDP Yogam, Quilon, Re,* (1970) 40 Com Cases 60, 69 (Ker) is **followed** by a remark that issued or paid-up capital is a reality whereas the nominal capital is an authority. See also *South India Co-op. Insurance Society Ltd. v. Corporation of Madras,* (1954) 24 Com Cases 323, 328, 329 (Mad—FB), where it was emphasised that a company having no authorised or stated capital cannot have paid-up share capital.

Section 148 requires that 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 authorised capital there must be mentioned in an equally prominent position and in equally conspicuous character the amount of the capital which has been subscribed and the amount paid-up. The amount of paid-up share capital is also reckoned for the purposes of some provisions of the Companies Act *e.g.* those relating to borrowings, lendings and investments in other companies.

§ The concept of paid-up share capital is also relevant to the listing of securities at a recognised stock exchange. See under section 73, *post.*

"Prescribed" [Clause (33)]

The definition was amended by the Companies (Amendment) Act, 1960. The reasons for amending the definition were, thus, given in the Notes on clauses of the Bill: "So as to accord with the correct constitutional position the changes proposed will firstly take away from the Supreme Court, and vest in the Central Government, the power to make rules in relation to 'withdrawal and payment into the public account of India of moneys handled by the Official Liquidator and secondly, vest in the Supreme Court, rather than in the Central Government, the power to frame rules for inspection of books and papers of the company, while in the custody of the Official Liquidator, as liquidation in such cases will be under the supervision of the Court and should appropriately be subject to uniform rules framed by the Supreme Court." [*Report : para 21*]. Para 21 of the *Report* of the

Companies Act Amendment Committee, 1957, stated as follows:—"The definition of the word 'prescribed' in section 2(33), as it now stands appears to vest in the Supreme Court of India powers of rule-making which include matters falling outside its jurisdiction. In the absence of Parliamentary Legislation, Article 283(1) of the Constitution vests the rule-making power in the President with reference to deposits into or withdrawals from the public account of India, or monies realised by the Official Liquidator. Consequently, the Supreme Court cannot be empowered to frame rules in respect of the above matters as section 2(33), read with section 552 purports to do. Under section 555(3) of the Act, the Liquidator in the winding up of a company is required to furnish to the officer authorised by the Central Government a statement in the prescribed form giving particulars relating to monies deposited in the Companies' Liquidation Account, in the public account of India, in the Reserve Bank. For this purpose, the Central Government has appointed the Registrars of Companies as 'officers' to whom the said statement is to be furnished. Under section 555(7)(b) of the Act, the Central Government is empowered to make an order for payment of the amount due to any claimant on a certificate by the Liquidator or on other materials. The power to prescribe the form of the statements to be made by the liquidator to the officer appointed by the Central Government under section 555(3) should appropriately vest in the Central Government and not in the Supreme Court. On the other hand, as we have suggested in paras 187 and 204 *infra* the power to prescribe rules for inspection of the books and papers of a company in liquidation, at present exercisable by the Central Government under section 549 could appropriately be vested in the Supreme Court. For these reasons, section 2(33) and section 643 would have to be amended by taking away the power of the Supreme Court to frame rules in respect of matters provided for in sections 552 and 555(3) of the Act and vesting it with power to make rules as respects the matter provided for in section 549."

Companies (Second Amendment) Act, 2002 (11 of 2003).—As per the Companies (Second Amendment) Act, 2002 (11 of 2003), the powers of winding up have been conferred on the Tribunal constituted under Part IB of the Act. Consequential changes have, accordingly, been made in clause (33) for prescribing rules by the Supreme Court in consultation with the Tribunal, instead of the High Court.

"Previous Companies Law" [Clause (34)]

The definition is explicit in itself and requires no further comments.

"Private Company" [Clause (35)]

§ See Notes under section 3.

"Prospectus" [Clause (36)]

Companies Act, 1956.—The definition of 'prospectus' in the 1956 Act was based on the definition found in the English Companies Act [section 455(1)]. The words 'but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed', which occurred in the definition in the 1913 Act as amended in 1936 were, however, omitted, as suggested in paragraph 27 of the Company Law Committee's Report. (*Clause 2 of the Bill*).

Companies (Amendment) Act, 1960.—The definition was amended in 1960, following the recommendation of the Companies Act Amendment Committee of 1957. The recommendation read as under: "The definition of 'prospectus' taken from the English Act is not happy inasmuch as a 'prospectus' is defined as meaning 'any prospectus, notice, etc.' What is meant is probably that any document, described as a prospectus, has to be regarded as a prospectus within the meaning of the Act. If so, 'prospectus' might be defined as meaning "any document described or issued as a prospectus or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate." The definition includes a newspaper advertisement. It has been pointed out that advertisement charges for the insertion in a newspaper of a prospectus with full statutory particulars are inordi-

nately heavy in the case of companies with a modest capital and that a newspaper advertisement of the fact of the floatation of a company should be excluded from the definition of 'prospectus'. Sections 56 to 65 of the Act contain stringent provisions regarding the contents of prospectuses but section 66 provides that where any prospectus is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum or certain other particulars referred to in the section. There is no reason to exclude newspaper advertisements from the definition of 'prospectus' if there is an invitation to the public to subscribe for shares or debentures. A mere announcement in a newspaper about the information of a company or of the fact of the publication of a prospectus by the company in connection with the issue of shares or debentures without any invitation to the public to subscribe need not be included in the definition of prospectus provided the place where a copy of the prospectus may be obtained is stated in the announcement. [*Report : Para* 22, *Pages* 18, 19].

Companies (Amendment) Act, 1974.—The words "inviting deposits from the public or" were added by the Companies Amendment Act, 1974 as the definition of 'prospectus' has had to be enlarged for purposes of sections 58-A and 58-B (w.e.f. 1-2-1975).

Scope of Clause (36).—This definition of 'prospectus' follows S. 455(1) of the English Companies Act, 1948. A prospectus is a notice, circular, advertisement or other document inviting the public to subscribe or purchase of shares or debentures or make deposits. The first condition implies that an oral invitation shall not be regarded as a prospectus. Thus a TV or Radio advertisement, not being a document, does not become a prospectus within the meaning of this sub-section. The second condition is that the offer must be made to the public and the same may be viewed in the light of section 67 as to when an offer shall be regarded as being made to the public.

The offer by a new company to purchase the shares of two existing companies in exchange for its own shares which was made by issuing circulars containing form of acceptance and transfer was held to be not an offer to the public nor a prospectus because it was not an invitation to purchase the new company's unissued shares nor an invitation to subscribe for shares. *Government Stock & Other Securities Investment Companies Ltd. v. Christopher,* (1956) 1 All ER 490 : (1956) 26 Com Cases 210 (Ch D).

Distinction under the general law of contract between "invitation to an offer" and "an offer" is not relevant here. An offer of rights shares, though regarded as an "offer" under the law of contracts, is still treated as an "invitation" for the purpose of section 67(1).

§ See also General Notes as regards to 'Prospectus' given in the beginning of Part III and Notes under sections 55, 56, 58-A and 58-B.

"Public company" [Clause (37)]

§ See Notes under section 3 *post.*

"Public holiday" [Clause (38)]

This definition is important for sections 74, 166(2) and 288(1).

According to the Negotiable Instruments Act (XXVI of 1881) "the expression 'public holiday' includes Sundays, New Year's Day, Christmas Day: if either of such days falls on a Sunday, the next following Monday, Good Friday and any other day declared by the Central Government by notification in the Official Gazette to be a public holiday".

The power to declare any day as a public holiday has also been vested with the State Governments *vide Notification* dated 8-6-1957 and therefore any day declared by a State Government as a public holiday will be applicable to companies in that State. No other holiday is a public holiday for purposes of this Act.

The true test of a public holiday is not whether the holiday is declared by the State or the Central Government but whether it has been so declared under the Negotiable Instruments Act. The Central and State Governments in consultation with their employees'

unions publish a list of Government holidays every year. These holidays for Central/State Government offices are not holidays under the Negotiable Instruments Act for which separate notifications are required. Only holidays declared under the Negotiable Instruments Act are public holidays. If the Central Government and the State Government exercising their respective powers under the Negotiable Instruments Act declare two different dates as holidays for the same festival, it is submitted that both the days will be public holidays for the companies in that particular State.

The meaning of proviso to clause (38) is that if, *after* a meeting is fixed for a particular date and notice of such date is issued to the members, the Central Government or State Government declares a particular day as a public holiday, the declaration is not to affect the holding of meeting on the day already fixed.

The proviso has relevancy in relation to annual general meeting [section 166(2)], as no other general meetings are prohibited from being held on a public holiday, and also to meetings of the Board of directors adjourned for want of quorum (S. 288).

§ Also see Notes under sections 74 and 166, *post.*

"Recognised stock exchanges" [Clause (39)]

Power of the Central Government.—The Central Government may notify any stock exchange as recognised stock exchange for purposes of the Companies Act, 1956.

The power of the Central Government to recognise a stock exchange has been delegated to and is exercisable by SEBI. [*Press Note, dated 13-9-1994 issued by the Department of Economic Affairs*].

In supersession of earlier notifications, Government has notified a fresh list of stock exchanges as per new *Notification No. GSR* 1060(E), dated 21-12-1989 : (1990) 67 Com Cases 341 (St.). "In pursuance of clause (39) of section 2 of the Companies Act, 1956 (1 of 1956), and in supersession of the notifications of the Government of India in the late Ministry of Law (Department of Company Affairs) *G.S.R. No.* 466, dated 21st March, 1966, and *G.S.R. No.* 1157, dated 16th July, 1966, on the subject, the Company Law Board hereby notifies, for the purposes of the provisions of clause (b) of sub-section (5) of section 56, section 73, sub-sections (1A) and (1B) of section 108, clause (c) of sub-section (1) of section 149, sub-section (1) of section 161, clause (iv) of proviso (b) to sub-section (1) of section 219 and sub-section (5) of section 603 of the Companies Act, 1956, and clause 8 of Part III of Schedule VI to the said Act, the following stock exchanges as recognised stock exchanges, namely:—

1. BSE[37], (Bombay Stock Exchange)
2. Calcutta Stock Exchange Association Ltd., Calcutta,
3. Madras Stock Exchange Ltd., Madras,
4. The Stock Exchange, Ahmedabad,
5. The Delhi Stock Exchange Association Ltd., New Delhi,
6. Madhya Pradesh Stock Exchange, Indore,
7. Bangalore Stock Exchange Ltd., Bangalore,
8. The Hyderabad Stock Exchange Ltd., Hyderabad,
9. Cochin Stock Exchange Ltd., Ernakulam,
10. The Uttar Pradesh Stock Exchange Association Ltd., Kanpur,
11. Pune Stock Exchange Association Ltd., Pune,
12. The Ludhiana Stock Exchange Association Ltd., Ludhiana,
13. The Gauhati Stock Exchange Association Ltd., Gauhati,
14. Mangalore Stock Exchange Ltd., Mangalore,

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37. The name of "Bombay Stock Exchange" has been changed to "BSE" *vide Notification* No. S.O. 76(E), dated 17-1-2001.

15. Magadh Stock Exchange Association, Patna, [*Notification* 855(E), dated 7-12-1996]
16. Jaipur Stock Exchange Ltd., Jaipur,
17. Bhubaneswar Stock Exchange Association Ltd., Bhubaneswar,
18. Saurashtra Kutch Stock Exchange Ltd., Rajkot,
19. Vadodara Stock Exchange Ltd., Vadodara, [*Notification SO (E)*, dated 2-1-1997]
20. Meerut Stock Exchange, Meerut, [*Press Release,* dated November 20, 1991 : (1991) 72 Com Cases 235 (St.)]
21. O.T.C. Exchange of India, Bombay, [*Notification No. SO* 343(E), dated 31-5-1993]
22. Coimbatore Stock Exchange Ltd., Coimbatore, [*SO* 174(E), dated 15-2-1994]
23. National Stock Exchange of India Limited. [*Notification No. SO* 638(E), dated 14-7-1995].
24. Inter-Connected Stock Exchange of India Ltd. [*Press Release,* [PR 316/98] dated 19-11-1998 *issued by SEBI*].
25. Capital Stock Exchange Kerala Ltd. [SO 668(E), dated 19-8-1999 *issued by SEBI*]

The Central Government will not allow new companies to use the words 'stock exchange' as part of their name unless SEBI has given in-principle approval or 'No Objection'. This is to ensure that investors are not misled by such names into dealing with members of unrecognised stock exchanges. *Vide SEBI's Letter, dated 18-3-1996 to Department of Company Affairs and Circular No. 3/96, dated 12-4-1996 issued by the Department.*

SEBI's caution against unrecognised Stock Exchanges.—It has been brought to the notice of Securities and Exchange Board of India (SEBI) that certain companies calling themselves Stock Exchanges are enrolling persons as broker members and collecting substantial deposits from them. Section 19(1) of Securities Contracts (Regulation) Act, 1956 prohibits organising or assisting in organising any stock exchange without the prior permission of the Central Government. Also, membership of stock exchanges can be granted only to those persons who fulfil the criteria prescribed under the Securities Contracts (Regulation) Rules as well as the authorisation criteria prescribed by the Central Government for brokers. The companies who have not obtained permission to operate as a stock exchange under section 19 of Securities Contracts (Regulation) Act, 1956 or have not been granted recognition by Central Government/SEBI under section 4 of the above Act cannot admit any person as a broker member nor can they collect any deposits from them. Investors are advised not to sell or deal in securities through persons who are members of unrecognised stock exchanges. SEBI does not grant a certificate of registration to persons who are members of unrecognised stock exchanges. Investors dealing through such members would be doing so at their own risk. (*Press Release, dated 25-3-1996 issued by SEBI.*)

Model Bye-laws of Stock Exchanges

§ For the text of Model Bye-laws of Stock Exchanges as prescribed by SEBI, see *Appendix* 249.

Corporatisation and Demutualisation of Stock Exchanges

§ For the text of the Scheme see, *Appendix* 250.

Addresses of Stock Exchanges

§ For the addresses of Stock Exchanges, see *Appendix* 261.

Over the Counter Exchange of India (OTCEI)

"Over the Counter Exchange of India", was promoted, as a company, by a consortium of a number of institutions, namely IDBS, IFCI, ICICI, UTI, SBI Capital Markets Ltd., Can Bank Financial Services Ltd., GIC and LIC. Under the provisions of the Securities Contracts (Regulation) Act, 1956, recognition has been granted to it for five years (w.e.f. 23-8-1994 ending with 22-8-1999) *vide Notification* F.N. 1/36/SE/94, dated 22-8-1994 with a condition namely: "The Exchange shall take necessary action for implementing the recommendations contained in section III in the *Report on Inspection of OTC Exchange of India* forwarded to the Exchange under reference number SMD-1/4186/94, dated 8-8-1994 by the Securities and Exchange Board of India, Bombay."

OTCEI is a ringless, electronic and nation-wide stock exchange for listing of Securities of Companies. The Companies listed on OTCEI are entitled to the same privileges like any other listed company on any other stock exchange. Listing on OTCEI is nationalised listing and provides 24 hours trading and international linkages. It has been envisaged as a device to particularly cater to financial needs of small-sized companies, which are unable to raise resources directly from the public or meet the listing requirements of stock exchanges in regard to minimum public offering necessary for listing. OTCEI is also an answer to the problems of small investors, who face many problems like lack of liquidity, price information, inaccessibility, delayed settlements etc.

§ For the complete text of Business Rules and Trading Mechanism of OTCEI, see *Appendices* 263 to 265.

National Stock Exchange

National Stock Exchange of India Ltd. (NSE) was incorporated under the Companies Act in November, 1992 by leading All India Financial Institutions and Banks and was granted recognition under section 4 of the Securities (Contracts & Regulation) Act, 1956, for a period of 5 years w.e.f. 26-4-1993 *vide Notification No.* 268(L), dated 26-4-1993 *extended for a further period of 5 years commencing from 26-4-1998 ending on 25th April, 2003 vide Notification No. SO 295(E), dt. 6-4-1998 issued by SEBI* to serve as a national market for dealing in securities, *e.g.*, shares, PSU Bonds, Debentures, Government securities and units of UTI. etc. The Members of NSE could link themselves to the mainframe through satellite dishes, leased data lines, or through dial up modems and telephone lines. The automated quotation system allow brokers to buy and sell electronically in contrast to the current method of exercising one's vocal chords. A National Clearing House has been set up and it is able to determine who owes what scrips and to whom. Since all the securities would be physically stored in the Central Securities Depository, book entries will suffice to conclude deals. Apart from the NSE's computer terminals, price data will be broadcast by the Press Trust of India (PTI) and Reuters through infoterminals. Financial data about every deal concluded by the NSE would flow into the National Settlement System (NSS) computers every day after trading hours. After calculating every firm's debits and credits, the NSS will provide the firm one financial figure, which is either owed or it owes for that day's financial transactions. Firms would be required to settle up every five days.

The objectives of the NSE are:

—to establish a nationwide trading facility for equities, debt instruments and hybrids,

—to ensure equal access to investors across the country,

—to provide a fair, efficient and transparent securities market,

—to establish shorter settlement cycles and book entry settlement systems, and

—to meet the current international standards prevalent in the securities industry.

Market makers who would be distinguished from brokers would be assigned to each scrip and would be required to give two-way quotes. Just like the dealers on the OTC Exchange of India (OTCEI), they would be linked to a central computer through a mo-

dem. Thus, every market maker's office would give investors (scattered all over the country) the opportunity of observing for themselves the quotes every minute and conclude transactions based on these quotes. The creation of NSE is in no way expected to interfere with the functioning of the existing Stock Exchanges. The only possibility in that NSE might lay standards which will have to be followed by all Stock Exchanges.

Inter-Connected Stock Exchange of India

Securities and Exchange Board of India, has granted recognition to Inter-Connected Stock Exchange of India Ltd., Mumbai (ICSI). ICSI will be the 23rd Stock Exchange in India. ICSI has been promoted by 14 regional stock exchanges. ICSI will set-up an interconnected market system and will provide its trading members a facility to trade on the national market in addition to the trading facility at the regional stock exchanges. The trading members are required to satisfy the capital adequacy as prescribed by SEBI. Further, each of the participating regional stock exchange is to follow uniform trading and settlement cycle in tune with the trading and settlement cycle of the ICSE. ICSE will also establish a Settlement Guarantee Fund to ensure settlement of trades. [*Press Release* [*Ref. No. PR 316/98*], *dated 19-11-1998, issued by SEBI*].

Norms relating to Multiple Membership in Stock Exchanges

Department's Press Note, dated 12-8-1991.—The Government formulated a set of norms for multiples membership in Stock Exchanges to admit members of other stock exchanges as members of particular stock exchanges. They relate to eligibility criteria, cost of membership, number of stock exchanges, Board of directors etc. etc.

§ For the text of the norms relating to Multiple Membership in Stock Exchanges, see *Appendix* 260.

SEBI Guidelines for Opening of Trading Terminals Abroad

Circular 23/99, dated 12-7-1999.—SEBI had constituted a group consisting of representatives from BSE, NSE and officials of RBI & SEBI to formulate guidelines for opening of trading terminals abroad. The guidelines are formulated on the basis of discussions with the Committee members and RBI.

§ For text of Guidelines See *Appendix* 268.

Nasdaq Stock Market in United States

In United States of America, the multiple market maker system is operating under this scheme. For a write up on the system see *Appendix* 266.

Listing Agreement.—For specimen Listing Agreement see *Appendix* 252.

Listing Fees.—For Listing Fees payable by Companies on Bombay Stock Exchange see *Appendix* 253.

Amendments to Listing Agreements.—For the text of the various circulars relating to Amendments to Listing Agreement clauses and their clarifications, see *Appendix* 254.

Securities Contracts (Regulation) Act, 1956.—For the text see *Appendix* 246.

Securities Contracts (Regulation) Rules, 1957.—For the text, see *Appendix* 247.

Guidelines for Listing of Securities on Recognised Stock Exchanges in relaxation of Rule 19(2)(b).—For upto date Guidelines see *Appendix* 251.

Listing Agreement clause 49 and related Corporate Governance Committee Reports and allied Circulars. See *Appendix* 256.

Exclusive trading right of Stock Exchange.—The following points emerge from the decision of the Kerala High Court in *C.P. Radhakrishnan v. Cochin Stock Exchange Ltd.*, (1994) 80 Com Cases 247 (Ker): (1) When a company is given the status under s. 19 of the Securities Contracts (Regulation) Act, 1956 of a recognised stock exchange in a particular area, it gets the exclusive right to function as a stock exchange in that area. (2) It would have the right to exclude others from functioning as such stock exchange. If any

other company establishes a business similar to that of a stock exchange in that area, an action would lie to restrain it from doing so. A *prima facie* case for an injunction was made out against the company in question because the objects of the company coupled with the nature of the advertisements issued by it showed that it wanted to create a floor functioning as a stock exchange. (3) The Securities Contracts (Regulation) Act provides the right to exclude others without providing for a special forum. Civil court jurisdiction would, therefore, be available for this purpose. (4) The right to exclude others would not be in the nature of a public right and, therefore, the provisions of Order 1, rule 8 or s. 91(1) of the Civil Procedure Code would not be applicable. (5) The fact that the violations of ss. 13 and 19 can be brought to the notice of the authorities constituted under the Securities Contracts (Regulation) Act, does not amount to ousting the jurisdiction of the civil courts. (6) The fact that the company had applied under s. 12 of the Securities and Exchange Board of India Act, 1992 for enlistment and registration would not enable it to contend that restrictions envisaged by the Securities Contracts (Regulation) Act would not be applicable.

Complaint against Stock Exchanges and Stock Brokers.—For addresses of regional offices of SEBI for enabling investors complaints against brokers and stock exchanges, see *Appendices* 234 and 235. A stock broker failed to exercise due caution and diligence in transacting business with a client and did not follow safety requirements and indulged in blind dealings, and thereby caused losses. The fact that he had made all the payments to the National Stock Exchange and had suffered because of his client's default was held to be not sufficient to absolve him of penalty for non-compliance with the Regulations. The suspension of his certificate was held to be a proportionate penalty to the gravity of his negligence. *India Cements Investment Services Ltd. v. SEBI,* (2003) 57 CLA 104 (SAT); *Chona Financial Services P. Ltd. v. SEBI,* (2003) 57 CLA 104 (SAT).

Bye-laws of Stock Exchange.—Bye-laws of a stock exchange framed in the exercise of power conferred by s. 9 of SCRA acquire the force of statutory enactment within the meaning of s. 2(4) of the Arbitration and Conciliation Act, 1996. *Stock Exchange, Mumbai v. Vinay Bubna,* (1999) 35 CLA 344 (Bom).

§ For the text of this Model Bye-laws of Stock Exchanges, see *Appendix* 249.

Writ remedy against Stock Exchange.—In *Sejal Rikeen Dalal v. Stock Exchange, Bombay,* AIR 1991 Bom 30, the court was of the opinion that the functions of the Stock Exchange were in public interest and for the benefit of the investors. In that context the court observed that for safeguarding the public interest, the court could reasonably exercise its jurisdiction under article 226. A single Judge of the Karnataka High Court in *R. Jagadeesh Kumar v. P. Srinivasan,* AIR 1995 Karn 420 expressed a **contra** view, it appears, because the facts of the case indicated that the stock exchange had taken action to expel a member and the court was of the opinion that it did not involve performance of any public duty or disregard of any law which imposed upon the Exchange any public duty. A Bench of the Kerala High Court in *Satish Nayak v. Cochin Stock Exchange Ltd., Ernakulam,* AIR 1995 Ker 373 has apparently shown **dissent** to the view expressed in *Sejal Rikeen Dalal* (*Supra*). But, on facts, the case was similar to the case of *R. Jagadeesh Kumar* (*Supra*).

The Andhra Pradesh High Court allowed remedy by way of a writ under Art. 226 of the Constitution against a Stock Exchange for violation of a duty of public nature vested in it under a statute and did not consider it necessary that the institution or individual proceeded against should come within the scope of the word "State" under Art. 12 of the Constitution. Statutory bodies are supposed to act justly and reasonably in accordance with rules or guidelines. *Rakesh Gupta v. Hyderabad Stock Exchange Ltd.,* (1999) 96 Com Cases 645 (AP). To the same effect, *Rajendra Rathor v. MP Stock Exchange,* (2000) CLC 302 (MP). See also *Srinivasa Rao (B.) v. National Stock Exchange of India Ltd.,* (2000) 100 Com Cas 600 (AP), writ against National Stock Exchange entertained. *Trilochana K. Doshi v. Stock Exchange of India,* (2000) 100 Com Cases 649 (Bom), writ entertained, appeal against ar-

bitration award allowed on deposit of half the sum awarded in the shape of securities instead of cash.

Suspension of trading in a scrip, postponement of settlement (Sec. 11B of SEBI Act]

An order passed upon a complaint made by a trading member suspending the trading in a particular scrip and postponement of settlement was held to be justified. *Srinivasa Rao (B.) v. National Stock Exchange of India Ltd.*, (2000) 100 Com Cas 600 (AP).

Persons convicted of offences, not eligible for membership.—As you are aware that in terms of rule 8(1)(e) of Securities Contracts (Regulation) Rules, 1957, "no person shall be eligible to be elected as a member if he has been convicted of an offence involving fraud or dishonesty". However, it has been observed that in some cases, persons with a past police record who were admitted as members of the stock exchange had subsequently indulged in fraud and cheating the public. In the light of the above, you are advised to verify the antecedents of the applicant before granting admission as a member of stock exchange and also submit a declaration at the time of forwarding the application for registration with SEBI, to the effect that the member has not been convicted of any offence involving fraud or dishonesty. [*SEBI Circular No. SMD/Policy/Circular/30/97, dated 25th November, 1997, issued by SEBI*].

Suspension of Membership.—The suspension of membership on the admitted ground that the member's employees were indulging in unauthorised accessing of surveillance terminal of the exchange was held to be justified. The suspension was for one month and the representation of the member was considered. *Prasad and Co. Pvt. Ltd. v. Delhi Stock Exchange Assn. Ltd.*, (1999) 98 Com Cases 192 (Del).

Power to cancel membership.—The power of the stock exchange to cancel the membership of a defaulting member has been held to be a valid provision under the Companies Act, 1956 and the Securities and Exchange Board of India Act, 1992. *Rajendra Prasad Bagaria v. Bhubneshwar Stock Exchange Assn. Ltd.*, (1999) 97 Com Cases 182 (Ori).

The defaulter ceases to be a member. The membership card or right of membership is not the member's personal property. The same can be sold by the stock exchange. Rules 16 and 43 which provide that out of the sale proceeds, the payment due to the stock exchange should be made first and then to the broker's creditors was held to be neither arbitrary nor illegal. *Vinay Bubna v. Stock Exchange, Mumbai*, (2000) CLC 117 : AIR 1999 SC 2517.

"Relative" [Clause (41)]

§ See Notes under section 6, *post*.

"Scheduled bank" [Clause (43)]

The expression 'scheduled bank' refers to a bank included in the Second Schedule to the Reserve Bank of India Act, 1934. See Notes under section 2(5) *ante*.

"Secretaries and treasurers" [Clause 44]

Omitted by the Companies (Amendment) Act, 2000 (w.e.f. 13-12-2000).

"Secretary" [Clause (45)]

Development of the concept of 'Secretary' in Company Legislation

Companies Act, 1956.—Under the 1956 Act, Secretary was defined to mean a person, if any, who is appointed to perform the duties which may be performed by a Secretary under the Act.

Companies (Amendment) Act, 1960.—The definition was amended in 1960 so as to enable firms and companies as well as individuals to act as Secretaries, (*vide* Notes on clause 2 of the Bill), following the recommendation made by the Companies Act Amendment Committee. The recommendation read as under: "Section 2(30) of the Act defines 'officer' as including a secretary and section 2(45) defines a secretary as meaning

a person appointed to perform the duties of a secretary under the Act. The Act does not, however, define his duties though it imposes penalties upon 'officers' (including a secretary) for breach of the duties enjoined by the Act. Section 177 of the English Act provides that every company shall have a secretary and that a sole director shall not also be a secretary. The suggestion has been made that a statutory provision requiring every company in India to have a secretary should now be made. While it is desirable to have a competent secretary to guide the management in the day-to-day work not only in matters of company law and mercantile law, but also in matters relating to accounts, taxation, holding of meetings, drafting of resolutions and reports, etc., we doubt if, at present, it would be possible to find an adequate number of competent secretaries for all companies. Accordingly, we feel that at this stage it should continue to be left to the judgment of the Board of a company to arrange for the carrying out of its secretarial work.

* * * * *

"It has been suggested that firms qualified to perform the duties should be allowed to function as secretaries of companies. It is said that not only the efficiency of company administration would be increased by the appointment of a firm comprising men of professional competence as secretaries but the cost would be reduced if several companies employed the same firm. Section 25(4) and the proviso to section 226(I) recognise that a firm might be a member of a company licensed under section 25 or that a firm might be appointed as auditors of companies. Under section 2(45), as it stands, an individual or possibly a company but not a firm, is intended to be the secretary of a company. It has been brought to our notice that persons purporting to be appointed as secretaries of companies have, in some cases, been entrusted with functions and duties appropriately belonging to managing agents or secretaries and treasurers, as defined in the Act and have in this manner sought to avoid the limitations attaching to the holders of these offices. Nothing, of course, turns on the name and the duties and powers assigned to the office determine its true legal character. The duties of secretaries, as visualised by the Act (sections 54 and 220) and in Table 'A' [Regulation 84(2)] contained in Schedule I to the Act, though important, are not managerial. Though a secretary does not enjoy the same status as a Managing Agent or Manager and though no specific duties or functions are assigned to him under the Act, still they are not trivial and require administrative ability besides a good working knowledge of company law and procedure. Being a principal officer of the company, he is responsible for the correctness of the statements and documents filed with the Registrar. For default in compliance with the requirements of the Act, knowingly or wilfully, he incurs penalties. If responsibility is to be distributed among a number of partners then not only section 2(45) but allied sections like sections 539, 540 and 543 will have to be suitably amended, so as to make each of the partners liable for the default of misconduct of the others.

* * * * *

If a firm or another company is to be allowed to function as the secretary of a company, the word 'secretary' may preferably be defined as "any individual, firm or company, appointed to perform ministerial and administrative functions in relation to a company under the Act, but not entrusted with the direction, control or management of the affairs of the company." [*Report : Para* 20, *Pages* 16, 17]

Companies (Amendment) Act, 1974.—The definition was first amended by the Companies (Amendment) Act, 1974 so as to permit only individuals to be appointed to the office of secretary and to drop the word 'purely' before the words 'ministerial or administrative duties' so as to enlarge the scope of the secretary's functions. The *Notes on Clauses* stated: "In order to promote the growth of the profession of company secretaries on healthy lines, it is necessary that they should have requisite qualifications. The sub-clause seeks to empower the Central Government to prescribe the qualifications in order that the companies which will be required to employ secretaries may appoint only such persons as have the requisite qualifications to be prescribed. The scope of the functions

and duties of a secretary has increased considerably under modern conditions and the Court of Appeal also has held that it is no longer true that a secretary is a 'purely' ministerial officer of the company. Hence the definition of secretary has been suitably amended." [*Notes on Clause 2(vii)(b).*]

Companies (Amendment) Act, 1988.—The definition was further amended by the Companies (Amendment) Act, 1988 so as to bring the existing definition of 'secretary' in section 2(45) in line with the definition of 'Company Secretary' contained in the Company Secretaries Act, 1980 (*Clause 2 of Notes on Clauses*).

The definition of the word 'Secretary' prior to its amendment in 1988, read as follows: " 'Secretary' means any individual possessing the prescribed qualification, appointed to perform the duties which may be performed by a secretary under this Act and any other ministerial or administrative duties."

As per section 2(1)(c) of the Company Secretaries Act, 1980, 'Company Secretary' means a person who is a member of the Institute of Company Secretaries of India constituted under that Act.

The present definition is an inclusive one and includes any other individual possessing the qualifications, as prescribed under the Companies (Appointment and Qualifications of Secretary) Rules, 1988, and appointed to perform the duties which may be performed by a secretary under this Act and any other ministerial or administrative duties.

Companies with Rs. 2 Crores capital to have qualified secretary [w.e.f. 11-6-2002]

The Companies Act unlike the English Act does not insist on every company to have a whole-time secretary. Section 383A, added by the Amendment Act of 1974, only required that companies with paid-up share capital of Rs. 25 lakhs or more must have a whole-time secretary. In place of the amount of Rs. 25 lakhs or more as aforesaid, the Amendment Act of 1988 provided that the said amount shall be such as may be prescribed by the Central Government. The Central Government has prescribed that a company with paid up share capital of Rs. 2 crores or more shall appoint a whole-time company secretary. Other companies, whether public or private, whose paid-up share capital is less than the prescribed amount need not appoint a whole-time secretary. [*Vide G.S.R. No.* 419(E), dated 11-6-2002].

Qualifications prescribed for office of Secretary:

The Companies (Appointment and Qualifications of Secretary) Rules, 1988, prescribe as follows:—

COMPANIES (APPOINTMENT AND QUALIFICATIONS OF SECRETARY) RULES, 1988

Notification No. G.S.R. 1105(E), dated 29th November, 1988

In exercise of the powers conferred by clauses (a) and (b) of section 642 read with clause (45) of section 2 and section 383A of the Companies Act, 1956 (1 of 1956), and in supersession of the Companies (Secretary's Qualifications) Rules, 1975, the Central Government hereby makes the following rules, namely:—

1. Short title and commencement.—(1) These rules may be called the Companies (Appointment and Qualifications of Secretary) Rules, 1988.

(2) It shall come into force on the 1st day of December, 1988.

2. Appointment, etc., of whole-time secretary.—(1) Every company having a paid-up share capital of not less than rupees [38][two crores] shall have a whole-time secretary.

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38. Subs. for the words "fifty lakhs" by Amendment Rules, 2002 *vide* GSR No. 419(E), dated 11-6-2002.

(2) No person shall be appointed as whole-time secretary under sub-rule (1) unless he is a member of the Institute of Company Secretaries of India constituted under the Company Secretaries Act, 1980 (56 of 1980).

(3) A company having a paid-up share capital of less than rupees [38b][two crores] may appoint any individual as its whole-time secretary to perform the duties of a secretary under the Companies Act, 1956, and any other ministerial or administrative duties:

Provided that no individual shall be eligible to be so appointed unless he possesses one or more of the qualifications specified in sub-rule (4).

[38a][*Provided further* that a company with its registered office and corporate office and works situated in towns with a population of less than one lakh in accordance with census of India 2001 report and having a paid-up share capital of rupees two crores or more but less than rupees five crores, may appoint any individual, who possess any one or more of the qualifications specified in clauses (i) to (x) of sub-rule (4) as its whole-time secretary to perform the duties as such under the Companies Act, 1956 (1 of 1956):

Provided also that if a company having a paid-up share capital of rupees two crores or more but less than rupees five crores shifts either its registered office or corporate office or works from towns with a population of less than one lakh in accordance with census of India 2001 report, it shall appoint a person as a whole-time secretary under sub-rule (1).".

(4) No individual shall be appointed as secretary pursuant to sub-rule (3) unless he possesses any one or more of the following qualifications, namely:—

(i) membership of the Institute of Company Secretaries of India constituted under the Company Secretaries Act, 1980 (56 of 1980);

(ii) pass in the Intermediate examination conducted either by the Institute of Company Secretaries of India constituted under the Company Secretaries Act, 1980 (No. 56 of 1980), or by the earlier Institute of Company Secretaries of India incorporated on 4th October, 1968, under the Companies Act, 1956 (1 of 1956), and licensed under section 25 of that Act;

(iii) Post-graduate degree in commerce or corporate secretaryship granted by any university in India;

(iv) degree in law granted by any university;

(v) membership of the Institute of Chartered Accountants of India constituted under the Chartered Accountants Act, 1949 (38 of 1949);

(vi) membership of the Institute of Cost and Works Accountants of India constituted under the Cost and Works Accountants Act, 1959 (23 of 1959);

(vii) post-graduate degree or diploma in management sciences, granted by any university, or the Institutes of Management, Ahmedabad, Calcutta, Bangalore or Lucknow;

(viii) post-graduate diploma in company secretaryship granted by the Institute of Commercial Practice under the Delhi Administration or Diploma in Corporate Laws and Management granted by the Indian Law Institute, New Delhi;

(ix) post-graduate diploma in company law and secretarial practice granted by the University of Udaipur; or

(x) membership of the Association of Secretaries and Managers, Calcutta, registered under the West Bengal Registration of Societies Act, 1961 (XXVI of 1961):

Provided that where the paid-up share capital of such company is increased to rupees [38b][two crores] or more, the company shall, within a period of one year from the date of such increase, comply with the provisions of sub-rules (1) and (2) of rule 2.

Explanation.—In this rule, "University" has the meaning assigned to it in the University Grants Commission Act, 1956 (No. 3 of 1956), and includes any university outside India which is recognised by the Union Public Service Commission for the purposes of recruitment to public services and posts in connection with the affairs of the Union or of any State.

3. Provisions relating to existing secretaries.—Notwithstanding anything contained in sub-rules (1) and (2) of rule 2, the qualifications possessed by a person holding the office of whole-time secretary of a company immediately before 30th October, 1980, in terms of the second proviso to clause (a) of rule 2 of the Companies (Secretaries Qualifications) Rules, 1975, shall be deemed to

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38a. Ins. by Amendment Rules, 2003 *vide* GSR No. 804(E), dt. 14-10-2003.

38b. Subs. for the words "fifty lakhs" by Amendment Rules, 2002 *vide* GSR No. 419(E), dated 11-6-2002.

be the qualifications which he shall be required to possess in order to be eligible to continue as whole-time secretary in that company.

Exemption to section 25 Companies.—Secretaries appointed by non-profit making companies registered under section 25 are exempted from these Rules, (*Notification No.* SO 42(E), dated 9-1-1976).

Provisions of the Act relating to secretary's statutory duties

Section 5	—Filing with the Registrar a return in the prescribed form under clause (g);
Section 33	—Statutory declaration as to compliance in respect of incorporation;
Section 75	—Delivering for registration returns of allotment, and contracts relating to allotment of shares for consideration other than cash;
Section 97	—Giving notice to the Registrar of an increase of share capital;
Section 113	—Issuing certificates of shares, debentures and debenture stock;
Section 118	—Allowing inspection of the debenture register;
Sections 125 to 127	—Delivering particulars of mortgages and charges for registration;
Section 149	—Making the statutory declaration for commencement of business;
Sections 159, 160, 161 and 162	—Signing the annual return and certifying the documents-annexed thereto;
Section 163	—Allowing inspection of and furnishing copies of register of members;
Section 215	—Authentication of balance sheet and profit and loss account;
Section 269	—Filing of certificate as to compliance of requirements of Schedule XIII;
Section 304	—Allowing inspection of the register of directors;
Section 322	—Where a director's liability is made unlimited, giving the notice required to be given to him;
Section 454	—Assisting in the making of the statement of affairs of the company, in a winding up.

§ For detailed study as to secretary's statutory duties refer BHANDARI GUIDE TO COMPANY LAW PROCEDURES, Vol. 2 (18th Edn., 2003). See pages 78 to 98.

Secretary's functions under the Companies Act and other legislations

Apart from the statutory duties enumerated above, the secretary is required to send notices of the meetings of the Board of directors and general meetings. He is also required to maintain minutes of the meetings and several registers as also file the various returns prescribed under the Act with the Registrar. He is also responsible for ensuring compliance of the various provisions of the Act and to seek approval of the Central Government, besides compliance of other legislations, more particularly relating to investor and consumer protection like the SEBI Act, 1992, the Competition Act, 2002, the Consumer Protection Act, 1986 and the Depositories Act, 1996.

Secretary's powers and duties

Duties are largely ministerial or administrative.—Secretary's duties are largely of ministerial or administrative nature. He has no power to negotiate contracts or borrow moneys or make policy decisions, nor, in the absence of special authorisation, acknowledge a debt or other liability. The Supreme Court observed: Ordinarily the functions of the secretary of the corporation would be ministerial and administrative. As a secretary only, he would have no authority to bind the corporation by entering into contracts or

other commitments on its behalf. *Lakshmiratan Cotton Mills Ltd. v. Aluminium Corpn. of India Ltd.*, AIR 1971 SC 1482 at 1490; *Lakshmi Rattan Cotton Mills Co. Ltd. v. Aluminium Corporation of India Ltd.*, (1967) 37 Com Cases 586 (All); *Cleadon Trust Ltd., Re,* (1938) 4 All ER 518 : (1939) 9 Com Cases 94 (loan advanced by a director at the request of the Company Secretary, Secretary has no such power) **affirmed** in *Cleaden Trust Ltd., Re,* (1939) 9 Com Cases 134 (CA); *Houghton & Co. v. Nothard, Lowe & Wills Ltd.*, 1927 All ER Rep 97 (HL); *Barnett Hoares & Co v. South London Tramways,* (1887) 18 QBD 815 (CA); *Bishop v. Balkis Consolidated Co. Ltd.*, (1890) 25 QBD 512 (CA). He cannot register a transfer of shares without the sanction of the Board and if there is no Board of directors it does not mean that he can register the transfer on his own. *Zinotty Properties Ltd., Re.*, (1984) 3 All ER 754 : (1986) 1 Comp LJ 278 (Ch D); *Chida Mines Ltd. v. Anderson,* (1905) 22 TLR 27.

Under no circumstances can the secretary of the company discharge the functions of the Board or act on behalf of the company in matters of policy or take substantial steps which are not of an administrative or ministerial nature. He cannot give consent on behalf of the company under section 399 to the filing of a petition under Ss. 397 and 398. *Mohan Lal Mittal v. Universal Wires Ltd.*, (1983) 53 Com Cases 36 (Cal). Speaking of the effect of the amendment of 1974, the Calcutta High Court said that though the amendment elevated the position of the secretary to that of an administrative officer, it has not altered the basic position of the secretary as to enable him to undertake serious litigation on behalf of the company without a decision of the company's Board. The court cited the following passage from HALSBURY'S LAWS OF ENGLAND [Vol. 7 Para 546-547, 4th Edn.]: He (the secretary) has no power, without the resolution of the directors, to call a meeting of the company or to commence proceedings on behalf of the company, nor can he alter the register of members, but any such act may be ratified by the directors. The secretary cannot usurp the functions and powers of the board or the company, but due to the enormous growth of company activities he has been empowered to discharge various ministerial and administrative duties on behalf of the company which generally can be performed by an authorised agent. In due course of time the secretary has been given certain statutory powers, like signing the annual returns etc. But under no circumstances can he discharge the functions of the board or act on behalf of the company in matters of policy or substantive steps which is not administrative or ministerial in nature.

He cannot also file a suit on behalf of the company, unless authorised to do so. *Turner Morrison & Co. v. Hungerford Investment Trust Ltd.*, (1972) 42 Com Cases 512 : AIR 1972 SC 1311. So also the secretary cannot issue notices without the Board's authority, (*Haycraft Gold Reduction and Mining Co., In re,* (1900) 2 Ch 230) or commence litigation in the company's name without authority from the Board (*Daimler Co. Ltd. v. Continental Tyre & Rubber Co. (G.B.) Ltd.*, (1916) 2 AC 307 (HL) or alter the register of members without the Board's authority, *Indo-China Steam Navigation Co. Ltd., In re,* (1917) 2 Ch 100) or summon a meeting without the Board's authority [*State of Wyoming Syndicate Ltd., In re,* (1901) 2 Ch 431] or fill-up the blanks in the minutes of a directors' meeting. *Cawley & Co., Re,* (1889) 42 Ch D 209 (CA).

§ For further study of the secretary's position and functions see A. RAMAIYA, The Role of the Company Secretary, (1963) 1 Comp LJ 1.

Whole field of administration but not managerial functions.—The functions of the secretary of a company have considerably expanded during the past eighty and more years. He is no more a mere clerk or servant as was stated in several decisions of the English Courts such as *Barnett Hoares & Co. v. South London Tramways Company,* (1887) 18 QBD 815 (CA); *George Whitechurch Ltd. v. Cavanagh,* 1902 AC 117; *K.A. Krishnan v. Indo Union Assurance Co. Ltd.*, (1944) 14 Com Cases 10 (Mad). Short of managerial functions his powers and duties extend to the whole field of administration of the affairs of the company, so that an outsider dealing with him may assume that functions and duties other than managerial, are normally within the ambit of the secretary's

powers unless there are circumstances to show that they are limited in respect of particular matters. HALSBURY'S LAWS OF ENGLAND, paras 540-548 (4th Edn., Vol. 7).

In England the duties of secretary are thus described: "The duties of the secretary will depend on the size and nature of the company and of the arrangement made with him. But in any case he will be present at all meetings of the company and of the directors and will take proper minutes of proceedings, he will issue under the direction of the Board all notices to members and others that may be requisite; he will conduct all correspondence with shareholders in regard to calls, transfers, forfeiture and otherwise, and will keep the books of the company or such of them as relate to the internal business thereof, *e.g.*, the register of members, the share-ledger, the transfer book, the register of mortgages, etc. He will also make all necessary returns to the Registrar of Companies" (PALMER'S COMPANY GUIDE, 122-123 (36th Edn.).

The company secretary performs many of the administrative duties imposed upon companies, such as delivering documents to the Registrar of Companies and engaging office staff. In *Maidstone Buildings Provisions Ltd., Re,* (1971) 3 All ER 363, PENNYCUICK V C said: "So far as the position of a secretary as such is concerned, it is established beyond all question that a secretary, while merely performing the duties appropriate to the office of secretary, is not concerned in the management [of] the company. Equally I think he is not concerned in carrying on the business of the company. On the other hand, it is equally well established, indeed it is obvious, that a person who holds the office of secretary may in some other capacity be concerned in the management of the company's business".

Advisory role of Secretary : Cadbury Report.—The CADBURY COMMITTEE in England observed that the secretary is a kind of impartial civil servant offering advice to the Board of directors on procedures and responsibilities. Para 4.25 of the Report proceeds as follows: "The company secretary has a key role to play in ensuring that board procedures are both followed and regularly reviewed. The chairman and the board will look to the company secretary for guidance on what their responsibilities are under the rules and regulations to which they are subject and on how those responsibilities should be discharged. All directors should have access to the advice and services of the company secretary..... It should be standard practice for the company secretary to administer, attend and prepare minutes of board meetings."

In para 4.27 the Committee expressed its expectation that the secretary would be a source of advice to the Chairman and also to the Board of directors on the implementation of the Code of Best Practice. This provision of the Code has to be observed by all listed companies. The Report on this point further says that all directors should have access to the advice and services of the secretary and that the secretary is responsible to the Board for ensuring compliance with provisions Rules and Regulations.

Representations by Secretary.—Representations by the secretary in the absence of authority, do not bind the company. *Deposit and General Life Assurance Co., Re, Ayre's* case, (1858) 25 Beav 513; *New Lands v. National Employer's Accident Assoc. Ltd.,* (1885) 54 LJ QB 428; *Barnett Hoares & Co. v. South London Tramways Co.,* (1887) 18 QBD 815; *British Mutual Banking Co. v. Charnwood Forest Rly. Co.,* (1887) 18 QBD 714. The secretary has no general authority to make representations to induce persons to take shares in a company. *Diwan Chand v. Gujranwala Sugar Mills Co. Ltd.,* (1937) 7 Com Cases 203, 212 : AIR 1937 Lah 644.

Even where a Secretary is held out as a person to answer certain enquiries, the company incurs no liability for untrue answers if made by the Secretary for his own private ends. PALMERS COMPANY PRECEDENTS, 596 (17th Edn. 1956), *Citing British Mutual Banking Co. (supra)* and *Ruben v. Great Fingall Consolidated,* (1906) AC 439. In all these cases it would have been open to the directors to ratify the unauthorised acts. *Hooper v. Kerr, Stuart and Co. Ltd.,* (1900) 83 LT 729.

A bank was held to be guilty of negligence in crediting to the secretary's private account the company's cheque which was endorsed by the secretary without authority. *Hannan's Lakeview Central v. Armstrong,* (1900) 16 TLR 236. The company was allowed to recover the amount. A similar recovery from a bank was allowed where it had permitted the secretary to draw from the company's account by forging signatures. *Kepitigalla Rubber Estates v. National Bank of India,* (1909) 2 KB 1010.

Fiduciary nature of duties.—A secretary is in a fiduciary position towards the company and is liable to account to the company if he receives an improper commission. *Stapleford Colliery Co., Re, Barrow's* case, (1880) 14 Ch D 432 (CA); *Morvah Consols Tin Mining Co., Re,* (1875) 2 Ch D 1 : (1874-80) All ER Rep Ext 2212; *Mckay's* case, (1875) 2 Ch D 1 (AC); *Gulabdas Bhaidas, Re,* (1892) ILR 17 Bom 672. But a secretary is not personally liable for a misapplication of the company's funds by someone else though he may have known all about it. In a parallel situation a director would have been held liable. *Joint Stock Discount Co. v. Brown,* (1869) 8 Eq 381, 396. There is also this observation in a ruling on the position of a company secretary that as company secretary, he owed no fiduciary duty to the company and had, therefore, committed no act causing loss to the company which could be actionable by it. *Brown v. Bennet,* (1998) 2 BCLC 97 at pp. 106-107 (Ch D).

Prescribed authority for authentication of documents.—A secretary is a prescribed authority for authenticating a number of documents which companies have to issue for different purposes at different times. Most of the documents which are required to be filed with the Registrar have to be authenticated either by a secretary or by a director or by both, a secretary and a director. When two signatures are so prescribed they cannot be made by one person acting in both capacities. (S. 283), Where at the crucial moment there is no secretary in office, the acts required to be done by the secretary, may be done by other officers, such as assistant or deputy secretary including a director who has been authorised by the Board.

A principal officer of a company, including its secretary can verify the contents of pleadings on the company's behalf and it is immaterial for this purpose that the appointment of any such officer is pending before the Central Government for approval. *N. Ramachandran v. Cardamom Marketing Co. (Travancore) Ltd.,* (1990) 69 Com Cases 205, 208 (Ker).

UK Institute of Secretaries' view of secretary's duties.—Mr. G.N. GABALI, President of the U.K. Chartered Institute of Secretaries, has summarised the secretary's duties as follows:

(1) **Board.**—Briefing directors; documenting agenda; preparation of concise minutes for action purposes; arrangement for meetings (conditions and atmosphere important); progression of business between meetings; liaison with full and part-time directors; personal matters affecting directors such as service contracts; committees; composition; meetings and reports.

(2) **Stockholders.**—Services in regard to notices, reports and dividend and interest payments; correspondence; information and work visits involving public relations, take over bids; merger codes; disclosure of information including interim financial and trading statements; timely notification to stock exchange and the press; analysis of shareholdings for board dissemination.

(3) **Legal obligations.**—Requirements of the Companies Acts, and a multitude of other legislation concerning trade, employment, etc.

(4) **Administrative duties.**—Accounting functions, general legal work in conjunction with internal legal departments and/or outside solicitors: company law administration; property valuations; negotiations and management; insurances and banking; pensions; personnel and contracts of services; clinics; medical and dental services; charitable trusts and general headquarters organization and administration.

(5) **Outside contacts.**—Government departments, stock exchange, professional advisers, consultants and trade associations.

(At a conference of Chartered Secretaries held at KIEL UNIVERSITY September, 19 to 21, 1968).

Judicial view of secretary's position

The secretary is only a subordinate officer and he has no managerial functions. He performs such functions and exercises such powers as the Board may delegate to him, and these powers may be extensive or limited according to the terms of appointment in each case, and there is nothing to prevent their being extended to the sphere of managerial functions also. But no one entering into contractual relations with the company can assume without further enquiry that the secretary as such, has authority to make representations or do anything binding on the company. *Barnett Hoares and Co. v. South London Tramways Co.,* (1887) 18 QBD 815. **Approved** by the House of Lords in *George Whitechurch Ltd. v. Cavanagh,* (1902) AC 117, 124 (HL) and **followed** by the Madras High Court in *K.A. Krishna v. Indo Union Assurance Co. Ltd.,* (1944)14 Com Cases 10 (Mad).

This view, however, has been **modified** in *Panorama Developments (Guildford) Ltd. v. Fidelis Furnishing Fabrics Ltd.,* (1971) 3 All ER 16 (CA), by the Court of Appeal where LORD DENNING M.R., thus describes the present position of the company secretary: "Times have changed, a company secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities. This appears not only in modern Companies Act, but also by the role which he plays in the day-to-day business of the companies. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day-to-day running of the company's business. So much so he may be regarded as having been held out as having authority to do such things on behalf of the company. He is certainly entitled to sign contracts in the administrative side of the company's affairs, such as employing staff and ordering cars and so forth. All such matters now come within the ostensible authority of a company secretary." SALMON, J. has concurred in this judgment and emphasised that the secretary is the chief administrative officer of the company and in respect of matters concerned with administration he has ostensible authority to sign contracts and do all things within the ambit of administration.

Even in the light of this decision it cannot be assumed, in the absence of facts or special circumstances in any case, that the powers of a secretary have expanded to any extent over the area of managerial functions. Functionally, a secretary as such can only be doing secretarial duties and exercising secretarial powers. He cannot be equated with a manager whose powers and functions are distinct from those of a secretary as understood by the business world. It may be noted that his remuneration is not taken into account for purposes of calculating overall managerial remuneration under section 198.

Wider powers may be vested.—Though a secretary as such has limited powers, there is nothing in the Act to prevent a company entrusting him with wider powers and responsibilities. If managerial powers are given to him and they extend to the management of the whole affairs of the company, the secretary though called by that name, will really be the manager or if he is also a director, the managing director or whole-time director for purposes of this Act. Also see Notes under section 383A.

Duty to ensure compliance with laws.—Under the scheme of the Act, it would be seen that where a company appoints a secretary, it is his duty and responsibility to see that the affairs of the company are conducted in accordance with law and the requirements of the Companies Act and other laws (tax laws, factory laws, etc.), are duly complied with. Accordingly in all cases where for contravention of any law by the company, an officer of the company is punishable as an officer in default, the secretary will be liable. See section 5(d).

True legal position that of agent.—His true legal position is that he is an agent in the same position as any other agent of the company. If his dealings are such that the company is not bound by them, he may himself be liable as in the case of a director (as regards this see Notes under sections 291 and 293) on the ground of breach of warranty of authority. If he does any unauthorised acts or makes unauthorised representations the company is not bound by them. [See HALSBURY'S LAWS OF ENGLAND, 322 (Vol. 7, para 546, 4th Edn. Re-issue Vol. 7(1), Para 675, Page 482 where the relevant case-law relating to this subject is referred to.]

Criminal liability for non-compliance.—Generally the secretary of a company is treated as a mere administrative assistant of the Board, statutes (such as labour welfare and anti-pollution) creating new criminal offences responsible for the company's crimes to the same extent as the directors. Thus criminal law is more in accordance with reality, because the secretary is often a full-time director also who is as influential in managing the company's affairs as his fellow directors.

Illustrative cases of secretary's role.—Certain English cases have considered different aspects of a secretary's role; these cases are being set out below:

(i) The knowledge of directors is in the ordinary circumstances the knowledge of the company, but the knowledge of a mere official such as the secretary, would only be the knowledge of the company if the thing of which the knowledge is secured is a thing within the ordinary domain of the secretary's duties. [*Houghton & Co. v. Nothard, Lowe & Wills Ltd.*, (1927) All ER Rep 97 (HL)].

(ii) The secretary is not liable or accountable, as the directors are, for loss which may be incurred by the company by reason of any mis-application of funds of the company even with his knowledge unless the said mis-application was due to his own fraud or negligence. [*Joint Stock Discount Company v. Brown*, (1866) LR 3 Eq 139].

(iii) The offices of a director and secretary are so incompatible that one and the same person cannot hold both. [*Boschoek Proprietary Ltd. v. Fuke*, (1906) 1 Ch 148].

(iv) Where the same person is the secretary of two companies, knowledge acquired by him for one company is not notice to the other. [*Fenwick, Stobart & Co.*, (1902) 1 Ch 507].

(v) If the acts of the secretary are done within the scope of his authority, it has been laid down that the principal (*i.e.* the company) is liable for the fraud of the secretary acting within the scope of his authority whether the fraud is committed for the benefit of the principal or for the benefit of the agent. [*Lloyd v. Grace Smith & Co.*, (1912) AC 716 (HL).]

Removal of secretary.—The removal of a secretary by the managing director is bad when the articles of association give such power only to the Board of directors. *Haryana Seeds Development Corporation Ltd. v. J.K. Aggarwal*, (1989) 65 Com Cases 95 (P&H). Where the managing director of a Government company, appointed by the Governor in accordance with the company's articles, placed the secretary of the company under suspension for initiating disciplinary proceedings, the secretary was not allowed to question the validity of the appointment of the managing director to his office. *P. Mahamani v. T.N. Magnesite Ltd.*, (1994) 13 Corpt LA 314 (Mad).

A secretary on his removal from service, has no cause of action against the company on the basis of articles. *Molhey Krishna Rao v. Grandhi Anjaneyalu*, (1953) 23 Com Cases 90 (Mad).

Where the directors of a company gave notice to the secretary for his removal but the notice was defective, it was held that the defect in the notice became rectified when the shareholders approved the notice of removal and, therefore, the removal was valid in law. *Tajore Parmanent Fund Ltd. v. Sadashiv Rao*, (1950) 1 MLJ 479 (Mad).

The Cadbury Committee has suggested that removal of a secretary should be a matter for Board as a whole and that it must be observed by all Listed Companies in England. [*Cadbury's Report Para* 1.6]

§ See also Notes under the heading "officer", *ante*.

Authentication of accounts by secretary

Department's views.—As regards the position and powers of a Secretary, the following view of the Department of Company Affairs expressed in connection with his power to authenticate the annual accounts should be noted: "Where a company employs a Secretary, that officer usually provides liaison between the Board and the executive management of the company. A Secretary is also responsible for ensuring the performance by the clerical and other staff of the office of their duties with diligence and accuracy. These responsibilities of the Secretary assume greater importance where the company does not have either a managing director [* * * *] or a manager. It would, therefore, be only proper that in the absence of a [* * * *] managing director or manager, the Secretary should be one of the officers who should authenticate the balance-sheet and the profit and loss account of a company and also to the fulfilment of the formal requirements as to the accounts. It appears that it is for these reasons that the legislature thought it fit to lay down as a requirement in sec. 215 of the Companies Act that where a company does not have a managing director [* * * *] or a manager, at least the Secretary (if any) must join in authenticating the company accounts." [*Department's Circular No.* 8/16(1)61-PR, dated 26-6-1961.]

Qualified secretary's professional privilege

The Act now distinguishes a 'secretary in whole-time practice' under section 2(45A), other than the secretary in whole-time employment of a company.

A company secretary possessing the qualifications prescribed under section 2(45) is entitled to appear in proceedings before the Company Law Board, as per rule 19 of the Company Law Board Regulations, 1991. See *Appendix* 3. A member of the Institute of Company Secretaries of India can also appear before the MRTP Commission, as per Regulation 58 of MRTP Commission Regulations, 1991. Several other Acts and authorities have recognised a practising company secretary for certification of documents etc.

ICSI is an authority.—The Institute of Company Secretaries of India is an "authority" within the meaning of Art. 12 of the Constitution. It has a public element and therefore its actions must be guided by reason. If it refuses arbitrarily to admit a person to membership the action will be violative of Art. 14 of the Constitution and a writ petition will be maintainable against such refusal. *Kalyan Kumar Mukherjee v. Institute of Company Secretaries of India,* (1987) 62 Com Cases 466 (Cal). Where a person possesses prescribed qualifications, he has a legal right to be enrolled as a member of the Institute. *Suraj Prakash Oberoi v. ICSI,* (1986) 60 Com Cases 536 (Del).

"Secretary in whole-time practice" [Clause (45-A)]

This definition was inserted by the Companies (Amendment) Act, 1988. It defines a "secretary" who is in whole-time practice, adopting the definition from section 2(2) of the Company Secretaries Act, 1980, which is reproduced below:

Company Secretaries Act, 1980 : Section 2(2)

S. 2(2).—"Save as otherwise provided in this Act, a member of the Institute shall be 'deemed to be in practice' when, individually or in partnership with one or more members of the Institute in practice or in partnership with members of such other recognised professions as may be prescribed, he, in consideration of remuneration received or to be received,—

(a) engages himself in the practice of the profession of Company Secretaries to, or in relation to, any company; or

(b) offers to perform or performs services in relation to the promotion, forming, incorporation, amalgamation, reconstruction, reorganisation or winding up of companies; or

(c) offers to perform or performs such services as may be performed by—

(i) an authorised representative of a company with respect to filing, registering, presenting, attesting or verifying any documents (including forms, applications and returns) by or on behalf of the company,

(ii) a share transfer agent,

(iii) an issue house,

(iv) a share and stock broker,

(v) a secretarial auditor or consultant,

(vi) an adviser to a company on management, including any legal or procedural matter falling under the Capital Issues (Control) Act, 1947, the Industries (Development and Regulation) Act, 1951, the Companies Act, the Securities Contracts (Regulation) Act, 1956, any of the rules or bye-laws made by a recognised stock exchange, the Monopolies and Restrictive Trade Practices Act, 1969, the Foreign Exchange Regulation Act, 1973, or under any other law for the time being in force,

(vii) issuing certificate on behalf of, or for the purposes of, a company; or

(d) holds himself out to the public as a Company Secretary in practice; or

(e) renders professional services or assistance with respect to matters of principle or detail relating to the practice of the profession of Company Secretaries; or

(f) renders such other services as, in the opinion of the Council, are or may be rendered by a Company Secretary in practice;

and the words "to be in practice", with their grammatical variations and cognate expressions, shall be construed accordingly."

Company Secretaries Act, 1980, Regulations prescribed under s. 6.—Under section 6 of the Company Secretaries Act, 1980, no member of the Institute shall be entitled to practice unless he has obtained a certificate of practice from the Council of the Institute under the Company Secretaries Regulations, 1982. These regulations are as under:—

"163. Branch Office.—Every company secretary in practice or a firm of such company secretaries maintaining more than one office at the commencement of the Act shall send within three months of the commencement of these regulations to the Council a list of offices and the persons in charge thereof. Any change in regard to any branch office or offices shall also be intimated to the Council not later than a month of such change.

164. Offices not in charge of members.—Where a company secretary in practice or a firm of such company secretaries has any office in India at the commencement of the Act which is not in separate charge of a member, he or it shall take steps within three months from the date of commencement of these regulations to regularise the position by obtaining exemption from the Council or otherwise.

165. Particulars of offices and firms.—Every company secretary in practice and every firm of such company secretaries shall submit to the Council in the appropriate form the particulars of his office or that of the firm within three months from the date of commencement of these regulations or the commencement of practice or formation of the firm, as the case may be, whichever is later. Any subsequent change in the particulars submitted shall be sent so as to reach the Council within thirty days after the change was effected. A Register of Offices and Firms shall be maintained by the Council.

167. Place of business of practising member in India.—It shall be obligatory on every member in practice to have a place of business in India in his own charge or in charge of another member. Particulars of such place of business shall be supplied by the member to the Council initially and whenever there is a change of such place of business within thirty days of such change:

Provided that the Council may, in the case of a person not covered by the proviso to sub-section (1) of section 4, allow a member to specify a place of business in India (whether he has business in India or not) which is neither in his own charge nor in charge of another member of the Institute, and in that event, such place shall be deemed to be the place of business for the purposes of section 19 and his professional address for purposes of *[sub-regulation (1) of regulation 62]. Particulars of any change of such place of business shall be furnished to the Council within thirty days of such change:

Provided further, that in the case of such a member who is a salaried employee of a Company Secretary in practice or a firm of such Company Secretaries in practice, the place of business of his employer(s) shall be deemed to be his place of business for the purpose of section 19.

168. Company Secretaries in practice not to engage in any other business or occupation.—(1) A Company Secretary in practice shall not engage in any business or occupation other than the profession of Company Secretary unless it is permitted by a general or specific resolution of the Council:

Provided that a Company Secretary in practice who at the commencement of the Act was engaged in any business or occupation other than the profession of Company Secretary may continue to engage himself in such business or occupation for a period of six months from the commencement of these regulations.

(2) Without prejudice to the discretion vested in the Council in this behalf, a Company Secretary, in practice may act as a secretary, trustee, executer, administrator, arbitrator, receiver, appraiser, valuer,

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* Subs. by Notification 710(2)(M)(2), dated 23-8-1988 : (1989) 65 Com Cases 262, 286 (St.).

internal auditor, management auditor, management consultant or as a representative on financial matters including taxation and may take up an appointment that may be made by the Central or any State Government, Courts of Law, Labour Tribunals, or any other statutory authority.

169. Company Secretaries to practise only in their individual names.—No Company Secretary who is not a partner of a firm of Company Secretaries shall practise under any name or style other than his own name except with the prior approval of the Council.

170. Constitution or reconstitution of firms to require Council's approval.—(1) After the commencement of these regulations no firm of Company Secretaries shall be constituted or reconstituted except with the prior approval of the Council.

(2) The Council shall not refuse to accord approval to the constitution or reconstitution of a firm under sub-regulation (1) unless it is of the opinion that the terms of the partnership agreement permit directly or indirectly, the doing of anything by the firm or any partner thereof which amounts to professional misconduct in relation to a Company Secretary in practice, or that the terms and conditions of the proposed partnership are not fair and reasonable or that, having regard to the circumstances of the case, the constitution or reconstitution of the proposed partnership would not be in the interests of the general public.

(3) The Council may, at its discretion, refuse to register the name of a firm if that name is already used by a Company Secretary in practice or a firm of such Company Secretaries and has been entered in the Register of Offices and Firms.

(4) Where the same firm has been inadvertently registered in the past in the Register of Offices and Firms, the Council may direct the firm other than the one whose name was registered first in the Register of Offices and Firms, to alter the name in such manner as the Council may direct in this behalf and the firm shall inform the Council of having effected such alteration within three months of the issue of such direction."

ICSI Guidelines : Displaying of Particulars on Websites by Members in Practice

The Council of Institute of Company Secretaries has decided to allow the Company Secretaries in Practice to create their Website subject to complying with the certain Guidelines.

§ For text of this Guidelines see "The Decision of Council of Institute of Company Secretaries of India, published in Chartered Secretary, March 2001 issue pp. 279-280, on 'Company Secretary in Practice'.

Provisions of the Act relating to secretary in whole-time practice

Section 33(2). —Signatory to the statutory declaration that all the requirements of the Act and rules have been complied with in respect of registration of a company.

Section 149. —Signatory to the statutory declaration as to compliance of the provisions of sub-sections (1), (2) and (2A).

Section 161(1)(a). —Signatory to the annual return filed by a company whose shares are listed on a recognised stock exchange.

Section 269. —Certificate as to compliance of the requirements of Schedule XIII prescribed under section 269 for appointment and payment of remuneration to a managing/whole-time director or manager without prior approval of Central Government.

Section 383A —Secretarial Compliance Certificate in respect of every company not required to employ a whole time secretary and having a paid up share capital of Rs. 10 lakhs or more.

It may be noted that the declaration under section 33 can be signed by other signatories specified therein, other than secretary in whole-time practice. Likewise, the declaration under section 149 is to be signed by the secretary in whole-time practice, if there is no secretary in the company. The annual return under section 161 is mandatory and is also required to be signed by a secretary in whole-time practice in case of a listed company, in addition to the company secretary, if any.

Legal representation before Company Law Tribunal.—A practising Company Secretary is empowered to represent the applicant or the opponent before the Tribunal or the Appellate Tribunal, in terms of section 10GD.

Restriction upon practising as advocate.—Changes in company have brought about greater responsibilities and more duties upon company secretaries. The Council under the Company Secretaries Act, 1980, therefore, decided to prohibit company secretaries from practising simultaneously as advocates. The restriction was held to be reasonable and justified. *ITU Khatri and Rajan Pandurang v. Institute of Company Secretaries of India,* (2003) 116 Com Cases 621 (Bom). The court **followed** the decision in *Dr. Hansraj L. Chulani v. Bar Council of Maharashtra,* AIR 1996 SC 1708 where a medical practitioner who was not prepared to give up his practice was not allowed registration as an advocate and the order was held to be not suffering from any infirmity or constitutional vice.

Recognition of practicing Secretary under the Rules.—A practising Company Secretary is empowered under the following Rules and Regulation under the Act to discharge the functions as noted below:

The Companies Regulations, 1956.—In respect of section 25 companies, to give a declaration under regulation 4(ii) that the Memorandum and Articles of Association have been drawn up in conformity with the provisions of the Companies Act and that all requirements of the Act and the Rules made thereunder have been duly complied with in respect of the registration or matters incidental or supplementary thereto.

Private Limited Company and Unlisted Public Limited Company (Buy-Back of Securities) Rules, 1999.—(1) Extinguishment and physcial destruction of the bought back shares to be done in the presence of a Company Secretary in whole-time practice within seven days from the date of acceptance of shares.

(2) To issue certificate regarding compliance with these Rules including those relating to extinguishment and destruction of certificates.

Companies (Compliance Certificate) Rules, 2001.—Central Government has prescribed the Rules for the issue of a certificate as to whether the company has complied with all provisions of this Act, vide Notfn. No.GSR 52(E), dt. 31-1-2001.

§ For the text of the Rules, see *Appendix* 38.

Secretarial Compliance Certificate.—See Notes under section 383A *post.*

§ See also Guidance Notes on Compliance Certificate issued by ICSI given in *Appendix* 312

"Securities" [Clause (45AA)] (w.e.f. 13-12-2000)

The term 'securities' has been defined in this Act in terms of its definition in section 2(h) of the SCR Act, 1956 but it has been enlarged so as to include, apart from 'securities' 'hybrids' also. This is based on the recommendation of the Working Group for facilitating companies to introduce new financial instruments in the capital market.

Sec. 2(h) of SCR Act defines 'securities' as follows:

"(*h*) "securities" inlcude—

(*i*) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(*ia*) derivative;

[39](*ib*) units or any other instrument issued by any collective investment scheme to the investors in such schemes;

[40](*ic*) security receipt as defined in clause (*zg*) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002];

(*ii*) Government securities;

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39. See Sec. 11AA of SEBI Act, 1992 for meaning of 'Collective Investor Scheme' *ante.*
40. Ins. by Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

(*iia*) such other instruments as may be declared by the Central Government to be securities; and

(*iii*) rights or interest in securities"

The expression "Security receipt' is defined as follows:

(zg) "Security receipt" means a receipt or other security, issued by a securitisation company or reconstruction company to any qualified institutional buyer pursuant to a scheme, evidencing the purchase or acquisition by the holder thereof, of an undivided right, title or interest in the financial asset involved in securitisation".

The term 'hybrid' has been defined in clause (19A) inserted by the Amendment Act, 2000 as follows:

" 'Hybrid' means any security which has the character of more than one type of security, including their derivatives".

The Working Group explained the term 'hybrid' as "an omnibus term that allows the combination of securities including their derivatives and options".

§ See also Notes under 'Derivative' [clause (12B) *ante*.

Test for a "security" under securities laws is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others so that whenever an investor relinquishes control over his funds and submits their control to another for the purpose and hopeful expectation of deriving profits therefrom he is in fact investing his funds in a security. *Investment Co. Institute v. Camp,* D.C.D.C., 274 F. Supp. 624, 642. "Securities" under Securities Act of 1993 (USA), means investment in common enterprise in which investors are purchasing interest and where growth of that investment is to result from efforts of promoter, *Neuwirth Inv. Fund, Ltd., v. Swanton,* D.C.N.Y., 422 F. Supp. 1187, 1194.

For purposes of the Securities Act of 1933 (USA) and the Securities Exchange Act of 1934 (USA) the term "security" embraces all investment contracts, and the test is whether the investment is made in a common enterprise which is premised upon the reasonable expectation of profits solely from the managerial or entrepreneurial efforts of others. Such test contains three elements: the investment of money; a common enterprise; and profits or returns derived solely from efforts of others. *Felts v. National Account Systems Ass'n., Inc., D.C. Miss.*, 469 F. Supp. 54 63.

As defined in the Bankruptcy Code (USA) "security" includes; note, stock, treasury stock, bond, debenture, collateral trust certificate, preorganization certificate or subscription, transferable share, voting-trust certificate, certificate of deposit, investment contract or certificate of interest, etc.

"In the English Financial Services Act, 1986, investment securities are defined as follows:

(a) Shares and stock in the share capital of a company.

(b) Debentures, including debenture stock, loan stock and bonds.

(c) Warrants or other instruments entitling the holder to subscribe for investments.

(d) Certificates representing securities. (This primarily refers to depositary receipts).

Also defined as investments for the purposes of the Act are Government and Local Authority stocks, units in unit trusts, options to buy or sell anything that is an investment for the purposes of the Act, or currency, gold, silver, palladium or platinum, futures contracts, contracts for differences, long-term insurance contracts and rights to and interests in anything which is an investment for the purposes of the Act (excluding interests under the trusts of an occupational pension scheme).

Hybrid Securities.—Hybrid securities means securities which have some of the attributes of both debt securities and equity securities. A type of security which, in the form of a debenture, contains elements of indebtedness and elements of equity stock also is an example of a hybrid. *J.S. Biritz Const. Co. v. C.I.R.*, C.A. Mo., 387 F.2d 451, 455. It is a security which combines features of both debt and equity.

Units

It is a term which in reference to investments is used in the sense of a share or as equivalent to an investment security. The Working Group on the Companies Act, 1956 observed :

The "Tree" Companies and their Kin.—The Group noted the trend in incorporating companies which engage in activities such as tree plantation, forestry, horticulture, fisheries, and the like. These are to be encouraged. Often the invitation is to deposit money in "units" representing a future good, i.e. a teak tree 20-years hence. At present, these "units" are not recognised as securities and, hence, do not come under the regulatory ambit of SEBI, DCA or the Reserve Bank of India. The Group felt that such units require to be treated as a form of capital market securities (since they are essentially forwards contracts); hence, provisions of the prospectus chapter in the new Act should apply to them [*Para 3-21*].

Mutual funds are securities

The definition of securities in Section 2(h) of the SCR Act is an inclusive definition of securities and also refers to investments that are issued under any collective investment scheme. Keeping in mind the wide definition, it is submitted that mutual funds will also be securities within the meaning of Section 2(45AA). See also commentary under Section 372A.

"Securities and Exchange Board of India" [Clause (45-B)]

The definition of Securities and Exchange Board of India has been introduced in the Act for the first time by the Depositories Act, 1996 by insertion of new clause (45-B). The Companies Act, 1956 now recognises the SEBI, established under section 3 of the SEBI Act, 1992.

Companies Amendment Act, 2000.—Companies (Amendment) Act, 2000 has conferred powers on SEBI to administer certain provisions of the Companies Act in respect of listed companies (*vide* section 55A); SEBI has also been recognised as a prosecution agency (*vide* section 621].

"Share" [Clause (46)]

Sub-section 2(46) states that share means a share in the share capital of the company. This presupposes the existence of share capital. *S.N.D.P. Yogam, Quilon, Re,* (1970) 40 Com Cases 60 (Ker). A share reflects the contribution of a shareholder towards the share capital of the company. That is why a share is essentially a unit of account for measuring a member's interest in his company. Each share is required to have a sum of money assigned to it as its nominal value. Such a share is known as a par value share. Where no value is assigned, it is, no par value, share. In *Borland's Trustee v. Steel Bros. and Co. Ltd.,* (1901) 1 Ch 279 (Ch D) FARWELL J. thus spoke of a share: A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of the interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se*. This description of the concept of a share was adopted by the Supreme Court in *CIT v. Standard Vacuum Oil Co.,* AIR 1966 SC 1393. See also *IRC v. Crossman,* (1936) 1 All ER 762 (HL). In the subsequent pronouncement of the Supreme Court on the concept of a share in *LIC v. Escorts Ltd.,* (1986) 59 Com Cases 548 (SC), emphasis was laid upon the rights conferred by a share on the shareholder so as to constitute him as the owner of a property.

The resulting comparative position has been thus stated : A share in a partnership reflects the partner's proprietary interest in the partnership assets: the assets are jointly owned by the partners. In the case of a company, it is not the shareholders but the company that owns the corporate assets, and the concept of a share serves somewhat different functions. In the first place, it is a fraction of the capital, denoting the holder's proportionate financial stake in the company. Secondly, it is a measure of the holder's interest in the company as an association and the basis of his right to become a member and to enjoy the rights of voting, etc. so conferred. And, thirdly, it is a species of property in its own right, a rather complex form of chose in action, which the holder can buy, sell, charge, etc., and in which there can be both legal and beneficial interests. SEALY, CASES & MATERIALS IN COMPANY LAW, (5th Edn., 1993, p. 413) : (6th Edn., 1996, p. 459).

In India a share is not merely a *chose in action*. By virtue of the declaration in s. 82, a share is also a movable property and s. 2 of the Sale of Goods Act, 1930 defines goods as including shares and stock.

It should however be noted that issuing of shares or debentures is not by itself a trade nor a dealing in goods or services so as to attract Consumer Protection Act, or MRTP Act, 1969, *Director General of Investigations and Registrations v. Deepak Fertilizers Corpn. Ltd.*, (1994) 81 Com Cases 342 (MRTPC—FB); **Affirmed** by Supreme Court in *Goyal (R.D.) v. Reliance Industries Ltd.*, (2003) 113 Com Cases 1 (SC); *Arvind Gupta (Dr.) v. SEBI*, (1994) 81 Com Cases 318 (SC); *Morgan Stanley Mutual Fund v. Kartick Das*, (1994) 81 Com Cases 318 (SC).

Flexibility to fix denomination for issue of Equity Shares

SEBI Guidelines 2000.—For "Freedom to determine the denomination of shares for public/rights issues and to change the standard denomination" see Chapter III, Clause 3.7 of SEBI Guidelines, 2000 in *Appendix* 162.

§ See also Notes under S. 82.

Units issued by UTI, not shares—Department's view.—"The units issued by the Unit Trust of India under section 21 of the Unit Trust of India Act, 1963 are not shares as understood in Company Law and hence the investments made by a company in the purchase of units issued by the Unit Trust does not attract the provisions of section 372 of the Companies Act, 1956." [*Company News and Notes, dated 16th January, 1965*].

"Share with differential rights" [Clause (46A)]

This is a new concept which has been introduced pursuant to the recommendations of the Working Group, to facilitate companies to mobilise funds through new financial instruments.

This expression is defined as a share that is issued with differential rights in accordance with the provisions of section 86. When read with section 86, it means shares issued with differential rights as to "dividend, voting or otherwise". As explained by the Working Group, this expression "essentially refers to equity shares that carry differential voting or dividend rights".

The capital raised by issue of such shares is 'equity share capital'.

The Working Group cited preference shares as the simplest and best example of such an instrument. 'Share with differential rights, though termed as 'equity', is a 'hybrid' instrument which may carry the features of participating preference shares in respect of dividend and right to vote on other matters than their own interest.

§ See also Notes under section 86 *post*.

"Sick industrial company" [Clause (46AA)]

Companies (Second Amendment) Act, 2002 [11 of 2003].—This definition of "Sick Industrial Company" has been inserted by the Companies (Second Amendment) Act, 2002 (11 of 2003) based on the recommendations of the High Level Committee on Law relating to Insolvency and Winding up of Companies chaired by Justice V. BALAKRISHNA ERADI, as under:

> "7.23 The Committee recommends there should be a two point criteria for determining the maintainability of the reference for revival and rehabilitation of a company to the Tribunal, namely, that the company has suffered erosion of 50% of its net worth or there is a debt default involving a sum of not less than Rs. 1 lakh in respect of undisputed debts.

As per definition in clause (46AA), Sick Industrial Company means an industrial company whose accumulated losses in any financial year have eroded 50% or more of its average net worth during 4 years immediately preceding such financial year, or it has failed to repay its debts within any 3 consecutive quarters on demand made in writing by

a creditor. This definition is at variance with the definition given in section 3(1)(o) of SICA, 1985 (since repealed), which is as follows:

"Sick Industrial Company" means an industrial company (being a company registered for not less than 5 years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth."

Clause (46A) recasts the definition of 'sick industrial company' in clause (o) of section 3(1) of SICA, with the following modifications:

(1) Debt default is now an index of sickness in addition to erosion of net worth,

(2) Reference of sickness to the Tribunal is based on erosion of 50% or more of net worth instead of 100% of net worth under SICA [Under section 23 of SICA a company which suffered a loss of 50% of its peak net worth was treated as a potentially sick industrial company.]

(3) The extent of erosion in net worth is to be computed in terms of the accumulated losses in a financial year *vis-à-vis* the average net worth during the preceding four financial years.

§ For detailed Notes refer Sections 424A & 424L, dealing with "Revival and Rehabilitation of Sick Industrial Companies."

"State Level Institution" [Clause (46AB)]

Companies (Second Amendment) Act, 2002 [11 of 2003].—This definition of "State Level Institution" has been inserted by the Companies (Second Amendment) Act, 2002 (11 of 2003), and adopts the definition which was given in section 3(1)(p)(i) and (ii) of SICA 1985 (since repealed). The power of the Central Government to specify, by notification, other institutions as State Level Institutions vested under sub-clause (iii) of clause (p) of section 3(1) of SICA has been withdrawn.

The definition is relevant as State level institutions can be appointed as Operating Agency by the Tribunal. It can also make a reference of sickness of an industrial company in which it has financial interests/obligations, to the Tribunal under section 424A(3).

§ For detailed notes refer "Sections 424A to 424L, dealing with "Revival and Rehabilitation of Sick Industrial Companies"

"Total voting power" [Clause (48)]

The total voting power has to be determined with reference to the particular matter or matters in respect of which votes may be cast at a general meeting. In respect of certain specified matters, preference shareholders equally with the equity share holders are given the right of voting at general meetings (*Cf.* section 87). In respect of all other matters, equity shareholders alone have the right of voting. The total voting power in respect of the two categories is thus necessarily different.

The same principle will apply as regards meetings of classes of shareholders, such as those provided in sections 106, 391 and 395.

In the matter of *Bajaj Tempo Ltd. v. Unit Trust of India,* (1992) 73 Com Cases 451 before the Company Law Board, the directors of a company refused to register a transfer of shares under the apprehension that because of a change in the voting power and the composition of the Board of Directors which was likely to be brought about by the transfer, the company would become an inter-connected undertaking within the meaning of s. 2(*g*) *Explanation IV* of MRTP Act, 1969 which provides that in calculating voting power shares held by Public Financial Institutions are to be excluded. The CLB held that the directors' apprehension was wrong and directed them to accept the transfer. The following explanation occurs in the judgment as to the meaning of total voting power *vis-a-vis* the MRTP Act. [at pp. 458-459]:

In this connection, one has also to take into consideration the definition of "total voting power" as defined in section 2(48) of the Companies Act. The voting power is largely dependent on the shareholding in the company. However, the inter-connection on the basis of holding of equity shares and the exercise of the voting powers has been treated separately under clauses (*vi*) and (*vii*) of *Explanation I. Explanation IV* relates to the

common holding of equity shares as postulated under clause (*vi*). On a plain reading of *Explanation IV,* there are two interpretations which are possible. One interpretation can be that the shares held by financial institutions should be totally disregarded, but the denominator does not change as it also relates to the voting power. The second interpretation could be that the shareholding of the financial institutions is to be ignored, even for calculating percentage-holding and, therefore, the denominator should also be reduced by excluding the shareholding of the financial institutions. The first interpretation where the equity holding of a public financial institution in the other bodies corporate should be treated as not being relevant to provide the source of inter-connection between the bodies corporate concerned is clear and evident. The second interpretation that the equity holding of public financial institutions will not be taken into account so that the actual total equity shares in other bodies corporate will fictionally be reduced with a consequential notional increase in the ratio/percentage of non-institutional equity holdings in the relative bodies corporate does not appear to be in consonance with the other provisions of the Companies Act as well as in consonance with statutory interpretation. Such an interpretation would mean that a fiction is introduced whereby some of the existing shares would be treated as non-existent. The words "shall not be taken into account" appearing in *Explanation IV* cannot be stretched to such an extent as to validly introduce this fiction. The introduction of such a fiction would not be in consonance with the definition of "total voting power" as defined in section 2(48) of the Companies Act, 1956. The total voting power must correspond to the total number of equity shares and the proportionate voting power held by the bodies corporate must correspond to the proportionate shares held. If such an interpretation is followed, a conflict may also arise with the substantive provision in clause (*vi*) of *Explanation I.* Clause (*vi*) postulates ¼th of the total equity shares held in two bodies corporate by the apex body corporate. There is no indication even otherwise in that clause that ¼th of the equity holding of the apex bodies corporate in the other bodies corporate will vary or increase or reduce due to institutional holdings or the absence of it. An interpretation treating the percentage of non-institutional holdings as variable and dependent on the existence or the non-existence of institutional holdings will introduce manifest uncertainty in the determination of inter-connection between bodies corporate and militate against giving a literal interpretation which should be normally given to the expression "holding not less than one fourth of the equity shares in one body corporate" occurring in clause (*vi*) of *Explanation I* to section 2(*g*). The established rules of construction of statutes lean heavily against inequities and, as a regulatory enactment, *Explanation IV* should be construed in favour of the citizen. Therefore, *Explanation IV* to section 2(g) should be interpreted as simply postulating that no two bodies corporate shall be deemed to be inter-connected by reason of any shares held by financial institutions and, therefore, inter-connection cannot be established through the instrumentality of shareholding by financial institutions. In view of this, we hold that the Board of directors based their opinion in the matter of registration of transfer of shares on an erroneous interpretation of law, and, therefore, they reached a conclusion not warranted by the facts. We have also noted that, even following the wrong interpretation, the shareholding of the Bajaj group would not have reached the level of shareholding to establish inter-connection between the two undertakings, if the impugned shares had been transferred in favour of the Unit Trust of India.

Total voting power on issue of shares with differential rights.—For the purpose of the total voting power in a company, equity shares with differential voting right, if any, issued in terms of section 86, have to be taken into account.

Illustration

• 100 equity shares of Rs. 10 each carrying one vote for *each* share	100 votes
• 100 equity shares of Rs. 10 each carrying one vote for every *two* shares	50 votes
Total Voting Power	150 votes

For instance, a demand for poll under section 179 can be made by member(s) holding one-tenth of the total voting power, *i.e.*, 15 votes as per the above illustration.

"Trading Corporation" [Clause (49)]

According to the definition contained in S. 2(49) of the Companies Act a trading corporation means a trading corporation within the meaning of entries 43 and 44 in List I in the 7th Schedule of the Constitution Item 43 of List I of the 7th Schedule of the Constitution states that incorporation, regulation and winding up of trading corporation including banking, insurance and financial corporations, but not including co-operative societies. A company registered under the Companies Act is a corporation. Trade in its primary meaning is exchanging of goods for goods or goods for money and in its secondary meaning it is repeated activity in the nature of business carried on with a profit motive, the activity being manual or mercantile as distinguished from the literal arts or modern profession or agriculture. Where the object of the company is to start and conduct kuries as could be seen from the memorandum of association that it could start any business with a view to earn profits and in that view it has to be held that the company was a trading corporation as referred to in S. 13(1)(e) of the Companies Act. *John v. Oriental Kuries Ltd.*, (1994) 2 KLT 353 (Ker).

"Tribunal" [Clause (49A)]

Companies (Second Amendment) Act, 2002 [11 of 2003].—The definition of 'Tribunal' has been inserted by the Companies (Second Amendment) Act, 2002 to mean the National Company Law Tribunal constituted under sub-section (1) of section 10FB. The powers and jurisdiction exercised by Courts in the matter of winding up of companies and reconstruction/amalgamation etc. and by the Company Law Board (CLB) under the Companies Act, 1956 as also by the Board for Industrial and Financial Reconstruction (BIFR) under Sick Industrial Companies (Special Provisions) Act, 1985 (since repealed) shall all be consolidated and vested in the Tribunal. Consequently, the CLB and BIFR shall stand dissolved.

All matters or proceedings or cases pending before the Courts, as also before the CLB, before its dissolution, shall stand transferred to the Tribunal for disposal, in terms of sections 10FA(3) and 647A. Any reference or enquiry pending before the BIFR before its dissolution shall stand abated in terms of section 4(b) of the Sick Industrial Companies (Special Provisions) Repeal Act, 2002.

It may be noted that the powers and jurisdiction of the Courts under the Act relating to matters other than winding up, reconstruction and amalgamation e.g., sections 81(7), 119, 203, 237(a)(ii), 424L(2), 581ZN(16), 581ZS(1), 630(2) and 633 have not been conferred on the Tribunal.

§ For further Notes see comments under section 10FB *post*.

'Variation', 'Vary' [Clause (50)]

These include 'modification', 'modify', 'alteration' and 'alter'.

[41][**S. 2A. Interpretation of certain words and expressions.**—Words and expressions used and not defined in this Act but defined in the Depositories Act, 1996 shall have the same meanings respectively assigned to them in that Act.]

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41. Ins. by the Depositories Act, 1996 (w.e.f. 20-9-1995).

NOTES

Words and expressions used in this Act and defined in Depositories Act

The need for adopting the definitions in the Depositories Act, 1996 arose due to the changes made in the Companies Act, 1956 consequent upon the introduction of depository system to record ownership details in book entry form. The Depositories Ordinance, 1995, which preceded the Depositories Act, 1996 spelt out the objectives of the Ordinance thus :

The Depositories Ordinance has been promulgated by the President Ordinance No. 11 of 1995, dated 20-9-1995. It is designed to provide a legal framework for establishment of depositories to record ownership details in book entry form. Investors will have the choice of continuing with the existing share certificates or opt for the depository mode.

Press Note, dated 21-9-1995.—"The Ordinance provides for establishment of one or more depositories. Every depository will be required to be registered with the Securities and Exchange Board of India (SEBI) and receive a Certificate of Commencement of Business on fulfilment of such conditions as may be prescribed. Investors opting to join the system will be required to be registered with one more 'participants' who will be agents for the depositories. The participants will be custodial agencies like banks, financial institutions as well as large corporate brokerage firms. Upon entry into the system, share certificates belonging to the investors will be "dematerialised" and their names entered in the books of participants as beneficial owners. The investors' names in the register of companies concerned will be replaced by the name of the depository as the registered owner of the securities. The investors will however continue to enjoy the economic benefits from the shares as well as voting rights on the shares concerned.

"Shares in the depository mode will be fungible. They will cease to have distinctive numbers. Issuers of new securities will give investors the option either to receive physical securities or to join the depository mode. While investors holding share certificates may opt to become beneficial owners in a depository system, those investors opting to exit from a depository will be allowed to do so and claim share certificates from the company by substituting their names as the registered owner in the place of the depository.

"Ownership changes in the depository system will be made automatically on the basis of delivery *vs.* payment. There will be a regular, mandatory flow of information about the details of ownership in the depository's record to the company concerned. If the latter has any reservations about the admissibility of share acquisition by any person on the grounds that the transfer of the security conflicts with the provisions pertaining to substantial acquisition of shares and takeovers, or conflicts with the provisions of the Sick Industrial Companies (Special Provisions) Act, the company will be entitled to make an application to the Company Law Board (CLB) for rectification of the ownership records with the depository. During the pendency of company's application with the CLB, the transferee would be entitled to all the rights and benefits of the shares, except voting rights which will be subject to the orders of the CLB.

"The Ordinance provides for detailed regulations to be framed by SEBI as well as detailed bye-laws to be framed by depositories with the approval of SEBI. The bye-laws will crystallise the rights and obligations of participants and beneficial owners as well as procedures for ensuring adequate safeguards to protect the interests of investors. Any loss caused to beneficial owners due to the negligence of the depository or the participant will be required to be indemnified by the depository.

"The Ordinance has proposed to make consequential changes in legislations like the Companies Act, Income-tax Act, the Securities Contracts (Regulation) Act, the Stamp Act etc. In respect of Stamp Act, in particular, the changes are intended to exempt all transactions taking place in the depository mode from payments of stamp duty. Transactions involving investors of existing share certificates opting to join the depository system as well as those opting to move away from the depository mode by seeking issue of certificates will also be exempted from payment of stamp duty.

"It is proposed that the depository arrangement will be implemented in phases so that there is an orderly switchover from the existing system. It is felt that the new system will considerably enhance the efficiency of the securities market and afford considerable benefits to investors in general in the form of much greater efficiency, accuracy and safety in share transactions, improved liquidity of secondary market transactions and better means of ownership change.

"A major weakness in Indian stock market operations has been the lack of depository services on modern lines. In the absence of depositories which provide for maintenance of ownership records in a book entry form, every share transfer is at present required to be accomplished by physical movement of share certificates to, and registration with, the company concerned. This process often involves long delays and a significant portion of transactions ends up as 'bad delivery' due to the faulty completion of paperwork, or signature differences with the specimens on record with the companies, or for other procedural lapses. Investors are also subjected to considerable difficulties on account of loss of share certificates, forgery and mutilation. The significant time involved in effecting ownership changes also im-

pounds a substantial volume of shares at any given time leading to lower trading volumes. These problems have multiplied as the volume of trading has grown." [*Press Note dated 21-9-1995 issued by Press Information Bureau*].

Definitions in Depositories Act, 1996.—Section 2 of the Depositories Act 1996, which carries all the definitions, reads as follows:—

"(1) In this Act, unless the context otherwise requires—

(a) "beneficial owner" means a person whose name is recorded as such with a depository;

(b) "Board" means the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 (15 of 1992);

(c) "bye-laws" means bye-laws made by a depository under section 26;

(d) "Company Law Board" means the Board of Company Law Administration constituted under section 10E, of the Companies Act, 1956 (1 of 1956);

(e) "depository" means a company formed and registered under the Companies Act, 1956 (1 of 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 (15 of 1992);

(f) "Issuer" means any person making an issue of securities;

(g) "participant" means a person registered as such under sub-section (1A) of section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992);

(h) "prescribed" means prescribed by rules made under this Act;

(i) "record" includes the records maintained in the form of books or stored in a computer or in such other form as may be determined by regulations;

(j) "registered owner" means a depository whose name is entered as such in the register of the issuer;

(k) "regulations" means the regulations made by the Board;

[42][(*ka*) *"Securities Appellate Tribunal" means a Securities Appellate Tribunal established under sub-section (1) of section 15K of the Securities and Exchange Board of India Act, 1992 (15 of 1992);*]

(l) "security" means such security as may be specified by the Board;

(m) "service" means any service connected with recording of allotment of securities or transfer of ownership of securities in the record of a depository.

(2) Words and expressions used herein and not defined but defined in the Companies Act, 1956 (1 of 1956), or the Securities Contracts (Regulation) Act, 1956 (42 of 1956), or the Securities and Exchange Board of India Act, 1992 (15 of 1992), shall have the meanings respectively assigned to them in those Acts."

The words and expressions, defined in the Depositories Act, 1996, which occur in the Companies Act, 1956 are:

1.	"Beneficial owner"	Sections 41(3), 49(5)(c), 152A.
2.	"Depository"	Sections 41(3), 49(5)(c), 51(proviso), 108(3), 111A, 113(4), 152A and sub-clause (9A) of Schedule II [Clause C of Part C]
3.	"Participant"	Section 111A

'Beneficial owner'.—The expression "beneficial owner" as defined in the Depositories Act, 1996 is to be applied only to those provisions which have been incorporated into the Companies Act, 1956 by that Act and not to other sections.

'Depository'/'Participant'.—Under section 12(1A) of the SEBI Act, 1992, a depository as well as a participant are required to obtain a certificate of registration from SEBI for performing the services as a depository/participant in accordance with the procedure laid down in SEBI (Depositories and Participants) Regulations, 1996.

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42. Inserted by the Securities Laws (Second Amendment) Act, 1999.

'Securities'.—The term 'Securities' means "Securities' as defined in section 2(h) of the Securities Contracts (Regulation) Act, 1956 and also includes hybrids. [S. 2(45AA)].

§ For the text of the Depositories Act, 1996 see *Appendix* 199.

S. 3. Definitions of "company", "existing company", "private company" and "public company".—(1) In this Act, unless the context otherwise requires, the expressions "company", "existing company", "private company" and "public company" shall, subject to the provisions of sub-section (2), have the meanings specified below:

(i) "company" means a company formed and registered under this Act or an existing company as defined in clause (ii);

(ii) "existing company" means a company formed and registered under any of the previous companies laws specified below:—

(a) Any Act or Acts relating to companies in force before the Indian Companies Act, 1866 (X of 1866) and repealed by that Act;

(b) The Indian Companies Act, 1866 (X of 1866);

(c) The Indian Companies Act, 1882 (VI of 1882);

(d) The Indian Companies Act, 1913 (VII of 1913);

(e) The Registration of Transferred Companies Ordinance, 1942 (LIV of 1942); and

[1][(f) Any law corresponding to any of the Acts or the Ordinance aforesaid and in force—

(1) in the merged territories or in a Part B State (other than the State of Jammu and Kashmir) or any part thereof, before the extension thereto of the Indian Companies Act, 1913; or

(2) in the State of Jammu and Kashmir, or any part thereof, before the commencement of the Jammu and Kashmir (Extension of Laws) Act, 1956, [2][in so far as banking, insurance and financial corporations are concerned, and before the commencement of the Central Laws (Extension to Jammu and Kashmir) Act, 1968 in so far as other corporations are concerned;]

(iii) "private company" [3][*means a company which has a minimum paid-up capital of one lakh rupees or such higher paid-up capital as may be prescribed, and by its articles*,—]

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

(b) limits the number of its members to fifty not including—

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1. Subs. by Act LXII of 1956, section 2 and Schedule (w.e.f. 1-11-1956).
2. Ins. by Act 25 of 1968, s. 2 and Sch. (w.e.f. 15-8-1968).
3. The words "means a company which, by its articles,—" substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 3 (w.e.f. 13-12-2000).

(i) persons who are in the employment of the company; and

(ii) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased; and

(c) prohibits any invitations to the public to subscribe for any shares in, or debentures of, the company;

[4][(d) *prohibits any invitation or acceptance of deposits from to persons other than its members, directors or their relatives*:]

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

[5][(*iv*) *"public company" means a company which—*

(a) is not a private company;

(b) has a minimum paid-up capital of five lakh rupees or such higher paid-up capital, as may be prescribed;

(c) is a private company which is a subsidiary of a company which is not a private company;]

(2) Unless the context otherwise requires, the following companies shall not be included within the scope of any of the expressions defined in clauses (i) to (iv) of sub-section (1), and such companies shall be deemed, for the purposes of this Act, to have been formed and registered outside India:—

(a) a company the registered office whereof is in Burma, Aden or Pakistan and which immediately before the separation of that country from India was a company as defined in clause (i) of sub-section (1);

(b) [6][* * * *]

[7][(*3*) *Every private company, existing on the commencement of the Companies (Amendment) Act, 2000, with a paid-up capital of less than one lakh rupees, shall, within a period of two years from such commencement, enhance its paid-up capital to one lakh rupees.*

(*4*) *Every public company, existing on the commencement of the Companies (Amendment) Act, 2000, with a paid-up capital of less than five lakh rupees, shall, within a period of two years from such commencement, enhance its paid-up capital to five lakh rupees.*

(*5*) *Where a private company or a public company fails to enhance its paid-up capital in the manner specified in sub-section (3) or sub-section (4), such company*

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4. Sub-clause (d) inserted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 3 (w.e.f. 13-12-2000).
5. Clause (iv) substituted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 3 (w.e.f. 13-12-2000), prior to its substitution it stood as under :
"(iv) "Public company" means a company which is not a private company."
6. Omitted by Act LXII of 1956, sec. 2 and Schedule in view of Jammu and Kashmir having become part of India (w.e.f. 1-11-1956).
7. Sub-sections (3), (4), (5) and (6) inserted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 3 (w.e.f. 13-12-2000).

shall be deemed to be a defunct company within the meaning of section 560 and its name shall be struck off from the register by the Registrar.

(6) A company registered under section 25 before or after the commencement of Companies (Amendment) Act, 2000 shall not be required to have minimum paid-up capital specified in this section.]

NOTES

Companies Act, 1956

The Act of 1956 combines clauses (2), (7), (13) and (13A) of section 2(1) and section 2A of the Act of 1913. The Acts enumerated in section 3(1)(ii) of the 1956 Act are previous Companies Laws.

Companies (Amendment) Act, 2000

Substantial changes have been made in this section by the Companies (Amendment) Act, 2000 (w.e.f. 13-12-2000).

1. Private Company.—The following modifications have been made in the concept of a private company :

(1) Clause (iii) of sub-section (1) has been amended to provide that a private company shall have a minimum paid up capital of Rs. 1 lakh or such higher share capital as may be prescribed.

(2) A new sub-clause (d) has been inserted to provide that a private company shall, by its Articles, also prohibit invitation or acceptance of deposits from persons other than its members, directors or their relatives.

2. *Public Company.*—The concept of public company has been altered in two respects:

(1) Clause (iv) of sub-section (1) has been amended to provide that a public company shall have a minimum paid-up share capital of Rs. 5 lakhs or such higher capital as may be prescribed.

(2) It is also provided that a private company which is a subsidiary of a public company shall be a public company.

3. Time-limit for increasing share capital.—Sub-sections (3), (4) and (5) have been inserted to provide that the existing public and private companies shall increase their paid-up capital at least up to the required minimum prescribed in clauses (iii)/(iv) within a period of 2 years from the date of commencement of the Amendment Act of 2000 [Period expired on 12-12-2002]. If the company fails to effect the increase, it shall be deemed to be a defunct company under section 560 and its name shall be struck off from the register maintained by the Registrar of Companies.

4. Sec. 25 Company.—The minimum paid-up capital requirement is not applicable to companies registered under sec. 25 [sub-sec. (6)]. This implements the recommendation of the Parliamentary Standing Committee on Home Affairs, 64th Report on Companies (Second Amendment) Bill, 1999.

Company [Sub-section (1)(i)]

The definition of "company" in this sub-section is subject to the other definitions given in other provisions of the Act for the limited purposes stated therein. In *Telesound India Ltd., In re,* (1983) 53 Com Cases 926 at 940 (Del) it was held that though the word company is generally defined in S. 3, that definition cannot be used to cut down the scope of the word company as defined in other sections for their own different purposes. For example, S. 390(a) defines a company for the purposes of the section "as a company liable to be wound up under this Act." The court said that if the word company were to be restricted to the definition of S. 3, a large number of companies, such as, unregistered companies and foreign companies would be outside the purview of the provisions contained

in Chapter V of the Act with regard to compromise, arrangement, reconstruction etc. even though these categories would be within the winding up sweep of the Act.

For the purposes of the Industries Development and Regulations Act, 1951 which permits the take-over of the management of a company, it has been held that the word 'company' does not include a partnership firm. *Vasantrao Dattaji Dhanwatey v. Union of India,* AIR 1984 Bom 181.

A Banking company registered under the Sikkim Registration of Companies Act, 1961 has been held to be a company within the meaning of s. 5(d) of the Banking Regulation Act, 1949 and S. 3 of the Companies Act, 1956. *North East Finance Corpn. v. Union of India,* AIR 2000 Sikkim 1.

Note that the word "company" as defined in this section does not include a foreign company. But the word when used with "holding" and "subsidiary" is wider in scope and includes also a foreign body corporate [see section 4(5)].

Existing Company [Sub-section (1)(ii)]

The definition necessarily implies the actual existence of the company. A company which has become defunct and whose name has been struck off the register under s. 560, will not come within the definition of existing company.

A company registered under the Sikkim Registration of Companies Act, 1965, is not a company within the meaning of section 3(1)(ii) nor an existing company within the meaning of section 3(1)(ii). The provisions of the present Act do not extend to the State of Sikkim. See Notes under section 1.

Private company [Sub-section (1)(iii)]

A private company must have articles of its own, containing the restrictions, limitations and prohibitions required by clause (iii) of sub-section (1) of this section. The articles must expressly contain all the requirements specified in the definition. [See section 27(3)].

As regards restrictions, it is sufficient if the articles contain the common restrictions usually found in the articles of most companies that the directors may, in their absolute discretion and without assigning any reason therefor, decline to register the transfer of any shares whether fully paid or partly paid; but they may also contain other restrictions such as that the shareholders must be Indian citizens, or of the male sex, or adult persons, and there may be provision for determining "fair value" of the shares. But the restriction clause should apply equally to all shareholders or shareholder of the same class, and not exempt the shares held by some of them.

The object of clause (a) restricting the right to transfer shares is probably to enable the company to keep the number of its members within the limits prescribed by clause (b). Where a private company is without share capital (which is quite possible because the restriction as to transferability of shares in clause (iii)(a) is followed by the words 'if any'), the restriction as to transferability of shares cannot be literally complied with. It would have to be complied with by restricting the number of members to fifty and by reserving the power to regulate membership.

Shares of private company not marketable security.—Shares of a private company do not possess liquidity, because the purchaser of shares cannot be guaranteed that he will be registered as a member of the company. Such shares cannot be easily sold in the market. They cannot be said to be marketable and cannot, therefore, be said to fall within the definition of 'securities' as a 'marketable security'. The definition of securities in s. 2(*h*) of the Securities Contracts (Regulation) Act, 1956 will only take in shares of a public limited company notwithstanding the use of the words "any incorporated company or other body corporate" in the definition. A contract for the purchase of shares in a private company entered into at Bombay is not governed by the provisions of the Securities Contracts (Regulations) Act, 1956 and cannot be claimed to be illegal on the ground of

the contravention of the provisions of s. 13 of that Act. *Dahiben Umedbhai Patel v. Norman James Hamilton,* (1983) 85 Bom LR 275 (Bom).

Requirement of minimum paid-up share capital [Sub-section (1)(iii)/(iv)(b)]

As per amendments made in clauses (iii) and (iv) of sub-section (1) by the (Amendment) Act of 2000, a company to be incorporated as a private company must have a *minimum paid-up capital* of Rs. 1 lakh and a public company must have a minimum paid-up capital of Rs. 5 lakhs. This requirement can only be complied with by the promotors/subscribers to the memorandum by subscribing for the shares of the requisite paid-up share capital through subscription clause of the memorandum of association of the company at the time of its incorporation.

Consequence of failure to effect increase.—An existing company having less than the required minimum paid-up capital must, however, ensure that the paid-up capital is increased atleast to the level of the prescribed sum of Rs. 1 lakh or Rs. 5 lakhs, as the case may be, within 2 years from the date of the commencement of the Companies (Amendment) Act, 2000. In case of default, a deeming provision has been made under sub-section (5) to the effect that such a company shall be deemed to be a defunct company under section 560 and its name shall be struck off from the register of companies maintained by the Registrar.

In such an event, the Registrar is not required to comply with the procedure laid down in sub-sections (1), (2) and (3) of section 560 and may straight away strike off the name of the company from the register and publish a notice of it in the Official Gazettee in terms of s. 560(5). The company or any member or any creditor may, however, approach the Court for its revival under s. 560(6) by producing evidence in support of enhancement of the paid-up share capital of the company. It appears that the deeming provision made in sub-section (5) may not be in public interest. It may cause hardship to the creditors of the company whose name is struck off.

These provisions do not apply to a section 25 company or, by necessary implication, to a company not having any share capital.

Restriction on the right to transfer shares [Sub-section (1)(iii)(a)]

One of the requirements envisaged by the definition of a private company is that there must be some restriction upon transferability of the company's shares. It has all along been held by the courts that the restriction upon transfer means any restriction which will give some control to the company over transferability. It does not mean prohibitory restrictions. The Privy Council in *Ontario Jockey Club Ltd. v. Samuel McBride,* AIR 1928 PC 291 observed at p. 293 as follows : "That restrictions may be placed upon a shareholder's right of transfer of shares cannot be questioned. The cases are numerous in which such restrictions have been upheld. Shares are *prima facie* transferable. A restriction which precludes a shareholder altogether from transferring may be invalid but a restriction which does no more than give a right of pre-emption is valid." **Following** this ruling in *Chiranji Lal Jasrasaria v. Mahabir Dhelia,* AIR 1966 Assam 48 it was held that right of pre-emption does not amount to a prohibition upon transferability.

The restriction must apply to all shares and classes of shares, and not to some shares or classes of shares only. No share can be free from the restriction.

But it has been suggested that such restrictions may not possibly apply in two cases. In the first place, the restriction on the right of a member to transfer his shares may not apply to his personal representatives on whom his shares have devolved and who are seeking the registration of the shares in their favour. *Bentham Mills Spinning Co., Re,* (1879) 11 Ch D 900 (CA). The representative in interest would be bound only if the articles clearly restrict the transfer rights in such cases also. Such a provision exists in Articles 26(2) of Table A. In the second place, the restrictions on transfers would apparently be applicable to shares figuring in the company's register of members and which are being sought to be transferred. The restriction may not apply to shares which are proposed to be

issued on rights basis conferring upon the members the right to renounce in favour of their nominees. This is so because renounced shares will be allotted to the renouncee for the first time and not transferred to him. In practical reality, however, such a right cannot be enjoyed by the members of a private company. The members of such a company would be under a restriction as to their rights options because otherwise the company would find it very difficult to resist the renouncees so as to maintain the restriction on membership. *Pool Shipping Co. Ltd., Re,* (1920) 1 Ch 251; *Systems Control Plc. v. Munro Corpn. Plc.,* (1990) 6 BCC 386, 388. This is the rationale behind the decision in *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.,* (1981) 51 Com Cases 743 : AIR 1981 SC 1298, where the Supreme Court held that the right to renounce shares in favour of any person as provided by s. 81(1)(c) cannot apply to deemed public companies, as an exercise of this power in favour of a non-member would result in violation of the restrictions contained in s. 3(1)(iii). This restriction must also apply to a private limited company.

Where under the articles of a private company no transfer was possible without previous sanction of the Board of directors, the Supreme Court held that this would require written resolution of the Board of directors sanctioning the proposed transfer. *John Tinson and Co. P. Ltd. v. Mrs. Surjeet Malhan,* (1997) 88 Com Cases 750 : AIR 1997 SC 1411.

'Restriction' not to include 'prohibition'.—By section 82, shares are expressed to be transferable in the manner provided by the articles of the company. There cannot be an absolute prohibition on the right to transfer shares. The right to transfer may be subjected to restrictions contained in the articles and though such restrictions may be either very stringent or very slight, it would be alright so long as it does not amount to a total ban on transferability. The framers of the articles should be very clear in the choice of their words because such provisions are generally construed very strictly and the narrowest possible meaning is put on them. Where the restriction in question is capable of having two meanings, the less restrictive meaning would be adopted by the court. In *Delavenne v. Broadhurst,* (1931) 1 Com Cases 414: (1931) 1 Ch 234, BENNET J. observed [at p. 238]: "In the absence of restrictions in the articles, the shareholder has by virtue of the statute the right to transfer his shares without the consent of anybody to any transferee, even though he be a man of straw, provided it is a *bona fide* transaction in the sense that it is an out and out disposal of the property without retaining any interests in the shares." See also *Greenhalgh v. Mallard,* (1943) 2 All ER 234 (CA).

Private agreement between members as to right to transfer.—The only permissible restrictions on transferability are those contained in the company's articles of association. An additional restriction not contained in the articles but in a private agreement between two shareholders which places further obstacles in the way of transferability is not binding either on the company or on the shareholders, *Rangaraj (V.B.) v. V.B. Gopalakrishnan,* (1992) 73 Com Cases 201 : AIR 1992 SC 453. In order to substantiate this point the Supreme Court **relied** on *Swaledale Cleaners Ltd., In re,* (1968) 1 All ER 1132 (CA), where it was held that it is well-established that a share in a company is an item of property freely alienable in the absence of express restrictions under the articles. This view is **reiterated** in *Tett v. Phoenix Property and Investment Co. Ltd.,* (1986) BCLC 149 (CA). In Chapter 16 of GORE-BROWNE ON COMPANIES, (43rd edition), in determining the extent of any restriction on transfer contained in the articles, a strict construction is adopted. The restriction must be set out expressly or must arise by necessary implication and any ambiguous provision is construed in favour of the shareholder wishing to transfer.

§ See also Notes under S. 111 under the heading "Private Agreements for pre-emption rights between shareholders does not bind company".

Usual forms of restriction

Restrictions on right of a shareholder to transfer his shares generally take two common forms (1) Right of pre-emption in favour of the other members, (2) powers for the directors to refuse to register transfer.

Right of pre-emption.—The articles generally provide that when a member wishes to sell some or all of his shares, he shall first offer them to the other members at a price to be determined in the manner in formula set out in the articles, or at a fair price at which the shares are valued by the directors or by the company's auditors, and that the member may transfer the shares to his proposed transferee only if the other members do not exercise their right of pre-emption. If it is desired by the members of the company that they should maintain the proportionality of shareholdings as between themselves, it is desirable to extend the right of pre-emption further still and to make it applicable to transfer to a fellow member also and to the transfer of shares on the death or insolvency of a member as also to transfer of a director's shareholding when he ceases to be a director.

The types of pre-emptive clauses stated above have a binding effect even though the price payable by the other members is considerably less than their market value of the shares and even though the exercise of the right will result in the company only having one member. *Borland's Trustee v. Steel Bros & Co. Ltd.*, (1901) 1 Ch 279; *Phillips v. Manufacturers' Securities Ltd.*, (1917) 86 LJ Ch 305; *Jarvis Motors (Harrow) Ltd. v. Carabott*, (1964) 3 All ER 89 : (1964) 34 Com Cases 921. A pre-emption provision in the articles also bind a mortgagee of a member's shares, and also the company itself if it claims a lien on the shares under its articles. Before exercising the power to sell the shares to realise the mortgage or to enforce the lien, the mortgagee or the company must offer the shares to the other members of the company in accordance with the pre-emption clauses. *Hunter v. Hunter*, (1936) AC 222 (HL); *Champagne Perrier—Jouet SA v. H.H. Finch Ltd.*, (1982) 3 All ER 713. See also *G. Venkatapathy v. Prakathi Spinners P. Ltd.*, (2002) 49 CLA 97 : (2002) 38 SCL 131 : 2002 CLC 1529 (CLB), where the requirement of the articles that a proposed transfer should be notified to the directors and the latter should give an opportunity to the existing members to purchase the shares was found on facts to have been complied with.

A transfer in violation of a pre-emptive clause is defeasible. The court said in *Hurst v. Crampton Bros (Cooper) Ltd.*, (2003) 1 BCLC 304 (Ch D), that the deceased was in breach of the articles when she, by executing the transfer form, transferred the shares to the transferee. It followed that the transfer was defeasible at the suit of a member. The claimant was a member and, unless he or his predecessor in title waived his rights of pre-emption, what the transferee got was not an entitlement to the shares but only to the price paid if a right of pre-emption were exercised. That price would be, as the article provided, the 'fair value' of the shares. In the instant case there was no waiver of the pre-emption rights.

Procedure for implementation of pre-emption rights.—Where the articles prescribe a procedure it would have to be followed. The usual procedure laid down in the articles is to require the transferor to give to the company a notice of his intention to transfer his holding and asking the company to notify the other members of the availability of the shares and the price at which they will be available to them for acquisition and the time within which they should communicate to the company their desire to purchase the proffered shares. The articles may also provide a formula for price fixation. If there is no agreement as to price, the directors or, more usually, the auditors of the company, work out a fair price and then a final contract is concluded on that basis. Where the articles do not provide any machinery for implementation of pre-emption rights, the member who wants to transfer his shares must notify all the other members of his intention to do so. He should then allow them a reasonable time to inform him of their decision. In both the above situations if the company fails to find any purchasers of its choice within a reason-

able time or if no member comes forward to purchase the shares, the shares can be transferred to an outsider and the company will be compellable to accept the transfer.

Any transfer to an outsider without complying with the above requirements will not be effective against the company irrespective of the fact that it may not be a total nullity as between the transferor and the transferee. *Tett v. Phoenix Property and Investment Co. Ltd.*, 1986 BCLC 149 (CA). Where the procedure prescribed by the articles was not observed and though it was without the fault of the selling shareholder, the transfer to outsiders was restrained. *Curtis v. J.J. Curtis & Co. Ltd.*, 1986 BCLC 86 (CA) (NZ).

A private company's articles provided for transfer of shares to an outsider only if the insiders would refuse to take them. The company had only three shareholders between whom two held 45% shares each and the third was holding the remaining ten per cent. This last-mentioned shareholder transferred his shareholding to an outsider. The petitioner-director made noise about its validity. The CLB found on facts that in accordance with the articles, the offer of shares was intimated to the petitioner and the same was discussed at the board meeting also. In view of the negative response from the shareholders, the shares were transferred to non-member belonging to the petitioner's opposite group. Thus there was nothing irregular or in violation of articles. *Aruna Suresh Mehra v. Jifcon Tools P. Ltd.*, (1998) 94 Com Cases 329 (CLB—PB).

So long as the transfer is between members it does not matter whether the transfer is of a huge quantity of shares or that a transferor member or transferee member is a beneficial owner or a mere nominee or a trustee. *Greenhalgh v. Mallar,* (1943) 2 All ER 234; *Theakston v. London Trust plc.*, (1984) BCLC 390. In the later case the articles permitted transfers to any member of the company. This was held to be applicable to a transfer to an existing member even if that member was funded by another party and therefore his title was subject to equitable obligations to that party. A pre-emption clause in the articles cannot be evaded by an intended transferor agreeing to transfer his shares on the basis that the transferee whilst receiving general proxies will not seek registration but an executor who has been placed on the register of members and who *remains* registered at the request of the beneficiaries is not a "proposing transferor" for the purpose of setting in motion a pre-emption procedure provided by the articles. *Safeguard Industrial Investments Ltd. v. National Westminster Bank Ltd.*, (1982) 1 All ER 449 (CA); *Lyle and Scott Ltd. v. Scott's Trustees (infra).* It has been held that a pre-emption provision was complied with where one member sold to another member even though the purchase price was paid by an outsider and the transferee was to vote at the outsider's direction. *Theakston v. London Trust plc.*, (1984) BCLC 390.

In *Roberts v. Letter "T" Estates Ltd.*, (1961) AC 795, where a pre-emption clause provided that "any person (not a member) becoming entitled to shares in consequence of the death of a member", was not bound to transfer the shares to a member in accordance with the articles where he was himself a member, though only a nominee member.

A member cannot evade a provision for pre-emption in the articles by contracting to sell his shares to a third person, or by executing an instrument of transfer to such a person, with the intention that the purchaser shall not apply for registration as a member, but shall rest content with the vendor holding the legal title to the shares as a bare trustee for him *Lyle and Scott Ltd. v. Scott's Trustees,* (1959) 2 All ER 661 : (1960) 30 Com Cases 30 (HL). The vendor evinces his wish to sell his shares by agreeing to sell them to the third person, and until that agreement is terminated, the company or the other members may compel him to comply with the articles *Lyle and Scott Ltd. v. Scott's Trustees (Supra); Rayfield v. Hands,* (1958) 2 All ER 194. The principles stated in these cases were **followed** in *Sedgefield Steeplechase Co. (1927) Ltd. Re. Scotto Ltd. v. Petch,* (2000) 2 BCLC 211 : (2001) BCC 889 (Ch D), though the case was **distinguished** on facts. The Articles provided that a member intending to transfer his shares must give notice in writing to the Board of directors who may then offer them to other members. A takeover bid was made for the company. All the shareholders, excepting one, entered into agreements

to sell beneficial interest in their shares to the bidder. The agreement did not authorise the bidder to transfer shares in contravention of the company's articles, but did require the members to vote in favour of the deletion of pre-emption provisions from the company's articles. It was held that this agreement did not have the effect of triggering the obligation to give notice unless the shareholders went further and did something which was in breach of the relevant provisions. The obligation to serve a transfer notice did not attach until the shareholder had entered into an arrangement such as a sale or grant of an option which placed him under a contractual obligation to execute and deliver a transfer in violation of the rights of pre-emption. LORD HOFFMANN cited the following passage from the decision in *Lyle & Scott Ltd. v. Scott's Trustees,* (1959) 2 All ER 661 at 668 as to the meaning of transfer : "Transferring a share involves a series of steps, first an agreement to sell, then execution of a deed of transfer and finally the registration of the transfer. The word transfer can mean the whole of those steps. Moreover, the ordinary meaning of "transfer" is simply to hand over or part with something, and a shareholder who agrees to sell is parting with something. The context must determine in what sense the word is used..... No action can be taken against a shareholder who merely says that he wishes to sell, or does something which shows that that is his intention. But, when he goes further and does something which is a breach of his obligation under the article, the position would appear to be quite different."

On the other hand, if a member enters into a conditional agreement to sell his shares (*e.g.* where the condition is the passing of a resolution altering the company's articles), the agreement is not effective until the condition is fulfilled, and the pre-emption rights of the other members are not exercisable until that has happened *Re, A Company (No. 005685 of 1988),* 1989 BCLC 424 (Ch D). A shareholder in a limited company, sought a declaration that an agreement between other shareholders and an external purchaser for the sale of shares was an intention to transfer the legal title, which would invoke her pre-emption rights as contained in the company's articles of association. Furthermore, she contended that a condition requiring the purchaser to vote in favour of a special resolution to remove pre-emption rights from the articles amounted to an intention to transfer the shares. The court dismissed the application and said that pre-emption rights were not triggered because the agreements for sale had explicitly declared that the buyer could not force the shareholders to prejudice existing pre-emption rights contained in the articles. The articles were not breached even where the purchaser was required to vote for the removal of pre-emption rights from the articles. It was not necessary to serve a notice of transfer until the point where the shareholder was contractually bound to complete in breach of a pre-emption agreement. *Scotto v. Petch; sub nom. Sedgefield Steeplechase Co. (1927) Ltd., Re,* (2000) 2 BCLC 211 (Ch. D). The court **applied** the rule in *Company (No. 005685 of 1988), Re* [1989] B.C.L.C. 424. If the condition is one which can be fulfilled by the intended transferee, however (*e.g.* the exercise of an option to purchase a member's shares), it would seem that the selling member will be treated as having agreed to transfer his shares as soon as the agreement is entered into. *Re, A Company (Supra).*

An offer of shares made to the other members under the right of pre-emption is not irrevocable unless the articles so provide. If the articles do not provide that such an offer is irrevocable, the member offering the shares can change his mind and decide not to sell to anyone so that the offer stands revoked when the other members or the company are notified to that effect. *Lyle and Scott Ltd. v. Scott's Trustees, (Supra).* No member is bound to sell his shares to other members under pre-emption clause unless the other members or some of them agree to buy all the shares which he offers for sale. *Ocean Coal Co. Ltd. v. Powell Duffryn Steam Coal Co. Ltd.,* (1932) All ER Rep 845 : (1932) 2 Com Cases 454. Where the notice of intended sale related to the whole number of shares offered and not a part, it must be accepted, if at all, as to all the shares offered: *Re Champion & White Ltd.,* [1943] 1 DLR 283 at 286; **reversed** on other grounds [1943] 2 DLR 145 (B.C. C.A.). (Canada) Failing this the holder would become entitled to sell all the shares to third parties.

Transfer by representatives and pre-emption clauses.—A pre-emption clause is binding on the executor of a deceased member even where there is only one surviving member to whom the shares can be transferred. *Jarvis Motors (Harrow) Ltd. v. Carabott,* (1964) 1 WLR 1101. An executor of the will of a majority shareholder may seek an alteration of the pre-emption articles to give effect to the requirements of the will to transfer the deceased's shares to non-members. *Re, Rudderham,* (1969) 9 DLR (3d) 492 (Canada). Where the pre-emptive clauses of a company's articles permit transfer of shares to a members relatives or his wife and under the articles the clauses are binding on the representatives of a deceased member, the representatives may transfer the shares to the widow of the deceased member. *New Cedos Engineering Co. Ltd.,* (1994) 1 BCLC 797 (Ch D).

Transfer under Will.—Where shares were standing in the name of a deceased Mohammedan and there was an application for transmission to his son, it was held that the will produced by him (the son) which showed that the testator had left the shares to him and the other legal heirs not objecting, the company was not justified in calling for probate or letters of administration. The CLB also said that it was for the CLB to decide in each case whether the case involved complicated questions of fact so as to make a civil action necessary. *Khurshid Alam v. P. Pagnon Co. P. Ltd.,* (2002) 108 Com Cases, 523 : (2002) 1 Comp LJ 175 : (2001) 45 CLA 392 (CLB).

The controlling shareholder of a private company, the articles of which provided that the shares should not be transferred to an outsider before the shareholders were given an opportunity to buy them, by his will left all his shares to an outsider. The court held that the proposal of the executors of the will to use their majority voting power to eliminate the article restricting transfer so that they could give effect to the deceased's will, might legally be carried out provided this was done *bona fide* and in the best interests of the company. *Re Leigh; Royal Trust Co. v. Norrie,* (1951), 3 W.W.R. (N.S.) 503 (B.C. C.A.) (Canada).

The articles of association provided that shares might be transferred from one member to another but no shares were to be transferred to a non-shareholder if any shareholder was willing to purchase the shares. A shareholder bequeathed her shares in the company to a non-shareholder. The court held that the articles did not prohibit the bequest to the non-shareholder who could have them held in trust by the executors but so long as a shareholder was willing to purchase the shares the articles prohibited the entry of the shares in the non-shareholder's name in the share register. *Harvey v. Harvey,* [1979] 2 W.W.R. 661 (B.C. C.A) [Canada].

Closely held corporation's Bye-laws preventing shareholders from transferring stock, or allowing stock to pass to heirs, without obtaining consent of corporation, and without first giving corporation opportunity to purchase stock at book value, was held to be valid stock transfer restriction, especially in the context of closed corporations. *Miller Waste Mills v. Mackay,* (1994, Minn App) 520 NW2d 490.

Valuation of shares for purposes of pre-emptive rights in private companies.—The articles of a private limited company often provide that the price payable for the shares sold in exercise of a right of pre-emption shall be a fair price to be certified by the company's auditor. In this regard it is stated in PENNINGTON'S COMPANY LAW, 758 (6th Edn. 1990) as follows : "If the pre-emption clause requires the shares to be offered to the other members at a fair value certified by the directors or the company's auditor, the court cannot interfere, unless there is evidence that it was not honestly made, or unless the person who made it set out the reasons for his valuation, but did not apply the proper principles. *Dean v. Prince,* (1954) 1 All ER 749 : (1954) 24 Com Cases 198 (CA), *Burgess v. Purchase & Sons (Farms) Ltd.,* (1983) 2 All ER 4 : (1985) 2 Comp LJ 188. This is so even if the person who made the valuation acted negligently by not taking relevant factors into account, by giving undue emphasis to one of those factors, or by taking irrelevant factors into account, *Baber v. Kenwood Manufacturing Co. Ltd. and Whinney Murray & Co.,*

(1978) 1 Lloyd's Rep 175. In such a situation the transferor's only remedy is to sue the person who made the valuation for the difference between the valuation and the real value of the shares as damages in an action for negligence. *Arenson v. Casson Beckman, Rutley & Co.*, (1975) 3 All ER 901. Where the error appears in the valuation itself, the fact that the company's articles provide that the valuation shall be final, binding and conclusive, or that the shares in question have already been registered by the company in the names of the other members who have exercised their pre-emption rights on the basis of an erroneous valuation does not prevent the members whose shares are the subject of the valuation from challenging its validity. *Burgess v. Purchase & Sons (Farms) Ltd. (Supra)*". This statement from PENNINGTON was cited with **approval** in *Banoo J. Coyaji (Dr.) Mrs. v. Shanta Genevieve Pommeret Parulekar*, (1995) 84 Com Cases 534 (Bom).

Where the articles provided for a pre-emptive right in certain cases of breakdown of relationship, the member who broke out and against whom the clause was sought to be enforced, was not entitled to expect that others would not insist upon their right. The circumstances were such that one or the other had to leave. Where the shareholder whose ouster was more convenient was offered a price of £ 900 per share, which he refused to accept. The shares were then valued in accordance with a provision in the articles and the auditors submitted a report of £ 800 per share. He was not allowed to challenge the valuation particularly when he did not participate in the machinery constituted under the articles for valuation of his share. *Re, A Company (No. 004377 of 1986)*, 1987 BCLC 94 (Ch D). See also *Re, A Company (No. 007523 of 1986)*, 1987 BCLC 200 (Ch D); *Abbey Leisure Ltd.*, (1990) BCLC 342 (CA).

The control potentiality of the shares in question has also to be taken into account in the matter of their valuation. In a case of this kind the court ordered the majority group to purchase the shares of the outgoing minority on the basis of valuation which should appropriately belong to a 40% holding *A Company (No. 005134 of 1986), Re, Ex parte Haries*, (1989) BCLC 383 (Ch D). Thus the above cases make it clear that if the shares under transfer carry the power of control, a corresponding addition would have to be made to the price ascertained on a *pro rata* basis. *Re, Abbey Leisure Ltd.*, (1990) BCLC 342 (CA).

There was an agreement between the members of a private company that when a member offered the shares to others the latter would be bound and entitled to take them. The only question was that of fair market price. The parties could not agree. The matter came before an arbitrator who held that the fair market price meant 40% of the fair value as between the parties of the net assets of the company. [The selling shareholder had 40% shares]. The other shareholders objected to the valuation and the court laid down as follows: The market price of an asset was the price that the asset would fetch in the open market between a willing vendor and a willing purchaser. Where the asset was a holding of shares in a private company the market price would normally depend on the proportion of the shares of the company comprised in the holding and on any special rights or restrictions contained in the articles of association of the company as well as on the value of the net assets of the company and its profit and dividend record. The addition of the word 'fair' added nothing except to remind the valuer that the market price was to be ascertained on the assumption that no one was excluded from the bidding, and to exclude any exceptional or freak price that might otherwise have had to be taken into account if the agreement referred to an 'open market price'. The arbitrator had accordingly applied the wrong test and his award would therefore be set aside and the matter remitted to him for reconsideration. The parties should then be given the opportunity of adducing expert evidence on the factors to be taken into account in determining the fair market value of C's (selling member) shareholding. *Howie and Crawford's arbitration, Re*, 1990 BCLC 686 (Ch D).

In a company composed of husband and wife, who fell apart and the shares had to be apportioned between them on valuation basis, it was held that the court had applied the correct test, that is, the price at which a hypothetical willing but not anxious vendor

would sell to a hypothetical willing but not anxious buyer. *Holt v. Holt,* (1990) 1 WLR 1250 (PC) **following** *Hatrick v. Commissioner of Inland Revenue,* 1963 NZLR 641.

§ See also Notes under s. 227 under the heading 'Auditor's duty and liability in valuation of shares of a private company'.

§ For valuation of shares in connection with acquisition of shares s. 395 and Prevention of Oppression s. 397 and s. 402. See notes under those sections.

Relationship between valuation and net worth.—Valuation of shares for certain purposes may have to take into account the net worth of the company as a going concern. This was one of the problems in *Rakhra Sports Pvt. Ltd. v. Khraitilal Rakhra,* (1993) 76 Com Cases 545 (Kar). For a detailed study of the contribution of the case see notes on S. 397 under the heading "Mode of valuation of shares ...."

An Income tax matter involved valuation of the shares of a private company. The case before the High Court of Delhi was that of *Hansa Industries P. Ltd. v. Kidarsons Industries P. Ltd.,* (1998) 94 Com Cases 552 : (1998) 5 Comp LJ 430 (Del). Deduction on value because of restriction on transferability was held to be proper. On transfer of assets to shareholders in lieu of their shareholding, deduction of capital gains tax was proper. The settlement arrived at on the basis that the *substratum* of the company was gone and that neither goodwill nor tenancy rights had any value was held to be justified. There was no material to indicate the market value of the property. Hence, valuation on the basis of book value of assets was held to be appropriate.

Acceptance of whole number of proffered shares.—The member proposing to transfer the shares is not bound by the pre-emption provision unless any other member or any combination of them is willing to purchase all the shares contained in the proposal. *Ocean Coal Co. Ltd. v. Powell Duffryn Steam Coal Co. Ltd.,* (1932) All ER Rep 844. The articles may however provide that he will be bound to handover as many shares to other members as they are willing to take but in such a case it appears to be an inevitable conclusion that he will become free to transfer rest of the shares to others. He is also not compellable to offer more shares than he has proposed to transfer. In such cases if other members want to purchase shares in greater number and the transferor is not compellable to do so, the article should carry a provision as to the manner in which the proffered shares would be apportioned among the willing members.

Creation of equitable interest.—This aspect of the matter has been stated in PENNINGTON'S COMPANY LAW, 757 (6th Edn., 1990) with remarkable clarity: "Pre-emption provisions in articles are construed as applying only when a member proposes to sell or transfer the legal title to his shares, and as not applying if he or anyone else proposes merely to transfer or create an equitable interest, even though the interest extends to the whole beneficial ownership of the shares *Safeguard Industrial Investment Ltd. v. National Westminster Bank Ltd.,* (1980) 3 All ER 849 **affirmed** (1982) 1 All ER 449. The reason for this is that equitable interests may relate to only part of the beneficial ownership, or they may be contingent or conditional, and the owner of such a partial or conditional interest should not be empowered by disposing of it to actuate a right for other members of the company to acquire the whole legal ownership of the shares. It would seem impossible to overcome this obstacle effectively by express provision in the company's articles, first, because the owners of equitable interests in shares may not be members of the company and so may not be personally bound by its articles, and secondly, because there would appear to be no legal method available to the company or other members who wish to exercise pre-emption rights to compel the owners of equitable interests to release them to such members if they acquire the legal ownership of the shares."

Power of refusal to accept transfer of shares in private companies.—The power to refuse to register a transfer must be exercised by the directors in good faith and for the benefit of a company and not for some extraneous purpose. Consequently if the directors exercise this power in such a manner that the transferor cannot sell his shares at all or

because they fear that the purchase by the intending transferee will prevent them from gaining control of the company, the court will order the company to register the transfer. *Robinson v. Chartered Bank of India,* (1865) LR 1 Eq. 32; *Tett v. Phoenix Property and Investment Co. Ltd.,* 1984 BCLC 599. **Reversed** in *sub-nom Tett v. Phoenix Property and Investment Co. Ltd.,* 1986 BCLC 149 (CA) on the ground that the articles contained definite restriction on transfer which required notice of intended transfer to be given to the other members, and this requirement had not been complied with, the directors could not register the transfer.

The articles of a private company usually carry rigid restrictions upon the right of transfer and they also empower the directors with a blanket power to refuse to accept a transferee who in their judgment is not a desirable person to be admitted into the company. If such a general power is permitted to be used arbitrarily, the position of the shareholder of a private company would be very miserable. Section 111 being not applicable, he might have to struggle for his rights in the ordinary civil courts. The basic approach of the courts was spelled out in *Smith and Fawcett Ltd., Re,* (1942) 1 All ER 542 (CA). Here, of the two members of a private company having equal holding, one died and the surviving member acting in his capacity as a director refused to accept the deceased member's son as a member for the whole of the holding and wanted the son to transfer half the holding to him. The court expressed its inability to interfere in the matter and laid down that judicial interference in the affairs of a private company would be possible only if there is a *mala fide* exercise of the power or either that the directors had proceeded on grounds not expressed in the articles or the reasons for the refusal which they voluntarily disclosed were not adequate to support their decision.

Cases which warranted judicial interference.—The cases in which the courts did interfere have been thus summarised in PENNINGTON'S COMPANY LAW, 753 (6th Edn., 1990): The courts do not interfere where the directors exercise their power to refuse to register a transfer of shares, like all their other powers, in good faith and for the benefit of the company, and not for some extraneous purpose. Consequently, if they exercise the power in order to prevent the transferor from selling his shares at all, *Robinson v. Chartered Bank of India,* (1865) LR 1 Eq 32 or because of their hostility towards him, *Re, Ceylon Land and Produce Co. Ltd, ex p Anderson,* (1891) 7 TLR 692 or because the directors wish to gain control of the company themselves and they consider that the acquisition of the shares by the transferee may prevent them from doing so, *Tett v. Phoenix Property and Investment Co. Ltd.,* (1984) BCLC 599, **reversed** on other grounds, (1986) BCLC 149 the court will order the company to register the transfer. Conversely, if the directors approve a transfer of their own shares in order to escape liability for unpaid capital which will inevitably have to be called up to pay the company's existing debts, *Re, Accidental Death Insurance Co., Allin's Case,* (1873) LR 16 Eq 449 or if they approve a transfer of a member's share to themselves when they have bought the shares in order to stifle an inquiry into irregularities in the management of the company, *Re, Mitre Assurance Co., Eyre's Case,* (1862) 31 Beav 177 their approval is inoperative, and the court will order the transferor's name to be restored to the register of members, unless the members of the company in general meeting resolve that the transfer shall be registered, or that a registration of the transfer already effected shall remain undisturbed *Bamford v. Bamford,* (1969) 1 All ER 969 (CA). But the court will only restore a transferor to the register when he has connived with the directors, or has otherwise been a party to the improper approval of the transfer of his shares *Re Discoverers Finance Corpn. Ltd., Lindlar's Case,* (1910) 1 Ch 207; **affirmed** (1910) 1 Ch 312. This was so in the case cited above where the directors approved a transfer of shares to themselves in order to prevent an inquiry into irregularities, *Re, Mitre Assurance Co., Eyre's Case* (1862) 31 Beav 177 and also in another case, *Re, Cameron's Coalbrook Steam Coal and Swansea and Lougher Rly Co., Bennett's* case, (1854) 5 De GM & G 284 where the transferor paid the directors the amount of money which they demanded as the price of their approval, and the fact that the directors undertook to apply the money towards meeting the company's debts made no difference. If a transferor procures the directors' approval of a

transfer of his shares by a misrepresentation made to them, the company may cancel the registration of the transfer and restore the transferor's name to the register. *Re, Discoverers Finance Corpn Ltd., Lindlar's* case, *(Supra).*

Refusal to be on grounds specified in articles.—It is further necessary that the power of refusal should be exercised strictly on the grounds specified in the articles. No other ground can be imported into the matter. A refusal is liable to be struck down if it proceeds on grounds extraneous to the articles. *Babulal Choukhani v. Western India Theatre,* (1958) 28 Com Cases 565 : AIR 1957 Cal 709. In such cases the injured transferee can also approach the Company Law Board because section 111 keeps private companies out of its purview only so long as they are enforcing their articles.

The only permissible restrictions on transferability are those contained in the company's articles of association. Any additional restriction not contained in the articles but in a private agreement between two shareholders which places further obstacles in the way of transferability is not binding either on the company or on the shareholders, *Rangaraj (V.B.) v. V.B. Gopalakrishnan,* (1992) 73 Com Cases 201 : AIR 1992 SC 453.

Thus, if the articles empower the directors to refuse registration if they do not approve of the transfer or of the transferee, they may do so only if they have some personal objection to the transferee, and it is not sufficient that they consider that the number of shares transferred to him is too small, *Bede Steam Shipping Co. Ltd., Re,* (1917) 1 Ch 123 or that shares should not be transferred to persons who do not belong to the family of the founder of the company, *ibid; Re, Bell Bros. Ltd.,* (1891) 7 TLR 689, or that the transferee is a nominee for the transferor, and the purpose of the transfer is to increase the transferor's voting power unfairly at general meetings, *Re, Stranton Iron and Steel Co.,* (1873) LR 16 Eq 559; *Moffatt v. Farquhar,* (1878) 7 Ch D 591; *Re, Bede Steam Shipping Co. Ltd., supra.* In these cases the number of votes a member might cast at general meetings was graduated, and the larger his holding, the fewer votes he could cast for each block of ten or twenty shares. By transferring his shares in blocks of ten or twenty to different nominees, the transferor ensured that he could cast the greatest number of votes possible in respect of each block, or that the transferee is a nominee for a third person of whom they disapprove. *Re, Bell Bros. Ltd., (supra); V.S. Ratnam v. Ossor Estates Ltd.,* (1989) 2 Comp LJ 355, 359 (CLB). On the other hand, if the articles permit the directors to reject transfers for any reason whatsoever, their discretion is limited only by the rule that they must act in what they honestly conceive to be the company's interest, and subject to this, they may refuse registration for whatever reason they think fit. *Smith and Fawcett Ltd., Re,* (1942) 1 All ER 542. Their Lordships observed in this case : ".....In construing the relevant provisions in the articles it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases. When it is said, as it has been said more than once, that regard must be had to this last consideration, it means, I apprehend, nothing more than that the shareholder has such a *prima facie* right, and that right is not to be cut down by uncertain language or doubtful implications. The right, if it is to be cut down, must be cut down with satisfactory clarify....." See also PENNINGTON, COMPANY LAW, 754-755 (6th Edn., 1990) : (7th Edn., 1995, p. 1002).

Presumption of *bona fides* on part of directors and burden of proof.—The wrongful nature of the refusal has to be proved by those who allege it. The court presumes *bona fides* on the part of directors. *Gresham Life Assurance Society, Re, ex p Penney,* (1872) 8 Ch App 446; *Coalport China Co., Re,* (1895) 2 Ch 404. They are not compellable to disclose reasons for their decision and this does not create any adverse presumption against them. *Duke of Sutherland v. British Dominion Land Settlement Corpn.,* 1926 Ch 746; *Muthapa Chettiar (E.M.) v. Salem Rajendra Mills Ltd.,* (1955) 25 Com Cases 283 : AIR 1955 Mad 665. Where, however, their decision proceeds on one or more of the grounds specified in the articles they must inform the transferor and the transferee of the specific ground on which they have proceeded. *Coimbatore Kamala Mills Ltd. v. T. Sundaran,* (1950) 20 Com Cases 61 : AIR 1950 Mad 725; *Berry and Stewart v. Tottenham Hotspur*

Football and Athletic Co. Ltd., (1935) 5 Com Cases 472 : 1935 Ch 718. Though the court does not substitute the directors' decision with its own decision and cannot interfere on merits, it has yet to reconcile two underlying principles, namely, the right of the shareholder freely to deal with his property in the shares *Smith Knight & Co., Weston's* case, (1868) 4 Ch App 20 and that of the private company to safeguard its privacy by keeping off outsiders from membership. The aggrieved party has to show that the directors have not exercised their discretion for the proper purpose or that they went outside the articles. The power of refusal would have to be formally exercised by passing Board resolutions. *Moodie v. W & J Shepherd (Bookbinders) Ltd.*, (1949) 2 All ER 1044; *Ramesh Chandra v. Jogini Mohan*, 47 Cal 901; *Mohinudin's* case, AIR 1928 Mad 571. If they fail to pass a resolution because of equal division and, therefore, no formal rejection takes place, the transferee becomes entitled to be registered. *Hackney Pavilion Ltd., Re*, (1924) 1 Ch 276 : (1923) All ER Rep 524; *Shepherd's Trustees v. Shepherd*, 1950 SC 60 (HL). The chairman of the Board did not enjoy the casting vote in these cases.

Time within which power of refusal to be exercised

Further, the power of refusal must be exercised within reasonable time from the date of the presentation of the application which is that of two months because that is the period prescribed by section 111 for notifying the applicant of the directors' decision. *Swaledale Cleaners Ltd., Re*, (1968) 3 All ER 619 CA though the Bombay High Court has held that it is wrong to contend that the company loses its right to refuse to register a transfer if the same is not rejected within two months. *S.P. Mehta v. Calico Dyeing & Printing Mills Ltd.*, (1990) 67 Com Cases 533, 543-544 (Bom). The decision of the Bombay High Court was **affirmed** by the Supreme Court in *S.P. Mehta v. Calico Dyeing and Printing Mills Ltd.*, (1994) 80 Com Cases 64 (SC) accepting the view that the company does not lose the right of refusing to register a transfer or transmission by reason of its failure to exercise the power of refusal within two months. On the facts also the decision seems to be fully justified because the petitioner had filed his succession certificate years after the death of the shareholder and the company had, in the meantime, altered its articles in such a way that it became entitled to reject the transmission within the scope of the amended article.

§ For further comments on the power to refuse to register transfer of shares, see Notes under section 111, *post*.

Restriction on number of members [Sub-section (1)(iii)(b)]

A private company is required compulsorily to restrict through its articles the number of members to fifty, taking joint holders, as single member, and not counting past or present employees who are members.

Persons in employment of company.—In calculating the number of members, not only present employee-members but persons who were previously employees and who during their employment became members and are continuing to be members, are also to be excluded. The previous Act of 1913 did not contain this exclusion.

With reference to former employees, for the benefit of the exemption being available to the company, such employees must have been members while they were in employment and continued as members after ceasing to be employed. As per this definition, if a company has five hundred employees and each holds one or more shares in the company and another five hundred have retired from employment, the company can still be a private company even though the total number of shareholders is more than one thousand.

It is uncertain whether directors may be treated as employees for the purpose of a provision in a company's articles limiting the size of its membership, but making an exception for employees and former employees. It has been held that directors are not employees for the purposes of counting the membership of a private company. *Normandy v. Ind. Coope & Co. Ltd.*, (1908) 1 Ch 84; *Lee Behrens & Co. Ltd., Re*, (1932) 2 Ch 46. Though a managing director can be regarded as an employee for several other purposes connected with labour, employment and taxation legislation but not for counting the membership of

a private company. *Lee v. Lee's Air Farming Ltd.*, (1960) 3 All ER 420; *Parsons v. Albert J. Parsons & Sons Ltd.*, (1979) ICR 271; *Boulting v. Association of Cinematograph Television and Allied Technicians*, (1963) 1 All ER 716.

Joint holders.—Two or more persons holding one or more shares jointly, are treated as a single member for the purposes of definition of a private company. They are not necessarily treated as a single member for other purposes, so long as the total number of members does not exceed fifty. *Jarnail Singh v. Bakshi Singh*, AIR 1960 Punj 455 : (1960) 30 Com Cases 192 (DB). Though joint holders of shares are ordinarily entitled to have their holdings split up or divided so as to enable all of them to attend and vote or for any other reason, a private company may decline to split or divide their holdings, if such splitting, or division is likely to endanger its position as a private company, by increasing the number of its members beyond fifty.

Debenture-holders may exceed fifty.—It must be noted that it is only the number of members that is limited to fifty. A private company may issue debentures to any number of persons, the only condition being that an invitation to the public to subscribe for debentures is prohibited. In the English Act of 1948, if the number of debenture-holders in the case of a private company exceeded fifty, the company was required to make its balance-sheet and profit and loss account public (section 129 of that Act). There is no similar provision in this Act, though all private companies are required by section 220 to file their annual balance-sheets and profit and loss accounts with the Registrar, the profit and loss account in the case of a private company being, however, not open to inspection by the public, other than members of the company concerned. (See second proviso to section 220(1).)

Restriction upon issue of prospectus [Sub-s. (1)(iii)(c)]

This sub-section requires that a private company must by its articles prohibit itself from issuing any invitation to the public to subscribe for any shares in or debentures of, the company. In practical terms, this requirement means that a private company must not make a public issue of its prospectus or publish any other advertisement or resort to any other method of inviting public to invest in its shares or debentures or deposit. A company may, however, solicit investment in its shares or debentures only by private approach, as distinguished from a public appeal. A private approach means giving opportunity of investment to the person approached and not to others through him if those others are likely to be members of the general public rather than a restricted circle of known persons such as his relatives. This is a restriction only so that the company is at liberty to go to public but only at the cost of losing its privileged status of a private company. As to what is meant by a 'Public Issue', see general notes given under Part III beginning with section 55 (*infra*).

Private placement through brokers and renunciation of rights [Sub-s. (1)(iii)(c)]

Section 67 and the Amendment Act, 2000.— A private company cannot make a public issue. The Companies (Amendment) Act, 2000 has added a proviso to sub-section (3) of sec. 67 which is to the effect that the section 67(3) will not apply where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. The effect of the proviso seems to be that any such offer to fifty or more persons would be deemed to be a public issue as stated in Notes on Clause [*clause* 23/Bill 1999].

Press Note, dated 6-7-1992.—It has come to the notice of the Government that some companies utilise the services of brokers and other intermediaries for private placement of equity shares, out of promoters' quota or otherwise, insert advertisements in the print media and also mass-mail literature/material/brochures superscribed by the caption "Confidential/For private circulation only". It is also noticed that the rights of renunciation are floated in the market by the companies themselves, charging unofficial premia from the investing public. Under section 67(3) of the Act, no offer or invitation shall be treated as made to the public, only if the same can be regarded, in all the circumstances—

(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or

(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation.

In the context of the above provisions of law, such offers cannot be treated as private placement and provisions relating to prospectus under the Companies Act, 1956, are applicable. The companies concerned, their promoters and their intermediaries are hereby warned that making of so-called private placement of shares or collecting unofficial premia without recording the same in the books of account of the company, are serious contraventions of the Companies Act and will invite penal action under the Act by the Government. It may be noted that marketing of rights of renunciation by a private company is prohibited under section 3(1)(iii)(c) of the Act, as it cannot make any invitation to the public to subscribe for its shares. [*Press Note No. 7/92; File No.* 17/6/92-CL-V, dated 6-7-1992].

Note : The Circular should now be read with the proviso added to s. 67(3) by the Amendment Act, 2000 which has the effect of saying that any such offer to more than fifty persons would be a public issue.

Membership of private company

As in the case of a public company, the members of a private company need not be individuals. They may consist wholly or in part of private and/or public companies or other bodies corporate.

Prohibition on acceptance of public deposits [Sub-section (1)(iii)(*d*)]

Under sub-section (1C) of section 43A (which ceased to be effective on the commencement of the Amendment Act, 2000), a private company which accepted deposits from the public, other than from its members, directors or their relatives, on invitation made by advertisement, was deemed to be a public company. The concept of 'deemed public company' has been abolished by the Amendment Act, 2000. The prohibition on acceptance of deposits from the public is, however, retained by incorporation of clause (d) in sub-section (1)(iii).

The expression "deposit" used in clause (d) of clause (iii) has not been defined in section 3 or in the definition section 2. The said term has been defined in Explanation to section 58A and the rules made thereunder which regulate deposits. It may be noted that uner Rule 2 of the Companies (Acceptance of Deposits) Rule, 1975, certain amounts borrowed by a company are not treated as 'deposit'. Acceptance of exempted deposits by a private company will also not come within the mischief of section 3(1)(iii)(d).

Articles of a private company must prohibit invitation or acceptance of deposits from persons other than its members, directors or their relatives. The prohibition extends to deposits accepted from members of the public. It is open to a private company to accept deposits privately from its members, directors and their relatives. The director or member from whom money is received has to furnish to the company, at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting from others.

A company cannot be incorporated as a private company after the commencement of the Companies (Amendment) Act, 2000 unless its Articles provide for the aforesaid prohibition. No provision has, however, been made in this behalf in respect of existing private companies, unlike sub-sections (3)-(5) for enhancing the paid-up capital within 2 years. It appears that non-insertion of such a prohibition in its articles by an existing private company shall not *ipso facto* change its character into a public company. Such company should, however ensure that deposits are not accepted from persons other than its members, directors and their relatives.

The Company Law Board has held that a private company cannot be treated as a public company merely because it has not complied with the requirement by amending its articles of including the prohibition on acceptance of deposits from persons other than its members, directors or relatives in conformily with S. 3(1)(iii)(*d*) as introduced by amendment with effect from Dec. 13, 2000. The CLB said that the provision in the Act would automatically govern all private companies. *G. Venkitapathy v. Prakathi Spinners P. Ltd.*, (2002) 49 CLA 97 : (2002) 38 SCL 131 : 2002 CLC 1529 (CLB).

Deposits from Joint shareholders.—Though joint holders are treated as one member, it seems that deposits can be taken from all the joint holders separately. The RBI circular cited below which permits deposits from first joint holder only confines itself only to private NBFC

Deposits received from joint shareholders by a private limited NBFC.—Some of the private limited NBFCs have reportedly started accepting deposits from all the joint shareholders. This practice has been found to be irregular, undesirable and circumventing the NBFC directions on acceptance of public deposits. Accordingly, it has been decided that the deposits accepted by a private limited NBFC from the first named shareholders will only be exempted from the purview of public deposit. The deposits accepted from the rest of the joint shareholders will be treated as public deposit. [Circular No. DNBS (PD) CC No. 12/02-01/99-2000 dt. 13-1-2000 issued to NBFCs and RNBCs by RBI].

Public Company [Sub-section (1)(iv)]

A public company means a company which is not a private company and which has a minimum paid-up capital of Five lakhs rupees or more as may be prescribed and any private company which is subsidiary of another company which is not a private company.

After the commencement of the Amendment Act, 2000, a company cannot be registered as a public company unless it has a minimum paid-up capital of Rs. 5 lakhs. The effect is that the promotors must subscribe for shares at least upto the required minimum through subscription clause of the memorandum of association at the time of incorporation as a public compay [Clause (iii)(b)]. In so far as the existing public companies which have less than the required minimum paid-up share capital are concerned, sub-section (4) allows a period of 2 years from the date of commencement of the Companies (Amendment) Act, 2000 to enhance their capital up to the required minimum. In the event of default, such a public company shall be deemed to be a defunct company under section 560 and the Registrar has to strike off its name under sub-section (5) of that section.

In case the public company is unable to raise its paid-up capital to the required level within the period of two years, it can convert itself into a private company subject, of course, to the fulfilment of the provisions of clause (iii) of sub-section (1) and in accordance with the statutory requirements of the Act.

Private company which is subsidiary of public company [Sub-s. (1)(iv)(c)]

In respect of several sections of the Act where a private company is exempted, it is provided that the exemption will apply only in the case of private companies which are not subsidiaries of public companies. The reason for this is that a private company which is subsidiary of a public company, is throughout in the Act put in the same position as a public company. For, where a private company is subsidiary of a public holding company, it is controlled by the latter, and treated as having the characteristics of the holding company itself, enjoying the same privileges and rights and subject to the same restrictions, duties and liabilities. Its interests are the interests of the holding company and its acts are the acts of the holding company. Such a company is now statutorily declared as a public company for all purposes under the Act in view of section 3(iv)(c).

Where a private company is subsidiary of a private holding company, its position as a private company is not affected in any way. Further if a private company is subsidiary of another private company and the latter is subsidiary of a public company, the first mentioned company will also be subsidiary of a public company [*Cf. Illustration* to section 4(1)].

Privileges of a private company

As to the privileges of a private company which is not a subsidiary of a public company, see Notes under section 4.

Privileges enjoyed by all private companies as compared with public companies

(1) A minimun of two persons may form a private company [section 12(1)].

(2) A private company may allot shares without issuing a prospectus or delivering to the Registrar a statement in lieu of prospectus (section 70).

(3) The provisions of section 81 as regards further issue of capital do not apply to a private company.

(4) The restrictions on the commencement of business contained in section 149 do not govern private companies.

(5) Private companies need not hold a statutory meeting (section 165).

(6) One or two members may demand a poll (section 179).

(7) A private company need not have more than two directors (section 252).

(8) Restriction on appointment or advertisement of directors contained in section 266, does not apply.

(9) Copies of balance-sheet and profit and loss account may be filed separately with the Registrar and no person other than a member of the company is entitled to inspect the profit and loss account (Section 220).

For a complete account of such privileges, see notes under section 4 under heading 'Exemptions and privileges of private companies not being subsidiaries of public companies'.

As regards personal liability of directors of private companies under the Income-tax Act 1961, see Notes under section 291.

Failure to comply with section 3(1)(iii)

By virtue of the provisions in section 43, if a private company fails to comply with the conditions mentioned in section 3(1)(iii), it ceases to be entitled to the benefits and privileges of a private company. The company becomes a full-fledged public company because section 43 says that "this Act shall apply to the company as if it were not a private company". However, under the proviso to section 43, the CLB has the power to grant relief if the failure to comply with the conditions was accidental or due to inadvertence or some other sufficient cause.

Companies having no share capital

Every company registered under section 25 and every company limited by guarantee and not having a share capital will be a public company where the number of members is not limited to fifty, and the provisions of this Act relating to public companies will, so far as applicable, apply to them.

Deemed public company.—The provisions of s. 43A (now inoperative) created a third class of company *viz.* the deemed public company. A company could not be incorporated as a deemed public company. It was incorporated as a private company and became subject to the provisions applicable to a public company when the conditions of section 43A were satisfied. *Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.*, (1981) 51 Com Cases 743 : AIR 1981 SC 1298. Now a company of this category has become a matter of the past because section 43A has been made inoperative by the Companies (Amendment) Act, 2000.

Companies excluded from the Act [Sub-section (2)]

It is only where a company's registered office as distinguished from any other office such as head office, or principal office, is in Myanmar or Aden or Pakistan or Bangladesh, that a company is excluded from the Act. But where the registered office is in India,

even though the head office or principal office may be elsewhere, the company will come within one or other of the clauses of sub-section (1).

Present position of private and public companies in England

Under the English Companies Act, 1985 the private company is the residual company form. Every company is a private company unless it meets with the statutory requirements of a public limited company. The memorandum of a public company must state that the company shall be a public company (Section 3(a)). The name of the public company shall end with the words "public limited company" or the abbreviation "plc". The authorised capital of a public company shall not be less than the prescribed amount which is now £50,000 and that amount shall be fully subscribed. Each of the allotted shares must be paid up at least as to one-quarter of the nominal value and the whole premium. The company must be registered or re-registered as a public company. A private or a public company may be formed with two members and there is no limit on the maximum number of members. A private company must satisfy only one statutory requirement: it must not offer shares or debentures to the public through a prospectus or by offer for safe or in any other manner.

Company and Partnership

The points of difference between a company and a partnership as noted in PALMER have been cited by D.P. WADHWA J. in *New Horizones Ltd. v. U.O.I.* (1997) 89 Com Cases 785 at 802 (Del) : "In the treatise PALMER'S COMPANY LAW (25th edition) distinction has been brought out between a company and a partnership (para 2.1523). It will be advantageous to reproduce this distinction from that book:

"The principle that, apart from exceptional cases, the company is a body corporate, distinct from its members, lies at the root of many of the most perplexing questions, that beset company law. It is a fundamental or cardinal distinction—a distinction which must be firmly grasped. The principle is thrown into clear relief by contrasting an incorporated company with a partnership, for under English law (though not under Scottish law or that of most Continental systems) a firm or partnership is not a separate entity from its members.

"The principal distinctions between a company and an English partnership are as follows:

1. In the case of a partnership the property of the firm belongs to the individual members. They are collectively entitled to it, whereas, in the case of a company, it belongs to the company and not to the members.
2. Creditors of a firm are creditors of the members of the firm, and on obtaining judgment against the firm can levy execution on the property of the partners in the firm, whereas, in the case of a company, "the creditor has no debtor but that impalpable thing, the corporation," and judgment against the company normally gives no right to levy execution against the members.
3. A member of a firm can on behalf of the firm dispose of property and incur liabilities, within the scope of the business, to any extent (unless this authority is expressly excluded), whereas a member of a company, as such, has no power.
4. A partner cannot contract with the firm, whereas a member of the company can contract with the company."

Company as partner

The Companies Act recognises that a company can be a partner in a partnership firm. Under Schedule VI to the Act, under the sub-head 'loans and advances', advances and loans to a partnership firm in which the company or any of its subsidiaries is a partner, has to be disclosed separately. Thus, it is possible for a company to be a partner in a firm, as the company is a legal person. The object clause of the memorandum of association must contain a power enabling the company to enter into partnership with any person or company. There may not be

any operational difficulty in case of a company becoming a partner in a firm. Such partner-company could act through its officers duly authorised in this behalf.

"Notionally and juristically if two incorporated companies under the Indian Companies Act enter into a partnership, then each company becomes agent for the other and agrees to share the profits. This will create many problems for the two incorporated companies. Both the companies will have to be, therefore, agents for each other in a manner which may not be permissible at all by their own articles and memorandum. It would be difficult to apply the very specific rights and obligations as between partners in the case of companies as partners, such as in Chapter III (Sections 9 to 17), Chapter IV (Sections 18 to 30) and Chapter VI (Sections 39 to 55) of the Partnership Act, 1932. Then there is need also for the registration of firms and the companies as such partners in a partnership will have to, therefore, obey two masters, the Registrar of Firms and Registrar of Companies. The access of each partner to the other partner's books of account will mean that one incorporated company would be entitled to get into the fields of the accounts of the other incorporated company which is its partner. This will make nonsense of the Companies Act. Strangers then will have access to the books, accounts and papers of the companies, whereas under the Companies Act, they are only limited to their own members and shareholders". *Ganga Metal Refining Co. P. Ltd. v. CIT*, (1968) 38 Com Cases 117, 124 : AIR 1967 Cal 429. It is not only individuals who can be partners in a firm, an incorporated company may form a partnership with an individual. *Latilla v. I.R.*, 25 TC 107 (HL).

§ See also Notes under section 12, *post*.

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 3 of the Rules relating to the status of a private company reads as follows:—

***Paragraph-3.*—The company being a private limited company has the minimum prescribed paid-up capital and its maximum number of members during the said financial year was..... excluding its present and past employees and the company during the year under scrutiny:**

(i) has not invited public to subscribe for its shares or debentures; and

(ii) has not invited or accepted any deposits from persons other than its members, directors or their relatives.

Prescribed Check List

STATUS OF THE COMPANY

(a) In case of Private Company

Check whether :

(i) the company has a minimum paid up capital of Rs. 1 lakh or such higher paid-up capital as may be prescribed. In case of an existing private company this requirement was required to be complied within a period of two years from the commencement of the Companies (Amendment) Act, 2000 *i.e.* 13.12.2000;

(ii) company's Articles contain provisions—

(a) restricting the right to transfer its shares;

(b) limiting the number of members to fifty;

(c) prohibiting any invitation to public to subscribe its shares/ debentures; and

(d) prohibiting any invitation or acceptance of deposits from persons other than its members, directors or their relatives.

Note : The requirement as at (d) above was prescribed by the Companies (Amendment) Act, 2000. Private companies formed before the commencement of the said amendment Act may not contain the clause. Such private companies should therefore be advised to amend the Articles of Association to include this clause.

(b) In case of Private Company which is a Subsidiary of a Public Company

Check whether the company has a minimum paid-up capital of one lakh rupees or such higher paid up capital, as may be prescribed. In case of existing company, check that it has enhanced its paid up capital as required within two years from the commencement of the Companies (Amendment) Act, 2000 *i.e.* 13.12.2000.

Note: A company registered under section 25 before or after the commencement of the Companies(Amendment) Act, 2000 shall not be required to have minimum paid up capital specified above.

§ 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. 4. Meaning of "holding company" and "subsidiary".—(1) For the purpose of this Act, a company shall, subject to the provisions of sub-section (3), be deemed to be a subsidiary of another if, but only if,—

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

[1][(b) that other—

(i) where the first-mentioned company is an existing company in respect of which the holders of preference shares issued before the commencement of this Act have the same voting rights in all respects as the holders of equity shares, exercises or controls more than half of the total voting power of such company;

(ii) where the first-mentioned company is any other company, holds more than half in nominal value of its equity share capital; or]

(c) the first-mentioned company is a subsidiary of any company which is that other's subsidiary.

Illustration

Company B is a subsidiary of Company A, and Company C is a subsidiary of Company B. Company C is a subsidiary of Company A, by virtue of clause (c) above. If Company D is a subsidiary of Company C, Company D will be a subsidiary of Company B and consequently also of Company A, by virtue of clause (c) above, and so on.

(2) For the purposes of sub-section (1), the composition of a company's Board of Directors shall be deemed to be controlled by another company if, but only if, that other company by the exercise of some power exercisable by it at its discretion without the consent or concurrence of any other persons, can appoint or remove the holders of all or a majority of the directorships; but for the purposes of this provision that other company shall be deemed to have power to appoint to a directorship with respect to which any of the following conditions is satisfied, that is to say—

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1. Subs. by Act 65 of 1960, s. 3.

(a) that a person cannot be appointed thereto without the exercise in his favour by that other company of such a power as aforesaid;

(b) that a person's appointment thereto follows necessarily from his appointment as director [2][* * * *] or manager of, or to any other office or employment in, that other company; or

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

(3) In determining whether one company is a subsidiary of another—

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

(b) subject to the provisions of clauses (c) and (d) any shares held or power exercisable—

(i) by, any person as a nominee for that other company (except where that other is concerned only in a fiduciary capacity); or

(ii) by or by a nominee for, a subsidiary of that other company, not being a subsidiary which is concerned only in a fiduciary capacity;

shall be treated as held or exercisable by that other company;

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

(d) any shares held or power exercisable by, or by a nominee for, that other or its subsidiary [not being held or exercisable as mentioned in clause (c)] shall be treated as not held or exercisable by that other, if the ordinary business of that other or its subsidiary, as the case may be, includes the lending of money and the shares are held or the power is exercisable as aforesaid by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

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

(5) In this section, the expression 'company' includes any body corporate and the expression "equity share capital" has the same meaning as in sub-section (2) of section 85.

(6) In the case of a body corporate which is incorporated in a country outside India, a subsidiary or holding company of the body corporate under the law of such country shall be deemed to be a subsidiary or holding company of the body corporate within the meaning and for the purposes of this Act also, whether the requirements of this section are fulfilled or not.

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2. The words "managing agents, secretaries and treasurers" omitted by the Companies (Amendment) Act, 2000 (53 of 2000), s. 4 (w.e.f. 13-12-2000).
3. Subs. by Act 65 of 1960, s. 3.

[4][(7) A private company, being a subsidiary of a body corporate incorporated outside India, which, if incorporated in India, would be a public company within the meaning of this Act, shall be deemed for the purposes of this Act to be a subsidiary of a public company if the entire share capital in that private company is not held by that body corporate whether alone or together with one or more other bodies corporate incorporated outside India.]

NOTES

Eng. Act, 1948 : Secs. 150(4), 154. Previous Act : Sec. 2(2)
Eng. Act, 1985 : Secs. 736, 744

Companies Act, 1956

In the Notes on clauses in the Companies Bill, 1953, it was stated as under: "As suggested by the Company Law Committee (Para 27), the definitions are based on those found in section 154 of the English Act. The illustration has been added so as to bring out clearly the intention underlying sub-clause (1)(c). A few minor drafting improvements have also been effected." (*Clause* 4 of the Companies Bill, 1953).

The recommendation of the Committee were as follows: "We have entirely recast the definitions of subsidiary and holding companies and replaced the existing definitions in section 2 of the Act by the provisions of section 154 of the English Companies Act, 1948. The effect of this new definition would be that company *A* would be deemed to be a subsidiary of company *B*, if one of the following conditions applies:

(i) company *B* is *both* a member of company *A* and controls the composition of the Board of Directors, or

(ii) company *B* holds more than half of company *A*'s equity share capital in nominal value, or

(iii) company *A* is a subsidiary of any subsidiary of company *B*.

"As a corollary, a company is defined as a holding company of another, when that other company fulfils the above conditions so as to make it a subsidiary of the first. It will be noted that a company under the new definition, may be the subsidiary of another even though it is not a company within the meaning of the Act." (*Report:* Para 27 Page 24).

Companies (Amendment) Act, 1960

This section was amended on the basis of the recommendations made by the Companies Act Amendment Committee of 1957. The recommendations were as follows:

Re, Section 4: "According to competent legal opinion obtained by the management of some companies, a private company registered as such in India, which is subsidiary of a public company incorporated outside India, cannot be deemed to be a subsidiary of a public company within the meaning of the Act. According to this opinion, the expression 'private company which is a subsidiary of a public company' occurring in the Act should be taken to mean a private company which is a subsidiary of a public company registered under the Act and not to include a private company registered in India which is a subsidiary of a foreign company, described as a 'body corporate' in the Act. It was pointed out that there are private companies registered in India which are subsidiaries of foreign companies and which have been doing business on a large scale. Logically, it would be difficult to justify a discrimination between 'Indian' subsidiaries of Indian public companies and 'Indian' subsidiaries of foreign public companies. Indian subsidiaries of foreign public companies need not, if they are private companies, file their profit and loss account with the Registrar [*vide* section 220(1)(b)]. They would not also be subject to the ceiling on managerial remuneration imposed by section 198 or the separate ceilings in

4. Ins. by Act 65 of 1960, s. 3.

respect of different classes of managerial personnel under sections 309, 348, 381 and 387. Even under the law of the country of incorporation of the holding company, some of these privileges might not be available to private companies of this type. It was presumably not intended by the legislature that private companies which are subsidiaries of foreign bodies corporate, should find themselves in a privileged position *vis-a-vis* private companies which are subsidiaries of Indian public companies. So far as we can ascertain, there are about 100 such private companies which are Indian subsidiaries of foreign bodies corporate which, if they were incorporated in India, would be public companies. The capital of the majority of these private companies is said to be wholly owned by the foreign bodies corporate. It has been represented to us that to render such private companies at this stage subject to the provisions of section 198 *et al* is bound, in the long run, to inhibit foreign investment in this country through the medium of an Indian subsidiary and might also give rise to some measure of disinvestment by existing foreign companies. It is said that, in the present world-wide shortage of development capital, the restrictions on management remuneration (which are not generally found in the capital-exporting countries themselves) will tend to drive capital away from India, other things being equal.

"Bearing in mind the prime purpose of the Companies Act, *viz.*, the protection of the interests of the shareholder, subject always to the overriding requirements of public policy, a distinction might be drawn between private companies which are wholly owned subsidiaries of foreign bodies corporate and other private companies which are subsidiaries of foreign bodies corporate but in which a portion of the capital is nevertheless held by Indian nationals or companies. In the first type of cases, it has been argued that the management, having no shareholding interest, is, in fact, effectively supervised in regard to remuneration and otherwise by the parent company abroad and is subject to any restrictions which the foreign legislature may care to impose and that there is no necessity for the Indian Legislature to concern itself with the matter. But this argument is by no means decisive in view of the fact that the business operations are carried on and profits are earned in India by the subsidiaries and that there is, therefore, a sufficient economic and territorial connection justifying regulation by Parliament. So far as the second type of company concerned, however, it must be conceded that the company being incorporated in India and Indian capital being in some degree involved, there is no reason for any difference in treatment for the purposes of the Act between such a company and a company which is a subsidiary of an Indian public company.

"We, therefore, recommend that in the case of private companies, which are subsidiaries of foreign bodies corporate, but in which some part of the capital is beneficially held by the Indian nationals or Indian companies, a provision should be inserted in section 4 to make it clear that such private companies will be treated as subsidiaries of public companies for all the purposes of the Act. As regards the treatment of private companies, the entire share capital of which is owned by one or more foreign bodies corporate, it is a matter of economic and financial policy for Government to decide, having regard to the position of foreign investments in this country generally, whether or not such private companies should continue, as at present, to remain outside the restrictions imposed on private companies which are subsidiaries of Indian public companies or whether they should henceforth be made subject to these restrictions. If an alteration of law in this respect is considered desirable, a provision should be inserted in section 4 to the effect that "a private company, which is registered in India and which is a subsidiary of a foreign public company, shall be deemed to be a subsidiary of a public company for all the purposes of this Act." (*Report:* Para 24 Pages 20-22).

Re, Section 4(1)(b): There are a few drafting defects in the definition of a 'subsidiary' in section 4. There are 'existing' companies where preference shareholders have the same voting rights as equity shareholders. Section 90 preserves such rights. In such cases it is possible that the equity shares of a company may be held by one company and the preference shares by another and the preference shares might exceed the equity shares in voting strength. In such cases, it may be inappropriate to treat the company as a subsidiary of

both the companies. To avoid this difficulty, section 4(1)(b) might be amended by adding the following words at the end of the clause after the words "share-capital":—

> "or, in the case of existing companies, with equity and preference shareholders having the same voting rights, that other holds more than half of its total voting power."

Re, Section 4(2)(c): Section 4(2)(c) refers to a directorship of one company being held by another company or its subsidiary. Section 253 prohibits a body corporate from being appointed as a director of a company. Section 4(2)(c) should be recast as follows:—

> "(c) that the directorship is held by an individual nominated by that other company or by a subsidiary thereof." (*Report*: Para 25, Page 22).

The Notes on clauses in the Companies (Amendment) Bill, 1959 explained as under:

"The amendments seek to remove certain drafting defects—(i) in clause (b) of sub-section (1) of section 4 in that the holders of preference shares issued before the commencement of the Act which may carry the same voting rights as equity shares are not covered by it, though such voting rights are preserved under section 90; and (ii) in clause (c) of sub-section (2) of section 4 which is inconsistent with section 253 which prohibits a body corporate from being appointed as a director of a company.

It is proposed to place a private company registered in India, which is a subsidiary of a foreign public company, at par with an Indian private company which is a subsidiary of a public company registered in India. An exemption is proposed to be provided in the case of a private company registered in India which is a wholly owned subsidiary of a public company incorporated outside India." (*Clause* 3 of the Bill).

The Joint Committee, thereafter, observed as under:

"The amendments made in the clause are clarificatory in nature. The Committee considers it necessary to treat an Indian Company, the entire share capital of which is held by one or more bodies corporate incorporated outside India, as a private company which is subsidiary company for the purposes of the Act". (*Report*: Para 16).

Companies (Amendment) Act, 2000

The words "managing agent, secretaries and treasurers" have been omitted from s. 4(2)(*b*) by the Amendment Act of 2000. The amendment is of consequential nature. The Notes on Clauses stated thus : "*Clause 4* seeks to omit the expression "managing agent, secretaries and treasurers" in clause (*b*) of sub-section (2) of section 4 of the Act which is of consequential nature. [*Clause (4)*]"

Scope of section

The section is adopted from section 154 of the English Act, 1948 but in adopting it an important change has been made in order apparently to make the definition wider. While the wording of clause (a)(i) of sub-section (1) of the English section is "that other is a member of it and controls the composition of its Board of Directors" the words "is a member of it and" are omitted from the definition in the corresponding clause (a) of the present section. The effect of this is that while under the English Act it is necessary for a company to be treated as having the legal status of a holding company of another, that it must both be a member of that other company and also control the composition of its Board of Directors, it is enough under the Indian Act to have control of the composition of the Board of Directors of the other company. That is to say, a company will be treated as holding company of a subsidiary company under the Indian Act even though it may not be a member of the subsidiary company and does not hold any shares in it.

Such will be the case where a holding company is in a position to control the Board of Directors of its immediate subsidiaries and through such control, controls also the subsidiaries of such subsidiaries without itself being a member of such sub-subsidiaries.

The words 'holds more than half in nominal value of its equity share capital' obviously mean 'holds more than half in nominal value of its paid-up equity share capital' and not of its authorised equity share capital. In s. 154(5) of the English Act of 1948 [s. 744 of the 1985 Act] this is made clear by defining the expression "equity share capital" as meaning "its issued share capital excluding any part thereof which neither as respects dividends nor as respects capital carries any right to participate beyond a specified amount in a distribution". As the present section is adopted from the English Act, it may be presumed that the meaning of the expression 'equity share capital' is the same here also. The omission of the word 'issued' would seem to be inadvertent.

The various provisions of this Act dealing with holding companies and their subsidiaries maintain the distinction between the two as separate legal entities and although certain provisions are made "there are also equally certain exemptions made in defence (*sic.*), (deference) to common managerial concepts between the holding company and subsidiaries". An application to join the subsidiaries of the company as parties in a petition under s. 397 was dismissed on the ground that the affairs of the holding company do not necessarily include the affairs of its subsidiaries. See *Hungerford Investment Trust Ltd. v. Turner Morrison & Co. Ltd.*, ILR (1972) 1 Cal 286 at 341 para 118.

Meaning of 'control' [sub-section (1)(a)]

The expression 'control' in relation to a company ordinarily means the possession of the power by the exercise of voting rights to carry a resolution at a general meeting of a company. *Cf. Inland Revenue Commissioners v. Harton Coal Co. Ltd.*, (1960) 3 All ER 48 : (1961) 43 ITR 541.

The control can be said to exist only if the member company, *i.e.* the holding company, has independent power by the exercise of which either directly and/or through one or more subsidiaries it can appoint or remove the whole or a majority of the Board of directors.

But control may also be indirect as in the case of a company A holding shares in one or more subsidiaries B, C, D etc. and controlling the subsidiaries of B, C, D etc. *i.e.* the sub-subsidiaries, by indirectly giving directions through B, C, D etc., A company may also be a holding company where a majority of shares in a company is held by it or its subsidiaries, and all of them along with or without the holding company, can, by acting together control that company, even though none of them taken by itself holds a majority of shares in that company: Where a company is the holding company of the holding company of company A, it does not directly hold any shares in company A and, therefore, not a member of company A. That is to say, in the case of a subsidiary's subsidiary, the ultimate holding company will not directly be a member, but will have ultimate control of the Board.

Controlling interest.—The holding of a majority of voting power in a company is sufficient to constitute controlling interest; and it is not necessary to have such share-holding as would secure the passing of a special resolution for which special majority is required. In determining whether one company has a controlling interest in another company or whether directors have a controlling interest in a company, it is not necessary to consider whether the interest is a proprietary one and no distinction is to be drawn between direct and indirect interest. A relationship which brings about control in fact, by whatever machinery or means that result is effected, is sufficient. The degree of control resulting from a 51 per cent holding is a control within the Act. *British American Tobacco Company v. IRC*, (1942) 12 Com Cases 129, 134, 135: (1943) AC 235 (CA). **Affirmed** by House of Lords in *British American Tobacco Co. v. IRC*, (1943) 13 Com Cases 123 (HL).

Control through nominee directors.—Where a company appointed additional directors as the nominees of another company and these nominees constituted the majority of the Board, the nominating company became the holding company within the meaning of S. 4, notwithstanding that the nominees would hold office only up to the next annual general meeting. *Velayudhan M. v. ROC*, (1980) 50 Com Cases 33 (Ker).

Where the Memorandum and Articles provided that its Board of directors was to be constituted only of the nominees of another company's Board of directors, the former company would become the subsidiary of the later. *Fatima Tile Works v. Sudarsan Trading Co. Ltd.*, (1992) 74 Com Cases 423 (Mad).

Controlling composition of Board [Operation of Sub-secs. (1)(a) and (2) and Sec. 255]

No inconsistency between s. 4(1)(a) and s. 255(1)(b).—Under sub-section (1)(a), a company shall be deemed to be a subsidiary of another company if, and only if, that other company controls the composition of the Board of directors of the first mentioned company. The company which controls the composition of the Board of Directors of the other company is called the holding company and the other company is called the subsidiary company. Under section 255, unless the articles provide for retirement of all the directors at every annual general meeting not less than 2/3rd of the total number of directors of a public company or of a private company which is a subsidiary of a public company shall be persons whose period of office is liable to determination by retirement of directors by rotation, and save as otherwise provided, to that effect be appointed by the company in general meeting. By virtue of section 255(1)(b) the investment of power to appoint directors of a company in another company is saved. It is submitted that there is no inconsistency between the provisions of sec. 4(1) and sec. 255(1). Section 255 deals with appointment and retirement of directors of a public company. Such appointment and retirement take place at the annual general meeting of the company. Section 4 deals with investment of power in a company to control the composition of the Board of another company. When a company exercises power conferred upon it by arrangement to control the composition of the Board of directors of another company, the appointments so made remain effective till the date of the next annual general meeting of the company at which directors are to be appointed. On the day on which the annual general meeting is held, the process of retirement of directors must take place according to section 255. The directors appointed by the other company are accordingly subject to retirement under section 255(1), read with section 256(1) and (2) unless the directors so appointed are non-retiring directors. Section 255(1)(b) states that save as expressly provided in the Act, appointment of directors shall be made in general meeting. Under sub-section (1)(a) of section 256, retirement of directors whether appointed by election or by the nomination of another agency is obligatory. Directors nominated by another company are, therefore, subject to retirement in the same manner as elected directors. Section 4(1) and section 255(1) operate in different fields. Vesting of power to control the composition of the Board of another company does not render section 255 inoperative.

The High Court of Delhi held in *Oriental Industrial & Investment Corporation Limited v. Union of India*, (1981) 51 Com Cases 487, that where under an agreement, a company acquired the right to control the composition of the Board of directors of another company and the articles of the company of which the Board of directors were controlled were amended and thereafter the controlling company acquired shares in excess of the permissible limit u/s. 372 the acquisition of shares was not contrary to section 372 of the Companies Act and the amended articles of the controlled company were not *ultra vires*. In the view of the High Court, section 255 applies in those cases which are not subject to any other provisions: where there is conflict between section 255(1)(b) and another provision, the latter provision prevails. By virtue of the Amendment Act of 1988, the benefit of the relationship of holding and subsidiary company by means of control over the composition of the Board of directors is not available for the purpose of investment by a holding company in its subsidiary, *vide* s. 372(14)(d). As per sub-section 8(e) of section 372A inserted by the Companies (Amendment) Act, 1999, the exemption is available to the holding company for investment in its wholly-owned subsidiary only.

It is submitted that the view of the Delhi High Court that s. 255(1)(a) is subject to s. 4(1)(a) is not correct. Section 255(1)(a), unlike section 255(1)(b), is not subject to any other provision of the Act. Therefore, because the company has made an arrangement

with another company for exercising the power to control the composition of its Board of directors, it cannot be said that the provisions of section 255 (1)(a) do not apply at all. It is submitted that directors appointed pursuant to the exercise of the power to nominate will hold office till they retire in accordance with section 255 (1)(a); the first company will, however, on the acquisition of that power immediately become a holding company.

The practice usually followed by a company intending to invest in shares of another company or to advance loans to that other company was to acquire the status of a holding company under an arrangement which satisfies the requirements of section 4(1)(a) and before the next general meeting at which the directors are liable to retire by rotation to acquire the status of a holding company under clause (b) or (c) of section 4(1) and on that account to continue to remain outside the operation of sections which prohibit investments in shares or for advance of loans in excess of the prescribed limits. This loophole was plugged in respect of inter-corporate investments under the Amendment Act of 1988.

Department's views.—The Department has issued *Circular* 14/74, dated 28-8-1974 to the effect that the articles of a company which confer upon another company the right to make provisions for appointment of director on the Board of another company with a view to make the company a subsidiary is invalid under s. 9 of Companies Act on a combined reading of the provisions of sections 255, 256 and 257 and because section 257 is a mandatory provision. This view does not seem to be well founded. The appointments made pursuant to an arrangement whether by the Articles or by an agreement is not invalid, merely because any shareholder may seek election at the annual general meeting. S. 257 only deals with the rights of a person other than a retiring director to stand for election at the annual general meeting. The agreement or article of a company, in so far as it or they invest a company with the status of holding company, in relation to the company of which the Board is controlled, cannot be said to be inconsistent with s. 257 which comes into operation only when elections are to be held at the annual general meeting. (This view appears to be contrary to the judgment of Delhi High Court cited above).

Controlling the Board without holding majority shares.—The possibility of controlling the Board of a company without holding majority shares has been all along recognised. It is observed in PENNINGTON, COMPANY LAW, 796 (5th Edn. 1985): "The other way by which the holding company may have power to appoint or remove a director of the subsidiary is by the subsidiary's memorandum and articles conferring the power or by a contract between the holding company and the subsidiary doing so." A case of this kind was before the Kerala High Court in *Velayudhan M. v. Registrar of Companies*, (1980) 50 Com Cases 33 (Ker). A company entered into an agreement with another under which one company advanced money to the other. The agreement provided that the lending company would have power to nominate the majority of the number of directors, that the nominee directors would be treated in all respects as directors of the borrowing company and that they would be co-opted on its board and that the lending company would have the power to convert the loan into shares in instalments or in lump sum. The lending company nominated its directors and they were immediately co-opted by the borrowing company on its Board. The Registrar launched proceedings against the lending company for violation of S. 372, namely, exceeding the limits of permissible investment. The lending company contended that they were a holding company and therefore enjoyed the exemption of Sub-section (14) of S. 372 and were not liable to the penalty of S. 374. The Registrar contended that they were a holding company at the most for a short period because they themselves had the power to recall the loans and their nominee directors would in any case rotate out at the next annual general meeting. Even so the court held that the lending company qualified itself as a holding company within the meaning of sub-section (1)(a) and sub-section (2). The court accepted the possibility of a temporary controlling power and therefore temporary relationship of holding and subsidiary because the Act nowhere prescribes the duration of the relationship. But the effect of the Amendment Act of 1988 is that a holding company cannot invest beyond the limits prescribed by the section in a company which is its subsidiary only by virtue of control over the composition of the Board of directors *vide* section 372(14)(d). The provisions of section 372 ceased to be operative with effect from 31-10-1998. These provisions were re-enacted with some modifications in section 372-A. The exemptions are stated in sub-section (8) of sec. 372-A.

The type of control envisaged by the Act has been further clarified in PENNINGTON'S COMPANY LAW, 796 (5th Edn., 1985): "Powers of appointment to and removal from the putative subsidiary's board which are exercisable by other subsidiaries of the holding company, or by nominees for its or such other subsidiary are deemed to be exercisable by the holding company, but powers held in a fiduciary capacity, or conferred by debentures issued by the subsidiary, or by a trust deed securing such debentures, or enjoyed in consequence of holding shares in the subsidiary as security for loans are disregarded in the same way as shares in the subsidiary are disregarded when ascertaining whether the holding company holds more than half of the subsidiary's equity share capital."

When deemed to control composition [Sub-sections (1)(a) and (2)]

As provided in sub-section (2), the Board of directors of company will be deemed to be controlled by another if, and only if, that other, at its own discretion and without depending upon any other person's consent or concurrence, has power to appoint or remove the whole or a majority of the directors of the first-mentioned company.

'Consent or concurrence' of any other person cannot be taken to include the consent or concurrence of the person appointed. For, as under section 264 the consent of the person appointed as director is a necessary condition for his acting as director in all cases, it will not be possible in any case for any company to satisfy the requirement of sub-section (2). If the provision is to be construed so as to have efficacy, the expression 'without the consent or concurrence of any other person' will have to exclude from its scope the person appointed as director.

Again, the expression 'any other person' cannot also include the subsidiary company itself. For if the consent or concurrence of the subsidiary company is required, it cannot be said that the appointment or removal of any of its directors is made at the holding company's own discretion 'without the consent or concurrence of any other person'. Further, where the holding company exercises control, it will be meaningless to say that the subsidiary's consent or concurrence is required for exercising such control. If such consent is required, then there can be no control at all nor can it be said that the power of appointing and removing the subsidiary company's directors is exercised or exercisable at the holding company's own discretion.

"Holds more than half in nominal value of its equity share capital...." [Sub-s. (1)(b)(ii)]

The expression 'nominal value' is used to denote the paid-up value of the equity shares so as to distinguish it from their market value'. What the phrase 'holds more than half in nominal value of its equity share capital' means is that where one company holds equity shares, in another company and the paid-up value *i.e.* the amount paid in respect of such shares is more than half of the total paid-up value or amount on the entire equity share capital issued and allotted by that other company, the first-mentioned company becomes the holding company and the other its subsidiary. The meaning will be clear when we read this provision along with section 87(1)(b) which provides that in the case of a member holding equity shares in a company his voting right in respect of such shares shall be in proportion to his share of the total paid-up equity capital of the company.

The words 'holds more than half in nominal value of its equity share capital', obviously mean 'holds more than half in nominal value of its paid-up equity share capital' and not of its authorised equity share capital. In the English Act of 1948 this is made clear by defining the expression 'equity share capital' as meaning 'its issued share capital excluding any part thereof which neither as respects dividends nor as respects capital carries any right to participate beyond a specified amount in a distribution'. As the present section is adopted from the English Act, it may be presumed that the meaning of the expression 'equity share capital' is the same here also. The omission of the word 'issued' would seem to be inadvertent.

Thus, where both fully paid and partly paid equity shares have been issued and allotted by a company, it is more than half of the total of equity shares held, and not the holding of more than half of the total paid-up equity share capital that will make the company holding such shares, the holding company of the company issuing and allotting the shares. Thus, in a given case a holding company may not be in a position to exercise majority of voting power in respect of any resolution at any general meeting of the subsidiary company, having regard to the provisions of sub-s. (1)(b) of section 87 (which provides that in case of member holding equity shares in a company, his voting rights in respect of such shares shall be in proportion to his share of the total paid-up equity capital of the company). The power to control by exercise of majority voting rights is thus not the decisive factor in determining the holding—subsidiary relationship.

This indeed is an anomalous situation as a holding company should be one which controls the majority voting power in the subsidiary.

The position stated here seems to have been acknowledged by the CLB in the decision in *Namita Gupta v. Cachar Native Joint Stock Co. Ltd.,* (1999) 98 Com Cases 655 : (1999) 34 CLA 287 : (2000) 6 Comp LJ 511 at pp. 673, 678 (CLB—PB). It was observed that it was enough that there was voting power to the prescribed extent and it was not necessary that the numerical share-strength should have carried an effective voting right power. On the facts, however, the relationship of holding and subsidiary company was not established.

The interpretation by way of clarification given by the Department of Company Affairs in their publication entitled 'CLARIFICATIONS AND CIRCULARS ON COMPANY LAW' at page 4 as regards the expression nominal value of equity share capital, to the effect that the nominal value of equity share capital is "unrelated to the amount paid up on the equity shares" and "may be interpreted to mean the face value of the equity capital which has been subscribed" is vague and ununderstandable. The expression "nominal value of equity share capital" used in this section has no affinity whatever with the expression 'nominal share capital' occurring in Schedule X in connection with the levying of fees for the registration of companies, where it clearly means the authorised capital for purposes of registration as required by section 13(4). The use of the word 'value' after the word 'nominal' in this section clearly indicates that what is meant here is 'paid-up' equity capital as used in section 87(1)(b). The text of the Department's Clarification is reproduced hereunder :

Query: On a query to Department: If a part of the share capital of a company is fully paid and part partly paid, how should the "half in nominal value of its equity capital" mentioned in the section be reckoned?

Reply: Department expressed the following view.—The "nominal value of equity capital" is a fixed figure at any point of time and readily ascertainable. It is unrelated to the amount paid upon the equity shares. The words "nominal share capital" in Schedule X of the Act indicate the "authorised capital". The words "nominal value of equity capital" in section 4 may be interpreted to mean the face value of the equity capital which has been subscribed. *[Clarification and Circulars on Company Law pp. 3-4 F. No. 2/25/61-PR].*

It may further be noted that the word 'holds' in the section does not imply holds beneficially on the ratio of the judgment given in a different context in *Bainbridge v. Smith,* (1889) 41 Ch 462 (CA). Thus, even if company A is holding on behalf of any other person more than half of the equity shares of the company B, the latter company becomes its subsidiary. This will however require compliance with the provisions of sections 153B and 187C.

The relationship of holding company and subsidiary company may also exist where there is no share capital, a reference to the interest of the members in such cases being construed as a reference to shares [See section 42(5).]

What is majority shareholding?

If the holding company holds more than half in nominal value of the subsidiary's equity share capital, the relationship of holding company and subsidiary subsists between them. In deciding whether this is so, no regard is to be had of the paid-up value of the shares held by the putative holding company, nor to the fraction of the putative subsidiary's distributed profit which the holding company receives, nor to the voting rights attached to the shares it holds in the subsidiary. Consequently, a holding company may be entitled to less than half of the dividends paid on the subsidiary's equity share capital, or may hold less than half of the voting rights exercisable at a general meeting of the subsidiary, yet be its holding company. Furthermore, shares held in the subsidiary by another subsidiary of the holding company, or by a nominee for the holding company or of that other subsidiary, are treated as though they were held by the holding company itself, but shares in the putative subsidiary held by the holding company or its other subsidiaries, or by its or their nominees, are disregarded if they are held in a fiduciary capacity, or if they are held by virtue of any trust deed for securing such debentures, or as security for a loan made in the ordinary course of the lender's business. [See PENNINGTON'S COMPANY LAW, 795 (5th Edn. 1985)]. Sections 736(1) and 744 of the English Companies Act, 1985 in their original form made a company the holding company of another because of its shareholding in that other only if the holding company and its subsidiaries and nominees for it and them together held more than half of the issued equity share capital of the subsidiary. The new provision substituted by the Companies Act, 1989 makes no distinction between the equity and non-equity share capital which the subsidiary has issued, and it attaches no importance to the nominal or paid up value of the subsidiary's shares, but only to the voting rights attached to them. [PENNINGTON'S COMPANY LAW, 6th Edn., 1990, p. 732) : (7th Edn., 1995, p. 973).

§ For an explanation of the meaning of "voting power" under the English Companies Act, 1985, see Schedule 10A.

Holding of preference shares [Sub-section (1)(b)(i)]

In view of the amendment of section 90 by the Amendment Act 41 of 1974 by which preference shares issued before the commencement of the Companies Act, 1956 are placed on the same footing as those issued thereafter with limited voting rights as provided in sections 85 to 89, this sub-clause has ceased to have any effect or significance after the coming into force of the amended section 90.

Sub-subsidiary, decision to delink [Sub-section (1)(c)]

The third type of subsidiary listed in section 4(1)(c) comes in the category of a group of companies in which one is controlling the other not by direct shareholding or power to appoint directors but indirectly through a subsidiary. It appeared in a case, as shown by the documents on record which included minutes of the meeting of the group executives, that the decision to delink one sub-subsidiary by disinvestment was a collective corporate decision taken on commercial considerations and not by manipulations. The ultimate holding company was not allowed to challenge the decision as to disinvestment or to try to control the delinked subsidiary. *BDA Breweries and Distilleries Ltd. v. Cruickshonk & Co. Ltd.*, (1996) 85 Com Cases 325 (Bom).

Position of holding company's directors

Liability as shadow directors or *de facto* directors.—Where a parent company gave its sanction to a subsidiary for the disposal of the subsidiary's assets, this would be unlikely to constitute the parent company as shadow director of the subsidiary. In such cases, the court said, the parent company was acting as a shareholder. As long as the decision was made by the directors of the subsidiary, exercising their own independent discretion and judgment, and the parent company only approved or authorised the decision, the parent company would not be a shadow director. In order to prove a shadow directorship, one must show that the board of the company did not exercise any discretion or

judgment of its own, but acted in accordance with the directions of the alleged shadow director. This test, taken literally, seems to set a higher standard than the statutory definition. It would be all too easy for the directors to recite that, having considered the "advice" of the alleged shadow director, they had on their own judgment decided to follow that advice. The statute says that the directors must be *accustomed* to act on the directions of the alleged shadow directors. The directors may be accustomed so to act, even if they are retaining some discretion of their own. *Cf. Hydrodam (Corby) Ltd., Re,* (1994) 2 BCLC 180 (Ch D).

***De facto* or shadow directors.**—MILLETT J. explained the identification marks of a *de facto* directors as follows [(1994) 2 BCLC 180 at p. 183]:

A *de facto* director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a *de facto* director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level.

The difference between *de facto* and shadow directors is explained in *Hydrodam's* case as follows: A *de facto* director is one who claims to act and purports to act as a director, although not validly appointed as such. A shadow director, by contrast, does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a defendant is a shadow director of a company it is necessary to allege and prove:

(1) who are the directors of the company, whether *de facto* or *de jure*;

(2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so;

(3) that those directors acted in accordance with such directions; and

(4) that they were accustomed so to act.

What is needed is first, a board of directors claiming and purporting to act as such; and secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others.

Parent company directors should not, however, rest too easily. MILLETT J. observed [(1994) 2 BCLC 180 at p. 184]: "In practice, in a case of the present kind, it is much more likely that it will be found that the executive directors of the ultimate parent company (or some of them) have from time to time individually and personally given directions to the directors of the subsidiary and thereby rendered themselves personally liable as shadow directors of the subsidiary." By contrast, he said, if the parent company director has done no more than vote on resolutions at board meetings in respect of directions to the subsidiary, then that director is not a shadow director of the subsidiary.

The resulting principles for determination of liability were thus stated in the judgment:

1. A parent company board acting collectively should not be liable for directing a subsidiary's directors, because in doing so the board is exercising the parent company's discretion. The parent company will, though, be liable.

2. A parent company director who personally communicates a direction of the parent company board to a subsidiary's directors should not be liable, because in so doing he exercises no discretion of his own.

3. A parent company director who has been given authority to direct a subsidiary's directors may be liable, in so far as he has a discretion as to what direc-

tions to give. The position should be the same where the authority has been given to a committee of the parent company directors.

§ See also Notes under section 7 *post.*

Subsidiary not agent of holding company

"A company whose shares are controlled by another company is not by mere existence of that control properly to be described as agent." *English Sewing Cotton Co. Ltd. v. IRC,* (1947) 1 All ER 679 (CA).

A subsidiary company cannot be restrained from issuing rights shares merely on the ground that the holding company will not be able to subscribe to the rights issue and consequently its shareholding interest would be reduced. The subsidiary company is a separate legal entity. *Freewheel (India) Ltd. v. Dr. Veda Mitra,* (1969) 39 Com Cases 1 (Delhi).

§ As regards piercing the corporate veil of 'holding company-subsidiary, relationship, see Notes under section 34, under that heading.

Transfer of assets to holding company under normal restructuring

§ For the notes see the case of *Ord v. Belhaven Pubs Ltd.,* (1998) 2 BCLC 447 (CA) discussed under the same heading under s. 34.

Holding-subsidiary relationship under sub-section (3)

For determining whether a company is a subsidiary of another, (a) the shares held by that other company in a fiduciary capacity, (b) shares held by virtue of the provisions of any debentures of the first-named company or of a trust deed for securing issue of such debentures, and (c) shares held by way of security only for the purpose of a business transaction entered into in the ordinary course of business, shall not be treated as so held by that other company. In the said situations, power exercisable shall also be disregarded. But, shares held or power exercisable by any person as a nominee of that other company shall, however, be treated as held or exercisable by the said company. Thus, the shares held or power exercisable by a subsidiary shall be treated as 'held' or 'exercisable' by the holding company. For example, in case, 'B' and 'C', the subsidiaries of company 'A', hold together more than half of the equity share capital of company 'D', then 'D' shall be deemed to be a subsidiary of 'A' although it has not made any direct investment, nor 'B' or 'C' singly hold more than 50% shares, in the company 'D'.

Where a company agreed to transfer its shares to a company which agreed to buy the company's flats and the buyer company was the subsidiary of the transfering company, it was held that the statutory tenant of the property was not entitled to say that there had been a change in his landlordship, the transfer being between associate companies. The fact that the transfer of shares was to be implemented after the transfer of property had been completed and in the meantime the shares were to remain with the selling company, would not make the selling company a holder of shares in a fiduciary capacity. *Michaels v. Harley House (Marlebone) Ltd.,* (1997) 2 BCLC 166 : (1997) 1 WLR 967 (Ch D). The decision was **affirmed** by the Court of Appeal on other grounds in *Michaels v. Harley House (Marylebone) Ltd.,* (1999) 1 All ER 356 : (1999) 1 BCLC 670 (CA). The court said that the judge had erred in holding that the transferor company did not hold the voting rights in a fiduciary capacity.

Meaning of "body corporate" [Sub-section (5)]

As sub-section (5) says that for purposes of this section, the term "company" includes a body corporate. It follows that, if any foreign body corporate is the holding company of a private company in India, the latter will be treated as a subsidiary of a public company where the foreign body corporate cannot be considered a private company within the definition under section 3.

The extended definition of 'company' given here will apply to "holding company" and "subsidiary company" wherever they occur in this Act. That means that the word company in 'holding company' and 'subsidiary company' wherever used in the Act, includes also a foreign incorporated company. And there may be cases where neither the 'holding company' nor the 'subsidiary company' is a company within the meaning of Section 2(10), both being foreign bodies corporate.

Foreign holding or subsidiary [Sub-section (6)]

Where according to the law of a foreign country a company (whether incorporated in that country or not), is treated as the holding company or subsidiary of a company incorporated in that country, it will also be so treated for purposes of the Companies Act, even though it may not satisfy the requirements of this section.

An application to the Central Government by a foreign company for approval for establishing a wholly owned subsidiary in India has been held to be not an application for establishing a joint venture because the subsidiary and parent companies to be treated as one entity, whereas a joint venture require two separate entities. *Mehra (U.K.) v. Union of India,* (1997) 88 Com Cases 213 (Del).

Private company which is subsidiary of foreign body corporate [Sub-section (7)]

The object of inserting sub-section (7) by Companies Amendment Act, 1960 was "to place a private company registered in India, which is a subsidiary of a foreign public company at par with an Indian private company which is a subsidiary of a public company registered in India".

The exemption in favour of private companies, the entire share capital of which is held by one or more foreign bodies corporate, was made by the Joint Committee who stated: "The Committee consider it unnecessary to treat an Indian private company, the entire share capital of which is held by one or more bodies corporate incorporated outside India, as a private company which is a subsidiary of a public company for the purposes of the Act." (*Report :* para 16).

As per this sub-section a private company in India, if, but only if, its entire share capital is held by one or more foreign bodies corporate even though they may be public companies as per the definition in this Act, will not be treated as a subsidiary of a public company but will only be treated as a private company which is not subsidiary of a public company for all purposes of this Act.

The sub-section does not make any distinction between equity and preference capital. The sub-section requires the entire equity share capital as well as the entire preference share capital, if any, to be held by bodies corporate incorporated outside India. The exemption will be lost if the entire preference share capital is not held by the bodies corporate incorporated outside India even if the entire equity capital is held by such bodies corporate.

Note that only in cases where the entire share capital of a private company is held by one or more bodies corporate incorporated outside India, the private company will be excluded from being deemed to be a subsidiary of a public company. If any portion of its share capital should be held by one or more individuals anywhere, or by an Indian company however small a fraction the share-holding may be, the private company will be treated as a subsidiary of a public company.

As a company requires at least a minimum of two members, it is necessary for a private company not being considered as subsidiary of a public company that its shares should be held by at least two foreign bodies corporate as its members, though one of them may be a nominee.

Note that the provision does not enable the share capital being held in the name or names of individuals as nominees of the body or bodies corporate owning the share capital.

A number of provisions of the Act, like sections 269, 295, etc., applicable to public companies also apply to private companies which are subsidiaries of public companies, *i.e.* public companies registered under the Act. In view of sub-section (7), these restrictive provisions also apply to Indian private companies which are subsidiaries of foreign public companies, if the entire share capital of the former is not held by one or more foreign companies.

Department's Clarification dated 30-9-2002.—Regarding the applicability of Section 43A(2A) to those public companies which are subsidiaries of foreign body corporate, a clarification was sought and the matter was examined in the DCA. Section 4(7) of the Act was an exemption available to Indian private companies when foreign body corporates were holding 100% share in them to retain their "private" status when Section 43(A) was in operation. After amendment of Section 43A, such exemption is not required. The legal position in the above circumstances would be that a private company would be the subsidiary of another private limited company even if the holding company happens to be a foreign body corporate, if it would be a private company, if incorporated in India and these companies do not need the exemption provided in Section 4(7) of the Act. The Department has already clarified and given instructions to the Registrar of Companies, Delhi in particular to dispose of all pending applications seeking reversion back to private limited companies on the above lines. [*General Circular No. 23/2002, dated 30-9-2002*].

Joint shareholding.—It is submitted that the entire share capital will not be deemed to be held by foreign bodies corporate if there is a joint shareholding in which a resident Indian is a joint holder along with a foreign body corporate irrespective of who is the first named holder.

Sub-section (7) vis-a-vis sub-section 1(c).—Sub-section 1(c) is the basic provision to determine holding-subsidiary relationship. The purpose of sub-section (7) where it applies, is merely to bring the Indian private company, which is a subsidiary of a foreign body corporate (which if incorporated in India would be a public company), within the ambit of the same regulatory provisions, *e.g.*, those contained in sections 269, 295, etc., as applicable to an Indian private company which is a subsidiary of an Indian public company.

Avoidance of legal relationship of subsidiary company

The definition given in the section, though looks formidable, has certain lacunae and permits escape in actual practice. For example, a public company and its managing director or any other director or directors may together hold the whole or most of the shares in another company in such manner that while the company does not hold more than half in nominal value of its equity share capital, they together hold such a majority of the shares as to ensure complete control over the affairs, and/or appointment by them of the whole or majority in number of the directors of that other company. In such case, the other company will not have the legal status of a subsidiary and the relationship of 'holding company' and 'subsidiary' for purposes of the Act is avoided.

The tendency to avoid the legal relationship of 'holding company' and 'subsidiary' is due to its disadvantages in the following respects :—

(1) For the purpose of very many provisions of the Act, a private company which is subsidiary of a public company is put in the same position as a public company and is deprived of the various privileges and exemptions which will be available to it as a private company, if it does not fall within the definition of 'subsidiary' given in this section.

(2) Section 212 makes it obligatory on the part of a holding company that its balance-sheet should have attached to it the balance-sheets, profit and loss accounts and other financial particulars of its subsidiaries also and that copies of the same should be distributed and disclosed to all its members and also filed with the Registrar even though the subsidiaries may be private companies. If by a careful arrangement the legal relationship of holding company and subsidiary as laid down in this section can be avoided, the obligations imposed by section 212 can likewise be avoided.

(3) Again there is a prohibition in section 42 as regards allotment of shares to a subsidiary or the latter's acquisition and holding of any shares in its holding company and the section denies voting rights to the subsidiary where such shares are held. If a company so manages as not to fall legally within the definition of a subsidiary as given in this section the disabilities under section 42 will be successfully avoided.

Advantages of holding-subsidiary relationships

It seems that one major advantage of this relationship was exemption from the requirements from the restrictions contained in section 372 on inter-corporate investments because a holding company was free to invest any amount in its subsidiary. This advantage became diluted subsequently when the exemption in case of Board-controllled subsidiary was withdrawn by the Amendment Act, 1988. The advantage has been further diluted by section 372A which permits the exemption only to cases of wholly owned subsidiaries. The net result is that the exemption is now not available in cases of Board-controlled or majority controlled companies. The following commentary should be read in the light of the above note.

There are certain advantages resulting from holding-subsidiary relationship. Firstly, loans may be given to and investments made in the shares of a subsidiary company without attracting sections 370 and 372 though s. 372 will be attracted to the limited extent, *i.e.*, it will apply where the relationship is due only to control over the composition of board of directors *vide* s. 372(14)(d) as amended by Amendment Act, 1988. In view of the *Department's Clarification No.* 48(50)-CL-W/61, dated 12-2-1962, an investment that has the effect of making the other company the subsidiary of the former company shall not be exempted from the provisions of sec. 372. This implies that the Central Govt's approval shall be required every time a public company desires to make any other company its subsidiary. In most of the cases, the requirement will rope in private companies also, as they will become deemed public companies under section 43A(1B) once they acquire 25% or more equity stake in a public company.

There is a conspicuous tendency to avoid the application of sec. 372 while creating the holding-subsidiary relationship. One of these ways is the scheme which came before the court in *Oriental Industrial & Investment Corporation Limited v. Union of India,* (1981) 51 Com Cases 487 (Del) *viz.,* by providing in the Articles of the proposed subsidiary company the conditions similar to those mentioned in sec. 4(2). Once, by virtue of these conditions, the other company becomes a subsidiary company, then shares can also be acquired without the sanction necessary under sec. 372. This method has now been eliminated by the Companies (Amendment) Act of 1988 by providing in s. 372(14)(d) that the exemption will not be allowed to a holding company which is enjoying that status only by virtue of its control over the composition of the subsidiary's Board of directors.

In *Navjivan Mills Co. Ltd. Kalol, In re,* (1972) 42 Com Cases 265 (Guj) it was held that S. 372 operates in a different field and applies only in case the investment is made out of the funds of the company. For the purpose of sec. 4, the requirement of beneficial holding does not exist.

Position of holding-subsidiary relationship under English Law

"Under section 736 [English Companies Act, 1985] there are three ways of establishing that a company (B) is a subsidiary of another company (A):

(i) where A holds a majority of the voting rights in B (this may be called *voting control*);

(ii) where A is a member of B and can appoint or dismiss a majority of its directors (this may be called *director control*);

(iii) where A is a member of B and controls alone or under an agreement with others a majority of the voting rights in B (this may be called *contract control*).

If C is a subsidiary of B and B is a subsidiary of A, then C is also regarded as being a subsidiary of A.

A wholly-owned subsidiary is one whose shares are all owned by one company, its wholly-owned subsidiaries and their and its nominees.

Section 736A [English Companies Act, 1985 as amended by 1989 Amendment Act] expands upon this basic framework. When calculating the voting rights (for voting control or contract control) it is the rights attached to the shares which count. For the pur-

poses of calculating a majority of the board (for director control) it is the majority of the voting rights on the board on all, or substantially all, matters which must be taken into account and not a numerical majority. A company is deemed to be able to control the appointment or dismissal of the director of another company if either that director's appointment follows necessarily from his appointment as a director of the first company or the directorship is held by the first company itself. Rights to appoint or dismiss a director which require another's consent do not count unless there is no-one else who has those rights under the new criteria.

The final aspect of the definition is to discover which *rights,* either as to voting or as to the appointment or dismissal of directors, should be attributed to whom for the purpose of establishing any of the three methods of control. The following rules will apply:

(a) rights which are applicable at all times will count. Restricted rights, *i.e.* ones which only apply in certain circumstances, will only count if they are in fact exercisable at the relevant time. On the other hand a general right which is in a temporary abeyance will still count;

(b) fiduciary rights (*i.e.* held only as a trustee) do not count against the trustee. Further, where the shares are held in a fiduciary capacity only because the transferor retains them under a contract to transfer them at a future date, the voting rights remain with the transferor: *Michaels v. Harley House (Marylebone) Ltd.,* (1999) 1 All ER 356 : (1999) 1 BCLC 670 CA.

(c) nominee rights (*i.e.* those exercisable only on instructions or with consent) are to be attributed to the beneficial owner;

(d) where shares are mortgaged, the rights attached to those shares count as those of the lender and not the borrower only if, apart from normal creditor, protection rights, they are exercisable only by or with the lender's, or the lender's subsidiaires', instructions;

(e) the rights of a subsidiary count as those of its holding company and rules (c) and (d) above must not be read as applying to the contrary;

(f) any voting rights held by a company in itself must be discounted when making the calculation; and

(g) rights held under (b)-(f) are cumulative if necessary."

§ See CHARLESWORTH AND MORRIS, COMPANY LAW, 37-38 (16th edn. 1999).

Holding company's interest in subsidiary's Trade Marks

Where the holding company was exercising supervision and control over the quality of the goods produced by its subsidiary, it was held that the use of a trade mark by such a controlled subsidiary could be regarded as a use by the holding company so as to show a connection between the goods and the owner of the trade mark under sections 2(1)(*v*)(*ii*), 32 and 46(1)(*b*) of the Trade and Merchandise Marks Act, 1958. *Fatima Tile Works v. Sudarsan Trading Co. Ltd.,* (1992) 74 Com Cases 423, 433 (Mad).

Transfer of shares between subsidiaries : Contractual implications

A contract between two companies constituting an arrangement for supply of materials provided that the contract could be terminated if the "controlling shareholding" in one company or the other passed to "new ownership". A majority of the shares in the supplier company were transferred to another subsidiary company in the same group. The new management of the company asked the purchasing company for revision of prices to which it refused to agree. Thereupon the new management exercised the power reserved under the contract of terminating it. The purchaser company contended that transfer of shares from one subsidiary to another subsidiary in the same group could not be regarded as passing of shares to new ownership and therefore it was not capable of giving the right to terminate the contract. The Court said that the words new ownership could apply only

where the controlling shareholding passed to a stranger to the respective groups. The phrase 'Controlling shareholding' was to be taken as referring to a shareholding which had the practical and decisive controal over the company. Thus the phrase had a wider connotation than the phrase majority shareholding. The words 'new ownerships' must be taken to refer to a company which was not under the control of either company. Here in this case inspite of the transfer of shares the same person was controlling the company both before and after the transfer. Hence the power to terminate the contract was not exercisable. The court observed *obiter* that if the change of ownership came within the ambit of the clause, the contract in quesiton could have been terminated irrespective of the motive behind the termination because the new ownership could have taken advantage of the contract clause to get rid of an onerous contract. *Ringway Roadmaking v. Adbruf Ltd.*, (1998) 2 BCLC 625 (QBD).

Other provisions affecting holding-subsidiary relationship

There are also the following provisions of the Act having a bearing on holding-subsidiary relationship :

(a) Holding company as shadow director, see Notes under sec. 7.

(b) Subsidiary's membership of its holding company, see Notes under sec. 42 and sec. 372A.

(c) Obligation on the part of the holding company to furnish certain information, etc. to its shareholders about the subsidiary. Annual Accounts etc., of all the subsidiaries to be attached with the Annual Accounts of the holding company under s. 212. See Notes under sec. 212.

(d) Financial year of holding company and subsidiary, see Notes under sec. 213.

(e) Rights of holding company's representatives and members, see Notes under sec. 214.

(f) Investigation of the affairs of the subsidiary's holding company, see Notes under secs. 239 and 247.

(g) A director receiving commission from his company and who is in the whole-time employment or a managing director, cannot receive any commission or other remuneration from any subsidiary of the company [s. 309(6)].

In contrast to the U.K. Companies Act, the Indian Companies Act, 1956 does not provide for compilation of 'group' accounts. The Indian Act only requires publication of the statement referred to in sec. 212 and the annual reports of the subsidiary companies along with that of the holding company. As for the U.K. law, for a discussion on group accounts and group undertakings accounts, see PENNINGTON'S COMPANY LAW, 739 (6th Edn., 1990, p. 739) : (7th Edn., 1995, p. 981).

Loans and investments by holding company in its wholly owned subsidiary

The restrictions on intercorporate loans and investments as envisaged by s. 372-A do not apply in respect of the following transactions as stated in s. 372A(8):

"(c) to any loan made by a holding company to its wholly owned subsidiary;

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

(e) to acquisition by a holding company by way of subscription, purchases or otherwise, the securities of its wholly owned subsidiary."

§ For Notes on the point see under Section 372A *post.*

Exemptions and privileges of private companies not being subsidiaries of public companies

The following list indicates the important provisions of the Act relating to the exemptions and privileges available to a private company which is not a subsidiary of any public company:—

Section 70: Statement in lieu of prospectus.—Filing of statement in lieu of prospectus before allotment of shares is not required.

Section 77(2): Financial assistance.—A private company which is not subsidiary of a public company is not prohibited from giving financial assistance to any one for purchasing or subscribing for shares of the company or of its holding company.

Section 81: Further issue of capital and right of pre-emption.—Restrictions envisaged under S. 81 requiring allotment of shares on pre-emptive basis to the existing shareholders are not applicable.

Sections 85 to 90: Share capital and voting rights.—The provisions of these sections requiring that there should be only two kinds of share capital and that voting rights should be proportional to the capital paid up and prohibiting and terminating disproportionately excessive voting rights are not made applicable to a private company which is not subsidiary of a public company and such company may issue share capital of such kinds, in such forms and with such proportionate or disproportionate or other voting rights as it may think fit.

Section 111(13): Limited right of appeal to Company Law Board against rejection of transfer.—The right of appeal to the Company Law Board against rejection of a transfer of shares is not available as long as the private company is only enforcing the provisions of its articles in rejecting a particular transfer. It appears from the new section 111(13) that a right of appeal will be available where the rejection is outside the provisions of the private company's articles. The right of appeal is also available where there is a transmission by court sale or sale by other public authority [s. 111(11)].

Section 149: Commencement of business.—A certificate for commencement of business is not necessary.

Section 165: Statutory meeting.—Holding of statutory meeting and filing of statutory report are not required.

Sections 170 to 186: Provisions as to general meetings.—The provisions of these sections relating to general meetings, unless the provisions of any section are expressly made applicable by the company's articles, do not apply to such a private company to the extent to which the company makes its own provisions by its articles. In particular it is not bound by the prescribed 21 days' notice for general meeting required by the section and may provide a shorter or longer period of notice for calling such meetings and may make its own regulations by its articles as regards the contents and manner of service of notice and persons on whom it is to be served, election of chairman, proxies, manner of taking votes, restrictions as regards exercise of voting rights by members who have not paid calls, etc., and the manner of exercising of voting rights, taking of polls, etc.

Section 198: Managerial remuneration.—Such a private company is not controlled by the provisions of this section fixing overall maximum remuneration of 11 per cent of net profits for the management of a company and the limit of minimum managerial remuneration ranging between Rs. 75,000 and Rs. 4,00,000 per month depending upon the effective capital of the company, in the event of no profits or inadequate profits. A private company which is not subsidiary of a public company may remunerate those in management of it by such higher percentage of profits or in any manner as it may think fit.

Section 204: Appointment of firms or body corporate.—Such private company is not governed by the restrictions as to duration etc. imposed by this section as regards appointment of a firm or body corporate to any office or place of profit under it.

Section 220: Restriction on disclosure of profit and loss account.—The profit and loss account of such company though filed with the Registrar are not to be disclosed to the public, unlike in the case of a private company which is a subsidiary of a public com-

pany, whose balance-sheet, profit and loss account and other financial particulars are open to the public.

Section 252: Number of directors.—A private company which is not a subsidiary of a public company need not have more than two directors.

Sections 255 and 256: Rotational retirement of directors.—The provisions relating to the appointment, retirement, re-appointment, etc., of directors who are to retire by rotation and the procedure relating thereto are not applicable to a private company not being subsidiary of a public company.

Section 257: Notice for election as director.—The provisions requiring the giving of fourteen days' notice by new candidates seeking election as directors and deposit of five hundred rupees are not applicable to such private companies.

Section 259: Increasing number of directors.—Nor the provision requiring Central Government sanction for increasing the number of directors (by way of amendment of the articles or otherwise) beyond the maximum fixed in the existing articles applies.

Section 261: Holding place of profit.—This section providing that certain persons connected with the managing agent or holding certain offices of profit are not to be appointed directors except by sanction of a special resolution of the company, applies only to a public company and its subsidiaries.

Sections 262 to 264: Filling casual vacancies, voting and filing of consent.—The provisions relating to the manner of filling up casual vacancies among directors and the duration of the period of office of those so appointed, the provision requiring that the appointment of directors should be voted on individually and the requirement that the consent of each candidate for directorship should be filed with the Registrar do not apply to a private company, unless it is subsidiary of a public company.

Section 266(5): Restriction on appointment or advertisement of directors.—Provision relating to the filing of consent with the Registrar before a person's name is included in the prospectus or advertised as director, is not applicable.

Sections 268 and 269: Appointment of managing, wholetime director.—Nor is Central Government's approval required in the case of such company either for appointment of or for amending any provisions relating to the appointment or re-appointment of a managing director or wholetime director of the company.

Sections 270 to 273: Qualification shares.—The provisions of these sections requiring the holding of a share qualification by directors and fixing the time within which such qualification is to be acquired and the filing with the Registrar of a declaration of his share qualification by each director are also not applicable to a private company which is not subsidiary of a public company.

Section 274: Special disqualification for appointment of directors.—A private company which is not subsidiary of a public company may by its articles, provide special disqualifications for appointment of directors.

Sections 275 to 279: Restriction on number of directorships.—The restrictive provisions as regards the total number of directorships which any person may hold do not include any directorship held in private companies which are not subsidiaries of public companies.

Section 283: Vacation of office.—A private company may provide special grounds for vacating the office of director.

Section 293: Restrictions on powers of directors.—The restrictions imposed by this section on the powers of the Board of Directors as regards selling, leasing, remitting or giving time for payments of debts, investing or borrowing moneys, or contributing to charities other than for political purposes do not extend to the Boards of private companies not being subsidiaries of public companies.

Section 295: Loans to directors.—This section prohibiting loans to directors does not apply to such companies.

Section 300: Interested directors.—Nor does the provision prohibiting an interested director from participating or voting in Board proceedings relating to his concern or interest in any contract arrangement apply.

Section 303(1): Date of birth.—A private company which is not a subsidiary of a public company is not required to enter the date of birth in the register of directors.

Sections 309, 310, and 311: Remuneration of managing, wholetime director.— The provisions relating to the extent and manner of payment of remuneration to directors and the requirement that any increase in the remuneration of a director including a managing or wholetime director and any amendment of any provision relating thereto must have for their validity the approval of the Central Government are confined only to public companies and private companies which are their subsidiaries. A private company which is not such subsidiary, is free from these restrictions.

Sections 316 and 317: Number of managing directorships, term of appointment.—The restriction as to the number of companies of which a person may be appointed managing director and prohibition of such appointment for more than five years at a time, do not extend to private companies unless they are subsidiaries of public companies.

Sections 349 and 350: Determination of net profits for remuneration.—The provisions relating to the: (1) percentage of quantum of remuneration payable to a managing agent; (2) method of determination of net profits and provision for depreciation, for determining such percentage or quantum; (3) prohibition of payment of office allowance; (4) payment of additional remuneration; (5) time and manner of payment of remuneration are all not to apply to a private company which is not subsidiary of a public company. It is free to make its own provisions in respect of all these matters.

Section 372A: Inter-corporate loans and investments.—The section does not apply to a private company which is not subsidiary of a public company.

Sections 386 and 388: Restrictions as to managers.—The provisions restricting the number of companies for which a person may be appointed manager and remuneration of manager and applying sections 269, 310, 311, 312 and 317 to a manager.

Section 409: Power to prevent changes in Board .—The special powers of interference given to the Company Law Board to prevent change in the Board of directors of a company where in the opinion of the Board such change will be prejudicial to the interests of the company, are not extended to the case of a private company unless it is a subsidiary of public company.

Section 416: Company an undisclosed principal.—Contracts entered into by an agent of private company, which is not the subsidiary of a public company, if entered into by him on behalf of the company as undisclosed principal, need not be recorded by a memorandum in writing.

Provisions not applicable to private companies, whether subsidiaries of public companies or not

Section 70.—Prohibition of allotment before registration of statement in lieu of Prospectus.

Section 81.—Provision as to the manner in which subscribed capital may be increased by issue of further shares.

Section 149.—Restrictions on commencement of business. A private company can commence business immediately on incorporation without obtaining certificate of commencement of business from the Registrar.

Section 165.—Provisions as to Statutory Meeting and Statutory Report.

Section 219.—Provisions as to right of a member to copies of Balance-Sheet and Auditor's Report in relation to Balance-Sheet laid before the company.

Section 266.—Restrictions on appointment or advertisement of directors as regards consent and qualification shares.

Section 284.—Provisions for removal of directors in case of a director holding office for life on 1st April 1952.

Equity share capital

§ As to what is equity share capital, see section 85 and Notes thereunder.

Stamp duty remission on transfers of property *inter se*

Notification No. 1, dated 16-1-1937.—In exercise of powers under Cl. (a) of section 9 of the Indian Stamp Act (1899) G G in Council remits the stamp duty chargeable under Art. 23 (Conveyances) and 62 (transfers) of Schedule I on instruments evidencing transfers of property between companies limited by shares in cases—

(i) where at least 90 per cent of the issued share capital of the transferee company is in the beneficial ownership of the transferor company; or

(ii) where the transfer takes place between a parent company and a subsidiary company one of which is the beneficial owner of not less than 90 per cent of the issued share capital of the other; or

(iii) where the transfer takes place between two subsidiary companies of each of which not less than 90 per cent of the share capital is in the beneficial ownership of a common parent company :

Provided that in each case a certificate is obtained by the parties from the officer appointed in this behalf by the local Government concerned that the conditions above prescribed are fulfilled.

Note.—This notification of reduction and remission was designed to facilitate reconstruction of a company or amalgamation of two companies which are more or less under the same ownership so that they should be able to re-arrange their affairs without being saddled with liability for payment of stamp duties. For the notifications of reduction and remission issued by different States, see K. KRISHNAMURTHY INDIAN STAMP ACT, (8th Edn., 2002).

§ See also Notes under S. 391 under the heading "Stamp Duty under a Scheme of amalgamation/reconstruction".

[1][**S. 4-A. Public Financial Institutions.**—(1) Each of the financial institutions specified in this sub-section shall be regarded, for the purposes of this Act, as a public financial institution, namely :—

(i) the Industrial Credit and Investment Corporation of India, Limited, a company formed and registered under the Indian Companies Act, 1913;

(ii) the Industrial Finance Corporation of India, established under section 3 of the Industrial Finance Corporation Act, 1948;

(iii) the Industrial Development Bank of India, established under section 3 of the Industrial Development Bank of India Act, 1964;

(iv) the Life Insurance Corporation of India, established under section 3 of the Life Insurance Corporation Act, 1956;

1. Ins. by Act 41 of 1974, s. 3 (w.e.f. 1-2- 1975).

(v) the Unit Trust of India, established under section 3 of the Unit Trust of India Act, 1963.

[2][(vi) the Infrastructure Development Finance Company Limited, a company formed and registered under this Act.]

[3][(*vii*) *the securitisation company or reconstruction company which has obtained a certificate of registration under sub-section (4) of section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.*]

(2) Subject to the provisions of sub-section (1), the Central Government may, by notification in the Official Gazette, specify such other institution as it may think fit to be a public financial institution :

Provided that no institution shall be so specified unless—

(i) it has been established or constituted by or under any Central Act; or

(ii) not less than fifty-one per cent of the paid-up share capital of such institution is held or controlled by the Central Government.]

NOTES

Companies (Amendment) Act, 1974

This section was added by the Amendment Act 41 of 1974. The definition is relevant for purposes of sections 67, 94A, 224-A, 372A, 424A *etc.* It is also relevant for the purposes of SICA, SEBI Guidelines, 2000 *etc.*

Companies (Amendment) Act, 1999

Clause (vi) has been inserted in sub-section (1) of this section by the Companies (Amendment) Act, 1999, w.e.f. 31st October, 1998. It confers recognition on the Infrastructure Development Finance Company Limited, a company formed and registered under this Act, as a Public Financial Institution.

The Securitisation and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002—

An overview of Securitisation Act

Object of the Act.—The Act deals with four distinct actions to be taken in respect of financial assets held by banks and financial institutions, namely:

1. Securitisation of financial assets,
2. Assets reconstruction,
3. Enforcement of security interest without intervention of Courts,
4. Setting up of Central Registry.

The object of the Act is to make financial assets (loans, advances and other receivables) of banks and financial institutions easily realisable. Securitisation or reconstruction company has been given powers to take possession of securities and to sell or lease the same without intervention of the courts.

Securitisation.—Securitisation is a special purpose process through which securitisation or reconstruction of financial assets is to be done and the company to be used for this process is defined as securitisation company or reconstruction company. The Act requires that a securitisation company or reconstruction company has to be a company registered under the Companies Act, 1956 and qualifies to be regarded as a public financial institution under s. 4A of the Act.

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2. Ins. by the Companies (Amendment) Act, 1999 (w.e.f. 31-10-1998).
3. **Ins. by the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), earlier issued as an Ordinance (2 of 2002) (w.e.f. 21-6-2002).**

A reconstruction company has been defined in section 2(v) of the Act to mean a company formed and registered under the Companies Act, 1956 for the purpose of asset reconstruction. A 'securitisation company has been defined in section 2(za) of the Act to mean a company formed and registered under the Companies Act, 1956 for the purpose of securitisation. Asset reconstruction means acquisition by any such company of any right or interest of any bank or financial institution for the purpose of realisation of financial assistance, [section 2(b)]. Securitisation means acquisition of financial assets (*i.e.* debt or receivables) by any such company by raising of funds from qualified institutional buyers by issue of security receipts representing interest in such financial assets, [Section 2(g)].

A Securitisation Company (SCO) or Reconstruction Company (RCO) would be required to obtain a certificate of registration from RBI for carrying on securitisation or asset reconstruction activities. The Act provides for regulatory powers of RBI which include cancellation or rejection of registration and issue of directions. It further provides that any SCO or RCO shall have owned fund of not less than rupees two crores or such other amounts which are not to be more than fifteen percent of the total financial assets acquired by SCO or RCO. [sec. 3]

A securitisation or reconstruction company may acquire with or without the underlying securities any financial assistance granted by any bank or financial institution to any borrower. In consideration for such acquisition it may issue a debenture or a bond or any other security in the nature of debenture. A securitisation or reconstruction company may raise funds from qualified institutional buyers by issue of security receipts. The SCO or RCO are not permitted to raise funds from public. [sec. 5]

The Act does not apply to Non Banking Financial Companies, Regional Rural Banks and Co-operative Banks. The Central Government is, however, empowered to extend the Act to such entities by issue of Notification.

On acquisition of financial assets by SCO or RCO the rights and interests in all the underlying securities and all sanctions, NOCs, approvals, etc., in relation to the financial assets are to be available to the SCO or RCO. Further, any legal proceedings or other actions pending are to be continued, prosecuted or enforced by SCO or RCO whether by or against it. [secs. 5 and 6]

The Act enables any SCO or RCO to acquire a bundle of homogenous financial assets from any bank or financial institution and split up the total value of such assets into small-denominated instruments to be known as "security receipts" under the Act for the purpose of investment by qualified institutional buyers. The Act, however, does not provide for issue of security receipts to the public.

The security receipts to be issued by an SCO or RCO would be regarded as securities within the meaning of section 2 of the Securities Contracts (Regulation) Act, 1956. A clause has been inserted in section 2 of that Act defining "security receipt". Stamp duty rates on such instruments can be prescribed by the Central Government. Requirement of registration of such security receipts has been dispensed with.

Recovery of loan instalments, servicing of interest on security receipts to be issued by the SCO or RCO and other terms of sale of financial assets would be in accordance with an agreement between banks and FIs and SCO or RCO, which would have to follow policy directions of the RBI in this regard.

If notice of securitisation or reconstruction is given to the borrowers, a copy would have to be filed with the concerned registering authority with whom original charge (if any) on the underlying securities is registered.

If a bank or FI acts as an agent for collection of loan instalments and interest and borrowers are not given notice, no notice will be filed with the concerned Registry.

Asset Reconstruction.—SCOs or RCOs have been empowered to take following measures for the purpose of asset reconstruction:

1. to take possession of secured assets and sell or lease a part or whole of such assets;
2. to take over the management of the business of the borrower;
3. to reschedule payment of the debt payable by the borrower;
4. to make settlement of dues payable by the borrower; and
5. it is also provided that after realization of the secured debt from the borrower, the secured creditor has to restore the management to him. [sec. 13]

As a result of this enactment, the following types of transaction will become facilitated:

(a) Loans and advances of banks and financial institutions will become marketable. Any securitisation company will be able to acquire such loans and raise funds from institutional investors, to be serviced and redeemed out of the receivables of the loans.

(b) Loans and advances which have already become non-performing assets or are likely to be so classified can also be acquired by any reconstruction company for the purpose of realisation of the loans by exercising any of the powers conferred under the Act. Acquisition of such assets and their realisation will result in better recovery of loans and reduction in NPA levels, and this may bring about better use of productive assets which might otherwise have been lying idle on account of closure of units.

Creation of Security Interest, Registration and Enforcement.—The Act defines property as inclusive of both movable and immovable property. It further provides that any type of security irrespective of its form which is created for the purpose of securing the due repayment of a loan shall be treated as a security interest which can be enforced under the provisions of the new law. The effect of this provision is to give a statutory recognition to certain categories of securities, like hypothecation, that do not have any statutory basis under the existing law.

Default is defined as non-payment of principal debt or interest or any other amount payable by the borrower consequent upon which the borrower's account is classified as non-performing asset by the bank or financial institution (secured creditor). An officer authorised by the Board of directors of the bank or financial institution can initiate steps for recovery by issue of notice calling upon the borrower to discharge all his liabilities within sixty days from the date of notice.

In the event of default, the secured creditor/SCO/RCO/will get the following powers :

(a) to take possession of, and sell or lease, the secured assets;

(b) to take over the management of the business of the borrower;

(c) to appoint a manager;

(d) to recover any money payable by third parties to the borrower. [sec. 13]

In cases of joint financing under consortium or multiple lending arrangement, if 75% of the secured creditors in value agree to initiate recovery action, the same is to be binding on all the secured creditors.

No reference can be made to BIFR under SICA in respect of cases in which any financial assets have been acquired by SCO or RCO. If any proceedings are pending before BIFR under the provisions of SICA in respect of any borrower whose secured creditors holding 75% or more of secured assets in value have taken any measures to recover the secured debt, such proceedings would abate.

Exemptions.—Security interest in pledge as defined under the Contract Act, 1872 is not to be covered by this law. Transactions below Rs. 1 lac will also not be covered by the provision of the Act. Thus small loans will not be covered by the powers of enforcement conferred on banks and FIs. The new legislation also provides for exclusion of any security interests created in agricultural land and also in cases in which the borrower has already paid off eighty percent of the total dues to the secured creditor.

The provisions of the Act are also not to apply to financial, lease and hire purchase transactions in which no security interest has been created. In respect of such transactions, the lessor or owner of the hired goods are entitled to take possession of the assets without intervention of the courts.

Appeals [Ss. 17, 18].—Any borrower or any other person aggrieved by the action of the secured creditor can file an appeal to the concerned Debt Recovery Tribunal. [s. 17] An appeal has to be filed within 45 days from the date on which measures under s. 13(4) have been taken. To ensure that this right is not abused to delay or defeat the proceedings for recovery, a provision is made requiring the borrower to deposit 75% of the amount claimed with the DRT. The latter as appellate authority is given the discretion to waive or reduce the amount to be deposited for reasons to be recorded.

An appeal can also be filed by any person aggrieved by the action of the bank or FI without being required to deposit any amount with the DRT. Such provisions will take care of any third party interests in the secured assets which need to be considered before sale of securities.

Any person aggrieved by an order made by the DRT, may prefer an appeal to the Appellate Tribunal within 30 days of the receipts of the order. [sec. 18]

Assistance in seizure of assets.—A secured creditor can take assistance of the Chief Metropolitan Magistrate or District Magistrate for the purpose of obtaining possession of the securities if there is resistance from the borrower in handing over possession.

Return of wrongfully seized assets and right to recover compensation and Costs [sec. 19].—If the DRT or the Appellate Tribunal holds that the possession of secured assets taken over by the secured creditors was wrongful and directs the secured creditor to return such secured assets to the concerned borrower, such borrower shall be entitled to payment of such compensation and costs as may be determined by the DRT or the Appellate Tribunal, as the case may be.

Central Registry [Secs. 20-26].—The Act provides that steps shall be taken to establish a Central Registry for the purpose of registration of security interests securitisation and reconstruction transactions. Once the Central Registry is set up from the effective date to be notified by the Central Government, it shall become obligatory for all banks/financial institutions to register securitisation or reconstruction and creation of the security interests.

Even after new registry is set up, it can be provided that such registry shall function concurrently with other registries under existing laws.

SCOs, RCOs to be public financial institutions.—SCOs or RCOs are to be deemed as public financial institutions under section 4A of the Companies Act, 1956 so that such companies can avail the special recovery proceedings through the Debt Recovery Tribunals.

Relevant Rules.—The Central Government has framed the Security Interest (Enforcement) Rules, 2002 prescribing service of demand notice on the borrower, procedure to be adopted by the authorised officer to realise the debt by adopting one or more measures specified in section 13(4), sale of movable and immovable secured assets, appointment of manager to manage the secured assets, etc.

§ For the text of the Securitisation and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 and for Security Interest (Enforcement) Rules, 2002 refer *Appendix* 71 and 72.

Power of Central Government

Central Government may specify any institution as public financial institution for the purposes of the Act on fulfilment of prescribed conditions under sub-section (2).

Public Financial Institutions specified [Sub-section (2)]

Other public financial institutions specified by the Central Government are:—

(1) The Industrial Reconstruction Bank of India established under the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984) [Subs. by SO 2091 dated 9-10-1987].

(2) The General Insurance Corporation of India established under the General Insurance Business (Nationalisation) Act, 1972 (57 of 1972).

(3) The National Insurance Company Limited, formed and registered under the Companies Act, 1956 (1 of 1956).

(4) The New India Assurance Company Limited, formed and registered under the Companies Act, 1956 (1 of 1956).

(5) The Oriental Fire and General Insurance Company Limited, formed and registered under the Companies Act, 1956 (1 of 1956).

(6) The United Fire and General Insurance Company Limited, formed and registered under the Companies Act, 1956 (1 of 1956). [*Notification* S.O. 1329, dated May 8th, 1978].

(7) The Shipping Credit & Investment Company of India Limited (Ins. by S.O. 330, dated 21-1-1988).

(8) Tourism Finance Corporation of India Limited formed and registered under the Companies Act, 1956 (1 of 1956). [Ins. by S.O. 7(E), dated 3-1-1990].

*[(9) IFCI Venture Capital Fund Limited formed and registered under the Companies Act, 1956].

(10) Technology Development and Informations Company of India Limited, formed and registered under the Companies Act, 1956 (1 of 1956) [Ins. by S.O. 321(E), dated 12-4-1990.]

(11) Power Finance Corporation Limited formed and registered under the Companies Act, 1956 (1 of 1956). [Ins. by S.O. 674(E), dated 31-8-1990].

(12) National Housing Bank [Ins. by S.O. 484(E), dated 26-7-1991].

(13) Small Industries Development Bank of India (SIDBI] established under the Small Industries Development Bank of India Act, 1989 (39 of 1989). [Ins. by S.O. 812(E), dated 2-12-1991].

(14) Rural Electrification Corporation Limited formed and registered under the Companies Act, 1956 (1 of 1956) [Ins. by S.O. 128(E), dated 11-2-1992].

(15) Indian Railways Finance Corporation Limited, formed and registered under the Companies Act, 1956 (1 of 1956). [*Notification No.* 765(E), dated 8-10-1993].

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* **Subs. for "Risk Capital and Technology Finance Corporation Limited formed and registered under this Companies Act, 1956 (1 of 1956)." By Notification No. S.O. 322(E), dt. 25-3-2003].**

(16) Industrial Finance Corporation of India Ltd., formed and registered under the Companies Act, 1956 (1 of 1956). [*Notification No.* S.O. 98(E), dated 15-2-1995].

Entry No. 17 to 34 were added by *Notification No.* 247(E), dated 28-3-1995

(17) Andhra Pradesh State Financial Corporation.

(18) Assam Financial Corporation.

(19) Bihar State Financial Corporation.

(20) Delhi Financial Corporation.

(21) Gujarat State Financial Corporation.

(22) Haryana Financial Corporation.

(23) Himachal Pradesh Financial Corporation.

(24) Jammu & Kashmir State Financial Corporation.

(25) Karnataka State Financial Corporation.

(26) Kerala Financial Corporation.

(27) Madhya Pradesh Financial Corporation.

(28) Maharashtra State Financial Corporation.

(29) Orissa State Financial Corporation

(30) Punjab Financial Corporation.

(31) Rajasthan Financial Corporation.

(32) Tamilnadu Industrial Investment Corporation Limited. [*Sub. by Notifn. No.* 859(E), dated 27-10-1995].

(33) Uttar Pradesh Financial Corporation.

(34) West Bengal Financial Corporation." [*Notification No.* S.O. 247(E), dated 28-3-1995].

(35) Indian Renewable Energy Development Agency Limited [*Notification No.* 843(E), dated 17-10-1995.]

(36) North Eastern Development Finance Corporation Limited [*Notification* S.O. No. 529(E), dated 23-7-1996].

(37) Housing and Urban Development Corporation Limited [*Notification* S.O. 857(E), dated 9-12-1996].

(38) Export-Import Bank of India [*Notification* S.O. 433(E), dated 14-6-1999].

(39) National Bank for Agriculture and Rural Development (NABARD) [*Ins. by Notification* S.O. 440(E), dated 17-4-2002].

(40) National Co-operative Development Corporation (NCDC) [*Ins. By Notification S.O. 518(E), dt. 9.5.2003 read with Notification S.O. 674(E), dt. 12-6-2003*].

It may be noted that on repeal of the Industrial Finance Corporation Act, 1948, a new company namely, Industrial Financial Corporation of India Ltd. was formed and registered under the Companies Act, 1956. The company is specified as a public financial institution under sub-section (2) of this section. See Entry No. 16 above. The name of this Company has been changed to IFCI Ltd. Hence, clause (ii) of sub-section (1) is now redundant.

The Unit Trust of India was allowed to file its recovery proceedings before the Debt Recovery Tribunal in its capacity as a Public Financial Institution. It had paid away some money mistakenly as dividend and that was held to be a legally recoverable debt. *G.V. Films Ltd. v. U.T.I.*, (2000) 100 Com Cases 257 (Mad).

Public Financial Institution (PFI) as operating agency

Operating Agency under clause (31AA) of section 2 has been defined to include PFI in the context of revival and rehabilitation of Sick Industries concerned under sections 424A-424E.

Guidelines for Issue of Securities by Development Financial Institutions (DFIs)

SEBI has issued a separate set of guidelines for issue of securities by the Developmental Financial Institutions which include public financial institutions included in or notified under this section.

§ See Notes under section 67, *post.*

[1][**S. 5. Meaning of "officer who is in default".**—For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression "officer who is in default" means all the following officers of the company, namely:—

(a) the managing director or managing directors;

(b) the whole-time director or whole-time directors;

(c) the manager;

(d) the secretary;

(e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;

(f) any person charged by the Board with the responsibility of complying with that provision:

Provided that the person so charged has given his consent[2] in this behalf to the Board;

(g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors:

Provided that where the Board exercises any power under clause (f) or clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form[3]]

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1. Subs. by the Companies (Amendment) Act, 1988, s. 3, w.e.f. 15-7-1988 *vide* GSR 781(E), dated 13-7-1988, "S. 5 Meaning of "officer who is in default".—For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression "officer who is in default" means any officer of the company who is knowingly guilty of the default, non-compliance, failure, refusal or contravention mentioned in that provision, or who knowingly and wilfully authorises or permits such default, non-compliance, failure, refusal or contravention."
2. The new prescribed form for consent is Form 1AB and for revocation or withdrawal of such consent is Form 1AC w.e.f. 15-7-1988 *vide* GSR 782(E) dt. 13-7-1988 and relevant Rule is Rule 4BB(2) & (3) under Companies (Central Govt.) General Rules & Forms, 1956.
3. The new prescribed form of Return is Form 1AA and Form 1AC w.e.f. 15-7-1988 and relevant Rule is Rule 4BB(1) & (3) under Companies (Central Govt.) General Rules & Forms, 1956 inserted w.e.f. 15-7-1988 *vide* GSR 782(E) 13-7-1988.

NOTES

Eng. Act, 1948 : Sec. 440(2)
Eng. Act, 1985 : Sec. 730(5)

Essentiality of *'mens rea'* under former provision

Originally, 'officer who is in default' in section 5 was defined as any officer of a company who was knowingly guilty of the default, non-compliance, failure, refusal or contravention mentioned in any provision of the Act, or who knowingly and wilfully authorised or permitted such default, non-compliance, failure, refusal or contravention. *'Mens rea'* or guilty mind was, thus, necessary to be proved for successful prosecution. It was held by the Bombay High Court that an ordinary director who was neither a managing director nor exercising any other managerial power and who did not take part in any act or resolution for borrowing in excess of prescribed limits was not an officer in default. *H. Nanjundiah v. V. Govindan, Registrar of Companies, Maharashtra,* (1986) 59 Com Cases 356 (Bom). Where deposits under section 58A were accepted in excess of limits and three directors were charge-sheeted for the same, the court acquitted them because no matter was brought on record showing even their knowledge of the excess, not to speak of any involvement, or presence at meetings which decided to go in for excess deposits. They could not be described as "officers in default". *S.P. Punj v. ROC,* (1991) 71 Com Cases 509 (Delhi). Similarly, where there was a default in calling annual general meeting and filing of accounts, the Allahabad High Court in *Shyam Sunder Jhunjhunwala v. State,* 1970 All WR (HC) 814 had held that an ordinary director who kept on requesting the managing director to comply with the Act could not be said to be an officer in default.

In a prosecution for default under section 159, it was held in *V.M. Thomas v. Registrar of Companies,* (1980) 50 Com Cases 247 (Ker), that the annual return could have been signed by the managing director and the manager or secretary of the company and the petitioner (ordinary director) could not have known that the return had not been filed with the signature of managing director and the manager or the secretary of the company; the prosecution could not be held to have succeeded in establishing that the petitioner was an officer of the company who was in default.

In *Mousell Bros. v. London & North-Western Railway Co.,* (1917) 2 KB 836 a company was made liable for an offence committed by its employee even though the definition of the offence made it a condition of liability that it be committed 'with intent'. According to ATKIN J., it was sufficient that the employee had the intent [at p. 846]. In *Vane v. Yiannopoullos,* (1964) 3 All ER 820 (HL), the HOUSE OF LORDS held that, unless otherwise provided by the statute, there could be no vicarious liability for an offence with a mental element unless the employer's proprietary or managerial functions were delegated to the employee who committed the offence.

Meaning of 'officers in default'

Changes made by Companies (Amendment) Act, 1988.—The section was amended by the Companies (Amendment) Act, 1988 (w.e.f. 15-7-1988) so as to revise the definition of 'officer who is in default' so that officers and directors, who are in-charge of management or who have been charged with the responsibility of complying with any of the provisions of the Act are held responsible for any contravention of the Act. (Clause 3 *of Notes on Clauses*).

Where the applicants to whom debentures could not be allotted were given refund with a delay and also without interest, it was held that only those persons could be prosecuted who fell within the meaning of the expression "officer in default". A person who was simply a director was not liable to be prosecuted. *S.C. Bhatia v. P.C. Wadhwa,* (1998) 92 Com Cases 511 (P&H). **See also** on appeal to the Supreme Court, *S.C. Bhatia v. P.C. Wadhwa,* (1995) 4 Supp SCC 244, which was under sections 73 and 621 and it was held that the proceeding should not have been quashed.

No prosecution was allowed under the Indian Penal Code [sections 406, 420] where the complainant was not aware as to who was the principal officer of the company. The company could not be prosecuted by implicating the booking clerks unless they are shown to be incharge of affairs. They could be prosecuted as individuals without showing a position of responsibility in the company but it would have to be shown that they were guilty of the alleged offences individually. *Bhagwan Das Sharma v. Vijay Kumar Jain,* (1998) 94 Com Cases 909 (P&H).

Balance of probability.—The Court of Session (Inner House), in dealing with the imposition of a penalty on directors pursuant to section 61 of the VAT Act 1994 [English], held that the required standard of proof was to be established on the balance of probabilities (and not beyond reasonable doubt) as this penalty is civil in nature. *1st Indian Cavalry Club Ltd. and Chowdhury v. Customs and Excise* [1998] *Simon's Tax* Cases 293.

Scope of section

The following officers are now 'officers in default':—

(a) managing director(s), if any; as defined in section 2(26).

(b) whole-time director(s), if any; as stated in *Explanation* to section 269.

(c) manager, if any; as defined in section 2(24).

(d) secretary, if any; as referred to in section 2(45).

(e) any person in accordance with whose directions or instructions, the Board of directors of the company is accustomed to act; it requires very strong evidence to prove that such a person is directing the policy of the company and has the ultimate control over the affairs of the company. Also refer to section 2(30).

(f) any person charged by the Board with the responsibility of complying with any provision of the Act and such person has also given his consent [Form 1AB] therefor. The Board may fix responsibility of different persons for compliance with different provisions of the Act. While fixing such responsibility, the Board has to apply its mind to ensure that a competent and reliable person was charged with the duty and was in a position to discharge that duty. The intention of the legislature is not to fasten the liability on a person unconnected with the affairs of the company and who is not in a position to discharge the said responsibility on behalf of the company. Also refer to sections 209(5)/210(5).

(g) in the absence of any managing director, whole-time director or manager, any director or directors who have been specified by the Board for purposes of this section. A return in the prescribed form [*Form 1AA*] has to be filed with the Registrar. In case no action is taken by the Board under this clause, all the directors of the company have to be treated as officers in default. It may be noted that no time limit has been prescribed for specifying the name of director/s by the Board, which has the option to identify any director(s), failing which all the directors will be deemed to be officers in default. Needless to say that before filing prosecution under any penal provision of the Act, it has to be ascertained whether the Board has passed any resolution under this clause.

It may be noted that a Board-managed company will be required to pass necessary resolution under clause (g) so as to name the director or directors who will be officer(s) in default, for purposes of section 5, failing which all the directors shall be deemed to be officers in default.

As per section 269, a public company or a private company which is a subsidiary of a public company, having paid-up capital of such sum as may be prescribed [*Rs. 5 crores or more w.e.f. 18-9-1990*] by Central Government is required to appoint a managing director, whole-time director or manager and the officers so appointed will be officers in default. Under section 383A, a company having a paid-up capital of the prescribed sum

(*presently Rs. 2 Crores or more*) is required to appoint a whole-time secretary, and he will be an officer in default.

The usual pattern in all labour and economic legislations is that when an offence is committed by a company, liability is not imposed upon all the officers of the company *en bloc*. Those guilty are generally sorted out from those not guilty. The Companies Act however makes a slight departure from this conventional pattern. It gives an opportunity to the Board of directors to distribute the work as between the members of the Board or to appoint a managerial personnel like managing director or whole time director or manager. If nothing of the sort is done, only then the whole Board will be liable to be prosecuted.

The ordinary directors of a company were not allowed to be prosecuted under S. 220 for default in filing accounts when the company had a managing director at the relevant time. *Ravindra Narayan v. ROC, Jaipur,* (1994) 81 Com Cases 925 (Raj).

Department's norms for prosecuting officers.—Going by the decision of the Rajasthan High Court in *Ravindra Narayan v. ROC, Jaipur, (Supra)*, the Department of Company Affairs issued following circular :

Department's Circular.—The issue relating to correct interpretation of 'officer who is in default', as per provision of section 5 of the Companies Act, 1956, has been considered by the Department in the light of the abovesaid judgment of the Hon'ble Rajasthan High Court. The Department is of the view that this judgment has correctly interpreted the provisions of section 5 as amended in 1988. It may, therefore, please be ensured that where the penal provisions provide for punishment of 'officers in default', prosecution be filed against the managing director(s), whole-time director(s) and Manager, apart from the Secretary, if any, and the company and only in those cases where there is no such managerial personnel (*i.e.*, managing director/whole-time director/Manager), prosecution be filed against all ordinary directors, apart from the Secretary, if any, and the company. [*Circular No. 6/94 F.No.* 3/41/93-CL-V, dated 24th June, 1994].

Prosecution of officers other than managing, wholetime director or manager.—Inspite of the decision of the Rajasthan High Court (*Ravindra Narayan's* case) and the Department's Circular based on that decision (*cited above*), no officer is immune from prosecution. Anyone can be brought into the accusation if a role can be attributed to him in the default. In another matter before the same High Court, *Herdilia Unimers Ltd. v. Renu Jain,* (1998) 92 Com Cas 841 : (1995) 19 CLA 190 : (1995) 4 Comp LJ 45, the chairman of the company was held to be not immune from being prosecuted for delay in delivering share certificates after allotment even when there was a managing director. The reason being that he also might have played some role in bringing about the default or he might not have performed the duties assigned to him under the agreement of his appointment and by the memorandum and articles of the company. Similarly, it has been held under the Negotiable Instruments Act, 1881, in connection with dishonour of cheques, that no presumption of guilt can be made against the vice-president of the company merely by virtue of his position. It is also not necessary to prosecute all the directors. *Agritech Hatcheries and Food Ltd. v. Valuable Steels India P. Ltd.,* (1999) 96 Com Cases 534 (Mad). It has been held that where there is a managing or wholetime director or manager, it would be an abuse of the process of the court if proceedings are launched against ordinary directors without examining their role in the default. *G. Vijayalakshmi v. SEBI,* (2000) 100 Com Cases 726 : 2000 CLC 974 : (2000) 25 SCL 183 : (2000) 4 Comp LJ 132 : (2001) 40 CLA 55 (AP).

Default during tenure.—The default in reference to an officer means the default during his tenure. Where defaults were committed in reference to accounts even before the officer joined the company, he was not allowed to be prosecuted for these defaults. *C.V. Siva Prasad v. ROC,* (1997) 88 Com Cases 420 : (1997) 14 SCL 14 (AP).

Position under other enactments

This provision, however, confines itself to violations of the Companies Act only. Violation of other Acts will be governed by the procedure prescribed by a particular Act or by the general principles of criminal law which require proof beyond a reasonable doubt.

Officers who can be prosecuted.—A director of a company has to be deemed to be guilty of the contravention, if it is proved that he at the time of the contravention was in-charge of and responsible to the company for the conduct of its business. It has to be alleged and proved by placing material on record that the person sought to be made liable was in-charge of and responsible to the company for the conduct of its business at the relevant time. These words have been interpreted by the Supreme Court, as also by some High Courts in a number of cases. In *Girdharilal Gupta v. D.N. Mehta, Collector of Customs,* AIR 1971 SC 2162, the Supreme Court held that the words 'in-charge of' must mean 'in overall control of the day-to-day business of the company or the firm'. In *State of Karnataka v. Pratap Chand,* AIR 1981 SC 872, the Supreme Court relied on its decision in *Girdharilal Gupta's* case (*supra*) and observed that a partner who was not in overall control of the day-to-day business of the firm could not be proceeded against merely because he had a right to participate in the business of the partnership firm under the terms of the partnership deed. *Vidyawati v. State,* (1988) 3 Comp LJ 117 at 120 (Del).

The managing director of a company licensed under the Imports and Exports (Control) Act, 1947 was allowed to be prosecuted alongwith the company for an offence under S. 5 of that Act. *Stephen (T.J.) v. Parle Bottling Co. (P.) Ltd.* (1988) 64 Com Cases 151 : AIR 1988 SC 994.

Where the allegation that the directors sought to be prosecuted were incharge of and responsible for the company's affairs, was made out *prima facie*, the court said that the question whether they were actually incharge would be decided at the trial. *Manju Podar (Mrs.) v. Ashwani Kumar,* (1996) 86 Com Cases 631 (P&H).

Where there was no proof of the fact that the person proceeded against was a director of the company and there was also no averment in the complaint that he was knowingly guilty of the default in not filing annual accounts with the Registrar of Companies in time or that he knowingly permitted or acquiesced in the default, he was freed from the accusation. *Registrar of Companies v. Bipin Behari Nayak,* (1995) 83 Com Cases 95 (Ori) [**Affirming** *Bipin Behari Nayak v. ROC,* (1988) 63 Com Cases 271 (Ori)]; *Siddharth Kejriwal v. Regional Director, ESIC,* (1995) 17 Corpt LA 48 (Kant), prosecution under the Employees' State Insurance Corporation Act, 1948, but no averment that the director in question was in charge of or responsible for affairs of the company.

Labour laws.—Where a person has been nominated by a resolution of the Board of directors of the company as the occupier of the factory of the company, he has to be regarded as the real occupier within the meaning of s. 2(n) of the Factories Act, 1948. It is only in the absence of such a resolution and nomination that the directors or any of them can be deemed to be occupier. *Greaves Ltd. v. State of W.B.,* (1996) 87 Com Cases 914 (Cal).

According to a ruling of the Supreme Court only a director can be nominated as occupier and not simply an officer or employee. The Supreme Court observed this to be the result of the 1987 amendment of the Factories Act, 1948. The discretion of inspector of factories as to occupier can be exercised only where no director is identified or nominated as an occupier. *J.K. Industries Ltd. v. Chief Inspector of Factories and Boilers,* (1997) 88 Com Cases 285 (SC). This decision of the Supreme Court to the effect that only a director of the company can be appointed as an occupier of the factory, has been distinguished by the Supreme Court in *Indian Oil Corpn. Ltd. v. Chief Inspector of Factories,* (1998) 94 Com Cases 64 : (1998) II LLJ 604 : (1998) 3 Comp LJ 385 : AIR 1998 SC 2456. The Court said : [(1998) 94 Com Cas 64 at 79] that in the case of the appellant corporation it will have to be held that the ultimate control over the affairs of all the factories of the corporation is really of the Central Government and, therefore, all the factories of the corporation should be regarded as factories owned and controlled by the Central Government. As there is a special provision governing factories owned and controlled by the Central Government, the general principle applicable to non-Government companies

would not apply. Accordingly, a person, not being a director, appointed to manage the affairs of the factory, could be the occupier.

The managing director can also occupy the position of principal employer within the meaning of the ESI Act, 1948. *Employees State Insurance Corpn. v. Apex Engineering P. Ltd.*, (1998) 1 LLJ 274 : (1998) 1 Comp LJ 10 (SC). It has been held that under s. 86 of of the Employees' State Insurance Act, 1948 the person incharge can be prosecuted all by himself without bringing in the company for prosecution. The managing director cannot take the plea that he was not incharge of or responsible for the company's affairs. *Employees' State Insurance Corpn. v. K.A. Vijayan*, (2000) 99 Com Cases 31 (Ker) **following** *Sheoratan Agarwal v. State of M.P.*, (1984) 4 SCC 352 : AIR 1984 SC 1824.

Where the person accused of violating a labour code was incharge of and responsible for the affairs of the company, that was held to be sufficient to prosecute him for the violation and it was not necessary to implead the company with him as a co-accused. *Naresh Kumar v. State of Bihar*, (1991) 70 Com Cases 358, 362 (Pat). The District Manager of the Food Corporation of India was prosecuted under the Act without any averment that the accused was in charge of and responsible for the conduct of the company's affairs at the relevant time and no offence was alleged against the company. The complaint was quashed. *A. S. Dalela v. State of Haryana*, (1995) 82 Com Cases 71 (P&H). In a prosecution under section 29 of the Payment of Bonus Act, the company should be chargesheeted. To prosecute a director, it should be shown that he was in charge of and was responsible for the conduct of the company's affairs. *Sivalingam Chettiar (V.B.) v. Labour Officer, Nellore*, (1986) 59 Com Cases 701 (AP).

Where labour legislation [Health and Safety at Work Act, 1970] [English] creates an offence of strict liability for corporate employers and the employer seeks to argue that it had done all that was reasonably practical to ensure the safety of workers, it has been held that it would not be to show sufficient that reasonable steps were taken by directors to delegate responsibility to another person. The aim of the protective legislation would be frustrated by allowing directors to get out of their responsibilities by simple delegation. *R. v. British Steel plc.*, (1995) 1 WLR 1356 (CA).

A company can be made liable for an offence under the Health and Safety at Work Act, 1974 [British] in circumstances where it cannot be shown that reasonable precautions had been taken on its behalf to ensure the safety of staff. This would not depend on proof of failure by senior management or the alter ego of the company. The company can be made liable for a failure by a local store manager. *R. v. Gateway Food Markets Ltd.*, The Times, January 2, 1997 [UK].

§ See also Notes under s. 291 under the heading "Liability under ESI, EPF and Gratuity Act".

Pollution Laws.—It has been held that only such persons could be prosecuted who were responsible for the conduct of day to day business of the company. Proceedings against administrative and security officers and packing incharge were quashed. The prosecution was under Water (Prevention and Control of Pollution) Act, 1974. *Haryana State Board for Prevention and Control of Water Pollution v. Bharat Carpets Ltd.*, (1995) 84 Com Cases 681 (P&H). In *Woodhouse v. Walsall Metropolitan Borough Council*, (1994) 1 BCLC 435 (QBD) it was held that site manager is not personally liable under the Pollution Act, 1974 (English) because he could not be equated with a person who was managing in a governing role of the affairs of the company. The Supreme Court did not permit quashing of proceedings against directors on the ground that they were not shown to be responsible for conduct of the company's business. That matter could be examined at the trial. Prosecution had been pending for about 17 years. The court said that the complaint could not be quashed only on that ground because the Pollution Board was not responsible for the delay. *U.P. Pollution Control Board v. Mohan Meakins Ltd.*, (2000) CLC 976 : (2000) 101 Com Cases 278 (SC).

The managing director of a company was charged under the Water (Prevention and Control of Pollution) Act, 1974 with the responsibility of violation of pollution laws as an occupier of the unit. The documents filed with the complaint showed that he had control over the unit. The fact that the complaint did not state that he was incharge of and responsible for company's affairs, was held not to vitiate the complaint. *Singhwi (MR) v. State of T.N.*, (2001) 106 Com Cases 234 (Mad).

A company transported industrial wastes from their foundry to disposal sites. The company instructed the drivers to check, so far as possible, that there were no toxic materials in the wastes. The company was acquitted of the charges of depositing special wastes contrary to a statute. There was appeal against the acquittal. The appeal was allowed. The system adopted by the company was not adequate to provide it a defence, namely leaving it to the drivers. *Durham County Council v. Peter Connors Industrial Services*, (1992) Cr LR 743 (DC).

The offence of disposing of wastes on land contrary to the Control of Pollution Act, 1974 [English] applies not only to the final disposal but also to any disposal of it on land. It was no defence for the accused to say that the wastes had not in fact been deposited because they were not to be left there permanently but would be moved to another site. *R. v. Metropolitan Stipendiary Magistrate*, (1993) 3 All ER 113 (DC). It has been held in *National Rivers Authority v. Alfred McAlpine Homes East Ltd.*, (1994) 4 All ER 286 that if a company's employees, acting within the course and scope of their employment, cause polluting matter to enter controlled waters contrary to the Water Resources Act, 1991, s. 85 [British], the company would be guilty of an offence regardless of whether the employees were sufficiently senior to be identified with the company. In *Alphacell Ltd. v. Woodward*, (1972) 2 All ER 475, the company operated a paper factory. The layout of the plant was such that if two pumps failed, waste material from the paper-making process would be discharged into a river. The pumps failed and the river was polluted by the waste material. The HOUSE OF LORDS dismissed the company's appeal against conviction for causing polluting matter to enter a stream contrary to the Rivers (Prevention of Pollution) Act, 1951, s. 2 (since repealed and replaced by the Water Resources Act, 1991, s. 85) [British]. It was not necessary to examine whether the company 'knew' that it was polluting the river. In *Shanks & McEwan (Teesside) Ltd. v. The Environment Agency* [1997] 2 All ER 332 the Court held the company to be liable for a criminal offence under s. 33(6), Environmental Protection Act, 1990 [UK] it was sufficient for the company's management to know generally that the company allowed the deposit of controlled waste in or on any land. It was not necessary for the company's management to know of the specific breach of the conditions of the licence. The court said that a director could become criminally liable if he actively participated in or directly brought about acts which could constitute the offence.

Where the officers are to be held liable for the fault of the company, it is necessary that the company should be impleaded. Where this was not done, the Supreme Court held that it was at the most a technical flaw, and being curable, the guilty officers would not be permitted to shield themselves behind a technicality. *U.P. Pollution Control Board v. Modi Distillery*, (1988) 63 Com Cases 77 (SC).

§ See also Notes under S. 291, under the heading "Liability under Pollution Laws".

Insecticides Act.—In *M.V. Arunachalam v. T. Karthikeyan, Agricultural Officer (Quality Control)*, (1991) 2 Comp LJ 125 (Mad), the prosecution under the Insecticides Act, 1968 was rejected because the fact of responsibility was not proved. Another prosecution under the same Act was rejected where there was not even an allegation that the directors in question were incharge of or responsible for the conduct of the company's business. *Bharat Pulverising Mills (P.) Ltd. v. State of AP*, (1991) 1 Comp LJ 403 (AP). A complaint was similarly quashed under the Insecticides Act, where there was no allegation that the director in question was responsible for the conduct of company's business at the material time or that he had consented to or had connived at the matter; *D.K.*

Jhaver v. State of Punjab, (1996) 87 Com Cases 236 (P&H). Similar prosecutions were quashed in the following cases: *Lachu Ram v. Inspector Insecticides,* 1980 Cr LJ NOC 93 (Raj); *Neelkantham (P.R.) v. State of Rajasthan,* (1986) Cr LJ 1811 (Raj). A company secretary working for a company was prosecuted under the Insecticides Act, 1968 without any allegation that the offence was committed by his neglect or with his consent or connivance. The complaint was quashed. *B.B. Nagpal v. State of Haryana,* (1995) 83 Com Cases 596 (P&H).

The managing director of a company was not allowed to be prosecuted under the Insecticides Act, 1968 without making the company the co-accused. It was necessary that the company of which he was the responsible person should have been arraigned as a co-accused. *Narinder Singh v. State of Punjab,* (1998) 92 Com Cases 957 (P&H).

Where nobody is incharge of the company's affairs at the material time, a complaint would be maintainable against the company. Section 33 of the Insecticides Act, 1968 indicates this by using the words "as well as the company". *Hindustan Chemical Industries v. State of Punjab,* (1997) 88 Com Cases 794 (P&H).

§ For a detailed study *see* M. NARAYANA SWAMY'S LAW RELATING TO INSECTICIDES IN INDIA, 3rd Edn. 2001.

Food Adulteration and Essential Commodities.—In a prosecution under the Prevention of Food Adulteration Act, 1954, evidence showed that the offence was committed by the nominated directors who were in complete charge of the company, it was held that the nominating company and the nominated directors alone could be prosecuted and not the other directors except where the nomination is shown to be invalid or that the offence was committed with the connivance of others, in which case under S. 17 of that Act all other directors would also become liable. *Banerjee (R.) v. H.D. Dubey,* (1992) 75 Com Cases 722 (SC).

In *Biswanath Modi v. Purna Chandra Misra,* (1992) 34 OJD 39 (Criminal) (Ori), dealing with section 16(1)(a)(ii) of the Prevention of Food Adulteration Act, 1954, it was held that : "The word 'person' in section 16 of the Act includes a company in view of the definition of person given in section 3(42) of the General Clauses Act. Section 16 of the Act applies both to juristic and natural persons. A custodial sentence in the case of a juristic person cannot be awarded, even though both imprisonment and fine are mandated in terms of section 16. In such cases fine alone can be imposed..."

In *Sheoratan Agarwal v. State of M.P.,* AIR 1984 SC 1824, it was held that in respect of contravention of an order made under section 3 of the Essential Commodities Act before the person in charge or an officer of the company is held guilty in that capacity, it must be established that there has been a contravention of the order by the company itself. **Following** this decision, the Calcutta High Court in *Madanlal Agarwalla v. State,* (1989) 65 Com Cases 237 (Cal) quashed the proceedings prosecuting the person in charge of the partnership firm for a similar offence.

A complaint under the Essential Commodities Act, against the executive president of a company was not quashed because the allegations in the complaint did make out the offence in question. No one can say that he should be exempted from prosecution because of his senior position in life. *L.P. Mittal v. State of NCT Delhi,* (2000) 100 Com Cases 737 (Del).

§ See also Notes under s. 291, under the heading "Personal liability of directors".

Health and safety legislation.—The Court of Appeal (Criminal Division) [UK] laid down guidelines on appropriate penalties to be imposed on companies and responsible directors in cases of breach of health and safety legislation. The court said that special consideration should be given to small companies where the directors and the company may in essence be the same persons. Penalties may be paid by instalments. The personal responsibility of directors to ensure safety cannot simply be transferred to the company. *R. v. Rollco Screw and Rivet Co. Ltd., The Times* April 29, 1999 (CA). The decision in *R*

v. Gateway Foodmarkets Ltd., (1997) *The Times,* 2 January, shows that a company and its directors are not only liable for what goes on at a store management level but also for the actions of a company's agents, like contractors, under health and safety legislation. In this case, a duty store manager fell through a trap door which had been inadvertently left open and was killed.

Drugs and Cosmetics Act, 1940.—The vicarious liability of a person for being prosecuted for an offence under the Drugs and Cosmetics Act, 1940 arises if it can be shown that at the material time he was incharge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the defaulting company, it does not follow as a matter of course that he fulfils the requirements of liability. A person may, of course, be in a responsible position without being a director. In this case, the court said that except for a bald statement that the respondents were directors of the manufacturing company, there was no other allegation to indicate, even to the *prima facie* extent, that they were in charge of the company and responsible for the conduct of its business. *State of Haryana v. Brij Lal Mittal,* (1998) 93 Com Cases 329 : (1998) 29 CLA 462 : (1998) 3 Comp LJ 1 : AIR 1998 SC 2327.

Regulation of fishing by foreign vessels.—Under the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 it has been held that the managing director of a company chartering a foreign trawler which committed the offence of fishing in the prohibited depth, could not be exonerated of the liability for the offence where he did not produce any record or material to show that he had excercised all due diligence to prevent the commission of the offence. *V.B.C. Exports Ltd. v. Commander S.D. Baijal,* (1998) 91 Com Cases 63 (SC).

Motor Vehicles Act.—A manager of a company which owns a motor car cannot be prosecuted under the Motor Vehicles Act for not displaying the disc or token showing the payment of tax. *Shetty (K.P.K.) v. Emperor,* (1943) 13 Com Cases 75 (Bom).

Negotiable Instruments Act—Dishonour of Cheques

General Principles.—In *Anil Hada v. Indian Acrylic Ltd.* (2000) 99 Com Cas 36 : (2000) 1 Comp LJ 7 (SC) K.T. THOMAS J. proceeded as follows to explain the position of officers of a company in the context of dishonour of cheques under s. 138 [(2000) 99 Com Cas 36 at pp. 40, 41]:

"Three categories of persons can be discerned from the said provision who are brought within the purview of the penal liability through the legal fiction envisaged in the section. They are :

(1) The company which committed the offence;

(2) Everyone who was in charge of and was responsible for the business of the company;

(3) Any other person who is a director or a manager or a secretary or officer of the company, with whose connivance or due to whose neglect the company has committed the offence."

"Normally, an offence can be committed by human beings who are natural persons. Such offence can be tried according to the procedure established by law. But there are offences which could be attributed to juristic persons also. If the drawer of a cheque happens to be a juristic person like a body corporate, it can be prosecuted for the offence under section 138 of the Act. Now there is no scope for doubt regarding that aspect in view of the clear language employed in section 141 of the Act. In the expanded ambit of the word 'company' even firms or any other associations of persons are included and as a necessary adjunct thereof, a partner of the firm is treated as director of that company."

"Thus when the drawer of the cheque who falls within the ambit of section 138 of the Act is a human being or a body corporate or even firm, prosecution proceedings can be initiated against such drawer. In this context, the phrase 'as well as' used in sub-section

(1) of section 141 of the Act has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending company. Similarly, the words 'shall also' in sub-section (2) are capable of bringing the third category persons additionally within the dragnet of the offence on an equal par. The effect of reading section 141 is that when the company is the drawer of the cheque such company is the principal offender under section 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the legislature as per the section. Hence the actual offence should have been committted by the company, and then alone the other two categories of persons can also become liable for the offence."

"If the offence was committed by a company, it can be punished only if the company is prosecuted. But instead of prosecuting the company, if a payee opts to prosecute only the persons falling within the second or third category, the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the company. In such a prosecution, the accused can show that the company has not committed the offence, though such company is not made an accused, and hence the prosecuted accused is not liable to be punished. The provisions do not contain a condition that prosecution of the other company is *sine quo non* for prosecution of the other persons who fall within the second and the third categories mentioned above. No doubt, a finding that the offence was committed by the company is *sine quo non* for convicting those other persons. But if a company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in section 141 of the Act." [(2000) 99 Com Cases 36 at pp. 40, 41 (SC)]. **Followed** in *Ramaganesan v. Jannath Steel Scrap Traders,* 2000 CLC 2049 (Mad).

Specific allegation of role played by officer Director.—In a matter of bouncing of cheques before the Karnataka High Court in *Nucor Wires Ltd. v. HMT International Ltd.,* (1998) 91 Com Cases 850 (Kant) the court surveyed a number of authorities and observed : [At p 856] "To launch a prosecution against the directors of a company, there must be specific allegation in the complaint as to the part played by them in the transactions. There must be clear and unambiguous allegations as to how all the partners are incharge of and responsible for the conduct of the business of the company. There should be clear description and also allegations that the offence was committed with their knowledge and that they had not exercised due diligence to prevent the commission of such offence. The court should also make attempt to find out whether on the available allegations the offence was committed with the consent or connivance or is attributable to any negligence on the part of the directors or partners or members of any association or group of persons. In this case the agreement in question and the subsequent cheque under the agreement was signed by the joint managing director. Therefore, the company, the managing director and the joint managing director were necessary parties. The court said that other directors could not be prosecuted for the only reason that they were directors. It would have to be shown that they or any of them were incharge of and responsible for the company's affairs."

It is necessary that there should be averment that the director in question was incharge, *Dr. O.P. Mehra v. Mansi Finance (Chennai) Ltd.,* (2001) 106 Com Cases 128 (Mad). A director cannot be made liable without averment in the plaint that he was responsible for the affairs of the company or that the offence was committed with his consent or connivance. The consent or connivance of the director must be clearly pleaded and cannot be inferred. *Sunil Kumar Chhaparia v. Dakka Eshwararaiah,* (2002) 108 Com Cases 687 (AP).

Where there was no specific allegation in the complaint that the director in question was incharge of or responsible for the conduct of the company's business, it was held that the ingredients of the offence against him were not satisfied. The complaint against him was not maintainable. *Mukesh Gupta v. Kabsons Gas Equipment Ltd.,* (2003) 114 Com Cases 728 (AP).

A complaint against directors who were participating in business was held to be maintainable. *Sandeep Kumar v. Rajiv Kumar,* (2003) 115 Com Cases 892 (P&H).

Where the complaint stated that the additional director was incharge of the company's affairs at the time of the offence, issuing of the process by the magistrate was held to be justified. *Tapash Kumar Mazumdar v. Sumit Usha Martin Finance Ltd.,* (2003) 115 Com Cases 611 (Delhi).

The averment in the complaint that the director in question was incharge of the day-to-day affairs of the company if properly proved, would be sufficient to hold him vicariously liable. *R. Kannan v. Kotak Mahindra Finance Ltd.,* (2003) 115 Com Cases 321.

In another case on the point the court did not quash the proceedings because it felt that the position of the director could be proved at the trial. *Avneet Food Products v. Government of NCT, Delhi,* (2003) 114 Com Cases 798 (Delhi); *Lok Housing & Construction Ltd. v. Raghupatil Leasing & Finance Ltd.,* (2003) 115 Com Cases 957 (Del). The A.P. High Court did not quash a complaint because there was the specific allegation against all the directors but described it as not a healthy practice of routinely repeating the words of the section in a complaint so as to make all the directors stand the trial. *Om Prakash Agarwal v. State of A.P.,* (2003) 115 Com Cases 190 (AP).

A complaint must be read as a whole. The complaint carried the allegation that the accused persons were not merely directors but also responsible for management of the company's affairs. The court said that the case was *prima facie* made out and was not to be quashed. *Sunil Sareen v. Govt. of NCT of Delhi,* (2003) 115 Com Cases 290 (Delhi).

Averment of being incharge.—There was an averment in respect of the signatory director that he was incharge of and responsible for company's affairs but there was no such averment in respect of other directors (who did not sign). It was held that a proper foundation for prosecuting such directors was not laid. *M Arumugam v. Upasana,* (2001) 105 Com Cases 103 (Mad).

The managing director and administrative officer who signed the cheques in question were deemed to be persons incharge and responsible for the company's affairs. The court refused to quash the prosecution. *G.A. Vadivelu v. Shenbagarajan,* (2001) 105 Com Cases 157 (Mad). In the case of a managing director there is a presumption that he is incharge of the company's affairs. The absence of any such allegation in the complaint is not material. The complaint was held to be maintainable. *Trichur Cotton Mills Ltd. v. Devarasetty Cotton,* (2003) 115 Com Cases 168 (AP).

Where in the case of the prosecution of a former managing director there was no averment as to the date up to which he was the managing director and whether he was so on the date of cause of action, the prosecution was quashed. *Pandurang Camotim Saneoakar v. Suresh Prabhakar Prabhu,* (2003) 113 Com Cas 600 (Bom).

It is not necessary in order to attract prosecution that the person in question should hold a particular position in the company. His role and functions are the real thing. *Asit Kumar Mukherjee v. TTK Pharma Ltd.,* (2001) 105 Com Cases 165 (AP).

Where at the time of the commission of the offence there was no evidence to show that the directors sought to be made liable were incharge of or responsible for the company's affairs, the complaint was quashed. *Modern Denim Ltd. v. Lucas TVS Ltd.,* (2001) 105 Com Cases 194 (Mad). A person cannot be held liable only for the reason that he was a director. It has to be shown either in averments or by producing some other material that he was incharge of the company's affairs, or that he was a part of the fraud. The mere fact that a notice was served on him would not do. *P.K. Kurien Menon and Pai v. R. Sankara Raman,* (2001) 106 Com Cases 675 (Ker).

From the mere fact that a person was a director at the time when the offence was committed by the company, he cannot be automatically roped in. It has to be shown that he

played some part in the commission of the offence. *K. Janaki Manoharan v. Gayatri Sugar Complex Ltd.*, (2002) 108 Com Cases 899 (AP).

Where Form 32, as filed with the Registrar of Companies, showed that the person in question was not a director of the company at the time of the offence, his prosecution was quashed. *Ashok Muthanna v. Wipro Finance Ltd.*, (2001) 105 Com Cases 203 (Mad).

A director tendered resignation much before the commission of the offence, but the company delayed filing of Form No. 32 with the Registrar. The form clearly showed the date of resignation. The court said that the director was not expected to explain anything on behalf of the company. Prosecution of such a director was held to be not maintainable. *Dushyant D. Anjaria v. Wall Street Finance Ltd.*, (2001) 105 Com Cases 655 : (2001) 3 Comp LJ 40 : (2001) 34 SCL 242 (Bom).

A post dated cheque was issued for rent under a lease agreement. Persons who were directors of the company at the time of the agreement had resigned before the date of the cheque. The court refused to quash the prosecution. *Krishna Murari Poddar v. State of Maharashtra*, (2001) 105 Com Cases 625 (Bom).

Where the complaint contained the averment that the persons in questions were directors on the date of the cheque and were also incharge of the day-to-day affairs of the company, merely on the fact that they had resigned before the notice of complaint was issued by the payee of the cheque, the court refused to quash the prosecution. *Ashwin C. Muthiah v. Multipack*, (2002) 108 Com Cases 563 (Mad); *Hotline Shares and Securities Ltd. v. Dinesh Ganeshmal Shah*, (2003) 113 Com Cases 28 (Kant), *prima facie* evidence of directors involvement in the company's affairs, hence complaint maintainable.

Where the authorised signatory of cheques is made an accused person, it does not preclude prosecution of other directors under whose instructions he was functioning. The court said that there was a *prima facie* case against such directors and their prosecution was not to be stayed. *Ashok Muthanna v. Wipro Finance Ltd.*, (2001) 105 Com Cases 203 (Mad).

Where the company had a managing director and also executive directors and yet an ordinary director was included in the accusation under the averment that he was also incharge of and responsible for the company's affairs and though the court did not quash the complaint against him, it did not consider it proper that all directors should routinely be subjected to prosecution by repeating words used in the section. *Rohinton Noria v. NCC Finance Ltd.*, (2001) 105 Com Cases 227 : (2001) Comp LJ 331 (AP).

Where neither the company's managing director who signed the cheque nor the company were brought into accusation and the complaint was filed only against a director in his individual capacity without averment that he was incharge of the company's affairs, the complaint was held to be not maintainable. *R. Nanjan v. Sri Krishna Electricals*, (2001) 106 Com Cases 497 (Mad).

Where the complaint contained no averment as to the accused directors being incharge of the company's affairs and he produced evidence to show that he ceased to be a director much before the commission of the offence, his prosecution was held to be not maintainable. *Chokalingam (M.) v. Sundaram Finance Service Ltd.*, (2001) 106 Com Cases 375 (Mad).

Where the complaint contained the allegation that the persons charged were responsible for and incharge of the company's affairs, it was held that they were liable to be prosecuted. Their real position could be examined at the trial on evidence. *Karunathu C. Sundaram v. Ind Bank Merchant Banking Services Ltd.*, (2001) CLC 617 (Mad). Where it was alleged against the director in question that he was associated with the day-to-day management of the company and this fact was also supported by a memorandum of understanding, it was held that the complaint was competent. The allegations were true or not, could be gone through at the trial. The complaint was not vitiated by reason of the fact that the exact words as required by s. 141 were not used in the complaint. *Asith Kumar Mukerjee v. TTK Pharma Ltd.*, (2000) CLC 2174 (A.P.).

For other similar decisions see *Girish K. Bhandari v. Lakshmi Finance and Industrial Finance Corpn. Ltd.*, (1999) 97 Com Cases 92 (AP); *N. Doraisamy v. Archana Enterprises*, (1999) 97 Com Cases 129 (Mad); *Mahendra Pratap Singh Batra v. N.K. Metals*, (1999) 97 Com Cases 152 (Del), prosecution of managing director allowed, that of other directors against whom there were no specific allegations, not allowed. But see *Secunderabad Health Care Ltd. v. Secunderabad Hospitals P. Ltd.*, (1999) 96 Com Cases 106 (AP) : (1999) 4 Comp LJ 171 where the court did not allow the prosecution of directors about whom no proof was offered to show that they were incharge of or responsible for the conduct of the company's affairs.

Where the allegations in the complaint were against the company and its managing director who signed the cheque and there was allegation that the other directors were incharge of or responsible for the company's affairs at the time of the offence, the complaint against other directors was held to be not maintainable. *Sushil Singla v. Haripal Singh*, (1998) 94 Com Cases 580 (P&H). The courts have deprecated the practice of proceeding against every person irrespective of the fact whether he is liable in fact or is likely to be held liable. The director in question produced a letter in the court showing that he had resigned before the offence occurred. *M.S. Mohan Rao v. S. Nagu Bai*, (2003) 117 Com Cases 403 (Mad).

Where a company's cheque was dishonoured in spite of presentment as many as three times and the court found on evidence that there was a specific allegation that the dishonour was due to the neglect of the managing director, the court did not quash the proceedings against him and also observed that it was not necessary to make the company a party to his prosecution under Negotiable Instruments Act. *Sekhar Gupta v. Subhas Chandra Mondal*, (1992) 73 Com Cases 590 (Cal).

Notice to director sought to be prosecuted.—An ordinary director to whom the notice of the fact of dishonour was not issued was not allowed to be prosecuted. Notice to his company was not sufficient for his prosecution. *Harbhajan Singh Kalra v. State of Haryana*, (1993) 76 Com Cases 371 (P&H). In this case the dishonoured cheques were not issued by the director who was prosecuted but by another director and no notice was also issued to him under s. 138 of the Negotiable Instruments Act. The proceedings were quashed.

It is not necessary that the notice of demand should be issued to each and every director who is sought to be prosecuted. *Suraj Theatre v. Kakarla Bharathi*, (1998) 94 Com Cases 590 (AP). A separate notice was considered to be not necessary to a director who had signed and issued the cheque. Notice to the company was a sufficient compliance with the conditions of liability under s. 138 of the NI Act, 1881. *RRJ Das (Wg Cdr, retd.) v. Satya Bhama Lal*, (2003) 115 Com Cases 878 (Delhi). Where the company was not given notice of dishonour and notice was given to the director in his individual capacity, prosecution of the director was held to be not maintainable. *Amit J. Bhalla v. Rajneesh Aggarwal*, (2000) 99 Com Cases 130 (HP). **Reversing** this decision the Supreme Court on appeal came to the conclusion that the signatory director to whom notice was given, could be prosecuted alone even though neither the company was notified nor proceeded against. *Rajneesh Aggarwal v. Amit J. Bhalla*, (2001) 104 Com Cases 332 (SC).

Where the cheque was issued by the President of a Society, the impleadment of the Society as an accused was considered to be not necessary. Prosecution of the President alone was considered to be permissible. *Mohd Isaq Gulsani v. J. Rajamouli*, (2001) 105 Com Cases 230 : (2001) 2 Comp LJ 341 (AP).

Where the director in question had issued the cheque on behalf of the company, it was held that he could be prosecuted alone without impleading the company. *O.N. Phadnish v. Radha Krishnan*, (2001) 105 Com Cases 210 (Mad).

Where the payee did not serve a notice on the company, prosecution of the company was not allowed. But even so the director who signed the cheque and to whom notice was

given could be prosecuted. *P. Rajarathinam v. State of Maharashtra,* (2001) 105 Com Cases 632 (Bom).

Notice given to a company through its chairman and managing director was held to be sufficient, *Bhakthavatsalam Vidhyashra v. V. Veliah,* (2000) 101 Com Cases 154 (Mad).

Prosecution of company alongwith officer/Director.—In order to invoke the penalty provisions (ss. 138-141) of the Negotiable Instruments Act, 1881 for making the signer of a cheque which is dishonoured criminally liable it is not necessary that the cheque should have been given to discharge his personal liability. Accordingly, a managing director or a managing partner can be prosecuted for a dishonoured cheque issued by him in his representative capacity. But it has been held that he cannot be prosecuted alone. He would have to be prosecuted along with the company or the firm, as the case may be. *Krishan Bai v. Arti Press,* (1994) 80 Com Cases 750 (Mad); *S. Krishnamoorthy v. B.S. Kesavan,* (1994) 80 Com Cases 755 (Mad); *A. Jafferullah v. T. Stanes & Co. Ltd.,* (1994) 80 Com Cases 759 (Mad). Differing from the trend of cases cited herein, the Kerala High Court held in *M. O. H. Iqbal v. M. Uthaman,* (1995) 82 Com Cases 726 (Ker) that the company alone or person incharge of the company alone or both can be prosecuted; *Doraisamy (N.) v. Archana Enterprises,* (1997) 97 Com Cases 129 (Mad) : *Subaraman (K.S.) v. Iyyammal,* (2000) 100 Com Cases 177 (Mad).

A prosecution was not quashed because there was allegation in the complaint that the director in question was in charge of the company's affairs and the cheque was issued at his instructions. *Gyan Chand Kotia v. Indian Renewable Energy Development Agency Ltd.,* (2000) 99 Com Cases 517 (Delhi). Another similar prosecution of the person in charge of the company's affairs was not quashed, though he contended that he had left the company before that cheque was issued. The court said that such a serious matter of fact could not be considered in a limited purpose complaint. *KPG Nair v. Jindal Menthol (India) Ltd.,* (2000) 99 Com Cases 519 : 2000 CLC 576 (Delhi). This decision was **reversed** by the Supreme Court and the proceeding was quashed because the allegations in the complaint did not either in express words or with reference to the allegations contained therein, make out a case that at the time of the commission of the offence, the appellant was incharge of and was responsible to the company for the conduct of its business. The court said that the substance of the allegations in the complaint should fulfil the requirements of ingredients of the offence. *KPG Nair v. Jindal Menthol India Ltd.,* (2001) 104 Com Cases 290 : (2001) 2 Comp LJ 258 (SC).

In *Steel Authority of India v. Harbhajan Singh,* (2000) CLC 76 (All), the chairman-cum-managing director, and others alleged, were found to be persons incharge and, therefore, the proseuction was allowed to proceed.

A director who signs or authorises signature on a cheque which bounced can be prosecuted alone without joining the company as a co-accused. But it would have to be shown that he was responsible for and incharge of the company's affairs. This being a matter of evidence, the complaint could not be quashed at the initial stage. *T.P. Singh Kalra v. Star Wire India Ltd.,* (1998) 93 Com Cases 186 (P&H); *Egmore Benefit Society Ltd. v. K. Balasigamani,* (1998) 94 Com Cases 879 (Mad); *Raja Krishna Reddy v. Satwick Drugs Ltd.,* (1999) 96 Com Cases 891 (AP); *R. Ramchandran v. Yeram Sesha Reddy,* (1999) 96 Com Cases 830 (AP); *Anil Hada v. Indian Acrylic Ltd.,* (2000) 99 Com Cases 36 : (2000) 1 Comp LJ 7 (SC); *Ashok Chaturvedi v. Dr. Nirula Jaywant Patil,* (2003) 1 Mah LJ 981 : (2003) 54 CLA (Snr.) 6 (Bom). Where a cheque was signed by the managing director and also by another director then latter was not allowed to plead that he was not responsible for the conduct of the Company's business. *Urjit Singh v. State of Punjab,* (2002) 111 Com Cases 183 (P&H). Where blank cheques were signed by the director in question entitling the payee to encash after completing, he was not allowed to say that he should not be held liable because there was no averment in the complaint that he was not incharge of the company's affairs. *Guruswamy v. Sree Balaji Cotton Industries,* (2002) 112 Com Cases 338 (Kant).

Contra Directors cannot be prosecuted alone without prosecuting the company. *S. Vishwanathan v. United Phosphorus Ltd.*, (1999) 97 Com Cases 922 (Mad).

Quashing of Complaints.—Where the complaint contained the averment that the chairman, managing director and general manager were responsible for the dishonour, it was held that the complaint was not to be quashed. *Natasha Singh v. Klen and Marshalls Mfrs & Exporters P. Ltd.*, (1999) 96 Com Cases 538 (Mad). A complaint did not contain specific allegations that the persons proceeded against were either managing directors or incharge of the company's affairs nor that the offence of dishonour of cheque was committed with their consent or connivance. But the complaint did contain the averment that the accused persons had the necessary knowledge and that they intended to cheat. The court refused to quash the complaint. *Renewable Energy Systems Ltd. v. State,* (2002) 111 Com Cases 786 (AP). This should be compared with another decision of the same High Court in *Neeta Bhalla v. SMS Pharmaceuticals Ltd.*, (2002) 111 Com Cases 793 (AP). The court said that the complaint must lay factual foundation against a particular director; a director cannot be proceeded against automatically. The averment in the complaint that the accused numbers 2-4 were activily involved in the management of the company would not show that a particular person was in overall charge of the management of the company. The court also held that the resolution of the company, dated a year before the dishonour of the cheque, to avail of a loan facility from the complainant and authorising one of the directors to sign post-dated cheques, did not disclose the commission of any offence. A complaint filed against the chairman-cum-managing director without impleading other directors was held to be maintainable. *Sadhu Ram Singla v. State,* (2002) 111 Com Cases 52 (Delhi).

The director who is the signatory of the cheque can be prosecuted without any averment as to whether he was incharge of or responsible for the company's affairs. The fact that he was not conducting the business of the company was not a ground for quashing the complaint. The court further said that a director could be prosecuted independently and the proceedings would not be vitiated by non-prosecution of the company and as to whether the director had resigned before the date of the cheque, could be considered at the trial. *Anand v. S.M. Thomas,* (2001) 105 Com Cases 406 (Mad). Where the averment was that the cheque was issued with the consent of persons accused and they were directors at the relevant time, the court did not allow the complaint to be quashed. *K. Subramaniam v. Sri Kamakshi Extractions,* (1999) 97 Com Cases 325 (AP). A prosecution was not quashed although the accused person asserted that he was not participating in the company's affairs but the court directed that he may be granted exemption from personal attendance. *V.K. Jain v. UOI,* (2000) 100 Com Cases 827 (SC). Where the requirements of cognizance are satisfied, a person cannot ask for quashing of the complaint against him on the ground that he had ceased to be director. That fact could be sorted out at the trial. *N. Chandrasekhar v. Allwyn,* (1999) 97 Com Cases 570 (AP). A notice given to the company was held to be sufficient because the managing director and other directors could not be heard to say that they did not come to know of it. They could not be heard to claim that separate notices should have been issued to them. *Sarwarya Textiles Ltd. v. Integrated Finance Ltd.*, (2001) 107 Com Cases 256 (Mad); *Arun Hegde v. M.J. Shetty,* (2002) 108 Com Cases 876 (Kant); *A.K. Goenka v. State,* (2001) 105 Com Cases 107 (Del).

The Madras High Court has held that every director is entitled to separate notice. A director cannot be made liable without notice. Notice to the company alone is not sufficient to charge a director. *Harish C. Chadda v. XS Financial Services Ltd.*, (2001) 107 Com Cases 169 (Mad). A prosecution was quashed when it was shown that the persons in question were not directors at the time of the commission of the offence. *Ashok Malhotra v. Mansi Finance (Chennai) Ltd.*, (2002) 110 Com Cases 604 (Mad); *S.B. Shankar v. Aman Steel Corpn.*, (2002) 51 CLA 341 (Mad), (Form No. 32 as filed by the Company and its annual report showed that the director in question had resigned before the cheque was drawn). Where the person proceeded against stated that she was not a director at the

material time but the complaint specifically alleged that she was a director and also in-charge of the company's affairs and she was not able to produce any evidence against her directorship, the court refused to quash the complaint against her. The court also held that there is no provision in S. 482, Cr. P.C., 1973 exempting sick persons from prosecution. *Sudhavenkata Lakshmi P. (Smt.) v. Sree Chakra Cotton Co.*, (2002) 112 Com Cases 60 : 2002 Cr. L.J. 3320 (AP). Where the question was whether the director proceeded against had resigned and whether his resignation has been accepted by the Board of directors when the company filed particulars with the Registrar of Companies, it was held that such matters could be sorted out at the trial. The prosecution was not to be quashed. *Asanammal Karim v. Ceat Financial Services Ltd.*, (2002) 112 Com Cases 287 (AP).

A person who was managing director when the cheque was issued and he pleaded that he was no longer the managing director when the complaint was filed, the court said that the material date was not the date of the filing of the complaint but that of offence. *Srikanth (GS) v. Sri Lakshmi Financiers*, (1999) 98 Com Cases 321 (AP).

A managing director was allowed to be prosecuted where a cheque issued by him to pay salary was dishonoured though he claimed to have issued the cheque from his own account which the court said, could be decided only at the trial. The prosecution was under s. 138 of the Negotiable Instruments Act, 1881. *Jagarlamudi Durga Prasad v. State of A.P.*, (1993) 76 Com Cases 339 (AP); *Ashok Kumar Kaul v. Jagarlamudi Durga Prasad*, (1993) 76 Com Cases 339 (AP).

Where the cheque was issued by the managing director in his individual capacity, he alone was allowed to be prosecuted and not the company though the cheque was issued to discharge the liability of the company. *Gummadi Industries Ltd. v. Khushroo F. Engineer*, (1999) 98 Com Cases 296 (Mad) Notice sent to the managing director who was the signatory of the cheque at the company's address was held to be valid for the purpose of launching his prosecution for dishonour of the cheque. *Bilakchand Gyanchand Co. v. A Chinnaswami*, (1999) 98 Com Cases 573 : (2000) 37 CLA 11 (SC).

In another case a prosecution under the Act was not quashed because there was a specific allegation in the complaint that the officers named therein were responsible for day to day working of the business of the company and therefore, a *prima facie* case was made out. *Voltas Limited v. Hiralal Agarwalla*, (1992) 3 Comp LJ 241 (Cal); *CDR Shekhar Singh v. N.K. Wahi*, (2003) 113 Com Cases 293 (Delhi); *B.T. Gokhaleingh v. State*, (2003) 113 Com Cases 293. *V. Muthukumara Ramalingam v. State of A.P.*, (2003) 114 Com Cases 372 (AP), it is for the director to prove that he is not liable and, therefore, there could be no quashing at the initial stage. A complaint against the managing director was not quashed though there was no averment that he was incharge of affairs. The court said that the managing director is supposed to be incharge. *B Manipal Reddy v. State of AP*, (2000) 38 CLA 349 : (2001) 103 Com Cases 158 : (2001) 2 Comp LJ 126 (AP). But the proceedings were quashed where there were no allegations in the complaint that the directors in question were incharge of or responsible for day to day affairs of the company and since from the facts emerging out of the complaint, it could not be said that the accused had anything to do with the bouncing of the cheque. *Sharda Agarwal v. Additional Chief Metropolitan Magistrate*, (1993) 78 Com Cases 123 (All). Also to the same effect, *FMI Invest P. Ltd. v. State*, (2000) 99 Com Cases 17 (Del); *Jord Engineers India Ltd. v. Nagarjuna Finance Ltd.*, (2000) 100 Com Cases 691 (AP) prosecution quashed because the role of the director concerned was not explained. A proseuction was not quashed though the complaint did not specifically state that the director in question was responsible for the conduct of company's business but there were allegations indicating that he was actually participating in the company's affairs. *Sudheer Reddy (V) v. State of A.P.*, (2000) 99 Com Cas 107 (AP). The finance manager of a company was authorised by its Board to sign loan agreements on behalf of the company. He also signed the cheques in question. The complaint against him was held to be maintable though it did not contain details of the basis on which he incurred liability. *R.P. Balakrishna v. Muthoot Leasing and Finance Ltd.*, (2002) 112 Com Cases 191 (Karn). Where the alle-

gation is that the offence was committed with the connivance of or is attributable to the neglect of a director, it is not necessary to prove that he was incharge of the company's affairs. The words in sec. 141 "it is proved that the offence has been committed" do not mean that a director can be indicted only after proof. Proof can be adduced at the trial. *Laxmanan (N.) v. Sri Shanmukha Cotton Traders*, (2000) 102 Com Cases 154 (AP). The directors of a company who signed cheques for repayment of loans were held liable to be prosecuted because the cheques were dishonoured. *Orient Syntex Ltd. v. Besant Capital Tech. Ltd.*, (2000) 38 CLA 154 : (2001) 104 Com Cases 169 (Bom).

Effect of Company becoming Sick Industrial Company.—Where the offence under s. 138 was complete before the company was declared to be a sick industrial company, the prosecution of directors or other persons as enumerated in s. 141 was allowed to be continued. *Scan Organics Ltd. v. State of Maharashtra,* 2000 CLC 2111 (Bom).

Defence and burden of proof.—Where the accusation was discernible from averments in the complaint or statements answering the requirements of the section, a director so accused may show that he was not incharge of the company's affairs. Where other officers are also accused under the allegation of their connivance in the offence, burden would lie on the prosecution to prove such connivance. *Avon Industries Ltd. v. Integrated Finance Co. Ltd.*, (2001) 105 Com Cases 259 : (2001) 2 Comp LJ 347 (AP).

Resignation by officer director and quashing of complaint.—A director who had issued a cheque on behalf of the company could not escape liability by resigning subsequent to the receipt of statutory notice. *Krishna Bhoopal v. Sanam Jhansi Devi,* (2003) 113 Com Cases 363 (AP). A prosecution was not allowed to be quashed merely on the ground that the managing director who had signed the cheque had resigned by the time that the cheque was presented for payment. *Talavadi Rock and Mineral Products Ltd. v. Alwarpet Finance and Funds Ltd.*, (2001) 103 Com Cases 566 (Mad).

Resignation by director.—The court refused to exercised its inherent power to quash a proceeding againt a director who said that he had ceased to be director by resignation before the date of dishonour of the cheque. As long as there is the existence of an alternative remedy, inherent powers should not be used, the court said. *Kailash Rohera v. First Leasing Co. of India Ltd.*, (2003) 117 Com Cases 215 (Mad).

The question whether the person sought to be made liable was a director in fact at the time of the offence has been held to be a question which can be gone into at the trial and therefore the complaint was not to be quashed. *Santipriya Sen v. S.P. Bhattacharyya,* (2001) 106 Com Cases 124 (Cal). Where the director in question sought quashing of complaint on the ground that he had resigned before the cheque was issued, but the complainant doubted the genuiness of the documents relating to resignation, the court said that the prosecution could not be quashed. *Bharati N. Wadhwana v. Arun Kishandas Jaising,* (2003) 115 Com Cases 298 (Bom); *Anuradha v. Sat Pal Singh,* (2003) 116 Com Cases 78 (P&H), prosecution not quashed only because of the fact of resignation.

There was the averment in the complaint that all the directors of the company were responsible for the conduct of the company's business. There was a resolution of the company that the particular director who sought quashing of the complaint was not empowered to operate the company's bank account. This was held to be not sufficient to quash the complaint against that director. *M. Sivakami v. Bharat Ginning & Oil Mill Factory,* (2001) 105 Com Cases 925 (Guj).

Form No. 32 has been considered to be not conclusive as to the date of resignation. Where the director in question consistently relied upon his letter of resignation, the court said that the date shown on the letter could be taken as the date of resignation. The director could not be prosecuted for the offence committed after that date. *Pandurang Camotim Sancoalcar v. Suresh Prabhakar Prabhu,* (2003) 113 Com Cas 600 (Bom); *S.B. Shankar v. Amman Steel Corpn.,* (2002) 110 Com Cases 50 (Mad), Form 32 showed that the chairman had retired before the cheque was issued. Proceeding against him was quashed.

Prosecution of accountant.—Where the requirements of sections 138 and 141 of the Negotiable Instruments Act, 1881 are satisfied, the accountants of the company can be prosecuted. *Dev v. State of A.P.*, (2002) 108 Com Cases 607 (AP).

Absence of signature and company seal.—Where a cheque by which tax dues were paid came back dishonoured because of the absence of the managing director's signature and company's seal, it was held that there was not a ground for prosecution under s. 138. *Managing Director, Jindal Pranair Oxygen Co. Ltd. v. Asst. Commr. of Entry Tax*, (2001) 106 Com Cases 185 (Kant).

Effect of winding up.—In *Pankaj Mehra v. State of Maharashtra*, (2000) 100 Com Cases 917 : (2000) 2 JT 113 (SC), after analysing the scope and ambit of sections 441(2) and 536(2) of the Companies Act, 1956, and section 138/141 of the NI Act, the Supreme Court held that a company and its directors could not escape from penal liability under section 138 of the Act on the premise that a petition for winding up of the company had been presented and was pending during the relevant time. **Followed** in *Rajiv Gupta v. State*, (2001) 104 Com Cases 26 (Del).

§ See also notes under section 536 under the heading "Payment of Dishonoured Cheques."

Cheque issued by persons other than directors.—Where the cheque issued by an employee of the company was not stated to be on behalf of the company, the latter was not allowed to be prosecuted. *Janachaitanya Housing P. Ltd. v. P. Surya Kumari*, (2001) 105 Com Cases 180 (AP).

The company could not be regarded as the drawer of a cheque where a cheque was drawn on the company's account by a person who was neither a director nor a person-in-charge. *HND Mulla Feroze v. KVD Prasad Rao*, (2003) 114 Com Cases 325 (AP).

Issue of process.—Where no director or person was mentioned by name in the complaint against the dishonour of a company's cheque, it was held that the issue of process was not valid. *Charanjit Singh v. D.B. Merchant Banking Services Ltd.*, (2001) 105 Com Cases 299 (Del).

Exemption from personal attendance.—The trial court has to be moved at the first instance for granting exemption from personal appearance before it. *S. Madhava v. Can Bank Factors Ltd.*, (2003) 114 Com Cases 703 (Kant).

§ See also Notes under S. 47, *post*, under the heading "Criminal liability for dishonoured cheques under N.I. Act".

Income-tax Act

In a prosecution of a director under the Income-tax Act, 1961 for non-deduction of tax at source, there was no order by the Tax Authorities specifying any person as principal officer of the company, the prosecution was held to be not proper. *Greatway (P.) Ltd v. Assistant CIT*, (1993) 76 Com Cases 259 (P&H). Where the *income tax* return of a company showed false statements in the verification and a director who was a Government nominee was sought to be prosecuted for abetting one of the accused directors in making false verification, it was held that irrespective of the fact whether a nominee director could be prosecuted as such, the fact that he made himself a party to the abetment would put him in a different position and, therefore, the complaint should be allowed to proceed. *Sethuraman (J.) v. V. Thiruvengadathan, Inspecting Asst. Commr. of Income Tax*, (1992) 74 Com Cases 815 (Mad). Where the records showed that certain directors were incharge of the company's business, a complaint against them for offences by the company under the Income Tax Act, 1961 was held to be valid. *S.C. Gupta v. State*, (2002) 112 Com Cases 121 (Del).

Where the prosecution of the company for non-payment of TDS amount had to be dropped because the company could not be imprisoned, the prosecution of the principal officer of the company was allowed to be continued by virtue of the provision of s. 278B of I.T. Act, 1961, which carries the deeming provision that every officer incharge shall be

deemed to be guilty. *Tiwari (J.) v. Union of India,* (1997) 89 Com Cases 415, 419 (Cal). The Court **followed** *Pratap (M.R.) v. Muthukrishnan,* AIR 1994 SC 674 : (1992) 74 Com Cases 400, 406.

§ See also notes under section 197A under the heading "Managing Director is a Principal Officer for Income-tax Purposes" and under s. 291 under the heading "Liability in respect of Income-tax Return".

Consumer Protection Act.—A company is a person within the meaning of s. 2(1)(m) and s. 27 of the Consumer Protection Act, 1986 and, therefore, liable to be punished for dishonouring the decree of a consumer forum. A director of the company who is responsible for causing the disobedience is also liable to be prosecuted. *Ravi Kant v. National Commission,* (1997) 89 Com Cases 471 : (1997) 3 Comp LJ 174 (Del).

Central Excise and Salt Act, 1944.—Persons against whom charges were framed by the court were not able to produce any evidence in support of their innocence. The testimony of the Departmental witnesses remained uncontradicted. Their evidence showed that persons in question were incharge of and responsible for the conduct of the company's business. Charges framed by the trial court were confirmed. *Mahesh Kumar v. Union of India,* (1998) 3 Comp LJ 90 : (2001) 105 Com Cases 538 (MP).

In *Mulki Suryanarayanarao Rau v. Gurushant Gangadhar Kamble,* (1987) 89 Bom LR 178 (Bom), proceedings against a company, its directors and senior executive officers for evasion of excise duties were not allowed to be quashed. Where in a prosecution under s. 9 of the Central Excise and Salt Act, 1944, the liability to pay the tax money and fine was imposed on the company alone, it was held that the managing director was neither liable for the default nor he could be arrested and prosecuted for the same. *Hrushikesh Panda v. State of Orissa,* (1997) 89 Com Cases 613 at 618 (Ori). The Court **relied** on *Sheoratan Agarwal v. State of M.P.,* AIR 1984 SC 1824 wherein the Supreme Court noted that there are two categories of liability, *viz.,* liability of the company and the liability of person incharge and that one can exist without other. Thus it is clear that the company alone can be made liable and similarly an officer incharge can also be made liable alone.

False trade descriptions.—Directors were held liable under the [British] Trade Descriptions Act, 1968 for misstatements in a holiday brochure. There no delegation of responsibility in the matters to an employee. *Airtours v. Shipley,* (1994) 158 JPN 319.

Deposits.—Where directors were charged with the offence of permitting their company to accept a deposit whilst lacking authorisation from the Bank of England, it was held to be necessary for the prosecution to establish that they knew of the material facts that constituted the offence by the company and agreed to its conduct of its business on the basis of those facts. *Attorney-General's Reference (No. 1 of 1995),* The Times, January 30, 1996.

Applicable to private and public companies.—The provisions of this section apply to both public and private companies.

Applicability of *mens rea* after Amendment Act of 1988

Under the amended definition of "officer who is in default", it is not necessary to prove that the default has been committed by the officer knowingly or wilfully. Thus, *mens rea* is not an essential ingredient for establishing the offence in question. In *Sukhbir Saran Bhatnagar v. ROC,* (1972) 42 Com Cases 408 (Del), it was held that where there is failure to comply with a statutory provision and the mere failure is made punishable, it is a clear indication that *mens rea* is ruled out.

It may be noted that this section will be applicable only to those provisions which provide for punishment to 'officer in default' and it will not apply to provisions in which the said (or similar) expression has not been used. In case of latter mentioned provisions of the Act, *mens rea* will continue to be a determining factor and the prosecution will have to prove that the offence was committed knowingly or wilfully. *Mens rea* cannot always be attributed to all the directors of a company. It is, therefore, incumbent on the prosecution to fix the liability with respect to the particular officer and there should be a specific averment to that effect in the complaint. *Ajit Kumar Sarkar v. Asstt. ROC,* (1979) 49 Com

Cases 909 (Cal). **Followed** in *Registrar of Companies v. Bipini Behari Nayak,* (1996) 86 Com Cases 641 (Ori). In order that a conviction of an officer of a company may be sustained, the only thing the prosecution has to prove is that the particular officer knowingly and wilfully authorised or permitted the default. Authorization of default is not necessary to be proved as the offence is complete if the officer of the company knew of the default and permitted it. *Ballav Dass v. Mohan Lal Sadhu,* (1936) 6 Com Cases 432 : AIR 1936 Cal 237.

Where the directors of a company were required by the Central Government under section 233B to appoint cost auditor and in spite of a reminder, the directors did not do so, it was held that the directors were liable to be prosecuted and proceedings against them could not be quashed under section 482 of Cr.P.C., 1973 only because it was not shown that the directors fell within the meaning of 'Officers in default'. That is something which can also be taken care of during the trial. *Bimal Kumar Nopany v. ROC, A.P.,* (1990) 68 Com Cases 567, 570 (AP).

Mere default is enough to charge a company with penal liability; *mens rea* or negligence being not a relevant factor. *Public Prosecutor v. The Coimbatore National Bank Ltd.,* (1943) 13 Com Cases 50, 52 : AIR 1943 Mad 214.

Default: Meaning.—Default has been explained as meaning "nothing more, nothing less than not doing what is reasonable under the circumstances—not doing anything which you ought to do, having regard to the relation which you occupy towards the other persons interested in the transaction." BOWEN, LJ in *Re Young and Harstons Contract,* (1886) 31 Ch D 168 at 174. A wilful default has been defined thus : "An act or omission to do an act is 'wilful' where the person who acts or omits to act knows what he is doing and intends to do what he is doing and in case of breach of duty, it will be considered 'wilful' even if it arises out of being recklessly careless, even though there may not be knowledge or intent." *City Equitable Fire Insurance Co. Ltd. Re,* 1925 Ch 407 at 434 per ROMER J.

The suggestion by an officer proceeded against that he was not in default and that the default was due to circumstances beyond his control cannot be a ground for dismissal of the complaint before trial because these are the very matters which have to be examined at the trial. It is enough for the prosecution to show that there was a *prima facie* case. *Bachraj Baid v. State of West Bengal,* (1992) 74 Com Cases 809 (Cal).

Knowingly and Wilfully.—The term 'knowingly' means with knowledge of the facts, and 'wilfully' means deliberately, that is, acting as a free agent, such action arising out of the spontaneous expression of one's own will. See *In re Young and Harston's Contract, (Supra).* The expressions 'knowingly' and 'wilfully' would still be relevant in respect of the penal provisions of this Act, where the expression 'officer who is in default' (or similar expressions, *e.g.,* officer in default, officer of the company who is in default, etc.) have not been used.

The words "knowingly" or "wilfully" need not necessarily be suggestive of dishonesty or fraud on the part of those concerned. *Saraswathi Printers Ltd. v. State,* (1960) 30 Com Cases 523, 532 (Raj). Knowledge as officer of one company cannot be imputed to the other company where a person is an officer in two companies unless there is a duty to communicate the same to the other company. *Sree Meenakshi Mills Ltd. v. Ratilal Tribhovandas Thakar,* AIR 1941 Bom 108.

Where the averments in a complaint *prima facie* showed that the persons accused were officers in default, it was held that the mere fact that the complaint did not use the word 'knowingly' was not material. The trial Court could examine that aspect of the question. *First Leasing Company of India Ltd. v. Addl. ROC,* (1997) 89 Com Cases 635 : (1997) 26 Corpt LA 210 (Mad).

The words 'knowingly' and 'wilfully' cannot be applied to a company at all. A company, as a corporate body, cannot either 'know' or 'will'. The company is always liable

when return is not filed before the Registrar in time but the officers are liable only if they knowingly or wilfully commit or authorise or permit the default. *Public Prosecutor v. B.V.A. Lury Co.*, (1941) 11 Com Cases 331 : AIR 1942 Mad 75.

When Directors' knowledge is company's knowledge.—As to when the knowledge of an employee is to be considered the knowledge of the company for the purposes of charging the company with a liability which depends upon guilty knowledge see Notes under s. 34 under the above heading.

False averment in plaint.—False averments were made in a plaint made on behalf of a company regarding the repudiation of a contract. The company, its managing director and authorised representative were held liable to be prosecuted for fraud and perjury under the Indian Penal Code. *Seltron P. Ltd. v. Hooghly Mills Co. Ltd.*, (1997) 1 Comp LJ 389 (Cal).

Exemption from personal attendance

Certain directors were accused of certain offences. They appeared through counsel and undertook to appear before the court whenever called upon. The court granted them exemption from personal attendance at the first instance. *Siemens Ltd. v. NEPC Micon Ltd.*, (1999) 98 Com Cases 388 : (2000) 37 CLA 275 (Mad).

Jurisdiction for complaint

A company was the payee of a cheque. The company had its registered office in Coimbatore. The cheque was issued and dishonoured at Madras. It was held that the Coimbatore court had jurisdiction to take cognizance. *Agro Oil Traders v. South India Viscose Ltd.*, (1999) 98 Com Cases 798 (Mad).

Representation of company in proceedings

A company can be represented at a proceeding through any authorised officer, *e.g.*, the person incharge of production. *Hindustan Pulverising Mills v. State of Haryana*, (1995) 83 Com Cases 75 (P&H).

Effect of non-service of notice

Where the show cause notice remained unserved on the officer sought to be prosecuted, it was held that he could not be termed as an officer in default for his failure to give reply. *B. Sivandhi Adityan v. Additional ROC, Madras*, (1995) 83 Com Cases 616 (Mad). The court relied on *Assistant Registrar of Companies v. Southern Machineries Works Ltd.*, (1986) 59 Com Cases 670 (Mad); *V.M. Thomas v. ROC*, (1980) 50 Com Cases 247 (Ker).

Deemed officers in default

Since under Section 5, the managing director, the whole-time director, the manager and the secretary are deemed to be officers in default and in case of Board managed companies, all the ordinary directors, in the absence of specification of some director or directors as officers responsible, are deemed to be officers in default, the directorial class would do well to note their obligations.

Where all the directors of the company were notified by the ROC for the default in filing the annual returns and accounts and none of them made any reply, it was held that they could be treated officers in default for the purpose of maintaining a complaint. They could explain their position at the trial. *Asst. Registrar of Cos. v. Southern Machinery Works Ltd.*, (1986) 59 Com Cases 670 (Mad).

Institutional and nominee directors

§ For duties and responsibilities of such directors see Notes under S. 291 under the heading "Nominee Directors and Conflict of interest".

Offences covered by section 5

The expression 'officer who is in default' appears in several penal provisions of the Act, and the officers identified in section 5 above are liable for these defaults. The number of sections wherein the said expression appears are listed below:—

Section	Section	Section	Section
22(2)	111(12)	188(8)	303(3)
39(2)	113(2)	192(5)	304(2)
40(2)	115(6)	192(6)	307(7)
44(3)	117A(3)	192A(6)	307(8)
49(9)	117C(5)	193(6)	370(1E)
58A(5)(b)	118(2)	196(3)	372(8)
58A(6)(b)	127(2)	197(2)	372A(9)/(10)
72(3)	142(1)	205A(8)	374
73(2)	142(2)	209A(8)	383A(1A)
73(2A)	144(3)	218	391(5)
73(2B)	146(4)	219(3)	393(4)
73(3)	147(2)	219(4)	394(3)
75(4)	148(2)	220(3)	404(4)
76(5)	150(2)	223(4)	416(3)(b)
77(4)	151(4)	224(4)	423
77A(11)	152(3)	232	485(2)
79(4)	154(2)	233B(11)	493(3)
80(6)	157(3)	250(10)	500(5)
80A(3)(b)	158(9)	269(10)(b)	501(2)
84(3)	162(1)	269(11)	541(1)
89(3)	163(5)	292A(11)	581ZS(6)
95(3)	165(9)	293A(5)(b)	598
97(3)	168	294(8)	615(6)
107(5)	176(2)	301(4)	629A
111(9)	176(4)	302(5)	

Offences not covered by section 5

The expression 'officer who is in default' does not appear in many penal provisions of the Act, in respect of which the provisions of section 5 will have no application and prosecution, in such cases, will lie against the officers or persons specified, in respective sections. The provisions of the Act, not covered by section 5, are mentioned below:—

Section	Nature of offence	Persons who are Responsible
11(5)	Being a member of a company, association or partnership exceeding certain numbers	Every person who is a member.
25(10)	Failure to remove name of Chambers of Commerce consequent upon revocation of licence	Body making the default
44(4)	Filing with Registrar prospectus or statement in lieu of prospectus containing any untrue statement	Any person who authorised the filing of the document
56(3)	Issue of application form without salient features of prospectus or non-supply of copy of prospectus on demand	Any person who acts in contravention
58A(10)	Failure to comply with order of Tribunal granting extension of time for making repayment of deposits	Whoever fails to comply with the order
58AA(9)	Failure to comply with the provisions of section 58AA or CLB's order	Whoever knowingly fails to comply
59(1)	Issue of prospectus in contravention of section 57 or 58.	The company and every person who is know-

Section	Nature of offence	Persons who are Responsible
		ingly a party to the issue thereof
60(5)	Issuing prospectus without delivering copy to the Registrar or without endorsing on or attaching document with the prospectus	The company and every person who is knowingly a party.
63(1)	Mis-statement in prospectus	Every person who authorises issue of prospectus
68	Fraudulently inducing persons to invest money	Any person who, either by knowingly or recklessly making any statement, promise or forecast which is false etc.
68A(1)	Application made for subscription of shares in a fictitious name	Any person who makes an application in fictitious name, etc.
69(4)	Failure to keep application moneys in Scheduled Bank	Every promoter, director or other person who is knowingly responsible for such contravention
70(4)	Failure to file statement in lieu of prospectus	The company and every director who wilfully authorises or permits the contravention
70(5)	Delivery to the Registrar statement in lieu of prospectus which includes untrue statement	Any person who authorised the delivery of statement in lieu of prospectus for registration
75(4) proviso	Default in stating in return of allotment any shares as allotted for cash, if cash has actually not been received	Every officer or promoter who is guilty of contravention
105	Concealing name of creditor etc.	Any officer who knowingly conceals the name
116	Deceitfully personating as owner of any shares or interest in a company	Any person who deceitfully personates an owner
133(2)	Delivering debenture or certificate of debenture stock without endorsing on it certificate of registration	Any person who knowingly delivers or wilfully authorises or permits the delivery
137(3)	Default in complying with the provisions of section 137 regarding appointment of receiver or manager	Any person who makes default
143(2)	Failure to make entry in Register of charges	Any officer who knowingly omits or wilfully authorises or permits the omission

Section	Nature of offence	Persons who are Responsible
147(2)	Misuse of seal, letterheads, etc. by an officer	Any officer or any person on its behalf who uses or authorises the use of the seal, etc.
149(2A)	Commencement of any new business in contravention of this sub-section	Every person who is responsible for the contravention
149(6)	Commencement of business or exercising borrowing powers in contravention of section 149	Every person who is responsible for the contravention
202(1)	Discharging functions of a director by an undischarged insolvent	Any person, being an undischarged insolvent
203(7)	Acting as a director in contravention of the order of Court	Any person who acts in contravention of the order
207	Failure to distribute dividend within 30 days	Every director etc. who is knowingly a party to the default
209(5)/(7)	Failure to keep proper books of account	Persons referred to in section 209(6) who failed to take reasonable steps or charged for compliance of these provisions
210(5)	Failure to lay balance-sheet and profit and loss account at the AGM	Any director who fails to take all reasonable steps or person charged for compliance of these provisions
211(7)/(8)	Failure to prepare balance-sheet and profit & loss account showing a true and fair view	Persons referred to in section 211(6) or charged for compliance of these provisions
212(9)/(10)	Failure to attach accounts of subsidiary company, etc.	Persons referred to in section 212(6) or charged for compliance of these provisions
221(4)	Failure to disclose certain payments to the Company	Any person who knowingly makes default in performing the duty
234(4)	Failure to furnish information or explanation or production of books and papers	All persons who are officers of the company
240(3)	Disobedience to the Court's order directing production of books before inspector	Any person who fails without reasonable cause or refuses

Section	Nature of offence	Persons who are Responsible
248(4)	Failure to give information to the Central Govt., as required	Any person who fails to give information
250(9)	Exercise of right in respect of shares/debentures in violation of restrictions imposed by Tribunal	Any person who exercises any right, etc.
272	Acting as director without holding qualification shares	Any person who acts as such director
279	Holding office of director in more than 20 companies	Any person who holds such office
283(2A)	Functioning as a director after vacation of office	A person who knows that the office held by him has become vacant
286(2)	Default in giving notice of Board Meetings	Every officer whose duty is to give notice .
295(4)	Loans to directors etc. without approval of Central Govt.	Every person who is knowingly a party to the contravention including the person to whom loan is made
299(4)	Failure to disclose interest in a contract by the director	Every director who fails to comply
300(4)	Participation in Board Meeting by interested director	Every director who knowingly contravenes this provision
305(1)	Failure by a director, etc. to inform change of his particulars	Every such director, etc.
308(3)	Failure to make disclosure of shareholding by a director	Any person who fails to comply with this provision
320(3)	Failure to secure particulars regarding payment to directors stipulated in sub-section (1)	Any such director who fails to take reasonable steps
322(3)	Default in giving notice under this section	Any director etc. or officer who makes default
393(5)	Failure to give information by directors relating to compromise or arrangement	Every director and trustee for debenture holdings
407(2)	Acting as a director in contravention of section 407(1)(b)	Any person who knowingly acts
420	Failure to collect P.F. contribution and payment to the Trust	Any officer who knowingly contravenes this provision
424L	Violation of Part VIA or any scheme or order of the Tribunal or Appellate Tribunal or	Whoever violates or makes false statement

Section	Nature of offence	Persons who are Responsible
	making a false statement or giving false evidence.	or gives false evidence.
441F	Non payment of cess payable under section 441A	Company which is in arrears
446A	Books of account not completed and audited upto the date of winding up	Directors and officers of the company
454(5)	Default in making statement to Official Liquidator	Any person who does not comply with requirements of section 454
454(7)	Untruthfully claiming to be a creditor or contributory	Any person making the untruthful claim.
481(3)	Not forwarding copy & order of dissolution to the Registrar	The Liquidator
488(3)	Making a false declaration of solvency	Any director who makes the declaration
495(2)	Failure to call creditor's meeting	The Liquidator
496(2)	Failure to call general meeting and submit accounts	The Liquidator
497(3)	Failure to submit account and return of winding up to the Registrar and Official Liquidator	The Liquidator
497(7)	Failure to call final meeting after affairs of company are fully wound up	The Liquidator
509(3)	Failure to submit accounts and return of the winding up to the Registrar and the Official Liquidator (in case of insolvency)	The Liquidator
509(7)	Failure to call final meeting or meeting of creditors after affairs of company are fully wound up (in case of insolvency)	The Liquidator
514	Offering corrupt inducement to secure appointment or, prevent someone else's appointment as company's liquidator	The Liquidator
516	Failure to publish and give notice of appointment as liquidator	The Liquidator
538	Several acts of omission/commission committed before and after winding up	Past or present officers of the company
539	Falsification of accounts; destruction, mutilation, etc. of books, papers or securities	Any officer or contributory of the company which is being wound up
540	Acts done with intent to defraud creditors	Any officer of the company who committed the stipulated acts.
542	Business carried on with intent to defraud	Persons who were knowingly parties to the car-

Section	Nature of offence	Persons who are Responsible
	creditors or any other persons	rying on of business with intent to defraud, etc.
545	Commission of any offence in relation to the company	Any past or present officer or any member of the company who is found guilty
547	Failure to make statement in invoice/order, etc. that company is being wound up	Any officer, liquidator, receiver or manager who wilfully authorises or permits the default
550(4)	Improper disposal of books and papers after winding up	Any person who contravenes rules or directions.
551(4)	Untruthfully claiming to be creditor or contributory to obtain inspection of statement	Any person making the untruthful claim
551(5)	Failure to file statement, pending liquidation, to the court, Registrar or Central Government.	The Liquidator
559(2)	Failure to file certified copy of order of dissolution	Any person on whose application order was made
581U(3)	Failure to give notice of Board Meeting of Producer Company	Chief Executive of Producer Company
581ZM(1)	Use of 'Producer Company Ltd.' other than by a Producer Company	Any person who carries on business with such name
581ZM(2)	Failure to furnish information to any member of Producer Company	Director or any officer of Producer Company
581ZM(3)(a)	Failure to hand over custody of property, books of account, etc.	Director or officer of Producer Company
581ZM(3)(b)	Failure to convene annual general meeting	Director or Officer of Producer Company
606	Contravention of the provisions of sections 603, 604 and 605 relating to prospectus of foreign companies	Any person who is knowingly responsible
614A(2)	Failure to file document with Registrar as directed by Court	Any officer or employee who fails to comply with the order
628	False statement made in any return, balance-sheet, prospectus etc.	Any person making a false statement knowing it to be false, etc.
629	False evidence given on oath or in any affidavit	Any person who intentionally gives false evidence

Section	Nature of offence	Persons who are Responsible
630(1)	Wrongfully withholding of property of the company by an officer or employee	Who wrongfully withholds property
630(2)	Default in complying with the courts' order for deleting of property	Who fails to comply with courts' order
631	Improper use of the words 'limited' or 'private limited'	Any person or persons who trade or carry on business

Relief under section 633

An officer who is found to be in default or who is apprehending proceedings against him, may be relieved by the court of the consequences of default if he satisfies the requirements of S. 633. No relief can be granted to the company under s. 633.

§ See Notes under section 633.

Compounding offence.—The company and an officer in default as also persons responsible for compliance of the relevant provisions of the Act and punishable with fine or with imprisonment or with both can apply for compounding the offence under section 621A. See Notes under section 621A. The offences punishable with compulsory imprisonment are, however, not compoundable.

Filing of return with the Registrar

(1) The company shall, within thirty days of exercising its powers pursuant to the provisions of clause (f) or clause (g) of section 5 of the Act, file with the Registrar a return in Form 1AA duly signed by secretary or, where there is no secretary, by a director.

(2) Every return relating to exercise of power under clause (f) shall be accompanied by the consent given to the Board of directors by the person concerned in Form 1AB.

(3) Where, the consent given pursuant to the proviso to clause (f) of section 5 has been revoked or withdrawn, the company shall within thirty days of such revocation or withdrawal file with the Registrar a return in Form 1AC. See R. 4BB of the Companies (Central Government's) General Rules and Forms, 1956 in *Appendix 1*.

Relevant Rule and Prescribed Forms

§ For the Relevant Rule see Rule 4BB and for prescribed form see Forms 1AA, 1AB and 1AC in *Appendix 1*.

ICSI Guidance Note on Compliance Certificate

The ICSI has issued a check list for issue of Compliance Certificate under proviso to section 383-A(1) in respect of matters specified in companies (Compliance Certificate) Rules, 2001.

§ 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 : Officer who is in default

1. *Check* whether any person other than wholetime, managing director, manager or secretary is charged with the responsibilities? If so, check;

(i) whether consent of that person is obtained in Form 1AB.

(ii) whether Form 1AA is filed with the Registrar of Companies within 30 days from the date on which the person has been charged with the responsibility.

2. The company has either manager/wholetime director(s) or manager or secretary. If not, check;

Whether the Board of directors specified any person to be responsible for complying with any provisions of the Act. If so, *check*;

Whether Form 1AC is filed with the Registrar of Companies either for one or more directors or for all the directors.

Documents involved.—1. Board Resolution fixing up responsibility on any director or officer. 2. Letter of Consent. 3. Letter of withdrawal or revocation of consent 4. Return filed with the Registrar.

[1][**S. 6. Meaning of "relative".**—A person shall be deemed to be a relative of another if, and only if,—

(a) they are members of a Hindu undivided family; or

(b) they are husband and wife; or

(c) the one is related to the other in the manner indicated in Schedule I-A.]

NOTES

Companies (Amendment) Act, 1960

Recommendations of Committee.—The Companies Act Amendment Committee, 1957 made the following recommendations: "Section 6 contains a definition of the expression 'relative', occurring in various contexts in the Act as, for example, sections 2(3) and (4), 295, 297, 314, 354 to 360, etc. About 67, or according to another calculation, 81 persons standing in different degrees of relationship would come within the definition and it is highly inconvenient and in many cases, impracticable, for the director of a company to ascertain the different firms or companies in which any of the enumerated relatives is a partner or managing agent or director. Various suggestions were put forward, one of them being that section 6 should be omitted altogether and another to the effect that the words "whether by legitimate or illegitimate descent or by adoption and whether by full blood or half blood" should be deleted. Any change in the definition of 'relative' would affect the ambit and scope of several other important provisions of the Act referred to above. The omission of section 6 from the Act would, besides requiring the amendment of many other sections, run counter to the fundamental policy of the legislature in enacting those provisions. In this connection, it must be remembered that the practice of resorting to *benami* transactions in the names of relatives is prevalent in certain sections of the mercantile community and that this practice is often resorted to for concealing the identity or interest of the person standing to gain by questionable transactions. Having given our consideration to the objections put forward by various interests we think that a simpler and narrower definition of 'relative' should be substituted for the existing definition. Section 6 might run thus:—

"Two persons shall be deemed to be 'relatives' if and only if:—

(a) they are members of a Hindu undivided family; or

(b) they are husband and wife; or

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1. Subs. by Companies (Amendment) Act, 1960 (65 of 1960), s. 4.

(c) the one or the spouse of the one is related to the other or the spouse of the other as parent and child, grandparent and grandchild, or brother and sister; or

(d) the one is related to the other directly (and not by marriage only) as uncle or aunt, nephew or niece."

"Since the Mitakshara, the Dayabhaga, the Marumakhathayam and the Aliyasanthana are all parts of the Hindu law, though some of them are based on custom, specific reference to the different systems of Hindu law in this context would appear to be unnecessary. The section might be simplified as stated above. The revised definition suggested above would cut down the number of 'relatives' by more than half. The reference to relationship by adoption and illegitimate descent is out of place in a section which does not deal with the general law of inheritance and may be omitted." (*Report*: Para 26 Pages 23, 24).

The Notes on clauses in the Companies (Amendment) Bill, 1959 explained the reasons for substitution of this section as follows:

"The redraft of section 6 is based on the recommendation contained in para 26 of the Report so that in order to make it practicable for the officers of a company to comply with the provisions of the several sections in which the expression "relative" occurs, very remote relationships may be excluded from the purview of the definition." (*Clause* 4).

List of Relatives [Schedule I-A]

For convenience of reference, Schedule I-A is reproduced hereunder.

SCHEDULE I-A

List of Relatives

1. Father.
2. Mother (including step-mother).
3. Son (including step-son).
4. Son's wife.
5. Daughter (including step-daughter).
6. Father's father.
7. Father's mother.
8. Mother's mother.
9. Mother's father.
10. Son's son.
11. Son's son's wife.
12. Son's daughter.
13. Son's daughter's husband.
14. Daughter's husband.
15. Daughter's son.
16. Daughter's son's wife.
17. Daughter's daughter.
18. Daughter's daughter's husband.
19. Brother (including step-brother).
20. Brother's wife.
21. Sister (including step-sister).
22. Sister's husband.

While Schedule I-A mentions son's wife as a relative, it does not mention the reverse relationship husband's father as relative. If A is related to B as B's son's wife, B who is A's husband's father is not related to A in the manner indicated in Schedule I-A.

Scope of the term "relationship"

On a reference made by the Indian Banks' Association as regards the scope of the relationship listed in Schedule 1A, the Department of Company Affairs, stated that "section 6(c) of the Companies Act does not cover reciprocal relationships in the reverse direction" in the case of any of the 'relatives' enumerated in the Schedule, except those expressly included in the Schedule 'itself'. That is to say according to their view while a son-in-law (daughter's husband) or daughter-in-law (son's wife) is a relative of a father-in-law or mother-in-law, the father-in-law or mother-in-law is not a relative of the son-in-law or daughter-in-law as this reciprocal relationship is not expressly included in the list in the Schedule I-A. So also while a person's sister's husband is his relative, he himself cannot be treated as a relative of his sister's husband, because the latter relationship does not find mention in Schedule I-A. Similarly in the case of the other relationships enumer-

ated in that Schedule, the relationships in the reverse direction are not to be recognised so as to constitute the parties as relatives except where such reverse relationships are expressly included in the Schedule itself.

According to a *Departmental Clarification* (i) the relatives of a deceased spouse would be deemed to be relatives within the meaning of Section 6 (ii) the relationship by half blood will make the step brothers or the step mother of a person his relatives within the meaning of this section, (iii) where a person has been given away in adoption, he will cease to be a relative.

The definition does not take in an illegitimate child. *Lakshmikutty v. Mohandas,* AIR 1990 Ker 78, 81.

Effect of adoption

Where a person has been adopted by some third person, he ceases to have any relationship with his previous parents. Hence, a person who was related to a director as his son will not remain so related on his adoption by a third person within the meaning of section 6.

Provisions to which relationship is relevant

The definition of 'relative' is relevant for the following sections:—Ss. 3(1)(iii)(d), 294AA, 295, 297 and 314. The object is to put restrictions on the relatives of directors, holding offices of profit in the companies or having contractual and other business dealings with them and ensure that the powers of the directors are not abused to the detriment or loss of the companies in their charge and improper gain or other pecuniary advantage made by directors themselves and/or their relatives.

Members of Hindu undivided family

Department's Clarification.—The expression 'members of a Hindu undivided family' is a wider term than 'coparceners' and includes all female members, including the wives of coparceners. See *Departmental Clarification F. No.* 8/16(1)/62-PR.

S. 7. Interpretation of "person in accordance with whose directions or instructions directors are accustomed to act".—Except where this Act expressly provides otherwise, a person shall not be deemed to be, within the meaning of any provision in this Act, a person in accordance with whose directions or instructions the Board of Directors of a company is accustomed to act, by reason only that the Board acts on advice given by him in a professional capacity.

NOTES

Eng. Act, 1948 : Sec. 455(2)
Eng. Act, 1985 : Part XXVI

Shadow directors

In several sections of the Act [sections 162(2), 239(1)(c), 295(1)(e), 303(1), *Explanations*, 305, 307(10)(a) and (b)(i), 308, 538(3) and Schedule V [Part II—Note—"Director"] prohibitions, restrictions, duties and liabilities are imposed on persons in accordance with whose directions or instructions the directors of a company are accustomed to act and penalties are also imposed on them for contravening certain provisions. As it is not the intention of the Act to bring within this category of persons, professional advisers, such as, solicitors and auditors, the present section is enacted in order to make it clear that such persons, by reason only of giving advice in their professional capacity, do not come within the category. The words 'by reason only' show that a lawyer, accountant, technician or other professional adviser will not come within the expression 'person in accordance with whose directions or instructions the Board of directors of a company is ac-

customed to act' only when his advice is professional advice *i.e.*, advice given in his professional capacity. If he gives any extra-professional advice or instructions and the Board is accustomed to act according to his advice or instructions, he will come within the expression.

Recommendation of Company Law Committee.—The Company Law Committee on whose recommendation the section is enacted thus explain the provision : "In order to safeguard the position of professional advisers like solicitors, auditors and others, and to limit their liability, we consider it desirable to incorporate a sub-section similar to sub-section (2) of section 455 of the English Companies Act, 1948, with the proviso that this sub-section should apply except where the Act otherwise prescribes. This sub-section provides that a person shall not be deemed to be a person in accordance with whose direction or instructions the directors of a company are accustomed to act merely by reason of the fact that the directors of the company act on advice given by him in a professional capacity. Unless this immunity is given to professional advisers, like solicitors and auditors, it will be difficult for them to carry on their professional work. In several sections of the Act (*Cf.* our re-draft of section 86-D of Item II of the Addendum to the Annexure) we have recommended that certain prohibitions or restrictions should be imposed on directors and managing agents and on those persons in accordance with whose directions or instructions they are accustomed to act, and that the penalties which we have proposed for directors and managing agents who contravene the provisions of these sections should also extend to the latter category of persons. It is not our desire that professional advisers should come within these restrictive or penal provisions of the Act merely because they have tendered advice to directors and managers concerned and the latter have acted on such advice." (*Report* para 30).

This section was thus further explained in the Lok Sabha: "If this clause is removed, the effect would be, if some professional persons render their advice to the company for doing certain things in the company, and if the directors act according to that advice, those professional persons would also be roped in. In order to give exception to these professional people, this clause is put in here .... This provision which we have made is a copy of sub-section (2) of section 455 as it stands in England. There the necessity for this provision arose on account of two reasons. Firstly they say that there are directors who are not shareholders themselves. The real shareholders are outsiders. They merely nominate the directors. The real seat of power is somewhere else. The directors are only the nominees of the shareholders and they act only according to the wishes of shareholders who do not come on the Board of the company, but who remain outside. These directors who are only the creatures of such shareholders, carry out the wishes of the shareholders, in which case, where a liability arises, the shareholders where the power really resides escape, and the directors who are their creatures are roped in. In order that this may not happen, the section was enacted there. Secondly this may also happen because of nominee shareholdings." ("Speech of Shri R. R. Morarka explaining the Joint Committee Report on the Bill" *Lok Sabha Debates*, 24th August, 1955, pages 11, 178).

Scope of section

As per section 2(30), 'officer' includes any person in accordance with whose directions or instructions the Board of directors or any one or more of the directors is or are accustomed to act.

The definition of shadow director has to be construed in accordance with the purpose of the legislation. The definition is meant to identity those, other than professional advisors, with real influence over the corporate affairs and over the whole field of the company's corporate activities. The concepts of "direction" and "instruction" do not exclude the concept of advice. *Secretary of State for Trade and Industry v. Deverell*, (2000) 2 WLR 907 : (2002) 111 Com Cases 303 : (2001) CLC 905 (CA) : (2000) 2 BCLC 133, (CA).

The person in accordance with whose directions or instructions, directors are accustomed to act need not necessarily be an individual. The person may be a body corporate. Generally holding companies may come under this term in relation to the directors of their subsidiary companies. See *Gramophone & Typewriter Ltd. v. Stanley,* (1908) 2 KB 89 (CA).

Any body corporate or individual holding more than 50% voting power or having control over the majority of directors in the Board may come within the section.

Further any body corporate or individual or individuals who, even though holding less than majority voting power, in fact are in a position to control the whole or a majority of the Board, will also come under the section. The idea underlying the provisions of the section seems to be to hold responsible those persons who truly control the company and are able to pull the strings by appointing as directors their own puppets or subservients.

As the word 'person' includes persons, there may be two or more persons under whose directions or instructions the directors of the company will be accustomed to act *e.g.* in the case of a subsidiary's subsidiary, both the holding company and the subsidiary may direct or instruct.

'Accustomed to act'.—The words 'accustomed to act' imply more than a casualness in the acting. They require some sort of casualness or general conduct on the part of the directors indicating that they are in the habit of carrying out the instructions or directions of the third person concerned. The position will have to be decided on the facts of each case. And going by the facts in *A Company (No. 005009 of 1987), Re,* 1989 BCLC 13 (Ch D) the court agreed that by virtue of the power to dictate a course of action on the part of the company's directors about the way in which they would handle the moneys received by the company, the bank might be regarded as occupying the position of shadow director. The Court however did not consider that matter further because it would have made no difference to the result of the case. In another case a bank nominated two directors on the Board of a company of brokers and the angle of the bank being held liable as a shadow director was not considered because all the directors of the company had to be accustomed to act on the bank's directions and instructions. *Kuwait Asian Bank EC v. National Mutual Life Nominees Ltd.,* (1990) 3 All ER 404. This question was again raised in *M.C. Bacon Ltd., Re,* 1990 BCLC 324 but the allegation was abandoned because the evidence did not support it.

It is possible for a holding company to be a shadow director of its subsidiary companies. But not necessarily so. For observations to this effect see *Gramophone and Typewriter Ltd. v. Stanley,* (1908) 2 KB 89 (CA). In order to prove a shadow directorship, it must be shown that the directors of the company did not exercise any discretion or judgment of their own, but acted in accordance with the directions of the alleged shadow director. Following this approach in *Hydrodam (Corby) Ltd., Re,* (1994) 2 BCLC 180 it was held that where a parent company gave its sanction to a subsidiary for the disposal of the subsidiary's assets, this would not constitute the parent company as shadow director of the subsidiary. The so called sanction was an approval by a majority shareholder (parent company) in its capacity as a shareholder and not as a controller from behind. As long as the decision was made by the directors of the subsidiary, exercising their own independent discretion and judgment, and the parent company only approved or authorised the decision, the parent company would not be a shadow director. The decision has been criticised because it seems to carry the matter beyond the statutory standard of being "accustomed to act." This expression may be satisfied even if the directors of the company are exercising some discretion of their own and have not surrendered to the directions of the parent company. This matter was also considered without going into any detailed legal analysis in *A Company Re, (No. 005009 of (1987),* 1989 BCLC 13 (Ch D); *Tasbian Ltd. Re (No. 3),* 1993 BCLC 297 (CA) and *Kuwait Asia Bank EC v. National Mutual Life Nominees,* (1990) 3 All ER 404 (PC).

Services given by the directors of the holding company to the directors of the subsidiary in a professional capacity do not make the advisors liable as shadow directors. [S. 741(2) the English Companies Act, 1985.]. Similarly, an advise by the landlord company to its tenant company that the latter's directors must attend weekly management meetings and that the tenant company should decide which creditors were to be paid, was not sufficient to make the landlord company liable as shadow director. The Court said that a complete control of a company's affairs would be necessary before a person could be taken to be a shadow director of the company. *PFTZM Ltd., Re,* (1995) 2 BCLC 354.

Where a company was in the position of being a shadow director of another company, it was held that by that reason alone its directors would not become the shadow directors of the other company. *Secretary of State for Trade and Industry v. Lang,* (1996) 2 BCLC 324 (Ch D).

The reference to a person in accordance with whose directions and instructions the directors were "accustomed to act" does not require that there be formal or all-encompassing directions or instructions. Where a person had strategic control of the companies and defined the context in which they operated and contrived significant transactions involving breaches of trust and the board was often required to act partially toward him, he came in the category of shadow director. Where a director of a trust company knowingly or recklessly assisted in or procured a breach of trust or fiduciary duty by a trustee, he was liable for that breach and was held to be exposed to the full range of equitable remedies available as against the trustee. The accessorial liability of directors in the case was not limited to breaches of trust by their companies, but also extended to dealing with other companies in the group. *Australian Securities Commission v. A.S. Nominees Ltd.,* (1995) 133 ALR (Aust) : (1996) 22 Comm LB 111 (FC). The Court **applied** the decisions in *Barnes v. Addy,* (1874) LR 9 Ch App 244; *Young v. Murphy,* (1994) 13 ACSR 722 (Aust); *Biala Pty. Ltd. v. Mallina Holdings Ltd.,* (1993) 11 ACSR 785 (Aust).

Though the expression 'accustomed to act' has been adopted from section 125(4) of English Act of 1948 a little analytical thinking, will show that the word or words "obliged" or "under obligation" will be better than 'accustomed' as what is sought to be expressed is a feeling of compulsion to act.

Position of shadow directors

Persons who direct the affairs of a company from behind by giving directions and instructions to the company's Board of directors are described by the words 'shadow directors'. For some of the provisions of the Act they are treated the same way as other directors but the fact remains that they do not occupy the position of directors in the company and that the concept has been evolved to prevent violations of the Act by indirect methods. Fiduciary duties can also apply to such persons *Yukong Line Ltd. v. Rendsburg Investments Corpn. of Liberia,* (1978) 1 WLR 294 at 311. The different provisions of the Act under which their existence becomes relevant are, *e.g.* section 299, disclosure of interest, this requirement is applicable to a shadow director also, but he being not a member of the Board nor entitled to attend meetings, he has to disclose his interest by a notice in writing to the directors; section 295 which deals with loans to directors is also applicable to shadow directors; transactions involving loans guarantees, etc. coming within scope of section 295 have to be disclosed in notes of annual accounts; section 203 under which undesirable persons can be kept out of the management of companies applies to shadow directors also because they indirectly participate in management.

§ See also Notes under section 2(30) and section 5 *ante.*

***De facto* directors**

A *de facto* director is something different from a shadow director. A *de facto* director is an individual who is holding himself out as a director without any formal appointment to any such position. A shadow director, on the other hand, exercises real (but clandestine)

control over the nominal directors of the company. The court did not agree to this general proposition that where a company is controlling another company (subsidiary) its directors would automatically become the *de facto* or shadow directors of the subsidiary. *Hydrodam (Corby) Ltd., Re,* (1994) 2 BCLC 180 (Ch D). MILLETT J said (at 183) :

'A *de facto* director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a *de facto* director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level.' And, a little earlier (at 182), MILLETT J. pointed to the purpose of any test by saying:

'Liability for wrongful trading is imposed by the Act on those persons who are responsible for it, that is to say, who were in a position to prevent damage to creditors by taking proper steps to protect their interests. Liability cannot sensibly depend on the validity of the defendant's appointment. Those who assume to act as directors and who thereby exercise the powers and discharge the functions of a director, whether validly appointed or not, must accept the responsibilities which are attached to the office.'

The above definition was **applied** in *Secretary of State for Trade and Industry v. Morral,* (1996) BCC 229 but it was criticised by LLOYD J. in *Re Richborough Furniture Ltd.,* (1996) 1 BCLC 507 principally as to the need for any element of holding out. He substituted a revised version of the other element in MILLETT J.'s defintion, *i.e.* as to the necessary acts:

"It seems to me that for someone to be made liable..... as a *de facto* director, the court would have to have clear evidence that he had either been the sole person directing the affairs of the company..... or, if there were others who were true directors, that he was acting on an equal footing with the others in directing the affairs of the company. It also seems to me that, if it is unclear whether the acts of the person in question are referable to an assumed directorship, or to some other capacity such as a shareholder or, as here, a consultant, the person in question must be entitled to the benefit of the doubt." [(1996) 1 BCLC 504 at 524]

That test was **approved** and **applied** in *Secretary of State for Trade and Industry v. Laing,* (1996) 2 BCLC 324 with the gloss that even if one particular act could be regarded as amounting to a *de facto* directorship, that would not mean that the person continued to act as such. One can cease to be a *de facto* director simply by ceasing to act as such. The person in question has to be given the benefit of doubt where his acts are of a different nature than those of a director. *Secretary of State for Trade and Industry v. Hickling,* (1996) BCC 678 and *Re Sykes (Butchers) Ltd.,* (1998) 1 BCLC 110.

These propositions were cited by JACOB J in *Secretary of State for Trade & Industry v. Tjolle,* (1998) 1 BCLC 333 at p. 343, who proceeded further to say as follows : "For myself I think it may be difficult to postulate any one decisive test. I think what is involved is very much a question of degree. The court takes into account all the relevant factors. Those factors include at least whether or not there was a holding out by the company of the individual as a director, whether the individual used the title, whether the individual had proper information (*e.g.* management accounts) on which to base decisions, and whether the individual had to make major decisions and so on. Taking all these factors into account, one asks 'was this individual part of the corporate governing structure', answering it as a kind of jury question. In deciding this, one bears very much in mind why one is asking the question. That is why I think the passage I quoted from MILLETT J is important. There would be no justification for the law making a person liable to misfeasance or disqualification proceedings unless they were truly in a position to exercise the powers and discharge the functions of a director. Otherwise they would be made liable for events over which they had no real control, either in fact or law."

"An alleged *de facto* director can only be such by reason of the factual position. *De jure* directors have both common law and statutory powers and duties. In particular they are entitled to be at the heart of the company, and to have proper details of its financial position. They cannot be heard to say : 'I had no way of knowing what the position was'. But an alleged *de facto* director is in a different position. *De facto* they may have had no knowledge and no right or means to have that knowledge. This is important in this case, because the Secretary of State's case in part relies on what he alleges Mrs. Kenning *ought* to have known. Mr. Davies contends that one is either a director or not. He says there are no different rules for *de facto* directors as opposed to *de jure* directors. I think that must be right, but I think it follows that someone who has no, or only peripheral knowledge of matters of vital company concern (*e.g.* financial state) and has no right, legal or *de facto*, to access to such matters is not to be regarded by the law as in substance a director."

The Court of Appeal reviewed authorities in *Kaytech International plc.*, (1999) 2 BCLC 351 (CA); *Secretary of State for Trade and Industry v. Kaczer*, (1999) 2 BCLC 351 (CA) and observed that there was no single test. It was a question of considering all the relevant factors, including, but not limited to, those set out by JACOB J. in *Tjolle's* case. The individual concerned must have assumed the status and functions of a director, so as to have openly exercised real influence in the corporate governance of the company. In the present case the second 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 de jure secretary and his professional status as 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 Disqualification of Directors Act, 1986.

§ See also Notes under s. 4 *ante* under the heading "Position of holding Company's Director", under s. 203 under the heading "Disqualifying *de facto* and shadow directors".

Directors of holding company.—The directors of a holding company do not *ipso facto* became the *de facto* directors of the subsidiary company. Accordingly a liquidator's attempt to hold two directors of the holding company liable for wrongful trading by the subsidiary was not successful. He had to show either that they were the directors of the company or that they were controlling the company from behind so as to come in the category of *de facto* or shadow directors, something which he could not do. *Hydrodam (Corby) Ltd., Re*, (1994) 2 BCLC 180 (Ch D).

§ See also Notes under section 4 *ante*.

S. 8. Power of Central Government to declare an establishment not to be a branch office.—The Central Government may, by order, declare that in the case of any company, [1][* * * *] any establishment carrying on either the same or substantially the same activity as that carried on by the head office of the company, or [2][any establishment engaged in any production, processing or manufacture,] shall not be treated as a branch office of the company for all or any of the purposes of this Act.

NOTES

Companies (Amendment) Act, 1960

The original exemption of banking and insurance companies has been removed. The other amendment is consequential on the definition of "branch office" in sec. 2(9).

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1. The words "not being a banking or an insurance company" omitted by Act 65 of 1960, s. 5.
2. Subs. by Companies (Amendment) Act, (65 of 1960), s. 5.

Object of section

The object of this section is to empower the Central Government to deal with cases where companies having manufacturing or producing centres outside the locality where their registered office or head office or principal office is situate, try to evade the scrutiny and/or proper checking of the accounts kept at those centres, by merely complying, with the requirement of submission of branch returns from those centres, as provided by sub-section (2) of section 209.

The power of the Central Government to declare that an establishment shall not be treated as a branch office is apparently not extended to an establishment described as a branch by the company itself, unless such establishment falls within clauses (b) and (c) of the definition given in section 2(9). It may be noted that the present section does not cover cases of sub-clause (a) of that definition.

The provision has also an important bearing in relation to audit (Cf. sections 227 and 228).

§ For further details see Notes under section 2(9) *ante*.

S. 9. Act to override memorandum, articles, etc.—Save as otherwise expressly provided in the Act—

(a) the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its Board of Directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and

(b) any provision, contained in the memorandum, articles, agreement or resolution aforesaid shall, to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be.

NOTES

Companies Act, 1956

The Notes on clauses in the Bill explained as under the need of a provision of this kind: "This is intended to make it clear that the provisions of this Bill will override the memorandum, articles and agreements executed by the company, and resolutions passed in general meeting by the company and resolutions passed by the directors of the company, unless it is expressly provided otherwise in the Bill itself. This clause will apply whether the memorandum or articles, agreements or resolutions, be before or after coming into operation of this Bill." (*Notes on clause 7* of Companies Bill, 1953).

Thus, on the commencement of this Act, any provision in the memorandum, articles, resolutions, etc., of an existing company became void to the extent it was repugnant to or irreconcilable with the provisions of the Act, but only to that extent and no further.

Scope of section

Section 9 will override the provisions of a company's memorandum and articles to the extent they are inconsistent with the provisions of the Companies Act. It comes into play when there is a conflict between the Act and the Company's Memorandum or Articles of Association or in any agreement or resolution passed by the directors or in the general meeting. For example, if the company's articles provide that the quorum at the general meeting would be three members personally present, it will be void inasmuch as it is repugnant to section 174(1). But when a larger quorum than 5 persons is provided, it will not be assailed. In *Amrit Kaur Puri v. Kapurthala Flour, Oil and General Mills Co. P.*

Ltd., (1984) 56 Com Cases 194 (P & H) an article of a private company providing for a larger quorum than that prescribed by S. 287(2), was held to be valid.

Section 9 of the Companies Act, 1956 is specific and the provision of the Act shall apply in all matters where there is a specific provision. However, the provisions of the articles shall apply where they are more stringent than what is prescribed by the Companies Act. For example, where the Act provides for sanction by a general meeting by ordinary resolution and the articles provide for special resolution, the provisions of the article shall prevail.

The articles of a private company prescribing share qualifications in the terms of S. 270, the section being not applicable to private companies, has been held to be void and therefore a director was not permitted to be removed under automatic vacation of office under S. 283, when he failed to take his qualification shares as required by the articles. *Surjit Malhan and B.K. Malhan v. John Tinson and Co.*, ILR (1985) HP 135, 175. A provision in the articles of a company depriving the company of its power to increase capital is void because it runs against S. 94, *Miheer Hemant Mafatlal v. Mafatlal Industries Ltd.*, (1987) 89 Bom LR 86 (Bom).

A provision in the articles regarding declaration of dividend at an extraordinary general meeting is void. *Raghunandan Neotia v. Swadeshi Cloth Dealers Ltd.*, (1964) 34 Com Cases 570 : AIR 1964 Cal 347. An agreement for appointment of a sole-selling agent without complying with the provisions of section 294(2) is void. *Arantee Manufacturing Corporation v. Bright Bolts Private Ltd.*, (1967) 37 Com Cases 758 : AIR 1967 Bom 440.

A provision in the articles empowering the managing director to appoint any person to be the managing director by will, is, however, valid, as it does not contravene section 312; this, section speaks of "assignment" and not "appointment" *Oriental Metal Processing Works Ltd. v. Bhaskar Kashinath Thakoor*, (1961) 31 Com Cases 143 : AIR 1961 SC 573.

One possibility of a conflict arises, when the Companies Act is amended requiring all the existing companies to modify their memorandum and articles to the requirements of the new Act. If they do not do so the inconsistent provisions in their memorandum and articles will automatically stand nullified. *Mahant Vaishnava Dass v. Shri Fakir Chand*, AIR 1968 Del 6.

The section must be read along with section 657, which saves the regulations in Table A of Schedule I of Act VII of 1913 and similar regulations in previous Companies Act, so far as those regulations apply to any company existing at the commencement of this Act, *i.e.* 1st April, 1956. In the case of existing companies which have adopted Table A of Schedule I of the Companies Act of 1913, section 657 says that "nothing in this Act shall affect..." In the case of such companies, the provisions of the present section will have to be applied only subject to that saving section.

The provisions of section 76 have been held to govern agreements to pay commission made prior to the coming into force of this Act. *Madanlal Fakirchand Dudhadiya v. Shree Changdeo Sugar Mills Ltd.*, (1958) 28 Com Cases 312 : AIR 1958 Bom 491, **affirmed** in *Madanlal Fakirchand Dudhadiya v. Shree Changdeo Sugar Mills Ltd.*, (1962) 32 Com Cases 604 : AIR 1962 SC 1543.

The provisions of the Act for this purpose are taken to mean not only what they prescribe directly but also by necessary implication, *Cricket Club of India Ltd. v. Madhav L. Apte*, (1975) 45 Com Cases 574 (Bom). In the winding up of a company, however, such a conflict ceases to be of any practical value because winding up is conducted largely in accordance with the provisions of the Act. *Globe Motors Ltd. v. Globe United Engineering and Foundry Co. Ltd.*, (1975) 45 Com Cases 429 (Del—DB).

Provisions of memorandum and articles conflicting with other laws equally void

Provisions conflicting with other laws would be equally void. Section 22A(3) of the Securities Contracts (Regulation) Act, 1956 before its repeal permitted a few specified restrictions on transferability of shares of listed public companies. The articles of such a company containing an additional restriction, *e.g.*, share-transfers in less than lots of 50 would not be accepted, would be void to that extent. *Kinetic Engg. Ltd. v. Sadhana Gadia* (1992) 74 Com Cases 82, 88, **following** *Co-operative Central Bank Ltd. v. Additional Industrial Tribunal,* (1970) 40 Com Cases 206 : AIR 1970 SC 245 (conflict between bye-laws of a co-operative society and the Co-operative Societies Act).

Any provision in the articles of a public company which was destructive of free transferability of shares in a manner not permitted by S. 22A of SCRA (now repealed) was held to be void. *Shree Madhu Industrial Estates Ltd. v. Arjun S. Kalro* : (1997) 1 Comp LJ 318 (CLB—PB).

S. 10. Jurisdiction of Courts.—(1) The Court having jurisdiction under this Act shall be—

(a) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any District Court or District Courts subordinate to that High Court in pursuance of sub-section (2); and

(b) where jurisdiction has been so conferred, the District Court in regard to matters falling within the scope of the jurisdiction conferred, in respect of companies having their registered offices in the district.

(2) The Central Government may, by notification in the Official Gazette and subject to such restrictions, limitations and conditions as it thinks fit empower any District Court to exercise all or any of the jurisdiction conferred by this Act upon the Court, not being the jurisdiction conferred—

(a) in respect of companies generally, by sections 237, 391, 394, 395 and 397 to 407, both inclusive;

(b) in respect of companies with a paid-up share capital of not less than one lakh of rupees by Part VII (sections 425 to 560) and the other provisions of this Act relating to the winding up of companies.

(3) For the purposes of jurisdiction to wind-up companies, the expression "registered office" means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up.

NOTES

IMPORTANT NOTE

Curtailment of Civil Court Jurisdiction by the Companies (Second Amendment) Act, 2002 [11 of 2003].—The Civil Courts have been deprived of their jurisdiction to a very large extent by the Companies (Second Amendment) Act, 2002. New Forums, namely National Company Law Tribunal and National Company Law Appellate Tribunal have been formed to take over the complete jurisdiction of the Company Law Board, BIFR and to a very large extent that of the Civil Courts and High Courts. Now only a few points of jurisdiction on company matters will survive with Civil Courts/High Courts.

The experience gained from Court decisions on matters which now stand transferred to the new Forum (NCLT/NCLAT) and which is reflected by a large number of Court decisions detailed in the commentary on the section will remain a useful accumulation of knowledge on the subject of company law because the decisions of the new Forum may go under the appeal processes upto the Supreme Court and there the same principles will be of great guidance. The whole commentary has been retained here for that useful purpose.

—Editors

Companies Act, 1956

The Notes on clauses explained as under: "This is based on the recommendation made by the Company Law Committee in paragraph 31 of its Report. In regard to winding up, the District Court may be invested with jurisdiction only in respect of companies whose paid-up share capital is one lakh of rupees or less. In respect of certain other specified matters chief among which are those relating to investigation, and remedial action where the company acts either oppressively, or prejudicially to the intersts of the company, jurisdiction will vest exclusively in the High Court." (*Clause* 8 of the Companies Bill, 1953)

Recommendation of Company Law Committee.—The Company Law Committee recommended as follows: "The only important recommendation on the question of jurisdiction that we make is that certain types of suits and proceedings under the Companies Act should be triable exclusively in the High Courts. In Chapter XIII we have suggested that sections 164 and 165 of the Indian Companies Act should be so amended as to provide that winding up proceedings in respect of companies with a subscribed share capital of rupees one lakh and over should take place only in the High Courts. We would further suggest that suits arising out of the new sections 153C and 153D, which we propose on the broad lines of section 210 of the English Companies Act, 1948, should also similarly be exclusively triable in the High Courts. The evidence that we received on this subject was, on balance, definitely in favour of the centralisation of jurisdiction in difficult and complicated matters arising out of the Indian Companies Act like those mentioned above. The only argument against this recommendation was the possible increase in costs to litigants in the districts, but from the testimony of well-informed witnesses who appeared before us, we gathered that even at present in all complicated cases of the type we have in mind, it was usual to obtain legal assistance at considerable cost, from the bars attached to the High Courts. We do not, therefore, think that the additional cost to litigants in the districts, that is likely to result from our recommendation, would be appreciable. In any case, the case for the centralisation of jurisdiction in the type of cases that we have in view is so strong that we do not hesitate to recommend this step.

"There is one point arising out of our recommendations to which we would like to draw particular attention. While we have been unable to accept the suggestion in the Government Memorandum that the jurisdiction of District Courts should be widened and uniform powers should be conferred on them, and have recommended instead that certain types of cases under the Indian Companies Act will be triable exclusively by the High Courts, we would like to make it clear that our recommendations on this point are subject to administrative arrangements being made by the High Courts concerned to dispose of such suits and proceedings as expeditiously as possible. We were told by witnesses that congestion of work in some of the High Courts was considerable. If this is so, we suggest that company cases should receive priority and as far as possible should be allotted to a special judge in each High Court." (*Report*: Para 31 Page 27).

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

Setting up of National Company Law Tribunal.—As per changes made by the Companies (Second Amendment) Act, 2002 (11 of 2003), National Company Law Tribunal has been set up under Part 1B to the Act [sections 10FB to 10FP] with powers and jurisdiction presently exercised by the High Courts relating to winding up and recon-

struction/amalgamation of companies and by the Company Law Board under the Act. As a result, the powers of the High Courts are now confined to the following sections:

Courts have now no power in relation to winding up of companies. The powers under sections 101-104, 237, 391, 394, 395, 397 and 398 are now vested in the Tribunal. However, no consequencial amendments have been made in sub-sections (2) and (3) of this section.

Under section 10GB, Civil Courts have now been barred from exercising jurisdiction in respect of any matter which the Tribunal or Appellate Tribunal is empowered to determine.

POWERS VESTED WITH COURT

Section No.	Subject Matter
Sec. 81(7)	Appeal to Court if the terms and conditions of conversion of debentures or loans into shares are not acceptable to the company.
Sec. 119(4)	Approval of Court for calling debenture-holders meeting for giving benefit to debenture trustees;
Sec. 203(1)	Power of Court to restrain fraudulent persons from managing companies.
Sec. 237(a)(ii)	Investigation of company's affairs;
Sec. 424L(2)	No court to take cognizance of any offence under sub-section (1) except on a complaint in writing of an officer of the NCLT or NCLAT or any officer of the C. Govt.
Sec. 581ZN(16)	Appeal to the High Court by any member or creditor or employee aggrieved by the transfer of assets, division, amalgamation a merger of producer companies;
Sec. 581ZS(1)	Reconversion of producer companies to inter-state co-operative society
Sec. 630(2)	Penalty for wrongful withholding of property
Sec. 633(3)	Power of Court to grant relief in certain cases

Note : The commentary under this section with powers of the Court in winding up matters and concurrent jurisdiction of Civil Courts has been retained, for reference purposes.

Jurisdiction of High Courts/District Courts [Sub-section (1)][1]

Except to the extent to which any jurisdiction is expressly conferred on the District Court either by this Act or by the Central Government by notification in the Official Gazette, all residuary jurisdiction under the Act is vested only in the High Courts. See *All India Motor Transport Mutual Co. Ltd. v. Raphael George,* (1963) 33 Com Cases 1166, 1172 (Bom); *Benaras Bank Ltd. v. Jyoti Bhushan Gupta,* (1951) 21 Com Cases 266, 268 : AIR 1951 All 362; *A. Ananthasubramania Ayyar v. Official Receiver, Sitaram Spinning and Weaving Mills Ltd.*, (1957) 27 Com Cases 417, 421 (TC).

It may be noted that the High Court has no power to delegate any of its jurisdictions and the District Court can have no delegated jurisdiction except to the extent authorised by the Act (*vide* sections 435 to 438), and any Rules framed under section 642 or 643 consistent with the provisions of the Act.

The High Court will have exclusive jurisdiction:

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1. The powers of the court henceforth will be exercised by 'National Company Law Tribunal'/'National Company Law Appellate Tribunal' constituted under sections 10FB and 10FR.

(1) as regards all companies in respect of matters covered by sections 391, 394 and 395.

The powers under Ss. 237 and 397-407 have been transferred by the Companies (Amendment Act), 1988 to the Company Law Board, and

(2) as regards companies with a paid-up capital of one lakh of rupees and over, in respect of all matters covered by Part VII of the Act [sections 425 to 560] and other provisions relating to winding up.

Jurisdiction under this section is not concurrent. It is vested either in one or the other according as notified. *India Electric Works, In re,* (1969) 1 Comp LJ 195 (Cal); *Himachal Terpene Products (P.) Ltd. v. ROC,* 1974 Tax LR 2194 (HP). Notifications under an Act cease to be operative when that Act is repealed. *Chintaman Jagannath Kathikar v. Gandhi Sewa Samaj Ltd.,* (1958) 28 Com Cases 99, 101 (Bom). For **contrary** opinion based on section 24 of the General Clauses Act, 1897, see *Asoka Tea Estates (P.) Ltd. v. ROC,* (1959) 29 Com Cases 244, 246 : AIR 1959 Mad 384, where it was held that the *Notification G.O. No. Ms. 654 Development,* dated 20th February, 1947 must be deemed to continue in force even after the coming into force of the new Act of 1956 and the District Court had jurisdiction to entertain the petition to condone the delay in filing a statement in prescribed Form of the allotment of shares.

A winding up petition would be in the Bench of the High Court in whose jurisdiction the registered office of the company is situate and not in the principal Bench of the High Court. *Vimal Kumar v. Bhilwara Wooltax Ltd.,* (1996) 86 Com Cases 286 (Raj). A winding up petition against a company was not entertained by the Allahabad High Court because the company's registered office was at Calcutta. *Thadani Leasing v. Allahabad Patrika Pvt. Ltd.,* (2002) 111 Com Cases 754 (All.)

The jurisdiction to entertain a winding up petition would be in the court of the place where the registered office of the company is situated. Such jurisdiction cannot be ousted or vested in any other court by any amount of understanding between the parties or by acquiescence. Accordingly, the transferee company, even after its amalgamation, is not estopped from raising the question of jurisdiction by reasons of the fact that it participated in the proceedings in the court which had jurisdiction in respect of the transferor company. *Data Computer Services v. Northern Digital Exchanges Ltd.,* (1998) 92 Com Cases 362 : (1998) 31 CLA 350 : (1999) 20 SCL 105 (P&H); *GTC Industries Ltd. v. Parasrampuria Trading & Finance P. Ltd.,* (1999) 34 CLA 350 (All). Such jurisdiction cannot be conferred under an agreement of the parties on a court which otherwise does not have the jurisdiction to be a winding up court. *J.G. Finance Ltd. v. Jamna Auto Industries,* (1999) 34 CLA 382 : (2001) 103 Com Cases 107 : (2001) 29 SCL 325 (P&H).

In reference to a petition under ss. 397-398, the M.P High Court observed: It is only that High Court where the registered office is located which can hear the petition. The High Court at Jabalpur will not have jurisdiction merely because large number of depositors were of Jabalpur zonal office. No consent or appearance can give jurisdiction to a Court of limited jurisdiction which it does not possess. Simply because the appellants were participating in the disposal of various interlocutory applications and orders, that would not mean that they had given up their objection regarding entertainment of the Company petition by the M.P. High Court. It was not a case of mere lack of territorial jurisdiction but inherent lack of jurisdiction in entertaining the petition here when the registered office was at Calcutta. *Sanchayani Savings and Investments (I) Ltd. v. Madhusudan Ghosh,* 1987 MP LJ 417, 427, 428 (MP) **following** *Nava Samaj, Ltd. v. Civil Judge, Class I, Rajnandgaon,* AIR 1966 MP 286, where the court was of the view that the jurisdiction under Sections 397 and 398 was exclusive and was not exercisable by any other civil court. [at p. 292]. **Dissenting** from this view, the Allahabad High Court did not consider it to be exclusive and observed that civil suit in respect of the matters under those sections was not barred. *Patna Devi (Smt.) v. Harihar Prasad Naik,* 1978 Tax LR 2292 (All—DB).

The provisions of s. 10 cannot be construed to mean that the High Court has jurisdiction with respect to all the matters of a company whose registered office falls within the territorial jurisdiction of the High Court. The High Court does not have any general or residuary jurisdiction to deal with all matters and all questions arising under the Companies Act. There is no special remedy under the Act for violation of s. 166 of the Act which prescribes the time and place of holding an annual general meeting. The High Court does not have power to pass any order for breach of s. 166(2). The common law remedy before the ordinary civil courts would be available. *M.G. Doshit v. Reliance Petrochemicals Ltd.*, (1994) 79 Com Cases 830 (Guj).

Territorial Jurisdiction[2].—An action challenging the validity under S. 372 (ceased to be operative w.e.f. 31-10-1998, now see section 372A) of certain investments made by the company was challenged in a court of the place where the plaintiff received a copy of the balance-sheet in his capacity as a member and it was held that the court of that place had no jurisdiction in the matter. *Jyoti Bhushan Mukherjee v. Eastern Tea Co. Ltd.*, (1983) 53 Com Cases 722 (Cal).

The Supreme Court in its decision in *Patel Roadways Ltd. v. Prasad Trading Co.*, (1992) 74 Com Cases 11 (SC) held that section 20 of the Civil Procedure Code, 1908, applied to the defendants, which was a corporation and that term includes a company. The company in this case, carrying on the business of common carriers, had its principal office at Bombay and several branch or subordinate offices at other places. Goods were handed over at Delhi for transport to certain places in Tamil Nadu where the company had subordinate offices. Suits were filed at those places. The company's defence was that since the booking documents contained a clause that only Bombay courts would be the venue of litigation, the courts at other places should have no jurisdiction. It was held by the Supreme Court that the courts at Bombay had no jurisdiction and, therefore, the agreement between the parties conferring jurisdiction on the Bombay courts was of no avail. Hence the suits as filed were valid.

This ruling of the Supreme Court was **followed** by the Delhi High Court in *Korba Super Thermal Power Project v. Radha Madhav Engineering Enterprises*, (1996) 2 Comp LJ 159 (Del). Here a company had its principal office at Delhi and a subordinate office at Korba. The entire cause of action arose at Korba. It was held that the courts at Delhi had no jurisdiction. Only the courts at Korba had jurisdiction. The contract was finalised at Korba and, therefore, the matter of the arbitration proceedings could be taken up only there. In *Subramanian Swamy (Dr.) v. Union of India*, 2003 CLC 1101 : (2003) 55 CLA 275 : (2003) 46 SCL 61 : (2004) 118 Com Cases 126 (Delhi), it was held that the courts of the place where the offence was committed would have jurisdiction in the matter and not the courts at the place of the company's registered office.

A company's failure to allot shares can be questioned only in a court having jurisdiction over the place where the registered office of the company is situate. Accordingly, a review petition against the decision of a civil judge in Andhra Pradesh over the matter was **allowed**. *Pandian Graphites (India) Ltd. v. Lovvuri Lakshmi*, (1996) 87 Com Cases 323 (AP).

A suit by a shareholder against his company filed at his place instead of at the place of the registered office of the company was held to be not proper. *Sri Surayanarayana Paper & Board P. Ltd. v. Padam Kumar*, (1997) 88 Com Cases 684 (Mad). Where a company forfeited shares of a large number of shareholders for non-payment of allotment and call money and shareholders questioned the validity of the forfeiture in different States and within the same State in different courts and the company applied to the Supreme Court for direction for transfer of all cases to a single court, the Supreme Court ordered that instead of transferring all cases to one single court, which would cause hardship and

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expense to the shareholders, it would be desirable that the company moved the respective High Court to have the cases statewise to be transferred to a single court. *Vatsa Industries Ltd. v. Shankerlal Saraf,* (1996) 87 Com Cases 918 (SC). Where the company was ordered to be wound up by the High Court and the company's lending banker filed a recovery suit at the seat of the High Court, it was held that the suit could be filed only at the borrowing company's registered office or the lending banker's branch office, which was located at the same place. The place of the residence of the Official Liquidator and that of the seat of the High Court had no relevance. *Goutham Rao (J.) v. Union Bank of India,* (1988) 64 Com Cases 674 (AP). Where a sum of money was sent in full payment of the shares applied for and the company allotted the lessor number and did not refund the balance money and the applicant having moved the local consumer forum and having had a rejection on the ground that he was not a consumer, it was held by the Rajasthan High Court that neither it had jurisdiction against the consumer forum decision nor it had jurisdiction to entertain the case under S. 10 of the Companies Act. A Company Court had no jurisdiction in this particular matter. The only jurisdiction in such cases is that of the appropriate civil court. *Poonam Chand Kothari v. Rajasthan Tubes Mfg. Co. Ltd.,* (1996) 87 Com Cases 842 (Raj).

There are also decisions to the effect that the jurisdiction for entertaining complaints would be only at the place where the company has its registered office. The complaint in this case was for failure on the part of the company to supply copies of memorandum, articles and balance-sheets and deliver share certificates. The offence became complete at the place of the registered office of the company. The courts having jurisdiction at that place alone could try the offence. *ICICI Ltd. v. H.V. Jayaram,* (1998) 94 Com Cases 409 : (1999) 33 CLA 58 (Kant). **Affirmed** in *H.V. Jayaram v. ICICI Ltd.,* (2000) 99 Com Cases 341 : (2000) 36 CLA 1 : AIR 2000 SC 579. The Karnataka High Court had **applied** the principle of law as laid down in *Hanuman Pd. Gupta v. Hiralal,* (1998) 94 Com Cases 409 (SC).

Certain rulings of the Rajasthan High Court under which complaints were allowed to be filed at the place of the complainant's residence to which documents like share certificates, dividend warrants had to be sent, have been **overruled** by the Supreme Court in *H.V. Jayaram v. ICICI Ltd.,* (2000) 99 Cam Cases 341 (SC). One of the rulings which became **affected** is *Hindustan Development Corpn. Ltd. v. Kushan Chand Bader,* (1998) 94 Com Cases 384 : (1998) 29 CLA 222 : (1998) 1 Comp LJ 222 : (1998) 15 SCL 1 (Raj).

The Notification issued by the Chief Justice excluding jurisdiction of the Lucknow Bench of the Allahabad High Court in respect of cases under the Companies Act has been held to be valid. The effect of the Notification is that company cases can be instituted and heard only at Allahabad. *Sumac International Ltd. v. PNB Capital Services Ltd.,* (1998) 93 Com Cases 236 (All).

Proceedings at the place of branch office[3].—Where one of the allegations against certain companies was that they were interfering in the company's management and the proceedings were initiated at a place where the company had their branch office only, it was held that notwithstanding the *Explanation* to S. 20 of the Civil Procedure Code which confers jurisdiction on the courts of the place of a company's branch office, it is also necessary that a cause of action should arise there. A charge of interference in management can be alleged against the head office of the company and not against the branch office unless the later was controlling the head office. *Bhankerpur Beverages (P.) Ltd. v. Sarabjit Singh,* (1996) 86 Com Cases 842 (P&H).

A company can be sued at the place where the cause of action arises. In this case the company's project site was regarded as the place where it was carrying on business and inciden-

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tally the company also had its subordinate office at that place. *B B Verma v. National Projects Construction Corpn. Ltd.*, (1999) 4 Comp LJ 274 (Delhi).

Thus a company can be sued either at the place where the cause of action arose or at the place of the company's principal business or such subordinate office as plays some controlling role over the company's affairs. *Home Insurance Co. Ltd. v. Jagatjit Sugar Mills Co. Ltd.*, (1952) 22 Com Cases 338 (Punj).

Notified Jurisdiction of District Courts [Sub-section (2)][4]

GSR 663, dated 29-5-1959.—"In exercise of the powers conferred by sub-section (2) of section 10 of the Companies Act, 1956 (I of 1956), and in supersession of all the notifications issued by the Provincial/State Government under the proviso to sub-section (1) of section 3 of the Indian Companies Act, 1913 (VII of 1913), the Central Government hereby empowers all the District Courts in the Union of India, except the District Courts in the State of Jammu and Kashmir, to exercise the jurisdiction conferred upon the Court by the sections hereinafter specified of the said Companies Act, 1956, subject to the condition that in the case of the District Courts in the State of Orissa and in the Union Territory of Himachal Pradesh, such jurisdiction shall be exercisable subject to the Orders of the High Court or, as the case may be, the Judicial Commissioner's Court, namely:

Section 89 —Termination of disproportionately excessive voting rights in existing companies.

*Section 113 —Limitation of time for issue of certificates.

*Section 118 —Right to obtain copies of and inspect trust deed.

*Section 144 —Right to inspect copies of instrument creating charges and company's register of charges.

*Section 163 —Place of keeping, and inspection of, registers and returns.

*Section 196 —Inspection of minute books of general meetings.

*Section 219 —Right of member to copies of balance-sheet and auditor's report.

*Section 234 —Power of Registrar to call for information or explanation.

*Section 304 —Inspection of the register of Directors.

*Section 307 —Register of Director's shareholdings, etc.

*Section 614 —Enforcement of duty of company to make returns, etc. to Registrar.

*Note.—The jurisdiction under sections 113, 118, 144, 163, 196, 219, 304, 307 and 614 which was being exercised by the Courts by virtue of above notification was vested by the Companies (Amendment) Act, 1988 in the Company Law Board. This has now been vested in the Central Government/Tribunal by the Companies (Second Amendment) Act, 2002.

No jurisdiction without Notification.—District Court has no jurisdiction unless it is conferred by a Notification to that effect on a particular court. Where no jurisdiction exists there the High Court would have no power to give directions to the District Court. Where power has been conferred on a District Court, the High Court would have the power to give directions under s. 437. *Madhula Devappa Manere v. Jay Maharashtra Gur & Khandsari Udyog Ltd.*, (2002) 109 Com Cases 403 (Bom).

Proceedings against company in wrong court[4]

The previous Act of 1913, contained a provision [section 3(3)] that nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court. This has been omitted from the present Act, though it had been included in the original Bill.

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The effect will be that a proceeding taken in a court without jurisdiction will have no validity. See, however, section 437 under which the High Court has power to direct that proceedings for the winding up of a company wrongly commenced in a District Court might be retained and continued in that court.

Section 437 can apply only to a case where there is a defect of territorial jurisdiction and not a case where there is an inherent want of competence regarding the subject-matter of the proceeding. Where in respect of a matter (winding up) regarding which no jurisdiction whatsoever has been conferred on a District Court under s. 10(2) of the Act, a District Court can never be the Court within the meaning of that term as defined in s. 2 (11) and as used in s. 437, and the High Court cannot direct under s. 437 that the District Court in which proceedings for winding up have been commenced shall retain and continue the proceedings. *Alleppey Chit Fund (P.) Ltd.*, AIR 1962 Ker 64 at 65 : (1961) 31 Com Cases 641 (Ker).

When an appeal is pending before a division bench against a winding up order and the division bench has put the order in abeyance pending the implementation of a scheme of compromise and arrangement, the division bench is entitled to hear applications under S. 446 (stay of suits) and to give directions to the provisional liquidator. *Sudarsan Chits (India) Ltd. v. O. Sukumaran Pillai,* (1985) 58 Com Cases 633 : AIR 1984 SC 1759.

A petition against a company was presented at Indore whereas the company was registered and incorporated in Bombay. After pendency for four years, the petition was returned for presenting before the proper court. The prayer of the petitioner for fixing a date for hearing and for appearance of parties in the proper court on the date so fixed was granted. *Champalal Dilip Kumar v. Balaji Proteins (P.) Ltd.*, (1992) 3 Comp LJ 19 (MP).

Pending proceedings.—The District Judge in whose court the winding up proceedings were pending before the Act of 1956 came into force had jurisdiction to retain the proceedings in his court and to pass judgment thereon in accordance with the provisions of the old Act, and it was not necessary under the provisions of the Act of 1956 to transfer the said proceedings to the High Court. *National Planners Ltd. v. Contributories,* (1958) 28 Com Cases 198 (P&H—FB) **followed** in *Ram Kumar v. Bharat Electrical and Industrial Corporation Ltd.*, AIR 1959 Raj 85 at 86 : (1959) 29 Com Cases 485, 486.

Power of review.—The High Court functioning as a company court has been held to be nonetheless a civil court and, therefore, it has the power to review its own orders. This is the effect of s. 10 being read with s. 102 and Order 47 of the Civil Procedure Code, 1908. A review petition would lie at the instance of any aggrieved person. A person who is a creditor on the date on which an application was filed under s. 101 for confirmation of reduction of capital would be an aggrieved person. A claim which requires ascertainment does not make the claimant a present creditor. *Shapoorji Data v. Ameer Trading Corpn.*, (2003) 52 CLA 5 (Bom).

Inherent powers of company court[5]

The courts referred to in this section have inherent jurisdiction to compel due observance of the mandatory provisions of the Act. *British India Corpn. v. Robert Menezies,* (1936) 6 Com Cases 250, 255 : AIR 1936 All 568; *Maharaj Kumar Mahendra Singh v. Lake Palace Hotels & Motels (P.) Ltd.*, (1985) 58 Com Cases 805 (Raj).

In a well considered order, the company Court, while directing transfer of impugned shares by one group in favour of an individual ordered that such transfer and registration would be subject to the outcome of the proceedings before it under sections 397 and 398 and other conditions. Later without there being any exigency of facts and circumstances, the Court modified its earlier order which was shown to have affected the individual transferee adversely. It was held that assuming for the sake of argument that in company matters, the Company Judge can pass orders from time to time as the exigency of the

5. The powers of the court henceforth will be exercised by 'National Company Law Tribunal'/'National Company Law Appellate Tribunal' constituted under sections 10FB and 10FR.

facts and circumstances of the case require, but in this case, no such exigency or fact existed justifying the modification of the earlier order. The modified order was accordingly set aside and the earlier order restored. *Rattan Chand Jain v. Uberoi Ltd.*, (1992) 2 Comp LJ 202 (Del).

Where in a case before the Bombay High Court one group of the shareholders of a faction-ridden company sought a declaration from the court that the members of the opposite group who were in the majority should be prevented from presiding over the company's meetings, it was held that the question raised pertains to the subject of corporate democracy, doctrine of internal management, rule of supremacy of majority coupled with exceptions thereto and the power of the Court to interfere with the conduct of company meetings and further, involves a consideration of the power of the Civil Court to grant an interlocutory relief of the kind sought in the absence of prayer for final relief in terms thereof. While considering applications made to the Company Court under the substantive provisions of the Companies Act, 1956, the Company Court is entitled to mould the relief and exercise its inherent jurisdiction whenever found necessary to prevent injustice. The Court is thus required to address itself to the question as to under which substantive provision of the Companies Act, 1956, the application is made by the applicant. If the application is found maintainable under some specific substantive provision of the Act, then alone rule 9 of the Companies (Court) Rules, 1959 can be pressed into service and not otherwise. In this case the application made by the plaintiffs was found to be not maintainable under any of the provisions of the Companies Act, 1956. Therefore, rule 9 aforesaid could not be invoked. *Kishore Y. Patel v. Patel Engineering Co. Ltd.*, AIR 1992 Bom 114 : (1994) 79 Com Cases 53.

Where the main relief sought for in the company petition was on the ground of oppression and framing of a scheme and appointment of directors which was distinctly different from the relief asked for in the civil suit restraining some directors nominated by the Government from functioning, it was held that stay of the proceedings in the company petition could not be granted under this section. *Piyush Kanti Guha v. West Bengal Pharmaceutical & Phytochemical Development Corpn. Ltd.*, AIR 1982 Cal 94 at 97.

Inherent powers of Civil Court[6]

A civil court does not have jurisdiction in the exercise of its inherent power to order the calling of a general meeting of a company or to appoint a chairman to preside over the meeting. The Bombay High Court in its decision in *Kishore Y. Patel v. Patel Engineering Co. Ltd.*, (*Supra*) conducted a survey of authorities on the subject and deduced from them the following points [(1994) 79 Com Cases 53 at 70]:

(1) The Companies Act makes specific provisions for convening of company meetings. The Act empowers authorities like Company Law Board to convene meetings and issue directions notwithstanding the provisions contained in the articles of association. The Act specifically empowers the Court to direct convening of meetings in certain situation only. The Civil Court or the Company Court has no inherent power to convene or conduct a company meeting by appointing a Chairman or otherwise. The Companies Act prevails. In absence of invocation of overdoing [overriding (*Sic.*)] statutory provision of the Act, articles of association of the company must prevail.

(2) Rule 9 of the Companies (Court) Rules is liable to be interpreted in light of the enabling provisions of the Act contained in section 643 of the Companies Act, 1956. Rule 9 can, therefore, be invoked by the Company Court while considering applications made to it under one or other substantive provision of the Companies Act and not otherwise.

(3) The Civil Court cannot intervene to conduct a company meeting not in the manner prescribed by the Act or by the articles of association of the company

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or override the same in exercise of its inherent power under rule 9 of Companies (Court) Rules or section 151 of the Code of Civil Procedure. **Following** *Rangachari (A.) v. S. Suppiah,* (1975) 45 Com Cases 641 : AIR 1976 SC 73; *Selvaraj (V.) v. Maylapore Hindu Permanent Fund,* AIR 1968 Mad 378 : (1968) 38 Com Cases 153, *Ashok Mathew Zacharia (Dr.) v. Majestic Kuries and Loans P. Ltd.,* (1987) 62 Com Cases 865 (Ker); *Menon (TM) v. Universal Film (India) P. Ltd.,* (1982) 52 Com Cases 371 (Mad) and **Distinguishing** *Nagappa Chettiar (N.V.R.) v. Madras Race Club,* AIR 1951 Mad 831 : (1949) 19 Com Cases 175.

At a meeting of the share-holders of a company, some of the share-holders were, according to the decision of the majority of those present, not allowed to vote; these share-holders instituted a suit for a declaration that they were entitled to vote at the meeting. It was held that the plaintiffs' had a cause of action and that there was nothing in the Companies' Act to exclude the jurisdiction of the ordinary Civil Courts to entertain such a suit. *Gobinda Prosad Das v. Akhoy Kumar Dey,* (1905-06) 10 CWN 906 (Cal—DB).

The position in English law has been thus stated: "The court has an inherent power to direct that meetings of members or classes of members shall be held, *Re, Paris Skating Rink Co.,* (1887) 6 Ch D 959, but it will not direct a meeting merely because the directors have rejected a request by a member that one should be called, *MacDougall v. Gardiner,* (1875) 10 Ch App 606; *Pergamon Press Ltd. v. Maxwell,* (1970) 2 All ER 809. The most frequent occasions when the court directs the holding of a meeting are when it is impossible to hold a general meeting because of the persistent absence of a quorum at general meetings, or because of the absence of a quorum at a general meeting called or requisitioned by the applicants, or because an action has been brought in the company's name by a member, and the court needs to ascertain whether a majority of the members wish the action to be continued. PENNINGTON'S COMPANY LAW, 619 (6th Edn., 1990): p. 826 (7th Edn., 1995).

Important Note.—It may be noted that as per section 10GB inserted by the Companies (Second Amendment) Act, 2002 [11 of 2003] no civil court shall have jurisdiction to entertain any suit or proceeding in respect of which the Tribunal is empowered to determine by or under this Act or any other law for time being in force.

Revisional jurisdiction not barred[7]

There is nothing in the Companies Act either expressly or by implication ousting the revisional jurisdiction of the High Court. *British India Corpn. v. Shanti Narain,* (1935) 5 Com Cases, 161, 173 (All).

Judicial interference in company's affairs : Representative or Derivative action[7]

Unlike the previous enactments, the present Act makes elaborate provision as regards the management and conduct of a company's affairs, and in respect of very many of the important matters of internal administration, the Central Government's sanction or approval is made necessary. Elaborate provision is made for relief against oppression of minorities or mismanagement of a company's affairs and enabling aggrieved shareholders or directors to seek relief either by application to the Company Law Board (sections 397 to 409) or by moving the Company Law Board to exercise its powers under Chapter VI-A (sections 388-B to 388-E) as the nature of the case may require and in respect of the applications that are required to be made by those in management of companies for getting Central Government approval or sanction as regards various matters, shareholders are given ample opportunity to ventilate their grievances and make representation.

In all cases where there is fraud, mismanagement or serious irregularity in the affairs of a company and they are such as to prejudicially affect the company or its shareholders or the public interest, the Department of Company Affairs is equipped with adequate powers

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under the present Companies Act so as to effectively interfere and set right matters, even on the mere complaint of a small shareholder, if there is evidence enough to justify such interference. See Notes under section 237.

Under such circumstances, the need for resort to the court for relief by way of representative or derivative action is indeed very limited and is nowadays much less than before. If, nevertheless, occasion should arise for such interference, it will be limited to the following matters:

(1) Where the act complained of is illegal or *ultra vires* the company. [See *Bharat Insurance Co. Ltd. v. Kanhaya Lal Gauba,* AIR 1935 Lah 792 : (1934) 4 Com Cases 411.] See Note under the heading "*Ultra vires* and illegal transactions", *post.*

(2) Where the act complained of is a fraud on the company or the minority or any act or conduct calculated to benefit the directors or the majority shareholders at the expense or to the detriment of the company or the minority. See Notes under the heading "Fraud on minority", *post.*

(3) Where the circumstances are such that the general rule of non-interference in the internal management or affairs of the company should be waived in order that there may not be a denial of justice. See *Prudential v. Newman Industries,* (1981) Ch 25 where this new exception was propounded by was reversed in (1982) Ch 204.

(4) Where the act complained of though not *ultra vires* the company, is illegal and beyond the powers of the Board of Directors such, for instance, as acting in contravention of the articles of association, or on the strength of a mere Board resolution or ordinary resolution of the company, where a special resolution is required. See Notes under the heading "Acts requiring special majority", *post.*

(5) Where the voting right and other personal rights of a shareholder are infringed. See Notes under the heading "Individual membership rights", *post.*

In all these cases, any aggrieved member of the company may seek redress in the ordinary civil court.

The rule in *Foss v. Harbottle* prevents an action by a minority where what is complained of is—

(a) a breach of fiduciary duty by promoters or directors. (*Foss v. Harbottle,* (1843) 2 Hare 461).

(b) negligent mismanagement of the company's affairs. (*Pavlides v. Jensen,* (1956) 2 All ER 518 (Ch D), but see *Daniels v. Daniels,* (1978) 2 All ER 89 (Ch D) and *Prudential Assurance Co. v. Newman Industries Ltd.,* (1980) 2 All ER 841).

(c) some procedural irregularity which an ordinary resolution can put right. (*Bentley-Stevens v. Jones,* (1974) 2 All ER 653).

The entire case-law on this subject beginning with *Foss v. Harbottle,* (1843) 2 Hare 461, is reviewed in the decision of *Nagappa Chettiar (N.V.R.) v. Madras Race Club,* AIR 1951 Mad 831 : (1949) 19 Com Cases 175, see also *Edwards v. Halliwell,* (1950) 2 All ER 1064 (CA); *Star Tiles Work Ltd. v. N. Govindan,* AIR 1959 Ker 254; *Pavlides v. Jensen,* (1956) 2 All ER 518 (Ch D). See further *Heyting v. Dupont,* (1964) 2 All ER 273 : (1964) 2 Comp LJ 106 [**affirming** (1963) 3 All ER 97 : (1964) 34 Com Cases 765] where it was held that misfeasance or breach of trust without fraud or *ultra vires* acts do not give a cause of action. But note that under the Companies Act in India, the Company Law Board is given ample powers to interfere and it may be moved to interfere either under the investigation provisions or section 388-B or 397 or 398, if a minority shareholder can find support from sufficient number of shareholders to take any of the proceedings.

Form of action.—The form of action is under order 1, Rule 8 of the Civil Procedure Code, 1908, *i.e.* the minority shareholders sue on behalf of themselves and all other

shareholders except those who are defendants, and may join the company as a defendant. The directors are usually defendants. This action is brought instead of an action in the name of the company. "The form of the action is always : 'A.B. (a minority shareholder) on behalf of himself and all other shareholders of the company's against the wrongdoing directors and the company": per LORD DENNING M.R. in *Wallersteiner v. Moir (No. 2),* (1975) QB 373 at 390 (CA). This type of action is a *derivative action, i.e.* the right to sue derives from that of the company. The shareholders as such have no such right. If their own personal rights are being infringed they may bring a *representative* action.

The nature of the derivative action is that it is a "procedural device for enabling the court to do justice to a company controlled by miscreant directors or shareholders." PER LAWTON J in *Nurcombe v. Nurcombe,* (1985) 1 WLR 370 at 376 : 1984 BCLC 557 (CA); *per* LORD DENNING MR in *Wallersteiner v. Moir (No. 2),* (1975) QB 373 at 390 since such action lies with the permission of the court, the defendants are entitled to have determined as a preliminary issue whether the plaintiff has established:

"a *prima facie* case

(i) that the company is entitled to the relief claimed, and

(ii) that the action falls within the proper boundaries of the exceptions to the rule in *Foss v. Harbottle."* See *Prudential v. Newman Industries Ltd., (No. 2),* (1982) Ch 204.

The Bombay High Court did not allow a derivative action to be filed by a director of the company who was not its shareholder. Order 1, Rule 1 of CPC would not permit a person to join a proceeding in which he has no right of relief. A person whose name is not borne out by the company's register of members has no *locus standi* to say that a wrong has been done to his company. The court would not lift the veil of incorporation at the instance of such a person so as to enable him to show his beneficial interest in the company through a chain of intercorporate investments. *BSN (UK) Ltd. v. Janardan Mohandas Rajan Pillai,* (1996) 86 Com Cases 371 (Bom).

Principle of Judicial non-interference[8]

As a general rule, courts will not interfere in matters of internal administration. It is for the majority of shareholders to decide the manner in which the affairs of the company are to be conducted. This principle was laid down in the celebrated case of *Foss v. Harbottle,* (1843) 2 Hare 461. The court held that in the case of an injury to the corporation, it is for the corporation to sue in its own name and individual shareholders cannot assume to themselves the right of suing in the name of the corporation. That this is the normal pattern of corporate litigation is further shown by *Breckland Group Holdings Ltd. v. London and Suffolk Properties Ltd.,* 1989 BCLC 100 (Ch D); *Fletcherttunt Bristol Ltd., Re,* 1989 BCLC 108 (Ch D). Where a landlord on terminating the lease granted by him to a company levied distress on goods of the company found on the company's business premises, this being essentially a wrong done to the company, it was held that the rule in *Foss v. Harbottle* was invokable to block an action by a shareholder against the company's landlord. *Dovey Enterprises v. Guardian Assurance Publications,* (1993) 1 NZLR 540 (CA).

In a case before the Bombay High Court, *P.S. Offshore Inter Land Services P. Ltd. v. Bombay Offshore Suppliers and Services Ltd.,* (1992) 75 Com Cases 589 (Bom), it was observed that [at p. 593] in any litigation concerning a company, the advocate for the company must derive his authority either under a Board resolution or under an authorisation supported by the majority shareholders or at least under a *vakalatnama* signed by a principal officer of the company. Acting on this the court did not permit some of the shareholders to question the sale of company's one out of two vessels in order to raise funds. The sale was in good faith in the ordinary course of business of an item of property

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which was not in use and the sale did not constitute the sale of the company's undertaking so as to necessitate the consent of the general body.

An action was brought by a 50% shareholder against a director to hold him liable for misappropriation of the company's assets. Such personal action was held to be misconceived in the circumstances. The court said that a loss sustained by a shareholder by a diminution in the value of his shares by reason of the misappropriation of the company's assets is a loss recoverable only by the company and not by the shareholder who suffers no loss distinct from that suffered by the company. *Stein v. Blake (No. 2),* (1998) 1 BCLC 573 : (1998) 1 All ER 724 (CA). The court **did not grant** the right to appeal against the decision.

The effect of the rule in *Foss v. Harbottle* is that the minority shareholders cannot complain of any irregular act which the majority are entitled to do regularly. See *Mac Dougall v. Gardiner,* (1875) 1 Ch D 13; *Edwards v. Halliwell,* (1950) 2 All ER 1064 (CA). The majority of shareholders can approve an allotment of shares clearly made for the improper motive of a move for retaining the control of the company. See *Hogg v. Cramphorn Ltd.,* (1966) 3 All ER 420 and *Bamford v. Bamford,* (1969) 1 All ER 969 (CA).

The shareholders power of approval is further shown by cases like *Brady v. Brady,* 1988 BCLC 579 : (1988) 2 All ER 617, HL where a transaction involving disposal of the company's assets was upheld because it was carried out not only with the knowledge and assent of all the shareholders but with their active co-operation and at their instigation, the company being also solvent with a considerable surplus of assets over liabilities and *Joint Receivers & Managers of Niltan Corson Ltd. v. Hawthorne,* 1988 BCLC 298 (QBD), where the managing director of a company acting on its behalf granted a lease of the hotel premises of the company to another director without the necessary approval of the shareholders, it was held that the shareholder challenging the validity of the transaction would have to show that proper value was not given, which was not done, and practically all of the shareholders had supported the transaction. The members of a club registered as a company were not permitted to question the validity of certain restrictions sought to be imposed by a licensing authority as a part of the grant of licence. *Ananthadevaraj Urs (M.P.) v. Bangalore Turf Club Ltd.,* (1988) 3 Comp LJ 239 (Karn).

Reasons for judicial non-interference[9]

Business Judgement.—A number of reasons account for the judicial non-interference in the affairs of a company at the action of a member. One of them is that the court does not want to involve itself in disputes over business policy. Judges have repeatedly said that a court determines questions of law and not questions of business judgment. The court will not look into the merits of a lawful decision of the members or directors of a company. See the remarks of SCRUTTON LJ in *Shuttleworth v. Cox Bros. & Co. (Maidenhead) Ltd.,* (1927) 2 KB 9 Ch at 22-24. See also *Sunil Dev v. Delhi and District Cricket Assn.,* (1994) 80 Com Cases 174 (Del). In the old cases of *Waters v. Taylor,* (1808) 15 Ves Jr 10; 33 ER 658 and *Carley v. Drury,* (1812) 1 Ves & B 154, the court refused to appoint managers to take care of the endlessly quarelling partners. Where the directors were removed under the articles on a reasonable cause, the court refused to intervene and said that the shareholders' sense of what was reasonable must prevail. also *Odessa Tramways Co. v. Mendel,* (1878) 8 Ch D 235 and *Anglo-Universal Bank v. Baragnon,* (1881) 45 LT 362; *Danish Mercantile Co. v. Beaumont,* (1951) 1 All ER 925.

Wishes of majority.—The second suggested reason is that the membership of any association involves an obligation to settle the disputes within the organisation and to abide by the majority decisions. *Cooper v. Garden,* (1869) LR & Eq 249. Lord WILBERFORCE remarked in *Kong Thai Sawmill (Miri) Sdn. Bhd.,* (1978) 2 MLJ 227 PC at 229: "Those who take interest in companies limited by shares have to accept the majority rule."

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Multiplicity of suits.—The third suggested reason is the public policy of preventing multiplicity of actions. See the remarks of MELLISH LJ in *Mac Dougall v. Gardiner,* (1875) 1 Ch D 13 at 25. The court should not deal with matters with which they are not familiar and for which a domestic settlement procedure exists and where allowing one action would lead to an overwhelming number of similar actions.

Ratifiability.—The fourth reason is the principle of ratifiability. Where majority approval can eliminate the wrong, there any order of the court would be rendered infructuous just by majority approval.

Proper plaintiff doctrine.—The next important reason is that a company being a separate legal person is the only proper plaintiff for anything wrong done against it. See *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2),* (1982) Ch 204, 204 at 210 : (1982) 1 All ER 354 (CA) and *Breakland Group Holdings Ltd. v. London & Suffolk Properties Ltd.,* 1989 BCLC 100; *Danish Mercantile Co. Ltd. v. Beaumont,* (1951) 1 All ER 925 (CA); *SBA Properties Ltd. v. Cradock,* (1967) 2 All ER 610; *Edwards v. Halliwell,* (1950) 2 All ER 1064, 1066 (CA); *Heyting v. Dupont,* (1963) 3 All ER 97 : (1964) 34 Com Cases 765; *Normandy v. Ind Coupe & Co. Ltd.,* (1908) 1 Ch 84 where a single member was not permitted to question the conduct of directors increasing their remuneration. He was told to appeal to the general meeting. See also *Hogg v. Cramphorn Ltd.,* (1966) 3 All ER 420 and *Bamford v. Bamford,* (1969) 2 WLR 1107, where increase of capital in a bid to resist the take-over of the company was held to be capable of being ratified by the majority. Also see *Bhajekar v. Shinkar,* AIR 1934 Bom 243 where the court said: "it is difficult to see how a few shareholders who represent a minority are entitled to maintain the suit and ask the court to interfere on the question as to who should be the managing agents of the company." To the same effect, see *Jhajharia Bros. v. Sholapur Spinning and Weaving Co.,* AIR 1941 Cal 174: (1941) 11 Com Cases 180.

Even a majority shareholder was not permitted to question the conduct of the managing director when the shareholders' agreement provided that such action could be commenced only with the approval of the managing director. *Breckland Group Holdings Ltd. v. London & Suffolk Properties Ltd.,* 1989 BCLC 100 (Ch D). The shareholders cannot interfere in the manner in which the company's account are prepared. *Devlin v. Slough Estates Ltd.,* 1983 BCLC 497 : (1985) 1 Comp LJ 437 (Ch D).

Grounds of Judicial Interference [Derivative Action][10]

The circumstances in which minority shareholders' actions are allowable constitute the exceptions to the rule in *Foss v. Harbottle,* (1843) 67 ER 189 : (1843) 2 Hare 461. Such an action is filed by the shareholder in his own name but is for the advantage of the company. *Spokes v. Grosvenor Hotel Co.,* (1897) 2 QB 124. It is called a "derivative action", because it enforces the right derived from the company. *Schiowitz v. JOS Ltd.,* (1971) 23 DLR (3d) 102, (New Brunswick) at p. 121 and *Estmanco (Kilner House) Ltd. v. Greater London Council,* (1982) 1 All ER 437. The company is joined in such a proceeding as a co-defendant. If the action is successful, the company becomes entitled to enforce the judgment. *Russel v. Wakefield Waterworks Co.,* (1875) LR 20 Eq 474; *Spokes v. The Grosvenor and West End Railway Terminus Hotel Co. Ltd.,* (1897) 2 QB 124; *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2),* (1982) Ch 204 CA at p. 220 : (1982) 1 All ER 354.

Such proceedings can also be authorised by the Central Government for prevention of oppression or mismanagement or conduct prejudicial to public interest. See Ss. 399 and 401; *A Company, Re,* (1986) 2 All ER 253 : 1986 BCLC 68 (Ch D); or may be filed by the liquidator of the company, *Ferguson v. Wallbridge; Fargo Ltd. v. Godfroy,* (1986) 3 All ER 279 : (1986) BCLC 370 (Ch D). If such actions were not allowed, very serious corporate abuses would have gone on with impunity.

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The person filing a derivative claim has to show that the company has the right to sue but being indulgent in the matter is not likely to sue and, therefore, he gets a derivative authority to sue. *Birch v. Sullivan,* (1958) 1 All ER 56. A person defending a derivative action may properly raise these matters to have the action struck out. *Smith v. Croft (No. 2),* (1987) 3 All ER 909 : (1987) BCLC 206; *Jaybird Group Ltd. v. Greenwood,* (1986) BCLC 319. The matter of *locus standi* is generally decided at the initial stage, but the rule is variable, because in some cases proving the plaintiff's standing may involve proving his whole case. Some Australian decisions have taken this view. *Orison Pty. Ltd. v. Strategic Minerals Corp. NL,* (1988) 81 ALR 139 (Aust); *Biala Pty. Ltd. v. Mallina Holdings Ltd.,* (1988) 14 ACLR 350 (Aust).

The courts do not allow a derivative action to be brought by a person who participated in the wrongful act of which he is complaining. *Whitwam v. Watkin,* (1898) 78 LT 188; *Nurcombe v. Nurcombe,* (1985) 1 All ER 65 (CA), nor when the company is in liquidation. *Clarkson v. Davies,* 1923 AC 100; *Fargo Ltd. v. Derek Godfroy,* (1987) 2 Comp LJ 241 : 1986 BCLC 370 : (1986) 3 All ER 279 (Ch D). But the action of a person who purchased the shares for the very purpose of remedying the wrong being perpetrated on the company is not tainted with disability. *Seaton v. Grant,* (1867) LR 2 Ch App 459. Thus, the court would see that the plaintiff is a proper person to bring the action, that his conduct has not been so tainted as to bar equitable relief and that there has not been an unacceptable delay in bringing the action. *Towers v. African Tug Co.,* (1904) 1 Ch 558 (CA); *Nurcombe v. Nurcombe,* (*Supra*).

If a derivative action is successful, the company should indemnify the plaintiff for the costs incurred by him in pursuing the litigation for the benefit of the company. This is so because the entire benefit of the proceedings will go to the company and not to the shareholder who brings the action. *Wallersteiner v. Moir (No. 2),* (*Supra*); *Jaybird Group Ltd. v. Greenwood,* (*Supra*); *Smith v. Croft,* (*Supra*).

The exceptional circumstances in which a minority shareholder's action lies were listed by JENKINS LJ in *Edwards v. Halliwell,* (1950) 2 All ER 1064 at 1067 (CA) and they are as follows:

1. *Ultra vires* and illegal transactions.—In cases where the act complained of is wholly *ultra vires* the company, the rule in *Foss v. Harbottle* has no application because there is no question of the transaction being confirmed by any majority. See *Bharat Insurance Co. Ltd. v. Kanhaya Lal,* AIR 1935 Lah 792, where at the action of a shareholder, directors were restrained from laying out the funds of the company on investments which were outside the provisions of the memorandum. For other cases, see *Simpson v. Westminster Palace Hotel Co.,* (1860) 8 HL Cas 712; *Hope v. International Financial Society,* (1876) 4 Ch D 327, where illegality was involved. While this action is readily allowed to stay executory transactions, the courts are much more reluctant in permitting any shareholder to sue where the transaction has already been executed and the only question is that of recovering the company's money or property because there the company itself is the proper plaintiff. *Russel v. Wakefield Waterworks Co.,* (1875) LR 20 Eq 474; *Nankivell v. Benjamin,* (1892) 18 VLR 543, Victoria; *Hawkesbury Development Co. Ltd. v. Landmark,* (1969) 92 WN (NSW) 199 (New South Wales). Company's decision is necessary in such cases because even while acting *bona fide* the company may waive recovery. *Taylor v. National Union of Mineworkers (Derbyshire Area),* (1985) BCLC 237; *Smith v. Croft,* 1988 Ch 114, 139. Shareholders can restrain payment of dividends out of capital, *Drown v. Gaumont British Picture Corp. Ltd.,* (1937) 2 All ER 609 : (1938) 8 Com Cases 136, and also payment in kind when the articles require payment in cash. *Wood v. Odessa Waterworks Co.,* (1889) 42 Ch D 636, where the proposed payment was less than what the memorandum required, *Evling v. Israel & Oppenheimer Ltd.,* (1918) 1 Ch 101, or implementation of a directors' decision which under the articles had been effectively vetoed. *Quin & Axtens Ltd. v. Salmon,* (1909) AC 442, where there was illegal forfeiture of shares by directors, *Sweny v. Smith,* (1869) LR 7 Eq 324, where there was improper appointment of directors and other officers, *Ryan v. South Sydney*

Junior Rugby League Club Ltd., (1974) 3 ACLR 486, New South Wales; *Pappaiaonnoy v. Greek Arthodox Community of Melbourne*, (1978) 3 ACLR 801 (Aust).

An injunction was granted at the instance of a minorty shereholder and was confirmed by the Sri Lanka Supreme Court to prevent foreign collaborators in the construction of a hotel to take payments from the local company in a manner which amounted to siphoning of foreign exchange from the country and from the hands of the company. The decision had the effect of laying down the following principles:

(1) If the applicant as a minority shareholder was unable to induce the company to take steps to protect its interests and the acts of which he complained could not be validly effected or ratified by an ordinary resolution, then he had every right as a representative of the company to obtain an injunction. Accordingly, the appellant had *locus standi* on the material placed before the judge.

(2) In order to grant an injunction a judge should be satisfied that an applicant had a *prima facie* claim with a reasonable prospect of success in the light of the defences raised. The judge had considered the material before him and correctly decided that the applicant had a real prospect of success and a *prima facie* case.

(3) Although an injunction should not be granted if damages were an adequate remedy; in this case damages were not adequate as it had been alleged that money was being siphoned out of the country and, therefore, the chance of satisfying a judgment was remote. *Amerasekere v. Mitsin & Co. Ltd.*, (1992) LRC (Comm) 638 (Sri Lanka SC).

In this respect the following valuable opinion is worth noting on the subject: "We suggest that the common factor in the personal rights cases is that a member is alleging that a decision is unlawful in the sense that it fails to comply with the law generally or with the memorandum or articles of the company. We suggest that a member of a company has standing to challenge the lawfulness of any decision of the members or the directors or the chairman of a meeting of members, subject only to the irregularity principle. The recognition of a member's standing to challenge the lawfulness of company decisions would, we suggest, provide a means of enforcing the entitlement of shareholders 'to have the affairs of a company conducted in the way laid down by the company's constitution' which ROMER LJ recognised in *Re, H.R. Harmer Ltd.*, (1958) 3 All ER 689 : (1959) 29 Com Cases 305 (CA)."

Departing from the mainline decision in the *Foss v. Harbottle* Case, an Australian court has held that even a ratifiable wrong can be made the subject-matter of a proceeding at least up to the time that it is actually ratified. *Residues Treatment & Trading Co. Ltd. v. Southern Resources Ltd. No. 4*, (1988) 14 ACLR 569 at 576-7 (Aust). Further, a ratification cannot eliminate wrongs which are challengeable on the basis of other exceptions, such as, fraud on the minority.

2. Acts requiring special majority.—This exception was noted by ROMER J in *Cotter v. Union of Seamen*, (1929) 2 Ch 58, where he pointed out the rule did not prevent an individual member from suing if the matter in respect of which he was suing was one which could validly be done or sanctioned, not by a simple majority of members, but only by some special majority, as, *e.g.* in the case of a limited company under the Companies Act, a special resolution duly passed as such. *Young v. South African & Australian Exploration & Development Syndicate*, (1896) 2 Ch 268. If this were not so, the effect would be to allow a company acting in breach of its articles to do *de facto* by ordinary resolution that which according to the company's own regulations or the Companies Act could only be done by special resolution. See, *e.g. Dhakeshwari Cotton Mills Ltd. v. Nil Kamal Chakravarti*, AIR 1937 Cal 645 and *Nagappa Chettiar v. Madras Race Club*, AIR 1951 Mad 831. See also *Hodgson v. National and Local Govt. Officers' Assn.*, (1972) 1 All ER 15, restraining action in violation of company's resolutions; *Baillie v. Oriental Telephone & Electric Co. Ltd.*, (1915) 1 Ch 503; *Cotter v. National Union of Seamen*, (1929) 2 Ch D 58.

3. Wrongdoers in control.—Where the wrongdoers are themselves in control of the company's affairs, the rule is relaxed in favour of aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves being in control, would not allow the company to sue. Thus, where a company was controlled by the two plaintiffs and the two defendants and the plaintiffs' allegation was that the defendants had diverted the company's assets to their own use, the court said : while the general principle was for the company itself to bring an action where it had an interest, it was appropriate for the two plaintiffs here to bring an action on behalf of the company since the defendants controlled the company in the sense that they would prevent the company from taking action. *Glass v. Atkin,* (1967) 65 DLR (2d) 501 (Canada). See also *Satya Charan Lal v. Rameshwar Prasad Bajoria,* (1950) 20 Com Cases 39 : AIR 1950 FC 133 where FAZIL ALI J restates all the situations in which a minority shareholder can take action to redress a wrong being done to the company.

The word "control" for this purpose does not necessarily mean "majority control". It has been said that control exists if it would be futile to call a general meeting because the wrongdoers would directly or indirectly exercise a decisive influence over the result. "Control" embraces a broad spectrum extending from an overall absolute majority of votes at one end, to a majority of votes at the other end made up of those likely to be cast by the delinquent himself plus those voting with him as a result of influence or apathy, *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2),* [(1982) Ch 204 at p 219]. This exception to *Foss v. Harbottle* applies whenever the defendants are shown to be able by means of any manipulation of their position in the company to ensure that the action is not brought by the company. See VINELLOT J in *Prudential Assurance Co. v. Newman Industries Ltd.,* (1980) 2 All ER 841 as commented upon in a note in (1981) 44 Mod LR 202 where it is observed that whenever a director is in breach of fiduciary duty, every shareholder should be constituted into an authorised agent to bring the action.

A derivative action will only be allowed where the alleged wrongdoers are in a position to defeat any proposed resolution of the shareholders that the company initiate proceedings against them. In other words, if the majority of independent shareholders do not want to initiate proceedings, then a derivative action will not be allowed, since the decision not to initiate proceedings will have been reached even if the "tainted" votes are disregarded. The matter can be expressed in this way: if the "tainted" voters had abstained and the majority were still against the proceedings, then a minority shareholder could have no cause for complaint, and the minority shareholder cannot be in a better position because the "tainted" votes are exercised without any effect on the result. In *Smith v. Croft (No. 2),* (1988) Ch 114 at 184 KNOX J used the following test to determine whether there was an independent majority in favour of the company not taking action (at p. 186): "...votes should be disregarded if, but only if, the court is satisfied either that the vote or its equivalent is actually cast with a view to supporting the defendants rather than securing benefit to the company, or that the situation of the person whose vote is considered is such that there is a substantial risk of that happenings." The learned Judge added: "The court should not substitute its own opinion but can, and in my view should, assess whether the decision-making process is vitiated by being or being likely to be directed to an improper purpose." A decision not to sue must be made in good faith and for the benefit of the company. *Taylor v. National Union of Mineworkers (Derbyshire Area),* per VINELOTT, (1985) BCLC 237.

The directors of a company, holding majority shares, formed a new company to which they proposed to divert the company's distribution rights. This amounted virtually to a misappropriation of the company's property. The members were purporting to accept the directors proposed course of action. They, at a meeting of the company, being in majority, passed resolutions dismissing the plaintiff as director and terminating his employment

as managing director and general manager. The court granted an interlocutory injunction against the proposed course of conduct.

The court said that the grant of an interlocutory injunction depended, not upon the application of a set of fixed rules, but rather upon the decision whether, having regard to such factors as may be relevant in that case, it was, in the discretion of the Court, appropriate to grant the relief sought. The defendant had established, on the affidavit evidence before the Court, that the action proposed by the majority shareholders was likely to amount to a breach of fiduciary duty, even though the company had, in general meeting, purported to accept that action. There was a serious issue to be tried. Difficulty and uncertainty in the assessment of damages was a relevant factor in deciding whether to grant an interlocutory injunction: if the defendants (majority shareholders and directors), in seeking to obtain the distributorship for themselves, had acted in breach of their fiduciary duty, they would be liable to account to the compay for any profit made thereby: ascertainment of those profits could be extremely difficult, particularly if the new company had additional capital or if different shareholders became involved in that company. The volatile nature of the computer business also made the assessment of damages more problematie. The defendants, by proposing to obtain for themselves the company's most valuable asset, had forced the plaintiff to take legal action; and thus, the fact that the issue of an interlocutory injunction might put pressure on the defendants to purchase the plaintiff's shares on terms favourable to the plaintiff, for otherwise there was a danger that the distributorship might be granted to a third party, was no reason for refusing the grant of that interlocutory injunction. *Edney v. Commodore Computer (NZ) Ltd.*, (1985) LRC (Comm) 767 (NZ High Court).

An English court would not have jurisdiction to examine the conduct of a director who was functioning in France where the English registered company was carrying on business. The company was having only American and French Directors. *Newtherapeutics Ltd. v. Katz*, 1990 BCLC 700 (Ch D).

For a general view of abuse of majority powers, see *Campbell v. Australian Mutual Provident Society*, (1908) 77 LJ PC 117; *Dominion Cotton Mills Co. Ltd. v. Amyot*, (1912) AC 546.

4. Individual membership rights.—This was the type of situation involved in *Edwards v. Haliwell*, (1950) 2 All ER 1064. By altering rules without following the prescribed procedure, the complaining members of a union were excluded from their status of membership. Their rights following from that status were invaded. The gist of the case was that the personal and individual rights of membership were invaded by the purported, but invalid, alteration of the tables of contributions. "In these circumstances", said JENKINS LJ, "the rule in *Foss v. Harbottle* has no application at all, for the individual members who are suing sue, not in the right of the union, but in their own right to protect from invasion their individual rights as members." A shareholder's right to vote, to have his vote recorded, to contest for directorship, to have a dividend paid in cash if the articles so specify, to enforce a declared dividend as a legal debt, to have the articles observed if they specify a certain procedure to be followed in particular matters. etc., have been recognised as individual membership rights. See *Nagappa Chettiar v. Madras Race Club*, AIR 1951 Mad 831 and *Pender v. Lushington*, (1877) 6 Ch D 70. Thus where a member's candidature for directorship was rejected because of his previous defeat, *Joseph v. Jos*, (1964) 34 Com Cases 931 (Ker) and *Srinivasan v. Subramania*, AIR 1932 Mad 100 and where a director refused to retire in accordance with articles, *Karus v. Lloyd Property Ltd.*, 1965 VR 232 (Aust.), individual rights of the plaintiffs as members were held to be invaded. In the earlier case of *Mozley v. Alston*, (1847) 1 Ph 790 a derivative action to force certain directors to retire in accordance with the provisions in the company's articles was refused on the hypothesis that their continuance could have been regularised by a majority of the shareholders.

Personal rights are also likely to be harmed when the management is pursuing a policy bringing about a loss of the value of shares. In such cases the company as a whole suffers and, therefore, the action would have to be for prevention of mismanagement and the order may be disqualification of directors who are pursuing an unwise business policy. *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.,* (1982) 1 All ER 354 (CA); *Heron International Ltd. v. Lord Grade,* (1983) BCLC 244 (CA), involving directors' duty to maintain proper price in a take-over so that the shareholders who are compelled to sell may get their real market price. Further, injury to personal rights may arise when the company is not observing the requirements of its memorandum and articles. ROMER LJ said in *H. R. Harmer Ltd., Re,* (1958) 3 All ER 689 (CA): "..... shareholders are entitled to have the affairs of the company conducted in the way laid down in the company's constitution." But see *Cotter v. National Union of Seamen,* (1929) 2 Ch 58, 70, where a complaint about irregular conduct of meetings was not entertained. Thus, a member does not have a right to have a poll taken, *Mac Dougall v. Gardiner,* (1875) 1 Ch D 13 (CA), nor to have accounts prepared in accordance with the requirments of the Companies Act, *Devlin v. Slough Estates Ltd.,* (1983) BCLC 497 nor to have directors retire in accordance with the articles *Mozley v. Alston,* (1847) 1 Ph 790, nor do members have the right not to have the value of their shares reduced by the wrongdoing of the directors where that wrongdoing has caused damage to the company and the shareholders' loss is only consequential to that, *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2),* (1982) 1 All ER 354 at 367 (CA), although such conduct may found a derivative action. To found a personal action, the shareholder's loss must be separate and distinct from that of the company. See also *Heron International Ltd. v. Lord Grade,* (1983) BCLC 244 where the Court of Appeal thought that a loss to the share-holders where they were deprived of an opportunity of realising their shares to greater advantage would found a personal action.

The question of the scope of the rights of preference shareholders as spelled out in the terms of issue and the company's memorandum and articles can be decided by the court at the instance of a single shareholder of any class. *Webb v. Earle,* (1875) LR 20 Eq 556; *Staples v. Eastman Photogrpahic Materials Co.,* (1896) 2 Ch 303 (CA).

The courts are poised to extend this category so as to cover all cases of breaches of fiduciary obligations by the management. It has been said that where a shareholder alleges that the directors have breached their fiduciary duty by using their powers to allot shares for an improper purpose then whether the petitioner commences the action by writ, or seeks relief under s. 459 of the U.K. Companies Act, 1985 (unfair prejudice) the substance of the complaint is that his rights as a shareholder have been infringed. *A Company, Re, No. 005136 of 1986,* (1987) BCLC 82 (Ch D). Many commentators have argued for a liberalisation of the personal rights category since ultimately that would make the rule in *Foss v. Harbottle* redundant. One suggestion has been that all the articles should be regarded as conferring personal rights on the shareholders except for those articles which have already been clearly identified by case law as concerning internal procedures only. Another suggestion has been to regard any breach of a director's fiduciary duty as giving a shareholder a personal cause of action. See FARRAR, COMPANY LAW, 448 (3rd Edn., 1991).

A company court is not vested with original jurisdiction to grant relief in cases where wrongs are done to individual members and where those wrongs pertain to the realm of individual, as opposed to corporate, rights. *Prakasam R. v. Sree Narayana Dharma Paripalne Yogam,* (1980) 50 Com Cases 611 (Ker).

5. Prevention of oppression and mismanagement.—To the extent to which relief against oppression and mismanagement goes in favour of the company, this statutory remedy also constitutes an exception to the remedial procedure carved out by the rule in *Foss v. Harbottle.* See *Kanika Mukherji v. Rameshwar Dayal Dubey,* (1966) 1 Comp LJ 65 (Cal-DB). A petition under sections 397 and 398 cannot be stayed by a civil court un-

der s. 10 of the Civil Procedure Code, *Pijush K. Guha v. West Bengal Pharmaceuticals & Phyto Commercial Development Corpn. Ltd.*, AIR 1982 Cal 94.

Where the affairs of a company were so manipulated as to deprive a shareholder of his sizeable amount of rights shares and the matter having been brought before the court, it was held that the conduct in question amounted to oppression within the meaning of S. 397 and, therefore, the Company Law Board had exclusive jurisdiction over the matter, and not the High Court under section 10. *Vijay M. Shah v. Flex Industries Ltd.*, (1996) 21 Corpt LA 177 : (1996) 7 SCC 156 : (2001) 103 Com Cases 1063 (Delhi). This should be **contrasted** with *Jayanthi R. Padukone (Mrs.) v. ICDS Ltd.*, AIR 1994 Kant 354 : (1999) 96 Com Cases 86, where the decision was that the jurisdiction of other courts is not ousted and that the aggrieved party can choose one forum or the other.

§ For a complete study of this subject matter see Notes under sections 397 and 398 *post*.

Compromise/out of court settlement of derivative action.—For Notes on the subject see commentary under S. 397 under the same heading.

6. Fraud on the minority.—The word "fraud" is not used here in its technical sense. It is used to denote any such conduct of affairs as constitutes a discrimination of the minority of shareholders. For the purposes of this exception any discriminatory conduct is a fraudulent conduct. Lord EVERSHED MR put it in these words: "special resolution would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and minority shareholders, so as to give to the former an advantage of which the latter were deprived." *Greenhalgh v. Arderne Cinemas Ltd.*, (1950) 2 All ER 1120. The concept was developed in *Menier v. Hooper's Telegraph Works*, (1874) 9 Ch App 350 so as to hold that the minority action will be allowed whenever the majority of the shareholders of a company propose to benefit themselves at the expense of the minority, *e.g.* directors compromising a case filed by one company against another in both of which the same set of persons constituted the majority but the minority shareholders were different. In another case, 98% majority were restrained from compelling the single 2% shareholder to contribute more capital at the pain of expulsion. *Brown v. British Abrasive Wheel Co.*, (1919) 1 Ch 290. This was an abuse of the majority power, taking "abuse" to mean in terms of LINDLEY MR'S version in *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch 656, 671 that all majority decisions must have this virtue that they are taken in absolute good faith in the interest of the company as a whole. The expression "company as a whole" has to be taken to mean sometimes the company as a legal entity distinct from all the shareholders and sometimes as an entity along with all its shareholders. Thus, where the institutional interest demanded the explusion of such minority shareholders as were carrying on competing business, the court justified the conduct of the majority in compulsorily purchasing at fair value the minority interest. *Sidebottom v. Kershaw Leese & Co.*, (1920) 1 Ch 154. As against it, compulsory purchase of the shares of certain minority shareholders was not allowed who were refusing to purchase their steel requirements from the company. *Dafen, Tinplate Co. Ltd. v. Llanley Steel Co. Ltd.*, (1920) 2 Ch 124. The majority decision must be arrived at in good faith acting as reasonable businessmen. The decision should be for the benefit of the company and not a section of the company. See *Seters American Delicacy Co. v. Health*, (1939) 61 CLR 457, 481, (High Court of Australia) and *Shuttleworth v. Cox Bros. & Co.*, (1927) 2 KB 9.

Any sale of a company's property below its natural price is a fraud and, therefore, any shareholder can question its validity. *Daniels v. Daniels*, (1978) 2 All ER 89 (Ch D), though it is a matter which can be set right by majority approval. *Brady v. Brady*, (1988) 2 All ER 617 (HL). Any breach of duty on the part of a company's directors which brings some benefit to them is similarly questionable, *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.*, (1980) 2 All ER 841, 869, for example, diverting business opportunities of the company and profiting by it, *Cook v. Deeks*, AIR 1916 PC 161; *Kerry v. Moari Dream Gold Mines Ltd.*, (1898) 14 TLR 402 (CA). *Birch v. Sullivan*, (1958) 1 All ER 56 (Ch D), directors appropriating the assets of the company. See also *Pavlides v. Jensen*,

(1956) Ch 565 where a minority shareholders' action alleging negligent sale of the company's property at an undervalue was dismissed, because no fraud or misappropriation was involved.

In *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2),* (1981) Ch 257, VINELOTT J surveyed the cases and concluded, at p. 316 : "... the authorities show that the exception applies not only where the allegation is that directors who control a company have improperly appropriated to themselves money, property or advantages which belong to the company or, in breach of their duty to the company, have diverted business to themselves which ought to have been given to the company, but more generally where it is alleged that directors though acting "in the belief that they were doing nothing wrong" (per LINDLEY MR in *Alexander v. Automatic Telephone Co.,* (1990) 2 Ch 56 at p. 65) are guilty of a breach of duty to the company, including their duty to exercise proper care, and as a result of that breach obtain some benefit. In the latter case it must be unnecessary to allege and prove that the directors in breaking their duty to the company acted with a view to benefiting themselves at the expense of the company; for such an allegation would be an allegation of misappropriation of the company's property. On the other hand, the exception does not apply if all that is alleged is that directors who control a company are liable to the company for damages for negligence it not being shown that the transaction was one in which they were interested or that they have in fact obtained any benefit from it. It is not easy to see precisely where the line between these cases is to be drawn".

It has been held that the principle enunciated in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2),* [1982] Ch. 204 [1982] CLY 331 does not preclude an action brought by a claimant as a beneficiary under a trust against his trustee for an account of profits received in relation to shares which are the subject of the trust, save where it can be shown that the whole of the claimed profit reflects losses which the company has a cause of action to recover. The action in this case was by a beneficiary shareholder (plaintiff) against the sole shareholder (defendant) of the company. Seventy per cent (70%) of the shares of the company were held by the defendant in trust for the plaintiff. The plaintiff sought to recover compensation for his loss caused by the defendant's failure to account for the sale proceeds of the subsequent sale of the company's shares. The court of appeal held that the *Prudential* principle did not preclude an action brought by a claimant not as a shareholder but as a beneficiary under a trust against his trustee for an account of profits received in relation to shares which were the subject of the trust, unless it could be shown that the whole of the claimed profit reflected what the company had lost and which it had a cause of action to recover. As the *Prudential* principle was an exclusionary rule denying a claimant his right to sue, it was for the party relying upon it to establish its applicability. In the instant case, the defendant had not established that such a claim was available to the company on the facts, and could not do so unless the matter proceeded to trial. *Shaker v. Al-Bedrawi (No. 2); Shaker v. Masry; Shaker v. Steggles Palmer (A Firm),* [2002] EWCA Civ 1452 : (2003) 1 BCLC 157per, ARDEN, L.J., (CA).

In *Alexander v. Automatic Telephone Co.,* (1900) 2 Ch 56 where the directors' action in calling upon other shareholders to pay their call money without paying the money due from the directors' themselves, was set aside by a derivative action. See also, *Dominion Cotton Mills Co. Ltd. v. Amyot,* (1912) AC 546.

In *Daniels v. Daniels,* (1978) 2 All ER 89 a husband and wife were the directors and majority shareholders of a company. The company sold some land to the wife for £ 4,250 which, some four years later, she resold for £ 1,20,000. There was no intention to defraud the minority shareholders, but even so TEMPLEMAN J held that there had been a misappropriation of the company's land in respect of which a derivative action would lie. The learned judge said [at p. 414 *D-E*]: ".... [A] minority shareholder who has no other remedy may sue where directors use their powers, intentionally or unintentionally, fraudulently or negligently, in a manner which benefits them at the expense of the company."

A derivative action may not lie where the act complained of has been ratified either by the Board of directors or by a majority of the shareholders having the competence to do so. *Atwool v. Merryweather,* (1868) LR 5 Eq 464 at 468 n; *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2),* (1982) 1 All ER 354 (CA); *Brady v. Brady,* (1988) 2 All ER 617 (HL); *Joint Receivers and Managers of Niltan Carson Ltd. v. Hawthorn,* 1988 BCLC 298 (QBD). The majority decision not to sue must be made in good faith and for the benefit of the company. *Taylor v. National Union of Mineworks (Derbyshire Area),* (1985) BCLC 237; *Phillips v. Manufacturers' Securities Ltd.,* (1917) 116 LT 290, 296. Directors' decision to allot shares which is not *bona fide* in the interest of the company or is not for a proper purpose can be questioned by a minority action. *Fraser v. Whalley,* (1864) 11 LT 175; *Residues Treatment and Trading Co. Ltd. v. Southern Resources Ltd. (No. 4),* (1988) 14 ACLR 569 South Australia. Negligence by directors which does not benefit them personally is not of a fraudulent character. *Pavlides v. Jensen,* (1956) Ch 565 : (1957) 27 Com Cases 191 (Ch D) to be **contrasted** with *Daniels v. Daniels,* (1978) Ch 406. See also *Vadilal v. Maneklal,* (1925) 27 Bom LR 48 : AIR 1925 Bom 188 where a suit alleging fraud in accounts was ordered to be put on trial on merits inspite of majority shareholders resolution disowning the suit.

Expropriation of minority rights.—Where there was no suggestion that the minority shareholders' continued presence as members put the company's business activities at risk or that they acted in some way to its detriment and the fact that taxation advantages and administrative benefits would flow to the company if minority shareholdings were expropriated would not constitute a proper purpose for the resolution altering the articles and it followed that the new article was invalid.

The court said that where the purpose of altering a company's articles of association by resolution was to confer on the majority power to expropriate the shares of the minority, such a power would only be valid to the extent it was exercisable for a proper purpose and would not operate oppressively in relation to minority shareholders. Whether the alteration was *bona fide* for the benefit of the company as a whole was not a relevant consideration in such determination. Exceptional circumstances would be required to justify an amendment to a company's articles authorising the compulsory expropriation by the majority of the minority's interests. An alteration might be justified where the purpose of such was to secure the company from significant detriment and the alteration was not oppressive to the minority, provided that the process used to expropriate was fair, which required the majority shareholders to disclose all relevant information leading up to the alteration, and that the terms of the expropriation itself were fair. To allow expropriation where it would advance the interests of a company as a legal and commercial entity or those of the general body of corporators would be to fail to attach sufficient weight to the proprietary nature of a share and tantamount to expropriation by the majority for personal gain and thus improper. The nature of proprietary rights attaching to ownership of shares required that the onus of proving whether or not the power to expropriate was validly exercised lay on those supporting an expropriation. *Gambotto v. WCP Ltd.,* (1995) 2 LRC 368 : (1995) 182 CLR 432 (Aust HC).

List of exceptions not exhaustive.—The question whether this list of exceptions is exhaustive or whether the courts can go on expanding it whenever justice of the situation requires has been considered in a number of cases and has been thus answered by KNOX J in *Smith v. Croft (No. 2),* (1987) BCLC 206 : (1987) 3 All ER 909: "The fact that such a yardstick [*i.e.* justice of the case] would or might be unsatisfactory because it does not give a practical guide to the limits of the rule and its exceptions does not detract from the fact that the whole doctrine whereby a minority shareholder is permitted to assert claims on behalf of the company is rooted in procedural expedients and adopted to prevent a wrongdoing without a redress." The other cases in which this point has been considered are: *Estamanco (Kilner House) Ltd. v. Greater London Council,* (1982) 1 All ER 437.

In the *Estamanco* case (*supra*) an institutional shareholder with a large majority changed its policy and threatened to commit the breach of the contract as to the way in

which the company's flats were to be handled. The only other shareholders were 12 non-voting members who were prejudiced by the decision. The court allowed their action in spite of the fact that the decision was in the best interest of the company. MEGARRY V.C. said: "Plainly there must be some limit to the power of the majority to pass resolutions which they believe to be in the best interests of the company and yet remain immune from interference by the courts. It may be in the best interests of the company to deprive the minority of some of their rights or some of their property, yet I do not think that this gives the majority an unrestricted right to do this, however unjust it may be, and however much it may harm shareholders whose rights as a class differ from those of the majority. If a case falls within one of the exceptions from *Foss v. Harbottle,* I cannot see why the right of the minority to sue under that exception should be taken away from them merely because the majority of the company reasonably believe it to be in the best interests of the company that this should be done." He continued to say: "No right of shareholder to vote in his own selfish interests or to ignore the interests of the company entitle 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." In a note on the case in (1981) JBL 409, PROFESSOR SCHMITTHOFF said: "... the extension of the "fraud" exception in the *Kilner House* case reduces the difference between the "fraud" and the "justice" exceptions and makes such differentiation, to some extent, a question of semantics. But it gives the term "fraud" an unnatural, highly artificial meaning."

Where derivative action lies and where not: Pointwise presentation of situations[11]

§ For this see Notes under S. 291 under the headings "Cases where derivative action lies" and "Cases where derivative action does not lie".

Indemnity for costs and expenses

One important factor to be considered by an independent director or shareholder would be the incidence of costs in the proposed litigation. Since the minority shareholder proceeds on behalf of the company as also shareholders and not merely on personal behalf, he would *prima facie* be entitled to an indemnity as to costs from the company if the action were successful. Even if the action were unsuccessful but the court took the view that the plaintiff had acted reasonably in the circumstances, the court might give him such an indemnity. Per BUCKLEY L.J. in *Wallersteiner v. Moir (No. 2),* (1975) 1 All ER 849. But see now *Smith v. Croft (No. 2),* (1987) 3 All ER 909 : 1987 BCLC 206.

The court have in appropriate cases ordered a company for whose benefit a derivative action was brought to indemnify the claimant bringing it against his costs of doing so which were not recovered from the wrongdoer. Such an order would not have the effect that the right of indemnity was secured by a lien for unrecovered costs on the company's assets, or assets recovered as a result of the action. Accordingly, when making the order giving the claimant an indemnity from the companies in respect of 75% of his costs, the judge was specifically not intending to give him the benefit of any security in the nature of a lien over any part of the companies' assets. *Qayoami v. Oakhouse property Holdings plc.,* (2003) 1 BCLC 362 (Ch D) : 2002 EWHC 2547.

A procedure has grown up whereby a minority shareholder can apply to the court at an interlocutory stage for an order that the company do indemnify him as to the costs of the action. *Re, Beddone,* (1893) 1 Ch 547.

In *Jaybird Group v. Greenwood,* (1986) BCLC 319, decided after *Prudential Assurance v. Newman Industries (No. 2),* (1980) 2 All ER 841, the court held that the action was one which would have been commenced by an independent Board of the company. The plaintiff was given an order for the indemnity down to discovery and inspection. Whether the plaintiff was impecunious or not was considered to be irrelevant.

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§ **Costs of petition and expenses of litigation.**—For notes on costs and expenses of litigation in petition for prevention of oppression and mismanagement, see Notes under s. 397 under the same heading.

No interference in mere irregularities[12]

A shareholder must not fancy that he can obtain the intervention of the Court to put a stop to or remedy irregularities. The Court only intervenes in very exceptional cases, *e.g.*, where there is fraud, or oppression—'Thus, where anything has been done irregularly, which the company would by ordinary resolution do regularly, the court generally refuses to interfere at the suit of a minority. The principle upon which it refuses is, that the minority must submit to the majority, for if a single member of any minority could procure the aid of the Court in such case, would only lead to endless litigation, and the business of a company could not be carried. This rule is a great protection to the directors of a company. (Cf. PALMER'S COMPANY GUIDE, 36th Edn., page 121). In *Bahoo J. Coyajee v. Shanta Genevieve Prommeret Parulekar,* (1991) 3 Bom LR 319 it has been observed: "If the thing complained of is a thing which in substance the majority of the company are entitled to do or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes".

But suits in respects of or for redress of individual wrongs cannot be considered as merely concerned with matters of internal management, *Rathnavelusami Chettiar M.R.S. v. M.R.S. Manickavelu Chettiar,* (1951) 21 Com Cases 93 : AIR 1951 Mad 542; *Kaliappa Nadar v. Kathayee Cotton Mills Ltd.,* (1964) 34 Com Cases 947 (Ker—DB).

The Court will not, however, interfere except where there is manifest breach of the statute or the articles. *Mahaliram-Santhalia v. Fort Gloster Jute Manufacturing Co. Ltd.,* AIR 1955 Cal 132 : (1954) 24 Com Cases 311. Where the candidature of a shareholder for directorship is rejected by the chairman, it is an individual wrong in respect of which a suit is maintainable. *Joseph C.L. v. Jos,* (1964) 34 Com Cases 931 (Ker). See also *Panipat Woollen and General Mills Co. v. R. L. Kaushik,* (1969) 39 Com Cases 249 (P&H).

Interference in serious irregularities.—An injunction was granted to the majority shareholder and chairperson of the company's Board of directors to restrain the company from acting on a resolution passed at a meeting of the Board of directors. The basis for his action was that there had been various irregularities in respect of the meeting of the Board including shortness of notice and failure to obtain his clearance, lack of a quorum and passing resolutions and making decisions which were *ultra vires.* The company and some individuals, claiming to be directors of the company, appealed against the grant of injunction largely on the ground that as a director and chairman of the company, he had no *locus standi* according to the rule in *Foss v. Harbottle.* The Court of Appeal confirmed the injunction and dismissed the appeal. The court was of the opinion that the rule in *Foss v. Harbottle* did not apply to the present case because the wrongs complained of were not simple wrongs against the company as a corporate body, in respect of which the company only could sue, but were irregularities which affected the respondent as an individual. It would be idle to suggest that the respondent had no right to vindicate the infraction of his right to receive a proper notice of a meeting at which a resolution was passed for his removal as Chairman. The case was a proper one for the granting of an interlocutory injunction. The trial judge had rightly considered the balance of convenience and on whom the onus lay in such matters. He had also rightly come to the conclusion that the proper thing to do was to preserve the *status quo,* as none of the appellants were exposed to any

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damage by the injunction. *Pan Atlantic Clearing and Forwarding Agencies Ltd. v. Aleyidieno*, (1986) LRC (Comm) 562 (Nigeria CA).

Jurisdiction over the Societies Registration Act[13]

In the case of the Societies Registration Act under which non-profit charitable institutions, social clubs, etc., may be registered, instead of under section 25 of the Companies Act, the general principles governing the rights of members are the same as in the case of shareholders or members of a company and the jurisdiction of the ordinary civil court to interfere in the internal management of the society is the same as in the case of companies. For a discussion of this subject and a review of the authorities thereon, see *Krishnaswami v. South India Film Chamber of Commerce,* AIR 1969 Mad 42.

Jurisdiction of Civil Courts[13]

Under section 9 of the Code of Civil Procedure, 1908, the Civil Courts have jurisdiction to try all suits of civil nature, except where their jurisdiction has been specifically excluded. Therefore, the Civil Courts alone will have jurisdiction to decide the rights of parties in disputes arising under the Companies Act except where their jurisdiction has been expressly excluded, as in matters relating to winding up. See *Hirendra Bhadra v. Triton Engineering Co. P. Ltd.,* (1975-76) 80 CWN 242; **followed** in *Vithal Rao Narayan Rao Patil v. Maharashtra State Seed Corpn. Ltd.,* (1990) 68 Com Cases 608, 610 (Bom). In this case a director received a letter from the managing director intimating him that he had ceased to be a director from a particular date. When this was challenged by filing a civil suit it was held that the civil court had no jurisdiction to try the suit. See also *Panipat Woollen & General Mills Co. Ltd. v. Kaushik,* (1969) 39 Com Cases 249 (P&H) **applied** in *Prakasam (R.) v. Sree Narayana Dharma Paripalna Yogam,* (1980) 50 Com Cases 611 (Ker); *Avanti Explosive P. Ltd. v. Principal Subordinate Judge,* (1987) 62 Com Cases, 301 (AP); *Tej Prakash S Dangi v. Coromandal Pharmaceuticals Ltd.;* (1997) 89 Com Cases 270 : (1997) 26 CLA 116 (AP); [On Appeal the Full Bench in *K. Venkat Rao v. Rockwool (India) Ltd.,* (2002) 108 Com Cases 494 : (2002) 1 Comp LJ 519 : (2001) 46 CLA 243 (AP—FB) held that the director was entitled to go before the Company Court.] *Maharaja Exports v. Apparels Export Promotion Council,* (1986) 60 Com Cases 353 (Del); *Nawabshah Electric Supply Co. Ltd. v. Hariram S. Ahuja,* (1946) 16 Com Cases 204, 205 (Sind). (A dispute between the managing agent and the company). Indeed, there is no provision in the Companies Act, which gives the company court exclusive jurisdiction in all company matters. *Mylavarapu Ramakrishna Rao v. Mothey Krishna Rao,* (1947) 17 Com Cases 63 at 68 (Mad); *Marturi Umamaheshwara Rao v. Pendyla Venkatrayudu,* (1970) 40 Com Cases 751 (AP); *Marikar Motors v. Ravikumar (M.I.)* (1982) 52 Com Cases 362 (Ker).

A writ petition was not allowed where it seemed that the only purpose was to circumvent the orders already passed or that might be passed by the High Court in a company petition. The matter was pending before the High Court under s. 155 for rectification of the register of members. A company petition of this kind was a bar for institution of any civil proceeding in respect of the same matter. *Indian Fruits Ltd. v. Mantrad Pvt. Ltd.,* (1993) 12 CLA 117 (AP).

Matters over which civil suit can be filed[13].—The principles regarding exclusion of jurisdiction of civil courts were explained in *Dhulabhai v. State of M.P.,* AIR 1969 SC 78 which was **followed** in *Union of India v. Tara Chand Gupta,* AIR 1971 SC 1558. Thus, it has become clear to the extent of the following points that a civil suit can be filed :

(a) to challenge the election of a director. *Niranjan Singh v. Edward Ganj Public Welfare Association Ltd.,* (1977) 47 Com Cases 285 (P&H); **Affirmed** in *Sub-*

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nom, Niranjan Singh v. Edward Ganj Public Welfare Assn. Ltd., (1981) 51 Com Cases 475 (P&H—DB);

(b) to challenge the appointment and removal of directors, *Prakash Roadlines Ltd. v. Vijay Kumar Narang*, (1995) 83 Com Cases 569; For **contra** see *K. Venkat Rao v. Rockwool India Ltd.*, (2002) 108 Com Cases 494 : (2002) 46 CLA 243 (AP—FB).

(c) to implement the election of a person as a director. *T.L. Arora v. Ganga Ram Agarwal*, (1988) 63 Com Cases 736 and 739 (Del); *Sati Nath Mukherjee v. Suresh Chandra Roy*, (1941) 11 Com Cases 203 (Cal); *Panipat Woollen and General Mills Co. v. R.L. Kaushik*, (1969) 39 Com Cases 249 (P&H). The suit can be filed even when the same matter is pending before the Company Law Board under section 408, *T.L. Arora v. Ganga Ram Agarwal*, (1987) 1 Comp LJ 241 (Del), for a review of authorities and elaborate discussion of this subject, see *Patan Devi v. Harihar Prasad*, 1978 Tax LR 2292 (All);

(d) to direct the erstwhile managing director to file accounts. *Thiruvallu var Velanmai Kazhagam P. Ltd. v. M.K. Seethai Achi*, (1988) 64 Com Cases 305 (Mad);

(e) for a declaration that a meeting was illegal, *Ravinder Kumar Jain v. Punjab Registered (Iron & Steel) Stockholders Association Ltd.*, (1978) 48 Com Cases 401 (P&H);

(f) restraining consideration of agenda item at a meeting. *Oriental Benefit and Deposit Society Ltd. v. Bharat Kumar K. Shah*, (2001) 103 Com Cases 947 : (2001) 30 SCL 246 (Mad—DB).

(g) to challenge the validity of a notice calling a meeting *Niranjan Singh v. Edward Ganj Public Welfare Association Ltd.*, (1977) 47 Com Cases 285 (P&H). The Kerala High Court has held that the validity of an annual general meeting can be questioned only in a civil suit; the company court has no jurisdiction to grant relief in such matters. *Prakasam (R.) v. Sree Narayana Dharma Paripalna Yogam*, (1980) 50 Com Cases 611 (Ker);

(h) to decide matters arising out of an underwriting agreement. *Orissa State Financial Corporation Ltd. v. Kalinga Textiles Ltd.*, ILR (1973) Cut 38 (Ori);

(i) suit for refund of subscription money [*Vatsa Industries Ltd. v. Shankerlal Saraf* (1996) 87 Com Cases 918 (SC)];

(j) suits relating to the validity of forfeiture of shares. In this case notice of forfeiture was published in a newspaper and the validity of the same was under question. Such a matter could not go to a Company Court or CLB. *Tej Prakash S. Dangi v. Coromandal Pharmaceuticals Ltd.*, (1997) 89 Com Cases 270 (AP). *Sub-nom Tej Prakash Dangi v. Coromandal Pharmaceuticals Ltd.*, (2001) 43 CLA 21 : (2002) 108 Com Cases 516 : (2002) 1 Comp LJ 527 (AP—DB). The Full Bench **disapproved** this view and held that the director in question was entitled to go before the Company Court. *K. Venkat Rao v. Rockwool (India) Ltd.*, (2002) 108 Com Cases 494 : (2002) 1 Comp LJ 519 : (2001) 46 CLA (AP—FB).

(k) to save the company from two warring factions among the directors. *Jayanthi R. Padukone (Mrs.) v. I.C.D.S. Ltd.*, AIR 1994 Ker 354.

(l) to adjudicate disputes relating to issue of duplicate share certificates. Over this point no machinery has been provided by the Companies Act. *Inter Sales v. Reliance Industries Ltd.*, (1999) 35 CLA 370 (Cal).

Exclusion of jurisdiction of civil court[14].—In *Vithalrao Narayanrao Patil v. Maharashtra State Seeds Corporation Ltd.*, (1990) 68 Com Cases 608 (Bom), **following**

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Hirendra Bhadra v. Triton, Eng. Co. (P.) Ltd., (1975-76) 80 CWN 242, it was held that except where jurisdiction has been specifically conferred on the District Courts by the Central Government, the High Court by virtue of this section is the proper court to entertain any dispute in respect of the affairs of a company. Accordingly the court of the Civil Judge has no jurisdiction to entertain a suit filed by a director challenging his removal. With respect, this view seems to be incorrect. The jurisdiction under this section is conferred upon the High Court only where the Act provides a specific remedy, as for example, winding up proceedings. Where no specific remedy is provided, as under section 284, the proper remedy is a suit which has to be filed in the appropriate court, which may be a court subordinate to the High Court.

In *Santosh Poddar v. Kamal Kumar Poddar*, (1992) 3 BCR 310 (Bom—DB), a Division Bench of the Bombay High Court **overruled** *Vithalrao* case and **disagreed** with the Calcutta decision. The Court said that there is no ouster of the jurisdiction of a Civil Court in all cases where the provisions of the Companies Act may be attracted. It is only in respect of those proceedings which are expressly contemplated under the Companies Act under any specific provision that the Court which is referred to in that section would be the special Court, namely the High Court or the notified District Court. In all other cases ordinarily Civil Courts would continue to have jurisdiction. Case law discussed. To the the same effect is *Maheshwari (K.K.) v. Rockhard Building Materials Ltd.*, (1993) 12 Corpt LA 14 (AP).

However, the case of *Vithalrao Narayanrao Patil*, (*supra*) was **followed** by Andhra Pradesh High Court in *Nizamabad Corn Products P. Ltd. v. Vasudev Dalia*, (1992) 3 ALT 303, 305 (AP) so as to hold that Civil Court has no jurisdiction in such matters. In this case, a director who was removed was seeking an injunction declaring that the resolution passed at the AGM for his removal was not valid. The court refused to help him in the matter and **followed** its own decision in *Golden Wine Agencies v. Venedela Distilleries (P.) Limited*, AIR 1984 AP 274 in which it was held that the relief in the form of temporary mandatory injunction cannot be granted unless the plaintiff shows a clear right and a case of necessity and of extreme hardship and that the Court should exercise its jurisdiction of granting temporary mandatory injunction with greatest possible care and in cases where the remedy of damages is inadequate in the interests of justice.

The precise result of the network of the provisions is still not clear. The Act tries to distribute the jurisdiction as to company matters among the Central Government, Company Law Board, the company court and the ordinary civil courts. Whether a particular matter relating to a company falls within one jurisdiction or the other continues to be productive of confusion and litigation. In an attempt to straighten up the matter, the Kerala High Court has observed that unless a particular matter is specified in the Act to be dealt with by the company court, it cannot exercise jurisdiction merely because it is also a matter which relates to a company. Section 10 does not purport to invest the company court with jurisdiction over every matter arising under the Act. *Rajendra Menon (No. 2) v. Cochin Stock Exchange Ltd.*, (1990) 69 Com Cases 256, 258 (Ker—DB) **affirming,** *Rajendra Menon (No. 1) v. Cochin Stock Exchange Ltd.*, (1990) 69 Com Cases 231 (Ker).

The Supreme Court emphasised in *Dwarka Prasad Agarwal v. Ramesh Chandra Agarwal*, (2003) 117 Com Cases 206 (SC) : (2003) 4 Comp LJ 385 that ouster of jurisdiction is not to be readily inferred. The court observed that there is no complete ouster of civil court jurisdiction. The matter in question was whether there was illegal dispossession. The court said that this was a matter of civil nature and, therefore, a suit before the civil court for a temporary injunction was maintainable. It was not considered proper for the High Court to allow in a multiparty suit the remedy in one party and not in the other. *Dwarka Prasad Agarwal v. Ramesh Chandra Agarwal*, (2003) 117 Com Cases 206 : AIR 2003 SC 2696.

The exclusion of jurisdiction of civil courts is not to be readily inferred and such exclusion must either be "explicitly expressed or clearly implied. G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION, Chapter 9 (9th edn., 2004).

Jurisdiction for questioning appointment and removal of directors[15]

In *Avanthi Explosives (P.) Ltd. v. Principal Subordinate Judge,* (1987) 62 Com Cases 301 (AP), a civil suit was filed involving disqualification of the director of a company. The question was whether the suit was maintainable. Justice M. JAGANNATHA RAO, held that when the case deals with an individual right then the suit filed by him is maintainable. There may be some regulatory provisions in the Act but from this, it cannot be inferred that the general right of suit is taken away. Accordingly a suit for declaration that the plaintiff is and continues to be the managing director of the company, that the board meeting is null and void and for injunction to restrain the respondents from interfering with the office of the plaintiff as a managing director is maintainable. In *M.G. Kadali v. A. Krishna,* ILR (1990) Kar 3446, a learned Judge of the Karnataka High Court also took a similar view. A suit questioning the rejection of nomination paper by the management of the company was held to be maintainable. The learned Judge observed [at page 3465] that no particular provision of the Act barred the jurisdiction of the civil court from entertaining a suit for granting the reliefs of the nature sought for in the case.

The fact that civil courts are not deprived of the jurisdictions of all matters covered by the Act is clear from: (1) *Karnal Distillery Co. Ltd. v. Ladli Prashad Jaiswal,* AIR 1960 Punj 655, and (2) *Public Passenger Service Ltd., Chidambaram v. M.A. Khadar,* (1966) 36 Com Cases 1 : AIR 1966 SC 489. After a due consideration of these authorities, the Karnataka High Court in *Prakash Roadlines Ltd. v. Vijay Kumar Narang,* (1995) 83 Com Cases 569 (Kar) came to the conclusion that sections 257 and 284 regulate the exercise of the power to appoint and remove directors. No particular provision of the Act creates a specific jurisdiction to enforce such rights exclusively. Therefore it remains a matter for the jurisdiction of the Civil Courts.

In *British India Corporation Ltd. v. Robert Menzies,* (1936) 6 Com Cases 250 : AIR 1936 All 568 a Bench of Allahabad High Court held that the Company Judge alone has jurisdiction to enforce compliance with the provisions of the Companies Act, though such power is not expressly conferred on the Judge by the provisions of the Act. It was also held that the Company Judge may issue a mandatory injunction to ensure compliance with the mandatory provisions of the Act, even though the proceedings are of a summary nature. It was a case where the shareholder filed an application before the company for a copy of the register of members which was denied and therefore he moved the company court. The court said that there was no particular remedy provided under the Act and therefore it should be assumed that such a remedy is available and that the company court had jurisdiction. The court was not considering the exclusiveness of the jurisdiction anywhere. The court was not concerned in the said case whether the ordinary court had juridiction or not. The High Court observed that it is a fundamental principle of legal administration that where the law requires something to be done, there must be in existence a court that can directly order it to be done.

In *Hirendra Bhadra v. Triton Engineering Co. Ltd.,* (1975-76) 80 CWN 242 (Cal), it was held that the court of Munsiff had no jurisdiction to entertain the suit which was filed to enforce the resolution of the Board of directors and to declare that the defendant had vacated or deemed to have vacated the office of the director of the plaintiff company consequent upon the resolution. The learned Judge of the Calcutta High Court held that in view of Section 10 of the Act mainly the High Courts had jurisdiction with regard to the matters under the Act and in certain cases the district court may have jurisdiction, but not the Munsiff court. The court held that the matters alleged in the suit were matters under

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15. The powers of the court henceforth will be exercised by 'National Company Law Tribunal'/'National Company Law Appellate Tribunal' constituted under sections 10FB and 10FR.

the Act and therefore only the court under the Act had jurisdiction to entertain the suit. This was **followed** by a learned Judge of the Bombay High Court in *Vithalrao Narayanrao Patil v. Maharashtra State Seeds Corporation Ltd.*, (1990) 68 Com Cases 608 (Bom). However, the judgment in *Vithalrao* case was in effect **overruled** in *Santosh Poddar v. Kamal Kumar Poddar*, (1992) 3 BCR 310 (Bom). See also *Prakasam (R.) v. Sree Narayana Dharma Paripalana Yogam*, (1980) 50 Com Cases 611 (Ker); *Prakash Roadlines Ltd. v. Vijayakumar Narang*, (1995) 1 Comp LJ 195 (Karn); *Jayanthi R. Padukone (Mrs.) v. I.C.D.S. Ltd.*, (1995) 1 Comp LJ 178 (Karn); and *Rajendra Menon (No. 2) v. Cochin Stock Exchange Ltd.*, (1990) 69 Com Cases 256 : (1995) 1 Comp LJ 573 (Ker).

This line of cases was **followed** by the Madras High Court in *Radhakrishnan (K.) v. Thirumani Asphalts & Felts P. Ltd.*, (1997) 13 SCL 169 : (1997) 27 Corpt LA 78: (1997) 91 Com Cases 31 (Mad) so as to hold that the question of automatic vacation of office by a director by reason of non attendance was within the jurisdiction of ordinary civil courts. The court, therefore, had the power to examine the background of the automatic vacation and to declare that the director continued to be in office because the groundwork for the application of s. 283(1) was not made out. The court did not agree with the decisions in *Vithalrao Narayanrao Patil v. Maharashtra State Seeds Corpn. Ltd.*, (1990) 68 Com Cases 608, **overruled** as noted above and *Nizambad Corn Products P. Ltd. v. Vasudev Dalia*, (1992) 3 ALT 303 (AP). The Full Bench of Andhra High Court **did not agree** with the above view of the Madras High Court in *K. Venkat Rao v. Rockwood (India) Ltd.*, (2002) 108 Com Cases 494 : (2002) 1 Comp LJ 519 : (2001) 46 CLA 243 (AP—FB).

In connection with the right of shareholders to elect directors and to remove them, proceedings involving identical issues were instituted both before a civil court and before the Company Law Board. The question was whether the cases should be transferred to the Company Law Board. The court took it to be settled law that civil courts can entertain matters and deal with the same in relation to the rights of individual shareholders. If the suits are transferred, it will result in ousting the jurisdiction of the civil courts. Hence, there was no scope or justification to direct the transfer of suits to be heard and decided by the Company Law Board. *Prakash Roadlines Ltd. v. Sudarshan Kumar Manchanda*, (1995) 1 Comp LJ 208 (Kant).

Shareholders have the right to move the court for the purpose of saving their company from being victimised by warring factions. A *prima facie* case was made out to restrain the company from removing the chairman and managing director. The board of directors was told by the court that proper course would be to call a general meeting and proceed further according to the wishes of the shareholders. In forming a *prima facie* opinion about the issue of an injunction, the court said that when the court is called upon to appreciate the contentions of the parties through pleadings and documents only, it is all the more necessary to consider each and every circumstance pertaining to the situation. *Jayanthi R. Padukone (Mrs.) v. ICDS Ltd.*, AIR 1994 Kant 354 : (1999) 96 Com Cases 86.

Relief of declaration that a meeting of directors and resolutions passed at it are invalid, is a matter of common law and, therefore, a civil court has jurisdiction over such matters. The meeting of the Board of directors was called at a time when certain directors were absent and the specific purpose was to take advantage of that fact for passing certain resolutions. This was a fraudulent purpose which vitiated the meeting. *T.M. Paul (Dr.) v. City Hospital P. Ltd.*, (1999) 97 Com Cases 216 : (1999) 39 CLA 164 (2000) 2 Comp LJ 84 (Ker). The court also held that transactions which have already been concluded, and which while in process could have supported a petition under sections 397-398, can be questioned in a civil suit.

The Bombay High Court has expressed the opinion in *Khetan Industries P. Ltd. v. Manju Ravindra Prasad Khetan*, AIR 1995 Bom 43 that a civil court has no jurisdiction to interfere with the internal management of companies in matters like appointment and removal of directors. The court felt that the Companies Act has laid down an elaborate and detailed procedure for dealing with such matters. The court said that the Bombay

High Court was the principal civil court for Bombay for the purpose of proceedings for removal of trustees of a private trust under Chapter VII of the Trust Act and on that analogy no civil suit would lie for removal of directors of a private limited company.

Jurisdiction in matter of Company Deposits[16].—Where for the purpose of making a term deposit with a company a cheque was given at Bombay and was encashed by the company through its account also at Bombay and further still the refund cheques, which were dishonoured and became the cause of litigation, were also on a Bombay bank, but the deposit receipts carried the remark: "subject to Anand (Gujarat) Jurisdiction", it was held that this remark was of a unilateral nature and, therefore, it did not have the effect of ousting the jurisdiction of the competent courts and so the Bombay courts had jurisdiction to entertain proceedings arising out of the dishonour of the cheques. *R.S.D.V. Finance Co. P. Ltd. v. Shree Vallabh Glass Works Ltd.*, (1993) 78 Com Cases 640 (SC). The court further held that when under a State legislation (Bombay Relief Undertakings (Special Provisions) Act, 1955, as applied to Gujarat) an undertaking is declared "relief undertaking," it will not operate to stay proceedings against the properties of the company outside that State.

Jurisdiction under Sick Industrial Companies (Special Provisions Act, 1985[16].—In *Patheja Bros. Forging and Stampings v. ICICI Ltd.*, 2000 CLC 1492 : (2000) 4 Comp LJ 9 (SC), it has been held that so long as the matter relating to a Sick Industrial Company remains pending before BIFR/AAIFR, the protection under section 22 of SICA, 1985 would continue and the exclusive nature of jurisdiction given to BIFR/AAIFR is absolute.

§ **Note** : SICA, 1985 has since been repealed.

§ For further details see notes under section 433 under the heading "Enforcement of Bank Guarantee".

Jurisdiction of Company Court *vis-a-vis* Debt Recovery Tribunal[16].—In *Allahabad Bank v. Canara Bank*, (2000) 2 Comp LJ 170 : (2000) 101 Com Cases 64 (SC), it has been held that the Debt Recovery Tribunal has exclusive jurisdiction to deal with all matters for pursuing, filing, enforcing and conducting proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and leave of winding up of court under section 446 is not required to proceed against the debtor company.

§ For further details see Notes under section 446 under the heading "Proceedings under Debt Recovery Tribunal".

Jurisdiction for foreign proceedings.—In *Barclays Bank Plc. v. Horman*, (1993) BCLC 680 (Ch D and CA), the holding company was in liquidation in London. Its subsidiary in USA was disposed of to pay a bank debt there. The question was whether, if that payment constituted a fraudulent preference, the issue should be tried in England or USA. The court said that the following principles were relevant in deciding the question :

1. If the only issue is whether the English or the foreign court was the more appropriate forum, the question should normally be decided by the foreign court on the principle of *forum non convenient*.
2. If exceptionally the English court decided that the action before the foreign court would be vexatious or oppressive and that the English court is the natural forum, it can properly grant an injunction restraining the action in the foreign court.
3. In deciding whether the action is vexatious or oppressive account must be taken of the possible injustice to the defendant if the injunction is not granted and the possible injustice to the plaintiff if it is granted.

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16. The powers of the court henceforth will be exercised by 'National Company Law Tribunal'/'National Company Law Appellate Tribunal' constituted under sections 10FB and 10FR.

It was held on the facts that the judge directed himself properly and correctly that there was a connecting factor with the United States which made it proper for the proceedings to be brought there.

Jurisdiction of Consumer Forum and MRTP Commission and their power to provide interim relief

Investor is not consumer.—The Supreme Court in its decision in *Arvind Gupta (Dr.) v. SEBI,* (1994) 81 Com Cases 318 (SC); *Morgan Stanley Mutual Fund v. Kartick Das,* (1994) 81 Com Cases 318 (SC) has laid down that a prospective investor is not a consumer within the meaning of s. 2(1)(d) of the Consumer Protection Act, 1986 because neither an application for allotment of shares can be regarded as goods nor issue of shares can be regarded as a trade in shares and, therefore, consumer protection forums do not have jurisdiction over this matter and further that such forums do not have any power to grant an interim relief or even an *ad interim* relief. Issue of shares being not a trade in shares, it cannot be questioned under the category of unfair trade practices within the meaning of s. 2(1)(r) of the Consumer Protection Act, 1986. As a matter of guidance the Court emphasised the principle which the judicial and *quasi*-judicial authorities must bear in mind in granting *ex parte* injunctions in areas connected with the functioning of the capital market. See also *Director General (Investigation and Registration) v. Deepak Fertilizers and Petrochemicals Corpn. Ltd.,* (1994) 81 Com Cases 342 (MRTPC-FB) where also it was held that issue of shares or debentures is not a trade nor a dealing in goods or services **affirmed** by the Supreme Court in *R.D. Goyal v. Reliance Industries Ltd.,* (2003) 113 Com Cases 1 (SC). *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.,* AIR 1995 SC 470 : (1995) 83 Com Cases 30.

As a matter of further guidance it should be noted that the definition of the word 'goods' as it appeared in MTRP Act, 1969 was amended by the Amendment Act of 1991 with effect from 27-9-1991 so as to provide that goods would include 'shares and stock' including issue of shares before allotment. Thus matters relating to unfair and restrictive trade practices in respect of allotment of shares and stock can go before the M.R.T.P. Commission.

One of the effects of this amendment is the decision of Union Territory, Consumer Commission at Chandigarh in *Indian Acrylics Ltd. v. Rajni Goyal,* (1997) 14 SCL 93 (UTCDRC-Chd). The Commission held that shares are a marketable commodity and therefore a purchaser of shares who has filed with the company his application for transfer with payment of transfer fee has paid service charges and is therefore entitled to proceed against the company under the Consumer Protection Act, 1986, S. 2(1)(d) for any deficiency in service.

Inordinate delay in issue of shares to a debenture-holder exercising her option to convert debentures into shares and further harrasment by infructuous and irrelevant queries amounts to an untrade practice and therefore a complaint would lie before MRTP Commission under s. 36-A of the MRTP Act, 1969. The availability of a remedy under the Companies Act, would be no bar to the MRTP Commission. *Pushpa Rani Sharma v. ICICI,* (1997) 27 Corpt LA 87 (MRTPC).

Family companies and jurisdiction of family courts

Where all of the shareholders in a company were members of the same family and the husband and wife pursuing divorce proceedings, it was held that issues relating to share ownership in that company and its ultimate control could quite properly be dealt with by the Family Division. There is no need to try to limit the jurisdiction of the Family Division by holding that corporate matters are the sole concern of the Companies Court—*Poon v. Poon,* (1994) 2 FCR 777.

Jurisdiction of Securities Appellate Tribunal

The Tribunal has been constituted by the Central Government to hear appeals under s 15T of the SEBI Act, 1992 [*GSR* 425(E), dated 28-7-1997].

§ For text of SEBI Appellate Tribunal (Procedure) Rules, 2000 see *Appendix* 153.

Jurisdiction for Investor Guidance, Grievances, and Complaints

The Securities and Exchange Board of India has been receiving investor complaints against companies and other intermediaries in the capital market. While complaints against intermediaries differ widely in nature, complaints against companies can be standardised. SEBI has evolved an investor complaint format. If investors give complaint in this format, it will be easier to process their complaints. The process of grievance redressal can be speeded up. Specimen copies of this investor complaint format will be available at all offices of SEBI in Mumbai, Delhi, Calcutta and Chennai, all stock exchanges and SEBI recognised investor associations.

§ For the text of the format of complaint and addresses of the Forum, see *Appendix* 234.

Investor Grievance Redressal—Decentralisation

SEBI's Press Release, dated 16-9-1997.—SEBI has been, as a part of performing its statutorily assigned function of investor protection, attending to the grievances of the investors in the securities market. Many investors do come down to the office of SEBI at its Head Office in Mumbai to personally lodge their complaints or to follow-up the matter. This creates avoidable hardships for outstation investors.

In order to mitigate the difficulties of the investors in approaching the Investor Grievance Redressal and Guidance Division of SEBI at its Head Office, Mumbai, it has since been decided to delegate the work relating to attending to investor grievances to the Regional Offices of SEBI at Calcutta, Chennai and New Delhi.

Investors in securities market are hereby advised to forward their grievances against listed companies to the particular Regional Office of SEBI within whose territorial jurisdiction the registered offices of the companies are located. Any follow-up on the matter may also be taken up with this particular Regional Office of SEBI. The territorial jurisdiction of each of the Regional Office is given below:

REGION	TERRITORIAL JURISDICTION	ADDRESS OF SEBI OFFICES
NORTH	Haryana, Himachal Pradesh, Jammu & Kashmir, Punjab, Rajasthan, Uttar Pradesh, Chandigarh Delhi and Uttaranchal	Block No. 1, Rajendra Bhavan, Rajendra Place Dist. Centre, New Delhi-110 008 Tel. : 25732313, 25739784 Fax : 011-25768992
EAST	Assam, Bihar, Manipur, Meghalaya, Nagaland, Orissa, West Bengal, Arunachal Pradesh, Mizoram, Tripura and Jharkhand	FMC, Fortuna, 5th Floor, 234/3A, AJC Bose Road, Calcutta-700 020 Tel. : 22402435, 22406105, 22801219, 22801220, 22801423 Fax : 033-22404307
SOUTH	Andhra Pradesh, Karnataka, Kerala, Tamil Nadu and Pondicherry	3rd Floor, D'Monte Building No. 32, D'Monte Colony, TTK Road, Alwarpet, Chennai-600 018 Tel. : 24971791 to 95, 24971797 Fax : 044-4971796
WEST	Gujarat, Maharashtra, Madhya Pradesh, Dadra and Nagar Haveli, Goa and Chattisgarh	Earnest House, 14th/15th Floor, 194, Nariman Point, Mumbai-400 021 Tel. : 22850441-50, 22880944-47 Fax : 022-22870746, 22856002

Investor to approach RBI for Complaints regarding NBFCs

Press Release, dt. 30-3-2001.—Union Government has taken effective steps to expeditiously redress investor grievances in the Securities and Exchange Board of India (SEBI). Under the new measures, disposal of investors' grievances and relevant powers have been delegated to SEBI for expeditious settlement of investors complaints relating to listed companies. The time-limit for disposal of such grievances has been reduced from 120 days to 90 days.

Moreover, the Department of Company Affairs has advised the investors to approach the Reserve Bank of India for complaints concerning non-banking finance companies.

No jurisdiction over winding up matters.—It has been held by the Madras High Court that a Consumer Forum has no jurisdiction to consider claims of creditors against a Company which is being wound up under the Companies Act. Any other Court than the winding up Court can consider the matters of such a company only when permitted by the winding up Court under s. 446. This is so because the whole property of the company becomes vested under s. 456 in the winding up court and therefore its disposal can only be with the sanction of that Court. *Sudarshan Chits India (Ltd.) v. Official Liquidator, High Court of Kerala,* (1992) 1 Comp LJ 34, 37 (Mad).

Power of Court to grant interim relief

§ For a discussion on the power of courts to grant interim relief see Notes under section 403, *post.*

Section 10-A *omitted*[1]

Section 10-B *omitted*[1]

Section 10-C *omitted*[1]

Section 10-D *omitted*[1]

1. Omitted by the Companies Tribunal (Abolition) Act (XVII of 1967), s. 4 and Sch. (w.e.f. 1-7-1967).