

# Chapter 1 - Preliminary

**Objective of this Act:**

Act to consolidate and amend the law relating to companies

**Enactment:**

- Received the assent of the Hon'ble President of India on **29th August 2013**
- Notified in Official Gazette on **30th August 2013** (different dates may be appointed for enforcement)

**Flow:**

- 29 Chapters (+ Generally, 1 rule per chapter)
- 470 Sections (Sec 1 to 148 covered in Intermediate)
- 7 Schedules

**Company:** An **incorporated** association which is an **artificial person**, having a separate **legal entity**, with a **perpetual succession**, a **common seal** (if any), and a common capital comprised of transferable shares and limited liability

**Section 1: Short Title, Extent, Commencement and Application:**

Short Title	Companies Act, 2013
Extent	Whole of India (by default includes J&K)
Commencement	From date as appointed by CG by notification in OG
Applicability	The provision of this Act shall apply to: <ol style="list-style-type: none"> <li>a. <b>companies incorporated</b> under this Act or under any previous company law</li> <li>b. <b>insurance</b> cos., except where provisions are inconsistent with that of Insurance Act, 1938 or IRDA Act, 1999;</li> <li>c. <b>banking</b> companies, except where provisions are inconsistent with that of Banking Regulation Act, 1949</li> <li>d. cos. engaged in generation/supply of <b>electricity</b>, except where provisions are inconsistent with that of Electricity Act, 2003</li> <li>e. other company governed by any <b>Special Act</b>, except where provisions are inconsistent with that of Special Act (Ex: LIC, RBI)</li> <li>f. such <b>body corporate</b>, incorporated by any Act for the time being in force, as may be <b>notified by CG</b> [Example - Food Corporation of India (FCI), National Highway Authority of India (NHAI)]</li> </ol>

**Section 2: Definitions:** ('Internal aids to construction')

In this Act, unless the context otherwise requires:

Cla use	Definition:
1	<b><u>Abridged Prospectus</u></b> Means a <b>memorandum</b> containing such <b>salient features</b> of a <b>prospectus</b> as may be specified by the Securities and Exchange Board by making regulations in this behalf

2	<p><b><u>Accounting Standards</u></b> Means the standards of accounting or any <b>addendum</b> thereto for companies or class of companies referred to in section 133;</p> <p><b><u>Section 133: Central Government to Prescribe Accounting Standards</u></b> As per Sec 133, CG may prescribe the AS or any addendum thereto, as recommended by <b>ICAI</b>, constituted u/s 3 of the CA Act, 1949, in consultation with and after examination of recommendations made by <b>National Financial Reporting Authority (NFRA)</b></p> <p><b><u>Rule 7 of Companies (Accounts) Rules, 2014:</u></b> Accordingly,</p> <ol style="list-style-type: none"> <li>i. The standards of accounting as specified under Companies Act, <b>1956</b> shall be deemed to be AS until AS are specified by CG u/s 133.</li> <li>ii. Till the NFRA is constituted u/s 132 of the Act, the CG may prescribe AS or any addendum thereto, as recommended by ICAI in consultation with and after examination of recommendations made by <b>National Advisory Committee (NAC)</b> on AS constituted u/s 210A of Companies Act, <b>1956</b>.</li> </ol> <p>Further, in exercise of powers conferred u/s 133, the CG in consultation with the National Advisory Committee on AS prescribed that Companies (AS) Rules, 2006 and Companies (Ind AS) Rules, 2015 may be followed.</p>
3	<p><b><u>Alter or Alteration</u></b> <b>Includes</b> the making of additions, omissions and substitutions;</p>
5	<p><b><u>Articles</u></b> Means the <b>articles of association</b> of a company:</p> <ul style="list-style-type: none"> <li>• as <b>originally</b> framed, or</li> <li>• as <b>altered</b> from time to time, or</li> <li>• applied in pursuance of any <b>previous</b> company law or <b>this</b> Act;</li> </ul>
6	<p><b><u>Associate Company</u></b> In relation to another co., means a company in which that other co. has a <b>significant influence</b>, but which is <b>not a subsidiary company</b> of the company having such influence and <b><u>includes a joint venture company</u></b></p> <p><b><u>Explanation:</u></b> For the purpose of this clause:</p> <ol style="list-style-type: none"> <li>(a) "Significant influence" means control of <b>at least 20% of total voting power</b>, or control of or participation in <b>business decisions</b> under an agreement;</li> <li>(b) "Joint venture" means a <b>joint arrangement</b> whereby the parties that have <b>joint control</b> of the arrangement have rights to the net assets of the arrangement</li> </ol> <p><b><u>Clarification:</u></b> Shares held by a company in another company in a <b>fiduciary capacity</b> shall <b>not be counted for</b> the purpose of determining the relationship of associate company</p> <p>A fiduciary is a person who holds a <b>legal or ethical relationship</b> of trust with one of more parties (persons or group of persons). Typically, a fiduciary prudently takes care of money or other assets for another person.</p>

7	<p><u>Auditing standards</u> means the standards of auditing or any addendum thereto for companies or class of companies referred to u/s 143(10)</p> <p>Section 143(10) - CG may prescribe the standards of auditing or any addendum thereto, as recommended by ICAI, constituted u/s 3 of the CA Act, 1949, in consultation with and after examination of recommendations made by NFRA.</p> <p>Provided that until any auditing standards are notified, any standard or standards of auditing specified by the ICAI shall be deemed to be the auditing standards.</p>							
8	<p><u>Authorised Capital or Nominal Capital</u> means such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company;</p>							
10	<p><u>Board of Directors or Board</u> means the collective body of the directors of the company</p>							
11	<p><u>Body corporate or Corporation</u> Includes a company incorporated outside India, but does not include: i. a co-operative society registered under any law relating to co-operative societies; and ii. any other body corporate (not being a company as defined in this Act), notified by CG;</p>							
12	<p><u>"Book and Paper" and "Book or Paper"</u>: Includes: [WARM DVD]</p> <table border="1" data-bbox="228 1100 1390 1178"> <tr> <td>Books of Accounts</td> <td>Deeds</td> <td>Voucher</td> <td>Writings</td> <td>Documents</td> <td>Minutes</td> <td>Registers</td> </tr> </table> <p>maintained on paper or in electronic form;</p>	Books of Accounts	Deeds	Voucher	Writings	Documents	Minutes	Registers
Books of Accounts	Deeds	Voucher	Writings	Documents	Minutes	Registers		
13	<p><u>"Books of account"</u> includes records maintained in respect of: (i) all sums of money received and expended by a company and matters in relation to which the receipts and expenditure take place; (ii) all sales and purchases of goods and services by the company; (iii) the assets and liabilities of the company; and (iv) the items of cost as may be prescribed u/s 148 in the case of a company which belongs to any class of companies specified under that section;</p>							
14	<p><u>Branch office</u>, in relation to a company, means any establishment described as such by the co.;</p>							
15	<p><u>Called-up capital</u> means such part of the capital, which has been called for payment;</p>							
16	<p><u>Charge</u> means an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage;</p>							
17	<p><u>Chartered accountant</u> means a CA as defined in section 2(1)(b) of the Chartered Accountants Act, 1949 who holds a valid certificate of practice u/ss 6(1) of that Act;</p>							

18	<u>Chief Executive Officer</u> means an officer of a company, who has been <b>designated</b> as such by it;
19	<u>Chief Financial Officer</u> means a person <b>appointed</b> as the Chief Financial Officer of a company;
20	<u>Company</u> means a company <b>incorporated</b> under this Act or under any previous company law; <u>Example</u> : RIL (1973), Tata Steel (1907), Infosys (1981).
21	<u>Company limited by guarantee</u> means a company having the <b>liability</b> of its members <b>limited</b> by the <b>memorandum</b> to such amount as the members may <b>respectively undertake to contribute</b> to the assets of the company in the event of its being <b>wound up</b> ;
22	<u>Company limited by shares</u> means a company having the <b>liability</b> of its members limited by the <b>memorandum</b> to the amount, if any, <b>unpaid on the shares respectively held</b> by them;  Example: A shareholder who has paid Rs. 75 on a share of face value Rs. 100 can be called upon to pay the balance of Rs. 25 only.
26	<u>Contributory</u> means a person <b>liable</b> to contribute towards the assets of the company in the event of its being <b>wound up</b> .  Explanation: For the purposes of this clause, it is hereby clarified that a <b>person holding fully paid-up</b> shares in a company shall be considered as a contributory <b>but</b> shall have <b>no liabilities</b> of a contributory under the Act whilst retaining rights of such a contributory;
27	<u>Control</u> shall <b>include</b> : <ul style="list-style-type: none"> <li>• the right to appoint <b>majority</b> of the <b>directors</b> or</li> <li>• to control the <b>management</b> or <b>policy decisions</b> exercisable by a person(s) acting individually or in concert, directly or indirectly,</li> <li>• including by virtue of their <b>shareholding</b> or <b>management rights</b> or shareholders agreements or voting agreements or in any other manner</li> </ul>
30	<u>Debenture</u> includes debenture stock, bonds or any other instrument of a company <b>evidencing a debt</b> , whether constituting a charge on the assets of the company or not.  Provided that, following instrument shall not be shall not be treated as debenture: <ol style="list-style-type: none"> <li><b>instruments</b> referred to in Chapter III-D of the RBI Act, 1934; and</li> <li>such other instrument, as may be prescribed by <b>CG</b> in consultation with RBI, issued by a company,</li> </ol>
34	<u>Director</u> means a director <b>appointed to the Board</b> of a company;
35	<u>Dividend</u> includes any <b>interim dividend</b> ;
36	<u>Document</u> includes <b>summons, notice, requisition</b> , order, declaration, form and register, whether issued, sent or kept in pursuance of this Act or under any other law for the time being in force or otherwise, maintained on paper or in electronic form;
37	<u>Employees stock option</u> means the <b>option</b> given to the <b>directors, officers or employees</b> of a company or of its holding company or subsidiary company or companies, if any, which gives such directors, officers or employees, the benefit or <b>right to purchase</b> , or to subscribe for, the shares of the company at a <b>future date</b> at a <b>pre-determined price</b> ;

38	<p><u>"Expert"</u> includes an <b>engineer</b>, a <b>valuer</b>, a <b>CA</b>, a <b>CS</b>, a cost accountant and any other person who has the power or authority to <b>issue a certificate</b> in pursuance of any law for the time being in force;</p>
40	<p><u>Financial statement</u> in relation to a company, includes:</p> <ol style="list-style-type: none"> <li><b>Balance sheet</b> as at the end of the financial year;</li> <li>a <b>profit and loss account</b>, or in the case of a company carrying on any activity <b>not for profit</b>, an <b>income and expenditure account</b> for the financial year;</li> <li><b>cash flow statement (CFS)</b> for the financial year*;</li> <li>a statement of changes in <b>equity</b>, if applicable; and</li> <li>any <b>explanatory</b> note annexed to, or forming part of, any doc. referred to in sub-clause (i) to (iv):</li> </ol> <p>*Provided that the FS, with respect to <b>OPC, small co. and dormant co. and Private company (startup)</b>, may not include <b>CFS</b>;</p>
41	<p><u>Financial Year</u>, in relation to any company or BC, means <b>period ending on 31st day of March every year</b>, and where it has been <b>incorporated on or after the 1st day of January</b> of a year, the period ending on the 31st day of March of the <b>following year</b>, in respect whereof FS of the company or BC is made up.</p> <p>Provided that where a company or BC, which is a holding company or a subsidiary or associate company of a <b>company incorporated outside India</b> and is required to follow a different FY for consolidation of its accounts outside India, the CG may, on an application made by that company or BC in such form and manner as may be prescribed, <b>allow any period as its FY</b>, whether or not that period is <b>a year</b>.</p>
43	<p><u>Free reserves</u> means such reserves which, as per the latest audited balance sheet of a company, are <b>available for distribution as dividend</b>.</p> <p>Provided that, following shall not be treated as free reserve:</p> <ol style="list-style-type: none"> <li>any amount representing <b>unrealised gains, notional gains</b> or revaluation of assets, whether shown as a reserve or otherwise, or</li> <li>any change in <b>carrying amount</b> of an asset or of a liability recognised in equity, including surplus in profit and loss account on measurement of the asset or the liability at <b>fair value</b>;</li> </ol>
45	<p><u>Government company</u> means:</p> <ul style="list-style-type: none"> <li>any co. in which <b>not less than 51%</b> of paid-up share capital is held by <b>CG</b>, or by any <b>SG</b>, or partly by <b>CG</b> and partly by one or more <b>SG</b>, <b>and</b></li> <li><b>includes</b> a company which is a <b>subsidiary co. of such Government co.</b>;</li> </ul>
46	<p><u>Holding company</u>, in relation to one or more other companies, means a company of which such companies are <b>subsidiary companies</b>;</p>
50	<p><u>Issued Capital</u> means such capital as the company <b>issues</b> from time to time <b>for subscription</b>;</p>
51	<p><u>Key Managerial Personnel</u>, in relation to a company, means:</p> <ol style="list-style-type: none"> <li>the <b>CEO</b> or the managing director or the manager;</li> <li>the company secretary;</li> </ol>

- iii. the whole-time director;
- iv. the Chief Financial Officer
- v. such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and
- vi. such other officer as may be prescribed;

52 **Listed company** means a **company** which has any of its securities listed on any **recognised stock exchange ("RSE")**;  
 Provided that **such class** of companies, which have listed or intend to list such class of securities, as may be prescribed in consultation with the SEBI, shall **not be considered as listed companies**.

According to Rule 2A of the Companies (Specification of definitions details) Rules, 2014, the following classes of companies shall not be considered as listed companies, namely:

- a. **Public** companies which have **not listed their equity** shares on a RSE but have listed their:
  - i. **non-convertible debt securities** issued on **private placement basis** in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008; or
  - ii. **non-convertible redeemable preference shares** issued on **private placement basis** in terms of SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013;
  - iii. **both** categories of (i) and (ii) above.
- b. **Private** cos which have listed their **non-convertible debt securities** on **private placement** basis on a RSE in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008;
- c. **Public** cos which have not listed their equity shares on a RSE but whose **equity shares are listed on a stock** exchange in a jurisdiction as specified in section 23(A) of the Act.

53 **Manager** means an **individual** 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 co., and
- **includes a director** or any other person occupying the position of a manager, by whatever name called, whether under a contract of service or not;

54 **Managing Director** means a **director** who

- By virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors,
- is entrusted with **substantial powers of management** of the affairs of the company and
- includes a **director** occupying the position of managing director, by whatever name called.

Explanation: For the purposes of this clause, the **power to do administrative acts** of a **routine nature** when so authorised by the Board **shall not be deemed** to be included within the substantial powers of management;

Power to do administrative act:

power to affix the common <b>seal</b> to any document	draw and endorse any <b>cheque</b> in any bank	draw and endorse any <b>negotiable instrument</b>	sign any <b>certificate</b> of share	direct registration of <b>transfer</b> of any share
---	--	---	--------------------------------------	---

55	<p><b>Member</b> in relation to a company, means:</p> <ol style="list-style-type: none"> <li>i. the <b>subscriber</b> to the memorandum of co. who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its <b>register of members</b>;</li> <li>ii. every other person who <b>agrees in writing</b> to become a member of the company and whose name is entered in the <b>register of members</b> of the company;</li> <li>iii. every person holding shares of the company and whose name is entered as a <b>beneficial owner</b> in the records of a <b>depository</b>;</li> </ol>			
56	<p><b>Memorandum</b> means the <b>MoA</b> of a company as <b>originally</b> framed or as <b>altered</b> from time to time in pursuance of any <b>previous</b> company law <b>or of this Act</b>;</p>			
57	<p><b>Net worth</b> means the:</p> <table border="1" data-bbox="237 632 1463 877"> <tr> <td data-bbox="237 632 708 877"> <p><u>Aggregate value of:</u></p> <ol style="list-style-type: none"> <li>1. paid-up share capital,</li> <li>2. <b>All reserves</b> created out of the profits,</li> <li>3. Securities premium account &amp;</li> <li>4. debit or credit balance of P&amp;L</li> </ol> </td> <td data-bbox="708 632 1094 877"> <p><u>After deducting aggregate value of:</u></p> <ol style="list-style-type: none"> <li>1. the accumulated <b>losses</b>,</li> <li>2. <b>deferred</b> expenditure &amp;</li> <li>3. miscellaneous <b>expense</b> <b>not written off</b></li> </ol> </td> <td data-bbox="1094 632 1463 877"> <p><u>Does NOT include:</u></p> <ol style="list-style-type: none"> <li>1. Reserve created out of <b>revaluatn</b> of assets</li> <li>2. <b>Write-back</b> of depreciation and amalgamation</li> </ol> </td> </tr> </table>	<p><u>Aggregate value of:</u></p> <ol style="list-style-type: none"> <li>1. paid-up share capital,</li> <li>2. <b>All reserves</b> created out of the profits,</li> <li>3. Securities premium account &amp;</li> <li>4. debit or credit balance of P&amp;L</li> </ol>	<p><u>After deducting aggregate value of:</u></p> <ol style="list-style-type: none"> <li>1. the accumulated <b>losses</b>,</li> <li>2. <b>deferred</b> expenditure &amp;</li> <li>3. miscellaneous <b>expense</b> <b>not written off</b></li> </ol>	<p><u>Does NOT include:</u></p> <ol style="list-style-type: none"> <li>1. Reserve created out of <b>revaluatn</b> of assets</li> <li>2. <b>Write-back</b> of depreciation and amalgamation</li> </ol>
<p><u>Aggregate value of:</u></p> <ol style="list-style-type: none"> <li>1. paid-up share capital,</li> <li>2. <b>All reserves</b> created out of the profits,</li> <li>3. Securities premium account &amp;</li> <li>4. debit or credit balance of P&amp;L</li> </ol>	<p><u>After deducting aggregate value of:</u></p> <ol style="list-style-type: none"> <li>1. the accumulated <b>losses</b>,</li> <li>2. <b>deferred</b> expenditure &amp;</li> <li>3. miscellaneous <b>expense</b> <b>not written off</b></li> </ol>	<p><u>Does NOT include:</u></p> <ol style="list-style-type: none"> <li>1. Reserve created out of <b>revaluatn</b> of assets</li> <li>2. <b>Write-back</b> of depreciation and amalgamation</li> </ol>		
58	<p><b>Notification</b> means <b>a notification published in OG</b> and expression "notify" to be construed accordingly;</p>			
60	<p><b>Officer who is in default</b>, for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the <b>following officers</b> of a company, namely:</p> <ol style="list-style-type: none"> <li>(i) <b>Whole-time director</b>;</li> <li>(ii) <b>KMP</b>;</li> <li>(iii) where there is <b>no KMP</b>, such <b>director(s) as specified</b> by the Board in this behalf and who has or have given his consent in writing to the Board to such specification, <b>or all the directors</b>, if no director is so specified;</li> <li>(iv) any <b>person</b> who, <b>under the immediate authority of</b> Board/KMP, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, <b>actively participates</b> in, knowingly permits, or knowingly fails to take active steps to prevent, any default;</li> <li>(v) any <b>person</b> in accordance with whose advice, directions or instructions the <b>BoD</b> of company is <b>accustomed to act</b>, <b>other than</b> a person who gives advice to the Board in a <b>professional capacity</b>;</li> <li>(vi) <b>every director</b>, in respect of a contravention of any of the provisions of this Act, who is <b>aware</b> of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings <b>without objecting</b> to the same, or where such contravention had taken place with his consent or connivance; in respect of the issue or transfer of any shares of a company, the <b>share transfer agents</b>, registrars and merchant bankers to the issue or transfer;</li> </ol>			
62	<p><b>One Person Company (OPC)</b> means a company which has only one person as a member;</p>			

63	<u>Ordinary or Special Resolution</u> means an OR/SR as referred to in section 114;
64	<u>Paid-up share capital or share capital paid-up</u> means: such <b>aggregate</b> amount of <b>money credited</b> as paid-up as is equivalent to the amount received as paid-up in respect of shares issued and also includes any amount credited as paid-up in respect of shares of the company, but does not include any other amount received in respect of such shares, by whatever name called;
65	<u>Postal ballot</u> means voting by post or through any e-mode;
66	<u>Prescribed</u> means prescribed by rules made under this Act;
68	<u>Private Company</u> means a company having a minimum paid-up share capital as may be prescribed, and which by its articles: i. <b>restricts</b> the right to <b>transfer</b> its shares; ii. except in case of OPC, <b>limits</b> the number of its <b>members</b> to <b>200</b> :  Provided that in case <b>joint holding</b> - Treat them as <b>single member</b>  Provided further, following shall <b>not be included</b> in number of members: a. persons who are in the <b>employment</b> of the company; and b. persons who, having been <b>formerly in employment</b> of company, were members of company while in that employment and have <b>continued to be members</b> after the employment ceased  iii. <b>prohibits</b> any invitation to the <b>public to subscribe</b> for any securities of the company;  The requirement of having a minimum PUSC shall <b>not apply to a Section 8 provided</b> it has not committed a default in filing its financial statements u/s <b>137</b> or annual return u/s <b>92</b> with RoC.
69	<u>Promoter</u> means a person: a) who has been <b>named</b> as such in a <b>prospectus</b> or is identified by co. in <b>annual return</b> u/s 92, b) who has control over the <b>affairs</b> of the company, directly or indirectly whether as a shareholder, director or otherwise; or c) in accordance with whose advice, directions or instructions the Board of the company is <b>accustomed to act</b> ( <b>except</b> where such person is acting merely in <b>professional capacity</b> )
70	<u>Prospectus</u> means any document described or issued as a prospectus and includes a <b>red herring prospectus</b> or <b>shelf prospectus</b> or <b>any notice</b> , circular, advertisement or other document <b>inviting offers</b> from public for subscription or purchase of any securities of a body corporate;
71	<u>Public company</u> means a company which: i. is <b>not a private</b> company; and ii. has a minimum paid-up share capital as may be prescribed (N.A. to Sec 8 companies)  Provided that <b>subsidiary of a public company</b> shall be <b>deemed</b> to be <b>public</b> company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles;
74	<u>Register of companies</u> means the register of companies maintained by the Registrar on paper or in any electronic mode under this Act;



75	<p><b>Registrar</b> means a <b>Registrar</b>, an <b>Additional Registrar</b>, a <b>Joint Registrar</b>, a <b>Deputy Registrar</b> or an <b>Assistant Registrar</b>, having the <b>duty</b> of registering companies and discharging various functions under this Act</p>
76	<p><b>Related Party:</b></p> <pre> graph TD     subgraph Person         P1[Director and Relatives]         P2[KMP and Relatives]     end     subgraph Firm         F1[Director, Manager or relative is a partner]     end     subgraph Private_Company [Private Company]         PC1[Director, Manager or Relative is - Member or Director]     end     subgraph Public_Company [Public Company]         PUSC[Such director or manager <del>or Relative is</del> - a <b>director AND</b> holds along <b>with relatives</b> &gt;2% of PUSC]     end     subgraph Body_Corporate [Body Corporate (N.A to Private Company)]         BC1[BOD / MD / Manager is <b>accustomed to act</b> as per advice or instruction of <b>director or manager and relative</b>]         BC2[holding, subsidiary, <b>co-subsidiary</b> or associate of such company]         BC3[Investing company or venturer of the company (such investment leads to the company becoming <b>associate</b>)]     end     subgraph Any_person [Any person]         AP1[on whose advice or instruction of <b>director or manager and relative is accustomed to act</b>]     end     subgraph Other_person [Other person]         OP1[As may be <u>prescribed</u> Director (other than I.D), KMP of the <b>holding co.</b> or relatives of such directors or KMP]     end   </pre>
77	<p><b>Relative:</b> Anyone who is related to another and covers the following:</p> <ol style="list-style-type: none"> <li>they are members of a HUF (Hindu Undivided Family);</li> <li>they are husband and wife; or</li> <li>one person is related to the other in the prescribed manner as under:       <ol style="list-style-type: none"> <li>Father (including stepfather);</li> <li>Mother (including stepmother);</li> <li>Son (including stepson);</li> <li>Son's wife;</li> <li>Daughter (<del>including stepdaughter</del>);</li> <li>Daughter's husband;</li> <li>Brother (including the stepbrother);</li> <li>Sister (including the stepsister).</li> </ol> </li> </ol>
78	<p><b>Remuneration</b> means any <b>money</b>, or its equivalent given or passed to any person for services rendered by him and includes perquisites as defined under the Income Tax Act, 1961</p>
84	<p><b>Share</b> means a share in the share capital of a company and <b>includes stock</b>;</p>
85	<p><b>Small company</b> means a company, <b>other than a public company</b>:</p> <ol style="list-style-type: none"> <li><b>PUSC</b> of which does not exceed <b>Rs. 50 lakh</b> or such <b>higher</b> amount as may be prescribed which shall not be <b>&gt; Rs. 10 crores</b>; <b>and</b></li> </ol>

ii. **turnover** of which as per P&L account for the immediately preceding FY does not exceed **Rs. 2 crores** or such **higher** amount as may be prescribed which shall not be **> Rs. 100 crores**

Provided that nothing in this clause shall apply to:

- i. a **holding** company or a **subsidiary** company;
- ii. a company registered under **section 8**; or
- iii. a company or body corporate governed by any **special Act**.

As per the Companies (Specification of Definitions Details) Rules, 2014, for section 2(85), **PUSC and T/O of small company shall not exceed Rs. 2 crores and Rs. 20 crores respectively.**



86 **Subscribed capital** means **such part** of the capital which is for the time being **subscribed** by the members of a company;

87 **Subsidiary company or Subsidiary**, in relation to any other co., means a **company** in which the **holding** company:

- i. **controls** the **composition** of the Board of Directors; or
- ii. **exercises** or controls more than  $\frac{1}{2}$  of the **total voting power** either at its own or together with one or more of its subsidiary companies.

Provided that such class or classes of holding companies as may be prescribed **shall not have layers of subsidiaries** beyond such numbers as may be prescribed.

Explanation: For the purposes of this clause:

- a) a company shall be **deemed** to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or (ii) is of **another subsidiary** company of the holding company;
- b) the **composition** of a company's BoD shall be **deemed** to be controlled by another company if that other company by exercise of some power exercisable by it at its **discretion** can **appoint or remove all or a majority** of the directors;
- c) the expression "**company**" includes any **body corporate**;
- d) **layer** in relation to a holding company means its subsidiary or subsidiaries;

Note - Shares held by a company or power exercisable by it in another company in a **fiduciary capacity** shall **not be counted** for the purpose of determining the holding -subsidiary relationship.

88 **Sweat equity shares** means such **equity** shares as are issued by a company to its **directors** or **employees** at a **discount** or for consideration, other than cash, for **providing** their **know-how** or making available rights in the nature of **intellectual property rights** or **value additions**.

89 **Total voting power**, in relation to any matter, means the **total number of votes** which may be cast in regard to that matter on a poll at a meeting of a company **if all the members** thereof or their proxies having a right to vote on that matter **are present** at the meeting **and cast their votes**;

90	<u>Tribunal</u> means the <b>NCLT</b> constituted u/s 408;
91	<u>Turnover</u> means the <b>gross amount</b> of <b>revenue recognised</b> in the <b>P&amp;L account</b> from the sale, supply, or distribution of goods or on account of services rendered, or both, by a company during a <b>FY</b> ;
92	<u>Unlimited company</u> means a company <b>not having any limit on the liability</b> of its members;
93	<u>Voting Right</u> means the right of a <b>member</b> of a company <b>to vote</b> in any meeting of the company or by means of postal ballot;
59	<u>Officer</u> includes any <b>director, manager or KMP</b> or any person in accordance with whose directions or instructions BoD or any one or more of the directors is or are accustomed to act;

# Chapter 2 - Incorporation of Company and Matters incidental thereto

## Introduction to the Chapter:

- A person who initiates promotion of a company is called as **Promoter** [as defined u/s 2(69)]
- In this chapter we are going to read about - Incorporation of company, constitutional documents (MoA and AoA) and various other key provisions.
- Types of company on the basis of Liability:
  - Limited by Shares
  - Limited by Guarantee **with** Share Capital
  - Limited by Guarantee **without** Share Capital
  - Unlimited company **with** Share Capital
  - Unlimited company **without** Share Capital

Note - Specified IFSC company shall be formed on as company limited by shares.

## Section 3 - Formation of Company:

A company may be formed for any **lawful purpose** by:

- (a) **> = 7** persons in case of a **public** company;
- (b) **> = 2** persons in case of a **private** company; or
- (c) **1 person**, where the company to be formed is to be **OPC** that is to say, a **private company**, by **subscribing** to a **memorandum** and complying with the requirements of this Act.

## In case of OPC, MoA to specify nominee:

1. Nominate a person: In case of OPC, the **MoA** shall indicate:
  - the **name** of the **other person**,
  - with his prior **written consent** in the prescribed form,
  - who shall, in the **event** of the subscriber's **death** or his **incapacity** to contract
  - become the **member** of the company

The **written consent** so obtained shall also be filed with the **Registrar** at the time of **incorporation** of the OPC along with its MoA and AoA

2. Withdrawal: Nominee may **withdraw** consent any time in prescribed form
3. Replacement of Nominee - Member of OPC may, at any time, change the name of Nominee by:
  - a. Giving **notice** in prescribed form
  - b. Intimating the **company** about such change
  - c. On receipt of such intimation, company to inform **Registrar**.
  - d. Change of such name shall **NOT be deemed as Alteration of MoA**

### Section 3A - Members severally liable in certain cases:

If at any time, the **no. of members is reduced** below prescribed limit i.e., 7 (public) or 2 (private)



Company carries on **business for > 6 months** while no. of members is so reduced

Every person who is a member during the time that it so carries on business **after those 6m and is cognizant** of the fact that it is carrying on business with < 7 or 2 members, as the case may be, shall be **severally liable** for payment of **whole debts** contracted during that time, **and** may be **severally sued** therefor

### Section 7 - Incorporation of Company:

1. File the following **documents** and information with the **Registrar** within whose jurisdiction the Registered Office (RO) of a company is **proposed** to be situated:

**MoA and AoA** - duly signed by Subscribers

**Declaration**, that req. of Act/Rules w.r.t., incorporation is **complied** with, by:  
1. Advocate, CA, Cost Accountant, CS in practice engaged in **formation** of co., **AND**  
2. Person named in **AoA** (director, manager or secretary of co.)

**Address** for correspondence till RO is estb.

**Particulars** (name, residential address, nationality and others) of **every subscriber** + Proof of identity

**Particulars of first directors** - Names, **DIN**, residential address, nationality and other particulars + Proof of identity

Related to **first directors** - **Interest** in other firms/BC + **Consent** to act as directors

**Declaration** from each **Subscribers** and **First Directors** that:  
(a) he is not **convicted** of offence w.r.t., promotion, formation or mgt. of any co., or  
(b) that he has not been found **guilty** of any fraud/misfeasance or breach of duty to any co. during **preceding 5 years** **AND**  
(c) all **docs** filed with RoC for registration contain **correct**, complete and true information to best of his knowledge and belief

**Add on** - In case of OPC, file the written consent of nominee in addition to above documents!

2. **Issue of Certificate of incorporation ("COI")** - RoC shall, on basis of above doc and info, **register** and **issue a COI** in the prescribed form to the effect that the proposed company is incorporated under this Act
3. **Allotment of Corporate Identity Number (CIN)** - RoC shall allot to the co. a **CIN**, which shall be a **distinct identity** for the company, and which shall also be included in the COI
4. Company shall maintain & **preserve at its RO** copies of all **docs** & info. as **originally filed** u/ss (1) till **dissolution**.
5. If person furnishes any **false/incorrect** particulars of info. or **suppresses** any material info., of which he is aware in any of docs filed with RoC above → Such person - **liable** for action **u/s 447**

6. If **after incorporation**, it is **proved** that co. is incorporated by furnishing **false/incorrect** info. or representation or by **suppressing** any material info. for incorporating such co., or by any fraudulent action:
- the **promoters**, the **first directors** and persons making **declaration** u/s 3(1)(b) shall **each be liable** u/s 447.
  - Tribunal** may, on an application made to it [**MR. LOW**]:
    - pass orders for **regulation** of **Management** of the co. including changes, if any, in its MoA/AoA, in **public interest** or in the interest of company and its members and creditors; or
    - direct that **Liability** of the members shall be **unlimited**; or
    - direct **Removal** of the name of the company from the register of companies; or
    - pass an order for the **Winding up** of the company; or
    - pass such **Other orders** as it may deem fit**Prior** to such orders - Reasonable **OOBH** to Co. + take into consideration transaction entered into by co.

Simplified Proforma for Incorporating Company Electronically (**SPICE**) - For ease of doing business, MCA has now simplified the process of filing of forms for incorporation of company through SPICE.

#### **Formation of One Person Company (OPC):**

- MoA** of OPC to indicate name of other person (**nominee**) who becomes member of the OPC in case of death/ incapacity of subscriber.
- Nominee to give his prior **written consent** in prescribed form.
- Such written consent to be **filed with RoC** along with MoA/AoA
- Nominee may **withdraw** consent any time in prescribed form
- Member of OPC may, at any time, change the name of Nominee by:
  - Giving **notice** in prescribed form
  - Intimating the **company** about such change
  - On receipt of such intimation, company to inform **Registrar**.
  - Change of such name shall **NOT be deemed as Alteration of MoA**
- Only a **natural person** who is an **Indian citizen** whether **resident** in India or otherwise:
  - shall be eligible to **incorporate OPC**;
  - shall be a **nominee** for the sole member of OPC.

"Resident in India" means a person who has stayed in India for **> = 120 days** during immediately preceding FY.
- A natural person shall **not be member of > 1 OPC** at any point of time and **the said person** shall not be a **nominee** of **> 1 OPC**.
- Where a natural person being member in **OPC becomes member** in another such company by virtue of his being a **nominee** in that OPC, such person shall meet **eligibility criteria** (as given in point above) **within 180 days**.
- No minor** shall become member or nominee of the OPC or can hold share with beneficial interest.
- Such Company **cannot** be incorporated or **converted** into a section 8 company.
- OPC **may be converted to private/public companies** in certain cases. The procedure of conversion is given in the Rules 6 & 7 of Chapter II of the Companies Act, 2013.
- ~~No OPC can convert **voluntarily** into any kind of company **unless 2 years** have expired from the date of incorporation, **except** threshold limit (**paid-up share capital**) is increased beyond **Rs. 50 lakhs** or its **average annual turnover** during the relevant period exceeds **Rs. 2 crores** [**Omitted w.e.f Apr'21**]~~
- OPC **cannot carry out** Non-Banking Financial Investment activities incl. investment in sec of any BC.

## **Section 8 - Formation of companies with charitable objects, etc.:**

1. Where CG (power delegated to RoC) is **satisfied** that a person/AOP proposed to be registered as **Limited company**:

a. Has its **objects** to promote -

Commerce	Art	Science	Sports	Education	Research
Social Welfare	Religion	Charity	Protection of environment	Other Object	

b. intends to **apply** its **profits**, if any, or other income in promoting its objects; and

c. intends to **prohibit** the payment of any **dividend** to its members,

CG may issue a **license** and thereupon the RoC shall register such company as **Limited Company**.  
[**Without** addition of the word "Limited" or "Pvt. Ltd" as the case may be]

2. Sec 8 co = **Privileges** and obligation of **Limited** company.

3. Can a **Firm** become member of Section 8 company - **Yes!**

4. Additional points relating to Section 8 co.:

a. **Not alter** provision of MoA or AoA w/o prior approval of **CG**

b. **May be converted** to any other kind of company - Subject to passing **SR** at **GM** approving such conversion

5. CG may suo motu also issue license u/s 8 to an existing public or private co.

6. Revocation of License and conversion to normal company: Where the company:

a. **contravenes** any requirements of this **section** or

b. **contravenes** any conditions subject to which a **license** is issued or

c. the affairs of co. are conducted **fraudulently** or in manner violative of objects of co. or prejudicial to **public interest**,

CG may, by order (after reasonable **OOBH**):

- **revoke license**

- **direct the company** to **Convert** its status and

- change its name to add the word "Limited" or the words "Private Limited", as the case may be, to its name and thereupon the **Registrar** shall register the company accordingly:

7. Where license is **revoked**, CG may, in **public interest**, order (reasonable **OOBH**),

- **winding up** under this Act, or

- **amalgamate** such co. with other company registered under this section and having similar objects, constitution, powers, rights, etc. to be defined by CG

8. If on winding up/dissolution, there remains, after satisfaction of its liab, **any asset**, they may be:

a. **transfer to another sec 8 co.** having similar objects subject to T&C imposed by **Tribunal**, or

b. **sold** and proceeds thereof credited to **Insolvency and Bankruptcy Fund** formed u/s 224 of IBC

9. Section 8 co. shall amalgamate only with another Sec 8 co. having similar objectives

10. **Punishment for default in complying with this section:**

If a co. makes any default in complying with requirements of this section, the co. shall be punishable with fine which shall not be less than Rs. 10 lakhs but which may extend to Rs. 1 crore AND the directors and every officer of the company who is in default shall be punishable with fine which shall not be less than Rs. 25,000 but which may extend to Rs. 25 lakhs [Amended w.e.f. Dec 2020]

Provided that when it is proved that affairs of co. were conducted fraudulently, every OID liable u/s 447.

	<u>Company</u>	<u>Directors and OID</u>
Minimum fine	Rs. 10 lakhs	Rs. 25,000
Maximum fine	Rs. 1 crore	Rs. 25 lakhs
Affairs of co. - fraudulent	-	Sec 447

**Examples of exceptions to Sec 8 companies:**

- Call for GM by giving clear 14 days' notice (instead of 21)
- Requirement of min. no. of director, ID, does not apply.
- Need not constitute NRC or SRC

**Concept Clarity Check:**

- Can a Sec 8 co. be incorporated with unlimited liability? - No. Sec 8 co. only be a limited company
- Can an existing public/private co. seek license u/s 8? - Yes. In such case, it will drop the suffix Ltd or pvt ltd
- Can a Firm become member in a public company (non sec 8 company) - No. Partnership firm is not separate legal entity

**Section 9 - Effect of Registration:**

From the date of incorporation mentioned in COI, such subscribers to MoA and all other persons, as may, from time to time, become members of the company, shall be:

- a body corporate by the name contained in the memorandum,
- capable of exercising all the functions of an incorporated company under this Act and
- having perpetual succession with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name.

**Certain case laws to understand the effect of registration:**

Hari Nagar Sugar Mills Ltd. vs. S.S. Jhunjunwala	From date of incorporation, the co. becomes a legal person separate from the incorporators; and there comes into existence a binding contract b/w company and its members as evidenced by MoA/AoA
State Trading Corporation of India vs. Commercial Tax Officer	A company on registration acquires a separate existence and the law recognizes it as a legal person separate and distinct from its members
Spencer & Co. Ltd. Madras vs. CWT Madras	Merely because a company purchases all shares of another company, it will not serve as a means of putting an end to the corporate character of another company and each company is a separate juristic entity
Heavy Electrical Union vs.	The mere fact that entire share capital has been contributed by CG



State of Bihar	and all its shares are held by the President of India and other officers of CG does not make any difference in the position of registered company and it does not make a company an agent either of the President or CG
----------------	---

#### **Section 4 - Memorandum of Association: [As defined u/s 2(56)]**

##### Basics of MoA:

- **Base document** for the formation of the company (MoA + AoA = Constitutional Document)
- **Content** of MoA need to be in compliance with Companies Act, 2013
- MoA contains object for formation of co. beyond which its actions cannot go.
- A memorandum is a **public document u/s 399** of the Companies Act, 2013. Consequently, every person entering into a contract with the company is **presumed** to have **knowledge** of conditions contained therein.
- Shareholders must know the **purposes** for which his money can be used by the company and what **risks** he is taking in making the investment.
- Co. cannot depart from provisions contained in MoA - Otherwise, **ultra vires** Act.

##### Legal provision:

1. The MoA of a company shall state: [**NR SOLO**]

the **Name** of co. with **last word** "Limited" (public) or "Private Limited" (Pvt co.); (**Not applicable to Sec 8 Co.**)

the **state** in which the **Registered office** of the company is to be situated

**Objects** for which the company is proposed to be incorporated and any **matter incidental thereto**

the **Liability** of members of company, whether limited or unlimited\*\*

In case of **company having SC**:  
 a. **Amount of registered SC** (divided into amt and no. of shares)  
 b. the no. of shares each **subscriber** intends to take opposite to his name

in case of **OPC** → **Name** of person who, in event of death of subscriber, shall become the member of **OPC (nominee)**.

\*\* **Liability clause**: Also, state that liability is limited to unpaid amount of shares (in case of co. limited by **shares**) or amount upto which member undertake to contribute in the event of winding up (in case of limited by **Guarantee**)

2. **Name Clause**: The name stated in the memorandum shall:
  - (a) **NOT** be **identical** with or resemble too nearly to name of an **existing co.** under this/previous Act;
  - (b) **NOT** be such that its use by the company:
    - (i) will constitute an **offence** under any law for the time being in force; or
    - (ii) is **undesirable** in the opinion of the **CG**.
3. Without prejudice to provision u/ss (2), a co. shall **not** be registered with a **name** which contains:
  - a. any **word** or expression which is likely to give the **impression** that the company is in any way connected with, or having the **patronage** of, the **CG**, any **SG**, or any **local authority**, corporation or body constituted by the **CG/SG** under any law for the time being in force; or
  - b. such **word** or expression, as may be **prescribed**, unless the **previous approval** of **CG** has been **obtained** for the use of any such word or expression.

**Rule 8B of Companies (Incorporation) Rules, 2014:**

Following words and combinations thereof shall not be used in the name of a company in English or any of the languages depicting the same meaning unless the previous approval of the CG has been obtained:

<ul style="list-style-type: none"><li>• Board;</li><li>• Union;</li><li>• Nation;</li><li>• Central;</li><li>• Federal;</li><li>• Bureau</li></ul>	<ul style="list-style-type: none"><li>• National;</li><li>• Republic;</li><li>• President</li><li>• Minister;</li><li>• Governor;</li><li>• Rashtrapati;</li><li>• PM or CM;</li></ul>	<ul style="list-style-type: none"><li>• Authority;</li><li>• Municipal;</li><li>• Panchayat;</li><li>• Commission;</li><li>• Undertaking;</li></ul>	<ul style="list-style-type: none"><li>• Forest corporation;</li><li>• Development Scheme;</li><li>• Court or Judiciary;</li><li>• Statute or Statutory;</li></ul>	<ul style="list-style-type: none"><li>• Development Authority;</li><li>• Small Scale Industries;</li><li>• Financial Corporation and the like;</li><li>• Khadi and Village Industries Corporation;</li></ul>
--	--	---	---	--

- The use of word of Scheme with the name of Government (s), State, India, Bharat or any Government authority or in any manner resembling with the schemes launched by CG/SG or local Governments/auth

**Approval of Regulator:**

If the proposed name include words such as 'Insurance', 'Bank', 'Stock Exchange', 'Venture Capital', 'Asset Management', 'Nidhi', 'Mutual fund' etc., unless a declaration is submitted by the applicant that the requirements mandated by the respective regulator, such as IRDA, RBI, SEBI, MCA etc. have been complied with by the applicant;

**Bonus Points:**

- In case of Govt co., the suffix - "Pvt Ltd" or "Ltd" is not required provided 92 + 137
- In case of OPC, add the suffix - (OPC) Private Limited

4. A person may make an application (SPICe+/RUN form) to Registrar for reservation of a name as:
- the name of the proposed company; or
  - the name to which the company proposes to change its name.

**5. Reservation of Name:**

- Upon receipt of appln u/ss (4), the Registrar may, on the basis of info. and docs furnished with application, reserve the name:
  - for 20 days from the date of approval or such other period as may be prescribed in case of new co.
  - for 60 days from the date of approval in case of an application by an existing company
- Where after reservation, it is found that name was applied by furnishing wrong or incorrect info, then:
  - if company not yet incorporated → Cancel reserved name + Applicant liable for penalty upto Rs. 1 lakh;
  - if company is incorporated → Registrar may, after giving the company an OOBH:
    - either direct the company to change its name within 3 months, after passing an OR;
    - take action for striking off the name of the company from the register of companies; or
    - make a petition for winding up of the company.

General Circular No. 29/2014 dated 11th of July 2014:

CG directed **Registrar** that while allotting names to Cos./LLPs, the **RoC** concerned should exercise **due care** to ensure that the names are **not in contravention** of the provisions of the "Emblems and Names (Prevention of Improper Use) Act, 1950. It is necessary that Registrars are fully familiar with provisions of the said Act.

6. MoA shall be in respective **forms** specified in Tables A, B, C, D and E in Schedule I as may be applicable.
7. In case of co. limited by **guarantee** and **not having a share capital** - Any **provision** in MoA/AoA **purporting** to give any person a right to **participate** in the **divisible profits** of co. otherwise than as a **member**, shall be **void**.

### Doctrine of Ultra Vires

- In case of a company, whatever is **not stated** in the memorandum as the objects or powers is **prohibited** by the doctrine of ultra vires.
- An act which is **ultra vires** is **void** and **does not bind** the **company**.
- Neither the **company** nor the contracting party can **sue** on it.
- The company **cannot make it valid**, even if every **member** assents to it (i.e., ultra vires act cannot be ratified)

### Important Case Laws:

#### Rajendra Nath Dutta v. Shilendra Nath Mukherjee, 1982

An act which is **intra vires** the company but outside the authority of the directors may be ratified by the company in proper form

#### House of Lords in - Ashbury Railway Carriage and Iron Co. Ltd. v. Riche

##### Facts of the case:

- MoA defined its objects as - "The objects for which the company is established are to make and sell, or lend or hire, railway plants to carry on the business of mechanical engineers and **general contractors**.....".
- The **company** entered into a contract with M/s. **Riche**, a **firm** of railway contractors **to finance** the construction of a railway line in Belgium.
- On subsequent repudiation of this contract by the company on the ground of its being ultra vires, **Riche brought a case** for damages on the ground of breach of contract, as according to him the words "general contractors" in the objects clause gave power to the company to enter into such a finance contract and, therefore, it was within the powers of the company.
- **More so** because the contract was **ratified** by a majority of shareholders, it is a valid contract.

##### Decision by The House of Lords:

- Held that the contract was **ultra vires** the company and, therefore, **null and void**.
- The term "general contractor" was interpreted to indicate as the making generally of such contracts as are connected with the business of mechanical engineers.
- The Court held that **if every shareholder** of the company had been in the room and had said, "That is a contract which we desire to make, which we authorise the directors to make", **still** it would be **ultra vires**.
- The **shareholders cannot ratify** such a contract, as the contract was ultra vires the objects

clause, which by Act of Parliament, they were prohibited from doing.

**Author's Note** - The purpose of doctrine of ultra vires has been **defeated** as now the **object clause** can be **easily altered**, by passing just a **special resolution** by the shareholders

**Section 5 - Article of Association: [Defined u/s 2(5)]**

**[Nothing in this sec shall apply to articles of a company registered under previous act]**

1. AoA shall contain the **regulations for management** of the company (internal rules and regulations)
2. AoA to include such **matters**, as may be prescribed.  
Provided that company may include such additional matters in AoA as may be considered necessary for mgt.

**Entrenchment Provision:**

3. AoA may contain **provisions for entrenchment**  
**Effect of such provision** - AoA may be **altered** only if conditions or procedures as that are **more restrictive** than those applicable in case of **special resolution**, are met or complied with.
4. Provisions for **entrenchment** shall **only** be made:
  - **either** on **formation** of a company, or
  - by an **amendment in AoA** agreed to by:
    - **all members** (in case of **private** company) or
    - by a **special resolution** (in case of **public** company)
5. Where AoA contain prov. for entrenchment → Co. shall give **notice** to **Registrar** of such prov. (in prescribed form)
6. AoA shall be in respective forms specified in Tables, **F, G, H, I and J** in Schedule I as applicable to such co.
7. A company may **adopt** all or any of the regulations contained in the **model** articles applicable to such co.
8. In case of any company, which is **registered** after the **commencement** of this **Act**, in so far as the registered articles of such company do not exclude or modify the regulations contained in the model articles applicable to such company, those **regulations (in the model)** shall, so far as applicable, be the **regulations** of that **company** in the same manner as if they were contained in the duly registered articles of the company.

**Doctrine of Indoor Management:**

- Persons dealing with the company **cannot be assumed** to have knowledge of internal problems of co.
- **Stakeholders** need not enquire whether the necessary meeting was convened and held properly or whether necessary resolution was passed properly. They are entitled to take it for granted that it is all done.
- The **doctrine** helps **protect external members** from the company and states that the people are entitled to **presume** that **internal proceedings** are as per documents submitted with the Registrar of Companies.

### Doctrine of Indoor Management (DIM) vs Doctrine of Constructive Notice (DCN)

The DIM evolved around 150 years ago in the context of the DCN. The role of DIM is **opposed** to the role of DCN. Whereas the **DCN protects a company** against outsiders, the **DIM protects outsiders** against the actions of a company. This doctrine also is a **possible safeguard** against the possibility of abusing the DCN

#### Basis for Doctrine of Indoor Management

- What happens internal to a company is not a matter of public knowledge. An outsider can only presume the intentions of a company, but not know the information he/she is not privy to.
- If not for the doctrine, the company could escape creditors by denying the authority of officials to act on its behalf.

#### Exceptions to DIM (i.e., Applicability of DCN):

Knowledge of irregularity: In case this 'outsider' has actual knowledge of irregularity within the company, the benefit under DIM would no longer be available. In fact, he/she may well be considered part of the irregularity.

Negligence: If with a **minimum** of **effort**, the irregularities within a company could be **discovered**, the benefit of the DIM would not apply. The protection of the rule is also not available where the circumstances surrounding the contract are so suspicious as to invite inquiry, and the outsider dealing with the company does not make proper inquiry.

Forgery: The rule does not apply where a person relies upon a document that turns out to be forged since **nothing can validate forgery**. A company can never be held bound for forgeries committed by its officers.

#### Section 6 - Act to Override Memorandum, Articles, etc.

Save as otherwise expressly provided in this Act—

- a. the **provisions** of this **Act** shall have effect notwithstanding anything to the contrary contained in:

Memorandum/Articles

any **agreement** executed by co.

BoD **resolution** or SH resolution

- b. any **provision** contained in the memorandum, articles, agreement or resolution shall, to the extent to which it is **repugnant** to the provisions of this Act, become or be **void**, as the case may be.

#### Section 10 - Effect of Memorandum and Articles

1. Subject to the provisions of this Act, the MoA and AoA shall, when registered **bind the company** and the **members** thereof to the same extent as respectively signed by them and contained covenants on its and his part to **observe** all the provisions of the MoA/AoA.
2. All **monies payable** by any member to the company under MoA/AoA shall be a **debt due** from him to company.  
(i.e., co. can recover calls in arrears from members as if it a loan recovery)

Note - Company is liable to members and vice-versa. But members are not liable to each other.

**Section 13 - Alteration of Memorandum** [Alteration = Addition, Omission or substitution]

1. Co. may alter provisions of MoA by a **SR** + by complying with procedure of this section  
Filing with RoC: A company shall, in relation to any alteration of its memorandum, file with the Registrar:
  - (a) the **SR** passed by the company u/ss (1);
  - (b) the approval of **CG** u/ss (2), if alteration involves any change in the name of the company.
2. Change in **Name** - Effective only with approval of **CG** in writing (power delegated to **RoC**)  
Provided that - **No approval** if the only change is addition/deletion of the word "**Private**" on **conversion**
3. On change of name - RoC shall **enter** the new name in register of cos. and issue new **COI**. Name change effective from issue of CoI
4. Alteration of registered office **from one state to another** - Effective only on approval of **CG** (delegated to RD) on application in prescribed form
  - Certified **copy** of the **order of CG** approving such change to be filed with **RoC of each of the States**
  - Such RoCs shall **register the same**, and
  - **Registrar of the State where the RO is being shifted to**, shall **issue a fresh CoI**
5. On **application to CG** u/s 13(4) for approval of change in **state** where RO is situated:
  - a. **CG to dispose** application within **60 days**
  - b. Before passing order, may **satisfy** itself that:
    - i. Alteration has the **consent** of creditors, DH and other persons concerned with the company, **or**
    - ii. sufficient **provision** has been made by co. for due discharge of all its **debts** and obligations **or**
    - iii. adequate **security** has been provided for such discharge
6. Change in object for which money raised from Public:  
Co., which has **raised money** from public through prospectus + still **has any unutilised amount**, shall **not change** its objects for which it raised such money unless a special resolution is passed **and**:
  - a. prescribed **details** of such resolution shall be:
    - published in **newspapers** (English + vernacular which is in circulation at place where **RO is situated**) **and**
    - placed on the **website** of the company, if any, indicating the **justification** for such change;
  - b. the **dissenting shareholders** shall be given an **opportunity to exit** by the promoters and shareholders having control in accordance with regulations to be specified by the **SEBI**.
7. Alteration of Object clause of MoA:  
The RoC shall **register** any alteration of MoA w.r.t, the **objects** of the company and certify the registration **within 30 days** from the date of filing of the **SR** u/ss (6)(a) of this section.
8. No alteration made under this section shall have any **effect** until it has been **registered** as per this

section.

9. Any alteration of the MoA of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in divisible profits of the company otherwise than as a member, shall be void.

Summary of provision related to Amendment of MoA:

MOA clause	SH Resolution	External approvals	Outcome
Name	SR	Approval of CG (ROC) + Sec 4 & 16	Change effective from date of issue of Fresh CoI by ROC N.A. where only word "Pvt" is added/deleted on conversion
Domicile	SR	Approval of CG (RD) (only when RO is changed from one state to another)	CG shall dispose appln within 60 days and before approving, may satisfy itself that consent of crs, DH, etc. or that sufficient provision is made for due discharge, or that adequate security is provided for discharge of debts.
Objects	SR	-	Co., which has raised money from public through prospectus + still has any unutilised amount, shall not change its objects for which it raised such money unless a SR is passed and: i. the details of SR - published in newspapers + Placed on website of co. indicating justification for such change; ii. the dissenting SH shall be given an opportunity to exit by the promoters and SH having control as per SEBI regulation
Liability /Capital	SR	-	Any alteration of the MoA of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void.

Section 14 - Alteration of articles

- Company may, by SR, alter its AoA.  
Alteration of AoA includes conversion of:
  - Pvt co. to public co.
  - Public co. to Private co. (subject to approval of CG by application in prescribed form)

Provided that - Where a Pvt. co. alters its article such that it does not include the restriction/limitation which a Pvt. co. is required to include in AoA as per the Act, such Pvt. co. shall cease to be private from date of alteration

- Following shall be filed in prescribed manner with RoC, within 15 days of alteration of AoA, for registration:

- Every **Alteration** of AoA
- **Approval** of CG for such alteration
- **Printed** copy of the altered articles,

3. Any alteration of AoA registered u/ss (2) shall be **valid** as if it were **originally** in the articles.

Andrews vs Gas Meter Co. - The power to alter articles vests with the Company by virtue of Companies Act, 2013. A company cannot divest itself of these power.

Section 15: Alteration of MoA/AoA to be noted in every copy

(1) Every alteration in MoA/AoA shall be noted in **every copy** of the MoA/AoA, as the case may be.

(2) If default u/s 15(1) → Co. + Every **OID** - Liable to penalty of **Rs. 1,000 for every copy issued** w/o alteration.

Section 17: Copies of memorandum, articles, etc., to be given to members.

1. Co. **shall**, on being so **requested** by a member, send to him **within 7 days** of the request and subject to the payment of such **fees** as may be prescribed, a **copy** of each of the following documents, namely:

Memorandum

Articles

agreement and resolutions u/s 117(1) not so included in MoA/AoA

2. If default u/s 17 → Co. + Every **OID** - Liable **for each default - Rs. 1,000/day or Rs. 1 lakh WEL**

Section 12: Registered Office of Company

1. Co. shall, **within 30 days** of incorporation and at all times, thereafter, have a RO, capable of receiving comm.

2. Co. to furnish to RoC **verification of RO within 30 days** of incorporation

3. Every company shall:

- a. paint or affix its **name, address** of its **RO** on the **outside** of **every office** or place in which its business is carried on, in a **conspicuous** position, in **legible** letters in **languages** in **general use** in that locality.
- b. have its name **engraved** in legible characters on its **seal**; if any
- c. get its name, address of its RO and the **CIN** along with **telephone number**, fax number, if any, **e-mail** and website addresses, if any, **printed** in all its **business letters**, billheads, letter papers and in all its notices and other **official publications**; and
- d. have its name **printed** on **hundies**, promissory notes, bills of exchange and such other docs as prescribed

Provided that, in case **name change** during the **last 2 years**, print or affix the former name as well.

In case of OPC - The words "One Person Company" to be mentioned in bracket below such name.

Change in RO:

4. Notice of change in situation of RO, **verified** in manner prescribed → Send to RoC **within 30 days** of change

5. Except by passing a **SR**, the RO shall **NOT** be changed:

- a. in the case of an **existing company**, outside the **local** limits of any city, town or village where



such office is situated at commencement of this Act or where it may be situated later by virtue of SR passed by co.:

- b. in the case of any other company, outside the **local** limits of any city, town or village where such office is **first situated** or where it may be situated later by virtue of a SR passed by the company:

Provided that **no company** shall change RO from **jurisdiction** of one RoC to another RoC within the **same State unless** confirmed by **Regional Director (RD)** on appln made in this behalf by Co. in prescribed manner.

6. On appln u/ss 5, RD to communicate **confirmation within 30 days** from date of receipt of application  
On such confirmation, co. to file the same with **RoC within 60 days** of date of confirmation  
RoC shall **register** the same **and certify** registration **within 30 days** of date of filing confirmation.
7. The certificate referred u/ss (6) shall be **conclusive evidence** that all the **requirements** of this Act w.r.t, change of RO have been **complied with and** the change shall take effect from the date of the certificate.
8. If any **default** is made in complying with this section → **Company** and every OID shall be liable to penalty of **Rs. 1,000/day** during which the default continues but **not > Rs. 1 lakh**.
9. If RoC has **RGTB** that co. is **not carrying on any business or operations**, he may cause a **physical verification** of the RO in prescribed manner and if any **default** is found to be made in complying with requirements of sub-section (1) → Initiate action for the **removal** of the name of the company from register of companies

Can RO be different from Head Office or Corporate office? - **Yes!**

Concept Clarity Check:

A Ltd. has current Registered office at Dadar, Mumbai, Maharashtra under Mumbai RoC. It is considering changing the location of RO. Help A Ltd. with the approvals required.

Proposed RO	RoC	Sec	Board Resolution	SR	CG (RD) approval
Bandra, Mumbai, MH <b>(within local limits)</b>	Mumbai	12	Yes	No	<b>No</b> (Notice to RoC - 30 days)
Thane District Pune, MH	Mumbai	12	Yes	Yes	<b>No</b> (Notice to RoC - 30 days)
	Pune	12	Yes	Yes	Yes (RD to approval within <b>30 days</b> of application. <b>Co.</b> to submit RD's approval to RoC in <b>60 days</b> . Post that, <b>RoC</b> to register & certify in <b>30 days</b> )
Ahmedabad, Gujarat	Gujarat	13	Yes	Yes	Yes (RD to approval <b>within 60 days</b> and then <b>RoC</b> to register <b>within 30 days</b> of application)

### Section 10A: Commencement of business etc.

1. A **company having a share capital** shall not commence any business or exercise any borrowing powers unless:

**declaration** by a director, within **180** days of incorp. (in prescribed form and manner) is filed with RoC that - As on date of declaration, every **subscriber** has **paid** the value of shares agreed to be taken

The co. has filed with RoC a **verification of RO** provided u/s 12(2)

2. If any **default** under this sec → company - Rs. 50,000 **and** every OID - Rs. 1,000/day upto Rs. 1 lakh
3. If no declaration within 180 days + RoC has **RGTB** that co. is **not carrying on any business or operations** → RoC may initiate action for the **removal** of the name of the co. from register of cos.

### As per the Companies (Incorporation) Rules, 2014:

- Declaration u/s 10A by a director shall be in prescribed form **and** contents of the said form shall be **verified** by a **CS/CA or a Cost Accountant, in practice**.
- In case of a **co.** pursuing objects requiring registration/approval from any **sectoral regulators** such as RBI, SEBI, etc., the regt./approval from such regulator shall also be **obtained** and attached with the declaration.

### Section 16: Rectification of Name of Company:

1. If, through **inadvertence** or otherwise, a company on its **first registration or** on its registration by a **new name**, is registered by a name which:
- a. in **opinion of CG**, is **identical** with or too nearly resembles the name by which a company in **existence** had been previously registered, it may:
    - **direct** the co. to **change its name** and
    - the co. shall change its name **within 3m** from such direction, after adopting an **OR**;
  - b. on an **application**:
    - by a registered **proprietor** of a **trademark**
    - made to **CG within 3 years** of incorporation or registration or change of name of the company
    - that the name is **identical** with or too nearly resembles to a registered trademark of such proprietor under the Trade Marks Act, 1999,
    - in the opinion of **CG**, is identical with or too nearly resembles to an existing trademark,
    - **CG** may:
      - **direct** the co. to **change its name** and
      - the co. **shall** change its name **within 3m** from such direction, after adopting an **OR**;
2. Where a co. **changes its name** or obtains a new name u/ss (1), it shall, **within 15 days** from date of such change, give **notice** of the change to **Registrar** along with the **order** of **CG**, who shall carry out necessary changes in the **CoI** and **memorandum**.
3. If a co. is in default in complying with any direction given u/ss (1), the **CG** shall allot a new name to the co. in prescribed manner and Registrar shall enter the new name in register of companies in place of the old name and issue a fresh CoI with the new name, which the company shall use thereafter **[Amended and updated]**

Provided that nothing here shall prevent a company from subsequently changing its name as per Sec 13

### Section 18: Conversion of Companies Already Registered:



1. A co. of **any class** registered under this Act **may convert** itself as a company of **other class** under this Act by **alteration** of **MoA and AoA** of the co. as per the provisions of this Chapter.
2. Application to RoC for fresh CoI:
  - Where **conversion** is required to be done under this section,
  - the **RoC** shall, on an **application** made by co, after satisfying himself that provisions of this Chapter is complied with,
  - **close** the **former registration** of the co. and
  - after registering docs referred u/ss (1), **issue a CoI** in same manner as its first registration.
3. The **registration** of a co. under this section shall **not affect any debts, liabilities**, obligations or contracts incurred or entered into, by or on behalf of the company before conversion **and such debts, liabilities, obligations and contracts may be enforced** in the manner **as if such registration had not been done**.

### Section 19: Subsidiary Company not to hold Shares in its Holding Company

1. Restriction:
  - **No** co. shall (itself/nominees) **hold** any shares in its holding co., and
  - **No** holding co. shall **allot**/trf its shares to any of its sub sy co. and
  - any such allot/trf of shares of a co. to its sub sy. shall be **void**

Provided that nothing in this sub-section shall apply to a case:

- a. where sub sy co. holds such shares as **legal representative** of a deceased member of holding co.;
- or
- b. where the sub sy co. holds such shares as a **trustee**; or
- c. where sub sy company is an **SH even before it became a subsidiary co.** of the holding co.

Provided further that sub sy co. referred to in the above proviso shall have a **right to vote** at a **meeting** of holding co. only w.r.t., the shares held by it as a LR/trustee, as referred to in said proviso.

2. The reference in this section to shares of a **holding co. which is a co. not having share cap (ltd. by guarantee or unlimited)**, shall be construed as reference to **interest** of its **members**, whatever be the form of interest.

### Concept clarity check:

As on April'22 - A Ltd holds 5% shares in B Ltd.

As on June'22 - Due to some transactions, A Ltd. becomes subsidiary of B Ltd.

As on July'22 - A Ltd calls for AGM.

Question 1 - Can B Ltd. vote in such AGM as A Ltd. is a subsidiary of B Ltd?

Answer - No! The exception of right to vote at a meeting is only in case shares as held as a LR/Trustee. It is not applicable in the third exception that is "where suby co. is SH even before it became a suby of holding co"

Question 2 - Can B Ltd. issue bonus shares to A Ltd (say, in the ratio 1:1)

Answer - Yes, as this transaction is under purview of exemption, such bonus shares can be issued.

### Section 20: Service of Documents

1. A document may be served on a co. or an officer thereof by sending it at the RO of the co. by:

registered  
post

speed  
post

courier  
service

leaving it at  
its RO

means of such electronic or  
other mode as may be prescribed

However, where securities are held with a depository, the records of the beneficial ownership may be served by such depository on the company by means of electronic or other mode.

2. A document may be served on Registrar or any member by sending it to him by:

registered  
post

speed  
post

courier  
service

delivering at his  
office or address

means of such electronic or  
other mode as may be prescribed

Provided that member may request delivery through a particular mode by paying fees as determined in AGM.

Author's Note - Law only provides for an option to pay extra fees and decide an alternate mode for receiving notice. However, the notice will still be sent at the registered address of the member only. Company is not responsible for sending notice to any other address (even if extra fees is paid)

### Exception to Nidhi Co.

In case of Nidhi Company, u/s 20 (2), docs may be served only on members who hold shares more than:

- Rs. 1,000 in face value or
- 1% of the total PUSC

whichever is less.

For other SHs, docs may be served by a public notice in newspaper circulated in the district where the RO of Nidhi is situated; and publication of the same on the notice board of the Nidhi.

### Rule 35 of Companies (Incorporation) Rules, 2014

- Electronic transmission means a communication that creates a record that is capable of retention, retrieval and review (RRR), and which may thereafter be rendered into clearly legible tangible form. It includes:

fax

email

posting of electronic message  
board or network

other mode capable of  
verifying the sender

- In case of delivery by post, such service shall be deemed to have been effected:

(i) in case of notice of a meeting, at expiration of 48 hours after letter containing the same is posted; and

(ii) in any other case, at the time at which the letter would be delivered in the ordinary course of post

Section 21: Authentication of documents, proceedings and contracts

Save as otherwise provided in this Act,

(a) a document or proceeding requiring authentication by a company; or

(b) contracts made by or on behalf of a company,

may be signed by any KMP or an officer or employee of the company duly authorised by the Board in this behalf.

Section 22: Execution of bills of exchange (BOE), etc.

1. A BOE, hundi or promissory note shall be deemed to have been made, accepted, drawn or endorsed on behalf of a company if made, accepted, drawn, or endorsed in the name of, or on behalf of or on account of, the company by any person acting under its authority, express or implied.

2. Company having seal: A company may, by writing under its common seal, if any, authorise any person, either generally or in respect of any specified matters, as its attorney to execute other deeds on its behalf in any place (India/outside India)

Company not having seal: Provided that in case if no common seal, the authorisation under this subsection shall be made by 2 directors or by director + CS, wherever the company has appointed a CS.

3. A deed signed by such an attorney on behalf of the company and under his seal shall bind the company

## Chapter 3 - Prospectus and Allotment of Securities

Form	Section No	Purpose
PAS - 1	27	Advt. providing details of notice of SR for varying terms of contracts referred to in Prospectus or Objects for which Prospectus was issued
PAS - 2	31	Information Memorandum
PAS - 3	39 & 42	Return of allotment of securities
PAS - 4	42	Private placements offer cum application letter
PAS - 5	42	Record of Private placement offers
PAS - 6	29	Unlisted Public company to file with RoC within 60 days of each half year

Sec No.	Section Name
23	Public Offer and Private Placement
<del>24</del>	<del>Power of SEBI to Regulate Issue and Transfer of Securities, etc.</del>
25	Document Containing Offer of Securities for Sale to be Deemed Prospectus
26	Matters to be Stated in Prospectus
27	Variation in Terms of Contract or Objects in Prospectus
28	Offer of Sale of Shares by Certain Members of Company
29	Public Offer of Securities to be in Dematerialised Form
30	Advertisement of Prospectus
31	Shelf Prospectus
32	Red Herring Prospectus
33	Issue of Application Forms for Securities
34	Criminal Liability for Misstatements in Prospectus
35	Civil Liability for Misstatements in Prospectus
36	Punishment for Fraudulently Inducing Persons to Invest Money
37	Action by Affected Persons
38	Punishment for Personation for Acquisition, etc., of Securities
39	Allotment of Securities by Company
40	Securities to be Dealt with in Stock Exchanges
41	Global Depository Receipt
42	Offer or Invitation for Subscription of Securities on Private Placement

## Overview

This Chapter is divided in two parts:

Part I - Provisions relating to issue of securities through **Public Offer** (Sec 23 - 41)

Part II - Provisions relating to issue of securities through **Private Placement** (Sec 42)

## Section 23 - Public Offer (PO) and Private Placement (PP)

1. **Public** co. may issue securities:

through prospectus  
to public (PO)

Private  
Placement

Right issue and Bonus issue as per this Act (and SEBI  
in case of listed co./co. intending to get listed)

2. **Private** co. may issue securities:

~~through prospectus  
to public~~

Private  
Placement

Right issue and Bonus issue as per this Act (and SEBI  
in case of listed co./co. intending to get listed)

Note - Public offer includes IPO, FPO and OFS

## Important Definitions:

- **Securities** [Sec 2(81)] - As defined in Section 2(h) of SCRA, 1956
- **Prospectus** [Sec 2(70)] - Any **document** described or issued as a prospectus and includes:
  - Red Herring Prospectus (**RHP**) as per Sec 32 and
  - Shelf Prospectus (**SP**) as per sec 31
  - Notice, circular, advt. /other **doc inviting offers** from public for subscription or purchase of any securities of BC

## Section 25 - Document Containing Offer of Securities for Sale to be Deemed Prospectus



**Meaning** - Where a **company (A)** allots or agrees to allot any securities of the co. (A) with a **view** that those securities shall be **offered for sale** to **public**, any **document** by which the offer for sale to the public is made shall, **for all purposes**, be **deemed** to be a **prospectus**.

### Effect of deeming provision-

1. Law relating to **content** of prospectus and **liabilities** u/s 34,35 shall apply
2. Person making offer were person named as director in the co.

**Presumptions:** *Unless the contrary is proved*, it shall be **evidence** that an allotment of securities was made with a view to the securities being offered for sale to the public if it is shown:

- a. that offer for sale to the public was made **within 6m** after the allotment or agreement to allot; or
- b. that at the **date** when **offer** was made, the **whole consideration** had **not been received** by the co.

In addition to matter stated u/s 26, following **additional matter** is to be included in the document:

- a. Net amt. of **consideration** received/to be received by the co.
- b. **time** and place at which contract for allotment of said securities may be inspected

### **Signature** of document:

In case of co. - 2 directors; In case of Partners - At least  $\frac{1}{2}$  of Partners

## Section 26 - Matters to be Stated in Prospectus

Dated and Signed

Copy to RoC for Registration

Signed by dir./proposed dir.

RoC not to register unless consent in writing of all person named received

1. Every prospectus issued by/on behalf of public co. shall be **dated** and **signed**.

Prospectus shall **state information** and **set out** such **reports** on financial information as specified by SEBI + CG. Unless specified by SEBI, the regulations already made by SEBI shall apply.

Prospectus to include:

- a. **declaration** about **compliance** with this Act, and
- b. **statement** that nothing in prospectus is contrary to this Act, SEBI and SCRA.

2. Nothing u/ss (1) shall apply to the issue of prospectus/form of application for:

- a. Issue of shares/debentures to **existing** members or DH, whether or not there is right to renounce u/s 62(1)
- b. Issue of shares/debentures which are, in all respects, **uniform** with shares/debentures **previously issued and are currently quoted on RSE**.

3. Provision of 26(1) shall apply to prospectus or form of application issued on formation of co. or subsequently.

Explanation - **Date** indicated in prospectus shall be **deemed** to be the date of **publication**

4. File prospectus with RoC: No prospectus shall be issued unless, on or before its publication, a copy thereof has been **delivered to RoC** for filing, **signed** by:

- every person who is named therein as a **director** or **proposed director** of the co. or
- by his duly authorised **attorney**.

5. Prospectus shall not include a statement purporting to be made by **expert**, **unless**:

- expert is a person who is **not engaged/interested** in formation/promotion/mgt. of co., **and**
- has given his **written consent** to the issue of the prospectus and has **not withdrawn** such consent before filing of such prospectus with RoC and a **statement** to that effect shall be included in the prospectus.

*Read definition of Expert - Sec 2(38) [Chapter 1]*

6. Every prospectus shall, on the **face** of it,

- (a) state that a copy has been **delivered** to RoC u/ss (4); **and**
- (b) specify **docs attached** to the copy so delivered

8. Prospectus **not valid** if issued **more than 90 days** after date of delivery of copy thereof to RoC

9. Issue of prospectus in contravention of this sec- Co. and every person who is knowingly a party - Rs. 50,000 to Rs. 3 lakhs

## Section 27 - Variation in Terms of Contract or Objects in Prospectus

General Rule - Company shall **not vary** terms of contract referred to in prospectus/objects

Co. shall not vary the **terms of a contract** referred to in the prospectus or objects for which the



prospectus was issued, except with:

- a. Prior approval by way of **special resolution** in GM and:
- b. prescribed **details** of such resolution shall be:
  - published in **newspapers** (English + vernacular which is in circulation at place where **RO is situated**) and
  - placed on the **website** of the company, if any, indicating the **justification** for such change;
- c. Amount so raised **cannot be used** for buying, trading or otherwise dealing in **Eq.** shares of listed cos.
- d. the **dissenting shareholders** shall be given an **exit offer** by the promoters and controlling shareholders in accordance with regulations to be specified by the **SEBI**.

Rule 7 of The Companies (Prospectus and Allotment of Securities) Rules, 2014:

1. **SR** u/s 27 shall be passed through **Postal Ballot**. Notice of proposed SR to contain following info:

Original purpose/ object	total money raised	money utilised for stated objects	extent (%) of achievement of proposed obj.
unutilised amount	particulars of the proposed variation	reason and justification for variation	risk factors pertaining to the new objects
proposed time limit within which the proposed varied objects would be achieved		other relevant info	

2. Advertisement of the notice - **Form PAS-1** (published simultaneously with dispatch of notice)
3. Place notice on **website** of co.
4. the dissenting shareholders shall be given an exit offer by the promoters and controlling shareholders in accordance with regulations to be specified by the **SEBI**. (*Repeated in rule*)

Section 28 - Offer of Sale of Shares by Certain Members of Company [Vijay selling stakes in Paytm]

1. Authorise the co.
  - Where certain members (indv. /BC) of a co. propose in consultation with BoD
  - To offer **whole/part** of their holding to public
  - the members shall then collectively **authorize** the co. to take necessary action for OFS and
  - then they shall **reimburse** the company of all expense incurred.
2. Document by which such OFS is made to public shall be deemed to be a prospectus issued by the company and all provisions related to content and misstatement shall apply.

Rule 8: Exception to certain matters

The following provision of this chapter shall not be applicable in case of OFS:

- a. the provisions relating to **minimum subscription**;
- b. the provisions for minimum **application value**;
- c. the provisions requiring any statement to be made by BoD in respect of **utilization** of money; and
- d. any other provision/information which cannot be compiled or gathered by the **offeror**, with **detailed justifications** for not being able to comply with such provisions.

Note: Prospectus to disclose name of the person(s)/entity **bearing cost** of making the OFS + reasons.

### Section 29 - Public Offer of Securities to be in Dematerialized Form (Demat Form)

1. *Notwithstanding anything contained in any other provisions of this Act:*
  - a. every company making **public offer**; and
  - b. such other class or classes of public companies as may be **prescribed**, shall **issue** the securities only in **dematerialised** form by complying with the provisions of the Depositories Act, 1996 and the regulations made thereunder.

#### Rule 9 of Companies (Prospectus and Allotment of Securities) Rules, 2014:

The promoters of every **public company** making a public offer of **any convertible securities** may hold such securities **only** in demat form.

Provided that the **entire holding** of convertible securities of the co. **by promoters** held in **physical** form (up to **date of IPO**) shall be **converted** into demat form before such offer is made.

*Example - Vijay Shekhar sharma OFS in Paytm - Has to be in demat form first*

2. In case of prescribed class of **unlisted** companies, the securities shall be held or transferred only in **Demat form** in manner laid down in the Depositories Act, 1996 and regulations made thereunder.

#### Rule 9A of Companies (Prospectus and Allotment of Securities) Rules, 2014:

##### Issue of securities in demat form by UNLISTED Public Company (UPC):

1. Every UPC shall:
  - a. **Issue** securities in demat form, **and**
  - b. **Facilitate** dematerialisation of all existing sec. as per the Depository Act, 1996 and regulations made thereunder.
2. For **UPC** intending to make **offer** for:

issue of securities	buyback	issue of bonus shares	right shares
---------------------	---------	-----------------------	--------------

shall ensure that, **before** making such offer, **entire holding of** securities of:

promoter	directors	KMPs
----------	-----------	------

has been **dematerialized** as per the Depository Act, 1996 and regulations made thereunder
3. On or after 2<sup>nd</sup> October 2018, every **holder** of securities of UPC:
  - a. who intends to transfer such securities, shall get such sec. dematerialised before transfer
  - b. who **subscribe** to any sec. of UPC - Ensure existing securities are held in demat form.
4. Every UPC shall:
  - a. **Facilitate** dematerialisation of existing securities by making necessary application to Depository (as defined u/s 2(1)(e) of the Depository Act), **and**
  - b. Secure International security Identification Number (**ISIN**) for each type of securities,
  - c. **Inform** existing security holder about such facility.

5. Every UPC shall ensure:
  - a. **Timely payment of fees** to Depository, Registrar to Issue & Share Transfer Agent (DRS) as per the respective agreement
  - b. it maintains **security deposit** of **>=2 years** of fees with DRS as per agreement
  - c. **Complies** with regulations of SEBI or Depository w.r.t, dematerialisation of shares
6. No UPC which has **defaulted** in above payment, shall make offer of issue of any securities or buyback or bonus/right issue **till payment** to DRS has been made.
7. Provision of Depositories Act, SEBI (Depositories and Participants) Regulations, 2018 and SEBI (RTI and STA) Regulations, 1993 - Apply **Mutatis Mutandis**
8. Every UPC shall submit **Form PAS-6 + Fees** with ROC **within 60 days** of conclusion of each half year (FY). Such form shall be **certified by a CA/CS/CMA in practice**
- 8A. Any **diff.** b/w issued capital and capital in demat form - Co to bring to **notice** of Depository
9. **Grievances** of securities holders of UPC - File with **IEPF Authority**. IEPF authority shall initiate action against DRS after consultation with SEBI
10. This rule shall N.A. to an UPC which is - Nidhi, Govt. company or a WOS

3. Any co., other than above, **may** convert its securities into demat form **or** issue its securities in **physical form** in accordance with the provisions of **this Act** or the Depositories Act, 1996 and the regulations made thereunder.

### Section 30 - Advertisement of Prospectus

Where an **advertisement** of prospectus of a co. is published in any manner, it is necessary to specify therein the contents of MoA as regards to:

Objects	Liability	Amount of SC of Co. (ASC)	names of the signatories	No. of shares subscribed by them	Capital Structure
---------	-----------	---------------------------	--------------------------	----------------------------------	-------------------

### Section 31 - Shelf Prospectus (SP)

#### Meaning

- SP means a **prospectus** in respect of which
- the **securities** or class of securities included therein
- are issued for subscription in **one or more issues** over a **certain period**
- **without** the issue of a further prospectus.

#### Provision:

- Any class(es) of cos., as the **SEBI** may provide by regulations in this behalf, may file SP **with RoC**
- at the **stage** of the **first offer of securities included therein**
- which shall indicate the period of **validity** of such prospectus, **not exceeding 1 year**
- validity shall **commence** from date of **opening of first offer of securities** under that prospectus,
- w.r.t., second/subsequent offer of such securities issued, **no further prospectus** is required.

### Information Memorandum (IM): (Form PAS-2)

- Within **1 month prior** to second/subsequent offer., co. to file IM with RoC
- IM to contain material facts relating to:

New <b>charges</b> created	Changes in <b>financial position</b> of co. between previous offer and subsequent offer	<b>Other</b> changes as prescribed
----------------------------	---	------------------------------------

### Intimation of Changes:

- Where a co. has received **applications** for the allotment of securities along with **advance payments** of subscription before making of any such change,
- Co. to **intimate** such changes to applicant
- If they desire to **withdraw** application - **Refund** payment **within 15 days** of subscription

Note: **IM** together with **shelf prospectus** shall be deemed to be **prospectus**.

### Section 32 - Red Herring Prospectus (RHP)

Meaning - Prospectus which does not include complete particulars of quantum/price of securities included therein.

1. Co. proposing to make an offer of securities **may** issue a RHP prior to prospectus
2. RHP to be filed with **RoC at least 3 days** prior to opening of subscription list and the offer
3. RHP to have **same obligation** as prospectus.  
**Variation** b/w RHP and prospectus to be **highlighted** as variation in prospectus
4. Upon **closing** of offer - **Prospectus (not RHP)** stating therein the **total capital** raised and **closing price** and any other details as are not included in RHP shall be filed with the **RoC** and the **SEBI**.

Read section 2(1) - Abridged prospectus

### Section 33 - Issue of Application Forms for Securities

1. Every form of application for purchase of any securities of a co. shall be accompanied by an **abridged prospectus**.

This sub-section shall N.A. if it is shown that the form of application was issued in connection with:

- a. a bona fide invitation to a person to enter into an **underwriting agreement** w.r.t. such sec.; or
  - b. in relation to securities which were **not offered to the public** (Example - Private placement)
2. Copy of the prospectus shall, on a request being made by any person **before the closing of the subscription** list and the offer, be **furnished** to him.
  3. Default in this section - Co. liable for **Rs. 50,000** for each default

## Section 34 and Section 35 - Liability for Misstatement

### Section 34 - Criminal Liability

If prospectus includes any statement - **untrue** or **misleading**, every person who **authorizes** the issue of such prospectus shall be liable under section **447**.

Section N.A. if a person **proves** that:

- a. such statement/omission was **immaterial** or
- b. that he had **RGTB** that statement was **true**, or the inclusion or omission was **necessary**.

### Section 35 - Civil Liability

#### Applicability:

- Where a person has **subscribed** for securities of a co +
- **Acting** on any **statement** included/omitted in prospectus which is misleading, and
- has **sustained loss** or damage as a consequence thereof

Person Liable: Company and every person who is:

1. **Director** at the time of issue of prospectus or authorized himself to be named as director
2. Agreed to become **director** in future
3. **Promotor** of co.
4. **Authorized** the issue of prospectus
5. **Expert** u/s 26(5)

**Above person** shall be liable to pay **compensation** to every person who has sustained such loss or damage.

No person shall be liable if he **proves** that:

- a. Having consent to become director, **withdrew** the consent and prospectus was issued w/o consent.
- b. Prospectus issued **w/o knowledge** or consent + on becoming aware gave **reasonable public notice**
- c. For every misleading statement by expert - He had RGTB at the time of such statement that expert is **competent** to make it + **Gave consent** + **Not withdrawn consent**

If proven that prospectus issued with intent to defraud - every person u/ss (1) shall be **personally responsible** - **without any limitation** of liability

### Peek Vs. Gurney (not covered in ICAI material but was included in past paper question)

The remedy u/s 35 by way of damage will not be available to a person if he has not purchased the shares on the basis of prospectus. (for example, a person bought shares from open market, in such case, it can't be said that he relied on the information of prospectus and hence, no remedy available)

### Sec 447: Punishment for Fraud

Without prejudice to any liability including repayment of any debt under this Act or any other law in force, any person guilty of fraud shall be liable as follows:

Amount involved in the fraud	<u>At least</u> Lower of:		<u>Less than</u> Lower of:
	a. Rs. 10 lakhs b. 1% of T/O		a. Rs. 10 lakhs b. 1% of T/O
Whether public interest involved?	No	Yes	No
Jail	6m - 10 years	<b>3 years</b> - 10 years	Upto 5 years
And/or	AND	AND	OR
Fine	Up to 3x amt involved	Up to 3x amt involved	Upto Rs. 50 lakhs or both

### Fraud bole toh?

Act	Ommission	Concealment of Fact	Abuse of position
-----	-----------	---------------------	-------------------

Committed with:

Intent to <b>decieve</b>	Gain undue <b>advantage</b>	<b>Injure</b> interest. of co/SH/crs/others
--------------------------	-----------------------------	---

**whether or not there is a wrongful gain/loss.**

### Sec 36: Punishment for Fraudulently Inducing Persons to Invest Money

Any person who:

- either knowingly/recklessly makes any **statement**, promise or forecast
- which is **false**, deceptive/misleading or
- deliberately **conceals** any material fact,
- to induce another person to enter into any **agreement**:

for <b>Subscribing</b> , Acquiring, Disposing or Underwriting securities	the purpose of which is to secure a <b>profit</b> to any of the parties from such securities	for obtaining <b>credit</b> <b>facilities</b> from any bank or financial institution
--	--	--

shall be liable for action **u/s 447**.

### Section 37: Action by Affected Persons

A **suit** may be filed, **or any other action** may be taken u/s 34,35 or 36 by any person, group of persons or any association of persons **affected by any misleading** statement or the inclusion or omission of any matter in the prospectus.

Note - If Mr. M had purchased the shares based on statement in the prospectus, only Mr. M can initiate a suit against the co. and not Mr. X (to whom shares are transferred post allotment)

Allotment means appropriation of previously un-appropriated co. of capital.

[Issue of Prospectus - Invitation to offer; Receiving Application - Offer; Allotment - Acceptance]

### Section 39: Allotment of Securities by Company

1. Co. can allot share to public only when:
  - a. amount stated in prospectus as **min. amount** has been **subscribed and**
  - b. **sums payable on application** have been **paid** to and received by co. by **cheque/other instrument**.
2. Application money shall not be **<5%** of **nominal amt.** of securities (or **other** amt. specified by SEBI)
3. If **stated min.** amount has **not been subscribed and** application money is **not received** within **30 days /other period** by **SEBI** from date of issue of prospectus - **Return** amount in **pres. time & manner**

#### Rule 11 of Cos (Prospectus and Allotment of Securities) Rules, 2014 - Refund of Appln Money:

1. If min. amt not subscribed + Application money not received within prescribed time - Application money to be **repaid within 15 days** from close of issue.  
  
If **not repaid** - **Directors** who are **OID** - Jointly & severally liable to repay **intt. @15%** p.a.
2. Refund shall be **credited** only to the **bank account from which the subscription was remitted**.

4. When a co. having **SC** makes any allotment of sec.- File with RoC - **Return of allotment (PAS-3)**

#### Rule 12 - Return of Allotment:

1. Return of allotment to be filed in **Form PAS - 3** within **30 days** of allotment of securities
2. Along with the Return of allotment, **attach** - List of **allottees** stating name, address, occupation and no. of securities allotted
3. In case of allotment of securities (not being bonus shares) for **consideration other than cash**, attached to Form PAS-3 - A copy of the **contract** (duly stamped), pursuant to which sec. have been allotted **together with any contract of sale** if relating to a property or an asset, or a contract for services or other consideration.
4. Where a **contract** referred above is **not** reduced to **writing**, the co. shall furnish along with the Form PAS-3, **complete particulars of the contract stamped** with the same stamp duty as would have been payable if the contract had been reduced to writing **and** those particulars shall be **deemed** to be an **instrument** within the meaning of the Indian Stamp Act, 1899.
5. Report of RV w.r.t. valuation of the consideration to be attached
6. In case of issue of **bonus** share - Copy of **resolution** passed in the **GM** authorizing the issue of such shares
7. In case of **right** issue by company other than listed company, **valuation report** of RV to be attached.

5. In case of default u/ss (3) and (4) - Co. and its **OID** - **Liable** - **Rs. 1,000/day** or **Rs. 1 lakh WEL** for each default

### Section 40: Securities to be Dealt with in Stock Exchanges

1. Before Public Offer - Co. to make an **application** to one or more **RSE(s)** and obtain **permission** for securities to be dealt with in such RSE
2. Where prospectus states application u/ss (1) has been made - Also **state** the **name(s)** of RSE in

which the securities shall be dealt with.

3. Application money shall be kept in a separate bank account in a scheduled bank + Not to be utilised for any purpose other than:
  - a. Adjustment against allotment - If sec. have been permitted to be dealt with on RSE
  - b. Repayment within the time specified by SEBI - If co. is unable to allot securities
4. Any condition purporting to require or bind any applicant for securities to waive compliance with any of the requirements of this section shall be void.
5. Default in complying with this section:

	Company	OID
Minimum	Rs. 5 lakhs	Rs. 50,000
Maximum	Rs. 50 lakhs	Rs. 3 lakhs

6. Co. may pay commission to any person w.r.t, subscription to its sec. subject to conditions prescribed.

**Rule 13 of Companies (Prospectus and Allotment of Sec) Rules, 2014 - Payment of Commission:**

Commission can be paid subject to following conditions:

- a. Such payments to be authorized by AOA
- b. Comm. may be paid out of (a) Proceeds of issue, or (b) Profit of co., or both
- c. Rate of comm.

In case of sec. issue being:	Commission shall NOT exceed
Shares	Lower of: a. 5% of price of share issue or b. Rate auth. by AOA
Debentures	Lower of: a. 2.5% of price at which debenture issued or b. Rate auth. by AoA

- d. Prospectus to disclose:

name of underwriters	rate and amount of commission payable to u/w	no. of sec. underwritten or subsc. by u/w
-------------------------	---	--

- e. No commission to be paid if securities are not issued to public.
- f. Copy of contract for payment of comm. - File with RoC along with prospectus for registration

**Concept clarity check:**

1. A Ltd. applies in BSE and NSE for obtaining permission prior to IPO. Of them, NSE rejected the application and BSE approved such application. Can A Ltd. issue IPO? - No. All the RSE where application has been made has to approve such application
2. Can underwriting commission be paid in kind (say, in forms of flats) - Yes, there is no such restriction in law that commission has to be paid only in cash.



## Section 42: Offer or Invitation for Subscription of Securities on Private Placement (PP)

### Definition:

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

### Provision:

1. Subject to this section, a company may make private placement (PP) of securities
2. Private placement:
  - PP to be made only to **select** group of person **identified by BoD** ("Identified Persons" (IPs)).
  - No. of IPs shall not exceed **50 or higher no.** prescribed (**200 members in aggregate** in FY)
  - Above limit of 200 **not** to include - QIBs and employees being offered securities under ESOP u/s 62 [N.A. - NBFC and HFC if Regulation by RBI/NHB complied with)

Explanation- It is hereby clarified that restrictions of 200 members would be reckoned **individually** for **each kind of security** that is equity share, preference share or debenture.

### Rule 14: Private Placement:

The proposal to make PP has to be previously approved by SH of co. by a **SR** for each such PP.

**ES** annexed to notice for SH approval shall made following **disclosure:**

- a. **particulars** of the offer including date of passing of **Board resolution;**
- b. **kinds** of securities offered and the **price** at which security is being offered;
- c. **basis** or justification for the **price** (incl. premium, if any) at which offer/invitation is made;
- d. name and address of **valuer** who performed valuation;
- e. **amount** which the company intends to **raise** by way of such securities;
- f. **material terms of** raising such securities

Provided that: This sub-rule shall not apply in case of offer for NCD:

- a. If amount raised **does not exceed limit** u/s 180(1)(C) and **BoD resolu**n is adequate (No SR)
- b. If amount raised **exceed limit** u/s 180(1)(c) - It shall be sufficient if co. passed a previous **SR only once in a year** for all such offers during the year

Provided also that: In case of offer to **QIBs**, if co. passes **previous SR only in a year** for all such allotments during the year

3. Co. making PP shall issue **Private Placement Offer (PPO)** and **application** in Form **PAS-4** to IPs whose **names** and **addresses** are recorded by co. in prescribed manner.

Note - PPOs shall NOT carry right of renunciation.

### Note: Deemed Public Offer:

- If a co. makes an **offer** to allot **securities to > prescribed no. of IPs**,
- the same shall be **deemed** to be an **offer to public** and
- shall accordingly be **governed** by the provisions of Part I of this Chapter

- irrespective of whether or not the **payment** for securities has been received or
- whether the company intends to **list** its securities or not on any RSE in or outside India

4. Mode of payment of subscription money:

IPs willing to **subscribe** to PP issue shall **apply** in the PP and application issued to such person along with **subscription money** paid either by **cheque/DD** or other banking channel & **not by cash**.

Application money not to be utilized unless **allotment** made and **return** of allotment filed with RoC.

5. Prohibition on Fresh offer:

No fresh offer unless:

- a. allotments w.r.t, any **offer** or **invitation** made earlier have been **completed** or
- b. that offer or invitation has been **withdrawn** or **abandoned** by the co.

6. Allotment:

- Co. shall **allot** its securities **within 60 days** from receipt of **application money**
- If co. **fails to allot** securities in 60 days - Repay same **within 15 days** from expiry of 60 days
- If co. **fails to repay** - It shall be liable to repay that money + **Intt. @ 12% p.a.** from expiry of 60<sup>th</sup> day (read again, from which day?)

Application money shall be kept in a **separate bank account** in a **scheduled bank** + **Not to be utilized** for any purpose other than:

- a. **Adjustment** against allotment
- b. **Repayment** - If co. unable to allot sec.

7. Co. making PP shall **NOT** release any **public advertisements** or utilise any media, marketing or distribution channels or agents **to inform the public at large** about such an issue.

8. Return of Allotment to be filed with RoC within 15 days from allotment date

Co. making PP to **file** with RoC a "Return of Allotment" in **Form PAS-3** **within 15 days** from the date of the allotment. (Incl. a complete list of all **allottees**, with their full **names, addresses**, no. of sec. allotted, etc.)

Rule 14: Private Placement (Continued)

**Return of allotment** in Form PAS - 3 shall include the following details:

- the full name, address, permanent Account Number and E-mail ID of such security holder;
- the class of security held;
- the date of allotment of security;
- no. of securities held, nominal value and amount paid on such securities; and particulars of consideration received if tire securities were issued for consideration other than cash.

9. Default in filing Return of allotment u/ss (8) - Co., its promoters and directors - Fine Rs. 1,000/day for each default upto Rs. 25 lakhs

10. If co. makes PP in contravention of this section - Company, its promoters and directors - Fine which may extend to **amount raised** through the PP or **Rs. 2 crores**, whichever is **lower**, and the **company** shall also **refund** all monies **with interest (12%)** within **30 days** of order imposing the

penalty.

"Qualified Institutional Buyer" means the QIB as defined in SEBI (ICDR) Regulations, 2009.

Rule 14: Private Placement (Continued)

- PP offer cum application letter shall be in Form PAS-4 serially numbered and addressed specifically to the person to whom the offer is made and shall be sent to him, either in writing or in e-mode, within 30 days of recording the name of such person u/s 42(3).
- Co. to maintain complete record of PP offers in Form PAS-5
- Co. shall issue PP offer only after relevant SR/BR filed with RoC

Note - Any offer or invitation which is not in compliance with the provision of Sec 42 shall be treated as public offer and relevant provisions shall apply accordingly.

# Chapter 4 - Share Capital and Debentures

Form	Sec	Purpose
SH-3	54	Issue of Sweat Equity Shares
SH-4	56	Form for transfer of security held in physical form
SH-5	56	Notice by the co. to the transferor and transferee in case of partly paid-up shares
SH-7	64	Notice to Registrar for the alteration of share capital
SH-9	68	Solvency declaration - File with RoC (+ SEBI in case of listed cos) in case of Buyback
SH-10	68	Register of shares or other securities bought back
SH-11	68	Return on completion of the buyback of shares or other securities

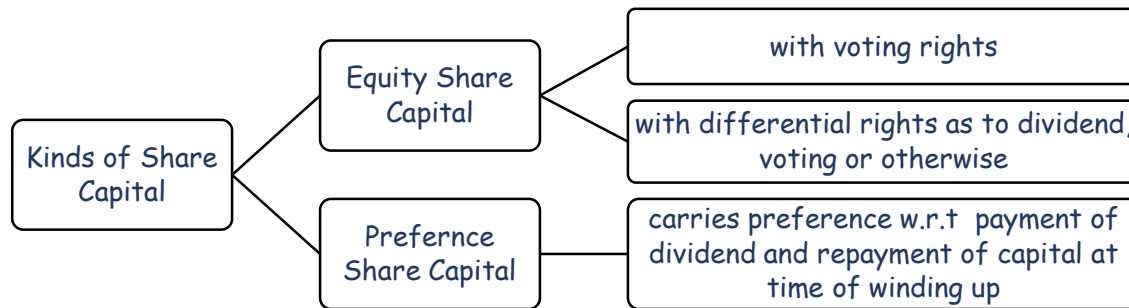
Sec No.	Section Name
43	Kinds of Share Capital
44	<del>Nature of Shares or Debentures</del>
45	<del>Numbering of Shares</del>
46	Certificate of Shares
47	Voting Rights
48	Variation of Shareholders' Rights
49	Calls on Shares of Same Class to be Made on Uniform Basis
50	Company to Accept Unpaid Share Capital, although not Called Up
51	Payment of Dividend in Proportion to Amount Paid-Up
52	Application of Premiums Received on Issue of Shares
53	Prohibition on Issue of Shares at Discount
54	Issue of Sweat Equity Shares
55	Issue and Redemption of Preference Shares
56	Transfer and Transmission of Securities
57	Punishment for Personation of Shareholder
58	Refusal of Registration and Appeal against Refusal
59	Rectification of Register of Members
<del>60</del>	<del>Publication of Authorised, Subscribed and Paid Up Capital</del>
61	Power of Limited Company to Alter its Share Capital
62	Further Issue of Share Capital
63	Issue of Bonus Shares
64	Notice to be Given to Registrar for Alteration of Share Capital
<del>65</del>	<del>Unlimited Company to Provide for Reserve Share Capital on Conversion into Limited co.</del>
66	Reduction of Share Capital
67	Restrictions on Purchase by Company or Giving of Loans by it for Purchase of its Shares
68	Power of Company to Purchase its Own Securities
69	Transfer of Certain Sums to Capital Redemption Reserve Account
70	Prohibition for Buy-Back in Certain Circumstances
71	Debentures
<del>72</del>	<del>Power to Nominate</del>

\* Sec 44, 45, 60, 65 and 72 are not applicable for students

**Key Definitions:**

**Section 2(84):** "Share" means a share in the share capital of a company and includes **stock**.

**Section 43 - Kinds of Share Capital** [N.A. to pvt. Co. if mentioned so in MoA/AoA, subject to 92/137]



**Explanations:**

1. "Equity share capital" - w.r.t., any co. limited by shares, means **all share capital** which is **not preference share capital**;
2. "Preference share capital", w.r.t, any co. limited by shares, means that part of the **issued share capital** of company which **carries** or would carry a **preferential right** w.r.t,
  - (a) payment of **dividend** (fixed amt or amt calculated at fixed rate)- free or subject to tax
  - (b) **repayment**, in the case of a **winding up**, of amount of PUSC.
3. **Capital** shall be **deemed to be preference capital**, notwithstanding that it is entitled to either or both of the following rights, namely:
  - (a)w.r.t **dividends**, in addition to the preferential rights to amounts as specified above, it has a **right to participate** (fully/limited) **with capital** not entitled to the preferential right aforesaid,
  - (b) that in respect of **capital**, in addition to the preferential right to the **repayment**, on a winding up, it has a right to **participate** (fully/limited), with capital not entitled to such preference

**Rule 4 of Cos (Share Capital and Debentures) Rules, 2014 - Equity Shares with Differential Rights:**

Conditions to issue equity shares with **Differential Rights** (DR): [**A2 VP FD2**]

1. **AoA** authorizes the issue of such shares;
2. Such issue is authorized by an **ordinary resolution** passed at **GM**.  
If eq. shares are **listed** on RSE - Seek approval through **postal ballot** (still **OR**).
3. **Voting Power** (VP) of shares with DR shall **not be > 74%** of total VP (incl. VP on shares with DR)
4. omitted
5. Co. has not defaulted in filing **FS and AR** for **3** immediately preceding **FY**
6. Co. has no **subsisting** default in:

payment of declared <b>dividend</b>	repayment of matured <b>deposit</b> + Intt.	Redemption of <b>pref. shares</b>	Redemption of <b>debenture</b> + Intt
-------------------------------------	---	-----------------------------------	---------------------------------------

7. Co. has **not defaulted** in:

payment of <b>dividend</b> on pref. shares	repayment of <b>term loan</b> + Intt. - PFI/State FI / Sch. Bank.	Stat. <b>dues</b> w.r.t., Employee	Default in crediting amt. in <b>IEPF</b> to <b>CG</b>
--	---	------------------------------------	---

Provided that co. may issue DVR on **expiry of 5 years** from end of FY in which default made good.

8. the co. has **not been penalized** by Court/Tribunal during last **3 years** of offence under the **RBI**

Act, 1934, the **SEBI Act**, 1992, the **SCRA**, 1956, the **FEMA**, 1999 or any other **special Act**

**Additional Points:**

1. **ES to notice** for GM or Postal Ballot to contain prescribed details about the issue (size of issue)
2. Co. shall **NOT convert** existing ESC with Voting Rights into ESC carrying DVR and **vice versa**
3. Details of such issue to be disclosed in **BOD Report**
4. Holders of Eq. shares with DR shall **enjoy all other rights** such as bonus shares, rights shares etc., which holders of eq. shares are entitled to, subj to DR with which such shares are issued.
5. **Register of Members** u/s 88 to contain relevant particulars of such shares with details of SHs.

**Section 44** - Shares/debentures or other interest = **Movable property** + **Transferable** as per AOA

**Section 45** - Every share shall be **distinguished** by its **distinctive number** [N.A. in case of depository]

**Section 46 - Certificate of Shares**

1. **Certificate to be Prima Facie Evidence of title of such shares:** - If such certificate is issued under:
  - a. Common seal, if any or
  - b. Signed by 2 dirs. or a dir. + CS (if co. has a CS)
2. **Duplicate certificate may be issued if:**
  - a. It is **proved** to have been **lost** or destroyed; or
  - b. has been defaced, **mutilated** or torn + **Surrendered** to company.
3. Details regarding **manner of issue** of certificate/duplicate - As may be **prescribed** (Rule 6)
4. Where share is held in **depository form** - **Record** of depository is **prima facie** evidence of interest of beneficial owner.
5. If Co. issues a **duplicate** certificate of shares with intent to **defraud**:  
**Co.** - Fine - Not less than 5x Face Value of Shares involved | Extend to (10x or Rs. 10 crores WEH)  
**OID** - Liable for action u/s 447

**Section 47 - Voting Rights** [N.A. to Private Co. if mentioned so in MoA/AoA, subject to 92 + 137]

1. Subject to certain provisions of this Act:
  - a. every member holding **ESC**, shall have **right to vote** on **every resolution** placed before co.; and
  - b. his **voting right** on a **poll** shall be in **proportion** to his share in the **paid-up ESC** of the co.
2. Every **member** holding **PSC** shall, in respect of such capital, have a **right to vote only**:
  - a. on resolutions which **directly affect** the rights attached to his preference shares and,
  - b. any resolution for the **winding up** of the company or
  - c. for the **repayment** or reduction of its **EQUITY** or **PSC** andhis voting right on a **poll** shall be in **proportion** to his share in the paid-up PSC of the co.

Provided that **proportion** of voting rights of ESH to voting rights of PSH shall be in the **same proportion** as the ESC bears to PSC.

Provided further that where **dividend** in respect of a class of pref. shares has **not been paid for 2 years or more**, such class of **PSH** shall have a **right to vote** on **ALL resolutions** placed before the co.

### Section 48 - Variation of Shareholder's Rights

#### 1. How to vary the rights?

Rights attached to shares of any class may be varied with:

- **Consent** in writing of **not less than 3/4th** of issued shares of that class, **or**
- **SR** (at a separate meeting of such class)

if provision for such variation is contained in **AoA/MoA** or in **absence** of such provision, it is **not prohibited** by terms of issue of such shares

If **variation by one** class of SH **affects** rights of any **other class**, consent of **3/4th** of such **other class** of SH shall also be obtained and the provisions of this section shall apply to such variation.

#### 2. Resistance to such variation

- Where holders of **not less than 10%** of issued shares of a class
- did **not consent** to such variation or vote in favor of SR
- they **may** apply to **Tribunal** to have the variation **cancelled**.
- Where such appln is made - Variation shall **not** have **effect until** it is **confirmed** by Tribunal:

Provided that - Such **application** to be made **within 21 days** after date of consent/resolution

3. The **decision** of the **Tribunal** on any application u/ss (2) shall be **binding** on the shareholders.

4. Co. shall, **within 30 days** of the date of order of Tribunal - File a copy thereof with the **Registrar**.

### Section 49 - Calls on shares of same class to be made on uniform basis

Where any **calls for further share capital** are made on shares of a class, such calls shall be made on uniform basis on all shares falling under that class (Shares of same nominal value with different PUSC are not said to be in same class)

### Section 50 - Company to accept unpaid share capital, although not called up (call in advance)

1. Co. **may**, if so authorized by its **articles**, **accept** from any member, the whole or a part of the amount remaining unpaid on any shares held by him, even if no part of that amount has been called up.
2. A **member** shall **NOT** be **entitled** to any **voting rights** w.r.t., amt. paid u/ss (1) **until** it is **called up**.

### Section 51 - Payment of dividend in proportion to amount Paid-Up.

Co. may, if so authorised by its **articles**, pay dividends in proportion to amount **paid-up** on each share  
**OTHERWISE - In general, dividend is paid on nominal value**

#### Level up Question (not relevant for exam but for understanding):

Can a company pay dividend on the advance payment received u/s 50 - **No!**

### Section 52 - Application of Premiums Received on Issue of Shares

1. Where co. issues shares at premium (cash/otherwise) - **Transfer** such aggregate amount of premium to Securities Premium Account (**SPA**)

Except as provided in this section, provisions relating to **reduction of share capital shall apply** as if the SPA were the PUSC of the company.

2. Application/Utilisation of amount in SPA account:

- a. towards issue of unissued shares of co. to members as fully paid **bonus** shares
- b. write off **Preliminary** expenses of the co.
- c. write off - **Expenses/Commission** paid, or discount allowed on issue of shares/debentures of co.
- d. providing for premium payable on **Redemption** of any redeemable pref. shares/ any debentures
- e. purchase of its own shares u/s 68 (**Buyback**)

3. Notwithstanding above (1) and (2), in case of such **class** of cos. as may be **prescribed +** whose **FS** comply with prescribed **AS** u/s 133, the SPA shall be utilised for:

- a. towards issue of unissued shares of co. to members as fully paid **bonus** shares
- ~~b. write off Preliminary expenses of the co.~~
- c. write off - **Expenses/Commission** paid/Discount allowed on issue of shares/debentures of co.
- ~~d. providing for premium payable on Redemption of any redeemable pref. shares/ any debentures~~
- e. purchase of its own shares u/s 68 (**Buyback**)

Section 53 - Prohibition on Issue of Shares at Discount

1. Except as u/s 54, a company shall **NOT** issue shares at **discount**.
2. Any share issued by a company at a discount price shall be **void**.

**Exception** - Notwithstanding anything contained above, a co. may **issue shares** at a discount to its **creditors** when its **debt** is converted into **shares** in pursuance of any **statutory resolution plan** or **debt restructuring scheme** in accordance with any guidelines or directions specified by the RBI.

3. Default under this section:

- Co. and OID - **Fine up to amt. raised** through such issue or **Rs. 5 lakhs**, whichever is **less, and**
- Co. shall also be liable to **refund** such money + Intt. @12% p.a. from **date of issue** of such shares

Section 54 - Issue of Sweat Equity Shares (SES) to Directors/Employees

Sweat Equity Shares [Sec 2(88)]

- Such **equity shares** as are issued by a co.
- to its **directors** or **employees**
- at a **discount** or for **consideration**, other than cash,
- for providing their **know-how** or making available rights in the nature of intellectual property rights (**IPRs**) or **value additions**, by whatever name called;

Provisions:

1. Notwithstanding anything contained in sec 53, co. may issue **sweat equity shares (SES)** (of class of shares **already issued**), provided that:
  - a. the issue is authorized by a **SR**
  - b. Resolution specifies:
    - (a) No. of shares, (b) Current Mkt Price, (c) Consideration, if any **and** (d) to whom issued
  - c. If eq. shares are **listed**, such issue is as per **SEBI** Regulations. If not listed, as per **Rules**.
2. Rights, limitations and provisions of equity shares shall be applicable to sweat equity shares too and it shall rank **pari passu** with other ESH.



### Rule 8 - Issue of Sweat Equity Shares:

"Employee" means:

- (a) a **permanent** employee of the company who has been working **in India or outside India**, or
- (b) a **director** of the company, whether a whole-time director or not; or
- (c) Dir/Employee as per (a) or (b) above of **subsidiary** (India or o/s India) or of **holding** co. of the co.;

"Value additions" means actual or anticipated **economic benefits** derived/to be derived by co. from an **expert** or a **professional** for providing **know-how** or making available **rights** in the nature of **IPRs**, by such person to whom sweat equity is being issued **for which the consideration is not paid or included in the normal remuneration** payable under the contract of employment, in the case of an employee.

### Additional Points:

1. Validity of SR = Allotment of sweat eq. shares to be made within 12 months of passing SR
2. Maximum issue size per year:  
Co. shall **NOT** issue **SES > 15% of existing PUESC or issue value of Rs. 5 crores, WEH**  
Provided that, issuance shall not **> 25% of PUESC at any time**  
Prov. further that - In case of **Startup** - Issue not **> 50% of its PUESC** upto 10 years from incorp.
3. Lock in (i.e., non-transferable) - **3 years** from date of allotment
4. Issue price of SES - To be determined by **Registered Valuer** with proper justification
5. **Valuation** of IPR/Know how/Value Add - By **RV** with a proper report to BoD.
6. Treatment of non-cash consideration in books:
  - a. Where non-cash consideration is a depreciable/amortizable asset - Carry to **BS** as per AS
  - b. Where clause (a) N.A. - **Expense** as per AS
7. Co. to disclose specific details of such issue in **BoD report**
8. Co. to maintain register of SES **in Form SH-3** at RO or such other place decided by BoD

### Section 55 - Issue and Redemption of Preference Shares

1. **No** company limited by shares shall **issue** preference shares that are **irredeemable**
2. Co. may, if so authorized by **AoA**, issue preference shares **redeemable** within period **not > 20 years**

Provided that - Co. engaged in setting up and dealing with **infrastructural projects** may issue pref. shares of period **exceeding 20 years but not exceeding 30 years** provided that - **Min. 10%** of such pref. share is **redeemed** each year **from 21st year** at the option of PSH

Provided further that:

- a. Redemption - Such shares shall be redeemed only out of -
  - (i) **profits** of the co. available for dividend or
  - (ii) **proceeds** of **fresh issue** made for purpose of such redemption
- b. Only **fully paid-up** preference shares can be **redeemed**
- c. Where such shares are **proposed** to be redeemed **out of profits**, transfer a sum = **Nominal value** of shares to "Capital Redemption Reserve" A/C and provision relating to reduction of SC shall apply as if CRR were PUSC of the company.
- d. In case of prescribed class of co. whose FS comply with AS u/s 133, **premium** on redemption shall be **provided for** out of profits (and not SPA as u/s 52) of company before such redemption
- e. For **other class** of companies, such premiums can be provided for out of **profits or SPA**.

### Rule 9 - Issue and Redemption of Preference Shares

1. Co. may, if so authorized by **AoA**, issue preference shares subject to:
  - a. the issue has been authorised by passing **SR** in the **GM**
  - b. at the time of such issue - there is **no subsisting default** in **redemption** of any pref. share or payment of **dividend** due on preference shares.
2. **Register** of members u/s 88 shall contain particulars w.r.t, such pref. SHs
3. If co. **intends** to **list** such pref. shares - Issue preference shares as per **SEBI** regulations
4. **Redemption of PS** - As per terms of issues/as varied after approval.
  - (a) at a fixed time or on the happening of a particular event;
  - (b) any time at the company's option;
  - (c) any time at the shareholder's option

3. Where a company is **not in position to redeem/pay divided** on any pref. shares, it **may**:

- with **consent of 3/4th** in value of PSH and
- approval of **Tribunal** on petition made by it

**issue further** redeemable preference shares = amount of unredeemed pref. shares + dividend.

On such issue - Unredeemed pref. shares shall be **deemed** to have been **redeemed**.

Provided that **Tribunal shall**, while giving approval, order **redemption forthwith** of pref. shares held by such persons who have **not consented to** issue of further redeemable preference shares.

Note - Issue or redemption of pref. share is **not** = Reduction in SC of co.

4. CRR account may be applied for - **paying up** unissued shares to be issued as fully paid **bonus** shares.

#### Concept clarity check:

A co. proposes to redeem a pref. share of nominal value Rs. 100 with a premium of Rs. 20 per share.

Such redemption was to be made by further issue of pref. shares. Decide the amount to be transferred to CRR? - **Zero! CRR is only needed when amt. is paid out of profit (as you are utilizing dividend money)**

### Section 56 - Transfer and Transmission of Securities

#### 1. Company to record transfer of securities

- Other than transfer between persons both of whose names are entered as beneficial owners in records of depository,
- co. shall **not register** trf. of securities (or intt. of member in case of co. not having SC) **unless**:
  - a. proper **instrument** of transfer (**Form SH-4**) is duly **stamped, dated** & executed by TOR & TEE
  - b. the instrument **specifies** the name, address and occupation of TEE
  - c. such instrument has been **delivered** to co. by TOR or TEE **within 60 days** of execution along with certificate relating to securities or **letter** of allotment (if no certificate is in existence)

If **instrument** of transfer is **lost/has not been delivered** to co. within prescribed time, co. may **register** on such terms as to **indemnity** as Board may think fit.

In case of **Govt co.**, **instrument** of transfer shall **not** be **required** w.r.t. transfer of **bonds** issued by a Govt. co provided that an **intimation** by TEE specifying name, address and occupation + **Bond certificate** or Letter of Allotment is delivered to the co.

2. Nothing contained u/ss (1) shall prejudice the power of co. to register **TRANSMISSION** of any right to securities by **operation of law** on receipt of **intimation** for the same from any person to whom such right is transmitted (**transferee**) (i.e., transfer instrument not required in case of transmission. Instead, it requires intimation of transmission)

Cases of Transmission:

**Death** (to Legal Rep)

**Insolvency** (to resolution professional)

**Lunacy** (to administrator appointed by Court)

3. Notice to transferee in case of partly paid shares:
- If application is made by **TOR** alone + it is **partly paid** shares, trf to be registered only after
  - co. to give **notice (in Form SH -5)** of the application to TEE and
  - TEE to give **no objection** to the transfer **within 2 weeks** from receipt of notice.

4. Unless prohibited otherwise, co. to **deliver certificates** of all securities allotted, trfd/transmitted:

In case of:	Within a period of:
<b>Subscribers</b> to MoA	within <b>2m</b> of incorporation
Any <b>Allotment</b> of its <b>shares</b>	within <b>2m</b> of allotment
Transfer or transmission	within <b>1m</b> from date of receipt of <b>transfer</b> instrument or Intimation of <b>Transmission (IOT)</b>
<b>Allotment</b> of <b>debentures</b>	within <b>6m</b> from date of allotment

**Note** - where sec are dealt with in a **depository**, co. to intimate details of allotment to depository **immediately** on **allotment**.

5. **Transfer** of any security of a deceased person **made by his LR** shall, **even if the LR is not a holder** thereof, **be valid** as if he had been holder at the time of execution of instrument of transfer.
6. Default in compliance of above provisions - Fine - Co. and OID - Rs. 50,000 [**Amendment**]
7. Without prejudice to any liability under the Depositories Act, 1996, where any **depository** or DP, with an **intention to defraud** a person, has **transferred shares**, it shall be **liable u/s 447**.

Difference between Transfer and transmission (just for knowledge)

	Transfer	Transmission
Voluntary?	Yes	No. Operation of Law
Transfer Instrument?	Yes	No. Intimation of Transfer
Consideration	Likely, yes.	No.

**Note** - **Forged Transfer** is a **Nullity** and is not legally binding. A company can be forced to delete name of TEE in case of Forgery.

**Case** - Mr. A is shareholder of RIL. Mr. Chor forged signature of Mr. A and transferred his shares to Mr. B. Mr. B then further transferred the shares to Mr. C and RIL registered such transfer. Discuss the consequences.

Answer -

Co. to restore **ownership** to Mr. A.

Co. to **compensate** genuine buyer (Mr. C) and shall indemnified by Mr. B.

Mr. B, who **indemnified** the co, shall, in turn, chase Mr. Chor.

Exam question:

What if a share certificate is transferred via forgery (Q2 of QB):

- A forged transfer is a nullity.
- It does not give the transferee any title to the shares. Similarly any transfer made via such forgery will also not give a good title to shares as the title of buyer is only as good as that of seller.
- If a co. acts on a forged transfer & removes name of real owner, then co. is bound to restore such name and pay him any dividends which he ought to have received  
(*Barton v. North Staffordshire Railway Co.*)

Section 57 - Punishment for Personation of Shareholder

- If any **person deceitfully personates** as **owner** of any security/interest/share warrant/coupon, **and**
- thereby **obtains** or attempts to obtain any such security or interest or any such share warrant or coupon, **or receives** or attempts to receive **any money due to any such owner**,
- he shall be **punishable** with **imprisonment** - 1 year to 3 years **AND** with **fine** Rs. 1 lakh to Rs. 5 lakhs.

Section 58 - Refusal of registration and appeal against refusal.

Refusal by Private Co:

Where a private co (limited by shares) refuses to register transfer or transmission, it shall:

- **within 30 days of delivery** of instrument of transfer or IOT to the co.
- send **notice** of refusal to TOR and TEE or to person giving IOT
- stating the **reason for refusal** in such notice.

Appeal in case of refusal:

TEE or IOT person may appeal to tribunal:

- **within 30 days** of receipt of notice of refusal
- where no notice of refusal is received, **within 60 days** of delivery of instrument of trf or IOT to co.

Refusal by Public Co:

- Securities of public companies are **freely transferrable**.
- Any contract w.r.t., trf of securities shall be a **valid contract** and enforceable.

In case of refusal by a public co. without sufficient cause:

If a public co., without sufficient cause refuses to register the transfer of sec. **within 30 days** from date on which instrument of transfer or IOT, is **delivered** to the co., transferee **may** appeal to tribunal:

- **within 60 days** of receipt of notice of refusal
- where no notice of refusal is received, **within 90 days** of delivery of instrument

Order by Tribunal:

After hearing the parties, Tribunal may **either dismiss** the appeal **or** by order:

- a. Direct co. to **register** trf/transmission & co. shall comply **within 10 days** of receipt of such order, or
- b. Direct **rectification** of the register and also direct the co. to **pay damages** to party aggrieved.

Contravention of order of Tribunal - **Imprisonment** - 1 year to 3 years **AND Fine** Rs. 1 lakh to Rs. 5 lakh

Section 59 - Rectification of Register of Members

1. Application for Rectification of Register of Member (RoM):

**If without sufficient cause, the name of any person is:**

name is entered into RoM

omitted from RoM

unnecessary delay in entering/removing name

Aggrieved person or Any Member may make an application for rectification of RoM to:

- a. Tribunal, or
  - b. Competent court o/s India specified by CG - In case of foreign members or DHs o/s India
2. Tribunal may either dismiss the appeal or by order:
- a. Direct co. to **register** trf/transmission and co. to comply **within 10 days** of receipt of order, or
  - b. Direct **rectification** of the register and also direct the co. to **pay damages** to party aggrieved.
3. The sections shall not restrict the holder of the sec. from **transferring** such sec. and any person acquiring such sec. shall be entitled to **Voting Rights**.
4. Where a trf. is made in contravention of any Law, Tribunal may, on application to it, direct the company or depository to set right the contravention and rectify registers.

#### Section 61 - Power of Limited Company to Alter its Share Capital

1. A limited co. having a SC may, if so authorised by its AoA, alter its MoA in its GM to:
- a. **increase** its ASC by such amount as it thinks expedient;
  - b. **consolidate & divide** all or any of its SC into shares of a **larger amount** than its existing shares. Provided that **no consolidation** and division which **results** in changes in the **voting %** of SHs shall take effect unless it is **approved** by **Tribunal** on an **application** in prescribed manner;
  - c. **convert** all or any of its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination;
  - d. **sub-divide** its shares, or any of them, into shares of **smaller amount** than is **fixed by the memorandum**, so, however, that in the sub-division the **proportion** between the amount paid and the amount, if any, unpaid on each reduced share shall be the **same** as it was in the case of the share from which the reduced share is derived;
  - e. **cancel** shares which, at the date of the passing of resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish amount of its share capital by amt. of the shares so cancelled.
2. The **cancellation** of shares u/ss (1) shall **not** be **deemed** to be a reduction of share capital.

Note - The capital clause of memorandum, if authorised by the articles, shall be altered by passing an **ordinary resolution (and not SR)** as per Section 61 (1) of the Companies Act, 2013.

#### Section 62 - Further Issue of Share Capital (Right issue/preferential allotment/Right of Pre-emption)

1. Where a co. proposes to increase its subscribed capital, by issue of further shares, such shares shall be offered to -
- a. Persons who, on the date of such offer, are ESH of the company:  
Such offer shall be made in **proportion to PUSC** by sending a letter of offer subject to:
    - i. Offer to be made by **notice** specifying no. of shares offered & limiting time to accept offer. **Time limit** shall be **not < 15** days or days as may be prescribed and shall **not > 30** days. If **not accepted** within time limit - **Deemed declined**.

Note - In Pvt. co (92 + 137) - If 90% of member give consent, then less than 15 days allowed

    - ii. Right to Renounce - **Unless AOA** provides otherwise, the above offer shall be deemed to include right to renounce the shares offered. A statement to this effect is to be included in

the offer

iii. After expiry of time limit/receipt of intimation declining offer - BoD to dispose such shares in manner **not dis-advantageous** to SH and the company

b. Offer to employees - Under **ESOPs** subject to **SR** and prescribed T&C (In case of Pvt co (92+137) - Pass OR instead of SR)

c. Offer to any person:

if it is authorised  
by **SR**

either for cash or  
**consideration** other than cash.

if the **prices** to be determined by  
a valuation report by **RV**

2. Dispatch of notice referred above: to existing SH

- Via - **Registered post** or **speed post** or **e mode** or **courier** or other mode having **proof of delivery**
- at least **3 days** before opening of issue

3. Provision of this section - **N.A.** in case of **conversion** of debenture/loan by way of exercise of option as per terms attached to such debt issued/loan raised. Provided that such an option in the issue of debenture/loan raised was approved by **SR**.

4. Conversion of Debenture issues to Government on T&C as per Govt.:

- Notwithstanding provision u/ss (3),
- where any **debentures/loan** has been obtained from any **Government**, and
- if that Govt. considers it necessary in **public interest** so to do,
- it may, by **order, direct** that debentures/loans or part thereof shall be **converted** into shares
- on **terms** as may appear **reasonable** to **Govt.**
- even if terms of debentures/loan **do not include option** for such conversion.

Provided that where **terms** of such conversion are **not acceptable to co.**, it may, within **60 days** from date of communication of such order, **appeal to Tribunal** for order as NCLT may deem fit.

5. In determining the terms, Govt. shall have due regard to:

Financial Position

terms of issue of such  
debt

rate of intt. on such  
debt/loan

Others

6. Effect of Govt passing such order + **No appeal** or where appeal is made has been dismissed, if the order has effect of increasing the ASC:

- a. the **MoA** stands altered
- b. **ASC** stands increased by amt equal to **value** of shares to which such debt/loan is converted into.

Rule 12 - Issue of **Employee** Stock Options (ESOP)

"**Employee**" means-

- (a) a permanent employee of the company who has been working in India or outside India; or
- (b) a director of the co., whether whole time or not **but excluding an independent director**; or
- (c) an employee referred in (a) or (b) of a **subsidiary** (India or outside) or of a holding co.

but does not include:

- (a) an employee who is a **promoter** or a person belonging to the promoter group; or
  - (b) **director** who (himself or via relative/any BC) holds **more than 10%** of o/s equity shares of the co.
- In case of Startups - Above 2 exceptions N.A. for **first 10** years.

To issue ESOP:

Listed company - Comply with SEBI Regulations.

Other than listed co, comply with following conditions:

Such issue is approved by way of <b>SR</b>	Co. to make specified <b>disclosure</b> in ES annexed to notice	Co. has <b>freedom</b> to determine "Exercise Price" as per applicable policies
Min. period of <b>1 year</b> between grant and vesting of options*	Co. has freedom to specify <b>lock in</b> period.	No right to <b>vote</b> /receive <b>dividend unless</b> shares issues on <b>exercise</b> of option.
Options are <b>non-transferrable</b>	Options granted shall <b>not be pledged</b> , hypothecated, etc	No person other than employee entitled to ESOPs.
In case of <b>death</b> - options granted to him shall vest with <b>legal heirs or nominees</b>	In case of <b>permanent incapacity</b> - Option granted to vest on such employees <b>on that day</b>	In case of <b>resignation/termination</b> - option to <b>expire</b> .

\* In case of amalgamation - Adjust the period for which options were held in prior co. with min. vesting period. (If you didn't understand this, read the detailed text below or else, skip.)

*Provided that in a case where options are granted by ABC Ltd. under its ESOP in lieu of options held by the same person under an ESOP in XYZ Ltd, which has merged or amalgamated with ABC Ltd., the period during which the options granted by ABC Ltd. were held by him shall be adjusted against the minimum vesting period required under this clause;*

Section 63 - Issue of Bonus Shares

A company may issue **fully paid-up** bonus shares to its **members**, in any manner whatsoever, out of:

Free Reserve	Sec. premium Account	CRR Account
--------------	----------------------	-------------

Provided that **no issue** of bonus to be made by **capitalizing reserves** created by **revaluation** of assets.

Conditions for issuing bonus shares:

No company shall **capitalise its profits or reserves** for issuing fully paid-up bonus shares, **unless:**

Auth. by <b>AOA</b>	On recommendation of <b>BoD</b> - Auth in <b>GM</b>	<b>Not defaulted</b> in payment of intt/principal w.r.t., fixed deposit or debt sec. issued by it
Not defaulted - <b>Stat due</b> of employee	<b>Partly</b> paid up shares are made fully paid up	Condition prescribed - Bonus once announced by BoD, cannot be withdrawn

Concept clarity check:

1. Can a company issue bonus out of revaluation reserve after complying with above 6 conditions? - **No!**
2. Bonus shares shall **not** be **issued** in **lieu of dividend**.

Section 64: Notice to be Given to Registrar for Alteration of Share Capital

1. In the following cases:

Alteration of SC u/s 61(1)

Increase in ASC u/s 62(6)

Redemption of pref. shares

Co. shall file a notice (**Form SH - 7**) along with **Altered MoA** to RoC **within 30 days** of such action.

2. Contravention - Co. & OID - Fine of Rs. 500 / day subject to max. Rs. 5 lakhs (Co) or Rs.1 lakh (OID)

Section 65: Not in syllabus

Section 66: Reduction in Share Capital

1. A company **may reduce** its share capital subject to:
  - a. Confirmation by **Tribunal** on application by company, and
  - b. By a **Special Resolution**, and
  - c. Alter MoA by reducing the amt. of SC and no. of shares.

Manner of Reduction in SC:

- i. **Extinguish** or reduce the liability on any shares **not paid up**
- ii. With or without extinguishing or reducing liability on its shares:
  1. **Cancel** any PUSC which is **LOST** or is **unrepresented** by available asset.
  2. **Pay off** any PUSC which is in excess of the wants of the co.

Provided that **no such reduction** shall be made if the **company** is in **arrears** in the **repayment** of any **deposits** accepted by it, or the **interest** payable thereon.

2. On receipt of application u/ss (1), the Tribunal shall give a notice thereof to:

CG

RoC

Creditors of co.

SEBI (in case of Listed Co.)

and shall take into consideration the **representation**, if any, made **within 3 months** of such notice. If **no** representation - **Presume** no objection.

3. **Tribunal** to **order confirming** reduction of SC on T&C as it may deem fit - **Only** when it is satisfied that debt/claim of every **creditors** has been **discharged** or his **consent** is obtained.

Provided that Tribunal shall not sanction unless: **A/C treatment**, proposed by co. **for such reduction** is in **conformity** with **AS u/s 133 + Certificate** by company's **auditor** has been **filed** with **Tribunal**.

4. Order of Tribunal shall be published in manner as directed by Tribunal.

5. Co. to deliver **copy** of **order** to Tribunal **and** of a **minute** approved by Tribunal showing the following with **ROC** **within 30 days** of receipt. RoC shall register and issue a certificate thereof.

The minute approved by Tribunal shall include the following info:



Amount  
of SC

No. of shares into which  
it is to be divided

Amt. of each  
share

Amt. at the date of registration  
deemed to be paid up

6. Nothing in this section shall apply to buy-back of its own securities by a company u/s 68.
7. A member, past or present, shall not be liable to any call/contribution w.r.t, any share held by him exceeding [Amount paid up on the share - Amount of share as fixed by the order of reduction].
8. Where the name of a creditor is not entered in the list of creditors by reason of his own ignorance of proceeding for reduction or otherwise AND after such reduction, the co. commits a default (Sec 6 of IBC) of his debt;
  - a. Every member of co. on the date of registration by RoC of order for reduction shall be liable to contribute to payment of that debt an amt not > amt he would be liable in case of WUP, AND
  - b. If co. is wound up, the Tribunal may, on application of such cr. + proof of his ignorance - Settle a list of person so liable to contribute and enforce such calls on contributories as if they were ordinary contributories.
9. If any officer of the company:
  - a. Knowingly conceals the name of any creditor entitled to object to the reduction;
  - b. Knowingly misrepresents the nature or amount of the debt or claim of any creditor; or
  - c. abets or is privy to any such concealment or misrepresentation as aforesaid  
he shall be liable under section 447.

Alteration (sec 61) vs Reduction (sec 66) - Refer QB Q19

Section 67: Restrictions on Purchase by Company or Giving of Loans by it for Purchase of its Shares

1. No company having SC shall have power to buy its own shares without consequent reduction in SC.
2. No public company shall give any loans, guarantee or any financial assistance for purchase/ subscription of its shares or its holding co.
3. Nothing u/ss (2) shall apply to:
  - a. lending of money by a banking company in the ordinary course of its business;
  - b. the provision by a co. of money as per any scheme approved by co. through SR for the purchase/ subscription, fully paid-up shares in co. or its holding co., if the purchase/subscription of the shares is held by trustees for benefit of employees or such shares are held by employees
  - c. Loan to employee for purchase of shares of company:
    - giving of loans by a company to persons in the employment of the company
    - other than its directors or KMP,
    - for an amount < 6m salary or wages
    - with a view to enabling them to subscribe for fully paid-up shares in co. or its holding company to be held by them by way of beneficial ownership.

Provided that disclosures in respect of voting rights not exercised directly by employees in respect of shares to which scheme relates shall be made in BOD report in prescribed manner.
4. Nothing in this section shall affect the right of a co. to redeem any preference shares issued by it.
5. Contravention:  
Co. - Rs. 1 lakh to Rs. 25 lakh and OID - Jail upto 3 years and fine Rs. 1 lakh to 25 lakhs.

## Section 68: Power of Company to Purchase its Own Securities ("Buy-back/BB")

This section talks about purchase of own shares or other specified securities (Buy-back). Specified Securities include ESOPs or securities notified by CG.

1. Notwithstanding other provision of the Act, co. may BB out of:

Free Reserve    Sec. premium Account    proceeds of issue of any share/other sec.

Proviso- No buy-back of a kind of share/sec. shall be made out of **proceeds of an earlier** issue of the same kind.

2. Conditions to be fulfilled prior to BB:

i. Auth. by **AoA**

ii. Auth. by **SR** in the GM

**Note** - SR not needed where:

- Limit - buy-back is  $\leq 10\%$  of total PUESC + FR, and
- Auth. by **Board** by means of resolution passed at BM

iii. BB is  $\leq 25\%$  of total PUC + FR

[With respect to BB of equity share in any FY, reference to 25% shall be construed w.r.t., PUESC + FR in that FY]

iv. **Ratio**  $\rightarrow \frac{\text{Debts (secured + unsecured) owed after BB}}{\text{Paid up Equity Capital + FR}} = \text{Not} > 2$  (or higher ratio by CG)

v. All the shares/sec. for buy-back is **fully paid up**

vi. If securities are **listed** on RSE - BB as per SEBI Regulations. If not listed, then as per this Act

Proviso - BB shall **NOT** be made **within 1 year** reckoned from date of closure of **preceding** BB

3. The ES of the notice of meeting at which SR is proposed to be passed shall state: [FAST N]

full disclosure of **material Facts**;

**Necessity** for the buy-back;

securities **intended** to be purchased;

**Amount** to be invested; and

**Time-limit** for completion

4. **Time limit** for completion - **Within 1 year** from date of passing SR/BR as the case may be

5. **Source of BB**: buy-back may be from:

Existing SH on prop. basis

Open Market

Sec. issued to employee (ESOP or sweat shares)

6. **Declaration of Solvency**:

- Before making buy-back, co. to file with **RoC** and **SEBI** (only if listed),
- a "**Declaration of solvency**" in **Form SH-9**
- signed** by at least 2 directors (1 MD compulsory).
- verified by an **affidavit** stating BoD has made **full inquiry** into affairs of co. and are of **opinion** that it is capable of **meeting liabilities** + will **not** be rendered **insolvent within 1 year** from date of declaration adopted by BoD.

7. **Post buy-back** - Co. to **extinguish** and physically **destroy** the share so bought back **within 7 days** of **last date** of completion of BB

8. Where a company complete a buy-back - Co. shall **NOT** make **further issue** of shares/sec. of **SAME** kind including allotment u/s 62(1)(a) **within 6m** (except for bonus shares or shares to discharge subsisting obligations such as conversion of warrants, ESOPs, sweat equity or conversion of pref.

shares/debentures into equity)

9. Co. to maintain register (in **Form SH-10**) showing:

shares/sec. so bought back	consideration paid	Date of cancellation of sec. so bought back	date of extinguishing/ physically destroying shares	Other part.
----------------------------	--------------------	---	---	-------------

- After completion of buy-back - File return with **RoC + SEBI** (if listed) **within 30 days** in **Form SH-11**
- Default under this section → Company and OID - Rs. 1 lakh to Rs. 3 lakhs

#### Section 69: Transfer of Certain Sums to Capital Redemption Reserve Account

1. Where a co. **purchases** its own shares out of **free reserves** or **SPA**, a **sum** equal to the **nominal value** of shares so purchased shall be transferred to **CRR A/C**
2. Details of such transfer shall be **disclosed** in the **balance sheet**.
3. CRR A/C may be **applied** by the company, in issue of **bonus** shares.

#### Concept clarity check -

A co. does BB from proceeds from issue of any other shares. How much amt is to be trfd to CRR? **None!**  
**Trf. to CRR is to be done only in case of purchase out of FR or SPA**

#### Section 70: Prohibition for Buy-Back in Certain Circumstances:

1. No **company** shall directly or indirectly **purchase** its own shares or other specified securities:
  - a. through any **subsidiary** co. including its own subsidiary companies;
  - b. through any **investment company** or group of investment companies; or
  - c. if a **default**, is made by the co., in the **repayment** of **deposits** + interest payment thereon, redemption of **debentures** or **pref. shares** or payment of **dividend** to any shareholder, or repayment of any **term loan or interest** payable thereon to any **banking** company or FI:

Provided that the buy-back is not prohibited, if the default is **remedied** and **3 years** has lapsed after **such default ceased to subsist**.

2. No company shall, directly or indirectly, purchase its own shares or other specified securities in case such company has **not** complied with the provisions of **sections 92, 123, 127 and section 129**.

#### DEBENTURE (SECTION 71)

##### Section 2(30) - Debenture:

Debenture includes debenture stock, bonds or **any other instrument** of a company **evidencing a debt**, whether constituting a **charge** on the assets of the company **or not**.

Provided that, following instrument shall **not** be treated as debenture:

- a. instruments referred to in Chapter III-D of the RBI Act, 1934; and
- b. such other instrument, as may be prescribed by **CG** in consultation with RBI, issued by a company.

##### Section 71:

1. A co. **may** issue debentures with an **option** to convert such debentures into **shares**, either wholly or partly at time of **redemption**.  
Provided that the issue of such convertible debentures shall be approved by a **SR** passed at a **GM**.
2. **No** company shall issue any debentures carrying any **voting rights**.

3. **Secured** debentures may be issued by a company subject to such T&C as may be **prescribed**.

Rule 18 - Issue of Secured Debenture:

1. Redemption period

In case of secured debenture, the date of redemption shall **not > 10 years from date of issue**.  
Provided that, in following class of cos, it **may exceed 10 years but not exceeding 30 years**:

Companies engaged in setting up infra projects	Infra finance companies	Infra debt fund NBFC	Co. as may be permitted by CG/RBI/NHB for > 10 years
--	-------------------------	----------------------	--

2. How will it be secured - Creation of charge:

- Such an issue of debentures shall be **secured**
- by the creation of a **charge** on properties or assets (in favor of **debenture trustee**)
- of **company** or its **subsidiaries** or its **holding co.** or its **associates'** companies,
- having **value** which is sufficient for due repayment of the debentures and interest thereon

3. Appointment of debenture trustee:

- **Company** shall appoint debenture trustee ("DT")
- **before issue** of prospectus or letter of offer for subscription of its debentures **and**
- execute a debenture trust deed ("deed") to protect the interest thereon **not later than 60 days** after allotment of debentures

4. Creation of DRR:

- Co. shall create a **Debenture Redemption Reserve (DRR)** account
- out of the **profits** available for distribution as dividend, and
- Amt. credited to DRR account shall **be utilised** only for **redemption** of debentures.

Rule 18:

All India Financial Institutions and Banking companies are generally not required to create DRR.

For the companies which are required to create DRR, it shall:

- on or before **30th April** in each year,
- in respect of debentures issued by such co., **invest or deposit**,
- a **sum not less than 15%** of amount of debentures **maturing during the year** (ending 31st March of next year) in any one or more methods of investments or deposits as follows:

<b>deposit</b> with scheduled bank	<b>unencumbered</b> securities of CG/SG	<b>unencumbered</b> securities as per Indian Trust Act	unencumbered <b>bonds</b> of any other cos. notified under Indian Trust Act
------------------------------------	---	--	---

Provided that amount invested or deposited shall not:

- at any time **fall below 15%** of amount of debentures maturing during the year ending on 31st day of March of that year
- **be used** for any purpose other than redemption of debentures maturing during the year

5. No co. shall issue a **prospectus** to the public or to its members (> **500**) for subscription of its debentures, **unless** the co. has, **appointed** one or more **debenture trustees**.  
(i.e., if offers to public or members (> 500), appoint debenture trustee)

### Rule 18: Eligibility of Debenture Trustee?

The co. shall appoint DT after complying with following conditions:

1. **Name** of DT to be stated in prospectus or letter of offer and in subsequent communications
2. Before appointment, **written consent** of DT obtained and statement to that effect included in the letter of offer
3. A person shall not be appointed as DT if he:
  - a. Beneficially holds **shares** in co.
  - b. is promoter, director or KMP or other officer or **employee** of CASH
  - c. beneficially entitled to moneys to be **paid by the co.** (other than remuneration as DT)
  - d. **indebted** to CASH or subsidiary of such holding co.
  - e. furnished **guarantee** in respect of principal debts secured by debentures
  - f. has **pecuniary** relationship with co.  $\geq$  Lower of [ 2% of Gross T/O or total income or 50 lakhs or higher amount as may be prescribed] in preceding 2 FY or CY
  - g. **Relative** of [promoter or director or KMP] of the company
4. Board to fill **casual vacancy** in office of trustee (in case of **resignation**, obtain **written consent** of majority of **DH** prior to filling such vacancy)
5. DT may be **removed** if approved by **not less than 3/4th in value of DHs**

6. A **debenture trustee** shall take steps to **protect** the **interests** of the **debenture-holders** and redress their grievances in accordance with such rules as may be prescribed.

### Rule 18: Meeting of DHs:

**Meeting** of all the DHs shall be convened by the DT on:

- (a) **requisition** in writing signed by DHs holding  $\geq$  1/10<sup>th</sup> in value of outstanding debentures;
- (b) happening of any **event**, which constitutes **breach**, default or which in the **opinion** of DT **affects** interest of DHs.

7. Any **provision** in trust deed which has the **effect** of exempting DT from **liability for breach of trust** or **indemnifying** him where he fails to due care and diligence - Shall be **void**.

Provided that - **Liability** of DT shall be subject to **exemption** as agreed by - **Majority of DHs holding  $>$  3/4th in value** of total debentures.

8. Co. shall pay **interest** and **redeem** debentures as per the **terms** and conditions of their **issue**.
9. Where at any time, **DT** comes to **conclusion** that **assets** of co. are **insufficient/likely** to become insufficient to **discharge** principal amount when it became due, **DT** may **file petition** before **Tribunal**.

Tribunal may, after hearing, impose **restriction** on **further liability** of co. (in interest of DH)

10. If **co. fails** to **redeem debentures** on date of maturity or **fails** to pay **interest** when due, **Tribunal** may, on **application** of DHs or DT, order co. to **redeem** it **forthwith** with payment of principal and interest thereon.

11. A contract with co. to **take up and pay** for any debentures of co. may be enforced by a **decree** for specific performance.

### Additional points:

1. As per sec 180(1)(C) - Co. to obtain SR if borrowings exceed 100% of PUSC + FR + SPA
2. Co. to file return of allotment in Form PAS -3 within 30 days of allotment of such debentures

# Chapter 5 - Acceptance of Deposits by Company

[Section 73, 74, 75, 76 and 76A]

Form	Section	Purpose
DPT 1	73 & 76	Circular or advertisement in a newspaper inviting deposits
DPT 2	76	Deposit trust deed
DPT 3	73 & 76	Return of deposits
DPT 4	74	Statement on existing deposits as on the date of commencement of the companies act

## Overview of the chapter:

<u>Acceptance of Deposits</u>	<u>Prohibition on Acceptance of Deposits</u>	<u>Repayment of Deposits</u>	<u>Acceptance of deposits from public</u>	<u>Punishment for Non-Compliance / Contravention</u>
↳ Definition ↳ Related terms	↳ Section 73	↳ Section 74	↳ Section 76	↳ Section 76A

## Let's understand what's Deposit:

### Deposits [Sec 2(31)] - "Deposit":

- **includes** any receipt of money by way of deposit or loan or in any other form by a co.,
- but **does not include** such categories of amt. as may be prescribed in consultation with the **RBI**

### Note:

1. Repayment of 'deposit' is time-bound.
2. It can be secured (by creating charge on tangible asset) or unsecured (no security).
3. **Private co.** can accept deposits from its **members only**.
4. **Public co.** can accept deposits from **members and public** subject to certain **parameters**

## Rule 2 of the Companies (Acceptance of Deposit by Company) Rules, 2014:

### Deposits shall not include the following:

SN	From	Amount received from:
1	<b>G</b> overnment	<ul style="list-style-type: none"> <li>• CG/SG/Local Authority</li> <li>• Stat. Auth. constituted under any Act of Parliament or State Leg.</li> <li>• Any other source where repayment is guaranteed by CG/SG</li> </ul>
2	<b>F</b> oreign Source (subject to FEMA)	<ul style="list-style-type: none"> <li>• Foreign Govt.,</li> <li>• Foreign or international banks,</li> <li>• Multilateral financial institutions</li> </ul>
3	<b>B</b> anks and PFIs	Amt. received as a loan or facility from <ul style="list-style-type: none"> <li>• any banking company or SBI or subsidiary or co-operative bank</li> </ul>

		<ul style="list-style-type: none"> <li>PFI's</li> </ul>
4	Issue of CPs	Amt. received against issue of CPs or other Instruments as per RBI Guidelines
5	Inter-corporate	Any amount received by a company from any other company;
6	Application Money	<p>Any amount received pursuant to an offer made towards subscription to any securities, including share application money or advance towards allotment of securities pending allotment.</p> <p><u>Explanation</u> - If securities for which appln. money was received is not allotted within 60 days from receipt thereof or is not refunded within 15 days from completion of 60 days, such amount to be treated as a deposit as per these rules.</p> <p>Any adjustment, other than what is allowed of such application money, will NOT be considered as refund.</p>
7	Director	<p>Amount received from person - who at the time of such receipt, was:</p> <ol style="list-style-type: none"> <li>Director of the co. (public or private), or</li> <li>Relative of the director of the co. (only in case of private co.)</li> </ol> <p>Following conditions are to be met:</p> <ul style="list-style-type: none"> <li>At the time of giving such money, director or relative to furnish a declaration to co. that such amt. is not being given out of loans/borrowings from others</li> <li>Co. to disclose money so accepted - In Board's Report.</li> </ul>
8	Bonds or Debentures	<p>Amount raised by issue of:</p> <ul style="list-style-type: none"> <li>Bonds/Debentures secured by a first charge or Pari Passu with first charge on any assets referred to in Sch III, excluding intangible asset (provided, amount of such bond/debt &lt;= Market value of such asset as assessed by RV)</li> <li>Bonds/Debentures compulsorily convertible into shares of co. within 10 years</li> <li>Non-convertible bond/debenture unsecured and listed on RSE as per SEBI</li> </ul>
9	Sec. Deposit from Employee	Amt. received from Employee of co. <= Annual Salary in nature of non-interest-bearing security deposit.
10	Trust	Any non-interest-bearing amount received and held in trust
11	In course of business	<p>Any amount received in course of business of co:</p> <ol style="list-style-type: none"> <li>As an advance for supply of goods/services provided that such advance is appropriated against supply of goods/services within 365 days of acceptance of such advance (except where advance is subject matter of any legal proceeding)</li> <li>as advance received towards consideration for an immovable property as per an agreement provided that such advance is adjusted against such property as per the terms of agreement</li> <li>as security deposit for performance of contract for supply of goods/services</li> </ol>

		<p>iv. as <b>advance</b> received under <b>long term projects</b> for supply of <b>capital goods</b> except those covered under item (b) above</p> <p>v. as an <b>advance</b> towards consideration for providing <b>future services</b> in form of a <b>warranty/maintenance contract</b> as per written agreement, provided that period for providing such services is <b>not &gt; 5 years</b> or period as per common <b>business practice</b> whichever is <b>less</b>;</p> <p>vi. as <b>advance</b> received <b>and</b> as <b>allowed</b> by sectoral regulator or as per <b>CG/SG</b></p> <p>vii. as an <b>advance</b> for <b>subscription</b> towards publication, whether in print or in electronic to be adjusted against receipt of such publications;</p> <p><b>Provided that</b> if amount received under (a), (b) and (d) above <b>becomes refundable</b> (with or w/o interest) due to <b>reasons</b> that the co. does not have <b>necessary permission</b> to deal in goods or properties or services for which advance is received → On <b>expiry of 15 days</b> from date they become due for refund, it shall be <b>deemed</b> to be a <b>deposit</b>.</p>
12	Promoters	<p>Any amount brought in by promoters of Co. by way of <b>unsecured loan</b> subject to following conditions:</p> <p>a. the loan is brought in pursuance of <b>stipulation</b> imposed by <b>lending institutions/banks</b> on promoters to contribute such finance</p> <p>b. the loan is provided by <b>promoters</b> themselves or their <b>relatives</b> or both; <b>and</b></p> <p>c. the <b>exemption</b> under this sub-clause shall be available only till the <b>loans</b> of financial institution or bank are <b>repaid</b> and not thereafter</p>
13	By a Nidhi Co. or subscription to Chit	Amt. accepted by a Nidhi company as per Section 406 and Rules made thereunder or amt received by way of subscription in respect of a chit under the Chit Fund Act, 1982.
14	CIS	any amount received under any <b>collective investment scheme</b> as per SEBI
15	Start-Up Convertible Note	<p>An amount of <b>&gt;= Rs. 25 lakhs</b> received by a <b>start-up</b> company, by way of a <b>convertible note</b> (convertible into equity shares or repayable within period not &gt; 10 years from date of issue in a single tranche) from a person.</p> <p><u>Explanation:</u> For this sub-clause:</p> <p>a. <u>Start-up</u> co. means a <b>Pvt. co. and</b> recognized as per notification issued by Department for Promotion of Industry and Internal Trade (DPIIT);</p> <p>b. <u>Convertible Note</u> means an <b>instrument</b>:</p> <ul style="list-style-type: none"> <li>• evidencing receipt of money <b>initially</b> as a <b>debt</b>,</li> <li>• which is <b>repayable</b> at the <b>option</b> of holder, <b>or</b></li> <li>• which is <b>convertible</b> into such number of <b>Eq. shares</b> of start-up company <b>upon occurrence</b> of specified events and as per the other T&amp;C agreed to and indicated in the instrument.</li> </ul>
16	Amt. received from AIF	<p>Any amount received by a company from:</p> <ul style="list-style-type: none"> <li>• Alternate Investment Funds,</li> <li>• Domestic Venture Capital Funds,</li> <li>• Infrastructure Investment Trusts</li> <li>• Real Estate Investment Trusts and</li> </ul>



- Mutual Funds registered with SEBI

“Depositor” means:

- any **member** of company (public or private) who has made a deposit as per Sec 73(2), or
- any **person** who has made a deposit with a **public** company as per Sec 76;

“Eligible Company” means a **public co.** as referred u/s 76 (1), having

- a net worth of not less than Rs. 100 crores or
- a turnover of not less than Rs. 500 crores and
- which has obtained the prior consent in general meeting by means of a **SR\*** and
- filed the said resolution with RoC before any invitation to public for acceptance of deposits

\*Eligible co. accepting deposits within limits u/s 180 (1) (c), may accept it by means of an **OR (not SR)**

### Section 73: Prohibition on Acceptance of Deposits from Public

- On and after the commencement of this Act, **no company** shall invite, accept or renew deposits under this Act from the **public** except in a manner provided under this Chapter:

Provided that nothing in this sub-section shall apply to:

- **Banking** company and NBFC as per RBI Act and
- Such other company as **CG + RBI** may specify in this behalf.

- A company may, subject to passing a **resolution (ordinary)** in **GM**, accept deposit from its **members** after complying with the following conditions:

- Issuance of a **circular** to members (Form DPT -1) authorized by BoD including statement showing:

Fin. position	Credit Rating Obtained	Total no. of depositors	Amt. due towards previously accepted deposit	Other particulars
---------------	------------------------	-------------------------	--	-------------------

#### Rules relating to Circulars:

Manner of issuance	<ul style="list-style-type: none"> <li>• Issue to all <b>members</b> by RPAD or Speed post or e-mode</li> <li>• Publish in <b>newspaper</b> - English + Vernacular.</li> <li>• Place on <b>website</b> of the co.</li> </ul>
Attachments to Form DPT-1	<b>Certificate from Stat. Auditor</b> stating that: <ul style="list-style-type: none"> <li>• Co. has not defaulted in repayment of deposit + interest or</li> <li>• Default, if any, has been made good and 5 years have lapsed from the date such default was made good.</li> </ul>
Register with RoC	Co. to send to RoC - Copy of circular <b>signed by majority</b> of the directors - <b>At least 30 days prior</b> to issue → for registration
Validity of Circular in form of Advt.-	<b>Earliest of:</b> <ul style="list-style-type: none"> <li>• Until 6m from date of closure of FY in which it is issued, or</li> <li>• Date on which Fin. Statement is laid in <b>AGM</b></li> <li>• If <b>AGM</b> not held - Last date for holding <b>AGM</b></li> </ul>
Fresh Circulars	To be issued, in <b>each succeeding FY</b> for inviting deposits during that FY.

- Filing copy of circular + Such Statement with RoC **within 30 days before** date of issue of the circular;

- Co. to **deposit**, on or **before 30th April** each year, sum  $\geq$  20% of amt. of deposit maturing during

following FY & keep in a scheduled bank in separated bank a/c called - Deposit Repayment Reserve A/C

Purpose - The amount so deposited shall not be utilized for purpose other than repayment of deposit.

Minimum Balance - 20% of amount maturing during the (Current) FY

- d. Co. to certify that no default in **repayment** of deposits + Interest and where default had occurred, it was made good, and **5 years** have lapsed since date of making the **default good**.
- e. Providing **security**, if any, for the due repayment of the amount of deposit or the interest thereon including the creation of such charge on the property or assets of the company.

Provided that in case where a co. **does not secure** the deposits or secures **partially**, then, the deposits shall be termed as "**unsecured deposits**" and shall be so **quoted** in **every circular, form, advertisement** or in any doc. related to invitation or acceptance of deposits.

Note - Partly secured deposits are termed as unsecured.

#### Exemption to Private Companies:

The above provision of Sec 73(2) clause (b) to (e) **shall not apply to a Pvt. co.** which:

- a. accepts from its **member's monies not > 100%** of PUSC + FR + SPA; **or**
- b. is a **start-up** → For **5 years** from the date of its incorporation; **or**
- c. Fulfils **ALL** the following conditions:
  - Not an associate or subsidiary of any other co.
  - Borrowings from banks/FI or BC is < Lower of - 2x PUSC or Rs. 50 crores, **AND**
  - Co. has no subsisting default in repayment of borrowing at time of accepting deposit.

However, the above cos. will have to file details of deposit accepted with **RoC (Form DPT-3)**.

3. Every **deposit** accepted by a co. u/ss (2) shall be **repaid with interest** as per the T&C of agreement.
4. Where co. **fails to repay** the deposit or part thereof or any interest thereon - **Depositor** concerned may **apply** to the **Tribunal** for an order directing the company to **pay the sum due or for any loss or damage** incurred by him as a result of such non-payment and for such other orders as the Tribunal may deem fit.

#### Other provisions relating to Deposits (from Rules):

1. **Tenure** of deposit - A company cannot accept deposit which is:

- Repayable on **demand**
- Repayable within **6m** (see exception below)
- Max. period > **36** months (3 years)

Exception to min. period of 6 months: Co. may accept deposit repayable within 6m subject to:

- Deposit <= 10% of PUSC + FR + SPA, **AND**
- Deposit repayable on or after 3m from date of such deposit.

2. Max. amount of deposit from Members (existing + new): **35% of (PUSC + FR + SPA)**

Exception - Specified IFSC Public Co. or Private Companies - 100% of **(PUSC + FR + SPA)**

The above maximum limit will not apply to a **Private co.** which is:

- a. is a **Start-up** → For **10 years** from the date of its incorporation; **or**
- b. Fulfils **ALL** the following conditions:
- Not an associate or subsidiary of any other co.
  - Borrowings from banks/FI or BC is < Lower of - 2x PUSC or Rs. 50 crores, **AND**
  - Co. has no subsisting default in repayment of borrowing at time of accepting deposit
- However, the above cos. will have to file details of deposit accepted with **RoC (Form DPT-3)**.
3. Ceiling on Rate of Interest and Brokerage Payable on Deposits - **Maximum** - As prescribed by RBI in case of NBFC for acceptance of deposit.  
Brokerage payable on to those who are auth. by co. to solicit deposit and actually procure deposit.
4. Depositor to file application form and declaration:  
Co. can accept deposit only when application is submitted by intending depositor  
Along with application - **Declaration that money is not borrowed** from any other person.
5. Deposit in Joint Names - **Not > 3**.  
A joint deposit may be accepted with or without any of the clauses, namely, "Jointly", "Either or Survivor", "First named or Survivor", "Anyone or Survivor". These clauses operate on maturity.
6. Depositor **may** nominate a person at any **time**.
7. Deposit Receipt: **Within 21 days** from date of receipt of money/realization of cheque/date of renewal → Co. to furnish receipt to depositor/agent.  
DR to be **signed** by duly auth. officer **and state date, name** & address, amount, rate of intt. & maturity date.
8. Premature Payment - Same as Public Deposit provision. Refer Sec 76
9. Filing of Return of Deposit with RoC - A duly audited return in **Form DPT-3** containing info upto 31<sup>st</sup> March of that year to be filed on or before **30th June**  
It is clarified by way of Explanation that DPT-3 shall be used to include particulars of deposits or particulars of transactions not considered as deposits or both by every company (other than a Government company).
10. No right to alter T&C of Deposit - Co. has no right to alter any T&C of deposit, **deposit trust deed** & deposit **insurance** contract which may prove **detrimental** to interest of depositors **after circular is issued** **and** deposits are accepted.
11. Disclosure in FS by way of a note -
- Public co. shall disclose about money received from its directors/**relatives**
  - Pvt. company shall disclose about the money received from directors/**relatives** thereof
12. Penal Rate of Interest: In case co. **fails to repay** deposits (both secured and unsecured) on maturity, after they are claimed, it shall pay penal rate of interest of **18% per annum for the overdue period**.
13. Punishment for Contravention: If co. inviting deposits or any other person contravenes any of the 'deposit rules' **for which no punishment** is provided in Act, the **co. and OID** shall be liable as under:
- with fine extendable to Rs. 5,000; and
  - Continuing one - Further fine up to Rs. 500 /day during which the contravention continues.

**Section 76: Acceptance of Deposits from Public by Certain Companies**

1. Notwithstanding section 73, ELIGIBLE COMPANIES may accept deposits from **persons other than its members** subject to compliance with Sec 73(2) and rules CG + RBI may prescribe.  
Eligible Company = **Public** company having Net worth of  $\geq$  Rs. 100 crores **OR** Turnover of  $\geq$ Rs. 500 crores
2. Conditions to be satisfied for accepting such deposits:
  - a. Prior consent of members by **SR** in **GM** [Ordinary Resolution if deposit is within limit u/s 180(1)(c)]
  - b. **File** such consent (SR) with **RoC** prior to invitation for deposits
  - c. Obtain **credit rating** from recognised credit rating agency (as approved for NBFCs). This credit rating has to be informed to public at time of invitation of deposit.

As per Rule 3:

- Rating shall be obtained **every year during the tenure** of deposits.
- **Copy** of credit rating  $\rightarrow$  **RoC** along with Return of Deposits in **Form DPT-3**.
- Rating shall not be below **min. investment grade rating** or other specified rating for **fixed deposits**.

d. Creating of Charge in case of Secured Deposits:

- **Within 30 days** of acceptance.
- In **favor** of deposit holders or trustee for the depositor as per prescribed rules
- Amt. of charge (value of security) shall  $\geq$  **Amt.** of deposits accepted (& interest payable thereon)
- **Market value** of such asset to be determined by **RV**.
- Charge to be created only on its **tangible assets**. (Rule 6)

e. Tenure:

**Tenure** of deposit - A company cannot accept deposit which is:

- Repayable on **demand**
- Repayable within **6m** (see exception below)
- Max. period  $>$  **36 months** (3 years)

Exception to min. period of 6 months: Co. may accept deposit repayable within 6m subject to:

- Deposit  $\leq$  10% of PUSC + FR + SPA, **AND**
- Deposit repayable on or after 3m from date of such deposit.

f. Appointment of Trustee for Depositors:

- One/more trustees for depositors to be appointed **by the company** for creating security for deposits.
- A **written consent** shall be obtained from the trustees before their appointment.
- A **statement** shall appear in the **circular** with reasonable prominence to the effect that the **trustees** for depositors have given their **consent** to the company for such appointment.
- Co. to execute a **deposit trust deed** in **Form DPT-2** at least 7 days **before** issuing circular.

Qualification of Trustee:

Person (incl. a company) shall **NOT** be appointed as a trustee if such person is:

- a. is a director, KMP or any other officer/employee of CASH or a **depositor in the company**;
- b. is **indebted** to **CASH** or a **subsidiary** of such holding company;
- c. has any **material** pecuniary relationship with the company;

- d. has entered into any **guarantee** arrangement w.r.t, principal debts secured by the deposits or interest thereon;
- e. is **related** to any person specified in clause (a) above.

Removal of Trustee:

- General Rule - Can't remove after issue of circular and before expiry of his term
- Procedure to remove:
  - Consent of **all the directors present at a meeting** of the board.
  - In case Co. is required to have Independent Dir. - At least 1 ID present in such meeting

Concept clarity check:

1. Can a company be appointed as Trustee? - Yes. Law says "Person".
2. Is it necessary to have depositor trustee even when the deposits are unsecured? - No!

g. Maximum amount of Deposit:

Eligible companies other than Eligible Govt co.:

From **Members** - **10%** of PUSC + FR + SPA

From person **other** than Members - **25%** of PUSC + FR + SPA

Eligible Govt. co. - **35%** of PUSC + FR + SPA

h. Issuance of a **circular** (in Form DPT -1) in the name of BoD of co. to the members including:

Statement showing Fin. position	Credit Rating Obtained	Total no. of depositors	Ant. due towards previously accepted deposits	Other particulars
---------------------------------	------------------------	-------------------------	---	-------------------

As per Rules relating to Circulars:

Manner of issuance	<ul style="list-style-type: none"> <li>• <del>Issue to all members by RPAD or Speed post or e mode</del></li> <li>• Publish in <b>newspaper</b> - English + Vernacular.</li> <li>• Place on <b>website</b> of the co.</li> </ul>
Circular to be signed and Registered	Co. to send to RoC - Copy of circular <b>signed by majority</b> of the directors - <b>At least 30 days prior</b> to issue → for registration
Validity of Circular in form of Advt.-	<b>Earliest</b> of: <ul style="list-style-type: none"> <li>• Until 6m from date of closure of FY in which it is issued, or</li> <li>• Date on which Fin. Statement is laid in AGM</li> <li>• If AGM not held - Last date for holding AGM</li> </ul>
Fresh Circulars	To be issued, in <b>each succeeding FY</b> for inviting deposits during that FY.
<b>Effective Date</b>	Date of issue of <b>advertisement</b> = Date on which Advt. appeared in <b>newspaper</b> Date of issue of <b>circular</b> = Date on which the circular was <b>dispatched</b> .

i. DRR A/C:

Co. to **deposit**, on or **before 30th April** each year, sum  $\geq$  20% of amt. of deposit maturing during **following** FY & keep in a scheduled bank in separated bank a/c called - Deposit Repayment Reserve A/C

Purpose - The amount so deposited shall not be utilised for purpose other than repayment of deposit.

Minimum Balance - 20% of amount maturing in **CURRENT** FY

j. Rate of Interest and Brokerage Payable on Deposits - **Maximum** - As prescribed by RBI in case of NBFC for acceptance of deposit.

Brokerage payable on to those who are auth. by co. to solicit deposit and actually procure deposit.

k. Depositor to file application form and declaration:

Co. can accept deposit only when application is submitted by intending depositor

Along with application - Declaration that money is not borrowed from any other person.

l. Deposit in Joint Names - **Not > 3**.

A joint deposit may be accepted with or without any of the clauses, namely, "Jointly", "Either or Survivor", "First named or Survivor", "Anyone or Survivor". These clauses operate on maturity.

m. Depositor **may** nominate a person at any **time**.

n. Deposit Receipt: **Within 21 days** from date of receipt of money/realization of cheque/date of renewal → Co. to furnish receipt to depositor/agent.

DR to be **signed** by Auth. officer **and state date, name** & address, amount, rate of intt. & maturity date

o. Register of Deposits: Co. accepting deposits shall maintain one/more separate registers for deposits accepted or renewed at its **RO**. Following particulars shall be entered in the case of each depositor:

name, address & PAN	particulars of the guardian (In case of minor)	particulars of the nominee;	deposit receipt number;	date & amt of each deposit;
duration & Repayment date	rate of interest	due date for payt. of interest;	mandate & instructions for payment of interest and for non-deduction of tax at source	
date on which the payment of interest shall be made;		charge created for repayment of deposits	any other relevant particulars	

Entries in Register to be made within 7 days from issuance of receipt + Authenticated by dir./CS.

Preserve in good order for **>= 8 years** from FY in which the **latest entry** is made in the register.

p. Premature Repayment of Deposits:

- After 6m but before expiry of actual date of maturity,
- if depositor **requests** for premature repayment
- RoI shall be **1% less** than what **would** be payable for period for which deposit has actually run

Note - If period is less than 6m, exclude that. Else, include full year.

Reduction of rate of interest (i.e., 1%) is not applicable in the following cases: Where the deposit is prematurely repaid in order to:

- Comply with Rule 3 i.e., **reduce total amt. of deposits** to bring it within permissible limits; or
- provide for **war risk** or other related benefits to the personnel of naval, military or air forces or to their families during the period of **emergency** declared under Article 352 of the constitution.

q. Premature Closure of Deposit by Holder to Earn Higher Rate of Interest:

In case a depositor desires to avail higher rate of interest by renewing the deposit before its actual maturity date, the company shall pay him the higher rate of interest only if the deposit is renewed for a period longer than the unexpired period of deposit.

r. Filing of Return of Deposit with RoC - A duly audited return in Form DPT-3 containing info upto 31/3 to be filed on or before **30th June**

It is clarified by way of Explanation that DPT-3 shall be used to include particulars of deposits or particulars of transactions not considered as deposits or both by every company (other than a Govt. co).

s. No right to alter T&C of Deposit - Co. has no right to alter any T&C of deposit, **deposit trust deed** & deposit **insurance** contract which may prove **detrimental** to interest of depositors **after circular is issued and** deposits are accepted.

t. Disclosure in FS by way of a note - Public co. shall disclose about **money received from its directors**.

u. Penal Rate of Interest: In case co. **fails to repay** deposits (both secured and unsecured) on maturity, after they are claimed, it shall pay penal rate of interest of **18% per annum for the overdue period**.

v. Punishment for Contravention: If co. inviting deposits or any other person contravenes any of the 'deposit rules' **for which no punishment** is provided in the Act, the **co. and OID** shall be punishable as under:

- with fine extendable to Rs. 5,000; and
- Continuing one - Further fine up to Rs. 500 /day during which the contravention continues.

Section 76A - Punishment for Contravention of Section 73 or Section 76

- Where co., **accepts** or invites or causes any other person to accept any deposit in contravention of prov,
- if co. fails to **repay** deposit or any interest due thereon within the time specified u/s 73 or 76:

Penalty:

- a. Co. shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with **fine** - From (Rs. 1 crore or 2x Amt. of deposit whichever is **lower**) to **Rs. 10 crores; and**
- b. OID - Jail upto 7 years **AND** with fine - Rs. 25 lakhs to Rs. 2 crores.

Provided that if it is **proved** that the officer of the company who is in default, has contravened such

provisions **knowingly** or willfully with the intention to deceive the company or its shareholders or depositors or creditors or tax authorities, he shall be liable for action **under section 447**.

#### Section 74: Repayment of Deposits, etc., Accepted Before Commencement of this Act

1. Filing of Statement of Deposits with RoC and Repayment thereafter:

Where deposit was accepted before commencement of this Act (i.e., before 1.4.2014), and remains unpaid as on 1.4.2014 or becomes due at any time thereafter, the company shall take the following steps:

- a. file, within **3 months from** such commencement, with RoC - Statement of all deposits accepted by co. & sums remaining unpaid on such amt. with interest
- b. Repay within 3 years from such commencement or maturity date, whichever is earlier.

Note - If co. has been repaying such deposits and interest thereon without any default on due dates for the remaining period of such deposit as per the T&C, point (b) above shall be deemed to have been complied with.

2. Extension of time for repayment by Tribunal:

Tribunal may, on an application made by the company, after considering the financial condition of the co., amt. of deposit and interest payable thereon & such other matters, allow further time as considered reasonable to the company to repay the deposit.

3. Punishment for Non-Repayment of Deposits:

Company - Fine Min. of Rs. 1 crores and Max. of Rs. 10 crore; and

OID - Jail upto 7 years or with fine Rs. 25 lakhs to Rs. 2 crores or with both.



# Chapter 6 - Registration of Charge

[Section 77 to Section 87]

Form	Sec	Purpose
CHG-1	77	Application to register creation or modification of charge (except debentures)
CHG-2	77	Certificate of registration of charge
CHG-3	77 & 79	Certificate of modification of charge
CHG-4	82	Intimation to the Registrar regarding particulars for the satisfaction of charge
CHG-5	82 & 83	Certificate of registration of satisfaction of the charge
CHG-6	84	Notice of appointment or cessation of a receiver or a manager
CHG-7		Register of charges created, modified and satisfaction by the company
CHG-8	87	Application to CG requesting extension of time
CHG-9	77	Application for registering charge for debentures including rectification

## Introduction:

Section 2(16) - Charge means:

- an **interest** or **lien**
- **created** on the **property** or assets of a company or any of its undertakings or both
- as **security** (for repayment of loan) and
- includes a mortgage;

## Fixed Charge vs Floating Charge:

Fixed Charge	Floating Charge
Charge on specific asset of borrowing company	Charge on assets which are of fluctuating nature or changing in nature
Examples - Land and Building, office premises, machinery, etc.	Examples - Raw material, stock-in-trade, debtor, etc.
Usually, mortgage or deposit of title deeds	--
Not allowed to sell (except with permission of charge holder). But can use.	Permitted to use for trading or producing final goods for sale.
Vacated when money repaid in full	Crystallization of floating charge - Enforce security or company goes into liquidation

Conceptual check - Is charge passed on to the buyer in case of sale of goods which is under floating charge? - No!

## Section 77: Duty to Register Charges, etc.

### 1. Charge to be registered:

- **Duty** of every **company** creating a charge (in or o/s India)
- To **register** the particulars of the charge **signed** by co. and charge holder with the instrument creating such charge [in **Form CHG-1** (for other than debentures) or Form CHG - 9(for debentures)]
- **Within 30 days** of creation such charge.
- On payment of such fees and in such manner as prescribed

Note:

- a. Charge created within India or O/S India - Both needs to be registered
- b. Charge created on property or asset which is situated within India or O/S India - Register
- c. Tangible asset, intangible asset, financial asset - Charge on any of them have to be registered.

Rule 3 of Company (Registration of Charges) Rule, 2014:

Verification of instruments filed with RoC:

- a. Where underlying property is situated outside India - Verify by a certificate issued under:

seal of the  
co., if any

hand of any dir/CS or auth.  
officer of charge holder

hand of some person other than the co.  
who is interest in such charge

- b. Where underlying property is situated in India - Verify by a certificate issued under:

~~seal of the  
co., if any~~

hand of any dir/CS or auth.  
officer of charge holder

~~hand of some person other than the co.  
who is interest in such charge~~

Extension of Time Limit: (Effective From 2<sup>nd</sup> November 2018)

- On application by the Company (showing sufficient cause), **7AM Class?**
- RoC may allow such registration of charge to be made
- **Within 60 days** of such creation (i.e., extension of 30 days only) - On payment of **Additional Fee**

Further Extension:

- Where co. fails to register charge within 60 days,
- ROC is empowered to allow such registration within **further 60 days** - Pay **ad valorem fees**

Application for extension - Make in **Form CHG -1** or **9** as the case may be + **Declaration** by company CS or director that belated filings shall not affect right of any creditors.

2. Issuance of Certificate of Registration (CoR):

On registration u/ss (1), RoC to issue a **CoR** of such charge in **Form CHG-2** (fresh registration) or **CHG-3** (modification of charge) to charge holder and the company.

CoR = **Conclusive evidence** that requirements of this Act w.r.t, charge have been complied with

3. Consequence of Non-Registration - Charge to become void:

- Notwithstanding anything contained in any other law for the time being in force,
- Such charge shall **NOT be taken into account by:**
  - **Liquidator** (appointed under this Act or IBC, 2016) or
  - any other **creditor**
- unless it is duly registered u/ss (1) and CoR is issued u/ss (2).

However, nothing u/ss (3) to prejudice any contract/obligation for **repayment of money** secured by a charge.

Important consequence of non-registration or delayed registration - Charge-holder loses priority.

### Section 78: Application for Registration of Charge

#### Charge-holder may apply for Registration:

- Where a company fails to register the charge within 30 days u/s 77,
- without prejudice to its liability w.r.t., any offence under this Chapter,
- person **in whose favor** charge is created **may apply** to Registrar for registration (along with instruments),
- within such time and in such form and manner as may be prescribed **and**
- the Registrar may, on such application, **within 14 days after giving notice to the company**, allow such registration on payment of such fees, as may be prescribed, unless
  - the company itself **registers** the charge or
  - shows **sufficient cause** why such charge should not be registered,

**Recovery of Fees** - Entitled to recover from company the amount of any **fees** or **additional fees** paid by him to the Registrar for the purpose of registration of charge.

### Section 79: Section 77 to Apply in Certain Matters.

The provisions of section 77 relating to registration of charges shall, so far as may be, apply to:

- a. a company **acquiring any property subject to a charge** within the meaning of that section; or
- b. any **modification** in T&C or the extent or operation of any charge registered under that section.

Modification includes change in T&C of the underlying borrowing (including change in rate of interest)

Rule 6 - Where the particulars of modification of charge is registered under Section 79, the Registrar shall issue Certificate of Modification in **Form CHG 3**

### Section 80: Date of Notice of Charge - i.e., Registration to act as Constructive Notice

Where any charge is registered u/s 77, any **person** acquiring such property, assets, undertakings or part thereof or any share or interest therein shall be **deemed** to have **notice of the charge** from the date of such registration.

### Section 82: Company to Report Satisfaction of Charge

On payment or satisfaction of any charge registered under this chapter:

- a. Co. to intimate RoC **in Form CHG-4 within 30 days** of such payment/satisfaction.

Provided that - On application by the company or charge holder, RoC may allow such intimation **within 300 days** of payment/satisfaction **with additional fees**.

- b. Notice to Charge Holder:

On receipt of intimation u/ss (1), Registrar shall cause a **notice** to be sent to charge holder calling upon him to **show cause** within time specified in notice (**not > 14 days**), as to **why payment** or satisfaction in full should **NOT be recorded**.

Notice to CH not required - If intimation u/ss (1) is **signed by CH**. [Show CHG - 4]

If no cause is shown - RoC shall order that a memorandum of satisfaction shall be entered in register-maintained u/s 81 and shall **inform** the co. (in Form CHG -5)

If cause is shown - RoC to record a **note** to that effect in **register of charges** + **Inform** the co.

c. Preserve instrument creating charge/modification - **8 years** from satisfaction of charge.

Sec 83: Power of Registrar to make entries of Satisfaction & Release in absence of intimation:

Suo motu change in Register of Charges by RoC:

Registrar may, **on evidence** being given to his satisfaction with respect to any registered charge that:

- the **debt** for which the charge was given has been **paid** or **satisfied** in whole or in part; or
- part of prop. /undertaking charged has been **released** or **ceased** to form part of prop/undertaking it may enter in **register** of charges:

- memorandum** of **satisfaction** in whole or in part, or
- fact** that part of the prop/undertaking has been **released** or ceased to form part, **notwithstanding** the fact that **no intimation** has been received by him from the company.

The Registrar shall **inform** the **affected parties** within **30 days** of making such entry (and issue Certificate of Registration of satisfaction of charge in **Form CHG-5**)

Section 84: Intimation of Appointment of Receiver or Manager

- If any person obtains an **order** for **appointment** of a **receiver** of, or of a person to manage, the property, subject to a charge, of a company or
- if any person appoints such receiver or person under any power contained in any instrument, **he shall, within 30 days** from date of the passing of order or of the making of the appointment, give **notice** of such appointment to **company and Registrar** along with a copy of the order or instrument **and** the Registrar shall, on payment of the prescribed fees, **register** particulars of the receiver, person or instrument in the **register of charges**.

Any person **appointed** above shall, on **ceasing** to hold such appointment, give to the **company** and the **Registrar** a **notice** to that effect and the Registrar shall register such notice. (**Form CHG - 6**)

Section 86: Punishment for Contravention:

If **co. is in default** under this Chapter, penalty:

**Co. - Rs. 5 lakhs and OID - Rs. 50,000**

If willfully furnishes any false or incorrect info. - Liable for action u/s 447

Section 87: Rectification by Central Government in Register of Charge (or Extension of Time Limit)

The **CG** on being **satisfied** that:

- omission** to give intimation to Registrar of **payment/satisfaction** of a charge, within required time; or
- omission** or misstatement of any **particulars**, in any filing previously made to the **Registrar** w.r.t., any such charge/modification thereof or w.r.t., any memorandum of satisfaction or other entry made u/s 82 or 83,

was **accidental** or due to **inadvertence** or some other sufficient cause or it is not of a nature to prejudice the position of creditors or shareholders of the company, it may, **on the application of the company** or any person interested and on such T&C as it deems just and expedient, **direct** that the **time for the giving** of intimation of payment/satisfaction shall be **extended** or, as the case may require, that omission or misstatement shall be rectified

# Chapter 7 - Management and Administration

[Section 88 to Section 122]

Sec	Name	Sec	Name
88	Register of Members, etc.	106	Restriction on Voting Rights
89	Declaration in Respect of Beneficial Interest in any Share	107	Voting by Show of Hands
90	Register of significant beneficial owners	108	Voting through Electronic Means
91	Power to Close Register of Members or DH or Other Security Holders	109	Demand for Poll
92	Annual Return	110	Postal Ballot
93	Omitted	111	Circulation of Members' Resolution
94	Place of Registers, Returns, etc.	112	Repr. of President & Governors in Meetings
95	Registers, etc., to be Evidence.	113	Repr. of Corporations at Co and crs meetings
96	Annual General Meeting	114	Ordinary and Special Resolutions
97	Power of Tribunal to Call AGM	115	Resolutions Requiring Special Notice
98	Power of Tribunal to call Meetings, etc.	116	Resolutions Passed at Adjourned Meeting
99	Punishment for default u/s 96 to 98	117	Resolutions and Agreements to be Filed
100	Calling of EOGM	118	Minutes of GM, BoD and Other Meeting and Resolutions Passed by Postal Ballot
101	Notice of Meeting	119	Inspection of Minute-Books of GM
102	Statement to be Annexed to Notice	120	Maintenance & Inspection of doc in e-form
103	Quorum for Meetings	121	Report on Annual General Meeting
104	Chairman of Meetings	122	Applicability to OPC
105	Proxies		

Form	Sec	Purpose
MGT-1	88	Register of members of the company
MGT-2	88	Register of Debenture Holders or Any Other Security Holders
MGT-3	88	Notice of change in situation or discontinuation of location where foreign reg. is kept
MGT-4	89	Declaration by Registered owner of shares who do not hold beneficial interest
MGT-5	89	Declaration by beneficial owner of shares but whose name is not entered in RoM
MGT-6	89	Return to the Registrar in respect of declaration under Section 89 received by Co.
MGT-7	92	Annual Return (for companies other than OPC and small companies)
MGT-7A	92	Annual Return (for OPC and small companies)
MGT-8	92	Certificate by a Company Secretary in practice (in case of Annual Return)
MGT-11	105	Appointment of proxy for a meeting (proxy form)
MGT-12	109	Polling paper in the meeting
MGT-13	109	Scrutinizer's report to the Chairman pertaining to the poll of the meeting
MGT-14	117	Filing of company resolutions and agreements with the Registrar
MGT-15	121	Form for filing report on the AGM

## Introduction:



## Section 88: Register of Members, etc.

- (1) Every co. shall keep and maintain following registered in **prescribed** manner:
  - a. register of **Members** (RoM) for each class of ES & PS held by member in or o/s India (**MGT 1**)
  - b. register of debenture holders (**DH**) (**Form MGT 2**)
  - c. register of any other securities holders (**OSH**) (**Form MGT 2**)
- (2) Every register maintained u/ss (1) shall include an **index** of the names included therein.  
Note - Maintenance of index is **not necessary** in case the number of **members < 50**.
- (3) Register + Index of beneficial owners (BO) maintained by **depository** = Deemed compliance of Act
- (4) Foreign Register:
  - If so authorized by **AoA**, co. **may keep outside India** (in prescribed manner)
  - a **part** of the register u/ss (1) called Foreign register
  - containing **names** and other **particulars** of members, DH, OSH or BO **residing o/s India**.

## Rule 7: Foreign Register (FR):

Particulars	Details
File with RoC	Co. shall, <b>within 30 days</b> from date of opening of FR - <b>File with RoC - Notice</b> of situation of the office in <b>Form MGT-3 + Fees</b>
Change in situation	In event of <b>change</b> in situation of office or discontinuance - Intimate within <b>30 days</b> (MGT 3)
FR = PR	FR = <b>Deemed part</b> of principal register
Inspection and advertisement for closing FR	FR shall be <b>open</b> to inspection and may be closed, <b>and extracts /copies</b> may be taken, in <b>same manner</b> , mutatis mutandis, as is applicable to <b>principal register</b> . <u>Except that advertisement</u> before closing FR shall be inserted in at least <b>2 newspapers</b> circulating in the <b>place wherein FR</b> is kept.
Entry in FR	After BoD approves allotment
Transmit data to RO	Company shall: <ol style="list-style-type: none"><li>a. <b>transmit to RO</b> in India a <b>copy</b> of <b>every entry</b> in any FR <b>within 15 days</b> of making entry;</li><li>b. <b>keep</b> at such office a <b>duplicate register</b> of every FR duly entered up</li></ol>

	from time to time.
Discontinue FR	<p><b>Thereupon</b>, all entries in that register shall be <b>transferred</b> to:</p> <ul style="list-style-type: none"> <li>• some other FR kept by the company outside India or</li> <li>• to the principal register.</li> </ul>

(5) Failure to maintain register u/s 88:

Company - Penalty of Rs. 3 lakhs; OID - Rs. 50,000

Rules relating to Register of Members:

- **Entry** to be made **within 7 days** of date of BoD approval for allotment or transfer of shares
- RoM shall be maintained at **RO**. However, SR in **GM** is passed to keep register at:
  - Any other place within city, town or village of **RO**, **OR**
  - Any place **within India** in which > 1/10<sup>th</sup> of total members (as in RoM) **reside**
- Every **co. limited by shares** shall - maintain RoM in **Form MGT-1**
- In case of **co. not having SC**, RoM shall contain following particulars w.r.t. each member:
  - Basic details of **members** (name, address, e-mail, PAN or CIN)  
In case member is a **minor**, name of the **guardian** and **DOB** of member;  
Name and Address of **Nominee**;
  - date of **becoming** member or date of **cessation**;
  - amount of **guarantee**, if any;
  - any **other interest** if any; and
  - **instructions**, if any, given by the member w.r.t. sending of **notices**.
- **Changes**, if any, in the **status** of members or DH or OSH on account of **death**, insolvency or transfer of shares to **IEPF** or any other reason - **Record** such change in register

Note:

1. Can a minor's name be entered in RoM? - No. Only legal guardian's name can be entered
2. Joint SHs may **request** the co. to enter their names in RoM in a **certain order**, or execute transfers to have their holding split, with the result that part of the holding is entered showing the name of one holder and part showing the name of another. However, it is not possible that name of only one of the joint SH is written in RoM. The reason for this is that the **articles** of most companies provide that, **in the case of exclusion of the other joint holders**, and for this purpose, **seniority** shall be determined by the order in which the names stand in the ROM.

Section 89: Declaration in Respect of Beneficial Interest in any Share

- (1) Where name of person is entered in RoM as **holder** of shares **but who does not hold beneficial interest (BI)** on it - Such person shall:
  - **within 30 days** of **entry** of name in RoM, in **Form MGT 4**
  - **make a declaration to the company specifying** name & other particulars of **beneficial owner**.
- (2) Every person who **acquires a BI** in share shall:
  - **within 30 days** of acquiring such BI,
  - in **Form MGT-5**
  - make a **declaration** to co. specifying nature of his interest, particulars of person in whose name shares are registered and other prescribed details
- (3) Where any **change occurs in BI** such shares, such person and BO shall - **within 30 days** from date of such change, make a **declaration** to the **company** in prescribed form.

- (4) Where **declaration** under this section is **made** to a company, the **company shall**:
- make a **note** of such declaration in concerned register and shall
  - **within 30 days** of receipt of declaration - File a return in **Form MGT - 6** with **Registrar + Fees**
- (5) Where **declaration** required under this section is **not made** by BO - **No rights** in respect of such shares shall be **enforceable** by him or by any person claiming through him.
- (6) Notwithstanding this section, company to **pay dividend** to members (not BO)
- (7) **Penalty**:
- Failure to make declaration to company - Rs. 50,000 + 200/day - Max 5 lakhs  
 Failure of co. to file MGT 6 - Co. + OID - Rs, 1,000/day - Max 5 lakhs (co) and 2 lakhs (OID)

### Exemption

Trust created to set up Mutual fund, venture capital fund or other SEBI approved fund - Need not file such declarations.

### Section 90: Register of significant beneficial owners in a company

#### Who is a significant beneficial owner (SBO)? [2(1)(h)]

"SBO" in relation to a **reporting company** means:

- an **individual**,
- who acting **alone** or together, or through one/more persons or trust,
- possesses one or more of the **following rights** or entitlements in such reporting co., namely:
  - (i) holds **indirectly**, or **together** with any direct holdings, **not less than 10%** of the **shares**;
  - (ii) holds **indirectly**, or **together** with any direct holdings, **not less than 10%** of **voting rights**;
  - (iii) has right to receive or participate in **not less than 10%** of the total distributable **dividend** in a FY through **indirect holdings alone**, or together with any direct holdings;
  - (iv) has right to exercise, or actually exercises, **significant influence\*** or **control**, in any **manner other than through direct holdings alone**:

Note - If an individual **does not hold any right indirectly** under (i), (ii) or (iii) above - he shall **not be considered** to be SBO. (i.e., Indirect holdings are mandatory for becoming SBO)

\*Significant influence means power to **participate**, directly or indirectly, in **financial and operating policy** decisions of the reporting company **but is not control or joint control** of those policies

#### Legal provision

- (1) Every SBO shall make a **declaration to the co.**, specifying the nature of his interest and other particulars, in **Form BEN - 1** within **30 days** of becoming SBO.  
 (Ignore the provision of 90 days mentioned in ICAI Mat. It was transition provision)
- (2) Every co. shall **maintain a register** of SBO and changes therein in Form **BEN-3** which shall include the name of individual, his date of birth, address, details of ownership and other prescribed details



(3) The register maintained u/ss (2) shall be open to inspection during business hours, at such reasonable time of not < 2 hours, on every working day, by any member on payment of fee specified by company (not > Rs. 50 for each inspection)

(4) Return of SBO:

Every company shall file a return of SBO of the company and changes therein in Form BEN-2 with the Registrar containing names, addresses and other prescribed details within 30 days of receipt of declaration from SBO in Form BEN -1

Note - Every co. shall take necessary steps to identify an individual who is a SBO in relation to the company and require him to comply with the provisions of this section.

(5) A company shall give notice in Form BEN-4 to any person (whether or not a member) whom the company knows or has RGTB:

(a) to be a SBO of the co.;

(b) to be having knowledge of identity of a SBO or another person likely to have such knowledge;

(c) to have been a SBO of the company at any time during 3 years immediately preceding the date on which the notice is issued,

and who is not registered as a SBO with the company as required under this section.

(6) Info. required by notice u/ss (5) - Concerned person to give within 30 days of date of the notice.

(7) Apply to Tribunal

The company shall:

(a) where that person fails to give info. within time specified therein; or

(b) where info. given is not satisfactory,

apply to Tribunal within 15 days of expiry of period specified in notice, for an order directing that shares in question be subj. to

- restrictions w.r.t. transfer of interest,

(8) On application u/ss (7), Tribunal may, after giving OOBH to parties concerned, make such order restricting the rights attached with the shares within 60 days of receipt of application.

(9) Co. or the person aggrieved by order of Tribunal may apply to Tribunal for relaxation or lifting of the restrictions placed u/ss (8), within 1 year from the date of such order.

Provided that - If no appln. made within 1 year - such shares shall be transferred to IEPF Authority

Penalty u/s 90:

Sub -section	(10)	(11)		(12)
Failure	Person fails to make declaration u/ss (1)	Co. fails to maintain register or allow inspection thereof		Person willfully furnishes false or incorrect info. or suppresses material info.
Liable	Person	Company	OID	Such person shall be liable for action u/s 447
Penalty	Rs. 50,000	Rs. 1 lakh	Rs. 25,000	
Continuing Failure	Rs. 1,000/day	Rs. 500/day	Rs. 200/day	
Maximum	Rs. 2 lakhs	Rs. 5 lakhs	Rs. 1 lakh	

Section 91: Power to Close Register of Members or Debenture-Holders or Other Security Holders.

(1) A company may **close** the RoM or register of DH or OSH for **any period**, subject to:

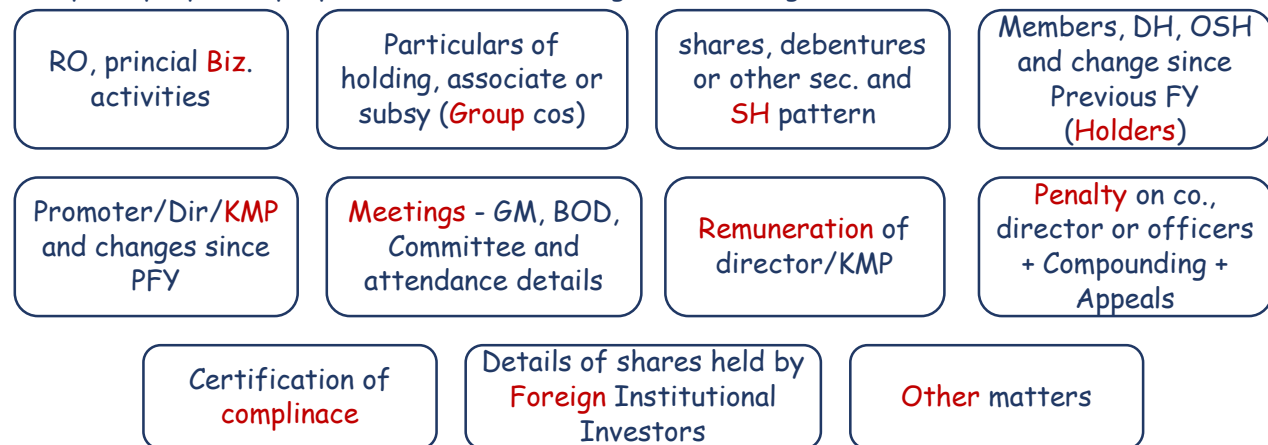
- Such period **shall not exceed in aggregate 45 days in each year and not exceed 30 days at any one time**
- **previous notice** has to be given in prescribed manner **of at least 7 days** (or such lesser period as specified by SEBI for listed cos. or companies which intend to get their securities listed)

(2) In case of contravention u/ss (1), penalty shall be:

Co. and OID - **Rs. 5,000 for every day** during which register was closed subject to **max. Rs. 1 lakh**.

Section 92: Annual Return

Every company shall prepare a return containing the following details as on close of FY: [BGR SH KMP CFO]



Annual Return:

Sign on Annual Return	<ul style="list-style-type: none"> <li>• <u>OPC &amp; small co</u> - AR to be signed by CS. Where there is no CS, by director</li> <li>• <u>Other companies</u> - By a director + CS (where no CS, by CS in practice)</li> </ul>
Form for AR	<ul style="list-style-type: none"> <li>• Other companies - <b>MGT - 7</b></li> <li>• OPC &amp; Small Co - <b>MGT - 7A</b></li> </ul>
AR to be certified by CS in Practice	<p>AR filed by:</p> <ul style="list-style-type: none"> <li>• <b>Listed</b> company</li> <li>• Co. having <b>PUSC not less than 10 crore or turnover not less than 50 crore</b> shall be certified by CS in practice in Form <b>MGT - 8</b> stating that: <ul style="list-style-type: none"> <li>• AR discloses the <b>facts correctly</b> and adequately and</li> <li>• company has <b>complied</b> with all the <b>provisions</b> of this Act.</li> </ul> </li> </ul>

Place on website	AR on <b>website</b> of company <b>and web-link</b> thereof - Disclose in BoD's report
File with RoC [Section 96(4)]	Every <b>co.</b> shall file with <b>the Registrar</b> a copy of AR + Fees: <ul style="list-style-type: none"> <li>• within <b>60 days</b> from date on which AGM is held or</li> <li>• where no AGM is held in any year, <b>within 60 days</b> from date on which AGM should have been held + statement specifying reasons for not holding AGM</li> </ul>
Penalty	Co. fails to file AR within prescribed time, penalty of: Co. - Rs. 10,000 + Rs. 100/day upto max Rs. 2 lakhs OID - Rs. 10,000 + Rs. 100/day upto max Rs. 50,000
Penalty on CS in practice	If <b>CS in practice certifies</b> the AR <b>otherwise than in conformity</b> with the requirements of this section, he shall be liable to a <b>penalty</b> of Rs. 2 lakhs

### Section 93: Omitted

### Section 94: Place of keeping and Inspection of Registers, Returns, etc.

(1) Registers u/s **88** and copy of AR filed u/s **92** shall be **kept** at the RO of the company.

Provided that such registers or AR may **also be kept** at any **other place in India** in which **> 1/10th** of the **total no. of members** (as per RoM) **reside**, if approved by **SR** passed at GM  
(3 conditions - Such place is within India, more than 1/10<sup>th</sup> member reside and SR is passed)

The period for which such registers or AR shall be preserved is as shown below:

Registers/Annual Return	Preserve for?	Custody
RoM u/s 88 + Index	<b>Permanently</b>	CS of co. or any other person auth. by Board
Register of DH or other security holders + Index	<b>8 years</b> from date of redemption	CS of co. or any other person auth. by Board
Foreign Register	<b>Permanently</b> , unless it is discontinued, and all the entries are trfd. to any other FR or to the principal register	CS of co. or any other person auth. by Board
Foreign register of DH or any other security holders	<b>8 years</b> from date of redemption	CS of co. or any other person auth. by Board
Annual returns u/s 92	<b>8 years</b> from date of filing with RoC.	

(2) Inspection of Registers, Indices and AR:

The registers, indices and AR shall be open for inspection during **business hours** (at such reasonable time on every working day):

- By **members**, DH or OSH - **without** any fees
- By any **other** person - on payment of such **fees** as may be prescribed.

Note - Reasonable time of not less than 2 hours on every work day shall be considered by the co.

(3) Extract or copies by ANY person:

Any member, DH, OSH or BO or any other person may—

- take **extracts** from any register, or index or return **without payment** of any fee; or
- require a **copy thereof** on **payment** of fees as per AoA (not > Rs. 10/page). Co. to provide copies within **7 days**.

(4) On **refusal** of any inspection or making extract or copy:

- **company** and every **OID - Liable** for each such default, to a **penalty** of Rs. 1,000/day subject to a max of Rs. 1 lakh during which the refusal or default continues.
- **CG** may also, **by order**, direct:
  - an immediate **inspection** of the document, or
  - that **extract** required shall **forthwith** be allowed to be taken by person requiring it.

#### Section 95 - Registers, etc., to be Evidence

The registers, their indices and copies of annual returns maintained under sections 88 and 94 shall be **prima facie evidence** of **any matter** directed or authorised to be inserted therein by or under this Act.

#### General Meetings

##### Section 96: Annual General Meeting

1. **Every company** (other than OPC) shall, in **each year**, in addition to other meetings, hold AGM, and shall specify as such in the notices, and **not more than 15m** shall elapse between two AGMs

Provided that - **First AGM** to be held **within 9m** of closing of first **FY**. Thereafter, within **6m** from closing of each **FY**

Provided further - If first AGM is held as aforesaid - **No AGM** necessary in **year of incorporation**

**RoC** may, for any **special reasons**, **extend** the time within which AGM (**other than first AGM**) shall be held by **not > 3m**

2. AGM shall be called during **business hours (9AM to 6PM)** on **any day other than national holiday** (as declared by **CG**).

##### Place of holding AGM:

**AGM:**  
Held at **registered office** or some other place **within city, town/village** where **RO** is situated

**AGM of unlisted co. - Held at any place in India** if **consent** in writing/emode by **ALL members** in advance

**AGM of Govt co. (92+137) - RO or within city/town/village** where **RO** is situated or **other place** approved by **CG**

##### Section 97: Power of Tribunal to call AGM

1. Notwithstanding anything contained in Act or AOA, in case of **default** in holding AGM u/s 96, **Tribunal** may, **on apnln** by **any member** of co - call or direct **calling of AGM** & give such consequential directions.

**Provided that** - Such directions **may include** that **1 member** present in **person or proxy** shall be **deemed to constitute** a meeting.

2. **GM** held u/ss (1) - Deemed AGM of company

##### Section 98: Power of Tribunal to call meeting of members, etc. (applicable only for EGM. Not AGM)

1. **Other than AGM**, if for any reason, it is **impracticable** to call a meeting or hold or conduct a meeting in manner prescribed by Act or AOA, **Tribunal** may, either:

- i. either **suo motu**, or
- ii. on **application** of director or member entitled to vote at the meeting

order a meeting of co. to be called, held and conducted in manner as Tribunal thinks fit, and give such ancillary directions as may be expedient.

Provided that - Such directions may include that 1 member present in person or proxy shall be deemed to constitute a meeting.

2. Any meeting held u/ss (1) - Deemed to be a meeting of company duly called, held and conducted

#### Section 99: Punishment for default u/s 96 to 98.

If default is made in holding meeting u/s 96, 97 or 98 or in complying Tribunal's directions:

Company and OID - Fine which may extend to Rs. 1 lakh + Continuing default - Further Rs. 5,000/day

#### Section 100: Calling of Extraordinary General Meeting (EGM)

1. Board may, whenever it deems fit, call an EGM of the company.

Place - EGM shall be held at a place in India (except in case of WOS of co. incorporated o/s India)

2. Board shall, at the requisition made by following, call an EGM of the company:

Co. having share capital -  
Members holding not less than  
1/10th of total PUSC that

Co. not having SC - Members  
having not less than 1/10th of  
total voting power

3. The requisition made u/ss (2) shall:

- Set out matters for consideration at the meeting
- Signed by requisitionists, and
- Sent to RO of the co.

4. The Board shall:

- Call for such meeting within 21 days from receipt of valid requisition
- Meeting to be called on a day not later than 45 days from date of receipt of valid requisition

5. On failure of board to call such meeting - Requisitionists may themselves call and hold such meeting within 3m of date of requisition.

6. Meeting by requisitionists to be called, held and conducted in same manner as it is called and held by BoD

7. Reasonable expenses of such meeting shall be reimbursed to requisitionists by company and such sum shall be deducted from remuneration u/s 197 of directors who were in default in calling the meeting.

#### Rule 17: Calling of EGM by Requisitionists:

1. Such requisition has to be in writing or e-mode at least 21 clear days prior to proposed date of EGM

2. Notice to specify place, date, day and hour of meeting and contain business to be transacted thereon

The meeting shall be convened at RO or in the same city or town where RO is situated on any day except national holiday

3. If proposed resolution is SR - Give notice as required u/s 114(2)

4. The notice shall be signed by all requisitionists or by a requisitionists duly authorized in writing.

5. **No ES** needs to be annexed to notice for such EGM. They **may disclose reasons** for proposed resolutions at the meeting.
6. Notice shall be given to those members whose names appear in RoM **within 3 days** of receipt of a valid requisition by the co.
7. Where **meeting is not convened**, the requisitionists shall have a **right to receive**:
  - **list** of members
  - their registered **address** and
  - number of **shares** held and
 the co. is bound to give such information **as on 21<sup>st</sup> day** from date of receipt of valid requisition form **together with such changes**, if any, **before expiry of 45 days** from such receipt.
8. **Mode** of sending notice - Speed post or registered post or through e-mode.
9. **Accidental omission** to give notice to, or the non-receipt of such notice by, any member shall **not invalidate** the proceedings of the meeting.

Concept clarity check

Are the requisitionists required to specify reasons for the matters proposed to be considered? - **No**. **Just stating the matters is enough. Reasons not required. [LIC vs Escorts]**

Section 101: Notice of meeting:

1. GM may be called by giving **not less than clear 21 days'** notice in **writing** or **e-mode** - Manner prescribed  
 Provided that GM may be called after giving **shorter notice** if **consent** is accorded:

<u>In case of AGM:</u> By not less than <b>95% of members</b> entitled to vote thereat	<u>In case of any other GM:</u> a. <u>In case of co. having SC</u> - <b>Majority</b> in numbers + representing <b>not less than 95% of PUSC</b> b. <u>In case of co. not having SC</u> - members having not less than <b>95% of total voting power</b>
---	--

To calculate 21 clear days: - **Exclude** - Date on which **notice** is served AND date of **meeting**

2. Notice to specify **place, date, day** and **hour** of meeting and contain **business** to be **transacted** thereon
3. Notice to be given to:

<b>Every member</b> of the co. (LR of deceased member or <b>assignee</b> of insolvent member)	<b>Auditors</b> of the company, and	Every <b>director</b> of the company
---	-------------------------------------	--------------------------------------

4. **Accidental omission** to give notice to, or the non-receipt of such notice by, any member shall **not invalidate** the proceedings of the meeting

Rule 18: Modes of Sending the Notice

- Sending of notices through electronic mode (e-mode) has been statutorily recognized
- "Electronic mode" means:
  - any communication sent by co. through authorized & **secured computer** programme
  - capable of **producing confirmation and**
  - keeping **record** of such communication addressed to the person entitled to receive
  - at the **last e mail** address provided by the member.
- Notice may be sent through e-mail as a **text, attachment** or URL.
- E-mail to be **addressed** to **entitled person** (as per records of **depository**)

- Co. to **allow changing** or adding email IDs at least **once in a FY**
- **Subject line** of email - State the name of co., notice of type of meeting, place and date.
- Place notice on **website** of co. and other website notified by **CG**

Note -

Where notice is sent by **post**, it shall be **deemed to be served** at expiration of **48 hours after** the letter containing the same is **posted**. (Refer Sec 20 of chapter 2)

Concept clarity check:

1. Can an individual director call for **GM**? - **No. Individual director is not authorized. Only BoD can. However, if individual director ends up calling, BoD can later, ratify the same.**
2. Cos **obligation** to send notice shall be **satisfied when it transmits the email**. Co. cannot be held responsible for transmission of email beyond control.
3. If an entitled members fails to provide email address to co., co. shall not be in default for not delivering notice via email.
4. Companies Act does **not provide** anything specific regarding **condonation** of delay in giving notice.

Example:

AGM to be held on 7<sup>th</sup> Nov. Notice was posted on 16<sup>th</sup> October. Is the notice valid or short?

**Answer - Notice is invalid as it is of only 19 clear days. (because when posted on 16<sup>th</sup> Oct, it is deemed to be served on 18<sup>th</sup> October i.e., 48 hours later)**

Section 102: Statement to be annexed to notice (Explanatory statement)

1. A statement setting out following material facts concerning each item of special business shall be annexed to notice calling such meeting:

<p>the nature of <b>interest</b> (finance/otherwise) in respect of each <b>items</b> of:</p> <ul style="list-style-type: none"> <li>- every <b>director &amp; manager</b></li> <li>- every other <b>KMP</b></li> <li>- <b>relatives</b> of above</li> </ul>	<p><b>other info and facts</b> that may enable to <b>understand</b> meaning, scope and implication of items of business and <b>take decisions</b></p>
---	---

Where, as a result of **non-disclosure** or insufficient disclosure of interest (as required above), if any **benefit accrues** to promoter, director, manager, KMP or their relatives - They shall **hold** such benefit **in the trust** of the company + **Liable to compensate** the co. to extent of such benefit.

2. Special business in AGM - In case of **AGM**, **all business** shall be deemed **special**, **other than**:

consideration of <b>FS</b> and <b>reports</b> of <b>BoD</b> and <b>auditors</b>	declaration of <b>dividend</b>	appointing of <b>director</b> in place of those <b>retiring</b>	<b>appointment</b> of and fixing <b>remuneration</b> of <b>auditors</b>
---	--------------------------------	---	---

Special business in EGM - All business shall be deemed to be special.

Provided that:

- Where any **item** of **special business** **relates to or affects** any other company (say, A Ltd),
- the extent of **shareholding interest** in that other company (A Ltd) of:

- every promoter, director, manager, if any, and
- of every other KMP of the first mentioned company
- shall be set out in the ES, if not less than 2% of PUSC of that company (A Ltd)

3. Where any item of business refers to any doc, which is to be considered at the meeting, the time and place where such doc can be inspected shall be specified in ES.

Contravention - If default is made in complying with this section - Every promoter, director, manager, KMP or their relatives who is in default - Liable to penalty which is higher of:

- Rs. 50,000 or
- 5x the amount of benefits accrued to such promoter, director, manager, KMP or their relative

Summary of Ordinary vs Special Business:

	AGM	EGM
Ordinary Business	FS, Dividend, Director, Auditor	None
Special Business	All, other than above	All

Note: ES not required for transacting ordinary business

Section 103: Quorum for meetings

1. Unless articles provide for a larger number:

a. In case of a public company:

No. of members as on date of meeting	Members personally present
Not more than 1,000	5
More than 1,000 but up to 5,000	15
> 5000	30

b. In case of a private co. - 2 members personally present

2. If quorum is not present within half an hour from appointed time:

- a. Meeting called by requisitionists u/s 100 - stands cancelled
- b. Other meetings - Adjourned to same day, next week at same time and place or such other date as board may determine.

In case of adjourned meeting or change of day, time or place of meeting - the company shall give not less than 3 days' notice to members either individually or publish ad in newspaper (eng + vern)

3. If at adjourned meeting, quorum is not present within half an hour - Members present = Quorum

Concept clarity check:

1. AOA can only provide for a larger number of quorum (i.e., not less than number given in act)
2. Preference shareholder (PSH) shall not be counted for quorum where the matter is such that it does not affect rights of PSH or where PSH are not allowed to vote.
3. In case where a person representing a body corporate shareholder is present in meeting, he shall be considered as personally present (i.e., Say, X Ltd is a SH in A Ltd. X Ltd. sent his representative Mr. X in the GM of A Ltd. It shall be considered personal presence)
4. One member representing 2 companies is counted as 2 members
5. Proxies will not be included for the purpose of quorum.
6. Presence of a single member can never be called as meeting (even if meeting is adjourned meeting)



Section 104: Chairman of meetings (N.A. to Pvt. Co. (92+137) unless AoA of Pvt co. specifies otherwise)

1. Unless AOA provides otherwise, members personally present shall elect one of themselves to be chairman thereof on a show of hands
2. If poll is demanded on election of chairman:
  - Chairman elected u/ss (1) by show of hands shall continue to be chairman until some other person is elected chairman by way of poll
  - Such other person to be chairman for rest of the meeting.

Additional points:

- Chairman is a person who manages meetings and ensured decorum is maintained
- Chairman has prima facie authority to decide all questions arising in the meeting
- Chairman has casting vote in BM and GM (only if empowered by AoA)

Section 105: Proxies

1. Any member entitled to attend and vote at a meeting shall be entitled to appoint another person as a proxy to attend and vote on his behalf.

Provided that proxy shall have no right to speak at such meeting + entitled to vote only on a poll

Provided further that:

- Unless AoA provides otherwise, this sub-section - N.A. to co. not having SC
- CG may prescribe classes of cos. whose members shall not be entitled to appoint proxy
- Limit - A person shall not act as a proxy on behalf of members exceeding 50 and having prescribed no. of shares.

Rule 19: Proxies

1. A member of sec 8 co. can only appoint another member ONLY of the co. as proxy
2. A person can act as proxy on behalf of members not exceeding 50 and holding (aggregate) not > 10% of total share capital of the company carrying voting rights

Provided that a person holding > 10% of SC may appoint a single person as proxy and such person shall not act as proxy for any other SH

3. Appointment of proxy shall be in Form MGT 11

2. Every notice calling for meeting, there shall appear with reasonable prominence a statement that -
  - a member entitled to attend & vote is entitled to appoint a proxy, or one or more proxies (where allowed) and
  - that proxy need not be a member

3. Default u/ss (3) - OID liable to penalty of Rs. 5,000

4. Deposit of proxy form:

48 hours before meeting, proxy form or any other doc. necessary to show validity of such appt. shall be deposited with the company (even if articles provide for longer period)

Such instrument appointing proxy shall be in writing and be signed by:

- appointer or duly authorized attorney in writing or

- if appointer is **BC** - under its **seal** or be signed by an **officer** or duly authorized attorney
5. If **invitations to appoint as proxy** a person or one of a number of persons specified in the invitations are **issued** at the company's **expense to any member entitled** to notice of meeting and vote thereat - Every officer who issues or authorized such issue - Liable for **penalty Rs. 50,000** Provided that - Officer **not liable** if such issue is at the **member's request** in writing.
  6. An instrument appointing proxy in **Form MGT - 11** shall **not be questioned** on the **grounds** that it fails to comply with **special** requirements by the **AOA**
  7. Inspecting proxy forms by member:  
Every member entitled to vote at the meeting - entitled to inspect proxies lodged. Provided that:
    - Inspect **during period - 24 hours before time fixed** for commencement of meeting and **ending** with **conclusion** of meeting during **business hours**
    - Not less than **3 days' notice** in writing of intention given to co.

Concept clarity check:

1. In case where member and proxy both are present in a GM -  
The members have a right to revoke the proxy's authority by voting himself before the proxy has voted but once the proxy has voted the member cannot retract his authority
2. AoA provides that the proxy form should be received at least 60 hours before the GM. Is such provision valid? - **No! In no case the limit of 48 hours be increased.**

Voting [Sec 106 to 109]

Section 106: Restriction on voting rights:

1. Notwithstanding anything contain in act, AoA may provide that:  
A member shall **not exercise voting right** in respect of the shares registered in his name on which:
  - **call** or other sum is **unpaid**
  - co. has exercised any right of **lien**
2. Except as specified above, a co. shall **NOT prohibit** member from voting right **on any other ground**
3. In case of poll - Member (or his proxy) entitled to **more than one vote need not use all his votes or cast in the same way all the votes he uses.** (i.e., he can split his votes for and against same resolu)

Voting in case of joint shareholders:

- Unless AOA provides otherwise, joint shareholders **must concur** in voting
- In case of joint shareholder, voting is done in **order of seniority** (determined on basis of order of **name appearing in RoM** which is as per the joint shareholder's instruction)

Note - A company can restrict voting right in case of unpaid calls or lien **only if authorized by AoA**

Section 107: Voting by show of hands

1. At any **GM**, resolution put to vote shall be **decided by show of hands, unless poll** is demanded u/s 109 or voting is carried out **electronically.**
2. Following shall be conclusive evidence of fact of passing of resolution or otherwise:
  - a. **Declaration** by **chairman** of passing of such resolution, and

b. Entry to that effect in the **minutes** of the meeting

Concept clarity check:

Can insolvent SH vote by show of hands? **Yes (as long as his name appears in RoM, he is entitled)**

Section 108: Voting through electronic means.

CG may **prescribe** class(es) of **cos. and manner** in which member may exercise voting rights by e-means.

Rule 20: Voting through e-means:

1. Following cos. shall provide facility to vote by e-means:

- a. Every co. having **listed** its equity shares in a RSE and
- b. Every co. having **>= 1000** members

Provided that - **Nidhi** cos or **institutional investors** as per SEBI Regulations - Not required to provide such facilities

2. Companies providing facility of voting by e-means shall comply with following procedures:

Particulars	Detail
Notice of meeting	To be <b>sent to</b> - All members, directors and auditors <b>Mode</b> - Registered post, speed post or e-means or by <b>courier</b> service
Place notice	On <b>website</b> of - Company and Agency (NSDL/CDSL)
Notice to state:	<ol style="list-style-type: none"> <li>a. Co. is <b>providing facility</b> for voting by e-means</li> <li>b. That the facility - either <b>EVS or ballot or polling paper</b> shall also be made <b>available at the meeting</b> and members attending the meeting who have not already cast vote via remote e-voting shall be able to exercise their right at meeting</li> <li>c. Members who have cast <b>vote by remote voting</b> prior to meeting <b>may</b> also <b>attend meeting</b> but not vote again.</li> </ol>
Notice shall:	<ol style="list-style-type: none"> <li>a. indicate process and manner for voting by e-means;</li> <li>b. indicate <b>time schedule</b> including time period during which the <b>votes</b> may be cast by <b>remote e-voting</b>;</li> <li>c. provide login ID details</li> <li>d. specify process for generating <b>password</b> and voting in secure manner</li> </ol>
Publication in newspaper	<p>Co. shall cause a public notice by way of advertisement - <b>Immediately</b> on dispatch of notices <b>but at least 21 days before</b> date of GM in the following newspaper:</p> <ul style="list-style-type: none"> <li>• at least once in <b>vernacular newspaper</b> in the language of <b>district</b> where RO is situated and having wide circulation in that district,</li> <li>• at least once in <b>English newspaper</b> having country wide circulation</li> </ul> <p><b>specifying</b> the following:</p> <ol style="list-style-type: none"> <li>1. statement that business may be transacted by <b>e-voting</b></li> <li>2. date and time of <b>commencement</b> of remote e-voting</li> <li>3. date and time of <b>end</b> of remote e-voting</li> <li>4. <b>cut-off date</b> (a date not earlier than 7 days before date of GM <b>for determining eligibility</b> to vote)</li> <li>5. <b>manner</b> in which person who became <b>members after dispatch</b> of notice may</li> </ol>

	<p>obtain login ID and password</p> <p>6. the statement that:</p> <ol style="list-style-type: none"> <li>remote voting shall not be allowed beyond said date and time</li> <li>manner in which co. shall provide for voting at the meeting</li> <li>member may participate in GM even after remote voting but not allowed to vote again</li> <li>person named in RoM as on cutoff date only - entitled to vote</li> <li>website of the co. and agency</li> <li>name, designation, address, etc. of person responsible for grievances addressal</li> </ol>
Remote voting	<ul style="list-style-type: none"> <li>Remain open for <math>\geq</math> 3 days. Shall close at 5PM on date preceding date of GM.</li> <li>During such period - members holding shares in physical or demat form, as on cut-off date, may vote</li> <li>Vote once cast - cannot be subsequently changed</li> <li>At the end - facility to be forthwith blocked</li> </ul> <p><u>Provided that</u> - If a co. decides to use the same EVS as used in remote e-voting for voting during the GM, the said facility - The said facility shall be operational till all resolutions are voted upon in the meeting.</p>
Scrutiny	<ul style="list-style-type: none"> <li>BoD to appoint one/more scrutinizers (CA, CS or Cost Accountant, in practice or advocate or any person not in employment + Person of repute) to scrutinize the voting process in fair and transparent manner</li> <li>Scrutinizer may take assistance of person - Not an employee + well versed with EVS</li> <li>scrutiniser shall be willing to be appointed and be available for ascertaining requisite majority</li> <li>Chairman to allow voting at the GM by use of ballot or polling paper or by EVS for those who didn't vote using remote e-voting</li> </ul>
Counting votes	<p>Scrutiniser shall, immediately after conclusion of voting at GM:</p> <ul style="list-style-type: none"> <li>first count votes cast at GM,</li> <li>thereafter unblock votes cast through remote e-voting in presence of at least 2 witnesses not in employment of co. and</li> <li>make (within 3 days of conclusion of GM), a consolidated scrutiniser's report of total votes cast in favor or against, if any, to Chairman or a person authorised by him in writing who shall countersign the same.</li> <li>Thereafter, CM or authorised person to declare result of voting forthwith;</li> <li>Votes to remain secret till the votes are cast at GM</li> </ul>
Prevent dual votes	<p>To ensure that members who voted via e-voting do not vote again in GM - Scrutinizer to have access to details of shareholders who voted but not the manner in which they have cast their votes.</p>
Register of assent/dissent received	<ul style="list-style-type: none"> <li>Scrutiniser to maintain a register (manually or electronically) to record assent or dissent received, mentioning particulars of name, address, folio number or client ID of members, number of shares held by them, nominal</li> </ul>

	<p>value and whether the shares have DVR;</p> <ul style="list-style-type: none"> <li>Such <b>register</b> to remain in <b>safe custody of scrutinizer till approval of minutes</b> by chairman. Thereafter, hand over to company</li> <li>Result of resolution - Place on <b>website</b> - Co + Agency + RSE (if listed)</li> </ul>
Deemed date of resolution	Date of GM
Cannot be withdrawn	Resolution proposed to be considered through voting by e-means <b>shall not be withdrawn</b>

### Section 109: Demand for poll

1. **Before or on** declaration of result of voting on any resolution **on show of hands**:

- a poll may be **ordered** to be taken by the **Chairman on his own motion**, and
- shall** be ordered to be taken by him on a **demand** made in that behalf:

In case of co. having SC -  
By members present **in person or proxy** having  $\geq$  **1/10th of total VP** or holding shares in aggregate having **PUSC  $\geq$  Rs. 5 lakhs or higher** amount prescribed

In case of other co. -  
By members present in person or proxy having  $\geq$  **1/10th of total VP**

- The demand for a poll **may be withdrawn** at **any time** by the persons who made the demand.
- A poll demanded for **adjournment** of meeting or appt. of **Chairman** of meeting to be taken forthwith.
- A poll demanded on **any question other** than adjournment/ appt. of chairman shall be **taken at such time (within 48 hours from time it was demanded)**, as Chairman of the meeting may direct
- Where poll is to be taken, the Chairman shall **appoint such number of persons**, as he deems necessary, to **scrutinise** the poll process and votes given on poll and to report to him in manner prescribed.
- Chairman** of the meeting shall have **power to regulate** the manner in which the poll shall be taken
- Result** of poll shall be **deemed** to be the **decision** of the meeting on the **resolution** on which the poll was taken

### Rule 21: Manner in which chairman shall get the poll process scrutinized:

Chairman of the meeting shall ensure the following:

- Scrutinizers are **provided** with:
  - RoM**, specimen **signs** of members, attendance and proxy register
  - All documents pursuant to sec 105, 112 and 113
- Scrutinizers to arrange **Polling papers (Form MGT-12)** & distribute it to members & proxies present  
In case of joint SH - Give polling paper to first named holder (in his absence - joint holder)
- Scrutinizers to **keep record** of the polling papers received in response to poll, **by initialing** it.
- Scrutinizers shall **lock and seal** an empty polling box in presence of members and proxies

- e. In case of **ambiguity** about validity of a **proxy**, **Scrutinizers + Chairman to decide** validity
- f. Ensure that if member (who has appointed proxy) has voted in person, proxy's vote **disregarded**.
- g. Scrutinizers shall **count votes** cast on poll and prepare a **report** addressed to the Chairman. The report shall be in **Form MGT - 13**. Such report shall be sign and submitted **within 7 days** from date of poll. Chairman to counter-sign the same.
- h. Where voting is conducted by **e-means** u/s 108 and rules made thereunder, co. shall **provide all the necessary support**, technical and otherwise, to Scrutinizers in orderly conduct of voting and counting the result thereof.
- i. Scrutinizers' **report shall state total votes cast**, valid votes, votes in favour and against the resolution including the details of invalid polling papers and votes comprised therein.
- j. Chairman shall **declare the result** of Voting on poll. The result may either be announced by him, or a person authorized by him in writing.

**Section 110: Postal Ballot**

As per Sec 2(65) - Postal ballot means voting by post or through e-mode

(1) Notwithstanding anything contained in this Act, a company:

shall, w.r.t., such items of business as **CG** may, by notification, declare to be transacted **only** by means of postal ballot; **and**

may, in respect of any item, **other than ordinary business** and any **business** in respect of which **Directors** or **auditors** have **right to be heard** at meeting, transact by means of postal ballot

in such manner as may be prescribed, **instead of transacting such business at a GM**.

Provided that any item of business required to be transacted by means of postal ballot **under clause (a)**, may be transacted at a **GM** by a company which is **required** to provide the facility to members to **vote by e-means** u/s 108, in the manner provided in that section.

(2) If a resolution is **assented** to by the requisite **majority** of SHs by means of postal ballot, it shall be **deemed** to have been **duly passed** at a **GM** convened in that behalf.

**Rule 22: Postal Ballot:**

Particulars	Detail
Introduction	Where a company is required or decides to pass resolution by postal ballot, - send <b>notice to all SHs + draft resolution</b> explaining reasons therefor and requesting them to <b>send their assent or dissent in writing on a postal ballot</b> because postal ballot means voting by post or through e-means <b>within 30 days</b> from the date of dispatch of the notice
Notice of meeting	To be <b>sent to</b> - All members, <del>directors and auditors</del> <b>Mode</b> - Registered post, speed post or e-means or by <b>courier</b> service
Place notice	On <b>website</b> of company - Remain on website till last date of receipt of PB forms
Publication in newspaper	Co. shall publish an advertisement about having dispatched the ballot papers, in: <ul style="list-style-type: none"> <li>• at least once in <b>vernacular newspaper</b> in the language of <b>district</b> where RO is</li> </ul>

	<p>situated and having wide circulation in that district,</p> <ul style="list-style-type: none"> <li>at least once in <b>English newspaper</b> having country wide circulation</li> </ul> <p><b>specifying</b> the following:</p> <ol style="list-style-type: none"> <li>statement that business may be transacted by postal ballot including <b>e-voting</b></li> <li>date of <b>completion</b> of dispatch of notice</li> <li>date of <b>commencement</b> of voting</li> <li>date of <b>end</b> of voting</li> <li>the statement that: <ol style="list-style-type: none"> <li><b>postal ballot</b> received beyond date is <b>invalid and voting</b> shall not be allowed beyond said date and time</li> <li>members who have not received the postal ballot forms may apply to the co. and obtain a <b>duplicate</b> thereof.</li> </ol> </li> <li>name, designation, address, etc. of person responsible for <b>grievances</b> addressal</li> </ol>										
Scrutiny	<ul style="list-style-type: none"> <li><b>BoD</b> to appoint one <del>more</del> scrutinizers who is <b>not in employment</b> to scrutinize the postal ballot process in fair and <b>transparent</b> manner</li> <li>Scrutiniser shall be <b>willing</b> to be appointed and be <b>available</b> for ascertaining requisite majority</li> <li>Postal ballot <b>received back</b> from SH shall be kept in <b>safe custody</b> of <b>scrutinizer</b> and after receipt of assent or dissent of the SH in writing on a postal ballot, <b>no person shall deface</b> or destroy the ballot paper or declare the identity of the SH.</li> <li>scrutinizer shall submit his <b>report</b> as soon as possible <b>after last date</b> of receipt of postal ballots but <b>not later than 7 days</b> thereof</li> </ul>										
Register of assent/dissent received	<ul style="list-style-type: none"> <li>Scrutiniser to maintain a <b>register</b> (manually or electronically) to <b>record</b> assent or dissent received, mentioning particulars of name, address, folio number or client ID of members, number of shares held by them, nominal value and whether the shares have DVR; details of postal ballot <b>defaced</b>, if any</li> <li>Such <b>register</b> and other papers to remain in <b>safe custody of scrutinizer till approval of minutes</b> by chairman. Thereafter, hand over to company to <b>preserve</b></li> <li>Assent or dissent received <b>after 30 days</b> from the date of issue of notice shall be <b>treated</b> as if reply from the member has <b>not been received</b>.</li> <li>Result shall be declared by placing it on <b>website</b> of company</li> </ul>										
Rule 20 to apply	Provisions of rule 20 regarding voting by e-means shall apply, as far as applicable, <b>mutatis mutandis</b> to this rule in respect of voting by e-means.										
Postal Ballot ONLY	<p>Following items of business shall be transacted only by means of voting through a postal ballot:</p> <table border="1"> <thead> <tr> <th>Section</th> <th>Business</th> </tr> </thead> <tbody> <tr> <td>13</td> <td>Alteration of object clause of MoA</td> </tr> <tr> <td>NA</td> <td>Alteration of AoA to insert or remove provisions which, u/s 2(68) are required to be included in AoA of private co.</td> </tr> <tr> <td>12</td> <td>Change in place of RO outside local limits of city/town/village</td> </tr> <tr> <td>13</td> <td>Change in object for which money raised from public</td> </tr> </tbody> </table>	Section	Business	13	Alteration of object clause of MoA	NA	Alteration of AoA to insert or remove provisions which, u/s 2(68) are required to be included in AoA of private co.	12	Change in place of RO outside local limits of city/town/village	13	Change in object for which money raised from public
Section	Business										
13	Alteration of object clause of MoA										
NA	Alteration of AoA to insert or remove provisions which, u/s 2(68) are required to be included in AoA of private co.										
12	Change in place of RO outside local limits of city/town/village										
13	Change in object for which money raised from public										

	43	Issue of shares with differential rights
	48	Variation in rights attached to class of shares
	68	Buy-back
	151	Election of a director
	180	Sale of undertaking of co.
	186	Giving loans, guarantees in excess of limit
Non-applicability	Provided further - OPC and Cos. having members up to 200 are NOT required to transact any business through postal ballot	

### Section 111: Circulation of Member's Resolutions

1. On requisition in writing by such number of members as u/s 100, a company shall:
  - a. give notice to members of any resolutions intended to be moved at the meeting, and
  - b. circulate to members - any statement w.r.t. matters referred to in proposed resolution
2. A company shall not be bound u/ss (1) unless:
  - a. Copy of signed requisition is deposited at the RO:
    - i. In case of requisition requiring notice of resolution - Not less than 6 weeks before meeting
    - ii. In case of any other requisition - Not less than 2 weeks before meeting
  - b. Along with requisition, deposit a sum reasonably sufficient to meet company's expense

Provided that - If after the requisition requiring notice is deposited at the RO + AGM is called on a date within 6 weeks after deposit thereof - It shall be deemed to have been properly deposited.

3. Where, on an application by the co. or aggrieved person, and application is made to CG and CG declares that rights in this section are being abused to secure needless publicity for defamatory matter - The co. shall not be bound to circulate any statement u/ss (1)(b)

Note - Cost of such application to CG - CG may order requisitionists to pay such cost

4. Default - Co and OID - Penalty of Rs. 25,000.

### Section 112: Representation of President and Governors in Meetings

- (1) The President of India or the Governor of a State, if he is a member of a company, may appoint such person as he thinks fit to act as his representative at any meeting of the company.
- (2) A person appointed u/ss (1) shall, be deemed to be a member and shall be entitled to exercise the same rights and powers, including the right to vote by proxy and postal ballot, as the President or, he Governor could exercise as a member of the company

#### Concept clarity check:

President of India appointed Mr. Lazy as his representative. However, Mr. Lazy, instead of going to the meeting himself, appointed Mr. Proxy to attend and vote on his behalf. Is Mr. Lazy allowed to appoint a proxy? - Yes. Mr. Lazy enjoys same rights as the president would and hence allowed to appoint proxy.



### Section 113: Representation of Corporations at Meeting of Companies and of Creditors

(1) A **body corporate** may:

if it is a <b>member</b> of a Co.	by <b>BoD resolution</b> , <b>authorise</b> such person as it thinks fit to act as its representative at any meeting of the company
if it is a <b>creditor</b> , including Debenture holder	By <b>BoD resolution</b> , <b>authorise</b> such person as it thinks fit to act as its <b>representative</b> at any meeting of any creditors

(2) A person appointed u/ss (1) shall, be **deemed** to be a **member** and shall be **entitled to exercise** the same rights and powers, including the **right to vote by proxy and postal ballot**, on behalf of BC which he represents **as that body could exercise if it were an individual member**, creditor or DH.

### Section 114: Ordinary and Special Resolutions

(1) A resolution shall be an **OR** if:

- **notice** has been duly given and
- it is required to be **passed i.e.**, votes cast (show of hands or e-voting or poll) in **favour**, including **casting vote**, if any, of CM, by **members** (personally or via proxy where allowed),
- **exceed** the votes, if any, **cast against** the resolution by members, so entitled and voting.

(2) A resolution shall be a **SR** when—

- (a) the **intention** to propose the resolution as a SR has been duly **specified** in the **notice** calling the GM or other intimation given to the members of the resolution;
- (b) the **notice** required under this Act has been **duly given**; and
- (c) the votes cast in **favor** (show of hands, poll or e-voting), by entitled members (in person or proxy or postal ballot) is **not less than 3x** number of votes, if any, **cast against** such resolution.

#### Concept clarity check:

1. It is not necessarily true that ordinary business require OR and special business require SR. Example - Issue of equity share with differential rights is a **special business but requires OR**.
2. Whether 2 or more resolutions can be moved together at the same time in a GM? - **Yes, there is nothing illegal with the same. Except in case of resolution to appoint directors (Sec 162 requires one resolution for each director, multiple resolutions can be moved all at once.**
3. At a GM, 40 members are present. 20 votes in favor, 5 voted against. 5 votes were invalid, and 10 members abstained from voting. Is SR passed? - **Yes. Abstentions or invalid votes, if any, are not to be taken into account.**

### Section 115: Resolutions Requiring Special Notice

- Where, by any provision contained in this **Act** or in the **articles** of a company,
- **special notice** is required of any resolution,
- notice of intention to move such resolution to be given to company by:
  - a. members holding **not < 1% of total VP** or
  - b. holding **PUSC** of prescribed sum (not > **Rs. 5 lakhs**)
- and company shall give its members notice of the resolution in such manner as may be prescribed

#### Rule 23 - Special Notice (SN)

- (1) SN shall be **signed** (individually/collectively) and given by such number of members holding:
  - c. not < **1% of total VP** or

d. holding shares on which not < Rs. 5 lakhs has been paid up on the date of the notice.

(2) Time period of sending notice - Notice to be sent to co. not earlier than 3 months but at least 14 days before date of meeting, exclusive of day on which the notice is given and day of meeting.



(3) Immediately on receipt of notice - Co. to give notice to its members of the resolution - At least 7 days before meeting (exclusive of date of dispatch and day of meeting)

(4) Where it is not practicable to give notice u/ss (3) in same manner as notice of GM - Publish notice in newspaper (english/vernacular) and post it on the website of company.

(5) The notice shall be published at least 7 days before the meeting, exclusive of the day of publication of the notice and day of the meeting.

As per Companies Act, special notice is required in following cases:

Section	Provision
140	Appointment of auditor other than retiring auditor
169	Removal of director

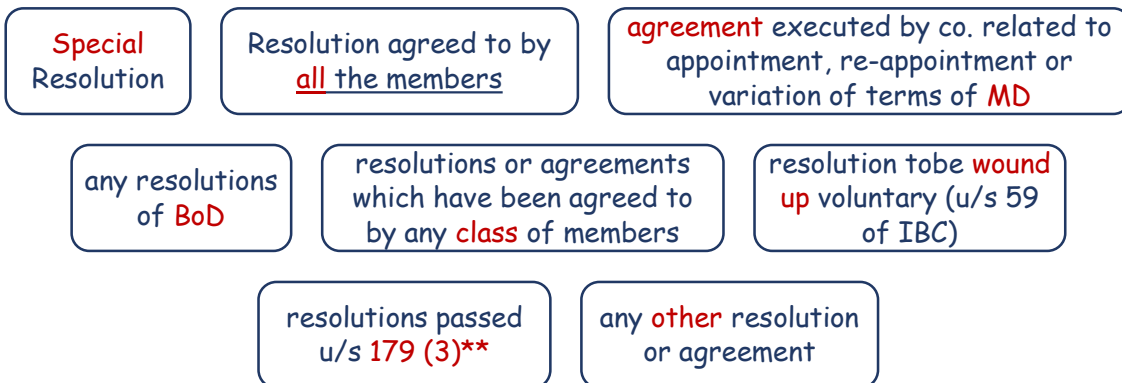
#### Section 116: Resolutions passed at adjourned meeting

Where a resolution is passed at an adjourned meeting of company, shareholders or BoD - It shall be treated as having been passed on the date on which it was in fact passed and shall not be deemed to have been passed on any earlier date.

Example: EGM dated - 23<sup>rd</sup> Sept. Quorum absent. Adjourned - 1<sup>st</sup> October. Two resolutions passed in adjourned meeting. Effective date of resolution = 1<sup>st</sup> October (and not 23<sup>rd</sup> sept)

#### Section 117: Resolutions and Agreements to be Filed

1. The provision of this section shall apply to following resolutions and agreements: [SAB CA WPO]



\*\*Provided that - Any person shall NOT be entitled u/s 399 to inspect copies of such resolution Provided further that - This clause is N.A. to resolution passed to grant loans, etc. u/s 179(3)(f) in ordinary course of business (OCOB) by a banking company, NBFC or housing finance companies.

2. A copy of every resolution or agreement mentioned above along with ES u/s 102 (if any) - File with RoC in Form **MGT 14** within **30 days** of passing such resolution or making such agreement.

Where such resolution or agreement has **effect of altering AoA** - **Annex** such resolution to every copy of AoA issued after passing such resolution/making agreement

3. In case of failure to make such filing with RoC, penalty:

Company	Rs. 10,000 + Rs. 100/day after first	Max - Rs. 2 lakhs
OID	Rs. 10,000 + Rs. 100/day after first	Max - Rs. 50,000

**Section 118: Minutes of proceedings of GM, Board Meeting and Resolutions passed by Postal ballot**

(1) The co. shall cause the minutes of the proceedings of the following to be **prepared, signed** and **kept** in the minute books (with pages consecutively numbered) within **30 days** of the conclusion thereof:

- **GM** of any class of SH or creditors
- **board** meetings or meetings of any committee thereof
- resolutions passed by **postal** ballot

(2) Minutes shall contain **fair** and correct summary of the proceedings

(3) **Appointments** made at any meetings shall be included in minutes

(4) In case of meeting of **BoD** or committee thereof, the minutes shall also include:

Names of **directors** present

where a resolution is passed, the names of **dissenting** directors

(5) The following matters shall not be included in the minutes which, in opinion of Chairman, is:

reasonably be regarded as **defamatory** of any person

**irrelevant** or immaterial to proceedings

**detrimental** to interest of co.

(6) Chairman shall exercise **absolute discretion** w.r.t. inclusion or exclusion of any matter u/ss (5)

(7) Minutes = **Evidence** of the proceedings recording therein.

(8) Where minutes are kept as u/ss (1), until the contrary is proved, it shall be deemed that:

- **Meeting** have been duly called and held
- **Proceedings** have duly taken place and resolutions duly passed
- All **appointments** of director, KMP, etc. is valid.

(9) No **document** purporting to be a report of the **proceedings of any GM** shall be **circulated** or advertised **at company's expense**, unless it includes matters required by this section to be contained in the minutes of the proceedings of such meeting.

(10) Every co. to observe **secretarial standard** specified by Institute of CS of India

(11) **Default** under this section - Co. - Rs. 25,000 and OID - Rs. 5,000

(12) Person found guilty of **tampering** with minutes - Jail upto 2 years **AND** Fine - Rs. 25k to Rs. 1 lakh

**Rule 25 - Minutes:**

1. **Distinct minute books** shall be maintained for each type of meeting - GM of member, crs, BM, etc.  
Note - Resolution by **postal** ballot shall be recorded in **minute of GM** in which deemed to be passed
2. Minute of proceeding to be entered into such book within **30 days** of conclusion of meeting
3. In case of resolution by **postal ballot**, include the following in the minutes books within 30 days:  
**resolution proposed**      **result of voting**      **summary of scrutinizer's report**
4. Each page of minute book - Initialed and signed.

**Last page** of the record of proceeding shall be **dated** and **signed**:

<u>Minutes of proceedings of</u>	
<b>BoD</b> meeting or committee thereof	By chairman of said meeting or chairman of next succeeding meeting
<b>General Meeting</b>	By chairman of same meeting within 30 days In event of death or inability of CM - a director duly authorized by the BoD
Resolution passed by <b>postal</b> ballot	By chairman of the <b>BoD</b> within 30 days In event of there being no CM or death or inability of CM - a director duly authorized by the BoD

**5. Preserving minute books:**

	of General Meeting	of BoD or committee
Kept at	RO <del>or such place as BoD may decide</del>	RO or <b>such place as BoD</b> may decide
Preserve	Permanently	Permanently
Custody	CS or director duly authorized by BoD	CS or director duly authorized by BoD

Note - In case of section 8 co. - the section shall **not apply as a whole except** that minutes may be recorded **within 30 days** of conclusion of every meeting (in case of co. **where AoA** provide for confirmation of minutes by circulation)

**Section 119: Inspection of minute-books of GM:**

- (1) Minute books of proceeding of any GM, ~~BoD meeting~~ or of resolution by postal ballot shall be:
  - a. kept at **RO** of the co.
  - b. open to **inspection** by any **member**, **without** any **charge**, during **business hours**, subject to imposing reasonable **restriction** by AoA or in GM. However, **not < 2 hours** in each business day are allowed for inspection
- (2) On **request** to the co. + **payment** of fees as specified in AoA - **Copy** of minutes to be furnished to member **within 7 working days**.

As per Rules:

A member who has requested for **soft copy** of minutes of any previous GM held during immediately preceding **3 FY** shall be entitled to be furnished, with the same **free of cost**.

(3) If inspection is **refused** or copy of minutes is not furnished - **Penalty:**  
Company -Rs. 25,000; OID - Rs. 5,000

(4) In case of such **refusal** or default, **Tribunal may**, without prejudice to action u/ss (3), by **order:**

- direct an **immediate inspection** of the minute-books or
- direct that the copy required shall **forthwith** be **sent** to person requiring it.

Concept clarity check:

Can a member **authorize his friend** to inspect minutes book on his behalf of him by signing a power of authority? - **No, sec 119 does not provide for authorizing anyone else to inspect the minutes book.**

Section 120: Maintenance and Inspection of Documents in Electronic Form:

Without prejudice to any other provisions of this Act, any doc., record, register, minutes, (DRRM):

(a) required to be **kept** by a company; or

(b) allowed to be **inspected** or copies to be given to any person by a company under this Act, **may be kept** or inspected or copies given, as the case may be, **in e-form** in prescribed form & manner.

Rule 27:

Every **listed company** or a company having  $\geq$  1000 SH, DH and other security holders, ~~shall~~ **may maintain** its records, as required to be maintained under the Act or rules, in **electronic form**.

Rule 28: MD, CS or any other director or officer as BoD may decide - shall be **responsible** for maintenance of e-records

Rule 29: Records in e-form shall be available for **inspection** in e-form (on payment not  $>$  Rs. 10/page)

Section 121: Report on AGM:

(1) Every **listed public company** shall prepare a report on each AGM including confirmation that the meeting was called, held and conducted as per provision of this Act and Rules

(2) Report u/ss (1) shall be filed with **Registrar within 30 days** of conclusion of AGM in **Form MGT 15**.

(3) **Default** u/ss (2) - Penalty:

Company - Rs. 1 lakhs + Rs. 500/day after the first subject to maximum Rs. 5 lakhs

OID - **Not less than** Rs. 25,000 + Rs. 500/day after the first subject to maximum **Rs. 1 lakh**

Rule 31:

a. Report u/s 121 shall be **in addition to minutes** of GM

b. Report shall be **signed** & dated by CM and **CS**.

In case of his inability of CM - Sign by 2 directors (1MD, if any) and **CS**

c. Report shall contain following details: [**A BOLD MCQ**]

day, date, hour and venue of AGM ( <b>Details</b> )	confirmation w.r.t. appt. of <b>Chairman</b> of AGM	no. of <b>Members</b> attending AGM;
confirmation of <b>Quorum</b> ;	confirmation w.r.t <b>compliance</b> of the Act and Rules, secretarial std. made there under w.r.t. conducting AGM; ( <b>Law</b> )	
<b>Business</b> transacted and result thereof;	particulars w.r.t any <b>Adjournment</b> , postponement of meeting, change in venue;	any <b>Other</b> relevant points

**Section 122: Applicability of this chapter to OPC:**

(1) Provision of Sec 98 and 100 to 111 - **N.A. to OPC**

(2) In case of OPC, ordinary business at AGM shall be transacted as u/s (3)

<u>Business at AGM or EGM in case of OPC</u>	<u>Business at BoD meeting in case of OPC</u>
<p>For sec 114, any business which is required to be transacted at AGM or other GM by OR/SR - it shall be <b>sufficient if</b>, in case of such OPC:</p> <ul style="list-style-type: none"> <li>• resolution is <b>communicated</b> by member to co.,</li> <li>• <b>entered</b> in minutes-book maintained u/s 118,</li> <li>• <b>signed</b> and dated by member and</li> <li>• such <b>date</b> shall be <b>deemed</b> to be the <b>date of meeting</b> for all the purposes under this Act</li> </ul>	<p>Where there is only <b>1 director</b> in BoD of OPC - any business which is to be transacted at BoD meeting, it shall be sufficient if, in case of OPC:</p> <ul style="list-style-type: none"> <li>• the resolution by such director is <b>entered</b> in <b>minutes book</b> maintained u/s 118 and</li> <li>• <b>signed</b> and dated by such director and</li> <li>• such <b>date</b> = <b>deemed</b> to be the date of <b>BoD meeting</b> for all the purposes under this Act</li> </ul>

# Chapter 8 - Declaration and Payment of Dividend

[Section 123 to 127]

Basics	Provisions	Funds related to Dividend	Punishment for Non-Compliance
↳ Definition u/s 2(35) ↳ <b>Types</b> (Final/ Interim)	↳ <b>Sec. 123:</b> Declaration of Dividends ↳ <b>Sec 124:</b> Unpaid/ Unclaimed Dividend	↳ <b>Sec. 125:</b> IEPF ↳ Establishment ↳ Credits to the Fund ↳ Utilization	↳ <b>Sec. 127:</b> Punishment for failure to distribute dividend within 30 days

### Definition:

Section 2(35) "dividend" includes any interim dividend.

### Important points relating to dividend:

- It is a **distribution of profits**
- **Final** dividend is **declared and approved** by shareholders (by **OR** at **AGM**) on recommendation of Board
- The **rate** of dividend declared by SH shall **not exceed** the amount **recommended** by BOD
- Dividend % is a proportion of **nominal value** or face value

### Concept clarity check:

1. Board recommended 10% dividend. Can SH, by passing unanimous resolution, declare 12% dividend? - **No!**
2. **Calculate** the amount of dividend in following case:  
 No. of shares held = 50  
 Face Value = Rs. 10; Market Value (in stock exchange) - Rs. 200; Purchase price - Rs. 190  
 SH approved and declared dividend = 10%  
**Amount of dividend = No. of shares \* Dividend \* Face Value i.e., 50 shares \* 10% \* Rs. 10 = Rs. 50 (total)**

Note - Market value or purchase price is irrelevant for the calculation of amt. of dividend

### Types of dividend:

<u>Classification based on time</u>		
Particulars	Interim Dividend	Final Dividend
Announcement	Announced and declared by <del>SH</del> <b>BOD</b> at any time during the FY or from <b>closure</b> of FY <b>till</b> the <b>AGM</b>	Recommended by BoD and declared by <b>shareholders</b> at the <b>AGM</b> of the co.
Provision in AOA	Declared only when the <b>AOA</b> <b>permits</b> the declaration.	Does not require any specific provision in the articles
Source	Out of profits before final adoption of accounts	--

	Sources for interim dividend = Surplus in PL or CY profit or Prior Profits	
Ratification	Shall be <b>ratified</b> at the AGM by the members	Not applicable
Rate of Dividend	If the company has incurred loss during the CY upto preceding quarter <ul style="list-style-type: none"> <li>dividend not to be declared at a rate higher</li> <li>than Avg rate of dividend declared by Co</li> <li>during the immediately preceding 3 FYs.</li> </ul>	The rate recommended by the Board cannot be increased by the members
Revocation	Can be revoked with consent of <b>ALL shareholders</b>	Once declared - cannot be revoked.

The Dividend shall be deposited in a separate A/c of a scheduled bank **within 5 days** from the date of declaration

Classification of Dividend based on Nature of Shares		
Preference Shares (Sec 43)		Equity Shares
Cumulative	Non-Cumulative (Default)	
Dividend gets <b>accumulated</b>	Dividend is payable only in a year of profit. <b>No accumulation</b> of profit	Equity shares holder do <b>not</b> enjoy any <b>preferential rights</b> for dividends or repayment of capital
<b>Arrears</b> due to insufficiency of profits payable from <b>future profits</b> . Unless this dividend is paid in full (incl. arrears), <b>no dividend</b> is payable to <b>equity shareholders</b>	Holder not entitled to be paid arrears of dividend out of future years i.e., right to receive dividend <b>expires</b> if not declared in any year.	Rate of dividend depends upon the dividend policy and availability of profits <b>after satisfying Pref. SH rights</b>

### Section 123: Declaration of Dividend

(1) **Source:** Dividend shall be declared or paid by a company for any **FY** out of:

<b>Profits*</b> for that FY (current) arrived at <b>after</b> providing for <b>depreciation</b> (Sch II)	<b>Undistributed profits*</b> of any <b>previous</b> FYs arrived at after providing for <b>depreciation</b> as per Sch II (i.e., credit balance in P&L and free reserves)	Both (a) and (b) [Current + Past Profits]	Money provided by <b>CG/SG</b> for payment of div. in pursuance of guarantee given by the Govt
--	---	---	--

\*Provided that - While calculating **profits** - **exclude**:

- unrealised gains**, **notional gains** or **revaluation** of assets AND
- any change in **carrying amount** of an asset/liability on measurement at fair value

**Transfer to Reserves** - A company **MAY**, before declaration of dividend in any FY, **transfer** such % of its profits for that FY **as it may consider appropriate** to **reserves** of the company.



Conceptual Clarity Check:

1. Can capital reserve be used for payment of dividend? - **No! Only free reserves can be used for dividend**
2. Carried over previous **losses** and **depreciation** not provided in PY has to be **set off** against CY profits before declaration of dividend
3. **Capital profits** are not earned in normal course of biz. Hence, **not available for distribution** as dividend
4. Is it okay if a company decides not to transfer any amount to reserves before dividend? - **Yes! Whether or not to transfer and what % to be trf to reserve is left to the discretion of the company.**

(2) For the purposes of clause (a) of Sec 123(1) **depreciation** shall be provided in accordance with **Sch II**

(3) Rate of Dividend - Interim Dividend in case of loss in recent quarter (not Final Dividend):

Board **may declare** interim dividend during any FY or at any time from closure of FY till holding of AGM out of:

- **Surplus** in the P&L account or
- Profits of the FY for which such interim dividend is sought to be declared (**past FY**), or
- Profits generated in the **FY till the quarter** preceding the date of declaration of interim dividend

**Provided that** - In case the co. has incurred **loss** during the **current FY** up to the end of the **quarter** immediately preceding the date of declaration of interim dividend, such interim dividend shall **not be declared** at a **rate > Average dividends** declared by the company during the **immediately preceding 3 FY**

Concept clarity check:

Is the upper limit on rate of dividend (i.e., not > Avg of preceding 3 FY) also applicable in case if there is profit in the current FY till preceding quarter? - **No. In case of profit, the % of dividend can be higher?**

Rule 3 Declaration of Dividend out of Reserves: [Very imp]

In the event of **inadequacy** or **absence** of profits in any year, a co. may declare dividend out of free reserves subject to the fulfilment of the following **3 conditions**, namely:-

**Rate shall not exceed**  
Average of dividend  
of 3 immediately  
preceding FY\*

**Total amount drawn** from accumulated profits  
≤ 1/10th of [PUSC + FR] as per latest audited  
FS  
Amount drawn shall **first be utilised** to set off  
losses of current FY

**Balance in reserve**  
after such drawal  
**not < 15%** of PUSC  
as per latest  
audited FS

\* This sub-rule (1) shall not apply if co. has not declared **any dividend in each** of 3 preceding FY.

(4) Dividend amt (incl. interim) - **Deposit** in separate account with **scheduled bank** within 5 days from **declaration**

(5) No dividend shall be paid by a co. in respect of any share therein except to the registered shareholder of such share or to his order or to his banker and shall not be payable except in cash.

Provided that nothing in this sub-section shall be deemed to prohibit the capitalisation of profits or reserves of a company for the purpose of issuing fully paid-up bonus shares or paying up any amount for the time being unpaid on any shares held by the members of the company.

Concept clarity check:

1. Mr. Singh has purchased shares of Burraah Ltd. from Mr. Jai by making full payment. However, the transfer of shares is not yet registered with the company. Meanwhile, the co. announces dividend. Is the company allowed to pay the dividend to Mr. Singh? - No. In such case, the company will keep the dividend till the registration is pending (Discussed in detail in sec 126)
2. Can a company issue bonus shares in lieu of dividend - No. Dividend can only be paid in cash.
3. Can a company pay dividend via bank? - Absolutely Yes. Cash doesn't mean hard cash. It means - Cash, cheque, dividend warrant or via any e-mode.

(6) A company which fails to comply with the provisions of sections 73 and 74 shall not, so long as such failure continues, declare any dividend on its equity shares.

Note: Section 8 companies are prohibited from paying any dividend to its members. Its profits are intended to be applied only in promoting the objects for which it is formed. [Sec 8]

Bonus Point

What is record date?

Record date is the date announced by the company for determining members who are entitled to dividend. All person whose name is included in the register of members on the record date shall be entitled to dividend.

Section 124: Unpaid Dividend Account

(1) Where a dividend is declared but not paid or claimed within 30 days from the date of declaration,

- the company shall, within 7 days from the expiry of the said 30 days,
- transfer the total unpaid/unclaimed amount of dividend to a special account (with scheduled bank) called the Unpaid Dividend Account (UDA)

(2) Preparing of Statement of the Unpaid Dividend

- Within 90 days of transferring any amount to the Unpaid Dividend Account
- prepare a statement containing the following:

Name	Last known address	Unpaid dividend amount
------	--------------------	------------------------

- and place it on website and on any other website approved by CG for this purpose.

(3) Payment of Interest on default

If default is made in transferring the total amount u/ss (1) to UDA, company shall:

- Pay interest @12% p.a. from the date of such default
- Interest accruing on such amount shall ensure to benefit of members of the co. in proportion to amt. remaining unpaid to them

(4) **Claimant** to apply for payment of Claimed Amount apply to the Co concerned for payment of the money claimed

(5) **Transfer of Unclaimed or unpaid amount** to Investor Education and Protection Fund (IEPF)

- If remains **unpaid or unclaimed** for **7 years** from the **date of such transfer**
- It shall be transferred by the company **along with interest** to the **IEPF**, and
- A **prescribed statement** containing details of such transfer shall be sent to **IEPF** Authority and
- Authority to **issue receipt** as evidence of such transfer

(6) **Transfer of Shares to IEPF**

All **shares** in respect of which dividend has not been paid/claimed for **>= 7 consecutive years** shall be **transferred** by the company in the **name of IEPF** along with a statement containing such details.

Author's Note - Note that this section is talking about transfer of the "shares" itself and not the unpaid amount of dividend. The trf. of unpaid amount is already discussed u/ss (5)

Provided that any **claimant** of shares transferred above shall be entitled to **claim** the transfer of **shares** from **IEPF** with such procedure and on submission of such documents as may be **prescribed**.

Explanation:

In case any dividend is **paid or claimed for any year** during the said period of **7 consecutive years**, the share shall **not be transferred** to Investor Education and Protection Fund.

(7) Punishment for Contravention of this section:

	Company	Officer in default
Penalty	Rs. 1 lakh + Rs. 500/day after first	Rs. 25,000 + Rs. 100/day
Max penalty	Rs. 10 lakhs	Rs. 2 lakhs

### **Section 125: Investor Education and Protection Fund**

*(Read with IEPF Authority (Accounting, auditing, transfer and refund) Rules 2016)*

(1) The **CG** shall **establish** a Fund to be called the **Investor Education and Protection Fund (IEPF)**

(2) There shall be **credited** to the Fund—

- a) the amount given by the **CG** by way of **grants** after due appropriation made by Parliament by law in this behalf for being utilised for the purposes of the Fund;
- b) **donations** given to the Fund by the **CG**, State Governments, companies or any other institution for the purposes of the Fund;
- c) the amount in the **Unpaid Dividend Account** of companies transferred to the Fund u/s 124(5)
- d) the amount in **general revenue account** of the **CG** which had been transferred to that account u/s 205A (5) of Companies Act, 1956 and remaining unpaid or unclaimed on the commencement of this Act;
- e) the amount lying in **IEPF** u/s 205C of the Companies Act, **1956**;
- f) the **interest or other income** received out of **investments** made from the Fund
- g) the amount received under section 38(4);
- h) the **application money** received by companies for allotment of any securities and due for refund;

- i) **matured deposits** with companies **other than banking** companies;
- j) **matured debentures** with companies;
- k) **interest accrued** on the amounts referred to in clauses (h) to (j);
- l) **sale proceeds** of fractional share arising out of **bonus shares, merger & amalgamation for >=7 yrs**
- m) **redemption** amount of **preference shares** remaining unpaid or unclaimed **for >=7 yrs**; and
- n) such **other** amount as may be prescribed

Provided that no such amount referred to in clauses (h) to (j) shall form part of the Fund unless such amount has remained **unclaimed and unpaid** for **7 years** from the date it became **due** for payment.

Summary da summary!

CG grants	Donation by CG/SG/Cos.	Amt. of UDA u/s 124	General Revenue A/C	IEPF in Co. Act 1956	Other income from investment
Amount disgorged u/s 38(4)	Application money	Matured deposit or debenture or intt thereon	sale proceeds of fractional shares (>=7 yrs)	Redemption of pref. shares (>=7 yrs)	Other amount

(3) The Fund shall be **utilised for**: [CD PRO]

- a) the **refund** in respect of unclaimed **dividends**, matured **deposits**, matured **debentures**, the **application** money due for refund and interest thereon
- b) **promotion** of investors' **education, awareness** and **protection**;
- c) **distribution of any disgorged amount** among eligible and identifiable applicants for shares or debentures, shareholders, debenture-holders or depositors who suffered losses due to wrong actions by any person, in accordance with the orders made by the Court which had ordered disgorgement;
- d) **reimbursement** of legal expenses incurred in pursuing **class action suits** u/s 37 and 245 by members, debenture holders, or depositors as may be sanctioned by the Tribunal; and
- e) any **other purpose incidental thereto**, in accordance with such rules as may be prescribed:

**Provided** that, where, as per provision of Sec 205C of Co. Act, 1956, amount is transferred to **IEPF**, after the expiry of **7 yrs**, such person shall be **entitled to get refund** out of IEPF (constituted under Co. Act 2013)

(4) Any person **claiming** to be entitled to amt referred u/ss (2) may apply to IEPFA for payment of money claimed

(5) **CG** to **constitute**, by notification, an **authority** for **administration** of Fund consisting of:

Chairperson [Ex-officio - Secretary, MCA]	a CEO (appt. by CG)	Members not > 7 (including CP)
--	---------------------	-----------------------------------

(6) Manner of **administration**, **appt.** of CP, members & CEO, holding of IEPFA **meetings**- As per prescribed rules

- (7) Resources - CG may provide to IEPFA such offices, officers, employees and other resources - as prescribed.
- (8) The authority shall administer the Fund and maintain separate accounts and other relevant records in relation to the Fund in such form as may be prescribed after consultation with the C&AG of India.
- (9) It shall be competent for IEPFA to spend money out of the Fund for carrying out the objects of IEPF.
- (10) Accounts of the Fund shall be audited by the C&AG of India (at specified intervals). Audited accounts + audit report to be forwarded annually by IEPFA to the CG.
- (11) Annual Report:
- IEPFA to prepare its annual report (prescribed form and time for each FY)
  - Giving full account of its activities during the FY and
  - Forward a copy thereof to the CG and
  - CG shall cause annual report + audit report (by C&AG) to be laid before each House of Parliament

**Sec 126: Right to dividend, rights shares and bonus shares to be held in abeyance pending registration of transfer of shares**

- Notwithstanding anything contained in any other provision of this Act,
- Where any instrument of transfer of shares has been delivered to any co. for registration and
- Such transfer has not been registered by the co.,
- Such company shall:

Transfer the dividend w.r.t. such shares to UDA account (unless the co. is authorised, in writing, by registered holder to pay such dividend to transferee specified in transfer instrument)



Keep in abeyance - Any offer of right shares u/s 62(1)(a) or issue of fully paid up bonus shares

**127. Punishment for failure to distribute dividends**

- Where a dividend has been declared
- But, within 30 days of such declaration, it has not been paid or warrant has not been posted, to entitled SH,
- The punishment shall be:

	Every Director who is knowing a party to default (not OID)	Company
Imprisonment	Extend to 2 years AND	NA
Fine - During the period where default continues	Not < Rs. 1k / day - Default continues	Simple Interest 18% p.a.

Provided that no offence under this section shall be deemed to have been committed where:

- (a) the dividend could not be paid by reason of the operation of any law
- (b) SH has given directions to co. regarding payment of dividend and those directions cannot be

**complied** with and the same has been **communicated** to him (3 conditions - Given directions + Cannot comply + Communicate)

- (c) there is a **dispute** regarding right to receive the dividend;
- (d) the dividend has been **lawfully adjusted** by the company against **any sum due from shareholder**; (for example - adjustment of **calls in arrears**), or
- (e) for any other reason, the failure to pay the dividend or to post the warrant within the period under this section was **not due to default on part of company**.

Technique to remember - **Law** ke **Direction** mein jaoge toh **Dispute** nahin hoga. Par agar books mein **Adjustment** ya payment mein **Default** karoge toh dikkat hai

Modification for Nidhi Company (w.r.t. Sec 127):

In case of Nidhi Co., where the dividend payable is  $\leq$  **Rs 100**, it shall be **sufficient compliance** of sec 127 if:

- declaration of dividend is announced in local language in **one local newspaper** of wide circulation
- announcement is also displayed on the **notice board** of the Nidhis for **at least 3 months**.

Concept clarity check:

The company is responsible to post the dividend warrant within 30 days of declaration of dividend. However, if such post doesn't reach SH within 30 days, it's not the responsibility of the co. Hence, company cannot be penalised if warrant doesn't reach before 30 days.

# Chapter 9 - Accounts of Companies

[Section 128 to Section 138]

Sec	Name	Sec	Name
128	Books of Accounts to be kept by co/	133	CG to Prescribe AS
129	Financial Statement	134	Financial Statement, Boards Report, etc
129A	Periodical financial results	135	Corporate Social Responsibility
130	Re-opening of accounts on Court's or Tribunal's Orders	136	Right of Member to Copies of Audited FS
131	Voluntary Revision of FS/Board's Report	137	Copy of FS to be Filed with Registrar
132	Constitution of NFRA	138	Internal Audit

Form	Purpose
AOC 1	Statement containing <b>salient features</b> of FS of subsidiaries/ associates/JVs
AOC 2	Details containing contracts or arrangements entered into with <b>related parties</b>
AOC 3	Statement containing salient features of the <b>audited FS</b>
AOC 3A	Detailed statement on FS to be filed by co. complying with Cos ( <b>Ind AS</b> ) Rules
AOC 4	Form to file a FS and other documents of the company with the Registrar
AOC 4 (XBRL)	XBRL doc. in respect of FS and other documents to be filed with the Registrar
AOC 4 (CFS)	Form to file CFS s and other documents with the Registrar
AOC 4 (NBFC)	Form for NBFCs to file financial statement and other documents with the Registrar
AOC 5	Notice to declare the <b>address</b> of the location in which the BoAs are maintained

## Important Definitions

"Books of account" **includes records** maintained in respect of:

sums of <b>money</b> received and expended	<b>sales</b> and purchase	<b>assets</b> and liabilities	items of <b>cost</b> u/s 148
--	---------------------------	-------------------------------	------------------------------

Financial statement in relation to a company, **includes:**

<b>BS</b> as at end of FY	<b>P&amp;L</b> account (in case of <b>NPO - Income &amp; Exp a/c</b> )	<b>CFS</b> for FY*	Statement of change in <b>equity</b>	<b>Explanatory</b> note annexed
---------------------------	--	--------------------	--------------------------------------	---------------------------------

\*Provided that FS, w.r.t. **OPC, small co. and dormant co. and Private co. (startup)**, may not include **CFS**;

"Book and Paper" and "Book or Paper": Includes: **[WARM DVD]**

Books of <b>Accounts</b>	<b>Deeds</b>	<b>Voucher</b>	<b>Writings</b>	<b>Documents</b>	<b>Minutes</b>	<b>Registers</b>
--------------------------	--------------	----------------	-----------------	------------------	----------------	------------------

maintained on **paper** or in **electronic** form;

**Section 128: Books of account, etc., to be kept by company:**

For the purpose of this section, books of accounts (BOA) means - Books of account and other relevant books and papers ~~and financial statement (FS)~~

**(1) Co. to prepare BoA:**

Every co. shall **prepare** and **keep** BOA and FS at its **RO** every FY

- Giving a **true and fair view** of **state of the affairs**
- of - the company, **including** that of its **branch** office(s), and
- **explaining** all such transactions and

Such books shall be kept on **accrual basis** and as per the **double entry system** of accounting

**Note** - Such **BOA** may be **kept** at **such other place** in India as BoD may decide. Inform **RoC** within **7 days of such decision** - by filing a notice in writing (**Form AOC -5**) giving **full address** of such place.

Provided that - Companies may keep books in **e-mode** in prescribed manner.

**Rule 3 - Manner of maintaining BoA & FS in e-form - Companies (Accounts) Rules, 2014:**

- Such BOA in e-mode shall remain **accessible** in India so as to be usable for subsequent ref.
- **Features of accounting software:**

For FY commencing after **1/4/2022** - Every co. using **accounting software** for maintaining BOA shall use only such software which has the **following feature:**

recording **audit trail** of every transaction and

ensuring that audit trail cannot be **disabled**, and

creating an **edit log** of each change made in BOA + **date** of such changes.

- BoA shall be **retained** completely in **original** format info. shall remain **complete & unaltered**.
- Info. received from **branch** office - **not be altered** + keep in manner depicting what was **originally** received from the **branches**
- Info. of such e-record should be capable of being displayed in **legible form**.
- There shall be proper system for **storage**, retrieval, display or printout of the e-records
- Such e-records shall **not be disposed** of or rendered unusable, unless permitted by law.
- **Backup** of such e-records shall be kept in servers **physically located in India**.
- Co. shall intimate the following to RoC on an **annual basis** at time of filing FS: (**No LIC**)

**Name** of the service provider

internet protocol (**IP**) address of service provider

**location** of the service provider

where BOA are maintained on **cloud**, such address as provided by service provider

**(2)** Where a co. has **branch office** (India or o/s India), it shall be **deemed** to have complied with provisions of BoA, if:

- **proper BOA** relating to transactions effected at branch office are **kept at that office** and
- proper **summarized returns periodically** are sent to co. at its RO or other place as u/ss (1)



(3) BOA open for **inspection** for directors only:

BOA maintained <b>within India</b>	<ul style="list-style-type: none"> <li>open for inspection at <b>RO</b> or other place in India</li> <li>by any <del>members</del> <b>director</b></li> <li>during business <b>hours</b></li> </ul>
BOA maintained <b>outside India</b>	<ul style="list-style-type: none"> <li>Director shall furnish a <b>request</b> to co. <b>setting out</b> the full details of the financial info. sought and the <b>period</b> for which it is sought.</li> <li>Co. shall produce such info. to director <b>within 15 days</b> of date of <b>receipt</b> of the written request.</li> <li>Such info shall be sought for by the <b>director himself</b> and <b>not by</b> or through his <b>power of attorney</b> holder or agent or representative.</li> </ul>

(4) Where **inspection** is made u/ss (3), **officers** and other **employees** of co. to give all assistance to the person making such inspection.

(5) BOA to be kept in good order

BOA pertaining to the period:

- not less than **8 FY** immediately preceding a FY, or
- where company had been in **existence** for <8 yrs, w.r.t. **all preceding years** together with vouchers relevant to any entry in such books of account shall be **kept in good order**.

Note - If **investigation** ordered - **CG** may direct that BoA may be kept for **longer** period.

(6) In case of contravention of such provision, following shall be **responsible**:

<b>MD</b>	<b>WTD</b> in charge of <b>finance</b>	<b>CFO</b>	Any <b>other</b> person of co. charged by BoD with such duty
-----------	--	------------	--

for a **fine** which shall **not < Rs. 50,000** which may extend **up to Rs. 5 lakhs**

Note - This section majorly talks about books of accounts and books and paper. Although, FS is mentioned in the first subsection, but details of FS is discussed in Sec 129 below.

Section 129: Financial Statement (FS)

(1) FS shall:

give a <b>true</b> and <b>fair</b> view of state of affairs of the co	<b>comply</b> with the <b>AS</b> notified u/s 133, and	shall be in form as prescribed in <b>Schedule III</b>
---	--	---

Provided that the items contained in such FS shall be **in accordance with the AS**:

Provided further that nothing contained in this sub-section shall apply to:

<b>insurance</b> or <b>banking</b> co.	<b>electricity</b> co.	<b>other class</b> of co. for which form of FS specified in other Act
--	------------------------	---

Provided also that FS shall **not be treated as not disclosing** a true and fair view of the state of affairs of the company, merely by reason of the fact that they do not disclose:

<b>In case of:</b>	<b>Matters which are not required to be disclosed by:</b>
Insurance co.	Insurance Act, 1938, or IRDA Act, 1999
Banking co.	Banking Regulation Act, 1949
Electricity co.	Electricity Act, 2003
Governed by other law	by that law

(2) At every **AGM** of co. - BoD shall **lay before** such meeting - **FS** for the FY

(3) Consolidated FS (CFS):

Where a co. has **one or more suby** - Prepare CFS of the co. and all subsidiaries (in addition to FS) in manner prescribed. Such CFS - **Lay before AGM** along with FS u/ss (2)

Provided that co. shall also **attach along** with its FS - a separate **statement** containing the **salient features of FS of its subsidiary, associates or JV** in Form AOC - 1

Rule 6 Manner of Consolidation

CFS shall be made in accordance with provisions of **Sch III + Applicable AS**

Provided that - If a co. is **not required** to prepare **CFS** under the **AS**, it shall be **sufficient** if it **complies** with provisions of CFS in **Schedule III** of the Act.

Provided further that - nothing in this rule shall apply w.r.t. prep of CFS if it meets **ALL** the following:

- i. it is wholly/partially owned **subsidiary** of another company **and**
  - all its other **members**, including those **not** otherwise **entitled** to vote,
  - having been intimated in **writing** and
  - **do not object** to the company not presenting CFS
- ii. securities **are not listed** or are not in the process of listing (in or outside India), **and**
- iii. **ultimate** or any intermediate holding co. **files CFS** with the **RoC** in compliance with Ind AS

(4) **Provisions** applicable to preparation, adoption and audit of **FS** of holding company shall, **mutatis mutandis**, apply **to the CFS** referred u/ss (3).

(5) **Without prejudice** to ss (1), where **FS do not comply with AS**, co. shall **disclose** in its FS:

deviation from AS

reasons for deviation

financial effects, if any, of such deviation

(6) **CG** may, on its **own or on application** by cos, **exempt** any class of companies from complying with this section, if it is considered necessary in **public interest**.

(7) If company contravention this section, following shall be responsible:

MD

WTD in charge  
of finance

CFO

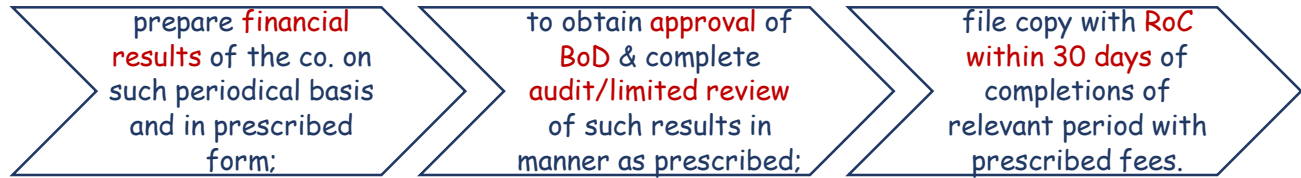
Any **other** person of co. charged  
by BoD with such duty

or in absence of any officer mentioned above, **all directors**

Punishable with - Jail up to **1 year** **or** fine Rs. 50,000 to Rs. 5 lakhs **or BOTH**

### Section 129A. Periodical financial results

CG may, require such class or classes of **unlisted companies**, as may be prescribed:



### Section 130 - Re-opening of Accounts on Court's or Tribunal's Orders:

(1) A company shall **not re-open** its BOA and **not recast** its FS **unless**:

- An **application to Court/Tribunal** in this regard is made by:



- And an **order** is made by court or Tribunal to this effect that:
  - the relevant earlier **accounts** were prepared in a **fraudulent** manner, or
  - the **affairs** of co. were **mismanaged** - casting doubt on reliability of FS

Provided that the court or Tribunal shall give **notice** to - CG, ITA, SEBI, etc. and **consider their representation**, if any, before passing orders.

(2) Without prejudice to the provisions contained in this Act the **accounts so revised or re-cast** under sub-section (1) shall be **final**.

(3) No order shall be made u/ss (1) for **re-opening** of BOA **relating to a period earlier than 8 FY** immediately preceding current FY.

Provided that, on **investigation**, where CG has directed for keeping BOA for **period > 8 years**, the BOA may be ordered to be **re-opened within such longer period**.

### Section 131 - Voluntary Revision of FS or Board's Report (after Tribunal's approval):



(1) If it appears to **directors** of a co. that:



they **may** prepare **revised** FS or BoD report:

- in respect of any of **3 preceding FY**
- after obtaining **approval** of the **Tribunal**
- on an **application** made by the **company** in prescribed form and manner and
- a **copy** of the order passed by the Tribunal shall be **filed** with the **Registrar**:

Provided that **Tribunal** shall give **notice** to **CG** and **ITA** and shall consider their **representation**, if any, made by that Government or the authorities before passing any order under this section.

Provided that such revised FS or report shall **not be prepared/filed more than once** in a FY

Provided also that **detailed reasons** for revision of such FS or report shall also be **disclosed** in the **Board's report** in the **relevant FY** in which such revision is being made.

(2) How much can you alter FS or report of previous FYs?

Where **copies** of previous FS or report have been **sent out** to **members** or delivered to **Registrar** or laid before the **Company** in general meeting, the revisions must be **confined to**:

- (a) **correction** w.r.t. which previous FS/report **do not comply** with provisions of sec 129 or 134; &
- (b) the making of any necessary **consequential** alternation.

(3) **CG** may make rules relating to or provisions as to:

- how previous FS or report shall be supplemented by document indicating correction
- function of company's auditor in case of revised FS
- require the directors to take prescribed steps

Note - Here, application will be made to Tribunal only. Courts (e.g., district court) cannot be involved.

Concept clarity check:

A Ltd. applied to Tribunal for revising FS on Dec 2022. Such application was approved, and revisions were made. A Ltd again applied in March 2023 for revision board report. Is such application valid?

**Yes! The limit of once in a year is for each of these - FS and BoD report. As in Dec 2022, application was made to revise FS, one application for revising Board report can be made.**

Section 132 - Constitution of National Financial Reporting Authority

(1) **CG** may, notification, **constitute** NFRA to provide for matters w.r.t. accounting & auditing (A&A) standards

(2) Functions of NFRA: NFRA shall: [**REQ-O**]

- a. Make **R**ecommendation to **CG** on formulation & laying down of A&A policies and standards.
- b. Monitor and **E**nforce compliance with A&A standards
- c. Oversee **Q**uality of service of professions associated with ensuring compliance of such standards and suggest measures for improvement therein.
- d. Such **O**ther function as may be prescribed

(3) Constitution of NFRA:

- a **chairperson** - appointed by **CG**, having expertise in accountancy, auditing, finance or law, and
- such **other members not > 15** consisting of part-time & full-time members as prescribed:

Each division of the NFRA shall be **presided** over by **Chairperson** or full-time Member authorised by Chairperson. [Section 3A]

Section 3B - There shall be an **executive body** of the NFRA consisting of **Chairperson and full-time Members** of such Authority **for efficient** discharge of its functions.

Such chairperson and members shall:

give declaration to **CG** regarding no **conflict** of interest or lack of **independence**

**not associate** with any **audit firm** (or related consultancy firm) during course of such appt + **2 years** after ceasing

(4) Powers to investigate: The NFRA shall:

(a) have power to **investigate**, either **suo motu** or on **reference** by **CG** into matters of professional or other misconducts under **CA Act, 1949**

Provided that - where **NFRA** has initiated such investigation, **no other institute** shall initiate or continue any proceedings in such matter.

(b) have same power as vested in civil court: *[A IPC]*

- Discovery and **production** of BoA and other docs at specified place & time;
- summoning and enforcing the **attendance** of persons and examining them on oath; and
- **inspection** of any books, registers and other docs. of co. at any place.
- issuing **commissions** for examination of witnesses or documents;

(c) where professional or other misconduct is **proved**, have the power to make order for:

(A) Imposing penalty:

- Individuals - Rs. 1 lakh to 5x of fees received
- Firms - Rs. 5 lakhs to 10x of fees received

(B) Debarring the member/firm from:

- Being appointed as an **auditor** or internal auditor or any other assignment
- Performing any **valuation** u/s 247 for **min. 6 months** or such higher period (not > 10 years) as determined by NFRA

(5) Any **person aggrieved** by order of NFRA u/ss (4) - may prefer an **appeal** before **Appellate** Tribunal

Additional points of NFRA:

Head office	New Delhi
Meeting	At any place in India as it may deem fit
Books of accounts	Maintain in manner as prescribed in <b>CG</b> in consultation with <b>C&amp;AG</b>
Audit	<b>C&amp;AG</b>
Annual Report	Each FY, giving full account of its activities during FY
Forward to <b>CG</b> (annually) <b>CG</b> to lay these reports before each House of Parliament	<ul style="list-style-type: none"> <li>• <b>Accounts</b> as certified by <b>C&amp;AG</b></li> <li>• Auditor's <b>report</b> thereon</li> <li>• <b>Annual Report</b></li> </ul>

Rule 3 of NFRA Rules: Classes of companies or BC governed by NFRA:

Following classes of companies and BC are monitored under NFRA:

(a) companies whose securities are **listed** on any stock exchange in India or outside India;

(b) **unlisted** public companies having:

**PUSC** not less than **500** crores, or

**T/O** not less than **Rs. 1,000 crore**

**Outstanding loans**, debentures and deposits of not less than **Rs. 500 crores**

as on the 31st March of immediately preceding FY

(c) insurance cos., banking companies, electricity companies or companies governed by special Act.

(d) any BC or company or person, etc. - on a reference **made to NFRA by CG** in **public interest**

(e) BC which is subsidiary or associate of any of the above mentioned companies if the **income** or **net worth** of such subsidiary or associate company > **20%** of **consolidated** income or net worth of such above mentioned companies,

Every BC, (other than co. as defined in section 2(20)), **formed in India** and governed under this rule

shall, within 15 days of appointment of an auditor u/s 139, inform NFRA in Form NFRA-1, the particulars of the auditor so appointed.

Where PUSC or T/O or o/s loans fall below limit for 3 consecutive years - NFRA stops governing.

Section 133: CG to prescribe Accounting Standards (AS):

CG may prescribe AS or any addendum thereto, as recommended by ICAI, constituted u/s 3 of CA Act, 1949, in consultation with and after examination of recommendations made by NFRA

Provided that:

- Until NFRA is constituted u/s 132,
- the CG may prescribe the AS or any addendum thereto,
- as recommended by ICAI, in consultation with and after examination of recommendations by National Advisory Committee on Accounting Standard (NACAS) constituted u/s 210A of Companies Act, 1956 (previous law)

Section 134: Financial Statement, Board's Report, etc.

(1) The FS, including CFS, shall be approved by the BoD before it is signed on behalf of BoD by:

- Chairperson of the co., if so authorized by BoD or else - 2 directors (1MD), AND
- CEO, CFO and CS

before it is submitted to auditor for his report thereon.

In case of OPC - Sign by one director only.

(2) Auditor's report shall be attached to every FS.

(3) In the FS laid before company in GM, a BoD's report shall be attached, which includes [FC WARM Dividend Reserve 3 Policy]:

Web address where AR u/s 92 has been placed

No. of board meetings

Directors's responsibility statement (DRS)

Details of fraud reported by auditors u/s 143(12) other than those reportable to CG

Statement on declaration given by ID u/s 149(6)

Explanation & comments on every qualifn, reservatn & adverse remark - by auditor in his report or by CS in practice in his secretarial audit report

state of company's affairs

particulars of loan, guarantee investments u/s 186

material change and commitments - affecting fin. position of co. between end of FY and date of report

contracts and arrangements with related parties u/s 188 (Form AOC -2)

amount proposed to be carried to any reserve

the conservation of energy, tech absorption, forex earnings and outgo as prescribed

recommended amount of dividend

statement indicating development & implementation of risk mgt. policy and risks identified therein

Policies on director's appointment and rem. (if covered u/s 178)

details of policy developed and implemented on CSR initiatives taken during the year

in case of listed company and every other public company having such PUSC >= Rs. 25 crores - statement indicating the manner in which formal annual evaluation of performance of Board, its Committees and of individual Directors has been made

Other matters as may be prescribed

Provided that - where above disclosures are made in FS already, such disclosures shall be referred to instead of repeating it in BoD's report

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

Note - CG may prescribe an abridged Board's report, for compliance with this sec. by OPC/small co.

(4) BoD report shall, in case of an OPC, mean a report containing explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by auditor in his report.

(5) Director's responsibility statement shall state that:

a. in preparation of the annual accounts, the applicable AS had been followed along with proper explanation relating to material departures;

b. Directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of FY and of the P&L for that period;

- c. Directors had taken proper and sufficient **care for**:
- **the maintenance** of adequate accounting records as per this Act
  - **safeguarding the assets** of the co. and
  - for preventing and detecting **fraud** and other irregularities;
- d. the Directors had prepared the annual accounts on a **going concern** basis; and
- e. the Directors, in the case of a **listed company**, had laid down internal financial **controls (IFC)** to be followed by the company and that such IFC are **adequate** and were **operating effectively**.

Explanation: For the purposes of this clause, the term "IFC" means:

- the **policies** and procedures adopted by the company
  - for ensuring the orderly and **efficient conduct** of its business,
  - including **adherence** to company's policies, the **safeguarding** of its assets, the prevention and detection of **frauds** and errors, the accuracy and **completeness** of the accounting records, and the **timely** preparation of reliable financial information;
- f. the Directors had devised proper **systems** to ensure compliance with the provisions of all applicable **laws** and that such systems were **adequate** and operating **effectively**.

(6) Sign on BoD report - Chairman, if authorised. Or else, 2 directors (1 MD)

Note - In case where in the co. there is **only 1 director**, FS shall be **signed** by such 1 dir. (e.g., OPC)

(7) A signed **copy** of every FS, including CFS, if any, shall be **issued**, circulated or published with:

any **notes** annexed to or forming part of such FS

**auditor's report**

**Board's report**

(8) If a company is in **default** in complying with this section:

**Co.** liable to penalty of **Rs. 3 lakhs**; **OID** shall be liable to penalty of **Rs. 50,000**

#### Rule 8: Matters to be Included in Board's Report

1. BoD's report shall be prepared based on standalone FS of the co. and shall report on highlights of performance of subsy, associates and JVs and their contribution to overall performance of co.
2. Additionally, BoD report shall include following information:
  - (i) the **financial** summary or highlights;
  - (ii) the change in nature of **business**, if any;
  - (iii) details of directors or KMP who were **appointed** or have **resigned** during the year;
  - (iiia) statement regarding opinion of Board w.r.t. **integrity**, expertise and experience of **independent** director appointed during the year".
  - (iv) names of cos. which have **become or ceased** to be its subsy, JV or assoc. during the year;
  - (v) the details relating to **deposits**, covered under Chapter V of the Act:
    - a. accepted
    - b. remaining unpaid or unclaimed as at the end of the year;
    - c. any **default** in repayment of **deposits** or interest thereon **during** the year and **if so**,



number of such cases and the total amount involved:

at the beginning of year

max during the year

at the end of year

- (vi) the details of deposits which are not in compliance with requirements of Chapter V;
- (vii) details of significant and material orders passed by regulators/courts/tribunals impacting the going concern status and company's operations in future;
- (viii) details in respect of adequacy of internal financial controls w.r.t. FS
- (ix) a disclosure, as to whether maintenance of cost records as specified by the CG u/s 148, is required and accordingly such accounts and records are made and maintained,
- (x) a statement that the co. has complied with provisions relating to the constitution of Internal Complaints Committee under the Sexual Harassment related Act
- (xi) details of application made or any proceeding pending under IBC during the year along with their status as at the end of the financial year.
- (xii) the details of difference between amount of valuation done at time of one time settlement and the valuation done while taking loan from the Banks or FI along with reasons thereof.

### Section 135: Corporate Social Responsibility (CSR):

Read with Companies (Corporate Social Responsibility Policy) Rules, 2014

(1) Every co. having:

- net worth  $\geq$  Rs. 500 crores, or
- turnover  $\geq$  Rs. 1,000 crore or
- net profit  $\geq$  Rs. 5 crores

During immediately preceding FY

shall constitute CSR Committee consisting of 3 or more Directors (at least 1 independent director)

#### Note

1. Where co. is not required to appoint ID u/s 149(4), CSR committee shall have 2 or more dir.
2. Pvt. co. having only 2 directors shall constitute its CSR Committee with 2 such directors
3. If any of the limits not met for 3 consecutive FYs - not required to comply with Sec 135.

Exemption - Where the amount to be spent by co. u/ss (5)  $\leq$  Rs. 50 lakhs, CSR committee shall not be applicable. In such case, function of CSR committee to be discharged by BoD.

(2) Board report u/s 134 to disclose the composition of CSR committee

(3) Function of CSR committee:

- Formulate and recommend to board CSR policy indicating activities to be undertaken
- Recommend amount of expenditure to be incurred on such activity
- Monitor CSR policy of company

(4) The Board of such company shall:

- (a) after taking into account recommendations of CSR Committee, approve CSR Policy and disclose contents of thereof in its report and place it on website.
- (b) ensure that activities as are included in CSR Policy are undertaken by the company.

- (5) The Board shall ensure that the company **spends**, in every FY,
- at least **2% of avg net profits**
  - made during the **3 immediately preceding FY** or
  - where co. has **not completed 3 FY** since incorp., during such immediately preceding FYs in **pursuance** of its CSR Policy

Provided that the co. shall **give preference to the local area** and areas around it where it operates, for spending the amount earmarked for CSR activities:

Provided further that, if a co. **fails** to spend such amount:

- **Board** shall specify **reasons** for not spending the amount in its report u/s **134**, and
- **unless** the unspent amt. relates to any **ongoing project**, **transfer** it to a **Fund** specified in **Schedule VII**, within **6 months** of expiry of the FY

Provided that if co. **spends** excess amounts, such company **may set off** such excess amount against the requirement to spend **for such number of succeeding FY** and in such manner as prescribed.

As per Rules

Where co. **spends** an amount in **excess** of requirement, such **excess** amount may be **set off** against requirement to spend u/ss (5) up to immediate **succeeding 3 FY** provided that:

- (i) such **excess amt.** shall **not include** the **surplus** arising out of such CSR activities
- (ii) the Board of the company shall pass a **resolution** to that effect.

(6) Transfer ongoing project to special account:

Amt. remaining **unspent** u/ss (5), pursuant to any **ongoing project**, undertaken by a co. in pursuance of its CSR Policy, shall be:

- **transferred within 30 days** from **end of FY** to a **special account** to be opened in any scheduled bank to be called "**Unspent Corporate Social Responsibility Account**", and
- **spent it** in pursuance of obligation towards CSR Policy **within 3 FY** from date of such trf,
- failing which, the **co. shall trf.** the same to a **Fund** (as per sch VII) **within 30 days** from date of completion of the 3<sup>rd</sup> FY.

(7) Default u/ss (5) or (6):

**Co.** shall be liable to penalty - **Lower** of:

- **2x** of (amt. required to be transferred to the Fund or unspent CSR account) or
- **Rs. 1 crore**

**OID** shall be liable to penalty - **Lower** of:

- **1/10th** of (amt required to be transferred to the Fund or unspent CSR account) or
- **Rs. 2 lakhs**

**Companies (Corporate Social Responsibility Policy) Rules, 2014**

**Rule 2: Definitions**

"**CSR**" means the **activities undertaken** by a Company in pursuance of its **statutory obligation** u/s 135 as per provisions contained in these rules, but **shall not include** the following, namely: (**SPEL FB**)

Sponsorship

Political

Employee

Law

Foreign

Business

- (i) activities undertaken in **normal course of business** of the company.  
 Provided that any company engaged in research and development (R&D) activity of new vaccine, **drugs and medical devices** in their normal course of business may undertake R&D activity of new vaccine, drugs and medical devices related to COVID-19 for FY 2020-21 to 2022-23 subject to the conditions that:
- (a) such R&D activities is carried out in **collaboration** with institutes mentioned in Sch VII;
  - (b) details of such activity to be **disclosed** separately in **Annual report on CSR** (in BoD report);
- (ii) any **activity undertaken** by **co. outside India** except for **training** of Indian **sports** personnel representing any State or UT at **national level** or **India** at **international level**;
- (iii) **contribution** of any amount directly or indirectly to any **political party** u/s 182 of the Act;
- (iv) activities benefitting **employees** of the company;
- (v) activities supported by cos. on **sponsorship basis** for **marketing benefits** for its products;
- (vi) activities carried out for fulfilment of **any other statutory obligations** under any other law

"Administrative overheads" means:

- expenses incurred for '**general** mgt. and admin' of CSR functions
- but shall **not include** expenses directly incurred for **designing, implementation, monitoring,** and evaluation of a **particular** CSR project or programme.

"Net profit" means net profit of a company **as per its FS**, but shall **not include** the following, namely:

- (i) **profit** arising from **overseas branch(es)** of co., whether operated as separate co. or not; and
- (ii) any **dividend** received from **other** companies in India, which are covered under and complying with prov. of sec 135 of the Act.

"Ongoing Project" means a **multi-year project** undertaken in **fulfilment** of its CSR obligation having **timelines <= 3 years excluding FY** in which it was **commenced** and shall include such project that was **initially not approved** as a multi-year project but whose duration has been **extended beyond one year** by the board based on reasonable justification.

#### Rule 4. CSR Implementation

- (1) Board shall ensure that CSR activities are **undertaken** by the company **itself** or **through**:
  - (a) **Sec 8** company, or a registered **public trust** or a registered **society**:
    - established by the **company**, either singly or along with any other company, or
    - established by **CG** or State **Government**; or
    - having an established track record of **at least 3 years** in undertaking similar activities
  - (b) **any** entity established under an **Act** of Parliament or a State legislature; or
- (2) Every **entity**, covered above, who **intends** to undertake any CSR activity, shall **register** itself with the **CG** by filing **form CSR-1** with **Registrar**.

Form CSR-1 shall be **signed** and submitted **electronically** and shall be **verified digitally** by **CA, CS** or **CMA** in practice.

On submission thereof, a **unique CSR Registration Number** shall be generated automatically.

- (3) A company may engage international organisations for designing, etc. of the CSR projects or programmes as per its CSR policy as well as for capacity building of their own personnel for CSR.
- (4) A company may also **collaborate with other companies** for undertaking projects in such a manner that CSR committees of respective cos. are in a **position to report separately** on such project.
- (5) Board shall **satisfy** itself that **funds so disbursed** have been **utilised** for purposes **as approved and CFO** (or person responsible for fin. mgt.) shall **certify** to the effect.
- (6) In case of **ongoing project**, Board shall **monitor** the implementation of the project w.r.t. the **approved timelines** and year wise allocation and shall be **competent** to make **modifications**, if any, for smooth implementation of the project within the overall permissible time period.

**Rule 5: CSR committee:**

CSR Committee shall formulate and recommend to the Board, an **annual action plan** in pursuance of its CSR Policy, which shall **include** the following, namely:

- (a) the **list** of CSR **projects** that are **approved** to be undertaken in areas specified in Sch VII;
- (b) the **manner** of execution of such projects;
- (c) the **modalities** of utilisation of funds and implementation schedules for the project;
- (d) **monitoring** and reporting mechanism for the projects; and
- (e) details of need and **impact assessment**, if any, for the projects undertaken by the company:

Provided that **Board may alter** such plan at any time during FY, **on recommendation** of its CSR Committee, based on the **reasonable justification** to that effect.

**Rule 7: CSR Expenditure:**

- (1) Board shall ensure that **admin overheads** shall **not exceed 5%** of **total CSR** expense for the FY.
- (2) Any **surplus** arising out of CSR activities shall:
  - **not form part** of **business profit** of a co. and
  - shall be **ploughed back** into same project or
  - **trf.** to **Unspent CSR Account** and spent as per CSR policy and **annual action plan** or
  - **trf.** to a **Fund** specified in Sch VII, **within 6 months** of expiry of the FY.
- (3) Covered above.
- (4) CSR amount may be spent for creation or acquisition of a **capital asset**, which shall be held by:
  - (a) **section 8** company, or a Registered Public Trust or Registered Society, having **charitable objects** and CSR Registration Number; or
  - (b) **beneficiaries** of the said CSR project, in the form of **self-help groups**, collectives, entities; or
  - (c) a public authority:

Provided that any capital asset created prior to commencement of this Rule, shall within 180 days (may seek further 90 days) comply with this provision.

Rule 8: CSR Reporting

(1) **Board Report** pertaining to any FY shall include an "Annual report on CSR"

(2) In case of a **foreign co.**, the **BS** u/s 381 of the Act, shall contain annual report on CSR

**\*\* Annual Report on CSR** containing particulars specified in Annexure I or II, as applicable.

(3) Impact assessment:

(a) Every co. having **avg CSR obligation**  $\geq$  **Rs. 10 crores** in **3 immediately preceding FYs**, shall:

- **undertake** impact assessment,
- through an **independent agency**,
- of their CSR projects having **outlays**  $\geq$  **Rs. 1 crore**, and
- which have been **completed not less than 1 year before** undertaking the impact study.

(b) Impact assessment **reports** - Place before **BoD** & **annexed** to the annual report on CSR.

(c) Co. undertaking impact assessment may **book expense** towards CSR for that FY, not exceeding **lower of:**

- 5% of **total CSR exp.** for that FY or
- **Rs. 50 lakhs**

Additional clarifications on CSR:

1. Read Sch VII from ICAI Module Pg. 9.44 (not imp. from exam point of view. Just read casually)
2. Entries in Sch VII is to be interpreted **liberally**.
3. CSR activity should be taken up as a project. **One-off events** such as marathon **won't qualify**
4. Expense incurred by foreign **holding co.** for **CSR activities in India** will **qualify** as CSR spend of the **Indian subsidiary** if, it is routed through Indian suby.

COVID related clarifications:

1. Spending of CSR funds for **COVID-19 is eligible** CSR activity.
2. spending of CSR funds for carrying out **awareness campaigns** or public outreach campaigns on **COVID-19 vaccination programme** is an **eligible** CSR activity
3. Setting up makeshift hospitals and **temporary** COVID Care facilities is an **eligible** CSR activity

Section 136: Right of member to copies of audited financial statement.

(1) A copy of following documents laid before **GM**:

**FS**    **CFS, if any**    **auditor's report**    **every other doc.** required to be attached to FS

shall be **sent** to every:

**member**    **trustee for DH**    **all other entitled person**

**not less than 21 days** before the date of meeting.

Provided that if **copies** of docs are sent **less than 21 days** before date of meeting, it shall be **deemed** to have been **duly sent** if it is so agreed by **members**:

If company has share capital:  
Majority in numbers + 95% of PUSC

If company has no SC:  
95% of total VP

Provided further that, in case of **listed co.**, this sub-section shall be **deemed** to be **complied** with if:

- copies of docs. are made available for **inspection** at **RO** during working hours for **21 days** before date of meeting
- a statement containing **salient features** of such docs or **copies** thereof is **sent** to member, DT of DH in **Form AOC-3** not less than **21 days** before date of meeting **unless** SH ask for **full FS**.

**Note** - Cos. which are reqd to comply with Cos (**Ind AS**) Rules, 2015 shall send in Form **AOC - 3A**

**Mode of sending FS:** In case of all:

<b>listed</b> companies and	such <b>public</b> companies having: - <b>NW</b> of <b>more than Rs. 1 crore</b> and - <b>Turnover</b> of <b>more than Rs. 10 crore</b>
-----------------------------	---

the financial statements may be sent:

<b>Shareholding is in:</b>	<b>Mode</b>
Demat form + Email IDs <b>registered</b> with depository	<b>E-mode</b>
Otherwise than demat form but members have positively <b>consented</b> in writing to e-mode	<b>E-mode</b>
In all other cases	<b>dispatch</b> of <b>physical</b> copies through any recognised mode of delivery u/s 20

Provided - **Listed co.** shall also place its FS including CFS, and other docs on its **website**

Provided also that every **listed company** having **subsidiary(ies)** shall place **separate audited accounts** w.r.t. **each** of **subsidiary** on its **website**, if any.

Provided also that a **listed company** which has a **subsidiary incorporated outside India** (herein referred to as "**foreign subsidiary (F-sub)**"):

where such F-sub is statutorily required to prepared CFS under law of the country of incorporation - this proviso is complied with if such CFS is placed on website of listed co.	where F-sub is not required to get FS audited and hence does not get FS audited - holding Indian listed co. may place unaudited FS on website**
---	---

**\*\***Where FS is in language other than English, place a **translated copy** in English on the website.

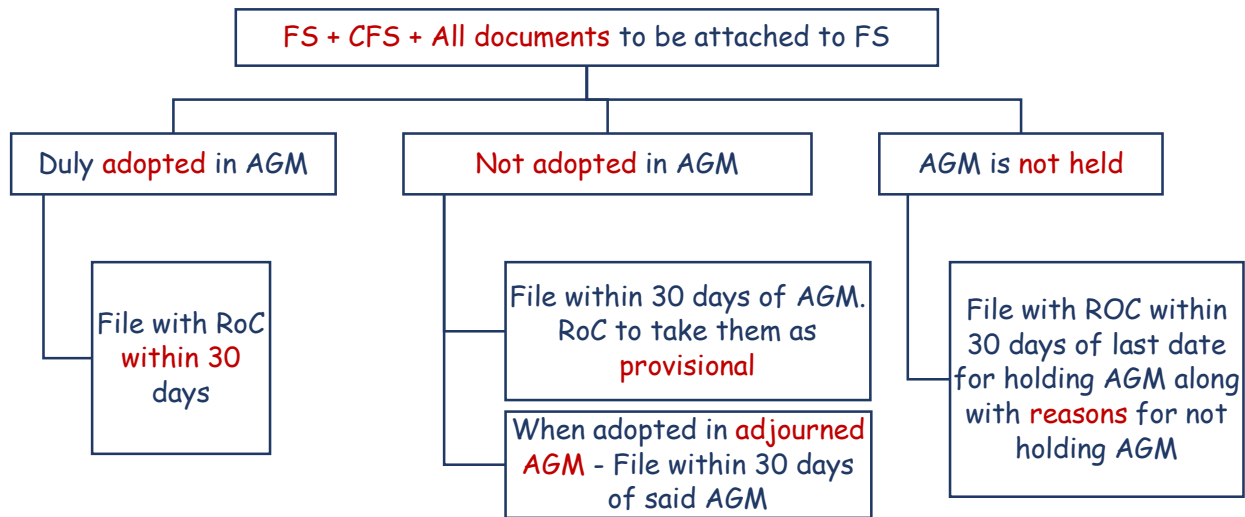
(2) Co. shall allow members/DT to **inspect** the documents stated u/ss (1) at its **RO** during **biz. hours**.

Provided that **every co.** having subsy shall **provide** a copy of **separate audited or unaudited** FS, as prepared in respect of each of its subsidiary to **any member** of the company who asks for it.

(3) **Default in complying with this section:**

Co. - Liable to penalty of Rs. 25,000; OID - Liable to penalty of Rs. 5,000

**Section 137: Copy of FS to be filed with RoC:**



**(1) Filing FS with ROC:**

- A copy of **FS**, including CFS, along with all docs required to be attached to FS,
- **duly adopted** at AGM shall be
- filed with **RoC** within **30 days** of date of AGM
- in the following forms:

AOC 4	Financial Statement and other documents
AOC 4 CFS	Consolidated Financial Statement
AOC-4-NBFC (Ind AS)	NBFCs to file FS and other documents with the Registrar
AOC-4 CFS NBFC (Ind AS)	NBFCs to file CFS with the Registrar

**Note** - Along with such FS, co. shall **attach accounts** of its **subsy** which have been **incorporated outside India** and which have **not established** their place of business in India.

**Where FS is not adopted in AGM or adjourned AGM:**

- Such **unadopted** FS shall be **filed** with RoC within 30 days of date of AGM.
- RoC to take it in records as **provisional** till FS are filed after adoption in the adjourned AGM

**Where FS is are adopted in adjourned AGM** - File with RoC within 30 days of such adjourned AGM

**In case of OPC:**

File copy of FS duly adopted by its member **within 180 days** from closure of **FY**

**In case of Foreign subsidiary not having audited FS - Send unaudited FS to RoC**

In case of a subsy incorporated o/s India (foreign subsidiary) which is not required to get FS audited under law of such country and does not get it audited - Holding Indian company to file **unaudited FS + declaration** to such effect to **ROC**

Where such FS is in language other than English - **translated copy** to be sent.

**(2) Where AGM is not held, FS + Documents duly signed shall be filed with RoC within 30 days of last**

date before which AGM should have been held.

(3) Co. fails to file copy of FS:

- Co. - Liable to penalty of Rs. 10,000 + Rs. 100/days - Max. Rs. 2 lakhs
- Person responsible - Liable to penalty of Rs. 10,000 + Rs. 100/days - Max. Rs. 50,000

Person responsible -

- MD and CFO, or
- in absence of MD and CFO - any other director charged with such responsibility
- in absence of any such director - all directors.

Additional Points:

1. Following class of companies shall file FS and other documents in e-form AOC-4 XBRL:

co. **listed** in India and their **Indian suby**

Co. having **PUSC**  $\geq$  5 cr.

Co. having **turnover**  $\geq$  100 cr.

Cos. required to prepare FS as per **Ind AS**

Note - Once you come in purview of above limit, continue to file AOC-4 XBRL.

2. NBFCs, Housing finance companies engaged in business of banking or insurance sector - exempted from filing FS.

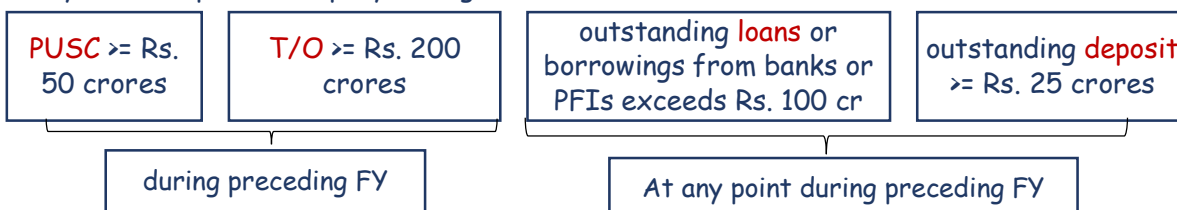
Section 138: Internal Audit

Prescribed class of cos. shall **appoint internal auditor** (CA or cost accountant, or such other professional as may be decided by the Board) to **conduct internal audit** of co's functions and activities

Rule 13: Companies required to appoint Internal Auditor:

Following companies shall be required to appoint an internal auditor (who can be **either individual or partnership firm or BC**), namely:

- (a) every **listed** company;
- (b) every **unlisted** public company having:



- (c) every **private** company having-



Who shall become an internal auditor - Either individual or partnership firm or body corporate - CA or cost accountant, or such other professional as may be decided by the Board to **conduct internal audit**

What is his role? - To conduct internal audit of the functions and activities of the company



Note - An internal auditor may or may not be an *employee*.

Concept clarity check:

If an unlisted co. has outstanding loan of Rs. 100 exactly, in such case, the provision of internal auditor shall not apply as the law says - outstanding loan and borrowings from banks or financial institution exceeding Rs. 100 crore or more. So exact 100 crore will not be covered here.

# Chapter 10 - Audit and Auditors

[Section 139 to 148]

Sec	Name	Sec	Name
139	Appointment of Auditors	144	Auditor not to Render Certain Services
140	Removal, Resignation of Auditor and Giving of Special Notice	145	Auditor to Sign Audit Reports, etc
141	Eligibility, Qualifications and Disqualifications of Auditors	146	Auditors to Attend GM
142	Remuneration of Auditors	147	Punishment for Contravention
143	Powers and Duties of Auditors and Auditing Standards	148	CG to Specify Audit of Items of Cost in Respect of Certain Companies

Form	Section	Purpose
ADT-1	139	Form to inform the Registrar regarding the appointment of auditor by the co.
ADT-2	140	Application for removing the auditor before the expiry of their term by the co.
ADT-3	140	Notice of resignation of auditor
ADT-4	143(12)	Form to report any suspected fraud by the auditor to the Central Government

## Section 139: Appointment of auditors

### (1) Appointment of first auditor and tenure:

- Every co. shall, at the **first AGM** appoint an individual or firm ~~or BC~~ as an auditor,
- who shall hold office from conclusion of that meeting till conclusion of **6th AGM** and,
- thereafter, till conclusion of every 6<sup>th</sup> AGM, and
- the **manner** of selection of auditor shall be as may be **prescribed**.

### Rule 3: Manner of selection of Auditor:

#### (1) Who will select the auditor?

In case where a company is:	Competent Authority:	Responsibility: [MCQ]
Required to constitute AC u/s 177	Such <b>AC</b> shall -	<ul style="list-style-type: none"> <li>• take into <b>consideration Qualification</b> and experience (Q&amp;E) of proposed indiv/ firm</li> <li>• whether such Q&amp;E are <b>Commensurate</b> with size and requirements of the co.</li> <li>• while considering appointment, have regard to any order or <b>pending proceeding</b> related to <b>professional Misconduct</b> before ICAI or court.</li> </ul>
Not required to constitute such AC	the <b>Board</b> shall -	

(2) AC/Board may **call** for such other **info.** form proposed auditor as it may deem fit.

(3) Recommendation of name of auditor: Subject to sub-rule (1):

- Where co. is required to constitute AC - Such AC shall **recommend** name of indiv/firm as

auditor to Board for consideration.

- In other cases - Board shall consider and recommend an indiv/firm as auditors to members in AGM for appointment

(4) If Board agrees with AC recommendation - further recommend to member in AGM for appt.

(5) If Board disagrees - Refer back to AC for reconsideration citing reasons for disagreement

What if AC decides not to reconsider original recommendation?

If AC, after considering reasons by Board, decides not to reconsider its original recom.:

Board shall record reasons for its disagreement with AC and send its own recom. for consideration of members in AGM; and

if Board agrees with recommendations of AC, it shall place the matter for consideration by members in AGM.

Before such appointment, the following shall be obtained from the auditor:

- written consent of such auditor to such appointment
- Certificate from the auditor stating that: [P LET]

indv/firm is Eligible for appt. and is not disqualified under this Act or CA Act

proposed appt. is as per the Terms provided in this Act

proposed appt. is within Limits laid down by or under authority of the Act

list of Proceedings against auditor/audit firm or any partner thereof pending w.r.t. professional matters of conduct, as disclosed in the certificate, is true and correct

Note - Certificate shall also indicate whether auditor satisfied criteria u/s 141

On appointment of auditor: The company shall:

- inform the auditor concerned of his or its appointment, and
- file notice (Form ADT-1) of appt. with RoC within 15 days of meeting in which auditor is appt.

Explanation: For this Chapter, "appointment" includes reappointment

NFRA Rules:

Every BC [other than co. u/s 2(20)] formed in India + governed by NFRA shall inform NFRA (Form NFRA-1) w.r.t., the particulars of auditor appt. u/s 139 (1) within 15 days of such appt.

(2) Tenure, re-appointment and cooling period of an auditor:

the following companies (except OPC and small cos):

Listed co.

UPC having PUSC  $\geq$  10 cr

Private Ltd. cos. having PUSC  $\geq$  50 cr

All companies having public borrowings from bank/PFI or public deposit  $\geq$  50 cr

shall not appoint or re-appoint:

- an individual as auditor for > 1 term of 5 consecutive years; and
- an audit firm as auditor for > 2 terms of 5 consecutive years:

Cooling period:

individual auditor who has completed his term under clause (a)

Audit firm which has completed its term under clause (b)

shall not be eligible for re-appointment as auditor in the same company for 5 years from the completion of his term

Incoming auditors should not have common partner with retiring auditors:

As on date of appt., no audit firm having common partner(s) to other audit firm, whose tenure has expired immediately preceding the FY, shall be appt. as auditor of same company for 5 years:

Note - Nothing contained in this sub-section shall prejudice right of the company to remove an auditor or the right of the auditor to resign from such office of the company.

(3) Rotation of auditor:

Subject to the provisions of this Act, members of a company may resolve to provide that:

- (a) in the audit firm appointed by it, the auditing partner and his team shall be rotated at such intervals as may be resolved by members; or
- (b) the audit shall be conducted by more than one auditor.

(4) CG may, by rules, prescribe manner in which cos. shall rotate their auditors.

Rule 6: Manner of rotation of auditor:

1. AC shall recommend to Board - Name of indiv/firm who may replace incumbent auditor on expiry of term.
2. Where co. is required to constitute AC - Board shall consider recommendation of AC  
In other cases - Board shall itself consider rotation of auditors and recommend for appt. of next auditors by members in AGM
3. For the purpose of the rotation of auditors-
  - (i) in case of an auditor (indv/firm), period for which indiv/firm has held office as auditor prior to commencement of the Act shall be taken into account for calculating 5 or 10 consecutive years.
  - (ii) the incoming auditor/firm shall not be eligible if it is associated with outgoing auditor /audit firm under the same network of audit firms.

Note - "Same network" includes firms operating under same Brand name or Trade name or common Control (BTC)

4. Where co. has appointed 2 or more indiv/firms or a combination thereof as joint auditors, co. may follow rotation of auditors in such a manner that both or all of the joint auditors, as the case may be, do not complete their term in the same year.

Explanation: For rotation of auditors:

- (a) break in term for 5 continuous years shall be considered as fulfilling requirement of rotation;

(b) if a partner, who is in charge of an audit firm and also certifies the FS, retires from said firm and joins another firm of CAs, such other firm - ineligible to be appt. for 5 years.

Refer Illustration in ICAI Module Pg. 10.10 and 10.11 (not imp. as it was transition provision)

**(5) Auditor in case of a Govt co. (Subsequent auditor)**

- Notwithstanding anything contained in sub-section (1),
- in case of Govt. co. or any other co. owned/controlled (directly or indirectly) by CG or SG or partly by CG and partly by SG,
- the C&AG shall, in respect of a FY, appoint an auditor duly qualified to be appt.,
- within 180 days from commencement of FY,
- who shall hold office till conclusion of AGM.

**(6) First auditor in case of Company (other than Govt co.)**

- Notwithstanding anything contained u/ss (1),
- the first auditor of a co. (other than Govt. co) shall be appointed by BoD
- within 30 days from the date of registration of co. and
- in case of failure of BoD to appoint such auditor - Inform the members, who shall within 90 days at an EGM appoint such auditor and
- such auditor shall hold office till conclusion of the first AGM.

**(7) Auditor in case of a Govt co. (First auditor)**

- Notwithstanding anything contained in sub-section (1) or (5),
- in case of Govt. co. or any other co. owned/controlled (directly or indirectly) by CG or SG or partly by CG and partly by SG,
- the first auditor shall be appointed by C&AG
- within 60 days from the date of registration of the co. and
- in case C&AG fails to appt. such auditor within 60 days - BoD shall appt. within next 30 days;
- and in case of failure of BoD to appoint within next 30 days - Inform the members, who shall within 60 days at an EGM appoint such auditor and
- such auditor shall hold office till conclusion of the first AGM

**(8) Any casual vacancy in the office of an auditor shall:**

Other than Govt co: i.e., Co. whose accounts are NOT subject to audit by C&AG	Fill casual vacancy: <ul style="list-style-type: none"> <li>• By BoD - 30 days</li> <li>• If vacancy due to resignation - Appt. to be approved at GM (Ordinary Resolution) within 3 months of BOD recommendation.</li> <li>• Hold office till conclusion of next AGM</li> </ul>
Co. whose accounts are subject to audit by C&AG	C&AG to fill vacancy within 30 days. Failure of C&AG - BoD to fill vacancy - Next 30 days

**(9) Re-appointment of retiring auditor:**

A retiring auditor may be re-appointed at an AGM, if:

- he is not disqualified for re-appointment;
- he has not given a notice unwillingness to be re-appointed in writing; and
- SR has not been passed at that meeting:

appt. some other auditor or	providing expressly that he shall not be re-appointed.
-----------------------------	--

- (10) Where at any **AGM**, **no auditor** is appointed or re-appointed, the **existing** auditor shall **continue** to be the auditor of the company.
- (11) Where a co. is required to constitute **AC u/s 177**, all **appointments**, including the filling of a **casual vacancy** of auditor shall be **made** after taking into account **recommendations** of such committee.

Note: For this chapter:

1. "Appointment" includes reappointment
2. Word "firm" shall include an LLP incorporated under LLP Act, 2008
3. NFRA Rules related explanation has been intentionally skipped from notes. Student may consider reading NFRA Rules Pg. 10.16 to 10.18 of ICAI mat.

Concept clarity check:

1. Can an auditor be appointed for 4 years? - **No. He cannot be appointed for less than 5 years. However, ratification is needed each year.**
2. Can an audit firm be appointed as internal auditor during cooling period? - **Yes! There is no such restriction. The only restriction is - such audit firm cannot be appointed as statutory auditor.**

### Section 140: Removal, resignation of auditor and giving of special notice

#### (1) Removal of auditor:

Auditor appointed u/s139 may be **removed** from his office **before expiry** of his term only by:

- **SR** of the company
- After obtaining previous approval of **CG** in manner prescribed

Provided that - Before any such action, auditor shall be given **ROBH**

#### Rule 7 - Manner of removal of auditor:

- Application to **CG** shall be made within **30 days** of BoD resolution in Form **ADT-2**.
- Co. to hold **GM** for passing SR within **60 days** of receipt of approval of **CG**



#### (2) Resignation of auditor:

- Auditor who has **resigned** shall,
- file **within 30 days** from date of resignation,
- a **statement** in Form **ADT-3** with the **company** and **Registrar** and **C&AG** (only in case of Govt. co)
- indicating **reasons** and other facts as may be relevant with regard to his resignation.

#### (3) Contravention: Auditor fails to comply with provision u/ss (2) - Liable to:

Penalty of - **Lower** of Rs. **50,000** or an amount equal to remuneration of auditor

In case of **continuing** failure - Further penalty of Rs. **500/day** after the first - **Max Rs. 2 lakhs**

#### (4) Special notice for removal of auditor and representation thereon by auditor

- (i) **Special notice** shall be required for resolution at **AGM** for:
  - a. **appointing** a person other than a retiring auditor, or
  - b. providing **expressly** that retiring auditor shall **not** be re-appointed, **except** where retiring auditor has **completed** consecutive tenure of 5/10 years.

(ii) On receipt thereof - Company shall **forthwith** send a copy thereof to the **retiring auditor**.

(iii) Where **notice** is given + retiring auditor makes **representation in writing** (not exceeding a reasonable length) **and requests** its notification to members, the **company shall**, unless the representation is received by it too late for it to do so, —

- (a) in **notice** given to members, **state the fact** that representation is made; and
- (b) send **copy** of representation **to every member**,
- (c) if copy thereof couldn't be sent (cause it was received too late or due to cos. default):
  - auditor may require the representation to be **read out** at the meeting (without prejudice to his right to oral representation) \*
  - a copy of such representation shall be filed with the **Registrar**:

\*Tribunal may order not to send representation:

- On application by co/aggrieved person, if **Tribunal** is satisfied that rights are being abused,
- it may order that such copy **may not be sent**, and representation **need not be read out**

(5) Tribunal may order to change auditor:

- Tribunal may:

**suo motu**

application by **CG**

application by person **concerned**

- if it is **satisfied** that **auditor** has (directly or indirectly):
  - acted in a **fraudulent** manner or
  - abetted or **colluded** in any fraud by, or in relation to, Co., its **Directors** or officers,
- it may, by **order**, direct the company to **change its auditors**

Instead of directing the company, Tribunal may itself change auditor:

If **application** is made by **CG** and Tribunal is **satisfied** that any change of the auditor is required it shall, within **15 days** of receipt of such appln, make an **order** that:

- **he shall not function** as an auditor and
- the **CG** may **appoint another** auditor in his place:

An auditor (indv/firm) against whom **final order** has been passed under this section shall:

- **not be eligible** to be appt. as an auditor of **any co.** for **5 years** from passing of such order **and**
- the auditor shall also be **liable** for action u/s **447**.

Note - In case of a **firm**, the **liability** shall be of the **firm and** that of **every partner (s)** who acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the co., dir. or officers.

Section 141: Eligibility, qualifications and disqualifications of auditors

1. Eligibility:

A **person** shall be eligible for appt. as auditor only if he is a **CA**.

A **firm** where **majority (not all)** of partners are **CAs practicing** in India - Such firm may be appt.

2. Who will sign on behalf of firm: Where a firm including LLP is appointed as an auditor - only the **partners who are CAs** shall be **authorised** to **act and sign on behalf** of the firm.

3. Disqualification: Following persons shall **not be eligible** for appt. as **auditor** of a company, namely:

- (a) Body Corporate (other than LLP)

- (b) an **officer** or employee of the company;
- (c) a person who is a **partner** or employee of an officer or employee of the company;
- (d) a person who, or his **relative** or partner:
- (i) is holding any **security** of CASH OR SOH.  
Except - **Relative** may hold security in **company** or **ASH** of **face value not > Rs. 1 lakh**;  
Note - If relative acquires security above Rs. 1 lakh, **corrective action** to maintain limits if Rs. 1 lakh shall be taken by the auditor within **60 days** of such acquisition or interest
- (ii) is **indebted** to the CASH or SOH **> Rs. 5 lakhs**
- (iii) has given **guarantee** or provided **security** w.r.t., **indebtedness** of any 3 person to CASH or SOH **> Rs. 1 lakh**

- (e) a person or a **firm** who, whether directly or indirectly, has **business relationship** with CASH or SOH or associate of such holding co.;

Business Relationship: Any transaction entered into for a **commercial purpose**, **except**:

- (i) transactions which are in nature of **prof. services** permitted to be rendered by auditor;
- (ii) transactions in **OCOB** of company at **arm's length price**

- (f) person whose **relative** is a **director** or is in employment of **company** as a director or **KMP**;

- (g) a person who is in **full time employment** elsewhere, or, a **person** or a **partner** of a firm holding appointment as its auditor, if such persons or partner is **at the date of such appointment** or reappointment **holding appointment** as auditor of **> 20 cos**;

While calculating the limit of 20 companies:

1. **Exclude** OPC, small co., dormant company and private cos. having PUSC < Rs. 100 crores
2. In case of firm, the limit of 20 shall be for **each partner**. i.e., limit of 20 is per person.

- (h) a person who has been **convicted** by a court of an offence involving **fraud** and a **10 years** has not elapsed from the **date of such conviction**;

- (i) a person who, directly or indirectly, **renders** any service referred to in **section 144** to the company or its holding company or its subsidiary company ~~or its associate~~.

4. Where person appt. as an auditor **incurs** any **disqualifications** mentioned u/ss (3) **after** appt., he **shall vacate** his office and it shall be deemed to be a **casual vacancy** in the office of the auditor.

#### Section 142: Remuneration of auditors

1. Remuneration to be **fixed at GM** or in such manner as may be determined in such **GM**.  
For **first** auditor - **BoD** to fix remuneration
2. Remuneration shall, **in addition to fee** payable to an auditor, **include**:
  - **expenses** incurred in connection with such audit and
  - any **facility** extended to him
but **does not include** any rem. paid to him for any **other service** rendered at request of co.

#### Concept clarity check:

Can engagement letter be signed without stating fees and merely stating that fees shall be decided mutually? - **Yes! Such engagement letter is valid.**



## Section 143: Power and duties of auditors and auditing standards

(1) Power of auditors: Every auditor of a company shall:

- have right of **access** at all times to **BoA** of co., whether kept at RO or at any other place &
- be entitled to **require** from officers such info & explanation (**I&E**) as may be necessary for performance of his duties, and
- have right to access **records** of all its **subsidiary or associate** cos. in so far as it relates to the **consolidation** of its FS with that of its suby and associate cos.

Inquiry by auditor: Amongst other matters, auditor to inquire into following matters:

- (a) whether **loans & advances** on the basis of security have been **properly secured** and whether term thereof is **prejudicial** to interest of co/members.
- (b) whether transactions which are represented merely by **book entries** are **prejudicial** to interest of co.
- (c) whether **asset** of co. as consist of **shares**, debentures or other securities have been **sold at price < purchase price** (except in case of investment co. or banking co.)
- (d) whether **loans & advances** have been shown as deposits.
- (e) whether **personal** expenses have been charged to **revenue** account
- (f) where it is stated in books that **shares** have been **allotted for cash**:
  - whether cash is actually **received**, and
  - if **no cash** is received, whether **BoA** and Balance sheet is **correct**, regular and no misleading

(2) Auditor Report: Auditor shall make a **report to members** of the co.:

### Report on:

1. Accounts examined
2. Every FS laid before co. in **GM**

### After taking into account:

- Provision of this Act
- AS and SAs
- Matters to be included in Auditor's report

### Express opinion:

- To the **best** of his info. and knowledge
- Accounts and FS give **true & fair view** of state of co's affairs at end of FY

(3) Auditor's report shall also state:

(a) Info. and explanations (I&E):

- Whether **sought and obtained** all I&E which to best of his knowledge is necessary for audit
- If **not**, details thereof and **effect** of such info. on FS

(b) Books of accounts:

- whether, in his **opinion**, proper BoA as per law have been **kept** by co. (as per his examination)
- proper **returns** adequate for his audit have been **received** from **branches** not visited by him;

(c) Branch auditor's report

- whether **report** on BoA of **any branch office** audited u/ss (8) by person other than company's auditor has been **sent to him** and
- **manner** in which he has **dealt** with it in preparing **his report**;

(d) whether **BS and P&L** dealt with in report are in **agreement with BOA** and returns;

(e) whether FS comply with the **AS**;

- (f) **observations** or comments of auditors on financial transactions or matters which have any **adverse** effect on the functioning of the company;
- (g) whether any **director** is disqualified u/s 164(2);
- (h) any **qualification, reservation or adverse remark** relating to maintenance of accounts and other matters connected therewith;
- (i) whether co. has adequate **IFC** w.r.t **FS in place** and **operating effectiveness** of such controls

Reporting on IFC shall **not apply** to a **private co** (92+137):

- a. which is **OPC** or **small co.**
- b. which has **T/O < Rs. 50 crores** **and** **aggregate borrowing** from bank/PFI **< Rs. 25 cr**

- (j) such **other** matters as may be prescribed

Rule 11: Other matters to be included in Auditor's report:

Include their **views and comments** on the following matters, namely:

- (i) whether co. has disclosed **impact** of pending **litigations** on its financial position in its FS;
- (ii) whether co. has made **provision** (as per law or AS) for **material foreseeable losses**, if any, on long term contracts including derivative contracts;
- (iii) whether there is any **delay** in transferring amt. **to IEPF** by the company.
- (iv) Omitted
- (v) Ultimate Beneficiaries:
  - i. Whether mgt. has represented that - no funds has been advances or lent to any person (intermediary) with an understanding that such intermediary shall lend such funds on behalf of co. to ultimate beneficiary or provided any guarantee or security on behalf of such **ultimate** beneficiary
  - ii. Whether mgt. has represented that - no funds has been received by the company from any person ("Funding parties") with an understanding that the co. shall lend such funds to **ultimate beneficiary** or provided any guarantee or security on behalf of such **ultimate** beneficiary
  - iii. Nothing has come to the notice of auditor that caused him to believe that above representations contain any material misstatement.
- (vi) whether the **dividend** declared or paid during the year is in compliance with sec 123.
- (vii) W.r.t. FY commencing on or after 1/4/22, whether **company** has used **accounting software** for maintaining BoA which:
  - has a **feature** of recording **audit trail** facility and
  - same has been **operated** throughout the year for all transactions recorded therein and
  - audit trail feature has **not been tampered** with and
  - audit trail has been **preserved as** per statutory requirements for record retention.

(4) Where any matter included in audit report is answered in negative or with a qualification, the report shall state the reasons therefor.

(5) In case of Govt co. or Govt controlled companies:

- C&AG to appoint auditor u/s 139(5) or 139(7)
- Direct such auditor the manner in which accounts are to be audited, and
- Auditor to submit a copy of audit report to C&AG which will include:

Directions issued by C&AG

Action taken thereon

Impact on accounts and FS

(6) C&AG may order supplementary audit

C&AG shall, within 60 days of receipt of audit report, have right to:

(a) conduct supplementary audit of FS by person as he may authorise in this behalf.

For the purpose of such audit, authorized person may require info. as C&AG may direct.

(b) comment upon or supplement such audit report.

Provided that any such comments by C&AG shall be:

- sent by co. to every person entitled to copies of audited FS u/s 136 and
- also be placed before AGM along with audit report.

(7) C&AG may, if he considers necessary, by an order cause test audit to be conducted of the BoA of such co. covered u/s 139 (5) or (7)

(8) Branch office:

**Branch is in India:**

Where co. has a branch office, BOA of branch office shall be audited either by:

- Auditor appointed for co. (Co's auditor), or
- By any other person qualified for appt. as auditor of co. & appointed as such for branch audit

**Branch is outside India:**

Where co. has a branch office outside India, BoA shall be audited either by:

- Company's auditor, or
- accountant or any other person duly qualified to act as auditor as per law of that country

**Note:**

- Duties and power of company's auditor w.r.t. branch audit shall be as per Sec 143(1) to (4)
- Branch auditor to prepare report on BoA of branch examined by him and send it to Co's auditor
- Co's auditor shall deal with such report in his report in manner as he considers necessary.

(9) Every auditor shall comply with the auditing standards (SAs).

(10) CG may prescribe SAs, or any addendum thereto, as recommended by ICAI, constituted u/s 3 of CA Act, 1949, in consultation with and after examination of recommendations made by NFRA  
Provided that - Until such SAs are notified, SAs notified by ICAI shall be deemed SAs

(11) CG may, in consultation with NFRA direct that auditor's report may include such other matters as may be specified.

(12) Reporting of Fraud by Auditor:

- If an auditor of a co.,

- in course of performance of his duties as **statutory auditor**,
- has **reasons to believe** that an offence of **fraud**, involving **individually amount >= Rs. 1 crore**,
- is being committed **against** the **co.** by its **officers** or employees,
- the auditor shall **report** the matter to **CG**.

Report to CG as under:

Inform AC/BoD	Auditor to report matter to <b>AC</b> or BoD <b>immediately (not &gt; 2 days)</b> of his knowledge seeking <b>reply within 45 days</b>
Forward to CG	<u>On receipt of reply</u> - Auditor to forward his report + AC/BoD reply + his comments thereon to <b>CG within 15 days</b> of reply. <u>In case of no reply</u> - Forward his <b>report + note</b> that details were forwarded to AC/BoD for which no reply received (within 15 days)
Mode	The report shall be sent to: <ul style="list-style-type: none"> <li>• <b>Secretary, MCA</b> in a <b>sealed cover</b></li> <li>• by Registered Post with acknowledgment due (<b>RPAD</b>), or <b>speed post</b></li> <li>• <b>followed</b> by an <b>email</b> in confirmation of the same</li> </ul> <p><u>The report shall be sent:</u></p> <ul style="list-style-type: none"> <li>• in <b>Form ADT - 4</b></li> <li>• on <b>letterhead</b> of auditor containing address, email and phone number</li> <li>• and <b>signed</b> by auditor with his seal, and indicate <b>membership no.</b></li> </ul>
Fraud < Rs. 1 cr.	Auditor shall report the matter to AC u/s 177 or BoD <b>immediately (not &gt; 2 days)</b> of his knowledge and report the following matter [ <b>NAP</b> ]: <div style="display: flex; justify-content: space-around; margin-top: 5px;"> <div style="border: 1px solid black; padding: 2px;">Nature of fraud with description</div> <div style="border: 1px solid black; padding: 2px;">Approx. amount involved</div> <div style="border: 1px solid black; padding: 2px;">Parties involved</div> </div> <p style="margin-top: 10px;">Of each fraud reported above, following details shall be disclosed in <b>BOD report</b>:</p> <div style="display: flex; justify-content: space-around; margin-top: 5px;"> <div style="border: 1px solid black; padding: 2px;">Nature of fraud with description</div> <div style="border: 1px solid black; padding: 2px;">Approx. amount involved</div> </div> <div style="display: flex; justify-content: space-around; margin-top: 5px;"> <div style="border: 1px solid black; padding: 2px;">Parties involved, if remedial action not taken</div> <div style="border: 1px solid black; padding: 2px;">remedial action taken</div> </div>
Above provision to apply mutatis mutandis to cost auditor & secretarial auditor.	

(13) Report fraud can never lead to contravention of duty (E.g., - confidentiality):

No duty of an auditor shall be regarded as having been contravened by reason of his reporting the matter u/ss (12) if **it is done in good faith**.

Penalty:

If any auditor, cost accountant or CS in practice do not comply with provisions of fraud u/s (12):

(a) in case of a **listed** company, be liable to a penalty of **Rs. 5 lakh**; and

(b) in case of any **other** company, be liable to a penalty of **Rs. 1 lakh**

Concept clarity check:

If some of the employee did fraud of Rs. 10 crores on the co. and such fraud was brought to the

notice of the auditor by the management of the co., would auditor be required to report it to CG? **No. As per sec 143(12), only fraud that the auditor identified himself in course of audit is to be brought to attention of CG. Here, the auditor just need to report to AC/BoD. Not CG.**

**Section 144: Auditor not to render certain services**

An auditor appointed under this Act shall:

- **provide** to co. only such other services as are approved by AC/BoD but
- which shall **not include** following services (directly or indirectly) to **CASH**, namely:

accounting and book keeping services;	internal audit	design and implementation of any financial info. <b>system</b>	actuarial services
investment advisory and banking services	rendering of outsourced <b>financial</b> services	management services	others as prescribed

**Explanation:** For this section, "directly or indirectly" shall include rendering of services by auditor:

- (i) **auditor is individual** - Either himself or **relative** or any other connected person or through any **entity** in which he has **significant influence** or control, or trademark or brand is used by him;
- (ii) **auditor is firm** - Itself or through **partners** or through its parent, susby/asso. entity or any other entity in which firm/partner has **significant influence** or control, or trademark or brand is used by firm/partners.

**Concept clarity check:**

- Can statutory auditor be appointed as GST auditors or tax auditors? **Absolutely, yes.**
- Can statutory auditor be appointed as cost auditors? **No. Specifically restricted u/s 148**
- Can he provide book keeping services to associate companies? - **Yes**

**Section 145: Auditor to sign audit reports, etc.**

Auditor shall <b>sign</b> Auditor's report or sign/certify any other doc. as per sec 141(2), <b>and</b>	QOC on financial transactions having <b>adverse effect</b> on functioning of co. mentioned in auditor's report shall be: <ul style="list-style-type: none"> <li>• <b>Read</b> out before co. in GM</li> <li>• Open to <b>inspection</b> by any member</li> </ul>
---	--

**Section 146: Auditors to attend general meeting**

- Notices related to GM shall be forwarded to auditor.
- Auditor **shall**, unless otherwise exempted by co., **attend such GM** (himself or through auth. representative who is qualified to be an auditor).
- Auditor shall have **right to be heard** on such **business** which concerns him as auditor.

**Section 147. Punishment for contravention**

(1) **Contravention u/s 139 to 146:**

Co. - Fine - Rs. 25,000 to Rs. 5 lakhs  
 OID - Fine - Rs. 10,000 to Rs. 1 lakh

(2) **Auditor contravenes u/s 139, 144, 145:**

Fine - Rs. 25,000 to Lower of - (Rs. 5 lakhs or 4x remuneration of auditor)

If such contravention is knowingly or willfully to deceive co./SHs or crs or tax authorities:

Imprisonment - Up to 1 year **AND**

Fine - Rs. 50,000 to Lower of - (Rs. 25 lakhs or 8x remuneration of auditor)

(3) Where auditor is **convicted** u/ss (2), he is liable to:

a. **refund** remuneration

b. **pay damages** to co/stat bodies or members or creditors for loss arising out of incorrect or misleading statements made in his audit report

(4) **CG shall**, by notification, specify any **statutory body** or **officer** for **ensuring prompt payment** of damages u/ss (3) **and** such person specified shall, **on payment file report with CG**

(5) In case of an **audit firm**, it is **proved** that partner(s) of such firm:

- acted in a **fraudulent** manner or
- abetted/**colluded** in any fraud against co.

the **liability** (civil or criminal) as per this Act or other law, for such act **shall be of partners concerned** of the audit firm **and** of firm - **jointly and severally**

In case of **criminal** liability, punishable with **only imprisonment** - **Only concerned partners liable**

#### Section 148: CG to specify audit of items of cost in respect of certain companies

(1) CG to order maintaining cost record:

- Notwithstanding anything contained in this Chapter,
- the **CG** may, by order, companies **engaged in** production of prescribed goods or providing prescribed services,
- **direct** that particulars relating to utilisation of material or labor, or other items of cost as may be prescribed **shall** also be included in **BoA**

Provided that, prior to passing such order for companies regulated under special act, **CG shall consult concerned regulatory body**. (E.g., approval of RBI in case of such order upon banking co.)

(2) CG may order audit of such cost records:

If **CG** is of **opinion**, that it is **necessary** to do so, it may, by **order**, direct **audit of such cost records** of such companies having **net worth** or **turnover** of such amount as may be **prescribed**.

(3) Manner of appointment and remuneration of cost auditor:

##### In case of cos. required to constitute AC:

- (a) On recommendation of **AC**, **BoD to appoint** an individual/firm of cost accountant in practice.
- (b) **Remuneration** thereof shall be recommended by **AC**, considered and approved by **BoD** and **ratified** by **SH**

##### In case of other companies:

- (a) **BoD to appoint** an individual/firm of cost accountant in practice
- (b) **Remuneration** thereof, considered and approved by **BoD** and **ratified** by **SH** subsequently

Important note - Auditor u/s 139 of the company cannot be appointed as auditor of cost records.

Such cost audit shall comply with **cost auditing standards** as issued by ICAI (Cost) + CG

(4) Audit u/s 148 is **in addition** to audit u/s 143

(5) **Qualifications, disqualifications**, rights, duties and obligations applicable to **auditors** under this Chapter shall, so far as may be **applicable**, apply to a **cost auditor**

Report on the audit of cost records shall be **submitted** by Cost Accountant to **BoD** of the company.

(6) Forward cost auditor's report to CG along with explanation of reservations:

Co. shall **within 30 days** from date of receipt of cost audit report - **Furnish CG** with such **Report + Full I&E on every reservation** or qualification contained therein.

(7) On receipt of report + info. u/ss (6), if **CG** is of opinion that **further I&E is necessary** - it may **call** for such further I&E **and co. shall furnish** the same within time specified by **CG**

(8) Default under this section:

Co. and **OID** - Punishable u/s 147 (1)

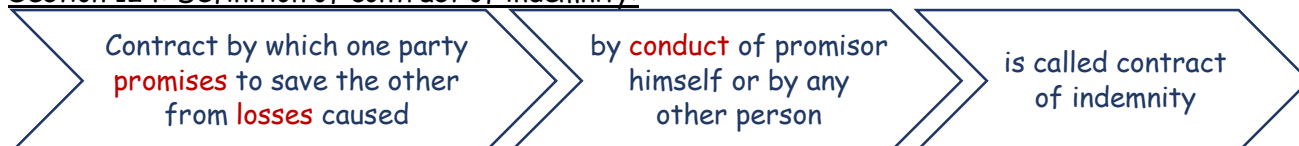
Cost auditor - Punishable u/s 147 (2) to (4)

# Chapter 1 - Indian Contract Act

Unit	Chapter Name
1	Contract of Indemnity and Guarantee
2	Bailment and Pledge
3	Agency

## UNIT 1 - CONTRACT OF INDEMNITY AND CONTRACT OF GUARANTEE

### Section 124: Definition of contract of indemnity:



### Mode of contract of indemnity:

- Express i.e., person **expressly promises** to compensate
- Implied i.e., when it is to be **inferred** from **conduct** of parties or **circumstance** of the case

### Contract of indemnity must fulfil essentials valid contract:

Offer and acceptance	Intention to create legal obligation	consideration	competency to contract	Free consent
lawful object	agreement <b>not</b> expressly declared <b>void</b>	terms of agreement - <b>not vague</b>	capable of <b>performance</b>	

### Examples of contract of indemnity:

1. Mukku, a SH of a co. lost his share certificate. He applied for the duplicate. The company agreed to issue the same on the term that Mukku will compensate co. against the loss where any holder produces the original certificate. Here, there is contract of indemnity between Mukku and the co.
2. A may contract to indemnify B against consequences of any proceedings which C may take against B in respect of a sum of Rs. 5000/- advanced by C to B. In consequence, when B who is called upon to pay the sum of money to C fails to do so, C would be able to recover amt. from A as u/s 124.

### Concept clarity check:

1. Loss occasioned by **an accident not** caused by any person, or an act of God/ natural event, is **not covered** in contract of indemnity.
2. A contract of **Fire Insurance** or **Marine Insurance** is **always a contract of indemnity**. But there is **no contract of indemnity in case** of contract of **Life Insurance** (due to lack of contingency)

### Section 125: Rights of indemnity-holder **when sued**

The **promisee/indemnity-holder** in a contract of indemnity, acting within the scope of his authority, is **entitled to recover** from promisor/indemnifier:

- (1) All **damages** which he may be compelled to pay in any suit w.r.t. matter to which indemnity applies



(2) All **cost** which he may be compelled to pay in bringing or defending any suit provided:

- he did not contravene the orders of promisor, and
- acted as a prudent man would act if there were no contract of indemnity.

(3) all **sums** which he may have **paid** under terms of any **compromise** of any such suit provided compromise:

- was **not contrary** to orders of promisor, and
- was one promisee would have prudently made in the absence of such contract.

When does the liability of an indemnifier commence?

Although the Act, is silent here, on basis of judicial pronouncements it can be stated that liability of an indemnifier commences **as soon as liability** of indemnity-holder **becomes absolute and certain**.

Section 126: Contract of Guarantee (COG):

A contract of guarantee is a contract to **perform the promise** made or discharge the liability, of a **third person (principal debtor)** in case of his default.

3 parties involved in a COG:

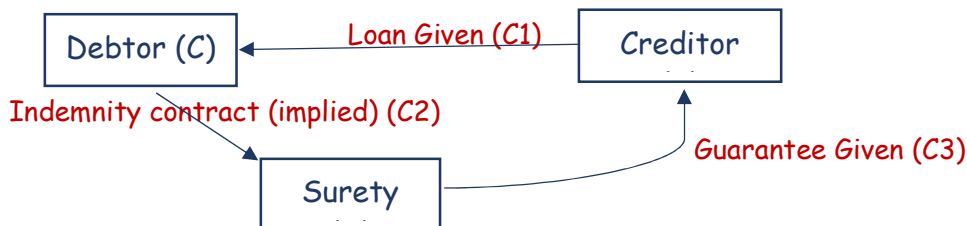
**Surety** - Person who gives guarantee

**Principal Debtor (PD)** - person in respect of whose default the guarantee is given

**Creditor**- person to whom the guarantee is given

Example

When A requests B to lend Rs. 10,000 to C and guarantees that C will repay the amount within the agreed time and that on C falling to do so, he (A) will himself pay to B, there is a COG. Here, B is the creditor, C the principal debtor and A the surety.



In a COG, there are 3 contracts in effect:

- (i) A **principal** contract (of loan) between the principal debtor and the creditor **(C1)**.
- (ii) A secondary contract between the **creditor** and the **surety (C3)**.
- (iii) An **implied** contract of indemnity between **surety** and **debtor (C2)** whereby debtor is under an obligation to indemnify the surety; if the surety is made to pay or perform.

Essential feature of contract of guarantee:

Principal Debt

Consideration

Existence of liability

No misrepresentation or concealment

Writing not necessary (Can be oral)

Joining of the other co-sureties

1. Principal debt - Purpose of a guarantee being to secure the payment of a debt, the existence of recoverable debt is necessary. If there is no principal debt, there can be no valid guarantee.

2. Consideration:

- Like every other contract, a COG should also be **supported by some consideration**.
- A guarantee without consideration is **void**.
- There is **no need** for a **direct** consideration between surety and creditor.

As per Section 127:

- Anything done, or any promise made, **for the benefit** of the principal **debtor**, may be a **sufficient consideration** to the surety for giving the guarantee.
- **Past consideration is no consideration** for the COG.
- Even if **debtor is incompetent** to contract, the guarantee is **valid**. i.e., **debtor can be minor**.
- But, if **surety is incompetent** to contract, the guarantee is **void**.

Examples:

- B requests A to sell goods to him on **credit**. A agrees to do so provided **C** will guarantee payment thereof. C promises the payment in consideration of A's promise to deliver the goods. As per Section 127, there is a **sufficient consideration** for C's promise. Therefore, the COG is **valid**
- A sells and delivers goods to B. **C afterwards, without consideration**, agrees to pay for them in default of B. The agreement is **void**.

3. Existence of a liability: There must be an **existing liability or a promise** whose performance is guaranteed. Such liability or promise must be legally enforceable by law and not time barred.

4. No misrepresentation or concealment (section 142 and 143):

Any guarantee obtained by means of:

- **Misrepresentation** by creditor or with his knowledge
- Keeping silence as to material circumstance

is **invalid**

Example: A engages B as clerk to collect money on his behalf. **B fails** to account for some of his receipts, and A, then calls upon him to **furnish security** for his duly accounting. **C gives his guarantee** for B's duly accounting. **A does not acquaint C** with B's previous conduct. B afterwards make default. The guarantee is **invalid**.

5. Writing not necessary: Sec 126 expressly declares that a guarantee may be either **oral or written**

6. Joining of the other co-sureties (Section 144):

Where a **person** gives a **guarantee** upon a contract that **creditor** shall act upon it only when another person has **joined** in it as co-surety, the guarantee is **not valid if that other person does not join**.

Types of Guarantee:

**Specific Guarantee**

- Extends to single debt/specific transaction
- Surety's liab. discharged when debt is paid



Example - A guarantees payment to B of price of 5 bags of rice to be delivered by B to C and to be paid in a month. B delivers 5 bags to C. C pays for them. This is contract for specific guarantee as An intended to guarantee only for payment of price of 5 bags delivered one time.

**Continuing Guarantee**

- Extends to a **series of transaction**
- Surety's liab continues until **revocation** of guarantee or discharge of all transactions entered into



Example -

- Guarantee given in favor a person employed for collecting monthly rentals on behalf of landlord
- A guarantees payment to B for all the loan that he lends to C in the next 1 year. This is a continuing guarantee

Distinction Between a Contract of Indemnity and A Contract of Guarantee

Distinction	Contract of Indemnity	Contract of Guarantee
No. of parties to the contract	<b>2 parties</b> - Indemnifier [promisor] and the indemnified [promisee]	<b>3 parties</b> - Creditor, principal debtor and surety.
Nature of liability	<b>Indemnifier - primary and unconditional</b>	<b>Principal debtor - Primary liability</b> <b>Surety is secondary and conditional</b>
Time of liability	The liability of indemnifier arises only on happening of a <b>contingency</b> .	The liability arises only on <b>non-performance</b> of existing promise or non-payment of an existing debt.
Time to Act	The indemnifier need <b>not act</b> at the <b>request</b> of indemnity holder.	The surety acts <b>at the request</b> of principal debtor.
Right to sue third party	Indemnifier cannot sue a third party for loss in his own name as there is <b>no privity of contract</b> . Such a right would arise <b>only</b> if there is an <b>assignment</b> in his favour.	Surety <b>can proceed against principal debtor</b> in his own right because he gets all the <b>right of a creditor</b> after discharging the debts.
Purpose	Reimbursement of loss	For the security of the creditor
Competency	All parties must be competent	Where <b>minor</b> is a <b>debtor</b> , the COG is still <b>valid</b> .

Section 129: Surety's liability:

The liability of the surety is **co-extensive** with that of the **PD**, unless it is otherwise provided by contract.

Note -

- "Co-extensive with that of **PD**" means that **surety is liable** for what debtor is liable.
- Liability of surety may be **made less (not more)** than debtor by **express contract** to that effect
- Where a **debtor cannot be held liable** on account of any **defect** in the **document**, the liability of the **surety** also **ceases**

- A creditor may choose to **proceed against a surety first**, unless there is an agreement to contrary

**Example**

A guarantees to B the payment of a bill by C, the acceptor. The bill is dishonored by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

**Section 132 - Liability of two person**

- Where 2 persons **contract with a 3rd person** to undertake a certain liability (contract 1), **and**
- also **contract with each other** that one of them shall be liable only on default of other (contract 2),
- the **third person** not being a party to such contract,
- the **liability of each** of such two persons **to the third person** under the **first contract (C1)** is not **affected** by the existence of the second contract (C2),
- although such third person **may have been aware** of its existence.

**Example** - A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

**Discharge of surety:**

By **revocation** of continuing COG

By conduct of the **creditor**

By **invalidation** of COG

**By Revocation of a continuing COG:**

<p>By Notice (Sec 130)</p>	<ul style="list-style-type: none"> <li>• The <b>continuing guarantee</b> may at any time be revoked by surety <b>as to future transactions</b> by <b>notice</b> to the <b>creditors</b>.</li> <li>• Once it is revoked, the <b>surety is not liable</b> for any future transaction.</li> <li>• However, he is <b>liable</b> for all the <b>(past) transactions</b> that happened before the notice was given.</li> </ul> <p><b>Note</b> - A <b>specific guarantee</b> can be revoked <b>only if liability</b> to debtor has <b>not accrued</b>.</p> <p><b>Example</b> - A guarantees to B, to the extent of Rs. 100,000, that C shall pay all the bills that B shall draw upon him. B draws the bill upon C. C accepts the bill. A gives <b>notice of revocation after the bill is drawn and accepted</b>. C dishonors the bill at maturity. A is <b>liable</b> upon his guarantee.</p>
<p>By Death (Sec 131)</p>	<ul style="list-style-type: none"> <li>• In absence of any contract to contrary,</li> <li>• the <b>death of surety</b> operates as a revocation of a continuing COG as to <b>future transactions</b> taking place <b>after</b> death.</li> <li>• However, the surety's estate <b>remains liable for the past transactions</b> which have already taken place before the death of the surety.</li> </ul>
<p>By Novation (Sec 62)</p>	<p>The surety under original contract is discharged if a <b>fresh contract</b> is entered into <b>either between the same parties or between the other parties</b>, the consideration being the <b>mutual discharge</b> of the old contract</p>

### Revocation by conduct of creditors:

By **variance** in terms of contract

By release/**discharge** of debtor

creditor **compounds** with, gives time to or agrees not to sue p.debtor

creditor's act or omission impairing surety's eventual **remedy**

#### (a) By variance in terms of contract (Section 133):

Where there is any **variance** in terms of **contract** between PD and creditor **without surety's consent**, it **discharges surety** in respect of **all transactions** taking place **subsequent** to such variance

Example - A becomes surety to C for B's conduct as a manager in C's bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and B will also be liable for losses on overdrafts. B allows a customer to overdraw, and bank loses money. **A is discharged** from his suretyship by variance made without his consent and is **not liable** to make good this loss.

Note -

Variation which is not substantial/material or beneficial to surety will not discharge him:

In *M.S Anirudhan v Thomco's Bank Ltd*, the **surety** guaranteed repayment of loan provided by bank to PD of only upto Rs. 25,000. Subsequently, since bank was willing to provide loan only upto Rs. 20,000, PD reduced amount to Rs. 20,000 in guarantee form **and, without intimation to surety**, gave it to the bank which was then accepted. **On default** by the PD, the **court held** that the **surety's liability** was **not discharged** as the alteration was **beneficial** to him **and not substantial**.

#### (b) By release or discharge of PD (Sec 134): The surety is discharged if the creditor:

- enters into a **fresh/ new contract** with PD by which the **PD is released**, or
- does any **act** or omission, the **legal consequence** of which is the discharge of PD.

Example - A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship

#### (c) when creditor compounds with, gives time to, or agrees not to sue, PD [Sec 135]:

A **contract** between creditor and PD, **by which** the creditor makes a **composition** with, or promises to **give time** to, or to not sue, PD - **Discharges** the surety, **unless surety assents** to such contract

#### Cases where surety is not discharged:

i. Surety not discharged when **agreement made with third person** to give time to PD [Sec 136]

Example: C, the **holder** of an overdue BOE drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

ii. Creditor's **mere forbearance** to sue PD does not discharge surety [Sec 137]

Example: B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

#### (d) Discharge of surety by creditor's act or omission impairing surety's eventual remedy [Section 139]:

- If **creditor** does any **act** which is **inconsistent** with **rights** of the surety, or
- omits to do any act which his duty to the surety requires him to do, and
- **eventual remedy** of the surety himself against PD is thereby **impaired**,
- the surety is **discharged**.

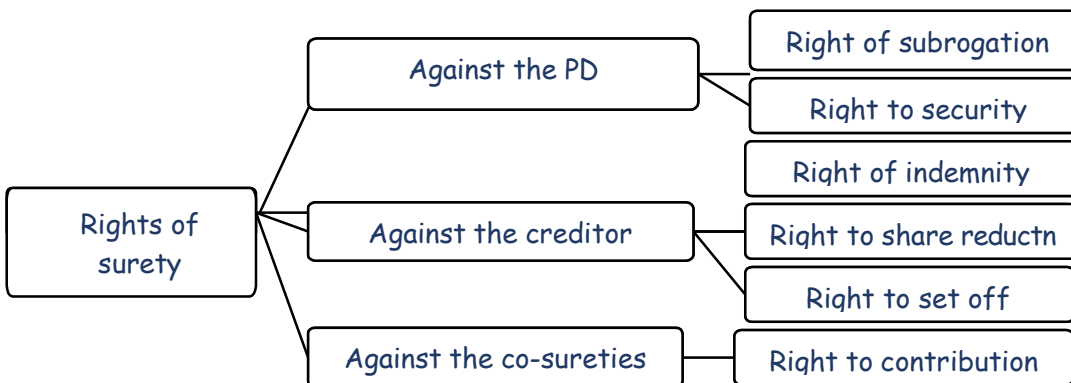
In a case before the Supreme Court of India, "A bank granted a loan on the security of the stock in the godown. The loan was also guaranteed by the surety. The goods were lost from godown on account of the negligence of the bank officials. The surety was discharged to the extent of the value of the stock so lost." [State bank of Saurashtra V Chitranjan Rangnath Raja]

Example - A puts M as apprentice to B and gives a guarantee to B for M's fidelity. B promises on his part that he will, at least once a month, see that M make up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B on his guarantee.

By invalidation of COG:

- a) Guarantee obtained by misrepresentation invalid [Section 142]:  
Any guarantee which has been obtained by means of misrepresentation made by creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.
- b) Guarantee obtained by concealment invalid [Section 143]:  
Any guarantee which creditor has obtained by means of keeping silence as to material circumstances is invalid.
- c) Guarantee on contract that creditor shall not act on it until co-surety joins (Section 144):  
Where a person gives a guarantee upon a contract that creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

Rights of surety:



(a) Right against PD

- i. Rights of subrogation (Sec 140):
  - Where, a guaranteed debt has become due, or default of PD to perform a guaranteed duty has taken place,
  - the surety, upon payment or performance of all that he is liable for,
  - is vested with all the rights which the creditor had against the PD.
  - This right is known as right of subrogation.

i.e., when surety makes payment of guaranteed debt, he steps into the shoes of the creditor.
- ii. Implied promise to indemnify surety (Sec 145):
  - In every COG, there is an implied promise by the PD to indemnify the surety.
  - The surety is entitled to recover from PD whatever sum he has rightfully paid under the

guarantee, but **not sums which he paid wrongfully**.

Example - B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

### **(b) Right against the Creditor**

#### **i. Surety's right to benefit of creditor's securities (Sec 141):**

- A surety is **entitled** to the **benefit of every security** which **creditor** has **against the PD** at the time when the contract of suretyship is entered into,
- **whether** the surety **knows** of the existence of such security **or not**;
- and, if the **creditor loses**, or, without the consent of the surety, parts with such security,
- the surety is **discharged** to the extent of the value of the security.

Example - C advances to B, his tenant, Rs. 2 lakh on guarantee of A. C has also a further security for the Rs. 2 lakh by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to amt. of value of furniture.

#### **ii. Right to set off:**

If the creditor **sues** the surety, for payment of PD's liability, the **surety** may have the **benefit** of the **set off**, if any, that the PD had against the creditor.

#### **iii. Right to share reduction:**

The surety has right to claim proportionate reduction in his liability if the principal debtor becomes insolvent.

### **(c) Rights against co-sureties**

"Meaning of Co-sureties - When the same debt or duty is **guaranteed by two or more persons**, such persons are called co-sureties"

#### **(a) Co-sureties liable to contribute equally (Sec 146):**

- **Equality of burden** is the basis of Co-suretyship.
- All the co-sureties (whether under same or different contracts and whether with or without the knowledge of each other),
- the co-sureties in the absence of any contract to the contrary,
- are **liable**, as between themselves, **to pay each an equal share of the whole debt**, or of that part of it **which remains** unpaid by the principal debtor.

#### **(b) Liability of co-sureties bound in different sums (Sec 147):**

The **principal** of equal contribution is, however, **subject to the maximum limit** fixed by a surety to his liability. Co-sureties who are bound in different sums are liable to **pay equally** as far as the limits of their respective obligations permit.

**Example:**

A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 1,00,000 rupees, B in that of 2,00,000 rupees, C in that of 4,00,000 rupees, conditioned for D's duly accounting to E.

Case 1 - D makes default of Rs. 3,00,000. A, B and C are each liable to pay 1,00,000 rupees.

Case 2 - D makes default of Rs. 4,00,000; A is liable to pay Rs. 1,00,000, and B and C Rs. 1,50,000 each.

Case 3 - D makes default of Rs. 7,00,000. A, B and C have to pay **each the full penalty of his bond**



## UNIT 2 - BAILEMENT AND PLEDGE

### Section 148: Definition of Bailment:



### Parties to bailment:

Bailor - Person delivering the goods

Bailee - Person to whom goods are delivered

### Examples of Bailment:

Delivery of **car** for repair

Giving cloth to **tailor** for stitching

Goods given to a **friend** for his own use for **free**

Goods given to **courier** co. for carriage

### Essential elements of Bailment:

Contract

Consideration

Delivery

Purpose

Possession

Return of Goods

#### (a) Contract:

- Contract may be **expressed** or **implied**
- **No consideration** is necessary to create a valid contract of bailment

#### (b) Delivery of Goods:

- Bailment is **only** for **movable** goods. It is never for immovable property or money
- Delivery of possession of goods can be:
  - Actual - Goods are physically handed over (e.g., delivery of car)
  - Constructive - Delivery is made by doing anything that has **effect** of **putting** goods in **possession** of bailee or his authorised person (e.g., delivery of keys of the car)

#### (c) Purpose - Goods are delivered for some purpose. The purpose may be **express** or **implied**.

#### (d) Possession:

- In bailment, **possession** of the goods **changes** (by actual or constructive delivery)
- Ownership of the goods remains unchanged.
- Where a person is in **custody without possession** he **does not become a bailee**. (E.g., servant having possession of master's good does not become bailee)

#### (e) Return of goods:

- Bailee is **obliged** to return good **physically** to Bailor
- Return in the **same form** as given or may be **altered** as per bailor's **direction**
- The bailee **cannot deliver** some **other** goods, even not those of higher value

Concept clarity check:

1. Money kept in bank locker is not bailment. Because, money cannot be bailed.
2. Ornaments deposited in bank locker - Is it bailment? - No. It is merely in custody of the banker. The possession still is with the owner thereof.
3. Parking a car but keeping the key with yourself - Doesn't amount to handing over possession. Hence, not bailment
4. Seizure by custom authorities - Yes bailment.

Types of Bailments:

- Gratuitous bailment: (free of charge)
  - One when provider of service does it **gratuitously** i.e. free of charge.
  - Such bailment would be either for **exclusive benefits** of either **bailor or bailee** (not both)
- Non-gratuitous bailment:
  - where **both** the parties get some **benefit** i.e. bailment for the benefit of both bailor & bailee

Duties of bailor:

disclose known facts	bear necessary expenses	Indemnify bailee	bound to accept the goods
----------------------	-------------------------	------------------	---------------------------

<u>Duties</u>	<u>Gratuitous (free)</u>	<u>Non - Gratuitous</u>
Bailor to <b>disclose faults</b> in goods bailed (Breaks not working fine in car or <b>dangerous</b> horse)	<ul style="list-style-type: none"> <li>• <b>Bound</b> to disclose fault of which bailor is <b>aware</b> and <b>materially interfere</b> with use thereof or extraordinary risk</li> <li>• <u>Non disclosure</u> - <b>Bailor to pay damages</b> arising <b>directly</b> due to such faults</li> </ul>	<ul style="list-style-type: none"> <li>• If bailed for hire, <b>bailor responsible</b> whether or not he was aware of existense of such fault.</li> </ul>
	<i>Hyman &amp; Wife v. Nye &amp; Sons</i> A hired a carriage + horses + driver for a specific journey from B. During the journey, a bolt of the carriage broke away and the carriage became upset. A was injured. Held that - B was liable to <b>pay damages</b> to A for injury sustained by A. Court observed - it was bailor's duty to supply a fit carriage.	
Pay Necessary and/or Extra Ordinary expenses	Where, the goods are kept/or are to be worked upon by bailee free of cost - <b>Bailor shall repay to bailee - Necessary expense (petrol) and extra ordinary exp. (engine repair)</b>	Bailor is liable to pay the <del>necessary</del> <b>extraordinary expenses ONLY</b> incurred by the bailee
Indemnify bailee for <b>premature termination</b>	Bailor must <b>compensate</b> bailee for <b>loss or damage</b> suffered by bailee that is <b>in excess of the benefit received</b> , (in case of gratuitous bailment is terminated before expiry)	Will depend on the term of bailment between bailor and bailee
Indemnify any loss	Bailor to indemnity any loss that bailee may sustain by reason that <b>bailor was not entitled</b> to make the <b>bailment</b> , or to receive back the goods	

Bound to receive goods	<ul style="list-style-type: none"> <li>It is the <b>duty</b> of bailor to <b>receive back</b> the goods <b>when bailee returns</b> them after expiry of <b>time</b> or <b>purpose</b> of bailment is accomplished.</li> <li>If bailor refuses - when offered at the proper time - the <b>bailee</b> can <b>claim compensation</b> for all <b>necessary</b> expenses incurred for <b>safe custody</b></li> </ul>
------------------------	---

**Duties of bailee: [CUT MAR]**

take reasonable care	No unauth. use	No mixing	Return the goods	return accretion	not set up adverse title
----------------------	----------------	-----------	------------------	------------------	--------------------------

<u>Duties</u>	<u>Details</u>
Take reasonable care of bailed goods	<p>Bailee is <b>bound</b> to take as much <b>care</b> of such goods as a man of ordinary <b>prudence</b> would, under similar circumstances, take care <b>of his own goods</b> of the same bulk, quality and value, as the goods bailed.</p> <p><u>Note</u> - The <b>bailee</b>, in the absence of any special contract, is <b>not responsible</b> for loss, destruction or deterioration of the thing bailed, <b>if</b> he has <b>taken</b> reasonable amount of <b>care</b> of it.</p> <p><u>Example:</u></p> <ol style="list-style-type: none"> <li>If X bails his ornaments to 'Y' and 'Y' keeps these ornaments in his <b>own locker</b> at his house <b>along with his own</b> ornaments. If all ornaments are lost/stolen - 'Y' will <b>not be responsible</b> for loss to 'X'.</li> <li>If 'X' <b>specifically instructs</b> 'Y' to keep them in a bank, but 'Y' keeps them at his residence, then 'Y' would be <b>responsible</b> for the loss</li> </ol>
Not make inconsistent or unauthorised use	<p>If the <b>bailee</b> makes any use of the goods bailed, which is <b>not according to the T&amp;Cs</b> of bailment, he is <b>liable to compensate</b> bailor for any loss or destruction of goods (E.g., Speed Limit of Car - 50km/hr)</p> <p><u>Note</u> - Bailment contract is <b>voidable at option</b> of the <b>bailor</b>, if bailee does <b>not use</b> the goods according to the T&amp;Cs of bailment</p>
Not to mix the goods	<p><u>Mixing with consent of bailor:</u> If Bailee, <b>mixes</b> the goods bailed <b>with his own goods</b>, <u>with consent of bailor</u>, <b>both parties</b> shall have an interest in <b>proportion</b> to their respective shares in the mixture thus produced.</p> <p><u>Mixing without consent of bailor:</u></p> <ul style="list-style-type: none"> <li><u>Separable</u> - Where mixed goods can be <b>separated or divided</b>, property in goods remains in the parties <b>respectively</b>. However, <b>bailee</b> is bound to bear <b>expense</b> of <b>separation</b> and <b>damage</b> arising from mixture (E.g., mixing colored cottons)</li> <li><u>Impossible to separate</u> - Where it is impossible to separate the goods bailed from other goods and to deliver them back, the <b>bailor</b> is <b>entitled</b> to be <b>compensated</b> by the bailee <b>for loss</b> of the goods (E.g., Flour, Rice, etc.)</li> </ul>

Return the goods	It is the <b>duty</b> of bailee to return, or deliver as per <b>bailor's directions</b> , the goods bailed <b>without demand</b> , as soon as bail period expired or purpose accomplished.  <u>Bailee responsible for damage:</u> If, by <b>default</b> of the bailee, the goods are <b>not returned</b> , delivered or tendered at the proper time, <b>bailee</b> is <b>responsible</b> to the bailor <b>for any loss</b> , destruction or deterioration of the goods <b>from that time</b> . (E.g., books burnt in accidental fire)
Return an accretion from Goods	In absence of any contract to the contrary, the bailee is <b>bound to deliver</b> to the bailor, or according to his directions, any <b>increase or profit</b> which may have accrued from the goods bailed.
No Adverse Title	Bailee must <b>not set up a title adverse to that of the bailor</b> . He must hold the goods on behalf of and for the bailor. He <b>cannot deny the title</b> of the bailor

#### Rights of Bailor:

<b>Terminate</b> Bailment is voidable if bailee acts inconsistent to T&C	<b>demand</b> back goods any time (in case of gratuitous bailment)	File <b>suit</b> against any wrong doer (see below)	file <b>suit</b> for enforcement of duties	<b>claim compensation</b> (for unauthorized use or mixing)
---	--	---	--	--

#### Rights of Bailor (and Bailee) against wrong doers:

- If a **3<sup>rd</sup> person** wrongfully **deprives bailee** of use/possession of goods bailed or does them any injury
- **bailee** is entitled to use **remedies as owner** might have used in **like case** if no bailment was made; &
- either **bailor** or **bailee** may bring a **suit** against a third person for such deprivation or injury.

Note - Whatever is obtained by way of **relief** or **compensation** in any such **suit** shall, as between bailor and bailee, be dealt with according to their **respective interests**

#### Rights of Bailee:

<b>Right to:</b>	<b>Details</b>
<b>Deliver</b> goods to one of the <b>joint bailors</b>	Unless there is contract to contrary, bailer can deliver to any of the joint bailors. <u>Example:</u> A, B and C are joint owners of harvesting machine. They bailed to to D. D may return the machine to A, B or C after expiry of term.
<b>Indemnity</b> (in case of bailor's defective title)	for any <b>loss</b> arising to him by reasons that bailor was <b>not entitled</b> to make bailment or to receive back goods or to give directions in respect to them
Claim <b>compensation</b> (for faulty goods)	<ul style="list-style-type: none"> <li>• Bailee is entitled to <b>receive compensation</b> from bailor for <b>loss</b> caused due to <b>failure</b> of bailor to <b>disclose</b> any <b>faults</b> in goods <b>known</b> to him.</li> <li>• If bailment is for <b>hire</b>, the bailor will be liable to compensate <b>even</b> though he was <b>not aware</b> of the existence of such faults</li> </ul>
Claim <b>necessary</b> expense	In case of <b>gratuitous</b> bailment - <b>bailor</b> shall <b>repay</b> to bailee necessary <b>and extraordinary</b> exp. incurred by him for purpose of bailment.

Apply to <b>Court</b> to Decide the <b>Title</b> to the Goods	If goods bailed are <b>claimed</b> by person other than bailor, bailee may <b>apply</b> to the <b>court to stop</b> its delivery and to decide the title to the goods. (E.g., TV given on rent on summer vacation by dealer. Mr. X claimed that the TV was his and he had given to dealer for repair. Bailee can apply)
Lien	Discussed later

#### Termination of Contract of Bailment (COB):

Expiry of period	If goods were given for <b>stipulated period</b> , COB to terminate after expiry of such period.
Fulfilment of purpose	If goods were given for <b>specific purpose</b> , COB to terminate after fulfilment of that purpose
By notice	<ul style="list-style-type: none"> <li>Where bailee acts in a manner <b>inconsistent</b> with T&amp;C of COB - Bailor can terminate such COB by giving notice to bailee</li> <li><b>Gratuitous bailment</b> can be terminated anytime by giving notice to bailee (but, compensate bailee to extent of loss in excess of benefit)</li> </ul>
By death	<b>Gratuitous bailment</b> terminates upon death of <b>either</b> bailor or bailee.
Destruction of subject matter	COB is terminated if <b>subject matter</b> of bailment is <b>destroyed or</b> there is a <b>change</b> in <b>nature</b> of goods which makes it <b>impossible</b> to be used for purpose of bailment

#### Finder of Lost Goods:

- A person who **finds** some goods which do not belong to him, is called the finder of the goods.
- It is **duty** of finder of goods to **find true owner and surrender** goods to him.

#### Can finder sue the real owner?

- Finder has **no right to sue** the owner for compensation for trouble and expense **voluntarily incurred** by him in finding the owner **and preserving** the goods found.
- But he has a **right to retain** the goods against owner **until he receives** such compensation; and,
- However, where the owner has **offered a specific reward** on the lost goods, **finder may sue owner** for such reward, **and may retain goods** until then.

#### Finder of goods may sell such goods:

Generally, the finder does not have right to sell the goods.

However, if **owner cannot** with reasonable diligence **be found**, or if he **refuses**, upon demand, to **pay** the lawful charges of the finder, the finder **may sell** it:

- when the thing is in danger of **perishing** or of losing the greater part of its value, **or**
- when **lawful charges** of finder amount to **2/3<sup>rd</sup>** of its **value**.

### General Lien vs Particular Lien:

Particular Lien (Sec 170): (E.g., A gives cloth to B, a tailor, to make into a coat)

- In case of COB for a specified **purpose**,
- where the **bailee** has, as per the purpose of the bailment,
- **rendered any service** involving exercise of **labour** or **skill** w.r.t. goods bailed,
- he has a **right to retain** such goods **until** he receives due **remuneration** for such services.

#### Note -

1. In above case, the **bailee** has **no right** to sue as long as he has bailed goods. However, if bailee **returns** goods w/o receiving remuneration - he has **right to sue** the bailor.
2. Right to particular lien is lost if - bailee **does not complete** the work within the **time** agreed.
3. Bailee has **no rights to sell** such goods

#### General Lien (Sec 171)

- **Bankers**, factors, wharfingers, attorneys of a High Court and policy brokers may,
- in the absence of a contract to the contrary,
- **retain**, as a **security** for general balance of account
- any goods bailed to them;
- but **no other persons** have such a right to **retain unless** there is an **express contract** to the effect

Example of General Lien - 'A' borrows Rs. 500/- from bank without security and subsequently again borrows another Rs. 1000/- but with security of say certain jewellery. In this illustration, even where 'A' has returned Rs. 1000/- being second loan, banker can retain jewellery given as security to second loan towards first loan which is yet to be repaid.

Under the **right of general lien** the **goods cannot be sold** but can only be **retained** for dues. The right of lien can be waived through a contract.

#### Difference between General and Particular Lien:

<b>General lien</b>	<b>Particular lien</b>
Rights of general lien is conferred by Sec 171	Rights of particular lien conferred by Sec 170
It is the <b>right</b> to keep possession of goods <b>belonging to other</b> against <b>general balance</b> of account.	It implies a right to <b>retain</b> specific goods bailed <b>for non-payment</b> of amount.
It is <b>not automatic</b> but is <b>recognized</b> through on <b>agreement</b> .	It is <b>automatic</b>
It can be exercised against goods even <b>without</b> involvement of <b>labor</b> or <b>skill</b> .	It comes into play <b>only when</b> some <b>labor</b> or <b>skill</b> is <b>involved</b> resulting in increase in value of good
<b>Only</b> Bankers, factors, wharfingers, policy brokers etc. are entitled to general lien.	<b>Bailee</b> , <b>finder</b> of goods, <b>pledgee</b> , <b>unpaid seller</b> , agent, partner etc. are entitled

#### Pledge:

- **Bailment** of goods **as security** for payment of a **debt** or **performance** of a promise is called "pledge".
- **Bailor** in this case is called "**pawnor** or **pledger**".
- **Bailee** is called the "**pawnee** or **pledgee**".

Example - Jewellery deposited as security against loan.

Essentials of a contract of pledge:

All essentials of a valid <b>bailment</b> contract	bailment for <b>security</b> against payment or performance of promise	<b>subject matter</b> of pledge is <b>goods</b>	Goods pledged shall be in <b>existence</b> ,	<b>delivery</b> of goods
--	--	---	--	--------------------------

Rights of a pawnee/pledgee:

Right to:	Details
<b>Retain</b> the goods pledged	<ul style="list-style-type: none"> <li>May retain goods pledged, <b>not only for payment or performance</b> of promise, but for the <b>interest</b> (of debt), and all <b>necessary expenses</b> incurred by him w.r.t. the <b>possession</b> or for the preservation of the goods pledged.</li> </ul> <p><u>Example</u> - <b>Bank</b> may retain pledged goods if <b>interest</b> amt. is pending.</p>
Retain goods for subsequent debts	<ul style="list-style-type: none"> <li>Pawnee can retain goods pledged <b>for any debt/promise</b> other than the debt or promise for which they are pledged.</li> <li><b>But</b> he can exercise <b>this right</b> only when there is <b>a contract</b> to this effect.</li> </ul>
<b>Extraordinary</b> expenses incurred	Entitled to receive from pawnor, extraordinary expenses for <b>preservation</b> of pledged goods. (he doesn't have right to retain goods for this but can sue)
Where pawnor defaults, pawnee can <b>file suit</b> or <b>sell goods</b>	<p>Where pawnor makes default w.r.t. payment or performance, the pawnee has the following rights:</p> <ol style="list-style-type: none"> <li>the pawnee may bring a <b>suit</b> against pawnor and <b>retain</b> the goods pledged as a <b>collateral security</b>; or</li> <li>he may <b>sell</b> goods pledged on giving the pawnor <b>reasonable notice</b> of sale.</li> </ol> <p><u>Note</u> -            If Sales proceed &lt; Amount due - <b>Pawnor</b> still <b>liable</b> to pay balance            If Sales proceed &gt; Amount so due - <b>pay over surplus to pawnor</b></p>

Rights of a pawnor/pledger: (*rights of bailor + right of redemption*)

- As the bailor of goods, pawnor has all the **rights of the bailor**.
- Pawnor also has **right of redemption** to the pledged goods

Right of redemption:

- If a time is **stipulated** for payment/performance, for which the pledge is made,
- and **pawnor makes default** in payment/performance at the stipulated time,
- he may redeem the goods pledged** at any **subsequent time** before actual sale of them;
- but he must, in that case, **pay**, in addition, any expenses which have arisen from his default.

### Duties of Pawnor and Pawnee:

Pawnee	Pawnor
Take reasonable <b>care</b> of pledged goods	Liable to <b>pay</b> debt/perform promise
Not make unauthorised <b>use</b>	<b>Compensate</b> pawnee for extraordinary exp. for preserving
Not to <b>mix</b> with his own goods	<b>Indemnify</b> the pawnee
<b>Return</b> the goods when debt paid/promise performed	Disclose all the <b>faults</b> which may put pawnee at extra-ordinary risk
Return <b>accretion</b> to the goods	If pawnee sells the pledged goods and receives shortfall, pawnor to <b>pay</b> the <b>deficit</b> .
Not act inconsistent with <b>terms</b>	

### Pledge by non-owners:

Usually, the **owner** of the goods **pledges** them to secure a loan. But, under certain circumstances, the **law permits a non-owner** who is in the possession of the goods to pledge the goods.

Thus, the following non-owners may create a valid pledge:

#### 1. Mercantile Agent:

- Such agent having the **possession** of goods/documents to title of goods with **consent** of owner
- can pledge these goods while acting in the **OCOB**.
- This pledge is **as valid** as if the owner of the goods expressly authorizes him to do so.
- Valid **only when** the **pawnee acts in good faith** and
- at the time of pledge is **unaware** of fact that such agent **did not have the authority** to pledge.

#### 2. Pledge by person in possession under voidable contract:

- When **pawnor** has **obtained** the **possession** (back) of goods pledged by him under contract voidable u/s 19 or 19A (not free consent),
- but **contract** has **not been rescinded** at the time of the pledge,
- the **pawnee** acquires a **good title** to the goods,
- provided he acts in **good faith** and without notice of the pawnor's defect of title.

Example - Srushti acquired valuable diamond at a very low price by a voidable contract. The voidable contract was not rescinded. Srushti pledged the diamond with Mr. VK. This pledge is valid.

#### 3. Limited interest:

When the **pawnor** not being the owner of the goods and **having limited interest** pledges the goods, the pledge is **valid** only to the **extent of such limited interest**.

Example: Mr. X finds a defective phone lying on road. He picks it up, gets it repaired for Rs. 5000. He later pledges phone for Rs. 10,000. **True owner** can recover the phone only on paying Rs. 5000

#### 4. Pledge by a co-owner:

When a **co-owner** in possession of the goods with the **assent** of **all** the other **co-owners** pledges them, it is a **valid** pledge.

#### 5. Pledge by seller or buyer in possession:

A **seller**, in whose **possession**, the **goods have been left** after sale **or** a buyer who with the **consent** of the seller, obtains possession of the goods, before sale, can make a **valid pledge**, provided the **pawnee** acts in **good faith** and he has **no knowledge** of the **defect** in title of the pawnor.



Distinction between bailment and pledge:

<u>Basis of distinction</u>	<u>Bailment</u>	<u>Pledge</u>
Meaning	Transfer of goods by one person to another for some specific purpose	Transfer of goods from one person to another as security for repayment of debt or performance of promise
Parties	2 - Bailor and Bailee	2 - Pawnor and Pawnee
Purpose	Can be made for any purpose	For securing a debt or performance of promise
Consideration	With or without consideration	Always with consideration
Right to sell goods	Bailee has <u>no right to sell</u> the goods even if the charges of bailment are not paid to him. The bailee's rights are <u>limited to suing</u> the bailor for his dues or to exercise lien on the goods bailed	The pawnee has right to sell the goods if the pawnor fails to redeem the goods.
Right to use goods	Use only for the purpose specified. Not otherwise.	Cannot use pledged goods

## UNIT 3 - AGENCY

### Definition:

Agent: means a **person employed** to do any **act** for another or to represent another in **dealing with the third persons and**

Principal: means a person **for whom** such act is done or who is so represented.

### Test of Agency

(a) Whether the person has the **capacity to bind** the principal and make him answerable to 3<sup>rd</sup> party.

(b) Whether he can establish **privity of contract between the principal and 3rd parties.**

If answer to both the above question is yes, then it's an agency relationship.

Rule of Agency is based on the maxim "**Qui facit per alium, facit per se**" i.e., he who acts through an agent is himself acting.

### Who may appoint an agent?

Any person who has attained **majority** and who is of **sound mind**, may employ an agent.

### Who may be an agent?

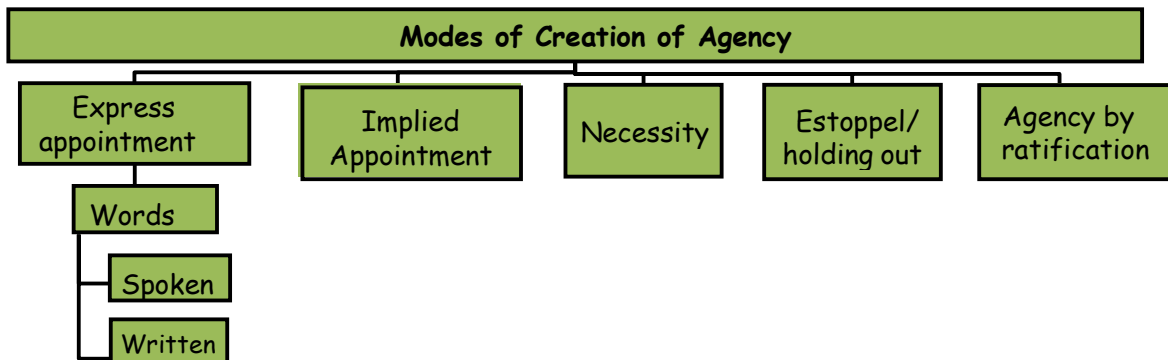
**Any person** may become an agent. But, no person who is not of the age of **majority** and of **sound mind** can become an agent, so as to be responsible to his principal.

Can minor become agent? - **Yes!** But he can't be held responsible for his acts but the principal will be bound by his acts.

Example - P appoints Q, a minor, to sell his car for not less than Rs. 2,50,000. Q sells it for Rs. 2,00,000. P will be held bound by the transaction and further shall have no right against Q for claiming the compensation for having not obeyed the instructions, since Q is a minor and a contract with a minor is 'void-ab-initio'.

Note - **No consideration is necessary** to create an agency. The acceptance of the office of an agent is regarded as a sufficient consideration for the appointment.

### Creation of agency:



1. Express authority - An authority is said to be express when it is given by **words** (spoken or written)

Example - Appointment of caretaker by way of power of attorney

2. Implied Authority - An **authority** is said to be **implied** when it is to be **inferred** from:
  - the **circumstances** of the case,
  - **conduct** of the parties and
  - things spoken or written, or
  - in **ordinary course** of dealing, may be accounted from the circumstances of the case.

Examples -

- Person realising **rental** on behalf of landlord
- **Manager** of a shop ordering from fixed vendors on behalf of owner of the shop

3. Agency by estoppel:

Based on **principle of estoppel** i.e., "when a person by declaration, act or omission has intentionally caused or permitted another person to believe a thing to be true, he shall not be allowed to deny his previous statement".

- When **agent** has **without authority** done acts or incurred obligations on behalf of principal
- the **principal** is **bound** by such acts or obligations **if**
- he has by his **words or conduct** (express or implied)
- **induced** such 3<sup>rd</sup> persons to **believe** that such acts were within scope of agent's authority

Example - if A gets to know that B is dealing on his behalf with C and does not take any steps to clarify his position, A would be liable for the transaction performed by B on his behalf.

4. Necessity: An agency of necessity arises due to some **emergent circumstances**. Thus, here an agent is authorised to do certain act, and while doing such an act, an emergency arises, he acquires an extra-ordinary or special authority to prevent his principal from loss.

Essentials for a valid agency in an emergency:

- Agent was not in position/had no opportunity to **communicate** with principal within available time
- Actual and definite **commercial necessity** for agent to act promptly
- Agent has **acted bonafide** and for the benefit of the principal
- Agent adopted most practical and **reasonable course** under such circumstances
- Agent must be in **possession** of goods which are subject of contract

Example -

1. If the owner is away from home, and **home catches fire**, **caretaker** can incur expenses to stop the fire and owner shall be responsible.
2. Agent having authority to sell goods may also **repair** it.
3. If **perishable** goods are consigned to be sent from one place to another. If they begin to perish, consignee may sell it off.

## 5. Ratification

Where acts are done by one person on behalf of another, **but without his knowledge** or authority, he may **elect to ratify or to disown** such acts.

**Example** - Agent who was authorized to purchase only in cash purchased in credit. Now principal may authorize such purchase.

**Essentials of a valid ratification:**

- a. It may be **express** or **implied** (E.g., accepting interest on loan lent without authority)
- b. Proper **knowledge** of the facts (i.e., complete knowledge of the transaction)
- c. The **whole** transaction must be ratified (i.e., part of transaction cannot be ratified)
- d. Such ratification **cannot injure** third parties

**Example:**

1. A, not being authorized thereto by B, demands on behalf of B, the delivery of a chattel, the **property** of B, from C, who is in **possession** of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.
  2. A holds a **lease** from B, terminable on three months' notice. C, an unauthorized person, gives notice of **termination** to A. The notice cannot be ratified by B, so as to be binding on A.
- e. Ratify within reasonable **time**
  - f. **Communicate** ratification (to third person)
  - g. **Valid** act can only be ratified (i.e., Illegal act cannot be ratified)

## **Extent of Agent's Authority:**

The extent of an agent's authority, whether expressed or implied is **determined by:**

- (a) the **nature** of the act or the business he is **appointed** to do
- (b) things which are **incidental** to the business or are usually done in the course of such business,
- (c) the **usage** of trade or business.

Whatever be the nature or extent of the agent's authority, it will **always include** the authority to do:

- 1) every **lawful** thing necessary for the purpose of carrying it out,
- 2) every lawful thing **justified** or usually done in the course, of conducting such business.,
- 3) in an **emergency**, all such acts for the purpose of **protecting** the principal **from loss** as will be done by a person of **ordinary prudence** in his own case under similar circumstances.

**Example:**

A is employed by B to recover at Mumbai a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt and may give a valid discharge for such debt.

## **Sub-agents**

**Definition** - Person employed by, and **acting under** the control of, the **original agent** in the business of the agency.

**General Rule** - Agent cannot delegate further:

- An agent **cannot lawfully** employ another to perform acts
- which he has expressly or impliedly **undertaken** to perform **personally**,
- **unless** by ordinary **custom** of trade a sub-agent may be employed, **or**

- from the **nature** of the agency, a sub-agent must, be employed.

Exception where an agent can appoint Sub-agent:

1. Where the **terms** of appt. of the agent originally contemplated appt. of sub-agents
2. **Custom** of trade
3. Where in the course of employment, unforeseen **emergency** arises making it necessary for agent to delegate the authority that was given to him by the principal.

Representation of principal by sub-agent properly appointed (i.e., with authority) [Section 192]:

Where a **sub-agent** is properly appointed,

1. **Principal** is **bound** and responsible to 3<sup>rd</sup> party for acts thereof as if he were agent originally appointed
2. **Agent** is **responsible** to the **principal** for acts of sub-agent
3. **Sub-agent** **responsible** for his acts **to agent, but not to principal**, except for fraud or willful wrong

Agent's responsibility for sub-agent appointed without authority [Section 193]:

Where an agent, **without** having **authority** to do so, **has appointed** a person to act as a sub-agent,

1. **Agent** acts as a principal to the sub-agent and is responsible for his acts to principal and **third person**
2. **principal** is **not responsible** for the acts of sub-agent.
3. Sub-agent is answerable to the agent but not to the principal

### Substituted agents

Definition - Person **appointed by the agent** to act for the principal, in the business of agency, with the **knowledge and consent** of the principal.

Substituted agents are not sub agents. They are agents of the principal.

Relation between principal and Substituted agents [Section 194]:

- Where an **agent**, holding an express or implied **authority** to name another person to act for the principal in the business of the agency,
- **has named another person** accordingly,
- such person is **not a sub-agent**, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Example

A directs B, his **solicitor**, to sell his estate by auction, and to employ an **auctioneer** for the purpose. B names C, an auctioneer, to conduct sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

Agent's duty in naming such person [Section 195]:

- In selecting such **agent** for his principal, an agent is **bound** to **exercise** the same amount of **discretion** as a man of ordinary **prudence** would exercise in his own case; and,
- if he **does this**, he is **not responsible** to the principal for the acts or negligence of agent so selected.

### Example

A instructs B, a merchant, to buy a ship for him. B employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. B is not, but the surveyor is, responsible to A.

Note - Appt. of substituted agent can never be improper. It always has to be within authority.

### Difference between sub-agent and substituted agent:

SN	Sub Agent	Substituted Agent
1.	A sub-agent does his work <b>under</b> the control and directions of <b>agent</b> .	A substituted agent works <b>under</b> the instructions of the <b>principal</b> .
2.	The agent not only appoints a sub-agent but also <b>delegates</b> to him a part of his own duties.	The agent <b>does not delegate</b> any part of his task to a substituted agent.
3.	There is <b>no privity</b> of contract between the principal and the sub-agent.	<b>Privity</b> of contract is established between a <b>principal</b> and a substituted <b>agent</b> .
4.	The sub-agent is <b>responsible to agent</b> alone and is not generally responsible to the principal.	Substituted agent is <b>responsible to principal</b> and not to original agent who appointed him
5.	The <b>agent</b> is <b>responsible to principal</b> for the acts of the sub- agent.	The <b>agent</b> is <b>not responsible</b> to principal for the acts of the substituted agent.
6.	The sub-agent has <b>no right of action</b> against the principal for remuneration due to him.	The substituted agent <b>can sue the principal</b> for <b>remuneration</b> due to him.
7.	Sub-agents <b>may be improperly</b> appointed.	Substituted agents can <b>never be improperly</b> appointed.
8.	The agent remains liable for the acts of the sub-agent as long as the sub-agency continues.	The <b>agent's duty ends</b> once he has <del>named</del> the substituted agent.

### Duties and obligation of an agent:

Execute mandate	Conduct business as per principal's Direction or custom	Reasonable care and skill	communicate with principal		
avoid conflict of interest	not make any secret profit	remit sums	maintain accounts	not delegate	not use confidential info. against principal

#### 1. Duty to execute mandate:

- The foremost duty of every agent is to **carry out the mandate of his principal**. (i.e., perform work for which he is appointed)
- Any failure in this respect would make the **agent** absolutely **responsible** for the principal's **loss**

#### Pannalal Jankidas V Mohanlal

- Commission agent **purchased** goods (on behalf of principal) and stored them in a godown
- Agent was instructed to **insure** them. He actually charged premium for insurance but failed to insure the goods.
- The goods were **lost** in an explosion on Bombay harbour.
- The agent was held **liable to compensate** the principal for his loss

2. Duty to follow instructions or customs: [Sec 211]

An agent is **bound** to conduct business as per the **principal's direction** or in absence thereof, as per the customs which prevails in doing such business.

Where agent acts **otherwise** - **Indemnify losses** sustained by principal and account for profit accrued

Example:

1. A, an agent is engaged for managing business of B, in which it is a **custom to invest money at hand for interest**. If A omits to make such investment, he must indemnify B for the losses i.e., for the interest B would have obtained for such investment.
2. B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C. C, before payment, becomes insolvent. B will have to indemnify A for the losses.

3. Duty of reasonable care and skill: [Sec 212]

An agent is **bound** to conduct business of the principal with as much **skill** as is **generally possessed** by **persons engaged** in similar business, unless the principal has notice of his want of skill.

- The agent is always bound to act with **reasonable diligence**, and to use such skill as he possesses;
- Agent to **compensate** his principal for **direct consequences** of his **own neglect**, want of skill or misconduct, but **not in respect of loss of damage** which are **indirectly** or remotely caused by such neglect, want of skill or misconduct.

Example:

1. A (a merchant in Kolkata) has an agent, B (in London) to whom a sum of money is paid on A's account, with orders to remit. B **retains** money for a considerable time. A, in consequence thereof, **becomes insolvent**. B is **liable** for **interest** from the day on which it ought to have been paid, as per usual rate, and **for any further direct loss**- e.g., by variation of exchange rate -**but not further**.
2. A, an agent for the sale of goods, having authority to **sell on credit**, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B, at the time of such sale is **insolvent**. A must compensate his principal for the loss sustained by him.

4. Agent's duty to communicate with principal [Sec 214]:

In cases of difficulty - agent to communicate with principal and obtain his instructions.

5. Duty to avoid conflict of interest (Duty not to deal on his own account): [Sec 215]

- If an agent **deals on his own account** in business of agency,
- without first obtaining **consent** of principal **and** acquainting him with all **material** circumstances which have come to his own knowledge on the subject,
- principal **may repudiate** the transaction, if:
  - any material fact has been dishonestly **concealed** from him by the agent, or
  - the dealings of the agent have been **disadvantageous** to him.

Examples:

1. A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.
2. A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allow B to buy. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or accept the sale at his option.

Principals right to benefit gained by agent dealing on his account [Sec 216]:

- If an agent, without knowledge of his principal deals on his own account
- principal is entitled to claim from agent any benefit which may have resulted from such transaction

Example:

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

6. Duty not to make secret profits:

Agent's relationship with principal is of fiduciary nature and this requires absolute good faith in the conduct of agency.

Secret Profit means any advantage obtained by the agent over and above his agreed remuneration and which he would not have been able to make but for his position as agent.

7. Duty to render proper accounts on demand [Sec 213]:

Rendering accounts does not mean showing the accounts but the accounts supported by vouchers. (Anandprasad vs. Dwarkanath)

8. Duty not to delegate: [Sec 190]

An agent cannot lawfully employ to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of agency, a sub- agent, must be employed.

9. Agent's duty to pay sums received for principal [Section 218]

10. Duty not to use any confidential information received in the course of agency against the principal.

Rights of an Agent:

Retain sums -  
Advances, Expenses,  
Remuneration

Right to  
remuneration

Retain or lien  
principal's  
property

Indemnity for  
lawful acts or  
good faith

Compensation for  
injury by Principal's  
neglect



1. Right of retain out of sums received on principal's account [Section 217]:

Agent can retain, out of any sums received on account of principal, for the following payments:

- (a) all moneys due to himself in respect of **advances** made
- (b) in respect of **expenses** properly incurred by him in conducting such business
- (c) such **remuneration** as may be payable to him for acting as agent.

2. Right to remuneration [Section 219]:

- The agent in normal course is entitled for remuneration **as per contract**.
- In **absence** of any agreed amount - Entitled for **usual remuneration** which is **customary** in business.
- However, an agent who is **guilty of misconduct** in the business of the agency is **not entitled** to any **remuneration** in respect of **that part** of the business which he has misconducted [Section 220].

Examples

1. A employs B to **recover** Rs. 1,00,000 from C, **and invest it in securities** that give good returns. B recovers the amount and lays out Rs. 90,000 on good securities, but lays out Rs. 10,000 on securities which he ought to provide poor returns, whereby A loses Rs. 2,000. B is entitled to remuneration for recovering the Rs. 1,00,000 and for investing the Rs. 90,000. He is not entitled to any remuneration for investing the Rs. 10,000, and he must indemnify A for Rs. 2000.
2. A employs B to recover Rs. 1,00,000 from C. Because of B's misconduct the **money is not recovered**. B is entitled to **no remuneration** for his services, **and must make good** the loss.

3. Agent's lien on principal's property against remuneration [Sec 221]:

In the **absence** of any **contract** to the **contrary**, an agent is **entitled to retain** the goods, papers and other property, **whether movable or immovable**, of the principal received by him, **until** the amount due to himself for **commission**, disbursement and services in respect of the same has been paid or accounted for him.

The conditions of this right are:

- a. The agent should be **lawfully** entitled to receive such commission.
- b. The **property** over which the lien is to be exercised should **belong to the principal** and
- c. it should have been **received** by agent **in his capacity** and during the course of his ordinary duties as an agent. (If the agent obtains possession of the property by **unlawful means**, he **cannot exercise** particular lien)

The agent's right to lien is **lost** in the following cases: *[PWC Loses]*

- (a) When the **possession** of the property is **lost**.
- (b) When the agent **waives** his right. Waiver may arise out of agreement express or implied.
- (c) The agent's lien is subject to a **contract** to the contrary.

4. Right to indemnity:

a. Right of indemnification for lawful acts [Section 222]:

The **principal is bound** to indemnify the agent against all consequences of **lawful acts** done in exercise of his authority.

Example: 'A' residing in Delhi appoints 'B' from Mumbai as an agent to **sell his merchandise**. As a

result 'B' contracts to deliver the merchandise to various parties. But **A fails** to send the merchandise to B and B **faces litigations** for non-performance. Here, A is bound to protect B against the litigations and all costs, expenses arising of that.

b. Right of indemnification against acts done in good faith [Section 223]:

Where the agent acts in **good faith** on the instruction of principal, agent is entitled for indemnification of any loss or damage from the principal.

Example: Where P appoints A as his agent and directs him to **sell certain goods** which in fact turned out to be **not those belonging to P** and if third parties sue A for this act, A is entitled for reimbursement and indemnification for such act done in good faith.

c. Non-liability of employer of agent to do a criminal act: [Sec 224]

Where a person employs another to do an act which is **criminal**, **employer is not liable to the agent**, either upon an express or implied promise, to indemnify him against the consequences of that act.

Example:

A employs B to **beat C**, and agrees to indemnify him against all consequences thereof. B thereupon beats C, and has to pay damages to C for so doing. **A is not liable** to indemnify B for those damages.

B, the proprietor of a **newspaper**, publishes, at A's request, a **false statement about C** in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. **B is sued by C** and has to pay damages, and also incurs expenses. A is not liable to indemnify B.

5. Right to compensation for injury caused by principal's neglect [Section 225]:

A principal **must compensate** his agent w.r.t. injury caused to such agent due to principal's neglect or want of skill. Every principal owes to his agent duty of **care**, and not expose him to unreasonable risks.

Example: A employs B as a **brick layer** in building a house, and puts up the **scaffolding himself**. The scaffolding is unskilfully put up, and B is in consequence hurt. A must compensate B.

Principal's Liability To Third Parties

1. Principal's liability for the Acts of the Agent (which are **within scope of authority**) [Sec 226]:

**Contracts** entered into through an agent, and obligations arising from acts done by an agent, may be **enforced** in the same manner, and will have the **same legal consequences**, as if the contracts had been entered into and the acts were **done by the principal in person**.

Example: C buys goods from A, knowing that he is an agent for their sale, but not knowing who is the principal. A's principal is the person entitled to claim from C the price of the goods, and C **cannot**, in a suit by the principal, **set off** against that claim a **debt due** to himself from A.

Example: A, being B's agent with authority to receive money on his behalf, **receives** from C, a sum of **money** due to B. C is **discharged** of his obligation to pay the sum in question to B.

2. Principal's liability when agent exceeds authority [Section 227]:

When an agent does **more than he is authorised** to do, and when the part of what he does, which is within his authority, can be **separated** from the part which is beyond his authority, so much only of what he does as is **within his authority is binding** as between him and his principal.

Example: A, being **owner** of a **ship** and cargo, **authorizes** B to procure an **insurance** for Rs. 4,00,000 on the ship. B procures a policy for Rs. 4,00,000 on the ship, **and another** for the like sum on the **cargo**. A is **bound to pay the premium** for the policy on the ship, but not the premium for the policy on the cargo.

Principal not bound when excess of agent's authority is **not separable** [Sec 228]:

Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority **cannot be separated**, **principal is not bound to recognize the transaction**.

Example: A authorizes B to **buy 500 sheep** for him. B **buys 500 sheep and 200 lambs for one sum** of Rs. 6,00,000. A **may repudiate** the whole transaction.

Example: A authorizes B to draw bills to the extent Rs. 200 each. B draws bills in the name of A for Rs. 1,000 each. A may repudiate the whole transaction.

Exception:

Liability of principal **inducing belief** that agent's unauthorized acts were authorized [Sec 237]:

When an agent has, **without authority**, done acts or incurred obligations to third persons on behalf of his principal, the **principal is bound** by such acts or obligations, if he has by his **words or conduct induced** such third persons to believe that such acts and obligations were **within the scope** of the agent's authority.

Example: A **consigns** goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. **A is bound by the contract**.

Example: A entrusts B with **a instrument** endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

3. Consequences of notice given to agent [Sec 229]:

- Any **information obtained by the agent**, in the course of business transacted by him for principal,
- shall have the **same legal consequence** as if it had been **obtained by the principal**.

Example:

Ajay is employed by Bijay to buy certain goods from Chinu (of which Chinu is apparent owner). Ajay buys them accordingly. In course of such sale, Ajay learns that goods really belonged to Dev, but **Bijay is ignorant** of that fact. **Bijay is not entitled** to set off a debt owing to him from Chinu against the price of the goods. Thus, the **knowledge of the agent is treated as the knowledge of the principal**.

4. Principal's liability for the agent's fraud, misrepresentation or torts [Sec 238]:

Misrepresentations or frauds by agents shall have **same effect** on agreements **as if committed** by the **principal**. But, misrepresentations or frauds which **do not fall within agent's authority, do not affect their principals**.

Example:

1. A, being B's agent for sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is **voidable**, as between B and C, at the option of C.
2. A, the captain of B's ship, **signs bills of lading** without having received on board the goods mentioned therein. The bills of lading are **void** as between B and the pretended consignor.

Personal Liability of Agent to third parties:

Agent cannot personally enforce, nor be bound by, contracts on behalf of principal [Sect 230]:

- In absence of any contract to that effect,
- an agent **cannot personally** enforce contracts entered into by him on behalf of his principal,
- **nor** is he **personally bound** by them.
- He can **neither sue** nor be sued on contracts made by him on his principal's behalf.

Exceptions: In following cases, **agent is presumed** to have **agreed** to be personally bound: [UF! CAP]

Foreign Principal

Unnamed  
Principal

inCompetent  
principal

Pretended agent

Agent exceeds  
authority

1. Where contract is for **sale or purchase** of goods for a **merchant resident abroad/foreign principal**:  
Here, presumption is that agent undertakes to be **personally liable** for performances of such contract
2. Where agent **does not disclose** the **name of his principal** or undisclosed principal (Principal unnamed):  
Here, a presumption arises that he himself **undertakes** to be **personally liable**.

Note - When the **principal** is **undisclosed**, the **liability** u/s 230 is **of the agent only**, and the **principal cannot be sued** in such a case.

3. Non-existent or incompetent principal: Where the principal, though disclosed, cannot be sued, the agent is presumed to be personally liable.

Example: An agent who contracts for a minor, the **minor** being not liable, the agent becomes personally liable. This result, may not, however, follow where other party already knows that principal is a minor.

4. Pretended agent - if the agent pretends but is **not an actual agent**, and the principal **does not ratify** the act but disowns it, the pretended agent will be himself liable (Sec 235).
5. When agent exceeds authority- When the agent exceeds his authority, misleads the third person in believing that the agent he has the requisite authority in doing the act, then the agent can be made liable personally for the breach of warranty of authority.

## Rights Of Third Parties

### 1. Rights of parties to a contract made by undisclosed agent [Section 231]:

- If an agent makes contract with a person who neither knows, nor has reason to suspect,
- that he is an agent, his **principal may require the performance** of the contract;
- but the other contracting party has, as against the principal, the **same right** as he would have had as against the agent if the agent had been the principal.

If the **principal discloses himself** before the contract is **completed**, the other contracting party may **refuse** to fulfil the contract, if he can **show** that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, **he would not have entered into the contract**.

Example: SK bought for himself a ticket of IPL match at Wankhede Stadium through AB because on personal grounds Stadium management would not have issued the ticket to SK. Stadium management may repudiate the contract and refuse SK to enter the stadium.

### 2. Performance of contract with agent supposed to be principal [Section 232]:

Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the **principal**, if he requires the performance of the contract, can **only obtain such performance subject to** the rights and obligations **subsisting between the agent and the other party** to the contract.

Example: A, who owes 50,000 rupees to B, sells 1,00,000 rupees worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. **C cannot compel B to take the rice without allowing him to set off A's debt.**

### 3. Option to Third Person - Sue the Agent or the Principal:

- a. Right of person dealing with agent personally liable [Section 233]: In cases where the agent is **personally liable**, a person dealing with him may hold either him or principal **or both** of them, liable.

Example: A enters into a contract with B to sell him 100 bales of cotton, and afterwards **discovers** that B was acting as agent for C. A may **sue** either B or C, or both, for the price of the cotton.

- b. Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable [Section 234]: When a person who has made a contract with an agent **induces the agent** to act upon the belief that the **principal only will be held liable** or induces the principal to act upon the belief that the agent only will be held liable, **he cannot afterwards hold liable** the agent or principal respectively.

## Termination of agency [Section 201]

Termination of agency means **putting an end** to the **legal** relationship between **principal and agent**.

Modes of termination: [CRR DIE]

Revocation	Renunciation by agents	Completion of business	Death or Unsound mind - principal or agent	Insolvency of Principal	Expiry of time
------------	------------------------	------------------------	--	-------------------------	----------------

a. Revocation:

- An agency may be **terminated** by the principal **revoking** the authority of the agent **at any time before** the authority has been **exercised so as to bind** the principal [Sec 203].
- However, the principal **cannot revoke** the authority w.r.t. acts **after authority** has been **partly exercised** for such acts. [Sec 204]

Example: A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands.

1. B buys it in his **own name**, so as to **make himself personally liable** for the price - In this case, A **cannot revoke** B's authority so far as regards payment for the cotton.
2. B buys 1,000 bales of cotton in **A's name**, and so as **not to render himself personally liable** for the price. A **can revoke** B's authority to pay for the cotton.

Compensation for revocation by principal [Sec 205]:

If there is **premature** revocation of agency **without sufficient cause**, the principal **must compensate** the agent, for such revocation

Note - Compensation is NOT mandatory in case where it is justified with sufficient cause.

Notice of revocation [Sec 206]:

When the principal, **having justification** to do so, revokes the authority, he **must give reasonable notice** of such revocation to the agent, **otherwise**, he **can be liable** to pay compensation for any **damage** caused to the agent (Sec 206).

Revocation and renunciation may be expressed or implied [Section 207]:

Example: A empowers B to let out A's house. Afterwards A lets it himself. This is an **implied** revocation of B's authority.

b. Renunciation by agent [Section 206]:

- An agent **may renounce** the business of agency in the same manner in which the principal has the right to revoke.
- If the agency is for a **fixed period**, the **agent** would have to **compensate** the principal for any **premature renunciation without sufficient cause**. [Sec 205]
- A reasonable **notice** of renunciation is necessary. Length of notice is to be determined by the same principles which apply to revocation by the principal. **If the agent renounces without proper notice**, he shall have to **make good any damage** thereby resulting to the principal.

c. Completion of business: An agency is **automatically** and by **operation of law** terminated when its business is completed. Thus, for example, the authority of an agent appointed to sell goods ceases to be exercisable when the sale is completed.

d. Death or insanity: An agency is terminated **automatically** on the **death** or **insanity** of the **principal or the agent**. Winding up of a company or dissolution of partnership has the same effect. **Act done by agent before death would remain binding**.

e. Principal's insolvency: An agency ends on the principal being adjudicated insolvent.

- f. On expiry of time: Where an agent has been appointed for a **fixed term**, the expiration of the term puts an end to the agency, whether the purpose of agency has been accomplished or not. An agency comes to an **automatic end** on expiry of its term

When the agency is irrevocable?

When the **agent** is **personally interested** in the subject matter of agency the agency becomes **irrevocable**.

(Note - In such cases, even death or insanity doesn't lead to termination of agency contract)

Example:

1. A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. **A cannot revoke** this authority, **nor can it be terminated by his insanity or death**.
2. A consigns 1000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself, out of the price, the amount of his own advances. A cannot revoke this authority, nor it is terminated by his insanity or death.

When does termination take effect? [Sec 208]

The termination of the authority of an agent **does not**, so far as regards the agent, **take effect before it becomes known to him**, or, so far as regards third persons, before it becomes known to **them**.

Example:

1. A directs B to sell goods for him, and agrees to give B 5% commission on the price fetched by the goods. A afterwards, **by letter**, **revokes** B's authority. B, after the letter is sent, but before he receives it sells goods of Rs. 1 lakh. Sale is **binding** on A and B is entitled to Rs. **5000** as his commission.
2. A, at Chennai, by **letter** directs B to sell for him some cotton lying in a warehouse in Mumbai, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Chennai. B, **after receiving** the second letter, **enters into a contract** with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. **C's payment is good as against A**.
3. A directs B, his agent, to pay certain money to C. A dies, and D takes out **probate to his will**. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D.

Agent's duty on termination of agency by principal's death or insanity [Sec 209]:

When an agency is terminated by the principal dying or becoming of unsound mind, the agent is **bound to take**, on behalf of the representatives of his late principal, **all reasonable steps** for the **protection and preservation** of the **interests entrusted** to him.

Termination of sub-agent's authority [Section 210]

The **termination** of the authority of an agent causes the **termination** of the authority of **all sub-agents** appointed by him.

The End

# Chapter 2 - The Negotiable Instruments Act, 1881

## Introduction:

### Meaning of Negotiable Instrument (NI) [Section 13]:

A "negotiable instrument" means a:

- promissory note,
- bill of exchange or a

payable:  
order or  
bearer.

### Explanation:

NI is payable to **order** when:

- It is expressed to be so payable
- When it is expressed to be payable to a specified person and does not contain words prohibiting its transfer

A NI is payable to **bearer** when:

- it is expressed to be so payable e.g., pay bearer
- the only or last indorsement on the instrument is an indorsement in blank

**Note** -The **property** in such a NI passes to a bonafide transferee for value (i.e., notwithstanding any defect in title of any prior party)

### Characteristics of a NI: [Write STD - CPT]

necessarily in  
**writing**

should be **signed**

freely  
**transferrable**

holder's **title** is  
**free** from defects

can be transferred  
**any number of**  
**times** till its  
satisfaction

must contain an  
**unconditional**  
**promise** or order  
to pay money

**sum** payable, **time** of  
payment and **payee** -  
must be **certain**

should be **delivered**.  
Mere drawing does not  
create liability

### Presumption as to a NI [Sec 118]:

Until the **contrary** is proved, the following presumptions shall be made:

In relation to:	Presumption drawn
Consideration	every NI was <b>made or drawn for consideration</b>
Date	every NI <b>bearing a date</b> was made or drawn on such date
Time of acceptance	every accepted BOE was accepted within a reasonable time after its date and before its maturity
Time of transfer	every <b>transfer</b> of a NI was <b>made before</b> its <b>maturity</b>
Order of indorsements	indorsements appearing upon a NI were made in the <b>order</b> in which they appear thereon
Stamps	a lost promissory note, BOE or cheque was duly stamped
Holder	the holder of a NI is a holder in due course

**Note:** The above presumptions are **rebuttable** by evidence to the contrary.

### Promissory Note (PN) [Section 4]:

#### Meaning:



- A 'promissory note' is an instrument in **writing** (not being a bank-note or a currency-note)
- containing an **unconditional undertaking**
- **signed** by the maker,
- to **pay** a **certain sum** of **money** only to, or to order of, a **certain person**, or to bearer thereof.

#### Parties to promissory note

- **Maker** (of the promise): The person who **makes** the **promise** to pay and **must sign** the instrument.
- **Payee**: the person **to whom** the amount on the note is **payable**.

<b>Promissory Note</b>	
France	July 28, 2021
Place of Residence	Date
<p>I, <b>Joe Phillips</b>, agree and promise to pay <b>Tim Warison</b> a sum of <b>\$1000</b> with an annual interest rate of <b>10%</b> payable on <b>September 28, 2021</b>.</p>	
<p style="text-align: right;"><i>Joe P.</i></p> <p style="text-align: right;">(Drawer's Signature)</p>	

#### Essential Characteristics of a Promissory Note

in <b>writing</b> (oral promise not sufficient)	should be <b>signed</b> by maker (else ineffective)	The promise to pay should be <b>definite</b> and <b>unconditional</b> .	Promise to pay <b>money</b> only
Promise to pay a <b>certain sum</b>	must be an <b>express promise</b> to pay. Mere acknowledgment of debt is insufficient	The maker and payee must be <b>certain</b> , definite and different persons	must be properly <b>stamped</b> and such stamp must be duly <b>cancelled</b> by maker's <b>signatures</b> or initials

#### Concept clarity check:

1. Can promissory note be made payable to bearer? - **As per definition of PN, yes. However, as per RBI Act, PN cannot be made payable to bearer (cause, payee has to be certain)**
2. Law says that, PN shall promise to pay a certain sum. Is it okay to write - "Pay to Mr. S Rs. 50,000 + 10% interest per annum" - Will this be considered certain sum? - **Yes!**

#### Bills of Exchange (BOE) [Section 5]:

##### Meaning:

- A "BOE" is an instrument in **writing**
- containing an **unconditional order**,
- **signed by the maker (Mr. M)**,
- directing a certain person (Mr. X)
- to pay a certain sum of money only to, or to order of, a certain person or to bearer of instrument

#### Parties to the bill of exchange

<p><b><u>Drawer:</u></b> The <b>maker</b> of a BOE</p>	<p><b><u>Drawee:</u></b> The <b>person directed</b> by the drawer <b>to pay</b> is called the 'drawee'. <b>On acceptance</b> of the bill, he is called an <b>acceptor</b> and is <b>liable</b> for payment of bill. His liability is primary and <b>unconditional</b></p>	<p><b><u>Payee:</u></b> The person named in the BOE, to whom or to whose order the money is, directed <b>to be paid</b></p>
--	---	---

Note - The **payee can be the drawer himself** or a third party.

Essential characteristics of bill of exchange

in <b>writing</b>	must be <b>signed</b>	The order to pay should be <b>definite</b> and <b>unconditional</b> .	order to pay <b>money</b> only
order to pay a <b>certain sum</b>	must be an <b>express order</b> to pay.	Drawer, drawee, and payee must be <b>certain</b>	must be <b>stamped</b>

Difference between Promissory note and bills of exchange:

Basis	Promissory Note	Bill of Exchange
Definition	<ul style="list-style-type: none"> <li>An instrument in <b>writing</b> (not being bank or currency-note)</li> <li>containing an unconditional <b>undertaking</b></li> <li><b>signed</b> by the maker,</li> <li>to pay a certain sum of money only to, or to order of, a certain person, or to bearer thereof.</li> </ul>	<ul style="list-style-type: none"> <li>An instrument in <b>writing</b></li> <li>containing an <b>unconditional order</b>,</li> <li><b>signed</b> by the maker,</li> <li><b>directing a certain person</b>,</li> <li>to pay a certain sum of money only to, or to order of, a certain person or bearer of instrument</li> </ul>
Nature	there is a <b>promise</b> to pay money.	there is <b>order</b> for making payment.
Parties	Maker and Payee	Drawer, Drawee and Payee
Acceptance	<b>Not required</b> as it is signed by person who is required to pay	A BOE <b>needs acceptance</b> from the <b>drawee</b> .
Payable to bearer	<b>cannot</b> be made payable to bearer. (RBI Act)	<b>can be</b> drawn payable to bearer. However, it <b>cannot</b> be payable to <b>bearer on demand</b>

Cheques [Section 6]:

### Meaning:

- A "cheque" is a bill of exchange
- drawn on a **specified banker** and
- **NOT** expressed to be payable otherwise than on demand and
- it **includes the electronic image** of a **truncated cheque** and a cheque in the **electronic form**.

Payable on demand means- It should be payable **whenever the holder chooses** to present it to the drawee (banker). Cheques are mandatorily payable on demand.

### Explanations:

**Cheque in the electronic form means** a cheque **drawn in e-form** by using any **computer resource**, and **signed in a secure system** with a **digital signature** (with/without biometric signature) and asymmetric crypto system or electronic signature, as the case may be

**a truncated cheque** means cheque which is **truncated** during a **clearing cycle**, either by clearing house or bank whether paying or receiving payment, immediately on generation of an e-image for transmission, substituting further physical movement

### Parties to Cheque

#### Drawer

The **maker** of a the cheque. Liability is primary and **conditional**

#### Drawee:

the specific **bank** on whom cheque is drawn.

#### Payee:

the person named in the cheque, to whom or to whose order the money is, directed **to be paid**

Note - The **payee can be the drawer himself** or a third party.

### Essential Characteristics of a cheque:

- it should fulfil all the essential characteristics of a **bill of exchange**
- must be drawn on a **specified banker**
- it must be payable **on demand**

Note - All cheques are bills but not all bills are cheque.

### Crossing of cheques:

There are two types of cheques:

- Open cheques - A cheque that can be paid in cash at the counter.
- Crossed cheques - Parallel transverse lines which is an **instruction to the drawee** i.e., the paying bank that the payment is **not** to be made **at the counter but** through a **bank**.

### Objects of crossing:

- Crossing affects the mode of payment of the cheque.
- It does not affect the negotiability or transferability of the cheques

### Types of crossing:

General crossing  
(lines without words)

Special crossing  
(Line + Name of banker + With or without words)

Restrictive crossing  
When words A/C Payee is added to General or special crossing  
This becomes non-negotiable and is not statutorily recognized

"Not negotiable" crossing  
This requires the word "not negotiable" inside or outside two parallel lines

### Section 127 -

Where a cheque is **crossed specially to >1 banker**, the banker on whom it is drawn shall **refuse** payment thereof **except** where the **banker** to whom it is crossed **may cross** it specially to **another banker, his agent** for collection

### Not negotiable Crossing [Sec 130]

- This requires writing of words "not negotiable" in addition to the two parallel Lines
- A cheque with such crossing is **not negotiable but** continues to be **transferable** as before
- If the **title** of the transferor is **defective**, the title of **transferee will also be so**.
- Thus, the addition of the words not negotiable **does not restrict the further transferability** of the cheque, but it entirely takes away the main feature of negotiability, which is that a **holder with a defective title can give a good title to the subsequent holder in due course**

### Who may cross? [Section 125]

A cheque may be crossed by the following parties:

- By Drawer: A drawer may cross it **generally** or **specially**.
- By Holder: A **holder** may cross
  - an uncrossed cheque generally or specially.
  - a generally crossed cheque may be crossed specially.
  - If cheque is crossed generally or specially, he may add words "not negotiable".
- By Banker: A **banker** may:
  - cross an uncrossed cheque, or
  - if a cheque is crossed generally, he may cross it specially to himself.
  - Where it is crossed specially, the banker whom it is crossed may again cross it specially to another banker, his agent, for collection.

### Protection of liability of the **paying banker** [Section 85, 128 and 129]

#### Cheque payable to order

- Where a cheque payable **to order purports to be indorsed** by or on behalf of the payee, the banker is **discharged by payment** in due course.
- The **banker can debit** his customers account **even though** the indorsement **by the payee** might turn out to be **forgery** or the indorsement might have been placed by payee's **agent without his authority**.

#### Cheque payable to bearer:

- The rule is "**once a bearer always a bearer**".
- A banker gets a **good discharge** by payment in due course to the **holder** of the cheque.
- It **does not matter** whether the apparent holder is the **owner** of cheque or not.

#### Crossed cheque

- Where the drawee banker has **paid the crossed cheque in due course**, the drawee banker and drawer shall be considered to have paid such amount to the **true owner** thereof.
- Where payment is **not made in due course** (e.g., crossed cheque not paid to banker), the drawee banker shall be **liable to the true owner** of the cheque for any loss he may sustain owing to the cheque having been so paid.

Exception in case of forgery: Payment of a cheque on which **drawer** signatures were **forged**:

If any **drawee banks** made the payment on a forged signature cheque, then **such bank** shall be **liable** to the **true owner** (i.e., **paying banker** shall be **liable** if it makes payment of cheque on which drawers' signatures were forged)

Protection of liability of the **collecting banker** [Section 131]

Collecting bank acting in good faith shall not be liable:

- A banker who has in **good faith** and **without negligence**
- received payment for a customer of a cheque crossed generally or specially to himself
- shall **not**, in case **title** of cheque **proves defective**, **incur any liability** to true owner of cheque
- by reason only of having received such payment.

To avail such protection, the banker needs to prove that the:

banker had **received** the payment of crossed cheque

collection was made by the bank **on behalf of customer**

bank must have acted in **good faith** and without negligence

"Payment in due course" [Sec 10] means payment in accordance with the **apparent tenor** of the instrument in **good faith** and **without negligence** to any person in **possession** thereof under circumstances which do not afford a RGTB that he is **not entitled** to receive payment of the amount therein mentioned.

**Acceptor and Acceptor for honour**

Who is an acceptor?

- After **drawee** of a bill has **signed his assent** upon the bill (or if there are more parts of the bill, upon one of such parts, **and**
- **delivered** the same, **or given notice** of such signing to holder or to some person on his behalf,
- he is called the "**acceptor**".

Thus, an acceptor is the drawee who has signed his assent upon the bill and delivered it to the holder.

Then, who is acceptor for honour?

- When a BOE has been **dishonoured by non-acceptance** and any person accepts it for honour of the drawer or of any indorsers, such person is called "an Acceptor for honour".
- In other words, it is an **undertaking** by a third party to accept and pay a BOE that was dishonoured, either by non-acceptance or non-payment by drawee [It is also called acceptance supra protest]

How acceptance for honour must be made

A person desiring to accept for honour must, by **writing on the bill** under his hand, **declare** that he **accepts under protest** the protested bill for the honour of the drawer or of a particular indorser whom he names, or generally for honour

Essentials of valid acceptance for honour

holder must <b>consent</b> to acceptance for honor	bill must have been <b>noted</b> or <b>protested</b> for non-acceptance
made by a person who is <b>not already liable</b> on the bill*	Acceptance must be for the honor of any party <b>already liable</b> on the bill
It must be made by <b>writing</b> on the bill	must be for <b>whole</b> amount due on the bill
Acceptance for honor must be made <b>before bill is overdue</b>	Stranger paying for honor must, before payment, declare before a <b>notary public</b> the party for whose honor he pays and Notary Public to <b>record</b> the same

\*Drawee of the bill when he **refuses** to accept the bill **becomes a stranger**. He may, therefore, accept the bill for honor of any party thereto.

#### Rights and liabilities of an acceptor for honour [Sections 111 & 112]

- Acceptor for honor **binds himself** to all the **subsequent** parties to pay the amount of the bill if the drawee does not pay (*like a guarantor*)
- The party for whose honor he accepts to pay the amount and all **prior parties** are liable to **compensate the acceptor** for honor for all loss or damage sustained by him in consequence of such acceptance. The liability of an acceptor for honor is **conditional** and he is **liable only if the drawee fails to pay the bill**.

#### Holder and Holder in Due Course

##### "Holder" [Section 8]

Holder of a NI means **any person** entitled in his own name to:

- the **possession** thereof, and
- receive** or **recover** the amount due thereon from the parties thereto

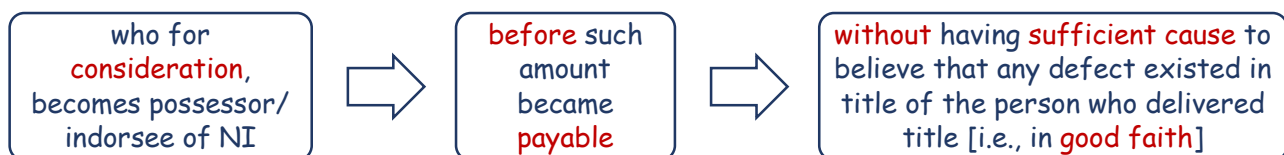
##### Concept clarity check:

- Holder is person who is rightful owner of such NI. Mere possession of the NI doesn't qualify such person to be called holder. [E.g., a thief of such NI cannot be called holder]
- Can an **agent** be called holder? - No. While the agent has the right to receive the amount, he is not entitled in his own name to the possession. Hence, **not a holder**.
- Mr. A is a payee of the cheque, but he is prohibited by a court order from receiving the amount of the cheque. Is Mr. A holder - **No. There is no right to receive**.

[Solve Question 7 of QB]

##### "Holder in due course" [Section 9] (Holder + Consideration + Before Maturity + Good Faith = HDC)

HDC means any person:



Essentials to become HDC:

1. The holder must have **paid valuable adequate consideration**:
  - a. To become HDC, a person must obtain a NI by paying valuable and lawful consideration for it.
  - b. When given as a **gift** or has been **inherited**, the **transferee cannot be an HDC**.
2. A holder must acquire NI **before** its **maturity** in order to attain the status of HDC.
3. Holder must have obtained NI in **good faith**.
4. NI must be **complete** and regular on the face of it.
5. He must have received the instrument **as a holder** i.e., the possessor (if the instrument is payable to bearer), or indorsee (if the instrument is payable to order)

Concept clarity check:

1. How can a person become HDC in case of **demand** instrument? (Because, to become HDC, you need to negotiate before maturity. What is the maturity for demand inst.?) - Law says, in case of demand instrument, it must be taken within a **reasonable** time (varies case to case)
2. HDC is protected when there is **defect** in the title of the prior party. But such HDC derives no title in case of forgery by party because there is entire absence of title by prior party (QB 9)

Privileges of being an HDC:

<u>In case of:</u>	
Inchoate Instrument	A person <b>signing and delivering</b> to another a <b>stamped</b> but otherwise inchoate instrument is <b>debarred from asserting</b> , as against a HDC, that the NI has <b>not been filled</b> in accordance with the authority given by him, the stamp being sufficient to cover the amount
Fictitious bill	An <b>acceptor</b> of a BOE drawn in a fictitious name and payable to drawer's order is <b>not relieved</b> from liability to any <b>HDC</b> claiming under an indorsement by the same hand as the drawer's sign, and purporting to be made by the drawer, by reason that such name is <b>fictitious</b> .
Conditional instrument or 'escrow'	In case a bill or note is negotiated to a HDC, the <b>other parties cannot avoid</b> liability on the ground that <b>delivery</b> of the instrument was <b>conditional</b> or for a <b>special purpose only</b> .
NI obtained by unlawful means / for unlawful consideration	The person <b>liable</b> in a NI <b>cannot set up against the HDC</b> the defenses that the instrument had been <b>lost</b> or obtained from the former by means of an offence or <b>fraud</b> or for an unlawful consideration (Sec 58).
Payee's capacity to indorse can't be denied	<b>No maker/acceptor</b> of NI payable <b>to order</b> shall, in a <b>suit thereon by a HDC</b> , be <b>permitted to deny</b> the payee's capacity to indorse the same
Original validity of NI cannot be denied	<b>No maker, drawer and acceptor for the honour</b> shall, in a <b>suit thereon by a HDC</b> be permitted to <b>deny the validity</b> of NI <b>as originally made</b> or drawn.

Classification of Negotiable instruments:

- a. "Bearer instrument" and "order instrument" [Section 13]

Nature:	Bearer	Order
Payee or payable to:	where <b>name</b> of payee is <b>blank or</b> where name of payee is specified with the words " <b>or bearer</b> " or where the <b>last indorsement is blank</b>	payable to a <b>person</b> or payable to a <b>person or his order</b> or payable to order of a person or where the <b>last indorsement is in full</b>

Negotiation by:	Mere delivery	indorsement and delivery
-----------------	---------------	--------------------------

b. Inland instrument and Foreign Instrument:

Instrument	Inland	Foreign
Meaning:	A PN, BOE or cheque, <ul style="list-style-type: none"> <li>• <u>drawn or made in India</u> and</li> <li>• made <u>payable</u> in India or <u>drawn</u> upon any PRI</li> </ul> shall be <b>deemed</b> to be an inland instrument.	Any instrument <u>not so drawn</u> , made or made payable (as that of inland instrument) shall be deemed to be foreign instrument. i.e., all instrument other than inland is considered as foreign instrument.
Other details	<u>Examples:</u> 1. PN made in Patna, payable in Ranchi 2. Bill drawn in Varanasi on a PRI Jodhpur (although payable in US)	

Liability of maker/drawer:

In absence of a contract to the country:

- **liability** of **maker/drawer** of a foreign instrument **is regulated by law** of **place** where he **made** the instrument, and
- **respective liabilities** of **acceptor /indorser** by law of place where instrument **is made payable**

Example: A BOE is **drawn** by A in **Berkley** where rate of interest is 15% and accepted by B **payable in Washington** where the rate of interest is 6%. The bill is **endorsed in India** and is **dishonoured**. An **action** is brought **against B in India**. He is liable to pay interest at 6% only. **But if A** is charged as **drawer**, he is liable to pay interest at 15%.

c. Inchoate instrument:

- It means an instrument that is **incomplete** in certain respects.
- The maker/drawer/acceptor or indorser of NI may **signs AND DELIVERS** it to another person leaving the instrument **wholly blank** or having written the word incomplete
- Such instrument is called inchoate instrument, and this give power to its holder to make it complete by writing any amount:
  - either within limits **specified** therein or
  - within limits specified by the **stamps** affixed on it.
- The person so signing both to holder and HDC.
- **Holder** cannot recover amount in excess of the amount intended to be paid to signor.
- **HDC** can **recover** any amount on such NI provided it is covered by the stamp affixed thereon.

d. Ambiguous Instruments

- Where an instrument may be **construed either** as a PN or BOE,
- **the holder may at his election treat** it as either, and
- the instrument shall be thenceforward treated accordingly.
- After exercising his **option**, the **holder cannot change** that it is the other kind of instrument.

e. In case of difference in amount stated in figures and words - Amounts stated in **words** shall be correct.

f. Demand Instruments (Section 19)



- PN or BOE in which **no time for payment** is mentioned, is payable **on demand**.
- Bills and notes can be either payable on demand or time instruments. However, **cheques** are **always** payable on **demand**.
- A BOE or PN is **payable on demand** when it is **expressed** to be payable:
  - on demand, or
  - "**at sight**" or
  - "**presentment**"

g. Time instrument (Section 22)

A bill or note which is payable

- After a **fixed period** or
- After sight or
- On a **specified day** or
- On the happening of an **event** which is **certain** to happen is known as time instrument.

**NOTE:**

In a PN or BOE, the expressions "**at sight**" and "**on presentment**" means on **demand**.

The expression "**after sight**" means,

- In a PN, **after presentment for sight**, and,
- In a BOE - **after presentment for acceptance**, or **noting** for non-acceptance, or **protest** for non-acceptance.

h. Maturity of NI (only in case of time instrument and not NI payable on demand)

The maturity of a note or bill is the date on which it falls due.

Days of grace

A note or bill (**not** being a **demand instrument**) is **at maturity** on **3rd day after** the day on which it is expressed to be payable. (i.e., **3 days grace** period is given in case of **time instrument**)

Calculation of maturity

In calculating maturity of a PN or BOE, payable at stated **no. of months after date/sight** or event,

- the **stated period** shall **terminate** on the **day** of the month, which **corresponds** with the day on which the instrument is dated/ presented for acceptance/ sight  
[E.g., If a time instrument dated 24<sup>th</sup> July, 2022 is payable **3 months after date**, the maturity shall be 24<sup>th</sup> October (instead of 23<sup>rd</sup> October) and then, add 3 days of grace period, so - 27<sup>th</sup> October],
- where the instrument is a **BOE** made payable at stated number of **months** after sight and has been accepted for honor, with the **day on which it was so accepted**.
- If the **month** in which the period would terminate has **no corresponding day**, the period shall be held to **terminate** on the **last day of such month**.  
[E.g., If a time instrument dated 31<sup>st</sup> Jan, 2022 is payable **3 months after date**, the maturity shall be ~~31<sup>st</sup> Feb~~ 28<sup>th</sup> Feb, 2022 and then, add 3 days of grace period, so - 3<sup>rd</sup> March]

### Calculating maturity of bill or note payable so many days after date or sight

In calculating date at which a note or bill made payable at certain **number of days** after date/sight/event, the **day of the date**, or of presentment for acceptance or sight, or of protest for non-acceptance, or on which the event happens, **shall be excluded**.

[E.g., If a time instrument dated 1<sup>st</sup> Jan 2022 is payable **5 days after date**, the maturity shall be 6<sup>th</sup> Jan 2022 (instead of 5<sup>th</sup>) and then, add 3 days of grace period, so - 9<sup>th</sup> March],

When the day of maturity is a holiday [Section 25] - When the day on which a PN or BOE is at maturity is a **public holiday**, the NI shall be deemed to be due on **next preceding business day**.

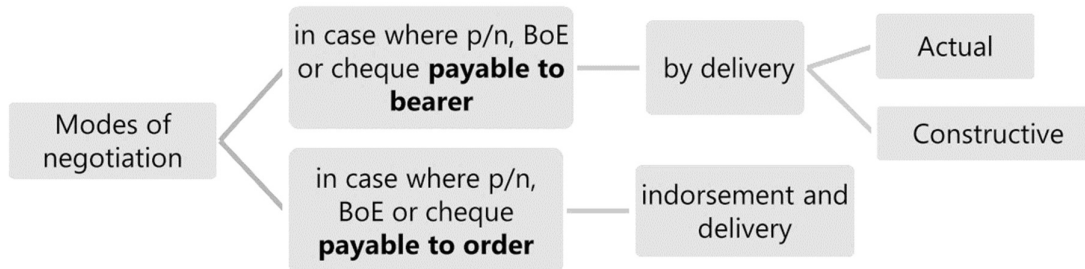
### Concept clarity check:

1. On 1<sup>st</sup> of July, Mr P. made a promissory note stating to pay Mr. X Rs. 50,000 on 27<sup>th</sup> of July. Is this NI eligible for grace period of 3 days? - **Yes! This is a time instrument and hence every time instrument is eligible for 3 days grace period.**
2. In case of **demand** instrument, there are **no grace** days.
3. Is Sunday a public holiday? - Woho!! Yes. But, it is not a national holiday.
4. If a time instrument dated 1st Jan 2022 is payable 5 days after date, then the instrument is said to be "at maturity" on 6<sup>th</sup> Jan or 9<sup>th</sup> Jan (i.e., including grace)  
**It is said to be "at maturity" on 9th Jan i.e., include grace days**

### Negotiation of NI:

- a. When a NI is **transferred** to any person with a **view** to constitute the person **holder** thereof, the instrument is **deemed** to have been negotiated.

b. Modes of Negotiation



c. Negotiation by delivery [Section 47]

Subject to sec 58 (instrument obtained by unlawful means or for unlawful consideration), a NI payable to **bearer** is negotiable by **delivery** thereof.

A NI **delivered on condition** that it is not to take effect **except in a certain event** is **not negotiable** (except in hands of a holder **for value without notice** of the condition) **unless such event happens**.

d. Negotiation by indorsement [Section 48]

Subject to sec 58, a NI payable to **order**, is negotiable by holder by **indorsement and delivery** thereof.

e. Importance of Delivery in Negotiation [Section 46]

- Delivery of instrument must be **voluntary** and should be with an **intention to pass property** in the instrument to person to whom it is delivered
- Actual delivery takes place when the instrument **changes hand physically**.
- Constructive delivery takes place when the instrument is delivered to the **agent**, clerk or servant of the indorsee on his behalf or when indorser, after indorsement, holds the instrument as an agent of the indorsee.
- When an instrument is indorsed **conditionally or for a special purpose only**, the **property** in it **does not pass** to the transferee, **unless** the NI is negotiated to **HDC**
- **Until delivery**, contract on a NI remains **incomplete** and revocable.
- Delivery is **essential** not only at time of negotiation but also at time of **making or drawing** of NI.
- Death of indorser:  
If a person makes the indorsement of instrument **but before** the same could be delivered to the indorsee **the indorser dies**, the **legal representatives** of the deceased person **CANNOT negotiate** the same **by mere delivery** thereof (Section 57) (ICAI Module Question)

Note - NI should be unconditional. However, **negotiation can be conditional**.

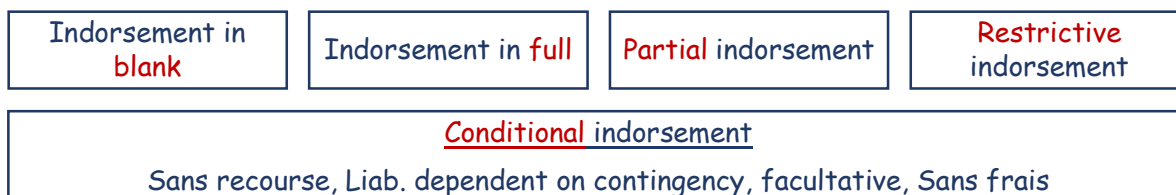
f. Delivery when effective between the parties

<u>Negotiation of instruments</u>	<u>How delivery is to be made</u>
As between parties standing in <b>immediate relation</b>	Delivery to be effectual must be <b>made by maker, acceptor or endorser</b> , or by person authorized by them
As between <b>such parties</b> and any <b>holder</b> other than HDC	It may be shown that instrument was delivered <b>conditionally</b> or for a <b>special purpose only</b> , and not for purpose of transferring absolutely property therein.

Indorsement of instrument (Section 15)

- When the **maker** or **holder** of a NI **signs** the same (otherwise than as such maker),
- for the purpose of negotiation,
- he is said to **indorse** the same and called as the indorser
- The person to whom the instrument is indorsed is called the **indorsee**.
- Sign may be on the **face** or **back** of NI or on a slip of paper annexed thereto known as **allonge**.

Various Kinds of Indorsement



- Indorsement in blank (Only Signature)
  - An indorsement where indorser just puts his sign without specifying indorsee (Section 16).
  - Effect - the NI becomes payable to **bearer** even though originally payable to order
- Indorsement in full (name and signature)  
An indorsement where along with indorser's **signature**, the **name** of indorsee is specified 0

- Partial Indorsement

An indorsement which purports to **transfer only a part of amount** of NI. Such indorsement is **invalid** under law

Exception: If a **bill** has been **paid in part**, the fact of the part payment may be indorsed on the instrument, and it may then be **negotiated for the residue**.

- Restrictive Indorsement

An indorsement is **restrictive** when indorser while making indorsement:

- **restricts or excludes right of indorsee to further transfer** such NI or
- **constitutes the indorsee as an agent** to indorse the instrument or to receive its content for the indorser or for some other specified person (Sec 50).

Note - Restrictive indorsement prohibits or restricts further negotiability of the instrument. It merely entitles the holder **to receive the amount** for a specific purpose.

Examples - Pay the contents to G only, Pay G for my use, etc.

- Conditional Indorsement

Where the indorser includes a **stipulation** negating (excluding) or limiting his **own liability** to the **holder** by making such liability or right of indorsee to receive amount due thereon upon happening of a **specified event although such event may never happen** (certain/**uncertain** event)

Conditional indorsement can be achieved by an indorser in any of the following ways

- Sans recourse indorsement

By **excluding** his liability e.g. the holder of a bill may indorse it thus: 'Pay A or order **without recourse** to me, or Pay A or order sans recourse, or Pay A or order at his own risk'.

- Liability dependent upon a contingency

By making his liability **dependent** upon the happening of a specified **event which may never happen**, in such a case the liability of holder as an indorser, arises only upon the happening of the event specified, and is **extinguished if the event becomes impossible**

Note - However, the indorsee **can sue the prior parties before** the event.

- Facultative indorsement

- ❖ An **indorser** by **express words** **abandons** some right or increases his liability under an NI.
- ❖ Example - Notice of **dishonor waived** is a facultative indorsement.

- 'Sans frais' indorsement

Where the indorser **does not want the indorsee** or any subsequent holder **to incur any expenses** on his account on the instrument, it is 'sans frais'.

Conversion of indorsement in blank into indorsement in full [section 49]

- The **holder** of NI indorsed in blank may, **without signing his own name**, by **writing** above indorser's sign a **direction to pay** to any other person as indorsee, **convert** indorsement in blank into an indorsement in full; **and** the holder **does not thereby incur** the **responsibility** of an indorser.

- If a NI, after having been indorsed in blank, is indorsed in full, the **amount** of it **cannot** be **claimed from** the **indorser in full**, **except** by the person to whom it has been indorsed in full, or by one who derives title through such person.
- Essentials of a valid indorsement
  - Signature of indorser  
Indorsement can be either by **merely signing** the NI (in case of payable to bearer) **or** by **mentioning name** of the person to whom such amount is payable (in case of payable to order)
  - Who may indorse or negotiate  
**Maker, drawer, payee** or **indorsee** in lawful possession - Solely or jointly **may indorse** the same unless negotiability of such instrument has been restricted or excluded as per sec 50.
  - Effect of indorsement  
Indorsement followed by delivery transfers to the indorsee the property therein with right of further negotiation, unless specifically restricted.

Instrument obtained by unlawful means /for unlawful consideration [section 58]

- When a NI has been **lost**, or
- has been **obtained** from any maker, acceptor or holder thereof by means of an **offence** or **fraud**, or for an **unlawful consideration**
- **no possessor** or **indorsee** who claims through the **person who found** or so obtained the instrument is **entitled to receive** the amount due thereon from such maker, acceptor or holder, **or from any party** prior to such holder, **unless**:
  - **such possessor** or indorsee is HDC, **or**
  - some person through whom he claims was HDC.

Instrument acquired after dishonour or when overdue [sec 59]

The **holder** of a NI, who has acquired it:

- **after dishonour**, whether by non-acceptance or non-payment, **with notice** thereof, or
- **after maturity**,

has only, as against other parties, the rights thereon of his transferor (same rights as transferor).

Accommodation note or bill: Provided that any person who, in **good faith** and **for consideration**, becomes holder, **after maturity**, of a PN or BOE made, drawn or **accepted without consideration**, for **enabling** some party thereto to **raise money** thereon, may recover such amount from any prior party (i.e., banks can recover from prior parties)

Instrument negotiable till payment or satisfaction [Section 60]

NI may be negotiated (**except** by the maker, drawee or acceptor **after maturity**) **until payment or satisfaction** thereof **at or after maturity**, **but not after** such payment or satisfaction.

Discharge of indorser's liability (Sec 40)

Where the **holder** of a NI, **without the consent** of the **indorser**, **destroys** or impairs the **indorser's remedy** against a prior party, the indorser is **discharged from liability to the holder** to the same extent as if the instrument had been paid at maturity.

### Negotiation Back ("taking up of a bill")

- In the **course** of negotiation, if a NI is **circulated/negotiated back** by an indorser to any of the **prior party** on the NI, it is termed as negotiation back.
- Person who becomes **HDC** under this negotiation back **cannot make any intermediate indorsers liable**.
- But where an **indorser** had **excluded his liability**, by the use of the words '**sans recourse**' or 'without recourse to me' and **after that becomes holder** of the instrument in his own right under the 'negotiation back', **all intermediate indorsers are liable to him** and in case of dishonour, he can recover the amount from all or any one of them.

### Discharge from liability on NI (Section 82 to 90):

#### a. Introduction:

- When a party who is liable of a NI, ceases to be liable, he is said to be discharged from liability
- **Discharge of liability of party** to an instrument is **different from discharge of NI** itself
- When the **rights against all** the parties on a NI **come to an end**, the **NI is discharged**.
- **After** NI is discharged, **no person** (even HDC) can claim amount of NI from any party thereto.
- When the **maker** of PN or **acceptor** of BOE is **discharged** - All other parties and **NI itself** is deemed **discharged**.

#### b. Modes of discharge from liability:

Cancellation	Release	Payment	holder agreeing to a qualified or limited acceptance of BOE	Holder allowing drawee > 48 hours to accept
Drawee not duly presenting cheque for acceptance	Bill coming to acceptor's hand after maturity	Discharge by material alteration		

#### By cancellation [Section 82 (a)]

- When holder of NI or his agent **cancels** the **name of a party (Mr. X)** on NI,
- with an **intention to discharge** him,
- **such party (Mr. X) and all subsequent parties**, who have right of recourse against Mr. X, **are discharged** from liability to the holder.

#### By release [Section 82 (b)]

- Where the **holder** of NI, **releases** any party to the NI by any method other than cancellation,
- the party so released (and all subsequent parties) are discharged from liability.
- For instance - discharge by agreement, waiver, release, accord and satisfaction.

#### By payment [Section 78]

- When **payment** on an instrument **is made in due course**, both the **instrument** and the **parties** to it are **discharged** subject to provision of Sec. 82(c)
- Such **payment** may be made by any **party** to NI or a **stranger** (on account of party liable to pay).

By the holder allowing the drawee of a bill more than 48 hours to accept [Section 83]

If holder of a BOE allows the drawee > 48 hours, exclusive of public holidays, to consider whether he will accept the same, all previous parties not consenting to such allowance are thereby discharged from liability to such holder.

By the Holder agreeing to a qualified or limited acceptance of bill of exchange [Section 86]

If holder of a BOE agrees to a qualified acceptance, all prior parties whose consent is not obtained to such an acceptance are discharged from liability.

Examples of qualified acceptance - Altering the sum ordered to be paid or accepting to pay at specified place only and not elsewhere. [Refer QB 20]

By the Drawer not duly presenting a cheque for payment [Section 84] [Refer QB 18]

- If holder does not present a cheque within reasonable time after its issue, and
- the bank fails to make the payment
- causing damage to the drawer,
- the drawer is discharged as against the holder to extent of the actual damage suffered by him.

Note

1. In determining what is a reasonable time, regard shall be had to
  - (a) the nature of the instrument
  - (b) the usage of trade and of bankers, and
  - (c) facts of the particular case.
2. The drawer will get discharge, but the holder of the cheque will be treated as creditor of the bank, in place of drawer. He will be entitled to recover the amount from Bank

Example - A draws a cheque for Rs. 1,000, and, when cheque ought to be presented, has funds at the bank to meet it. The bank fails before the cheque is presented. The drawer is discharged, but the holder can prove against the bank for the amount of the cheque

By the bill coming to the acceptor's hands after maturity (Section 90)

If a negotiated BOE, at or after maturity, held by the acceptor in his own right, all rights of action thereon are extinguished. (i.e., rights and liabilities of the same person cancel each other)

Discharge by material alteration

- Any material alteration of NI renders the same void as against anyone who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties.
- In case of material alteration by an indorsee, the indorser will be discharged from his liability even in respect of the consideration thereof
- The parties who consent to such alterations and those who make such alterations are disentitled to complain against such alteration.

- **Alteration must be material** - which in any way **alters** the **operation** of the instrument and **affects** the **liability** of parties thereto.

Any alteration is material which

- alters the **business effect** of the instrument
- causes it to speak a **different language** in legal effect form which it **originally spoke**, or which changes the **legal identity** or character

Following alteration are specifically **declared** to be **material** - Any alteration of:

date sum payable time of pay place of payment or addition of place

Consider reading examples of material alteration from pg. 2.39 of ICAI Mat (Not before exam)

- The **following** alterations **do not affect the liability** of parties thereto:

unintentional and pure accident	correcting clerical error	before issue of NI	consent of parties liable
to carry out common intention of original parties	made by stranger w/o holder's consent	parties who become liable after alteration	not material (e.g. - full name instead of first name)

- Alterations permitted (Exceptions to Section 87)

<u>Section 20:</u> Incomplete NI can be filled up by holder (inchoate instruments)	<u>Sec 29:</u> NI indorsed in blank can be converted to indorsement in full by holder
<u>Sec 125:</u> Crossing of uncrossed cheque (by holder)	Alteration should be apparent on face of it. Else, valid in hand of HDC

Relevant case laws:

- By material alteration, identity of original NI is destroyed and those parties who had agreed to be liable on original NI cannot be made liable on **new contract** contained in the altered instrument to which they **never consented** (*Gour Chandra vs Prasanna Kumar*)
- By material alteration, the liability of the parties is avoided, whether the change be prejudicial or beneficial to the parties [*Loonkaran sethiya v Ivan E. John*]

Concept clarity check:

A PN was given to Mr. X without mentioning time for payment. Mr. X added payable on demand. Is that material alteration? - **No, it does not alter business affect of the instrument.**



## Dishonor of Negotiable Instruments



### Dishonour by non-acceptance

When is bill said to be dishonoured:

A BOE is said to be dishonoured by non-acceptance in any one of the following ways (Sec 91):

*[48 Excuses why Drawee's Acceptance IS Fictitious]*

- a) when BOE is duly **presented** for acceptance, **and drawee**, does not accept or **refuse acceptance** within **48 hrs** from the time of presentment
- b) where presentment is **excused**, and the bill is **not accepted**.
- c) where the drawee is **incompetent** to contract (e.g., minor), the bill **may be** treated as dishonoured
- d) where the drawee is a **fictitious** person.
- e) where the drawee **could not be found** even after reasonable search
- f) when a drawee gives a **qualified acceptance**, the holder **may treat** the instrument dishonoured.

Effect of non-acceptance - Holder can **start an action** against the **drawer** and **indorsers** and need not wait for maturity of the bill.

### Dishonour by non-payment

A note, bill and cheque is said to be dishonoured by non-payment when:

- the **maker**, **acceptor** or **drawee** of the cheque **makes default** in payment
- **upon being** duly **required** to pay the same (Sec. 92).

Moreover, a NI is dishonoured by non-payment when **presentment for payment is excused** and the instrument when **overdue remains unpaid** (Sec. 76).

Case Law - Where a promissory note was sent by registered post and the party liable refused to receive the post, the bill was held to be dishonoured [K. Venkatasubbayya v. P.R. Rao Tobacco Co.]

### Notice of Dishonour (NOD):

Notice of Dishonour (NOD)	When NI is <b>dishonoured</b> (by non-acceptance/non-payment), the holder <b>must</b> give a NOD to <b>drawer</b> or his <b>previous holder</b> in order to <b>make them liable</b> .  If he <b>fails</b> to do so ( <b>except</b> when NOD maybe <b>excused</b> ), he will <b>forfeit</b> his <b>right of action</b> against <b>prior parties</b> entitled to NOD		
Object of NOD	<ul style="list-style-type: none"> <li>• The object of NOD is to <b>inform</b> (or warn) the party or person liable on instrument <b>about dishonour</b> of the instrument.</li> <li>• NOD is necessary in order to make <b>drawer liable</b>, on the dishonour by the drawee or the acceptor</li> </ul>		
<u>By and to whom</u> notice should be	<table border="1" style="width: 100%;"> <tr> <td style="width: 20%;"><b>By Whom?</b></td> <td> <ul style="list-style-type: none"> <li>• NOD must be given by <b>holder</b>, or by a <b>person liable thereon</b>.</li> <li>• NOD by <b>stranger</b> is of <b>no effect</b>.</li> </ul> </td> </tr> </table>	<b>By Whom?</b>	<ul style="list-style-type: none"> <li>• NOD must be given by <b>holder</b>, or by a <b>person liable thereon</b>.</li> <li>• NOD by <b>stranger</b> is of <b>no effect</b>.</li> </ul>
<b>By Whom?</b>	<ul style="list-style-type: none"> <li>• NOD must be given by <b>holder</b>, or by a <b>person liable thereon</b>.</li> <li>• NOD by <b>stranger</b> is of <b>no effect</b>.</li> </ul>		

given (Sec 93)		<ul style="list-style-type: none"> <li>• Even <b>NOD</b> by a <b>party</b> to the instrument is <b>not valid</b>, if, he is not liable thereon.</li> </ul>
	To Whom?	<ul style="list-style-type: none"> <li>• NOD must be given to <b>all parties</b> whom holder <b>seeks</b> to make <b>liable</b> (other than maker/ acceptor/ drawee as they are parties primarily liable on the due date and at proper place)</li> </ul>
<u>Modes</u> of giving Notice (Section 94).	<ul style="list-style-type: none"> <li>• NOD may be given to <b>duly authorized agent</b> of person to whom it is required to be given, <b>or</b>, if dead, to his <b>LR</b> or, if insolvent, to his <b>assignee</b>;</li> <li>• It may be <b>oral or written</b> (if written, sent by <b>post</b>); and</li> <li>• NOD must inform the party, either in <b>express term</b> or by reasonable in <b>intendment</b>, that NI has been dishonoured, and in what way, and that he will be held liable thereon</li> <li>• it must be given within <b>reasonable time after dishonour</b>,</li> <li>• at <b>place of business</b> or (in case such party has no place of business, at the residence of the party for whom it is intended).</li> <li>• If the notice is duly directed and sent by post and <b>miscarries</b>, such miscarriage <b>does not render the notice invalid</b></li> </ul>	
Party receiving must transmit NOD (Sec 95)	<ul style="list-style-type: none"> <li>• Any <b>party receiving NOD must</b>, in order to render <b>any prior party liable</b> to himself, <b>give NOD</b> to such party <b>within reasonable time</b>, unless such party otherwise receives NOD directly from holder u/s 93</li> <li>• Thus, a person receiving notice <b>must</b> transmit it to prior parties whom he wishes to make liable to himself because holder may have omitted giving NOD to some prior parties.</li> </ul>	
<u>Agent</u> of presentment (Sec 96)	<ul style="list-style-type: none"> <li>• When NI is <b>deposited</b> with an <b>agent for presentment</b>,</li> <li>• the agent is <b>entitled</b> to the same time to <b>give notice</b> to his principal as if he were the <b>holder</b> giving NOD, and</li> <li>• <b>principal</b> is entitled to a <b>further</b> like period to give notice of dishonour.</li> </ul>	
When party to whom notice given is dead (sec 97)	When the party to whom NOD is <b>dispatched</b> is <b>dead</b> , but party dispatching the notice is <b>ignorant</b> of his death, the <b>notice is sufficient</b>	
When NOD is unnecessary (Sec 98)	<p>No NOD is necessary:</p> <ol style="list-style-type: none"> <li>a. <b>waiver</b> i.e., party entitled thereto has dispensed such right (facultative indorse)</li> <li>b. in order to charge the <b>drawer</b>, when he has cancelled payment (e.g. cheque)</li> <li>c. to charge the drawers, when <b>acceptor is also drawer</b></li> <li>d. when the party charged <b>could not suffer damages</b> for want of notice</li> <li>e. <b>parties</b> entitled to notice <b>cannot</b> after due search <b>be found</b> or</li> <li>f. <b>party</b> bound to give notice is unable to, without any <b>fault</b> of his own</li> <li>g. in the case of <b>PN</b> which is <b>not negotiable</b></li> <li>h. when parties entitled to notice, knowing the fact of dishonour, <b>promises unconditionally</b> to pay the amount due</li> </ol>	

### Dishonour of cheques for insufficiency of funds in the accounts [Sec 138 to 142]

#### Sec 138: Dishonor of cheque for insufficiency, etc., of funds in the accounts

Where any cheque drawn by a person on an account maintained by him with a banker

- for payment of any amount of money
  - to another person from that account
  - for the discharge, in whole or in part, of any debt or other liability
  - is **returned** by the bank **unpaid**,
  - either because of the
    - amount of **money to credit** of account is **insufficient** to honor cheque, or
    - that it **exceeds amt arranged to be paid** from that account by an agreement made with bank,
- such person shall be **deemed** to have committed an **offence (criminal)** and shall be punished with
- **imprisonment** for a term which may extend to **2 years**, or
  - with **fine** which may extend to **2x amount** of the cheque, or **both**

Provided that this section shall **not apply, unless:**

- Cheque presented within validity period: The cheque has been presented to bank **within 3 months** from date on which it is drawn or within period of its validity, whichever is **earlier**.
- Demand for payment through notice: the **payee** or the **HDC** of cheque, as the case may be, makes a **demand** for the payment of the said amount of money by giving a **notice**, in **writing**, to the **drawer** of the cheque, within **30 days** of the receipt of information by him from the bank regarding the **return** of the cheque as unpaid, **and**
- Failure of drawer to make payment: the drawer of such cheque fails to make payment of said amount of money to payee or HDC of the cheque, within **15 days** of the receipt of the said notice.

**Note** - A cheque dishonoured on account of **stop payment** request by drawer due to unavailability of funds shall also be considered as dishonor of cheque and shall attract **penalty** on drawer. **Refer Q 25**

#### Section 139: Presumption in favor of holder

Unless the contrary is proved, when a cheque is **dishonoured**, it shall be **presumed** that the **holder** thereof **received** the cheque for **discharge**, in whole or in part, or any **debt** or other liability.

**Note** - Above presumption prescribed here is a "**rebuttable presumption**"

#### Section 140: Defence which may not be allowed in any prosecution u/s 138

It shall **not be a defence** in a prosecution of an offence u/s 138 that **drawer** had no **RGTB** when he issued cheque that cheque may be dishonoured on presentment for reasons stated in that section.

#### Section 141: Offences by Companies

1. Where person committing contravention is a **company**:
  - Every **person** who, at time of contravention, was **responsible** to co. for conduct of biz, and
  - Company itselfShall be **deemed to be guilty** and liable to be proceeded against and punished accordingly

Person shall not be liable to punishment if he **proves** that contravention took place:

- without his **knowledge** or
- that he exercised all **due diligence** to prevent such contravention.

2. Where person is **nominated as director** of a co. by virtue of his **holding any office** or employment in the **CG/SG** or a financial corporation owned or controlled by the **CG/SG**, as the case may be, he shall **not be liable for prosecution under** this chapter

3. Where it is **proved** that contravention has taken place with:

- the **consent** or connivance of, or
- is **attributable** to any neglect on part of

Dir/Mgr/CS/Other officer

Such Dir/Mgr/CS/Other officer shall also be **deemed guilty** and liable to be proceeded against and punished

#### Section 142: Cognizance of offence u/s 138:

- A **written complaint** to be filed to Metropolitan or first class judicial magistrate by Payee/HDC
- within 1m from date of cause of action (i.e., failure of drawer to make payment despite notice)
- No court inferior to metropolitan or judicial magistrate can try for such offence

Offence u/s 138 shall be inquired into and tried only by court within whose local jurisdiction:

- If cheque is delivered for collection through (bank) account - Branch of the bank where payee or HDC maintains the account is situated
- Otherwise, branch of the drawee bank where drawer maintains account is situated.

#### Power of court to try cases summarily (Section 143)

Trial of Offence: Notwithstanding anything contained in the CCP, 1973, all offences under this Chapter shall be tried by a **Judicial Magistrate** of the first class or by a **Metropolitan Magistrate**.

In case of summary trial: It shall be **lawful** for the Magistrate to pass a sentence of **imprisonment** for a term **not > 1 year** and an amount of **fine > Rs. 5,000**.

In case where no summary trial can be made: If it appears to **Magistrate** that the nature of the case is such that a sentence of imprisonment for a **term > 1 year may have to be** passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, **record an order** to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

Speedy Trial: The trial of a case shall, so far as practicable, **consistently** with the interests of justice, **be continued from day to day until its conclusion**, unless the Court finds the **adjournment** of the trial beyond the following day to be necessary for reasons to be recorded in writing.

Speedy and efficient Disposal: Every trial shall be **conducted as expeditiously** as possible, and an **endeavour** shall be made to **conclude** the trial within **6 months** from date of filing of complaint.

Section 143A: Power to direct interim compensation

- Court trying offence u/s 138 may order drawer to pay **interim compensation** to the complainant.
- Such interim compensation shall **not exceed 20% of amount** of cheque.
- Such compensation shall be **paid within 60 days** from date of order (+ upto 30 days on sufficient cause shown by drawer)
- If drawer is **acquitted**, the Court shall direct the **complainant to repay** to the drawer such interim comp., **with interest at bank rate within 60 days** from date of order (+ upto 30 days on sufficient cause shown by complainant)
- Interim compensation may be **recovered** as if it were a **fine**

Section 147: Offences to be Compoundable

Notwithstanding CCrP, 1973, every offence punishable under this Act shall be **compoundable**

Section 148: Power of Appellate court to order payment pending appeal against conviction

- Notwithstanding CCrP, 1973, in an **appeal** by **drawer** against conviction u/s 138, **Appellate Court may order** the **appellant** to deposit such sum (**min 20%** of fine or compensation awarded by trial Court)

Provided that amount payable here shall be **in addition to** any **interim compensation** paid u/s 143A.

- Above amount shall be **deposited within 60 days** from date of order (+ **Upto 30 days** if sufficient cause shown by appellant)
- Appellate Court **may direct release** of amount deposited by the appellant **to the complainant** at any time during the pendency of the appeal.

Provided that if appellant is **acquitted**, Court shall direct **complainant to repay** to appellant the amount so released, with **interest at bank rate within 60 days** from date of order (+ **Upto 30 days** if sufficient cause shown by complainant)

The End



# Chapter 3 - General Clause Act

## Introduction:

- The General Clauses Act, 1897 (*GCA*) contains 'definitions' of certain terms and general principles of interpretation
- The *GCA* also comes for a rescue in the absence of clear definition in the specific enactments
- **Objects** of the Act are:
  - to shorten the language of Central Acts;
  - to provide for uniformity of expression by giving definitions for common terms;
  - to state explicitly certain convenient rules for construction and interpretation of central acts;
  - to guard against slips and oversights by importing certain common clauses.

## Application Of the General Clauses Act

Act does not define any "territorial extent" clause. It applies to the Central Acts.

The Central Acts to which this Act apply are:

- (a) Acts of Indian Parliament (Central Act) along with rules and regulations made thereunder;
- (b) Acts of Dominion Legislature passed between 15th August 1947 and the 26th of January 1950;
- (c) Acts passed before commencement of the Constitution by the Governor-General in Council or the Governor-General acting in a legislative capacity.

Article 367 of the Constitution of India authorises use of General Clauses Act for the interpretation of constitution.

## Some Basic Understand of Legislature:

**"Preamble"**: Every Act has a preamble which expresses the scope, object and purpose of the Act. It is the main source for understanding the intention of lawmaker behind the Act. Whenever there is ambiguity in understanding any provision of Act, Preamble is accepted as an aid to construction of the Act.

**Note** - The Preamble to an Act discloses the primary intention of the legislature but can only be brought in as an aid to construction if the language of the statute is not clear. However, it cannot override the provisions of the enactment.

**Definitions** - Words are defined in the respective Act. Sometimes, definitions are referred in other statutes. If words are not defined in the respective Acts, such words are to be taken from General Clauses Act.

Section 1: Preliminary - Short Title - General Clause Act, 1897

Section 2: - Repealed.

## Section 3: Definitions:

Act	'Act', used with reference to an offence or a civil wrong, shall include a series of acts, and words which refer to acts done extend also to illegal omissions;
-----	---

Affidavit	'Affidavit' shall <b>include affirmation</b> and <b>declaration</b> in the case of persons by law allowed to affirm or declare <b>instead of swearing</b> .  <u>Note:</u> The terms "Affidavit", "Oath" & "Swear" have same definitions in the Act.
Central Govt	<ul style="list-style-type: none"> <li>In relation to anything done before the commencement of the Constitution, mean the <b>Governor General</b> in Council</li> <li>In relation to anything done or to be done after the commencement of the constitution of the Constitution, mean the <b>President</b></li> </ul>
Commencement	<p>The <b>day</b> on which the Act or Regulation <b>comes into force</b>;</p> <p>Coming into force or entry into force refers to the <b>process</b> by which legislation; regulations, etc. <b>comes to have legal force and effect</b>.</p> <p><u>State of Orissa Vs. Chandrasekhar Singh Bhoi</u> A <b>Law cannot</b> be said to be <b>in force unless</b> it is <b>brought into operation by legislative enactment</b>, or by the exercise of <b>authority</b> by a delegate empowered to bring it into operation. The theory of a statute being "<b>in operation in a constitutional sense</b>" though it is not in fact in operation <b>has no validity</b>.</p>
Document	<p>Document shall <b>include</b></p> <ul style="list-style-type: none"> <li>any <b>matter</b> written, expressed or described upon any substance</li> <li>by means of <b>letters</b>, figures or marks or by more than one of those means</li> <li>which is <b>intended</b> to be used or which may be used,</li> <li>for the purpose or <b>recording</b> that matter.</li> </ul> <p>For example, book, file, painting, inscription and even computer files are all documents. However, it <b>does not include Indian currency notes</b>.</p>
Enactment	<p><b>Shall include a Regulation</b> (as hereinafter defined) and any Regulation of Bengal, Madras or Bombay Code, and shall also include any provision contained in any <b>Act</b> or in any such Regulation as aforesaid;</p> <p>It has been held that an "enactment" would include <b>any Act</b> (or a provision contained therein) made by the <b>Union Parliament</b> or the <b>State Legislature</b>.</p>
Financial year	FY shall mean the year commencing on the first day of April.
Year	Means - A year reckoned according to the British calendar.
Good Faith	<ul style="list-style-type: none"> <li>A <b>thing</b> shall be deemed to be done in "good faith" where it is in fact done <b>honestly, whether it is done negligently or not</b>;</li> <li>The <b>question</b> of good faith under <b>GCA</b> is <b>one of fact</b>. It is to be determined w.r.t. the facts and circumstances of each case.</li> <li>The term "good faith" has been <b>defined differently in different enactments</b>.</li> </ul>



	<ul style="list-style-type: none"> <li>This definition of the good faith <b>does not apply</b> to that enactment which contains a special definition of the term "good faith" and the definition given in that particular enactment has to be followed.</li> <li>Definition may be <b>applied only if</b> there is <b>nothing repugnant</b> in [context].</li> </ul> <p>In <u>Maung Aung Pu Vs. Maung Si Maung</u>, it was pointed out that:</p> <ul style="list-style-type: none"> <li>the expression "good faith" is not defined in the Indian Contract Act, 1872 and definition given here in <i>GCA</i>, 1897 <b>does not expressly apply</b> the term on ICA.</li> <li>The <b>definition</b> of good faith as is generally understood in the <b>civil law</b>, and which may be taken as a <b>practical guide</b> in understanding the expression in ICA</li> <li>The definition is that - Nothing is said to be done in good faith which is <b>done without due care and attention</b> as is expected with a man of <b>ordinary prudence</b>.</li> <li>An honest purchase made <b>carelessly</b> without making proper enquiries <b>cannot</b> be said to have been made in good faith so as to <b>convey good title</b>.</li> </ul>
Government	shall <b>include both</b> the Central Government and State Government.
Immovable Property	shall include: <ul style="list-style-type: none"> <li><b>Land</b>,</li> <li><b>Benefits</b> to arise out of land, and</li> <li>Things <b>attached</b> to the earth, or</li> <li><b>Permanently</b> fastened to anything attached to the earth.</li> </ul>
	<p>Where, in <b>any enactment</b>, the definition of immovable property is in the <b>negative</b> and not exhaustive, the <b>definition</b> as given in <i>GCA</i> will apply.</p> <p><u>Example:</u></p> <ol style="list-style-type: none"> <li>In <i>Shantabai v. State of Bombay</i>, the Supreme Court pointed out that <b>trees</b> must be regarded as <b>immovable property (IP)</b> because they are attached to or rooted in the earth.</li> <li>An <b>agreement</b> to convey forest produce like tendu leaves, <b>timber</b>, bamboos etc., the <b>soil</b> for making bricks, the <b>right to build</b> on and occupy the land for business purposes and the right to grow new trees and to get leaves from trees that grow in further are all included in the term <b>IP</b>.</li> <li><b>Right of way to access</b> from one place to another, <b>may be considered as IP</b></li> <li><b>Right to drain</b> of water is <b>NOT IP</b>.</li> <li>Any <b>machinery fixed</b> to the soil, <b>standing crops</b> can be held as IP</li> <li><b>Insurance Policies</b> covering immovable property - Not covered under IP</li> </ol>
	<p><u>Example:</u></p> <p><u>Ananda Behera v. State of Orissa</u>. "Right to catch or carry fish" as an IP.</p>
Imprisonment	shall mean imprisonment of either description as defined in the Indian Penal Code; i.e., Rigorous or Simple imprisonment
Movable Prop	mean <b>property</b> of every description, <b>except immovable property</b> .

Section 4 is transition provision and hence intentionally not covered here

### Section 5: Coming into operation of enactment

- Where, if any **specific date** of enforcement is **prescribed** in the Official Gazette, Act shall into **enforcement from such date**.
- Where any Central Act has **not specifically mentioned a particular date** to come into force, it shall be implemented on the day on which it receives the **assent** of:
  - **Governor General** (for Acts made before commencement of Indian Constitution)
  - the **President** in case of an **Act of Parliament**.

#### Example:

SEBI (ICDR) (5<sup>th</sup> Amendment) Regulations, 2015 was issued by SEBI vide Notification dated **14th August** 2015 w.e.f. **1 January 2016**. Here, this regulation shall come into force on 1st January 2016 rather than the date of its notification in the gazette.

#### Notes:

1. Where an **Act empowers the government** to bring any of the provisions into operation on any day which it deems fit, **no Court can issue a mandamus** with a view to compel the Government to bring the same into operation on particular day
2. If a **sufficient time** has **elapsed** since an Act or any of its provisions has been passed and it has not been brought into force (operation) by the Government, the **Court** through a **writ** can **direct** the Government to **consider the question** as to when the same should begin to operate.
3. Effective date of Rules:  
Supreme Court held that effective date of Rules would be when the Rules are **published vide Gazette notification** and not from date when the Rules were under preparation.
4. Law takes no cognizance of fraction of day. It comes into force from midnight.  
Example - Law which comes into force on 1<sup>st</sup> Jan shall apply from midnight of 31<sup>st</sup> December.
5. All laws are **applicable prospectively** unless otherwise mentioned specifically.

### Section 6: Effect of Repeal:

Where any Central legislation or regulation **repeals any Act made** or yet to be made, **unless another purpose exists**, the **repeal shall not:** [*Revive Right Penalty Litigation*]

- **Revive** anything not enforced or prevailed during the period at which repeal is effected or;
- Affect any **right**, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
- Affect any **penalty**, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
- Affect any inquiry, **litigation** or remedy w.r.t. such claim, privilege, debt or responsibility or any inquiry, litigation or remedy may be initiated, continued or insisted.

#### Important Case Laws:

Kolhapur Canesugar Works Ltd. V, Union of India

Supreme Court held that **Sec 6 only applies to repeal** and **not to omissions** and applies when repeal is of a **Central Act or Regulation** and **not of a Rule**.

Navrangpura Gam Dharmada Milkat Trust v. Ramtuji Ramaji	<ul style="list-style-type: none"> <li>• 'Repeal' of provision is in distinction from 'deletion' of provision.</li> <li>• 'Repeal' ordinarily brings about <b>complete obliteration</b> of the provision <b>as if it never existed</b>, thereby affecting all incoherent rights and all causes of action related to the 'repealed' provision.</li> <li>• 'Deletion' ordinarily takes effect <b>from date</b> of legislature <b>effecting</b> the said deletion, <b>never to effect total</b> wiping out of the provision as if it never existed.</li> </ul>
---	---

**Example:**

The 3 farm laws were repealed after 1 year of protest by the farmers.

**Section 6A: Repeal of Act making textual amendment in Act or Regulation**

- Where any Central Act or Regulation **repeal any** enactment
- then such repeal shall **not affect continuance** of any **amendment** or insertion made by the enactment so repealed.

**Section 7: Revival of repealed enactments:**

- In any Central Act or Regulation made after commencement of this Act,
- **for the purpose of reviving**, either wholly or partially, any enactment wholly or partially repealed,
- it shall be necessary to expressly **state that purpose**.

**Section 8: Construction of references to repealed enactments**

- Where **this Act or Central Act** or Regulation made after the commencement of this Act,
- **repeals and re-enacts**, with or without modification, any provision of a former enactment,
- then **references** in any other enactment or in any instrument to the provision so repealed shall,
- unless a different intention appears, be **construed as references to the provision so re-enacted**.

**Example:**

1. Companies Act 1956 was repealed and re-enacted as Companies Act, 2013. In such case, every other Act which had reference to Companies Act 1956 will be construed as reference to 2013 unless different intention appears.
2. In **section 115 JB** of the Income Tax Act, 1961, for calculation of **book profits**, the Co. Act, 1956 are required to be referred. With the advent of Co. Act, 2013, the corresponding change has not been made in section 115 JB of the Income Tax Act, 1961. On referring of Sec. 8 of the GCA, book profits to be calculated u/s 115 JB of the Income Tax Act will be as per the Co. Act, 2013.

**Section 9: Commencement and termination of Time:**

- In any legislation or regulation, it shall be **sufficient**,
- for purpose of **excluding the first** in a series of days **to use the word "from"** &
- for the purpose of **including the last** in a series of days **to use the word "to"**.
- In simple words - Where the word "from" is used, exclude that particular date and where the word "to" is written, "include" that date.

**Example:**

A company declares **dividend** for its shareholder in its AGM held on 30/09/2016. Under the provisions of the Companies Act, 2013, company is required to **pay** declared **dividend within 30 days from** the

date of declaration i.e., from 01/10/2016 to 30/10/2016. In this series of 30 days, 30/09/2016 will be excluded and last 30th day i.e., 30/10/2016 will be included.

#### **Section 10: Computation of time:**

- Whereby any legislation or regulation,
- any act is directed to be done in any court or office on a certain day or within prescribed period
- then, if the Court or office is closed on that day or last day of the prescribed period,
- the act shall be considered as done in due time if it is done on the next day afterwards on which the Court or office is open.

Note - Even if the offices or Court are closed because of some random holiday or Sunday or Saturday or any reason, this provision will still apply.

#### **Section 11: Measurement of Distances**

Unless a different intention appears - Measure in a straight line on a horizontal plane.

Example: Distance between two cities by roadways is 100 kms and by water ways 80 kms. For purpose of any Central Act under GCA, distance shall be measured in a straight line on a horizontal plane.

#### **Section 12: Duty to be taken pro rata in enactments**

- Whereby any enactment, any duty of customs or excise or in the nature thereof, is leviable on any given quantity, by weight, measure or value of any goods or merchandise,
- then a like duty is leviable according to the same rate on any greater or less quantity.

#### **Section 13: Gender and number**

In all legislations and regulations, unless there is anything repugnant in the subject or context-

- Words importing the masculine gender shall be taken to include females, (i.e., he includes she) and
- Words in singular shall include the plural and vice versa.

Exception: Where word used conveys a specific gender, there is a presumption that provisions of GCA do not apply. For example:

1. the word 'bullocks' could not be interpreted to include 'cows'.
2. The word 'male descendants' cannot be interpreted to include females

#### **Section 14: Power and Functionaries:**

Powers conferred by Central Acts may be exercised from time to time as occasion requires.

#### **Section 15:**

- Whereby any legislation or regulation,
- a power to appoint any person to fill any office is conferred, then unless otherwise provided,
- any such appointment, may be made either by name or by virtue of office.

#### **Section 16: Power to appoint to include power to suspend or dismiss:**

- The authority having for the time being power to make the appointment
- shall also have power to suspend or dismiss any person so appointed

Example - Wherever the law provides that court will have the power to appoint, suspend or remove a receiver, the legislature simply enacted that wherever convenient the court may appoint receiver and it was implied within that language that it may also remove or suspend him

**Section 17: Substitution of Functionaries:**

- For **indicating the application of a law** to every person executing the functions of an office,
- it shall be **sufficient, to mention the official title** of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.

**Section 18: Successor**

- For indicating the **relation of a law to successors of any functionaries,**
- it shall be **sufficient to express** its relation to the functionaries.

**Section 19: Official Chiefs and subordinates**

A **law relative to the chief or superior** of an office **shall apply** to the **deputies** or subordinates **lawfully performing the duties of that office in the place of their superior.**

**Section 20: Construction of orders, etc., issued under enactments**

- Whereby any legislation or regulation,
- a power to issue any **notification, order, scheme, rule,** form, or by-law is conferred,
- then **expression** used in such notification, etc., shall, unless otherwise specified, have the **same respective meaning as in the Act** or regulation conferring power.

**Section 21:**

- Where any legislation or regular confers the power to issue notifications, etc.,
- it shall be deemed to include power to add, to amend, vary or rescind such notifications, etc.

**Section 22:**

- Where, by any Central Act or Regulation (which is not in force), on the passing thereof, a power is conferred to make rules or bye-laws, or to issue orders thereunder,
- then that **power may be exercised** at any time **after** passing of Act /Regulation (even before commencement thereof);
- but such rules, bye-laws or orders shall **not take effect till commencement of Act** or Regulation.

For example: If Companies Act, 2013 was passed on 29<sup>th</sup> Aug 2013. It authorised CG to make rules related to NCLT. CG made rules related to NCLT in 2014. However, NCLT provisions were not implemented till 2016. In such cases, the NCLT Rules will also apply only from 2016.

**Section 23: Publication for public comments:**

Where power to makes Rules, etc. is subject to the condition of rules or bye-laws being made after **previous publication**, then:



1. **Publish a draft** of the proposed rules or bye-laws for the information of **persons** likely to be **affected** thereby (in manner prescribed)
2. It shall be published with the **draft notice** specifying a **date** on or after which the draft will be

taken into consideration

3. Consider any **objection** or **suggestion** which may be received from any person w.r.t. draft before the date so specified;
4. **Publication in the Official Gazette** of such rule or bye-law after previous publication shall be **conclusive proof** that the rule or bye-laws has been duly made

**Conclusive presumption** - After the **publication** of the rules in the **Official Gazette**, it is to be **inferred** that the **procedure** for making the rules **has been followed**. Any irregularities in the publication of the draft cannot therefore be questioned.

**Note** - It is also **open** to the authority to **make suitable changes** in the **draft before finally publishing** them. It is **not necessary** for that authority to **re-publish** in the amended form before their final issue so long as the changes made are **ancillary** to the earlier draft and **cannot be regarded as foreign** to the subject matter thereof.

#### **Section 24: Continuation of orders etc., issued under enactments repealed and re- enacted**

- If a **statute** is repealed and **re-enacted** in the **same or substantially the same terms**, the re-enactment **neutralizes the previous repeal** and the provisions of the repealed Act which are re-enacted, **continue** in force **without interruption**.
- If, however, the statute is repealed and re-enacted in **somewhat different terms**, the **amendments** and modifications **operate as a repeal of provisions** of repealed Act which are changed by and are repugnant to the repealing Act.

Example - The **Mines Act of 1923** was repealed and replaced by the Mines Act of 1952. Rules made under the repealed Act must be deemed to continue in force by virtue of this section until superseded.

#### **Section 25: Recovery of fines (to be done as per IPC and CrP):**

- Sec 63 to 70 of the Indian Penal Code (IPC) **and**
- provisions of Code of Criminal Procedure w.r.t **issue** and execution of warrants for levy of **fines**
- shall **apply to all fines** imposed under **any Act**, Regulation, etc.,
- **unless** otherwise specified.

#### **Section 26: Provision as to offence punishable under two or more enactments**

- Where an **act** or **omission** constitutes an offence under 2 or more enactments,
- then offender shall be **liable** to be **prosecuted** & punished **under either or any** of those enactments,
- **but shall not be punished twice** for the same offence.

**Note** - As per Supreme Court, a plain reading of sec 26 shows that there is **no bar to trial** or conviction of an offender **under 2 enactments**, but there is **only a bar to punishment** twice for the same offence.

#### **Additional Points:**

1. When there are **2 alternative charges** in same trial, e.g., sec 409 of IPC and sec 5(2) of Prevention of Corruption Act, the fact that accused is acquitted of one of the charges will **not bar** his **conviction** on the other. [M.P. v. V.R. Agnihotri]
2. This provision apply only when **2 offences** which form the subject of prosecution is the **same**, i.e., the ingredients which constitute the two offences are the same. If the offences under the two enactments are distinct and not identical, none of these provisions will apply.

### Section 27: Meaning of service by post

Where any legislation or regulation requires any document to be served by post, then unless a different intention appears, the service shall be deemed to be effected by:

- (i) Properly Addressing
- (ii) Pre-paying, and
- (iii) Posting by registered post.

A letter containing the document to have been effected at the time at which the letter would be delivered in the ordinary course of post.

### Important case laws:

United Commercial Bank v. Bhim Sain Makhija	A notice when required by law to be sent by 'registered post acknowledgement due' is instead sent by 'registered post' only, the protection of presumption regarding serving of notice under 'registered post' under this section of the Act is neither tenable nor based upon sound exposition of law.
Jagdish Singh.v Natthu Singh	Held that - where notice is sent to landlord by registered post, and it is returned by tenant with an endorsement of refusal - presumed notice has been served.
Smt. Vandana Gulati v. Gurmeet Singh	Held that - where notice sent by registered post to person concerned at proper address is deemed to be served upon him in due course unless contrary is proved. Endorsement 'not claimed/not met' is sufficient to prove deemed service thereof.

Section 28, 29 and 30 - Intentionally not covered.

Important Notes:

- ❖ Chapter 4 - Interpretation of Statutes summary will be available separately here <https://shubhamsinghal.com/ca-intermediate/>
- ❖ Shortforms used in this notes is shown here:  
<https://docs.google.com/spreadsheets/d/1zBdfsvXQuMOi8UF57wzwPk5vN0wCoNShQvpYy8ycta8/edit#gid=0>
- ❖ You can find both the above links on my telegram.

Please note - This is the first print edition of the Ultimate Solution Summary Notes. If you find any error, please let me know at [therankerway@gmail.com](mailto:therankerway@gmail.com) and I will be happy to correct it in the next edition. I hope you loved this edition

Best of Luck, Dear Student.  
You Rock!