Chapter 2 – Incorporation of Company and Matters incidental thereto

(Related)

Incorporation → Registeration / formation of company.

and

Matter incidental there to.

→ sec 3
→ sec 4
→ sec 5
→ sec 6
→ sec 10A
→ sec 13
→ sec 14
→ sec 16.

Section 7

Section 3
- Pvt Co. = 2
- Pub. Co =
- OPC. =

RPC

Incorporate

overriding effect of Act.

Section 6 → 20 clear day → void for public co.

MOA → 6 clauses

① Name clause.
② Registered office clause.
③ object clause
④ Liability clause.
⑤ capital clause
⑥ Association / subscription clause.

Section 13 → Alteration of MOA

Section 14 → Alteration of AOA.

Section 16 – Rectification of name.

Chapter 2 Incorporation of Company and matters incidental thereto. [Sec 3 - Sec 22]

[Read with The Companies (incorporation) Rules, 2014]

- Background / purpose of this chapter -

In this chapter, we will learn the procedure for incorporation of company u/s 7 of the Act. To incorporate a company, we must aware of the related matters like -

a] statutory minimum no. of members required to incorporate a Company [Sec 3]

b] The name of the company shall not be identical or too nearly resemble with existing company. [Sec 4]

c] Alteration of name, registered office, object etc. [Sec 12, 13, 14]

d] Rectification of name of company in case the company is registered in the name of existing company. [Sec 16]

e] overriding effect of this Act. [Sec 6]

f] Effect of registeration of co. [Sec 9]

g] Declaration for commencement of business of company. [Sec 10A]

h] Registered office of the company. [Sec 12]

i] Service of document. [Sec 20]

j] Authentication / signing of contract on behalf of company [Sec 21]

k] Execution of Bills of exchange, promissory note, Hundi etc on behalf of company.

Provisions relating to incorporation of company is given u/s 7 of the Act. Apart from Sec 7, remaining provisions talks about the matters relating to the incorporation of company.

Section 3 - Formation of Company

SS 1

Minimum no. of members to incorporate a company
+

① **Proviso** - Appointment of nominee by member of OPC at the time of incorporation.
+
Prior written consent of nominee.

② **Proviso** - withdrawal of consent by nominee.

③ **Proviso** - change of nominee by member of OPC.

④ **Proviso** - Intimation of change of nominee by member to OPC, then OPC to ROC.

⑤ **Proviso** - Effect of change of nominee in MOA.

SS 2

Types of liability of company.

*** Forms required under this section & rules -**

① **INC 32 [Spice]** -
for incorporation of OPC
+
Name of nominee
+
Prior written consent of nominee.

② **INC 4** -
Intimation of change of nominee to ROC
+
Prior written consent.

③ **INC -3**
~~Prior written consent of Nominee.~~

Special Note - Now, In form no. INC 4 itself prior written consent of nominee is given.

Section 3(1)(c)

OPC – Memorandum

Name of member

\+

INC 32

At the time of incorporation

Name of Nominee

\+

Prior written consent.

Who in the event of death / incapacity of members.

Nominee will become member.

Within 15 days of becoming member, nominate another person as nominee.

\+

Prior consent in written

Notice

OPC

INC-4

\+

Prior written consent.

Within 30 days of change in membership.

ROC

Withdrawl of consent by nominee → Proviso 2

Nominee → Notice of withdrawl of consent → Sole member & OPC

NOTICE

Sole member → Within 15 days of receipt of notice → Appoint new nominee + Prior written consent

Intimation of new nominee on appointment of new nominee → OPC

OPC → ROC: Intimation by OPC within 30 days from receipt of notice of withdrawl of consent.

INC 4 + Prior written consent of nominee.

* Change of nominee by member of OPC - Proviso 3

Member of OPC → Notice of change of nominee + Prior written consent of nominee → OPC

OPC → ROC: Notice of change in nominee within 30 days from receipt of notice of change in nominee.

INC-4 + Prior written consent of nominee.

- Proviso 5 ~~Any change~~ Effect of change of nominee in MOA.

'Any change in the name of the person [change of nominee] shall not be deemed to be an alteration of the memorandum

In simple words, Although there is actual change in Memorandum but it shall be assumed that there is no change in MOA to skip the procedural compliance..

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* Rule 3(1) - One person Company

Only a natural Person

Who is an Indian citizen

→ Mandatory

Whether resident in India or otherwise.

→ optional

Resident of India.
→ person
Immediately preceding FY min 120 days or more reside in India.

Member - shall be eligible to incorporate OPC;

Nominee - shall be nominee for the sole member of OPC.

Rule 3 (2)

Natural Person

↓

Shall not be a

Member And Nominee

↓

of more than one opc at any point of time.

Rule 3 (3)

Where a natural person, being a member of OPC in accordance with this rules becomes a member in another such company by virtue of his being a nominee in other opc, such person shall meet the eligibility criteria specified in sub rule 2 within 180 days

* ~~Restriction~~ Restriction / Disqualification w.r.t OPC

Rule 3 (4)
↓
Minor can not become member and nominee of OPC. or can not hold share with benificial interest.

Rule 3 (5)
↓
OPC can not be incorporated or converted into a company u/s 8 of the Act.

Rule 3 (6)
↓
Can not carry on non banking financial investment activities including investment in securities of any body corporate.

Rule 3 (7)

~~OPC~~

~~Voluntary Conversion — unless 2 yrs of incorporation. — Pvt / Public.~~

~~Mandatory Conversion — P.U.S.C or A.A.T~~

~~P.U.S.C → Exceed 50 lakh~~

~~A.A.T → Exceed ₹ 2 cr.~~

~~Threshhold Limit.~~

No time restriction

* Effect of ommision of sub rule 7 –

It means, now there is no time restriction of 2 years for voluantary conversion of OPC into any other kind of OPC. Also, even if the paid up share capital exceeds ₹ 50 lakh or turnover exceeds ₹ 2 cr, OPC is not required to convert itself mandatorily into any kind of company.

* Sec 19 – Subsidiary Company not to hold shares in its Holding company

Q.10

SS 1

- Prohibition w.r.t Shares in Holding Company.
  - → Prohibition on subsidiary to hold shares in holding.
  - → Prohibition on holding to allot or transfer shares to subsidiary.
- Effect of Contravention
  - ↓ If holding allot or transfere → void.
- Proviso – ① ↓ Exceptions → Shares held as
  - LR
  - Trustee
  - before becoming subsidiary
- Proviso ② ↓ Voting Rights → only as LR OR Trustee.

SS 2

↓ Shares shall be construed as interest

Prohibition w.r.t in shares in Holding Company -

a) A Company shall not (either by itself or through its nominee) hold any shares in its holding company.

b) A holding company shall not allot or transfer its shares to any of its subsidiary companies.

Effects of Contravension -

Any allotment or transfer of its shares by a holding company to any of its subsidiary company shall be void.

Exception - Proviso ①

① Shares held as Legal representative

Where the subsidiary Co. holds such shares as the LR of deceased member of the holding company

② shares held as trustee

Where the subsidiary company holds such shares as a trustee.

③ shares held before a Company become subsidiary -

Where the subsidiary Co. is a shareholder even before it became subsidiary Co. of the holding Co.

Proviso ② (Voting Rights)

out of above three cases, the subsidiary shall have a right to vote at a meeting of the holding company only in case ⓐ & case ⓑ.

Section 20, 21 and 22

- Q.14 **Sec 20 – Service of Documents**
  - SS1: Service of documents on the company or any officer of the company
  - SS2: Service of document on registrar or any member
    +
    Proviso – Request by member to send any document by particular mode.
- **Sec 21 – Authentication of documents, Proceedings and contracts**
  - SS: Signing
  - Common seal → not required
- Q.16 **Sec 22 – Execution of Bills of Exchange, etc.**
  - SS1: Negotiable instrument – when binding
  - SS2: Authorisation to execute deed
  - SS3: Binding effects of deed.

Sec 20(1) - Service of Document on the Company or any other officer of Company.

a] Sec 20(1) apply when any document is to be served on –

The Company ; or
any officer of the company.

b] The document shall be adresed to

i] The Company ; or
ii] Any officer of the company.

c] The document shall be sent at the registered office of the Company.

d] The document shall be send by, mode –

i] Registered post ; or
ii] speed post ; or
iii] courier ; or
iv] Leaving it at its registered office ; or
v] such electronic or other mode, as may be prescribed.

e] The records of benificial ownership may be sent by the depository to the company by electronic or other mode.

SS2 Service of document on registrar or on the members

a) Sec 20(2) applies where any document is to be served on the registrar or on any member.

b] The document shall be sent by

① Registered post ; or
② speed post ; or
③ Courier ; or
④ Post ; or
⑤ Delivery at the address of the member or delivering at office of registrar.

* Saving clause -

Where any provision of the act or the rules requires that a document shall be served on the registrar by electronic mode only, then, such document shall be served on the registrar by electronic mode only.

* Proviso -

A member may request the company to deliver to him any document by a particular mode. For this purpose, he shall have to pay such fees as may be determined by the members in the AGM.

* Provisions contained in Rule 35 of the companies (Incorporation) rules, 2014 -

a] Where a notice of meeting is sent by post, it shall be deemed to have been served at the expiration of 48 hrs after the letter containing such notice is posted.

b] Where any other document is sent by post, it shall be deemed to have been served at the time at which the letter containing such document would be delivered in the ordinary course of post.

Ex - If, notice of document is sent by post on 1st April 2023, and as per custom of the market notice will be delivered on 9th - 10th April. The notice shall be deemed to have been served on 10th April 2023.

Answer of Q.14 -

In the present case, vijay being a member of company requested the company in writting that the notice of meeting must be sent to him by registered post at his residential address at kanpur and also deposited sufficient money for the same. However company sent notice to him by ordinary mail.

In the Light of the above provision and the facts of the instant case contension of vijay is absolutely correct because as per sec 20(2) which is in writting be made a valid request along with the sufficient amount.

on the other hand, the answer will be the same because company is oblised to send the notice by register post irrespective of the fact whether vijay remains in london or in konpure during the notice of the meeting.

Section 21

Signing -

Except 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 company,

may be signed by =

① Any KMP [key Managerial personnel] [sec 2(51)]; or

② Any officer or employee of company duly authorized by board in this behalf.

Sec 22

① A negotiable instrument binding

A negotiable instrument have been deemed to have been accepted, drawn or endorsed on behalf of company if it is made, accepted, drawn or endorsed on behalf of the company by any person acting under its authority, express or implied.

② Autherisation to execute deed -

A company may authorize any person as its attrony to execute deeds on its behalf in any place either in india or outside india. Such authorisation may be made -

ⓐ By writting under the common seal of the company, if company has common seal.

ⓑ By director and CS, if the company doesn't have common seal, but it has appointed a CS.

ⓒ By two directors, if does not have a common seal and it has not appointed a CS.

③ Binding Effects of deed -

A deed signed by such an attrony on behalf of company and under its seal shall be binding on the company.

Answer of Q.16

In the present case parag was not legally entitled to enter into a partnership deed on behalf of the company, he was neither authorised by common seal of the company nor authorised by the directors or CS of the company.

Therefore as per sec 22(3) Company is not bound by deed signed by Mr. parag and company can deny its liability as partner.

Sec 22 (2) - Authorisation to execute deed.

In Writing

General Authority

Specific authority

As its attrony

By affixing common seal.

or

If there is no common seal

By two directors, if there is no CS

or

By one director and one CS.

If there is CS.

Sec 3A - Members Severally Liable in Certain Cases

Case study - UMC Ltd. has only 7 shareholder having fully paid up shares. On 30th April 2017, all shares of X [shareholder of company] are sold to Y. (another shareholder of the co.) in an auction by the order of court.

Z (a shareholder of co) was in USA for business trip from January and not aware of the developments.

The co. continueous to carry on its business. In Dec 2017, the company borrowed a sum of ₹ 5 lacs from the unique bank. Later, The company wound up and the assets of the company were not sufficient for payment of its liability.

The bank filed a suit against Y and Z for recovery of the said loan from them. Decide the liabilities of Y and Z under the provisions of Companies Act, 2013. Would your answer be the same, if the said loan was taken in the month of March 2017.

→

Lucid language of Sec 3A

If -

- The no. of members falls below statutary minimum;
- The co. continues to carry on business for more than 6 months.

then, -

- The remaining members who are cognisant (aware) the of such fact.
- Shall be personally liable [severally liable] for the debts contracted after 6 months

→ Answer of Case study -

Y is personally liable for loan taken from unique bank. because no. of members has reduced below 7 and the company continues to carry on business for more than 6 month i.e after 31st Oct 2017 and also Y is cognisant of the fact of reduction in no. of members.

Since the loan from unique bank was taken by company after 6 month of the date the no. of members was reduced below 7 i,e 31^{st} Oct 2017.

Z is not personally liable for loan taken from unique bank as he was not cognisant of the fact of reduction in members, as he was not in India.

Limitation on liability of Y — Y shall be liable only for such of the debts as have been incurred by UMC limited after a period of 6 months. i,e After 31^{st} Oct 2017.

Y shall not be personally liable if the loan was obtained by the company, ~~March~~ 2017 because the personal liability u/s 3A arises only for such of the debts as are incurred by the company after period of 6 months from the date of reduction of members below statutory minimum, i,e for such of the debts as have been incurred by UMC limited after 31^{st} Oct 2017.

Sec 4 - Memorandum of Association -

CS LLB LLM Arjun Chhabra - 9552 52 143 8

Sec 4 Memorandum of Association

SS1

Particulars of Memorandum.

a] Name clause.
b] Registered office clause
c] object clause.
d] Liability clause.
e] Limited by share capital
f] Nomination clause.

SS2

Provisions relating to name of the company

SS3

Approval of CG in case use of certain names.

SS4

Application to ROC for reservation of new name as well as reservation of name of existing Company.

SS5

Reservation of name by ROC

- 20 day for new company
- 60 days for existing company

+

Provision for reserving name by giving false information.

SS6

forms of MOA

Table A - E

Sec 4 - MOA

#SS1 Particulars of MOA

(a) Name of company

Last Word

"Limited" → Public co.

"Private Limited" → Prt co.

Not applicable to sec 8.

(b) State where R.O is situated.

(c) object for which co. is registered

(d) Liability of members.

Limited or Unlimited

+

Mention if limited by

shares & Gurantee

Shares → Liability of members is limited upto unpaid amount, if any.

Gurantee → Amount upto which each member undertake to contribute.

(A) To the assets of the co. in the event of winding up. or, within 1 year he ceases to be member.

For the payment of debts and liabilities of company.

(B) To the cost, charges and expenses of winding up.

IFSC Co.

IFSC Co. shall have the suffix, "International Financial service company" or "IFSC".

In case of

[E]

Company having share capital, state-

i) Amount of registered share capital.

ii) Division of share capital into shares of fixed amount; &

iii) No. of shares which subs. to MOA agrees to subscribe, which shall not be less than one share.

[F]

One person company, state -

→ Name of the person

→ Who in the event of death of subscriber

→ shall become member of the company.

SS-② Provision relating to the Name.

Name shall not be

(a) Indentical with or resemble too nearly — To the existing registered Company.

(b) such that its use by company -

(i) will constitute an offence; or

(ii) is undesirable in the opinion of CG

SS-(3) Additional provisions relating to the name of the company

A Company shall not be registered with a name which contains

(a)

Any words or expression
- Which is likely to give the impression.
- that the company is in any way connected with, or
- having patronage (Privilage) of,

i) CG,
ii) SG, or
iii) Local authority
iv) corporation or body constituted by CG or any S.G

unless previous approval of CG is obtained

or

(b)

Such words or expression as may be prescribed

Rule 8B of Companies (Incorporation) Rules, 2014.

SS 4 Application to ROC for reservation of

(a)

Name of the Proposed company

or

(b)

the name to which the co. provides to change its name

SS-5 Reservation of name by Roc on receipt of Application

(i)

For 20 days from date of Approval

For 60 days from the date of Approval

↓

In case of name change

(ii)

Where name got reserved by ~~furnished~~ ~~for~~ furnishing wrong or incorrect info, then -

↓

If the company has

Not been incorporated

↓

→ reserved name shall be cancelled, and

→ Person making application is liable to a penalty of may ₹ 1 lakh.

been incorporated

↓

→ Roc may, after giving on opportunity being heard

(i) either direct the co to change its name within a Period of 3 months, after passing ordinary Resolution;

(ii) take action for striking off the name of co.

(iii) make petition for winding up of the company

SS 6 - Forms of MOA

Table

- A → Limited by Shares
- B → Limited by guarantee and having no share capital
- C → Limited by guarantee and having share capital
- D → Unlimited company having no share capital
- E → Unlimited Company having Share capital.

F G H I J

AOA

Sec 6 Act to override memorandum, Articles etc.

- A — Act to have overriding effect
- B — Inconsistent provision to be void.

* Act to have overriding effect

The provisions of the Co. Act, 2013 shall have effect not-with standing anything to the contrary content in -

a] Memorandum of Company ; or

b] Articles of company ; or

c] Any agreement executed by a company ; or

d] Any resolution passed by co. in GM ; or any resolution passed by Co. in board meeting.

*** Inconsistent provisions to be void –**

If any provisions contained in the point (a) – (e) above is inconsistent with the provision contained in the Act, then such Provision shall be void to the extent to such inconsitency.

In simple words, The provision of this chapter have overriding effect but keep in mind that this sec start with "Save as otherwise". It means that if any other section of the says the article is superior then we will treat it accordingly.

Ex – Sec 47 of the Act deals with voting powers of members and a notification dated 5th June 2015 says that sec 47 is applicable to a pvt. company if articles of company so provide.
Now If AoA of pvt. company says that sec 47 is not applicable to it then, in this case AOA will become superior and sec 47 of the will not be applicable.
on the other hand if the public co. does same as above, Provisions contained in AoA shall be void as per Sec (6) of the Act.

Section 5 – Articles

- **SS1** – AOA contains regulation for management of company.
- **SS2** – Company may include any additional matter in articles
- **SS3** – Provisions for entrenchment.
- **SS4** – When entrenchment Provisions can be made.
- **SS5** – Notice of entrench-ment to ROC.
- **SS6** – Forms of Articles.
- **SS7** – Model Articles.

SS3, SS4, SS5 – Provision related to entrenchment

S55 - Notice of Entrenchment to ROC.

S53
Provision for Entrenchment

The articles may contain provision for entrenchment to the effect that specified provisions of the articles may be alter only if -

- (a) Conditions or procedures
- (b) That are more restrictive
- (c) Then those applicable in case of SR.

are met or complied with.

S54
When Entrenchment provisions can be made.

Provisions for entrenchment shall be made only -

(a) Either on formation of a company ; or

(b) By an amendment in the AOA agreed to -

i) By all members of the company is case of pvt. company.

&

ii) By SR in case of Public company.

S55
Notice to ROC

The company shall give notice, in -

(a) INC 32 (Spice+) At the time of incorporation of company.

or

(b) Form no MGT-40, filed within 30 days from the date of Entrenchment of AOA in case of existing co.

Section 7 - Incorporation of Company

SS 1

Application for Incorporation. to ROC

a] MoA & AoA

b] Declaration by Professional in INC-8

c] Declaration by Subscriber INC - 9

d] Temperory Address of R.O.

e] Particulars of subscribers.

f] Particulars of Directors [In form no DIR-12].

g] Particulars of interest of directors.

[Application shall be in form no INC -32 (spice +)]

+

Approval from sectoral regulators. and declaration of the same.

SS 2

Registeration By registrar.

Certificate of incorporation in INC-11

SS 3

Allotment of incorporation indentity number.

SS 4

Maintanance/ Preservation of documents by the Company

SS 5

Consequences of furnishing false information.

Every person liable under Sec 447.

SS 6

Consequences where Co. incorpo-rate by Furshing false information

SS 7

other consequences of furnishing False information.

Procedure - Incorporation } Refer page 7 of CH-2 4

Before Vs After

1. ~~INC-1 - Name reservation~~
2. ~~INC-2 - OPC name reservation~~
3. ~~INC-7 - Incorporation form~~
4. DIR-3 - DIN [Director identification no]

→ INC-32 + INC-35

INC-32 ↓ Spice+

INC-35 ↓ AGILE

Simplified proforma for incorporation of company electronically.

जब से हटाया INC 1 / INC

RUN Service.

upto 3 DIN apply

Reserve Unique Name
→ जब CO उसका Existing नाम करना चाहती है तो वो ये service form use करेगी।

SPICE
- Application for incorporation of company
- Name Reservation
- PAN (Form 49A)
- TAN (Form 49B)
- Max 3 DIN's can be applied.

+

AGILE → INC 35 [Mandatory with INC-32]
- GSTIN
- ESIC
- EPF
of Reg.

ESIC, EPF → seperately.

AGILE - Application for Goods or service Tax Indentification

555 - Consequences of furnishing false information

Every person who furnishes any false or incorrect information, suppresses any material information shall be u/s 447

556 - Consequences where company incorporated by furnishing false Information

If it is proved that a company was incorporated by furnishing false or incorrect information, or by supressing any material fact or by any fraudulent activity then the following shall be held liable u/s 447.

ⓐ Every promoters;

ⓑ Every person named in the article as first director; &

ⓒ Every person who made a declaration that the requirements of the act and rules were complied with.

556 other Consequences of furnishing false information / order of tribunal where company got incorporated by furnishing false information

The tribunal may, on being satisfy that the situation so warrants -

ⓐ Pass such orders, as it may think fit, for the regulation of the management of the company; or

ⓑ Direct that the liability of the member shall be unlimited

ⓒ Direct removal of the name of the Co. from register of company; or

ⓓ Pass an order for winding up of the company.

ⓔ Pass such other order as it may deem fit.

Before passing any order -

ⓐ The Co. shall given a resonable opportunity of being heard;

ⓑ The tribunal shall take into consideration -

→ The transactions entered into by the company,

→ Including the obligation, if any contracted or payment of any liability.

✳ Summary of Incorporation of Co.

Step-1 - Decide which Co. to form.

Step 2 - Application for reservation of name of proposed company, incorporation etc in form no. INC 32 (Spice+). Also known as single window clearance form.

New Co. incorporation = 20 days for NR
existing Co. name change = RUN service → 60 days NR.

Step 3 - Filing of forms / Attachment of forms in INC 32.

1. INC 33 EMA
2. INC 34 EAoA
3. INC 35 - AGILE
4. INC 8 Declaration by CA, CS, advocate.
5. INC 9 - Declaration by subs. of MoA & first director.
6. DIR 12 - Particulars of directors.
7. No form - Particulars of subscribers

Step 4 - Certificate of Incorporation by ROC
INC - 11

Step 5 - verification of registered office of co.
INC-22 - within 30 days from date of inc. of co.

Special NOTE - INC 22 is not required if the address of the registered office in INC 32 itself.
i.e permanent office.

* Additional requirements in certain cases.

OPC
- consent of nominee shall also be attached INC-32

Sec 8
→ EMoA - INC 13
→ EAoA - INC 14

Sectoral co.
Approval from sectoral regulator shall also be attached.

Sec 12 - Registered office of company

SS 1
Mandatory to have registered office.
+
Communication to be sent at registered office.

SS 8
Penalty for Contravention of Sec 12

Company & every officer in default - ₹ 1000/per day
max - 1 lac

SS2
Verification of registered office.
INC-22
within 30 days of incorporation.

SS 9
Removal of name of company by ROC.

SS3
① Name to engraved in common seal, if any.
+
Name, address etc to be printed on official publication
+
Name and address to be painted o/s the office of co.
+
Additional requirement in case of OPC,

SS4
Notice of change of registered office.

SS5
change of registered office o/s city
+
Change of registered office from jurisdiction of one ROC another ROC within the same state.

SS 6
Confirmation from RD shall be communicated within 30 days to company & company shall communicate the same to ROC within 60 days & ROC shall give certificate within 30 days.

Regional Director

SS 7
Certificate in SS6 shall be conclusive evidence.

Sec 13 - Alteration of MOA

- **SS1** — SR + procedure specified u/s 13 → for alteration of memorandum.
  - **SS7** — Certified copy of order of CG [RD] shall be filed with ROC of each state.
- **SS2** — change in name.
  → Sec 4 ([illegible])(iii)
  +
  approval of Central Govt. in certain cases
  +
  Sec 16 - Rectification of name of co.
  If co. got registered in the name of existing company.
- **SS3** — New certificate of registration by ROC with new name
- **SS4** — Alteration of registered office from 1 state to another, with the approval Regional Director.
- **SS5** — Approval from CG [RD] within 60 days.
- **SS6** — Notice of Alteration to ROC.
- **SS8** — change in object clause.
  +
  Publication in newspaper
  +
  Exit opportunity to desenting shareholder.
- **SS9**, **SS10** → Registeration of Change in MOA by ROC
  +
  No change unless registered.
- **SS11**

Sec 13 - Alteration of Memorandum

Alteration of Name clause

① Pass SR and follow Procedure as given in Sec 13 (1)

② Compliance with sec 4 (2) & (3)

③ Rectification of the name of the company by order of CG as per sec 16 if co. got registered in the name of existing Company.

④ Approval of CG for change in name in certain cases.

Alteration of object clause :

① Pass SR ~~as per sec~~ and follow Procedure as per sec 13(8)

② Publication for change in object clause into newspaper also place on website if any.

③ Above publication is required if company has raised money through prospectus and still has unutilised amount.

④ Exist opportunity to dessenting Shareholders.

Sec 13 Alteration of MoA.

change in Registered office.

Within the city town and village

1. Board resolution in board meeting.
2. INC 22 within 30 days of change to ROC as per sec 12 (4).

Special Note –
Sec 13 is not attracted in this case.

O/s the city, town, village but within the same state

1. SR + Procedures as per sec 13 (1)
2. ~~Notice~~ INC 22 within 30 days of change to Roc as per Sec 12 (4)
3. MGT-14 To ROC within 30 days of Passing SR.

O/s the state

1. SR + Procedure as per Sec 13(1)
2. MGT 14 to ROC within 30 days of Passing SR [117(3)]
3. Application to RD in Form INC 23
4. Advertisement INC-26
5. INC-28-Order.
6. Form INC 22 to both old and New ROC.

within the same state but different ROC.

(Possible only in Maharashtra and Tamilnadu)

Same as change In state Except form INC 26 Advertisement.

13(2)

(a) A company may change its name by passing SR.

(b) The change in name shall not have any effect unless the approval of CG is obtained. (Proviso 1)

(c) The approval of CG is not required if the only change in the name of the company is -

1] Deletion of the word 'Pvt', consequent upon conversion of a Private company into a public Company; or

2] Addition of the word 'Pvt', consequent upon conversion of public company into a private company.

Example -

① ACT Ltd ⟶ ACT Pvt Ltd.
NO Approval of CG required.

② ACT Ltd ⟶ ACC Ltd
Approval of CG required

③ ACT Pvt. Ltd ⟶ ACT Ltd
No Approval of CG required

④ ACT Pvt Ltd ⟶ ACC Pvt Ltd.
Approval of CG required.

(d) The change in name shall be subject the provision of sec 4 (The name shall not be undesirable)

(e) The company shall file with the registrar

13(6)

① A copy of special Resolution; &

② A copy of order of CG approving the change of name;

14(1)

Compliance conclusion ⟶
13(1) + 13(2) + 13(6) + 13(3)

(G) The change in name shall become complete and effective from date of issue of fresh certificate of incorporation.

13(3)

(f) The registrar shall -

① Enter the new name of company in register of co; &

② Issue a fresh certificate of incorporation to the co.

Sec 14 - Alteration of Article.

SS1 Alteration to be subject to the act and memorandum

Every alteration of articles shall be subject to the provision contained in the Act and the memorandum.

SS1 Resolution required -

SR is required for every alteration of articles, including alteration of Articles for the purpose of -

a] Conversion of Pvt. Co into public co; &

b] Conversion of public co. into pvt. co.

(Proviso) ① - Conversion of Pvt. Co into public company.

a] A private company may get converted into a public company, by altering its articles. [By passing a SR] in such a manner that its articles no longer include the restriction and limitation required to be included in the articles of a pvt. company as per sec 2 (68).

b] The conversion from pvt. co. into a public company shall take effect from date of alteration of articles.

Proviso 2 - Conversion of Public co. into pvt. co.

a] A public may get converted into a pvt. co, by -

① Altering its articles (By passing SR). So as to include there in the restrictions and limitation required to be included in Articles of pvt co as per sec 2 (68);

② obtaining the approval of CG.

b] For obtaining the approval of CG, the co. shall make an application to CG.

SS2 Filing of Alteration.

Where any alteration is made in the article i.e conversion is approved by CG, or any other alteration, the co. shall, within 15 days File with the registrar -

① A copy of order of CG approving the alteration ; &
② A printed copy of altered articles.
③ in case of alteration of article other than conversion from public to private, a copy of altered articles. [It can be electronically]

Sec 14 (3) Effect of Alteration.

Every alteration of articles which is registered by the registrar, shall be as valid as if it were originally contained in the articles

* Conclusion For Conversion of public co. into pvt. Co.

① As per sec 13(2) if the alteration in name is only the addition or deletion of the word "Pvt", then approval of CG is not required.

② As per sec 14(1) if the company is altering the articles in a manner to convert itself from a public co. to a pvt. company, then approval of CG is required.

③ It means as per sec 13(2) read with sec 14(1) if converting itself from public co. to pvt. co, CG approval is required.

Alteration of object clause of the company - { 8.8. P.N-31 }

13(1)
ⓐ A company may alter its object clause by passing SR.
ⓑ If company has raised money from public by issue of prospectus and any part of such money remains unutilised with the company, then, the company shall not alter the object for which it raised the money through prospectus unless -
i] The company has published the prescribed details and justification for such alteration in two newspaper (one english & one vernacular language] circulating at the place where the registered office of the company is situated;
ii] The prescribed details and justification for such change have been placed on the website of co. if any;

(f) The dissenting shareholder have been given an exit opportunity by promoters and shareholders having controls in accordance with regulation of SEBI

(c) The company shall within 30 days file with registrar a copy of SR u/s 13 (6).

(d) The registrar shall, within 30 days, register the alteration, an issue a certificate of registeration. as per sec 13 (9).

(e) The Alteration shall not be effective until it has been duly registered by the registrar. [Sec 13 (10)]

Sec 16 - Rectification of name of company.

SS 1

(a) Where name is identical or similar to name of company already registered.

(b) Where name is identical or similar to name of a registered trade mark.

SS 2

filing requirements

SS 3

Penalty.

Company: Fine - 1000/- day till default continues

OID: Fine - 5000 may extent to 1 lakh rupe

* Sec 16 (1) (a) -

Where a company is registered [whether on its 1st registeration or afterwards, on its registeration by new name] by name, which in the opinion of CG, -

- Is identical with, or
- to nearly resembles,

The name of co. Previously registered,

then CG may direct the company to rectify its name.

when such direction is given the co. shall, within 3 months rectify its name by ordinary resolution.

SS 2 (b) (Q.15 P. no)

(a) The proprietor of a registered trademark may make an application to CG that the name of a company is identical with or too nearly resembles, the registered trademark of which he is the proprietor.

(b) such an application may be made by the proprietor of the registered trademark within 3 years of -

(1) Registration of co. by such name; or

(2) Registration of the co. by such new name.

(c) On receipt of such an application, if CG is of the opinion that the name of co. is so identical with, or too nearly resemble the registered trademark, the proprietor of which is the applicant them CG may direct the co. to rectify its name.

(d) When such a direction is given, the co. shall, within 3 months rectify the name by passing an OR.

Subsection 2 - Filing requirement

Within 15 days of passing an OR for rectification of name the co. shall file with the registrar -

(1) Notice of ~~the order of~~ rectification of name; and

(2) A copy of the order of CG.

The registrar shall make necessary changes in -

(1) The memorandum; and

(2) The certificate of incorporation.

Subsection 3 - penal provision

If default is made under SS 1

(1) CO - fine → 1000 p. day till default continues.

(2) OID - min - 5000/- max = 100000/-

Alteration of situation clause.

Case I - change of RO from one state to another state

(a) A company may change the place of its RO from one state to another state by passing SR.

(b) such change shall not have any effect unless the approval of CG (RD) is obtained.

(c) For obtaining the approval of CG, the co. shall make an application to CG in form no INC 23

(d) CG shall dispose of the application within 60 days.

(e) Before passing any order, CG shall satisfy itself that -

(1) The creditors, debenture holders and other persons concerned with the co. have consented to such alteration; or

(2) The co. has made sufficient provision for the discharge of all its debts and obligation; or

(3) The co. has provided adequate security for the discharge of all its debts & obligation.

(f) The co. shall within 30 days ~~of~~ file with the registrar of each state a copy of the order of CG in INC 28 approving the change.

(g) The registrar shall register the order of CG.

(h) The registrar of the state in which the RO is to be shifted shall issue a fresh certificate of Inc. indicating there in such alteration within 30 days.

(i) The change shall not be affective until it has been duly registered by registrar.

Case II – change of RO from one city to another city within same state but different ROC

(a) A Co. shall not change its registered office from the jurisdiction of one registrar to the jurisdiction of another registrar within the same state, unless –

(1) The Co. so authorized by a SR passed in GM; and

(2) The Co. has obtained the confirmation of the regional director.

(b) For obtaining the confirmation of RD, the Co. shall make an application to RD in form No INC 23.

(c) The confirmation of change of registered office shall be Communicated –

– Within 30 days from the date of receipt of application by RD to the company; and

– The Co. shall file the confirmation with the registrar within a period of 60 days of date of confirmation.

* Alteration of Capital clause –

The capital clause of memorandum may be altered by complying with the requirements of Sec 61 which we will learn in chapter 4 i.e share capital & debentures.

* Alteration of other clauses –

Any other clause of MOA may be altered by –

(a) passing SR; and

(b) Complying with procedure specified in this section.

Sec 12 - Registered office of co.

* SS1 -

Every co. shall have its RO within thirty days of its incorporation. All communication shall be sent to RO.

* SS2 -

The co. shall file in form no. INC 22, verification of RO within 30 days of Incorporation to ROC.

* SS3 -

Every co. shall give notice of change of RO to ROC in form no INC 22 within 30 days of the change.

* SS9 - Power of Registrar to make physical verification of RO.

① If the registrar has reasonable cause to believe that a co. not carrying on any business or operations, he may cause a physical verification to be made of the RO of the co.

② If it is found that the co. does not have a RO, the registrar may initiate action for the removal of the name of the co. from the register of companies.

Sec 8 - Formation of companies with charitable object etc.

SS 1
Conditions for formation of a non profit company.
+
Issue of license by CG and registered of co by the registrar.

SS 2
Previlages and obligations
↓
Same as other ltd company

SS 3
Firm may be member

SS 4
Alteration of MOA & AOA
+
Conversion into any other Company.

SS 5
Conversion of co. into a co. under Section 8.

SS 6
Revocation of license by CG

SS 7
Consequences of revocation of license
+
winding up of co.

SS 8
Amalgamation of the Company

SS 9
Use of surplus assets on winding up.

SS 10
Amalgamation with any other Sec 8 company

SS 11
Penal Provision
↓
Co → Fine
min = 10 la.
max = 1 cr

OID
min - 25000/.
max → 25 lac
+
Sec 447 in certain cases.

* SS 4

① A Co. may formed u/s 8 if -

i) The object of the co. are to promote -

① commerce ⑤ Education ⑧ Religion.
② Art ⑥ Research ⑨ charity
③ science ⑦ social welfare. ⑩ Protection of environment etc
④ sports

ii) The co. intends to apply its profit in promoting its object; &

iii) The co. intends to prohibit the payment to its members.

② ⓐ Where it is proved to the satisfaction of CG where than an association of person proposed to be register under this act as a Ltd. co. satisfies all the condition given u/s 8, CG may -

① By issue of license.

② Allow, that the company may be registered as Ltd Co., but without using the words 'Ltd' or 'Pvt' Ltd.

ⓑ Upon issue of such license by CG, the registrar shall, on application made to him, register such association of persons as Co u/s 8.

*SS 4

- A section 8 company may alter its MOA and AOA by complying same legal requirements and obtaining prior approval of CG.

- A sec 8 Company may convert itself into any other co.

* SS 6 -

Where CG satisfied -

① A Ltd. Co was formed under the Companies Act 2013 or under any previous co. law, otherwise than under Sec 8, and

② such company fulfills all conditions for formation of a Co. u/s 8.

It may issue of license allow such co. to be registered u/s 8.

* SS 6 -

ⓐ CG may revoke license issued to the co, if -

① The co. contravences any of the provision of sec 8 or any condition subject to which the license was issued ; or.

② The affairs of the co. are carried on fraudently or prejudicial to the public interest.

ⓑ Before passing any order of revocation, an OBH must be given.

* SS 7 -

① co. shall convert its status.

② CG shall order the co. to add words Ltd or pvt Ltd.

③ co. shall file with ROC a copy of order of CG.

- CG may order that the co. shall be wound up. co. must be given an OBH.

* SS 8 -

CG, may order that the co. shall be amalgamated with any other co. registered u/s 8, if it is necessary in the pub. interest. Co. must be given OBH.

* SS 9 -

① surplus assets after winding up i.e after the payments of all the debts and liabilities shall be transferred to any other Co. registered u/s 8 and having similar object OR

② sold, and proceeds of the sale shall be credited to IBC fund.

Sec 9 - Effect of Registeration.

1] Date of Incorporation - The date mentioned in the certificate of incorporation issued by the registrar, shall be the date of incorporation of company.

2] Body Corporate - from the date mentioned in the certificate of incorporation, the subscriber to memorandum and all other person as may, from time to time, become members of the company, shall be a body corporate.

3] Name - The name, as mentioned in the memorandum, shall be the name of the company, ~~capaci~~

4] capacity to function - The co. shall become capable of exercising all the functions of incorporated company.

5] Perpectual succession - The company shall have perpectual succession.

6] common seal - The co. may or may not have common seal.

7] Power to acquire property -
The company shall have the power to acquire, hold and dispose off the property of any kind, whether movable or immovable, tangible or intangible.

8] Power to contract -
The company shall have the power to contract in its own name.

9] Capacity to sue or be sued -
The company shall have power to sue in its own name, and the co. can be sued in its own name.

Case Law based on Section 9

Case-I

Harinagar Sugarmill Ltd V/s SS. Jhunjhunwala

From the date of Inc. mentioned in COI, the Co. becomes a seperate legal entity.

Case II

State trading corporation of India Vs Commercial tax officer

A company on registeration acquires a seperate existance distinct from its members.

Case III

Spenser & Co. Ltd Madras V/s CWT Madras.

Merelly because a company purchases all shares of another company, it will not and the corporate character of another company.

Case IV

Heavy electrical union Vs state of Bihar.

Mere fact that the entire share-capital has been contributed by Gr. and held by President of India does not make any difference in the character of the company. and it doesn't make a company an agent of President or Gr.

Sec 10 - Effect of Memorandum & Article.

SS 1

① Company is bound to member.

② Members are not bound to company.

③ Members are not bound with each other.

④ Company is not bound with outsiders.

SS 2

~~Members are bound to Company~~ All monies Payable by member to Company shall be ~~debt~~ debt ~~to~~ from him to company.

① Company is bound to Member -

Every member is given some individual rights under the

Act and the Articles. if a company deprives any of its members of such right, such a member can sue the company for enforcement of his right.

② Member are not bound ~~to the compa~~ each other -

There is no privity of contract between the member.

③ Company is not bound with outsiders -

The memorandum & Articles do not bind a company to the outsiders. This is based on the general rule of law than stranger to contract does not acquire any rights under the contract. Therefore, an outsider can not take help of the articles to establish a contract with the company.

Sec 10A - Commencement of Business etc.

SS1

Applicability → Co. incorporated after Companies Amendment Act 2019 & Having share capital.

Condition for commencement of Business or exercising borrowing Powers. → ·Declaration in Form INC 20A within 180 days of incorporation & ① verification of registered office in Form INC-22 within 30 days of incorporation u/s 12(2)

SS2

Penalty → company ₹ 50000

OID ₹ 1000/- day. Max → 100000

SS3

Power of registrar to remove the name of Company. → If

① INC 20A not filed. & ② Registrar has reasonable cost to believe that company is not carrying on any business.

* Conditions for commencement of Business or exercising borrowing Power -

① Filing of declaration w.r.t payment of money for shares subscribed by subscriber to MOA.

1] A declaration shall be filed by directors with the registrar that Every subscriber to MOA has paid the value of the shares agreed to be taken by him.

② The declaration shall be filed within 180 days of the date of incorporation of the company.

③ The declaration shall be in form no INC - 20A.

④ The contents of form no INC 20A shall be verified by a CA, CS, or CMA., in practice.

② Filing of verification of register office in form INC-22 within 30 days to ROC as per sec 12(2).

SS3 -

The registrar may initiate action for the removal of the name of the company from the register of companies, if -

ⓐ The declaration is not filed with the registrar within 180 days of the date of incorporation; and

ⓑ The registrar has reasonable cost to believe that the company is not carrying on any business.

Sec 15 - Alteration of Memorandum or articles to be noted in every copy

SS1

Alteration to be noted in every copy of MOA or AOA

SS2

Penalty

Co. & OID - ₹1000/- copy without such alteration.

Sec 17 - Copies of Memorandum or articles etc to be given to Member.

SS1

- Any member of company may request from the company -

ⓐ Copy of MOA;

ⓑ copy of AOA; &

ⓒ copy of every agreement and every resolution refered u/s 117, which is not embodied in MOA or AOA.

- The company shall furnish the same to member within 7 days of request

SS2

Penalty

Co. & OID - 1000/- day or max - 100000 whichever is lower.

Sec 18 - Conversion of Company already registered

SS 1

Legal requirements for conversion.

① Alter MOA or AOA according to this chapter.

② Comply the provisions of this chapter.

③ Make an application to Roc for conversion.

SS 2

Issue of fresh Certificate of Incorporation By ROC. (पुराना)

① Close the former registeration of the Company ;

② Register the documents filed with it ; &

③ Issue of fresh CoI

SS 3

Effects of fresh registeration

Does not affect any

- debts,
- Liability,
- obligations or contracts :

of the Company prior to such convertion.

*Coverage of Sec under this chapter :-

Section 3 - Formation of Company (...)

Section 4 - MOA [INC 33-e] Intimation of appointment, change in nominee.

Section 5 - AOA [INC 34-e]

Section 6 - Act to override MOA, AOA etc.

Section 7 - Incorporation of company [INC 32] [EMOA-INC 33] [EAOA-INC 34] [INC 35 - AGILE] [INC 8 - declared by professional] [INC 9 - declaration by subscriber & 1st director] [DIR 12 - Particulars of Directors] [INC 11 - Certificate of Incorporation] [INC 22 - verification of registered office]

Section 8 - formation of co. with charitable object, etc.

Section 9 - Effect of Registeration

Section 10 - Effect of registration of MOA or AOA.

Section 10 A - Commencement of business etc [INC -]

Section 11 - Ommited.

Section 12 - Registered office.

Section 13 - Alteration of MOA.

MGT 140

INC 20 - Application to RD.

INC 26 - Advertisement.

INC 28 - Certified true copy of the order of RD.

INC 22 -

Section 14 - Altereation of AOA.

Section 15 - Altereation to be noted in every copy of MOA, AOA.

Section 16 - Rectification of name of co.

Section 17 - Copies of MOA, AOA to be given to Members.

Sec 18 - Conversion of co. Already registered.

Sec 19 - Subsidiary co. not to hold shares in Holding co.

Sec 20 - Service of document

Sec 21 - Authentication of document, proceeding & contract.

Sec 21 - Execution of BOE, etc.