

Volume II

The Companies Act, 2013

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Applicable for:

CA - Foundation

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Law Degrees



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1.1. Introduction

The Act

Earlier Act: The Companies Act, 1956

Current Act: Act to amend and consolidate the law relating to companies | Contemporary

Content: 470 Sections | 7 Schedules | 29 Chapters | Rules

[Note: The Companies Act, 1956 – 658 Sections | 13 Parts | 15 Schedules]

Highlights:

To improve Corporate Governance

Simply / Strengthen Regulations

Strengthen the interests of Minority investors

Whistle Blowers (first time)

Resident Director | Woman Director

Auditor's Rotation

Establishment of SFIO

Constitution of NFRA

Class Action Suit

CSR

Necessity:

Changes in national / international economic environment

To facilitate expansion & growth of our economy

Applicability:

Companies incorporated under 1956 / 2013 Act

Insurance | Banking | Electricity | Special Act (except inconsistent)

CG – Notification

Characteristics / Features

Incorporated association	Common Seal	Termination of Existence
Artificial person	Transferability of shares	Voluntary Association for profit
Corporate Personality	Separate Management	Nationality and Residence
Separate Legal entity	Separate property	Citizenship Experience
Perpetual succession	Capacity to sue and be sued	Limitation of action
Limited liability		

Separate Legal Entity / Independent Corporate Existence – An outstanding Feature

Striking Feature	Clothed with legal personality	Same rights and powers as human being
Unique Character	Enter into contracts	Distinct and Separate from its members
Own property	Open Bank Account	Raise Loans Incur Liabilities

Points to Ponder:

A person and Subscriber (MOA) are different

Even members can enter into contracts

Creditors can sue for the debts of the company

Property – Company is the owner, even though SHs contribute the capital and assets.

Case Law: Macaura v. Assurance Co. Ltd: A member does not have insurable interest in the property of the company

Perpetual Succession – A company never dies

Members may come and go, but company goes on forever

No death – Legal Entity

Even an atom bomb cannot destroy a company

Case Laws:

1. Gopalpur Tea Co. Ltd v Penhok Tea Co. Ltd - Death of an individual does not affect

2. Re K'9 Meat Supplies (Guildford) Ltd. - Even a Hydrogen bomb cannot destroy it

Limited Liability

- No member is bound to contribute anything more than the nominal value of the shares held by him

- Depends on the kind of the company

1. Limited by shares – to the extent of unpaid amount

2. Limited by Guarantee – to the extent of amount guaranteed (during wind up and adjustment of rights of the contributories)

3. Unlimited – whole liability

Separate Property

Capable – To own | Enjoy | Dispose in own name

Includes – To mortgage / assign / convey / deal

Owner of its capital & Assets

SHs are not several / joint owners

Case Law: Bacha F Guzdar v C.I.T – Company is the real person

Transferable Shares

Easily transferability

Sec 44: "the shares / debentures / other interest of any member in a company shall be movable property, transferable in the manner provided by the AOA

Liquidity to the investor & Stability to the company

Artificial Legal Person

Status:

Legal Process

No natural Birth

Clothed with rights of individuals

Capacity to sue and be sued

Non – Eligibility:

Send to jail | Take oath | Marry | Practice profession

Acting through: Human agency - Directors (But not the agents for the members)

Common Seal:

Authenticate the formal acts thro common seal

Symbol of Incorporation

Official Signature

Affixed by Officers and Employees

A relic of medieval times

Optional under the Companies (Amendment Act), 2015

Alternative mode – Authorisation by 2 Directors / Director and CS

1.2. Corporate veil theory

Corporate Veil

- A legal Concept to identify the company separate from its members
- Looking behind the company as a legal person [Disregard the corporate entity]

Concept: Members are shielded from liability connected to the company's action.

The members enjoy the corporate insulation.

Case Law: Salomon v Salomon and Co Ltd – A SH cannot be held liable even virtually holds the entire capital

Lifting / Piercing of Corporate Veil –

Looking behind the company as a legal person

Court's willingness to lift to question the control and not ownership

Case Law: BSN (UK) Ltd. v. Janardan Mohandas Rajan Pillai - Evasion of tax

Statutory cases – by statute and abuse of the status

Judicial decision

Cases	Case Law
Enemy Character	Daimler Co Ltd Vs Continental type Rubber co Ltd Connors Bros. v. Connors
Protection of Revenue	Juggilal vs. Comm of IT Re Sir Dinshaw Mauckjee Petit
Welfare legislation / Legal Obligation	Workmen employed in Associated Rubber Industries Ltd Vs Associated Rubber Industries Ltd
Formation of subsidiaries to act as agents	Merchandise Transport Limited vs. British Transport Commission (1982) Smith, Stone & Knight Ltd. v Lord Mayor
Prevention of Fraud or Improper conduct	Gilford Motor Co Ltd Vs Horne
Transfer of property	Jones v. Lipman
State is responsible for PSUs	Kapila Hingorani v. State of Bihar
Tfr of shares for sale of prohibited property	Estate Officer UT Chandigarh v Esys Information Tech Limited

1.3. Types of Companies

Incorporation	Statutory Registered Charter
Liability	Limited by Shares Limited by Guarantee Unlimited
Size/members	Private OPC Small Public
Control	Holding Subsidiary Associate
Listing	Listed Unlisted
Share Capital	Having Not having
Others	Government Foreign Section 8 Dormant Nidhi PFI Joint Venture Company Vanishing Producer

I. On the basis of incorporation

(a) Statutory Company

- Special Act | Public utilities [RBI | SBI | LIC | IFC | UTI | SFC]
- NA of companies Act, unless by specific provisions by that specific act
- [Ex: Banking Regulation Act, 1949 – for Banking Companies]

(b) Registered Company – Formed & Registered under Companies Act, 2013m or earlier

II. On the basis of liability

(a) Limited by shares

- Sec 2(22)
- MOA Clause
- A SH is the owner of the company but not for the company's assets
- Separate Property of SH cannot be encompassed to meet the company's debt

(b) Limited by Guarantee

- Sec 2(21)
- MOA Clause
- Stipulated guaranteed amount during wind up

Case Law: Narendra Kumar Agarwal vs. Saroj Maloo. The membership of a guarantee company may carry privileges much different from those of ordinary SHs

(c) Unlimited Company

- Sec 2(92)
- Whole Liability, but entitled to claim compensation from other members
- Cessation of liability while membership ceases

III. On the basis of members

(a) Private Company

- Sec 2(68)
- Restricts – Rights to transfer | Max – 200 members | Prohibits invitation to the public
- Number of members: OPC – Not applicable | Joint holding – single SH
- Excludes: Employees | Ex-employees cum members

(b) Small Co:

- Sec 2(85)
- Pvt Co
- Paid up share capital: Not more than ₹ 50L | T/O – Not more than ₹ 2 Cr
- Non-applicability – Holding / Subsidiary / Sec 8 / Special Act
- Advantages:
 - Sec 173(5): Min 2 BM instead of 4 with gap not more than 90 days
 - Non – requirement of Cash flow statement

(c) One person Company

- Sec 2 (62)
- A hybrid of Sole Proprietor & Company
- To encourage entrepreneurship and corporatization of business
- Concessional / Relaxed Requirements
- Can be of any liability

ONE	SH - Natural Person (Indian Citizen RoI No Minor)
	Nominee - Natural Person (Indian Citizen RoI No Minor)
	Min 1 Director
	in only one OPC

More about OPC....

Pvt Ltd Co | Suffix OPC

Exemptions given

Nominee's name in MOA | Nominee – consent and withdrawal

Nominee becomes the member on the death of the original member

Change of nominee is possible | Not an MOA alteration

Shall incorporate only 1 company

Minor - Non – eligibility for a member

Not to carry out NBF investment activities (includes investment in securities in body corporate

No conversion to Sec 8 companies, but can convert to private / pub Companies

Voluntary conversion only after 2 years

(Except – paid up capital > ₹ 50 L / Avg T/O > ₹ 2 cr)

Contravention: Fine – ₹ 10,000 and ₹ 1000 / day

(d) Public Company

- Sec 2(71)
- Not a pvt Co
- Free Transferability of shares
- Members: min – 7 / Max – any
- Deemed pub Co – sub of pub co

IV. On the basis of control

(a) Holding, Sec 2(46) & Subsidiary, Sec 2 (87)

Controls – Composition of BoD | > ½ Total voting power | No layers of subsidiaries

Examples:

1. B is a subsidiary of A and C is a subsidiary of B. In such a case, C will be the subsidiary of A. Likewise, if D is a subsidiary of C, D will be subsidiary of B as well as of A and so on.

(b) Associate Company

- Sec 2(6)
- Significant Influence (20% of the voting power)
- Not a subsidiary Co.
- Includes Joint Venture

V. On the basis of Listing

(a) Listed Company – Listed on any recognized Stock exchange Definition – Sec 2 of Securities Contracts (Regulation) Act, 1956

(b) Unlisted Company – Not listed

VI. Other Companies

(a) Government Company

- Sec 2(45)
- 51% paid up capital by CG / SG / both
- Includes – Sub of a Govt company

(b) Foreign Company

- Sec 2(42)
- Company / Body Corporate incorporated outside India
- Place of business (thro agent / e mode) in India and conducts any business activity

(c) Formation of Companies with Charitable objects etc. (Section 8 Company)

Promote – Charitable Objects of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment, etc.

Applies profit to promote its object | prohibits payment of dividend

Examples: FICCI | ASSOCHAM | National Sports Club of India | CII

License:

CG's Power | No suffix –Ltd or Pvt Ltd | Apply for Registration | same privileges as Ltd Co.

Revocation – Fraud | violation of objects | written notice by CG and opportunity of being heard

Order of CG – On revocation,

1. Amalgamate with another Sec 8 company with the similar objects
2. Wind up

Contravention:

Company: Fine - ₹ 10Ls – ₹ 1Cr

Director / Officer: Imprisonment – 3 years / Fine ₹ 25T to ₹ 25 L / both

Officer in default for Fraud – Liable under Sec 447

Others:

A partnership firm can be partner

14 days clear notice for GM, instead of 21 days

Non requirement of min number of directors and IDs | NRC | SRC

(d) Dormant Company (Status)

- Formed for future project/ hold an asset or intellectual property

- No SAT

- Apply to the Registrar for Dormant Status | Inactive Company shall also apply

Note:

1. Inactive company: Not carrying business / operation | No SAT for 2 years | Not filed Fin, Statements and AR for 2 years

2. Not SAT: Allotment of shares | Payments w.r.t. Fees to Registrar / other payments / maintenance of office & records

(e) Nidhi Companies

- Sec 406

- To cultivate the habit thrift (cost cutting) and savings amongst its members

- within its members: Receives deposits / Lending only for their mutual benefit

- Comply CG Rules | Registered by RBI & Companies Act

- Called as Permanent Fund / Benefit Fund / Thrift Fund, etc

Requirement:

- Members – atleast 200
- Net owned funds – Rs 10L or more
- Unencumbered term deposits – Not less than 10% of O/s deposits specified in rule 14
- Ratio of Net owned funds – Not more than 1:20

(f) Public Financial Institutions (PFI)

- Sec 2(72)
- LIC | IDFC | UTI
- Institutions notified by CG u/s 4A (2) (repealed u/s 465) | Others in consultation with RBI
- Conditions: Unless under Central / State Acts or Companies Act | Govt Company

(g) Joint Venture Company

- Joint Arrangement
- Joint parties have rights to the net assets / arrangement
- Around 1,20,000 companies registered each year

1.4. Registration / Incorporation of Company

Promoters:

The person who formed the company	Has control over the affairs of the company
Named in Prospectus	The BoD accustomed by their advice / directions / instructions
Conceived the idea	Taken steps for registration (But not in professional capacity)
Identified in AR under sec 92	

Formation of Company

Pub Co – 7 / Pvt Co - 2 or more subscribers for lawful purpose and complying the Act

Incorporation of company

1. Filing of the Documents and information with the registrar

MOA – signed by Subscribers

Declaration by person involved in formation and proposed directors / officers / Secretary

Declaration by subscribers and Directors w.r.t. conviction of any offence / found guilty of fraud / misfeasance during 5 years / documents filed are true to the best of their knowledge and belief.

Address - Registered office / correspondence

Particulars of subscribers / first directors

2. Issues: Certificate of Incorporation | Allotment of Corporate Identify Number (CIN)

3. Maintenance of copies of all documents and information at Registered Office till its dissolution

4. Furnishing of false / incorrect information / Suppression of material fact - Fraud under Sec 447

At the time of incorporation – All person is liable

Post incorporation – Promoters / First Directors / persons given declaration are liable

5. Order of Tribunal, NCLT -

Pass such orders | Unlimited Liability | Removal of Name | Wind up | others

Simplified Proforma for Incorporating Company Electronically (SPICe) – E form

Effect of Registration: Date in CoI | Exercises all functions of a body corporate

Case Law:

Hari Nagar Sugar Mills Ltd vs S. S. Jhunjhunwala | State Trading Corporation of India

Spencer & Co. Ltd Madras vs. CWT Madras | Heavy Electrical Union vs. State of Bihar

Effect of MOA and AOA: Binds the company and its members | Money paid by a member is a debt

Shares

I. Nature of Shares

Definition – a share in the share capital | Includes stock | Proportion of interest

An interest in the Company

Case Law: Borland Trustees vs. Steel Bros & Co Ltd – Share is an interest measured by a sum of money and various rights | as per MOA and AOA | Contractual rights and legal rights for SH

Movable property – Movable Property | Transferable as per AOA | Includes Debentures also

Numbering – Distinguished by distinctive numbers | Except – Demat Shares

II. Kinds of share Capital – Not Applicable for Pvt Co

(i) Equity share Capital – voting rights | Differential rights w.r.t. dividend, voting or otherwise

Example:

Tata Motors in 2008 issued equity shares with differential rights

'A' equity shares with every 10 'A' equity shares carrying only one voting right but 5% more dividend. This share is traded at discount.

Future Retail, Jian Irrigation also issued equity shares with differential rights

(ii) Preference share Capital- Rights to participate in the proceeds during wind up

Points to Ponder:

Equity Share Capital: For Company limited by shares - all share capital and not preference share capital

Preference Share Capital – preferential right w.r.t. payment of dividend and repayment during winding up

Capital shall be deemed to be preference capital – w.r.t. dividend and capital

Classification of capital

Capital – Share Capital | Rupees divided into shares of fixed amount | contribution to the stock.

“A share is not the sum of money, it is rather an interest (and rights) measured by a sum of money”

a. Nominal / Authorised / Registered capital

Authorised by MOA | The maximum amount of share capital of the company | stamp duty is paid accordingly | Fixed including working capital and reserve capital

b. Issued Capital

Company issues from time to time | Includes shares allotted for consideration other than cash

Schedule III – To disclose in the B/S

c. Subscribed Capital - Shares taken by public

Stating of Authorised, Subscribed and Nominal Capital in notice, advertisement, Communication / business letter, bill head, letter paper.

Contravention: company – ₹ 5000 and Officer – ₹ 10,000

d. Called-up Capital - Capital called for payment

e. Paid-up Capital - Amount paid or credited | Capital less in arrears

1.5. Memorandum of Association & Articles of Association

Act to override MOA & AOA, etc... – Sec 6 | Void to the extent inconsistent

Memorandum of Association (MOA)

Charter | Public Document (Sec 399) (open for inspection) | Defines constitution, object and scope | Foundation | an Edifice | Limitation of action | Powers of SHs, Creditors and other | Presumption of knowledge | Ultra vires act is prohibited

Tables (Format): Schedule III –

Table A – Ltd by Shares	Table D – Unlimited Company
Table B – Ltd by Guarantee and having SH capital	Table E – Unlimited Company and having SH capital
Table C – Ltd by Guarantee and not having SH capital	

More about MOA...

Contents – Clauses | Compulsory Clauses | Conditions

- Name clause – Ltd | Pvt Ltd | OPC | Section 8 – Electoral Trust, Foundation, Forum, Association, Chambers, Confederation, Council | Govt Co - Ltd
- Registered office / Situation Clause - State
- Object clause – Scope of the company | shall change its name in its activities
- Liability clause – Ltd by shares / guarantee
- Capital clause – Authorised Capital | share of fixed amounts | Not applicable to the company not having share capital
- Association / Subscription clause – Every subscriber shall take atleast one share | Indicated in the table under the clause

Must: printed | paragraphs | consecutively numbered | signed by subscribed and witnessed and details entered | Company enters thro’ its agents | Minor is not competent, but guardian in his personal capacity | Not contrary to The Companies Act | All other documents should comply with MOA.

Doctrine of Ultra vires

Ultra vires:

Beyond its powers	Void, inoperative and not binding
Not to do acts in excess of the legal powers	Restriction on employment of Company’s fund
Presupposes limited powers	Exception to “Capacity to sue and be sued”
Constructive notice	Departure of objects to the extent provided by law

Ratification by SHs: MOA – No | AOA – Yes (if done within the powers) | Directors – Yes

Disadvantage is that the company cannot change its activities in a direction agreed by all. But does not affect the change in Object clause

Disadvantage is its advantage: Protection to the SHs and Creditors

No Intra vires by estoppel / Acquiescence / Lapse of time / delay / ratification

Case Law: Ashbury Railway carriage & Iron company Ltd V Richie – w.r.t. financing (not in object clause)

Points to Ponder:

Money lent on supplied goods / performed service cannot be recovered, unless not expended it can be done by injunction.

Money lent for payment debts is recoverable.

Articles of Association (AOA)

Rules and Regulations for internal affairs | Bye laws of the company

Directors / officers are required to perform their functions as regards the management of the company, its accounts and audit.

Case Law:

1. Guinness vs Land corporation of Ireland - Benefit of the creditors and outside public | Internal regulation
2. Ashbury Railway carriage & Iron company Ltd V Richie – Subsidiary to MOA | Defines duties, the rights and powers of the governing body | w.r.t. changes in internal regulation
3. S. S. Rajkumar vs Perfect Castings (P) Ltd – AOA is the business document | Domestic management of the company | creates certain rights and obligations between members and the company

Section 5: Contents and Model AOA

1. Contains Regulations for management
 2. Inclusion of matters – Additional matters may be included
 3. Contains provisions for entrenchment – i.e. Alteration for more restrictions only (like special resolutions)
 4. Manner of inclusion in the entrenchment provision – at the time formation / by amendment.
- Pvt Co – All the members | Pub Co. – Special Resolution
5. Notice to the Registrar of the entrenchment provision
 6. Forms of AOA – Schedule I | Tables F, G, H, I and J
 7. Model Articles – Adopt all or any as per applicability
 8. Company registered after the commencement of this 2013 Act – Not to exclude or modify regulations.

Contents

Exclusion wholly or in part of Table F	Adoption of Preliminary Contracts
SH Capital, Variation of Rights, Number and Value of Shares	Issue of Preference Shares
Shares – Allotment Calls Lien Transfer & Transmission Nomination Forfeiture Buy – Back SH Certificates Dematerialisation Conversion of Shares to Stock	Directors – Appointment Delagation of Powers Nominee Directors MD WTD Manager Secretary CEO CFO Additional Directors Remuneration BoD Meetings Proceedings of Meetings Rules regarding Committees of the BoD
Voting Rights & Proxies	GMs Proceedings Adjournment Voting Rights & Proxies
Seal	Audit Committee
Borrowing Powers	Dividends & Reserves Capitalisation of profits, Reserves
Accounts and Audit	Winding up
Indemnity	Secrecy

Key Differences between MOA and AOA

Characteristics	MOA	AOA
Objective	Defines and delimits the objectives	Provides Rules and Regulations
Relationship	Company and outside world	Company and its members
Alteration	As provided in the act Permission of RD / Tribunal is required	Special Resolution
Ultra vires	Acts are void Cannot Ratify	Ratified thro' special Resolution, if not contrary to MOA

Doctrine of Constructive Notice

Section 399 – Inspection of documents kept by the Registrar by electronic means | Take record | get copy or extracts including CoI.

MOA and AOA are public documents available on payment of nominal fees.

Duty of outsider to inspect its documents and conformity.

Presumption / Implied Notice that the person has not only read but also has knowledge of the contents of the documents and understood in its true perspective

A person cannot acquire any rights under the contract when a company has entered in ultra vires act

Doctrine of Indoor Management - Turquand's Rule

Exception to the Doctrine of Constructive Notice

Case Law: D. Royal British Bank V Turquand – If an act is authorised by MOA / AOA, an outsider is entitled to assume all the detailed formalities for doing that act

Exceptions:

a. Actual or Constructive Knowledge of irregularity:

Case Law:

1. Howard v Patent Ivory Manufacturing Company

- The directors of a company could borrow upto £1,000 without the sanction of members in GM
- The consent of the shareholders was required to borrow in excess of £1,000
- The directors themselves lent £3,500 to the company, internal irregularity – company is liable only for £1,000

2. Morris v Kanssen – A director cannot defend an allotment | validity of Director's appointment

b. Negligence – suspicious circumstances or unusual magnitude of transactions

Case Laws:

1. Anand Bihari Lal v Dinshaw & Company- the third party could not enforce a contract against the company (contract entered by an accountant to sell the property) even-though the third party acted bonafide

2. Haughton & Co. v Nothard Lowe & Mills Ltd – Apply one company's money for the payment of debt in another company by a director

c. Forgery:

Case Law: Ruben v Great Fingall Consolidated Company: Forgery of signature by the secretary for two directors is not defect in consent but absence of consent. Hence the certificate is invalid, even though the holder of the certificate is not aware of this.