PART II

JURISDICTION OF COURTS

7. *Jurisdiction of the Courts.* (1) The Court having jurisdiction under this Ordinance shall be the High Court having jurisdiction in the place at which the registered office of the company is situate:

Provided that the Federal Government may, by notification in the official Gazette and subject to such restrictions and conditions as it thinks fit, empower any civil Court to exercise all or any of the jurisdiction by this Ordinance conferred upon the Court, and in the case such Court shall, as regards the jurisdiction so conferred, by the Court in respect of companies having their registered office within the territorial jurisdiction of such Court.

(2) For the purposes of jurisdiction to wind up companies, the expression "registered office" means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up.

(3) Nothing in this section shall invalidate a proceeding by reason of its being taken in a Court other than the High Court or a Court empowered under sub-section (1).

Synopsis

1. Jurisdiction of High Court.
2. Jurisdiction of other Courts.
3. Civil Courts, jurisdiction of.
4. Execution of decree.
5. Life Assurance Companies.
6. Proceedings in wrong Court.
7. Revision of orders of District Court.

1. Jurisdiction of High Court. 'High Court' includes all sides of the High Court, and equally applies to the High Courts having Original Side, as well as those having no Original Side.[1] The jurisdiction of the High Court under the Companies Ordinance with regard to the Companies within its jurisdiction is special and exclusive and no other Court has jurisdiction. Nonetheless it exercises that jurisdiction as part of the ordinary original jurisdiction with which it is vested by law. The Act extends the jurisdiction of the High Court to Companies outside the territorial limits of its ordinary original civil jurisdiction and frees the exercise of that jurisdiction from the restrictions imposed by clause 12 of the Letters Patent. Even so the jurisdiction is only a part of its ordinary original civil jurisdiction

1. AIR 1925 Cal. 606 (DB).

which can be exercised only within the local limits of that jurisdiction.[2] Where the registered office of a company is situate in Sind Province, only Sind High Court has jurisdiction to entertain an application for merger of company with another company. Lahore High Court cannot do so.[3]

Original civil jurisdiction. The High Court or a Court empowered under section 7(1) of the Companies Ordinance, 1984 has been vested with the jurisdiction to entertain, hear, try and decide the matters and cases arising under the Ordinance. Such jurisdiction has been conferred by the Ordinance. The proceedings under the Ordinance are initiated in the High Court as a Court of first instance. While exercising such jurisdiction it has the characteristics and attributes of original jurisdiction. Term "original civil jurisdiction" has been used in the Companies Ordinance, 1984 in the general sense. Companies Ordinance, 1984 confers such original civil jurisdiction on the High Courts, which is completely different from the ordinary original civil jurisdiction conferred by the Code of Civil Procedure, 1908. Proceedings under the Companies Ordinance, 1984 are initiated in the High Court as a Court of first instance dealing with rights of civil nature and are decided according to the procedure provided therein.[4] This original civil jurisdiction is a jurisdiction which is in contradistinction to criminal jurisdiction.[5] It is to be noted in this context that in spite of a notification issued under proviso to section 7(1) delegating power to the District Court, the High Court continues to possess original jurisdiction under the Act in company matters.[6]

Extent of jurisdiction. Jurisdiction conferred by section 7 is confined to matters which are expressly covered by the Ordinance itself, such as winding up proceeding and the like and does not extend to those not expressly provided for by the Act.[7] Where the Companies Ordinance provides a remedy the party must move the Court specifically provided by the statute for obtaining relief, *e.g.* the High Court. He cannot move ordinary Civil Courts for the purpose.[8] Thus if any member of a company had complained or Registrar was of the opinion that affairs of Company were being conducted in an unlawful or fraudulent manner or in a manner not provided for in its memorandum, an application could be made to Court for an order under S. 290 of Companies Ordinance, 1984 and jurisdiction to entertain such application, was only vested in High Court under S. 7.[9]

Subsidiary Company. Where a subsidiary company had its registered office at Karachi. Parent Company having its registered office at Lahore, Board of Directors of parent Company superseded by Board of Administrators with right to manage affairs of subsidiary company. It was held that Lahore High Court had no

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2. 58 Cal. W N 641.
3. NLR 1982 Civ. 556=PLD 1982 Lah. 566=PLJ 1982 Lah. 340.
4. PLD 1996 SC 543=PLJ 1996 SC 1265=NLR 1996 Civ. 506.
5. PLD 1996 Lah. 1 (DB).
6. AIR 1956 Raj. 61=ILR (1955) 5 Raj. 931 (DB).
7. AIR 1947 Sind 31+AIR 1947 Mad. 322. (Application for remedy not provided for by the Act cannot be entertained by the company Court)+AIR 1957 Cal. 81.
8. AIR 1965 Punj. 24.
9. 1997 CLC 970.

jurisdiction to pass orders with respect of subsidiary company as its registered office was situated within jurisdiction of Sindh High Court at Karachi.[10]

Territorial jurisdiction. Court having jurisdiction to deal with winding up of Company would be the High Court having jurisdiction in the place at which registered office of Company was situate. Where registered office of a Company was situate within Province of Baluchistan, Lahore High Court would have no jurisdiction to entertain application for winding up of that company. Where Company's registered office is at Lahore and has been always at Lahore the Court at Karachi has no jurisdiction to entertain an application for winding up of Company at *K.*[11] But the Court which by virtue of section 7 has jurisdiction to order the winding up of a company has also jurisdiction to order payment by contributories even if they reside outside Pakistan.[12]

High Court in proceedings under section 412 can enquire into the conduct of only those directors who reside in Pakistan. It has no jurisdiction over the directors who reside abroad.[13]

Statutory duties, enforcement of. A Company Judge has jurisdiction to pass orders to enforce statutory obligations of a company, *e.g.* supplying copy of the register of the members of the company to a share-holder.[14] Provisions made in section 7 of the Companies Ordinance conferring powers on the High Court to try offences under the Companies Ordinance did not empower the High Court in general to try the criminal offences committed under the Companies Ordinance as a Court of first instance except where an offence is committed in a case under the Company Law directly being dealt with by the High Court.[15]

Criminal offences, trial of. In suitable cases, a company can be indicted for certain offences.[16] Jurisdiction of the High Court referred to in section 7 is the jurisdiction exercised by virtue of the specific provisions of the Ordinance and not jurisdiction where merely a criminal offence under this Ordinance is declared.[17] Jurisdiction that High Court exercises under the Companies Ordinance, 1984 is civil jurisdiction and the proceedings are civil proceedings. Civil Procedure Code, 1908 applies to such proceedings by virtue of section 117, C.P.C.[18]

Section 7 cannot be interpreted to mean that the High Court is the only Court to try as a Court of first instance offences due to breaches of provisions of Companies Ordinance.[19] The proviso to sub-section (1) of section 7 makes the intention of legislature clear wherein the words "any Civil Court" are used for

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10. NLR 1993 Civ. 388=1993 CLC 1915.
11. PLD 1989 Lah 106=PLJ 1989 Lah. 107.
12. AIR 1934 Lah. 362=15 Lah. 302.
13. AIR 1937 Pat. 196=15 Pat. 630.
14. AIR 1936 All. 568=58 All. 988 (DB).
15. 19 DLR 381 (DB).
16. PLD 1977 Kar. 183=PLJ 1977 Kar. 175.
17. 1991 MLD 2448+AIR 1936 All. 830=38 Cr. L. Jour 111 (FB).
18. PLD 1996 SC 543=PLJ 1996 SC 1265=NLR 1996 Civ. 506.
19. 1991 MLD 2448+AIR 1936 All. 830=38 Cr. L. Jour 111 (FB) (Contravention of S. 85).

purpose of delegation of powers of High Court, and not the Sessions Judge, who finds place in Section 9 of the Code of Criminal Procedure, 1898.[20]

Where there is no remedy provided in the Companies Ordinance for making the Registrar of Joint Stock Companies to discharge his duties properly, a writ can always be maintained against the Registrar where he has not acted in accordance with law. The Companies Ordinance is a subconstitutional legislation. It cannot and does not take away the jurisdiction of the High Court under the Constitution itself.[21] It is to be noted that wherever the Court has been given power under the Ordinance to direct the fulfilment of the requirements of any section, the Court which has jurisdiction to do so, is the Court referred to by section 7. Whether the provisions under which such directions are given are part of the same sub-section which has created an offence under the Ordinance or they constitute an independent sub-section it is the Court indicated in section 7 which is the High Court, that has jurisdiction to issue them. The Court which has jurisdiction to try the offence can in no circumstance become also the Court having jurisdiction to entertain an application for issuing directions.[1]

2. Jurisdiction of other Courts. The Company Courts cannot be regarded as Courts of exclusive jurisdiction in all matters pertaining to companies. Even where special remedies are provided by the Act there are many of them which can equally be enforced by a suit in another Court.[2] But in such cases where an Appellate Court exercising jurisdiction of Civil Court has jurisdiction to pass interim order relating to affairs of company but it would cease to operate no sooner than Companies Judge would pass any order in that regard one way or the other, provided impugned order satisfies other pre-requisites such as prima facie case, irreparability of loss and balance of convenience.[3]

Where there is an ordinary civil dispute in which a company is involved, a suit will lie in an ordinary civil Court and not in a Company Court.[4]

3. Civil Courts, jurisdiction of. The proviso to section 7 does not constitute delegated legislation and as such is not invalid.[5]

Civil Courts, being Courts of plenary jurisdiction, conferred on them by S. 9, Civil Procedure Code, 1908, would retain jurisdiction even to deal with certain matters concerning affairs of companies being governed by Companies Ordinance, 1984, to the extent they were not specifically dealt with by that Ordinance or any matter in respect of which no specific order had been passed by Companies Judge being simultaneously seized of matter because under the maxim, "wherever there was wrong there was remedy", if neither Civil Court had passed any order with regard to affairs of a Company and no order in that respect was passed by

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20. 1991 MLD 2448.
21. PLD 1963 SC 412=20 DLR (SC) 355.
1. 32 Cal. W.N 590.
2. AIR 1947 Mad. 322+AIR 1959 Ker. 264 (DB) (Share-holder denied the right to vote by proxy—Civil suit for a declaration that resolutions were not validly passed and were not binding either on company or the share-holders is maintainable).
3. 1992 CLC 1658=NLR 1992 Civ. 699=1992 Law Notes 538.
4. 1976 Dhaka L R 101.
5. AIR 1951 Bom. 282.

Companies Judge seized of matter, such situation would create vacuum and even entail injustice.[6]

An Additional District Judge appointed under section 75, Punjab Courts Act, 1884, and to whom the District Judge had assigned all the functions of supervising a liquidation has jurisdiction to pass any order which the District Judge himself could have passed.[7]

4. Execution of decree. The High Court alone can enforce an order under section 342 even if the property against which it is to be enforced lies within the District. The District Judge in view of section 356 read with section 7 cannot execute the order.[8]

In view of the provisions of section 7 read with section 356 the District Court under the jurisdiction of one High Court is incompetent to execute a decree passed in liquidation proceedings by another High Court and sent to it direct by such High Court.[9]

Decree obtained before winding up proceedings. Even if a decree has already been obtained before winding up proceedings, its execution is subject to leave of the Court. Where in execution of a decree-obtained by a company in liquidation, certain property has been attached as belonging to the judgment-debtor and a third person has unsuccessfully objected to the attachment on the ground that the property belonged to him and not to the judgment-debtor, such person cannot bring a suit under Order XXI, Rule 63, C.P.C. against the company for a declaration of his title, without first obtaining leave of the Court which had passed the winding up order.[10] Where leave has not been obtained the Court may, under its power restrain the decree-holder from proceeding further so that he will lose the benefit of execution or distress unless he has already completed it.[11] The Court, however, will not pass the order if the company is solvent so that other creditors will not be prejudiced.[12]

5. Life Assurance Companies. Although under the Companies Ordinance the High Court is the only Court which has jurisdiction to entertain an application for winding up of a company registered within the limits of its jurisdiction yet in the case of a Life Assurance Company such a petition has to be presented in spite of its registration under the Companies Ordinance only to the District Court as provided by section 22 of the Life Assurance Companies Act of 1912.[13]

6. Proceedings in wrong Court. The proceedings in the High Court or a District Court empowered under section 7 do not become invalidated by the mere fact that the Court had no territorial jurisdiction in the matter. The proceedings

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6. 1992 CLC 1658=NLR 1992 Civ. 699=1992 Law Notes 538.
7. AIR 1922 PC 361.
8. AIR 1930 Mad. 74=53 Mad. 147 (DB).
9. AIR 1927 Pat. 182=6 Pat. 132 (DB).
10. PLJ 1982 Lah. 439+(1943) MLJ 448+(1941) 22 ILR 760 (DB)+(1965) 3 All. ER 873.
11. PLJ 1982 Lah. 439+(1892) 1 QB 77+(1941) All ER 471.
12. PLJ 1982 Lah. 439+(1936) 9 All ER 905.
13. AIR 1942 Lah. 74=ILR 1942 Lah. 800 (DB)+AIR 1963 Bom. 7 (DB).

although taken in the wrong Court are saved by sub-section (3) of section 7.[14] However the section only provides that such proceedings shall not be invalidated. It does not mean also that an objection taken at the very beginning of the proceedings itself should not be decided according to law.[15]

7. Revision of orders of District Court. Although the jurisdiction under section 7 when conferred on the District Court gives it exclusive original jurisdiction, in the exercise of such jurisdiction it is amenable to the revisional power possessed by the High Court under section 115, Civil P.C.[16]

8. *Constitution of Company Benches.* There shall in each High Court be one or more benches, each to be known as the Company Bench, to be constituted by the Chief Justice of the High Court to exercise the jurisdiction vested in the High Court under Section 7.

9. *Procedure of the Court.* (1) Notwithstanding anything contained in any other law, all matters coming before the Court under this Ordinance shall be disposed of, and the judgment pronounced, as expeditiously as possible but not later than ninety days from the date of presentation of the petition or application to the Court and, except in extraordinary circumstances and on grounds to be recorded, the Court shall hear the case from day to day.

Explanation. In this sub-section, "judgment" means a final judgment recorded in writing.

(2) The hearing of the matters referred to in sub-section (1) shall not be adjourned except for sufficient cause to be recorded or for more than fourteen days at any one time of more than thirty days in all.

(3) In the exercise of its jurisdiction as aforesaid, the Court shall, in all matters before it, follow the summary procedure.

Synopsis

1. Scope.
2. Recovery of amount of liability from Company.
3. Limitation for disposal of petition.
4. Rectification of share register.

1. Scope. Under Companies Ordinance, 1984, section 9 is introduced for the first time. No such provision either existed in the old Companies Act, 1913 or in the Indian or English Law applicable in this regard. A careful examination of section 9 of the Companies Ordinance, 1984 will show that the intention of the legislature in introducing this new provision in the Ordinance is to provide a very expeditious and summary disposal of petition or application filed under the

14. ILR (1958) 8 Raj. 334.
15. AIR 1927 Pat. 182 (DB)=ILR 1930 Mad. 74=53 Mad. 147 (DB).
16. AIR 1935 All. 310=57 All. 810 (DB).

provisions of the Ordinance.[17] Under section 9(3) of the Companies Ordinance, 1984 the Court seized with the matter, has been empowered to follow the summary procedure. No doubt by adopting summary proceedings a lengthy procedure provided under the Civil Procedure Code can only be curtailed. However, to effectively decide the matter Court is under obligation to carefully apply its judicial mind, so the cases may be disposed of by an intelligent judicial act and if need be the point for determination be also noted down in the peculiar circumstances of the case, evidence be also recorded and thereafter on the basis of material produced in support of contentions the dispute should be resolved. The Courts are not under legal obligation to grant relief even in *ex parte* proceedings merely on the basis of the plaint. Although according to Order IX, Rule 6(1), C.P.C. a decree may be passed without recording evidence if the opposite side is being proceeded *ex parte* provided summons have been duly served. But if the provisions of Order IX, Rule 6(1), C.P.C. are not applied with caution, there would be apprehension that the plaintiff or petitioner might succeed in getting *ex parte* order or decree on the basis of the facts which might not be found true.[18]

2. **Recovery of amount of liability from Company.** Sections 410 to 415 which provide for determination of liability, civil and criminal, of Directors of Company with a view to recover ascertained amount of liability, have been made applicable in relation to application under section 290. Such a determination under sections 410 to 415 of the Ordinance is to be made in accordance with procedure laid down in section 9 the Ordinance.[19]

3. **Limitation for disposal of petition.** The intention of the legislature in prescribing 90 days period for disposal of all petitions and applications filed under the Ordinance was meant, only to secure an expeditious and early disposal of proceedings but it certainly did not affect the jurisdiction of Court in the event of non-observance of the prescribed time limit. The legislators are presumed to be aware of the existing rules of interpretation of such provision and if they still intended to make the observance of time limit prescribed in section 9 mandatory they could have provided so in the Ordinance.[20]

4. **Rectification of share register.** The proceedings for rectification of share register is in the nature of a summary procedure and, therefore, such jurisdiction will be exercised by the Company Judge in a case where facts are simple and undisputed and do not involve decision on intricate and disputed question of title between the parties in which case the parties may be left to settle their dispute in appropriate civil proceedings.[1]

10. *Appeals against Court orders.* (1) Notwithstanding anything contained in any other law, an appeal against any order, decision or judgment of the Court under this Ordinance shall lie to the Supreme Court where the company ordered to be wound up has a paid-up

17. 1988 CLC 1541=PLJ 1988 Kar. 508.
18. 1993 CLC 1540.
19. 1994 CLC 403.
20. 1988 CLC 206+1988 CLC 2127 (DB)+PLJ 1988 Kar. 234=1988 Law Notes 107.
1. 1988 CLC 1541=PLJ 1988 Kar. 508.

share capital of not less than one million rupees; and, where the company ordered to be wound up has a paid-up capital of less than one million rupees, or has no share capital, such appeal shall lie only if the Supreme Court grants leave to appeal.

(2) Save as provided in sub-section (1), an appeal from any order made or decision given by the Court shall lie in the same manner in which and subject to the same conditions under which appeals lie from any order or decision of the Court.

(3) An appeal preferred under sub-section (2) shall be finally disposed of by the Court hearing the appeal within ninety days of the submission of the appeal.

Synopsis

1. Scope.
2. Appeal in winding up proceedings.
3. Conditions regulating right of appeal.
4. Party entitled to appeal.
5. Necessary parties to appeal.
6. Court-fee.
7. Limitation.
8. Review by Trial Court.
9. Revision.

1. Scope. In order to make the right of appeal effective section 10(2) of the Companies Ordinance, 1984 and section 15, Code of Civil Procedure (Amendment) Ordinance, 1980 must be read together.[2] Appeal against an order of Company Judge is only competent where an order or decision has been made in proceedings when the company has already been ordered to be wound up. Where no order of winding up of company has been passed, appeal against order of Company Judge, relating to reconstruction/re-organization in accordance with agreement of parties concerned, would not be competent.[3]

Supreme Court appeal to. Where the company order to be wound up had a paid-up share capital of not less than one million rupees; and where the company ordered to be wound up has a paid-up capital of less than one million rupees; or had no share capital, such appeal shall lie only if the Supreme Court granted leave to appeal. Intra-Court appeal in such cases before the High Court was not competent.[4] It is to be noted that appeal to Supreme Court would be competent only when an order or decision has been made in proceedings when company has already been ordered to be wound up. Therefore appeal to Supreme Court against order of Company Judge in amalgamation/reorganization proceedings would not be competent where company has not been wound up.[5]

2. PLD 1996 SC 543=PLJ 1996 SC 1265=NLR 1996 Civ. 506.
3. 1993 SCMR 80=PLJ 1992 SC 334=1992 SCMR 1795=NLR 1992 SCJ 674=1992 Law Notes 792.
4. PLD 1995 Quetta 41=NLR 1995 AC 115+PLD 1991 Lah. 467=PLJ 1991 Lah. 468 (DB).
5. NLR 1994 SCJ 749.

Appeal where winding up order not made. Where Court had not passed winding up order but had dismissed petition for winding up, provision of S. 10(2) Companies Ordinance would be attracted and appeal would lie before Supreme Court and not before Division Bench of High Court.[6]

Constitutional petitions. Matters which are sought to be made the subject of extraordinary constitutional petitions such as *certiorari* and prohibition, cannot be adjudicated upon by the winding up Court, so that the aggrieved party may prefer an appeal to the High Court under section 10.[7]

Division Bench to hear appeal. Law Reforms Ordinance, 1972, was enacted on 14th April, 1972. By means of section 3 of this Ordinance, the Letters Patent appeals and second appeals in certain cases were abolished. Subsequently an amendment was made in this Law Reforms Ordinance, 1972 by amending Ordinance (No. XXXIV of 1972) whereby section 3 was amended to provide for an appeal to the Bench of two or more Judges of the High Court from decree passed or final order made by a Single Judge of that High Court in exercise of its original civil jurisdiction. So appeal against interlocutory orders was not still provided. In year 1980, section 3 of the Ordinance was further amended by section 15 of the C.P.C. (Amendment Act X of 1980) whereby the appeals against the interlocutory order passed by a Single Judge of the High Court in exercise of its original civil jurisdiction was made appealable before a Division Bench.[8] But in the instance of cases falling under this Ordinance appeal to a Division Bench was a creation of section 10 whereunder such appeal lay to a Bench of two or more Judges of High Court.[9] Even where the single Judge of a High Court referred a point arising in the winding up proceedings to the Division Bench and on receipt of their decision disposed of the proceedings, on the basis of the decision of the Bench; it was held that the decision given by the Bench on reference was a part of the decision of the single Judge itself and hence it was open to interference by the Division Bench hearing the appeal against that decision.[10] Where an appeal was filed before Supreme Court when appeal before Supreme Court was not maintainable, Supreme Court, in order to do complete justice between the parties and avoid any of the parties from being thrown out on technical ground remitted the appeals to the High Court while condoning the delay, keeping in view the peculiar circumstances of the case. Supreme Court, however, directed the High Court that the appeals be treated as intra-Court appeals pending before it, which will be decided after notice to the parties on merits in accordance with law.[11]

Second appeal. No second appeal lies against an order made in the winding up as the section contemplates only one appeal.[12]

Interlocutory orders appeal against. Provision of section 10(2), Companies Ordinance, 1984 which confers a right of appeal against orders and decisions passed

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6. PLD 1995 Quetta 41=NLR 1995 AC 115 (DB).
7. AIR 1952 Trav-Co. 14=1950 Trav-Co. L R 162.
8. PLD 1996 Lah. 1 (DB).
9. PLD 1996 SC 543=PLJ 1996 SC 1265=NLR 1996 Civ. 506+1988 CLC 2147 (DB).
10. AIR 1959 All. 276 (DB).
11. PLD 1996 SC 543=PLJ 1996 SC 1265=NLR 1996 Civ. 506.
12. AIR 1914 Lah. 39=1913 Pun Re. No. 34 (DB).

by the Company Judge would be applicable in a case to which section 10(1) of the Ordinance does not apply. In such cases the appeal will lie in the "same manner" and "subject to the same conditions" under which appeals lie from any order or decision of the Court. This provision does not specify the forum in which the appeal is to be filed nor does it clearly state the conditions which will be attracted while challenging the order in appeal. It, however, in clear terms states that the appeal will lie in the same way as appeal lies against an order of the Court. Intra-Court Appeal or High Court Appeal, therefore, can be filed against an interlocutory order provided same has been passed in exercise of original civil jurisdiction of the High Court.[13]

2. Appeal in winding up proceedings. Where any appeal was to be preferred against any order, decision or judgment when order of winding up of Company had been passed, same would lie to Supreme Court whether in shape of appeal or petition for leave to appeal. Intra-Court Appeal under section 3, Law Reforms Ordinance, 1972 was not competent in this case.[14]

An order or decision on an application under section 316, for leave to institute a suit against the company in liquidation is one in the matter of winding up and is appealable under section 10.[15] Where misfeasance proceedings under section 412 were initiated by the Official Liquidator, and in those proceedings the Company Judge tentatively decided to require the presence of some of the Directors of the Company for giving evidence on oath in open Court, after hearing the counsel, directed accordingly by an interlocutory order, an appeal is maintainable against such order to the Division Bench of the High Court under section 10 of the Companies Ordinance.[16] Similarly an order directing a preferential payment to one of the creditors of the Company in liquidation,[17] or an order which dismisses an application by which the claims of certain persons admitted by the liquidator is challenged, is a decision given in the matter of winding up and is therefore appealable.[18]

Orders not passed in winding up proceedings. If no order for winding up of the company has been passed, section 10(1) of the Ordinance will not be attracted. Thus, it is not attracted where the High Court has passed the order of investigation in the affairs of the company by Inspector to be appointed by the Corporate Law Authority,[19] or from an order made on an application under section 284 where the company which applied is not in the course of being wound up.[20] An order refusing to take the security offered for costs under section 487,[21] or an order under section 439 refusing to restore a Company on to register is not appealable under section 10

13. PLD 1996 SC 543=PLJ 1996 SC 1265=NLR 1996 Civ. 506+PLD 1996 Lah. 1 (DB).
14. 1997 CLC 260 (DB).
15. AIR 1959 Bom. 41 (DB) (Such an order is not a procedural order but one which affects the valuable right to obtain relief by filing a suit).
16. AIR 1964 Mys. 75 (DB).
17. AIR 1918 All. 342 (DB).
18. AIR 1951 Nag. 275=ILR 1950 Nag. 783 (DB).
19. PLD 1996 SC 543=PLJ 1996 SC 1265=NLR 1996 Civ. 506.
20. AIR 1925 Bom. 442 (DB).
21. AIR 1942 Mad. 405 (DB).

as it is not one given in the winding up of a company.[1] But an order appointing an interim receiver in an application under section 284 is open to appeal under section 202.[2]

An order by the liquidation Judge fixing the remuneration of the legal adviser for services performed to the liquidators is not one made in the matter of winding up of the company, but is of the nature of a ministerial order settling a dispute as between the liquidators and their employee and therefore is not appealable under section 10.[3]

An appeal to Supreme Court against order of Company Judge in amalgamation/reorganization proceedings would not be competent where company has not been wound up.[4]

3. Conditions regulating right of appeal. Section 3 of the Law Reforms Ordinance is not applicable to company cases.[5]

The proper construction to put upon section 10 is that the first part of this section confers a substantive right on a party aggrieved by an order made or a decision given by a Company Judge in winding up and the second part which deals with the manner and the conditions in which an appeal may be preferred only refers to the procedural aspect of an appeal and the forum to which an appeal would lie. The second part of this section does not in any way cut down or impair the substantive right already conferred by the first part of decision 10.[6] The criterion of appealability under section 10 is the same as in an order passed by a Judge on the original side of the High Court.[7] The second part of section 10 which refers to "the manner" and "the conditions subject to which the appeals may be had" must be construed as merely regulating the procedure to be followed in the presentation of the appeal and of hearing it, the period of limitation within which the appeal is to be presented and the forum to which appeal would lie, and not as restricting or impairing the substantive right of appeal which has been conferred by the opening words of that section.[8] Therefore, orders passed by the District Court or by Single Judge of the High Court in the matter of a winding up petitions are appealable under section 10 independently of the provisions of section 73 or that of Letters Patent. It is sufficient if the order is judicial as distinguished from administrative or ministerial order.[9]

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1. AIR 1925 Lah. 443 (Order if based on erroneous view of law is open to revision).
2. PLD 1980 Lah. 69=PLJ 1979 Lah. 381 (DB).
3. AIR 1943 Sind 82 (DB) (Such unappealable ministerial orders may be passed by the Judge when dealing with a company in liquidation)+AIR 1920 Lah. 433 (Order fixing remuneration of employee).
4. NLR 1994 SCJ 749.
5. 1988 CLC 2147 (DB)+PLD 1980 Lah. 86=NLR 1980 AC 9 (DB)+PLD 1980 Lah. 69=PLJ 1979 Lah. 381 (DB) (*Diss:* AIR 1925 Cal. 817).
6. PLD 1980 Lah. 69=PLJ 1979 Lah. 381 (DB).
7. PLD 1980 Lah. 80=NLR 1980 AC 9 (DB).
8. AIR 1965 S.C. 507.
9. AIR 1965 S.C. 507 (AIR 1955 Bom. 355 & AIR 1959 Bom. 386 *Approved;* AIR 1928 Cal. 295, *overruled*)+AIR 1961 Mys. 1 (DB).

The section is wide enough to cover appeals against any order made in the matter of winding up of a company, provided such an order finally decides a dispute between the parties or deprives the appellant of a substantial and important right and is not a mere formal or interlocutory order.[10] Therefore no appeal lies against an order rejecting the liquidator's prayer to compromise with the debtor.[11] Where a petition for compulsory winding up was ordered to be withdrawn from the file if the company gave security to the satisfaction of the Registrar in Insolvency; it was held that the order of the registrar accepting the security furnished could not be reviewed in appeal in the absence of a direction in the order of the Court to the effect that the registrar's decision should be subject to appeal.[12] It is to be noted that unless and until the Court passes an order for winding up, it cannot be said that it has finally determined the rights of parties so as to enable an appeal being filed even though it has expressed its finding on the several points raised before it.[13]

Procedural orders. Even though section 10 has made every order and decision in a winding up appealable, it is not possible to hold that purely procedural orders passed by the Judge in a winding up can also be appealed against under the section.[14]

Administrative orders. An appeal does not lie under section 10 against an order which is merely administrative in nature.[15] However the mere fact that the order is passed in the course of the administration of the assets is not by itself sufficient to make it an administrative, as distinguished from a judicial order. The question ultimately depends upon the nature of the order that is passed. An order according sanction to a sale undoubtedly involve a discretion and cannot be termed merely a ministerial order, for before confirming the sale, the Court has to be satisfied, particularly where the confirmation is opposed, that the sale has been held in accordance with the conditions subject to which alone the liquidator has been permitted to effect it, and that even otherwise the sale has been fair and has not resulted in any loss to the parties who would ultimately have to share the realisation. It is perhaps not possible to formulate a definition which would satisfactorily distinguish, in this context, between an administrative and a judicial order. That the power is entrusted to or wielded by a person who functions as a Court is not decisive of the question whether the act or decision is administrative or

10. PLD 1980 Lah. 69=PLJ 1979 Lah. 381 (DB)+PLD 1970 Dacca 648+20 DLR 1206 (DB)+19 DLR 335+AIR 1931 Lah. 8 (Order rejecting objection to being examined under section 195 of Companies Act, 1913 is a final order and therefore appealable even though the order directing summons to be issued may be only a preliminary order)+AIR 1929 Lah. 707=10 Lah. 806 (FB)+AIR 1956 All. 222=1956 Cri. L. Jour 369 (DB) (Application under section 235 of Companies Act, 1913 by official liquidator–Objection raised on the ground of limitation–Order rejecting objection is merely an interlocutory order)+AIR 1965 S.C. 507.
11. PLD 1970 Dacca 648 (DB)+20 DLR 1266 (*Rel.* 19 DLR 335; AIR 1929 Lah. 707; AIR 1959 Cal. 324).
12. AIR 1934 Cal. 603=61 Cal. 429.
13. AIR 1952 All. 223 (DB).
14. AIR 1939 Bom. 386 (DB) (Order directing advertisement of winding up petition is fraught with serious consequences to the company and is therefore appealable).
15. AIR 1959 Cal. 324 (Order made under section 183 (5)–Maintainability of appeal against the order depends on it being a judicial and not an administrative order).

judicial. But it is conceived that an administrative order would be one which is directed to the regulation or supervision of matters as distinguished from an order which decides the rights of parties or confers or refuses to confer rights to property which are the subject of adjudication before the Court. One of the tests would be whether a matter which involves the exercise of discretion is left for the decision of the authority, particularly if that authority were a Court, and if the discretion has to be exercised on objective, as distinguished from a purely subjective consideration, it would be a judicial decision. It has some time been stated that the essence of a judicial proceeding or of a judicial order is that there should be two parties and a *lis* between them which is the subject of adjudication, as a result of that order or a decision on an issue between a proposal and an opposition. No doubt, it would not be possible to describe an order passed deciding a *lis* before the authority, that is not a judicial order but it does not follow that the absence of a *lis* necessarily negatives the order being judicial.[16] No doubt the procedure for determining claims in winding up proceedings may not be as elaborate as that, for example, in a suit on the Original Side of this Court. Nonetheless, these claims are decided after hearing the parties concerned and after recording evidence, if necessary. In such cases the liquidation Judge is not distributing largesse but is administering justice according to law, and if his order is illegal, it must be challenged in an appeal.[17]

'Ex parte' order. This section has no application to petitions for setting aside *ex parte* decrees and hence the Court which made the *ex parte* order, which is in fact a nullity, can itself discharge the order.[18]

Appealable orders. An order refusing to wind up a company[19] or an order refusing to make a supervision order in a voluntary winding up,[20] or an order granting sanction to the official liquidator to sell the property of the company or revoking the sanction given is an appealable order.[1] Where the Court ordering the advertisement of the petition for winding up without hearing the company on its objections as to why it should not be proceeded with, and further steps should not be taken fails in the exercise of its jurisdiction and hence its order is appealable under section 10.[2]

Interlocutory orders. Under S. 3(B) of Law Reforms Ordinance an appeal does not lie against an interlocutory order an order which does not dispose of the entire case before the Court. But where an application was filed under section 292 of the Companies Ordinance under which an interim order is passed. Section 15 of Ordinance X of 1980 can be treated as an exception to section 3(3) of the Law Reforms Ordinance as it provides that notwithstanding anything contained in section 3 of the Law Reforms Ordinance appeal against interlocutory order made by a Single Judge of the High Court in exercise of its original civil jurisdiction, can be filed before a Bench of two or more Judges of that Court. Therefore, intra-Court appeal or High Court appeal can be filed against an interlocutory order provided it

16. AIR 1965 S.C. 507
17. PLD 1976 Kar. 85=PLJ 1976 Kar. 104 (DB).
18. AIR 1920 Lah. 51=1 Lah. 187 (DB).
19. PLD 1980 Lah. 86=NLR 1980 AC 9+AIR 1914 Bom. 251 (DB).
20. 30 Mad. 22 (DB).
1. AIR 1921 Mad. 286 (DB).
2. AIR 1959 Bom. 170=ILR 1951 Bom. 1237 (DB).

has been passed in exercise of "original civil jurisdiction" of the High Court. Under both the provisions precondition for filing intra-court appeal is that the impugned order must have been passed by a Single Judge in exercise of original civil jurisdiction.[3]

Orders under section 322. An order removing a liquidator cannot be said to be an order determining the final rights of the parties. No appeal lies against an order passed by the District Judge under section 322 of the Companies Act as it is not an appealable order.[4]

Order under section 412. An order which holds the application under section 412 maintainable is not one which is merely formal or ministerial in its character but finally decides points between the parties relating to substantial and important rights. The order is therefore appealable under section 10.[5]

Orders under section 418. Orders passed under section 418 directing the official liquidator to prosecute the directors and the Secretary of a company for offences under the penal provisions of the Act are appealable under this section.[6]

Non-appealable orders. The framing of issues in a winding up[7] or an order which dismisses the objection to the attachment of certain properties as belonging to the defaulting, contributory and ordering their sale is not an appealable order under section 10.[8]

4. Party entitled to appeal. Right of appeal under section 10 is available only to a person who can show that he has got an interest which is adversely affected by the decree, or has got an interest in the subject-matter of the litigation.[9] Therefore any creditor or contributory who is dissatisfied with the winding up may appeal against that order.[10] Where the Court has rejected the application of the liquidator under section 341 to recover the debts due to the company, the contributories can, when authorised to do so, validly file an appeal against the order.[11] However, where in a winding up petition a contributory is also shown as a creditor to whom notice of the proceedings ought to go, he becomes entitled to appeal against the winding up order as a party to the proceedings and his absence in the Court whether deliberate or due to the non-service of the notice does not in any way affect his right.[12]

Company. It is open to a company to appeal against the order of substitution passed by the company judge because in the absence of such an order, the winding up petition should have been dismissed. If it does not do so and allows the appeal to

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3. PLD 1996 SC 543=PLJ 1996 SC 1265=NLR 1996 Civ. 506.
4. AIR 1963 All. 606.
5. AIR 1938 Lah. 658 (DB).
6. AIR 1947 Mad. 343 (DB)+AIR 1931 Sind 120.
7. 16 Ind. Cas. 794 (DB) (Mad) (Case decided under section 169 of the Act of 1882).
8. AIR 1927 Lah. 282.
9. AIR 1932 Bom. 78=56 Bom. 16 (DB) (Scheme propounded for carrying out liquidation proceedings—Order refusing sanction—Propounder of the scheme neither a creditor nor a contributory—He has no right to appeal against the order.).
10. AIR 1936 Lah. 322 (FB).
11. 2 Sau L R 193 (DB).
12. AIR 1950 East Punj. 142.

become barred by limitation, it cannot challenge the order in an appeal against a different order passed by the company judge.[13]

Directors of company. An appeal filed by the directors in the name of the company against the winding up order is not incompetent where the directors have acted in pursuance of a resolution of the majority of the contributories. Such an appeal is really that of the contributories who are behind it.[14]

Official liquidator. The official liquidator representing the interests of the general body of the share-holders of the company has such an interest in the proceedings which gives him a right to file an appeal against the order of the Court below.[15] But the liquidator cannot himself appeal against an order which sets aside the order for winding up under the supervision of Court or which holds that there has been no proper and valid voluntary liquidation. In such a case it is the company and not the liquidator who is really the interested person.[16]

Person not party to proceedings. A person who was not a party to the proceedings for winding up has no right to appeal from an order made in those proceedings.[17]

5. Necessary parties to appeal. In an appeal against compulsory winding up order the official liquidator is not a necessary party. But it is desirable that as a general rule he should be made a party to such appeals.[18]

6. Court-fee. The section differentiates between appeals against order which are enforceable under section 121 in the same manner as a decree and decisions which have the force of a decree and stand *proprio vigore* as a decree whether it is enforced or not. Where the appeal is against orders of the former kind, Schedule I, Art. 11 of the Court-fees Act will not apply to the memorandum of appeal, court-fee will have to be paid in accordance with that provision on a memorandum of appeal against an order of the latter kind. Thus in an appeal against a decision to overrule the objections and proceed with a suit in another Court, court-fee should be paid under Schedule 2, Art. 11 of the Court-fees Act.[19]

7. Limitation. An appeal under section 10 against an order passed by a single Judge of the High Court on Original Side is governed by Art. 151, Limitation Act which is subject to section 12, Limitation Act. The appellant is entitled to deduct

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13. AIR 1959 Bom. 386=ILR 1959 Bom. 295 (DB).
14. AIR 1932 PC 1=58 Ind. App. 416=55 Mad. 180.
15. AIR 1953 Nag. 288=ILR 1953 Nag. 787 (The petitioning share-holder has no individual interest in the liquidation and therefore the official liquidator is not bound to implead him as a party to the appeal).
16. AIR 1950 East Punj. 355 (DB).
17. AIR 1949 Cal. 69 (Observation of Lord Williams, J, in AIR 1937 Cal. 667 and AIR 1942 Cal. 578, *Dissented from*)+AIR 1931 Cal. 391 (DB) (Proceedings on creditor's petition for winding up—Court wrongly refusing to hear share-holder—Appeal by company which did not appear in the proceedings on the ground of that refusal—Held appeal was not maintainable).
18. AIR 1941 Lah. 134=ILR 1941 Lah. 680 (DB).
19. AIR 1945 Lah. 146 (FB) (L.P.A. No. 116 of 1941, *overruled*).

time requisite for obtaining copy of the judgment even though under rules and orders of the High Court no copy need be filed with the memo. of appeal.[20]

8. Review by trial Court. In the case of this Court, an appeal against an order or decision of a Judge of this Court "within its ordinary jurisdiction" could only be heard by a Division Bench. Therefore, the re-hearing contemplated under the section can only be before a Division Bench, and this would suggest that the word "re-hearing" in the section was redundant.[1] However, an invalid order made in liquidation proceedings is open to review under section 10. The Courts are not only expected to recall and cancel invalid orders but are under an obligation to do so.[2]

9. Revision. A non-appealable order passed by a District Court under the provisions of this Ordinance is open to revision by the High Court under section 115, Civil P.C.[3]

20. AIR 1981 Lah. 237 (FB) (AIR 1921 Lah. 26, *overruled*).
1. PLD 1976 Kar. 85=PLJ 1976 Kar. 104 (DB) (AIR 1919 Lah. 255 is not good law).
2. PLD 1968 Kar. 231.
3. AIR 1935 All. 310 (DB) (Order under section 54).

PART III

CORPORATE LAW AUTHORITY

11. *Constitution of Corporate Law Authority.* (1) The Federal Government shall, by notification in the official Gazette, constitute a Corporate Law Authority.

(2) The Authority shall consist of such number of members, not being less than three, as the Federal Government deems fit, to be appointed by that Government by notification in the official Gazette.

(3) One of the members shall be appointed by the Federal Government to be the Chairman of the Authority.

(4) No act or proceeding of the Authority shall be invalid by reason only of the existence of a vacancy in, or defect in the constitution of, the Authority.

1. Scope. Section 11 postulates that no act or proceeding of Corporate Law Authority would be invalid by reason only of the existence of a vacancy in, or defect in the constitution of the Corporate Law Authority. Therefore where no prejudice was caused to a company. Corporate Law Authority by letter of specified date had directed Executive of the company to supply detailed information regarding alleged investment especially in an associate undertaking and to supply a copy of Members' register complete in all respects, but such information was never supplied to Corporate Law Authority and consequent upon failure to supply such information order in question, was passed. It was held that the order being just and proper no exception could be taken thereto.[1]

12: *Powers and functions of the Authority.* (1) The Authority shall exercise and perform such powers and functions as are conferred on it by or under this Ordinance or any other law.

(2) Notwithstanding anything contained in any other law, and without prejudice to the generality of the foregoing provisions, the Federal Government may, by notification in the official Gazette, direct that all or any of the powers and functions conferred on the Federal Government or any officer of the Federal Government under any law shall, subject to such limitations, restrictions or conditions, if any, as it may from time to time impose, be exercised or performed by the Authority.

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1. PLD 1995 Kar. 132=PLJ 1995 Kar. 75=1995 Law Notes (Kar) 97 (DB).

(3) The Authority may, by order in writing, direct that any power or function of the Authority referred to in sub-section (1) or sub-section (2) shall, subject to such conditions and limitations, if any, as may be specified in the order, be exercised or performed by the Chairman of the Authority or by such other member or officer of the Authority as may be so specified.

(4) The Authority, and the member or officer referred in sub-section (3) may for the purposes of a proceeding or enquiry, require anyone--

(*a*) to produce before, and to allow to be examined and kept by, an officer of the Authority specified in this behalf, any books, accounts or other documents in the custody or under the control of the person so required, being documents relating to any matter the examination of which may be considered necessary by the Authority or such member or officer; and

(*b*) to furnish to an officer of the Authority specified in this behalf such information and documents in his possession relating to any matter as may be necessary for the purposes of the proceeding or enquiry.

(5) The procedure of the Authority shall be such as may be prescribed.

(6) The Federal Government may appoint such officers as it thinks necessary to assist the Authority in the performance of its duties and functions under the Ordinance and may make regulations with respect to their duties.

(7) All officers and persons employed in the execution of this Ordinance shall observe and follow the orders, instructions and directions of the Authority.

1. **Notification as to exercise of powers.** All powers and functions conferred on the Federal Government or any officer of the Federal Government under the following laws shall, subject to such, limitations, restrictions or conditions, if any, as it may from time to time impose, be exercised and performed by the Corporate Law Authority established under sub-section (1) of section 11 of the said Ordinance, namely:--

(*i*) the Companies Ordinance, 1984 (XLVII of 1984);

(*ii*) the Securities and Exchange Ordinance, 1969 (XVII of 1969);

(*iii*) the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (V of 1970); and

(*iv*) the Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980 (XXXI of 1980).[2]

13. *Reference by the Federal Government or Authority to the Court.* (1) Without prejudice to the powers, jurisdiction and authority exercisable by the Federal Government or the Authority under this Ordinance, the Federal Government or the Authority, as the case may be, may make a reference to the Court on any question or matter which the Government or the Authority considers to be of special significance requiring orders, determination or action concerning the affairs of a company or any action of any officer thereof.

Explanation. In this sub-section "officer" includes an auditor, liquidator or agent of the company.

(2) Where a reference is made to the Court under sub-section (1), the Court may make such order as it may deem just and equitable under the circumstances.

2. S.R.O. 694(1)/86, dated 16-7-1986.

PART IV

INCORPORATION OF COMPANIES AND MATTERS INCIDENTAL THERETO

14. *Obligation to register certain associations, partnerships, etc., as companies.* (1) No associations, partnership or company consisting of more than twenty persons shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association, partnership or company, or by the individual members thereof, unless it is registered as a company under this Ordinance.

(2) Every person who is a member of any association, partnership or company carrying on business in contravention of the provisions of this section shall be punishable with fine which may extend to five thousand rupees and also be personally liable for all the liabilities incurred in such business.

(3) Nothing in this section shall apply to--

(*a*) Any society, body or association, other than a partnership, formed or incorporated under any other Pakistan law; or

(*b*) a joint family carrying on joint family business; or

(*c*) a partnership of two or more joint families where the total number of members of such families, excluding the minor members, does not exceed twenty.

Synopsis

1. Foreign Companies.
2. Registration of association, company or partnership.
3. Association.
4. Partnership--meaning of.
5. Persons.
6. Carrying on business.
7. Business--meaning of.
8. Acquisition of gain.
9. Company formed under other law.
10. Non-registration--effect of.
11. Suit against unregistered company by third party.
12. Punishment.
13. Procedure.

1. Foreign Companies. It appears that this section would apply only to associations formed in Pakistan, and not to foreign corporations doing business there through agents and hence that section could not render any members of that corporation residing in Western Australia individually liable for its debts on the ground of its failure to register itself as a company under the provisions of this Ordinance.[1]

1. (1881) 6 App Cas 386.

2. Registration of association, company or partnership. It is not correct to say that merely because persons choose to affix the word 'Co.' after the firm name, of a firm it must be registered under the Companies Ordinance. It is the number of the members of the partnership that determines the question whether the Company should or should not be registered under that Ordinance.[2] An Association of less than 20 members is not compulsorily registrable as company.[3] But a company, association or partnership not compulsorily registrable at its inception under section 14 would become so if during its continuance its number of members exceed the minimum prescribed in section 14. The section governs not only the formation of a company, association or partnership but also rules its continuance.[4] However, if minors become entitled to profits in a firm as heirs of a deceased partner, they cannot be counted as partners for the purposes of this section, and therefore the prohibition under section 14(1) would not apply even if counting minors, the number of partners exceeds the number twenty.[5]

Where the company of more than 20 persons was started and the money for the shares was collected; it was held that the bargain was clinched and the company required registration though the share certificates were not issued.[6]

Several partnerships combining to form company. A partnership entered into between several unregistered firms for carrying on business for gain is compulsorily registrable as a company under this Ordinance when the total number of persons constituting the different firms exceed twenty.[7]

Sub-partners. Sub-partners are not members of a firm and their existence does not affect the number of members of a firm as required under the provisions of the Companies Ordinance.[8] In a partnership arising not out of a contract but by operation of law as in the case of a Hindu joint family firm, an individual member is merely a sub-partner. Hence the joint family consisting of these members alone is to be reckoned as one person for the purpose of registration.[9]

3. Association. The word "association" as contemplated by section 14, Companies Ordinance, 1984 is one which has for its object acquisition of gain.[10] In order to come under the section association must be one in which its members should be so associated that there is a legal relation between them giving rise to joint and mutual rights and obligations.[11] Where there is no mutual agency between the members, the association need not be registered even when it has more than twenty members.[12] Thus where more than twenty persons enter into a chit fund agreement which creates mutual rights and obligations they constitute an

2. AIR 1951 Kutch 55.
3. AIR 1953 Hyd. 142 + AIR 1925 Mad. 233.
4. AIR 1939 Cal. 187 = ILR (1938) 2 Cal. 368 (DB) (Point considered but not finally decided in PLD 1977 SC 109).
5. PLD 1977 SC 109 = PLJ 1977 SC 104.
6. AIR 1939 Rang 273 = 40 Cr. L. Jour 799.
7. AIR 1930 PC 300 + AIR 1927 Mad. 123 (DB) + AIR 1914 Nag. 26.
8. AIR 1936 Bom. 246 + AIR 1957 Andh Pra 332 (DB).
9. AIR 1934 Nag. 45 = 30 Nag. L. R. 219.
10. PLD 1992 Kar. 230 = NLR 1992 UC 518.
11. AIR 1919 Low Bur 102 + AIR 1939 Rang 273 + 29 Mad 477 + 20 Mad. 68.
12. AIR 1964 M P 153.

association for the purposes of the section.[13] But where under a chit fund agreement the subscribers who are more than twenty, contract with the manager to pay their subscriptions for a fixed period and draw the amount by lots but no mutual rights and obligations are created by the agreement between the subscribers *inter se* there is no association within the meaning of the section.[14]

Joint Hindu families, partnership of. A joint family business in which interests are acquired not by an act of party but by the law of inheritance is not an association which requires registration.[15] But a partnership of several Hindu joint families constituted for the purpose of carrying on business for gain must comply with the requirements of section 14 where the total number of the adult members in all the families exceed twenty. An omission to do so would render the partnership illegal.[16]

4. Partnership--meaning of. Use of the word "partner" or "partnership" in an agreement does not necessarily show that there is a partnership. Where one of the parties to an agreement only lends money to the other to be repaid by a share of the profits, he stands, only as a creditor of the other although he is described as a partner in the agreement.[17]

5. Persons. The word "person" in Companies Ordinance denotes individuals and not bodies of individuals whether corporate or not.[18] It can be used to include a number of persons such as joint Hindu family or a varying number of beneficiaries who may from time to time become interested in the trust property.[19] Therefore the joint Hindu family on behalf of which one of its members has entered into a partnership must be deemed to be a person within the meaning of this Ordinance.[20] It was held in a case that it is doubtful whether registered companies can be held to be 'persons' within the meaning of the Companies Ordinance.[1] But a partnership between two individuals and the Managing Director of a limited company registered under the Companies Ordinance, and having twenty members is not a partnership of more than twenty members contravening the provisions of section 14(1) and there is nothing illegal in the formation of such a partnership. In the partnership agreement it is not the limited company as a body corporate that is a partner but only its Managing Director as an individual. It is not partnership between more than 20 persons but only a partnership of three persons.[2]

6. Carrying on business. The phrase "carry on business" is a very elastic one and is almost incapable of definition. The Court must in each case look to the circumstances.[3] It shows that what the Legislature contemplated is something

13. 1 Mad L Tim 106.
14. AIR 1962 A.P. 406 + AIR 1919 Low Bur 102 + 29 Mad. 477.
15. AIR 1939 Cal. 187 = ILR (1938) 2 Cal. 368 (DB).
16. AIR 1959 Cal. 380.
17. AIR 1922 Nag. 67.
18. AIR 1930 PC 300 + AIR 1927 Mad. 123 = 50 Mad. 175 (DB).
19. AIR 1924 All. 414 = 46 All. 509 (DB) + AIR 1930 Bom. 431 (DB).
20. AIR 1926 All 337 = 48 All. 395 (DB).
1. AIR 1936 Oudh 56 = 11 Luck 567 (DB).
2. AIR 1963 Mad. 128.
3. 18 Bom. 294 = 21 Ind. App. 13 (PC).

which must be business in the same sense in which banking is, although impliedly, described as business.[4] It implies some continuous control of the business by the association.[5] Thus where a person holding a licence for the capture and sale of elephants entered into an agreement with others for the purpose of financing the business and those others received only a share of profits with no right to interfere with the business; it was held that the association of persons who financed the licensee carried on no business as an association within the meaning of the section.[6] Where several persons agree, if they worked their factories, to work them in a particular manner and to share the profits in certain proportions but they are at liberty to work their factories or not, they do not constitute a partnership or association carrying on any business jointly within the meaning of this section.[7]

7. Business--meaning of. The co-existence of two things namely a business and the carrying on of that business for gain attracts the application of section 14. The fact that an association did not actually buy and sell goods for profit would not mean that it was not carrying on business when those goods were used as raw material for manufacture of goods to be sold by its members; thus a suit by some of the members under Order 1, Rule 8 for accounts against the office-bearers and the other members of the association was not maintainable, parties in the suit being members of an illegal association.[8]

Person under disability is not a partner. While undoubtedly the word 'person' as used in sub-section (1) of section 14 refers to individuals, yet the prohibition is in regard to the number of persons who are partners of a firm, and accordingly only those persons are to be counted who are not under any legal disability from becoming partners. As a minor cannot become a partner in view of the provisions contained in sub-section (1) of section 30 of the Partnership Act, he cannot be counted as a person for the purpose of determining whether the number of partners exceeds the statutory limit of twenty. To put it differently, the position simply is that a minor not being a partner but only entitled to the benefits of a partnership, does not count at all for the purposes of sub-section (1) of section 14 of the Companies Ordinance.[9]

The test of business is continuity and repetition of acts; whether a repetition of acts amounts to business or not must depend upon the nature of the acts, and the act itself, if done singly, must be such as to be called business. But if the act when done singly does not amount to business, then merely because twenty persons or more than twenty persons are repeating the same act, it cannot be said that they are carrying on business.[10] Thus a single venture whereby a number of articles are purchased and sold may not be business. But where though the purchase of several bales of yarn take place as a single transaction when their sales have to go on, the profits have to be realised and divided, it is not a single venture which would fall outside the meaning of the word "business" in the

4. 60 Bom. 800.
5. AIR 1934 Lah. 882.
6. 13 Cal. W N 638.
7. AIR 1934 Lah. 882 = 16 Lah. 574 (DB).
8. AIR 1964 Punj. 72.
9. PLD 1977 SC 109 = PLJ 1977 SC 104.
10. 60 Bom. 800.

section.[11] Where a syndicate of four firms entered into a contract with each of the three of those firms for purchase and sale of a specified number of bales of yarn and to divide the profits; it was held that the transaction amounted to a business and not merely a single venture.[12]

8. Acquisition of gain. In determining the purpose of the association the primary and original object of the association has to be looked into and no regard is to be had to circumstances developed later on.[13] The word "gain" in sub-section (3) of section 14 means "acquisition" and is not limited to mere pecuniary gain. The word should be taken as referring to a company which is formed to acquire something or in which the individual members are to acquire something.[14] Even though the business of an association has not for its object the acquisition of gain by the association, yet if it has for its object the acquisition of gain by the individual members and if the association consists of more than twenty members, it is hit by this section.[15] It is further to be noted that the expression 'acquisition' of gain does not necessarily mean the acquisition of a commercial profit. It is sufficient that the association carries on a business for the purpose of obtaining payments, and it is not necessary that the business should result in commercial profits at the end of the accounting period.[16]

Gains to be used for charitable purposes. The mere fact that the gains of the company are to be used for a charitable purpose does not exclude the company from the provision for compulsory registration under the Companies Ordinance.[17]

9. Company formed under other Law. A company may be formed under any other Act even when it contravenes the provisions of this section. But an association of more than twenty persons formed under the provisions of some other Act loses its immunity from the prohibition contained in section 14 when the Act under which it was formed is repealed. The expression incorporated under any other Pakistan Law in this section not only means formed but also having its existence recognised by another statute.[18]

10. Non-registration--effect of. Provision regarding registration of company, association or partnership are mandatory; any association contravening its provision is an illegal body and its existence cannot be recognised by law.[19] It affects its capacity to enter into a contract as a corporate body or to sue or be sued in that capacity.[20] But the effect of non-registration as a company of a compulsorily registrable association is not to render the association an unlawful

11. AIR 1920 PC 300.
12. AIR 1934 Bom. 361 (DB).
13. AIR 1930 All. 186=52 All. 325 (DB).
14. AIR 1955 Mys. 149=ILR 1955 Mys. 519.
15. (1882) 20 Ch. D. 137.
16. 1926 Ch. 657.
17. AIR 1930 All. 186 (DB)+AIR 1932 Rang. 167.
18. 1901-1 Ch. 102.
19. AIR 1934 Lah. 882 (DB)+AIR 1959 Punj. 104. (The fact that such associations were formed under the advice of Textile Commissioner cannot exempt them from the necessity for registration).
20. AIR 1931 All 83 (DB)+AIR 1939 Cal. 187 (DB)+AIR 1934 Bom. 361 (DB)+AIR 1914 Nag. 26

body.[1] It can have no effect on the legality of its business.[2] Therefore non-registration of a company, association or a partnership does not result in invalidating a contract entered into by one of its members in his individual capacity, with a stranger.[3]

Suit against non-registered company. A Court cannot entertain a suit brought in relation to a company or association which is compulsorily registrable under the Ord. but has not been so registered.[4] A suit for dissolution or for taking accounts of a compulsorily registrable partnership but not registered is not maintainable.[5] Thus a partition suit by one partner against the remaining partners of an illegal partnership,[6] or a suit for dissolution or for taking accounts of a compulsorily registrable partnership but not registered is not maintainable.[7] But a suit by members of an association which is illegal by reason of its non-registration, for refund of the amount paid by them as their share of capital is maintainable.[8] It has been held that although the agreement of partnership itself is illegal as contravening the provisions of the Act regarding registration, a person who has contributed an amount to commence the business can claim it back and recover it before the business has actually commenced.[9] Even otherwise although a partnership, company or association is hit by the section, its members can have a beneficial interest in its property.[10]

Increase in members without knowledge of partner. An increase of the members beyond 20 without the knowledge of a partner cannot deprive him of his right to a share of the profits of the firm when its membership was below 20 and therefore his suit for a share of such profit cannot be thrown out on the ground that it was a suit against a partnership of more than 20 persons, it was not maintainable.[11]

Reduction in members of unregistered company. The subsequent reduction in the number of members of an association below the prescribed number does not cure the illegality arising at its inception owing to its non-registration.[12]

Winding up of unregistered company. A Court cannot entertain a petition for the winding up of a company formed in contravention of the provisions for compulsory registration in the Company Ordinance.[13]

Person 'pari delicto' cannot take advantage of non-registration. A party who files a suit for dissolution of a partnership and upon which a consent decree has

1. AIR 1931 All. 83 = 83 All 316 (DB).
2. AIR 1951 Kutch 55.
3. AIR 1953 Sau. 141.
4. AIR 1955 Mys 149 = ILR 1955 Mys 519.
5. AIR 1951 Mad. 291 (DB) + AIR 1926 All. 591 (DB) + AIR 1926 Nag. 241.
6. AIR 1927 All. 487 = 49 All 319 (DB) + 9 Ind. Cas. 25 (All).
7. AIR 1951 Mad. 291 (DB) + AIR 1926 All. 591 (DB) + AIR 1926 Nag. 241.
8. AIR 1953 Ajmer 14 + AIR 1951 Mad. 291 (DB) + AIR 1930 Rang 21 (DB) + AIR 1921 All. 73 (DB).
9. AIR 1952 Vindh Pra 1.
10. AIR 1939 Cal. 187 = ILR (1938) 2 Cal. 368 (DB).
11. AIR 1938 Mad. 151.
12. AIR 1930 Rang 21 = 7 Rang 540 (DB).
13. AIR 1954 All. 555.

been passed cannot seek to get the decree set aside as one passed without jurisdiction on the ground that the partnership was one which required to be registered under this Ordinance but had not been so registered.[14]

Liability to pay income-tax. The non-registration of an association as a company under this Ordinance does not absolve it from liability to be assessed to income-tax.[15]

Registration of unregistered company—effect. Although an association may be illegal at its inception as a result of the failure to register it as a company, the illegality gets cured when it is subsequently registered.[16]

Objection on ground of non-registration when may be raised. The plea in bar of a suit which relates to a partnership which is illegal on the ground of its non-registration as a company under the Companies Ordinance can be raised for the first time even in a Supreme Court appeal. The provisions of the Ordinance being prohibitory in nature cannot be excluded from consideration even though the bar of that provision has been raised at that late stage.[17]

11. Suit against unregistered company by third party. A creditor who is not a member of an illegal partnership but is a stranger and entered into the transaction with the company bona fide and in ignorance of the fact that the company was not legally constituted can maintain a suit against the "partners".[18] But such suit would not be maintainable if the plaintiff was *participes criminis*.[19]

12. Punishment. Members of an unregistered company of more than 20 persons formed before the provisions of this Ordinance were enacted can be punished for continuing to be members of such a company.[20]

13. Procedure. A Magistrate is not precluded from trying an offence under sub-section (2) merely because the police investigated into the case and sent up the report which they were not entitled to send, it being a non-cognizable offence.[1]

MEMORANDUM OF ASSOCIATION

15. *Mode of forming a company.* (1) Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and complying with the requirements of this Ordinance in respect of registration, form a public company and any two or more persons so associated may, in like manner, form a private company.

(2) A company formed under sub-section (1) may be a company with or without limited liability, that is to say:--

14. AIR 1933 Sind 29 = 26 Sind L R 395.
15. AIR 1931 Lah. 376.
16. AIR 1930 Rang 21 = 7 Rang 540 (DB).
17. AIR 1952 SC 559.
18. AIR 1930 Bom. 5 = 53 Bom. 652 (DB).
19. AIR 1934 Lah. 882 (DB).
20. AIR 1942 Mad. 283 = 43 Cri. L. Jour 785.
1. AIR 1939 Rang 273 = 40 Cri. L. Lour 799.

(*a*) a company limited by shares; or

(*b*) a company limited by guarantee; or

(*c*) an unlimited company.

Synopsis

1. Scope.
2. Company may be formed for lawful purpose.
3. Statutory rights of members cannot be taken away.
4. One person cannot form company.
5. Person--meaning.
6. Holding company.
7. Company for business in foreign countries.

1. Scope. Promotion of a company by any person does not lead to conclusion that he can be termed as its owner. Company has its own separate legal entity from its promoters and shareholders.[2]

2. Company may be formed for lawful purpose. Under section 21 the essence of a validly incorporated company is that it should consist of a particular number of persons and that it should be associated for a lawful purpose. A purpose in order to be unlawful must *ex facie* appear so, or it should be transparently illegal or prohibited by the statute. The motive which induced the founders to form the company is absolutely irrelevant to the question whether its purpose is lawful or not.[3] Any purpose not prohibited by law is a lawful purpose under this section. Hence contributions to political funds or objects not prohibited by law can be validly included as one of the objects of a company.[4] People form their business into limited companies and others invest their money into them so that they might have the advantage from their business in the form of dividends and of not being personally liable for the transactions of the company. This purpose which underlies the formation of limited companies is a perfectly legitimate one.[5] Where the primary and original object for which the association was formed is a lawful one, the subsequent illegal acts of its members cannot render the association one whose purpose is unlawful.[6]

There is nothing illegal or opposed to public policy in several proprietors forming a company for the beneficial management of their *Zamindari*.[7]

3. Statutory rights of members cannot be taken away. Statutory rights which the members of a company collectively have, cannot be taken away or modified by any provisions of the memorandum or Articles of Association whether the company is a public or a private one.[8] But where the clauses of

2. 1984 CLC 103 (DB).
3. AIR 1960 Andh Pra 123 (DB).
4. AIR 1957 Cal. 234.
5. 1921-2 K.B. 492.
6. AIR 1930 All. 186 = 52 All. 325 (DB).
7. 16 Cal. W N 297.
8. AIR 1958 Pun. 190 (DB). (But the privileges and exemptions do not extend beyond the provisions defined in the statute and the companies or public should honour the obligations imposed by the statute).

Memorandum of Association sought to be deleted do not constitute mandatory conditions required for a Memorandum of Association as provided in section 17 of the Companies Ordinance and therefore, the fundamental requirements for a Memorandum of Association as provided in section 17 of the Companies Ordinance will continue to exist even after the proposed changes are effected, the changes were unexceptionable.[9]

4. One person cannot form company. A single individual cannot form a company. Hence his business although it may be banking, cannot be treated as a bank under the provisions of any law which applies only to banks which have been incorporated as company in accordance with the provision of the Companies Ordinance.[10] But the fact that one man because of his preponderating number of shares is in a position to outvote the others who are members of his own family possessing one vote each will not make the company illegal where the memorandum has been signed by the requisite number.[11]

5. Person--meaning. A person does not mean a person who is *sui juris*. Even an infant signing a memorandum is a 'person' within the meaning of this section and unless he has repudiated the contract, an objection to registration of the memorandum on the ground that he is not "a person" is not sustainable.[12]

The word 'person' includes bodies politic. One limited Company can be a share-holder of another where it is authorised to do so under its memorandum and Articles of Association.[13]

6. Holding company. There is no general law against a company refraining from indulging in active business and being content to be a holding company.[14]

7. Company for business in foreign countries. The mere fact of the principal business of a company being abroad should not exclude any foreign merchants from incorporating themselves as a Joint Stock Company and carrying on business as such.[15]

16. *Memorandum of company limited by shares.* In the case of a company limited by shares,--

(*a*) the memorandum shall state--

(*i*) the name of the company with the word "limited" as the last word of the name in the case of a public limited company, and the parenthesis and words "(Private) Limited" as the last words of the name in the case of a private limited company;

9. PLD 1964 Dacca 666.
10. AIR 1950 All. 487.
11. 1897 App. Cas. 22.
12. (1892) 3 Ch. 555 + (1876) Ch. D. 610.
13. (1867) 3 Ch. App. 105 + (1869) 4 Ch. App. 252.
14. AIR 1927 Bom. 371 = 51 Bom. 372 (DB).
15. (1871) 40 L J Ch. 655.

(*ii*) the Province or the part of Pakistan not forming part of a Province, as the case may be, in which the registered office of the company is to be situate;

(*iii*) the objects of the company, and, except in the case of a trading corporation, the territories to which they extend;

(*iv*) that the liability of the members is limited; and

(*v*) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount;

(*b*) no subscriber of the memorandum shall take less than one share; and

(*c*) each subscriber of the memorandum shall write opposite to his name the number of shares he takes.

17. *Memorandum of company limited by guarantee.* In the case of a company limited by guarantee,--

(*a*) whether or not the company has a share capital, the memorandum shall state--

(*i*) the name of the company with the parenthesis and words "(Guarantee) Limited" as the last words of its name;

(*ii*) the Province or the part of Pakistan not forming part of a Province, as the case may be, in which the registered office of the company is to be situate;

(*iii*) the objects of the company, and except in the case of a trading corporation, the territories to which they extend;

(*iv*) that the liability of the members is limited; and

(*v*) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as

may be required, not exceeding a specified amount; and

(*b*) if the company has a share capital,--

(*i*) the memorandum shall also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of fixed amount;

(*ii*) no subscriber of the memorandum shall take less than one share; and

(*iii*) each subscriber shall write opposite to his name the number of shares he takes.

Synopsis of sections 16 and 17

1. Memorandum of Association of company.
2. Construction of memorandum.
3. Company cannot go beyond its objects.
4. Class of shares not to be specified.
5. Place of office.
6. Shares of subscribers stated in Memorandum--effect.
7. Company limited by guarantee.

1. Memorandum of Association of company. Memorandum of Association binds Company and its members as they are deemed to have covenanted to carry out rights and obligations in specified manner.[16] The Memorandum of Association is the charter of a company to be established under the Companies Ordinance and defines the limitation of its powers. It is a covenant in which every member of the company covenants that he will observe its conditions, one of which is that the objects for which the company is established are the objects mentioned in it and that he will not only observe that but will observe it subject to the provisions of the Ordinance.[17] It is an established position in law that an act of the company in violation of the Memorandum is *ultra vires* and so void and cannot even be ratified.[18] The statement of the objects of a company in its memorandum is not a mere legal technicality but is a necessity of great practical import because the public who are called upon to subscribe to the capital of the company by purchase of its shares must know clearly what are the objects for which they are paying and which they want to encourage. To give this necessary information the statement of objects should be clear. A too vague, general and wide statement will defeat the very purpose of stating the objects in the memorandum.[19]

The purpose of stating the objects in the memorandum are (1) that the intending corporator may know in what field the money he is going to invest is to

16. NLR 1987 UC 352 = 1987 CLC 726.
17. 1907-2 Ch. 259.
18. NLR 1980 AC 9 = PLD 1980 Lah. 86.
19. AIR 1957 Cal. 593.

be put to risk and (2) to facilitate any one dealing with the corporation to know whether the contractual relation he is entering into relates to a matter within its corporate objects.[20] Therefore the objects stated should be those which the company intends to carry out in near and reasonable future. They should not be too remote objects for a too remote future and mere possibilities in some distant and uncertain time.[1] The memorandum should state only the object, that is to say the trade in the case of a trading company, and not the powers which the company must have in carrying out that object.[2]

2. Construction of memorandum. The Memorandum of Association of a company like any other document must be read fairly, its import derived from a reasonable interpretation of the language which it employs. There is no specially rigid canon of construction to be applied to it. The purpose of the memorandum is to enable share-holders, creditors and those who deal with the company to know what is its permitted range of enterprise and for this information they are entitled to rely on the constituent documents of the company. The intention of the framers of the memorandum must be gathered from the language in which they have chosen to express it and not from the antecedent transactions of the company to which the share-holders, creditors and others have no access and which they have no means of knowing.[3] The cardinal rule for construing the Memorandum of limited liability companies is that when a company has a primary object, all other clauses in the memorandum are to be understood as ancillary to the main object of the company.[4] But where the memorandum provides that the objects set out in each sub-clause of the object clause of the Memorandum of Association are to be construed as separate objects and not limited by reference to any other clause or the name of the company, such a provision operates to make each of those objects *intra vires.*[5]

Where the several other general objects mentioned in the objects clause were independent of each other; each of them had to be treated as principal and independent object.[6]

In construing a memorandum of association in which there are general words care must be taken not to make them a trap for unwary people. They should not be construed literally but should be taken in connection with what are shown by the context to be the dominant or the main object.[7] Thus where one of the main or principal objects was to carry on the business and undertaking of an Electric Energy Supply Company and this object included starting of industries primary or subsidiary to the said business. The starting of primary or subsidiary industries would, in itself, be an independent object. For instance, the company may start an industry to make cables, electric bulbs, electric meters, electric switches, etc. Such an undertaking would be covered by the expression "all

20. 1918 App. Cas. 514.
1. AIR 1957 Cal. 598.
2. AIR 1931 PC 182 + 1918 App. Cas. 514.
3. AIR 1931 PC 182 = 134 Ind. Cas. 333.
4. PLD 1969 Kar. 278 (DB).
5. PLD 1970 Lah. 235.
6. AIR 1962 Bom. 132 = 1918 AC 514 + AIR 1958 Bom. 195 + (1947) 2 All. ER 194 + (1946) All ER 435 + (1956) 2 All ER 763.
7. 1905-2 Ch 427.

industries primary or subsidiary to the said business". In construing a Memorandum of Association the principle of *inclusis unius* and *exclusis ulterious* should not be applied and hence a thing done by the company cannot be held to be *ultra vires* its powers merely because such a power is not expressly mentioned by its memorandum. The proper test for determining its validity should be to see whether the power to do that thing arises by necessary implication from the expressed objects and if it does, the act should be held as *intra vires* the Company. A Memorandum of Association must be taken as containing anything which is fairly incidental to the objects stated therein so that it can be said to be there by reasonable implication.[8] Where among other objects of the company, as stated in the Memorandum of Association, was the object embodied in clause 3(*d*) of the Memorandum of Association which ran as follows: "To advance money at interest on the security of land, houses, machinery and other property situated in India and to invest money not immediately required upon such securities and bank deposits as may be from time to time determined": It was held, on interpretation that a member of the Company was entitled to a declaration that advances of money in the nature of loans shall only be made on the security of land, houses, machinery and other property situated in India but that, so far as the investment of money not immediately required was concerned, the directors had complete discretion in the matter of approving the kind of security offered.[9] Where the Memorandum of Association of a Company stated it to be one of its objects "to carry on the business of manufacturers of and dealers in salt, soda, iodine and other products and that this it may do in any part of the world": It was held, that the business included in ordinary mercantile parlance, the sale of salt to purchasers abroad, though there was no express mention of exportation.[10]

Banking Company. Accepting money on deposit and paying it back by cheque or otherwise, falls within the definition of banking business and an ordinary limited Company is debarred from undertaking it.[11]

Trading Company. Powers of the company are not required to be and ought not to be specified in the memorandum. In the case of a trading Company, the Ordinance intends that the memorandum should define the trade, not that it should specify the various acts which should be within the power of the Company to do in carrying on the trade. In the case of a trading and commercial Company, prima facie one would expect it to have among its permitted objects all the ordinary transactions of trade, domestic and foreign, in the commodities in which it is established to deal.[12]

Borrowing powers. Where under its Memorandum and Articles, the Company had the power to mortgage and pledge, which showed that it could incur loans because in mortgages the relationship was always that of a debtor and creditor. It had also power to acquire properties on securities of the Company. It could make, draw, accept and issue cheques and promissory-notes, bills of exchange or other negotiable or transferable instruments. In promissory-notes and bills of exchange

8. 1907-2 Ch 259.
9. AIR 1935 Lah. 792 = 160 Ind Cas 24 (DB).
10. AIR 1931 PC 182 = 134 Ind Cas 333.
11. PLD 1971 SC 585.
12. AIR 1931 PC 182 = 134 Ind Cas 333.

there is always undertaken a liability to pay money which shows that the Company could incur such liabilities to pay money and incur loans and borrow money. Moreover the fact that a Company had adopted Regulations 44 and 46 in its Articles of Association, establishes the borrowing powers of the Company; because if that power had not been there, the Articles of Association would have clearly laid down that the said Regulations were not to apply. As this has not been done, the conclusion is unavoidable that the borrowing power did vest in the Company and the loans incurred by the Company cannot be said to be *ultra vires* of its power.[13]

Third party mentioned in memorandum—effect. The Memorandum of Association of a Company does not constitute a contract between the Company and a third party who may be named therein.[14]

3. **Company cannot go beyond its objects.** A Company cannot engage in a business which is not fairly incidental to or consequential upon the business, the carrying on of which constitutes its object. It is a question of fact whether such additional business is incidental to its main business.[15] The Courts are not disposed to construe even the widest powers given to it in such a way as to enable a Company to go outside the main objects for which it was formed. Every possible business which a Company is permitted to carry on by virtue of its Memorandum of Association is not its main object. The large variety of operations that are mentioned in it are intended to serve as subsidiary to its main object. The achievement of the main object can require a large variety of subsidiary ventures to be started by way of facility and convenience, but they are ancillary to the main object and cannot take its place. If the Company makes one of the subsidiary objects its main business, it is acting *ultra vires* of its memorandum.[16] Where a Shipping Company had in its memorandum of objects the following clauses. Clause 3(*g*)(3) provided "to acquire and deal with the following property: Plant, machinery, personal estate and effects". Clause 3(*h*)(7) provided "to perform or do all or any of the following operations, acts or things: To lend money with or without security, and to invest money of the Company in such manner (other than in the shares of this Company) as the directors think fit". The Company by its directors thought of buying gold and silver. Accordingly they bought the-same and kept the same with a Bank for safe custody. One of the share-holders sued for a declaration that Company's action was *ultra vires:* It was held, that the Company's action was *intra vires* and came within clause 3(*g*)(3). The action was not an investment within clause 3(*h*)(7).[17]

4. **Class of shares not to be specified.** While the memorandum must state the amount of capital divided into shares of certain fixed amount, provision as to the nature of those shares and the rights to be attached to them is more properly

13. PLD 1970 Lah. 235.
14. AIR 1934 Bom. 427 = 156 Ind Cas 80 (DB).
15. (1908) 99 L T 524. (Where the statutory enterprise of a company is railway enterprise the running of omnibuses cannot be considered to be incidental to it).
16. PLD 1967 Kar 637 + PLD 1969 Kar. 278 (Insurance Company cannot carry on independent business of investment).
17. AIR 1944 Bom. 131 = ILR 1944 Bom. 247 = 214 Ind Cas 205 (DB).

made in the Articles of Association which may be altered by a special resolution.[18] Hence even if there is a clause in the memorandum which fixes a limit on the dividend that can be declared on any class of shares that cannot be regarded as a condition for the purposes of section 20.[19]

5. Place of office. Company's memorandum must state the Province in which the office of the proposed Company must be situate, but a statement as to the place within the province where it is to be situate is not an essential condition of the memorandum.[20]

6. Shares of subscribers stated in Memorandum--effect. Where in the case of a Company limited by shares, the Memorandum of Association gives the names of the subscribers and opposite each name mentions the number of shares taken by the subscriber as required by section 16(*b*)(3) and a certificate of registration is given by the Registrar in respect of that Company, the certificate is under section 33 conclusive evidence of the fact that each subscriber wrote opposite his name the number of shares he took. The subscriber cannot, therefore, be permitted to prove the contrary.[1]

7. Company limited by guarantee. A Company limited by guarantee is generally a non-profit-making association and such a Company is an alternative to a Company limited by shares. The Companies Ordinance permits the incorporation of a Company limited by guarantee, that is, a Company in which the members agree that, in the event of liquidation of the Company, they will subscribe an agreed amount. In effect, such members are guarantors of the Company's debts up to the agreed amount. As regards the working capital of such a Company, it generally comes from other sources, that is, endowments, grants, fees, subscriptions, etc.[2]

18. *Memorandum of unlimited Company.* In the case of an unlimited company,--

(*a*) whether or not the Company has a share capital, the memorandum shall state--

(*i*) the name of the Company;

(*ii*) the Province or the part of Pakistan not forming part of a Province, as the case may be, in which the registered office of the Company is to be situate; and

(*iii*) the objects of the Company, and, except in the case of a trading corporation, the territories to which they extend; and

(*b*) if the Company has a share capital,--

18. AIR 1933 PC 39.
19. AIR 1959 Cal. 253 (Hence such clause can be altered by a special resolution).
20. AIR 1937 Cal 81 = 63 Cal. 773.
1. AIR 1948 Oudh 197 = 23 Luck 210 = 1948 OWN 172.
2. PLD 1975 Kar 128 (DB).

(*i*) no subscriber of the memorandum shall take less than one share; and

(*ii*) each subscriber shall write opposite to his name the number of shares he takes.

19. *Printing, signature, etc. of memorandum.* [3][(1)] The memorandum shall be--

(*a*) printed;

(*b*) divided into paragraphs numbered consecutively;

(*c*) signed by each subscriber who shall add his present name and surname in full, any former name or surname in full, his occupation and father's name or, in the case of a married woman or widow, her husband's or deceased husband's name, in full, his nationality and, if that nationality is not the nationality of origin, also the nationality of origin, and his usual residential address in full, in the presence of at least one witness who shall attest the signature and shall likewise add his father's name or, in the case of a married woman or widow her husband's or deceased husband's name, in full, as the case may be, address and occupation; and

(*d*) dated.

[4][(2) Notwithstanding anything contained in this Ordinance or in any other law for the time being in force or the memorandum and articles, the memorandum and articles of a company shall be deemed to include, and always to have included, the power to enter into any arrangement for obtaining loans, advances or credit, as defined in the Banking Companies Ordinance, 1962 (LVII of 1962), and to issue other securities not based on interest for raising resources from a scheduled bank or a financial institution.]

20. *Restriction on alteration of memorandum.* A company shall not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent specified in this Ordinance.

Synopsis of sections 18-20

1. Scope.
2. Objects of Company.
3. Classes of shares.
4. Rights of share-holders.

3. Section 19 renumbered as sub-section (1) by Ord. 57 of 1984, S. 7.
4. Add. by Ord. 57 of 1984, S. 7.

5. Details of management. 6. Registered office, place of.

1. Scope. Anything laid down as a rule in the Memorandum of Association though it is not something which is required by the law to be mentioned therein or which is essential to the constitution of the Company is one of the conditions on which the Company is established and hence cannot be altered unless it relates to a matter in respect of which alteration is expressly authorised by the law itself.[5]

2. Objects of Company. On reading this section it emanates that by signing the memorandum not only a covenant to observe the conditions upon which the Company is established is entered into but also that no change shall be made in those conditions. Such a covenant against the change must be held to include within its engagement that no object shall be pursued by the Company or attempted to be attained by the Company in practice except an object which is mentioned in the memorandum.[6] In this context the object clauses of the Memorandum of Association would constitute the conditions of the memorandum.[7]

3. Classes of shares. Where the memorandum prescribes the classes of shares into which the capital is to be divided and the rights to be attached to such shares respectively, the Company has no power to alter that position by special resolution.[8] But a clause in the Memorandum of Association fixing limit of dividends to be declared on a particular class of shares cannot be regarded as a condition within the meaning of sections 16 and 17. Hence that clause can be altered by special resolution.[9]

4. Rights of share-holders. Rights and privileges of share-holders when mentioned in the memorandum without any reservation of power to modify or alter them become conditions which cannot be altered.[10] But when the rights and privileges of the share-holders stated in the memorandum are shown as being subject to the condition that they can be varied an alteration of those rights does not amount to an alteration of the conditions of the memorandum.[11]

5. Details of management. A condition in a memorandum of association which is merely a detail of management for the purpose of carrying on the business is not a vital condition, and it can be altered.[12]

6. Registered office, place of. The place name of the registered office of a company by its mention in the memorandum of association does not make it an unalterable condition of the Company's constitution.[13]

21. *Alteration of memorandum.* (1) Subject to the provisions of this Ordinance, a Company may, by special resolution, alter the

5. (1885) 30 Ch D. 376.
6. (1875) 7 HL 635.
7. AIR 1957 Cal. 593 = ILR (1958) 2 Cal 362.
8. AIR 1933 PC 39.
9. AIR 1959 Cal. 258.
10. AIR 1935 All. 310 = 57 All 810.
11. AIR 1935 All. 310 = 57 All 810.
12. AIR 1934 Bom. 427 = 59 Bom. 218.
13. AIR 1937 Cal. 81 = 63 Cal. 773.

provisions of its memorandum so as to change the place of its registered office from one Province to another, or from one city or town in a Province to another, or from a part of Pakistan not forming part of a Province to a Province or from a Province to a part of Pakistan not forming part of a Province, or with respect to the objects of the Company, so far as may be required to enable it--

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

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

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

(*d*) to carry on some business, not being a business specified in its memorandum, which may conveniently or advantageously be combined with the business of the Company; or

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

(*f*) to sell or dispose of the whole or any part of the undertaking of the Company; or

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

(2) The alteration shall not take effect until and except in so far as it is confirmed by the Authority on petition:

Provided that an alteration so as to change the place of registered office of a Company from a place in the Province of the Punjab to the Islamabad Capital Territory or from the latter to a place in the Province of the Punjab, or from one city in a Province to another, shall not require confirmation by the Authority.

(3) Before confirming the alteration, the Authority must be satisfied--

(*a*) that sufficient notice has been given to every holder of debentures of the Company, and to any person or class of persons whose interest will, in the opinion of the Authority, be affected by the alteration; and

(*b*) that, with respect to every creditor who in the opinion of the Authority is entitled to object, and who signifies his objection in manner directed by the Authority, either his consent to the alteration has been obtained or his debt or

claim has been discharged or determined, or has been secured to the satisfaction of the Authority:

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

22. *Power of Authority when confirming alteration.* The Authority may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper.

23. *Exercise of discretion by Authority.* The Authority shall in exercising its discretion under sections 21 and 22 have regard to the rights and interests of the members of the Company or of any class of them, as well as to the right and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Authority for the purchase of the interests of dissident members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement:

Provided that no part of the capital of the Company may be expended in any such purchase.

Synopsis of sections 21, 22, 23

1. Scope.
2. Registered office, alteration of place of.
3. Objection to change.
4. Alteration in memorandum--extent of.
5. Details of management.
6. Confirmation by Authority.
7. Matters to be considered by Authority.
8. Terms and conditions may be imposed by Authority.
9. Effect of alteration.

1. Scope. The proper course for a company desirous of introducing a system of share capital as required by the Company Law in the place of the existing structure of share capital under which its capital is likely to disappear and automatically reduce itself without the company being able to do anything about it is to alter the Memorandum of Association in the manner prescribed by law.[14] As the law does not require the company itself at its general meeting to make even a bare proposal to alter memorandum or articles, the directors are not barred from initiating a proposal for compromise with members merely because, ultimately, when it is accepted by the majority and approved by the Court, it may involve such alteration.[15]

14. 22 Com Cas 299 (Mad).
15. AIR 1928 Bom. 80.

2. Registration office, alteration of place of. Name and place of the registered office in the Province mentioned in the memorandum does not bar the company from changing the registered office to another place in the same province and make suitable alteration in the memorandum in the manner provided by the Ord.[16] The provisions of section 21 read with section 142 will show that the change of registered office, if it is made within a particular Province, does not require the sanction of the Authority and it will suffice if the Registrar is notified duly in accordance with the provision of the said section as to the change of the registered office.[17]

Shifting to different Province. Where the share-holders having decided that a change of the registered office from one province to a different province would be conducive to the more economical running of the business and better efficiency, pass unanimously a special resolution for the change and for suitably altering the memorandum. It is not for the Authority to go into the question whether the share-holders were right or wrong in reaching that conclusion.[18] But it should not confirm the alteration as often as the company passes special resolutions to that effect. A special resolution altering the registered office can be confirmed only if the resolution is bona fide.[19] In such cases the Authority may also consider the fact that the Province from which the registered office is sought to be shifted would be adversely affected by reduction of income from income-tax and sales-tax by the change. It is a consideration which the Authority is entitled to take into account and refuse to confirm the resolution passed for the purpose.[20]

Registered office cannot be shifted out of Pakistan. The section does not give power to a company to alter the registered office from a place in Pakistan to a place outside Pakistan.[1]

Meeting cannot be held at place other than registered office. Where a company had a registered office but a meeting of the company was held at a place other than that office. It was held that such a meeting could not take place legally without having first secured the amendments of the relevant articles of the Memorandum and Articles of Association of the Company.[2]

3. Objection to change. The Authority would not consider an application against the confirmation of the resolution by a person who is neither a member of the petitioner-company nor has any right or interest therein as a creditor. The Court is not concerned with the remote expectation of a person or a company which may get some profits on the happening of an uncertain event.[3] The Memorandum of Association of a company is no doubt a notice to the public at

16. AIR 1937 Cal 81 = 63 Cal. 773.
17. 1971 DLC 711.
18. 40 Pun L R 327.
19. AIR 1957 Orissa 232 (Company changing registered office on the ground of convenience and obtaining confirmation of the resolution—Subsequent resolution retransferring the office to the original Province—Authority will not confirm that resolution on a bare statement that it has been made on the ground of convenience).
20. AIR 1957 Orissa 232 = ILR 1956 Cut 697.
1. AIR 1958 Mad 450 + AIR 1949 Nag 290.
2. PLD 1968 Dacca 211 (DB).
3. PLD 1964 Dacca 666.

large, of the objects of the company. But such notice does not vest in the members of the public, a right to come and raise objections when the company proposes to alter its object clauses. To hold that the landlord or any other member of the public who claims that there is a chance of his becoming creditor of the company in future, has the right to oppose the alterations, could open the door to serious mischief. The publication of an advertisement in the newspapers is not an invitation to the public at large to appear and oppose the application for alteration of the objects of the company. An incorporated company is a creature of statute. Its rights, privileges, obligations and liabilities have been defined and are controlled by the statute. The statute has prescribed the persons or classes of persons whose interest requires the Authority protection, when an order confirming the alterations of the objects of the company is going to be made. To say that the members of the public have the right to come and oppose the proposed alterations, would be to introduce an additional restriction on the company's right to have its object clauses altered, which is not warranted by law.[4]

The Authority is concerned with the interest of the holders of debentures of a Company or creditors or persons or class of persons having interests in the Company.[5] Therefore the State can also object to the change of the registered office of the company and the resolution passed to secure that end when its interests are adversely affected.[6] Thus if the company has existing liability to the State in respect of sales tax or excise duty, no doubt the State becomes a creditor of the company and would therefore be entitled to oppose the alterations, if its interest as a creditor is likely to be affected by the proposed alterations. But the statute does not confer upon the State, as a prospective creditor in respect of future liabilities of the company, the right to oppose the proposed alterations of the objects of the Company.[7]

Landlord of company, objection by. On any other grounds except those which are recognised by the law relating to landlord and tenant, the law does not recognise or confer on the landlord a right to dictate the business the tenant should carry on, or a right to object to a change of business of the tenant. Unless there is a statutory prohibition or unless there are restrictive covenants, a tenant has the right to use the demised premises for whatever purposes he likes, provided they are not illegal, immoral; and do not create a nuisance. Further in a contract for lease of property to be used for business purposes, the tenant is entitled to a lease under which he could carry on any business, subject only to the restrictions imposed by the general law of the land. If the rent is in arrears and the landlord is a creditor for such arrears of rent, different considerations would apply.[8]

4. Alteration in memorandum--extent of. A company has no power to alter its memorandum by special resolution in respect of its object beyond the extent required to enable it to do any of the things specified in clauses (*a*) to (*g*),[9] except where the change is necessitated by a change in law. Thus where the respondent-

4. AIR 1965 Cal 16.
5. PLD 1964 Dacca 666.
6. AIR 1957 Orissa 232 = ILR 1956 Cut 697.
7. AIR 1965 Cal 16 + (1920) 11 Ch 544.
8. AIR 1965 Cal 16.
9. AIR 1957 Cal 234 + AIR 1958 Bom 155 (DB).

company had by the 8th clause of the Memorandum reserved powers to itself to make such changes in the memorandum as were necessary. Subsequently due to the promulgation of Ordinance XLV of 1961, the respondent company was forced to choose either to dissolve itself or to change its objects in the Memorandum of Association. The members of the company were at liberty to choose either of the two ways. If they have chosen the way of continuing with their existence in a different category for different purposes and objects, and for that they have obtained the necessary legal sanction both of the Government and of the Authority. No fault could be found with the amendment so made.[10]

To carry on business more economically and efficiently. It is with reference to the object which the company is then actively prosecuting or which it is seeking to prosecute, out of the several objects mentioned in the memorandum, that the Authority has to see whether the suggested amendment will enable the company to carry out that object more economically or efficiently than before.[11] In the case of a company which actively prosecutes the object of production, an amendment of the memorandum for the purpose of carrying on business more efficiently" need not be confined to the purpose of increasing the efficiency with regard to production. The word "efficiency" being of very wide import would include every mode, means or method which is more efficient and beneficial to the business of the company in general.[12] There is nothing unlawful in an alteration which makes an addition to the memorandum to enable the company to make contribution to national, political and such other funds. The alteration on the other hand is one which would be conducive to the business of the company being carried on more efficiently within the meaning of clause (*a*) of sub-section (1) of section 21.[13]

Addition to objects of company by combining other business. The Memorandum of Association can be altered so as to add an entirely new business subject to the conditions that the business must be capable of being advantageously combined with the existing business under the existing circumstances.[14] Whether a company can carry on its business more economically or more efficiently is a matter for the judgment of the directors. They alone are best fitted by reason of their experience in the particular business to decide whether the business can be carried on more economically or more efficiently by adding fresh objects. The Authority, of course, on given facts may apply its mind and see whether the directors may reasonably and fairly form that opinion. If the directors consider that under the existing circumstances, it will be convenient and advantageous to combine the new objects with the existing objects, and if it appears that conclusion may be fairly arrived at, the Authority will not go behind it and hold an enquiry as to whether the opinion of the directors is well-founded and justified. In the very nature of things, such an enquiry will not be possible for the Authority to undertake.[15] The Authority allowed alteration in the memorandum of the company to include the production of vegetable ghee where

10. PLD 1966 Dacca 204 = 18 DLR 636 (DB).
11. AIR 1958 Bom. 155 = ILR 1958 Bom. 149 (DB).
12. AIR 1958 Bom. 155 = ILR 1958 Bom. 149 (DB).
13. AIR 1959 Pat 514 (The alteration was confirmed subject to terms and conditions designed to prevent abuse of the power) + AIR 1957 Cal 234.
14. PLD 1967 Kar 695 + AIR 1957 Cal 593.
15. AIR 1965 Mad 76.

the existing business of the company was *kapas*, cotton-ginning, cotton-seeds, oil expelling, oilcakes and maintenance and controlling oil mill.[16] Where Memorandum of Association permitted the company *inter alia* to enter into partnership or arrangement in nature of partnership or union of interest with any person or persons, firm or Company, to become engaged or interested in carrying on conduct of any business or enterprise from which Company would or might derive benefit directly or indirectly. The company had been already allowed to change its name and sanction to establish a jute mill. Alteration in Memorandum sought to be confirmed reading: "to set up a jute Mill and to carry on business of jute milling and other business connected or affiliated therewith" was covered by section 21 and was confirmed.[17]

No alteration can be allowed where the applicant was not carrying on any business on the date of application,[18] or the company has no existing business with which the new business proposed by the altered objects can be combined,[19] or where the new business sought to be combined with the existing business is inconsistent with it, or granting such permission would amount to circumventing the law. Thus where the applicant was carrying on the business of re-insurance, it could not have simultaneously carried on the business of mercantile insurance, which it sought to do; because the proposed business of mercantile insurance would have been inconsistent with the business of re-insurance. There can be no doubt that if the applicant had applied for sanction of the proposed alteration in its memorandum whilst it was carrying on the business of re-insurance, sanction would have been refused. Can the applicant then be allowed to commence the business of mercantile insurance by first winding up the business or re-insurance, which was the main purpose for which it was incorporated? If the application were allowed it would enable the applicant to do indirectly what it could not do directly, and thus defeat the provisions of section 21.[20] For the same reason the Memorandum of Association cannot be altered so as to include within its object the conduct of prize chits where the prize chits amount to a lottery.[1]

Restriction or abandonment of an object. Where the company's objects are the promotion, development, working and carrying on of industries and undertakings and colonization schemes in (*a*) a prescribed region and (*b*) in any part of the world, the proposal to eliminate the latter part is clearly one for the abandonment of an object and therefore the Court has jurisdiction to confirm a special resolution which gives effect to the proposal.[2]

5. Details of management. The appointment of a managing agent, the terms and conditions of the appointment and his remuneration are all details concerning the management of the company and even if they are inserted in the

16. PLD 1967 Kar. 695.
17. PLD 1982 Lah. 301 = PLJ 1982 Lah. 208 (DB).
18. 60 Bom. L R 1121.
19. AIR 1965 Cal 16.
20. PLD 1969 Kar. 71.
1. AIR 1934 Mad 482 = 57 Mad 844.
2. (1908) 1908-2 Ch 287.

memorandum among the object clauses, they can be altered without a special resolution and sanction of the Authority.[3]

6. Confirmation by Authority. The Authority has jurisdiction to confirm the alteration either wholly or in part. But this exercise of the power as conferred by these sections is fenced round by safeguards which are calculated to protect the interest of creditors, the interest of share-holders and the interest of the public. The creditors are protected by express provision in the sections. Their consent has to be procured and their claims have to be satisfied in certain events, which matter is entrusted to the Authority. So, in determining whether the discretionary power of the Authority ought to be exercised in favour of the confirmation of the alteration and if so, in what manner, it is necessary for the Authority to consider the facts of the case and the background on which the alteration is asked for.[4] But this does not give arbitrary powers to the Authority to refuse to allow an alteration. The authority cannot refuse under sub-section (2) to confirm an alteration which is within the ambit of sub-section (1) and which does not entrench upon the interests which it is required to safeguard under sub-section (3).[5] General insurance business is carried on the basis of actuarial calculations. When an insurer enters into a general insurance contract, he proceeds on the basis of being called upon to meet a certain percentage of risks which would mature into a claim. No general insurer is required to keep sufficient funds in its hands to meet every claim in respect of which a contract of insurance has been entered into. Where the claim arising out of subsisting policies should be much less than the sum of Rs. 1,27,293.29, but cannot in any event exceed that amount, it cannot be said that the company having surplus assets to the extent of Rs. 23,71,013.66 would be unable to meet its future liabilities or that the company's financial position is not sound enough to justify the confirmation of the alterations in the Memorandum of Association by stopping of insurance business and taking up other business.[6]

Special resolution necessary. The foundation of the jurisdiction to confirm the alteration of the memorandum is the passing of special resolution and hence must be strict evidence of a duly convened meeting and of the resolution having been duly passed at the meeting.[7] Even where a special resolution has been passed the Authority may refuse to allow the amendment if the resolution does not express the views of the majority of share-holders. Thus where the number of share-holders, who voted upon a special resolution to alter the memorandum curtailing the objects of a company, constituted only a very small part of the total number of its share-holders, and it was found that the wishes of those who had not voted could not be effectively ascertained and further while the alteration can do only very little good to those who advocated it by inflicting an unfair restraint upon those who opposed: it was held that the Court would not confirm the alteration.[8]

3. AIR 1956 Bom 257 (DB) + AIR 1944 Bom. 76.
4. AIR 1961 Cal 666 (DB).
5. AIR 1960 Mad 257.
6. AIR 1965 Cal 16.
7. KLR 1982 CC 384 = 1982 Law Notes 257 = PLD 1982 Lah. 664 = PLJ 1982 Lah 263 = NLR 1982 Civ 384 + ILR (1953) 1 Cal 183.
8. 1908-2 Ch 287.

Minutes of meeting of company making absolutely clear as to resolution in question having at most been a preliminary proposal due to no notice for moving special resolution having been given to members. The minutes even otherwise not speaking of any special resolution having been circulated, moved, and passed as to proposed amendment. The alteration was held to be not lawful and was not confirmed.[9] Where notice was properly served on only two out of three share-holders and the resolution was also passed by only two share-holders. The resolution was held to be not valid.[10] But where the resolution for alteration was passed unanimously by the five share-holders present at the meeting. Notices were sent to all the share-holders of the company. In spite of such notices no other share-holder came forward to oppose the Special Resolution. Then again advertisements were issued in the two newspapers setting out the date and time of the meeting and also the proposed alterations. No creditors or share-holders came forward to oppose the proposed alterations. The Special Resolution had been passed according to the requirement of the Companies Ordinance. The non-attendance of a large number of share-holders of the extraordinary general meeting was no ground for contending that the resolution had not been passed as required by law.[11]

Alteration of contracts by Company. As the Authority has a discretion in the matter of confirming or not confirming a resolution altering the Memorandum of Association; it will refuse to confirm a resolution deleting a clause in the memorandum appointing a certain person as agent, secretary and director inasmuch as there can be no justification for the company to unmake the contract which it had made with the appointee by means of an alteration of the memorandum.[12]

Company for charitable purpose--duty of Authority. In the case of a company registered as a charitable or other company under section 42, the Authority will not entertain an application to confirm the alteration of the memorandum unless the company had before passing the resolution for the alteration obtained the approval of the Government to the effect that the proposed alteration is consistent with the continuation of the licence granted to it.[13]

7. Matters to be considered by Authority. When a company seeks to alter its objects with a view to carry on some new business, if the company's position is financially sound, if the alterations are fair to all classes of members of the company and if the rights of creditors are in no way prejudiced, such alterations should be confirmed provided the requirement of the statute is complied with. It is not a matter for the Authority to determine as to what business the company should carry on. If the directors and members of a company propose to alter its objects, and if there is no objection from the creditors or if their position is not prejudiced by the proposed alterations, the Authority should not stand in the way of the company's seeking new objects to enable it to embark on a new venture.

9. PLD 1982 Lah. 664 = PLJ 1982 Lah 263 = NLR 1982 Civ 384 = KLR 1982 CC 384 = 1982 Law Notes 257.
10. AIR 1961 Orissa 62.
11. AIR 1965 Cal 16.
12. AIR 1924 Mad 126 (DB).
13. AIR 1937 All 432 = ILR 1937 All. 202.

But there are certain obvious limitations. The business must not be destructive of or inconsistent with the existing business. There must be some existing business which the company should be carrying on at the time when it passes the resolution for altering its objects and such business must be carried on under its existing object clauses. The company's financial position must be sound to enable it to carry on the new business. Subject to limitations mentioned, the wisdom of the directors and members of the company in regard to the decision to carry on the new business proposed under the altered object must prevail. In a trading company, where aim is to earn profits for the benefit of share-holders, the directors and share-holders of the company are the best judges of the trading policy of the company and so long as the requirements of the statute are complied with and the policy pursued by the company through the object clauses in its memorandum is not fraudulent or unfair to any class of its members and does not violate the statutory provisions, the Authority should not easily or lightly interfere with the decision of the share-holders and directors of the company and also of the creditors, if any. But the decision of the share-holders, creditors and directors, is not final and it is for the court to see if the statutory requirement has been complied with and the alterations sought for are not contrary to or inconsistent with the object clauses in the memorandum as they stand. The loss of substratum of the company is not by itself a ground on which the Authority should decline to confirm alterations in the Memorandum of Association of a company, if the conditions mentioned above are fulfilled.[14] The question of general welfare or public interest is not a consideration which is relevant under sub-section (3) to the disposal of an application for alteration of a memorandum.[15]

Notice to persons to be affected necessary. Special resolutions in order to be passed must be notified to members verbatim giving 21 days clear notice.[16] An application for confirmation of a special resolution passed under section 21 altering some provisions of the Memorandum of Association of a company does not take effect until and except in so far as it is confirmed by the Authority. Before confirming the alteration the Authority must be satisfied that sufficient notice has been given amongst others to any persons or class of persons whose interests will, in the opinion of the Authority be affected by the alteration. The interests contemplated by section 21 (3)(*a*) are, however, present interests and do not include a remote chance of being benefited in future.[17]

8. Terms and conditions may be imposed by Authority. The Authority has wide power under the section to confirm the alteration wholly or in part or on such terms and conditions as it thinks fit.[18] But this can be done only where the alteration prejudices the interests of share-holders or creditors or other persons. The terms and conditions which can be imposed can also be only those which may be called for protecting those interests.[19]

14. AIR 1965 Cal. 16.
15. AIR 1960 Mad 257.
16. PLD 1982 Lah. 664 = PLJ 1982 Lah. 263 = NLR 1982 Civ 384 = KLR 1982 CC 384 = 1982 Law Notes 257.
17. PLD 1970 SC 132 = 22 DLR (SC) 231.
18. AIR 1958 Bom. 155 = ILR 1958 Bom. 140 (DB).
19. AIR 1960 Mad. 257.

Where the company has by the alteration added a new business to its field of operations. If the Authority is inclined to make an order for confirmation of the alterations, the company should be directed to change its name in order to indicate the new business which it proposes to carry on.[20]

9. Effect of alteration. Once an alteration in a memorandum has been confirmed by the Authority the company is bound by it and any business carried on by the company which is not within its sphere of operations in view of the alteration effected would be *ultra vires* the company and illegal.[1]

24. *Procedure on confirmation of the alteration.* (1) A certified copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall, within ninety days from the date of the order, be filed by the company with the registrar, and he shall register the same, and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of this Ordinance with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum so altered shall be the memorandum of the company.

(2) Where the alteration involves a transfer of the registered office from one Province to another, or from the Islamabad Capital Territory to a Province or from a Province to Islamabad Capital Territory, a certified copy of the order confirming such alteration shall be filed by the company with the registrar in each of such provinces or the Islamabad Capital Territory, as the case may be, and each such registrar shall register the same, and shall certify under his hand the registration thereof, and the registrar for the Province or the Territory from which such office is transferred shall send to the registrar for the other Province or Territory all documents relating to the company registered or filed in his office.

(3) The Authority may by order at any time extend the time for the filing of documents with registrar under this section for such period as it thinks proper.

1. Extension of period of limitation. So long as the period of ninety days as mentioned in sub-section (1) of section 24 has not expired or as long as the order of the Authority has remained in force through some extension of time obtained from the Authority, sub-section (3) of section 24 will be applicable and the Authority will be entitled to extend the time at any time so long as the order is alive. But once section 25 comes into operation and the order loses its life by the expiry of the period and the same becomes absolutely null and void, then the only procedure to obtain revival is as provided in the proviso to section 25. Extension

20. AIR 1965 Cal 16.
1. AIR 1961 Cal 666 (DB).

in this regard in view of the terms of sections 24 and 25 has to be read separately from revival. The extension is dealt with in sub-section (3) of section 24 which is permissible so long as the order does not become null and void and is kept alive. As soon as the order loses its life and becomes "absolutely null and void", the provision relating to revival has to be adopted.[2]

25. *Effect of failure to register within ninety days.* No such alteration shall have any operation until registration thereof has been duly effected in accordance with the provisions of section 24, and if such registration is not effected within ninety days next after the date of the order of the Authority confirming the alteration, or within such further time, as may be allowed by the Authority, in accordance with the provisions of section 24, such alteration and order, if any, and all proceedings connected therewith shall, at the expiration of such period of ninety days or such further time, as the case may be, become null and void:

Provided that the Authority may, on sufficient cause shown, revive the order or alteration, as the case may be, on application made within a further period of ninety days.

ARTICLES OF ASSOCIATION

26. *Registration of articles.* (1) There may, in the case of a company limited by shares, and there shall, in the case of a company limited by guarantee or an unlimited company, be registered with the memorandum, articles of association signed by the subscribers to the memorandum and setting out regulations for the company.

(2) Articles of association may adopt all or any of the regulations contained in Table A in the First Schedule.

(3) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital, shall state the amount of share capital with which the company proposes to be registered.

(4) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles shall state the number of members with which the company proposes to be registered.

(5) In the case of a company limited by shares and registered after the commencement of this Ordinance, if articles are not registered, or, if articles are registered, in so far as the articles do

2. PLD 1968 Dacca 810 = 21 DLR 135 + AIR 1963 Mad. 383 + AIR 1963 Pb. 239.

not exclude or modify the regulations in Table A in the First Schedule, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered article.

(6) The articles of every company shall be explicit and without ambiguity and, without prejudice to the generality of the foregoing, shall list and enumerate the voting and other rights attached to the different classes of shares and other securities, if any, issued or to be issued by it.

Synopsis

1. Articles of Association.
2. Statutory rights not affected by Articles.
3. Regulations.
4. Conflict between Memorandum and Articles of Association.
5. Application of Table 'A'.

1. Articles of Association. Articles of Association, bind Company and its members as they are deemed to have covenanted to carry out rights and obligations in specified manner.[3]

Articles of Association provide for varying sets of circumstances.[4] The general presumption with respect to the Articles of Association of a Company is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing, and these terms are binding on the parties.[5] Thus where the Articles of Association of a bank provided that it was not bound to recognise an executor or administrator unless he obtained probate or letters of administration or other legal representation from a Court; it was held that the executor or administrator would have complied with the requirements of the articles by obtaining a succession certificate.[6]

Presumption as to terms. Some term which is not expressed in the Articles of Association but which is necessary to give efficacy to the transaction and to save the intention of the parties from being defeated, can be implied.[7]

Conflict between Articles, resolution of. Where two articles of the Articles of Association were inconsistent with each other, Article 109 providing that the number of the directors shall not be less than three nor more than four, and Article 126 laying down, that the company in General Meeting may from time to time increase or reduce the number of Directors, subject to the provisions of the Ordinance, and may alter their qualification and may also determine in what rotation such increased or reduced number is to go out of office. It was held that the omission to make such cross-reference as may be required to reconcile two textually inconsistent provisions is a common defect of draftsmanship. There is

3. NLR 1987 UC 352 = 1987 CLC 726.
4. AIR 1950 Sind 87.
5. AIR 1956 Bom. 190 (DB).
6. AIR 1943 Mad. 743.
7. AIR 1956 Bom. 190 (DB).

thus no insuperable difficulty in reconciling Article 109 with Article 126 either by implying in the former some such opening words as "subject to Article 106" or implying in the later some such opening words as "notwithstanding anything contained in Article 109."[8]

2. Statutory rights not affected by Articles. The statutory rights of companies whether public or private cannot be taken away or modified by the Memorandum or Articles of Association.[9] Thus where it was provided in the Articles of Association of a Company that a notice of a meeting would only be valid when sent by registered post. As Regulation 79 provides that notice may be given personally or by post, therefore if the Article in question invalidates all notices sent otherwise than by registered post card, the article is in conflict with Regulation 79 and to that extent invalid. Similarly where according to the Articles of Association a notice was to be deemed to have been served on the fourth day after which it was issued. It was held: This article of the Company is in conflict with Regulation 79 (2) in the Table. Regulation 79 (2) provides that a notice should be deemed to have been served on the day on which it would reach the person concerned in the ordinary course of post. Therefore the article was invalid.[10]

3. Regulations. The clauses in the Table A are only model Regulations which a trading Company may insert in its Articles of Association if it so chose. But the companies are left free to provide their own rules having regard to the scope and nature of their business except those clauses of Table A which they must compulsorily adopt.[11]

4. Conflict between Memorandum and Articles of Association. The Memorandum sets out the objects for which the particular Company is established, and the Articles of Association regulate the internal management of the Company and defines the powers of directors. It is firmly established that the Articles cannot enlarge the scope of the objects specified in the Memorandum. If the Articles go beyond the Memorandum they are to that extent *ultra vires* the Company. It is therefore, clear that primarily the Memorandum alone must be looked for the purpose of ascertaining the objects of the Company. It is only in case of ambiguity that the Articles may be referred to for the very limited purpose of explaining the ambiguity.[12]

5. Application of Table 'A'. In the absence of proof to the contrary, it must be taken that Table A of the Companies Ord. has been incorporated in the Articles of Association of a Company limited by shares.[13]

27. *Printing, signature, etc. of articles.* The articles shall be--

(*a*) printed;

(*b*) divided into paragraphs numbered consecutively;

8. PLD 1949 PC 339.
9. AIR 1958 Punj 190 (DB) (Nor could such privileges extend beyond the statutory limits).
10. PLD 1956 Lah. 731 = PLR 1956 Lah. 140.
11. ILR (1950) 1 Cal 235 (DB) + AIR 1949 Cal. 360 = ILR (1945) 2 Cal. 105.
12. AIR 1949 Cal. 337 = ILR (1945) 2 Cal. 313.
13. AIR 1931 Pat. 44 = 10 Pat. 249 (DB).

(*c*) signed by each subscriber who shall add his present name and surname in full, any former name or surname in full, his occupation and father's name or, in the case of a married woman or widow, her husband's or deceased husband's name, in full, his nationality and, if that nationality is not the nationality of origin, also the nationality of origin, and his usual residential address in full, in the presence of at least one witness who shall attest the signature and shall likewise add his father's name or, in the case of a married woman or widow, her husband's or deceased husband's name, in full, as the case may be, address and occupation;

(*d*) dated.

28. *Alteration of articles.* Subject to the provisions of this Ordinance and to the condition contained in its memorandum, a Company may by special resolution alter or add to its articles, and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution:

Provided that, where such alteration affects the substantive rights or liabilities of members or of a class of members, it shall be carried out only if a majority of at least three-fourths of the members or of the class of members affected by such alteration, as the case may be, personally or through proxy vote for such alteration.

Synopsis

1. Alteration of Articles of Association.
2. Special resolution necessary for alteration.
3. Conversion of private into public company--effect.
4. Power must be exercised bona fide.
5. Notice.
6. Registration of alteration.

1. Alteration of Articles of Association. The section empowers a Company to alter or add to its articles and when altered the new articles are as valid as if they had found place in the original articles.[14] The right of a Company to alter the Articles of Association is statutory and cannot be limited or removed either by a contract or provision in the articles themselves.[15] It would follow that whereas the Company can make provision for any majority for ordinary resolutions it cannot change the provision made in section 28 for special resolutions. Therefore a

14 KLR 1983 CC 288 = PLD 1983 Kar. 589 (DB) + 1946 Nag. L. Jour 128.
15. AIR 1945 Nag. 599 + AIR 1945 Nag. 187.

provision in the constitution of a Company requiring that a resolution under this section should be passed unanimously is illegal, being in conflict with the statutory provision regarding the passing of special resolution.[16]

Where a contract between an association and its member was entered into, not for payment of a definite sum but for a sum which had to be ascertained on the basis of the number of claims arising when the member's claim matured. Before the member's claim matured, the contract became unenforceable except as provided by Proviso 2 to section 52 (1), Insurance Act. The association by convening meetings of its members unanimously passed resolutions making the necessary amendments in the Articles of Association. The member, on the maturity of his claim, contended that he was governed by the Articles of Association as they existed on the date of his enrolment and that the association had no power to alter the articles so as to affect his interest. It was held, that as the association had power to alter their articles in good faith for the benefit of the association as a whole the alteration was binding on the member particularly when he had notice of the meeting and had said nothing against the irregularity of the resolutions passed.[17]

Additional capital, raising of. The rights of the share-holders in respect of their shares and the terms on which additional capital may be raised are matters to be regulated by the Articles of Association rather than the memorandum and are therefore matters which unless provided for by the memorandum may be determined by the company from time to time by special resolution. Hence alteration of the articles by a special resolution to authorise the issue of fully paid preference shares and the shares issued in accordance with it are perfectly valid.[18]

Alteration must be for the benefit of majority. It was held under Companies Act, 1913 that an alteration in the Memorandum of Articles can only be made if it is for the benefit of the majority of share-holders. To give a power to modify the terms on which debentures in a company are secured is not an uncommon practice. The business interest of the company may render such a power expedient even in the interest of the class of debenture-holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by section 13 of the English Companies Act of 1908, which enables a majority of the share-holders by special resolution to alter the Articles of Association. There is however, this restriction on such powers when conferred on a majority of a special class in order to enable that majority to bind a minority they must be exercised subject to a general principle that the power given must be exercised for the purpose of benefiting the class as a whole and not merely individual members only. Subject to this, the power may be unrestricted.[19] Proviso to this section has however specifically provided that where an alteration sought to be made affects substantive rights and liabilities of a class of members, it can be carried through

16. PLD 1956 Lah. 731 = PLR 1956 Lah. 1407.
17. AIR 1945 Nag. 187 = 1945 NLJ 249 = ILR 1945 Nag. 599.
18. 1897-1 Ch 361.
19. AIR 1927 PC 62 = 101 Ind Cas. 897.

only if more than three-fourths of the members or the class of members affected by such alterations vote for it.

2. Special resolution necessary for alteration. The ordinary rule is that everything in the Articles of Association not provided for by the memorandum may be altered by a special resolution.[20] Therefore where notice of a resolution did not as specify the intention to pass the resolution as a special resolution, any alteration made in Articles of Association by a meeting held to consider the resolution would be invalid.[1] Effect cannot be given to an article reserving power to the company to alter its articles by an ordinary resolution in general meeting as it would amount to getting round the provisions of the section in an indirect manner.[2]

Qualifications of Directors, alteration in. A special resolution under the section is necessary to alter the provisions in the article which provide the qualifications of directors.[3]

Number of Directors, alteration in. Where the articles prescribe the normal strength of directors and at the same time confer power on the company to revise the number if necessary at its general body meeting, a variation of the number does not amount to a variation of the articles.[4] Therefore where the articles although they have prescribed the maximum and minimum number of directors also allowed the company to vary the number at a general meeting, an ordinary resolution passed at a general meeting is sufficient to validly increase the strength of the directors.[5]

Rectification of clerical error. Clerical errors in the Articles of Association of a company should be set right by a special resolution and not by an action for rectification. A Court of law has no jurisdiction to rectify the articles on the ground of mistake for they have a statutory operation.[6]

3. Conversion of private into public company--effect. When a private company is converted into a public company there is only an alteration in the Articles of Association of the company; the company does not cease to exist nor does a new company spring into existence. In other words, the alteration in the articles of a company does not affect the legal personality of that company.[7]

4. Power must be exercised bona fide. The power to alter the articles should be exercised fairly and according to law,[8] for the benefit of the company as a whole.[9] It is for the share-holders themselves to decide what is for the benefit of the Company and the Court will not interfere with their decision provided it had

20. 33 Mad. 36.
1. PLD 1983 Kar 589 = KLR 1983 CC 288 (DB).
2. AIR 1928 Bom. 609.
3. AIR 1927 Bom. 609.
4. AIR 1933 All. 344 = 55 All. 399 (DB).
5. AIR 1953 PC 81 (50 Cal W N 310 *Reversed*) + AIR 1940 Sind 87.
6. (1902) 1902 W N 78 = 18 TLR 506.
7. AIR 1964 Mys 173 (DB).
8. AIR 1945 Nag 187 = ILR 1945 Nag. 599.
9. 6 Sau L R 387 (DB).

been taken honestly and reasonable men would regard it to be a beneficial alteration.[10]

An alteration must not be such as to oppress or defraud the minority of share-holders.[11] An alteration which does not unfairly discriminate and which has been made by a resolution bona fide passed cannot be objected to by a member as a fraud on the minority. A member coming into a Company is not entitled to assume that the articles will always remain in a particular form.[12]

5. Notice. An amendment can be made in Articles of Association of a company only after a proper notice had been given for passing the special resolution. Where a company amends the articles by a special resolution without mentioning in the notice that the question of amendment was to come up for decision in the meeting,[13] or without specifying the intention to pass a special resolution. The amendment is invalid and *ultra vires*.[14] The notice must be served on all the members of the company. Any alteration in the articles cannot bind a member from whom notice of the meeting at which the alteration was made was withheld.[15]

Resolution not amounting to alteration of Articles. It was held that the resolution of an association passed to regulate the business of its members during an emergency which had arisen was held to be not an amendment of its articles and therefore could not be challenged on the ground of non-compliance with the requirement as to notice and specified majority prescribed by the articles for an amendment thereof.[16]

6. Registration of alteration. The registrar can refuse to register an alteration of the articles which introduces an illegal object.[17]

FORMS OF MEMORANDUM AND ARTICLES

29. *Form of memorandum and articles.* The form of--

(*a*) the memorandum of association of a company limited by shares;

(*b*) the memorandum and articles of association of a company limited by guarantee and not having a share capital;

(*c*) the memorandum and articles of association of a company limited by guarantee and having a share capital;

(*d*) the memorandum and articles of association of an unlimited company having a share capital,

10. 1927-2 K B 9.
11. AIR 1945 Nag. 187 = ILR 1945 Nag. 599.
12. 1950-2 All ER 1120.
13. AIR 1940 Lah. 243.
14. KLR 1983 CC 288 = PLD 1983 Kar 589 (DB).
15. AIR 1941 Mad. 354.
16. AIR 1930 All. 661.
17. AIR 1933 Mad. 129.

shall be respectively in accordance with the forms set out in Tables B, C, D and E in the First Schedule or as near thereto as circumstances admit.

GENERAL PROVISIONS WITH RESPECT TO REGISTRATION OF MEMORANDUM AND ARTICLES

30. *Registration of memorandum and articles, etc.* (1) The memorandum and the articles, if any, shall be filed with the registrar in the Province or the part of Pakistan not forming part of a Province, as the case may be, in which the registered office of the company is stated by the memorandum to be situate.

(2) A declaration by such person as may be prescribed in this behalf, or by a person named in the articles as a director, or other officer of the company, of compliance with all or any of the requirements of this Ordinance and the rules made thereunder shall be filed with the registrar; and the registrar may accept such a declaration as sufficient evidence of such compliance.

(3) If the registrar is satisfied that the company is being formed for lawful purposes, that none of its objects stated in the memorandum is inappropriate or deceptive or insufficiently expressive and that all the requirements of this ordinance and the rules made thereunder have been complied with in respect of registration and matters precedent and incidental thereto, he shall retain and register the memorandum and articles, if any.

(4) If registration of the memorandum is refused, the subscribers of the memorandum or any one of them authorised, by them in writing may either supply the deficiency and remove the defect pointed out, or within thirty days of the order of refusal prefer an appeal--

(*a*) where the order of refusal has been passed by an additional registrar, a joint registrar, a deputy registrar or an assistant registrar, to the registrar; and

(*b*) where the order of refusal has been passed, or upheld in appeal, by the registrar, to the Authority.

(5) An order of the Authority under sub-section (4) shall be final and shall not be called in question before any Court or other authority.

Synopsis

1. Articles registered are Articles in force.
2. Inquiry before registration.
3. Appeal to compel registration.

1. Articles registered are Articles in force. The Articles of Association as they are found filed with the registrar must be taken to be what are in force and a person dealing with the company cannot assume that the directors have powers besides those that are found in them unless the special resolution granting to them such powers are also registered and are on record.[18]

2. Inquiry before registration. The registrar before functioning under section 3 may enquire into the circumstances under which the company was proposed to be formed. Not only is such an obligation laid on the registrar but he would be not exercising his jurisdiction if he does not undertake any such thing. The Registrar has a discretion to refuse to register an alteration of the articles to the same extent as he has with regard to the original articles themselves and therefore where by an alteration a scheme of lottery is sought to be introduced he would rightly refuse to register the alteration.[19]

3. Appeal to compel registration. A right of appeal against refusal to register has been given to the subscribers to the Article.

31. *Effect of memorandum and articles.* (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe and be bound by all the provisions of the memorandum and of the articles, subject to the provisions of this Ordinance.

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

Synopsis

1. Construction of Memorandum of Association.
2. Contractual nature of Articles of Association.
3. Rights falling outside company relationship.
4. Third parties.
5. "Debt due".
6. Constitutional jurisdiction.

1. Construction of Memorandum of Association. The memorandum of association like any other document, must be read fairly and its import derived from a reasonable interpretation of the language which it employs. A special rigid construction cannot be applied.[20] General words in a memorandum must be taken in connection with what are shown by the context to be the dominant or main

18. AIR 1927 Cal. 209 (DB).
19. AIR 1933 Mad. 129.
20. AIR 1963 SC 1185 + AIR 1931 PC 182.

objects. Those words should be construed in a manner which would virtually enable a company to carry on any business or undertaking of any kind whatever.[1] A memorandum is a covenant between the company and its members that the company shall not engage in any business which is not mentioned in the memorandum but with regard to the other matters it is the Articles of Association which determine the rights and liabilities of the contracting parties, namely, the company and its members as such.[2] A company is entitled to exercise the powers conferred on it by the memorandum unless such right it clearly restricted by the article.[3] Except in matters as must by statute be provided for by the memorandum of a company, the memorandum must always be read with the Articles of Association wherever there is ambiguity or where it is silent.[4] But it must be remembered that the articles cannot enlarge the scope of the objects specified in the memorandum. If the articles go beyond the memorandum they are to that extent *ultra vires* the company.[5]

Articles of Association, construction of. The Articles of Association ought not to be construed too meticulously. It is to be regarded as a business document and should be construed so as to give it a reasonable business efficacy in preference to a result which would prove unworkable.[6] Although the Articles of Association which are ambiguous could be given a meaning that would avoid a conflict with the bye-laws of the company, the clear and unambiguous words of the articles cannot be given an extended meaning merely because the bye-laws have used words of wider connotation. The function of the bye-laws is subordinate to the articles because they are framed only to carry out the purposes contained in the articles themselves.[7] But where certain powers have been specifically conferred on the company certain other powers necessary to effectively exercise those powers or for the meaningful use of those powers may be presumed. Thus the normal canon of construction either of a statute or of the Articles of Association is that when different expressions are used they are intended to connote something different,[8] or to let it out.[9]

Object of Company. Power to carry out an object, undoubtedly includes power to carry out what is incidental or conducive to the attainment of that object, for such extension merely permits something to be done which is connected with the objects to be attained, as being naturally conducive thereof.[10] Where one of the objects of the company stated in its Memorandum of Association was "to advance money on interest on the security of land, houses, machinery, etc., and to invest money not immediately required upon such securities and bank deposits as may be from time to time determined". It was on construction that so far as

1. 1905-2 Ch 427+(1882) 20 Ch D 169.
2. PLD 1971 SC 564.
3. AIR 1933 PC 39.
4. AIR 1934 PC 89+AIR 1963 SC 1185.
5. AIR 1963 SC 1185+AIR 1949 Cal. 337=ILR (1945) 2 Cal. 313.
6. 1958 (2) All ER 194+1958-2 WLR 772=1958-2 All ER 129.
7. AIR 1956 Bom. 459=ILR 1956 Bom. 100 (DB).
8. AIR 1956 Bom. 537=ILR 1956 Bom. 619 (DB)+AIR 1930 Bom. 4 (DB).
9. AIR 1930 Bom. 84 (DB).
10. AIR 1963 SC 1185.

the money not immediately required was concerned, the directors had complete discretion in the matter of approving the kind of security offered.[11] The object of a company stated as the carrying on of business of manufacturers and dealers in certain commodities in any part of the world includes also the business of export in those goods though it is not expressly mentioned.[12] The purchase of gold and silver and depositing the same in bank is *intra vires* the powers of the company where one of the objects as stated in the memorandum is "to invest the money of the company in such manner as the directors think fit".[13] The object clause "to raise money by issue of.....debenture, debenture stock, ..."and to invest the moneys so raised, includes raising of money by issue of debentures even when it is not for investment, inasmuch as the clause is an enabling one.[14]

Conflict of Articles of Association with statute. Where the Articles of Association are in conflict with any provision of this Act, they are illegal and not binding. Thus a clause in the articles of a company which limits the mode of sending a document to the company to only one of the three modes prescribed by section 97 cannot be justified.[15]

2. Contractual nature of Articles of Association. Articles of Association constitute a contract between the members and the company.[16] Therefore a member of a company and those claiming through him are bound by the company's articles.[17] That is so not because they have signed those articles but by virtue of the statutory provision of the section.[18] Even if the memorandum and articles of association of a company are held not to constitute a contract in themselves, an implied contract may be proved by the acts of the parties on the terms set out in the articles of association of the company.[19]

Articles are binding subject to provisions of the Ordinance. The Memorandum of Association is the covenant in which every member of the company covenants that he will observe its conditions, one of which is that the object for which the company is established constitutes the objects mentioned in it, and that not only will he observe that but will observe it subject to the provisions of the Ordinance.[20]

Articles constitute contract between members 'inter se'. The Articles of Association are in the nature of a contract not only between the company and its

11. AIR 1935 Lah. 792 (DB).
12. AIR 1931 PC 182.
13. AIR 1944 Bom. 131 = ILR 1944 Bom. 247 (DB).
14. AIR 1930 Cal. 536 = 57 Cal. 328.
15. AIR 1958 Bom. 247 (Hence a transferee is within his right if he sends the shares to the company by registered post although that is not the mode recognised by the article).
16. NLR 1987 UC 352 = 1987 CLC 726 + AIR 1941 Mad. 354 + AIR 1940 Lah. 243 = 190 Ind Cas. 319.
17. AIR 1936 Rang. 52.
18. AIR 1958 Mad. 34.
19. AIR 1942 Lah. 47 = ILR 1943 Lah. 28 (DB).
20. 1907-2 Ch 259. (The objects mentioned in the memorandum includes anything which is fairly incidental to them in the sense that it can be said to be there by reasonable implication).

members but also between members *inter se.*[1] The articles become in effect a contract under seal by each member of the company and regulate his rights. They constitute a contract between each member and the company and also between the individual members regulating their rights *inter se.* Such rights can no doubt be enforced by or against a member only through the company or through the liquidator representing the company but still no member can claim as between himself and another member any right beyond that which the contract with the company gives.[2] Therefore where contract between share-holders and company and between share-holders *inter se* being reflected by Memorandum and Articles of Association of company did not confer any power on Directors or other share-holders to either forfeit shares of a member or to expel him from the company. Forfeiture of fully paid-up shares of a share-holder by the company was not valid.[3]

Where the Articles of Association contain a general clause providing for compulsory arbitration of disputes arising between its members in respect of transactions falling within the purview of the association, it would govern not only a dispute arising out of a written contract expressly making a reference to the arbitration clause but also under an oral contract between them.[4]

Where in pursuance of certain articles acted upon by the company, a member was appointed Managing Director of the Bank and acted for eleven years in that capacity, the articles constitute an implied contract between the members and the company, a suit for performance of which lies in a Civil Court.[5]

Prospectus of company. Ordinarily the contract proper between a share-holder and the company is to be found in the application for allotment and in the Articles of Association and the prospectus is not relevant in any matter touching that contract. But where the application for allotment has stipulated that the shares are to be subject to certain special conditions and those conditions are to be found only in the prospectus then it would be necessary to refer to the prospectus also for reading those conditions into the contract.[6]

Rights given by Articles cannot be reduced or enlarged. Where members have under the articles a contractual right of inspection, that cannot be reduced by the power given to make rules, into a mere right to claim inspection subject to the Committee's approval. But a right of inspection does not carry with it a right to take copies; this right must be separately established. If a member has got such a right the motive with which he wants to exercise it is irrelevant.[7] Thus though the Articles of Association of an association contain a clause for compulsory arbitration of disputes arising out of or incidental to all the dealings or transactions entered into by one member with the others it will not cover a dispute

1. AIR 1940 Lah. 234+AIR 1959 Punj. 328+AIR 1956 Bom. 459 (DB)+50 Cal W N 310 (DB)+1909-1 Ch 311. (But the company may not enforce the covenant between individual share-holders in most cases)+(1889) 42 Ch D 636.
2. 1897 App Cas 299.
3. 1991 MLD 1225 (DB).
4. AIR 1956 Bom. 459=ILR 1956 Bom. 100 (DB).
5. AIR 1940 Lah. 243=190 Ind Cas. 819.
6. 1946 Nag L J Jour 128.
7. AIR 1938 Cal. 89.

as to the existence of the transaction or dealing itself and impose an obligation on a member to refer it to arbitrations.[8]

Company is bound by Articles. A member is bound by the Articles of the company and the company cannot, acting contrary to the Articles of Association, and in violation thereof, rectify its share register in order to enable a joint holder to exercise voting rights, by registering such members as holder of a separate block of shares, to which he or she claims to be entitled.[9]

Directors appointed in conflict with provisions in Articles. Where a company (respondent) was formed by Provincial Government which was to have nine Directors out of which five were to be nominated by the Provincial Government while four other Directors had to be from public (petitioners being such directors). Authority issued a Notification whereby Secretary Industries and two other Directors were appointed and Secretary Industries designated himself as Chairman of the Company. Memorandum and Articles of Association of Company had made it imperative that four Directors had to be from the public. Provincial Government having already nominated five Directors, could not have nominated any other Director which might have effect to increase number of Directors beyond nine. Provincial Government could not contravene provisions of Memorandum and Articles of Association unless same were amended or number of Directors was increased by resolution passed in accordance with provisions of said Memorandum and Articles of Association. Therefore, Notification issued by Provincial Government increasing number of fication issued by Provincial Government increasing number of Directors beyond nine being in contravention of Memorandum and Articles of Association was declared to be without lawful Authority and was thus quashed and all acts and orders of the person (who had declared himself to be the Chairman of the Company) based on the said notification were held nullity in law.[10]

Obligations existing before becoming member, how affected. A debtor of a company on becoming its share-holder becomes also bound by the provision where it exists in the article by which any debt due by a share-holder to the company is made a first charge on the share.[11]

3. Rights falling outside company relationship. In view of the provisions in section 147 it is clear that a person is not a member unless his name is registered in the register of the Company under that section.[12] Thus, for instance, they cannot affect matters which arise out of a commercial contract mutually entered into by them.[13]

Rights arising by special contract. A special contract between a person and a company is not affected by any change in the Articles of Association although such person is also a share-holder. Hence the act of the directors discharging that

8. AIR 1956 Bom. 459=ILR 1956 Bom. 100 (DB).
9. AIR 1965 Cal. 436.
10. 1996 CLC 370=PLJ 1996 Kar. 123=1996 Law Notes (Kar) 1 (DB).
11. AIR 1919 Mad. 1161 (DB).
12. PLD 1970 Dacca 155=20 DLR 1056 (DB)+AIR 1928 Bom. 252.
13. 53 Cal. W N 505.

contract out of the assets of the company is not *ultra vires* their powers.[14] The rights of a share-holder of an insurance company as one of its policy-holders are entirely governed by the terms of the policy and not by the Articles of Association of the company.[15] The appointment of a secretary must be regarded as having been made *de hors* the articles of the company even if the appointee is a share-holder and hence when he is removed from the office by the directors he cannot challenge his removal on the ground that the directors had no such power under the articles. He can succeed only if he is able to establish a contract in his favour outside and independently of the articles.[16]

4. Third parties. The memorandum of association,[17] or articles of association is no contract between a company and an outsider.[18] A third person who purports to have rights against the company would be precluded from relying on the articles as the basis of his claim and must prove a special contract. Hence it is not open to the policy-holders of an Insurance Company to take advantage of anything contained in the Articles of Association of the company.[19]

5. "Debt due." Money must be presently due and not merely due, to constitute a debt. Money does not become due merely because the signatories to the Articles of Association or memorandum undertakes to purchase shares and pay for them.[20] Although the liability of a share-holder as regards the balance due on his shares is a debt accruing on the date of taking of the shares, the liability is enforceable only after a valid call has been made.[21] In this context it must be noted that the mere passing of a resolution by the directors without notice of call being served on the share-holders, is no valid call, in the absence of evidence that the notice has been dispensed with by the Articles of Association.[1]

Jurisdiction. A suit by a company which is not under liquidation for recovery of arrears of allotment money and call money due on shares allotted to the defendant is cognizable by a Court of Small Causes.[2]

6. Constitutional jurisdiction. No *mandamus* lies in order to enforce a duty embodied in the memorandum and Articles of Association inasmuch as the duty arises under contractual obligation, and not as, a public duty or duty imposed by or under a statute.[3]

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14. AIR 1925 Cal. 590=52 Cal. 239.
15. 1946 Nag L Jour 128.
16. AIR 1954 Mad. 113 (DB).
17. AIR 1934 Bom. 427=59 Bom. 218 (DB).
18. AIR 1928 Bom. 252+AIR 1956 Mad. 316 (DB)+(1815) 1 Ex. D 20.
19. AIR 1956 Mad. 316 (DB)+AIR 1959 Bom. 201. (Non-member appointed as joint managing director of company removed–Suit for declaration that removal is illegal and the resolution for removal *ultra vires*-Plaintiff's suit sustainable only by relying on the articles of the company–No declaration can be given).
20. AIR 1939 All. 739.
21. AIR 1932 Cal. 716+AIR 1958 Mad. 34.
1. AIR 1932 Cal. 716=59 Cal. 1186=140 Ind Cas. 252.
2. AIR 1933 Lah. 657=34 PLR 592=143 Ind Cas. 723 (1).
3. KLR 1983 CC 288=PLD 1983 Kar. 589 (DB)+AIR 1957 Mad. 309 (DB).

32. *Effect of registration.* (1) On the registration of the memorandum of a company, the registrar shall certify under his hand that the company is incorporated and, in the case of a limited company, that the company is limited by shares or guarantee, as the case may be.

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum, together with such 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 forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being would up as is mentioned in this Ordinance.

Synopsis

1. Company has separate juristic personality.
2. Suit against the company.
3. Suit to redress wrong done to company or to enforce its claim.
4. Internal management, suits relating to.

1. **Company has separate juristic personality.** Unlike an unincorporated company, which has no separate existence and which the law does not distinguish from its members, an incorporated company has a separate existence and the law recognises it as a legal person separate and distinct from its members.[4] This new legal personality emerges from the moment of incorporation and from that date the persons subscribing to the Memorandum of Association and other persons joining as members are regarded as a body corporate or a corporation aggregate and the new person begins to function as an entity. But the members who form the incorporated company do not pool their status or their personality. If all of them are citizens of Pakistan the Company does not become a citizen of Pakistan any more than if all are married the company would be a married person. The personality of the members has little to do with the persons of the incorporated company. The persona that comes into being is not the aggregate of the persona either in law or in metaphor. The corporation really has no physical existence; it is a mere abstraction of law.[5] Thus an incorporated company is a separate entity from any individual

4. PLD 1985 Kar. 481.
5. AIR 1963 SC 1811+AIR 1955 SC 74. (The firm name of a partnership is merely a compendious methods of describing its partners and the partnership has no legal entity apart from those members. Hence the position of the share-holders in the company cannot be likened to the position of the partners *inter se*)+AIR 1931 Pat. 321 (FB)+AIR 1951 East Punj. 188 (DB). (The company has its own domicile, privileges and liabilities)+52 Cal. WN 188 (DB)+AIR 1936 Bom. 62 (DB)+AIR 1932 Pat. 196+AIR 1933 Rang. 70+AIR 1931 Bom. 178 (DB).

although that individual may practically hold all the shares.[6] A limited company and the individuals forming it are separate and legal entities, however complete the control might be by one or more of the individuals over the company. It is not the same as its share-holders but is distinct from them. It is also not the same as its directors but is different from them. Its separate character is recognised by law. The Courts would not normally lift the veil to discover if the two distinct separate legal and juristic entities in the shape of two limited companies are really identical and one, unless it is a case of fraud, the entities being a mere cover or facade to conceal the fraud. Where there are two separate genuine companies doing business side by side the fact that they had the same directors and the same share-holders does not make the same self.[7]

Doctrine of lifting the veil. Company though from juristic point of view was a legal personality entirely distinct from its members and was capable of enjoying rights and being subjected to duties as those enjoyed or borne by members, yet in certain exceptional cases, Court was entitled to lift veil of corporate entity and to pay regard to economic realities behind legal facade.[8] Where there is complete identity of an individual with a company in so far as he is in absolute control of its management and shares or where same person or set of persons control two or more companies in some cases the courts may have to go behind the name of the companies and see whether they have any distinct personality. But the doctrine of lifting the veil of incorporated company is a doctrine of limited application. There are broad propositions governing the matter and only in exceptional cases the veil is lifted. (1) The Courts are generally precluded from treating a company as the *'alias'*, agent, trustee or nominee of its members. (2) The Courts will nevertheless do so if corporate personality is being used as a cloak for fraud or illegal conduct. (3) The Courts will also rend the veil where agency can be established in fact, either in respect of particular transactions or even as regards the whole of the company's business. (4) The Courts will be more inclined to hold that agency is established where the controlling share-holder is another company and general tendency is to ignore the separate legal entities of various companies within 'a group' and to look instead at the economic unity of the whole group. But this is only generally done when the statute gives a lead in that respect and not otherwise. There are many cases and examples of lifting the veil in favour of state revenue. But the doctrine that in revenue cases the 'substance of the matter' may be regarded as distinguished from the strict legal position, is erroneous, further the persons veiled by the corporate personality are as a rule not themselves allowed to lift the veil which they have put on.[9] Therefore the burden to prove that corporate personality was farce lies on Income Tax Department and in the absence of any

6. AIR 1927 Bom. 371 (DB) (The assumption of separate legal entity which arises on the registration can however be rebutted by showing that the comapy has no business of its own apart from that of the controlling member and the limited liability is only a disguise for carrying on the business).
7. AIR 1963 Cal. 629 (DB).
8. 1991 MLD 1730 (DB).
9. AIR 1963 Cal. 629 (DB)+AIR 1943 PC 183+AIR 1925 PC 619.

evidence to that effect the High Court was wrong in invoking principle of piercing corporate veil.[10]

The device of lifting the veil of incorporation cannot be pressed into service as a matter of course in every case, but there should be some justifiable reason which may warrant the lifting of veil of incorporation. Therefore where total shares of company were owned and controlled by the Federal Government and company was engaged in manufacture and sale of cement. Invoking the doctrine of lifting the veil of incorporation in such a case to enable the company to have the benefit of Article 165 would place the company in an advantageous position to the detriment of the companies which were also engaged in manufacture and sale of cement as they would not be entitled to the benefit of exemption of octroi which would be violative of, *inter alia*, Article 25 of the Constitution.[11]

Distinction between company and member. The distinction should be marked and maintained between an incorporated company's legal entity and its actions, assets, rights and liabilities on the one hand, and the individual share-holders and their actions, assets, rights and liabilities on the other.[12] A share-holder who buys shares in a company cannot be assumed to buy any interest in the property of the company.[13] The business carried on by a company belongs to it not to its share-holders.[14] When a public limited company is a creditor of another company, it cannot be said that some share-holders of the former company are creditors of the latter company.[15]

Creditors, rights of. The creditors of an incorporated company whether the liability of its members is limited or unlimited, can call upon its individual members to contribute only in case the Ordinance or its charter so provides.[16]

Breach of duty by company. Where duty is imposed upon a company in such a way that a breach of duty amounts to a disobedience to the law then, the breach is an offence which can be visited upon the company.[17]

Incorporation of unincorporated company. A limited concern is no doubt a different one from its predecessor which was an unincorporated concern but merely because the name of the unincorporated concern is mentioned as the grantee of a putnee lease, in the sanction of the Government permitting the grant of the lease, it cannot be held that the sanction is ineffective with respect to the lease actually given to the limited concern where it is clear that at all stages of the negotiation the parties clearly meant that the transaction was to be with the limited concern only.[18]

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10. NLR 1992 Tax 172=PLD 1992 SC 276.
11. 1993 SCMR 468 (PLD 1990 Kar. 186 (DB) does not lay down correct law).
12. AIR 1936 PC 279+AIR 1952 Bom. 337=ILR 1952 Bom. 795.
13. AIR 1955 SC 74=1995-1 SCR 876.
14. AIR 1952 Bom. 337=ILR 1952 Bom. 794.
15. AIR 1964 All. 473.
16. AIR 1931 Pat. 321=11 Pat. 174 (FB).
17. AIR 1933 Rang. 70=11 Rang. 162=35 Cr. L.J. 1040.
18. AIR 1915 PC 27=24 Cal. Ind App. 96 (obiter).

Domicile of company. The registration of a company is not for all purposes of its decisive of the question of its domicile. The domicile of a corporation is the place where the brain which controls the operation of company is situate.[19]

2. Suit against the company. The Court has jurisdiction to entertain a suit by the share-holders against the company in respect of the infringement of their rights as share-holders, *e.g.* the right of exercising their individual votes, when the interests of justice so required.[20] But the minority of share-holders cannot sue the majority. It is only the company which can be sued. Thus where the majority of the members of a partnership firm formed a limited company to carry on the same business which the partnership firm was carrying on and the members who were in minority sued those who were in majority for accounts and profits; it was held that the suit was not maintainable as the limited company was altogether a third person.[21]

Managing Director dismissed, right of suit. Where a company terminates the appointment of its managing agent by an ordinary resolution when the articles require an extraordinary resolution for the purpose, a suit for declaring the resolution invalid is not barred.[1] Similarly the suit of a person removed from the office of managing director for a declaration that he has not ceased to be the managing director and that the person elected in his place has not become the managing director is maintainable at the instance of that person in his own name.[2]

Wages, suit for. A suit for wages from a company lies against the company and not against its Secretary or Managing Director.[3]

Costs in criminal complaint. Where one of the parties to proceedings under section 145, Cr.P.C. are ostensibly some managers of a certain limited company, costs against them should be realised from managers of the company itself.[4]

3. Suit to redress wrong done to company or to enforce its claim. A joint stock company registered by the Registrar of Joint Stock Companies is a legal person entitled to file suit.[5] Therefore in order to redress wrong done to a company, action, prime facie, should be brought by the company itself. The will of the majority of the share-holders is the will of the company for this purpose.[6] Therefore in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company the action should be prima facie brought by the company itself.[7]

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19. AIR 1939 Mad. 318.
20. AIR 1932 Mad. 100 (DB).
21. AIR 1952 Bom. 337=ILR 1952 Bom. 795.
1. AIR 1950 PC 81=77 Ind App. 128=ILR (1951) 1 Cal. 305.
2. AIR 1951 Mad. 452.
3. AIR 1913 Pun LR No. 190, p. 655.
4. AIR 1937 Pat. 559=38 Cr. L.J. 1099.
5. 1992 MLD 1085.
6. AIR 1937 Cal. 645 (DB)+AIR 1934 Bom. 243+AIR 1924 Cal. 598 (DB).
7. 1912 App Cas. 546+1961-1 Ch. 532+1902 App Cas. 83.

Compromise by company. A corporation has the same right to compromise claims brought against it as individual persons. They must have such power as an incident to their existence.[8]

Signing and verification of plaints. Where a suit is filed by a company, it has to be established that suit has been competently and authorisedly instituted on its behalf. Rigor of this principle to the extent that even a person in charge of affairs of Company unless specifically authorised in this regard is not considered competent to initiate suit on behalf of Company. A suit by Company instituted through its Secretary when Company's Articles confer power to institute suit upon Company's Committee would be incompetent in absence of Company's resolution authorising institution of suit through Secretary.[9] But where the chief officer of a limited company in the exercise of the power he had under the articles, appointed a person as the secretary of the company for its management and empowered him to file and defend suits for and on behalf of the company and that person signed and verified plaints, describing himself as the secretary of the company; it was held that those plaints complied with the provisions of O. 29, R. 1, Civil P.C.[10] A plaint verified in the manner provided by O. 6, R. 14, Civil P.C. on behalf of a corporation may in a proper case amount to a validly certified plaint although it has not been signed and verified in the manner provided by O. 29, R. 1 of the Civil P.C.[11] Thus where Articles of Association of Company authorised its Managing Director to institute legal proceedings on behalf of company. Legal proceedings were instituted by Managing Director on basis of authorisation under the Articles. Contention that proceedings were incompetent as only a person authorised by resolution of a company could institute legal proceedings was repelled as devoid of force and the proceedings were held to be properly instituted on behalf of the company.[12]

Constitutional petition by Company. Constitutional petition filed on behalf of company should be accompanied by the Memorandum or Articles of Association and the resolution of the Board of Directors containing names of Directors who had participated in the meeting and such meeting should also authorise a specific person for filing Constitutional petition. Constitutional petition not accompanied by such essential documents would be incompetent and deemed to have been filed without any authority of law and may be dismissed.[13]

4. Internal management, suits relating to. The doctrine of indoor management is to the effect that persons contracting with the company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regularly done.[14] The Court will not interfere with the

8. (1878), 8 Ch D 334.
9. NLR 1991 AC 795 (DB).
10. AIR 1937 Lah. 751.
11. AIR 1931 Sind 178=26 Sind LR 58 (DB).
12. NLR 1989 CLJ 555.
13. 1993 CLC 66.
14. PLD 1985 Kar. 481.

internal management of Companies acting within their powers.[15] Once it is seen that a particular power is not *ultra vires* the objects of the company the remedy against an abuse of that power has to be sought within the provisions of this Act itself. A suit for declaration and injunction by an aggrieved share-holder is not the proper remedy.[16] Even where the minority is alleged to have been overborne by the vote of the majority, if the acts complained of are acts which could be done validly with the approval of the majority or acts capable of being confirmed by them, the Court will not interfere merely on the ground of irregularity or informality in the doing of those acts.[17] In other words no more informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly could be within the power of the company and the intention of the majority of the share-holders is clear.[18] Where the impeached act is not in excess of the powers of the company and there is no allegation of fraud on the part of the directors or appropriation of assets of the company by the majority share-holders in fraud of the minority, the action by a share-holder who has no right to vote is not maintainable.[19]

When acts of internal management may be questioned in Court. The supremacy of the majority of share-holders is subject to certain exceptions namely (*a*) where the act complained of is *ultra vires* the company; (*b*) where it is a fraud on the minority and (*c*) where there is absolute necessity to waive the rule to prevent a denial of justice.[20] The Court may interfere where the action of the Board was fraudulent or against natural justice,[1] or where the action complained of is *ultra vires* the powers of the company or that the majority have abused their powers and are depriving the majority of their rights.[2] Where directors themselves are wrong doers and have their personal interests in conflict with their duty the majority of share-holders can take steps to redress the wrong. In the absence of any provision in the Articles of the company for such contingency, the majority can sue in the name of the company.[3]

The exception which allows the complaining share-holders of a company to bring a suit in their own name even in cases in which normally the company alone can sue is a matter of procedure recognised to give a remedy for a wrong which would otherwise escape. That being so the plaintiffs in such an action cannot have a larger right to relief than the company itself would have if it were plaintiff and cannot complain of acts which are valid if done with the approval of the majority of

15. PLD 1975 Kar. 556=PLJ 1975 Kar. 188 (DB)+PLD 1958 Lah. 721 (DB)+AIR 1933 Rang. 417+50 Pun LR 282 (DB)+AIR 1946 Bom. 516+PLD 1935 Lah. 792 (DB)+1902 App Cas. 83.
16. 50 Pun LR 282.
17. AIR 1934 Bom. 243 (Court does not interfere to force company to conduct their business according to strict unles where the irregularity complained of could be set right at the moment).
18. 1916-1 Ch 532.
19. 1962-2 All ER 518.
20. PLD 1975 Kar. 556=PLJ 1975 Kar. 188 (DB)+AIR 1934 Bom. 243+AIR 1951 Mad. 831 (DB)+AIR 1924 Cal. 598 (DB).
1. PLD 1956 Kar. 315.
2. 1912 App Cas. 546.
3. AIR 1950 PC 133=1949 FCR 673.

the share-holders or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are therefore confined to those in which the acts complained of are of a fraudulent character or beyond the powers of a company.[4] In case where the wrong-doer has the balance of power in his favour and therefore, the company does not take action the minority may sue in the company's name or in their own name or as a matter of convenience through a share-holder on behalf of himself and all others.[5] Thus where the majority share-holders are alleged to have put the minority's property into their pockets and are therefore wrongdoers, it would be right and proper to allow an individual share-holder to file a bill on behalf of himself and all other share-holders. Such cases constitute an exception to normal rule which prevents a share-holder from bringing an action where the company is the proper plaintiff.[6]

Matters not within internal management of company. Restrictions imposed by this section fall within the ambit of internal management of the company. Where the matter does not fall within the sphere of internal management a share-holder can sue the company. It has been held that interpretation of the clause in the Memorandum of Association relating to the assets of the company, is not a matter of mere internal management; a single member can therefore maintain a suit against the company for a declaration as to the true interpretation of the clause in question and the company cannot be excused from being impleaded in such an action.[7]

Pleadings. Where an action is brought by a share-holder complaining of certain acts of the directors the plaint should distinctly allege the illegality of acts complained of and the impossibility of getting the company to impeach their validity.[8] In the case of an action by some share-holders, is the primary fraud and that must be clearly indicated in the pleading although the pleading itself or the particulars may be so framed as to stress the dominance of the majority and the effectuation of the fraud through that dominance.[9]

Rights of third party. A third party may in all reasons rely on the assertion of an agent of the Company in respect of the contracts entered on behalf of the Company. His rights could be defeated only if it could be shown that the third party knew of circumstances tending to defeat his rights or the transaction was fraudulent. Every corporation in law is equal to a natural person and does have an independent legal entity of its own.[10] Where the Directors are the wrongdoers they must be parties to the action both where their decision is attacked as injurious to the company and also where the act so impeached continues to be impeached even after its confirmation, on the ground that the directors obtained the confirmation by

4. 1916-1 Ch 532+1912 App Cas. 546.
5. 1961-1 Ch 532+1912 App Cas. 546+11 Ch D 97+AIR 1941 Cal. 174+AIR 1937 Cal. 645=ILR (1938) 1 Cal. 90+AIR 1925 Bom. 188 (DB) (Misappropriation of company's goods by share-holder–Majority approving those acts–Minority members have the right to sue that share-holder).
6. (1874) 9 Ch App. 350.
7. AIR 1936 Lah. 792 (DB).
8. AIR 1934 Bom. 243.
9. AIR 1941 Cal. 174=ILR (1941) 1 Cal. 30+AIR 1937 Cal. 645.
10. PLD 1985 Kar. 481.

controlling the majority.[11] Where the wrongdoers are also share-holders they should be excluded from the category of plaintiffs in the action by the share-holders.[12]

33. *Conclusiveness of certificate of incorporation.* A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Ordinance in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under this Ordinance.

Synopsis

1. Certificate of Registration, conclusiveness of.
2. Powers of company.
3. Illegal registration, cancellation of.

1. Certificate of Registration, conclusiveness of. A certificate of incorporation is conclusive evidence that all the requirements of the Ordinance in respect of registration have been complied with and that the association is a company authorised to be registered and duly registered under the Ordinance,[13] and the parties have become an incorporated body.[14] As the certificate of incorporation is conclusive for all purposes, the Memorandum of Association shall be deemed to have been duly subscribed by seven persons, even though that is not so in fact,[15] and that each subscriber wrote opposite his name the number of shares he took and hence no subscriber will be allowed to prove the contrary.[16] A certificate of registration is conclusive evidence that the company was authorised to be registered under the Ordinance. In view of the conclusiveness it would not be permissible to go behind the certificate and establish that on the date of the registration no partnership or association capable of registration was really in existence.[17]

2. Powers of company. The certificate of registration of a company can only prove that incorporation is that of the statutory number of persons in accordance with the formalities of the Ordinance, that all the requirements of the Ordinance in respect of registration have been complied with and that is a complete person in law. It does not prove that all the powers in the memorandum are lawfully exercisable.[18] In considering the question whether a particular transaction was *intra vires* of the powers of the company or not the Court has to determine that question according to the memorandum as it is before it. It cannot in those proceedings consider whether the particular clause of the memorandum which places the transaction within the power of the company has been framed on the lines

11. AIR 1941 Cal. 174=ILR (1941) 1 Cal. 30.
12. AIR 1941 Cal. 174=ILR (1941) 1 Cal. 30.
13. ILR (1947) 2 Cal. 1.
14. (1976) 2 Ch D 610.
15. 40 Cal. 1=39 Ind App. 237 (PC)+109 Ind Cas. 451 (All).
16. AIR 1948 Oudh 197=23 Luck 210 (DB).
17. 1920-1 Ch 201.
18. 1917 App Cas. 406.

contemplated by the Ordinance. This follows from the conclusiveness which the statute attaches to the certificate of registration.[19]

3. Illegal registration, cancellation of. Under section 33 a certificate of incorporation granted by the Registrar is conclusive evidence of the fact that the requirements of the Companies Ordinance in respect of registration and matters precedent and incidental thereto have been complied with and that the association is a company authorised to be registered under this Ordinance. If a certificate of incorporation is illegally granted it can always be challenged by an appropriate proceeding. Section 33 does not bar such suit.[20]

34. *Effect of alteration in memorandum or articles.* Notwithstanding anything contained in the memorandum or articles of a company, no member of the company shall be bound by an alteration made in the memorandum or articles after the date on which he became a member if and so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alteration is made, or in any way increases his liability as at that date to contribute to the share capital, of, or otherwise to pay money to, the company:

Provided that this section shall not apply in any case where the member agrees in writing either before or after the alteration is made to be bound thereby.

1. Scope. Section 34 is limited to two things: (*a*) requiring a share-holder to take or subscribe for more shares than the number held by him at the date of the alteration; and (*b*) increasing his liability to contribute to the share capital of, or otherwise to pay money to, the company. An alteration of the articles which has none of these effects will bind even a member who is already a share-holder before such alteration.

35. *Copies of memorandum and articles to be given to members.* (1) Every company shall send to every member, at his request and within fourteen days thereof, on payment of such sum, not exceeding the prescribed amount, as the company may fix, a copy of the memorandum and the articles, if any.

(2) If a company makes default in complying with the requirements of sub-section (1), it shall be liable for each offence to a fine not exceeding one hundred rupees.

36. *Alteration of memorandum or articles to be noted in every copy.* (1) Where an alteration is made in the memorandum or articles of a company, every copy of the memorandum or articles issued after

19. 1918 App Cas. 514.
20. PLD 1968 SC 412=20 DLR (SC) 355.

the date of the alteration shall conform to the memorandum or articles as so altered.

(2) If, where any such alteration has been made, the company at any time after the date of the alteration issues any copies of the memorandum or articles which do not conform to the memorandum or articles as so altered, it shall be liable to a fine which may extend to one thousand rupees for each copy so issued and every officer of the company who is knowingly and wilfully in default shall be liable to the like penalty.

PROVISIONS WITH RESPECT TO NAMES OF COMPANIES

37. *Prohibition of certain names.* (1) No company shall be registered by a name which in the opinion of the Authority is inappropriate or deceptive or is designed to exploit or offend the religious susceptibilities of the people.

(2) A company shall not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires.

(3) Except with the prior approval in writing of the Authority, no company shall be registered by a name which contains any words suggesting or calculated to suggest--

(*a*) the patronage of any, past or present, Pakistani or foreign Head of State;

(*b*) any connection with the Federal Government or a Provincial Government or any department or authority of any such Government;

(*c*) any connection with any corporation set up by or under any Federal or Provincial law; or

(*d*) the patronage of, or any connection with, any foreign Government or any international organization.

(4) Whenever a question arises as to whether or not the name of a company is in violation of the foregoing provisions of this section, the decision of the Authority shall be final.

Synopsis

1. Name of company. 2. Similar names not permitted.

1. Name of company. The name of a company assumes importance as it helps to indicate its objects and its principal business.[1] Under the company law, a company by registering its name gains a monopoly of the use of that name.[2]

2. Similar names not permitted. Apart from under special statutes like the Companies Ordinance or the Trade Marks Act a claim for exclusive proprietary rights in a fancy name or title is not sustainable.[3] Under this section in order to protect the public from being deceived by the similarity of names, the Court has jurisdiction under the general law to restrain the registration of a projected company under this Ordinance under a name which closely resembles the name of an unregistered company carrying on the same business as that which is intended to be carried on by the projected new company.[4] In the matter of taking into consideration the identity of names, whilst effecting registration of companies there is no difference of principle between non-profit-making organization such as Chambers of Commerce and trading companies. It was held that Lagos Chamber of Commerce and African Chamber of Commerce were not sufficiently identical to refuse the later permission to be registered under that name.[5]

38. *Rectification of name of a company.* A company which, through inadvertence or otherwise, is registered by a name in contravention of the provisions of section 37,--

(*a*) may, with the approval of the registrar, change its name; and

(*b*) shall, if the registrar so directs, within thirty days of the receipt of such direction, change its name with the approval of the registrar:

Provided that the registrar shall, before issuing a direction for change of name, afford the company an opportunity to make representation against the proposed direction:

Provided further that no direction under clause (*b*) shall be issued after the expiration of three years from the date of registration of the company or registration by its new name, as the case may be.

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1. (1890) 44 Ch D. 634.
2. AIR 1942 Bom. 241 (DB).
3. AIR 1952 Cal. 804 = ILR (1953) 2 Cal. 210.
4. AIR 1942 Bom. 241 (DB) + AIR 1952 Cal. 804 + (1917) 1917-2 Ch 1.
5. PLD 1956 Privy Council 1.

39. *Change of name by a company.* A company may, by special resolution and with the approval of the registrar signified in writing, change its name:

Provided that no such approval shall be required where the only change in the name of a company is the addition thereto or, as the case may be, the deletion therefrom, of the parenthesis and word "(Private)" consequent on the conversion in accordance with the provisions of this Ordinance of a public company into a private company or of a private company into a public company.

1. Change of name. Notwithstanding the alteration in the name of a company it continues its legal status as before with its constitution unaltered.[6] Therefore where the name of a company was duly changed and Registrar issued a certificate to that effect, the contention that plaintiff had no *locus standi* to file a suit under new name as transaction related to a period prior to change of name was without substance.[7] The section allows the continuation of proceedings initiated in the original name instead of the new name. That however does not mean that the proceedings could not be continued in the new name, if so desired.[8]

Approval of change of name by registrar. The question whether the company did or did not obtain the approval of the Registrar to change its name is a question of fact and cannot be raised for the first time in second appeal.[9]

40. *Registration of change of name and effect thereof.*--(1) Where a company changes its name, the registrar shall enter the new name on the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case; and, on the issue of such a certificate, the change of name shall be complete.

(2) Where a company changes its name it shall, for a period of one year from the date of issue of a certificate by the registrar under sub-section (1), continue to mention its former name alongwith its new name on the outside of every office or place in which its business is carried on and in every document or notice referred to in clauses (*a*) and (*c*) of section 143:

Provided that the addition or deletion, as the case may be, of the parenthesis and word "(Private)" from the name of a company consequent on the conversion in accordance with the provisions of this Ordinance of a public company into a private company or a

6. 1992 CLC 2282+1985 CLC 529.
7. 1985 CLC 529.
8. AIR 1954 Mad. 802=ILR 1954 Mad. 533 (DB).
9. AIR 1955 All. 192 (DB).

private company into public company shall not be deemed to be a change of name for the purpose of this sub-section.

(3) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company; and any legal proceedings by or against the company and any legal proceedings that might have been continued or commenced against the company by its former name may be continued by or commenced against the company by its new name.

1. **Change of name pending suit--effect.** A change in the name of the plaintiff company during the pendency of a suit does not affect the rights of the company. If, therefore, a decree is passed in the old name of the company it can be executed by the company in its new name.[10]

41. *Alteration of names on commencement of Ordinance and change of status of company.* (1) As from the date of commencement of this Ordinance, the name of every existing company shall be deemed to include, before the last word "Limited", the parenthesis and word "(Private)" in the case of a private company and the parenthesis and word "(Guarantee)" in the case of a company limited by guarantee, and the memorandum of association, the certificate of incorporation and other books and papers shall be deemed to be altered accordingly from that date.

(2) On conversion of a public company into a private company in accordance with the provisions of this Ordinance, the registrar shall add the parenthesis and word "(Private)" before the word "Limited" in the name of the company in the register and shall also issue a certificate to meet the circumstances of the case.

(3) On conversion of a private company into a public company in accordance with the provisions of this Ordinance, the registrar shall omit the parenthesis and word "(Private)" in the name of the company in the register and shall also issue a certificate to meet the circumstances of the case.

(4) If default is made in complying with a direction issued by the registrar under section 38, or with the requirements of sub-section (2) of section 40, or in giving effect to the provisions of sub-section (1) of this section, the company, and every director or officer of the company who is knowingly and wilfully in default, shall be liable to a fine not exceeding ten thousand rupees and to a further fine not

10. AIR 1955 All. 192 (DB).

exceeding two hundred rupees for every day after the first during which the default continues.

ASSOCIATIONS NOT FOR PROFIT

42. *Power to dispense with "Limited" in the name of charitable and other companies.* (1) Where it is proved to the satisfaction of the Authority that an association capable of being formed as a limited company has been or is about to be formed for promoting commerce, art, science, religion, sports, social services, charity or any other useful object, and applies or intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment of any dividend to its members, the Authority may grant a licence and direct that the association be registered as a company with limited liability, without the addition of the words "Limited", "(Private) Limited" or "(Guarantee) Limited", as the case may be, to its name, and the association may be registered accordingly.

(2) A licence under sub-section (1) may be granted on such conditions and subject to such regulations as the Authority thinks fit and those conditions and regulations shall be binding on the association and shall, if the Authority so directs, be inserted in the memorandum and articles, or in one of those documents.

(3) The association shall on registration enjoy all the privileges of a limited company and be subject to all its obligations, except those of using the word or words "Limited", "(Private) Limited" or "(Guarantee) Limited", as the case may be, as part of its name.

(4) A licence under this section may at any time be revoked by the Authority, and upon its revocation the registrar shall enter the word or words "Limited", "(Private) Limited" or "(Guarantee) Limited", as the case may be, at the end of the name of the association upon the register, and the association shall cease to enjoy the exemptions and privileges granted by the preceding sub-sections:

Provided that, before a licence is so revoked, the Authority shall give to the association notice in writing of its intention, and shall afford the association an opportunity of submitting a representation in opposition to the revocation.

Synopsis

1. Charitable purpose--meaning.
2. Clubs.
3. Alteration of Memorandum of Association.
4. Income-tax, liability to pay.

1. Charitable purpose—meaning. A charitable purpose is where assistance is given to the bringing up, feeding, clothing lodging, and the education of those who from poverty or comparative poverty stand in need of such assistance. By a charitable purpose a temporal benefit is meant, being money or having a money value. In the light of this definition conversion of heathens and heathen nations is not a charitable purpose although it is a benevolent one.[11]

2. Clubs. It is only a member's club as distinguished from a proprietary club run for profit and from the management of which its non-proprietary members are excluded that can be allowed to be registered in accordance with this section. Therefore the registration of a club under this section is prima facie proof of the fact that it is not an association for profit.[12]

3. Alteration of Memorandum of Association. Where an Executive Committee duly nominated through Notification, had failed to fulfil mandate provided through terms of reference and had made amendments in Articles of Association without approval of Government which was mandatory in their own interest, Government, in circumstances, was justified to interfere in affairs of Association in the best interest of public.[13] In the case of a company registered under the section the High Court can entertain an application for the confirmation of the alteration of its memorandum only where the company had before the alteration obtained the approval of the Authority for the proposed alteration. Where in the absence of such approval the High Court wrongly orders confirmation of the alteration, it has jurisdiction to cancel the order.[14] Where Article 39 of the original Articles of Association of Ewan-e-Zaraat provided that Amendment to the memorandum of Association shall be subject to the approval of the Government and shall also be made when required by the Government in public interest; the amendment of Articles 2-A and 39 of Association including the addition of articles 2-A on 19.9.1994 and 5.12.1993 were brought in without the approval of the Government and against the public interest only to perpetuate their control over the Association and to deprive the respondent No. 1 and 2 of their powers given under Articles of Association. It was held that the petitioner had adopted the process of amendments in the Articles of Association with ulterior motives. It is a settled law that the High Court in its Constitutional jurisdiction does not exercise its powers in favour of persons who come to Court with soiled hands. Therefore interference by the Government in the matter was upheld.[15]

4. Income-tax, liability to pay. An association incorporated under the section is not exempted from being assessed to income-tax.[16]

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11. 1918 App Cas. 531.
12. AIR 1952 Mad. 814.
13. 1997 CLC 970.
14. AIR 1937 All. 432.
15. 1995 Law Notes (Lah) 493.
16. AIR 1936 All. 764 (DB).

COMPANIES LIMITED BY GUARANTEE

43. *Provision as to companies limited by guarantee.* (1) In the case of a company limited by guarantee and not having a share capital, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2) For the purpose of the provisions of this Ordinance relating to the memorandum of a company limited by guarantee and of sub-section (1), every provision in the memorandum or articles, or in any resolution, of a company limited by guarantee purporting to divide the undertaking of the company into shares or interests shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.

PROVISIONS RELATING TO CONVERSION OF PUBLIC COMPANY INTO PRIVATE COMPANY AND *VICE VERSA*, AND OTHER MATTERS

44. *Conversion of public company into private company.* No public company shall, except with the prior approval of the Authority in writing, and subject to such conditions as may be imposed by the Authority in this behalf, convert itself into a private company.

45. *Prospectus or statement in lieu of prospectus to be filed by private company on ceasing to be private company.* (1) If a company, being a private company, alters its articles in such a manner that they no longer include the provisions which, under clause (28) of sub-section (1) of section 2, are required to be included in the articles of a company in order to constitute it a private company, the company--

(*a*) shall as on the date of the alteration, cease to be a private company; and

(*b*) shall, within a period of fourteen days after the said date, file with the registrar either a prospectus or a statement in lieu of prospectus as specified in sub-section (2) or sub-section (3).

(2) Every prospectus filed under sub-section (1) shall state the matters specified in section 1 of Part I of the Second Schedule and set out the reports specified in section 2 of that Part, the said sections 1

and 2 shall have effect subject to the provisions contained in section 3 of that Part.

(3) Every statement in lieu of prospectus filed under sub-section (1) shall be in the form and contain the particulars set out in section 1 of Part III of the Second Schedule and, in the case mentioned in Section 2 of that Part, set out the reports specified therein, and the said sections 1 and 2 shall have effect subject to the provisions contained in section 3 of that Part.

(4) Where the persons making any such report as is referred to in sub-section (2) or sub-section (3) have made therein, or have, without giving the reasons indicated therein, made any such adjustments as are mentioned in clause 36 of Part I of the Second Schedule or clause 5 of section 3 of Part III of the Second Schedule, as the case may be, the prospectus or statement in lieu of prospectus filed as aforesaid shall have endorsed thereon or attached thereto a written statement, signed by those persons, setting out the adjustments and giving the reasons therefor.

(5) If default is made in complying with the provisions of any of the preceding sub-sections the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees and to a further fine not exceeding one hundred rupees for every day after the first during which the default continues.

(6) Where any prospectus or statement in lieu of prospectus filed under sub-section (1) includes any untrue statement, any person who authorised the filing of such prospectus or statement shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to ten thousand rupees, or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did, upto the time of the filing of the prospectus or statement, believe, that the statement was true.

(7) For the purposes of sub-section (6),

(*a*) a statement included in a prospectus or a statement in lieu of prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included; and

(*b*) where the omission from a prospectus or a statement in lieu of prospectus of any matter is calculated to mislead, the prospectus or statement in lieu of prospectus shall be

deemed, in respect of such omission, to be a prospectus or a statement in lieu of prospectus in which an untrue statement is included.

(8) For the purposes of sub-section (6) and clause (*a*) of sub-section (7), the expression "included" when used with reference to a prospectus or statement in lieu of prospectus, means included in the prospectus or statement in lieu of prospectus itself or contained in any report or memorandum appearing on the face thereof, or by reference incorporated therein.

1. Conversion of Private to Public Company. The section deals with the conversion of a private company into a public company and is based on the assumption that such a conversion can be made by merely altering the Articles.[17] When under section 45 a Private Limited Company is converted into a Public Limited Company the company's identity is not changed, but only its nature. A private Limited Company can be converted into a Public Limited Company by merely changing two or three of its Articles of Association, the original Articles of Association continuing to be operative.[18] Therefore any trade mark owned by the private company would vest in the public company into which it has been converted and the latter can institute proceedings for its infringement without applying under section 35 of the Trade Marks Act.[19]

46. *Consequence of default in complying with conditions constituting a company a private company.* Where the articles of a company include the provisions which, under clause (28) of sub-section (1) of section 2, are required to be included in the articles of a company in order to constitute it a private company, but default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemptions conferred on private companies by or under this Ordinance, and this Ordinance shall apply to the company as if it were not a private company:

Provided that the Authority, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other ground it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seem to the Authority just and expedient, order that the company be relieved from such consequences as aforesaid.

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17. AIR 1943 Pat. 278=22 Pat. 204 (DB).
18. AIR 1961 Bom. 292 (DB).
19. AIR 1964 Mys. 173 (DB).

CARRYING ON BUSINESS WITH LESS THAN THE LEGAL MINIMUM OF MEMBERS

47. *Liability for carrying on business with less than seven or, in the case of a private company, two members.* If at any time the number of members of a company is reduced, in the case of a private company, below two, or in the case of any other company, below seven and the company carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact it that is carrying on business with fewer than two members or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be sued therefor without joinder in the suit of any other member.

SERVICE AND AUTHENTICATION OF DOCUMENTS

48. *Service of documents on company.* A document may be served on a company or an officer thereof by sending it to the company or officer at the registered office of the company by post under a certificate of posting or by registered post, or by leaving it at the registered office of the company.

Synopsis

1. Scope.
2. Service on company.
3. Foreign Corporations.
4. Private Limited Company.

1. Scope. A clause in the articles of a company limiting the mode of sending a document to the company to one only of the three methods prescribed by the section cannot stand.[20]

2. Service on company. A company may be served through its director provided the service is made at the address of the Company. A service on a director at his residence is not valid service, although accepted by the director on behalf of the company.[21]

Service on Branch office. The service of a summons at the branch establishment of a company is not proper service.[1]

3. Foreign Corporations. In the case of foreign companies the place where the corporation carries on business means the principal place of business in

20. AIR 1958 Bom. 247.
21. 12 Bom. LR 739 (DB).
1. (1902) 1902-1 KB 91 (DB).

Pakistan.[2] In determining whether a foreign corporation can be served in Pakistan under Order 29, Rule 2, the only requirements are that there is a branch office and some sort of business, irrespective of its nature, is carried on in such office. If these two requirements are fulfilled then the service on the person in charge of such office of such company is sufficient service on the company.[3]

4. Private Limited Company. A letter of demand cannot be said to be not properly addressed by mere omission of the word "Private" in the name of a private limited company, if there is no other company of similar name at the address given.[4]

49. *Service of documents on registrar.* A document may be served on the registrar by sending it to him at his office by registered post, or by delivering it to him, or leaving it for him at his office, against an acknowledgment of receipt.

50. *Service of notice on members, etc.* (1) A notice may be given by a company to any member either personally or by sending it by post to him to his registered address or, if he has no registered address in Pakistan, to the address, if any, within Pakistan supplied by him to the company for the giving of notices to him.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

(3) If a member has no registered address in Pakistan, and has not supplied to the company an address within Pakistan for the giving of notices to him, a notice addressed to him or to the share-holders generally and advertised in a newspaper circulating in the Province or the part of Pakistan not forming part of a Province in which the registered office of the company is situate shall be deemed to be duly given to him on the day on which the advertisement appears:

Provided that in the case of a listed company such notice shall in addition to its being published as aforesaid be also published at least in one issue each of a daily newspaper in English language and a daily newspaper in Urdu language having circulation in the Province in which the stock exchange on which the company is listed is situate.

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2. AIR 1928 Sind 111 (DB).
3. PLD 1956 Kar. 832=PLR 1958 (1) WP 116.
4. AIR 1961 Cal. 439 (DB).

(4) A notice may be given by the company to the joint-holders of a share by giving the notice to the joint-holder named first in the register in respect of the share.

(5) A notice may be given by the company to the person entitled to a share in consequence of the death or insolvency of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title or representatives of the deceased, or assignees of the insolvent, or by any like description, at the address, if any, in Pakistan supplied for the purpose by the person claiming to be so entitled, or until such an address has been so supplied by giving the notice in any manner in which the same might have been given if the death or insolvency had not occurred.

(6) In addition to any other mode provided by this Ordinance for notice of any general meeting, notice of every general meeting shall be given in some manner hereinbefore authorised to--

(*a*) every member of the company except those members who, having no registered address within Pakistan, have not supplied to the company an address within Pakistan for the giving of notices to them;

(*b*) every person entitled to a share in consequence of the death or insolvency of a member who, but for his death or insolvency, would be entitled to receive, notice of the meeting; and

(*c*) the auditors of the company.

1. **Notice of general meeting of Company.** Notice of general meeting must specify place, day and hour of the meeting alongwith, a statement of the business to be transacted at such meeting. Such notice must be served in a manner provided in provisions of section 50, Companies Ordinance, 1984, although omission to give notice to or non-service of notice on any member would not invalidate proceedings at the meeting. Where a notice, in all material respects fulfills requirements of law and is also in consonance with articles of the Company, it is a valid notice.[5]

51. *Authentication of documents and proceedings.* Save as expressly provided in this Ordinance, a document or proceedings requiring authentication by a company may be signed by the chief executive or a director, secretary or other authorised officer of the company, and need not be under its common seal.

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5. 1991 MLD 2675=PLJ 1991 Kar. 399=NLR 1992 Civ. 371.

PART V

PROSPECTUS, ALLOTMENT, ISSUE AND TRANSFER OF SHARES AND DEBENTURES, DEPOSITS, ETC.

PROSPECTUS

52. *Prospectus to be dated.* A prospectus issued by or on behalf of a company shall, be dated and that date shall, unless the contrary is proved, be taken as the date of publication of the prospectus.

53. *Matters to be stated and reports to be set out in prospectus.* (1) Every prospectus issued--

(*a*) by or on behalf of a company, or

(*b*) by or on behalf of any person who has been engaged or interested in the formation of a company,

shall state the matters specified in section 1 of Part I of the Second Schedule and set out the reports specified in section 2 of that Part and the said sections 1 and 2 shall have effect subject to the provisions contained in section 3 of that Part.

(2) No prospectus shall be issued or an advertisement of a prospectus published in a newspaper less than seven days or more than thirty days before the subscription list, as specified in the prospectus, is due to open:

Provided that the Authority may for special reasons allow a prospectus to be issued or an advertisement of a prospectus to be published more than thirty days before the subscription list is due to open.

(3) If a prospectus is issued which does not comply with the provisions of sub-section (1) or sub-section (2), every person who is knowingly responsible for the issue of such prospectus shall be liable to a fine not exceeding ten thousand rupees and in the case of a continuing default to a further fine not exceeding two hundred rupees for every day from the day of the issue of the prospectus until a prospectus complying with the requirements aforesaid is issued and a copy thereof is filed with the registrar.

(4) A condition requiring or binding an applicant for shares in or debentures of a company to waive compliance with any of the requirements of this section, or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void.

(5) No one shall issue any form of application for shares in or debentures of a company, unless the form is accompanied by a prospectus which complies with the requirements of this section:

Provided that this sub-section shall not apply if it is shown that the form of application was issued either--

(*i*) in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures; or

(*ii*) in relation to share or debentures which were not offered to the public.

(6) If any person acts in contravention of the provisions of sub-section (5) he shall be liable to a fine not exceeding two thousand rupees.

(7) A director or other person responsible for the prospectus shall not incur any liability by reason of any non-compliance with or contravention, any of the requirements of this section, if--

(*a*) as regards any matter not disclosed, he proves that he had no knowledge thereof; or

(*b*) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part; or

(*c*) that non-compliance or contravention was in respect of matters which, in the opinion of the registrar or officer dealing with the case, were immaterial, or was otherwise such as ought, in the opinion of that registrar or officer, as the case may be, having regard to all the circumstances of the case, reasonably to be excused:

Provided that no director or other person shall incur any liability in respect of the failure to include in a prospectus a statement with respect to the matters specified in clause 18 of Part I of the Second Schedule, unless it is proved that he had knowledge of the matters not disclosed.

(8) This section shall not apply--

(*a*) to the issue to existing members or debenture-holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons; or

(*b*) to the issue of a prospectus or form of application relating to shares or debentures which are, or are to be, in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a stock exchange;

but, subject as aforesaid, this section shall apply to a prospectus or a form of application, whether issued on or with reference to the formation of a company or subsequently.

(9) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or under any other provision of this Ordinance..

Synopsis

1. More than one prospectus issued.
2. Prospectus, if determines rights of share-holders.
3. Misrepresentation in prospectus.
4. Omissions in prospectus.
5. Director's appointment, challenge to.
6. Prospectus not giving all particulars required by law.
7. Prospectus, if relevant for determining rights of share-holders.

1. More than one prospectus issued. Where one prospectus in English was filed in the office of the Registrar Joint Stock Companies. This prospectus fulfilled all the requirements of law. Subsequently they issued a prospectus in Bengali, substantially identical with the English prospectus, but which did not contain certain particulars required by Section 56 of the Companies Ordinance. A copy of this document was forwarded by a private person, to whom it had been sent, to the Registrar, who thereupon filed a complaint under Section 56 of the Ordinance before a Magistrate on the ground that the Bengali prospectus had been issued without having been filed before him. The Magistrate held that in effect the Bengali copy had been filed, that the offence was purely technical and that the omission was not culpable and acquitted the accused. The High Court held that the issued of the Bengali prospectus which did not in fact contain certain particulars specified in the English prospectus and required by law under Section 53 to be included in every prospectus issued on behalf of a company was in contravention of Section 56 and the accused were liable to be convicted under that section.[1]

2. Prospectus, if determines rights of share-holders. Ordinarily the prospectus is not relevant in any matter touching the contract between share-holder

1. AIR 1936 Cal. 33=27 Cri. L. Jour 379=160 Ind Cas. 829 (DB).

and the company. It is not the contract but only a matter which induces the contract. It would be relevant in an action for rescission based on misrepresentation or fraud or in an action for deceit, but not in a matter of contract. The contract proper is to be found in the application for allotment of shares and in the articles of association. But where the application for allotment stipulates that the shares are to be subject to certain special conditions found in the prospectus, that portion of the prospectus must be read into the contract.[2]

3. Misrepresentation in prospectus. Any contract that is induced by undue influence, misrepresentation or fraud is voidable at the option of the party who was led to enter into the contract by reason of undue influence, misrepresentation or fraud. This proposition though applicable to contracts relating to the purchase of shares of a company is subject to certain other rules of law, and one of those rules is that the repudiation or the avoidance of the contract by the share-holder must be within a reasonable time and before the commencement of proceedings for the winding up of the company.[3] However a person who signed the Memorandum of Association of a company and agreed to purchase a certain number of shares but subsequently, before registration of the company, asked the promoter to cancel his shares alleging that he had been induced to purchase shares by the misrepresentation of the promoter. It was held that he was bound by his agreement and could not rescind it.[4]

Damages for misrepresentation. If a document falling within the definition of a prospectus contains misstatements, the directors of the company would be liable to pay compensation under Section 59 to all who subscribe for shares on the faith of the prospectus for the loss they may sustain by reason of any misstatement contained therein and the fact that the prospectus did not comply with the requirements of Section 53 or that a copy of the same was not filed with the Registrar would not exempt the directors from the liability imposed by that Section.[5] But where misrepresentation is made by unauthorised person neither damages can be claimed nor can the contract for purchase of shares be rescinded. The Secretary of a company has no general authority to make a representation to induce persons to take shares in a company. Hence, a person who is induced to take shares in a company by a fraudulent misrepresentation not authorised by or known to the officers of the company entitled to make representations, or the Secretary of a company, is not entitled to maintain an action against the company for the rescission of the contract, or for damages for such misrepresentation.[6]

4. Omissions in prospectus. Under Section 53 a prospectus must contain certain particulars. But there is no penalty prescribed in the Ordinance for non-compliance with this provision of law. When the non-compliance involves misstatement of a material fact, there will be a right of rescission under the general

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2. (1946) 1946 NLJ 128.
3. AIR 1938 All. 193.
4. AIR 1937 Lah. 527.
5. AIR 1924 Mad. 641=152 Ind. Cas. 703.
6. AIR 1937 Lah. 644=173 Ind. Cas. 165 (DB).

law. But otherwise the omission of any of the particulars will not *per se* entitle a share-holder to rescission of his contract to take shares.[7]

5. Director's appointment, challenge to. It is not open to any outsider to challenge the appointment of a Director or contest a Director's authority to act on behalf of the company when the company had recognised a person to be a Director for a long time without repudiating his acts on any single occasion.[8]

6. Prospectus not giving all particulars required by law. Non-compliance with the provisions of the section does not involve any penalty. It will give only a right of rescission to the share-holder under the general law. Even that right will arise only when the omission amounts to a misstatement of a material fact and not otherwise.[9] Therefore the mere fact that contracts for shares upon an application issued, in contravention of the section cannot come within the words of section 112 does not necessarily lead to the conclusion that such contracts are void.[10]

7. **Prospectus, if relevant for determining rights of share-holders.** The terms of the prospectus, unless the application for allotment has stipulated that the shares are to be subject to those terms, are irrelevant for the purpose of deciding what were the terms of the contract between the company and its share-holders. But it may become relevant in an action for rescission based on misrepresentation or fraud or in an action for deceit.[11]

54. *Expert to be unconnected with formation or management of company.* A prospectus inviting persons to subscribe for shares in or debentures of a company shall not include a statement purporting to be made by an expert, unless the expert is a person who is not, and has not been, engaged or interested in the formation or promotion, or in the management, of the company.

55. *Expert's consent to issue of prospectus containing statement by him.* A prospectus inviting persons to subscribe for shares in or debentures of a company and including a statement purporting to be made by an expert shall not be issued, unless-

(*a*) he has given his written consent to the issue thereof with the statement included in the form and context in which it is included, and has not withdrawn such consent before the delivery of a copy of the prospectus for registration; and

(*b*) a statement that he has given and has not withdrawn his consent as aforesaid appears in the prospectus.

56. *Penalty and interpretation.* (1) If any prospectus is issued in contravention of Section 54 or 55, the company, and every person

7. AIR 1950 All. 508 (DB).
8. AIR 1915 Lah. 473=31 Ind. Cas. 595 (DB).
9. AIR 1950 All. 508=ILR (1951) 2 All. 228 (DB).
10. AIR 1953 Bom. 112.
11. 1946 Nag. L. Jour 128.

who is knowingly a party to the issue thereof, shall be punishable with fine not exceeding five thousand rupees.

(2) In Sections 54 and 55, the expression "expert" includes an engineer, a valuer, an accountant and every other person whose profession gives authority to a statement made by him.

57. *Approval, issue and registration of prospectus.* (1) No listed company, and no company which proposes to make an application to a stock exchange for listing of its [12][securities and no other person] shall issue, circulate or publish any prospectus or other document offering for subscription or publicly offering for sale any security unless approval of the Authority to its issue, circulation or publication has been obtained within the period of sixty days preceding the date of its issue.

[13][(2) The Authority may, while according approval under sub-section (1) impose such conditions as it may deem necessary.]

(3) No prospectus shall be issued by or on behalf of a company unless, on or before the date of its publication, there has been delivered to the registrar a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his agent authorised in writing, and having endorsed thereon or attached thereto:--

(*a*) any consent to the issue of the prospectus required by section 55 from any person as an expert; and

(*b*) in the case of a prospectus issued generally, also--

(*i*) a copy of every contract required by clause 16 of Part I of the Second Schedule to be specified in the prospectus, or in the case of a contract not reduced into writing, a memorandum giving full particulars thereof; and

(*ii*) where the persons making any report required by Part II of that Schedule have made therein, or have without giving the reasons, indicated therein, any such adjustments as are mentioned in clause 36 of Part I of that Schedule, a written statement signed by those persons setting out the adjustments and giving the reasons therefor.

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12. Subs. for "securities," by Act. 1 of 1995, S. 10 (1)(*a*).
13. Subs. by Act. 1 of 1995, S. 10 (1)(*b*).

(4) Every prospectus to which this section applies shall, on the face of it,-

(*a*) state that a copy has been delivered to the registrar as required by sub-section (3);

(*b*) specify any documents required by this section to be endorsed on or attached to the copy so delivered, or refer to statements included in the prospectus which specify those documents; and

(*c*) where application has been made, or is proposed to be made to a stock exchange for the listing of the security, state that such an application has been made or is proposed to be made.

(5) The registrar shall not Register a prospectus unless the requirements of sections 52, 53, 54 and 55 and this section have been complied with and the prospectus is accompanied by the consent in writing of the person, if any, named therein as the auditor, legal adviser, attorney, solicitor, banker or broker, being a member of a stock exchange, of the company, to act in that capacity.

(6) If a prospectus is issued, published or circulated without complying with, or in contravention of any provision of this section, the company, and every person who is knowingly a party to the issue, publication or circulation of the prospectus, shall be liable to a fine not exceeding ten thousand rupees and in the case of a continuing default to a further fine not exceeding two hundred rupees for every day from the date of issue, publication or circulation, as the case may be, of the prospectus, until a copy thereof complying with all the requirements of this section has been delivered to the registrar.

Synopsis

1. Prospectus.
2. Proceedings under sub-section (6).

1. **Prospectus.** The word "prospectus" in section 57 must be understood in the same sense in which it is defined in the definition section.[14] An advertisement in a newspaper offering to the public, some shares of the company for sale is "prospectus" as defined in the Ordinance.[15] Therefore where no prospectus has been filed with Registrar prior to the issue of the advertisement, it must be filed with the Registrar before issuing it.[16]

14. AIR 1934 Mad. 641.
15. AIR 1925 Cal. 714 (DB) (*Note*–After this case was decided by virture of the amendment of S. 2 (1)(14) in 1936 a trade advertisement which showed on its face a prospectus having already been filed before the Registrar was excluded from the scope of the prospectus).
16. AIR 1925 Cal. 714=52 Cal. 440=26 Cr. L. Jour 1061 (DB).

Two different prospectus issued. Where one prospectus in English was filed the office of the Registrar, Joint Stock Companies. This prospectus fulfilled all the requirements of law. Subsequently they issued a prospectus in Bengali, substantially identical with the English prospectus, but which did not contain certain particulars required by Section 53. A copy of this document was forwarded by a private person, to whom it had been sent, to the Registrar, who thereupon filed a complaint under Section 56 on the ground that the Bengali prospectus had been issued without having been filed before him. The Magistrate held that in effect the Bengali copy had been filed, that the offence was purely technical and that the omission was not culpable and acquitted the accused. The High Court held that the issue of the Bengali prospectus which did not in fact contain certain particulars specified in the English prospectus and required by law to be included in every prospectus issued on behalf of a company, was in contravention of Section 52 and the accused were liable to be convicted under Section 56.[17]

2. Proceedings under sub-section (6). Even when proceedings under sub-section (6) are initiated by a private person where the case is one of great importance in view of the scope of the Ordinance and in the interests of the community, the High Court can interfere when there is contravention of law.[18]

58. *Terms of contract mentioned in prospectus or statement in lieu of prospectus not to be varied.* A company shall not, at any time, vary the terms of contract referred to in the prospectus or a statement in lieu of prospectus except subject to the approval of, or except on authority given by the company in general meeting.

59. *Civil liability for mis-statements in prospectus.* (1) Subject to the provisions of this section, where a prospectus invites persons to subscribe for shares in or debentures of a company, the following persons shall be liable to pay compensation to every person who subscribes for or purchases any share or debentures on the faith of the prospectus for any loss or damage he may have sustained by reason of any untrue statement included therein, namely,--

(*a*) every person who is a director of the company at the time of the issue of the prospectus;

(*b*) every person who has authorised himself to be named and is named in the prospectus either as a director, or as having agreed to become a director, either immediately or after an interval of time;

(*c*) every person who is a promoter of the company; and

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17. AIR 1936 Cal. 33=37 Cr. L. Jour 379=160 Ind. Cas. 829 (DB).
18. AIR 1936 Cal. 33=37 Cri. L. Jour 379 (DB).

(*d*) every person who has given consent to the issue of the prospectus under Section 55 or sub-section (5) of Section 57:

Provided that where, under Section 55, the consent of a person is required to the issue of a prospectus and he has given that consent, or where, under sub-section (5) of Section 57, the consent of a person named in a prospectus is required and he has given that consent, he shall not, by reason of having given such consent, be liable under this sub-section as a person who has authorised the issue of the prospectus except in respect of an untrue statement, if any, purporting to be made by him as an expert.

(2) No person shall be liable under sub-section (1), if he proves:--

(*a*) that, having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent;

(*b*) that the prospectus was issued without his knowledge or consent, and that on becoming aware of it issue, he forthwith gave reasonable public notice that it was issued without his knowledge or consent;

(*c*) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent to the prospectus and gave reasonable public notice of the withdrawal and of the reason therefor; or

(*d*) that--

(*i*) as regards every untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, as the case may be, believe, that the statement was true; and

(*ii*) as regards every untrue statement purporting to be a statement by an expert or contained in what purports to be a copy of or an extract from a report or valuation of an expert, it was a correct and fair representation of the statement, or a correct copy of, or a correct and fair extract from, the report or valuation; and he had

reasonable ground to believe, and did up to the time of the issue of the prospectus believe, that the person making the statement was competent to make it and that person had given the consent required by section 55 to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration or, to the defendant's knowledge, before allotment thereunder; and

(*iii*) as regards every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement, or a correct copy of, or a correct and fair extract from, the document:

Provided that this sub-section not apply in the case of a person liable, by reason of his having given a consent required of him by section 55, as a person who has authorised the issue of the prospectus in respect of an untrue statement purporting to be made by him as an expert.

(3) A person who, apart from this sub-section would, under sub-section (1), be liable by reason of his having given a consent required of him by section 55, as a person who has authorised the issue of the prospectus in respect of an untrue statement purporting to be made by him as an expert, shall not be so liable, if he proves:--

(*a*) that, having given his consent under Section 55 to the issue of the prospectus, he withdrew it in writing before delivery of a copy of the prospectus for registration;

(*b*) that, after delivery of a copy of the prospectus for registration and before allotment thereunder, he, on becoming aware of the untrue statement, withdrew his consent in writing and gave reasonable public notice of the withdrawal and of the reason therefor; or

(*c*) that he was competent to make the statement and that he had reasonable ground to believe, and did up to the time of the allotment of shares or debentures believe, that the statement was true.

(4) Where--

(*a*) the prospectus specifies the name of a person as a director of the company, or as having agreed to become a director thereof, and he had not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof; or

(*b*) the consent of a person is required under section 55 to the issue of the prospectus and he either has not given that consent or has withdrawn it before the issue of the prospectus;

the directors of the company, excluding those without whose knowledge or consent the prospectus was issued, and every other person who authorsied the issue thereof, shall be liable to indemnify the person referred to in clause (*a*) or clause (*b*), as the case may be, against all damages, costs and expenses to which he may be made liable by reason of his name having been inserted in the prospectus or of the inclusion therein of a statement purporting to be made by him as an expert, as the case may be, or in defending himself against any suit or legal proceeding brought against him in respect thereof:

Provided that a person shall not be deemed for the purposes of this sub-section to have authorised the issue of a prospectus by reason only of his having given the consent required by section 55 to the inclusion therein of a statement purporting to be made by him as an expert.

(5) Every person who becomes liable to make any payment by virtue of this section may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the former person was, and the latter person was not, guilty of fraudulent misrepresentation.

(6) For the purposes of this section:--

(*a*) the expression "promoter" means a promoter who was a party to the preparation of prospectus or a portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company, and

(*b*) the expression "expert" has the same meaning as in section 55.

Synopsis

1. Director's liability for false statement.
2. Promoter's liability for false statement.
3. Promise to take shares, statement as to.

1. Director's liability for false statement. If a document satisfied the requirements of a prospectus according to the definition, in section 2 and contains a false statement the delinquent director is clearly liable under section 59. He cannot escape that liability on the plea that the document does not contain all the matters required to be stated by section 53 and that a copy of it has not been filed with the Registrar. Where the director who is sought to be made liable for a false statement therein admits that the managing director who issued it had the necessary authority to do so, it is immaterial to ascertain for the purpose of holding him liable under the section whether he himself saw it or not.[19]

2. Promoter's liability for false statement. A promoter is personally liable to third parties upon all contracts made on behalf of the intended company, until with their consent, the company takes over this liability. The mere fact that it has been constituted and registered, does not discharge the promoter.[20]

3. Promise to take shares, statement as to. In view of sub-section (1)(*a*) a statement in the prospectus that the promoters and their friends have promised to take shares of certain value cannot be held to be false unless it can be found that such a promise does not in fact exist. The non-existence of the promise cannot be inferred from the subsequent non-fulfilment of it by those who made it.[1]

60. *Criminal liability for mis-statements in prospectus.* (1) Where a prospectus includes any untrue statement, every person who signed or authorised the issue of the prospectus shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to ten thousand rupees, or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did up to the time of the issue of the prospectus believe, that the statement was true.

(2) A person shall not be deemed for the purposes of this section to have authorised the issue of the prospectus by reason only, of his having given:--

(*a*) the consent required by section 55 to the inclusion therein of a statement purporting to be made by him as an expert, or

(*b*) the consent required by sub-section (5) of section 57.

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19. AIR 1934 Mad. 641.
20. AIR 1961 MP 4 (DB).
1. AIR 1950 All. 508=ILR (1951) 2 All. 228 (DB).

61. *Document containing offer of shares or debentures for sale to be deemed prospectus.* (1) Where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company; and all enactments and rules of law as to the contents, filing and registration of a prospectus and as to liability in respect of statements in and omissions from a prospectus, or otherwise relating to a prospectus, shall apply with the modifications, specified in sub-sections (3), (4) and (5), and have effect accordingly, as if the shares or debentures had been offered to the public for subscription and as if persons accepting the offer in respect of any shares or debentures, where subscribers for those shares or debentures, but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statement contained in the document or otherwise in respect thereof.

(2) For the purposes of this Ordinance, it shall, unless the contrary is proved, be evidence that an allotment of, or an agreement to allot, shares or debentures was made with a view to the shares or debentures being offered for sale to the public if it is shown:--

(*a*) that an offer of the shares or debentures or of any of them for sale to the public was made within one year after the allotment or agreement to allot;

(*b*) that at the date when the offer was made; the whole of the consideration to be received by the company in respect of the shares or debentures had not been received by it; or

(*c*) that an offer of the shares or debentures or of any of them for sale to the public was made in pursuance of an understanding to which the company was directly or indirectly a party or a condition imposed by any authority in relation to the position, business or privileges of the company.

(3) For the purposes of this section, section 53 shall have effect as if it required a prospectus to state, in addition to the matters required by that section to be stated in a prospectus,--

(*a*) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates; and

(*b*) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected.

(4) For the purposes of this section, section 57 shall have effect as if the person making the offer were persons named in a prospectus as directors of a company.

(5) Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the document referred to in sub-section (1) is signed on behalf of the company or firm by two directors of the company or by not less than one-half of the partners in the firm, as the case may be; and any such director or partner may sign by his agent authorised in writing.

62. *Offer of shares or debentures for sale by certain persons.* (1) No person who holds more than ten per cent of the shares or debentures of a company shall offer for sale to the public any share or debenture of the company held by him except with the approval of the Authority.

(2) Any document by which an offer for sale to the public is made by any such person as is referred to in sub-section (1) shall, for all purposes, be deemed to be a prospectus issued by a company, and all enactments and rules of law as to the contents, filing and registration of a prospectus and as to the liability in respect of statements in and omissions from a prospectus, or otherwise relating to a prospectus, shall apply with the modifications specified in sub-sections (3) and (4), and have effect accordingly, but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of misstatements contained in the document or otherwise in respect thereof.

(3) For the purposes of this section, section 57 shall have effect as if the person making the offer were a person named in a prospectus as director of a company.

(4) Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the document referred to in sub-section (2) is signed on behalf of the company or firm, by two directors of the company or not less than one-half of the partners in the firm, as the case may be; and any such director or partner may sign by his agent authorised in writing.

[2][(5) A notice, circular, advertisement or other document soliciting bids, offers, proposals or tenders for sale of shares or other securities acquired in the course of normal business or for negotiating sale thereof or expressing an intention to disinvest such shares or other securities issued by a scheduled bank or a financial institution shall not be deemed to be a prospectus or an offer for sale to the public for the purposes of sections 61 and 62.]

1. Scope. Section 62 refers to 'Offer for sale to the public' of ten per cent of the shares of a company held by a person. Such offer to the public, by sub-section (2) is deemed to be a 'prospectus'. Therefore a sale is illegal and void by reason of non-compliance with the provisions of section 62 of the Companies Ordinance, 1984 which makes it mandatory to obtain the prior approval of the corporate law authority before selling more than 10% of the total shares of the Company.[3]

Sale by banks and financial institutions. Sub-section (5) creates an exemption of scheduled Banks and financial institutions from restrictions and prohibitions of sub-section (1) of S. 62. Therefore sale of shares by such institutions without permission of Authority therefore is not barred.[4]

[5][62A. *Issue of securities outside Pakistan.* No company shall, except with the prior approval of the Authority, issue any security outside Pakistan.]

63. *Interpretation of provisions relating to prospectus.* (1) For the purposes of the foregoing provisions relating to a prospectus,--

(*a*) a statement included in a prospectus shall be deemed to be untrue, if the statement is misleading in the form and context in which it is included; and

(*b*) where the omission from a prospectus of any matter is calculated to mislead, the prospectus shall be deemed, in respect of such omission, to be a prospectus in which an untrue statement is included.

(2) For the purposes of Sections 59 and 60 and clause (*a*) of sub-section (1) of this section, the expression "included", when used in reference to a prospectus, means included in the prospectus itself or contained in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith.

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2. Added by Ord. 57 of 1984, S. 7.
3. 1987 CLC 1919=PLJ 1988 Kar. 192=NLR 1992 UC 71.
4. 1987 CLC 1919=PLJ 1988 Kar. 192=NLR 1992 UC 71.
5. Inserted by Act 1 of 1995, S. 10(2).

Synopsis

1. Prospectus if determines rights of share-holders.
2. Misrepresentation in prospectus.
3. Omissions in prospectus.
4. Director's appointment, challenge to.

1. Prospectus, if determines rights of share-holders. Ordinarily the prospectus is not relevant in any matter touching the contract between share-holder and the company. It is not a contract but only a matter which induces a contract. It would be relevant in an action for rescission based on misrepresentation or fraud, or in an action for deceit, but not in a matter of contract. The contract proper is to be found in the application for allotment of shares and in the articles of association. But where the application for allotment stipulates that the shares are to be subject to certain special conditions found in the prospectus that portion of the prospectus, must be read into the contract.[6]

2. Misrepresentation in prospectus. Any contract that is induced by undue influence, misrepresentation or fraud is voidable at the option of the party who was led to enter into the contract by reason of undue influence, misrepresentation or fraud. This proposition though applicable to contracts relating to the purchase of shares of a company is subject to certain other rules of law, and one of those rules is that the repudiation or the avoidance of the contract by the share-holder must be within a reasonable time and before the commencement of proceedings for the winding up of the company.[7] However a person who signed the Memorandum of Association of a company and agreed to purchase a certain number of shares but subsequently, before registration of the company, asked the promoter to cancel his shares alleging that he had been induced to purchase shares by the misrepresentation of the promoter. It was held that he was bound by his agreement and could not rescind it.[8]

Damages for misrepresentation. If a document falling within the definition of a prospectus in section 2 contains misstatements, the directors of the company would be liable to pay compensation under section 59 to all who subscribe for shares on the faith of the prospectus for the loss they may sustain by reason of any misstatement contained therein and the facts that prospectus did not comply with the requirements of section 53 or that a copy of the same was not filed with the Registrar would not exempt the directors from the liability imposed by that section.[9] But where misrepresentation is made by an unauthorised person neither damages can be claimed nor can the contract for purchase of shares be rescinded. The Secretary of a company has no general authority to make a representation to induce persons to take shares in a company. Hence, a person who is induced to take shares in a company by a fraudulent misrepresentation not authorised by or known to the officers of the company, entitled to make representation, or the Secretary of a

6. (1946) 1946 NLJ 128.
7. AIR 1938 All. 193.
8. AIR 1937 Lah. 527.
9. AIR 1942 Mad. 641 = 152 Ind. Cas. 703.

company, is not entitled to maintain an action against the company for the rescission of the contract, or for damages for such misrepresentation.[10]

3. Omissions in prospectus. Under section 53 a prospectus must contain certain particulars. But there is no penalty prescribed in the Ordinance for non-compliance with this provision of law. When the non-compliance involves misstatement of a material fact, there will be a right of rescission under the general law. But otherwise the omission of any of the particulars will not *per se* entitle a share-holder to rescission of his contract to take shares.[11]

4. Director's appointment, challenge to. It is not open to an outsider to challenge the appointment of a Director or contest a Director's authority to act on behalf of the company when the company has recognised a person to be a Director for a long time without repudiating his acts on any single occasion.[12]

64. *Newspaper advertisement of prospectus.* Where any prospectus is published as a newspaper advertisement, it shall not be necessary in the advertisement to comply with the requirements of sub-clause (1) of clause I of section I of Part I of the Second Schedule in so far as the said provisions require the contents of the memorandum or the signatories thereto, or the number of shares subscribed for by them, to be specified.

65. *Construction of references to offering shares or debentures to the public, etc.* (1) Any reference in the Ordinance or in the articles of a company to offering of shares or debentures to the public, or to invitation to the public to subscribe for shares or debentures, shall, unless otherwise expressly provided in this Ordinance, include a reference to offering of shares or debentures to any section of the public or to invitation to any section of public to subscribe for shares or debentures, as the case may be.

Explanation. The term "section of the public" includes existing members or debenture-holders of the company or clients of the person issuing the prospectus.

(2) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) if the offer or invitation can properly be regarded, in all the circumstances--

(*a*) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or

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10. AIR 1937 Lah. 644=173 Ind. Cas. 165 (DB).
11. AIR 1950 All. 508 (DB).
12. AIR 1915 Lah. 473=31 Ind. Cas. 595 (DB).

(*b*) otherwise as being a domestic concern of the persons making and receiving the offer or invitation.

(3) Without prejudice to the generality of sub-section (2), a provision in a company's articles prohibiting invitations to the public to subscribe for shares or debentures shall not be taken as prohibiting the making to members or debenture holders of an invitation which can properly be regarded in the manner set forth in that sub-section.

(4) The provisions of this Ordinance relating to private companies shall be construed in accordance with the provisions contained in sub-sections (1) to (3).

1. **Scope.** In all cases the determination of the question of an offer being made to public depends upon the facts and language of the notice on the particular circumstances of each case. The word 'calculated' in C1. (*a*) of sub-section (2) suggests design, forethought or intention to accomplish a purpose. An offer made otherwise will not fall under its prohibition merely because it is followed by the result mentioned by it.[13]

Offering to selective persons. A company offering shares to selective persons cannot be said to extending an invitation to buy shares to the public. An offer of shares to an individual as such is not within the prohibition of the word 'public' as used in section 65.[14]

66. *Penalty for fraudulently inducing persons to invest money.* Any person who either by knowingly or recklessly making any statement, promise or forecast which is false, deceptive or misleading, or by any dishonest concealment of material facts, induces or attempts to induce another person to enter into, or to offer to enter into,--

(*a*) any agreement for, or with a view to, acquiring, disposing of, subscribing for, or underwriting shares or debentures; or

(*b*) any agreement the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of shares or debentures, or by reference to fluctuations in the value of shares or debentures;

shall be punishable with imprisonment of either description for a term which may extend to three years, or with fine which may extend to twenty thousand rupees, or with both.

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13. AIR 1959 Punj. 196.
14. AIR 1959 Punj. 196 (Offer by managing director of private company of shares to his own kith and kin is not an invitation to the public).

ALLOTMENT

67. *Application for, and allotment of, shares and debentures.* (1) No application for allotment of shares in and debentures of a company in pursuance of a prospectus shall be made for shares or debentures of less than such nominal amount as the Authority may, from time to time, specify, either generally or in a particular case.

(2) The Authority may specify the form of an application for subscription to shares in or debentures of a company which may, among other matters, contain such declarations or verifications as it may, in the public interest, deem necessary; and such form then shall form part of the prospectus.

(3) All certificates, statements and declarations made by the applicant shall be binding on him.

(4) An application for shares in or debentures of a company which is made in pursuance of a prospectus shall be irrevocable.

(5) Whoever contravenes the provisions of sub-section (1) or sub-section (2), or makes an incorrect statement, declaration or verification in the application for allotment of shares, shall be liable to a fine which may extend to ten thousand rupees.

68. *Restriction as to allotment.* (1) No allotment shall be made of any share capital of a company offered to the public subscription unless the amount stated in the prospectus as the minimum-amount which in the opinion of the directors must be raised by the issue of share capital in order to provide for the matters specified in clause 5 of section 1 of Part I of the Second Schedule has been subscribed, and the full amount thereof has been paid to and received in cash by the company.

(2) The amount referred to in sub-section (1) as the amount stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Ordinance referred to as the minimum subscription.

(3) All moneys received from applicants for shares shall be deposited and kept in a separate bank account in a scheduled bank until returned in accordance with the provision of sub-section (5) or until the certificate to commence business is obtained under section 146.

(4) The amount payable on application on each share shall be the full nominal amount of the share.

(5) If the conditions aforesaid have not been complied with on the expiration of forty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without surcharge, and, if any such money is not so repaid within fifty days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with surcharge at the rate of one and a half per cent for every month or part thereof from the expiration of the fiftieth day:

Provided that a director shall not be liable if he proves that the default in repayment of the money was not due to any misconduct or negligence on his part.

(6) Any condition purporting to require or bind any applicant for shares to waive compliance with any requirement of this section shall be void.

(7) This section, except sub-section (4) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

(8) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription, that is to say,--

(*a*) the amount, if any, fixed by the memorandum or articles and specified in the statement in lieu of prospectus as the minimum subscription referred to in sub-section (1) upon which the directors may proceed to allotment; or

(*b*) if no amount is so fixed and specified, the whole amount of the share capital other than that issued or agreed to be issued as paid up otherwise than in cash;

has been subscribed and the full nominal amount of each share payable in cash has been paid to and received by the company.

(9) Sub-section (8) shall not apply to a private company.

(10) In the event of any contravention of any provisions of this section, every promoter, director or other person knowingly responsible for such contravention shall be liable to a fine not exceeding ten thousand rupees and in the case of a continuing

contravention to a further fine not exceeding two hundred rupees for every day after the first during which the contravention continues.

(11) For the purpose of this section, the expression "promoter" has the same meaning as in section 59.

Synopsis

1. Applicability.
2. Allotment of shares.
3. Application for allotment.
4. Payment made for shares to be deposited in Scheduled Bank.
5. Subscriber to memorandum must pay in cash.
6. Non-compliance with section--effect.

1. Applicability. Provisions of section 68 expressly show that the entire section with all its sub-sections applies only to public companies.[15]

2. Allotment of shares. Allotment as such has not been defined in the Companies Ordinance. In the jurisprudence of Company Law allotment of shares has special meaning. It means division of entire share capital into definite shares each of a particular value and also of different classes and an assignment of such shares singly or numerously to different persons.[16] A company can allot to an applicant only unappropriated shares. Shares which are already appropriated to a person can be transferred only by that person and cannot be the subject-matter of allotment by the company.[17] The word "allotment" will not cover the case of re-issue of forfeited shares to other persons.[18]

Allotment by officers of company. An allotment of shares made by the secretaries and treasurers of a company, who under the articles have the general management of its affairs subject to the supervision of the directors is a valid allotment when there is no express provision in the articles for allotments to be made by the directors themselves.[19]

Cancellation of allotment. An allotment of a share once made cannot be cancelled by the company and re-allotted even to the same share-holders.[20]

Minors, allotment to. An allotment of fully paid-up-shares to minors is not void. There is no bar in law to minor acquiring or holding fully paid-up-shares inasmuch as no further obligations attach to the minors on such shares.[1]

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15. AIR 1951 Mad. 890=ILR 1952 Mad. 108 (DB).
16. AIR 1957 Cal. 438.
17. AIR 1937 Lah. 812 (DB).
18. AIR 1957 Cal. 438.
19. AIR 1915 Mad. 325 (DB).
20. AIR 1950 Bom. 149 (Hence the subsequent allotment and then non-payment of money thereunder cannot be made the foundation of a suit for the recovery of the amount due on the shares).
1. AIR 1959 Punj. 106.

3. Application for allotment. An application for shares need not necessarily be in writing. It can also be made orally.[2]

Application money must accompany application. The provisions of sub-section (3) are mandatory. Hence a company cannot allot shares on an application which is not accompanied by the application money.[3] The condition as to payment of application money on an application for shares applies to both first allotments as well as subsequent allotments.[4] However, it has been held in another case that the section does not forbid the directors from allotting shares to applicants who neglect to pay the application money in terms of the prospectus once the first allotment has been regularly made, although it may be that a provision in a prospectus empowering them to do this would be an infringement of the Ordinance.[5]

4. Payment made for shares to be deposited in Scheduled Bank. The auditor of a company is under a duty to mention in his report any deviation noticed by him with regard to the obligation imposed by the section to deposit the money received for shares in a Scheduled Bank. It is not in his power to accept an explanation given by the directors, for not having done so.[6]

5. Subscriber to memorandum must pay in cash. A subscriber to Memorandum of Association has to pay for his shares in cash, in spite of his agreement with the promoter that he should receive them for his legal services.[7]

6. Non-compliance with section--effect. The non-compliance with the provisions of the section does not render the contract for shares void. It only makes it voidable at the option of the allottee.[8]

69. *Statement in lieu of prospectus.* (1) A company having a share capital, which does not issue a prospectus on or with reference to its formation, or which has issued such a prospectus but has not proceeded to allot any of the shares offered to the public for subscription, shall not allot any of its shares or debentures unless, at least three days before the first allotment of either share or debenture, there has been delivered to the registrar for registration a statement in lieu of prospectus signed by every person who is named therein as a director or proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in section 1 of Part II of the Second Schedule and, in the cases mentioned in section 2 of that Part setting out the reports specified

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2. AIR 1956 Pepsu 98.
3. AIR 1936 Lah. 790 (DB)+AIR 1939 Nag. 225+AIR 1934 All. 855 (DB) (Directors making allotment in the absence of an application and allotment money are guilty of misfeasance).
4. AIR 1936 Lah. 790 (DB).
5. AIR 1940 Cal. 164=ILR (1939) 2 Cal. 512.
6. AIR 1954 Mad. 1080=1955 Cr.L.J. 1634 (DB).
7. AIR 1944 Mad. 322=ILR 1944 Mad. 796 (DB).
8. AIR 1953 Bom. 112.

therein, and the said sections 1 and 2 shall have effect subject to the provisions contained in section 3 of that Part.

(2) Every statement in lieu of prospectus delivered under sub-section (1), where the person making any such report as aforesaid have made therein, or have without giving the reasons indicated therein, made any such adjustments as are mentioned in clause 5 of Part II of the Second Schedule, shall have endorsed thereon or attached thereto a written statement signed by those persons, setting out the adjustments and giving the reasons thereof.

(3) This section shall not apply to a private company.

(4) If a company acts in contravention of sub-section (1) or sub-section (2), the company, and every officer of the company who wilfully authorises or permits the contravention, shall be liable to a fine not exceeding five thousand rupees and in the case of a continuing contravention with a further fine not exceeding one hundred rupees for every day after the first during which the contravention continues.

(5) Where a statement in lieu of prospectus delivered to the registrar under sub-section (1) includes any untrue statement, any person who signed or authorised the delivery of the statement in lieu of prospectus for registration shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to ten thousand rupees, or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did up to the time of the delivery for registration of the statement in lieu of prospectus believe, that the statement was true.

(6) For the purposes of this action,--

(a) a statement included in a statement in lieu of prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included; and

(b) where the omission from a statement in lieu of prospectus of any matter is calculated to mislead, the statement in lieu of prospectus shall be deemed, in respect of such omission, to be a statement in lieu of prospectus in which an untrue statement is included.

(7) For the purposes of sub-section (5) and clause (*a*) of sub-section (6), the expression "included", when used with reference to a statement in lieu of prospectus, means included in the statement in

lieu of prospectus itself or contained in any report or memorandum appearing on the face thereof, or by reference incorporated therein, or issued therewith.

70. *Effect of irregular allotment.* (1) An allotment made by a company to any applicant in contravention of the provisions of section 68 or 69 shall be voidable at the instance of the applicant within thirty days after the holding of the statutory meeting of the company and not later, or in any case where the company is not required to hold a statutory meeting or where the allotment is made after the holding of the statutory meeting, within thirty days after the date of the allotment, and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

(2) If any officer of a company knowingly contravenes of permits or authorises the contravention of any of the provisions of section 68 or 69 with respect to allotment, he shall, without prejudice to any other liability, be liable to compensate the company and the allottee respectively for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby:

Provided that proceedings to recover any such loss, damages or costs shall not be commenced after the expiration of two years from the date of the allotment.

Synopsis

1. Rescission of agreement to take shares.
2. *Ultra vires* issue of shares.
3. Winding up order, effect of.
4. Compensation for irregular allotment.

1. Rescission of agreement to take shares. A share-holder's contract to purchase shares is only voidable and not void on account of misrepresentation in the prospectus. But a share-holder has not unlimited time within which to rescind the contract. He must rescind it promptly, that is, within reasonable time of his becoming aware of the fraud giving him a right to rescind.[9] Repudiation of allotment in order to be effective must be made without any delay. The person should not gain time to find out if the company makes a profit or not and then to decide to accept the shares or refuse them. But mere delay in the absence of detriment to the interests of the company or its members or creditors and when there is no allegation of waiver or acquiescence against the allottee seeking to repudiate the allotment will not be considered sufficient to deny him the right.[10]

9. AIR 1950 All. 850=ILR (1951) 2 All. 228 (DB).
10. AIR 1956 Pepsu 98.

Notice of repudiation of contract. A notice of repudiation of allotment cannot be held to be ineffective and invalid merely because it did not set out the ground on which the repudiation was made.[11]

2. 'Ultra vires' issue of shares. Where an *ultra vires* issue of shares has been made, the subscribers are entitled to get their money back. But that cannot justify the claim of a person who has sold his shares, at a later date, to assert that the shares had not been lawfully issued or that there has been, so far as he is concerned, a total failure of consideration.[12]

3. Winding up order, effect of. An allottee in order to avoid the allotment of shares made to him should not only give a notice within the prescribed period of one month from the date of the statutory meeting but should also approach the Court within that time to have his name removed from the register of members. If he takes no steps within that period then a winding up order will debar him from coming to the Court for rectification of the register.[13]

4. Compensation for irregular allotment. Directors who make an allotment of shares in the absence of an application and the allotment monies, are liable to compensate the company for losses arising as a consequence.[14]

71. *Repayment of money received for shares not allotted.* (1) Where a company issues any invitation to the public to subscribe for its shares or other securities, the company shall take a decision within ten days of the closure of the subscription lists as to what applications have been accepted or are successful and refund the money in the case of the unaccepted or unsuccessful applications within ten days of the date of such decision.

(2) If the refund required by sub-section (1) is not made within the time specified therein, the directors of the company shall be jointly and severally liable to repay that money with surcharge at the rate of one and a half per cent for every month or part thereof from the expiration of the fifteenth day and, in addition, to a fine not exceeding five thousand rupees and in the case of a continuing offence to a further fine not exceeding one hundred rupees for every day after the said fifteenth day on which the default continues:

Provided that a director shall not be liable if he proves that the default in making the refund was not due to any misconduct or negligence on his part.

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11. AIR 1953 Bom. 417=ILR 1954 Bom. 1.
12. AIR 1949 PC 51.
13. AIR 1953 Bom. 417=ILR 1954 Bom. 1.
14. AIR 1934 All. 855 (DB).

(3) Any condition purporting to require or bind any applicant for shares or other securities to waive any requirement of this section shall be void.

72. *Allotment of shares and debentures to be dealt in on stock exchange.* (1) Where a prospectus, whether issued generally or not, states that application has been or will be made for permission for the shares or debentures offered thereby to be dealt in on any stock exchange, any allotment made on an application in pursuance of the prospectus shall, whenever made, be void if the permission has not been applied for before the seventh day after the first issue of the prospectus or if the permission has not been granted before the expiration of twenty-one days from the date of the closing of the subscription lists or such longer period not exceeding forty-two days as may, within the said twenty-one days, be notified to the applicant for permission by or on behalf of the stock exchange.

(2) Where the permission has not been applied for as aforesaid, or has not been granted as aforesaid, the company shall forthwith repay without surcharge all money receive from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the directors of the company shall be jointly and severally liable to repay that money from the expiration of the eighth day together with surcharge at the rate of one and a half per cent for every month or part thereof from the expiration of the eighth day and, in addition, to a fine not exceeding five thousand rupees and in the case of a continuing offence to a further fine of one hundred rupees for every day after the said eighth day on which the default continues:

Provided that a director shall not be liable if he proves that the default in the repayment of the money was not due to any misconduct or negligence on his part.

(3) All moneys received as aforesaid shall be deposited and kept in a separate bank account in a schedule bank so long as the company may become liable to repay it under sub-section (2); and, if default is made in complying with this sub-section, the company and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to a fine not exceeding five thousand rupees.

(4) Any condition purporting to require or bind any applicant for shares or debentures to waive compliance with any requirement of this section shall be void.

(5) For the purposes of this section, permission shall not be deemed to be refused if it is intimated that the application for it, though not at present granted, will be given further consideration.

(6) This section shall have effect--

(*a*) in relation to any shares or debentures agreed to be taken by a person underwriting an offer thereof by a prospectus as if he had applied therefor in pursuance of the prospectus; and

(*b*) in relation to a prospectus offering shares for sale with the following modifications, that is to say,--

(*i*) reference to sale shall be substituted for reference to allotment;

(*ii*) the person by whom the offer is made and not the company, shall be liable under sub-section (2) to repay the money received from applicant, and reference to the company's liability under that sub-section shall be construed accordingly; and

(*iii*) for the reference in sub-section (3) to the company and every officer of the company there shall be substituted a reference to any person by or through whom the offer is made and who knowingly and wilfully authorises or permits the default.

73. *Return as to allotments.* (1) Whenever a company having a share capital makes any allotment of its shares, the company shall, within thirty days thereafter,--

(*a*) file with the registrar a return of the allotment, stating the number and nominal amount of the shares comprised in the allotment, the name, father's name or in the case of a married woman, her husband's or deceased husband's name, address and occupation of each allottee, and the amount paid on each share; and

(*b*) in the case of shares allotted as paid up otherwise than in cash, produce for the inspection and examination of the registrar a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and file with the registrar copies verified in the prescribed manner of all such contracts and a return stating the number

and nominal amount of shares so allotted, the amount to be treated as paid-up, and consideration for which they have been allotted; and

(*c*) file with the registrar--

(*i*) in the case of bonus shares, a return stating the number and nominal amount of such shares comprised in the allotment and the name, father's name and in the case of a married woman, her husband's or deceased husband's name, address and occupation of each allottee together with a copy of the resolution authorising the issue of such shares;

(*ii*) in the case of issue of shares at a discount, a copy of the resolution passed by the company authorising such issue together with a copy of the order of the Aurthority sanctioning the issue, and where the maximum rate of discount exceeds ten per cent, a copy of the order of the Authority permitting the issue at the higher percentage.

Explanation.-- Shares shall not be deemed to have been paid for in cash except to the extent that the company shall actually have received cash therefor at the time of, or subsequent to, the agreement to issue the shares, and where shares are issued to a person who has sold or agreed to sell property or rendered or agreed to render services to the company, or to persons nominated by him, the amount of any payment made for the property or services shall be deducted from the amount of any cash payment made for the shares and only the balance if any, shall be treated as having been paid in cash for such shares, notwithstanding any bill; of exchange or cheques or other securities for money.

(2) Where such a contract as is mentioned in clause (*a*) of sub-section (1) is not reduced to writing, the company shall, within thirty days after the allotment, file with the registrar the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing, and these particulars shall be deemed to be an instrument within the meaning of the Stamp Act, 1899 (II of 1899), and the registrar may

as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section 31 of that Act.

(3) If the registrar is satisfied that in the circumstances of any particular case the period of thirty days specified in sub-sections (1) and (2) for compliance with the requirements of this section is inadequate, he may extend that period as he thinks fit, and, if he does so, the provisions of sub-sections (1) and (2) shall have effect in that particular case as if for the said period of thirty days the extended period allowed by the registrar were substituted.

(4) If default is made in complying with any requirement of this section, the company and every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues.

[15][(5) This section shall apply *mutatis mutandis,* to shares which are allotted or issued or deemed to have been issued to a scheduled bank or a financial institution in pursuance of any obligation of a company to issue shares to such scheduled bank or financial institution:

Provided that where default is made by a company in filing a return of allotment in respect of the shares referred to in this sub-section, the scheduled bank or the financial institution to whom shares have been allotted or issued or deemed to have been issued may file a return of allotment in respect of such shares with the registrar together with such documents as may be specified by the Authority in this behalf, and such return of allotment shall be deemed to have been filed by the company itself and the scheduled bank or the financial institution shall be entitled to recover from the company the amount of any fee properly paid by it to the registrar in respect of the return.]

Synopsis

1. Allotment of shares.
2. Payment for shares.
3. Stamp duty.
4. Default in filing statement.
5. Mistake in statement.
6. Allotment of forfeited shares.

1. Allotment of shares. Ratification by the Board of Directors, of a contract not in writing and entered into by the company before it was registered, is not a contract in writing constituting the title of the allottee within the meaning of section 73(1)(*b*).[16]

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15. Add. by Ord. 57 of 1984, S. 7.
16. AIR 1926 Mad. 380=27 Cr. L. Jour 700.

2. Payment for shares. Where some bonus has accrued to the share-holders of the company and as such the amount of money by way of accrual of bonus has become due to the share-holders who consequently agreed to purchase shares in lieu of the said bonus. This fact clearly shows that it is a simple question of adjustment of accounts and not a payment for the shares otherwise than in cash. This payment is certainly in cash. Therefore the company was not required to file the vendor's agreement along with the return of allotment of shares as required under the provisions of section 73.[17]

Allotment in lieu of surrender of debenture deeds. Where a debenture holder entitled under the debenture deed to surrender his debenture in lieu of a fully paid ordinary share forming part of or ranking *pari passu* with shares of original capital obtains such a share in exchange for his debenture there is an allotment of share" as fully paid up otherwise than in cash" within the meaning of section 73(1)(*b*).[18]

No payment in cash for shares. An arrangement under which a person was to receive shares on which company itself was to meet the calls was held to be one which in effect was to give fully paid-up shares for which no cash was to be paid at all and therefore would not be valid unless it had been made in writing and filed with the Registrar.[19]

3. Stamp duty. An agreement to allot fully paid shares in consideration of the allotment of shares by another company is not a conveyance. Hence the particulars filed under the section must be regarded as duly stamped where stamp duty has been paid on it as on agreement.[20]

Agreement to transfer property in future. Where contract of which particulars are given in the statement is only an agreement to transfer property in the future, the particulars thereof cannot be treated as a conveyance.[1]

Agreement to allot shares in return for transfer of property. There was nothing in section 73 which required the same stamp duty payable on a conveyance to be levied on an agreement of allotment of shares by a company in future.[2] Where there was an allotment of shares in consideration of written agreement as regards transfer of business, and a return of allotment was accompanied by an agreement forming the consideration for allotment. It was held that the agreement was not a conveyance and the fact that it was a written one was immaterial and so it was not liable to stamp duty as a conveyance.[3] Particulars furnished under section 73, when they are of an oral agreement for the allotment of fully paid-up shares to the vendor, in consideration of the sale of movable properties to the companies which preceded the completion of its title to them by delivery, must be held to be duly

17. 1971 DLC 155=22 DLR 793.
18. AIR 1918 Mad. 580=41 Mad. 307 (DB).
19. AIR 1914 Lah. 483 (DB).
20. AIR 1937 Mad. 259=ILR 1937 Mad. 559 (FB).
1. AIR 1934 Lah. 530=15 Lah. 501 (SB).
2. AIR 1932 All. 291 (SB).
3. AIR 1934 Lah. 533=15 Lah. 509 (SB).

stamped if the duty chargeable under Art. 5(*c*) of Sch. 1-B to the Stamp Act has been paid on them.[4]

4. Default in filing statement. The date of acceptance of an application for shares by notice to the applicants is the true legal date of allotment of shares and for the purpose of the return required under section 73, the time prescribed thereunder must be counted from this date.[5] The directors and managers of company must furnish to the Registrar the return of allotment of shares and failure on the ground of ignorance of law is no excuse. However, if the default is unintentional, heavy penalty ought not to be exacted.[6]

Delay in filing statement. The Registrar should file the documents referred to in the section even though they might have been presented after the expiry of time fixed for their presentation and the officer of the company presenting the documents should be informed that unless within certain time the applicant obtains an order from the Court extending the time for filing to the time when he actually did file, he will be liable to be prosecuted.[7] Where the person entrusted with the affairs of the company by inadvertence and due to want of legal knowledge of the consequences filed return of allotment of shares some six months beyond the date fixed by it. It was found that no ulterior motive existed for the delay. The Court condoned the delay and time for acceptance of document was extended by Registrar.[8]

Effect of default. Failure to file a statement under the section does not result in the allotment of fully paid shares becoming invalid and making the allottee a contributory.[9]

5. Mistake in statement. A clerical mistake cannot nullify the fact of filing the return of allotment under this provision in due time. Where a clerical mistake was committed in filing the return and that has been duly clarified in pursuance of a letter written by the Registrar to the petitioner Company. The return was held to have been filed.[10]

6. Allotment of forfeited shares. In Company Law allotment means the appropriation, out of the previously unappropriated capital of a company, of a certain number of shares to a person. Till such allotment the shares do not exist as such. It is on allotment in this sense that the shares come into existence. It would be impossible to give to the word "allotment" a different meaning.[11] When a share is forfeited and re-issued it is not "allotment" in the sense of appropriation of the share out of the authorised and unappropriated capital so as to bring the shares into existence. Quite-clearly, the view well accepted in company Courts has been that

4. AIR 1959 All. 595=ILR (1959) 1 All. 652 (SB).
5. 1970 DLR 494.
6. AIR 1919 Lah. 361=20 Cri. L. Jour 725 (DB).
7. AIR 1930 Cal. 146=56 Cal. 976.
8. 1969 DLR 16=21 DLR 413.
9. AIR 1926 All. 524=48 All. 503 (DB).
10. 1971 DLC 155=22 DLR 793.
11. AIR 1964 SC 250.

issue of the forfeited shares was not allotment of them but only a sale. No question of filing any return in respect of such re-issue arises.[12]

CERTIFICATE OF SHARES AND DEBENTURES

74. *Limitation of time for issue of certificates.* (1) Every company shall, within ninety days after the allotment of any of its shares, debentures or debenture stock, and within forty-five days after the application for the registration of the transfer of any such shares, debentures or debenture stock, complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, and unless sent by post or delivered to the person entitled thereto, within that period, shall give notice of this fact to the shareholders or debenture-holders, as the case may be, immediately thereafter in the manner prescribed, unless the conditions of issue of the shares, debentures or debenture stock otherwise provide.

Explanation. The expression "transfer", for the purposes of this sub-section, means a transfer duly stamped and otherwise valid, and does not include such a transfer as the company is for any reason entitled to refuse to register and does not register.

(2) If default is made in complying with the requirements of sub-section (1) the company, and every officer of the company who is knowingly a party to the default, shall be liable to a fine not exceeding one hundred rupees for every day during which the default continues.

1. Scope. A share certificate amounts to a declaration by the company to all the world that the person in whose name it has been made out is a share-holder in the company and that it could be acted upon in the sale and transfer of the shares. Anyone acting upon the faith of those certificates but who subsequently finds that the vendor has really no title can bring an action against the company to recover damages for the loss of the shares.[13] A company will be estopped from denying the truth of the statement it has made in a share certificate that the person mentioned by it therein is the owner of a specified number of shares. In case the company cannot give him those shares it must pay him damages.[14]

Non-issuance of certificate--liability. In case of default in issuance of share certificate under the repealed Companies Act of 1913, Court was empowered to impose fine for default committed but not so under section 476 of the Ordinance.

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12. AIR 1964 SC 250+AIR 1957 Cal. 438.
13. (1868) 2 Q.B. 584.
14. (1891) 1891-2 WB 614.

Application for imposition of penalty under section 74 of the Ordinance could not be entertained.[15]

75. *Issue of duplicate certificates.* (1) A duplicate of a certificate of shares, debentures or debenture stock issued under section 74 shall be issued by the company within forty-five days from the date of application if the original--

(*a*) is proved to have been lost or destroyed, or

(*b*) having been defaced or mutilated or torn is surrendered to the company.

(2) The company, after making such inquiry as to the loss, destruction, defacement or mutilation of the original, as it may deem fit to make, shall, subject to such terms and conditions, if any, as it may consider necessary, issue the duplicate:

Provided that the company shall not charge fee exceeding the sum prescribed and the actual expenses incurred on such inquiry.

(3) If the company for any reasonable cause is unable to issue duplicate certificate, it shall notify this fact, alongwith the reasons within thirty days from the date of the application to the applicant.

(4) If default is made in complying with the requirements of this section, the company and every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five hundred rupees.

(5) If a company with intend to defraud, renews a certificate or issues a duplicate thereof, the company shall be punishable with fine which may extend to twenty thousand rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both.

TRANSFER OF SHARES AND DEBENTURES

76. *Transfer of shares and debentures.* (1) An application for registration of the transfer of shares and debentures in a company may be made either by the transferor or the transferee, and subject to the provisions of this section, the company shall enter in its register of members the name of the transferee in the same manner and

15. 1987 CLC 2079.

subject to the same conditions as if the application was made by the transferee:

Provided that the company shall not register a transfer of shares or debentures unless proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company alongwith the scrip.

(2) Where a transfer deed is lost destroyed or mutilated before its lodgement, the company may on an application made by the transferee and bearing the stamp required by an instrument of transfer, register the transfer of shares or debentures if the transferee proves to the satisfaction of the directors of the company that the transfer deed duly executed has been lost, destroyed or mutilated:

Provided that before registering the transfer of shares or debentures the company may demand such indemnity as it may think fit.

(3) All references to the shares or debentures in this section, shall in case of a company not having share capital, be deemed to be references to interest of the members in the company.

(4) Every company shall maintain at its registered office a register of transfers of shares and debentures made from time to time and such register shall be open to inspection by the members and supply of copy thereof in the manner stated in section 150.

(5) Nothing in sub-section (1) shall prevent a company from registering as share-holder or debenture-holder a person to whom the right to any share or debenture of the company has been transmitted by operation of law.

(6) In the case of a public company, a financial institution duly approved by the Authority may be appointed as the transfer agent on behalf of the company.

(7) If a company makes default in complying with any of the provisions of sub-section (1) to (4), it shall be liable to a fine not exceeding five thousand rupees and every officer of the company who is knowingly or wilfully a party to such default shall be liable to a like penalty.

Synopsis

1. Transfer of shares.
2. Restriction on transfer.
3. Application for registration of transfer.

1. Transfer of shares. Transfer of shares and debentures in a company is based upon the act of parties and is different from a transmission of shares.[15]

Transfer of shares of a party cannot be effected without consent of the owner of such shares. Where transfer is effected without his consent and he has apprehension that defendant company might by passing special resolutions, irrevocably affect his rights; plaintiff would be adequately protected if defendant company was required to give notice to plaintiff of intention to pass any special resolution well in time to enable plaintiff to take such steps as might be considered by it to be necessary to protect its interests.[17]

Illegal transfer of shares. Where transfer of shares of plaintiff was found prima facie unauthorised, illegal and in violation of provisions of Companies Ordinance, 1984 and Memorandum and Articles of Association of Company, plaintiff had made out fit case for grant of injunction to restrain defendants from exercising voting right in respect of plaintiff's shares. Balance of convenience was in favour of grant of injunction to plaintiff. He was, however, not allowed to exercise his right of vote relating to shares in question, whereas defendants were also not permitted to exercise right of vote in respect of those shares.[18]

Transfer by modes other than those provided in section. This section is not exhaustive. It concerns only two kinds of transfer of shares, and debentures, *viz.*, under an instrument of transfer duly stamped and executed by the transferor and the transferee and transmission by operation of law. There are other instances of a person acquiring title to the shares of a company. Thus, a joint Hindu family can own shares and at the time of separation there has to be an actual partition of shares among the members thereof. Further, under special circumstances, a transfer of shares may be effected by an agreement between the parties.[19]

Sale by Court. The word 'transfer' which indicates that it is brought about by the will or act of the person in whom the property is vested would be inappropriate to describe a sale of shares *in invitum* by the Court.[20]

2. Restriction on transfer. A limited company formed with articles which confer no lien on fully paid-up shares and which allow them to be transferred

16. AIR 1949 Lah. 6+AIR 1945 Mad. 743.
17. 1993 MLD 42.
18. 1997 CLC 514.
19. AIR 1965 All. 135 (DB).
20. AIR 1949 Lah. 6+AIR 1928 Mad. 571 (DB)+AIR 1952 Cal. 58 (DB).

without any fetter can, generally speaking, alter those articles by special resolution to impose a lien and restrictions on the transfer of those shares by members indebted to the company.[21]

3. Application for registration of transfer. Section 76 of the Ordinance provides that an application for registration of the transfer of shares and debentures in a company may be made either by the transferor or the transferee and subject to the provisions of this section, the Company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application was made by the transferee.[1] A company is under no obligation, in the absence of an application for the registration of a transfer of shares, to enter the name of the transferee in its book and hence the transferee who has not complied with the requirements of the Ordinance cannot complain that the company has defaulted in its duty. The knowledge of the officers of the transfer is absolutely irrelevant in the matter.[2]

The transferee has no rights till registration takes place. The completion of the transaction by having the name entered in the register of members relates it back to the time when the transfer was first made.[3]

4. Instrument of transfer necessary. Proviso to section 76(1) provides that the company shall not register a transfer of shares or debentures unless proper instrument of transfer, duly stamped and executed by the transferor and the transferee has been delivered to the company along with the scrip.[4] A transfer of shares effected without executing an instrument of transfer is a nullity.[5] Some of the requirements of the transfer of shares are contained in section 76 and companies are entitled to lay down their own procedure in the articles of association. But article conferring upon the directors the power to transfer shares without an instrument of transfer are *ultra vires* of proviso to sub-section (1) of section 76.[6] Therefore it is not lawful for a company to register a transfer when there is no instrument of transfer.[7] Therefore a company's plea that plaintiff had transferred specified number of shares in favour of defendant share-holder could not be established due to non-production of any deed of transfer.[8]

5. Execution of instrument of transfer. The deed of transfer of shares must be executed by both transferor and transferee.[9] Where the articles of the company require both transferor and transferee to execute the instrument of transfer, a

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21. 1900-1 Ch. 656.
1. 1991 MLD 203.
2. 23 Com. Cas. 168 (Mad).
3. AIR 1959 SC 775.
4. 1991 MLD 203.
5. PLD 1977 Kar. 814.
6. PLD 1967 Kar. 144+AIR 1941 Mad. 354+AIR 1959 Cal. 715 (Sale in enforcement of lien is not the same as the sale of forfeited shares. It amounts to a transfer of shares and is therefore governed by S. 34).
7. AIR 1958 Assam 86 (DB).
8. 1993 MLD 42.
9. AIR 1923 Mad. 241=45 Mad. 537 (DB).

transfer executed by the former only cannot pass title.[10] But the sale so affected would be binding on the transferor and the transferee.[11]

Court sale. A share transfer certificate executed by the Presiding Officer of the Court under Order 21, Rule 30, Civil P.C. is sufficient to entitle the auction-purchaser of the shares to obtain mutation of his name in the company's register. In the case of Court sale the existence of an instrument of transfer duly stamped and executed by both transferor and transferee is not necessary.[12]

Instrument properly executed not presented to company. Non-compliance with the requirement to present an instrument of transfer executed by both transferor and transferee renders the transfer one to which the company cannot give effect and the fact that the lapse is due to an honest mistake on the part of the parties is absolutely irrelevant.[13]

6. Blank transfer. The transaction of sale (or mortgage) of fully paid-up shares of public companies quoted on the Stock Exchange accompanied by transfer forms in blank executed only by a transferor, is well-known to Company Law and is extensively practised and acted upon in the share markets in Pakistan as in other countries.[14] In such a case the purchaser as subsequent holder, in possession of the blank transfer forms and the share certificates became the prima facie owner thereof. He has the authority and the right to fill in the blanks in the transfer forms and present the same for registration along with the share certificates.[15] The transferee in that case gets both legal and equitable title and he can be filling in the blank ask for the registration of his name in the books of the company and his right thereto cannot be defeated either by the registered owner or by any person deriving title from such owner.[16] Where the shares are bought in open market with blank transfer forms duly executed by the registered holders, the ultimate purchaser filling up his name in the form has got the right to have his name put on the share register.[17] It must however be noted that in such cases the blank transfer deeds should have been signed in token of transfer of shares. If there are circumstances which show that no transfer had been effected in fact, the transfer cannot be registered. Thus where although the share scrips and blank transfer deed signed by the seller of the shares are handed over they are accompanied by a letter which asked the purchaser to pay a price which he considered just and reasonable and that the purchaser was under no obligation to purchase the shares; it was held that there was only an offer to sell by the seller which he could revoke before the purchaser accepted the offer by fixing a price and paid it.[18]

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10. AIR 1953 Nag. 187=ILR 1953 Nag. 106 (DB).
11. AIR 1957 Mad.702.
12. AIR 1952 Cal. 58=ILR (1953) 1 Cal 1 (DB).
13. AIR 1957 Mad. 702=ILR 1957 Mad. 1058.
14. PLJ 1978 Kar. 74=NLR 1978 Civ. 211=PLD 1978 Kar. 95 (DB).
15. PLJ 1978 Kar. 74=NLR 1978 Civ 211=PLD 1978 Kar. 95 (DB).
16. PLD 1954 Lah. 745+AIR 1956 Pat. 32 (DB)+27 Com Cas 65 (Punj)+AIR 1953 Cal. 526+AIR 1942 Cal. 461.
17. NLR 1978 Civ. 211=PLD 1978 Kar. 95=PLJ 1978 Kar. 74 (DB)+57 Cal. WN 102.
18. 28 Com Cas 29 (Punj).

Unstamped transfer forms. It is immaterial that the blank transfer forms were not stamped at the time of their transfer, for the practice is that they are stamped before presenting the forms for registration to the company by the ultimate holder who desires to have them registered in his name.[19]

Duty of buyer. The buyer of shares with blank transfer-deeds have a statutory duty to have the shares registered in his name in order to become the full owner thereof. Delivery of shares along with blank transfer-deed passes not the property in the shares, but a title legal and equitable which enables the holder to vest himself with the shares without risk of his right being repudiated by any other person deriving title from the registered owner. Such buyer has a further duty to the transferee or the public at large, not to leave or allow the share to remain with blank transfer-deeds duly executed by the registered holder, with a person thereby enabling him to deal with them and such duty is broken by leaving the property in such condition.[20]

Death of transferor who signed blank transfer-deeds. The transferee in cases of transfers of shares in blank has the right to fill in the necessary particulars including his own name as transferee and the date of the transfer after the death of the original transferor.[1]

Bona fide purchaser for value of shares with blank transfer-deeds. There may arise cases when the true owner may be estopped from asserting his title against a bona fide purchaser for value without notice of any defect in title although from whom such bona fide purchaser acquires such title has no title to pass. This has been recognised on the ground of mercantile convenience. Whether a bona fide purchaser for value acquires a good title from one who has no title to the same and the true owner is estopped from denying such title depends on the facts of each particular case. So far as true owner being estopped from asserting his title, such an estoppel may arise by negligence, by conduct or by representation.[2]

Signature of transferee necessary for registration. A blank transfer deed signed by the transferor may be sufficient to pass title to the transferee but it must be, before the transfer can be registered by the company, signed by the transferee in token of the transfer deed to him.[3]

7. **Instrument must be duly stamped.** The obligation to deliver a duly stamped transfer deed is upon the transferee and not upon the company.[4] A breach of the condition requiring an instrument of transfer to be duly stamped debars the company from registering the transfer.[5] A company in registering transfer where the instrument of transfer is not duly stamped breaks the law.[6] To refuse to register a transfer of shares when the instrument of transfer is not duly stamped, the company

19. PLJ 1978 Kar. 74=NLR 1978 Civ. 211=PLD 1978 Kar. 95 (DB).
20. AIR 1965 Cal. 355.
1. PLD 1954 Lah. 745=PLR 1955 Lah. 111 (DB)=AIR 1942 Cal. 461.
2. AIR 1965 Cal. 355.
3. AIR 1957 Mad. 702=ILR 1957 Mad. 1058.
4. AIR 1957 Cal. 709 (DB).
5. AIR 1954 Nag. 293 (DB)+AIR 1957 Cal. 709 (DB).
6. AIR 1945 Bom. 149 (DB)+AIR 1955 Bom. 79 (SB).

has not to seek its power from any particular article of its association. Its power in that behalf is statutory.[7]

Stamp must be cancelled. A company cannot legally give effect to a transfer where the stamps on the deed are not cancelled, inasmush as the statute is mandatory.[8]

Registration of not duly stamped instrument--effect. Where the instrument of transfer is not properly stamped before or at the time of its execution, the requirements of law are not satisfied by a subsequent affixation of the stamp to the deed.[9] The proceedings before the company for registering a transfer of shares are not judicial proceedings and therefore the fact that the company did not demand proper stamp on the instrument of transfer when it was presented to it will not attract the provisions of section 36, Stamp Act to save the registration, if made by the company.[10] An instrument of transfer of shares not duly stamped cannot be given effect to merely because it can be validated under proviso (*a*) of section 35, Stamp Act of 1899.[11] But it must be noted that non-payment of stamp duty on instrument incorporating transfer of shares, cannot invalidate transfer itself. Non-payment of stamp duty at best authorises Company to refuse to register transfer of shares but transaction of transfer and its legal effect would remain intact.[12]

There is no liability under the Companies Act or under the Stamp Act on the company for the payment of the proper stamp duty upon an instrument of transfer which it improperly registers.[13]

8. Production of share certificates. As share-certificates are 'goods' within the meaning of the Sale of Goods Act and shares could be sold by mere delivery of the certificates the company will be running a great risk if the production of the certificates is not insisted upon before registering the transfer.[14] Therefore non-fulfilment of the condition relating to the delivery of an instrument of transfer together with the scrip debars the company from registering the transfer.[15] The fact that the share certificates were with a pledgee and the person claiming to be the transferee of the shares failed to produce them with the transfer deed disentitles him to be registered.[16]

9. Rights of transferor after registration of transfer. When the shares are sold and vendee's name is registered in the company's record the vendor is not entitled to a decree against the company for proportionate dividend in spite of a private agreement between the vendor and the vendee.[17]

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7. AIR 1957 Cal. 709 (DB).
8. 28 Com Cas 29 (Punj)+AIR 1961 Cal. 527 (DB).
9. AIR 1957 Cal. 709 (DB).
10. AIR 1954 Nag. 293=ILR 1954 Nag. 392 (DB).
11. AIR 1954 Nag. 293=ILR 1954 Nag. 392 (DB).
12. NLR 1988 TD 71.
13. AIR 1955 Bom. 79=ILR 1955 Bom. 1074 (SB).
14. 52 Mys. HCR 345 (DB).
15. AIR 1954 Nag. 293=ILR 1954 Nag. 392 (DB).
16. 28 Com Cas 29 (Punj).
17. AIR 1941 All. 47=ILR 1945 All. 15.

Illegal transfer of shares. Where transfer of shares of plaintiff was found prima facie unauthorised, illegal and in violation of provisions of Companies Ordinance, 1984 and Memorandum and Articles of Association of Company, plaintiff had made out fit case for grant of injunction to restrain defendants from exercising voting right in respect of plaintiff's shares. Balance of convenience was in favour of grant of injunction to plaintiff. He was, however, not allowed to exercise his right of vote relating to shares in question, whereas defendants were also not permitted to exercise right of vote in respect of those shares.[18]

'Ultra vires' issue of shares. Where a share-holder transferred her shares to a third party who was recognised as the new holder by the Company and his name was brought on the record of the company as a member. It later on transpired that the issue of shares was *ultra vires* and the first holder brought a claim against the company for the refund of her money because she had not been paid any consideration for her money. It was held that it was idle to suggest that one who had parted with her shares for value could at a later date (it might be against the wish and against the interest of her transferee) challenge the validity of the issue and succeeding in that challenge claim that she had received no value for the shares and that there was a total failure of consideration.[19]

Transfer of shares without payment of price by transferee. As between a buyer and seller of shares, the buyer is entitled to all dividends declared after the date of the contract for sale unless otherwise arranged. The transferee cannot claim to retain a fair measure of the profit earned or the expense saved by reason of the price being unpaid without denying the vendor a correlative equity and ignoring the quality and character of the relief which he has sought. In this case the parties agreed that the buyer should pay interest at the unpaid purchase price at the rate of 4½%.[20]

Where transfer has been effected and price of shares had not been paid when the dividend accrued on them and the transferee prayed that it be paid to him. It was held that the transferee as the transferee of the beneficial interest in them could have controlled the exercise by the owner of the right to vote, because in such a case the legal owner becomes a trustee not only of the dividends but also of the right to vote of property annexed to the shares.[21]

10. Non-registration--effect. A transfer unless recorded and recognised in strict accordance with the law does not bind the company.[1] Until a transfer of shares is registered the transferor continues to be the legal owner of the shares and after his death the same right inheres in his heirs and they would be competent to obtain letters of administration in respect of the shares.[2] But after the transfer of the shares the transferor must hold the shares, till the name of the transferee is put on the register of the company, as trustee for the transferee to the extent necessary to

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18. 1997 CLC 514.
19. PLD 1948 PC 96.
20. PLD 1949 PC 305.
21. PLD 1954 Lah. 745 (DB) (*Rel.* AIR 1942 Cal. 461+ILR 50 Bom LR 46).
1. AIR 1958 Assam 86 (DB).
2. AIR 1959 SC 775+AIR 1954 Nag. 293 (DB)+45 Bom. L R 46.

satisfy the demands of section 94 of the Trusts Act of 1882.[3] Therefore in such a case where an *ultra vires* issue of shares has been made, the subscribers are entitled to get their money back, but this does not justify the claim of one, who has sold her shares, at a later date to assert that they have not been lawfully issued, much less to assert contrary to the plain fact, that there has been so far as she was concerned, a total failure of consideration.[4]

Payment for shares. In the absence of the transfer of shares in the name of the transferee the liability of the original share-holder for the unpaid share money continues.[5]

Dividend, payment of. Until the transferee's name is entered in the register, the dividends on the shares are also payable to the transferor for he is deemed to be the holder of the shares until the entry is made.[6] But the transferor receives the dividend only as a trustee for the transferee.[7] However, the company cannot be sued for damages by the transferee on the ground that because there was some delay on the part of the company in giving recognition to the transfer the dividend had been paid out to the transferor and that he is unable to recover it from him.[8] Where there was a dispute relating to specified number of shares, dividends of disputed shares were ordered to be deposited in Court, pending disposal of suit.[9]

Remedy of transferee. The non-registration of the transferee's name on the book of the company does not affect the transferee's right to obtain a declaration that as between himself and the transferor and persons claiming under the transferor, he has become the owner of the shares.[10]

11. Improper registration--effect. Unless the recognition of a transfer was given at a meeting of the directors with the necessary quorum by a vote of directors who were under no disqualification, the transfer will not bind the company.[11] A transfer of shares can be effected only with the approval of the Board of Directors; hence the approval of the transfer by a secretary of the company having no authority from the Directors,[12] or by a sub-committee which had no such legal status does not relieve the transferor of his liability as a share-holder.[13] But the other view is that as the law does not prescribe the consequences or does not lay down penalty for non-compliance of section76, the provision can be considered to be directory and not mandatory. It is true that there has to be substantial compliance of a provision which is merely directory; but in cases not strictly covered by the provision the authority can deviate from that rule and take a decision which is equitable and fair to both the parties. When the provision of section 76 are not

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3. PLD 1954 Lah. 745 (DB)+AIR 1953 SC 385+45 Bom. L R 46.
4. PLD 1948 PC 96.
5. AIR 1960 Bom. 516.
6. AIR 1959 SC 775+AIR 1936 Bom. 24=60 Bom. 297.
7. PLD 1954 Lah. 745=PLR 1955 Lah. 111 (DB).
8. AIR 1936 Lah. 208.
9. 1993 MLD 42.
10. 52 Mys. HCR 345 (DB).
11. AIR 1927 Lah. 797 (DB).
12. (1905) 22 TLR 27 (In this case Directors refused to recognize the transfer).
13. AIR 1915 Lah. 320.

mandatory and the company appears to have acted in good faith, its action in making alteration in the register of members giving effect to transfer of shares by agreement of parties cannot be said to be illegal and *ab initio* void.[14] It has been held in a Burma case that where a transferee complied with all the necessary formalities there is no duty on his part to see that the company had carried out its part in registering the transfer in strict accordance with the Articles of Association. Where according to Articles of Association two directors were to decide the registration of transfer of shares, simply because one only did it, the registration was not invalid.[15]

12. Priority of transfer. As between two persons claiming title to shares in a company which are registered in the name of a third person, priority of title prevails unless the later claimant can show that as between himself and the company he had acquired the full status of a share-holder by the transfer to him having been recognised by the company before it received the notice of the first claimant's claim.[16]

Court sale. On confirmation of Court sale and issue of order under Order 21, Rule 79, Civil P.C. no further steps are required to be taken by the Court for completing the sale of shares. All that remains for the company is to signify or to withhold its assent to the transfer. The auction-purchaser has therefore priority over the private transferee from the share-holder who has not got the assignment in the manner required by law and is thus merely a holder of an equitable contract.[17]

13. Firm cannot be registered as transferee. The Companies Ord. does not contemplate the registration of the name of a firm as holder of its shares, but only individuals or other legal entities can be so registered.[18]

14. Transmission of shares. The expression 'transmission' is appropriate to indicate assignment effected by some agency other than the transferor.[19] It indicates a devolution by law.[20] Thus the sale of shares *in-invitum* by the Court could more aptly be described as a transmission of shares than as a transfer.[1]

Transmission by operation of law. "Transmission by operation of law" covers those cases where a person or authority acquires an interest in the property, by operation of law, without any voluntary act on his part.[2]

Effect of transmission. In the case of transmission of shares they continue to be subject to the original liabilities and if there was any lien on the shares for any sums due, the lien would subsist notwithstanding the devolution of the shares.[3]

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14. AIR 1965 All. 135 (DB).
15. 6 Low Bur Rul 152.
16. 36 Bom. 334.
17. AIR 1923 Mad 241=45 Mad 537 (DB).
18. AIR 1944 Oudh 318.
19. AIR 1928 Mad. 571 (DB).
20. AIR 1949 Lah. 6+AIR 1952 Cal. 58 (DB)+AIR 1928 Mad. 571 (DB).
1. AIR 1949 Lah. 6+AIR 1952 Cal. 58 (DB)+AIR 1943 Mad. 743.
2. AIR 1965 All. 135 (DB).
3. AIR 1943 Mad. 743.

Registration on transmission by law. Where the Articles of Association of a limited company give absolute and unfettered discretion to directors to register the transfer of a share to any person and the articles do not provide for transmission by virtue of section 26 and Table A, Regulation 12, the Board of Directors have the same power even in the case of transmission as they have in the case of transfer *inter vivos*.[4]

77. *Directors not to refuse transfer of shares.* The directors of a company shall not refuse to transfer any fully paid shares or debentures unless the transfer deed is, for any reason, defective or invalid:

Provided that the company shall within thirty days from the date on which the instrument of transfer was lodged with it notify the defect or invalidity to the transferee who shall, after the removal of such defect or invalidity, be entitled to relodge the transfer deed with the company:

Provided further that the provisions of this section shall, in relation to a private company, be subject to such limitations and restrictions as may have been imposed by the articles of such company.

Synopsis

1. Power to refuse registration.
2. Refusal to register should be bona fide.
3. Undesirability of transferee.
4. Damages, liability for.
5. Transmission of shares by operation of law.

1. Power to refuse registration. Section 77 was not invalid on the ground that it interfered with a citizen's right of property by recognising the right of a private company to have a clause in the articles giving it absolute discretion to register or not to register a transfer of shares. The recognition of such a right in the company was justifiable because it was necessary for the well-being of companies and as the basis of contract between the company and its share-holders.[5]

Power must be conferred by Article. The directors can have no discretionary power to refuse to register a transfer unless the Articles of Association reserve to them such power.[6] The Directors cannot go beyond the power so conferred on them. Thus where, under the articles, the company had a first and paramount lien only on shares other than fully paid up shares and it could refuse to register any transfer of shares while the share-holder executing the transfer was indebted to the

4. AIR 1957 Orissa 203+AIR 1956 Nag. 20.
5. AIR 1957 Mad. 702=ILR 1957 Mad 1058 (DB).
6. (1900) 22 All. 410.

company. It could not refuse to register the transfer of fully paid-up shares by an indebted share-holder since it had no lien over fully paid-up shares.[7]

Where the article conferring absolute and uncontrolled discretion to the directors in the matter of refusing to register a transfer does not limit the discretionary power to any particular kind of cases, such as where the transferee is not a member or he is a person who cannot be approved, the directors are bound to exercise the discretion only in a bona fide manner without being subject to any other consideration.[8] It has been held that directors should refuse registration of transfer of shares when the company is insolvent though winding up has not commenced.[9]

Discretion should be exercised without delay. The discretion to refuse a proposed transfer should be exercised at the earliest opportunity.[10]

Reasons for refusal. Where absolute power to refuse to register a transfer is given to the directors by the articles they are not bound to assign any reason for their refusal to register.[11]

Where under the articles the directors have a discretion to refuse to register transfer without disclosing their reasons, the Court will not interfere with their exercise of that discretion in the absence of evidence to the effect that they did not act reasonably and bona fide.[12] Where, however, an article confers power on the directors to refuse to register a transfer without assigning reasons either on the ground that the transferee does not meet with their approval or on the ground that the transferor was indebted to the company, the directors, when refusing to register a transfer, must state under which particular ground they are doing so, although they are not bound to say why they do it.[13]

Cancellation of Registration. The Directors after communicating their acceptance of a transfer and agreement to register the same cannot alter their decision.[14] Where the company overlooking the fact that they had lien on the shares, registered transfer of the shares by the share-holders to the mortgagee but subsequently discovering their mistake attempted to rectify it by refusing to give effect to the transfer of those shares by the mortgagee to the purchasers. It was held that the reason for the refusal was arbitrary and unjustified.[15]

2. Refusal to register should be bona fide. The power vested in the board of directors of a company by its articles, which gave them an absolute and uncontrolled discretion, to register a transfer of shares or not, is a fiduciary power. They must exercise the power bona fide in the interests of the company.[16] A refusal

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7. AIR 1934 Mad. 476=57 Mad 955 (DB).
8. 1942-1 All E R 542.
9. AIR 1915 Lah. 320.
10. AIR 1949 Lah. 6+57 Cal W N 102.
11. AIR 1943 Mad. 743+AIR 1955 Mad. 665 (DB).
12. 1936-4 All E R 554.
13. (1926) 95 L J Ch. 542.
14. AIR 1949 Lah. 6.
15. 6 Low Bur Rul 152.
16. AIR 1957 Orissa 203+AIR 1943 Mad. 743+(1900) 22 All. 410.

which is oppressive, capricious, corrupt or mala fide or not in the interests of the company would not pass the test of "discretion".[17] Where petitioners were lawful owners of shares in question which had been purchased through Stock Exchange. Any claim adverse to claim of petitioners had not been filed and there was no other contesting claimant before Court except petitioners. Transfer of shares was being denied on sole ground that applications for registration of transfer of shares had not been lodged on or before specified date notified by Managing Director of respondent-company. It was held that objection of respondent that petitioners' claim was barred by time and it was not acceptable. Technical objections raised by respondents without any sound foundation were not tenable in dispensing complete justice to parties and technicalities should not be looked into in such cases. Petitioners' claim for transfer of specified shares of respondent-company was accepted.[18]

Presumption as to good faith. Where under the articles the directors are not bound to give reasons for declining to register a transfer, their refusal of registration, even when no reasons are assigned, would be presumed to be reasonable and bona fide, unless there is evidence to the contrary.[19] Therefore where the directors in exercise of the discretion given to them by the articles refused to register a transfer, the onus is on the party who alleged that the discretion was not exercised bona fide to prove the allegation.[20]

Mala fide, proof of. The person challenging the bona fides of the directors in refusing to register a transfer must positively prove his contention. It cannot be inferred lightly. Thus the fact that there is reason to believe that at some stage the directors thought of assigning an untrue reasons for their decision not to register a transfer cannot justify the conclusion that their decision is mala fide when actually that reason had been never communicated and also had not been mentioned in the resolution refusing to register the transfer.[1] Similarly the facts that the particular director was cornering the shares of the company or that the other directors of the company are indebted to that director cannot show the mala fides of the directors in their refusal to register the transfer of certain shares. The cornering being permitted by law cannot indicate the mala fides of that director in the matter of the refusal or that the other directors who were indebted were influenced by him to refuse the registration in order that it may aid in his attempt to acquire the shares himself. The evidence that in one particular case the directors' refusal to register a transfer was not bona fide is not admissible to show that the refusal in a subsequent case also was mala fide.[2]

3. Undesirability of transferee. The article which gives power to the board of directors to decline the registration of transfer of shares in case they did not approve of the transferee does not entitle the directors to refuse to register the name of a transferee for some objection, which has nothing to do with the transferee

17. AIR 1957 Cal. 709 (DB)+6 Low Bur Rul 152+(1900) 22 All. 410.
18. 1997 MLD 2155.
19. AIR 1944 Oudh 318+33 Bom L R 18+(1926) 95 L J Ch 542.
20. (1926) 95 L J Ch 542.
1. AIR 1957 Cal. 709 (DB).
2. AIR 1957 Cal. 709 (DB).

personally.[3] Absence of bona fides on the part of directors is established when it is shown that their rejection of a transfer application is not based on a personal disapproval of the transferee.[4] But the fact that the transferee is of such a character as would throw the company into confusion and that he is not a desirable person are valid reasons for refusing the registration of the transfer in his favour.[5]

Transferee not agreeing with policy of Directors. The directors cannot legitimately refuse to register transfers where their disapproval of the transferees is based on the consideration that they would act in conjunction with a prominent share-holder who distrusted the management and opposed it. The refusal for such a reason would be an exercise of the fiduciary discretionary power in an arbitrary and unjustifiable manner for a collateral purpose namely the safeguarding of the directors' personal interest and not the interests of the company.[6] For the same reason the directors cannot under their discretionary power refuse to register a transfer for some reason like that the transferee declined to pledge himself to a particular line of action as to the mode of management of the company in the future or because they believe although with some apparent reason that the transferee entertains different views as to the management of the company.[7]

Approval of transferee by majority of share-holders. The Directors have discretion in refusing to register a share-holder and they are not bound to exercise the discretion in conformity with the wishes of the majority of the share-holders. Where they have exercised the discretion bona fide the fact that the majority of share-holders approve the transferee is no ground for coming to a conclusion that the refusal of the directors to register the transfer is not bona fide.[8]

4. Damages, liability for. An improper refusal by the company to register the transfer of certain shares as their holder amounts to a breach of duty and in respect of that breach of duty an action at law to recover damages will lie.[9] Therefore a transferee, whose name the company arbitrarily refused to put on the register, can recover damages from the company on the basis of the fall in market price from the date of the refusal until the date of suit. Even if he is not able to prove any loss sustained by him by such refusal he is entitled to recover nominal damages on the ground of the breach of its legal obligations to him by the company.[10] However a slight delay in registering a transfer does not render the company liable to damages to the transferee who has been unable to recover dividend paid into the hands of his transferor as a registered share-holder.[11]

5. Transmission of shares by operation of law. Where the Articles of a company which has adopted Regulations 8 to 13 of Table A confer absolute and

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3. 16 Bom. 80+AIR 1957 Orissa 203+AIR 1950 Mad. 725 (DB)+(1900) 22 All. 410.
4. AIR 1950 Mad 725 (DB)+AIR 1943 Mad 743 (Shares devolving on person by operation of law).
5. AIR 1955 Mad. 665=ILR 1956 Mad. 686 (DB).
6. (1900) 22 All. 410.
7. 16 Bom. 80.
8. AIR 1941 All. 360=ILR 1941 All. 671.
9. 1898-1 Ch 618.
10. AIR 1943 Mad. 743.
11. AIR 1936 Lah. 207.

uncontrolled discretion on the directors to refuse to register a transfer of shares the directors have the same power even in the case of a transmission of shares by operation of law.[12] Therefore it is in the discretion of the company to recognise or not a transfer whether it is private or by Court auction.[13]

78. *Notice of refusal to transfer.* (1) If a company refuses to register a transfer of any shares or debentures, the company shall, within thirty days after the date on which the instrument of transfer was lodged with the company, send to the transferee notice of the refusal indicating reasons for such refusal.

(2) If default is made in complying with section 77 or this section, the company and every officer of the company who is a party to the default shall be liable to a fine not exceeding two thousand rupees and to a further fine not exceeding fifty rupees for every day after first during which the default continues.

79. *Transfer to successor-in-interest.* The transfer of shares or debentures from a deceased member or holder to his lawful nominee successor-in-interest shall be made on application by such nominee successor duly supported by a document evidencing nomination or lawful award of the relevant property to such nominee or successor and thereupon the nominee or successor shall be entered as a member:

Provided that the company may, on furnishing of a suitable indemnity by such nominee or successor, proceed to transfer the security in his name and enter him in the register of members.

80. *Transfer to nominee of a deceased member.* (1) Notwithstanding anything contained in any other law for the time being in force or in any disposition by a member of a company of his interest represented by the shares held by him a member of the company, a person may on acquiring interest in a company as member, represented by shares, at any time after acquisition of such interest deposit with the company a nomination conferring on one or more persons the right to acquire the interest in the shares therein specified in the event of his death:

Provided that, where a member nominates more than one person, he shall specify in the nomination the extent of right conferred upon each of the nominees, so however that the number of shares therein specified are possible of ascertainment in whole numbers.

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12. AIR 1956 Nag. 20=ILR 1955 Nag. 1016+AIR 1957 Orissa 203.
13. AIR 1923 Mad. 241=45 Mad. 537 (DB).

(2) Where any nomination, duly made and deposited with the company as aforesaid, purports to confer upon any person the right to receive the whole or any divisible part of the interest therein mentioned, the said person shall, on the death of the member, become entitled, to the exclusion of all other persons, to become the holder of the shares or the part thereof, as the case may be, and on receipt of proof of the death of the member alongwith the relative scrips, the transmission of the said shares shall be registered in favour of the nominee to the extent of his interest unless--

(*a*) such nomination is at any time varied by another nomination made and deposited before the death of the member in like manner or expressly cancelled by notice in writing to the company; or

(*b*) such nomination at any time becomes invalid by reason of the happening of some contingency specified therein:

and if the said person predeceases the member, the nomination shall, so far as it relates to the right conferred upon the said person, become void and of no effect:

Provided that where provision has been duly made in the nomination conferring upon some other person such right instead of the person deceased, such right shall, upon the decease as aforesaid of the said person, pass to such other person.

(3) The person to be nominated as aforesaid shall not be a person other than the following relatives of the member, namely, a spouse, father, mother, brother, sister and son or daughter, including a step or adopted child.

(4) The nomination as aforesaid shall in no way prejudice the right of the member making the nomination to transfer, dispose of or otherwise deal in the shares owned by him during his lifetime and shall have effect in respect of the shares owned by the said member on the day of his death.

81. *Transfer by nominee or legal representative.* A transfer of the shares or debentures or other interest of a deceased member of a company made by his nominee or legal representative shall, although the nominee or legal representative is not himself a member, be as valid if as he had been a member at the time of execution of the instrument of transfer.

COMMISSION, DISCOUNT, PREMIUM AND REDEEMABLE PREFERENCE SHARES

82. *Power to pay certain commissions, and prohibition of payment of other commissions discounts, etc.* (1) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in or debenture of company, or procuring or agreeing to procure subscription, whether absolute or conditional, for any shares in or debentures of the company if--

(*a*) the payment of the commission is authorised by the articles;

(*b*) the commission paid or agreed to be paid does not exceed such rate per cent of amount as may generally or in a particular case be fixed by the Authority; and

(*c*) the amount or rate per cent of the commission paid or agreed to be paid is--

(*i*) in the case of shares or debentures offered to the public for subscription, disclosed in the prospectus; or

(*ii*) in the case of shares or debentures not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and delivered before the payment of the commission to the registrar for registration and, where a circular or notice, not being a prospectus, inviting subscription for the shares or debentures, is issued, also disclosed in that circular or notice; and

(*d*) the number of shares or debentures which persons have agreed for a commission to subscribe absolutely is disclosed in the manner aforesaid.

(2) Save as aforesaid and save as provided in S. 84, no company shall allot any of its shares or debentures, or apply any of its moneys either directly or indirectly, in payment of any commission, discount or allowances, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in or debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares

in or debentures of the company, whether the shares, debentures or money be so allotted or applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise.

(3) Nothing in this section shall effect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, but brokerage shall not in any case exceed one per cent of the price at which shares or debentures issued have been actually and not merely sold through the broker or shall be paid at not more than such other rate per cent as may from time to time be specified by the Authority, generally or in a particular case.

(4) A vendor, promoter, or other person who receives payment in shares, debentures or money from a company shall have and shall be deemed always to have had power to apply any part of the shares, debentures or money so received in payment of any commission the payment of which, if made directly by the company, would have been legal under this section.

(5) If default is made in complying with the provisions of this section, the company and every officer of the company who knowingly and wilfully is in default shall:--

(*a*) for non-compliance with the provisions of clause (*b*) of sub-section (1), be liable to a fine not exceeding two thousand rupees;

(*b*) for non-compliance with the provisions of clause (*c*) or clause (*d*) of that sub-section, be liable to a fine not exceeding one thousand rupees; and

(*c*) for non-compliance with any other provision of this section, be liable to a fine not exceeding five hundred rupees.

Synopsis

1. Scope.
2. Brokerage.
3. Payment for shares out of commission.

1. Scope. Sub-section (1) of the section is both an enabling and a restrictive provision inasmuch as it enables the companies to pay commission on shares and debentures and at the same time restricts and regulates the quantum of the commissions.[14] The section in permitting the company to pay commission does not

14. AIR 1958 Bom. 491 = ILR 1958 Bom. 250 (DB).

compel it to pay it out of the capital, commission can be paid out of profits also subject to the limits prescribed in the section.[15]

2. **Brokerage.** Payment by a company of brokerage to brokers for placing its shares with other persons is legitimate.[16]

3. **Payment for shares out of commission.** An agreement by a company with its sole contractor for supply of materials to grant him certain shares of payment on the allotment money, the balance to be recovered in cash or from value of goods supplied was held not to contravene the provisions of section 82.[17]

83. *Application of premium received on issue of shares.* (1) Where a company issues shares at a premium, whether in cash or otherwise, a sum equal to the aggregate amount or the value of the premiums on those shares shall be transferred to an account, to be called "the share premium account"; and the provisions of this Ordinance relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the share premium account were paid-up capital of the company.

(2) The share premium account may, notwithstanding anything contained in sub-section (1), be applied by the company--

(*a*) in writing off the preliminary expenses of the company;

(*b*) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;

(*c*) in providing for the premium payable on the redemption of any redeemable preference shares or debentures of the company; or

(*d*) in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

(3) Where a company has, before the commencement of this Ordinance, issued any shares at a premium, this section shall apply as if the shares had been issued after such commencement:

Provided that any part of the premium which has been so applied that it does not at the commencement of this Ordinance form an identifiable part of the company's reserves within the meaning of the Fourth Schedule or the Fifth Schedule shall be disregarded in determining the sum to be included in the share premium account.

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15. AIR 1962 SC 1543 + AIR 1958 Bom. 491 (DB).
16. AIR 1932 PC 212.
17. AIR 1932 PC 240 = 54 All. 827 = 60 Ind App. 1.

84. *Power to issue shares at a discount.* (1) Subject to the provisions of this section, it shall be lawful for a company to issue shares in the company at a discount:

Provided that--

(*a*) the issue of the shares at a discount must be authorised by resolution passed in general meeting of the company and must be sanctioned by the Authority;

(*b*) the resolution must specify the maximum rate of discount, not exceeding ten per cent, or a higher rate fixed by the Authority, at which shares are to be issued;

(*c*) not less than one year must at the date of issue have elapsed since the date on which the company was entitled to commence business; and

(*d*) the shares to be issued at a discount must be issued within sixty days after the date on which the issue is sanctioned by the Authority or within such extended time as the Authority may allow.

(2) Where a company has passed a resolution authorising the issue of shares at a discount, it may apply to the Authority for an order sanctioning the issue; and on such application the Authority may, if, having regard to all the circumstances of the case, it thinks proper so to do, make an order sanctioning the issue on such terms and conditions as it thinks fit.

(3) Issue of shares at a discount shall not be deemed to be reduction of capital.

(4) Every prospectus relating to issue of shares, and every balance sheet issued by the company subsequent to the issue of shares, shall contain particulars of the discount allowed on the issue of the shares or of so much of that discount as has not been written off at the date of the issue of the prospectus or balance-sheet.

(5) If default is made in complying with sub-section (4), the company and every officer of the company who is in default shall be liable to fine not exceeding two thousand rupees.

Synopsis

1. Shares issued at discount.
2. Allottee of shares issued at discount cannot contest liability.

1. Shares issued at discount. If an arrangement for the issue of fully paid shares is such that in the course of its working out there is as much as even a possibility that the shares will have been issued at a discount, then the issue of those shares cannot be justified.[18] The allottee of discount shares cannot in the winding up contest his liability under section 298 to contribute on the ground that the allotment did not fulfil the requirements of section 84 and therefore was invalid.[19]

Forfeited shares. When a share-holder does not pay the full money which he has agreed to pay by taking the shares, he ceases to be a member of the company and his shares are forfeited; but nevertheless he remains liable to pay what he has been called upon to pay. The Legislature, no doubt, provides that the shares in the Company, which belonged to the defaulting share-holder shall be capable of being sold to another person, but though the other person is to be relieved from any liability for calls made previously to his becoming a holder of the shares, there is nothing whatever which suggests that he should be relieved from paying the balance still remaining unpaid on the shares. It is open to the Directors to re-allot the forfeited shared giving credit for the money already received in which event, the new allottees would be liable only for the unpaid capital in respect of the forfeited shares. Where the directors of a company sold certain forfeited shares of the face value of Rs.10 each, in respect of which Rs. 8 alone was paid, and the balance of Rs. 2 was due on each share, as fully paid up shares on payment of sum of Rs. 1.25 per share, the company suffering a loss of Ps.75 on each of those shares. It was plain that the transaction amounted to a re-allotment of forfeited shares at a discount, and where this was done without the sanction of the Authority as required by section 105 the re-allotment of the forfeited shares was void under section 106.[20]

2. Allottee of shares issued at discount cannot contest liability. Where a company proposed to issue debentures at a discount giving option to the debenture-holders to exchange them, at any time prior to their maturity, for fully paid shares of the company equivalent to the nominal value of the debentures: it was held that the company ought to be restrained by an injunction from issuing the debentures because the scheme as it stood, even if it was an honest one, was capable of being used for the purpose of acquiring fully paid shares, at a discount.[1]

85. *Redemption of preference shares.* (1) Subject to the provisions of this section, a company limited by shared may redeem the preference shares issued by it:

Provided that--

(*a*) no such shares shall be redeemed except out of profits of the company which would otherwise be available for dividend or from out of sinking fund created for this purpose or out of the proceeds of a fresh issue of shares made for the purposes

18. AIR 1930 PC 151=57 Ind App. 152+1892 App Cas. 125.
19. AIR 1958 Assam 86.
20. AIR 1962 A P 459+(1903) 1 K B 461.
1. (1904) 73 L J Ch 569=1904-2 Ch 108.

of the redemption or out of sale proceeds of any property of the company;

(*b*) no such shares shall be redeemed unless they are fully paid;

(*c*) where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall out of profits which would otherwise have been available for dividend be transferred to a reserve fund, to be called "the capital redemption reserve fund", a sum equal to the amount applied in redeeming the shares, and the provisions of this Ordinance relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the capital redemption reserve fund were paid-up share capital of the company;

(*d*) where any such shares are redeemed out of the proceeds of a fresh issue, the premium, if any, payable on redemption must have been provided for out of the profits of the company before the shares are redeemed or out of the share premium account.

(2) If a company fails to comply with the provisions of sub-section (1), the company and every officer of the company who knowingly and wilfully is in default shall be liable to a fine not exceeding five thousand rupees.

(3) The redemption of preference shares under this section by a company shall not be taken as reducing the amount of its authorised share capital.

(4) Subject to the provisions of this section, the redemption of preference share thereunder may be effected on such terms and in such manner as may be provided by the articles of the company.

1. **Redeemable preference shares.** Where the articles of association provided that shares should be under the control of directors who might allot the same to such persons or on such terms as they deem fit; it was held that the articles gave power, also to control the character of share and to issue preference shares.[2]

Re-organization or sub-division of shares. An arrangement which provides for conversion of preference shares into redeemable preference shares may be objectionable where the conversion in substance amounts to a surrender of the existing preference shares in exchange for redeemable preference shares and to a reduction and simultaneous increase of capital. But there can be no objection to an arrangement which does not extinguish the preference shares as such but which

2. AIR 1933 PC 39.

merely provides for the re-organisation and sub-division of the existing preference shares into preference shares of lesser denomination and for the extinguishment or modification of the special rights, privileges and conditions attached to those shares.[3]

FURTHER ISSUE OF CAPITAL

86. *Further issue of capital.* (1) Where the directors decide to increase the capital of the company by the issue of further shares, such shares shall be offered to the members in proportion to the existing shares held by each member, irrespective of class, and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined.[4][:

Provided that the Federal Government may, on an application made by any public company on the basis of a special resolution passed by it, allow such company to raise its further capital without issue of right shares.]

(2) The offer of new shares shall be strictly in proportion to the number of existing shares held:

Provided that fractional shares shall not be offered and all fractions less than a share shall be consolidated and disposed of by the company and the proceeds from such disposition shall be paid to such of the entitled share-holders as may have accepted such offer.

(3) The offer of new shares shall be accompanied by a circular duly signed by the directors or an officer of the company authorised by them in this behalf in the form prescribed by the Authority containing material information about the affairs of the company, latest statement of the accounts and setting forth the necessity for issue of further capital.

(4) A copy of the circular referred to in sub-section (3) duly signed by the directors or an officer authorised as aforesaid shall be filed with the registrar before the circular is sent to the share-holders.

(5) The circular referred to in sub-section (3) shall specify a date by which the offer, if not accepted, will be deemed to be declined.

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3. AIR 1960 Cal. 637.
4. Colon subs. for full-stop and proviso added by Act, 1 of 1995, S. 10 (3)(*a*).
5. See Appendix

[6]* * * * * * * * *

[7][(7) If the whole or any part of the shares offered under sub-section (1) is declined or is not subscribed, the directors may allot and issue such shares in such manner as they may deem fit.]

Synopsis

1. Object and scope.
2. Issue of capital.
3. Obligation to issue new shares to existing share-holders.
4. Interference by Court.
5. Persons entitled to acquire shares.
6. Suit for declaration that issue of shares was invalid.

1. **Object and scope.** The company, where its articles confer the necessary power upon it, may genuinely capitalise its earned profits. One of the recognised methods of capitalising the undivided profits is to add to its capital issue in the shape of either bonus debentures or bonus shares that may be either partly paid up or fully paid up. When fully paid-up shares are issued to the share-holders what actually happens is that the profits are capitalised and the existing share-holders only receive *pro rata* fresh shares out of old shares converted fully paid up or out of the new issue. The shares so issued would confer a title to a larger proportion of the surplus assets of the Company only if and when a general distribution of the assets of the company takes place as when the company is wound up or when the capital is reduced. Until then the company's shares issued in such circumstances retain the character of capital.[8]

Conversion of private into public company: Where a private company was converted into a public company and the share-holders of the private company became the share-holders of the public company, it followed as a matter of necessary logic that the shares issued by the company when it was a private company became the shares issued by the public company by operation of law. So, though in point of fact certain new shares were the first issue of the company after it became public, it could not be treated as the first allotment of shares of the public company in the eye of law but must be treated as shares issued subsequently to the first allotment, and consequently it would be governed by the provisions of section 86.[9]

2. Issue of capital. The execution of a simple hypothecation bond or mortgage by the company does not amount to an "issue" of capital by a company. The word 'issue' means putting into the money market.[10]

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6. Subsection (6) omitted by Act, 1 of 1995, S. 10 (3)(*b*).
7. Subsection (7) subs. by Act, 1 of 1995, S. 10 (3)(*c*).
8. AIR 1949 Mad. 521 = ILR 1949 Mad. 519.
9. AIR 1963 Orissa 189 (DB).
10. AIR 1957 Trav-Co. 6 (DB).

Increase of capital, when permitted. Directors hold a fiduciary relationship qua the company and are required to exercise power vesting in them for the benefit of the company.[11] Hence the directors can exercise that power only for the benefit of the company in general and not for maintaining their own control over the affairs of the company and to defeat the wishes of the majority of the present shareholders.[12] But when the need of the company for increase of capital is established, the fact that in promoting the interest of the company, the directors make use of this need to promote their own interest as well, their action cannot be dubbed as breach of trust.[13]

The directors although they may have power under the articles of the company to increase capital by the creation of new shares cannot issue and allot them by a resolution of the board where the articles require the resolution of a general meeting for that purpose.[14] Where evidence on record showed that meeting held for allocation of shares was in accordance with provisions contained in Articles of Association of company and procedure prescribed for issuance of further shares under section 105-C was duly adopted. Return showed allocation of shares duly submitted to Registrar in accordance with provisions of S.104(1). It was held that allocation of shares by company for increase of its capital was valid.[15]

Limits of increase in capital. The word 'capital' in section 86 means the subscribed capital of the company and therefore the section was applicable to cases where the directors decided to increase capital within the authorised limit by the issue of further shares.[16] Thus section 86 became applicable only when the directors decided to increase capital within the authorised limit by issue of further shares. Regulation 15 of Table A and section 86 did not cover the same field, Regulation 42 did not purport to deal with increase of capital which was within the competency of the directors to decide. Regulation 15 covered the field where the authorised capital of the company had to be increased.[17]

New shares must be paid for. A company raised a loan by the issue of £ 10 bonds on condition that the principal and a bonus of £ 25 would be paid to the creditor exclusively out of profits when they were earned by the company. The company having made no such profits for a number of years and being still in want of money proposed to raise further capital. But the charge on future profits created difficulty and therefore they proposed to issue new shares of £1 each and satisfy the bonus claims by allotting twenty such shares as fully paid as against a claim for £25. It was held that the transaction if carried out by the directors would be *ultra vires* because the company as a corporation would be receiving nothing by the extinction of the charge and therefore would be issuing shares without payment either in money or money's worth.[18]

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11. PLD 1992 SC 276=NLR 1992 Tax 172.
12. (1920) 1920-1 Ch 77 (The power cannot be exercised where there is no need for capital).
13. PLD 1992 SC 276=NLR 1992 Tax 172.
14. (1911) 1911-1 Ch 73.
15. NLR 1989 UC 167.
16. ILR 1954 Patiala 602+AIR 1956 Pepsu 89.
17. AIR 1963 Orissa 189 (DB)+AIR 1950 SC 172, *foll.*
18. (1910) 1910 App. Cas. 439.

3. Obligation to issue new shares to existing share-holders. When the company decides to issue further shares, it is imperative that newly issued shares, in the first instance, should be offered to the members whose names are borne on the register of the company in proportion to the existing shares held by them.[19] The object of the section is to prevent discrimination against share-holders and prevent the directors from offering shares to outsiders before offer is made to share-holders.[20] The object of the section is that there should be an equitable distribution of shares and the holding of shares should not be affected by the issue of new shares.[1] The Directors are under a mandate to offer the new shares in the first instance to its members in proportion to the existing shares held by them. A share-holder becomes entitled under this section to obtain shares in the further issue of capital as of right.[2] However, in providing that the newly-issued shares shall be offered to the members in proportion of the existing shares held by each, the legislature did not intend that every one of the shares so issued should be offered irrespective of the practical difficulties which might arise in working such a proposal.[3]

Information of offer to be sent to share-holders. The section places an obligation on the directors to inform the share-holders of the number of shares to which each of them is entitled and also limiting the time within which the offer if not accepted would be deemed to be declined.[4]

When company may deal with shares offered. A company cannot deal with new shares offered to the share-holders until it gets intimation that the share-holder declines the offer or till the expiry of statutory period of the notice.[5] The statutory right of an existing share-holder to acquire the new shares continues till the time limited has expired and that right can only be lost if an existing share-holder declines to accept the shares prior to the expiry of the time limit; the section limits the powers of directors to dispose of the further issue of capital in any manner that they may think most beneficial to the company. They are under a mandate to offer these shares in the first instance to the members in proportion to the existing shares held by them; in other words, a member becomes entitled under the provision of the section by reason of his being the holder of a certain number of shares in the company, to obtain shares in the further issue of capital as of right.[6] An acceptance of a part of the shares offered does not amount to a rejection of the offer as to balance. In order to hold that there is a rejection there must be a specific intimation by the share-holder that he declines the offer as to the balance.[7]

Date of completion of transfer. Where there was an offer by the company to sell the shares, an acceptance of the offer by the existing share-holders and the payment of consideration to the company for the purchase of the shares. All

19. PLD 1992 SC 276=NLR 1992 Tax 172.
20. AIR 1950 SC 172+AIR 1950 SCR 391+AIR 1962 Orissa 202.
1. AIR 1949 Bom. 56=ILR 1949 Bom. 158 (DB).
2. AIR 1953 SC 385+AIR 1949 Bom. 56 (DB).
3. AIR 1949 Bom. 56=ILR 1949 Bom. 158 (DB).
4. AIR 1949 Bom. 56=ILR 1949 Bom. 158 (DB).
5. AIR 1950 Bom. 76 (DB).
6. AIR 1962 Orissa 202.
7. AIR 1950 Bom. 76 (DB).

formalities of a contract as envisaged under section 5 of the Sale of Goods Act were complete and the goods being existing goods stood transferred to the share-holders to whom they were allotted as from the date that the share-holders accepted the offer made to them.[8]

Non-subscription of capital by members. If members of the company to whom shares are offered do not subscribe to those shares in whole or in part, the Directors must in the first place offer the unsubscribed shares to the institutions specified by the Authority. If even those institutions do not subscribe to those shares, they may be disposed of as the directors deem fit.

Non-compliance with section. The provisions of section 86 are mandatory and where they apply to the facts of a case, an allotment of shares which does not comply with those provisions must be held to be irregular and beyond the powers of the directors.[9] An allotment in contravention of section 86 was illegal and inoperative.[10]

Failure by company to comply with section 86 in issuance of new shares would make it liable to be wound up.[11]

4. Interference by Court. Directors of a company are in a fiduciary position *vis-a-vis* the company and must exercise their power of increasing the capital by issue of new shares for the benefit of the company.[12] Selection of the time when the shares are to be issued, and the proportion in which they should be issued is a matter within the discretion of the directors and it is not the province of the Court to interfere so long as the issue is not against the interest of the company or is mala fide.[13] It is to be noted in this context that possession of sufficient cash by the company when it issued further shares and allotted them cannot by itself indicate that no more funds were required and that the power to issue the shares was exercised by the directors not for the benefit of the company but only to keep the controlling hand in the management.[14] But if the power to issue further shares is exercised by the directors simply and solely for their aggrandisement and to the detriment of the company, the Court will interfere and prevent the directors from doing so.[15]

Exclusion of strangers does not show mala fides. There is no fiduciary relationship between the directors and persons who are complete strangers to the company. No mala fides can be established on the basis of such an assumed fiduciary relationship. Therefore an issue of further shares, when the company is in need of funds, and, which does not affect prejudicially either the company or the

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8. PLD 1973 Lah. 387 (DB).
9. ILR 1954 Patiala 602.
10. AIR 1956 Pepsu 89.
11. NLR 1996 Civ. 315=1996 CLC 1863.
12. AIR 1950 SC 172=1950 SCR 391+AIR 1962 Orissa 202.
13. AIR 1950 SC 172 (AIR 1949 Bom. 56. *affirmed*)+AIR 1962 Orissa 202.
14. ILR 1974 Patiala 602.
15. AIR 1950 SC 172 (AIR 1949 Bom. 56. *affirmed*).

existing share-holders cannot be condemned as not bona fide even if there is a motive to exclude strangers and such a motive can be assumed to be bad.[16]

5. Persons entitled to acquire shares. The legal representative of a deceased member whose name still remained on the registers of the company is entitled to require the allotment of the new shares which if the deceased had been living would have been entitled to have offered to him.[17] But under the Ord. it is not the duty of the transferor of shares to acquire further shares for the transferee. The obligation of a transferor as a trustee does not extend also in respect of the right to acquire further shares issued by company.[18] Similarly a receiver appointed in a suit cannot acquire the newly-issued shares in his name. Only a person whose name is on the register of members can acquire the shares.[19]

6. Suit for declaration that issue of shares was invalid. A suit by a share-holder under section 42, Specific Relief Act for a declaration that as resolution for increase of capital was not validly passed the issue of new shares thereunder was invalid and therefore the defendant as an allottee of such shares was not entitled to the character of share-holders of the Company, does not lie.[20]

[87. *Issue of shares in lieu of outstanding balance of any loans, etc.* Notwithstanding anything contained in section 86 or the memorandum and articles, a company may issue ordinary shares or grant option to convert into ordinary shares the outstanding balance of any loans, advances or credit, as defined in the Banking Companies Ordinance, 1962 (LVII of 1962), or other non-interest bearing securities and obligations outstanding or having a term of not less than three years in the manner provided in any contract with any scheduled bank or a financial institution to the extent of twenty per cent of such balance:

Provided that such shares shall not be issued or option to convert the outstanding balance exercised unless in any two of the preceding three years after expiry of two years from the date of commencement of commercial production, the return on such non-interest bearing securities, obligations, loans, advances or credit has fallen below the minimum rate or return laid down by the State Bank of Pakistan for the said years]

16. AIR 1950 SC 172 = 1950 SCR 391.
17. (1896) 1896-1 Ch. 456.
18. AIR 1953 SC 385 (AIR 1950 Bom. 76, *affirmed*).
19. AIR 1953 SC 385 (AIR 1950 Bom. 76, *affirmed*).
20. AIR 1932 Cal. 714 (DB).
1. Sub by Ord. 57 of 1984, S. 7.

REGULATION OF DEPOSITS

[2]88. *Deposits not to be invited without issuing an advertisement.* (1) The Federal Government may prescribe the limits up to which, the manner in which and the conditions subject to which deposits may be invited, accepted or retained by a company.

(2) No company shall invite, or allow any other person to invite or cause to be invited on its behalf, any deposit unless--

(*a*) such deposit is invited or is caused to be invited in accordance with the rules made under sub-section (1); and

(*b*) an advertisement, including therein a statement showing the financial position of the company has been issued by the company in such form and in such manner as may be prescribed.

(3) The provisions of this Ordinance relating to a prospectus shall, so far as may be apply to an advertisement referred to in sub-section (2).

(4) Where a company accepts or invites, or allows or causes any other person to accept or invite on its behalf, any deposit in excess of the limits prescribed under sub-section (1) or in contravention of the manner or conditions prescribed under that sub-section or in contravention of the provisions of sub-section (2), as the case may be,--

(*a*) the company shall be punishable,--

(*i*) where such contravention relates to the acceptance of any deposit, with fine which shall not be less than the amount of the deposit so accepted; and

(*ii*) where such contravention relates to the invitation for any deposit, with fine which may extend to twenty thousand rupees; and

(*b*) every officer of the company which is in default shall be punishable with imprisonment for a term which may extend to two years and shall also be liable to fine.

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2 Section 88 was enforced on 22.9.1987 vide S.R.O. 767 (1)/87, dated 22.9.1987, Gazetted on 22.12.1987.

Explanation:--For the purposes of this section, "deposit" means any deposit of money with, and includes any amount borrowed by, a company, but shall not include a loan raised by issue of debentures or a loan obtained from a banking company or financial institution.

(5) Nothing contained in the section shall apply to--

(*i*) a banking company, or

(*ii*) such other class of companies as the Authority may specify in this behalf.