PART VI

SHARE, CAPITAL AND DEBENTURES

NATURE, NUMBERING & CERTIFICATE OF SHARES

89. *Nature of shares and certificate of shares.* (1) The shares or other interest of any member in a company shall be movable property, transferable in the manner provided by the articles of the company.

(2) Each share in company shall have a distinctive number.

(3) A certificate under the common seal of the company specifying any shares held by any member shall be *prima facie* evidence of the title of the member to the shares therein specified.

Synopsis

1. Shares are movable property.
2. Situs of shares.
3. Shares are transferable.
4. Restrictions upon transfer.
5. Rights of transferee.
6. Power to refuse registration.
7. Effect of transfer.
8. Share certificates.
9. Paid-up shares.

1. Shares are movable property. Under the English Law, a share is a 'chose-in-action'. But in Pakistan, a share is not a chose-in-action.[1] It is movable property.[2]

Share certificates with blank signed transfer forms. Share certificates accompanied by transfer forms signed in blank by the registered holder are goods.[3] 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 alongwith blank transfer-deeds 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 shares 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. Therefore where share certificates with blank signed transfer forms are stolen or otherwise transferred by an unauthorized person the real owner has no remedy available against the transferee.[4]

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1. AIR 1943 Mad 74 = ILR 1943 Mad. 115 (DB) + ILR (1954) 1 Cal 220 (DB).
2. AIR 1956 Pat. 32 = 34 Pat. 8 (DB).
3. AIR 1926 PC 38 = 50 Bom. 360 = 53 Ind App 92.
4. AIR 1965 Cal 354.

Lien on shares--effect. A share-holder continues to be the proprietor of his shares notwithstanding the fact that he has made them a security by way of equitable lien in respect of his debt.[5]

2. Situs of shares. Shares can have a local habitation which would lie where their ownership could be effectively dealt with.[6] Therefore the locality of the share is where the register of the company is to be kept according to law for it is there that the shares can be effectually dealt with.[7]

3. Shares are transferable. Shares are prima facie transferable,[8] and can be transferred in the manner provided in the articles of the company.[9] The right of a share-holder to transfer his shares in a company is absolute subject to any restriction imposed by the articles of association.[10]

Transfer must be according to law. Transfer of shares otherwise than as provided by the Companies Ordinance and the Articles of Association is invalid.[11] Therefore a transfer of shares is complete on the day the deed is signed by both parties.[12] Moreover before a share-holder can get himself removed and another person can come in his stead, both must conform to regulations of the company.[13]

Sale by Court. A sale by the Court of shares has the effect of transferring them to the purchaser where there is no prohibition under the articles against the same.[14]

Sale when complete. Where the articles of the company provide so, a deed of transfer must be signed by both the transferor and the transferee, and the transfer deed signed by the transferor alone would not pass any legal title.[15] Therefore in such a case a transfer of shares to be effective must be made to one who is under no legal incapacity to purchase the share.[16]

Pledge or mortgage of shares. There can be a pledge of shares in Pakistan, and there can also be a mortgage of shares. Whether it is one or the other, will depend on the intention of the parties and the circumstances of each case.[17] Where shares are pledged with a company the legal owner thereof is the share-holder and not the company and he alone is liable for any unpaid calls.[18]

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5. (1837) 160 E R 488.
6. 1925 App Cas 371.
7. AIR 1930 PC 10 + AIR 1957 Pat 312 (DB) + AIR 1939 Bom. 447 (DB).
8. AIR 1928 PC 291.
9. AIR 1956 Pat 32 (DB) (Articles requiring transfer to be in writing--Share-holder executing transfer in blank and delivering share certificate--There is effective transfer of title both legal and equitable).
10. AIR 1943 Mad. 743 + AIR 1924 Lah. 173 (DB).
11. AIR 1923 Mad 241 = 45 Mad 637 (DB).
12. AIR 1923 Lah. 173 (DB).
13. AIR 1943 Mad. 111
14. AIR 1928 Mad. 571 (DB) + AIR 1952 Cal. 58 (DB). (The fact that share transfer certificate has been signed by Presiding Officer of Court only on behalf of transferor but not on behalf of the purchaser does not matter).
15. (1878) 38 L T 145.
16. AIR 1943 Mad 111.
17. AIR 1956 Pat 32 = 34 Pat 8 (DB).
18. AIR 1914 Lah. 480 = 1914 Pun Re No. 69 (DB).

4. Restrictions upon transfer. It is well settled that unless the Articles otherwise provide a share-holder has a free right to transfer his shares to whomsoever he chooses. It is not necessary to look in the Articles for the power because the section itself gives that power. It is only necessary to look to the Articles to ascertain the mode of transfer and the restrictions upon it.[19]

A restriction which precludes a share-holder altogether from transferring his shares may be invalid but a restriction which does no more than give a right of pre-emption is valid.[20] In the case of a private company, which bears a close analogy to a partnership, a provision in the Articles of Association, compelling its members, who desired to transfer their shares, to transfer them to the other share-holders and casting a reciprocal obligation on the other share-holders to accept the transfer cannot be held to be void.[1] Similarly where an article of a company merely stated that a share-holder indebted to the company should not transfer his shares during the subsistence of his debts and there was nothing in that article or elsewhere prohibiting the transfer or declaring it to be void; it cannot be said that the provision has the effect of taking away from the indebted share-holders their general right as members of the company to transfer the shares.[2]

Registration, restriction on. The provision in the Articles of Association that no transfer would be valid and recognised unless registered in the books and that the company could refuse to register a transferee without assigning reasons is one for the protection of the company and does not prevent the passing of title.[3]

5. Rights of transferee. Where shares are transferred to purchasers as fully paid-up shares without notice that they were not such and where they are also registered in the books of a company as fully paid up they must as between the company and the transferee be treated as fully paid-up shares.[4] In order that a person might get a title to get on the register of a company, he must be in possession of a certificate for the shares together with a transfer signed by the registered holder.[5] Where the Articles of Association provide for a transfer of shares by an instrument in writing, a transferee receiving a duly executed transfer in blank from a registered share-holder, can fill up in the blank and ask for the registration of his name in the books of the company and his title cannot be defeated by the registered owner or any other person deriving title from the registered owner.[6]

Registration not effected during lifetime of donor. A gift deed of shares intended by the donor to take effect by way of a transfer cannot operate to create a trust in favour of the donee who has failed to complete the transfer deed during

19. AIR 1958 Bom. 247 (The company cannot refuse to register a transfer where no such power has been reserved to it).
20. AIR 1928 PC 291.
1. 1958-2 W L R 851.
2. 52 Mys H C R 345.
3. AIR 1924 Lah. 173 (DB).
4. (1879) 14 Ch 'D' 432.
5. AIR 1926 PC 38 = 50 Bom. 360 = 63 Ind App 92.
6. AIR 1956 Pat. 32 = 34 Pat. 8 (DB).

the lifetime of the donor by getting the transfer registered in the books of the company.[7]

Court sale. In the case of a sale of shares through Court, there is no further deed of transfer to be executed. Hence a purchase of shares at a Court sale has priority over an assignee of shares in respect of which proper conveyance has not been made.[8] But the purchaser of shares at Court sale is in no way in a superior position to that of a transferee by a private sale, so far as the powers of the company in dealing with the transfer applications are concerned.[9]

Misrepresentation by seller--effect. Where shares are transferred to purchasers as fully paid-up shares without notice that they were not such and where they are also registered in the books of a company as fully paid up, they must as between the company and the transferee be treated as fully paid-up shares.[10]

Refusal to register transfer by company. Where the company has a discretion under the Articles to recognise or refuse to recognise a transfer, a transferee of shares cannot say, as against the company that he has become a member unless the company has registered his transfer.[11] Where the company refuses to register a transfer the vendor of his shares becomes trustee in respect of them and must comply with all directions of the purchaser.[12]

6. Power to refuse registration. A power vested in the directors by the articles to refuse registration of transfer at their discretion without assigning reasons is not invalid. The Court however has power to go into the question whether a refusal in such a case was made in exercise of discretion or merely on their whim and caprice.[13]

7. Effect of transfer. As between the buyer and the seller of the shares, the buyer is entitled to all dividends declared after the date of contract for sale unless otherwise arranged. But transfer of shares, after dividend was declared, does not, as against the company carry the dividend, even where the transferee has expressly bought *cum div.*[14]

Transfer of shares issued 'ultra vires'. A share-holder after selling away his shares cannot claim a refund of the money from the company on the ground that the issue of those shares being *ultra vires* there was a failure of consideration.[15]

Forged documents of transfer. A contract is implied on the part of a person lodging the transfer that he will indemnify the company if the document of transfer proves to be a forgery. Similarly the broker who deposits the transfer

7. AIR 1921 Cal 148 = 48 Cal. 986.
8. AIR 1923 Mad. 241 = 45 Mad 537 (DB).
9. AIR 1916 Bom. 147 = 41 Bom. 76 (DB).
10. (1879) 14 Ch D 432.
11. 36 Bom. 334.
12. 45 Bom. LR 46.
13. AIR 1957 Cal. 709 (DB).
14. AIR 1956 SC 655.
15. AIR 1949 PC 51.

becomes liable to the company to indemnify its loss even if he has acted in good faith.[16]

8. Share certificates. The certificates of shares issued under the company's seal are prima facie evidence of all that they state. They are issued for the very purpose of enabling the persons holding them to sell the shares to others.[17] A company is estopped from denying the title of a person to certain shares where it has stated him to be the owner of those shares in the share certificate issued by it.[18]

9. Paid-up shares. Where under a contract of loan the company agreed to give the creditor "fully paid-up shares" for money lent and also issued to him the share certificates in which the shares were described as "fully paid-up shares". It was held that the representation so made fully bound the company and that it was not open to place upon the list of contributories in the event of the company being wound up.[19]

The title of a person to whom shares are allotted is complete when the certificate of shares is issued in accordance with the resolution of the company and if the certificate shows that the shares are fully paid up the company cannot demand payment from the transferee of those shares who buys them from the original holder under the perfect and complete title obtained by him by the issue of the certificate of shares.[20] But as against the vendor of property, who accepts shares with full knowledge that they were only shares which were not paid for in cash but were to be treated as fully paid-up and who did not rely the purpose of accepting those shares upon statement in the share certificates as importing that they had been actually paid for, the liquidator is not estopped by the statement from denying the fact of payment in cash.[1] Where a share, the certificate for which has upon the face of it a representation by the company that the whole amount of the share is paid up, is dealt with in the ordinary course of business, it is not necessary for the person who takes it to disregard the assertion of the company and satisfy himself that the representation is true and that the money has been actually paid. If it is alleged that the person so taking the share had notice that the share had not actually been paid up, the onus of proof lies on those who assert that he had such notice.[2]

CLASSES AND KINDS OF SHARES

90. *Classes and kinds of share capital.* (1) A company limited by shares shall have only ordinary share capital, which may be sub-divided into different classes:

Provided that this sub-section shall not apply to preference shares issued before the commencement of this Ordinance or in

16. 1905 App Cas 392.
17. (1878) 1 App Cas 1004.
18. (1891) 1891-2 Q B 614.
19. 1897 App Cas 156.
20. (1874) 9 Ch. App. 554 + (1878) 3 App Cas 1004 + (1878) 7 Ch D 533.
1. 1899-1 Ch. 414.
2. (1887) 37 Ch D 712 = 57 LJ Ch 228.

pursuance of a contract or agreement entered into before such commencement.

(2) The rights as between various classes of ordinary shares, if any, as to profits, votes and other benefits shall be strictly proportionate to the paid-up value of shares.

GENERAL PROVISIONS AS TO SHARE CAPITAL

91. *Only fully paid shares to be issued.* No company shall issue partly paid shares:

Provided that where a company has partly paid shares on the commencement of this Ordinance, it--

(*i*) shall not issue any further share capital until all the shares previously issued have become fully paid up; and

(*ii*) shall pay dividend only in proportion to the amount paid up on each share.

92. *Power of company limited by shares to alter its share capital.* (1) A company limited by shares, if so authorised by its articles, may alter the conditions of its memorandum so as to--

(*a*) increase its share capital by such amount as it thinks expedient;

(*b*) consolidate and divide the whole or any part of its share capital into shares of larger amount than its existing shares;

(*c*) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum; or

(*d*) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled:

Provided that, in the event of consolidation or sub-division of shares, the rights attaching to the new shares shall be strictly proportional to the rights attaching to the previous shares so consolidated or sub-divided:

Provided further that, where any shares issued are of a class which is the same as that of shares previously issued, the rights attaching to the new shares shall be the same as those attaching to the shares previously held.

(2) The new shares issued by a company shall rank *pari passu* with the existing shares of the class to which the new shares belong in all matters, including the right to such bonus or right issue and dividend as may be declared by the company subsequent to the date of issue of such new shares.

(3) The powers conferred by sub-section (1) shall be exercisable by the company only in a general meeting.

[3][(3-A) Notwithstanding anything contained in this Ordinance or any other law for the time being in force or the memorandum and articles, where the authorised capital of a company is fully subscribed, or the unsubscribed capital is insufficient, the same shall be deemed to have been increased to the extent necessary for issue of shares to a scheduled bank or financial institution in pursuance of any obligation of the company to issue shares to such scheduled bank or financial institution.]

(4) A cancellation of shares in pursuance of sub-section (1) shall not be deemed to be a reduction of share capital within the meaning of this Ordinance.

(5) The company shall file with the registrar notice of the exercise of any power referred to in sub-section (1) within fifteen days from the exercise thereof.

Synopsis

1. Increase in share capital.
2. Consolidation on sub-division of shares.
3. Conversion of shares into stock.
4. Reduction of capital.
5. General meeting.

1. Increase in share capital. The authorised share capital of a company can be increased by the issue of new share only upon a decision taken by the company at its general meeting and the directors have no power in that behalf.[4] The authorisation of the increase of capital by giving power to issue new shares is distinct from the actual increase of such capital by the creation of new shares. With regard to the former, a resolution by the share-holders at the general meeting is necessary but once the authority has been given, the power of issue may be exercised by the Board of Directors.[5]

Deposit of Director. A certain sum of money demanded as a deposit from a director in addition to his share qualification is not an increase in capital inasmuch

3. Ins. by Ord. 57 of 1984, S. 7
4. ILR 1954 Pat. 602.
5. (1873) 9 Ch. App 1.

as the amount unlike the share capital can be claimed back by the person when he ceases to be a director.[6]

2. **Consolidation on sub-division of shares.** There was no provision of law which rendered the consolidation and sub-division of the capital of a company made by a single resolution unjustified and hence there could be no objection to it at all where there was also nothing in the articles of the company against the procedure followed.[7]

3. **Conversion of shares into stock.** A stock is simply a set of shares put together in a bundle.[8] Shares in a company, as shares, cannot be bought in small fractions of any amount. But the consolidated stock of a company can he bought just in the same way as the stock of a public debt can be bought split up into as many portions and as small portions as desired. Independently of that, the stock possesses all the characteristics of shares. It is, in fact, simply a set of shares put together in a bundle, with the peculiarity added to them, that they are transferable in a manner in which ordinary shares cannot be transferred.[9] The use of the term "stock" merely denotes that the company have recognised the fact of the complete payment of the shares and that the time has come when those shares may be assigned in fragments, which for obvious reasons could not be permitted before, but that stock shall still be the qualification, for example of directors, who must possess a certain number of shares, and that a meeting shall be of persons entitled to this stock, who shall meet as share-holders and vote as share-holders, in the proportion of shares which would entitle them to vote before consolidation into stock.[10] It follows that a direct issue of fully paid stock on receipt of value without going through the form of first issuing fully paid shares and then converting them into stock is a mere irregularity which will not affect the validity of the stock.[11]

4. **Reduction of capital.** A company issued share capital consisted of shares of £ 500 each. As a part of a soheme of reduction of capital the company sub-divided each of such shares into five shares of equal value and adjusting the paid-up value towards three of the new shares treated the remaining as unpaid shares. The scheme contained also a stipulation that those two shares should be surrendered by the share-holder when required by the company for re-issue. The scheme was sanctioned by the Court as being authorised by section 46(1) of the (British) Companies (Consolidation) Act of 1908.[12]

5. **General meeting.** A notice of the meeting to increase the capital must signify, in view of provisions of section 69 of the British Act of 1908, the intention to make the specific increase embodied in the resolution that is to be actually passed. It is not sufficient if it signifies merely an intention to make some increase or other in the capital of the company.[13]

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6. AIR 1951 Mad. 520.
7. 1920 W N 149.
8. 1912-1 Ch 72.
9. (1975) 7 H L 717 (1878) 10 Ch App 148. *affirmed*).
10. (1875) 10 Ch App 148.
11. (1912) 1912-1 Ch 72.
12. (1971) 1917-1 Ch 213.
13. (1916) 1916-2 Ch 57.

Rights of preference share-holders, change in. A scheme of arrangement which modified the memorandum of association so as to merely diminish the right of preference share-holders to dividends conferred on them by the memorandum and not involving consolidation of shares of different classes or the division of shares into shares of different classes was held not to require a special resolution passed by the majority.[14]

93. *Notice to registrar of consolidation of share capital, etc.* (1) Where a company having a share capital has consolidated and divided its share capital into shares of larger amount than its existing shares, it shall, within fifteen days of the consolidation and division, file notice with the registrar of the same, specifying the shares consolidated and divided.

(2) If a company makes default in complying with the requirements of sub-section (5) of section 92 or sub-section (1) of this section, it shall be liable to a fine which may extend to one hundred rupees for every day during which the default continues, and every office of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

94. *Notice of increase of share capital or of members.* (1) Where a company having a share capital has resolved to increase its share capital beyond the authorised capital, [15][or such capital is increased under sub-section (3-A) of section 92], and where a company not having a share capital has resolved to increase the number of its members beyond the number previously registered, it shall file with the registrar, within fifteen days after the passing of the resolution, a notice of the increase of capital or members, as the case may be, and the registrar shall record the increase[16][:]

[17][Provided that where default is made by a company in filing a notice of increase in the authorised capital under sub-section (3-A) of section 92, the scheduled bank or the financial institution to whom shares have been issued may file notice of such increase with the registrar and such notice shall be deemed to have been filed by the company itself and the scheduled bank or 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 such increase.]

14. (1915) 1915-2 Ch 439.
15. Ins. by Ord. 57 of 1984, S. 7
16. Subs. by Ord. 57 of 1984, S. 7.
17. Add. by Ord. 57 of 1984, S. 7.

(2) The notice to be given under sub-section (1) shall include particulars of the shares to be affected and the conditions, if any, subject to which the new shares are to be issued.

(3) If a company makes default in complying with the requirements of sub-section (1), it shall be liable to a fine which may extend to one hundred rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

(4) No resolution referred to in sub-section (1) shall take effect unless the notice required by that sub-section to be filed with the registrar is duly sent to him.

95. *Prohibition of purchase or grant of financial assistance by a company for purchase of its own or its holding company's shares.* (1) No company shall have power to buy its own share or the shares of its holding company.

(2) No company limited by shares, other than a private company, not being a subsidiary of a public company, shall give, whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with purchase made or to be made by any person of any shares in the company or where the company is a subsidiary, in its holding company:

Provided that nothing in this sub-section shall prevent the company from advancing or securing an advance to any of its salaried employees, including a chief executive who before his appointment as such, was not a director of the company, but excluding all directors of the company, for purchase of shares of the company or of its subsidiary or holding company, if making or securing of such advance is a part of the contract of service of such employee.

(3) If a company acts in contravention of sub-section (1) or sub-section (2), the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine which may extend to ten thousand rupees if the default relates to a listed company and to two thousand rupees if the default relates to any other company.

(4) Nothing in this section shall prevent a company from redeeming any shares or any other redeemable security issued in accordance with the provisions of this Ordinance.

Synopsis

1. Purchase of its own shares by company.
2. Forfeiture of shares.
3. Purchase under special statute.
4. Shares held in trust for company.

1. Purchase of its own shares by company. A purchase by a company of its own shares is *ultra vires*.[18] A provision in the articles for option to the company to buy its own shares is *ultra vires*.[19] Thus a transfer of their shares by a set of retiring directors to the remaining directors is void, where, to the knowledge of the parties, the shares are to form part of the stock of shares in the company, the transaction being a purchase by the remaining directors on behalf of the company and not in their individual capacity.[20] Similarly a surrender of share by a share-holder and acceptance of such surrender by the company releasing the liability of share-holder is equivalent to purchase of its own shares by the company and is therefore illegal and void.[1] Hence the question whether the purchase is to be made within the territorial limits of the place where it is incorporated or outside such limits is irrelevant.[2]

Purchase for reduction of capital. The rule which prohibits the company from purchasing its own shares without effecting the consequent reduction of capital with requisite sanction is distinct from the rule which prohibits a company from becoming its own member.[3]

Transfer of assets to share-holders in liquidation. A scheme of liquidation was drawn up by the share-holders after passing a valid resolution for the winding up of the company. Under the scheme certain assets of the company were transferred to the share-holders on their undertaking to pay off the liabilities of the company. But the company retained sufficient control over those assets to enable them to take them back from any defaulting share-holder. In these circumstances it was held that the transaction was not one of purchase by the company of its own shares.[4]

2. Forfeiture of shares. Companies Ordinance, 1984 does not prohibit a company from forfeiting shares of its share-holders. Where Articles of Association which constitute a contract between the shareholders and the company as also between shareholders *inter se* provided for forfeiture on happening of certain events or failure of share-holders to perform their obligation, company could validly exercise power and forfeit shares.[5] A provision in the articles of a company, which permits the company to forfeit shares and also places an obligation on it to re-issue the shares cannot be condemned as violation of the

18. AIR 1921 All 135 (DB)+4 Bom HCR 185 (DB)+(1887) 12 App Cas 409 (Company accepting surrender of shares and releasing share-holder from further liability--Transaction amounts to a purchase of shares).
19. 16 Ind Cas 49 (Bom.).
20. (1856) 52 E R 1028.
1. (1902) 1902-2 Ch 14.
2. AIR 1943 Mad 111.
3. AIR 1957 Cal 293 (DB).
4. AIR 1958 Andh. Pra. 666 (DB).
5. 1991 MLD 1225 (DB).

Ordinance either in regard to its provisions as to reduction of capital or as to the prohibition against a company purchasing its own shares or trafficking in them.[6] A company can accept surrender of shares only under conditions and limitations under which shares can be forfeited by it.[7] Where one of the articles of a company prohibited it from purchasing its own shares and another authorised its directors to forfeit shares of a debtor by way of lien for debt due to the company and the company took certain shares standing in the name of third parties and not the debtor in settlement of its claim against the debtor; it was held that the act of the company taking those shares by valuation and forfeiting them and adjusting its claim against its defendant amounted only to a purchase of the shares by the company from those third parties and not to forfeiture permitted by the latter article.[8] Forfeiture of shares, however, would not be permissible where it has the effect of reducing share capital.[9]

3. **Purchase under special statute.** Where a company is authorised by an Act of the Parliament to purchase its own shares, the shares purchased by it, whether in the name of trustees or in its own name, become extinguished.[10] This section does not invalidate a compulsory substitution of its own shares in lieu of its other assets by a special statute or even a purchase by a Company of its own shares by authority of a special statute. The compulsory substitution as also such purchase is lawful though the consequence may be reduction of capital.[11] Where its own shares are purchased by a company under statutory authority, the shares not extinguished either in law or in equity, in a proper case, for example, where the shares are subject to a pre-existing charge in favour of a third party.[12]

4. **Shares held in trust for company.** The rule prohibiting a company from acquiring its own shares does not bar certain persons on the share register of the company from holding shares upon trust for the company beneficially.[13]

REDUCTION OF SHARE CAPITAL

96. *Reduction of share capital.* (1) Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular and without prejudice to the generality of the foregoing powers may--

(*i*) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

6. ILR (1950) 1 Cal 235 (DB) + AIR 1949 Cal 360 = ILR (1945) 2 Cal 105.
7. AIR 1928 Lah. 240 + AIR 1924 Mad. 703.
8. (1871) 1 CP 43.
9. 1991 MLD 1225 (DB).
10. (1892) 1892-2 Ch 279.
11. AIR 1957 Cal 293 (DB) (Word "purchase" in the section cannot be appropriately applied to the compulsory substitution of the shares).
12. AIR 1957 Cal. 293 (DB).
13. AIR 1957 Cal. 293 (DB).

(*ii*) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

(*iii*) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the needs of the company;

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under sub-section (1) is in this Ordinance referred to as a resolution for reducing share capital.

Synopsis

1. Scope.
2. Reduction of capital, necessity for.
3. Subject to confirmation of Court.
4. Authorized by its Articles.
5. Reduce its share capital in any way.
6. Payment of paid-up capital.
7. Stock, reduction in.
8. Preference shares.
9. Special resolution necessary.

1. **Scope.** The section provides for reduction of share capital of a company. It does not permit purchase of its shares by the company. Thus a resolution authorising the directors to purchase shares from willing share-holders and prohibiting the directors from re-issuing the shares without the authority of a general meeting is *ultra vires* and invalid where the company has no power under its Memorandum or Articles to purchase or deal in its own shares or accept surrenders. Such a scheme amounts to an attempt to reduce the capital of the company without complying with the provisions of the Companies Ordinance or to a trafficking in the shares which has not been authorised by the memorandum of association.[14]

A scheme by which certain share-holders receive a part of the assets of the company equivalent to their shares therein and such shares are then cancelled is in effect a purchase of its own shares by a company. It is a permitted mode of effecting a reduction of capital. But the law has sanctioned that method subject to certain conditions and restrictions, therefore a reduction on the basis of that method is prohibited unless those conditions and restrictions are observed.[15] There is no distinction between a purchase of its own shares by a company under which it returns to the share-holder a part of the paid-up capital in exchange for his shares and a surrender of his shares by a share-holder in consideration of the company wiping out his liability for the uncalled up sum payable thereon. Both involve a reduction of the capital which persons dealing with the company are entitled to rely upon as existing, either as paid-up or as still to be called up, and

14. (1877) 4 Ch D. 327.
15. (1894) 1894 App Cas 399.

such a reduction therefore can hold good only if sanctioned under the conditions prescribed by the statute.[16]

Transfer of entire assets of company. Where the entire assets and liabilities of a company are transferred to another company so that as a result of the transfer all the assets of the transferor company would vest in the transferee company and the transferor company would really become defunct. It was held that the disappearance of the assets of the Company, for whatever reason, does not cause a reduction of the share capital.[17]

2. Reduction of capital, necessity for. The need for reducing capital may arise in various ways, for example, trading losses, heavy capital expenses, and assets of reduced or doubtful value. As a result the original capital may either have become lost or a company may find that it has more resources than it can profitably employ. In either case the need may arise to adjust the relation between capital and assets. Unlike an individual, a company has power to write off losses of this nature or to return capital except in the manner provided in the Ordinance. This can be done as indicated in the section.[18] Even prima facie evidence of the loss of capital is sufficient where the power of the Court under section 96 is invoked.[19]

3. Subject to confirmation of Court. A transaction which results in reduction of share capital is invalid where there is no sanction of the Court for the purpose. The only statutory exception is forfeiture under conditions laid down by law.[20]

Object of provision for sanction. The confirmation by Court of the reduction of capital by a company is the safeguard of the minority,[1] and in order to enable it to protect the interest of persons who dissented or even of persons who did not appear except on the argument and hearing of the petition.[2]

Exercise of discretion. The Court's powers in confirming a proposal for reduction of capital are not subject to any other limitation excepting that the scheme must be one which is fair and equitable.[3] The Court, shall ensure that a scheme does not unfairly prejudice any present or future share-holder or creditor.[4] The right to reduce capital has been conferred on the company statutorily and the Court will not refuse to confirm the reduction of capital decided upon by a company unless it sees something unfair or unreasonable being done.[5]

16. (1902) 1902-2 Ch 14 + (1894) 1894 App Cas 399.
17. AIR 1962 SC 1355.
18. AIR 1960 Mad. 537.
19. AIR 1963 Cal. 637.
20. AIR 1955 Madh B 166 (DB).
1. AIR 1938 Pesh 41.
2. (1895) 1895-1 Ch 691 + (1894) 1894 App. Cas. 399.
3. (1894) 1894 App. Cas. 399 + (1902) 1902-2 Ch. 601.
4. PLJ 1977 Lah. 10 = PLD 1976 Lah. 850.
5. (1895) 1895-1 Ch 691.

When exercising discretion the Court is concerned to see that the reduction is fair and equitable. Motive for the reduction is no concern of the Court.[6] In this matter the policy of the Legislature is to entrust the majority of the share-holders with the decision whether there should be a reduction of capital and if so how it should be carried into effect.[7] But the reduction may be allowed only when the decision can prudently be arrived at by businessmen in the interest of the business of the company and not for the confiscation of shares.[8] The test of reasonableness of the scheme is whether it is regarded by reasonable people, conversant with the subject as beneficial to both sides and not only to those who are making it. If a scheme of reduction involves an alteration of right to a class of shares and by the Memorandum or Articles, the consent of a meeting of the class is required, the Court will not approve the reduction of capital of the class, on the consent obtained by the vote of the holders of a majority of the shares of the class who did not act in good faith in the interest of members of the class generally but who wished to promote some other interests of their own such as their interest as holders of a different class of shares.[9]

Loss of capital due to illegal acts. Where the loss of capital is due to issue of shares at a discount the Court cannot confirm the proposed reduction of capital inasmuch as the issue of capital at discount is illegal.[10]

Court may impose conditions while granting sanction. The Court may either confirm a reduction with or without conditions or decline to confirm it. It is not necessarily confined to seeing that the creditors are properly protected but may take into account whether the reduction would work injustice between different classes of share-holders and although it may not fall within its function to impose conditions which amount to an alteration of the scheme, yet if such an alteration appears requisite it may refuse to confirm the reduction leaving the company to resolve on a reduction in an altered form if it thinks fit.[11]

Notice of proposed reduction. The publicity of the proceedings in relation to the confirmation of the reduction and discretion vested in the Court in the matter amply protects the public, the share-holders and every class of share-holder individually and collectively.[12]

Burden of proof. The question of reduction of capital is a domestic one for the decision of the majority.[13] The company is not bound to satisfy the Court that its proposals for the reduction of capital are not unfair. It is for the objectors to disclose such matters as will stand in the way of the Court's approval.[14]

4. Authorized by its Articles. In the case of limited company it is illegal to do what amounts to a reduction of capital without any express provision either in

6. AIR 1960 Mad. 537.
7. (1894) 1894 App Cas 399 + AIR 1960 Mad 537.
8. PLD 1976 Lah. 850 = PLJ 1977 Lah 10 + (1951) 1 All E R 881 = 1951 AC 625.
9. PLJ 1977 Lah 10 = PLD 1976 Lah 850 = (1971) 2 All ER 289.
10. (1889) 38 Ch D 475.
11. AIR 1960 Mad. 537.
12. (1907) 1907 App Cas 229.
13. AIR 1938 Pesh. 41 + AIR 1939 Rang 417.
14. AIR 1960 Mad 537.

the memorandum or articles of association authorising or enabling the company to effect any reduction of its capital.[15]

5. Reduce its share capital in any way. When exercising its discretion the Court is concerned to see that the reduction is fair and equitable. The motive for the reduction is no concern of the Court.[16]

Reduction must be permitted by law. Reduction of capital should not be permitted unless effected under statutory authority or by forfeiture as laid down in the articles. Any reduction of capital contrary to this principle is *ultra vires*.[17] It must however be noted that the three grounds in section 96 are only particular instances, but they cannot be deemed to be exhaustive in view of the general language of section 96 which particularises the three grounds "without prejudice to the generality of the foregoing power".[18] But arbitrariness is not to be countenanced in the reduction of capital. Since three grounds cover most of the cases in which the reduction of capital may be necessary, any other ground for reduction should be analogous to the three grounds given in section 96.[19]

Mode of reduction of capital. A company has power to reduce its capital and it may reduce the capital by reducing the share capital of all its share-holders wholly or in part.[20] Subject to the necessity of obtaining the confirmation of the Court the company is left to choose the mode in which the reduction is to be made, for example, the extent of the reduction and all other questions concerning the reduction including the application of the moneys which may be set free as a result of the reduction.[1] It is not necessary for the company to reduce capital *pro rata* of all members of the Company. It is not necessary that the reduction should affect all holders of the same class of shares. If all the share-holders were of the opinion that its capital should be reduced and that this reduction would best be effected by paying one share-holder and cancelling the shares held by him, their resolution to this effect would not be *ultra vires*, since there is no expression in the statute to indicate that the discretion of the Court with respect to an application to reduce capital does not extend to any possible mode of reduction and capital may be legitimately reduced by buying out some of the members of the Company.[2] A resolution authorising the directors to purchase shares from willing share-holders and prohibiting the directors from re-issuing the shares without the authority of a general meeting is *ultra vires* and invalid where the company has no power under its memorandum or articles to purchase or deal in its own shares or accept surrenders. Such a scheme amounts to an attempt to reduce the capital of the company without complying with the provisions of the Companies Ordinance or to a trafficking in the shares which has not been authorised by the memorandum of association.[3]

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15. (1875) 1 Ch D. 682.
16. AIR 1960 Mad. 537.
17. AIR 1930 Bom. 267 = 54 Bom 178.
18. PLJ 1977 Lah. 10 = PLD 1976 Lah. 850 + AIR 1957 Cal. 293 (DB).
19. PLJ 1977 Lah. 10 = PLJ 1976 Lah. 850.
20. AIR 1938 Pesh 41.
1. AIR 1960 Mad. 537.
2. PLJ 1977 Lah. 10 = PLD 1976 Lah. 580 + 1894 AC 399.
3. (1877) 4 Ch D. 327.

Compromise or settlement as to reduction. Where a scheme under section 284 of the Ordinance involved a reduction of capital; the Court could not sanction that scheme unless the procedure prescribed by section 96 and the following sections for the reduction of capital was found to have been complied with.[4]

Forfeiture of shares. A forfeiture, under which, according to the articles, the forfeited share could be cancelled or become extinct results in reduction of capital.[5] Where it is intended that the forfeited share should be re-issued, there is no reduction of capital.[6] A company passed a resolution to reduce its capital. The scheme of reduction involved the treating of forfeited shares as unpaid and unissued shares. A clause in the articles of the company provided that forfeited shares became the property of the company and could be resold, re-allotted or otherwise disposed of by the company. The company having been paid a small amount in respect of the forfeited shares, the question arose whether they could also be treated as unissued and unpaid shares. The Court held that these shares also came within the purview of the above clause in the article and confirmed the reduction.[7]

Surrender of shares. A surrender of share amounts to a reduction of capital which is unlawful unless confirmed by the Court.[8] Surrender of a partly paid-up share not liable to forfeiture in consideration of release by the company of the surrendering share-holder from his liabilities in respect of the shares surrendered is a case in illustration of the mode of reducing capital by extinguishment or reduction of liability on shares not fully paid up.[9] Permitting a share-holder to sever his connections with the company by paying a smaller amount than the face value of his shares is a reduction of capital which requires the assent of the Court to be valid.[10] Therefore the directors have no power to release any share-holder who says that he wishes to have his share cancelled or to resolve to discharge him from the Company on the ground of his having expressed his desire to be discharged.[11]

6. Payment of paid-up capital. A limited company not in liquidation cannot make payment by way of return of capital to its share-holders except as a step in an authorised reduction of capital. Any other payment can only be made by way of division of profits.[12]

7. Stock, reduction in. As "shares" include 'stock', a company can reduce its stock.[13] Thus reduction of capital can be made by cancelling stock as it can be done by cancelling shares.[14]

4. PLD 1976 Lah. 850 = PLJ 1977 Lah. 10 = ILR (1949) 1 Cal. 127 + AIR 1956 Pat. 364 = 35 Pat. 167 (DB) + 33 Cal. W N 207.
5. ILR (1950) 1 Cal. 235.
6. ILR (1950) 1 Cal. 235 + AIR 1949 Cal. 360.
7. (1914) 1913 W N 307.
8. AIR 1948 Oudh 197 = 23 Luck 210 (DB).
9. AIR 1957 Cal. 293 (DB).
10. AIR 1929 Mad. 773 = 52 Mad 915 (DB).
11. (1872) 13 Eq. 474.
12. AIR 1930 PC 302.
13. AIR 1960 Mad. 537.
14. (1912) 1912 W N 110.

8. Preference shares. There may be a reduction of share capital if the company returns part of the capital money to the preference share-holders in cash. So also, the conversion of issued preference shares into redeemable preference shares is equivalent to a reduction of share capital and simultaneous increase of share capital.[15] Where at the time of the issue of new shares carrying a preferential right to a dividend of a specified percentage on the value of the share but without any preferential right on the capital there was already a clause in the articles of the company authorising it by a special resolution, to reduce its capital and alter the amount and denomination of its shares; it was held that the company was not prevented by any special contract with the preference share-holders from reducing its capital by striking off a portion of the nominal amount of all the shares whether ordinary or preferential.[16] Where as a part of a scheme for reduction of its capital a company passed a resolution, subject to confirmation by the Court for extinguishment of the preferential rights attaching to preference stocks and for consolidation of them into one stock ranking *pari passu* with ordinary stock; it was held that the resolution was not *ultra vires* inasmuch as those rights had been conferred by the articles of association and not by the memorandum and hence could be altered without an alteration of the memorandum. Therefore the reduction made was confirmed.[17]

9. Special resolution necessary. The policy of the Legislature is to entrust the majority of the share-holders with the decision whether there should be a reduction of capital and if so how it should be carried into effect.[18] It is therefore necessary that everything should be done to serve a notice on all the members of the company of the special resolution proposed to be passed for this purpose. But in special circumstances when some of the share-holders cannot be served in view of statutory prohibitions the Court may sanction reduction on the basis of a resolution passed by members who could be served. Thus where a company convened a meeting to pass a resolution to reduce its capital by way of return of capital. Some of the share-holders were residing then in the enemy or enemy occupied territory and the company neither sent not even attempted to send a notice of the meeting to those share-holders. In spite of that it was held that the resolution had been validly passed on the ground that the company was prohibited by law to communicate with those share-holders and those share-holders' right to receive notice of meetings stood suspended during the continuance of the war.[19]

Meeting must be properly convened. In a petition for reduction of capital evidence must be adduced to show that the meeting at which the special resolution was passed was properly convened.[20]

97. *Application to Court for confirming order.* Where a company has passed a resolution for reducing share capital, it may apply by a petition to the Court for an order confirming the reduction.

15. AIR 1956 Pat. 364 = 35 Pat. 167 (DB).
16. (1886) 34 Ch D 287.
17. (1910) 1910 1 Ch 414.
18. (1894) 1894 App Cas 399.
19. (1943) 1943-2 All E R 88.
20. (1894) 1894 W N 108.

Synopsis

1. Petition for confirmation of reduction.
2. Confirmation by Court.
3. Compromise arrangement for reduction of capital.

1. Petition for confirmation of reduction. The application for the confirmation of reduction has usually to be made by petition and in the petition the company must show all facts and circumstances on which it relies in support of its prayer for sanction.[1] The Court in an application under section 97 confirms the reduction of capital and not the resolution passed therefor.[2] Therefore in the absence of any other material justifying the Court to do so and on the basis only of an invalid resolution, the Court cannot confirm reduction of capital.[3]

In a petition for reduction of capital evidence must be adduced to show that the meeting at which the special resolution was passed was properly convened.[4]

2. Confirmation by Court. The question of reduction of capital is a domestic one for the decision of the majority.[5] The company has the right to determine the extent, the mode, and incidence of the reduction of its capital. It may reduce the share capital of all its share-holders *pro rata* or may reduce any individual share-holder or any class of share-holders wholly or in part. Therefore a Court should generally be slow before it interferes with the decision of the company and refuse confirmation of the reduction of capital. But even so the Court before it proceeds to confirm the reduction of capital must see that the interests of the minority are adequately protected and there is no unfairness to it.[6] In a case where the creditors have no concern with the question of the reduction of capital the Court has to consider only whether it ought to refuse confirmation in the interest of the public who may become share-holders and whether as between the different classes of share-holders the reduction is fair and equitable. Where it is so and there is no suggestion of the public being adversely affected and there is also prima facie evidence of loss of capital the Court has to confirm the reduction.[7]

3. Compromise arrangement for reduction of capital. A scheme under section 284 must comply with the requirements of sections 96, 99 and the following sections where it involves reduction of capital resulting in diminution of the liability of or repayment to share-holders but the application for sanction of the scheme should not be rejected but kept over to allow the company to comply with the requirement.[8]

98. *Addition to name of company of "and reduced".* On and from the passing by a company of resolution for reducing share

1. AIR 1960 Mad. 537.
2. AIR 1952 Pepsu 114 = 3 Pepsu LR 342 + AIR 1939 Rang 417.
3. AIR 1952 Pepsu 114 = 3 Pepsu L R 342.
4. (1894) 1894 W N 108.
5. AIR 1938 Pesh. 41 + AIR 1939 Rang 417.
6. AIR 1938 Pesh. 41.
7. AIR 1939 Rang 417.
8. PLD 1976 Lah. 850 = PLJ 1976 Lah. 10 + 53 Cal W N 207.

capital, or where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any share-holder of any paid-up share capital, then on and from the making of the order confirming the reduction, the company shall, unless otherwise directed by the Court for any special reasons, add to its name until such date as the Court may fix, the words "and reduced" as the last words thereof, and those words shall, until that date, be deemed to be part of the name of the company:

Provided that, where the reduction does not involve either the diminution of any liability in respect of unpaid share capital, or payment to any share-holder of any paid-up share capital, the Court may, if it thinks expedient, dispense with addition of the words "and reduced".

Synopsis

1. Scope.
2. Withdrawal of resolution for reduction.

1. Scope. The addition to the name of the company of the words "and reduced" are intended as a warning to the public that the financial position of the company is not in a flowing condition.[9] Where a company filed a petition to confirm a special resolution for the reduction of its capital and requested the Court to dispense with the use of the words "and reduced" until the hearing of the petition. The reduction did not appear to involve either the diminution of any liability in respect of the unpaid or the repayment of the paid-up capital. The reduction had been approved by the chief creditors of the company. There was no objection from any other creditor even though the reduction had been mentioned in the local papers. Under these circumstances the Court permitted the company to dispense with the words as prayed for but without prejudice to the question as to how the petition was to be advertised.[10]

Company carrying on business abroad. In case of companies carrying on business abroad the use of the words "and reduced" may generally be dispensed with.[11]

2. Withdrawal of resolution for reduction. On an application made by the company after abandoning its special resolution for reducing its capital, the Court permitted it to withdraw its petition for confirmation of the resolution and to discontinue the use of the words "and reduced" as part of its name.[12]

9. (1892) 1892-3 Ch 125.
10. (1890) 1890 W N 222.
11. (1898) 1898 W N 80+(1919) 1919 W N 103 (The words were directed to be used only for 14 days in this case)+(1906) 1906 W N 128 (Court directed the use of the words for a period of one month instead of the usual 3 months).
12. (1885) 53 L T 763.

99. *Objection by creditors and settlement of list of objecting creditors.* (1) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any share-holder of any paid-up share capital, and in any other case if the Court so directs, every creditor of the company who, on the date fixed by the Court, is entitled to any debt or claim which, if that were the date of commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction.

(2) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

Synopsis

1. Debenture-holders. 2. Creditors entitled to object.

1. **Debenture-holders.** In cases where it was not possible to ascertain the names of all the debenture-holders an extraordinary resolution passed unanimously by the debenture-holders, at a duly convened meeting at which eighty-seven per cent of the debenture debt was represented, and which resolution was binding on all the debenture-holders under the majority clause in the trust deed, was held to be sufficient evidence within section 50, Companies (Consolidation) Act of 1908 of the consent of all the debenture-holders to a proposed reduction of capital.[13]

2. **Creditors entitled to object.** Prima facie creditors are not concerned with the question of reduction of capital where no diminution of unpaid capital or repayment to share-holders of paid-up capital is involved.[14] Therefore a creditor in order to persuade the Court to allow him to object to a reduction of the capital which does not involve a diminution of liability of the share-holders must make out a strong case.[15]

100. *Power to dispense with consent of creditor on security being given for his debt.* Where a creditor entered on the list of creditors whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct the following amount, that is to say,--

13. (1914) 1914-2 Ch 187.
14. (1919) 1919-1 Ch 28 + (1907) 1907 App Cas 229.
15. (1919) 1919-1 Ch 28.

(*i*) if the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim; and

(*ii*) if the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry, and adjudication as if the company were being wound up by the Court.

1. Non-objecting creditor. A creditor who remains perfectly passive, although having the opportunity to oppose, cannot be treated as a creditor who 'does not consent' and in respect of whose debt an amount is to be appropriated by way of security.[16]

101. *Order confirming reduction.* If the Court is satisfied with respect to every creditor of the company who under this Ordinance is entitled to object to the reduction that either his consent to the reduction has been obtained or his debt or claim has been discharged or has been determined or has been secured, the Court may make an order confirming the reduction on such terms and conditions as it thinks fit.

Synopsis

1. Confirmation of order of reduction.
2. Special resolution necessary.
3. Protection of share-holders.
4. Reduction not uniform.
5. Debenture-holders, absence of.
6. Court may impose conditions.

1. Confirmation of order of reduction. Where the reduction is shared equally by all the share-holders who are all of one class and is designed to work justly and equitably not involving diminution of any liability in respect of the unpaid capital or payment to any share-holder of any paid-up capital and there is evidence regarding the loss of capital and non-representation of available assets, there is nothing to prevent the Court from confirming such reduction.[17]

It is not always essential for the Court, when a petition for reduction of capital is made, to satisfy itself that there has been a reduction of capital. The only question which the Court has to consider is whether the company has duly passed its special resolution.[18] But where reduction of capital is based on the ground that capital has been lost or is unrepresented by available assets, it is always prudent to proceed on some evidence. Where in opposing the petition, a person accepts the statement of the company that there had been loss of capital as stated by the

16. (1871) 11 Eq. 356.
17. AIR 1939 Rang 417.
18. AIR 1936 Cal 327=63 Cal 703 (DB).

Managing Director, the Court should act upon the assumption that there is evidence of loss of capital.[19]

2. **Special resolution necessary.** In a petition for reduction of capital evidence must be adduced to show that the meeting at which the special resolution was passed was properly convened.[20] In cases where reduction of capital is based on the ground that capital had been lost or was unrepresented by available assets, it is always wise and prudent to insist on evidence of facts stated in the special resolution passed by the company.[1]

3. **Protection of share-holders.** The Judge, when he has to consider whether he shall make an order sanctioning the proposed reduction of capital, is required by the law to be satisfied that the creditors are duly protected. But that does not mean that it becomes obligatory on him to sanction the scheme when he is satisfied of that. He has a discretion in the matter and may refuse to sanction it even where it bears hard on others who do not consent to it.[2]

4. **Reduction not uniform.** Any scheme of reduction which does not provide for the uniform treatment of share-holders whose rights are similar must be most thoroughly scrutinized by the Court. But that does not mean that the Court cannot sanction such a scheme even where it is satisfied that it will not work unjustly or inequitably.[3]

5. **Debenture-holders, absence of.** Absence of debenture-holders who have been sufficiently apprised by the proceedings by an advertisement published as required cannot be a reason why an order confirming the reduction should not be passed.[4]

6. **Court may impose conditions.** Where the loss of capital is due to issue of shares at a discount the Court cannot confirm the proposed reduction of capital inasmuch as the issue of capital at discount is illegal.[5]

102. *Registration of order and minute of reduction.* (1) The registrar on production to him of an order of the Court confirming the reduction of the share capital of a company, and on the filing with him of a certified copy of the order and of a minute approved by the Court and showing, with respect to the share capital of the company as altered by the order, the amount of the share capital, the number of shares into which it is to be divided and the amount of each share, and the amount, if any, at the date of the registration deemed to be paid-up on each share, shall register the order and minute.

19. AIR 1936 Cal. 327 = 63 Cal. 703 (DB).
20. (1894) 1894 W N 108.
1. (1916) 1916 W N 70.
2. (1886) 34 Ch D 287.
3. (1902) 1902-2 Ch 601 + (1894) 1894 App Cas. 390.
4. (1871) 11 Eq. 356.
5. (1889) 38 Ch. D. 475.

(2) A resolution for reducing share capital as confirmed by an order of the Court registered under sub-section (1) shall take effect on such registration and not before.

(3) Notice of the registration shall be published in such manner as the Court may direct.

(4) The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of this Ordinance with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute.

1. **Certificate of Registrar--effect.** Where after an order of Court has been passed in accordance with the resolution of the company for reducing its capital the registrar certified the order and the minutes approved by the Court; it was held that the certificate conclusively established that the resolution for the reduction had been duly passed as required by the law.[14]

103. *Minute to form part of memorandum.* (1) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally incorporated therein, and shall be embodied in every copy of the memorandum issued after its registration.

(2) If a company makes default in complying with the requirement of sub-section (1), it shall be liable to a fine which may extend to fifty rupees for each copy in respect of which default is made, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

104. *Liability of members in respect of reduced shares.* (1) A member of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference, if any, between the amount paid, or, as the case may be, the reduced amount, if any, which is to be deemed to have been paid, on the share and the amount of the share as fixed by the minute:

Provided that, if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of this Ordinance with respect to

winding up by the Court, to pay the amount of his debt or claim, then--

(*i*) every person who was a member of the company at the date of the registration of the order for reduction and minute shall be liable to contribute for the payment of that debt, or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration; and

(*ii*) if the company is wound up, the Court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding up.

(2) Nothing in this section shall effect the rights of the contributories among themselves.

105. *Penalty on concealment of name of creditor.* If any officer of the company wilfully conceals the name of any creditor entitled to object to the reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor, or if any officer of the company abets any such concealment or misrepresentation as aforesaid, every such officer shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

106. *Publication of reasons for reduction.* In the case of reduction of share capital, the Court may require the company to publish in the manner specified by the Court the reasons for reduction, or such other information in regard thereto as the Court may think expedient with a view to giving proper information to the public, and, if the Court thinks fit, the causes which led to the reduction.

107. *Increase and reduction of share capital in case of a company limited by guarantee having a share capital.* A company limited by guarantee may, if it has a share capital and is so authorised by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Ordinance.

VARIATION OF SHARE-HOLDERS' RIGHTS

108. *Variation of share-holders' rights.* (1) The variation of the rights of share-holders of any class shall be effected only in the manner laid down in section 28.

(2) Not less than ten per cent of the class of share-holders who are aggrieved by the variation of their rights under sub-section (1) may, within thirty days of the date of the resolution varying their rights, apply to the Court for an order cancelling the resolution:

Provided that the Court shall not pass such an order unless it is shown to its satisfaction that some facts which would have had a bearing on the decision of the share-holders were withheld by the company in getting the aforesaid resolution passed or, having regard to all the circumstances of the case, that the variation would unfairly prejudice the share-holders of the class represented by the applicant.

(3) An application under sub-section (2) may be made on behalf of the share-holders entitled to make it by such one or more of their number as they may authorise in writing in this behalf.

(4) The decision of the Court on any such application shall be final.

(5) The company shall, within fifteen days after the service on the company of any order made on any such application, forward a copy of the order to the registrar and, if default is made in complying with this provision, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine which may extend to two hundred rupees for each day during which the default continues.

(6) The expression "variation" includes abrogation, revocation or enhancement.

(7) Section 5 of Limitation Act, 1908 (IX of 1908), shall apply to an application made under sub-section (2).

Synopsis

1. Scope.
2. Scheme of arrangement sanctioned by Court--variation under.
3. Enjoyment of right, variation in.

1. Scope. A variation effected by reason of the combined operation of section 108 and a particular clause in the Memorandum or the Articles of Association of the Company which authorised the variation, can be said to be complete and effectually made and no other step need be taken to clothe the

variation with the character of a full-fledged variation. That a variation becomes complete by the very fact of consent of the requisite proportion of share-holders being given to such variation is made clear by the language of the section.[6]

2. Scheme of arrangement sanctioned by Court--variation under. A provision in the articles of association of a company authorising the variation of the rights attached to any class of shares with the sanction of the holders of not less than three-fourths of the issued shares of that class is lawful and is sanctioned by section 108. Where such a provision explicitly states that it does not derogate from any other power which the company would have had if it had been omitted, a scheme of arrangement for reduction of capital which abrogates, modifies and affects the rights of preference share-holders to preferential return of capital is valid and can be sanctioned by the Court although the sanction of the majority of the holders of three-fourths of the issued preference shares has not been obtained in accordance with the provision in the article in question.[7] Therefore recourse to this section is not necessary for the modification of the rights clause in the Articles of Association when the modification or variation of the rights of share-holders is made as a part of the scheme of arrangement with the intervention of the Court under section 284.[8]

3. Enjoyment of right, variation in. Variation which merely affects the enjoyment of the right does not require to be dealt with under section 108. There is a distinction between enjoyment of the rights and affecting the rights.[9]

109. *Registration of unlimited company as limited.* (1) Subject to the provisions of this section, any company registered as unlimited may register under this Ordinance as limited or any company already registered as a limited company may re-register under this Ordinance, but the registration of an unlimited company as a limited company shall not affect the rights, debts, liabilities, obligations or contracts acquired, incurred or entered into by, to, with or on behalf of, the company before the registration.

(2) On registration in pursuance of sub-section (1), the registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company; but, save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Ordinance.

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6. AIR 1959 Cal. 253 (Agreement varying rights entered into with a share-holder ratified by other share-holders of the same class--Variation is complete--Omission to pass special resolution at a separate meeting of the share-holders confirming the agreement does render it incomplete).
7. AIR 1960 Cal. 637.
8. AIR 1959 Cal. 672+AIR 1960 Cal. 637 (Scheme of arrangement--Absence of approval by majority required under S. 6 is no bar to sanctioning the scheme).
9. AIR 1939 Cal. 672.

110. *Power of unlimited company to provide for reserve share capital on re-registration.* An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Ordinance, increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the amount by which its capital is so increased shall be capable of being called up except in the event and for the purpose of the company being wound up.

UNLIMITED LIABILITY OF DIRECTORS

111. *Limited company may have directors with unlimited liability.* (1) In a limited company, the liability of the directors or of any director may, if so provided by the memorandum, be unlimited.

(2) In a limited company in which the liability of any director is unlimited the directors of the company, if any, and the member who proposes a person for election or appointment to the office of director, shall add to that proposal a statement that the liability of the person holding that office will be unlimited and the promoters and officers of the company, or one of them shall, before that person accepts the office or acts therein, give him notice in writing that his liability will be unlimited.

(3) If any director or proposer makes default in adding such a statement, or if any promoter or officer of the company makes default in giving such a notice, he shall be liable to a fine which may extend to two thousand rupees and shall also be liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person elected or appointed shall not be affected by the default.

112. *Special resolution of limited company making liability of directors unlimited.* (1) A limited company, if so authorised by its articles, may, by special resolution, alter its memorandum so as to render unlimited the liability of its directors or of any director.

(2) Upon the passing of any such special resolution, the provisions thereof shall be as valid as if they had been originally contained in the memorandum:

Provided that an alteration of the memorandum making the liability of any of the directors unlimited shall not apply, without his consent, to a director who was holding the office from before

the date of the alteration, until the expiry of the term for which he was holding office on that date.

SPECIAL PROVISIONS AS TO DEBENTURES

113. *Rights of debenture-holder and share-holder to have copies of trust-deed.* (1) A copy of any trust-deed for securing any issue of debentures shall be forwarded to every holder of any such debentures or holder of shares in the company, at his request on payment of such fee as the company may fix not exceeding the amount prescribed.

(2) If a copy is refused or not forwarded as required under sub-section (1), the company shall be liable to a fine not exceeding five hundred rupees, and to a further fine not exceeding fifty rupees for every day after the first during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall be liable to the like penalty, and registrar may by order compel immediate supply of a copy.

114. *Debentures not to carry voting rights.* (1) Except as otherwise provided in this Ordinance, no company shall, after the commencement of this Ordinance, issue any debentures carrying voting rights at any meeting of the company:

Provided that debentures convertible into ordinary shares may, at the option of the company, carry voting rights:

Provided further that such voting rights shall not be in excess of the voting rights attaching to ordinary shares of equal paid-up value.

Explanation. Debentures convertible into ordinary shares include debentures with subscription warrants.

(2). Notwithstanding anything contained in this Ordinance, or in the memorandum or articles of any company, no debenture-holder having immediately before the commencement of this Ordinance voting rights shall, after such commencement, exercise any such rights at any meeting of the company, except a meeting of debenture-holders themselves.

1. Scope. Redeemable and transferable debentures with the right to control the affairs of the Company cannot be issued to the creditors.[10]

115. *Perpetual debentures.* A condition contained in any debenture or any deed for securing any debentures, whether issued

10. 1991 MLD 841 = PLJ 1991 Lah. 448 = NLR 1991 Civ. 260.

or executed before or after the promulgation of this Ordinance, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period however long.

116. *Power to re-issue redeemed debentures in certain cases.* (1) Where either before or after the commencement of this Ordinance a company has redeemed any debentures previously issued, the company, unless the articles or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company so to do, not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns, shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such reissue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

(2) Where with the object of keeping debentures alive for the purpose of re-issue they have, either before or after the commencement of this Ordinance, been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a reissue for the purposes of this section.

(3) Where a company had either before or after the commencement of this Ordinance deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit while the debentures remained so deposited.

(4) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to, or deemed to have been possessed by a company, whether the re-issue or issue was made before or after the commencement of this Ordinance, shall be treated as the issue of a new debenture for the purposes of stamp-duty and registration, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued:

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp-duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp-duty and penalty.

(5) Nothing in this section shall prejudice any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same.

117. *Specific performance of contract to subscribe for debentures.* A contract with a company to take up and pay for any debentures of the company may be enforced by a decree for specific performance.

118. *Payment of certain debts out of assets subject to floating charge in priority to claims under the charge.* (1) Where either a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge, or possession is taken by or on behalf of these debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part XI relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2) The periods of time mentioned in the said provisions of Part XI shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(3) Any payments made under sub-section (1) shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors.

Synopsis

1. Money borrowed to pay salaries of employees.
2. Municipal charges, payment of.

1. Money borrowed to pay salaries of employees. In a suit by the debenture-holders to enforce their mortgage debentures, secured by a charge over both the

fixed and floating assets of a company, a receiver was appointed for the protection of the property. The receiver raised a loan, to pay the arrears of salary to the employees who had gone on strike; under an agreement to hypothecate the property of the company. The creditors who lent money were entitled to priority over the debenture-holders even though a hypothecation in their favour had not been made in pursuance of the agreement.[11]

2. **Municipal charges, payment of.** A receiver appointed by debenture-holders to be receiver for the assets of the company, by his failure to pay out of the assets the preferential claims relating to municipal rates before making payments to ordinary creditors renders himself liable in damages in torts and the municipality can recover the same from him.[12]

119. *Powers and liabilities of trustee.* (1) The trustee nominated or appointed under the trust-deed for securing an issue of debentures shall, if so empowered by such deed, have the right to sue for all redemption monies and interest in the following cases, namely:--

(*a*) where the issuer of the debentures as mortgagor binds himself to repay the debenture loan or pay the accrued interest thereon, or both to repay the loan and pay the interest thereon, in the manner provided on the due date;

(*b*) where by any cause other than the wrongful act or default of the issuer the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of S. 66 of the Transfer of Property Act, 1882 (Act IV of 1882), and the trustee has given the issuer a reasonable opportunity of providing further security adequate to render the whole security sufficient and the issuer has failed to do so;

(*c*) where the trustee is deprived of the whole or part of the security by or in consequence of any wrongful act or default on the part of the issuer; and

(*d*) where the trustee is entitled to take possession of the mortgaged property and the issuer fails to deliver the same to him or to secure the possession thereof without disturbance by the issuer or any person claiming under a title superior to that of the issuer.

(2) Where a suit is brought under clause (*a*) or clause (*b*) of sub-section (1) the Court may at its discretion stay the suit and all

11. AIR 1945 PC 121 = ILR 1945 Kar (PC) 245.
12. (1950) 1950-2 All ER 65 (case decided under (English) Companies Act, 1948, S. 594).

proceedings therein notwithstanding any contract to the contrary, until the trustee has exhausted all his available remedies against the mortgaged property or what remains of it unless the trustee abandons his security and, if necessary, retransfers the mortgaged property.

(3) Notwithstanding anything contained in sub-sections (1) and (2) or any other, law for the time being in force, the trustee or any person acting on his behalf shall, if so authorised by the trust-deed, sell or concur in selling, without intervention of the Court the mortgaged property or any part thereof in default of payment according to re-payment schedule of any redemption amount or in the payment of any accrued interest on the due date by the issuer.

Explanation. "Issuer", in sub-sections (1), (2) and (3), shall mean the company issuing debentures and securing the same by mortgage of its properties or assets, or both its properties and assets, and appointing a trustee under a trust deed.

(4) Subject to the provisions of this section, any provision contained in a trust deed for securing and issue of debentures, or in any contract with the holders of debentures secured by a trust-deed, shall be void in so far as it would have the effect of exempting a trustee thereof from, or indemnifying him against, liability for breach of trust, where he fails to show the degree of care and diligence required of him as trustee, having regard to the provisions of the trust deed conferring on him any power, authority or discretion.

(5) Sub-section (4) shall not invalidate--

(*a*) any release otherwise validly given in respect of anything done or omitted to be done by a trustee before the giving of the release; or

(*b*) any provision enabling such a release to be given--

(*i*) on the agreement thereto of a majority of not less than three-fourths in value of the debenture-holders present and voting in person or, where proxies are permitted by proxy, at a meeting summoned for the purpose; and

(*ii*) either with respect to specific acts or omissions or on the trustee dying or ceasing to act.

(6) Sub-section (4) shall not operate--

(*a*) to invalidate any provision in force immediately before the commencement of this Ordinance, so long as person then entitled to the benefit of that provision or afterwards given the benefit thereof under sub-section (7) remains as trustee of the deed in question; or

(*b*) to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force.

(7) While any trustee of a trust-deed remains entitled to the benefit of provision saved by sub-section (6), the benefits of that provision may be given either--

(*a*) to all trustees of the deed, present and future; or

(*b*) to any named trustees or proposed trustees thereof; by a resolution passed by a majority of not less than three-fourths in value of the debenture-holders present in person or where proxies are permitted, by proxy, at a meeting called for the purpose in accordance with the provisions of the deed or, if the deed makes no provisions for calling meetings, at a meeting called for the purpose in any manner approved by the Court.

[13][120. *Issue of securities and redeemable capital not based on interest.*-- (1) [14][A company may by public offer or] upon terms and conditions contained in an agreement in writing, issue to one or more scheduled banks, financial institutions or such other persons as are specified for the purpose by the Federal Government by notification in the official Gazette, either severally, jointly or through their syndicate, any instrument to the nature of redeemable capital in any or several forms in consideration of any funds, moneys or accommodation received or to be received by the company, whether in cash or in specie or against any promise, guarantee, undertaking or indemnity issued to or in favour of or for the benefit of the company.

(2) In particular and without prejudice to the generality of the foregoing provisions, the agreement referred to in sub-section (1) for redeemable capital may provide for, adopt or include, in addition to others, all or any of the following matters, namely:--

13. Subs. by Ord. 57 of 1984, S. 7.
14. Subs. by Act 12 of 1994 S. 9(1).

(*a*) mode and basis of repayment by the company of the amount invested in redeemable capital within a certain period of time;

(*b*) arrangement for sharing of profit and loss;

(*c*) creation of a special reserve called the "participation reserve" by the company in the manner provided in the agreement for the issue of participatory redeemable capital in which all providers of such capital shall participate for interim and final adjustment on the maturity date in accordance with the terms and conditions of such agreements; and

(*d*) in case of net loss on participatory redeemable capital on the date of maturity, the right of holders to convert the outstanding balance of such capital or part thereof as provided in the agreement into ordinary shares of the company at the break-up price calculated in the prescribed manner.

(3) The terms and conditions for the issue of instrument or certificates of redeemable capital and the rights of their holders shall not be challenged or questioned by the company or any of its shareholders as repugnant to articles or any resolution of the general meeting or directors of the company or any other document.

(4) The provisions of this Ordinance or the Capital Issues (Continuance of Control) Act, 1947 (XXIX of 1947), relating to the creation, issue, increase or decreases of the capital shall not apply to the redeemable capital.]

PART VII

REGISTRATION OF MORTGAGES, CHARGES, ETC.

121. *Certain mortgages and charges to be void if not registered.* (1) Every mortgage, charge or other interest created after the commencement of this Ordinance by a company and being either--

(*a*) a mortgage or charge for the purpose of securing any issue of debentures; or

(*b*) a mortgage or charge on uncalled share capital of the company; or

(*c*) a mortgage or charge on any immovable property wherever situate, or any interest therein; or

(*d*) a mortgage or charge on any book debts of the company; or

(*e*) a mortgage or charge, not being a pledge, on any movable property of the company; or

(*f*) a floating charge on the undertaking or property of the company, including stock-in-trade; or

(*g*) a mortgage or charge on a ship or any share in a ship; or

(*h*) a mortgage or charge on goodwill, on a patent or licence under a patent, on a trade mark, or on a copyright or a licence under a copyright; or

(*i*) a mortgage or charge or other interest based on agreement for the issue of [1][any instrument in the nature of redeemable capital]; or

(*j*) a mortgage or charge or other interest based on a musharika agreement; or

(*k*) a mortgage or charge or other interest based on a hire-purchase or leasing agreement for acquisition of fixed assets;

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with a copy of the instrument, if any, verified in the prescribed manner, by which the mortgage or

1. Subs. by Ord. 57 of 1984, S. 7.

charge is created or evidence are filed with the registrar for registration in the manner required by this Ordinance within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable:-

Provided that:

(*i*) in the case of a mortgage or charge created out of Pakistan comprising solely property situate outside Pakistan, twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in Pakistan shall be substituted for twenty-one days after the date of the creation of the mortgage or charge as the time within which the particulars and instrument or copy are to be filed with the registrar; and

(*ii*) where the mortgage or charge is created in Pakistan but comprises property outside Pakistan, the instrument creating or purporting to create the mortgage or charge and a copy thereof verified in the prescribed manner may be filed for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and

(*iii*) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purpose of this sub-section be treated as a mortgage or charge on those book debts; and

(*iv*) the holding of debentures entitling the holder to a charge on immovable property shall not be deemed to be an interest in immovable property.

(2) Where any mortgage or charge on any property of a company required to be registered under sub-section (1) has been so registered, any person acquiring such property or any part thereof, or any share or interest therein, shall be deemed to have notice of the said mortgage or charge as from the date of such registration.

Synopsis

1. Registration.
2. Effect of non-registration.
3. Registration Act, non-registration under.
4. Charge or mortgage of immovable property.
5. Mortgage by deposit of title deeds.
6. Charge on movable property.
7. Charge on book debts.
8. Floating charge on company's assets.
9. Crystallisation of security.
10. Stock-in-trade.
11. Pledge of movable property.
12. Duty of Registrar.

1. **Registration.** The law required action to be taken for registration of particulars of the charge within 21 days under section 121(1)(*c*) of the Companies Ordinance. The delay in filing the application for registration of the particulars of a mortgage may be condoned subject to provisions of S. 134.[2] Validity of an instrument duly registered is not affected by an omission of certain particulars from the register.[3]

2. **Effect of non-registration.** A mortgage not registered according to the section does not create a valid charge on the company's properties as against a creditor or liquidator.[4] Section 121 contemplates that the mortgages and charges, created by the Company if not registered with the Registrar of Companies within 21 days from the date of their creation, the same shall be void against the liquidator and creditors of the Company. The companies are under legal obligation to provide complete particulars of the mortgage or charge alongwith copy of the instrument, verified in the prescribed manner within 21 days of the creation of the mortgage. Similarly the Registrar is supposed to examine the documents promptly and return them if defective or incomplete, immediately so that the companies have reasonable time at their disposal to resubmit the same after removing the defects, if any. In case the companies file defective document or fail to give particulars of the mortgage or charge or do not provide copy of the instrument as prescribed under the relevant rules, it cannot be contended on their behalf, that time consumed in returning the document be excluded from the period provided under the law. The Registrar, of his own accord cannot extend the period of 21 days. The requirement of the registration of mortgage or charge within 21 days from the date of its creation is absolute. If omission is made for any reason, the charge can only be registered by leave of the Court.[5]

An unregistered charge is not void for all purposes and would be binding on the company itself so long as it is a going concern.[6]

The validity of a charge under the section does not depend upon the actual registration of it by the Registrar. A charge for the purposes of the section is valid as soon as the particulars regarding it have been sent to the Registrar within the prescribed period.[7] In fact a mortgage or charge not registered according to the

2. 1991 CLC 415 = PLJ 1991 Kar 182 = NLR 1991 Civ. 599.
3. (1924) 1924-1 K B 431.
4. AIR 1930 PC 66 = 57 Ind. App. 76 = 5 Luck 128 + 60 Cal. W N 278.
5. PLD 1989 Lah. 539.
6. AIR 1959 Mad. 538 + AIR 1927 Rang 288 (DB) + 60 Cal W N 278 + 1951-1 Ch. 643.
7. AIR 1917 All 117 = ILR 1946 All. 867 (DB).

Ordinance is not avoided absolutely but operates as a valid admission of the debt.[8] In other words the effect of the section is that if the mortgage is not registered, the liquidator is not to take notice of it as a mortgage. The debt will survive and it will be treated on par with other debts. The property which is the subject-matter of the security will be available as the assets of the company to the liquidator for payment to the creditors. The creditors in liquidation will not be affected by the mortgage. This section does not take away the right of the company to deal with its property. If the company can validly deal with its property, any transfer made by the company will be binding on the company. If the company mortgages certain property, any person who subsequently purchases the property from the company will take it subject to the mortgage and section 121 is no bar to the mortgagee enforcing his mortgage as against the transfer of the company simply because it has not been registered under section 121.[9]

Penalty for non-registration. Where a company had made default in filing particulars of any charge created by the company on its assets with the Registrar of Companies, the defaulting company and every officer thereof, would be liable to a fine not exceeding Rs. 500 for every day during which default in filing such particulars had continued. Section 134 provides maximum penalty for default in compliance of the aforesaid requirement. However, the competent authority for imposition of penalty in such a case was the Registrar who was the head of the organization for the registration of companies in Pakistan under section 476(1)(*b*) of the Ordinance, as, under section 121(1)(*c*), the maximum fine per day would be Rs. 500. In the circumstances, High Court could not penalise. The competent authority under section 476 could take action under that provision after notice to the concerned party and providing them with a hearing.[10] Where delay of about a week occurred in registration of the document. The omission to seek registration of the charge, within the prescribed time is not of the nature as to prejudice the position of creditors or shareholders of the Company. The document was resubmitted for registration the following day and was received after removing the defects. It, therefore, was just and expedient to extend requisite time for its registration subject to payment of Rs. 500 as costs.[11]

Who may impose penalty. Penalty for non-compliance with requirements of S.121(1)(*c*) can be imposed only by Registrar, High Court cannot penalise company which files application before it for condonation of delay.[12]

Priority of registered over unregistered charge. A mortgage of company's land not registered according to the requirements of the company law will not prevail over a subsequent mortgage duly registered and the subsequent creditor is not deprived of that priority by the fact of his knowledge of the existence of the prior mortgage at the time of the execution of his mortgage.[13]

Creditor--meaning of. The creditor contemplated under the section is one who has a charge over the property, or where the company is in liquidation, has

8. AIR 1930 PC 66 = 57 Ind. App. 76 = 5 Luck 128.
9. AIR 1963 Assam 56 (DB).
10. 1991 CLC 415 = PLJ 1991 Kar. 182 = NLR 1991 Civ. 599.
11. PLD 1989 Lah. 539 + NLR 1987 UC 206.
12. NLR 1991 Civ. 599 = PLJ 1991 Kar. 182 = 1991 CLC 415.
13. (1915) 1915-1 Ch. 643.

acquired a right to ratable distribution of the assets of the company and he alone can avoid the mortgage of charge which is not registered. An ordinary unsecured creditor of the company cannot avoid the mortgage for the reason that it is not registered under the section since he has no enforceable right either against the mortgagee or against the property comprised in the mortgage.[14]

Charge by operation of law. The section applies to a mortgage or charge created by the company by contract, and not to a charge arising by operation of law.[15]

State debts. The Government is bound by the provisions of the Companies Ordinance and is bound in regard to the provisions relating to the liquidation of companies, to a statutory scheme of administration wherein its prerogative right to priority no longer exists. It is not entitled to any prerogative, priority, or preferential rights or treatment in payment of its claims save those expressly conferred and limited by the Ordinance itself. Where the State Government had advanced certain loan to a company under the State Aid to Industries Act under a mortgage deed which was not registered in accordance with section 121 and on the Company going into liquidation the State sought to recover the amount as arrears of land revenue in priority to other debts of the company. It was held that by omission to get the mortgage deed registered as required by section 121 of the Ordinance. The State lost the advantage of being a secured creditor of the Company and could not recover the amount.[16]

Loan by Bank to Company. Loan by a Bank to a Company which is not registered with Registrar, Joint Stock Companies, would be void in view of S.121. It cannot be given any preferential treatment under section 405.[17]

3. Registration Act, non-registration under. No precise form is required by the company for creating a charge of a mortgage whether on immovable property or movable property and if the intention of the parties to create a charge is clear from the transaction, it is sufficient.[18] Where a company issued debentures which were of a value above one hundred rupees and which purported to create a charge on the properties of the company present and future. The debentures were registered under section 121 but were not registered under section 17(1)(*b*) of the Registration Act. It was held that so far as the charge on the immovable properties in the ownership of the company on the date of creation of charge was concerned, the debentures required registration under section 17(1)(*b*) of the Registration Act since a debenture which does seek to create, declare or limit any right, title or interest to or in immovable property would be covered by the latter provision. The combined effect of sections 18 and 49 of the Registration Act was to make debentures ineffective so far as they sought to create a charge on immovable property of the Company.[19] A floating charge regarding immovable properties of a company is to be registered both under the Registration Act and

14. 60 Cal. W.N 278.
15. AIR 1927 Oudh 35 = 2 Luck 299 (DB).
16. AIR 1962 Punj. 519 + AIR 1946 FC 16.
17. NLR 1989 Civ. 648.
18. AIR 1955 Bom. 419.
19. AIR 1962 All. 191 (DB).

also under this section of the Companies Ord.[20] Though floating charge may become fixed on the happening of one of the events mentioned in the conditions of the debenture, issue of debentures is a mutation of the right of the company to its immovable property contingent on one of the events specified in the condition. Further the issue of the debenture purports to create a charge as described in section 100 of the T.P. Act on the property of the company. As the provisions of section 17(1)(*b*) of the Registration Act regarding the registration of non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish a right, title or interest are mandatory, debentures which are not registered under that section fail to create a charge on the immovable property of the company.[1] A debenture which contained no stipulation to qualify the elasticity of the floating charge and which left the company at liberty to execute specific mortgages or charges in priority to it, was held to require registration under Section 17 of the Registration Act and that in the absence of such registration it could not take effect with regard to the immovable property of all sorts possessed by the company at the time of its execution. The fact that the right of the company to use the property during the course of its business was a condition of the charge was no reason to exempt the instrument from compulsory registration under the Registration Act.[2]

4. Charge or mortgage of immovable property. No precise form is required by the company for creating a charge or a mortgage whether on immovable property or movable property and if the intention of the parties to create a charge is clear from the transaction, it is sufficient.[3]

Debentures. The fourth proviso to section 121(1) would exempt only the debentures from being registered and not the immovable properties given as security to the debenture-holders.[4]

Machinery. In certain circumstances, machinery might be immovable property under the section if it is affixed to the soil so as to become immovable property.[5]

5. Mortgage by deposit of title deeds. Particulars of a mortgage by deposit of title deeds must be filed with Registrar whether it is accompanied by a memorandum of deposit or not.[6] Where the company issued debentures purporting to create a first charge on the undertaking, hereditaments and effects of company. There was a subsequent mortgage of the colliery of the company by deposit of title deeds. The mortgage was held to have priority over the debentures on the ground that the debenture was intended to be a general floating security over all the property of the company at the time when it was put in force and not to prevent the carrying on of the business in all or any of the ways in which it was

20. AIR 1957 Mad. 169 (DB).
1. AIR 1959 All 247.
2. AIR 1913 Cal. 223 = 58 Cal. 136 (DB).
3. AIR 1955 Bom 419.
4. AIR 1957 Mad. 169 (DB).
5. AIR 1938 All 574 = ILR 1938 All. 896.
6. AIR 1927 Bom. 167 (DB).

carried on in the ordinary course and that mortgage was executed for the purpose of the business.[7]

6. Charge on movable property. A mortgage or charge on the movable property including its stock-in-trade requires registration under the Ord.[8] Assignment of book debt for securing existing debt constitutes a mortgage, and if unregistered is inoperative against the liquidator or creditors.[9]

7. Charge on book debts. An assignment of book debt for securing existing debt constitutes a mortgage, and if unregistered is inoperative against the liquidator or creditors.[10]

8. Floating charge on company's assets. A floating security or charge is recognised regarding limited companies in much the same terms as in England.[11] A floating charge is created by making the assets or the undertaking of the Company a security for the payment of debts into which a company enters. Such a charge might cover properties which may be specified or unspecified in the document creating the charge. The description may be a general one. A peculiar feature of this transaction, however, is that it is not possible to predicate the exact property on which the charge would operate until the happening of a future event.[12] A charge by a company on its general 'undertaking' constitutes a floating charge. Such a charge is an equitable charge on the assets for the time being of the company as a going concern and it attaches to the subject charged in varying conditions in which it happens to be from time to time.[13] It is not a future security; it is a present security which presently affects all the assets of the company expressed to be included in it.[14] Thus an agreement between the parties that the amount paid to the company will be a second charge on the machinery and other goods of the company, created a floating charge.[15]

A floating security is not a specific mortgage of the assets plus a licence to the mortgagor to dispose of them in the course of his business.[16] The principle tests as to whether a charge is a floating charge or not are: (1) Is it a charge upon all or a certain class of assets, present or future? (2) Would the assets charged in the ordinary course of business be charged from time to time? (3) Has the company power until such step is taken by the charges to carry on the business of

7. (1885) 29 Ch. D. 715.
8. AIR 1925 Mad. 136 (DB) (Note: In this case decided under section (1) (*e*), the view expressed by the Bombay High Court in AIR 1949 Bom. 262 on the effect of the words "except stock-in-trade" for coming to the conclusion that a transaction relating to a stock-in-trade did not require registration was dissented from. Now in the absence of those words in section 121 (1) (*e*) it is clear that the Madras view expressed in this case has received statutory recognition).
9. AIR 1935 Cal. 218=62 Cal. 1 (DB).
10. AIR 1935 Cal. 218=62 Cal. 1 (DB).
11. AIR 1957 Mad. 169 (DB).
12. AIR 1962 All 101 (DB).
13. AIR 1957 Mad. 169 (DB).
14. AIR 1926 Bom. 427 (DB)+AIR 1931 Cal. 223 (DB) (*reversed* on another point in AIR 1931 PC 245).
15. AIR 1942 All 119 (FB) (AIR 1938 All. 574, *affirmed*).
16. AIR 1926 Bom. 247 (DB)+AIR 1952 Mad. 595+AIR 1927 Cal. 682 (DB).

the company in the ordinary way.[17] Thus where under a deed creating a charge on the properties of the company possession is required to be given to the lender and it is actually given, the charge created by the deed cannot come within the description of a floating charge.[18]

Right of company to dispose of property to subject to charge. A floating charge creates an immediate equitable charge on the assets, subject to the right of the company in the ordinary course and for the purposes of its business, but not otherwise, to dispose of the assets as though the charge did not exist.[19] A floating security does not prevent the making of a specific charges or specific alienations of property by the company because that would destroy the very object for which the money is borrowed, namely the carrying on of the business of the company.[20] Thus where under the power conferred on it by the articles to borrow money by mortgage or by "bonds, debentures or mortgage debentures" under which the holders would be entitled to be paid out of the moneys, property and effects of the company *pari passu* the company issued instrument binding themselves and their estates, etc. to repay at a future date and with a power to redeem a certain part of the liability at intermediate dates. It was held that it constituted a charge on the property subject however, to the right of the company to dispose of any part in the ordinary course of its business.[1]

Registration of floating charge. An instrument creating a floating charge on the property of a corporation when not registered with the registrar is void as against official liquidator.[2] An agreement creating floating charge on machinery and other goods of a company would be void under this section if not registered.[3]

Floating charge when becomes enforceable. A floating charge applies to every item of security until some event occurs or some act is done by the mortgagee which causes it to crystallise into a fixed security.[4] A floating charge is an equitable charge on the assets for the time being of a going concern. By its very nature it is ambulatory and shifting and unlike a specific charge which without more fastens on ascertained and definite property or on property capable of being ascertained and defined, it is not intended to affect the property covered by it until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.[5] This future event may be the appointment of a receiver at the instance of the creditors of a company for the realisation of their debts or the winding up of the Company itself. Till such a future event happens, the charge is of an ambulatory or roaming character. Once, however, this future event occurs the charge settles down, and attaches itself to a fixed property. The right created under it is no doubt a right *in praesenti.* The security in respect of which the right is created however, becomes crystallized only when the

17. AIR 1939 Sind 100+AIR 1942 All 119=ILR 1942 All 242 (FB).
18. AIR 1927 Cal. 682=54 Cal. 513 (DB)+AIR 1952 Mad. 595.
19. AIR 1957 Mad. 169 (DB).
20. (1880) 15 Ch. D. 465.
1. (1878) 10 Ch. D. 530.
2. AIR 1939 Sind 100.
3. AIR 1942 All 119=ILR 1942 All 242 (FB).
4. AIR 1926 Bom. 427 (DB)+AIR 1927 Cal. 682 (FB).
5. AIR 1963 Ker. 301 (DB).

future event takes place.[6] In other words it is of the essence of a floating charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person is whose favour the charge is created intervenes.[7]

Thus where a deed of debenture after charging all the assets of the company by way of a floating charge, provides that notwithstanding such charge the company should have power to carry on the business and deal with the assets until the happening of a certain event the right to carry on the business is not determined automatically by the happening of the event but continues until the debenture-holder intervenes to show his desire that it should cease.[8]

9. Crystallization of security. The existence of a floating charge does not prevent the company from carrying on its business and the burden on such a charge does not clog the right of the company to carry on its business. And any debts incurred by the company in the ordinary course of carrying on its business after the creation of a floating charge are capable of being realised by the creditor through the process of law, before the security becomes crystallised.[9] The person is whose favour a floating charge has been created may intervene at any time after default. A debenture-holder may obtain the appointment of a receiver or receiver and manager and crystallise the floating security. When the floating security upon all the property or assets of the company is so crystallised or fixed, it constitutes a charge upon all the property or assets then belonging to the company. A floating security which has been crystallised has priority over subsequent equitable charges and over unsecured creditors and over moneys advanced to the liquidator to carry on the business of the company although the advances were made with the sanction of the court in winding up and over the costs of the liquidator other than costs of realisation.[10]

The right of the creditor holding a floating charge to intervene on default may be suspended by agreement and if the company creates mortgage and charges subsequent to the suspension of the power, the question of their priority is a question of construction. Such an agreement can also contain a power to create a second floating charge ranking in priority.[11]

A floating charge although crystallised is subject to all the then existing charges and to the payments of debts which by statute are made out of property subject to a floating security, in priority to the moneys thereby secured.[12]

Suspension of right. A debenture-holder who has a floating charge over certain properties is confined to the security of these properties only and cannot claim the usufruct of the property merely because he has crystllised the security.[13]

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6. AIR 1962 All 101 (DB).
7. AIR 1957 Mad. 169 (DB) + AIR 1934 All 161 + AIR 1917 Mad. 646 (DB) + AIR 1916 Mad. 7 (DB).
8. AIR 1917 Mad. 646 (DB) + AIR 1916 Mad 7 (DB).
9. AIR 1963 Ker. 301 (DB).
10. AIR 1957 Mad. 169 (DB).
11. AIR 1957 Mad. 169 (DB).
12. AIR 1957 Mad. 169 (DB).
13. AIR 1936 Oudh 338 = 12 Luck 288 (DB).

10. Stock-in-trade. Mineral ore is within the meaning of the term "stock-in-trade" in the case of a company incorporated for mining purposes and doing mining business.[14]

11. Pledge of movable property. Pledge of any movable property including stock-in-trade does not require registration.[15] Where a Bank endorses to its creditors as security, pronotes drawn in its favour by its debtors and delivers them to the creditor, entitling him to realise the securities as and how he pleases, the transaction though it may amount to a mortgage also amounts to a pledge and does not therefore require registration.[16] Where the director of a company gave as security all the present and future movables and himself remained in possession as the agent of the creditor. It was held that the transaction amounted to a floating charge and not a pledge.[17]

12. Duty of Registrar. A registration of charges created on the assets of a company is designed as a protection to the public, the registrar is bound to avoid all unnecessary delays in registering a charge of which notice has been given to him.[18]

122. *Registration of charges on properties acquired subject to charge.* (1) Where a company registered in Pakistan acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part, the company shall cause the prescribed particulars of the charge, together with a copy, certified in the prescribed manner to be correct copy of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the registrar for registration in the manner required by this Ordinance within twenty-one days after the date on which the acquisition is completed:

Provided that, if the property is situate and the charge was created outside Pakistan, twenty-one days after the date on which the copy of the instrument could in due course of post, and if despatched with due diligence, have been received in Pakistan shall be substituted for twenty-one days after the completion of the acquisition as the time within which the particulars and the copy of the instrument are to be delivered to the Registrar.

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14. AIR 1952 Mad. 136.
15. 1992 SCMR 1731 = NLR 1992 Civ. 611 + AIR 1956 Mad. 234 + AIR 1959 Cal. 117 (Aircrafts delivered into hands of partner as part of financing arrangement as security for money advanced by him--*Held* the transaction amounted to bailment which satisfied the requirements of a valid pledge and hence did not require registration under the section) + AIR 1949 Bom. 262.
16. AIR 1943 Mad. 73 (DB).
17. AIR 1926 Bom. 28 (DB).
18. AIR 1947 All 117 = ILR 1946 All. 867.

(2) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of two thousand rupees.

Synopsis

1. Scope.
2. Extension of time.
3. Right of creditors.

1. Scope. The omission of section 122 from section 131 is neither accidental nor due to inadvertence nor is section 122 or section 131 meaningless without the interpolation. If the Court were to add section 122 to section 131 it would be so violent a change that it would amount to framing a new section and constitute an encroachment upon the field of the legislature. To cases under section 122 section 131 cannot be applied by the Court.[19]

2. Extension of time. Where a company Judge who has jurisdiction over the subject-matter and also territorial and pecuniary jurisdiction passes an order under section 131 extending time in a case under section 122 to which section 131 does not apply, it is a decision given in irregular exercise of his jurisdiction. The order is not void but merely voidable and it can be revoked only at the instance of the litigant who has an interest in the subject-matter of the proceeding. It cannot be challenged by a person who was not only not a party to the proceeding but also had no interest which required protection in the proceedings.[20]

3. Right of creditors. The omission of the purchasing company to notify the registrar of the charge to which the purchased property is subject cannot enlarge the property from the charge and make it available to the creditor of that company free of it.[1]

123. *Particulars in case of series of debentures entitling holders pari passu.* Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture-holders of that series are entitled *pari passu* is created by a company, it shall be sufficient for the purposes of section 121 if there are filed with the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars, namely:--

(*a*) the total amount secured by the whole series;

(*b*) the dates of the resolutions authorizing the issue of the series and the date of the covering deed, if any, by which the security is created or defined;

(*c*) a general description of the property charged; and

19. AIR 1959 Cal. 464.
20. AIR 1959 Cal. 464.
1. AIR 1959 Mad. 538 = ILR 1959 Mad. 827.

(*d*) the names of the trustees, if any, for the debenture-holders;

together with a copy of the deed verified in the prescribed manner containing the charge, or if there is no such deed, one of the debentures of the series, and the registrar shall, on payment of the prescribed fee, enter those particulars in the register:

Provided that, where more than one issue is made of debentures in the series, there shall be filed with the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

1. Object of registration. One of the objects of registration under the Registration Act is to provide information to persons dealing with the property with a view to prevent fraud. Of the other object one is to give solemnity of form and legal importance to certain classes of documents and another is to perpetuate documents which may afterwards be of legal importance. The general purpose appears to be to ensure a record of the rights and obligations relating to immovable properties. In the light of these objects it would be difficult to hold that the registration under section 121 read with section 123 of a general description of the property charged has the same effect as registration under the Registration Act.[2]

124. *Particulars in case of commission, etc. on debentures.* Where any commission, allowance or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be filed for registration under section 121 and 123 shall include particulars as to the amount or rate per cent of the commission, discount or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued:

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this section be treated as issue of the debentures at a discount.

125. *Register of mortgage and charges.* (1) The Registrar shall keep, with respect to each company, a register in the prescribed form of all mortgages and charges created by the company and requiring registration under section 121 or section 122 and shall, on payment of prescribed fee, enter in the register, with respect to

2. AIR 1959 All. 247.

every such mortgage, or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgages or persons entitled to the charge.

(2) A register kept in pursuance of sub-section (1) shall be open to inspection by any person on payment of the prescribed fee.

1. Scope. The registration of a charge is intended to be a protection to the public and therefore should not be delayed by the Registrar for an unduly long time.[3]

126. *Index to register of mortgages and charges.* The registrar shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the mortgages or charges registered with him under this Ordinance.

127. *Certificate of registration.* The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of section 121, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of sections 121 to 125 as to registration have been complied with.

Synopsis

1. Finality of certificate of Registration.
2. Registration beyond time.

1. Finality of certificate of Registration. Once a certificate of registration is granted under section 127, it is no longer open to challenge any of the mechanical steps of registration including the delivery of particulars or the payment of prescribed fees.[4] If after the issue of debentures relating to immovable property by a company, the debenture-holder gets them registered under the Companies Ord. and obtains a proper certificate for the same, nothing done subsequently by way of alteration by the Registrar of his own accord can affect the validity of the documents as between the company and the debenture-holder.[5]

2. Registration beyond time. A registration made after the prescribed period is invalid and in such a case the issue of a certificate of registration can mean nothing at all. The fact that the form of procedure laid down by the statute had been complied with cannot validate such a registration.[6]

128. *Endorsement of certificate of registration on debenture or certificate of debenture stock.* The company shall cause a copy of every certificate of registration given under section 127 to be

3. AIR 1947 All. 117 = ILR 1946 All. 867 (DB).
4. AIR 1947 All. 117 = ILR 1946 All. 867 (DB).
5. AIR 1930 Cal. 536 = 57 Cal. 328.
6. AIR 1937 Oudh 62.

endorsed on every debenture or certificate of debenture stock which is issued by the company and the payment of which is secured by the mortgage or charge so registered:

Provided that nothing in this section shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

129. *Duty of company and right of interested party as regards registration.* (1) It shall be the duty of a company to file with the registrar for registration the prescribed particulars of every mortgage or charge created by the company and of the issue of debentures of a series, requiring registration under section 121, but registration of any such mortgage or charge may be effected on the application of any person interested therein.

(2) Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

(3) Whenever the terms or conditions or extent or operation of any mortgage or charge registered under sub-section (1) are modified, it shall be the duty of the company to send to the registrar the particulars of such modification together with a copy of the instrument evidencing such modification verified in the prescribed manner, and the provisions of sub-section (1) as to registration of mortgage or charge shall apply to such modification of the mortgage or charge as aforesaid.

130. *Copy of instrument creating mortgage or charge to be kept at registered office.* Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under section 121 and of every instrument evidencing modification of the terms or conditions thereof, to be kept at the registered office of the company:

Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient.

131. *Rectification of register of mortgages.* (1) The Court, on being satisfied that the omission to register a mortgage or charge within the time required by section 121, or that the omission or misstatement of any particular with respect to any such mortgage or charge, or the omission to give intimation to the registrar of the

payment or satisfaction of a debt for which a charge or mortgage was created, was accidental or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or share-holders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested and, on such terms and conditions as seem to the Court just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or mis-statement be rectified, and may make such order as to the costs of the application as it thinks fit.

(2) A certified copy of the order of the Court passed under sub-section (1) shall be filed with the registrar within twenty-one days of the date of such order by the company or the person on whose application it is passed.

(3) Where the Court extends the time for the registration of a mortgage or charge, the order shall not prejudice any rights acquired in respect of the property concerned prior to the time when the mortgage or charge is actually registered.

Synopsis

1. Applicability.
2. Interference by Court.
3. Extension of time.
4. Priority among different mortgages.
5. Non-registration--effect.
6. Review of orders.

1. Applicability. Section 131 does not apply to cases under section 127. The omission of section 127 from section 131 is neither accidental nor due to inadvertence. Nor is section 123 or section 131 meaningless or ineffective without the interpolation. If the Courts were to read section 127 into section 131 it would be so violent a change that it would amount to framing a new section and would constitute an encroachment upon the field of the legislature. Where a Company Judge who has jurisdiction over the subject-matter and also territorial and pecuniary jurisdiction, passes an order under section 131, extending time in a case under section 127 to which section 131 does not apply, it is a decision given in irregular exercise of his jurisdiction. The order is not void but merely voidable and it can be revoked only at the instance of a litigant who has an interest in the subject-matter of that proceeding. It cannot be challenged by a person who was not only a party to the proceeding but also had no interest which required protection in the proceeding.7

2. Interference by Court. The section gives a right to the mortgagee to come to the Court to be relieved of the consequences of his own negligence which is not actuated by any fraudulent or improper motive.[8] Under the first sub-section of

7. AIR 1959 Cal. 464.
8. 60 Cal. W N 278.

section 131 the Court is neither required to protect nor serve any notice upon unsecured creditors, and consequently the third sub-section of section 131 must be held to be an exhaustive codification of the legal effect of an order made under the first sub-section. The holder of any right which falls outside the third sub-section has no *locus standi* in a proceeding under section 131.[9]

Matters to be considered by Court. The Court may grant relief under the section even if any one of the alternative conditions mentioned therein is satisfied.[10] The section confers a wide judicial discretion. In exercising that discretion it is not material to consider the solvency or otherwise of the company, the presence or absence of any judgment against it or the pendency of a winding up proceeding.[11] The appointment of a provisional liquidator for the company is a material consideration in deciding if the discretionary relief should be granted under the section.[12]

3. Extension of time. Where there was delay in applying for registration of particulars of mortgage. Reasons that there was inadvertence on the part of Company and that no prejudice had been caused to any party on account of delay was accepted as valid ground for condonation of delay.[13] Where Company contended that 8 days' delay in submission of Form 17 was beyond its control. No opposition was there to grant of prayer for condonation of delay which otherwise appeared to be quite reasonable, delay was condoned without any penalty.[14]

A charge may be registered where it is created by a registered mortgage and the genuineness of the mortgage deed is not disputed even when the opposite party contends that there was an agreement between him and the company not to mortgage the property. The latter party can take action for breach of agreement but it cannot urge it as a ground for refusal of extension of time.[15] However the Court is not bound under the section to extend time and may decline to do so in appropriate cases, as where the order for extension will be useless, even when the petitioner makes out a condition for relief.[16] The Court will not pass an order for extension of time after a winding up order and the appointment of a liquidator inasmuch as the petitioner will not be able to enforce an unregistered charge against the liquidator and cannot also acquire any priority over any creditor of the company. The creditor by the passing of a winding up order acquires an accrued right over the properties of the company which is protected by sub-section (1).[17] Therefore if unsecured creditors can be said not to acquire any right in respect of any property as a result of the passing of a winding up order, the Court can refuse to pass an order to extend the time on the ground that the rights of the unsecured creditors have become crystallized by the winding up order.[18]

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9. AIR 1959 Cal 464 + AIR 1955 Mad. 35 (DB) (The rights of unsecured creditors are excluded by the section even where there is a winding up order).
10. 60 Cal. W N 278 = AIR 1955 Mad. 35 = ILR 1955 Mad. 948 (DB).
11. 60 Cal. W N 278 + AIR 1955 Mad. 35 (DB).
12. 60 Cal. W N 64.
13. NLR 1991 Civ. 599 = PLJ 1991 Kazr. 182 = 1991 CLC 415.
14. 1991 CLC Note 344, p. 256.
15. 1982 CLC 1653 = NLR 1982 Civ. 109.
16. 60 Cal. W N 278.
17. 60 Cal. W N 278 + 60 Cal. W N 64 + AIR 1937 Oudh 62.
18. 61 Cal W N 64

Even if an order for extension of time is made unconditionally it cannot prejudice any right acquired in respect of the charged property prior to actual registration of the charge including the right acquired by the general body of creditors under a winding up order.[19] Where debentures inadvertently omitted to be registered within the prescribed time were registered before the expiry of the extended time and the order granting extension of time contained a stipulation that the registration should not affect rights which might have been or might be acquired before actual registration. Ordinary unsecured creditors of company at the date of registration cannot rank *pari passu* with debenture-holders unless they had taken steps to enforce their debts or a winding up has intervened.[20]

Where time is extended by the Court, the registration of a mortgage within the extended time renders it a valid charge *ab initio*.[1] When an application for extending the time for registering a mortgage was made by the creditor. The company which opposed the extension later on withdrew the opposition. The Court extended the time and the mortgage was duly registered. There being no evidence that the company had, in withdrawing its opposition, fraudulently preferred the creditor or had been impelled by sinister motive, it was held that the registration was not void and the mortgage therefore was binding on the liquidator.[2]

4. **Priority among different mortgages.** The Court will not pass an order for extension of time after a winding up order and the appointment of a liquidator inasmuch as the petitioner will not be able to enforce an unregistered charge against the liquidator and cannot also acquire any priority over any creditor of the company. The creditors by the passing of winding up order acquires an accrued right over the properties of the company which is protected by sub-section (3).[3]

5. **Non-registration--effect.** Where a mortgage of the company's assets although effected on the 17th of March, 1950 was registered under section 121* after obtaining an order for extension of time under section 131; it was held that the claim in regard to the sum due under a notice issued under section 7, Public Demands Recovery Act on 21st March, 1950 obtained priority over the mortgage.[4]

6. **Review of orders.** The District Judge is competent to review his order passed under section 131. He has also inherent power to vacate his previous order if he considers it necessary for the ends of justice to do so.[5]

132. *Registration of payment or satisfaction of mortgages and charges.* (1) It shall be the duty of a company to give intimation to the registrar of the payment or satisfaction, in full, of any charge or mortgage created by the company and requiring registration under

19. 60 Cal. W N 278.
20. (1906) 1906-2 Ch. 696.
1. AIR 1930 PC 66=57 Ind. App. 76+60 Cal W N 278.
2. (1933) 102 L J Ch. 179=(1933) 1 Ch. 542.
3. 60 Cal W N 278+60 Cal W N 64+AIR 1937 Oudh 62.
4. 57 Cal W N 590.
5. AIR 1937 Oudh 62.

sections 121 and 122 within twenty-one days from the date of the payment or satisfaction, in full, thereof.

(2) The registrar shall on receipt of such intimation cause a notice to be sent to the holder of the charge or mortgage calling upon him to show-cause, within a time, not exceeding fourteen days, to be fixed by such notice, why the payment or satisfaction of the charge or mortgage should not be recorded.

(3) The registrar shall, if no cause is shown, order that a memorandum of satisfaction be entered in the register and shall if required furnish the company with a copy thereof.

(4) Where cause is shown, the registrar shall record a note to that effect in the register, and shall inform the company that he has done so.

(5) Nothing in this section shall be deemed to affect the powers of the registrar to make an entry in the register of charges under section 133 otherwise than on receipt of an intimation from the company.

1. Certificate of satisfaction. Where application for certificate of satisfaction of claim was made well within time for the period prescribed for filing such application was 21 days from the date of the satisfaction of the charge. If Registrar, had any doubt about the factum of satisfaction of charge, he could make necessary enquiries from the Banks concerned. Any formal defect in the application or the documents appended therewith would not affect the factum of filing of application which admittedly was filed within time. Registrar should have issued the requisite Certificate to petitioner company, on being satisfied that the payment or satisfaction of the debts was made after getting the omission pointed out in the impugned letter, rectified. Company had undertaken to remove the objections pointed out by the Registrar in his impugned letter. Delay, if any was condoned and Registrar was directed to proceed in the matter strictly according to law and issue the requisite certificate to company without any unreasonable delay.[6]

133. *Power of registrar to make entries of satisfaction and release in absence of intimation from company.* The registrar may, on evidence being given to his satisfaction with respect to any registered charge--

(*a*) that the debt for which the charge was given has been paid or satisfied in whole or in part, or

6. 1993 CLC 1398.

(*b*) that part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking,

enter in the register of mortgages and charges a memorandum of satisfaction in whole or in part, or of the fact that part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking, as the case may be, notwithstanding the fact that no intimation has been received by him from the company.

134. *Penalties.* (1) If any company makes default in filing with the registrar for registration the particulars--

(*a*) of any mortgage or charge created by the company or any modification thereof; or

(*b*) of the payment or satisfaction of a debt in respect of which a mortgage or charge has been registered under section 121 or section 122; or

(*c*) of the issues of debentures of a series,

requiring registration with the registrar under the foregoing provisions of this Ordinance, then, unless the registration has been effected within the prescribed period on the application of some other person, the company, and every officer of the company or other person who is knowingly a party to the default, shall--

(*i*) be liable to a fine not exceeding one hundred rupees for every day during which the default in filing of the particulars of satisfaction of a mortgage or charge continues; and

(*ii*) be liable to a fine not exceeding five hundred rupees for every day during which the default in filing of the particulars of a mortgage or charge or of debentures continues.

(2) Subject as aforesaid, if any company makes default in complying with any of the requirements of this Ordinance as to the registration with the registrar of any mortgage or charge created by the company, or any modification thereof, the company, and every officer of the company who knowingly and wilfully authorises or permits the default, shall, without prejudice to any other liability, be liable to a fine not exceeding five thousand rupees and to a further fine not exceeding one hundred rupees for every day after the first during which the default continues.

(3) If any person knowingly and wilfully authorises or permits the delivery of any debenture or certificate of debenture stock requiring registration with the registrar under the foregoing provisions of this Ordinance without a copy of the certificate of registration being endorsed upon it, he shall, without prejudice to any other liability, be liable to a fine not exceeding two thousand rupees.

135. *Company's register of mortgages.* (1) Every company shall keep a register of mortgages and enter therein all mortgages and charges specifically affecting property of the company and all floating charges on the undertaking or on any property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge and, except in the case of securities to bearer, the names of the mortgagees or persons entitled thereto.

(2) If any officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of sub-section (1), he shall be liable to a fine not exceeding two thousand rupees.

1. Scope. Entries to be made in register of mortgages to be kept by every company must be entries affecting property of that company and not entries relating to properties of other persons mortgaged to such company.[7]

136. *Right to inspect copies of instruments creating mortgages and charges and company's register of mortgages.* (1) The copies kept at the registered office of the company in pursuance of section 130 of instruments creating any mortgage or charge or modification of the terms and conditions thereof requiring registration under this Ordinance with the registrar, and the register of mortgages and charges kept in pursuance of section 135 shall be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding the amount prescribed for each inspection, as the company may fix.

(2) If inspection of the said copies or register is refused, the company shall be liable to a fine not exceeding five hundred rupees and a further fine not exceeding fifty rupees for every day after the first during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall

7. PLD 1992 Kar 295.

incur the like penalty, and in addition to the above penalty, the registrar may by order compel an immediate inspection of the copies or register.

RECEIVERS AND MANAGERS

137. *Registration of appointment of receiver or manager.* (1) If any person obtains an order for the appointment of a receiver of, or a person to manage, the property of a company, or appoints such a receiver or person under any powers contained in any instrument, he shall, within fifteen days from the date of the order or of the appointment under the powers contained in the instrument, file notice of the fact with the registrar, and the registrar shall, on payment of the prescribed fee, enter the fact in the register of mortgages and charges.

(2) If any person makes default in complying with the requirements of sub-section (1), he shall be liable to a fine not exceeding two hundred rupees for every day during which the default continues.

1. **Receiver, when may be appointed.** The Court has no jurisdiction to appoint a receiver to conduct the business of a company except in a debenture-holders' action when the business and assets of the company have been charged with the payment of the claims of the debenture-holders. Apart from that it has no jurisdiction in other cases and if there is any necessity to protect the assets of the company other means provided by the Ordinance must be sought.[8]

138. *Filing of accounts of receiver or manager.* (1) Every receiver of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall within thirty days of expiry of every six months while he remains in possession, and also within thirty days on ceasing to act as receiver, file with the registrar an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall also, within fifteen days of ceasing to act as receiver, file with the registrar notice to that effect, and the registrar shall enter the notice in the register of mortgages and charges.

(2) Where a receiver of the property of a company has been appointed, every invoice, order for goods, or business letter issued by or on behalf of the company, or the receiver of the company, being a document on or in which the name of the company

8. AIR 1925 Cal 817 = 52 Cal 513 (DB).

appears, shall contain a statement that a receiver has been appointed.

(3) If default is made in complying with the requirements of sub-section (1) or sub-section (2), the company and every director or other officer of the company and every receiver who knowingly and wilfully authorises or permits the default, shall be liable to a fine not exceeding two thousand rupees and, in the case of a continuing default, to a further fine not exceeding one hundred rupees for every day after the first during which the default continues.

(4) The provisions of sub-sections (1), (2) and (3) shall apply to any person appointed to manage the property of a company under any powers contained in an instrument in the same manner as they apply to a receiver so appointed.

139. *Disqualification for appointment as receiver or manager.* The following shall not be appointed under any powers contained in an instrument as a receiver or manager of the property of a company, namely:--

(*a*) a minor;

(*b*) a person who is of unsound mind and stands so declared by a competent Court;

(*c*) a body corporate:

(*d*) a director of the company;

(*e*) an undischarged insolvent unless he is granted leave by the Court by which he has been adjudged an insolvent; or

(*f*) a person disqualified by a Court from being concerned with or taking part in the management of a company in any other way, unless he is granted leave by the Court.

140. *Application to Court.* (1) A receiver or manager of the property of a company appointed under the powers contained in any instrument may apply to the Court for directions in relation to any particular matter arising in connection with the performance of his functions, and on any such application the Court may give such direction, or may make such order declaring the rights of persons before the Court, or otherwise, as the Court thinks just.

(2) A receiver or manager of the property of a company appointed as aforesaid shall, to the same extent as if he had been appointed by order of a Court, be personally liable on any contract

entered into by him in the performance of his functions, except in so far as the contract otherwise provides, and entitled in respect of that liability to indemnity out of the assets; but nothing in this sub-section shall be deemed to limit any right to indemnity which he would have apart from this sub-section, or to limit his liability on contracts entered into without authority or to confer any right to indemnity in respect of that liability.

141. *Power of Court to fix remuneration, etc. of receiver or manager.* (1) The Court may, on an application made to it by the receiver or manager of the property, by order fix the amount to be paid by way of remuneration to any person who, under the power contained in an instrument, has been appointed as receiver or manager of the property of the company:

Provided that the amount of remuneration shall not exceed such limits as may be prescribed.

(2) The power of the Court under sub-section (1) shall, where no previous order has been made with respect thereto,--

(*a*) extend to fixing the remuneration for any period before the making of the order or the application thereof;

(*b*) be exercisable notwithstanding that the receiver or manager had died or ceased to act before the making of the order or the application therefor; and

(*c*) where the receiver or manager has been paid or has retained for his remuneration for any period before the making of the order any amount in excess of that so fixed for that period, extend to requiring him or his representative to account for the excess or such part thereof as may be specified in the order:

Provided that the power conferred by clause (*c*) shall not be exercised as respects any period before the making of the application or the order unless in the opinion of the Court there are special circumstances making it proper for the power to be so exercised.

(3) The Court may from time to time, on an application made either by the liquidator or by the receiver or manager or by the registrar, vary or amend an order made under sub-section (1) and issue directions to the receiver respecting his duties and functions or any other matter as it may deem expedient:

Provided that an order made under sub-section (1) shall not be varied so as to increase the amount of remuneration payable to any person.