

Members and Shareholders

Lesson 5

KEY CONCEPTS

■ Subscribers ■ Members ■ Shareholders ■ Debenture holders ■ Significant Beneficial Owners ■ Beneficial Interest ■ Veto Power

Learning Objectives

To understand:

- The term 'Member'
- Modes of Acquiring Membership
- Who is eligible to become member in Company?
- What are the situations where a person cease to be a member of a company
- Maintaining the Register of Members
- Modalities of Maintaining the Register of Members
- Who can inspect the Register of Members?
- Foreign Register of Members
- Significant Beneficial Owner
- What are the Rights and Liability of Members?
- Concept of Shareholder's Democracy
- Shareholder's Agreement
- The term "Veto Power"

Lesson Outline

- Introduction
- How to become a Member?
- Register of Members
- Declaration of Beneficial Interest
- Significant Business Owner
- Rectification of Register of Members
- Rights of members
- Variation of shareholder's rights
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings
- Other References

REGULATORY FRAMEWORK

- The Companies Act, 2013 (Section 88-95)
- The Companies (Management and Administration) Rules, 2014
- The Companies (Significant Beneficial Owners) Rules, 2018

THE TERM - “MEMBERS”

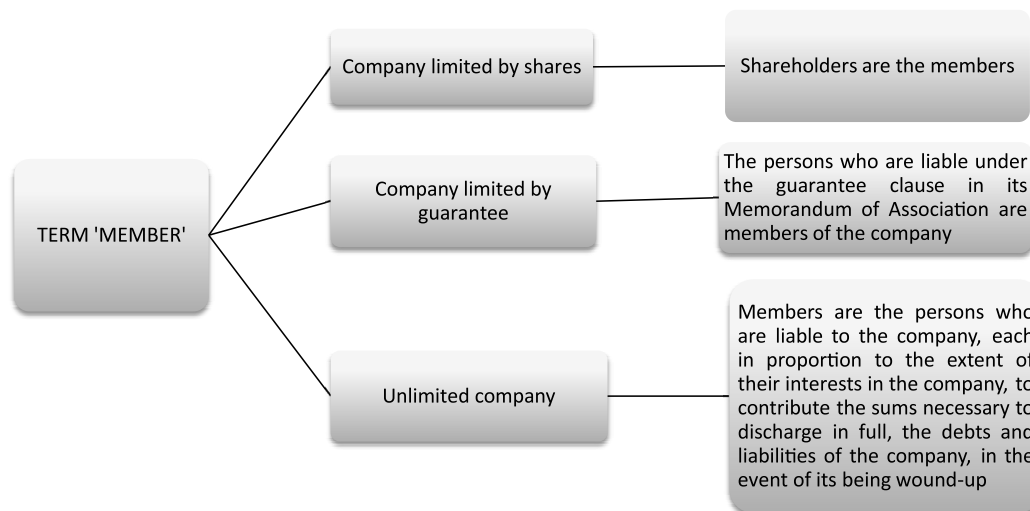
Members defined under the Companies Act, 2013

According to Section 2(55) of the Companies Act, 2013, member, in relation to a company, means,

1. The subscribers to the memorandum of a company who shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members;
2. Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members shall, be a member of the company;
3. Every person holding shares of a company and whose name is entered as a beneficial owner in the records of a depository shall be deemed to be a member of the concerned company.

A company is composed of members, though it has its own separate legal entity. The members of a company are the persons who, for the time being, constitute the company, as a corporate entity.

Definition-“Members” in different kinds of the company



Essential Elements for Membership of the Company

There are two important elements which must be present before a person can acquire membership of a company viz., –

- An agreement to become a member; and
- Entry of the name of the person so agreeing, in the register of members of the company.

In Herdilia Unimers Ltd. v. Renu Jain [1995] 4 Comp. LJ. 45 (Raj.), it was held that the moment the shares were allotted and share certificate signed and the name entered in the register of members, the allottee became the shareholder, irrespective of whether the allottee received the shares or not.

Member -Competency to Contract under Indian Contract Act, 1872

The person desirous of becoming a member of a company must have the legal capacity of entering into an agreement in accordance with the provisions of the Indian Contract Act, 1872. Section 11 of the Indian Contract Act lays down that:

Every person is competent to contract who:-

- (i) is of the age of majority according to the law to which he is subject.
- (ii) is of sound mind.
- (iii) is not disqualified from contracting by any law to which he is subject.

WAYS TO ACQUIRE MEMBERSHIP OF THE COMPANY

As per Section 2(55) of the Companies Act, 2013, a person may acquire the membership of a company:

- **Subscribers to MOA:** by subscribing to the Memorandum of Association (deemed agreement); or
- **Entering an Agreement:** by agreeing in writing to become a member:
 - (i) **Allotment:** by making an application to the company for allotment of shares; or
 - (ii) **Transfer:** by executing an instrument of transfer of shares as transferee; or
 - (iii) **Transmission:** by consenting to the transfer of share of a deceased member in his name; or
 - (iv) **Estoppel:** by acquiescence or estoppel.
- **Beneficial Owner in Depository's Records:** by holding shares of a company and whose name is entered as beneficial owner in the records of a depository (Under the Depositories Act, 1996).
- **Entering the name in Register of Members:** On his name being entered in the register of members of company.

(a) Subscribers to the Memorandum

In the case of a subscriber, no application or allotment is necessary to become a member. By virtue of his subscribing to the memorandum, he is deemed to have agreed to become a member and he becomes *ipso facto* member on the incorporation of the company and is liable for the shares he has subscribed.

In accordance with the provisions of Section 10(2) of the Companies Act, 2013 all monies payable by any member to the company under the memorandum or articles shall be debt due from him to the company.

A subscriber to the memorandum cannot rescind the contract for the purchase of shares even on the ground of fraud by the promoters. [*In Re. Metal Constituents Co., (1902) 1.Ch. 707.*]

Further, a subscriber to the memorandum must pay for his shares in cash even if the promoters have promised him the shares for services rendered in connection with the promotion of the company. Again, he must take the shares directly from the company, and not through transfer from other member(s).

When a person signs a memorandum for any number of shares he becomes absolutely bound to take those shares and no delay will relieve him from that liability unless he fulfills the obligation. His liability remains right up to the time when the company goes into liquidation and he is bound to bring the money for which he is liable to pay to the creditors of the company.

(b) Agreement in Writing

(i) By an application and allotment

A person who applies for shares becomes a member when shares are allotted to him, a notice of allotment is issued to him and his name is entered on the register of members. The general law of contract applies to this transaction. There is an offer to take shares and acceptance of this offer when the shares are allotted.

An application for shares may be absolute or conditional. If it is absolute, an allotment and its notice to the applicant will be sufficient acceptance. On the other hand, if the offer is conditional, the allotment must be made according to be condition as contained in the application. If there is conditional application and unconditional allotment, there is no contract.

(ii) By transfer of shares

Shares in a company are movable property as provided in Section 44 of the Act and are transferable in the manner as provided in the articles of the company and as provided in Section 56 of the Companies Act, 2013. A person can become a member by acquiring shares from an existing member and by having the transfer of shares registered in the books of the company, i.e. by getting his name entered in the register of members of the company.

(ii) By transmission of shares

A person may become a member of a company by operation of law i.e. if he succeeds to the estate of a deceased member. Membership by this method is a legal consequence. On the death of a member, his executor or the person who is entitled under the law to succeed to his estate, gets the right to have the shares transmitted and registered in his name in the company's register of members. No instrument of transfer is necessary in this case.

If the legal representative of deceased member desires to be registered as a member in place of the deceased member, the company shall do so or in the alternative he may request the company to transfer the shares in the name of another person of his choice. The Official Assignee or Official Receiver is likewise entitled to be a member in place of the shareholder, who has been adjudged insolvent.

(iii) By acquiescence or estoppels

A person is deemed to be a member of a company if he allows his name, without sufficient cause, to be on the register of members of the company or otherwise holds himself out or allows himself to be held out as a member. In such a case, he is estopped from denying his membership. He can, however, escape his liability by taking prompt action for having his name removed from the register of members on permissible grounds.

(c) Holding Shares as Beneficial Owner in the Records of Depository

Every person holding shares of the company and whose name is entered as a beneficial owner in the records of the depository shall be deemed to be a member of the concerned company.

Differences between Members and Shareholders

Every company must have members as specified under the law. The fact that a person owning shares in the company does not make him a member of the company.

The following are the differences between members and shareholders:

MEMBER	SHAREHOLDER
Section 2(55) of the Companies Act, 2013 specifies the meaning of 'member'	On the other hand, the meaning of 'shareholder' is not defined under the Companies Act, 2013
A shareholder becomes a member of a company, once his name is entered into the company's register of members or if he is a subscriber to the incorporation of the company	The person who has ownership of shares of a company is known as shareholder Further, in case of companies limited by guarantee do not have a share capital, and consequently, their members are not shareholders
The person who signs the memorandum of association with the company becomes a member	After signing the memorandum, a person may become shareholder only when the shares are allotted to him
The bearer of a share warrant is not a member	Whereas, the holder of a share warrant is a shareholder

WHO MAY BECOME A MEMBER

Subject to the Memorandum and Articles, any *sui juris* (a person who is competent to contract) except the company itself, can become a member of a company. However, it is important to note the following points in relation to certain organizations and persons:

S. No.	Entities	Eligible to become Member or not
1.	Company	Can become a member of another company
2.	Subsidiary Company	Can't become member of a Holding Company
3.	Partnership firm	Can't become member until registered
4.	Limited Liability Partnership	Can become a member
5.	Section 8 Company	Can become a member if authorized by MOA
6.	Foreigners	Can become a member
7.	Minors	Can't become member
8.	Society	Can become a member

- (a) **Company as a member of another company:** A company is a legal person and so is competent to contract. Therefore, it can become a member of any other company. However, it must be authorised by its Memorandum of Association to invest in the shares of that company or any other company. Also a company cannot become a member of itself.

As per section 19 of the Companies Act, 2013, a subsidiary company cannot become a member of its holding company.

EXCEPTIONS:

However, a subsidiary can hold shares in its holding company only under the following exceptional circumstances—

- where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or
- where the subsidiary company holds such shares as a trustee; or
- where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company.

- (b) **Partnership firm as a member of the company:** A partnership firm is not a legal person and as such it cannot, in its own name, become a member of a company except in company registered u/s 8 of Act.
- (c) **Limited Liability Partnership as a member of the company,** being an incorporated body under Limited Liability Partnership Act, 2008 can become a member of a company.
- (d) **Section 8 Company as a member of the company:** A non-profit making company licensed under Section 8 of the Act, can become a member of another company if it is authorised by its Memorandum of Association to invest into shares of the other company.
- (e) **Foreigners as members:** A foreigner may take shares in an Indian company and become a member subject to the provisions of the Foreign Exchange Management Act, 1999, but in the event of war with his country, he becomes an alien enemy and his power of voting and his rights to receive notices are suspended.

- (f) **Minor as member:** A member who is not a *sui juris* e.g., a minor, is wholly incompetent to enter into a contract and as such cannot become a member of a company. Consequently, an agreement by a minor to take shares is void *ab-initio*.

It has been held by the Company Law Board (replaced by the Tribunal under the Companies Act, 2013) that an agreement in writing for a minor to become a member may be signed on behalf of the minor by his lawful guardian and the registration of transfer of shares in the name of the minor, acting through his or her guardian, especially where the shares are fully paid cannot be refused on the ground of the transferee being a minor [*Miss Nandita Jain v. Bennett Coleman and Co. Ltd., Appeal No. 27 of 1972 dated 17.2.78*].

After attaining majority, the minor, if he does not want to be a member, must repudiate his liability on the shares on ground of minority, and if he does so, the company can not plead estoppel on the ground of his having received dividends during his minority or that he had fraudulently misrepresented his age in his application for shares [*Sadiq Ali v. Jai Kishori, (1928) 30 Bom. L.R. 1346*].

If shares are transferred to a minor, the transferor will remain liable for all future calls on such shares so long as they are held by the minor even if the transferor was ignorant of his minority. If the company knows of his minority it may refuse to register the transfer, unless the transfer was made through the guardian.

- (g) **Insolvent as member:** An insolvent may be a member of a company as long as he is on the register of members. He is entitled to vote, but he loses all beneficial interest in the shares and company will pay dividend on his shares to the Official Assignee or Receiver [*Morgan v. Gray, (1953) All E.R. 213*].
- (h) **Person of unsound mind or lunatic:** A person of unsound mind is not eligible to exercise his voting rights when he has been declared as person of unsound mind by a court. The voting rights on these shares may be exercised by the person designated by the competent court.
- (i) **HUF as member:** HUF is not a juristic person, although it is a person for purposes of the Income-tax Act, 1961. HUF is represented by its Karta. There is no legal bar on HUF to invest its money in shares and securities and the Companies Act does not prohibit membership of HUF. In case of an HUF, the shares can be registered in the name of 'A' as Karta of HUF as held in [*Vickers Systems International Limited v. Mahesh P. Keshwani [(1992) 13 Com Cases 317 (CLB)]*].
- (j) **Pawnee:** A pawnee has no right of foreclosure since he never had the absolute ownership at law and his equitable title cannot exceed what is specifically granted by law. In this sense, a pledge differs from a mortgage. In view of the above, a pawnee cannot be treated as the holder of the shares pledged in his favour, and the pawner continues to be a member and can exercise the rights of a member [*Balakrishna Gupta v. Swadeshi Polytex Ltd., (1985) 58 Com Cases 563 (S.C.)*].
- (k) **Receiver:** A receiver whose name is not entered in the register of members cannot exercise any of the membership rights attached to a share unless in a proceeding to which company is a party and an order is made therein. Mere appointment of a receiver in respect of certain shares of a company without more rights cannot, deprive the holder of the shares whose name is entered in the register of members of the company, the right to vote at the meeting of the company [*Balakrishna Gupta v. Swadeshi Polytex Ltd., (1985) 58 Com Cases 563 (S.C.)*].
- (l) **Society as a member:** Department's Clarification dated 24.11.1962 has clarified that "a society registered under the Societies Registration Act, 1860 should not be deemed to be a 'body corporate' within the meaning of the aforesaid provisions [Refer to Section 2(7) (i) of the Companies Act, 1956 (currently refer section sub clause (i) of clause 11 of section 2 of the Companies Act ,2013) although such a society

can be treated as a 'person' having separate legal entity apart from the members constituting it and thereby capable of becoming a member of a company under section 41(2) of the erstwhile Companies Act, 1956."

- (m) **Persons taking shares in fictitious names:** A person who takes shares in the name of a fictitious person, becomes liable as a member besides incurring criminal liability under Section 38 of the Act, wherein punishment is provided for commission of fraud.

Penalty under Companies Act, 2013: As per section 447 of the Companies Act, 2013, without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud involving an amount of at least 10 lakh rupees or 1% of the turnover of the company, whichever is lower shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.

Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than 3 years.

Provided further that where the fraud involves an amount less than 10 lakh rupees or 1% of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to 5 years or with fine which may extend to 50 lakh rupees or with both.

- (n) **Trade Union as member:** A trade union registered under the Trade Union Act, can be registered as a member and can hold shares in a company in its own corporate name [*All India Bank Officers Confederation v. Dhanlakshmi Bank Ltd.*, (1997) 90 Com Cases 225].

Joint Members

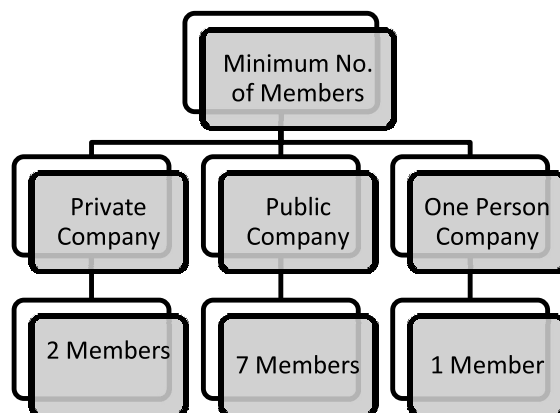
If more than one person apply for shares in a company and shares are allotted to them, each one of such applicant becomes a member (*Narandas v. India Mfg. Co.*, A.I.R. 1953 Bom. 433]. Unless the Articles of the company otherwise provide, joint members can insist on having their names registered in any order they may require. They may also have their holding split into several joint holdings with their names in different orders so that all of them may have a right to vote as first named holding in one or the other joint holdings. *Burns v. Siemens Brothers Dynamo Works Ltd.* (1919) 1 Ch. 225.

Nominee joint members

Where the shares of a company were registered in the joint name of the company and one of the directors, it was held that the director was a nominee of the company for that purpose. He could act jointly with the company and not individually. He had no rights of his own in respect of the shares and was not entitled to bring proceedings on the basis of being one of the registered holders as held in *Exchange Travel (Holdings) Ltd.*, Re [(1991) BCLC 728 (Ch D)].

Minimum Number of Members

Section 3(1) of the Companies Act, 2013 provides that a company may be formed for any lawful purpose by seven or more persons, where the company to be formed is to be a public company; or two or more persons, where the company to be formed is to be a private company; or one person, where the company to be formed is to be One Person Company that is to say, a private company, by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of registration.



Restriction on Membership

By virtue of Section 2(68)(ii) of the Companies Act, 2013, the maximum number of members of a private company except in the case of One Person Company is limited to two hundred excluding the present and past employees of the company who continue to be members of the company.

There is no restriction with regard to the maximum number of members of a public company

CESSATION OF MEMBERSHIP

Cessation of membership of the company means discontinuation of membership. A person ceases to be a member of a company when his name is removed from its register of members, which may occur in any of the following situations:

- (a) **Transfer:** He transfers his shares to another person, the transfer is registered by the company and his name is removed from the register of members;
- (b) **Forfeiture:** His shares are forfeited;
- (c) **Sale:** His shares are sold by the company to enforce a lien;
- (d) **Death:** He dies (his estate, however, remains liable for calls);
- (e) **Insolvency:** He is adjudged insolvent and the Official Assignee disclaims his shares;
- (f) **Redemption:** His redeemable preference shares are redeemed;
- (g) **Cancellation:** He rescinds the contract of membership on the ground of fraud or misrepresentation or a genuine mistake;
- (h) **Purchase by another member/ by company itself:** His shares are purchased either by another member or by the company itself under an order of the Tribunal under Section 242 of the Companies Act, 2013;
- (i) **Winding up:** The member is a company which is being wound-up in India, and the liquidator disclaims the shares;
- (j) The company is wound up.

Cessation of membership means removal of name of member from Register of members of the company.

Though one ceases to be a member, he remains liable as a contributory and is also entitled to share in the surplus, if any.

Expulsion of a Member

A controversy had arisen as to whether a public limited company had powers to insert an article in its Articles of Association relating to expulsion of a member by the Board of Directors of the company where the directors were of the view that the activities or conduct of such a member was detrimental to the interests of the company.

The Department of Company Affairs (now, Ministry of Corporate Affairs) clarified that an article for expulsion of a member is opposed to the fundamental principles of the Company Jurisprudence and is *ultra vires* the company, the reason being that such a provision against the provisions of the Companies Act relating to the rights of a member in a company, the powers of the Central Government as an appellate authority under Section 111 of the Act and the powers of the Court under Sections 107, 395 and 397 of the Companies Act, 1956. [These sections correspond to sections 58, 48, 235 and 241 of the Companies Act, 2013 respectively.]

According to Section 6 of the Companies Act, 2013, the Act overrides the Memorandum and Articles of Association and any provision contained in these documents repugnant to the provisions of the Companies Act, is void.

The Department of Company Affairs (now MCA) has, therefore, clarified that any assumption of the powers by the Board of Directors to expel a member by alteration of Articles of Association shall be illegal and void.

As, under Article 141 of the Constitution, the law declared by the Supreme Court is binding on all courts within the territory of India, any provision pertaining to the expulsion of a member by the management of a company which is against the law as laid down by the Supreme Court will be illegal and *ultra vires*. In the light of the aforesaid position, it is clarified that assumption by the Board of Directors of a company of any power to expel a member by amending its articles of association is illegal and void [Circular: Letter No. 32/75, dated 1.11.1975].

REGISTER OF MEMBERS

Section 88 of the Companies Act, 2013 lays down:

1. Every company shall keep and maintain the following registers in such form and in such manner as may be prescribed, namely :-

Register of members indicating separately for each class of equity and preference shares held by each member residing in or outside India;

Register of debenture-holders; and

Register of any other security holders.

2. **Inclusion of index:** Every register maintained under sub-section (1) of section 88 of the Act shall include an index of the names included therein.
3. The register and index of beneficial owners maintained by a depository under section 11 of the Depositories Act, 1996, shall be deemed to be the corresponding register and index for the purposes of this Act.
4. A company may, if so authorised by its articles, keep in any country outside India, in such manner as may be prescribed, a part of the register referred to in sub-section (1) of section 88 of the Act, called

“foreign register” containing the names and particulars of the members, debenture-holders, other security holders or beneficial owners residing outside India.

5. **Penalty:** If a company does not maintain a register of members or debenture-holders or other security holders or fails to maintain them in accordance with the provisions of sub-section (1) or sub-section (2) of Section 88 of the Companies Act, 2013, the company shall be liable to a penalty of three lakh rupees and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees.

CONTENTS OF REGISTER OF MEMBERS IN CASE COMPANY NOT HAVING SHARE CAPITAL

In the case of a company not having share capital, the register of members shall contain the following particulars, in respect of each member, namely:-

- (a) name of the member; address (registered office address in case the member is a body corporate); e-mail address; Permanent Account Number or CIN; Unique Identification Number, if any; Father's/ Mother's/ Spouse's name; Occupation; Status; Nationality; in case member is a minor, name of the guardian and the date of birth of the member; name and address of nominee;
- (b) date of becoming member;
- (c) date of cessation;
- (d) amount of guarantee, if any;
- (e) any other interest if any; and
- (f) Instructions, if any, given by the member with regard to sending of notices etc.

Rule 3 & 5 of the Companies (Management and Administration) Rules, 2014 deal with maintenance of Register under section 88. It is provided that every company limited by shares shall from the date of its registration maintain a register of its members in **Form No. MGT-1**.

MAINTAINING REGISTER OF MEMBERS

- **Time period to make entries in Register of members: 7 DAYS**

- a) The entries in the registers maintained under section 88 of the Companies Act, 2013, shall be made within 7 days after the Board of Directors or its duly constituted committee approves the allotment or transfer of shares, debentures or any other securities, as the case may be.

Every company which issues or allots debentures or any other security shall maintain a separate register of debenture holders or security holders, as the case may be, for each type of debentures or other securities in Form No.MGT.2.

- b) Consequent upon any forfeiture, buy-back, reduction, sub-division, consolidation or cancellation of shares, issue of sweat equity shares, transmission of shares, shares issued under any scheme of arrangements, mergers, reconstitution or employees stock option scheme or any of such scheme provided under this Act or by issue of duplicate or new share certificates or new debenture or other security certificates, entry shall be made within seven days after approval by the Board or committee, in the register of members or in the respective registers, as the case may be.

- **Maintaining Register of Members at RO:** The registers shall be maintained at the registered office of the company unless a special resolution is passed in a general meeting authorizing the keeping of the register at any other place within the city, town or village in which the registered office is situated or any other place in India in which more than one-tenth of the total members entered in the register of members reside.

- **Explanation to changes in register on account of death, insolvency, etc. of the member:** If any change occurs in the status of a member or debenture holder or any other security holder whether due to death or insolvency or change of name or due to transfer to Investor Education Protection Fund or due to any other reason, entries thereof explaining the change shall be made in the respective register.
- **Rectification in Register pursuant to order of authority:**
 - a) If any rectification is made in the register by the company pursuant to any order passed by the competent authority under the Act, the necessary reference of such order shall be indicated in the respective register.
 - b) If any order is passed by any judicial or revenue authority or by Security and Exchange Board of India (SEBI) or Tribunal attaching the shares, debentures or other securities and giving directions for remittance of dividend or interest, the necessary reference of such order shall be indicated in the respective register.

CASE LAW

Where the facts of the case do not warrant any directions for rectification of register of members, the petition fails on the ground of maintainability. (*Held in case of Rubicon Real Enterprises (P) Ltd. v. Premium Acres Infratech (P.) Ltd. (2017) NCLT- New Delhi.*)

- **Particulars of Pledge, charge, lien or hypothecation within 15 days:**
 - a) In case of companies whose securities are listed on a stock exchange in or outside India, the particulars of any pledge, charge, lien or hypothecation created by the promoters in respect of any securities of the company held by the promoter including the names of pledgee/pawnee and any revocation therein shall be entered in the register within fifteen days from such an event.
 - b) If promoters of any listed company, which has formed a joint venture company with another company have pledged or hypothecated or created charge or lien in respect of any security of the listed company in connection with such joint venture company, the particulars of such pledge, hypothecation, charge and lien shall be entered in the register members of the listed company within fifteen days from such an event.

AUTHENTICATION OF ENTRIES OF REGISTER OF MEMBERS

The entries in the registers maintained under section 88 and index included therein shall be authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose, and the date of the board resolution authorising the same shall be mentioned.

The entries in the foreign register shall be authenticated by the company secretary of the company or person authorised by the Board by appending his signature to each entry.

CASE LAW

Related to Register of Members

1. A person who claims to have purchased the shares of a member will be entitled to have his name entered in the register by satisfying the requirement of either Section 108 or 109 [Corresponds to section 56 of the Companies Act, 2013]. [*Lalithamba Bai v. Harrison's Malayalam Ltd., (1988) 2 Comp LJ 41 (Ker)*].
2. No company should enter in the register a statement that has a lien on the shares of a member, [*W. Key & Son Ltd., (1902) 1 Ch 467*].

3. A company cannot insist upon putting in the register anything except that which is required by the section to be inserted in it. [*T.H. Saunders & Co. Ltd. Re, (1908) 1 Ch 415*].
4. In a voluntary winding up, the liquidator may accept share transfers and alter the register accordingly. [*Taylor, Phillips and Richard's Case, (1897) 1 Ch 298*].
5. A firm in its own name cannot be registered as a member, as a firm is not a legal person like a company incorporated under the Act. Only the partners can be recognised and registered as joint holders. [*See Re Vagliano & Anthracite Collieries Ltd., (1910) 79 LJ Ch 769*].

Index of Members

Section 88(2) of the Companies Act, 2013 read with Rule 6 of Companies (Management and Administration) Rules, 2014 requires that every register maintained under section 88(1) of the Act, shall include an index of the names included therein.

Every register maintained under sub-section (1) of section 88 of the Act, shall include an index of the names entered in the respective registers and the index shall, in respect of each folio, contain sufficient indication to enable the entries relating to that folio in the register to be readily found.

The company shall make the necessary entries in the index simultaneously with the entry for allotment or transfer of any security in such Register.

Inspection must be allowed of the Index in the same manner as applicable to the register of members.

Note: No requirement in case the no. of members is less than 50.

Place of keeping and inspection of the Registers

Section 94 of the Companies Act, 2013 fixes the place for maintaining a company's registers returns etc. and for allowing their inspection.

- **Maintaining at Registered Office:** According to Section 94(1), the registers required to be kept and maintained by a company under section 88 and copies of the annual return filed under section 92 shall be kept at the registered office of the company.
- **Maintaining at a place other than Registered Office:** Such registers or copies of return may also be kept at any other place in India in which more than one-tenth of the total number of members entered in the register of members reside, if approved by a special resolution passed at a general meeting of the company.

Inspection of Registers

According to section 94(2) read with Rule 14 of the Companies (Management & Administration) Rules, 2014 the registers and their indices, except when they are closed under the provisions of this Act, and the copies of all the returns shall be open for inspection by any member, debenture-holder, other security holder or beneficial owner, during business hours without payment of any fees and by any other person on payment of such fees as may be specified in the articles of association of the company but not exceeding Rs. 50 for each inspection.

CASE LAW

The non-shareholder of the company/companies who has no commercial interest in the company/companies, is not entitled to file petition seeking inspection and supply of copies of statutory documents claiming as “any other person” under section 163. [*Held in Anlikumar Poddar v. Darshan Securities (P.) Ltd. (2017) NCLT-Mumbai.*]

- **Copies of Registers and Annual Return:** As per Section 94(3) any such member, debenture-holder, other security holder or beneficial owner or any other person may—

(a) Take extracts from any register, or index or return without payment of any fee; or

(a) Require a copy of any such register or entries therein or return on payment of such fees as may be specified in the Articles of Association of the company but not exceeding Rs 10 for each page.

Such particulars of the register or index or return as may be prescribed shall not be available for inspection under section 94(2) or for taking extracts or copies under section 94(3).

Explanation: For the purposes of this sub-rule, reasonable time of not less than two hours on every working day shall be considered by the company.

Such copy or entries or return shall be supplied within seven days of deposit of such fee.

- **Penalty:** If any inspection or the making of any extract or copy required under this section is refused, the company and every officer of the company who is in default shall be liable, for each such default, to a penalty of one thousand rupees for every day subject to a maximum of one lakh rupees during which the refusal or default continues.

The Ministry of Corporate Affairs (MCA) vide its notification dated April, 06, 2022 has notified “the Companies (Management and Administration) Amendment Rules, 2022” which has inserted a new sub rule (3) in rule 14, to restrict the inspection of register or index or return in respect of the members of the company. As per this amendment, particulars of register or index or return in respect of the members of the company related to address or registered address (in case of a body corporate), e-mail ID, Unique Identification Number, PAN, shall not be made available for any inspection or for taking extracts or copies.

Register - An evidence

Section 95 of the Companies Act, 2013 provides that the registers, their indices and copies of annual returns maintained under sections 88 and 94 shall be *prima facie* evidence of any matter directed or authorised to be inserted therein by or under this Act.

A register of members is *prima facie* evidence of the truth of its contents. Accordingly, if a person’s name, to his knowledge, is there in the register of members of a company, he shall be deemed to be a member and onus lies on him to prove that he is not a member. He must promptly appeal to the Tribunal or a competent Court outside India specified by the Central Government by notification, in respect of foreign members or debenture holder residing outside India for rectification of the register under Section 59 of the Act to take his name off the register, failing which the doctrine of holding out will apply.

In *Re. M.F.R.D. Cruz, A.I.R. 1939 Madras 803*, the plaintiff applied for 4,000 shares in a company but no allotment was made to him. Subsequently 4,000 shares were transferred to him without his request and his name was entered in the register of members. The plaintiff knew it but took no steps for rectification of the register of members. The company went into liquidation and he was held liable as a contributory. The Court held “when a person knows that his name is included in the register of shareholders and he stands by and allows his name to remain, he is holding out to the public that he is a shareholder and thereby he loses his right to have his name removed”.

Foreign Register

Section 88(4) of the Companies Act, 2013 empowers companies to keep foreign registers of members or debenture- holders, other security holders or beneficial owners residing outside India. It states:

“A company may, if so authorised by its articles, keep in any country outside India, in such manner as may be prescribed, a part of the register referred to in sub-section (1), called “foreign register” containing the names and particulars of the members, debenture-holders, other security holders or beneficial owners residing outside India.”

A foreign register is deemed to be a part of the company’s principal register and it should be kept in the same manner as the principal register and be likewise open to inspection.

A duplicate of such register should be maintained at the registered office in India and all entries made in the foreign register should be made in the duplicate register at the registered office as soon as possible.

A company may discontinue a foreign register at any time but all the entries made in it must be transferred to the principal register. The decision of a competent Court in the State or Country in which a foreign register is kept, with regard to its rectification, shall be as effective as if it were a decision of a competent Court in India, if the Central Government, by notification in the *Official Gazette*, so directs.

Maintenance of Foreign Register

Rule 7 of the Companies (Management and Administration) Rules, 2014 deals with maintenance of foreign register, it is provided that a company which has share capital or which has issued debentures or any other security may, if so authorised by its articles, keep in any country outside India, a part of the register of members or as the case may be, of debenture holders or of any other security holders or of beneficial owners, resident in that country (hereafter in this rule referred to as the “foreign register”).

Filing form with Registrar : The company shall, within 30 days from the date of the opening of any foreign register, file with the Registrar notice of the situation of the office in **Form No.MGT.3** along with the fee where such register is kept; and in the event of any change in the situation of such office or of its discontinuance, shall, within 30 days from the date of such change or discontinuance, as the case may be, file notice in **Form No.MGT.3** with the Registrar of such change or discontinuance.

A foreign register shall be deemed to be part of the company’s register (hereafter in this rule referred to as the “principal register”) of members or of debenture holders or of any other security holders or beneficial owners, as the case may be.

The foreign register shall be maintained in the same format as the principal register.

A foreign register shall be open to inspection and may be closed, and extracts may be taken there from and copies thereof may be required, in the same manner, *mutatis mutandis*, as is applicable to the principal register, except that the advertisement before closing the register shall be inserted in at least two newspapers circulating in the place wherein the foreign register is kept.

If a foreign register is kept by a company in any country outside India, the decision of the appropriate competent authority in regard to the rectification of the register shall be binding.

Entries in the foreign register maintained under sub-section (4) of section 88 shall be made simultaneously after the Board of Directors or its duly constituted committee approves the allotment or transfer of shares, debentures or any other securities, as the case may be.

The company shall-

- (a) transmit to its registered office in India a copy of every entry in any foreign register within fifteen days after the entry is made; and
- (b) Keep at such office a duplicate register of every foreign register duly entered from time to time.

Every such duplicate register shall, for all the purposes of this Act, be deemed to be part of the principal register.

Subject to the provisions of section 88 of the Act and the rules made thereunder, with respect to duplicate registers, the shares or as the case may be, debentures or any other security, registered in any foreign register shall be distinguished from the shares or as the case may be, debentures or any other security, registered in the principal register and in every other foreign register; and no transaction with respect to any shares or as the case may be, debentures or any other security, registered in a foreign register shall, during the continuance of that registration, be registered in any other register.

The company may discontinue the keeping of any foreign register; and thereupon all entries in that register shall be transferred to some other foreign register kept by the company outside India or to the principal register.

Closing of Register of Members

Section 91 of the Companies Act, 2013 contains guidelines for closing the register of members. It lays down:

- **Time Limit for Register of Members:** A company may close the register of members or the register of debenture-holders or the register of other security holders for any period or periods not exceeding in the aggregate 45 days in each year, but not exceeding 30 days at any one time, subject to giving of previous notice of at least 7 days or such lesser period as may be specified by Securities and Exchange Board for listed companies or the companies which intend to get their securities listed, in the prescribed manner.
- **Penalty:** If the register of members or of debenture-holders or of other security holders is closed without giving the notice as provided above, or after giving shorter notice than that so provided, or for a continuous or an aggregate period in excess of the limits specified in that sub-section, the company and every officer of the company who is in default shall be liable to a penalty of 5000 rupees for every day subject to a maximum of 1 lakh rupees during which the register is kept closed.

In a decided case law it was held that the provisions contained in Section 154 of the Companies Act, 1956 (Corresponds to section 91 of the Companies Act, 2013) are permissive and not mandatory. The section has application only when a company desires to close its register of members and in such a situation, the requirements of the section are to be complied with. [*Talyar Tea Co. v. Union of India, (1991) 71 Com Cases 95*].

The power in this section is intended for the convenience of the company in order to enable the register of members to be brought up to date for the purpose of calculating dividend and bonus, etc. However, even if the register of members is closed, the company is obliged to make certain entries during the period of closure, such as entries relating to registration and probates and letters of administration, notices of change of name and address and court orders, such as changing orders, etc. [*Killick Nixon Ltd. v. Dhanraj Mill Pvt. Ltd., (1983) 54 Com Cases 432 (DB) (Bom)*].

The closure of the register is cloaked with the right to refuse the transfer of shares/debentures. Record date is an alternate for closing the registers. The purpose of closing the registers is to get the registers updated and to fix a cut-off date for the purpose of payment of dividend or issue of rights and bonus shares. This purpose can also be achieved by fixing a record date for a day.

Further Rule 10 of the Companies (Management and Administration) Rules, 2014 in relation to Closure of register of members or debenture holders or other security holders provides that a company closing the register of members or the register of debenture holders or the register of other security holders shall give at least seven days previous notice and in such manner, as may be specified by Securities and Exchange Board of India (SEBI), if such company is a listed company or intends to get its securities listed, by advertisement at least once in a vernacular newspaper in the principal vernacular language of the district and having a wide circulation in the place where the registered office of the company is situated, and at least once in English language in an English

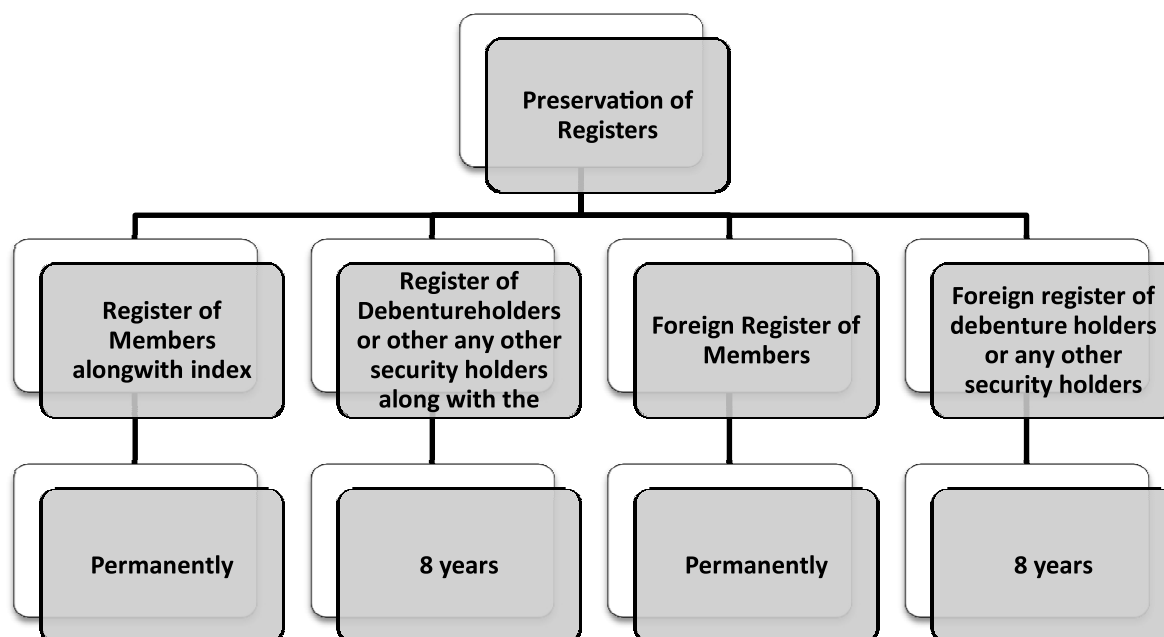
newspaper circulating in that district and having wide circulation in the place where the registered office of the company is situated and publish the notice on the website as may be notified by the Central Government and on the website, if any, of the Company.

The above mentioned provisions shall not be applicable to a private company provided that the notice has been served on all members of the private company not less than seven days prior to closure of the register of members or debenture holders or other security holders.

Preservation of Registers

Rule 15 of the Companies (Management and Administration) Rules, 2014 provides that the register of members along with the index shall be preserved permanently and shall be kept in the custody of the Company Secretary of the company or any other person authorized by the Board for such purpose and the register of debenture holders or any other security holders along with the index shall be preserved for a period of 8 years from the date of redemption of debentures or securities, as the case may be, and shall be kept in the custody of the company secretary of the company or any other person authorized by the Board for such purpose.

The foreign register of members shall be preserved permanently, unless it is discontinued and all the entries are transferred to any other foreign register or to the principal register. Foreign register of debenture holders or any other security holders shall be preserved for a period of 8 years from the date of redemption of such debentures or securities. The foreign register shall be kept in the custody of the company secretary or person authorised by the Board.



Power of the Central Government to Investigate into the Ownership of Company

Sometimes, the registered holder of shares in a company may be a nominee for some other person, who really owns the shares. This enables persons, who in fact control a company, to conceal their real status from the shareholders and from the public and practice fraud with regard to the management of the company. To check such a practice, Sections 216 of the Act, empowers the Central Government to appoint an inspector to investigate into and report on the ownership of a company.

DECLARATION BY PERSONS NOT HOLDING BENEFICIAL INTEREST IN ANY SHARE

Key Terminology:

- **Registered Owner:** It means the person whose name is entered in the Register of Members but do not hold any beneficial interest in the share.
- **Beneficial Owner:** It means the person who holds the beneficial interest in the shares of the company but his name is not entered in the Register of Members.
- **Registered Owner:** Section 89(1) of the Companies Act, 2013 read with the Companies (Management and Administration) Rules, 2014 makes it obligatory on the part of a person, whose name is entered in the register of members of a company as the holder of a shares in that company but who does not hold beneficial interest in such shares, a declaration to the company specifying the name and other particulars of the person who holds the to make beneficial interest in such shares.
- **Beneficial Owner:** Section 89(2) of the Act, makes it obligatory for any person who, holds or acquires beneficial interest in a share of a company to make a declaration to the company specifying the nature of his interest, the particulars of the person in whose name the shares stand registered in the books of the company and such other particulars as may be prescribed.
- **Changes in Beneficial Interest:** Section 89(3) of the Act, states that where any change occurs in the beneficial interest in such shares, the person referred in sub-section (1) and the beneficial owner specified under sub-section (2) of Section 89 of the Act, shall make a declaration within thirty days, from the date of such change to the company in the prescribed Form containing the prescribed particulars.

Section 89(4) of the Act, states that the Central Government may make rules to provide for the manner of holding and disclosing beneficial interest and beneficial ownership under this section.

- **Penalty in failure to make declarations:** Section 89(5) of the Act, provides that if any person fails to make a declaration as required under sub-section (1) or sub-section (2) or sub-section (3) of Section 89, he shall be liable to a penalty of fifty thousand rupees and in case of continuing failure, with a further penalty of two hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees.
- **Filing return with Registrar of Companies:** Section 89(6) of the Act, makes it obligatory on the part of the company to make a note of such a declaration in the register concerned and to file within thirty days from the date of receipt of declaration by it, with the Registrar of Companies, a return in the prescribed form with regard to such a declaration with such fees or additional fees as may be prescribed.

In case of Specified IFSC Public Company/ Specified IFSC Private Company, in Section 89(6) the word "30 days" is substituted as "60 days". Notification dated 4th January, 2017.

- **Penalty in failure to file return:** Section 89(7) of the Act, says if a company, required to file a return under sub-section (6), fails to do so before the expiry of the time specified therein, the company and every officer of the company who is in default shall be liable to a penalty of one thousand rupees for each day during which such failure continues, subject to a maximum of five lakh rupees in the case of a company and two lakh rupees in case of an officer who is in default.

Section 89(8) of the Act, says no right in relation to any share in respect of which a declaration is required to be made under this section but not made by the beneficial owner, shall be enforceable by him or by any person claiming through him.

Section 89(9) of the Act, says that nothing in this section shall be deemed to prejudice the obligation of a

company to pay dividend to its members under this Act and the said obligation shall, on such payment, stand discharged.

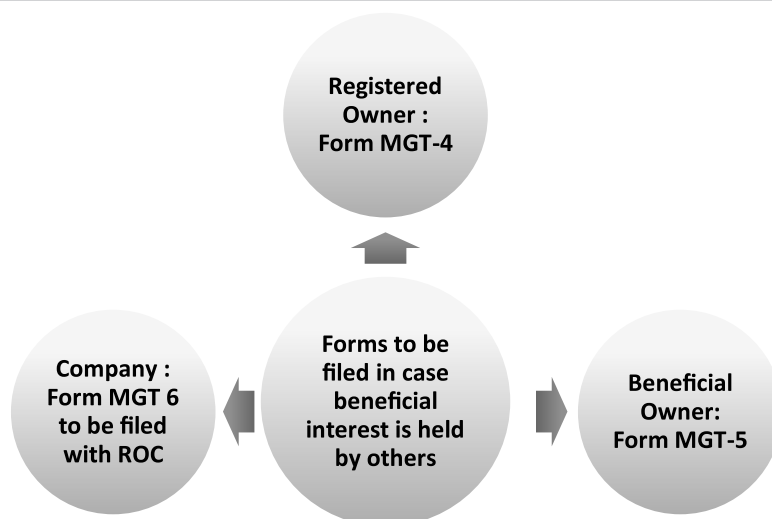
Section 89(10) of the Act, provides that for the purposes of this section and section 90, beneficial interest in a share includes, directly or indirectly, through any contract, arrangement or otherwise, the right or entitlement of a person alone or together with any other person to:

- (i) exercise or cause to be exercised any or all of the rights attached to such share; or
- (ii) receive or participate in any dividend or other distribution in respect of such share.

Section 89(11) of the Act, provides that the Central Government may, by notification, exempt any class or classes of persons from complying with any of the requirements of this section, except sub-section (10), if it is considered necessary to grant such exemption in the public interest and any such exemption may be granted either unconditionally or subject to such conditions as may be specified in the notification.

In case of Government Company - Section 89 shall not apply - Notification dated 5th June, 2015.

Step for declaration of beneficial interest in any shares [Rule 9 of the Companies (Management and Administration) Rules, 2014]



- (1) A person whose name is entered in the register of members of a company as the holder of shares in that company but who does not hold the beneficial interest in such shares (hereinafter referred to as “the registered owner”), shall file with the company, a declaration to that effect in **Form No. MGT 4**, within a period of 30 days from the date on which his name is entered in the register of members of such company:

When any change occurs in the beneficial interest in such shares, the registered owner shall, within a period of 30 days from the date of such change, make a declaration of such change to the company in **Form No. MGT 4**.

- (2) Every person holding and exempted from furnishing declaration or acquiring a beneficial interest in shares of a company not registered in his name (hereinafter referred to as “the beneficial owner”) shall file with the company, a declaration disclosing such interest in **Form No. MGT 5**, within 30 days after acquiring such beneficial interest in the shares of the company:

Provided that where any change occurs in the beneficial interest in such shares, the beneficial owner shall, within a period of thirty days from the date of such change, make a declaration of such change to the company in **Form No. MGT 5**.

- (3) Where any declaration under section 89 of the Act, is received by the company, the company shall make a note of such declaration in the register of members and shall file, within a period of 30 days from the date of receipt of declaration by it, a return in **Form No. MGT. 6** with the Registrar in respect of such declaration with fee.
- (4) Every company shall designate a person who shall be responsible for furnishing, and extending co-operation for providing, information to the Registrar or any other authorised officer with respect to beneficial interest in shares of the company.
- (5) For the purpose of sub-rule(4), the company may designate-
 - (i) a company secretary, if there is a requirement of appointment of such company secretary under the Act and the rules made thereunder; or
 - (ii) a key managerial personnel, other than the company secretary; or
 - (iii) every director, if there is no company secretary or key managerial personnel.
- (6) Until a person is designated as referred under sub-rule (4), the following persons shall be deemed to have been designated person;
 - (i) company secretary, if there is a requirement of appointment of such company secretary under the Act and the rules made thereunder; or
 - (ii) every Managing Director or Manager, in case a company secretary has not been appointed; or
 - (iii) every director, if there is no company secretary or a Managing Director or Manager.
- (7) Every company shall inform the details of the designated person in Annual return.
- (8) If the company changes the designated person at any time, it shall intimate the same to the Registrar in e-form GNL-2 specified under the Companies (Registration Offices and Fees) Rules, 2014.

Provided that nothing contained in this rule shall apply in relation to a trust which is created, to set up a Mutual Fund or Venture Capital Fund or such other fund as may be approved by SEBI.

SIGNIFICANT BENEFICIAL OWNERS IN A COMPANY [SECTION 90 R/W THE COMPANIES (SIGNIFICANT BENEFICIAL OWNERS) RULES, 2018]

Section 90(1) of the Act provides that every individual, who acting alone or together, or through one or more persons or trust, including a trust and persons resident outside India, holds beneficial interests, of not less than 25% or such other percentage as may be prescribed, in shares of a company or the right to exercise, or the actual exercising of significant influence or control as defined in clause (27) of section 2 of the Act, over the company (herein referred to as “significant beneficial owner”), shall make a declaration to the company, specifying the nature of his interest and other particulars, in such manner and within such period of acquisition of the beneficial interest or rights and any change thereof, as may be prescribed.

Provided the Central Government may prescribe a class or classes of persons who shall not be required to make declaration as stated above.

In case of Government company - Section 90 shall not apply. - Notification dated 5th June, 2015.

KEY CONCEPT**Rule 2 of the Companies (Significant Beneficial Owners) Rules, 2018 as amended by the Companies (Significant Beneficial Owners) Amendment Rules, 2019**

As per the definition provided in Section 90(1) of the Companies Act, 2013 the Government is empowered to prescribe other threshold limit for the determination of the Significant Beneficial Owner. Accordingly, the revised Rule 2 of the Companies (Significant Beneficial Owners) Rules, 2018 as amended by the Companies (Significant Beneficial Owners) Amendment Rules, 2019 provides the following definition :-

As per Rule 2(h) of the Companies (Significant Beneficial Owners) Rules, 2018:

“Significant beneficial owner” in relation to a reporting company means an individual referred to in sub-section (1) of section 90, who acting alone or together, or through one or more persons or trust, possesses one or more of the following rights or entitlements in such reporting company, namely:

- (i) holds indirectly, or together with any direct holdings, not less than 10% of the shares;
- (ii) holds indirectly, or together with any direct holdings, not less than 10% of the voting rights in the shares;
- (iii) has right to receive or participate in not less than 10% of the total distributable dividend, or any other distribution, in a financial year through indirect holding alone, or together with any direct holdings;
- (iv) has right to exercise, or actually exercises, significant influence or control, in any manner other than through direct holdings alone.

I) Explanation I: If an individual does not hold any right or entitlement indirectly under sub-clauses (i), (ii) or (iii) as mentioned above, he shall not be considered to be a significant beneficial owner.

II) Explanation II: Direct Holding of Right and Entitlement

An individual shall be considered to hold a right or entitlement directly in the reporting company, if he satisfies any of the following criteria, namely:

- (i) the shares in the reporting company representing such right or entitlement are held in the name of the individual;
- (ii) the individual holds or acquires a beneficial interest in the share of the reporting company under Section 89(2), and has made a declaration in this regard to the reporting company.

III) Explanation III: Indirect Holding of Right and Entitlement

An individual shall be considered to hold a right or entitlement indirectly in the reporting company, if he satisfies any of the following criteria, in respect of a member of the reporting company, namely:

A. BODY CORPORATE: Where the member of the reporting company is a body corporate (whether incorporated or registered in India or abroad), other than a limited liability partnership, and the individual,-

- a) holds majority stake in that member; or
- b) holds majority stake in the ultimate holding company (whether incorporated or registered in India or abroad) of that member.

B. HUF Member: Where the member of the reporting company is a Hindu Undivided Family (HUF) (through karta), and the individual is the karta of the HUF.

- C. PARTNERSHIP ENTITY MEMBER:** Where the member of the reporting company is a Partnership Entity (through itself or a partner), and the individual,-
- is a partner; or
 - holds majority stake in the body corporate which is a partner of the partnership entity; or
 - holds majority stake in the ultimate holding company of the body corporate which is a partner of the partnership entity.
- D. TRUST MEMBER:** Where the member of the reporting company is a trust (through trustee), and the individual-
- is a trustee in case of a discretionary trust or a charitable trust;
 - is a beneficiary in case of a specific trust;
 - is the author or settlor in case of a revocable trust.
- E. POOL INVESTEMENT VEHICLE MEMBER:** Where the member of the reporting company is,-
- a pooled investment vehicle; or
 - entity controlled by the pooled investment vehicle; based in member State of the Financial Action Task Force on Money Laundering and the regulator of the securities market in such member State is a member of the International Organization of Securities Commissions, and the individual in relation to the pooled investment vehicle;
 - is a general partner; or
 - is an investment manager; or
 - is a Chief Executive Officer where the investment manager of such pooled vehicle is a body corporate or a partnership entity.

IV) Explanation IV – Where the member of a reporting company is,

- (i) a pooled investment vehicle; or
- (ii) an entity controlled by the pooled investment vehicle,

based in a jurisdiction which does not fulfil the requirements referred to in clause (v) of Explanation III, the provisions of clause (i) or clause (ii) or clause (iii) or clause (iv) of Explanation III, as the case may be, shall apply.

DEFINITIONS:

- **Acting together means-** For the purpose of the aforesaid clause meaning of “Acting together” is given by Explanation V as under:

If any individual, or individuals acting through any person or trust, act with a common intent or purpose of exercising any rights or entitlements, or exercising control or significant influence, over a reporting company, pursuant to an agreement or understanding, formal or informal, such individual, or individuals, acting through any person or trust, as the case may be, shall be deemed to be ‘acting together’.

- **Shares:** For the purpose of the aforesaid clause meaning of “Shares” is given by Explanation VI as under:

As per Explanation VI of Rule 2 (h) of SBO Rules, For the purpose of calculation of 10% of beneficial interest in shares, **Shares** includes instrument in form of:

- Global Depository Receipts,
- Compulsorily Convertible Preference Shares, or
- Compulsory convertible debentures.
- **Reporting Company** - As per Rule 2(f) of SBO Rules, 2018, Reporting Company means a company as defined in clause (20) of section 2 of the Companies Act, 2013 required to comply with the requirements of section 90 of the Companies Act, 2013.
- **Partnership entity** means a partnership firm registered under the Indian Partnership Act, 1932 or a limited liability partnership registered under the Limited Liability Partnership Act, 2008.
- **Majority stake means:-**
 - (i) holding more than one-half of the equity share capital in the body corporate; or
 - (ii) holding more than one-half of the voting rights in the body corporate; or
 - (iii) having the right to receive or participate in more than one-half of the distributable dividend or any other distribution by the body corporate.
- **Significant Influence** means the power to participate, directly or indirectly, in the financial and operating policy decisions of the reporting company but is not control or joint control of those policies.

Illustration 1: Capital Structure of Company ABC limited is as following: Equity Share Capital of Rs. 2,000 CCD's of Rs. 3000 CCP's of Rs. 1000 TOTAL Rs. 6,000 Mr. A beneficially holds Rs. 520 equity shares in the Company. Whether Mr. A beneficially required to give disclosure under SBO?

Solution: For the purpose of SBO Rules share capital includes (CCD's and CCP's). Therefore total share capital of the Company is Rs. 6,000/-. Mr. A beneficially holds Share capital of Rs. 520/-. His percentage of holding is $520/6000 = 8.667\%$. As holding of Mr. A beneficially is less than 10% therefore no need to give disclosures u/s 90 of SBO Provisions.

Illustration 2: If an Individual ('A') holding shares in any Company (Exp. Mr. A Holding 60% shareholding of ABC Pvt. Ltd. and his name entered into register of member) Whether provisions of SBO shall be applicable on Mr. A or Not?

Solution "Significant Beneficial Owner": means beneficial owner holding ultimate beneficial interest not less than 10% and whose name not entered in the register of members of a Company. Therefore, one can opine that SBO provision applicable on person who is holding beneficial interest and whose name not entered into register of members. In above mentioned example individual holding shares directly in the company in his name therefore provision of SBO not applicable on such individual.

Illustration 3: If an Individual ("A") holding shares in any Company, (Exp. Mr. A Holding 7% shareholding of ABC Pvt. Ltd. and his name not entered into register of member). On behalf of Mr. A name of Mr. B entered into register of Members. Whether provisions of SBO shall be applicable on Mr. A or Not?

Solution: Significant Beneficial Owner means beneficial owner holding ultimate beneficial interest not less than 10% and whose name not entered in the register of members of a Company. In the above mentioned question, shareholding is less than 10% therefore question of SBO doesn't arise. No need to made compliances as per SBO.

Illustration 4: *If in the question B; Mr. A Holding 18% shareholding of ABC Pvt. Ltd. and his name not entered into register of member). On behalf of Mr. A name of Mr. B entered into register of Members. Whether provisions of SBO shall be applicable on Mr. A or Not?*

Solution: *Mr. A is beneficial owner and Mr. B is registered owner. Mr. B holding shares on behalf of Mr. A which is more than 10%. As per SBO provisions, Mr. A fall under conditions of Section 90. Therefore, have to comply with the provisions of Section 90.*

Some more practical scenarios for determining SBOs:

- (i) S holds directly 10% of equity in A Ltd. and he holds 55% of equity in H Ltd. which holds 1% equity in A Ltd.
S holds directly 10% of equity in A Ltd. and he holds 55% of equity in H Ltd. which holds 1% equity in A Ltd. - S is a Significant Beneficial Owner since he holds 11% totally through indirect and direct holdings.
- (ii) S holds 8% of equity while M holds 7% of equity in A Ltd. and they are deemed to act together.
S holds 8% of equity while Mr. M holds 7% of equity in A Ltd. and they are deemed to act together - S and M are not Significant Beneficial Owner, as there is no indirect holding and their acting together is irrelevant.
- (iii) S holds 8% of equity in A Ltd. directly. S is also the Karta of a HUF that holds 7% equity in A Ltd.
S holds 8% of equity in A Ltd. directly. Mr. S is also the Karta of a HUF that holds 7% of equity in A Ltd. S is a Significant Beneficial Owner since he holds total 15% equity through indirect and direct holdings.
- (iv) S holds 8% of equity in A Ltd. directly. S is also the trustee of a discretionary trust that holds 3% equity in A Ltd.
S holds 8% of equity in A Ltd. directly. Mr S is also the trustee of a discretionary trust that holds 3% equity in A Ltd. He is a Significant Beneficial Owner since he holds total 11% equity in A Ltd. through indirect and direct holdings. Holding by way of being a trustee of a discretionary trust is considered to be indirect holding.

Declarations to be made by Significant Beneficial Owner

- **Initial Disclosure:** On the date of commencement of the Companies (Significant Beneficial Owners) Amendment Rules, 2019, every individual who is a significant beneficial owner in a reporting company, was required to file a declaration in **Form No. BEN-1** to the reporting company within ninety days from such commencement i.e., February 08, 2019.
- **Continual Disclosure:** Every individual, who subsequently becomes a SBO/ or where his significant beneficial ownership undergoes any change shall file a declaration in **Form No. BEN-1** to the reporting company, within 30 days of acquiring such significant beneficial ownership or any change therein.

Obligations of the Reporting Company

- **Filing of Returns with ROC:**

Upon receipt of a declaration from the Significant Beneficial Owner of the company and changes therein, the reporting company shall file a return in **Form No. BEN-2** with the Registrar in respect of

such declaration, within a period of 30 days from the date of receipt of such declaration, along with the prescribed fees.

➤ **Notice to the Significant Beneficial Owner**

It should be noted that, the obligation of the individual to self-declare his significant beneficial holdings, and the obligation of the company to send notice seeking information from members in terms of Rule 2A of the Companies (Significant Beneficial Owners) Rules, 2018, are independent obligations.

As per Rule 2A(1) of the Companies (Significant Beneficial Owners) Rules, 2018, every reporting company shall take necessary steps to find out if there is any individual who is a significant beneficial owner, as defined in rule 2(h) of the Companies (Significant Beneficial Owners) Rules, 2018, in relation to that reporting company, and if so, identify him and cause such individual to make a declaration in **Form No. BEN-1**.

Further, according to Section 90(5) a company shall give notice, in the prescribed manner, to any person (whether or not a member of the company) whom the company knows or has reasonable cause to believe-

- (a) to be a significant beneficial owner of the company;
- (b) to be having knowledge of the identity of a significant beneficial owner or another person likely to have such knowledge; or
- (c) to have been a significant beneficial owner of the company at any time during the three years immediately preceding the date on which the notice is issued, and who is not registered as a significant beneficial owner with the company as required under this section.

As per Rule 2A(2) of SBO Rules whereby, the reporting company has members (other than individual) holding 10% or more of participating interest [either of shares, voting rights, or right to receive or participate in the dividend or any other distribution payable in a financial year], shall give notice to such member seeking information in accordance with Section 90(5) about the individual who is significant beneficial owner in the reporting company in **Form BEN-4**.

The abovementioned particulars should be submitted in writing to the registered address of the company by concerned person not later than 30 days of the date of this notice.

Consequences of Non-Reporting under Section 90 (5)

As per Rule 7 of The Companies (Significant Beneficial Owners) Rules, 2018, the reporting company shall apply to the Tribunal within a period of 15 days of the expiry of the period specified in BEN-4,

- (i) where any person fails to give the information required by the notice in Form No. BEN-4, within the time specified therein; or
- (ii) where the information given is not satisfactory.

In accordance with section 90(7) of the Companies Act, 2013, for order directing that the shares in question be subject to restrictions, including:

- (a) restrictions on the transfer of interest attached to the shares in question;
- (b) suspension of the right to receive dividend or any other distribution in relation to the shares in question;
- (c) suspension of voting rights in relation to the shares in question;
- (d) any other restriction on all or any of the rights attached with the shares in question.

Order of Tribunal

NCLT on application moved by a company is not under a binding obligation to pass any restrictive order and the concerned person or member shall have the opportunity to explain why he or she is not a significant beneficial owner and retract the contentions made by the company.

As per Section 90(8) of the Companies Act, 2013 the Tribunal may:

- After giving an opportunity of being heard to the parties concerned, make such order restricting the rights attached with the shares.
- Within a period of 60 days of receipt of application or such other period as may be prescribed.

As per Section 90(9) of the Companies Act, 2013, the company or the person aggrieved by the order of the Tribunal may make an application to the Tribunal for relaxation or lifting of the restrictions placed by the Tribunal within a period of one year from the date of such order.

However, if no such application has been filed within a period of one year from the date of the order, such shares shall be transferred, without any restrictions, to the authority constituted under sub-section section 125(5) i.e., Investor Education and Protection Fund , in such manner as prescribed.

Register of Significant Beneficial Owners

According to Rule 5 of the Companies (Significant Beneficial Owners) Rules, 2018, the company shall maintain a register of significant beneficial owners in Form No. BEN-3 which includes :

- the name of individual;
- his date of birth;
- address and e-mail ID;
- details of ownership in the company; and
- Such other details.

The register shall be open for inspection during business hours, at such reasonable time of not less than two hours, on every working day as the board may decide, by any member of the company on payment of such fee as may be specified by the company but not exceeding fifty rupees for each inspection.

Non-Applicability

As per Rule 8 of the Companies (Significant Beneficial Owners) Rules, 2018 shall not be made applicable to the extent the share of the reporting company is held by:

- IEPF Authority constituted under Section 125(5) of the Act;
- It's holding reporting company; however, the details of such holding reporting company shall be reported in Form No. BEN-2;
- The Central Government, State Government or any local Authority;
- Reporting company or a body corporate an entity, controlled by the Central Government or by any State Government or partially by the Central Government and partly by one or more State Governments;
- SEBI registered Investment Vehicles such as mutual funds, alternative investment funds (AIF), Real Estate Investment Trusts (REITs), Infrastructure Investment Trust (InVITs) regulated by SEBI; and

- Investment Vehicles regulated by RBI, or IRDA, or Pension Fund Regulatory and Development Authority.

Penal Provisions

Section	Nature of Violation	Person Responsible	Penalty
Section 90(10)	Failure to make a declaration	SBO	penalty of Rs.50,000 and in case of continuing failure, with a further penalty of Rs.1000 for each day after the first during which such failure continues, subject to a maximum of Rs.2 Lakhs
Section 90(11)	Failure to maintain register U/S 90(2) & file information U/S 90(4) or required to take necessary steps under sub-section 90(4A) and denial of inspection	<ul style="list-style-type: none"> ● Company ● Officer of the company who is in default 	<ul style="list-style-type: none"> ● liable to a penalty of Rs.1Lakh and in case of continuing failure, with a further penalty of Rs.500 for each day, after the first during which such failure continues, subject to a maximum of Rs.5 Lakhs ● a penalty of Rs.25000 and in case of continuing failure, with a further penalty of Rs.200 for each day, after the first during which such failure continues, subject to a maximum of Rs.1 Lakh
Section 90(12)	Furnishing of false and incorrect information or suppressing any material information	Person declaring Beneficial interest	Liable to action under Section 447 of the Companies Act, 2013 (Fraud)

Rectification of a Register of Members

The register of members of a company contains names, addresses, occupations, if any etc. only of members of the company. Any person, whose name is entered in the register of members of a company, considered to be its member, although he may not own the shares which are shown in his name in the register of members. On the contrary, a person, whose name is not entered in the register of members is not considered as member of the company even though he may have done everything to entitle him to be put on the register of members. Injustice may, therefore, result from such omission or commission.

CASE LAW

Where the petitioners failed to produce their share certificates, it could not be said that they had not transferred their shares in favour of respondents and thus, petitioners were not entitled to the relief for rectification of Register of Members of respondent company. [**Held in the case of M/s Bhupendra Patel v. Hotel Satyaketu (P.) Ltd. (2017) NLT – Ahmedabad.**]

Section 59(1) of the Companies Act, 2013 confers powers on the Tribunal or a competent court outside India specified by the Central Government by notification in respect of foreign members or debenture-holders residing outside India to order rectification of register of members of a company if an appeal is made by the aggrieved person or by any member of the company or the company on any of the following grounds:

- (a) where the name of a person is without sufficient cause, entered in the register of members of a company;
- (b) where his name, after having been entered in the register, is omitted without sufficient cause; or
- (c) where default is made or unnecessary delay takes place in entering in the register of members the fact of any person having become, or ceased to be, a member of the company.

This may happen where a person has transferred his shares according to law and the company either refuses or delays registration of transfer in the transferee's name.

The Tribunal may, after hearing the parties to the appeal for rectification of register of members, by the order, either dismiss the appeal or direct that the transfer or transmission shall be registered by the company within ten days of the receipt of the order or direct for rectification of records of the depository or the register and in the latter case also direct the company to pay damages if any, sustained by the party aggrieved [Section 59(2)].

The provisions of this section shall not restrict the right of a holder of securities, to transfer such securities and any person acquiring such securities shall be entitled to voting rights unless the voting rights have been suspended by an order of the Tribunal [Section 59(3)].

Where the transfer of securities is in contravention of any of the provisions of the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992 or this Act or any other law for the time being in force, the Tribunal may, on an application made by the depository, company, depository participant, the holder of the securities or the Securities and Exchange Board, direct any company or a depository to set right the contravention and rectify its register or records concerned. [Section 59(4)]

It is pertinent to note that though the time limit for filing an application for rectification of register of members has not been specified in the Act, the provisions of Article 137 of the Limitation Act would apply and in consequence, the application for rectification must be made within three years from the date on which the right occurs [Ref. *Anil Gupta v. Delhi Cloth & General Mills Co. Ltd.*, (1983) 54 Com Cases 301 (Delhi)].

RIGHTS OF MEMBERS

When once a person becomes a member he is entitled to exercise all the rights of a member until he ceases to be a member in accordance with the provisions of the Act. The appointment of a receiver, the attachment of the shares, the pledge of the shares or taking over of the management of a company which is holding shares in another company will not alter the position. So long a person's name stands registered in the books as a member, even if he has sold the share and has given the share certificates and the blank transfer deed duly signed, he alone is entitled to exercise the rights of membership [*Balakrishna Gupta & Others v. Swadeshi Polytex Ltd. and Others* (1985) 58 Com Cases 563 (S.C.); and *Life Insurance Corporation of India v. Escorts Ltd. & Others* (1986) 59 Com Cases 548 (S.C.)]. These rights are derived by virtue of the membership contract between the company and the member and the general law. Some of these rights can be exercised by him individually and others along with other members unless member himself holds shares equivalent to the minimum holding prescribed under the various provisions of the Companies Act, 2013.

Individual Rights

Members of a company enjoy certain rights in their individual capacity, which they can enforce individually. These rights are contractual rights and cannot be taken away except with the written consent of the member concerned. These rights can be categorized as under:

Right to receive copies of documents

Right to inspect statutory registers/returns and get copies

Right to attend meetings of the shareholders

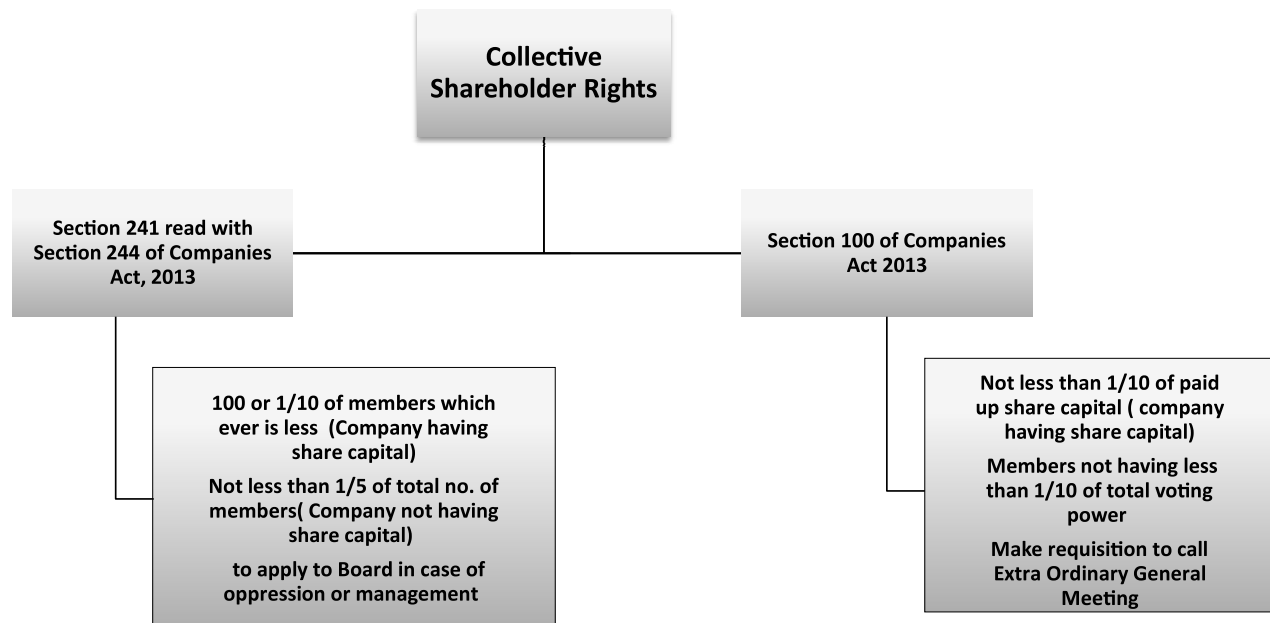
Other Rights

- (1) Right to receive copies of the following documents from the company:
 - (i) A copy of the financial statements, including consolidated financial statements, if any, auditor's report and every other document required by law to be annexed or attached to the financial statements (Section 136);
 - (ii) Abridged financial statement and auditor's report in the case of a listed company (Section 136);
 - (iii) Report of the Cost Auditor, if so directed by the Government;
 - (iv) Notices of the general meetings of the company (Sections 101-102).
- (2) Right to inspect statutory registers/returns and get copies thereof without payment on any fee or on payment of prescribed fee. The members have been given right to inspect the following registers etc.:
 - (i) Register of Charges and instrument of charges (Section 85);
 - (ii) Copies of contract of employment with Managing or Whole-time Directors);
 - (iii) Shareholders' Minutes Book (Section 119);
 - (iv) Register of Contracts, Companies and Firms in which Directors are interested (Section 189);
- (3) Right to attend meetings of the shareholders and exercise voting rights at these meetings either personally or through proxy (Sections 96, 100, 105 and 107).
- (4) Other rights: Over and above the rights enumerated at Item Nos. 1 to 3 above, the members have the following rights:
 - (i) To transfer shares (Sections 44 and 56 and Articles of Association of the company);
 - (ii) To resist and safeguard against increase in his liability without his written consent;
 - (iii) To receive dividend when declared (Section 123);
 - (iv) To have rights shares (Section 62);
 - (v) To appoint directors (Section 152);
 - (vi) To share the surplus assets on winding up (Section 320);
 - (vii) Right of dissentient shareholders to apply to Tribunal (Section 48);
 - (viii) Right to be exercised collectively by passing a special resolution and intimating the same to the Central Government for investigation of the affairs of the company (Section 210);

- (ix) Right to make application collectively to the Tribunal for relief in cases of oppression and mismanagement (Sections 241);
- (x) Right to file class action suits before the Tribunal (Section 245);
- (xi) Right of Nomination. (Section 72);
- (xii) Right to file a suit or take any other action in case of any misleading statement or the inclusion or omission of any matter in the prospectus. (Section 37).

Collective Shareholder Rights

Members of a company have certain rights which can be exercised by members collectively by means of democratic process, i.e. by majority of members usually unless otherwise prescribed. This involves the principle of submission by all members to the will of the majority, provided that the will is exercised in accordance with the law and the Memorandum and Articles of Association of the company. Thus, the shareholders in majority determine the policy of the company and exercise control over the management of the company.



- **Application to Board in case of Oppression and Management:** However, if and when the majority becomes oppressive or is accused of mismanagement of the affairs of the company, Section 241 read with section 244 of the Act, confers right, to not less than one hundred members of a company or not less than one-tenth of the total number of its members whichever is less or any member or members holding not less than one-tenth of the issued share capital of the company (but they must have paid all calls and others sums due on their shares) and in the case of a company not having a share capital, not less than one-fifth of the total number of its members, to apply to Board under Section 241 for relief in cases of oppression or for relief in cases of mismanagement respectively.
- **Making a requisition for calling Extra Ordinary General Meeting:** Section 100 of the Companies Act, 2013 confers on members, holding not less than one-tenth of the paid-up share capital of a company, right to make a requisition to the Board of Directors to call an extraordinary general meeting of the company. The section also confers on members having not less than one-tenth of the total voting power

in a company not having a share capital, to make a requisition to the Board to call an extraordinary general meeting of the company. If the Board of Directors of the company does not, within twenty-one days from the date of the deposit of a valid requisition in regard to any matter, proceed to call a meeting for the consideration of those matters on a day not later than forty-five days from the date of deposit of the requisition, the meeting may be called and held by the requisitionists themselves within a period of 3 months from the date of the requisition.

Voting Rights of Members

The right of attending shareholders' meetings and voting thereat is the most important right of a member of a company, as shareholders' meetings play a very important role in the company's life. Directors are appointed by the shareholders, who direct the affairs of the company, formulate short-term plans and long-term policies of the company, appoint management personnel to constitute organisation to implement their plans and policies in order to achieve the objects of the company.

- **Voting Rights on Poll:** Section 47 of the Act, provides that every member of a company limited by shares and holding equity share capital therein, shall have right to vote on every resolution placed before the company and his voting right on a poll shall be in proportion to his share in the paid up equity share capital of the company.

Section 43 of the Companies Act, 2013 provides that a company limited by shares shall be entitled to issue (i) equity share capital with voting rights or (ii) with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed by the Central Government.

- **Preference Shareholder Rights:** Preference shareholders ordinarily vote only on matters directly affecting the rights attached to preference share capital and on any resolution for winding up of the company or for the repayment or reduction of the equity or preference share capital. The voting right of a preference shareholder on poll shall be in proportion to his share in the paid-up preference share capital of the company. In respect of a resolution on a matter affecting both equity shareholders and preference shareholders, the proportion of the voting rights of equity shareholders to the voting rights of the preference shareholders shall be in the same proportion as the paid-up capital in respect of the equity shares bears to the paid-up capital in respect of the preference shares. However, where the dividend in respect of a class of preference shares has not been paid for a period of two years or more, such class of preference shareholders shall have a right to vote on all the resolutions placed before the company (Section 47).

Section 50 of the Act lays down that a company may, if authorised by its articles, accept from any member the whole or a part of the amount remaining unpaid on any shares held by him although no part of that amount has been called up. Such advance payment, however, shall not confer on the member concerned any voting rights.

- **Shareholders' Pre-emptive Rights with regard to further issue of share capital (Right Shares):** To preserve the shareholders' proportionate dividend, liquidation and voting rights, pre-emptive rights are often recognised, but their existence and scope can be effected by provisions in the articles. However, Section 62 of the Companies Act, 2013 secures shareholders' pre-emptive rights with regard to the further issue of share capital by the company. The Section lays down:

“(1) Where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered to persons who, at the date of the offer, are holders of equity shares of the company in proportion, as nearly as circumstances admit, to the paid-up share capital” on those shares by sending a letter of offer subject to the condition that unless

the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person and the notice of offer shall contain a statement of this right [Sub- clause (a)].

Rights of Dissenting Shareholders

Section 48(2) of the Companies Act, 2013 confers certain rights upon the dissenting shareholders. According to section 48(2), where the rights of any class of shares are varied, the holders of not less than ten per cent of the issued shares of that class, being persons who did not consent to such variation or vote in favour of the special resolution for the variation, can apply to the Tribunal to have the variation cancelled. Where any such application is made to the Tribunal, the variation will not be effective unless and until it is confirmed by the Tribunal.

The above application shall be made within twenty-one days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

Nomination by Security holders (including members) (Section 72)

Section 72(1) of the Act, states that every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.

Section 72(2) of the Act, states that when the securities of a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, any person to whom all the rights in the securities shall vest in the event of death of all the joint holders.

Section 72(3) of the Act, states that notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of the securities of a company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint holders, become entitled to all the rights in the securities, of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

Section 72(4) of the Act, states that when the nominee is a minor, it shall be lawful for the holder of the securities, making the nomination to appoint, in the prescribed manner, any person to become entitled to the securities of the company, in the event of the death of the nominee during his minority.

Rule 19 of the Companies (Share Capital and debentures) Rules, 2014 deals with Nomination by Securities Holders. It provides that:-

- (1) Any holder of securities of a company may, at any time, nominate, in **Form No. SH.13**, any person as his nominee in whom the securities shall vest in the event of his death.
- (2) On the receipt of the nomination form, a corresponding entry shall forthwith be made in the relevant register of securities holders, maintained under section 88 of the Act.
- (3) Where the nomination is made in respect of the securities held by more than one person jointly, all joint holders shall together nominate in **Form No.SH.13** any person as nominee.
- (4) The request for nomination should be recorded by the Company within a period of two months from the date of receipt of the duly filled and signed nomination form.

- (5) In the event of death of the holder of securities or where the securities are held by more than one person jointly, in the event of death of all the joint holders, the person nominated as the nominee may upon the production of such evidence as may be required by the Board, elect, either-
 - (a) to register himself as holder of the securities; or
 - (b) to transfer the securities, as the deceased holder could have done.
- (6) If the person being a nominee, so becoming entitled, elects to be registered as holder of the securities himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects and such notice shall be accompanied with the death certificate of the deceased share or debenture holder(s).
- (7) All the limitations, restrictions and provisions of the Act relating to the right to transfer and the registration of transfers of securities shall be applicable to any such notice or transfer as aforesaid as if the death of the share or debenture holder had not occurred and the notice or transfer were a transfer signed by that shareholder or debenture holder, as the case may be.
- (8) A person, being a nominee, becoming entitled to any securities by reason of the death of the holder shall be entitled to the same dividends or interests and other advantages to which he would have been entitled to if he were the registered holder of the securities except that he shall not, before being registered as a holder in respect of such securities, be entitled in respect of these securities to exercise any right conferred by the membership in relation to meetings of the company.

The Board may, at any time, give notice requiring any such person to elect either to be registered himself or to transfer the securities, and if the notice is not complied with within ninety days, the Board may thereafter withhold payment of all dividends or interests, bonuses or other moneys payable in respect of the securities, as the case may be, until the requirements of the notice have been complied with.
- (9) A nomination may be cancelled, or varied by nominating any other person in place of the present nominee, by the holder of securities who has made the nomination, by giving a notice of such cancellation or variation, to the company in **Form No. SH.14**.
- (10) The cancellation or variation shall take effect from the date on which the notice of such variation or cancellation is received by the company.
- (11) When the nominee is a minor, the holder of the securities, making the nomination, may appoint a person in **Form No. SH.13** specified under sub-rule (1), who shall become entitled to the securities of the company, in the event of death of the nominee during his minority.

SHAREHOLDERS' DEMOCRACY

The concept of shareholders' democracy in the present day corporate world denotes the shareholders' supremacy in the governance of the business and affairs of corporate sector either directly or through their elected representatives.

Democracy means the rule of people, by the people and for the people. In that context the shareholders democracy means the rule of shareholders, by the shareholders, and for the shareholders in the corporate enterprise, to which the shareholders belong. Precisely it is a right to speak, congregate, communicate with co-shareholders and to learn about what is going on in the company.

Under the Companies Act the powers have been divided between two segments: one is the Board of Directors and the other is of shareholders. The directors exercise their powers through meetings of Board of directors and

shareholders exercise their powers through General Meetings. Although constitutionally all the acts relating to the company can be performed in General Meetings but most of the powers in regard thereto are delegated to the Board of directors by virtue of the constitutional documents of the company viz. the Memorandum of Association and Articles of Association.

Under Section 179 of the Companies Act 2013 a general power has been conferred on the Board of directors. The section provides that “Subject to the provisions of this Act, the Board of directors of a company shall be entitled to exercise all such powers and to do all such acts and things, as the company is authorised to exercise and do.”

Proviso to this section restricts the power of the Board of Directors to do things which are specifically required to be done by shareholders in the General Meetings under the provisions of Companies Act or Memorandum of Association or the Articles of Association.

Thus the Companies Act has tried to demarcate the area of control of directors as well as that of shareholders. Basically all the business to be transacted at the meetings of shareholders is by means of an ordinary resolution or a special resolution or by postal ballot.

Few businesses which are required to be transacted by shareholders

1. Alteration of Memorandum of Association and Articles of Association.
2. Further issue of share capital.
3. To transfer some portions of uncalled capital to reserve capital to be called up only in the event of winding up of the company.
4. To reduce the share capital of the company.
5. To shift the registered office of the company outside the local limits of any city, town or village where the registered office is situated.
6. To decide a place other than the registered office of the company where the statutory books, required to be maintained.
7. Payment of interest on paid-up amount of share capital for defraying the expenses on construction when plant cannot be commissioned for a longer period of time.
8. To approach Central Government for investigation into the affairs of the company.
9. Any contract or arrangement with related party, above the threshold limits.
10. Payment of commission of more than statutory requirement to a managing or a whole-time director or a manager.
11. To make loans, to extend guarantee or provide security to other companies or make investment beyond the limit specified.
12. To borrow money and to charge out the assets of the company to secure the borrowed money where the sums to be borrowed along with money already borrowed exceeds the paid-up capital of the company and its free reserves i.e. reserves not set apart for any specific purpose.
13. To appoint directors.
14. To increase or reduce the number of directors within the limits laid down in Articles of Association.

15. To cancel, redeem debentures etc.
16. To make contribution to funds not related to the business of the company.

In view of the rights conferred on shareholders to be exercised at General Meetings, the Act casts an obligation on the directors to send notices for convening general meetings or else the meetings shall be declared to be void as also all proceedings transacted thereat.

Apart from the rights which are vested in the shareholders to be exercised in relation to the conduct of the business of the company, the directors of the company have certain obligations towards the shareholders.

The courts have determined two broad duties to be performed by a director:

1. Duty of utmost care and skill in managing the affairs of the company or else be liable for damages.
2. Fiduciary duty to act bona fide in the interest of the company, not to exercise powers for collateral benefit and not to earn profit from the position as a director.

VARIATION OF SHAREHOLDER'S RIGHTS

Shareholder's rights are determined by the Companies Act, Memorandum of association, and Articles of association of the company and the terms of issue of shares. Rights attached to a class of shares are known as "class rights".

Shareholder's rights relate to dividend, voting at members' meetings and return of capital. Preference shareholders may have rights to a fixed amount or a fixed rate of dividend or to cumulative dividend. Where the ordinary shareholders are conferred the right to participate in the surplus assets on winding up of a company, it is not deemed to be a class right as it is implied even in the absence of any express provision in the articles.

Section 48 (1) of the Companies Act, 2013 lays down that where a share capital of the company is divided into different classes of shares, the rights attached to the shares of any class can be varied with the consent in writing of the holders of not less than three-fourths of the issued shares of that class or with the sanction of a special resolution passed at a separate meeting of the holders of the issued shares of that class. Further, the variation of rights of shareholders can be effected only:

- (i) if provision with respect to such variation is contained in the Memorandum or Articles of association of the company; or
- (ii) in the absence of any such provision in a Memorandum or Articles of association of the company, if such a variation is not prohibited by the terms of issue of the shares of that class.

However, if variation by one class of shareholders affects the rights of any other class of shareholders, the consent of three-fourths of such other class of shareholders shall also be obtained and the provisions of this section shall apply to such variation.

LIABILITY OF MEMBERS

The liability of a member depends on the nature of the company. If the company is registered with unlimited liability, every member is liable in full for all the debts of the company contracted during the period of his membership. Where the company is limited by guarantee, each member will be bound to contribute in the event of winding up a sum specified in the liability clause of the memorandum of association. In case of company limited by shares, each member is bound to contribute the full nominal value of shares and his liability ends there. If before the full nominal value of the shares is paid, the company goes into liquidation, the member becomes liable as contributory to pay the balance when called upon to pay, by the liquidator of the company.

Where a company has been incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants, direct that liability of the members shall be unlimited [Section 7(7) of the Act].

If a member ceased to be member of a company within one year prior to the commencement of the winding up of the company he is liable to pay on the shares which he held to the extent of the amount unpaid thereon, if:

- (i) on the winding up, debts exist which were incurred while he was a member, and
- (ii) it appears to the Tribunal that the present members are not able to satisfy the contribution required from them in respect of their shares.

A person is liable as member inspite of a valid transfer of shares by him, if the name of the transferee is not placed on the register of members, in place of the transferors' name. If a person applies for shares in the name of a fictitious person or a person not in existence or uses another person's name for himself, or uses an alias, and shares are allotted in that name or alias, he will be liable as a member.

SHAREHOLDERS' AGREEMENT

Shareholders' agreements (SHA) are quite common in business. There are numerous situations where such agreements are entered into – family companies, JV companies, venture capital investments, private equity investments, strategic alliances, and so on. Shareholders' agreement is a contractual arrangement between the shareholders of a company describing how the company should be operated and the defining inter-se shareholders' rights and obligations. SHAs are the result of mutual understanding among the shareholders of a company to which, the company generally becomes a consenting party. Such agreements are specifically drafted to provide specific rights, impose definite restrictions over and above those provided by the Companies Act. SHA creates personal obligation between the members signing such agreement however, such agreements do not become a regulation of the company in the way the provisions of Articles are.

Enforceability of the Shareholder's Agreement

Though the international view is split but to a large extent courts are inclined towards favouring SHA as long as they are not found to be detrimental to the minority stakeholder's rights. In the leading case of *Russell v. Northern Bank Development Corporation Ltd* [1992] BCC 578; [1992] 1 WLR 588, the House of Lords found that though a company cannot deprive itself of its power to alter its constitution, the members of the company could agree in a shareholders' agreement as to how they will exercise their voting rights on a resolution to alter the articles/constitution. The US Courts have largely accepted shareholder agreements. [*Blount v. Taft* [246 S.E.2d 763 at 769 (1978)]]

While shareholders' agreements are enforceable in England regardless of whether they have been incorporated in the articles of association of the company, in India courts have either refused to recognize clauses in shareholders agreements or, even when consistent with company legislation, enforced such clauses only if they have been incorporated in the articles of association of the company. There is a series of rulings where the courts have upheld that in case of any conflict between the Articles and the SHA, the former will always prevail. Some of these are:

- *V.B. Rangaraj v. V.B. Gopalakrishnan* (AIR 1992 SC 453)
- *Shanti Prasad Jain v. Kalinga Tubes Ltd.*, (35 Com. Cas. 351 SC)
- *Mafatlal Industries Ltd., v. Gujarat Gas Co. Ltd* (97 Comp Cas 301 Guj),
- *Pushpa Katoch v. Manu Maharani Hotels Limited* [(2006) 131 Comp Cas 42 (Delhi)]

The Supreme Court in *V.B. Rangaraj v. V.B. Gopalakrishnan*, AIR 1992 SC 453 held that a restriction which is not specified in the articles of association is not binding either on the company or on the shareholders. This decision was reiterated by the Bombay High Court in *IL & FS Trust Co. Ltd. v. Birla Perucchini Ltd.* [2004] 121 Comp Cas 335 (Bom).

However, the Supreme Court in 2003 in its decision in *M.S. Madhusoodhanan v. Kerala Kaumudi Pvt. Ltd.* (2003 117 Comp Cas 19 (SC)) not disagreeing with the decision in *V.B. Rangaraj* case mentioned above, but distinguishing itself from the facts in that judgment, held that a restriction in relation to identified members on identified shares of a private company did not amount to restriction of transferability of shares *per se*.

In *Western Maharashtra Development Corporation Ltd. v. Bajaj Auto Ltd.* [(2010) 154 Company Cases 593 (Bom)], it was held that such clauses are to hamper the free transferability of shares and in violation of the Companies Act, and hence, are not enforceable. Subsequently in the case of *Messer Holdings Limited v. Shyam Madanmohan Ruia and Ors* [(2010) 98 CLA 325] the Division Bench of Bombay High Court overruled its judgement in *Western Maharashtra Development Corporation Ltd* and provided a more liberal interpretation and recognised the rights *inter se* among shareholders in case of restrictions on transfer of shares.

In Indian context, while the landmark decision of the Supreme Court in *V.B. Rangaraj* case mentioned above is often cited in the context of shareholders' agreements, most other decisions have been rendered by the High Courts in various states especially the Bombay High Court. The decisions on shareholders' agreements are not uniformly inclined in a direction. The High Court decisions are limited in their applicability as they are susceptible to disagreements by other High Courts, thereby conferring limited precedential value. It is difficult to come to clear and crisp answers as to enforceability of Shareholder's agreement.

VETO POWER

Meaning of the term – “veto”

A veto – Latin for “*I forbid*” – is the power to unilaterally stop an official action, especially the enactment of legislation.

A veto may give power only to stop changes, thus allowing its holder to protect the *status quo*.

The Companies Act, 2013 introduced various provisions to essentially bridge the gap towards protection and welfare of the minority shareholders under the Companies Act, 1956. As per the Companies Act, 1956, shareholders who hold the majority of shares, rule the company. This majority principle is recognised in a landmark case *Foss vs. Harbottle* (1843). The decision taken by the majority shareholders was binding on the minority. Now this principal has been replaced and minority shareholders have been given greater power under the Companies Act, 2013.

Veto Power or Rights

A right is inherent. Shareholders rights refer to rights enshrined in the constitutional document of the company or as provided by the law. A power has its genesis under the provisions of law.

As per the provisions of the Companies Act, 2013 there are some resemblance where the management can take decisions on their own, by virtue of law. However, there are some instances where the consent of the shareholders is mandatory to approve any decision or transaction which is said to be as the veto power or veto right of shareholders of the company.

For instance in case of related-party transactions, promoters, who are majority shareholders, cannot vote in resolutions in cases of related-party transactions (however a company in which ninety percent or more members in number are relatives of promoters or are related parties can vote in resolutions in cases of related-party transactions). As stated under the provisions of Section 188 any related-party transaction that is not done in the ordinary course of business and is not at an arm's length will need approval of minority shareholders by way of a resolution.

Difference between Veto Power and Casting Vote

Veto power is different than casting vote of Chairman. Casting vote is applicable in case of equality of votes in favour and against. In case of equality the Chairman may give vote either in favour or against the resolution and it can be carried accordingly. Veto power has not been defined in the Companies Act. However, dictionary meaning of veto power is: "to refuse to admit or approve; specifically: to refuse assent to (a legislative bill) so as to prevent enactment or cause reconsideration."

Shareholders Agreement and Articles of Association of a company may provide for certain rights to the minority shareholder who has invested funds in the company. Such powers may include power to refuse capital expenditure over certain specified limit. In case the representative of the minority group is not in favour of the capital expenditure proposed by the company, he can exercise his right under the Articles which in common terminology is referred to as "veto powers".

Veto Rights and 'Control'

The introduction of the concept of 'control' in the 2013 Act has implications for investors in Indian companies. Under the 2013 Act, 'control' is understood to include the right to:

- (i) appoint a majority of directors; or
- (ii) control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholding agreements or voting agreements, or in any other manner.

The definition is similar to the definition of 'control' under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("Takeover Regulations").

The definition of 'control' and the jurisprudence surrounding the same under the Takeover Regulations has been developed with the objective of protecting minority shareholders and providing an exit to them in the event of change in its control.

The definition of 'control' is linked closely with the definition of 'promoter'. The 2013 Act provides that a person having control over the affairs of the company would be regarded as its 'promoter'.

Given the similarity in the definition of 'control' under the Takeover Regulations and the 2013 Act and its linkage to the definition of 'promoter' it is likely that the jurisprudence of control under the Takeover Regulations would be applied under the 2013 Act, as well.

But, the scope of the term 'control' under the Takeover Regulations itself is not clear. The uncertainty around the interpretation of control would impact negotiation of shareholder agreements. Affirmative voting rights in favour of investors under a shareholders agreement are meant to be an effective tool for safeguarding investment or the interest of the investors. These rights are negotiated and decided in the shareholders' agreement, which are subsequently incorporated into the articles of association of a target company.

Accordingly, an investor or shareholder who has secured for itself certain rights which enable a degree of control over 'management or policy decisions', whether by way of board representation or veto rights, may be regarded as having 'control' of the company and therefore be classified as a 'promoter'. Investors would need to carefully consider the obligations and liabilities associated with the position of a promoter under the 2013 Act when negotiating rights and powers in a company under the shareholders agreement.

ASSIGNMENT OF SHARES IN A COMPANY

Section 44 of the Companies Act, 2013 defines the nature of property in the shares of a company. It lays down: “The shares or debentures or other interest of any member in a company shall be movable property, transferable in the manner provided by the articles of the company.”

The definition of “goods” in the Sale of Goods Act, 1930, specifically includes stocks and shares. Hence, it is necessary to provide by the articles the manner in which transfer of shares are to be affected. A “share” in a company is a right to a specified amount of the share capital of the company, carrying with it certain rights and liabilities, while the company is a going concern and in the winding up. It represents the interest of the holder measured for purposes of liability and dividend by a sum of a money.

A company cannot refuse to transfer shares except as provided by its articles. It is well settled that unless the articles otherwise provide, a shareholder has a free right to transfer his shares to whom he chooses. It is not necessary to look to the articles for a power to transfer, since that power is given by the Act. It is only necessary to look to the articles of association to ascertain the mode of transfer and the restrictions upon it.

As between buyer (transferee) and seller (transferor) of shares, the buyer is entitled to all dividends declared after the contract of sale, unless otherwise agreed. Whatever may be the agreement, a transfer of shares after declaration of dividend, does not, as against the company, carry the dividend, even though the transfer may be cum-dividend.

SPECIMEN RESOLUTION / FORMATS

Sample Resolution of Board Meeting for Transfer of Shares

CERTIFIED TRUE COPY OF THE RESOLUTION PASSED AT THE MEETING OF THE BOARD OF DIRECTORS OF **[Name of Company]**, HELD ON **[Date]**, AT **[Address]**.

The Director Mr./Mrs. **[Name of Director]**, informs to the board that they are in receipt of some share transfer application along with share certificates, share transfer deed, and other relevant documents duly signed, stamped and authenticated, for the approval of the company and to record the details of share transfer in the registers of members maintained by the company.

“**RESOLVED THAT** pursuant to the provision of section 56 of the Companies Act 2013 and other relevant provisions as amended from time to time, the consent of the board of directors is hereby accorded to record the transfer of share in the register of members maintained by the company as per details given below:-

<i>Date</i>	<i>Name of Transferor and Folio No.</i>	<i>Name of Transferee and Folio No.</i>	<i>Number of Shares</i>	<i>Share Certificate Number</i>	<i>Distinctive Number</i>

FURTHER RESOLVED THAT Mr./Mrs. **[Name of Director]** director of the company is hereby authorised to endorse the relevant share certificate and to enter the name of the transferee as a member in the register of members and make entries in the register of share transfer and to do all other necessary acts, deeds and things as may be required to give effect to the above resolution.”

A Specimen of Deed of Assignment of Shares in a Company

THIS ASSIGNMENT is made this day of between AB, son of , resident of..... (hereinafter called “the Assignor”) of the one part, and CD, son of....., resident of (hereinafter called “the Assignee”) of the other part.

THE DEED WITNESSES:

That in consideration of the sum of Rs..... (Rupees.....) paid by the assignee to the assignor, the receipt whereof the assignor hereby acknowledges, the said AB hereby assigns, sells and transfers to the said CD..... Equity Shares of Rs.....each, fully paid up, bearing consecutive Nos..... to..... (inclusive), which stand in the name of the assignor in the Register of Members of... Co. Ltd. TO HOLD the same to the assignee absolutely, subject nevertheless to the conditions on which the assignor held the same up to date.

AND the assignee hereby agrees to take the said Equity Shares subject to such conditions.

IN WITNESS WHEREOF the assignor and the assignee do hereto affix their respective signatures on the day, month and the year stated above.

Assignor:

Assignee:

Signed in the presence of :

Witness 1:

Witness 2:

LESSON ROUND-UP

- A Company is composed of members, though it has its own entity distinct from members.
- Every shareholder is a member and every member is a shareholder, however, there may be exceptions to this statement.
- Section 2(55) of the Companies Act, 2013 provides the modes by which a person may acquire membership of a Company:
 - by subscribing to the Memorandum,
 - by agreeing in writing to become a member,
 - by holding equity share capital of a Company as beneficial owner in the records of a depository.
- A non-profit making Company licensed under Section 8 of the Companies Act can become member of another company if it is authorized by its Memorandum of Association to invest into shares of the other company.
- Foreigners, trade unions can hold shares in a company, and consequently become its members.
- Person ceases to be a member when his name is removed from register of members of a company.
- In accordance with Section 88, every Company shall keep register of its members. This register shall be kept at the registered office of the Company subject to the provisions of Section 94 of the Companies Act, 2013.

- Every member of a public company limited by shares, holding equity shares, shall have votes in proportion to his share of the paid-up equity share capital of the company. On the other hand, preference shareholders ordinarily vote only on matters directly relating to rights attached to preference share capital and on any resolution for winding up of the company or for the repayment or reduction of the equity or preference share capital.
- On becoming member, a person is entitled to exercise all the rights of a member until he ceases to be a member in accordance with the provisions of the Companies Act, 2013.
- Under the Companies Act the powers have been divided between Board of Directors and the shareholders, the directors exercises their powers through meetings of Board of Directors and Shareholders exercise their powers through general meetings.
- Shareholders can exercise Veto Power through various provisions under the Companies Act, 2013. For instance, the shareholders can institute class action against the company as well as the auditors of the company.
- Particulars of register or index or return in respect of the members of the company related to address or registered address (in case of a body corporate), e-mail ID, Unique Identification Number, PAN, shall not be made available for any inspection or for taking extracts or copies.

GLOSSARY

Ipsa facto: By that very fact or act.

Sui juris: A person competent to contract

Minor: Person below the age of majority.

Estoppel: The principle that precludes a person from asserting something contrary to what is implied by a previous action or statement of that.

Global Depository Receipt (GDR): A GDR is an instrument in which a company located in domestic country issues one or more of its shares or convertible bonds outside the domestic country

Section 8 Companies: The company which is non-profit making and registered under section 8 of the Companies Act.

Cessation of membership: A person ceases to be a member of a company when his name is removed from its register of members.

Joint Members: If more than one person apply for shares in a company and shares are allotted to them, each one of such applicant becomes a member.

Class Rights: Rights attached to a class of shares are known as “Class Rights”

Veto: A Veto (latin for “I forbid”), is the power to unilaterally stop an official action, especially the enactment of legislation. Under the Act, there are some instances where the consent of the shareholders is mandatory to approve any decisions or transaction which is said to be as the veto power or veto right of shareholders of the company.

Insolvent: Insolvency is the inability of a debtor to pay their debt. If a person is unable to pay his debt, he is said to be insolvent.

TEST YOURSELF

(These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation).

1. Every shareholder of a company is known as a member while every member may not be known as a shareholder. Comment.
2. Who can become a member of the company? Can the following persons or institutions become member of a company:
 - (a) Minor; (b) Company; (c) Partnership firm; (d) Foreigner; (e) Insolvent.
 - (b) Is the subscriber to the memorandum of the company would be termed as member of the company?
3. Describe the circumstances under which a register of members may be rectified? Illustrate your answer in the light of the relevant provisions of the Companies Act, 2013.
4. What are the particulars to be recorded in a register of members of a company? Where is the register to be maintained and who has to maintain it? Can a member have access to the register?
5. The name of X is found entered in the register of a company. But X contends that he is not a member of the company. The company maintains that X had orally agreed to become a member and hence his name was entered in the register and so he is a member. Is the contention of the company valid?
6. What are the obligations of a person whose name is entered in the register of members of a company as holder of shares but does not hold beneficial interest in those shares?
7. What is the meaning and procedure for declaration of significant beneficial ownership? What are the obligations of Company upon receipt of declaration of significant beneficial ownership?
8. What are the individual and group rights of a member?
9. The Statement "Liability of the Members of the Company is always Limited" is False? Explain with reasoning.
10. Write short notes on:
 - (a) Cessation of membership of a company;
 - (b) Foreign Register;
 - (c) Index of members;
 - (d) Variation of members' rights;
 - (e) Registration of shares in the name of public office;
 - (f) Veto Power and Casting Vote.
11. Which all companies are required to comply with the provisions of Section 90?
12. What is the meaning of beneficial interest?
13. In case of non-convertible preference shares, where dividends distribution have consecutively failed for 2 years, will preference shares also be counted along with equity shares?

14. M/s Planet Stars Media Limited is planning to issue its equity shares to some of the persons residing outside India. In this context, Chairman of the company asks the Company Secretary of the Company provisions relating to maintenance of Foreign Register. As a Company Secretary suggest the management of the following:
- What are the provisions relating to maintaining the foreign register of members?
 - Can company discontinue maintaining foreign register of members? If so, when?
15. Decide on the validity of following entries made by the Company Secretary Mr. A in the register of member, debenture holders and other security holders in light of the provisions of the Companies Act, 2013:
- (a) Allotment of debentures made on 11th November, 2021 and entry was made on 20th November, 2021.
 - (b) Forfeiture of shares was made on 15th November, 2021 and entry made by Mr. A on 20th November, 2021.
 - (c) Issue of duplicate Share Certificates on 10th November, 2021 and entry was made on 24th of November, 2021.
16. Examine the following statements with respect to Beneficial Ownership:
- (a) Capital Structure of Company ABC limited is as following: Equity Share Capital of Rs. 2,000 CCD's of Rs. 3000 CCPS' of Rs. 1000 TOTAL Rs. 6,000 Mr. A beneficially holds Rs. 520 equity shares in the Company. Whether Mr. A beneficially required to give disclosure under SBO?
 - (b) If an Individual ('A') holding shares in any Company (Exp. Mr. A Holding 60% shareholding of ABC Pvt. Ltd. and his name entered into register of member) Whether provisions of SBO shall be applicable on Mr. A or Not?
 - (c) If an Individual ('A') holding shares in any Company, (Exp. Mr. A Holding 7% shareholding of ABC Pvt. Ltd. and his name not entered into register of member). On behalf of Mr. a name of Mr. B entered into register of Members. Whether provisions of SBO shall be applicable on Mr. A or Not?
 - (d) If in the question B; Mr. A Holding 18% shareholding of ABC Pvt. Ltd. and his name not entered into register of member). On behalf of Mr. A name of Mr. B entered into register of Members. Whether provisions of SBO shall be applicable on Mr. A or Not?

LIST OF FURTHER READINGS

- Company Law Exploring Procedural Dimensions VOL I / II / III – by ICSI
- ICSI Premiere on Company Law
- Bare Act- The Companies Act, 2013

OTHER REFERENCES (Including Websites/Video Links)

- <https://www.mca.gov.in/content/mca/global/en/acts-rules/ebooks/acts.html?act=NTk2MQ==>