

Formation and incorporation of companies

Who is Promoter? 2(69)

- Persons who form the company are known as promoters.
- It is they who conceive the idea of forming the company.
- They takes all necessary steps for its registration.

The companies Act, 2013 defines the term “**Promoter**” under **section 2(69)** which means a person –

(a) who has been named as such in a prospectus or its identified by the company in the annual return referred in section 92; or

(b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise: or

(c) In accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

Provided that, a person who is acting merely in a professional capacity, shall not be regarded as promoter, **e.g., the solicitor, banker, accountant etc. are not regarded as promoter.**

Section – 3 –Formation Of Company

A Company can be formed for any legal purpose i.e. for profit making or others and of any type whether Public or Private or One Person Company (OPC). In order to form a Company, **it has to go through a systematic process with some rules and regulations** as mentioned below.

By Minimum Number of members as per the type of the company coming together and subscribing their names in the memorandum and fulfilling all the conditions required by the registrar

Heads	Members			Directors		
	Public	Private	OPC	Public	Private	OPC
Section No.	2(71)	2(68)	2(62)	149(1)	149(1)	149(1)
Minimum	7	2	1	3	2	1
Maximum	No limit	200	1	15		
Who can be	Any person	Any person	Individual	Individual		

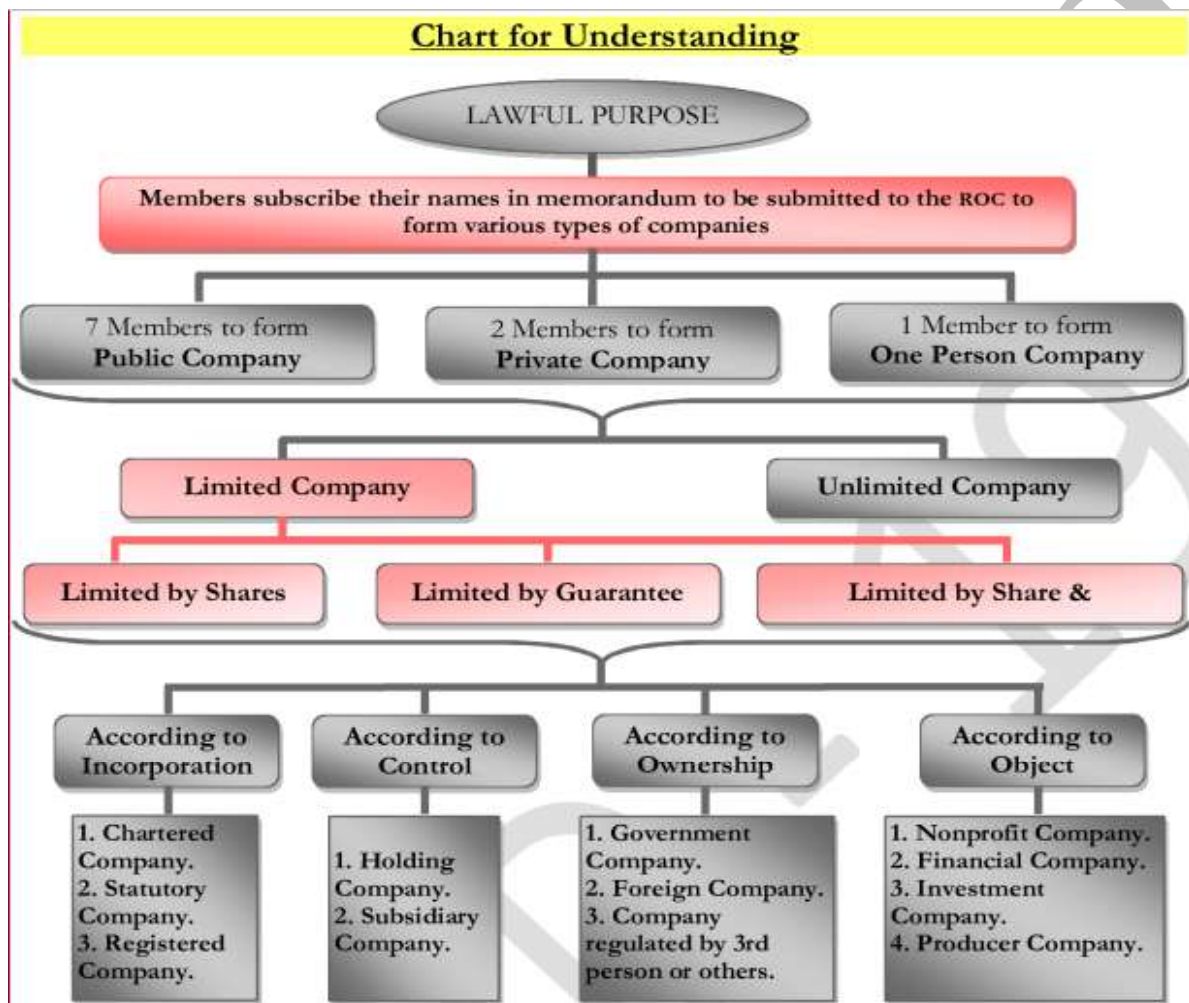
Formation of Different Companies

The company so formed will be either of the following

a. **A company limited by Shares.** It is a company having shareholders and the liability of such shareholders to the creditors of the company is limited to the capital originally invested (the nominal value of the shares) & any premium paid in return of the shares issued by the company.

b. **A company limited by guarantee.** These types of companies usually do not have share capital or shareholders instead they have members who act as guarantors and who give an undertaking of the nominal amount in the event of winding up of company.

c. **An unlimited company** It is a hybrid type of a company incorporated with or without the share capital but where the legal liability of the members or shareholders is not limited to their share or undertaking as the case maybe, i.e. its members or shareholders are jointly and severally liable to the creditors of the company in cast of winding up of the company.



Small Company

Small company given under the Section 2(85) of the Companies Act, 2013 which means a company, other than a public company—

- (i) paid-up share capital of which does not exceed Two Crore rupees or such higher amount as may be prescribed which shall not be more than Ten crore rupees; and
- (ii) turnover of which as per profit and loss account for the immediately preceding financial year does not exceed Twenty crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees

Exceptions: This clause shall not apply to:

- (A) a holding company or a subsidiary company;
- (B) a company registered under section 8; or
- (C) a company or body corporate governed by any special Act.

Dormant company (Section 455): Where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

“Inactive company” means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years.

“Significant accounting transaction” means any transaction other than—

- (i) payment of fees by a company to the Registrar;
- (ii) payments made by it to fulfil the requirements of this Act or any other law;
- (iii) allotment of shares to fulfil the requirements of this Act; and
- (iv) payments for maintenance of its office and records.

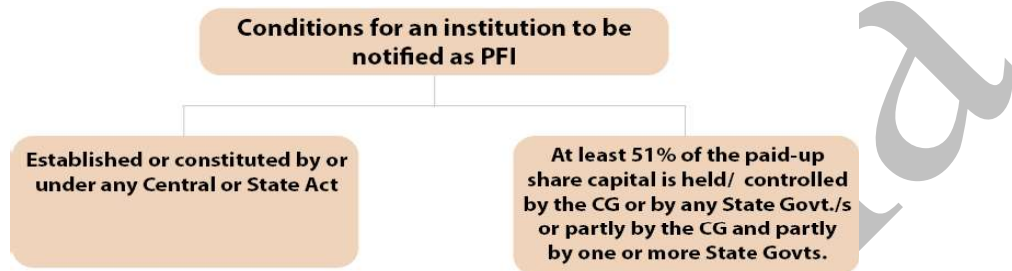
Public Financial Institutions (PFI): By virtue of Section 2(72) of the Companies Act, 2013, the following institutions are to be regarded as public financial institutions:

- (i) the Life Insurance Corporation of India, established under the Life Insurance Corporation Act, 1956;
- (ii) the Infrastructure Development Finance Company Limited,
- (iii) specified company referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002;
- (iv) institutions notified by the Central Government under section 4A(2) of the Companies Act, 1956 so repealed under section 465 of this Act;
- (v) such other institution as may be notified by the Central Government in consultation with the Reserve Bank of India

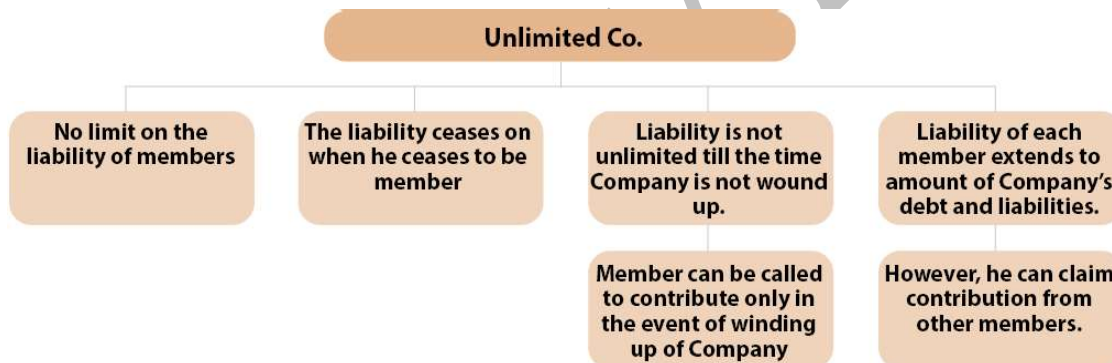
Conditions for an institution to be notified as PFI: No institution shall be so notified unless—

(A) it has been established or constituted by or under any Central or State Act other than this Act or the previous Companies Law

(B) not less than fifty-one per cent of the paid-up share capital is held or controlled by the Central Government or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments.



Contravention in case of OPC If One Person Company or any officer of such company contravenes the provisions, they shall be punishable with fine which may extend to ten thousand rupees and with a further fine which may extend to one thousand rupees for every day after the first during which such contravention continues.



Sec 7: Incorporation of Companies

Step 1: Filing of the documents and information with the registrars

For the registration of the company, following documents and information are required to be filed with the registrar within whose jurisdiction the office of the company is proposed to be situated-

a. The **memorandum (MOA) and articles (AOA)** of the company duly signed by all the subscribers to the memorandum.

b. A **declaration by person who is engaged in the formation of the company (an advocate, a chartered accountant, cost accountant or company secretary in practice)**, and by a person named in the articles (director, manager or secretary of the

company), that **all the requirements of this Act and the rules** made thereunder in respect of registration and matters precedent or incidental thereto **have been complied with.**

- c. A **declaration from each of the subscribers** to the memorandum and from persons named as the first directors, if any, in the articles stating that-
- he is not convicted of any offence** in connection with the promotion, formation or management of any company. or
 - he has not been found guilty of any fraud** or misfeasance or of any breach of duty to any company under this Act or any previous company law **during the last five years,**
 - and **that all the documents filed with the Registrar** for registration of the company contain information that **is correct and complete and true** to the best of his knowledge and belief;
- d. The **address for correspondence** till its registered office is established;
- e. **the particulars** (names, including surnames or family names, residential address, nationality) **of every subscriber** to the memorandum along with proof of identity, and in the case of a subscriber being a body corporate, such particulars as may be prescribed.
- f. **the particulars** (names, including surnames or family names, the Director Identification Number, residential address, nationality) **of the persons mentioned in the articles as the first directors** of the company and such other particulars including proof of identity as may be prescribed; and
- g. **the particulars of the interests of the persons mentioned in the articles as the first directors** of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as may be prescribed.

Step 2: Issue of certificate of incorporation on registration;

The Registrar on the basis of documents and information tiled, shall register all the documents and information in the register and **issue a certificate of incorporation** in the prescribed form to the effect that the proposed company is incorporated under this Act.

Step 3: Allotment of corporate identity number (CIN):

On and from the date mentioned in the certificate of incorporation, the Registrar shall allot to the company a **corporate identity number**, which shall be a distinct identity for the company and which shall also be **included in the certificate.**

Step 4: Maintenance of copies of all documents and information:

The company shall maintain and present at its registered office copies of all documents and information as originally filed, **till its dissolution under this Act.**

Step 5: Furnishing of false or incorrect information or suppression of material fact;

If any person **furnishes any false or incorrect particulars of any information or suppresses any material information**, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be liable for action under **section 447** as follows:

- 6 months to 10 years of jail &/or
- Penalty from amount of fraud to 3 times of amount of fraud.

Step 6: Order of the Tribunal.

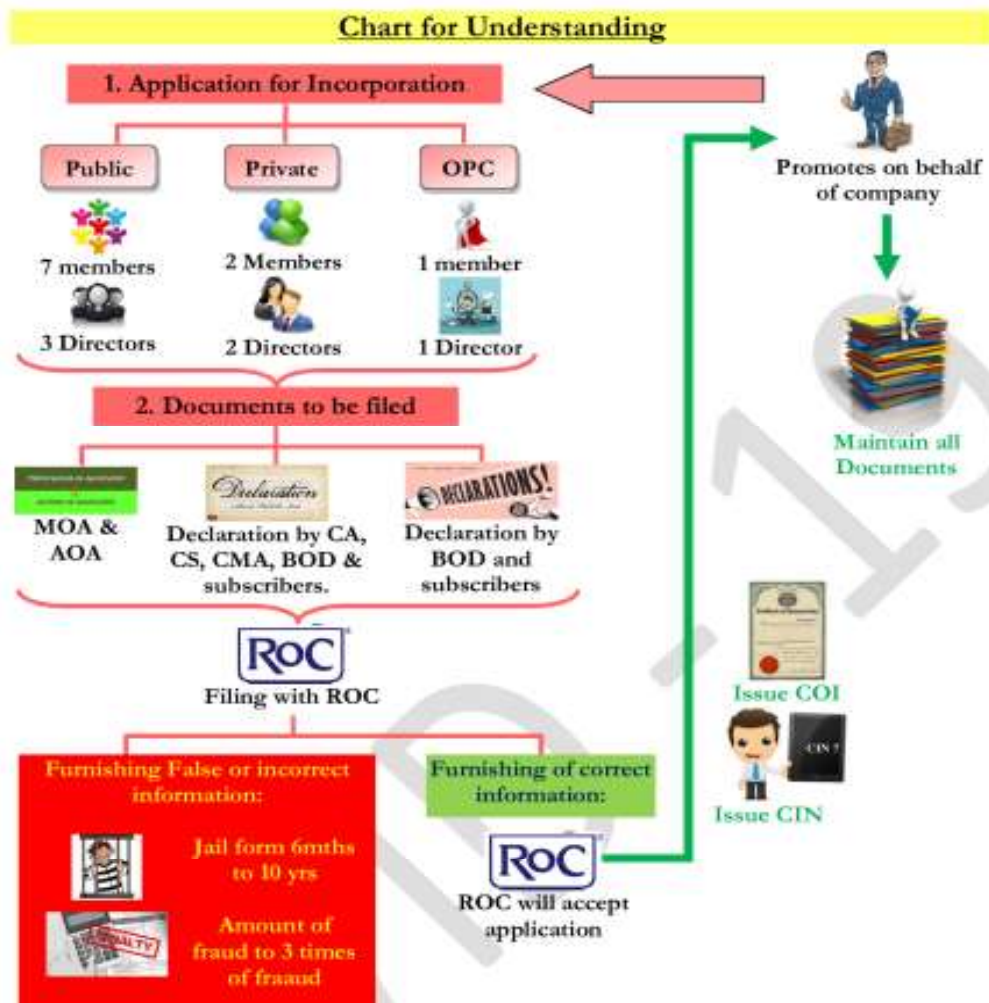
Where a company has been incorporated by furnishing false or incorrect it representation or by suppressing any material fact or information in any of the declaration filed or made for incorporating such company or by any fraudulent act may, on an application made to it, on being satisfied that the situation so warrants,—

- (a) pass such orders, as it may think fit, for regulation of the management of including changes, if any, in its memorandum and articles, in public interest or of the company and its members and creditors; or
- (b) direct that liability of the members shall be unlimited; or
- (c) direct removal of the name of the company from the register of companies; or
- (d) pass an order for the winding up of the company; or
- (e) pass such other orders as it may deem fit.

Step 7: Opportunity of Being Heard (OOBH):

Provided that before making any order, —

- a. the company shall be given a reasonable opportunity of being heard in the matter; and
- b. the Tribunal shall take into consideration the transactions entered into by the company, including the obligations, if any, contracted or payment of any liability.





Simplified Proforma for Incorporating Company Electronically (SPICE)

The Ministry of Corporate Affairs has taken various initiatives for ease of business. In a step towards easy setting up of business, MCA has simplified the process of filing of forms for incorporation of a company through Simplified Proforma for incorporating company electronically.

Sec 4: Memorandum of Association (MOA)

Meaning

1. It is Legal & Constitutional document of the company which states the matters like Name, Place of Business, Object, Capital, Liability, Subscription of the company.
2. The Memorandum of Association of company is in fact its charter, it defines its constitution and the scope of the powers of the company with which it has been established under the Act, It is the very foundation on which the whole edifice of the company is built.

Definition

As per **section 2(56) memorandum** means the memorandum of association of a company as originally framed or as altered from time to time from previous company law

Note- MOA is a Public Document

Fundamentally, there are two objects in registering the memorandum.

1. First, that the intending corporate (**person jo invest kar rha hai**) who contemplates the investment of his capital may know within what fields it will be incurring risks
2. Secondly, that anyone dealing with the company may know without reasonable doubt whether the contractual relationship which he is proposing to enter into with the company is one relating to matters within its corporate objects. (**bhar wale ko pata hona chaiye**)

It cannot enter into a contract or engage in any trade or business, which is **beyond the power** confessed on it by the memorandum. If it does so, it would be **ultra vires** the company and void. A memorandum is a public document of the Company. Consequently, every person entering into a contract with the company is presumed to have the knowledge of the conditions contained therein.

Forms OF Memorandum (as per schedule I)

Sr. No.	Type Of Company	Form of Memorandum
1.	Company Limited By Shares	Table A
2.	Company Limited By Shares and not having Share capital	Table B
3.	Company Limited By Shares and having Share capital	Table C
4.	Unlimited Company not having Share capital	Table D
5.	Unlimited Company having Share capital.	Table E

Clauses of Memorandum of association

Name clause The name of the company with the last word "Limited" in the Case of public limited company or the last words "Private limited" in the case of a private limited company.

This clause is not applicable on the companies formed under section 8 of the Act. The name including phrase 'Electoral Trust' may be allowed for Registration of companies to be formed under section 8 of the Act.

Object clause The objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof; if any company has changed its activities which are not reflected in its name in line with its activities within a period of six months from the change of activities after complying with all the provisions as applicable to change of name.

Registered office clause The State in which the registered office of the company is to be situated. It is the place of business of the company where the official communications will be made with the company. The Registered office defines the ROC under which the company will be registered and function accordingly. The General Meetings will be held in city in which the Registered office of the company is situated.

Capital clause The amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount and the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share. The share capital also states proportion of member's holding in the company and voting rights available to him and control according to same.

Subscription clause The number of shares each subscriber to the memorandum intends to take is indicated opposite his name. Subscription clause states that how many persons are involved in membership of the company at the time of incorporation. Subscriber can be any person. Either artificial or natural. First director will be elected from the subscribers if the names of directors are not mentioned in AOA.

Liability clause The liability of members of the company, whether limited or unlimited, and also state,—

- in the case of a company limited by shares, that the liability of its members is limited to the amount unpaid, if any, on the shares held by them; and
- in the case of a company limited by guarantee, the amount up to which each member undertakes to contribute—

> to the assets of the company in the event of it being wound-up while he is a member or within one year after he ceases to be a member, and
> to the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves

Nomination clause In the case of OPC, the name of the person who, in the event of death of the subscriber, shall become the member of the company. The OPC contains only one member who is individual. So in case of death of original member, the OPC will not function. In such Case the nominee will become the sole member of the OPC and OPC will function as it

Sec 5 : Article of Association (AOA)

Guinness vs. Land Corporation of Ireland

The articles of association of a company are its rules and regulations, which are framed to manage its internal affairs. Just as the memorandum contains the fundamental conditions upon which the company is allowed to be incorporated, so also the articles are the internal regulations of the company.

Ashbury Carriage Co. vs. Riche

"The articles play a subsidiary to memorandum of association. They accept the memorandum as the charter of incorporation, and so accepting it the articles proceed to define the duties, the rights and powers of the governing body as between themselves and the company and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulation of the company may from time to time be made.

S.S. Rajleumar vs. Perfect Castings Ltd. (1968) 38 Comp. Case 187

The document containing the articles of association of a company (the Magna Carta) is a business document; hence it has to be constructed strictly. It regulates domestic management of a company and creates certain rights and obligations between the members and the company.

The articles of association are in fact the bye-laws of the company according to which directors and other officers are required to perform their functions as regards the management of the company, its accounts and audit. It is important therefore that the auditor should study them and, while doing so he should note the provisions therein in respect of relevant matters.

Section 5 of the Companies Act, 2013 seeks to provide the contents and model of articles of association. The section lays the following law-

- (1) **Contains regulations:** The articles of a company shall contain the regulations for management of the company.
- (2) **Inclusion of matters:** The articles shall also contain such matters, as are prescribed under the rules. However, a company may also include such additional matters in its articles as may be considered necessary for its management.
- (3) **Contain provisions for entrenchment;** The articles may contain provisions for **entrenchment (to protect something)** to the effect that specified provisions of the

articles may be altered only if conditions or procedures as that are **more restrictive** than those applicable in the case of a special resolution, are met or complied with.

(4) **Manner of inclusion of the entrenchment provision:** The provisions for entrenchment shall only be made either on formation of a company, or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company.

(5) **Notice to the registrar of the entrenchment provision:** Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in such form and manner as may be prescribed.

(6) **Forms of articles :** The articles of a company shall be in respective forms specified in Tables, F,G,H,I and J in Schedule I as may be applicable to such company

(7) **Model articles.** A company may adopt all or any of the regulations contained in the model articles applicable to such company.

Sec 6: Act to Override MOA & AOA

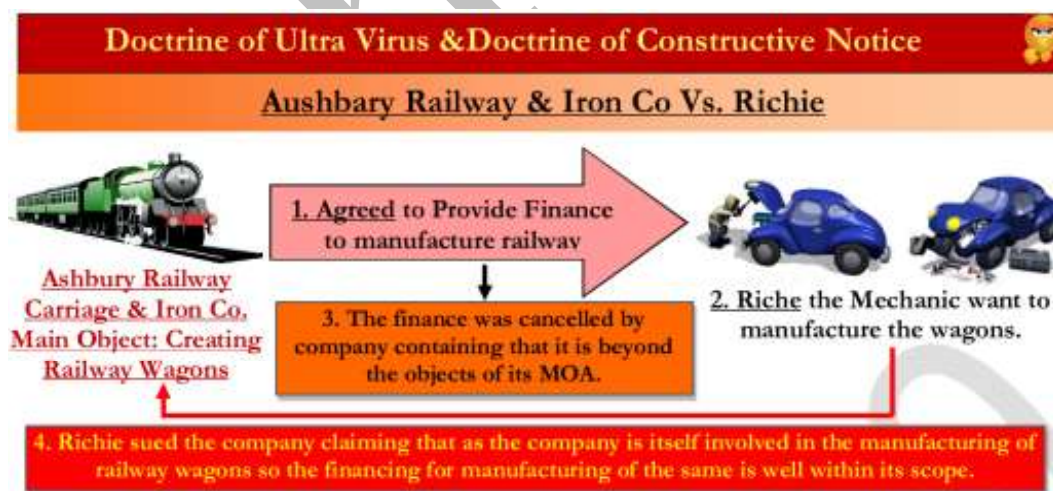
(i) The provisions of section 6 are as under:

The provisions of this Act shall have overriding effect on the provisions contained in:

1. The memorandum or article of a company. Or
2. Agreement executed by it, or
3. Any resolution passed by the company in general meeting or its Board.

(ii) any provision contained in the memorandum, articles, agreement or resolution in (i) above shall, to the extent in repugnant to the provision of this act (2013 Act), become or be void, as the case may be.

Doctrine of Ultra Virus And Doctrine of Constructive Notice



Facts of case

- a. The Aushbary company is involved in manufacturing of railway wagons.
- b. Mr. Richie who was mechanic approached the company for financing his work of Manufacturing railway wagons.
- c. The company entered in to an agreement with Richie to provide finance for manufacturing of railway wagons.
- d. Afterwards the company discovered that the finance is ultra vires as financing is beyond the powers of the company so company rescinded the contract of financing with Richie.
- e. Mr. Richie filed the petition on the company that as company is itself involved in the manufacturing of railway wagons, so the financing for manufacturing of the same is well within its scope.

Question

Whether financing for the activity which is main object of company can be considered within the scope of company and main object?

Decision of Court

1. It was held that the financing for main object of the company is outside the powers of the company and company shall not provide such finance.
2. It was also held that the outsider who it dealing with the company shall have the knowledge about the MOA and AOA of the company. As MOA & AOA are the public documents, the person dealing with the company bound to have the knowledge of the same.
3. If outsider enters into any contract with company which is beyond the scope of MOA and AOA then contract will he considered as void and outsider cannot claim any compensation for the same from company.

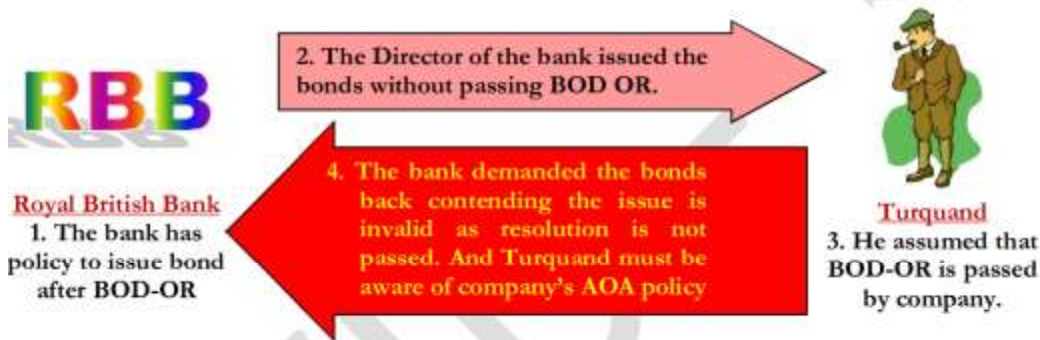
Meaning and Conclusion	
Doctrine of Virus	Doctrine of Constructive Notice
<p>The company shall not work beyond the pourers of its MOA and AOA. The MOA and AOA are the limitations of the company which arc stated and approved by the members i.e. owners of the company. The company shall not work beyond the same. Any act done beyond the MOA and AOA will be considered as void-ab-initio.</p>	<p>The MOA and AOA are public documents. The outsider or the 3rd party dealing with the company shall have the knowledge of the MOA and AOA of the company. Anything which is not approved as per MOA and AOA or beyond its powers will be considered as invalid in law. All the requirements of MOA and AOA shall be complied by the company before entering into contract with the 3rd party or outsider. If the contract is beyond the limits of MOA or AOA it will be void and 3rd party or outsider cannot claim any compensation for the same as it is assumed that he had knowledge of contravention through MOA or AOA.</p>

Doctrine of Indoor Management/ Turquand Rule

Rule of doctrine of indoor management

The aforesaid doctrine of constructive notice does in no sense mean that outsiders are deemed to have notice of the internal affairs of the company. In instance, if an act is authorised by the articles or memorandum, an outsider is entitled to assume that all the detailed formalities for doing that act have been observed.

The Royal British Bank Vs. Turquand



Fact of case

1. RBB used to issue bonds to the customer after BOD - OR as per AOA.
2. The Director of the RBB issued the Bonds to Turquand without BOD-OR.
3. Turquand assumed that company has passed BOD-OR and kept the bonds with himself.
4. The bank filed case on Turquand to give bonds back as he is aware of the requirement of BOD-OR for issue of bonds as it is written in AOA, a public document.
5. Turquand contended that even though he is aware that BOD-OR is required as per AOA still he is not able to verify the internal resolution and process of company as he has no access to verify the same. So he will not be liable for any internal irregularity of the company. So he need not give the bonds back to company.

Question

Whether 3rd party need to know the internal irregularities of the company and based on same whether company can rescind the contract with 3rd party for its own internal irregularity?

Decision of Court

1. Court held that there is no doubt that the 3rd must be aware of the MOA and the AOA of the company.
2. But if any process or activity is involved in the MOA and AOA which company shall follow internally will be entirely a responsibility of the company and 3rd party can assume that such procedure is being followed internally and it can proceed with the contract.
3. If any irregularity happens inside the company that will be the entire fault of the company and the 3rd party need not be liable for same.
4. The company cannot take the advantage of its own internal irregularity to rescind contract with the 3rd party.
5. Thus the contract is assumed to be valid for the protection of the 3rd party.

Exception to Doctrine of Indoor Management

Knowledge of irregularity: In this case ‘Outsider’ has actual knowledge of irregularity within the company, the benefit under this rule will no longer be available. Infact he/she may will be considered part of the irregularity.

Negligence: If with the minimum of effort, the irregularities within a company could be discovered, the benefit of rule of indoor management would not apply. The protection of this rule will not applicable where the circumstances surrounding to contract our suspicious and outsider does not make proper inquiry.

Forgery: The rule does not apply where a person relies upon a document that turns out to be forged. Since nothing can validate forgery, a company can never be held liable for forgeries committed by its officers.

Sec 9: Effect of Registration

From the date of incorporation mentioned in the certificate of incorporation, such subscribers to the memorandum and all other persons, as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company under this Act and having perpetual succession with power to acquire, hold and dispose off property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name. From the date of incorporation mentioned in the certificate, the company becomes a legal person separate from the incorporators; and there comes into existence a binding contract between the company and its members as evidenced by the Memorandum and Articles of **Association [Hari Nagar Sugar Mills Ltd. vs. S.S. Jhunjhunwala]**.

A legal personality emerges from the moment of registration of a company and from that moment the persons subscribing to the Memorandum of Association and other persons joining as members are regarded as a body corporate or a corporation in aggregate and the legal person begins to function as an entity. A company on registration acquires a separate existence and the law recognizes it as a legal person separate and distinct from its members [**State Trading Corporation of India vs. Commercial Tax Officer**].

It may be noted that under the provisions of the Act, a company may purchase shares of another company and thus become a controlling company. However, merely because a company purchases all shares of another company it will not serve as a means of putting an end to the corporate character of another company and each company is a separate juristic entity [**Spencer & Co. Ltd. Madras vs. CWT Madras**].

As has been stated above, the law recognizes such a company as a juristic person separate and distinct from its members. The mere fact that the entire share capital has been contributed by the Central Government and all its shares are held by the President of India and other officers of the Central Government does not make any difference in the position of registered company and it does not make a company an agent either of the President or the Central Government [**Heavy Electrical Union vs. State of Bihar**].

Chart for Understanding



Sec 10: Effect of MOA & AOA

1. The memorandum and articles, when registered would be binding on the company and its members to the same extent as if each one of them had individually signed the documents, so far as the covenants therein are concerned.
2. All monies payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.