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THE FUNDAMENTAL DOCUMENTS OF THE COMPANY UNDER THE COMPANIES ACT, 2013

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ABSTRACT

The term company means and includes the group of persons, came together or who contributed money for some common purpose and who have incorporated themselves into a distinct legal entity in the forms of a company for that purpose. The memorandum and articles of association are the two fundamental documents of the company. The memorandum contains the various clauses and shall be treated the charter of the company. Articles of association contain the internal regulations of the company affairs and subordinate to the memorandum. Any provisions in contravention with the memorandum become void, but in contravention with the articles are irregular and can be confirmed by ratification of the share-holders. Any acts of the company fall outside the scope of the object clause shall be treated as ultra vires transaction.

(Key words: company, incorporation, regulations, memorandum, articles, ratification, ultra vires etc.)

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INTRODUCTION

Before going to the fundamental documents of the company we must know about the concept of the Company. The term 'company' is the combination of Latin word and may described as 'com' means 'with or together' and 'pains' means 'bread' and hence it referred to a group of persons who took their meals together. So the term company means and includes a group of persons who came together or who contributed money for some common purpose and who have incorporated themselves into a distinct legal entity in the form of a company for that purpose. According to Halsbury's law dictionary the term 'company' means a collection of many individuals united into one body under special domination, having perpetual succession under an artificial form and vested by policy of law with the capacity of acting in several respect as an individual, particularly for taking and granting of property for contracting obligation and for suing and being sued, for enjoying privileges and immunities in common and exercising a variety of political rights, more or less expensive, according to the design of its institution or power upon its existence. A company also may be defined as an incorporated association which is an artificial person, having a separate legal entity, with a perpetual succession, a common seal, a common capital comprised of transferable shares and carrying limited liability. The company is called as an artificial person from its very inception that law alone can give birth of a company and law alone can put it to an end. Generally the Company can be known as an artificial being, run by a person or a group of person, carrying the profit oriented business, and incorporated in the eye of law, after incorporation the Company has acquire the distinct legal entity. The basic or fundamental documents of the company are the Memorandum of Association (MoA) and the Article of Association (AoA).

MEMORANDUM OF ASSOCIATION

Memorandum of Association is the important fundamental document of the company governance. Section 2(56) of the Companies Act, 2013 define the term Memorandum as " the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or the present Act[1]. The document has the great importance in the incorporation of the company. The memorandum of association of a company is its charter and defines the limitation of powers of the company. Lord Cairns states in the case of Ashbury Railway Carriage & Co. vs. Riche[2] : "Memorandum contains the fundamental conditions upon which alone the company is allowed to incorporate". Section 4 of the Companies Act, 2013 provides that, according to Section 4(1) the memorandum of a company shall state—

[1] The Companies Act, 2013 (18 of 2013)
[2] 1857 L.R. 7 H.L. 653

(*a*) the name of the company with the last word "Limited" in the case of a public limited company, or the last words "Private Limited" in the case of a private limited company: Provided that nothing in this clause shall apply to a company registered under section 8;

(*b*) the State in which the registered office of the company is to be situated;

(*c*) the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof;

(*d*) the liability of members of the company, whether limited or unlimited, and also state,—

(*i*) in the case of a company limited by shares, that liability of its members is limited to the amount unpaid, if any, on the shares held by them; and

(*ii*) in the case of a company limited by guarantee, the amount up to which each member undertakes to contribute—

(*A*) to the assets of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and

(*B*) to the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves;

(*e*) in the case of a company having a share capital,—

(*i*) 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; and

(*ii*) the number of shares each subscriber to the memorandum intends to take, indicated opposite his name;

(*f*) in the case of One Person Company, the name of the person who, in the event of death of the subscriber, shall become the member of the company.

Section 4(2) provides that the name stated in the memorandum shall not—

(*a*) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law; or

(*b*) be such that its use by the company—

(*i*) will constitute an offence under any law for the time being in force; or

(*ii*) is undesirable in the opinion of the Central Government.

Section 4(3) of the Companies Act, 2013 clearly states that, without prejudice to the provisions of sub-section (*2*), a company shall not be registered with a name which contains—

(*a*) any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central Government, any State Government, or

any local authority, corporation or body constituted by the Central Government or any State Government under any law for the time being in force; or

(*b*) such word or expression, as may be prescribed, unless the previous approval of the Central Government has been obtained for the use of any such word or expression.

Section 4(4) provides that a person may make an application, in such form and manner and accompanied by such fee, as may be prescribed, to the Registrar for the reservation of a name set out in the application as—

(*a*) the name of the proposed company; or

(*b*) the name to which the company proposes to change its name and according to Section [4(5)(i) &(ii)] upon receipt of an application under sub-section (*4*), the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of sixty days from the date of the application and Where after reservation of name under clause (*i*), it is found that name was applied by furnishing wrong or incorrect information, then,—

(*a*) if the company has not been incorporated, the reserved name shall be cancelled and the person making application under sub-section (*4*) shall be liable to a penalty which may extend to one lakh rupees;

(*b*) if the company has been incorporated, the Registrar may, after giving the company an opportunity of being heard—

(*i*) either directs the company to change its name within a period of three months, after passing an ordinary resolution;

(*ii*) take action for striking off the name of the company from the register of companies; or

(*iii*) make a petition for winding up of the company. Section 4(6) of the Act provides that the memorandum of a company shall be in respective forms specified in Tables A, B, C, D and E in Schedule I as may be applicable to such company and sub-clause 7 states that, any provision in the memorandum or articles, in the case of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void. The MoA of the company shall contain the following fundamental clauses:

1) **Name clause**: It is called as the first clause of the company and required to state the name of the proposed company. The name of the company is its own identification. The company can make the good will through its name. The name of the company should be suitable one and not previously in exists. The name of the company is undesirable when it is identical with, or too resembles with the name of the another company.[3] The name of the company should not indicate the

[3] Section 4(2) of the Companies Act, 2013

connection with the Government. The use of undesirable name will be an offence under any law for the time being in force. The company can use the word 'limited' in the last portion of its name, and the words indicate the limited liability of the members of the company. The name of company must be painted on the board where the company is situated. In case of advance reservation of name and to change the name of the company, any person may make an application to the Registrar in a prescribed format and on payment of prescribed fees in this regard.

2) **Registered Office clause**: The second clause of the memorandum must specify the name of the State in which the registered office of the company is situate. Within fifteen days of its incorporation a company shall have a registered office capable of receiving and acknowledging all communications and notices as may be address to it.[4] And the company shall furnish to the Registrar verification of its registered office within thirty days of its incorporation in such a manner as may be prescribed.[5]

3) **Object clause:** The third clause of the company provides the objects for which the proposed company is to be established. The memorandum of the company limited by shares or not limited by shares should state clearly the principal and ancillary objects which the company intends at the time of its incorporation to pursue; and should also state all other objects which are separate from the principal and ancillary one. The memorandum must state that the company shall not engage itself in any activities within the scope and objects other than the principal and ancillary ones, unless such activities are sanctioned by a special resolution of the company in a general meeting. The purpose of insertion of the object clause are :

   - To protect subscribers from the use of their money to some other purposes not mentioned in the object clause;
   - To protect the creditors dealing with the company, can learn from it the extent of the company's powers to deal with its assets. 'The narrower the objects expressed in the memorandum, the less is the subscribers risk but the wider such objects the greater is the security of those who transact business of the company'.[6]
   - It prevents diversion of the company's activities beyond the sphere of business for which it was established and minimizes concentration of economic powers.

[4] Section 12(1) of the Companies Act, 2013
[5] Section 12(2) of the Companies Act, 2013.
[6] Lord Parker in Cotman vs. Brougham, (1918) A.C.514

4) **Liability clause:** The fourth clause of the memorandum states about the nature of liability that the members of the company incur. Where the company is to be incorporated with limited liability, the clause must state that the liability of the members shall be limited by shares or the guarantee.

5) **Capital clause:** The last clause of the company provides about the nominal capital and number and value of shares. Section 3 of the Act, after Companies (Amendment) Act, 2000 provides that a public company must have a minimum paid-up capital of five lakh rupees or such higher amount as may be prescribed and a private company is required to have a minimum paid-up capital of one lakh rupees or such higher amount as may be prescribed by its articles. In case of one Person Company[7] this clause has to state the name of the person who, in the event of death of the subscriber, is to become the member of the company.

ALTERATION OF MEMORANDUM

The memorandum can be altered by a special resolution in a general meeting and with the approval of the Central Govt. in writing.[8] In relation to alteration of its memorandum a company shall file with the Registrar the following documents:[9]

a) the special resolution passed by the company under sub-section 1 of Section 13;
b) the approval of the Central Government under sub-section (*2*), if the alteration involves any change in the name of the company.

The memorandum of association can be altered in connection with the following:

1) to change the name of the company;
2) to change the place of its registered office;
3) to change its object;
4) whenever there is need for change in the capital;
5) the different rights bestowed on shares of different types;
6) the limited liability of its directors.

The aforesaid things can be altered so as to enable the company-

1. to carry on its business more economically or more efficiently;
2. to attain its main purpose by new or improved means;
3. to carry on any business which under existing circumstances may conveniently or advantageously be combined with the business of their company;

[7] Section [4(1) (f)] of the Companies Act, 2013.
[8] Section 13(1) of the companies Act, 2013.
[9] Section 13 (6) of the Companies Act, 2013.

4. to restrict or abandon any of the objects specified in the memorandum;
5. to sell or dispose of the whole or any part of the undertaking or any of the undertakings of the company; or
6. to amalgamate with any other company or body of persons.

DOCTRINE OF 'ULTRA VIRES' AND THE CONSEQUENCES OF 'ULTRA VIRES' TRANSACTION:

A company can perform every such thing according to its object clause, any act falls outside the object clause known as the ultra vires transaction. The company should devote itself only to the objects mentioned in the memorandum and to no others. The terms 'ultra vires' means beyond the power. Any act done by the company which is not expressly or impliedly contained in the objects clause of the memorandum and such not authorized by it is ultra vires of the company and void.[10]

Leading CasesError! Bookmark not defined.

Ashbury Rly. Carriage Co. Ltd. Vs. Riche, (1857, L.R. 7 H.L. 653), in this case the issue of dispute was, whether the directors of a company could enter into a contract which was not authorized by the memorandum of association of the company and whether the company was bound by such a contract. The House of Lords was held that a contract made by the directors of the company, not authorized by the memorandum of association which is a 'statutory deed of partnership', is ultra vires the company and cannot bind it. The decision was unanimous. It states, 'the object for which the company was formed were to be find in the memorandum'. Thus, the entering of the contract was an object not within the memorandum of association. The memorandum of association is the charter which defines the powers of a company. Articles of association play a secondary part. "They accept the memorandum as the charter of the incorporation of the company. If anything is done which is beyond the memorandum, it would be ultra vires the company whereas if anything done beyond article of association, it would be ultra vires the directors but within the powers of the company……"

It was, therefore, held that the contract being outside the scope of the objects given in the memorandum of association was ultra vires the function of the company and as such not binding upon it.

In ***Attorney-General vs. Great Eastern Railway Co***, [11]the House of Lords observed that the doctrine of ultra- vires, as it was explained in the Ashbury case, should be maintained. But it ought to be reasonably and not unreasonably understood and applied and that whatever may be fairly

[10] See Ashbury Rly. Carriage Co. Ltd. Vs. Riche, (1857, L.R. 656)
[11] (1880) LR 5 AC 473: (1874-80) ALL ER Rep Ext 1459 (HL).

regarded as incidental to the objects authorized ought not to be held as ultra vires, unless it is expressly prohibited.

In India the doctrine traced its origin in the year 1866, where in the case ***Jehangir R Modi vs. Shamji Ladha,***[12] the Bombay High Court held that, "the purchase by the directors of a company, on behalf of the company, of shares in other joint stock companies, unless expressly authorized in the memorandum is ultra vires".

EFFECTS OF ULTRA VIRES TRANSACTION

- Whenever an ultra vires act has been or is about to be undertaken, any member of the company can get an injunction to restrain it from proceeding with it.
- It is one of the duties of the directors to see that the corporate capital is used only for the legitimate business of the company. If any part of it has been diverted to purposes foreign to the company's memorandum, the directors will be personally liable to replace it.[13]
- If a company's money has been spent ultra vires in purchasing some property, the company's right over that property must be held secure. For that asset, though wrongly acquired, represents the corporate capital.
- It is the duty of an agent to act within the scope of his authority. For if he goes beyond he will be liable personally liable to the third party for breach of warranty of authority. The directors of company are its agents. As such it is their duty to keep within the limits of its company's powers. If they induce, however innocently, an outsider to contract with the company in a matter in which the company does not have the power to act, they will be personally liable to him for his loss.
- In Pullman's Car Co. vs. Central Transportation Co,[14] Gray J, observed that " a contract of a corporation which is ultra vires, that is to say, outside the objects as defined by its memorandum is wholly void and of no legal effect". "An ultra vires contract, being void ab initio, cannot become intra vires by reason of estoppels, lapse of time, ratification, acquiescence or delay"[15].
- A company is not liable for the torts which have been committed in the course of an activity falling outside the scope of the memorandum.

[12] (1866-67) 4 Bom HCR 185
[13] Exchange Banking Co, re, (1882) 21 Ch D 519: 48 LT 86 (CA).
[14] 35 L ED 69: 139 US 62 (1891)
[15] Ashbury Rly. Carriage Co vs. Riche, (1857) 44 LJ Exch 185.

ARTICLES OF ASSOCOATION (AoA)

The articles of association is the another fundamental document of the company which has to be registered along with the memorandum of association. The articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act.[16]

Section 5(1) of the Companies Act, 2013 provides that the articles of a company shall contain the regulations for management of the company. Sub- section 2 states that the articles shall also contain such matters, as may be prescribed: provided that nothing prescribed in this sub-section shall be deemed to prevent a company from including such additional matters in its articles as may be considered necessary for its management. Section 5(3) provides that the articles may contain provisions for entrenchment 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. Section 5(4) of the Act, clearly states that the provisions for entrenchment referred to in sub-section (*3*) 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. Sub-section 5 provides 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. Section 5 (6) and (7) provides that, 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 and a company may adopt all or any of the regulations contained in the model articles applicable to such company. Section 5 (8) and (9) clearly states that, in case of any company, which is registered after the commencement of this Act, in so far as the registered articles of such company do not exclude or modify the regulations contained in the model articles applicable to such company, those regulations shall, so far as applicable, be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered articles of the company and nothing in this section shall apply to the articles of a company registered under any previous company law unless amended under this Act.

Articles of association are the internal regulation and bye-laws of the company, and play a part subsidiary to the memorandum, and should not be inconsistent with or override or control the memorandum. Schedule 1 of the Companies Act, 2013 sets out tables of model forms of articles for different companies i.e. F, G, H, I and J). Table F contains about article of association limited

[16] Section 2(5) of the Companies Act, 2013.

by shares. Table G contains articles of association limited by guarantee and having a share capital. Table H contains articles of association limited by guarantee not having share capital. Table I provides about article of association of an unlimited company and having a share capital and Table J contains article of association of an unlimited company not having share capital. The articles of association of a company may contain the provisions for entrenchment to the effect that the specified provisions of the articles may be altered only if the conditions or procedures that are more restrictive than those applicable in the case of a special resolution are met or complied with.

ALTERATION OF ARTICLES OF ASSOCIATION

Every company has the power to alter its articles of association[17] by a special resolution. The power of alteration of articles has two restrictions. The first one is that, the alteration must not be in contravention of the provisions of the Act and should not be an attempt to do something which the Act forbids. The second one is that, the power of alteration of articles is subject to the conditions contained in the memorandum of association. Sub-section 1 of Section 14 states that an alteration which has the effect of converting a public company into a private company would not have any effect unless it is approved by the Tribunal. It is similar in case of conversion of private company into public company.

RULE OF CONSTRUCTIVE NOTICE

The rule of constructive notice seek to protect the company against the outsiders. The rule is confined to the external position of the company and, therefore, it follows that there is no nottice as to how the company's internal machinery is handled by its officers. The office of the Registrar is treated as the public office and consequently the memorandum and articles of association become the public documents and are open and accessible to all.[18] In ***Mahony vs. East Holyford Minning Co,***[19] it was held that, it is, therefore, the duty of every person dealing with a company to inspect its public documents and make sure that his contract is in conformity with their provisions. But whether a person actually read them or not, "he is to be in the same position as if he had read them". He will be presumed to know the contents of those documents. Persons dealing with the company would be deemed to have constructive notice as to who are the directors of the company. Accordingly, if a document is required to be signed by a director and the person actually signing is not there in the document filed by the company, it would not be properly signed document. In ***KL Engg vs. Arab Malaysian Finance***,[20] the Court observed that

[17] Section 14 of the Companies Act, 2013.
[18] Section 399 of the Companies Act, 2013.
[19] 1875 LR 7 HL 869,893: (1874-80) ALL ER Rep 427 : 33 TLR 338.
[20] (1994) 2 MLJ 201: (1995) 1 SCR 85 (Malaysia).

the common law doctrine of constructive notice should apply to the form which contains particular of the directors who are the mind and will of the company, as well as managers and secretaries who are responsible for the running business of the company. The document affects the powers of the company and its agents. The purpose of the document must be more than just to provide information about the company's personnel. Therefore, the persons dealing with the company should check with the Registrar of Companies who are its directors, managers, and secretaries are at any given time.

DOCTRINE OF "INDOOR MANAGEMENT"

The doctrine of "indoor management" means that the outsiders dealing with the company are entitled to assume that everything has been regularly done so far as its internal proceedings are concerned. This doctrine is also known as the doctrine of freedom of internal management and is popularly known as 'Turquand' rule laid down in ***Royal British Bank vs. Turquand***,[21] the brief fact was that the directors of the British Bank issued a bond to Turquand. The directors had the power to issue such bonds of authorized by a special resolution of the company. It was alleged that no such resolution had been ever passed. The Court held that Turquand could sue on the bond as he was entitled to assume that a special resolution had been passed. It was observed that persons dealing with company are bound to read the registered documents, and to see that proposed dealing is not inconsistent therewith. But they are not bound to do more; they need not inquire into the regularity of the internal proceedings. It was laid down that an outsiders is entitled tom assume that the domestic affairs of the company are perfectly valid. The doctrine is intended to protect an outsiders dealing with a registered corporation from the irregularities in the conduct of the corporation if he is dealing bona fide and has clean hands. It is based on the principle of convenience, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that internal regulations had been duly observed.

EXCEPTIONS TO THE DOCTRINE

- The doctrine of indoor management is not applicable in cases where a person purports to do something on behalf of the company which is not within the ordinary ambit of his power and where the document is a forgery.[22]
- The doctrine is not applicable in cases where persons claiming to have the benefit of this doctrine are the persons who have known or who ought to have known the irregularity. Directors and other person's in- charge the affairs of the company are not entitled to claim its benefits.

[21] (1856) 6 E & B 327 : 119 ER 886
[22] See Ruben vs. Great Fingal Ltd. (1906) A.C. 439.

- If the officers of the company acts in a manner which would not ordinarily be within his powers , the company is not bound by acts because the articles gave power (which in fact was not exercised) enabling the directors to delegate any of their powers, particularly third party had not read or relied upon the articles.[23]
- Outsiders will not be entitled to benefit of the rule, if the circumstances surrounding the contract are suspicious it invites further enquiry.[24]
- The doctrine will not apply where the plaintiff claiming relief has no knowledge of the contents of the article.

RELATION AND DIFFERENCE BETWEEN MEMORANDUM AND ARTICLES OF ASSOCIATION

RELATION

The articles regulate the manner in which the company's affairs will be managed. The memorandum defines the company's objects and various powers it possesses; the articles determine how those objects shall be achieved and those powers exercised. The articles of a company are subordinate and controlled by the memorandum of association which is the dominant instrument and contains the general constitution of the company. If, therefore, the memorandum and articles are inconsistent, then the memorandum will prevail. In ***Bryon vs. Metropolitan Saloon Omnibus Co***[25] it was held that the object of memorandum is to state the purposes for which the company established, while the articles provide the manner in which the company is to be carried on and its proceedings disposed of.

DIFFERENCES

1) Memorandum of association of a company are the charter of the company whereas, the articles of association are the rules and regulations of the company for internal regulations.
2) Memorandum defines and formulates the fundamental condition of the company's incorporation and whereas, articles lay down the various modes and methods to fulfill the conditions for company.
3) The memorandum states the purpose for which the company has been established and whereas the articles provide the manner in which the company is to be carried and its proceedings disposed of.

[23] See British Thomson Housetem and Co. vs. Federated European Bank Ltd. 2 K.B.176
[24] See Anand Bihar Ltd. vs. Dinshaw and Co. AIR. 1942 Oudh 417.
[25] (1885) 27 LJ Ch 685,687 : (1985) 3 DE G& J 122 : 44 ER 1215

4) The memorandum can be altered by a special resolution in a general meeting and with the approval of the Central Govt. in writing but some of the conditions of incorporation contained in the memorandum cannot be altered except with authoritative sanction and whereas articles can be altered only by a special resolution at a general meeting.
5) The memorandum of association defines the limitations of the powers of the company, whereas articles of association play a subsidiary part to the memorandum. Articles define the duties, the rights and the powers of the governing body of the company.
6) The activities of a company beyond the scope of the objects stated in the memorandum are void and whereas acts done in contravention of the provisions of the articles are only irregular and can be confirmed by ratification of shareholders.
7) The outsiders can take the benefit of the memorandum of a company but they cannot do so in case of the articles.
8) The acts done in contravention of the provisions contained in the memorandum are void and cannot be validated even by ratification by a unanimous vote while acts done in contravention of articles are simply irregular and can be ratified by the members.

CONCLUSION

From the aforesaid discussion it may be concluded that the memorandum and article of association are the two fundamental documents of the company, except which the existence of a company is a myth. The memorandum of association forms main charter of the company and is the statutory deed of partnership and whereas, the articles are document relating to the rules and internal regulations for the purpose of managing indoor affairs of the company. Any activities of the company beyond the scope of memorandum being treated as ultra vires transaction and becomes void and any activities of the company beyond the scope of articles are irregular, not void. The doctrine of constructive notice in relation to the articles of association seeks to protect the company against the outsiders and doctrine of indoor management operates to protect the outsiders against the company. The memorandum and articles can be read together only to remove an ambiguity or uncertainty. If the memorandum is perfectly clear, a doubt as to its meaning cannot be raised by reference to the articles; in such a case the articles are simply inconsistent with the memorandum and are disregarded.