

Chapter *1*

PROVISIONS RELATING TO ACCOUNTS

Section 209: BOOKS OF ACCOUNTS TO BE KEPT BY THE COMPANY

1. Books of accounts to be kept

- Details regarding Receipts / Payments of cash
- Sales / purchases of goods by the company
- Assets / liabilities of the company
- Cost records – if required by the Central Government.

2. Venue

Should be kept at the Registered office. If BOD decides to keep books at any other place in India it can do so, but a notice to Registrar in writing should be given within 7 days of its decision to do so (Form no. 23AA)

3. Branch books

- Can be kept at their respective offices.
- But proper summarised returns of branch transactions should be sent to registered office at reasonable intervals. But such interval shouldn't exceed more than 3 months.

4. No proper books deemed to have been kept if

- Double entry system and Accrual basis of accounting is not followed and
- True & fair view not reflected.

5. Directors can inspect "Books of accounts and other books and papers" during business hours.

6. Preservation of Books of accounts

Company

In existence for 8 years or more	Not in existence for 8 years
Books and related & vouchers relating to 8 preceding years.	Books & related vouchers of all years.

Section 209A: INSPECTION OF BOOKS OF ACCOUNTS OF COMPANY

(I) Who are all entitled to inspect:

- ROC
- Officer authorized by central government
- Officer authorised by SEBI [inspection only with respect to matters provided u/s 55A]

Note: These persons can inspect without previous notice.

(II) Assistance to persons inspecting

(a) Form of assistance

- Providing them with all books of accounts & other papers.
- Furnishing any statement, information or explanation with respect of affairs of the company.
- Any other assistance.

(b) Who shall give assistance

- Every director
- Other officers / employees of the company

(III) Powers of person inspecting: -

- Take copies of such books etc.
- Place identification marks thereon (as a token of inspection)
- All powers that a civil court have.
- All powers, which ROC has under this act to make inquiries.

(IV) The Inspector should make a report to Central Government and in case of person appointed by SEBI, he should report to SEBI.

(V) Violation of Sec. 209A by a director leads to **vacation of office** and is disqualified for appointment as a director for 5 years in any other company.

Section 210: ANNUAL ACCOUNTS & BALANCESHEET

- Balance sheet & Profit and loss account should be laid before every AGM.
- In case of non-profit organization, "Income and Expenditure account" should be laid in the place of profit and loss account.
- **Period of financial statement**

In case of 1st AGM: From Date of Incorporation up to a date, this doesn't precede the AGM by more than nine months.

Subsequent AGM's: Financial year

Note: The end of financial year shall not precede the date of AGM by more than more six months. [Extension from ROC by three months possible]

I) Financial year

- ⇒ Can be less than 12m
- ⇒ Can be more than 12m
- ⇒ But shall not exceed 15m [ROC can give extension up to 18m]

Section 211: FORM & CONTENTS OF BALANCESHEET AND PROFIT & LOSS ACCOUNT

I) Schedule VI part I & II compliance necessary with respect to B/S & P&L
Exemption to:

- Banking Company
- Insurance company
- Electricity Company
- Any other company having specific form of B/S & P&L a/c, specified by act governing it.

II) Central Government has got Power to exempt compliance of any of the requirement of schedule VI by notification in official gazette.

Note:

- CG can exercise such power only in public interest.
- Exemption may be conditional / unconditional.

III) Compliance of Accounting Standards

[Relevant provisions Sec.211(3A)(3B)(3C)]

Accounting Standard means Accounting Standard prescribed by National Advisory Committee on Accounting Standards. Till such committee prescribes AS, AS issued by ICAI is applicable.

If AS is not complied the following disclosure in financial statement is necessary:

- The fact of deviation from AS.
- Reasons for such deviation.
- Financial effect of such deviation

IV) Modification of Requirements of The Companies Act With respect to Financial Statement Possible

- On an application by BOD to CG.

- Suomoto modification by CG with BOD consent.

II) Non-disclosure of certain matters required by Schedule VI, if not required by the following acts, will not affect true and fair view shown by financial statements

Company	Act.
Insurance company	Insurance act 1938
Banking company	Banking companies act 1949
Electricity company	Electricity supply act 1948
Any other company	Special Acts governing that company

III) Financial statement includes Notes to accounts.

Section 213: FINANCIAL YEAR OF HOLDING COMPANY & SUBSIDIARY COMPANY

[Overrides all the provisions of this act]

- 1) CG may allow the holding company or its subsidiary to extend its financial year to bring the financial year of both the companies to end on the same date.
- 2) For the above purpose CG may allow postponing the
 - Submission of a/c of extended company
 - Submission of annual returns of extended company
 - AGM of the extended company to any date specified in its direction.

Note: For the above purpose BOD should apply to CG

Section 214: RIGHTS OF HOLDING COMPANY'S REPRESENTATIVE & MEMBERS

- 1) A holding company may authorize by a resolution, a representative to inspect the books of accounts kept by any of its subsidiaries.
- 2) Such books should be open to inspection during business hours.
- 3) Relevant portion of Sec. 235

Company

Having share capital	Not having share capital
At least 200 members	1/5 th of the members in companies ROM
Or	
Members holding at least 1/10 th voting Power	

Note: As per Sec.214 the above right to apply to CLB may be exercised by member of holding company as if they alone are the members of subsidiary.

Section 215: AUTHENTICATION OF B/S & P&LA/C

Note: Before authentication BOD should approve such financial statement.
Company

Banking Co.	Others
B/S & P&LA/C signed on behalf of BOD by Person specified in Sec. 29(2)(a) or (b) of Banking companies act	By Mgr / Sec (if any) and At least 2 directors (one MD if any)

Note: If only one director is available in India, he shall sign the financial statements and he should attach a statement duly signed by him, explaining the reason for non-compliance.

Section 218: PENALTY FOR CIRCULATION OR PUBLICATION OF FINANCIAL STATEMENTS IN CERTAIN CASES

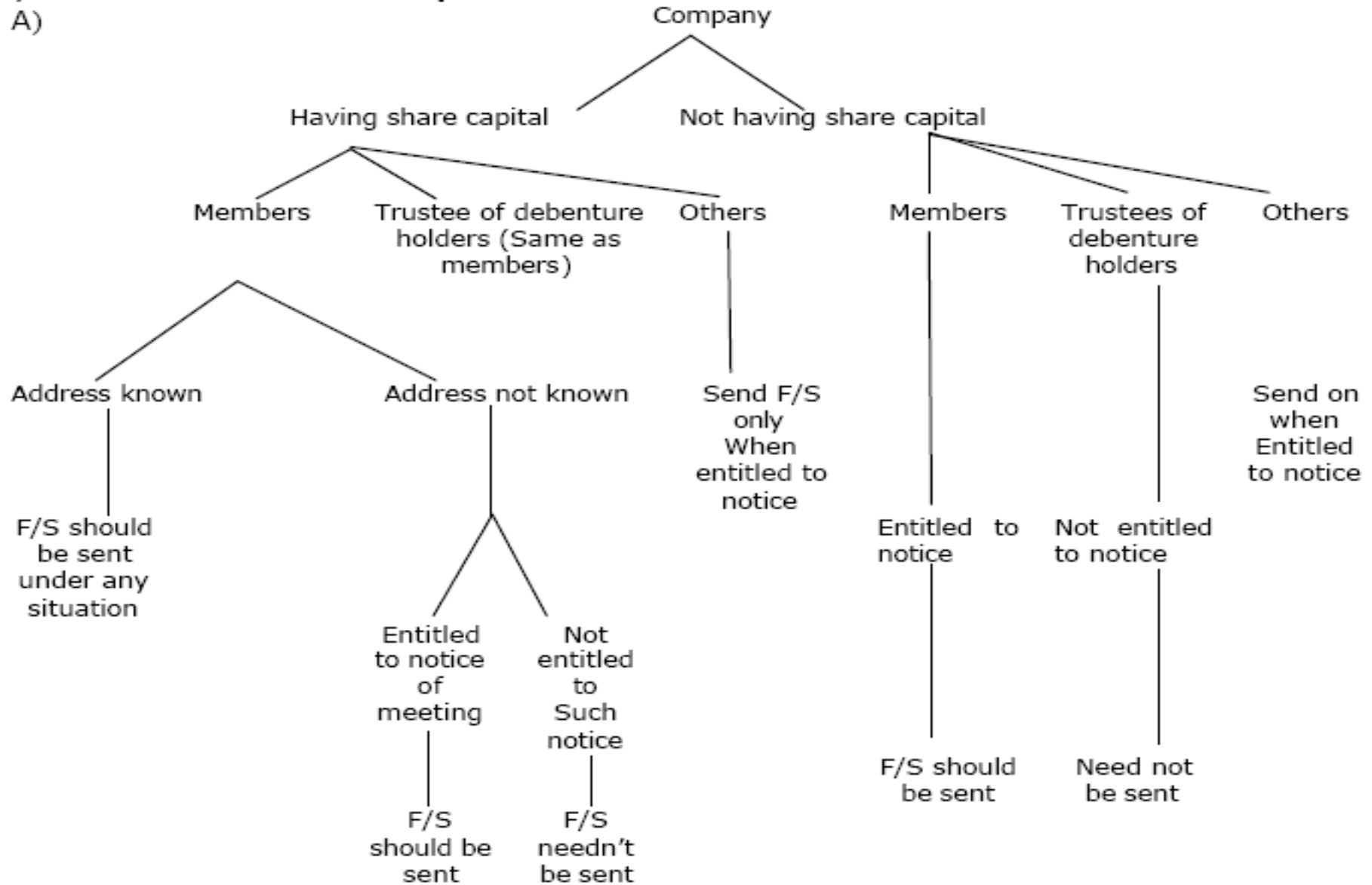
A company shall not circulate financial statements

- Which are not authenticated under Section 215
- Which are not accompanied by its annexures and attachment

If it does so it is liable to penalty, which may extend to five thousand rupees.

Section 219: RIGHT OF MEMBERS TO COPIES OF BALANCESHEET AND AUDITOR'S REPORT

- 1) Time limit for sending financial statements: at least 21 days before the date of meeting
- 2) **Persons entitled to copies of financial statements:**



Joint holders

Joint holders	
None of them entitled to notice	Only some entitled to notice
Send F/S only to one	Send F/S only to those entitled to notice.

Abridged financial statements

- ⇒ Only listed companies can issue abridged financial statements
- ⇒ An unabridged financial statement should be kept open for inspection in the registered office of the company during business hours at least 21 days prior to the meeting
- ⇒ Abridged financial statement should be sent to members etc 21 days before the meeting.
- ⇒ Shorter sending possible if all members entitled to vote agree

Section 220: FILING WITH ROC

(a) Time limit for filing the annual accounts

AGM

Held	Not held
3 copies of F/S should be filed within 30 days of AGM	3 copies of F/S should be filed within 30 days from the last date within which AGM ought to have been held.

(b) Before they are filed with ROC financial statements should be signed by:

Company

Has MD/Mgr/Sec.	Has no MD/Manager/Sec.
By MD or Mgr or Sec.	By a director

(c) In the following situations, a statement containing the fact and the reasons there for should be annexed with the F/S and filed with ROC

- When AGM is not held
- Accounts are not adopted due to adjournment.
- In AGM, Company did not adopt the accounts.

(d) Special provisions regarding private company

- Private company should file P & L A/C & B/S separately
- The profit and loss account filed with ROC is not open to inspection to non-members.

Section 222: CONSTRUCTION OF REFERENCES TO DOCUMENTS ANNEXED TO ACCOUNTS

- 1) If any information is required by this act to be given in accounts & is allowed by it to be given in a statement annexed to the accounts, such info may be given in Board's report.
- 2) Such portion of Board's report should be treated as annexure to the account and shall be the subject matter of audit report.

Note: Board's report is attachment and not annexure; therefore audit report should not cover matters included in Board's report except being matters specified in this section.

Chapter 2

PROVISIONS RELATING TO AUDITORS
(SECTION – 224 TO 233B)

Introduction

Earlier ownership & Management were vested with same person(s). In a corporate form of organisation owners (shareholders) has no role in managing the affairs of the company. The management is vested in a group of individuals. [Individually called directors, collectively called Board Of Directors]. So the owners (i.e., shareholders) will want to ensure that the affairs of the company are managed in accordance with sound business principles & prudent commercial practices. There arises the need for audit.

Sec. 224 - 233B speaks about provisions relating to audit.

A	B	C	D	E	F	G	H
Who can be appointed as an auditor (Qualifications & Disqualifications)	Who will appoint auditors	Duties of auditors	Rights of auditors	Removal of auditors	Appt. of branch auditors.	Special audit	Cost audit

(A) Qualifications & Disqualifications (Section 226)

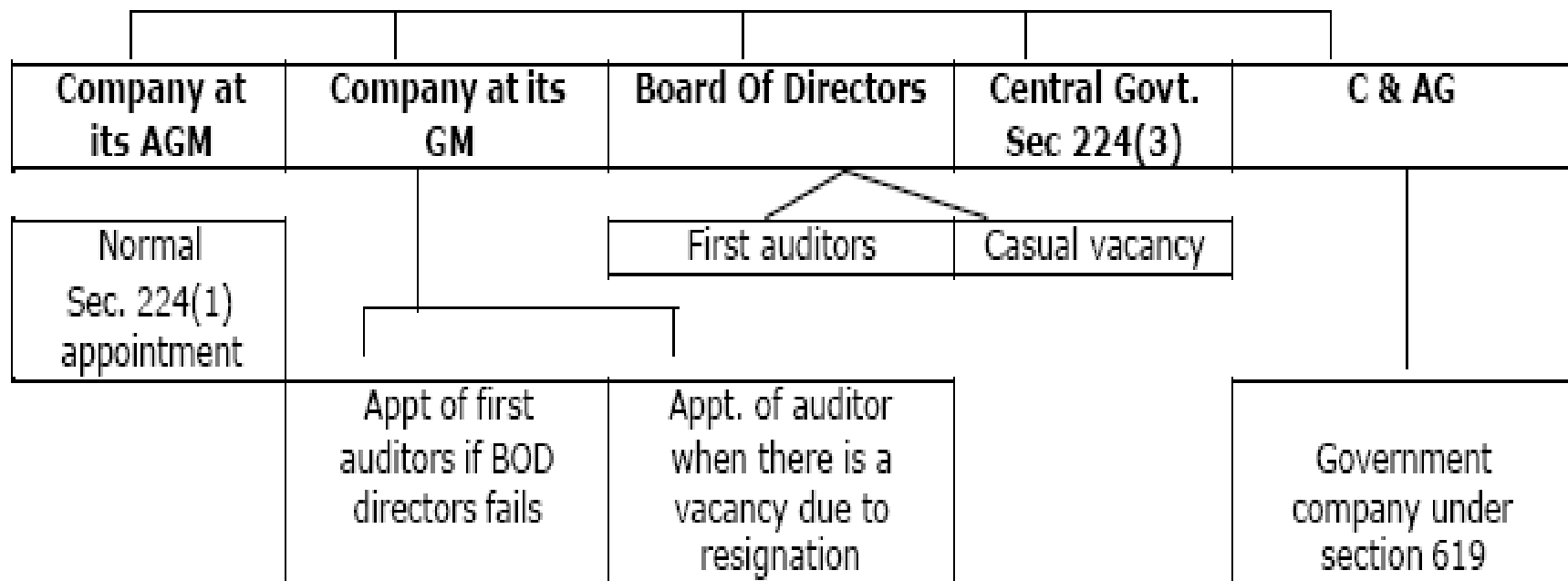
- 1) Chartered accountant holding the certificate of practice.
- 2) A firm in which all partners are chartered accountants holding certificate of practice & practice in India.
- 3) **Following persons are disqualified:**
 - (a) Body corporate
 - (b) Officer / employee of the company.
 - (c) Partner / employee of such officer / employee
 - (d) Indebted to the company for an amount exceeding Rs.1000.
 - (e) Disqualified for appointment as auditor in Holding company/ Subsidiary company / Subsidiary of that company's Holding company.
 - (f) Holds any security of the company.

Note: In addition, Sec. 8 of chartered accountants act specifies certain disqualifications:

- (i) An insane person.
- (ii) Un discharged insolvent
- (iii) Guilty of an offence involving moral turpitude.

(B) Appointment Of Auditor

(i) Who will appoint



(ii) Remuneration Sec 224(8):

Normally the appointing authority will fix the remuneration. If appointed by the BOD then BOD will fix it, if appointed by the company – then company will fix it or the BOD will fix it in a manner prescribed by the company at the general meeting, if appointed by Central Government – Central Government will fix it, but if appointment is done by C & AG – Company will fix it or the BOD will fix in a manner prescribed by the company in the general meeting.

(iii) Tenure:

Holds office from the conclusion of the AGM in which he is appointed till the conclusion of next AGM.

(iv) Procedure:

- (a) Obtain a certificate from the proposed auditor that there will be no violation of Sec. 224(1B) [ceiling on number of audits](with respect to the ceiling refer auditing material)
- (b) Within 7 days of appointment, intimate to the auditor about his appointment.
- (c) Auditor should within 30 days from the date of receipt of such intimation – inform the Registrar in writing of his acceptance.

(v) **Automatic re appointment [Sec 224(2)]**

A retiring auditor should be re-appointed except in the following cases:

- (a) He is not qualified for re-appointment.
- (b) He has given the company a notice in writing of his unwillingness to be re-appointed.
- (c) A resolution has been passed at the meeting appointing somebody instead of him or providing expressly that he shall not be reappointed.
- (d) Notice has been given of an intended resolution to appoint some other person, but due to death / incapacity of such person the resolution cannot be proceeded with

(vi) Appointment by Central Government:

Where a company fails to appoint a auditor in its AGM, then the Central Government gets the power to appoint the auditor of the company [Sec 224 (3)]. The company should inform the Central Government within 7 days from the date on which the above power becomes exercisable by Central Government. [Sec 224(4)]

(vii) Appointment of first auditor u/s 224(5)

- Should be appointed within 1 month of incorporation.
- Tenure – until the conclusion of next Annual General Meeting.
- Board of directors appoints the first auditors.
- If they fail to appoint the first auditors, the company in its general meeting can appoint the first auditors.

(viii) Filling of casual vacancy: Sec 224(6)

Board of directors can fill the casual vacancy in the office of auditors. Till such time the vacancy is filled the remaining auditors can act. If vacancy is due to resignation of an auditor then it can be filled only at the general meeting.

(C) REMOVAL OF AUDITORS [Section 224(7) & 225]

Previous approval of CG is necessary for removal of the auditor (Exception First auditors). Procedure for appointing any person other than retiring auditor or for removal of auditor

- Special Notice u/s 190 of the intended resolution – shall be made to the company.
- The company will shall in return send a copy of such notice to all members.
- A copy of such special notice should also be sent to the retiring auditor immediately.
- He has right to make representation in writing (This is in addition to his right to be heard at the GM).
- Such representation should be of reasonable length.
- Such representation should be sent to all members along with the notice of resolution.
- If the company could not send such representation due to the fact that it was rec'd belatedly or due to the default, such representation should be read out at the general meeting.

Note: If such representation is used to secure needless publicity for defamatory matters, then CLB can prohibit such representation on receipt of application from the agreed parties.

(D) RIGHTS OF AUDITOR (SEC. 227(1))

- Access to books and accounts and vouchers of the company (whether kept at H.O. or at branches)
- Access to information and explanation, considered necessary for performance of his duties.
- Right to receive all notice of and other communication relating to any GM which any member of the company is entitled to (Sec. 231)
- Right to visit branch and right to be heard at any GM (Sec. 231)
- Right to visit branch office (Sec 228)

(E) DUTIES OF AUDITOR (SEC. 227)

- * Reporting (Discussed at length in auditing)

(F) BRANCH AUDIT (Section 228)

(i) Who shall be appointed as branch auditor

- (a) Auditor appointed u/s 224.
- (b) Any person qualified u/s 226.

Note: In case of a foreign branch, in addition, an accountant duly qualified to act as an auditor of the accounts of branch office in accordance with the laws of foreign country can be appointed.

(ii) Who shall appoint branch auditor:

The company at the GM shall appoint the branch auditor. It may also authorize the BOD to appoint branch auditor, in consultation with the company's auditor.

- (iii) Power & duties of the branch auditor are similar so that of the company auditor.
- (iv) To whom the branch auditor should report: to the company's auditor.
- (v) Remuneration of branch auditor is to be fixed by the Company Or by the BOD duly authorized by the Company.

(vi) Power of CG to grant exemption to branch audit

In exercise of such power CG has framed rules regarding exemption of branch office audit.

(H) **SPECIAL AUDIT (Section 233A)**

(i) Who shall audit?

The central government

(ii) When can CG order special audit?

- * Affairs of the company are not managed in accordance with sound business principles or prudent commercial practices.
- * The company is being managed in a manner likely to cause serious damage or injury to the interest of the trade / industry / business to which it pertains
- * The financial position of any company is likely to endanger its solvency.

(iii) Who can be appointed as special auditor

(iv) Any chartered accountant (Whether or not such CA is holding a COP)

(v) Power & duties (similar to those provided u/s 227)

Note: In addition a special audit report is required to on such other matters specified by CG.

(vi) The special audit report should be submitted to CG.

(vii) On receipt of the report from the special auditor, the central government may take such action on the report as it considers necessary in accordance with the provision of the Act or any other law for the time being in force.

(viii) If the CG, intends to take no action & 4 months have elapsed, the CG may order circulation of such report or part thereof. In addition, it has to be read at the GM held immediately.

(ix) The expenses of special audit should be borne by the company otherwise, if should be recovered as arrears of land revenue.

Chapter 3

INVESTIGATION

(Section 234 to Section 251)

Section 234: POWER OF ROC TO CALL FOR INFORMATION AND EXPLANATION

- 1) There are number of Documents that are filed with ROC. On perusal of such documents, the ROC may seek through an order information / explanation w.r.t any matter relating to such documents.
- 2) Company and every officer (past / present) has duty to provide such information / explanation.
- 3) If such information is not furnished or Information / Explanation furnished is not sufficient, the ROC can require by an order such company to submit such books & papers as it considers necessary for the purpose of inspection.
- 4) If the company defaults, then the ROC can apply to the court and the court may make an order directing the company to submit the books.
- 5) Information and explanation received by ROC could be annexed to the documents and similarly copies / extracts of books and papers can also be annexed to the documents.
- 6) If the documents, along with the information / explanation received does not
 - Disclose a satisfactory state of affairs of the company or
 - Give full & fair statement of any matter to which the document purports, then ROC may report to Central Government.
- 7) ROC could exercise the above powers; if creditors or contributories apply to it stating that the business of the company is carried on to defraud them or it has been carried for fraudulent purposes.

Note: If on enquiry, ROC is satisfied that such application is frivolous, then ROC shall disclose the identity of the informer to the company.

This section applies even to documents submitted by Liquidator / Foreign company.

Section 234A: SEIZURE OF DOCUMENTS BY ROC

- 1) If ROC feels that, any document relating to a company, MD or Manager may be destroyed, mutilated, altered or defaced then it may –
 - (i) Enter the place where they are kept
 - (ii) Search those places.
 - (iii) Seize such books & papers.
- 2) The ROC should not keep such seized books for more than 30 days.

Note: Before returning such books Copies / extracts could be taken and marks of identification could be placed on such books.

Section 235: INVESTIGATION OF AFFAIRS OF A COMPANY

- 1) **Who can order investigation & appoint competent investigator:** Central Government.
- 2) **Situation under which it can order investigation:**
 - (i) When report from ROC is received u/s 234 or
 - (ii) When CLB declares that affairs of the Company ought to be investigated.
- 3) **When CLB can make such declaration:** when requisite number of members applies to it.
- 4) **Requisite number**

Company

Company	
Having share capital	Not having share capital.
* At least 200 members or * Members holding shares carrying at least 1/10 voting power.	* Members having at least 1/5th count in ROM. (i.e., at least 20% of members)

Note: Opportunity of being heard should be given before CLB makes such declaration.

Section 237: INVESTIGATION OF COMPANY'S AFFAIRS IN OTHER CASES

1) Other circumstances in which Central Government can order investigation

- (a) Company by special resolution resolves investigation
- (b) Court orders investigation.
- (c) CLB opines that investigation is necessary in certain circumstance

2) Circumstances which may make CLB feel that investigation is necessary

- * Business of the Company is conducted
 - To defraud its members, creditors & others
 - For unlawful / fraudulent purposes
 - In a manner oppressive to any of its members.
- * Persons concerned with formation of the company or with management of the affairs of the Company are guilty of fraud, misfeasance and other misconduct.
- * Information regarding affairs of the company are not furnished to the members (including calculation of commission payable to MD/ Directors)

Section 239: POWER OF INSPECTOR TO CARRY INVESTIGATION INTO AFFAIRS OF RELATED COMPANIES AND PERSONS

1) Related Companies and Persons:

- Company's holding company
- Company's subsidiary company
- Subsidiary of Company's holding Company
- Any body corporate in which the Company's Manager / MD is the MD / Manager
- Any body corporate whose BOD consists of Company's nominees.
- Any body corporate whose BOD is accustomed to act in accordance with the instruction of
 - (a) The Company
 - (b) The director of the Company
 - (c) Any Company which has, employees / nominees of person having control & management of the Company (1st Company) – as its director.
- Manager / MD of the Company

- 2) Central Government – before giving approval should give opportunity of being heard to these persons.
- 3) The words "at the relevant time" in Bare act.

Section 241: INSPECTOR'S REPORT:

1) Inspector's Report

Interim report to Central Govt. (Only when Central Govt. requires)	Final report to Central Govt. (On conclusion of investigation)
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2) Persons entitled to receive a copy of Final report:

(a) Company, and body corporate referred to u/s 239	-	To be delivered at its Registered office
(b) Member of the Company and BC inspected		On payment of prescribed fees.
(c) Affected creditors of the Company and body corporate inspected		
(d) Requisitionist under Sec. 235(2)		
(e) Court (u/s 237)		

Section 242: PROSECUTION: Prosecution is attracted only when a person is criminally liable.

Section 243: APPLICATION FOR WINDING UP OR ORDER U/S 397/ 398

- 1) If on the perusal of inspection report, if Central Government is of the opinion that the company should be wound up, it may:
 - (a) Present a winding up petition under just & equitable clause or
 - (b) Present an application u/s 397 /398 or
 - (c) Present both winding up petition & application u/s 397 & 398.

Section 244: PROCEEDINGS FOR RECOVERY OF DAMAGES OR PROPERTY

Central Government may in the public interest, initiate proceedings in the name of the company, for:

- 1) Recovery of damages in respect of any fraud, misfeasance and misconduct in connection with promotion or formation of the company or BC
- 2) Recovery of any property of the Company / BC, misapplied / wrongfully retained.

Section 245: EXPENSES OF INVESTIGATION

- 1) The expenses of investigation should in the first instance be defrayed by Central Government.
- 2) Central Government is entitled to reimbursement from:
 - (a) A person convicted u/s 242.
 - (b) A person ordered to pay damages / restore property u/s 244.
 - (c) Company/ BC under investigation and in whose name Section 244 proceedings are initiated.
 - (d) MD / Manager of the Company / BC – dealt with in the report

(e) Applicants u/s 235(2).

Notes:

- 1) Expenses of investigation includes cost of Section 244 proceedings
 - 2) Liability of Company / BC in whose name Section 244 Proceedings are initiated - is restricted to value of Security / Property recovered.
 - 3) Central Government has got the first charge in the above property.
 - 4) Persons referred to under © should reimburse the expenses borne by (d) & (e).
 - 5) Persons referred under (a) & (b) should reimburse the expenses borne by ©.
- Any portion of expenses not recovered by Central Government - shall be met out of money provided by parliament.

Section 247: INVESTIGATION OF OWNERSHIP OF THE COMPANY

- 1) Central Government has power to order investigation to find:
 - (a) The persons, who are financially interested in the Company's success / failure
 - (b) The persons, who could control the policy of the Company.
- 2) Central Government can order such investigation on receipt of an order from the CLB.
- 3) Central Government should define the scope of investigation i.e. the matters to be investigated and the period to be investigated.

Note: Scope may be so limited to the extent that investigation may be w.r.t the ownership of particular shares / debentures.

- 4) Those persons who are believed to have beneficial ownership / control over the Company's policy should provide necessary assistance to investigation.
- 5) Investigation report – Central Government need not give the report to any person, if it feels that there exists good reasons for not divulging the contents of the report.

Otherwise, it may keep such report with ROC for inspection .

**Section 250: IMPOSITION OF RESTRICTIONS UPON SHARES & DEBENTURES
& PROHIBITION OF TRANSFER OF SHARES / DEBENTURES IN CERTAIN
CASES.**

1) Restrictions that can be imposed by CLB on Shares / Debentures.

- (a) Transfer of such shares shall be void.
- (b) If shares are to be issued, then they should not be issued.
- (c) Voting rights should not be exercised
- (d) Right issue, Bonus issue (w.r.t such shares void.)
- (e) No payment of Dividend, Repayment of capital etc. shall be made except on liquidation.

2) When restrictions can be imposed:

CLB, in order to find out the relevant facts about any shares, with respect to whose ownership investigation u/s 247 is done, may impose the above restriction. CLB can do so if reference is made to it by Central Government or on receipt of a compliant in this behalf.

3) The above restriction can be imposed only for a period of 3 years.

4) Prohibition of transfer

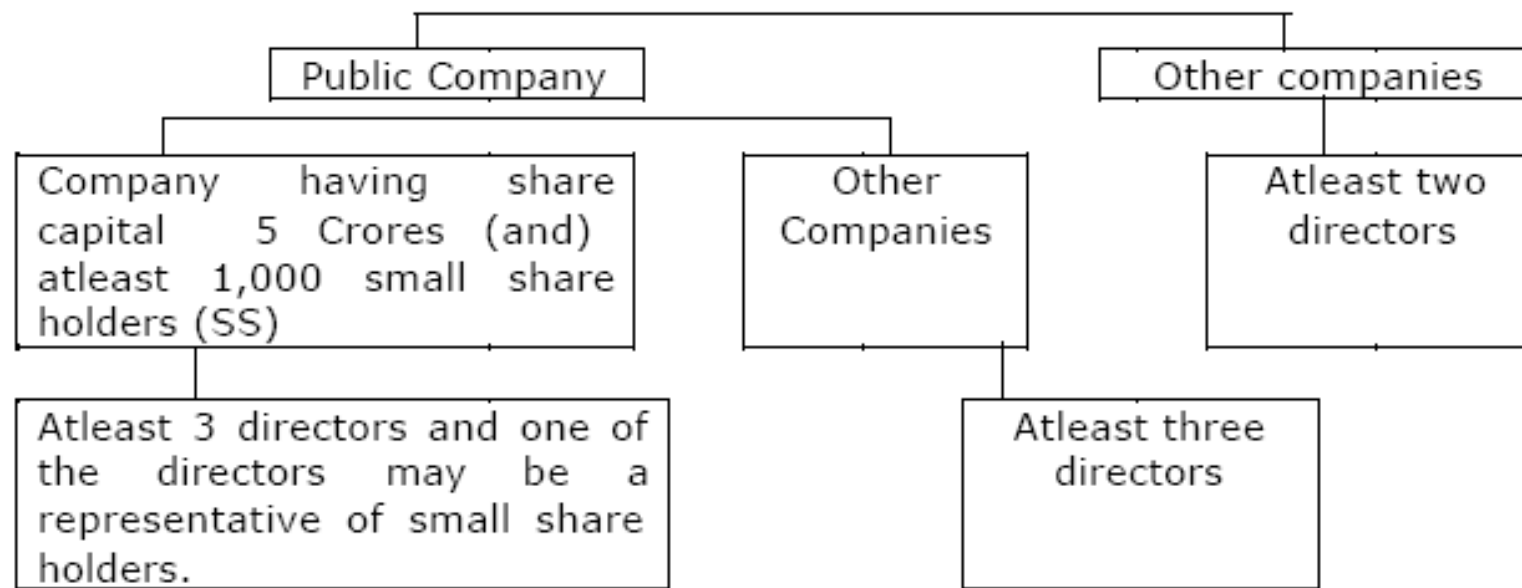
Transfer has already taken place	Transfer likely to take place.
➔As a result of which change in composition of BOD is likely to take place, which is likely to be prejudicial to public interest. ➔Then CLB may order that voting rights in respect such shares – shall not be valid for a period of not exceeding 3 yrs.	➔As a result of which change in composition of BOD is likely to take place, which is likely to be prejudicial to public interest ➔Then CLB may by order prohibit the transfer of such shares for a period of not exceeding 3 yrs.

Chapter 4

DIRECTORS

(Section 252)

Section 252 – Minimum No. of directors:-



Small shareholders may elect one among themselves to be small shareholders directors in such manner as may be prescribed.

Expn: SS means shareholder holding shares the nominal value of which do not exceed twenty thousand rupees.

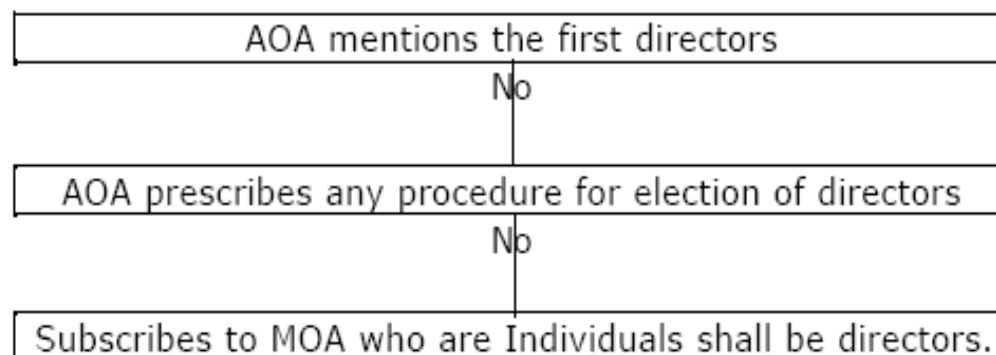
The directors of a company are collectively referred to as "Board of Directors" or "Board".

Section 254: First Directors

In default of or subject to any regulation in the articles, subscribers to the memorandum shall be deemed to be the directors of the company.

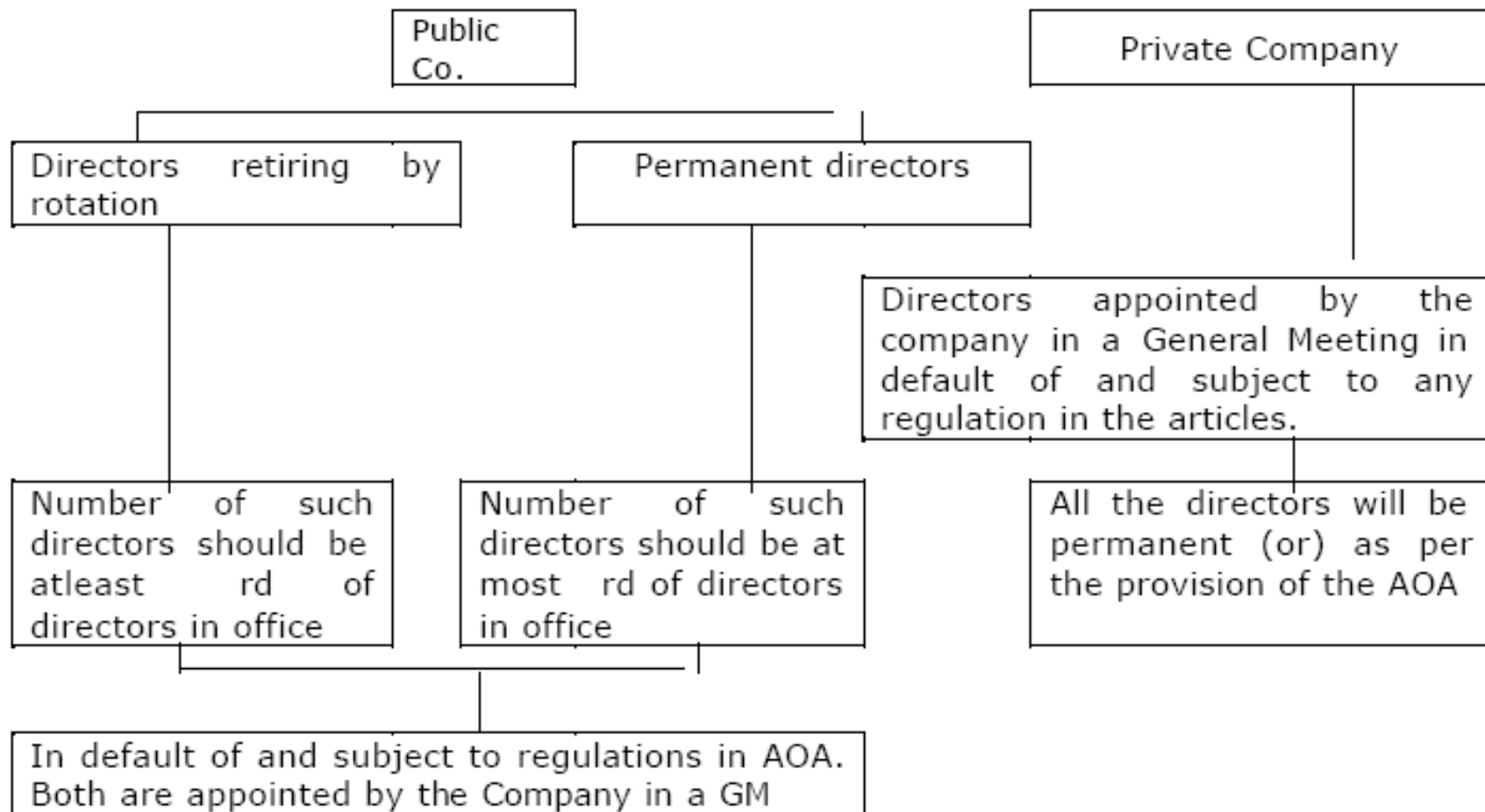
Such subscribers should be Individuals.

Such deemed directors will hold the office till the directors are duly appointed in accordance with section 255.



Note: First directors appointed Under Section 254 will hold the office only till the directors are appointed in accordance with the provision of Section 255.

Section 255



If the articles of a Public Company provide for the retirement of all directors at every AGM, all the directors has to retire and there will not be any classification of directors into

- (i) Directors retiring by rotation.
- (ii) Permanent directors.

Section 256

In this section, the expression "retiring directors" means a director retiring by rotation.

This section does not apply to a private company.

- (1) At an AGM held next after the date of GM at which directors are appointed under section 255 and at each subsequent AGMs,
 - (i) Directors liable to retire by rotation has to retire.
 - (ii) Number of such directors to retire is $\frac{1}{3}$ rd of such directors who are liable to retire by rotation.
 - (iii) If the number is not three or multiple of 3, the number nearest to one third shall retire.
- (2) Those who have been longest in office shall retire first. If directors were appointed on the same day, directors to retire will be determined based on the agreement between themselves & if there is no such agreement, it will be determined by lot.
- (3) The Company may fill up the vacancy by appointing the retiring director ((i.e.) by rotation) (or) by appointing some other person.

- (4) If the vacancy is not filled up then meeting has to resolve expressly that vacancy should not be filled up. Otherwise, meeting will be adjourned to the same day next week at the same time & place & if that day is a public holiday till the next succeeding day which is not a public holiday at the same time and place. Such adjournment is for filling up the vacancy.
- (5) If in the adjourned meeting also vacancy is not filled (or) the meeting does not resolve expressly not to fill up the vacancy then the retiring director will be deemed to have been reappointed at the adjourned meeting.
- However the retiring director will not be deemed to have been reappointed if
- (i) Either at the original meeting (or) at the adjourned meeting a resolution for the reappointment of such director has been put & lost.
 - (ii) Retiring director expressed his unwillingness in writing to be reappointed.
 - (iii) He is not qualified (or) he is disqualified.
 - (iv) A resolution, whether ordinary or special is required for his appointment or reappointment by director by any provision of this Act.
 - (v) Provision to Sec.263 (2) is applicable to his case.

Provision to Section 263

Even if a resolution is passed in violation of 263(1), no provision for the automatic reappointment of director retiring by rotation in default of another appointment shall apply.

(e.g) consider A Ltd. A & B are directors retiring by rotation. At an AGM, they retire & in their place X & Y are appointed as director at that meeting by passing a single resolution in violation of Section.263 (1). Then A & B cannot claim that their appoint is void & ∴ meeting has to be adjourned for filling by the vacancy (by virtue of provision to 263(2)).

Section 257

- (1) 257(1) is not applicable to a private company. But section 257(1A) is derived from section 257(1), therefore 257(1A) is also not applicable to private companies.
- (2) "Retiring director" means director retiring by rotation.
- (3) Retiring director is not required to follow the procedure provided in this section.
- (4) If a person is eligible for appointment to the office of director at any GM, he has to give a notice in writing under his name which should specify his candidature for the office of director. Such notice should be left at the office of the company not less than 14 days before the meeting. Similarly, if any member is proposing a person for the office of director, then such member has to give a notice in writing under his hand signifying his intention to propose that person for the directorship. Such notice should also be given not less than 14 days before the meeting.

The company shall after receipt of the notice, inform its members by serving individual notices not less than seven days before the meeting.

Instead of serving individual notices, the company may advertise such candidature or intention in at least two newspapers circulating in the place where the registered office of the Company is located

Time limit for advertisement is not less than seven days before the meeting.

At least one newspaper should be in English and another one should be in vernacular.

Section 258

A company in a General Meeting may by ordinary resolution increase or decrease the strength of its directors. However following should be considered:

- (1) Such increase should be within the limits fixed by the article.
- (2) Such decrease should not be below the minimum requirement specified in section 252 (or) the minimum requirement fixed by the articles.
- (3) While increasing (or) decreasing the strength, care should be taken that the ratio of directors retiring by rotation to other directors as specified in section 255 is not varied.
- (4) Provision of section 259 should also be considered.

Section 259

Note: Section.258 is applicable to any Company. Section 259 is applicable to public Company only.

If increase in strength of 15 directors is beyond the maximum specified in is articles as just registered, such increase shall not have any effect unless approved by the Central Government & if it is disapproved by the CG such increase shall become void.

However if permissible maximum is 12 or below 12, increase in the number of directors will not require the approval, if such increase does not take the total number beyond 12

Section 260 Additional Directors

- (1) Applicable to all companies.
- (2) Power to appoint additional directors should be given by the articles.
- (3) Nothing in Section 255, Section 258 (or) Section 259 shall not affect the power given by this article to appoint additional directors
- (4) Additional directors shall hold office only upto the date of next AGM. Date of next AGM means the due date on which next AGM is to be held.
- (5) No. of directors & no. of additional directors together shall not exceed the maximum strength of the Board fixed by the articles.

Section 262

- (1) This is not applicable to a private company.
- (2) Casual vacancy can be filled by the Board only in a Board Meeting & not by circular resolution.
- (3) However this is subject to any regulation in the articles.
- (4) Director whose vacancy is to be filled should have been appointed by the company in a General Meeting.
- (5) Term of office of the new director shall be upto the date upto which the director in whose place he is appointed would have held office if it had not been vacated.

Section 263

- (1) This is applicable to a Public Company only
- (2) A motion for appointing two or more directors by a single resolution cannot be made.
- (3) However such motion can be made if a resolution that such motion can be made should have been first agreed to by the meeting without any vote cast against it (Neutral may be possible).
- (4) A resolution moved in contravention of the above provision shall be void whether or not objection was raised at the time of moving it.

However just because the resolution is void, provision for the automatic re-appointment of the director retiring by rotation in default of another appointments shall apply.

See Section 256(4) (b) (v).

Section 264

- (1) This is not applicable to a Private Co.
- (2) This section is for filing consent with the Co. to act as a director & for filing consent in writing with the registrar to act as such director.
- (3) A person other than a director retiring by rotation or otherwise a person who has left a notice under section 257 signifying his candidature for the office of a director need not file consent with the co. to act as director if appointed. However every other person proposed as a candidate for the office of a director has to file consent in writing with the company to act as a director if appointed. 264(i). There is no time limit within which consent should be filed. However consent should be made before appointment.

If a person is appointed as a director, he shall not act as director unless he has filed his consent in writing to act as such director with the Registrar. Time limit is within 30 days of his appointment (section 264(2)).

Following persons need not comply with 264(2):-

- (a) A director re-appointed after retirement by rotation.
- (b) A director re-appointed immediately on the expiry of his term of office.
- (c) An additional director appointed as a director or re-appointed as additional director.
- (d) An alternate director appointed as a director or re-appointed as alternate director.
- (e) Person filling a casual vacancy in the office of a director under section 262 appointed as a director.

Note: However if a person is appointed for the first time as additional (or) alternate director, he has to comply with both provision of 264(1) & 264(2). Similar case for a person filling the casual vacancy under section 262 for the first time

- (f) A person named as a director of the Company under its articles as first registered. ((i.e.) under section 254).

Section 265

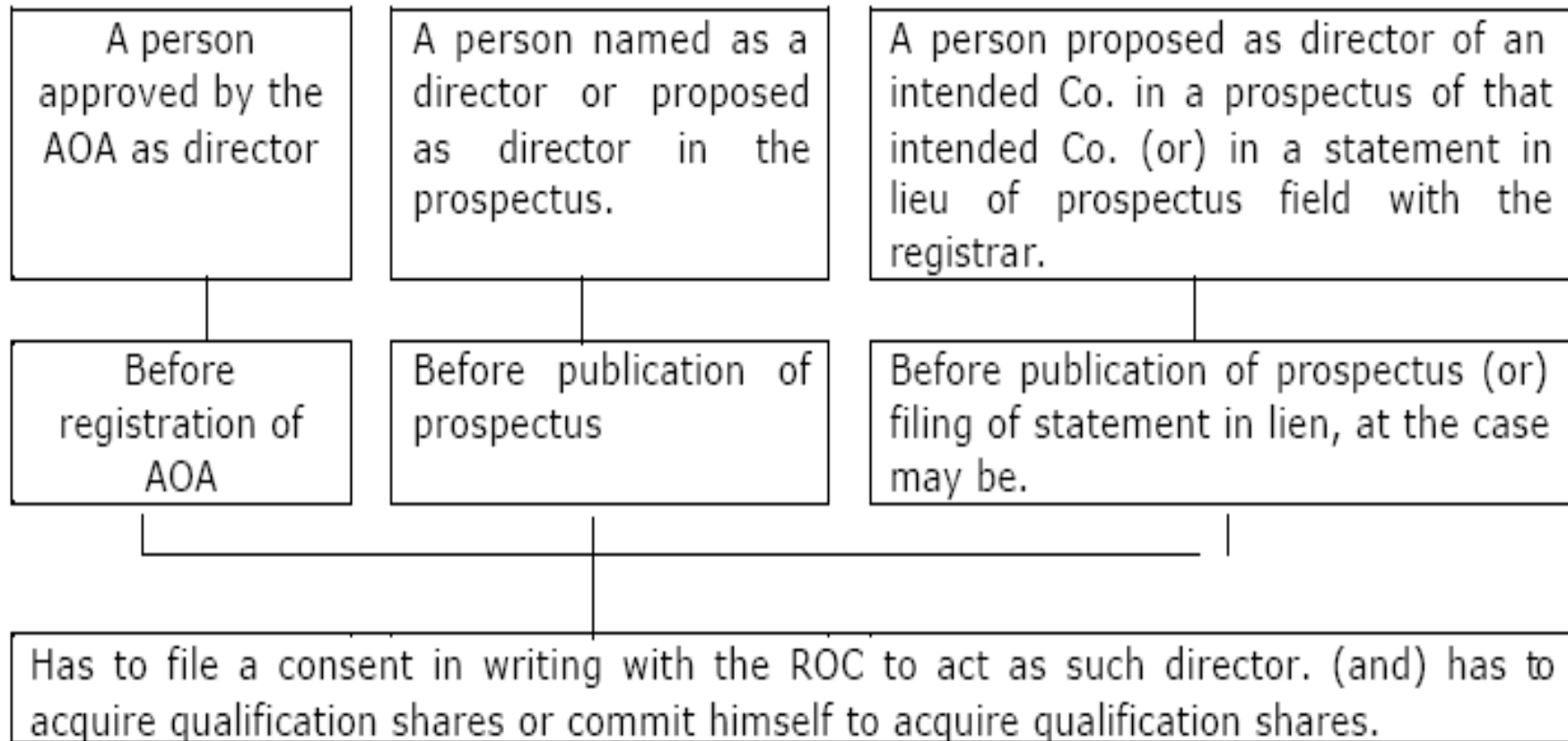
The article of a Public Company may provide for appointment of directors according to the principle of proportional representations. (i.e.) by way of single transferable vote (or) by a system of cumulative voting the provisions of section 265 have a overriding effect over other provisions in the Act.

If appointments are made in accordance with this section, they will not be removed under section 284.

Appointments will be made once in 3 years.

Interim casual vacancies will be filled in accordance with the provisions of section 262.

Section 266



Section 266 is not applicable to

- (a) A Company not having a share capital.
- (b) A private company
- (c) A company which was a private company before becoming a public Co.
- (d) A prospectus issued after one year from the date on which the company was entitled to commence business.

MANAGING DIRECTORS

Section 267

This section provides both for vacation and disqualification for managing directors.

A person cannot be appointed (or) continue to be employed if as a MD of any company if

- (i) He is an undischarged insolvent (or) at any time he has been adjusted insolvent.
- (ii) Suspends (or) has at any time suspended payments to his creditors.
- (iii) Makes composition (or) has at any time made composition with his creditors.
- (iv) Is (or) has at any time been convicted by a court, either in India (or) outside India, for an offence involving moral turpitude.

Section 268

This section applies only to public companies.

Amendment of any provision relating to the appointment (or) reappointment of

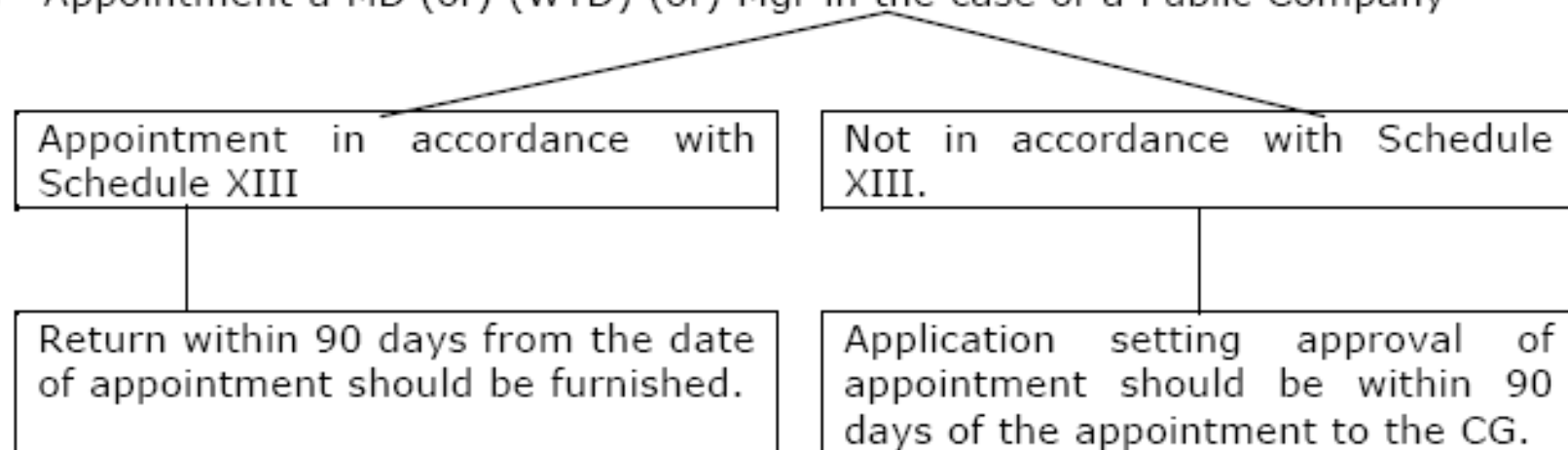
- (1) MD
- (2) WTD
- (3) Director not liable to retire by rotation.

Shall not have any effects unless approved by CG & become void if disapproved by the Government.

Such provision to be amended may be in MOA/AOA (or) in agreement (or) in resolution by Co. in a GM (or) in a resolution passed by its BOD.

Section 269

- (1) Public Company having a paid-up share capital 5 crores should have a MD (or) WTD (or) Manager.
- (2) Appointment a MD (or) (WTD) (or) Mgr in the case of a Public Company



- (3) CG may not accord its approval if the person appointment is not fit and proper (or) appointment is not in the public interest (or) terms & conditions of appointment are not fair & reasonable.
- (4) CG can also accord it approval for lesser period than the period for which appointment was made.
- (5) If CG does not approve the appointment, the person appointment shall vacate his office as such & date of vacation shall be the date on which the decision of CG is communicated to the Co.
- (6) If appointment is made in contravention of schedule XIII and without the approval of CG, the CG may refer it to CLB for decision. The CLB may issue show-cause notice to Co. such MD, WTD (or) Mgr. as to why appointment should not be terminated & penalties should not be levied.

- (7) If CLB makes an order that contravention has been made, the penalties will be levied & appointment will be deemed to have been terminated on making the order.

Thereafter such person in addition to fine & penalties, has to refund to the Co. all monetary benefits & perquisites received between the date of his appointment of the passing of such order.

All acts done by a MD (or) WTD (or) Mgr will be valid if the acts so done are otherwise valid notwithstanding any order made by the CLB.

Note: Appointment includes reappointment & WTD includes a director in whole-time employment of the company.

Section 274 – Disqualification of directors:

The following persons are disqualified from being appointed as a director of the company (Pvt. / Public):

- (a) Found to be a person of unsound mind by a court of competent jurisdiction and the finding is still in force.
- (b) Person who is an undischarged insolvent.
- (c) Person who has applied to be adjudicated as an insolvent and his application is pending.
- (d) Person who has been convicted by a court (in India or Outside India) of any offence involving moral turpitude and sentenced to imprisonment for a period of six months or more and five years has not elapsed from the day of expiry of the sentence.
- (e) Person who has not paid any call in respect of shares of the company (whether held singly /jointly) for a period of more than six months from the last day fixed for the payment of the call.
- (f) A person who has been disqualified for appointment by the order of the court u/s 203 and such order is in force.

Note: If leave of the court has been obtained for his appointment u/s 203, then he can be qualified.

- (g) Person who is already a director of a public company which
 - (i) Has not filed the annual accounts and annual returns for any continuous three financial years commencing on and after 1.4.1999 (or)
 - (ii) Has failed to repay its deposits or interest thereon on due date or redeem its debentures on due date or pay the dividend declared and such failure continuous for one year or more.

Note: Such person shall not be eligible to be appointed as a director of any other public company for a period of 5 years from the date on which such public company, in which he is a director, has performed the acts in (i) and (ii) above.
He need not vacate the office of directorship in the company in which such offence is committed.

Note: The Central Government (by notification in official gazette) has power to remove the disqualification incurred by a person in clause (d) and (e) above.
A private company can provide additional grounds for disqualification in its Articles.

Section 275:- No person to be a director of more than 15 companies.

A person cannot hold the office as director in more than 15 companies at the same time.

Section 277:- Choice by person becoming director of more than 15 companies.

- ⇒ A person who is already holding the office of director in 15 companies and such person is appointed as a director in another company, then within 15 days he has to vacate his office as director in any of the companies in which he was already a director.
- ⇒ If the director fails to vacate, the appointment in another company shall become void, immediately on the expiry of 15 days.
- ⇒ Where a person is already holding the office of director in less than 15 companies and is appointed as director in 2 or more companies, then he shall choose the directorships which he wishes to continue or accept so that the total number of directorships does not exceed 15. However if he does not make any choice within 15 days all new appointments shall become void and none of the new appointments shall have effect until such choice is made.

Section 278:- Exclusion of certain directorship for the purpose of Section 275, 276, 277.

The directorship held by a person in the following companies shall be excluded.

- (i) A private company which is neither a subsidiary nor a holding company of a public company.
- (ii) An unlimited company.
- (iii) An association not carrying on business for profit or which prohibits the payment of dividend. (Sec. 25 companies)
- (iv) A company in which such person is an alternate director.

If any company mentioned in (i), (ii), (iii) above loses its characteristics or ceases to fall within the purview of these clauses then such company shall be excluded for a period of 3 months from the date on which the company loses its characteristics or ceases to fall within the preview of those clauses.

Section 283:- Vacation of office by directors:-

A director shall vacate his office if:-

- (a) He is found to be of unsound mind by a court of competent jurisdiction;
- (b) He applies to be adjudicated an insolvent.
- (c) He is adjusted an insolvent.
- (d) He is convicted by a court of any offence involving moral turpitude and sentenced for a period of six months or more.
- (e) He fails to pay any call in respect of shares of the company held by him (singly/jointly) within 6 months from the last date fixed for the payment of the call.

Note: Central Government can by notification remove the disqualification incurred by such failure. In such a case director need not vacate the office.

- (f) He becomes disqualified by an order of court u/s203.
- (g) He absents himself from 3 consecutive Board meetings or from all board meetings for 3 calendar months, whichever is longer, without obtaining leave of absence from the Board.
- (h) He fails to obtain within 2 months the qualification shares.
- (i) He accepts a loan or any guarantees or security for a loan from the company in contravention of sec. 295;
 - (a) Whether by himself.
 - (b) By any person for his benefit
 - (c) On his account
 - (d) From any firm in which he is a partner
 - (e) From any private company of which he is a director
- (j) He acts in contravention of section 299.
- (k) He is removed in pursuance of section 284.
- (l) Having been appointed a director by virtue of his holding any office or employment and he ceases to hold such office or employment. (e.g. whole time director).

Note: A private company can provide additional grounds for vacation of office by directors in its Articles.

With respect to the points b, c, d above, the disqualification shall not take effect for 30 days from the date of adjudication/sentence/ order.

However, where any appeal is preferred within the said 30 days and such appeal results in adjudication / sentence / conviction, the disqualification shall not have any effect until the expiry of 7 days from the date of disposal of such appeal / petition.

Further, where another appeal is preferred within 7 days and if such appeal is allowed and such appeal would result in the removal of disqualification, then disqualification shall not have any effect until such further appeal / petition is disposed of.

Section 284: Removal of directors.

- (1) The following director cannot be removed by the company in general meeting:
 - (i) A director appointed by Central Government u/s 408.
 - (ii) Directors appointed under IDRA.
 - (iii) Directors appointed under SICA.
 - (iv) A director of a private company holding office for life on 1/4/1952.
 - (v) Director elected by the principle of proportional representation u/s 265.
 - (vi) Directors appointed by CLB u/s 402.
 - (vii) Nominee directors.
- (2) A company may, by ordinary resolution passed in general meeting after giving special notice of such resolution, remove a director before the expiry of his term of office.
- (3) On receipt, the company shall forthwith send on copy to director to enable him to make a representation.
- (4) If the director makes representation, in writing and requests the company to notify it to the members, the company shall, unless it is received by it too late for it to send to the members.
 - (i) State the fact of the representation made to members to whom notice is sent.
 - (ii) Send a copy of the representation to members to whom notice is sent.

- (5) If the representation is not sent as aforesaid, the company must at the instance of the director read it out at the meeting.
- (6) Director is also entitled to be heard on the resolution at the meeting.
- (7) If such representation is used to secure needless publicity for defamatory matters, then CLB can prohibit such representation on receipt of application from the aggrieved parties.
- (8) Another director can be appointed in his place (in the same meeting) provided special notice of the intended appointment has been given.
- (9) Such appointed director shall hold office for the period of his predecessor
- (10) Such vacancy can also be filled as a casual vacancy u/s 262.

Section 291: General Powers of Board.

- (1) The BOD shall be entitled to exercise all such powers and to do all such acts as the company is authorized for do.
- (2) The BOD shall not exercise any power or do any act which is to be exercised or done by the company in general meeting.
- (3) The BOD action or power should not be inconsistent with the following.
 - (i) Companies Act or any other Act.
 - (ii) Memorandum or Articles of the company.
 - (iii) Any regulations made in general meeting or otherwise.
- (4) The company in general meeting cannot by regulation invalidate the prior acts of the Board which would have been valid if that regulation had not been made.

Section 292: Certain powers to be exercised by Board only at meeting.

The following powers are to be exercised only by means of resolutions passed at Board meetings.

- (i) To make calls on shareholders in respect of money unpaid on their shares.
- (ii) To authorize buy back u/s 77A.
- (iii) To issue debentures.
- (iv) To borrow moneys otherwise than on debentures.
- (v) To invest the funds of the company.
- (vi) To make loans.

The Board can delegate the powers mentioned in (iv), (v), (vi) to

- ⇒ Any committee of directors
- ⇒ MD, Manager or any other principal officer
- ⇒ Principal Officer of the branch.

The Board should pass a resolution for such declaration.

The resolution delegating the powers should contain the extent of authority granted to the delegate.

Point (iii) above (i.e.) to borrow money, excludes borrowings by a banking company from other banking companies or from RBI, SBI or other banks.

With respect to OD / CC, the arrangement made by the company with its bankers is to be considered and not the day to day operations.

However, the above powers can be restricted by the company at general meeting.

Section 293: Restrictions on Powers of Board.

The BOD of a public company cannot without the consent of the company in general meeting.

- (i) Sell, lease or otherwise dispose of the company's undertaking or substantial part of the undertaking.
- (ii) Limit, or give time for the repayment of any debt due by a director.

(Renewal or continuance of an advance made by a banking company to its director in the ordinary course of business is to be excluded)

- (iii) Invest the amount received on disposal of undertaking otherwise than in trust securities.
- (iv) Borrow moneys where the moneys to be borrowed together with the moneys already borrowed will exceed the aggregate of the paidup capital and free reserve (temporary trans from bankers in the ordinary course of business is to be ignored)
- (v) Contribute to charitable or other funds not directly related to the business of the company or the welfare of its employees, any amounts the aggregate of which will exceed 50,000/- or 5% of its avg. net profits (Sec. 349, 350) during the immediately preceding 3 financial year, which ever is greater.

With respect to (iv), (v) above, where a resolution is passed at the general meeting authorizing the Board to borrow or contribute, such resolution should contain the extent of authority granted to the Board.

Temporary Loans	
Includes	Excludes
* loans repayable on demand	* Loans raised for the purpose of financing expenditure of a capital nature.
* Loans repayable within 6 months (cc, bill discounting etc.)	
* Other short term loans of seasonal character.	

The company should not reduce its capital due to sale, lease or otherwise of an undertaking or part of undertaking.

Where the company has borrowed in excess of the limits specified in (iv) above, the tender cannot demand repayment unless he proves that he had advanced the loan in good faith and without the knowledge that the limit had been exceeded.

Section 299: Disclosure of interests by director.

- (1) Every director of a company, who is in any way
 - ⇒ Directly or indirectly
 - ⇒ Concerned or interested in a
 - ⇒ Contract or arrangement or
 - ⇒ Proposed contract or arrangement
 - ⇒ Entered into or to be entered into
 - ⇒ By the company or on behalf of the company should disclose the nature of his concern / interest at the Board meeting.
- (2) Such disclosure should be made at the 1st Board meeting held after the director becomes concerned / interested.
- (3) Where a contract or arrangement is Proposed, disclosure should be made at the Board meeting at which the contract / arrangement was entered into and taken for consideration or at the first Board meeting held after he becomes interested / concerned in case he was not interested at the time of entering the contract.
- (4) Disclosure should be made by giving a general notice to the Board.
- (5) Such notice shall have effect during the financial year in which it is given.
- (6) Such notice can be renewed for 1 more financial year by giving a fresh notice in the last month of the financial year before expiry.
- (7) Such renewal notice should also be given to the Board and the director should take reasonable steps to ensure that it is brought up and read at the 1st meeting of the Board after it is given.
- (8) This section does not restrict the director to have any interest / concern in any contracts / arrangements with the company.
- (9) Where a contract / arrangement is entered into between 2 companies and one or more directors of one company holds not more than 2% of the paid up share capital in the other company, this section shall not apply.

Chapter 5

BOARD OF DIRECTORS MEETING

Section 285: BOARD TO MEET ATLEAST ONCE IN EVERY 3 CALANDER MONTHS

- Board meeting should be held atleast once is every 3 months.
- Atleast 4 such meetings must be held is a year.
- Central government has powers to exempt certain / any class of companies from the application of the above section.

Special points

(1) The year means calendar year.

(2) **DCA opinion:**

The Board meeting may be held on any date between 1st Jan & 31st March, 1st April & 30th June & so on.

But the above view seems to contradict to the plain words of Sec. 285(i.e.) the time gap between 2 meetings should not be more than 3 months. Moreover the aforesaid option of DCA seems to contradict the Marginal notes of the above section.

(3) **Duty of Directors to attend Board Meeting:**

The Director of a company need not attend all meetings of the Board. But his willful non-attendance w.r.t. important meetings may amount to negligence for which he may be held liable, if prejudice thereby is caused to the company (or) to the general body of shareholders.

Example: A. Ltd has 5 Directors. Mr. A. one of the director willfully & recklessly absented himself from a series of Board meetings, which transacted businesses having serious impact on the affairs of the company. The other Directors using his absence dissipated the assets of the Company by incurring wasteful & other improper expenditure. But had Mr. A. been present the entire picture could have changed. In this case Mr. A is answerable to the losses of the company. Moreover Sec. 283 also contemplates vacation of office of Director, if he absents himself from three consecutive Board meeting or did not attend all Board meeting held during a period of three months without obtaining leave of absence.

(4) Time & place of Board Meeting:

Unlike Sec. 166, Sec 285 does not require the Board to hold Board Meeting during business hours or on a day other than public holiday or only at the Registered Office. So the Board meeting can be held on any place & need not be at the Registered Office.

BOARD MEETING

Requires statutory records that are to be kept only at the Registered Office & are allowed for Inspection by members.	Which does not requires so.
Board Meeting can be held at a place other than Registered Office only if it does not come in the way of the right of members to Inspect such records.	Board Meeting can be held anywhere.

- (5) Any irregularity w.r.t the conduct of Board Meeting will in no way affect the rights of 3rd party acting bonafide.
- (6) **Section 25 Companies:** It is enough if the Board Meeting is held within every six calendar months. (Govt. notification)

Section 286: NOTICE OF BOARD MEETINGS

DIRECTOR

For the time being present in India.		Others	
Notice in writing should be served on him (i.e.) it should be sent to him wherever he is.		At his usual address in India.	

Special Points

- (1) **Notice to Directors residing abroad:** By reading the plain words of this section, notice need not be sent to the foreign country. But if AOA requires the sending of notice abroad, then it has to be sent.
- (2) **Importance of notice:** Notice of Board meetings must be sent to all Directors. Failure to do so will render the resolution passed at the meeting null & void.
- (3) In *Arunachalam Chettiar Vs. Kaleswara Mills Ltd.* It was held that it is sufficient compliance with provision of Sec 286 if the AOA states that "on the 1st Saturday of each month, there would be a Board Meeting".
- (4) **Whether notice of adjourned Meeting necessary:** In *Pramod Kumar Mittal Vs. Southern Steel Ltd*, it was held that notice of adjourned meeting need not be given unless AOA provide otherwise. The logic behind this is, the adjourn meeting is only a continuation of original meeting & therefore the notice of original meeting holds good for all the adjournments. But in the following situations notice should be given even for adjourned meeting:

- Where a meeting is adjourned since die.
 - Where a new business is to be transacted. (R.V. Grim shah Case)
- (5) **Ratification of Improper notice:** In Bharat fire & general Insurance Company Ltd Vs. Parameswari Prasad Gupta, it was held that, where notice is not given as required but all directors attend the meeting and do not object to the absence of notice (or) where the absentee Directors do not complain of want of notice, the proceedings at the meeting will not be invalid especially if they are ratified at a subsequent meeting at which the absentee directors are present.
- (6) **Waiver of notice:** A Director who is entitled to notice cannot waive his right to receive notice.
- (7) **Length of notice:**
- Not provided in the Section.
 - However AOA can prescribe
 - The logic for not providing the length of notices is that, the Board may have to meet instantaneously for transacting certain urgent business, so to facilitate conducting emergency meeting, the length of notice is not contemplated under provisions of Sec. 286
- (8) **Conditional notice invalid:** Contingent notice is not a sufficient notice (Alexander Vs. Simpson)
- (9) **Notice to Interested Directors:** There is a concept of Interested & Disinterested Director w.r.t. Board Meeting. Interested Director means, a Directors who is concerned / interested in a business to be transacted at the Board Meeting. The concept of interested director should be applied to each agenda & not w.r.t. Board Meeting as a whole.

Sec. 300 prohibits voting rights of Interested Directors & they are not allowed to participate in the discussion held during the Board meeting & they are also not counted for the purpose of Quorum u/s 287. But this does not mean that notice should not be sent to the Interested Directors (i.e.) the concept of interested directors does not affect the requirements of Sec. 286.

(10) **Agenda to the Board Meetings:** Agenda not necessary even if the meeting is extra-ordinary or special (Abnash Kaur Vs. Lord Krishna Sugar Mills Ltd.) (i.e.) the Board can transact any business even without formal agenda. But it is healthy Secretarial Practice to include agenda also in the notice, so that the Director may be knowing the materiality of the business to be transacted & may decide whether to attend the Board Meeting (or) not. Even when if they decide to attend, they may come prepared for the discussion if they are informed of the agenda to the meeting.

Note: But there are certain businesses w.r.t. which sections in the Act requires compulsory inclusion of agenda in the notice to the meeting:

- 1) Section 316: appointment of MD who is already a MD in one or more companies.
- 2) Section 386: appointment of Manager who is already a manager in one or more companies
- 3) Section 372A: inter corporate investments etc.

Note: The concept of ordinary & special resolution applies only to general Meeting & not to Board Meeting. w.r.t. Board Meeting there are only 2 types of resolution:

- (a) Ordinary resolution
- (b) Unanimous resolution.

Section 287: QUORUM FOR BOARD MEETING

- $1/3^{\text{rd}}$ to Total Strength (or) 2, which ever is higher.
- For the above purpose only disinterested directors should be considered.
- Total strength means Total strength fixed by AOA (-) vacancies in the Board.
- If the no. Of Interested directors equals (or) exceeds $2/3^{\text{rd}}$ of total strength then even 2 directors disinterested can constitute quorum.

Example: Let as assume that A. Ltd has by its AOA fixed 10 Directors as the total strength but at present, office of a director is vacant. The no. of directors present at the meeting were 5 in number out of the above 2 Directors are Interested. In this case the quorum will be $1/3^{\text{rd}}$ of total strength (i.e.) $1/3 * 9 = 3$ (or) 2 whichever is higher. Therefore 3 or 2 whichever is higher, which means 3 disinterested Directors. So the company has required quorum.

If out of 9 directors, 7 directors are interested, then the Quorum is deemed to be present even if atleast 2 disinterested directors are present.

Special points

- (1) The quorum is presumed to be present unless the presumption is questioned at the meeting (or) the records disclose that the quorum was infact not present.
- (2) Time at which the quorum should be present
Quorum should be present w.r.t. each & every business transacted. (Compare with GM)
- (3) **No. of Directors falls below the quorum:** Where the no. of Dir. Of the company is reduced below the minimum fixed by AOA, business may still be transacted if a quorum exist & is present. But where the number is reduced below the quorum requirement, the business cannot act unless the number is made up by the BOARD itself / thro' the general meeting. In this case disinterested Directors can be appointed u/s 260 as additional Directors / a general meeting can be called for appointment of a director. (DCA opinion)
- (4) **AOA can increase the quorum but cannot reduce it.** In Amrit Kaur Puri Vs. Kapartala Flower Oil & General Mills Co. Pvt Ltd, it was held that, the Section only indicates the min. no. of Dir. necessary to constitute a proper Quorum. It is open to the company by its AOA to indicate a higher but not a lower number, as constituting a valid quorum.

(5) Decision by majority.

Company	
Adopted Table 4 (or) Has provision in line with reg. 74 of Table A.	Others
Since regulation 74, specifically provides that decisions should be made by majority, it is enough if the resolution of is approved by majority of Director excepting SEC. 316, 386 & 372A where unanimous approval is necessary.	If AOA is silent, then all the directors present should approve the resolution.

- (6) w.r.t. Committee meeting, the whole of the committee should meet (no Quorum specified)
- (7) Any irregularity with respect to Quorum will not affect, the contracts entered into with 3rd party provided if such person has no knowledge of such irregularity.

Section 288: PROCEDURE WHEN MEETING IS ADJOURNED FOR WANT OF QUORUM

Board Meeting not held



For want of Quorum	For any other purpose
Automatically adjourned to next week same day, time & place. But if such day is a public holiday, to the next succeeding working day at the same time & place. (Note: the words "unless the articles otherwise provides")	Can be held on a public holiday.

- ⇒ The provisions of SEC. 285 shall not be deemed to have been contravened merely by reason of fact that a meeting of Board had been called in compliance with terms of that section could not be held for want of Quorum.

Section 289: PASSING OF RESOLUTION BY CIRCULATION
Modes of passing Resolution

At the Board Meeting

Thro' circular resolution

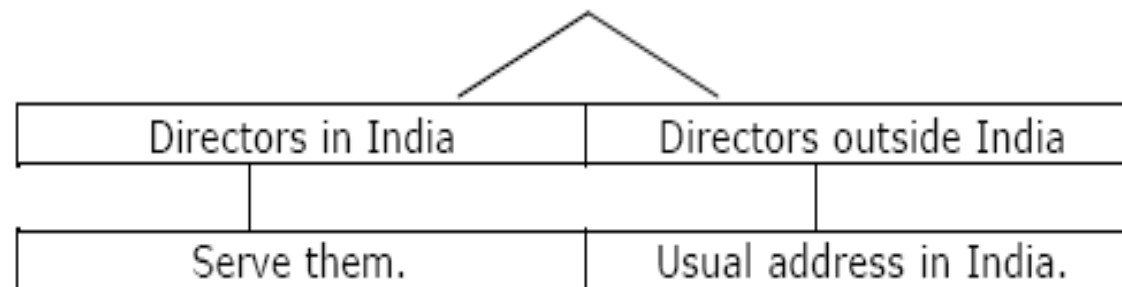
Following Sections requires passing of resolution only at the Board meeting:	If AOA / act do not require Board Meeting, circular resolution can be passed.
(1) SEC. - 262	
(2) SEC. - 292	
(3) SEC. - 297	
(4) SEC. - 299	
(5) SEC. - 308	
(6) SEC. - 316	
(7) SEC. - 386	
(8) SEC. - 372A	
(9) SEC. - 488	
(10) SEC. - 293A	
FD Advertisement	

Steps:

(1) Preparation of draft resolution that is to be circulated.

(2)

Sending of the draft resolution to



(3) Resolution is said to have been passed if all directors have approved it then present in India (or) majority of them.

(4) Passing resolution by circulation not possible if the no. of Directors present in India is less than the req. of quorum.

Section 290: VALIDITY OF ACTS OF DIRECTORS

Act done by Director whose appointment is defective & making it invalid

Company is not aware of such defect	Company is aware of such defect
Acts done is valid notwithstanding defect in appt.	Acts done is invalid.

Chapter 6

Sole Selling Agent

Section 294: APPOINTMENT OF SOLE SELLING AGENT TO REQUIRE APPROVAL OF COMPANY IN GENERAL MEETING.

- 1) Can be appointed for a maximum period of only 5 years. But reappointment is not prohibited.
- 2) Ratification of appointment, by company in the general meeting held immediately after the appointment is necessary to make the appointment valid. If no approval is obtained then the appointment becomes void.
- 3) Government has got the Power to investigate the terms & conditions of appointment of Sole Selling agent & vary the same, if it is against company's interest.
- 4) If more than one selling agent is appointed by the company, the government has got the power to declare one selling agent as Sole Selling Agent & has got the power to vary their terms of appointment.
- 5) Officers of the Company have got the duty to provide assistance for investigation made by the government.

Section 294A: PROHIBITION ON PAYMENT OF COMPENSATION TO SOLE SELLING AGENT FOR LOSS OF OFFICE IN CERTAIN CASES.

a. No compensation is payable to sole selling agent in the following cases:

- Appointment of sole selling agent is not approved in the general meeting.
- Where the sole selling agent has resigned.
- Where the sole selling agent has resigned due to amalgamation or reconstruction of the company and has been appointed as sole selling agent of the amalgamated or reconstructed company.
- Where the sole selling agent is guilty of Fraud, Breach of trust, gross negligence
- Where he himself has instigated termination.

b. Ceiling in other cases	=	[Residual period or three years] (Whichever is less)	*	Average remuneration (i.e.) Avg. of remuneration earned during preceding three years or if he is not in service for three years, the period of service)
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Section 294 AA: POWER OF CENTRAL GOVERNMENT TO PROHIBIT SOLE SELLING AGENT APPOINTMENT IN CERTAIN CASES.

1) Where the central government is of the opinion that the Demand for a product is greater than its supply and services of a sole selling agent is not necessary to create market for the product, then it can notify that, no sole selling agent should be appointed for that product.

2) Approvals those are required for appointment of a Sole Selling Agent
[Reading Sec 294(2), 294AA (2), 294AA (3)]

	Paid up capital is less than Rs.50lacs.	Paid up capital is 50lacs or more
Substantial interest	Previous approval of Central Government & ordinary resolution.	Previous approval of Central Government & special resolution.
No substantial interest	Ordinary resolution.	Approval of Central Government & special resolution.

Note1: Provisions relating to Sole Buying Agents. [SEC .294AA(8) & 294AA (4)]

i. Approvals required for appointment

	Paid up capital is less than 50 Lacs	Paid up capital is 50 Lacs or more
Substantial interest.	Previous approval of Central Government	Previous approval of Central Government & special resolution.
No substantial interest	No approval	Approval of Central Government & Special resolution

Note II

- ii. SEC 294A (Compensation) – will not apply to sole buying agent.

Substantial interest

Individual	Firm	BC.
With relatives	Partners with their relatives	Directors with their relatives
Beneficial interest	Beneficial interest	Beneficial interest

Exceeds 5 Lacs / 5% of paid up share capital which ever is less

Chapter 7

Political Contribution

Section 293A: PROHIBITIONS & RESTRICTIONS REGARDING POLITICAL CONTRIBUTION

➤ Contribution covered under this section

- Contribution to Political party
- Contribution to political purpose to any person.

➤ The following companies cannot contribute to political party or for political purpose:

- Government company
- Company in existence for less than 3 financial years.

➤ Conditions to be fulfilled by other companies for making the above contribution

- Resolution at Board meeting authorizing the above contribution should be passed.
- Contribution should be within the ceiling give below:
- Ceiling = 5% of Average Net profit of preceding three financial years
- **Note:** Net profit is the profit computed as per Sec 349 & 350
- Disclosure should be made in profit & loss a/c about the
 - ⇒ Total amount contributed
 - ⇒ Name of person to whom contributed.

➤ **Deemed political contribution**

- i. Contribution / subscription/ donation to any person carrying on any activity to affect public support for a political party amounts to contribution for **political purpose.**
- ii. Amount incurred for advertisement in publications run
 - i. By or on behalf of a political party amounts to contribution to a **political party.**
 - ii. For advantage of a political party amounts to contribution for political **purpose.**

Chapter 8

REGISTERS

Section 301: REGISTER OF CONTRACTS, COMPANIES & FIRMS IN WHICH DIRECTORS ARE INTERESTED

1) To what does the register relate

The register relates to contracts u/s 297/299,

2) Contents

- a) Date of contract
- b) Name of the parties.
- c) Terms and conditions of contract.
- d) Date of placing the contract before the Board of directors.
- e) Names of directors who voted for and who voted against and who remained neutral to the contract.

3) Time within which entry should be made in the Register

Contracts

Requiring Board approval	Other Contracts
Within 7 days of BOD meeting at which the contract was approved (exclusive of public holidays)	Later of: 7 days of receipt of contract at Registered Office Or 30 days of contract.

4) Necessity to place the Register before next BOD meeting

The register should be placed before the next BOD meeting and all Directors present should sign it.

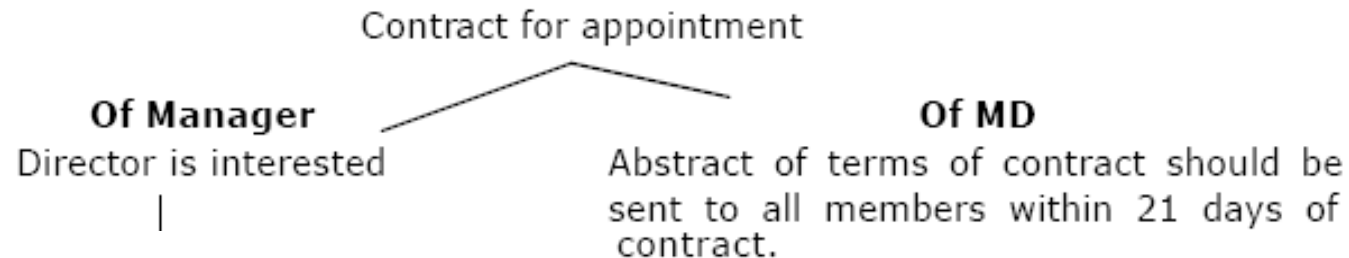
5) Place of keeping : At the Registered office of the Company.

6) Provision relating to inspection, taking copies and extracts:

Similar to Sec163 Provisions.

Note: If the value of goods/ services doesn't exceed Rs1000/-, this Section does not apply.

**Section 302: DISCLOSURE TO MEMBERS OF DIRECTOR'S INTEREST IN
CONTRACT APPOINTING MANAGER/MD.**



Abstract of terms of the contract, along with the memorandum specifying the nature of interest of the director should be sent to all the members within 21 days of the date of contract.

Note: If a contract has already been entered, in which the director was interested, then if there is a variation in such contract, then also the above provisions will apply.

If any other director is interested in such contracts, in addition, a memorandum specifying the nature of his interest should also be sent.

Note: If a contract has already been entered, in which the director was interested, then if there is a variation in such contract, then also the above provisions will apply.

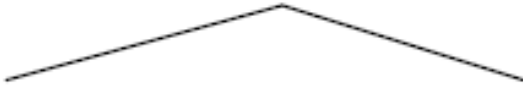
- 1) If the director becomes interested subsequent to the entering of such contract, then the abstracts etc should be sent to all members within 21 days from the date in which he became interested.
- 2) Provision relating to keeping, inspection, taking extracts / copies of above contracts is similar to Sec 163. (Should be kept at registered office.)

Section 303: REGISTER OF DIRECTORS ETC

- 1) Place at which it should be kept – Registered office.
- 2) Contents
 - i. Name, surname
 - ii. Father's name, Father's surname
 - iii. Residential address
 - iv. Nationality
 - v. Details regarding the office of Director/ Manager / Secretary / MD held by him in any other Body Corporate.
 - vi. Date of birth
- 3) Particular regarding whom should be kept
 - a) Director
 - b) MD
 - c) Any person in accordance with whose directions the Board of directors is accustomed to act.
 - d) Manager
 - e) Secretary
- 4) A return containing the particulars specified in the register should be filed within 30 days of appointment or change thereof.

Section 304: INSPECTION OF THE REGISTER

1)



Member	Any other person
• Inspection allowed without charging any fees.	• Inspection allowed on payment of Re.1/- on each occasion.

2) Inspection should be allowed during business hours only

Note: AOA may impose reasonable restrictions but at least 2 hours should be allowed for inspection each day.

Section 305: DUTY OF DIRECTORS ETC TO MAKE DISCLOSURE (APPLIES EVEN TO DEEMED DIRECTOR)

To facilitate maintenance of 303 register disclosure should be made.

Section 306: REGISTER TO BE KEPT BY ROC & INSPECTION THEREOF

- ROC should maintain a separate register incorporating the detail mentioned in the return under Sec 303.
- It shall be open to inspection to public during office hours.

SEC. 307 – Register of director's shareholding etc.

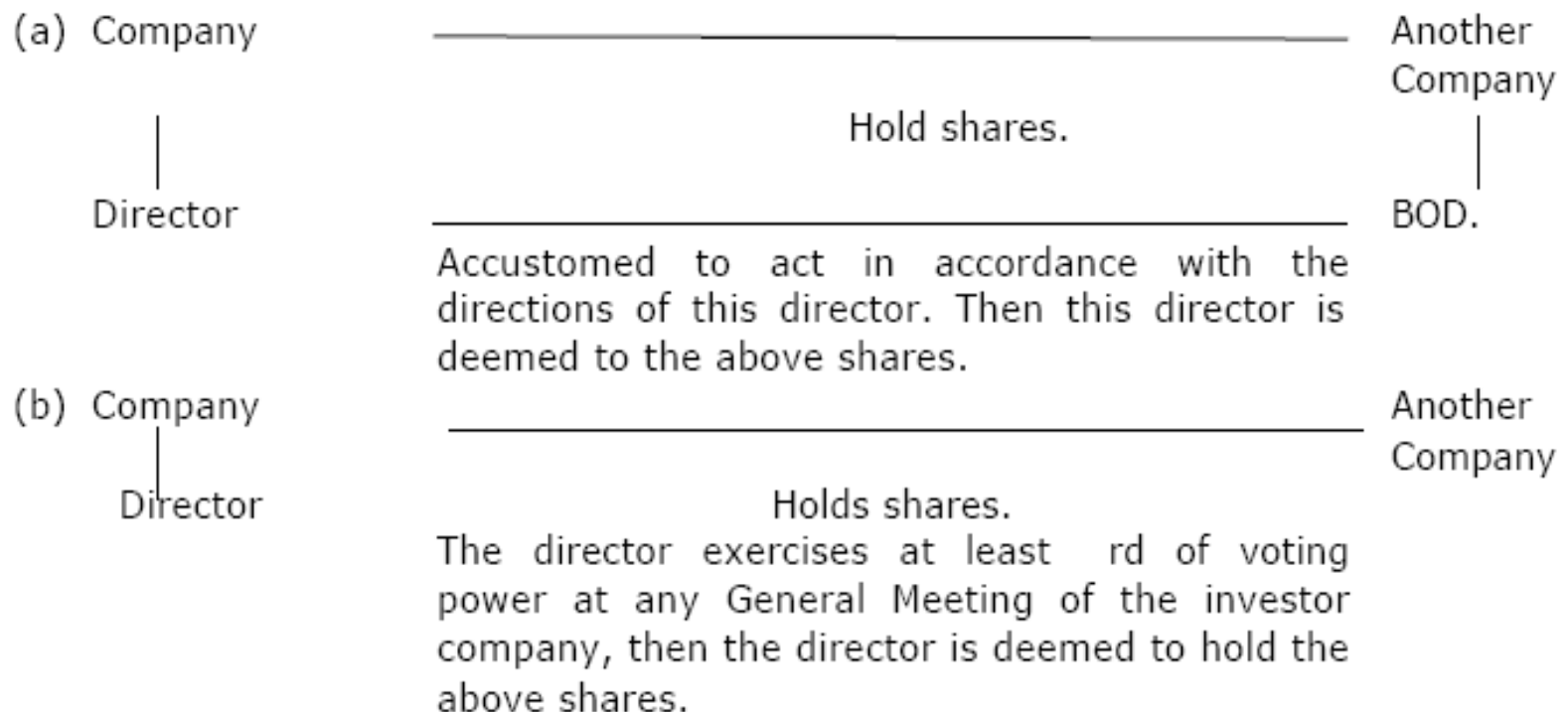
(1) The register should relate to whose shareholding / Debenture holding ?

- a) Directors holding shares.
- b) Managers holding shares.
- c) Deemed directors.
- d) Directors deemed to have shareholdings.

Note: Deemed directors:

Any person in accordance with whose direction, the BOD of the Company is accustomed to act.

Note: Directors deemed to hold shares



(2) **Shareholding or Debenture holding in which company**

- a) Company in which he is the director
- b) Its holding Company
- c) Its subsidiary Company
- d) Subsidiary of its holding company

(3) **Nature of interest**

- i. Registered ownership
- ii. Beneficial ownership

(4) **Contents**

- i. Number of shares / Debentures.
- ii. Description
- iii. Amount involved
- iv. Date of transfer
- v. Consideration for transfers.
- vi. Nature / extent of interest.

(5) Bar on inquiry if details contained are not correct.

(6) **Period allowed for inspection.**

Person inspecting

Central government or ROC.		Others (members / Debenture holders)	
• The register could be inspected at any time		• Business hours (at least 2 hrs a day)	
• Even extracts / copies could be taken at any time.		• During 14 days before AGM & 3 days after AGM.	

Note: exclude Saturdays / Sundays / Public holidays.

**Section 308: DUTY OF DIRECTORS and PERSONS DEEMED TO BE DIRECTORS
TO MAKE DISCLOSURE OF SHAREHOLDINGS:**

To facilitate maintenance of register u/s 307, the above persons should take reasonable steps to ensure that the above matters are read in BOD meeting.

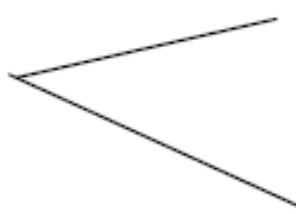
Section 317: TERM OF OFFICE OF MD

- 1) **Applicability:** Applies only to a public company.
- 2) Term shall not exceed a period of 5 years at a time.
- 3) Reappointment or extension is allowed but it should not be sanctioned earlier than 2 years from the date on which it is to come into force.

Chapter 9

COMPENSATION TO DIRECTORS FOR LOSS OF OFFICE

Section 318: COMPENSATION FOR LOSS OF OFFICE NOT PERMISSIBLE EXCEPT TO MD/WTD/DIRECTORS WHO ARE MANAGERS.

- 1) No compensation should be paid to a director who is not an MD/WTD/Director who is a manager.
- 2) **Situation under which no compensation should be paid even to MD/WTD/Directors who are managers:**
 - a) Such person resigns 
 - Due to amalgamation or reconstruction of the company and subsequently has been appointed in reconstructed / amalgamated company.
 - For his own reasons.
 - b) Loss of office arises due to operation of Sec 283 or 203
 - c) Loss of office is due to winding up of the company, which has resulted on account of his negligence.
 - d) He has been found Guilty of fraud, misfeasance, gross negligence or breach of trust.
 - e) He has himself instigated the process of termination of his appointment.

3) Ceiling on compensation: -

Maximum compensation	=	Average Remuneration	* [Unexpired period of service or three yrs]	Which ever is shorter?
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Note: Average Remuneration:

Average of remuneration earned by such director during the three years preceding the date of termination .If his service is less than three years, then Average of remuneration earned during the period of his service.

- 4) If a Company is being wound up and the assets are not sufficient to repay the share holders, their share capital and share premium and termination of office takes place within 12M before the date of commencement of winding up, then no compensation should be paid to such directors.
- 5) Paying Compensation to directors for services rendered in any other capacity is not prohibited.

Section 319: PAYMENT TO DIRECTORS' ETC COMPENSATION FOR LOSS OF OFFICE ETC IN CONNECTION WITH TRANSFER OF UNDERTAKING OR PROPERTY

- 1) If loss of office is due to transfer of property/ undertaking of the company then the compensation is payable as follows:

Compensation

<u>From company</u>	<u>From transferee or any other person</u>
Cannot be paid to a Director who is not an MD/WTD/Director who is a manager	Compensation can be paid to a Dir/MD/WDT if the proposed Payment has been disclosed to the Members & have been approved by them in the General Meeting.

- 3) Any amount received in contravention shall be kept in trust for the company.

Section 320: PAYMENT TO DIRECTOR FOR LOSS OF OFFICE ETC IN CONNECTION WITH TRANSFER OF SHARES.

- 1) Where loss of office is due to transfer of shares in a company and
- 2) The transfer is due to:
 - ⇒ An offer made to the general body of shareholders or
 - ⇒ An offer by a BC to make the company its subsidiary or subsidiary of its holding company or
 - ⇒ An offer by an individual to obtain at least 1/3rd of total voting power, then
- 3) No director should receive any **compensation from the company** for loss of office on account of above transfer.
- 4) **Conditions to be fulfilled to receive compensation from the transferee:**
 - ⇒ The Director should take reasonable steps to ensure that, the particulars of proposed payment are included in the notice of offer made by the transferee.
 - ⇒ The proposed payment should be approved at the class meeting. (Meeting of shareholders whose shares are offered & shareholders of the same class)
- 5) **Deemed approval:**

If quorum not present at the above meeting, then it will be adjourned to a later date.

If in the adjourned meeting also quorum is not present, then approval is deemed to have been granted for giving such compensation.
- 6) **If money is received without fulfilling above conditions, then:**
 - ⇒ It is deemed to have been received in trust for the persons who have sold their shares.
 - ⇒ The expenses incurred in distribution of the above amount should be borne by the director concerned.

Section 321: PROVISIONS SUPPLEMENTARY TO SECTION 318, 319 & 320

- 1) If a Director holds shares in the Company and an offer to obtain shares is made by the transferee u/s 320 and the Director also transfers his shares and as a result of which there will be loss of office for him and the Consideration paid for his shares is greater than the consideration paid for other's shares, then such excess consideration will be treated as compensation for loss of his office and thereby provisions of sec320 should be fulfilled.

2) Meaning of the term compensation for loss of office:

- Damages for breach of contract _____
- Superannuation allowance, gratuity etc in respect of past services_____

Not considered as compensation for loss of office.

Section 322: DIRECTORS and MANAGERS WITH UNLIMITED LIABILITY IN LIMITED COMPANY

Conditions to be fulfilled.

- MOA should provide for the same.
- At the time of appointment, in the proposal itself, a statement that the liability of the Director/Manager if appointed will be unlimited, should be added.
- Promoters / Directors / Managers / Officers should give a notice in writing to the person proposed to be appointed about the fact, that his liability will be unlimited if he is appointed.

Note: Even if such a statement is not added to the proposal or notice in writing is not given, the liability of the person appointed will not be affected i.e. it still remains unlimited. But the Director/Manager/officer who commits default is liable for damages sustained by the person, who was appointed and in addition is also liable for fine.

Section 323: SPECIAL RESOLUTION OF LIMITED COMPANY MAKING LIABILITY OF DIRECTOR ETC, UNLIMITED.

If AOA authorises, MOA could be altered by a Special resolution, to make the liability of Directors/Managers unlimited.

Note: Existing Director's/ Manager's liability will not become unlimited; unless they give their consent. This is only for the current term if they are reappointed, their liability will become unlimited.

Chapter *10*

COMPUTATION OF PROFITS

Section 349: DETERMINATION OF NET PROFITS

(1) **Credits shall be given:** To Bounties / Subsidies from government etc.

Note: If Central Government directs otherwise, credit shall not be given.

(2) **Credits shall not be given for:**

- 1) Securities premium
- 2) Profit on share forfeiture
- 3) Profit on sale of whole or part of an undertaking
- 4) Sale of proceeds immovable property – Original cost

Note: immovable property ≠ goods

(3) **Sums that could be deducted.**

- 1) All usual working charges.
- 2) Director's remuneration.
- 3) Bonus/commission to staff
- 4) Tax on abnormal profits
- 5) Tax on business profits on special reason.
- 6) Interest on debenture.
- 7) Interest on mortgages, loans or advances-Secured
- 8) Interest on Unsecured loans & advances
- 9) Repairs – revenue in nature.
- 10) Contribution u/s 293(i)(e) [charitable purpose]
- 11) Depreciation – u/s 350.
- 12) Unadjusted past years losses.
- 13) Damages payable including those payable for Breach of contracts. (Voluntary payment not allowed to be deducted)
- 14) Insurance premium.
- 15) Bad debts written off
- 16) Excess amount written off u/s. 350 on the year of sale, disposal etc.

Chapter *11*

INTER CORPORATE INVESTMENTS

Section 372A: INTER CORPORATE, LOANS, INVESTMENTS ETC

1) Transactions covered:

- a) Loans made by one body corporate to another
- b) Investment made by one body corporate with another
- c) Guarantee or security given by a body corporate to a loan made by /made to, another body corporate

2) Applicability: This Section does not apply to loans etc., made by

- a) Banking company
- b) Insurance company
- c) Housing finance company
- d) Infrastructure company
- e) Investment company
- f) Private Company

This section also does not

- i) Apply to investment in right shares
- ii) Loans, guarantee, security given by a holding company to its **wholly owned** subsidiary and also in investment in the securities of wholly owned subsidiary.

Note: For the purpose of computation of ceiling (i) and (ii) are considered.

3) **Relevant Definitions**

- a) Loan includes: -
 - Investment in debentures issued by a non-banking company
 - Deposit placed with a non-banking company
- b) Free reserves: -
 - Reserves free for distribution as dividend (as per latest audited B/S available)
 - It includes Securities premium, but does not include share Application Money.
- 4) **Companies prohibited to make loans& investment or give guarantee& security**

Companies, which have committed default in complying with provision of Sec 58A.

- 5) **Interest rate on loan:** interest rate prevailing bank rate.
- 6) **Register u/s 372A** (obligation to maintain is cast on Company)

Note: details regarding, investment in wholly owned subsidiary, Loans, Securities, and Guarantees to wholly owned subsidiary should form part of the Register.

(A) Contents:

- 1) Name of Body corporate.
- 2) Amount involved.
- 3) Terms & purpose.
- 4) Date of loan etc.

(B) Time limit for entry - Within 7 days of loan, security, guarantee or Investment

(C) Provisions regarding inspection, copies, extracts: Sec163 applies

(D) Place of keeping the register – Registered office.

6) Ceiling on Inter-corporate loan, Security, guarantee & Investment:

60% [paid up share capital + Free reserves] (includes both preference & equity)

Or

100% of free reserves

[Whichever is more]

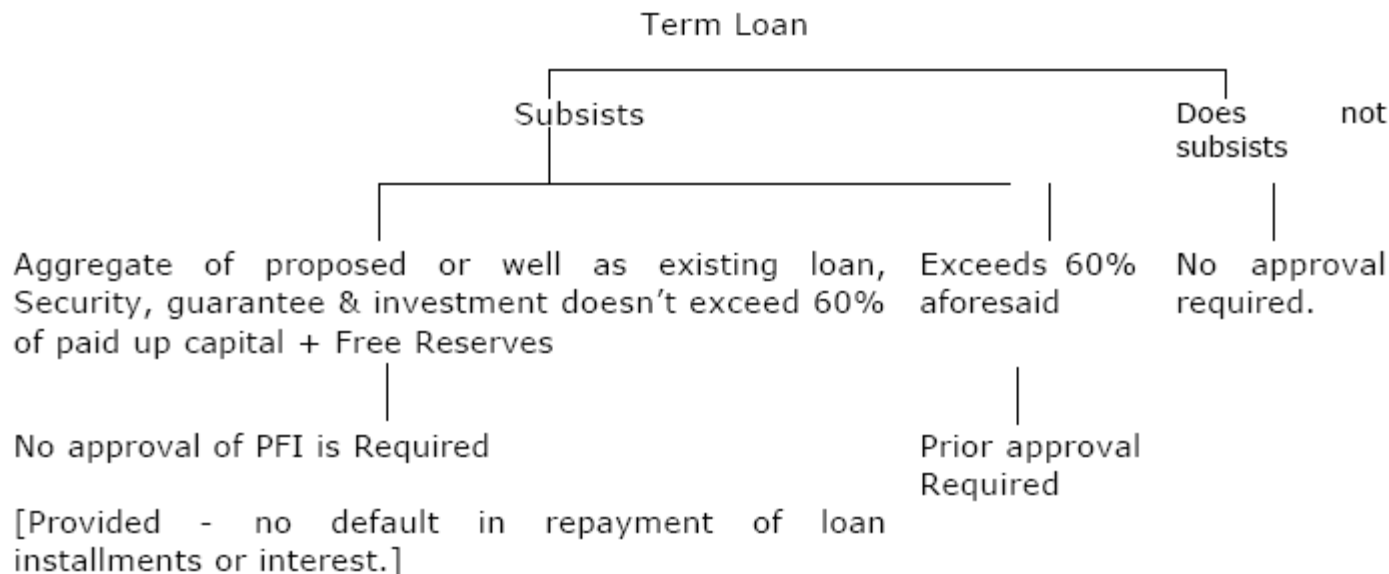
Note:

- While computing the ceiling, both existing as well as proposed loan, Security, guarantee & investment should be taken.
- If in the sum, details regarding bonus share issued by Investee Company are given, then ignore them.

7) Conditions to be fulfilled for making loan etc. above the ceiling

- (1) Board meeting should be convened to discuss the proposal.
- (2) Agenda to Board meeting is necessary.
- (3) Unanimous approval of all director present necessary
- (4) Previous SR in a general meeting necessary.
- (5) Notice of such resolution should contain:
 - a) Limits
 - b) Particulars of Body corporate
 - c) Purpose
 - d) Specific source of funding
 - e) Other relevant details.

(8) Approval from PFI's



Chapter 12

**Arbitration, Compromises, Arrangement &
Reconstruction**

Section 391: Power to make compromise & arrangement with creditors & members

Where a compromise or arrangement is proposed between Company & Creditors or between Company & its members, then application should be made to the NCLT by:

- The Company or
- The creditors or
- The Members or
- The Liquidator (in case of winding up).

The NCLT may on receipt of such application order meeting of creditors or members as the case may be and may also provide direction for holding such meeting.

The above compromise and arrangement should be approved by creditors or members as the case may be at their respective meetings. Such approval should be given by creditors or members (present and voting) who are majority in number and 75% in value.

If NCLT sanctions such compromise & arrangement, then it will be binding on creditors/members/ company/liquidator/contributories.

NCLT should give sanction only if the company /applicant furnishes material facts to a NCLT namely:

- Latest financial position details
- Latest auditors report.
- Latest accounts.
- Details regarding investigation proceedings.

Order of NCLT is effective only if certified copy of such order is filed with ROC.

Section 392: Power of NCLT to enforce compromise & arrangement

The NCLT has the following powers w.r.t compromises and arrangement:

- Power to supervise the carrying out of Compromise & Arrangement
- Power to modify Compromise & Arrangement
- Power to issue directions regarding any matter.
- Power to order winding up if NCLT is satisfied that Compromise & Arrangement cannot be worked satisfactorily.

Section 393: Information as to Compromises & Arrangements with creditors / members.

- a) Directors / MD/ Manager / Trustees of Debenture holders should furnish particulars regarding their material interest in the above compromises and arrangements.
- b) A statement should be prepared containing:
 - * The terms of Compromises & Arrangements and its effect.
 - * Material interest of Directors etc. on the above.
 - * Effects of Compromise & Arrangement on such interest if they are different from the effect on like interest of other persons.
- c) The above statement should be annexed to the notice of the meeting called under section 391.
- d) If notice is advertised, then the above statement should also be advertised. If it is not advertised, at least the place where such statement can be obtained should be advertised.
- e) The company should provide to members / creditors such statement free of charge.

Note:

The particulars regarding trustees are necessary only if the compromise or arrangement affects the rights of debenture holders.

Section 394: Provisions for facilitating reconstruction & amalgamation of Companies

Applicability of this section:

Applies only when:

- (i) Compromise & arrangement relates to reconstruction of the company or amalgamation of two or more companies or
- (ii) The scheme provides for transfer of whole / Part of the undertaking, assets, liabilities of the company to any other company.

In the above case NCLT may provide for the following matters in its order (either in order sanctioning the scheme or subsequent order)

- (i) Transfer of whole / part of undertaking, assets, liabilities etc.
- (ii) Manner of discharge of purchase consideration.
- (iii) Continuation by/against Transferee Company of any legal proceeding pending against / by Transfer Company.
- (iv) Dissolution of Transferor Company without winding up.
- (v) Provisioning for dissenting persons.
- (vi) Incidental, consequential or supplemental matters that are necessary.

In case of a company, which is being wound up, the NCLT should not give sanction for amalgamation unless it receives a report from ROC that business/ affairs of the company have not been conducted in a manner prejudicial to the interest of its members/public.

The NCLT should not pass order of dissolution unless a report from official liquidator stating that the affairs of the company have not been conducted in a prejudicial manner is received.

Once an order is passed, all liabilities and properties of transferor company shall vest with transferee company.

Once an order is passed it should be filed with ROC for registration.

Section 394A: Notice to central government

The NCLT has to give notice to central government about every application received by it u/s 391&394 and should take into consideration representation made by central government before passing an order.

Section 395: Power and duty to acquire shares of shareholders dissenting from scheme or contract approved by majority

This section deals with scheme or contract for acquisition of shares by a company (Transferee Company) in another company (target/transferor company) from shareholders of transferor company. [i.e. it is not a contract between two companies but a contract between a company and shareholders of another company]

The transferee company should keep the aforesaid scheme open for a period of four months.

On the expiry of four months, if shareholders holding nine-tenth in value approve the aforesaid scheme, the transferee company becomes entitled to acquire shares of the dissenting shareholders also.

Note:

- In calculating the nine-tenth, shares already held by nominee of the transferee company or its subsidiary should not be taken into account.
- If the transferee company along with its nominees and subsidiaries already holds more than one-tenth of the aggregate shares of the company then shareholders holding nine-tenth in value and three-fourth in number should approve the above scheme.

It may then send a notice to such shareholders requiring them to transfer their shares. Such notice should be sent within two months from the expiry of the said four-month period.

The dissenting shareholder can go on appeal to the tribunal within one month from the date of receipt of above notice.

If the tribunal decides in favour of the transferee company, the company shall forthwith send the following to the transferor company:

- Copy of notice given to dissenting shareholders
- An instrument of transfer duly signed.
- Amount representing consideration for transfer.

Thereupon the transferor company shall register the transferee company as its member and within one month from date of such registration, intimate the dissenting shareholders that their name has been struck off from the register and amount due to them is with the company.

The transferor company shall keep the amount due to the dissenting shareholder in a separate bank account in trust.

Miscellaneous provisions:

- Every offer / circular containing such offer shall contain the prescribed information.

- Such offer should contain a statement by transferee company disclosing the arrangement made for availability of cash
- Every offer shall be presented to ROC for registration (then only to be circulated)
- ROC can refuse to register
- Appeal against such refusal possible.

Section 396: Power of CG to provide for amalgamation of companies in national interest

Central government can pass order under this section to amalgamate two companies if it is in public interest.

In the order it shall provide for constitution, rights, liabilities, properties etc of the new company.

Care should be taken to ensure that the rights of the members/creditors/debenture holders etc of the existing companies remain same in the new company.

If rights are reduced, then compensation shall be payable for reduction in such rights.

A prescribed authority shall assess the above compensation and the same shall be notified in the official gazette.

The company resulting from amalgamation shall pay the compensation to the members or creditors.

Any person dissatisfied by the assessment made by the prescribed authority can go on appeal within 30 days from the date of publication of such assessment in official gazette. The authority to whom appeal is to be made is the NCLT.

Central government shall not pass any order for amalgamation under this section unless:

- A draft copy of proposed order has been sent to companies concerned,
- Two months time is given to parties concerned for suggestions and objections and
- Appeal if any, for compensation has been finally disposed off by the tribunal.

Copy of order made should be placed before both houses of parliament.

Section 396A: Preservation of books & papers of amalgamated to Transferor Company

Books, papers etc of amalgamated or acquired company shall not be disposed off without central government's permission.

Before granting permission central government may appoint a person to examine them to find out whether any act of commission or omission is there w.r.t promotion, formation or management of the company.

Chapter *13*

**PREVENTION OF OPPRESSION &
MISMANAGEMENT**

Section 397: **APPLICATION TO NCLT FOR RELIEF IN CASES OF OPPRESSION**

1) **The necessity of this remedy**

The Company may be a sound going concern. If remedy is sought u/s 433(f) (Just & equitable clause) for oppressive acts of majority, the remedy may be worse than the disease. Thus remedy u/s 397 gains importance.

In case of oppression of minority or mismanagement of the company, the minority shareholders have the following remedies.



Apply to the National company law tribunal for winding up under just & equitable clause	Apply to National company law tribunal u/s 397 & 398	Apply to CG for Proper relief
---	--	-------------------------------

2) If the affairs of the company are being conducted in a manner.

- Prejudicial to public interest
- Oppressive to any member/members,

then requisite number of members can apply to National company law tribunal for necessary relief

- 3) National company law tribunal, with a view to bring an end to the matters complained of, may pass such order as it thinks fit, after satisfying itself about the following:
- a) The affairs of the company are conducted in a manner
 - Prejudicial to public interest.
 - Oppressive to any member/ members.
 - b) It is just to windup the company, but to windup would unfairly prejudice the applicants.

Notes:

- a) **Meaning of oppression.** (Shanti Prasad Jain & Kalinga tubes)
- Visible departure from the standards of fair dealing and violation of condition of fair play on which every shareholder who entrust the money to the company is entitled to rely.
 - Complaining shareholder must be under a burden which is unjust, harsh & tyrannical.
 - The conduct complained should be a continuing one and not isolated.

Notes:

b) Instances of oppression: -

- (1) Forcing risky objects on unwilling minority
- (2) Unwise, inefficient & careless conduct of a director in conduct of his duties - **not oppression**
- (3) Depriving a member of his ordinary membership rights.
- (4) Unreasonable refusal to accept transfer/ transmission of shares.
- (5) Creating new majority without allowing the minority (petitioner) to participate in further issue.
- (6) Fixing issue price at a substantial higher level **will not amount to oppression.**
- (7) Member can complain of oppression only in this capacity as member & not in his capacity as director/ creditor

Section 398: APPLICATION TO NCLT FOR RELIEF IN CASES OF MISMANAGEMENT.

a) Circumstance under which application to NCLT can be made for relief.

1) Affairs of the company conducted in a manner Prejudicial to interest of company or public

Or

2) Material change has taken place in the management/control of the company and as a result, it is likely that the affairs of the company will be conducted in a manner prejudicial to company's interest/public interest.

Note:

Material change in management/control of the company is deemed to have taken place if there is an alteration:

- In BOD.
- In the ownership of the shares of the company
- In its members (for Company without shares capital)
- In its manager.
- In any other manner what so ever.

NCLT may on receipt of such application, bring an end to the matter complained there of by passing an order.

Important notes

- * Sec. 400: NCLT should give notice of every application received u/s 397/398 to Central Government & shall take into consideration the representation of Central Government.
- * Sec. 401: CG can also be the applicant u/s 397/398 or it can authorise any person to be an applicant u/s 397/398 on its behalf.
- * **Distinction between SEC 397 & 398**

SEC. 397	SEC. 398
• NCLT should pass order only when there are circumstances that necessitate winding up.	• No such requirement.
• NCLT seeks to prevent injustice done to member(s) in their capacity as members.	• NCLT seeks to prevent injustice done to company as a whole.
• NCLT can end matter complained of only.	• NCLT can prevent matters complained of (or) apprehended.

Section 399: REQUISITE NUMBER OF MEMBERS

Company having

Share capital	No share capital
Least of the three:	
• 100 members, • $1/10^{\text{th}}$ of total members, • Member having $1/10^{\text{th}}$ of issued share capital.	• Atleast $1/5$ of total members.

- Joint holder counted as one
- Applicants should have paid all calls & other sum due on shares.
- After obtaining the consent of other members in writing, any one of the above members can apply on behalf of other.

Note:

- (i) CG-may allow even one member to apply to NCLT u/s 397/398, even if Sec.399 condition is not satisfied. (SEC. 399(4))
- (ii) Before authorizing, CG may obtain security from such member for such amount as it thinks reasonable for payment of cost, which NCLT may order to pay.
- (iii) Application cannot be withdrawn without the leave of NCLT.

- (iv) Member authorised by Central Government u/s 399(4) can withdraw application only if notice of such withdrawal is given to Central Government.
- (v) After making application to NCLT, if any member who had given consent to such application withdraws, it will have no effect – (Rajamundry electric supply Company vs. Nageswara Rao)
- (vi) Whether majority shareholder can apply for relief u/s 397

Calcutta high court in Rameshwar Prasad Vs. Sindurs & Foundry Pvt. Ltd., held that majority can apply.

Delhi high court Suresh Kumar Sangh Vs. Supreme Motors Ltd., held that majority cannot apply. (Recent Judgment)

Section 402: POWERS OF NCLT ON APPLICATION U/S 397/398

1) NCLT may provide for the following in its order.

- a) Regulation of conduct of company's future affairs.
- b) Acquisition of shares of any members of the company
 - By any other member
 - By the company. (In this case, it may provide for consequent reduction in share capital.)
- c) Termination, setting aside or modification of contract between company & MD Director or Manager.
- d) Termination, setting aside or modification of contract between company & any other person.

Note:

- (i) Notice to concerned party should be given
 - (ii) Consent of person – is necessary (for modification)
-
- e) Setting aside of any transfer, delivery of goods, payment, or execution of any other act relating to property made or done by/against the company within three months before the application date, which shall be deemed to be a fraudulent preference.
 - f) Any other matter.

Section 403: INTERIM ORDER BY NCLT:

On application by any party to the proceeding for regulating the conduct of company's affairs.

Section 404: EFFECT OF ALTERATION OF MOA/AOA BY ORDER U/S 397/398.

- 1) Where NCLT by an order u/s 397/398 makes alteration to MOA/AOA, then Company should not alter the MOA/AOA in a manner inconsistent with the alteration made by NCLT, without the leave of NCLT.
- 2) Alteration made by NCLT's order shall have same effect, as if, it was made duly by the company.
- 3) Certified copy of order altering MOA/AOA shall be filed with ROC within 30 days of the order.

Section 407: CONSEQUENCES OF TERMINATION/MODIFICATION OF CERTAIN AGREEMENTS.

- No compensation / damages is payable for termination, setting aside or modification of agreements.
- No MD/Mgr/Director of the company whose agreement has been terminated / set aside u/s402, shall be appointed as MD/ Director /Mgr for a period of 5 yrs in the company

Note: CG has power to remove such restriction.

Chapter *14*

WINDING UP

INTRODUCTION

A company is a creation of law. It's existence can be put to an end only thro' a legal process. The process thro' which the existence of a company is put to an end is called winding up.

Once the affairs of the company are completely wound up, then the company will be dissolved.

Provisions relating to winding up. (Sec. 425 – 560)

Sec. 425 Modes of winding up.	Sec. 426 – 432 Provisions relating to contributories.	Provisions relating to every mode of winding up (Sec. 528 – 560)
Winding up thro' NCLT (Sec. 433 – 483)	Voluntary winding up (Sec. 484 – 520)	

1) **Meaning of contributory (Sec. 428)**

- a) Every person liable to contribute to the assets of the company, in the event of winding up.
- b) Holder of fully paid up shares – also considered as contributory.
- c) Person alleged to be a contributory – is also considered as contributory.

Note:

- Winding up – need not always result in deficiency. It may also result in surplus. Fully paid up shareholders are also entitled to participate in such surplus. This is the reason for including them as contributory.
- The contributions made by these contributories are used for:
 - (i) Payment of debts & liabilities

2) Liabilities of contributories (Sec. 426)

Contributories

Past members	Present members

Liabilities of present members as contributories:

Limited Companies

Company limited by shares.	Company limited by guarantee.
- Present members are liable to contribute only to the extent of amount remaining un paid on shares held by them.	a) Liable to contribute to the extent of amt remaining un paid on shares and b) Liable to contribute to the extent guaranteed by them.

Note: When a company goes into liquidation and the dividend is in arrears, then the shareholders will not be treated in paripassu with other creditors but this dividend liability will be taken into account only during adjustment of rights of shareholders as contributories.

Liabilities of past members as contributories

The NCLT has got the power to make the past members contribute to the assets of the company, if it feels that the present members are unable to contribute.

But, in the following cases the past members are not liable to make any contribution:

- a) The gap between the date of cessation and the date of commencement of winding up is more than 12 months.
- b) The debts for which, the contribution is required, was contracted after the date of his cessation as members.

3) **Obligations of directors / managers whose liability is unlimited: (Sec. 427)**

Section 322 & Section 323, allows a company to have directors / managers with unlimited liability.

Directors / managers with unlimited liability

Past	Present

Liability of Present Directors / Managers

Liability as an ordinary members	Liability as unlimited Director / Manager
Sec. 426 will apply.	His liability will be similar to that of a member of an unlimited company.

Note: These directors / managers can be required to make contribution, in their capacity as unlimited director or manager, only if the NCLT deems fit.

Liability of past directors / Managers:

The past directors / managers with unlimited liability can also be required to make contributions. But, in the following cases the past directors / managers with unlimited liability, need not make any contribution:

- a) The gap between the date of cessation and the date of commencement of winding up is more than 12 months.
- b) The debts for which, the contribution is required was contracted after the date of cessation.

Note: The liability of contributories is ex lege and not ex-contractu (Sec. 429). Therefore a fresh period of limitation operates in favour of liquidator.

Contributories

In case of death of a members	In case of insolvency of a members	In case of winding up of Company
(Sec. 430)	(Sec. 431)	(Which is a member in another company (Sec. 432))
Legal representative	Official assignee	Liquidator

WINDING UP THRO' NCLT (SEC. 433 - 483)

Sec. 433 & 434 Grounds for winding up	
Sec. 439 & 440 Petition for winding up to NCLT	
Sec. 441 Commencement of winding up	
Sec. 442 & 443 Powers of NCLT, after winding up petition is presented	
Sec. 444 - 447 Consequences of winding up order	
<u>Sec. 448 - 463</u> Previous relating to Liquidators	
Sec. 464 & 465 Committee of Inspection	
Sec. 466 - 483 Powers of NCLT after winding up order	

Grounds for winding up thro' NCLT (Sec. 433)



(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
Special resolution by company	Not conducting statutory meeting	Non - commencement of business within 1 year from the date of incorporation	Reduction of members below statutory minimum	Unable to pay debts	Just & equitable clause.	Default in filing annual accounts or annual returns for 5 consecutive financial years	The company has acted against the: • Interest of sovereignty and integrity of India • Security of the state • Friendly relations with foreign states • Public order decency or morality	Winding up of sick company by the tribunal under section 424G
For compulsory winding up.	Non - delivery of statutory report to ROC.	Suspension of business for whole year.						

Important points w.r.t. grounds for winding up

- a) Petition u/s 433© will be entertained only if there are indications that the company has no intention to start/ continue its business.

While considering the above petition the wishes of the majority should be respected by the NCLT.

b) Important point w.r.t 433 (e) ground (i.e., unable to pay debts) (Sec. 434)

- (i) **When a company will be deemed to be unable to pay its debts?**

Situation – 1	Situation – 2	Situation – 3
⇒ Company owes an amount to a creditor, exceeding Rs. 1,00,000	Execution / process issued by the NCLT in favour of a creditor and returned unsatisfied.	It is proved to the satisfaction of the NCLT that the company is unable to pay its debts.
⇒ The creditors had served a notice at the registered office requiring the company to repay his dues.		
⇒ The company had neglected to pay / secure / compound his claims.		
⇒ Three weeks had elapsed from the date of notice.		

Important points w.r.t. Just & equitable clause: - Illustrative list of cases falling under Sec. 433(f)

- (a) Where there is a dead lock or crises in management of a company.
- (b) Where the company has been formed to carry on an illegal / fraudulent business.
- (c) Where the company is a "bubble" (i.e., a company with no business to carry on)
- (d) Where the business of the company is carried on in a manner oppressive to any of its members.
- (e) Where the substratum of the company has disappeared. (i.e., the company can no longer carry on any business relating to its main object)

Note: This ground should not be construed as ejusdem generis (i.e., of the same kind / natural with the other clauses (a) to (e) of that section).

Petition for winding up to NCLT (Sec. 439)

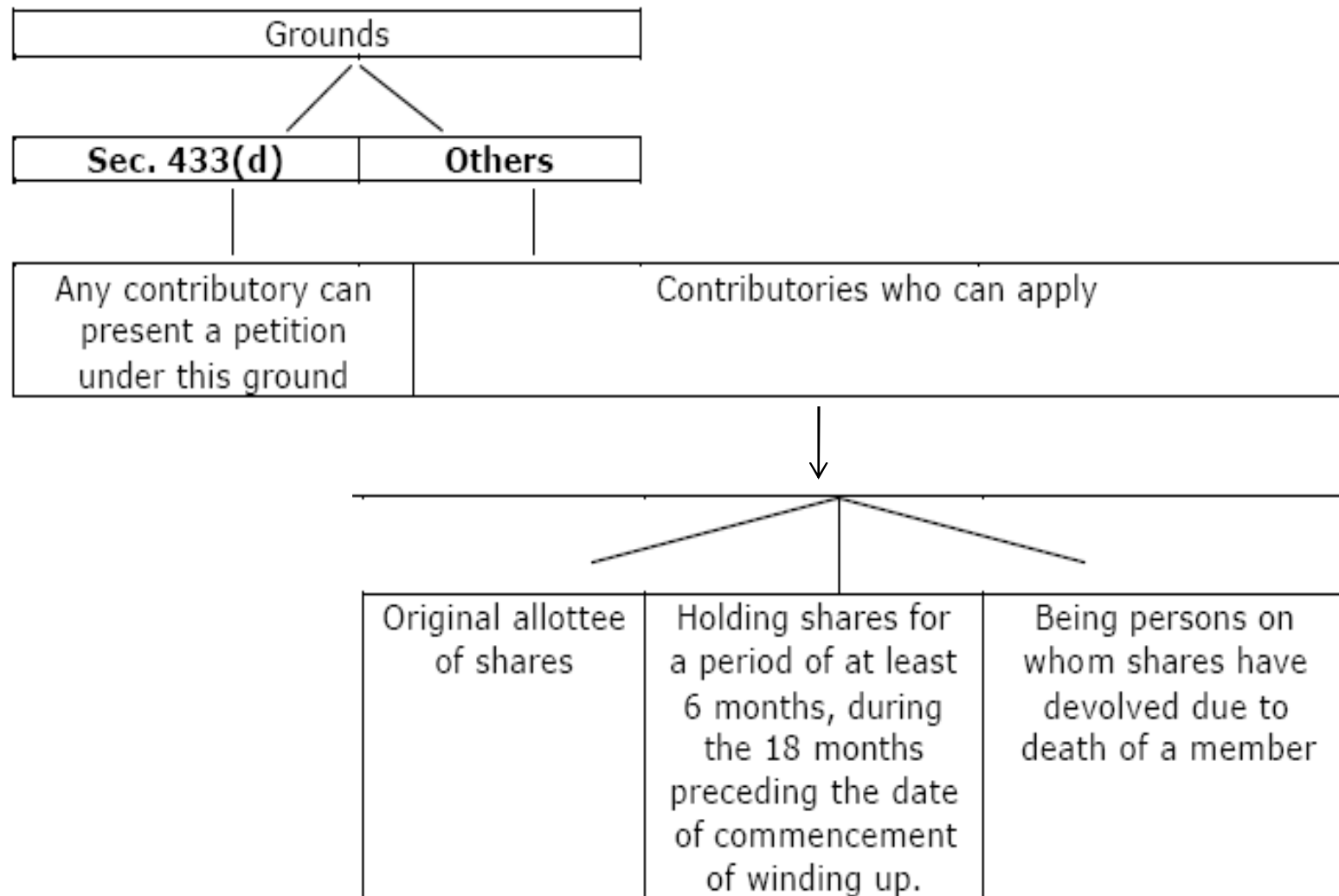
a) Who can present winding up petition to NCLT:

- (i) Company
- (ii) Creditors
- (iii) Contributories
- (iv) ROC
- (v) Any person authorized by CG u/s 243

b) Important points w.r.t. Creditors: -

- (i) The term 'creditor' includes
 - Any secured creditor
 - **Any debenture holder.**
 - Trustees to debenture holder.
 - Contingent creditors
 - Prospective creditors
- (ii) Contingent creditors & Prospective creditors can make petition only with the leave of NCLT.

c) Important points w.r.t. Contributories: -



Note: (For removal of doubts) Holders of fully paid up shares can also present petition even if:

- The company has no surplus assets
- The company has no assets.

d) **Important point w.r.t. ROC:**

- (i) ROC cannot apply under the ground referred to u/s 433(a).
- (ii) T
- (iii) o present a petition for winding up, ROC should obtain the previous sanction of CG.

(iv) **Grounds other than 433(a) ground**

Grounds other than 433(a) ground

433 (e) ground (i.e., unable to pay debts)	Others
	No other restriction

ROC should not present petition unless: ROC is satisfied that the financial condition of the company is not sound having regard to

- Sec. 233A Special audit report.
- Sec. 235 / 237 Inspector's report.
- The financial statements filed with it u/s 220.

Important points w.r.t. Sec. 433(b) ground:

- ⇒ Who can make petition under this ground
 - * Only ROC and / or contributory.
- ⇒ When such petition can be made:
 - * After expiry of 14 days from Sec. 165 deadline.

Even if the company is already being wound up voluntarily / under supervision of NCLT then also petition for winding up thro' NCLT can be made **(Sec. 440)**

- ⇒ Who can make such petition
 - * Official liquidators
 - * Persons referred to u/s 439.

Note: if section 433(h) is attracted, only central government or state government should make application to the tribunal.

Statement of affairs to be filed on winding up of a company(Section 439A)

- ⇒ A company inter alia can file winding up petition to the tribunal. In such case, a statement of affairs should accompany the petition.
- ⇒ If the winding up petition had been preferred by some other person referred to under 439, then if the company opposes, it has to file a statement of affairs.
- ⇒ Contents of such statement:
 - Last known addresses of all directors and company secretary.
 - Details of location of assets of the company and their value.
 - Details of all debtors and creditors with their complete addresses
 - Details of workmen and other employees and the amount outstanding to them.
 - Such other details as may be specified by the tribunal.

Commencement of winding up (Sec. 441)
Winding up

Voluntary winding up.	Through NCLT (Compulsory winding)	U/s 484 already commenced but later petition u/s 440 is made.
Date of Sec. 484 resolution	Date of Presentation of petition	Date of Sec. 484 resolution
Stated in Sec. 486		

Importance of commencement of winding up (Illustrative list):

- a) For settling the list of contributories
- b) For determining the contributories who can present petition u/s 439
- c) For determining whether fraudulent preference is made or not (Sec. 531)
- d) For determining whether a transfer of property fall under Sec. 531A
- e) For determining the validity of floating charge (u/s 534)
- f) For determining the period within which the liquidator is entitled to disclaim onerous property

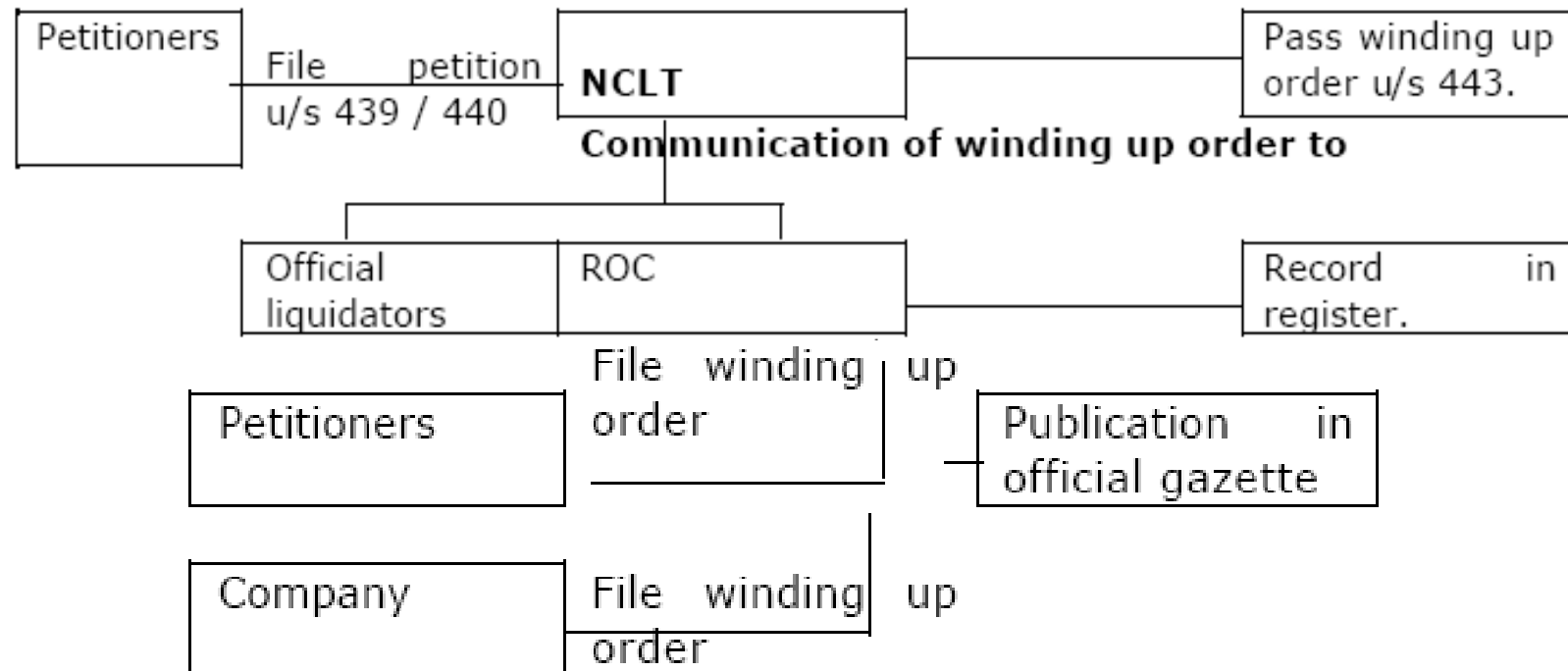
Powers of NCLT on hearing petition (Sec. 443)

Dismiss the petition	Adjourn the hearing conditionally or unconditionally	Make any interim order	Order winding up
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Note:

- (i) Even if all assets of the company are mortgaged or the company has no assets it should not be a ground to the NCLT for dismissing winding up petition.
- (ii) When remedies alternative to winding up of company – are available to petitioners – the NCLT will not order winding up.
- (iii) Where winding up petition is preferred u/s 433(b) then the NCLT instead of ordering winding up, may direct the company: -
 - * To conduct statutory meeting and / or
 - * To deliver statutory report.

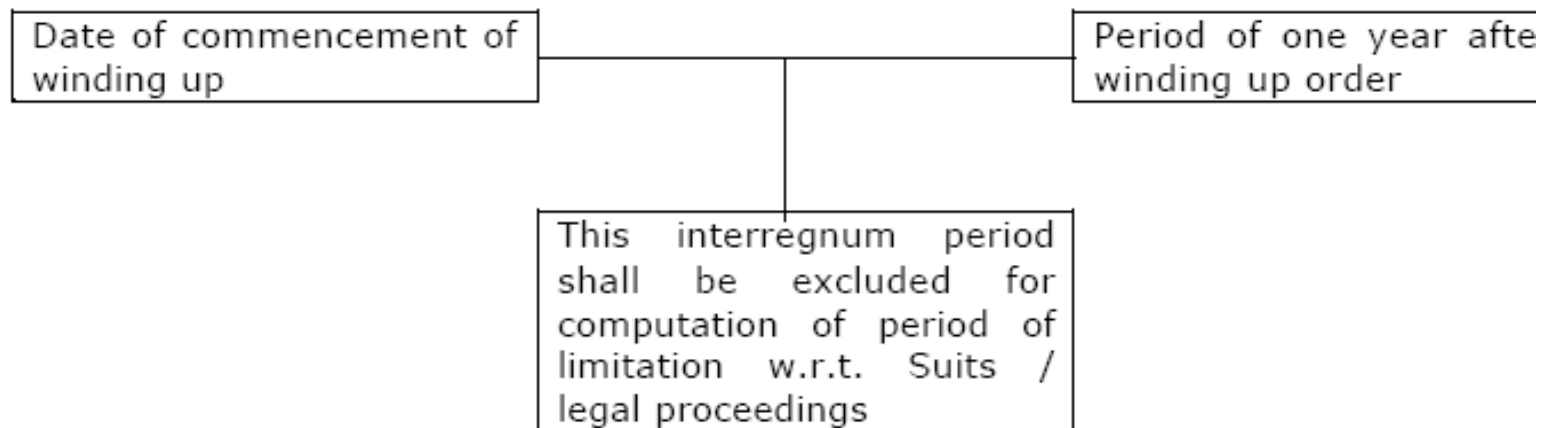
Consequences of winding up order. (Sec. 444 – 447)



Note:

- (i) Petitioners & Company shall file winding up order with ROC within 30 days of winding up order.
- (ii) While calculating 30 days – days required to obtain winding up order, shall be excluded.
- (iii) The winding up order, shall be deemed to be notice of discharge of all employees and officers except, when the business is carried on for beneficial winding up.

SEC. 458A: Exclusion of certain time in computing periods of limitation:



Provisions relating to liquidators. (Sec. 448 – 463)

- a) Who will be appointed as Liquidator in case of winding up thro' NCLT?
Official Liquidator **(Sec. 449)**
- b) Who can be an official Liquidator?
 - Firm of chartered accountants
 - Firm of advocates
 - Firm of company secretaries
 - Firm of cost and works accountants
 - A body corporate consisting of above professionals
 - A whole time or part time officer of central government **(sec 448)**

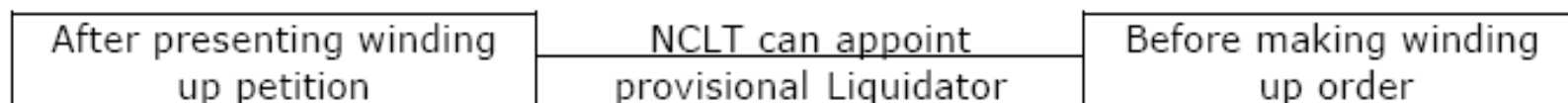
Terms and conditions of appointment:

- Determined by the tribunal for the person other than central government officer.
- Maximum remuneration = 5% of value of debt recovered and realisation of sale of assets. **(Sec 448)**

Priority of liquidators remuneration:

It shall be treated as first charge on the realisation of assets and will be either paid to the central government or official liquidator as the case may be. **(Sec 448)**

Provisional Liquidator: - (Sec. 450)



- ⇒ Before making such an appointment, opportunity of being heard, shall be given to all concerned.
- ⇒ The provisional liquidator shall have all powers, which the official liquidators have
- ⇒ But the NCLT can restrict any of such powers, if it deems fit.
- ⇒ When, winding up order is passed the provisional liquidator becomes official liquidator.

Validity of acts of Liquidators:(Sec. 451):If there is any defect in appointment, it will not affect the validity of his acts, which are otherwise valid.

Where liquidator is appointed, receiver shall not be appointed w.r.t. any assets without the leave of the NCLT. **(Sec. 453)**

Statement of affairs to be made to official liquidator (Sec. 454)

- (i) When winding up order is made or provisional liquidator is appointed, a statement as to the affairs of the company should be submitted to the official liquidator.
- (ii) **Time within which such statement shall be made: within 21 days from the relevant date.**

Contents of such statement:

- 1) Details of assets – (Separately state cash in hand & negotiable instruments)
- 2) Debts & liabilities
- 3) Creditor's details
 - Name, address & occupation
 - Amount of debt.
 - Amount secured
 - Amount not secured
 - Value of the securities
 - Dates on which they were given.
- 4) Debtor's details:
 - a) Name, address & occupation
 - b) Amount due
 - c) Amount likely to be realised.

Who shall make such statement available to official liquidator:

- a) Directors of the company (at the relevant date) and
- b) Managers or Secretaries or Chief officer of the company at the relevant date or
- c) **Such other person required by liquidator.**

Cost of preparation of such statement:

The official liquidators shall reimburse the cost to the person who had incurred such cost out of assets of the company.

Inspection of such statement:

- Who can inspect  on payment of prescribed fees.
 - ⇒ Creditors
 - ⇒ Contributories
- Inspection is allowed at all reasonable times.

Meaning of relevant date:

Relevant date

Date of appointment of provisional liquidator
Or

Date of winding up order

Report by official liquidator: (Sec. 455)

- (i) Once the statement referred to u/s 454 is rec'd, official liquidator should make a preliminary report to the NCLT, containing the following details:
- a) Issued share capital
 - b) Subscribed share capital
 - c) Paid up share capital
 - d) Cash & negotiable securities
 - e) Debts due from contributories
 - f) Debts due to the company (Specify also the extent secured)
 - g) Movable & immovable properties.
 - h) Un paid calls
 - i) All other liabilities
 - j) If the company has failed, the reason for such failure.

Note: The report should also state whether it is desirable to conduct further inquiry into promotion / formation or failure of the company.

(ii) Time within which such report shall be made:

- As soon as possible
- But not later than 6 months from the date of winding up order (or such extended period)

Custody of company's property: Sec. 456

- ⇒ Where a winding up order has been made or the provisional liquidator has been appointed, then the liquidator / provisional liquidator, shall take into his custody all the property, effects and actionable claims of the company.
- ⇒ For this purpose, he can seek the assistance from chief presidency magistrate or district magistrate.
- ⇒ Once winding up order is passed, all the properties will be deemed to be in the custody of NCLT.

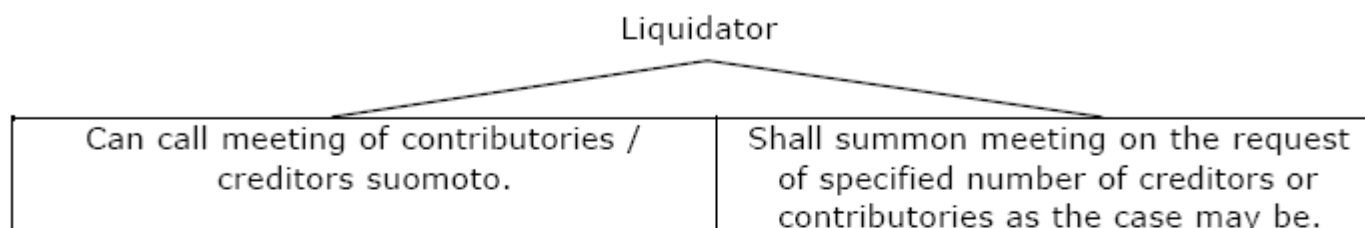
Powers of liquidator: (Sec. 457)

Powers which require sanction of NCLT	Powers which do not require sanction of NCLT
Sub Sec. (1)	Sub Sec. (2)
a) Institute / defend any suits or proceedings in the name or on behalf of the company.	a) Execution of deeds, documents, etc. in the name of the company.
b) Carry on the business of the company for beneficial winding up.	b) Using company's seal.
c) Sell immovable / movable properties & actionable claim of the company.	c) Inspection of records & returns filed with ROC.
d) Raise money on security of the assets of the company	d) Proving, ranking and claiming in the insolvency of a contributory.
e) Power to sell whole of the undertaking of the company as a going concern.	e) Execution of negotiable instruments in the name and on behalf of the company.
	f) Appointing an agent to carry on any business, which Liquidator is unable to do.

Note:

- (i) The NCLT has got the power to control the exercise of the aforesaid powers.
- (ii) The liquidator has got the powers to seek legal assistance from a chartered accountant, company secretary, cost accountants or legal practitioners **(Sec. 459)**
- (iii) **Points to be borne in mind by Liquidator in exercise of aforesaid powers (Sec. 460):**
 - a) Due regards should be given to resolution passed at creditor's meeting, member's meeting and Committee of inspection meeting.
 - b) If there is any conflict between directions given by contributories meeting / creditors meeting and the committee of inspection meeting, then directions by creditors / contributories will override the latter.
 - c) The liquidator can also use his own discretion w.r.t. exercise of aforesaid powers.

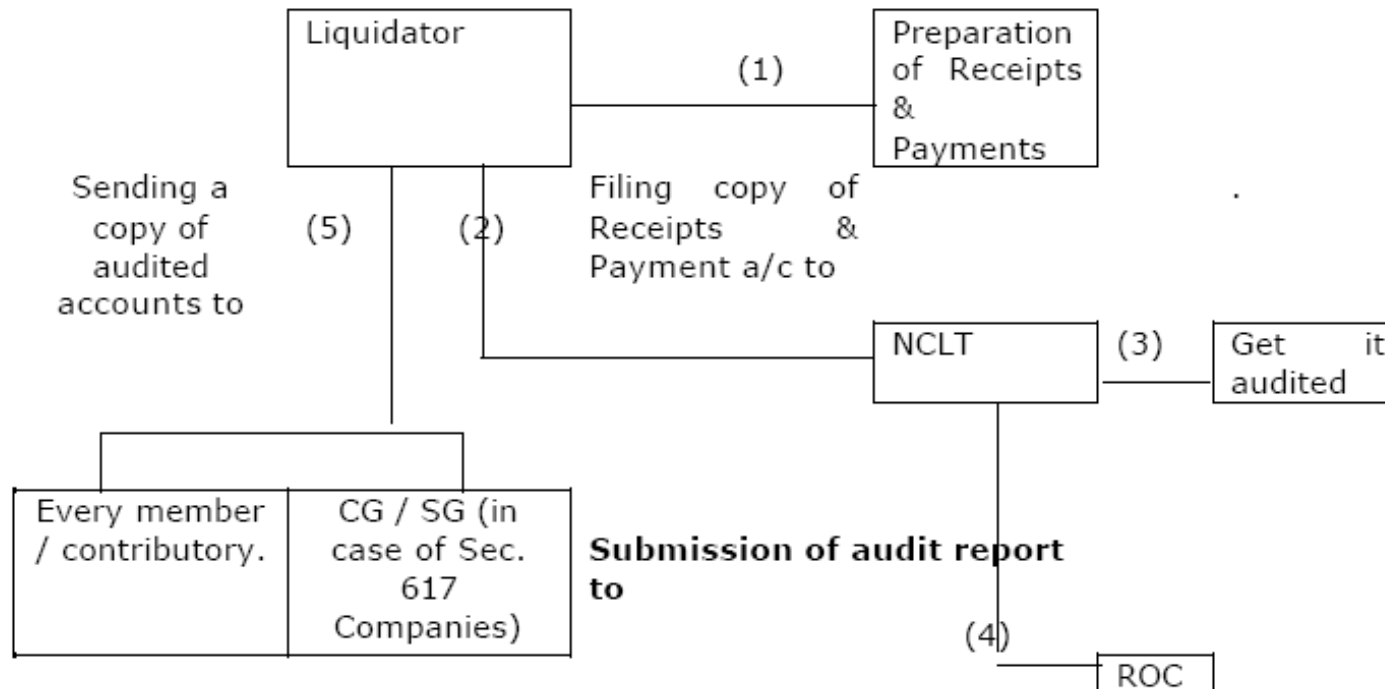
(iv) **Power of liquidator to call creditors / contributories Meeting:**



Note: Specified number: means members / creditors holding at least 1/10th in value.

- n) **Books to be kept by liquidator: (Sec. 461)**
 - (i) He should keep proper books as may be prescribed.
 - (ii) He should also maintain a minutes of proceedings of meetings.
- o) **Audit of Liquidators accounts: (Sec. 462)**
 - (i) Every liquidator should prepare an account of his receipts & payments as liquidator at least twice a year.
 - (ii) The account should be in the prescribed form and shall be made in duplicate.
 - (iii) Such account should be delivered to the NCLT.
 - (iv) It is the duty of NCLT to get the accounts audited.

- (v) Liquidator shall provide necessary assistance for the purpose of such audit.
- (vi) The audit report will be submitted to the NCLT.
- (vii) The NCLT shall deliver a copy of such audited accounts to ROC.
- (viii) In case of a government company, Liquidator shall forward a copy of audited accounts to Central Government or State Government or both.
- (ix) Liquidator shall circulate a copy of such audited accounts among every creditor and contributory.



Provisions relating to committee of inspection: (Sec. 464 & 465)

Section 464

- a) **When committee of inspection will be appointed** If NCLT thinks that it is necessary to have committee of inspection, it may direct the appointment of committee of inspection, to act along with the liquidator.
- b) **Procedure for appointment of committee of inspection**
 - (i) Within 2 months of NCLT's order, the liquidator shall convene a meeting of creditors

Note: This meeting is intended to determine the members of the committee.

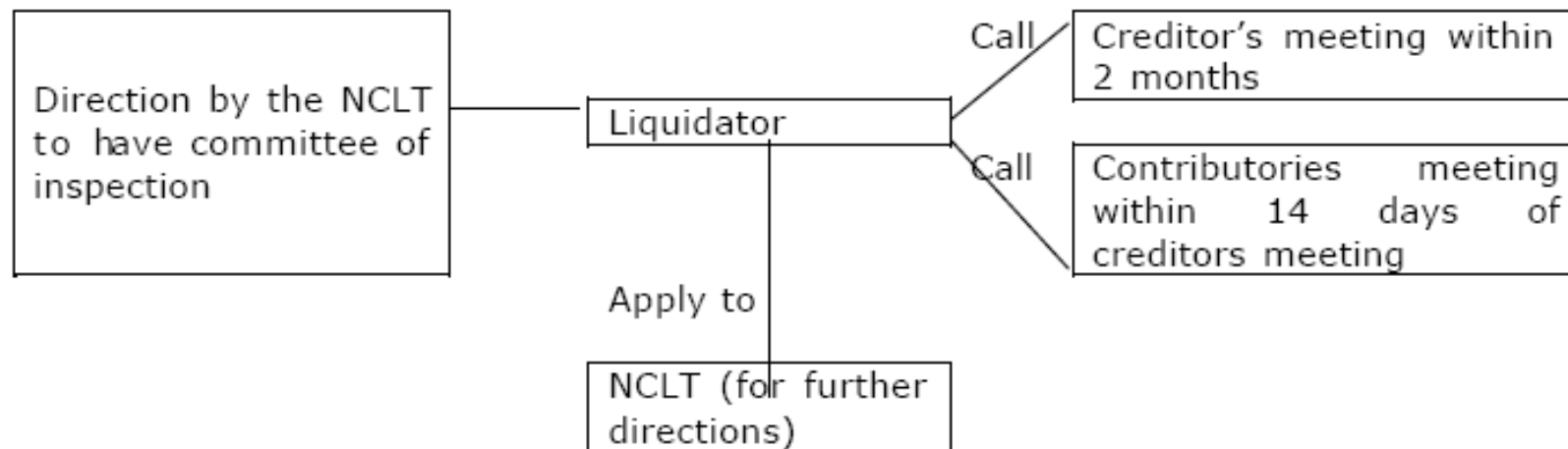
- (ii) **Within 14 days of the creditors meeting, the liquidator shall call a meeting of contributories to consider the decision taken at the creditor's meeting.**

Note:

The contributories can	Accept the decision of Creditors in full
	Reject in full
	Accept, subject to modification

- (iii) Where the decision of the creditors is not accepted in full, then the liquidator shall apply to the NCLT for further directions.

Summary of section 464:



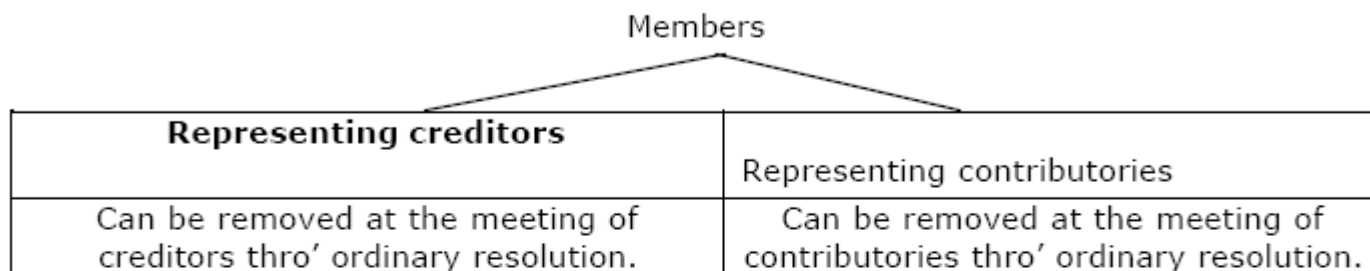
Section 465:

- c) **Maximum number of members that the committee can have: 12 members.**
- d) **Proportion of members & creditors:**

Agreement between Creditors & Contributories	No agreement
Agreed proportion	Determined by NCLT

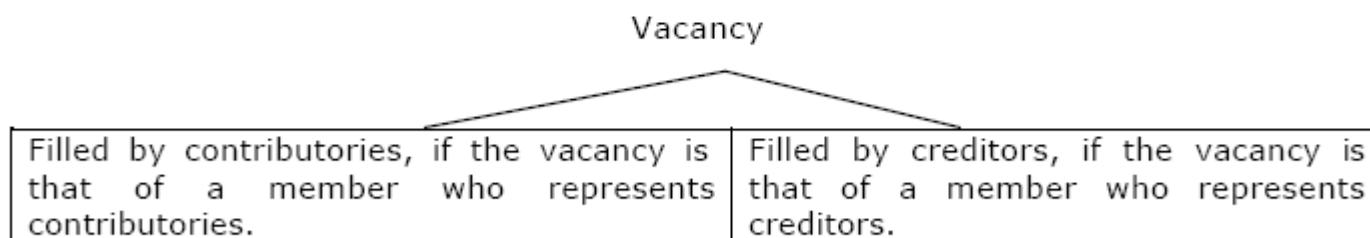
- e) **Circumstances which results in vacation of office of members:**
 - (i) If he is adjudged as insolvent.
 - (ii) If he enters into composition with creditors.
 - (iii) If he absents himself from 5 consecutive committee meetings without obtaining leave of absence.

- f) **Resignation of members:** A member can resign by submitting a resignation letter in writing to the liquidator.
- g) **Removal of member:**



Note: Length of notice calling the meeting at which the members is going to be removed – 7 days.

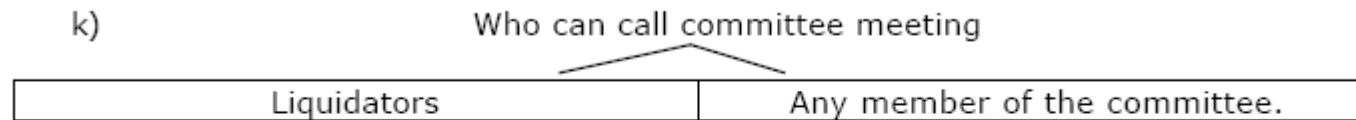
- h) **Filling of vacancy:**



- i) Liquidator, if he feels that the vacancy need not be filled, can apply to the NCLT w.r.t. the same.
- j) The continuing members can act, notwithstanding any vacancy, except when the number of members falls below two.

k)

Who can call committee meeting



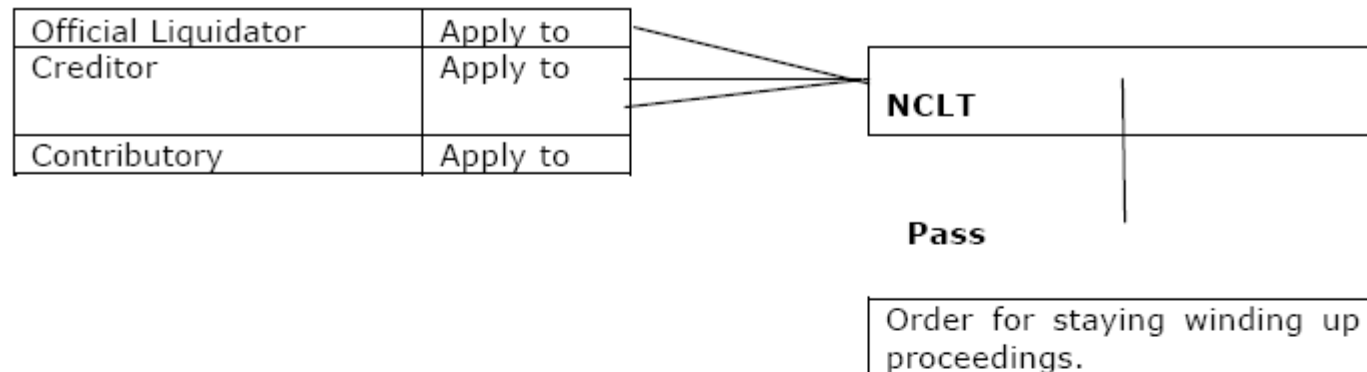
Liquidators	Any member of the committee.
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- l) **Quorum:** 1/3 of the total strength or 2 whichever is higher.
- m) Decisions are taken thro' majority.
- n) The committee has got the right to inspect the accounts of liquidators – at all reasonable times.

Power of NCLT after passing winding up order:

a) Power of NCLT to stay winding up (Sec. 466):

(i)



(ii) The company shall deliver a copy of such order to ROC immediately.

(iii) ROC shall make a minute of such order in its books.

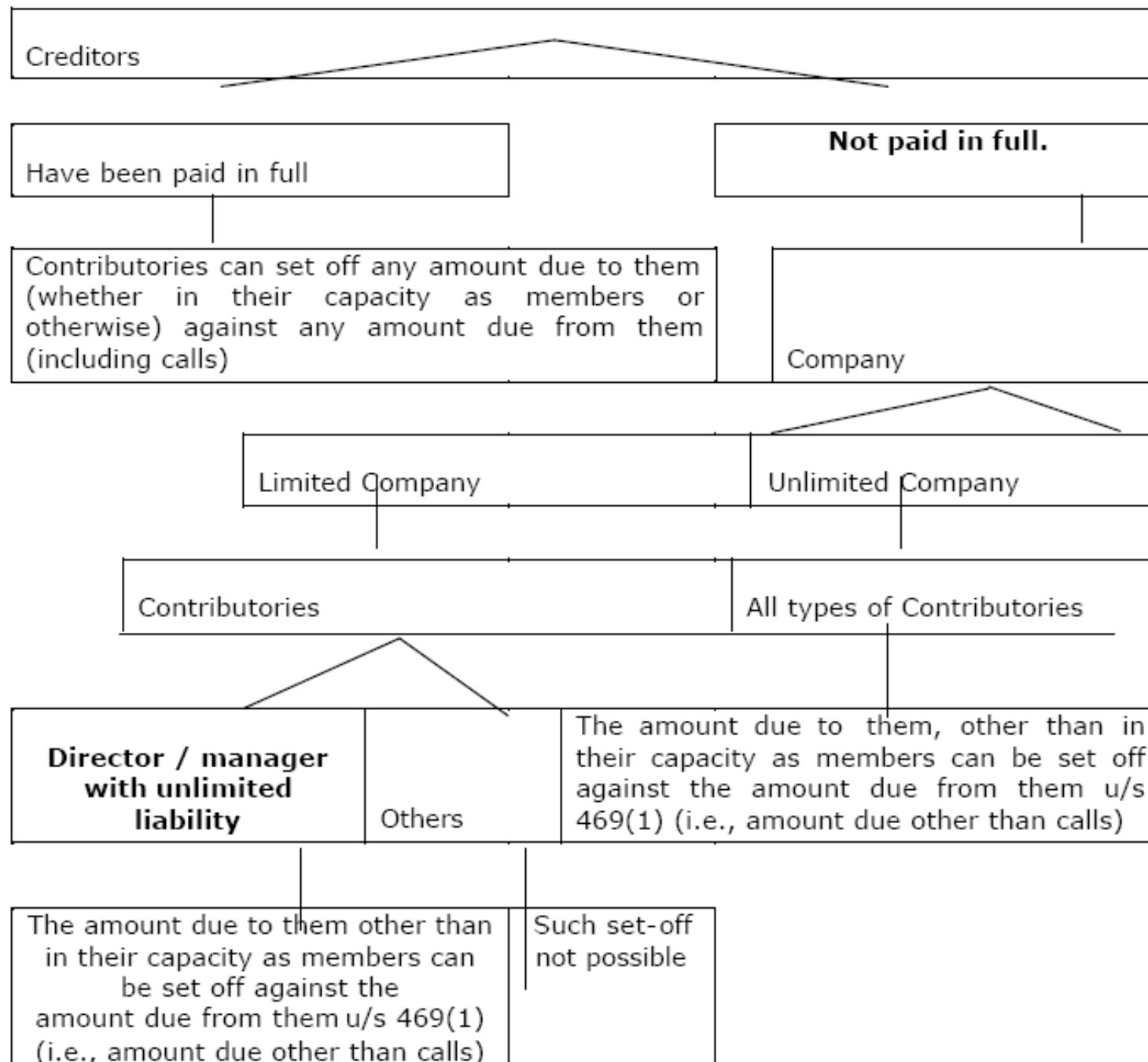
b) Powers of NCLT to settle list of contributories (Sec. 467):

- ⇒ The NCLT has power to settle the list of contributories
- ⇒ For the above purpose, it has power to rectify the register of members.
- ⇒ The NCLT has also got the power to dispense with the settlement of such list.

c) If money, property, books & papers belonging to the company are with the trustees, receives, banker, agent, officer, contributory or employees then the NCLT can direct them to deliver the same to the liquidator. **(Sec. 468)**

d) **Power of NCLT to enforce the payment of any sum, other than calls, due from contributories and extent of set off allowed (Sec. 469):**

The NCLT has power to enforce payment of any sum, other than calls, due from contributories.



Power of NCLT to make calls:(Sec. 470)

The NCLT has power to make calls and enforce the same from the contributories for

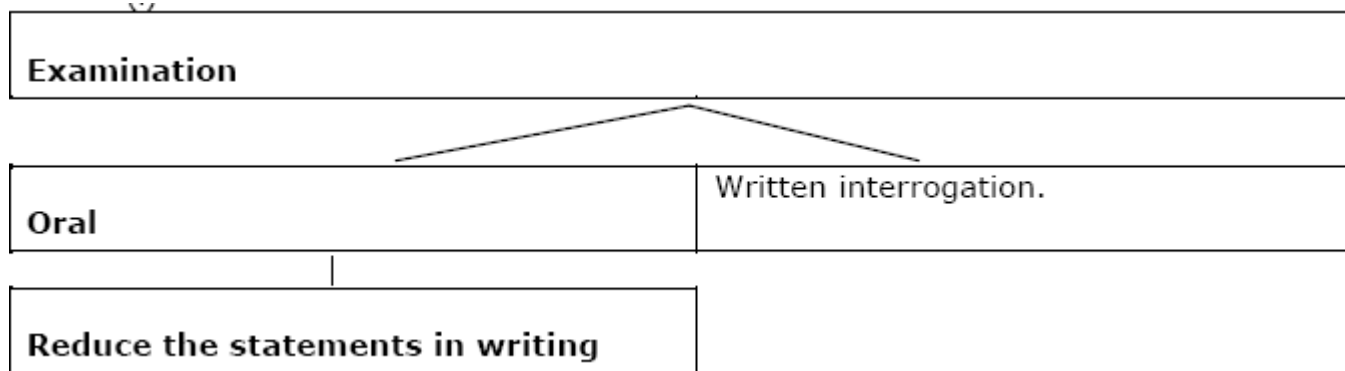
- Payment of debts & liabilities.
- Payment of cost of winding up.
- Making interse adjustments among members.

Note:

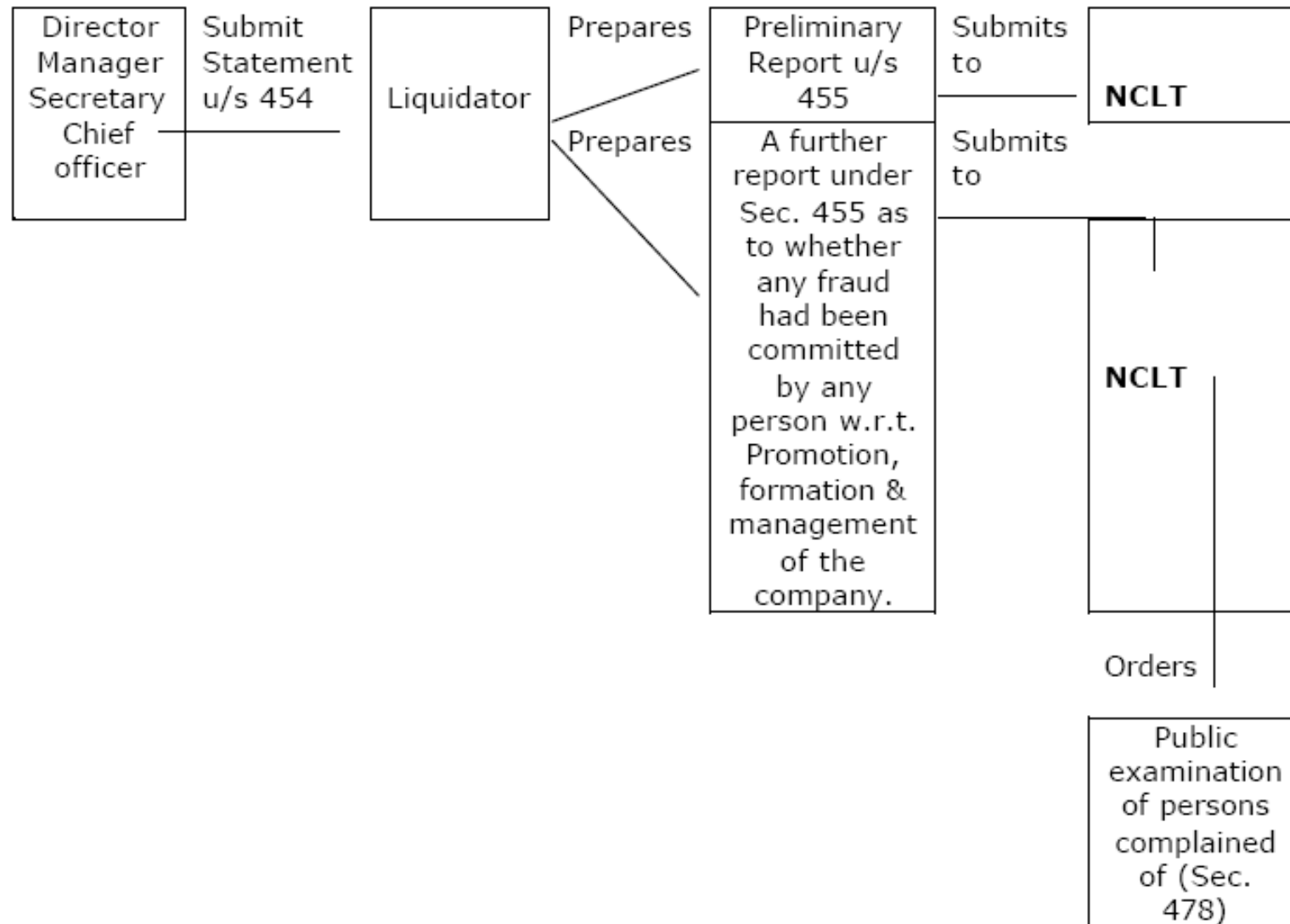
- (i) Before exercising the aforesaid power the NCLT has to take into account:
 - The sufficiency of assets
 - The possibility of certain contributories defaulting in payment of such calls.
- (ii) The NCLT has also power to direct the contributories to directly deposit the amount of calls and any amount due by them (Other than calls) into the public account of India in RBI. **(Sec. 471)**
- (iii) The amount so deposited in such account, shall be expended only in such manner as the NCLT directs. **(Sec. 472)**

The NCLT has power to summon the following persons and examine them on oath:

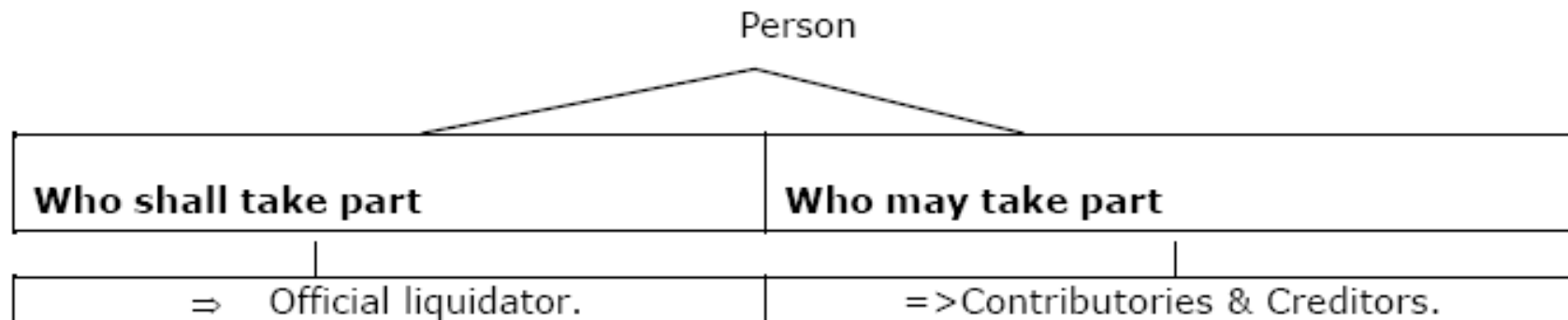
Persons			
Capable of giving information concerning	Having possession of property of the company	Having possession of books of papers	Indebted to the Company
* Promotion * Formation * Trade * Dealings * Property * Books * Papers * Affairs.			
(A)	(B)	(C)	(D)
The NCLT will require these persons to provide the necessary information.	The NCLT will require these persons to deliver such properties to the liquidator.	The NCLT will require these persons to return such books & papers in their custody (Without prejudice to their right of lien.)	The NCLT will require these persons to make the payment to the company.



Power to order public examination of promoters, directors, etc.: (Sec. 478)



Persons who can take part in the public examination:



Note: The above persons can seek legal assistance from a chartered accountant, company secretaries, cost accountants or advocate.

Powers of NCLT in this regard:

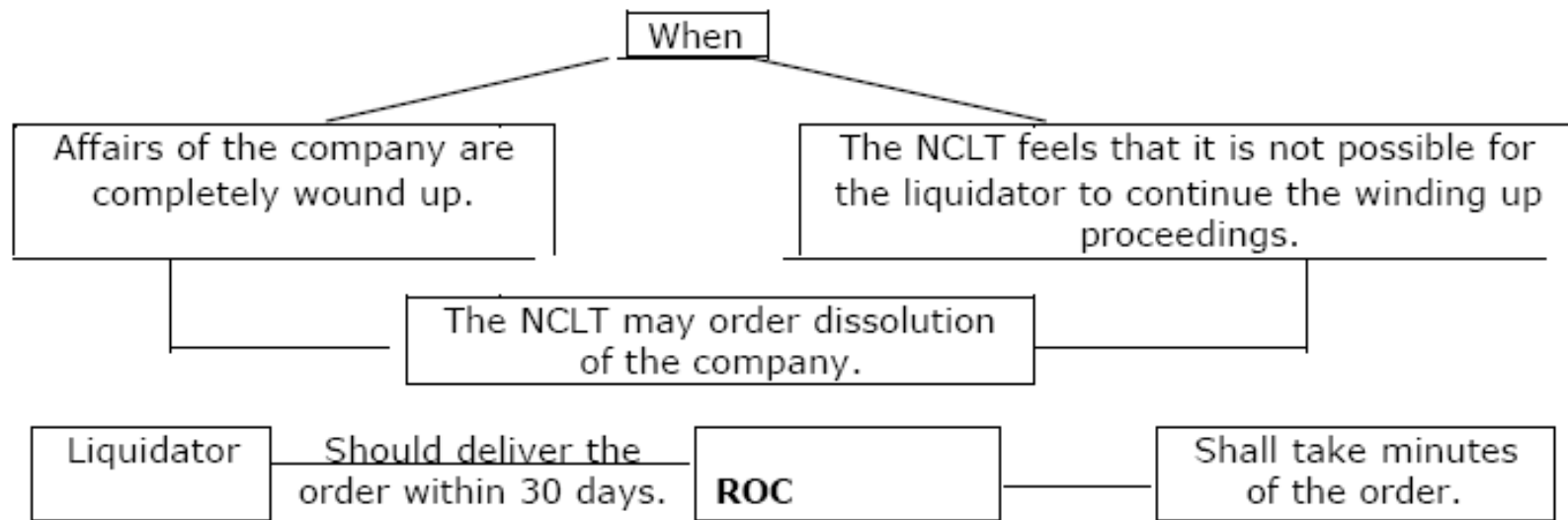
- (i) The person complained of could be examined on oath.
- (ii) The NCLT can put any question that it considers necessary.
- (iii) Notes of examination shall be taken down in writing & it will be read to the person who was examined and he will be asked to sign such statement.

Thereafter it can also be used as evidence against him.

Note: Such statements are available to creditors / contributories at reasonable time.

- (iv) **The NCLT has power to adjourn the examination from time to time.**

Power of NCLT to dissolve the company (Sec. 481):



Chapter *15*

VOLUNTARY WINDING UP

(Section 484 – 520)

Provisions relating to voluntary winding up

Provisions common to member's voluntary winding up and creditors voluntary winding up.	Declaration of Solvency	Provisions applicable to creditor's voluntary winding up	Provisions applicable to member's voluntary winding up	Provisions applicable when member's voluntary winding up is converted into creditor's voluntary winding up.
	Sec. 488	Sec. 499 – 509	Sec. 489 – 494 & 496 & 497	Sec. 495, Sec. 498

PART – I	PART – II
Sec. 484 – 487	Sec. 510 – 520

(Discussed later)

(1) COMMON PROVISIONS (PART – I) (SEC. 484 – 487)

Resolution for voluntary winding up	Publication of resolution	Commencement of winding up.	Consequences of winding up.
Sec. 484	Sec. 485	Sec. 486	Sec. 487
(i)	(ii)	(iii)	(iv)

(i) Resolution for winding up: (Sec. 484)

A company can be voluntarily wound up

If the company passes a special resolution in this regard	If the company passes an ordinary resolution in this regard
--	--

Note: Winding up thro' ordinary resolution is possible only in the following cases:

- i) When the period fixed for the duration of the company by AOA – has expired.
- ii) When the event, on the occurrence of which the company should be wound up, has occurred.

(ii) **Publication of resolution: (Sec. 485)**

The aforesaid resolution should be published

In the official gazette	In the News paper

Time limit for Publication: Within 14 days of passing resolution.

Note: The newspaper should have circulation in the district where the registered office is situated.

(iii) **Commencement of winding up : (Sec. 486)**

The winding up commences on the date of passing the aforesaid resolution.

(iv) **Consequences of winding up : (Sec. 487)**

- The company ceases to carry on its business.
- The corporate status & power continues.

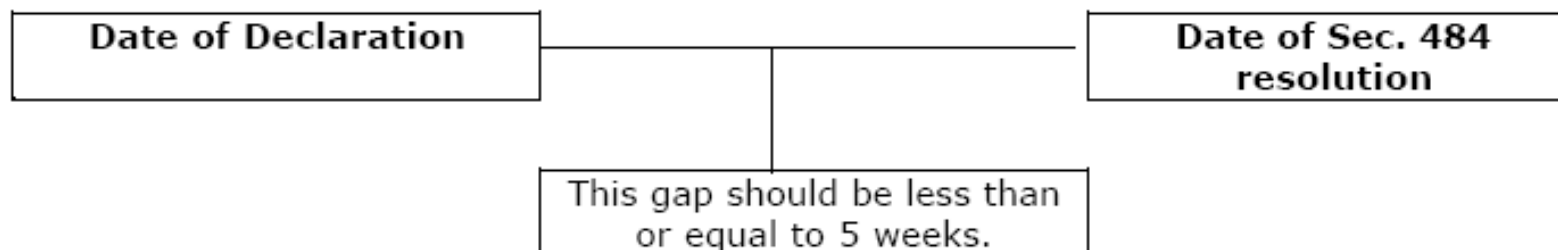
Note: For beneficial winding up, the company can continue its business.

(2) DECLARATION OF SOLVENCY: (SEC. 488)

- a) **Inquiry by BOD:** The BOD shall make a full inquiry into the state of affairs of the company.
- b) **Purpose of inquiry:** The purpose of inquiry is to ascertain whether the company is solvent or not.
- c) **Convening of BOD meeting:** Once the inquiry is completed the BOD, may convene a meeting of BOD to make a declaration.
- d) **Subject matter of declaration:**
 - i) The company has no debt
 - Or
 - ii) The company will be able to pay all its debts within the period specified in the declaration

Note: Such period shall not exceed 3 yrs.

- e) Time limit for making such declaration:



- f) Audit report should accompany the aforesaid declaration.

g) Importance of aforesaid declaration:

Board Of Directors

Able to make declaration of solvency	Not able to make declaration of solvency.
Member's voluntary winding up.	Creditor's voluntary winding up.

h) **Liabilities for misrepresentation:**

Declaration

Based on reasonable grounds	Not based on reasonable ground
	Directors liable to fine & imprisonment.

Note: If the company fails to pay the debts within the period specified in the declaration, then, it will be assumed that the declaration is made without reasonable grounds.

(3) PROVISIONS APPLICABLE TO MEMBER'S VOLUNTARY WINDING UP:

(SEC. 489 – 494 & 496 & 497)

a) Appointment of liquidator & fixation of remuneration :(Sec. 490)

- ⇒ Who can be appointed as liquidator: Only individual **(Sec. 513)**
- ⇒ Who will appoint the liquidator & fix remuneration: Company at the general meeting.
- ⇒ Remuneration
 - * Once fixed cannot be increased.
 - * The Liquidator shall not take charge unless remuneration is fixed.

b) Filling of casual vacancy: (Sec. 492)

Casual Vacancy may be

Casual Vacancy may be			
Due to death	Due to insolvency	Due to resignation.	Due to any other reasons.

Who can fill such casual vacancy: Company at the general meeting.

Who can call the general meeting?

Any contributory	Liquidator
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c) **Notice to ROC (Sec. 493):**

Notice to ROC

Notice relating to appointment u/s 490 or Filling of vacancy u/s 492	Notice relation to occurrence of vacancy
--	--

Time limit for such notice: Within 10 days of appointment or vacancy as the case may be.

d) **Consequences of appointment of liquidator: (Sec. 491)**

- i) Power of MD / Mgr / WDT / Dir – will cease.
- ii) **But if the company at the general meeting or the liquidator sanctions certain powers, such powers are exercisable by the aforesaid persons.**

e) **Duty of liquidator to call general meeting: (Sec. 496)**

Winding up process

Continues for more than one year	Does not continue for more than one year
----------------------------------	--

Liquidator should call general meeting every year.
Purpose of the general meeting is to lay before such meeting, an account of his acts & dealings.

f) **Final meeting & dissolution: (Sec. 497)**

i) Duty of Liquidator when affairs of the company are fully wound up

Preparation of an account showing how the winding up has been conducted.	Calling final meeting, to consider the aforesaid account.
--	---

ii) Notice to the final meeting:

- ⇒ Should be advertised in official gazette and newspaper circulating in the area where registered office of the company is situated.
- ⇒ The aforesaid notice should be given one month before the date of meeting.
- ⇒ Such advertisement should contain the time, place & object of the meeting.

iii) Documents to be filed with ROC & Official Liquidator.

Meeting

Held	Could not be held for want of quorum.
Documents to be filed.	Documents to be filed.
⇒ Copy of the aforesaid accounts	⇒ Copy of the aforesaid accounts.
⇒ A return stating that the meeting had been properly held.	⇒ A return, stating that the meeting had been duly convened, but could not be held for want of quorum.

iv) **When the aforesaid documents should be filed:**

It should be filed within one week from the date of meeting.

v) **Duty of ROC:** The ROC shall register the aforesaid documents.

vi) **Duty of official liquidator on receipt of the aforesaid documents:**

Conducting a scrutiny of books &
papers of the company

and

Reporting to the NCLT.

vii) **Report by official liquidator:**

Affairs of the company **are not**
conducted in a manner prejudicial to
the public interest.

Or

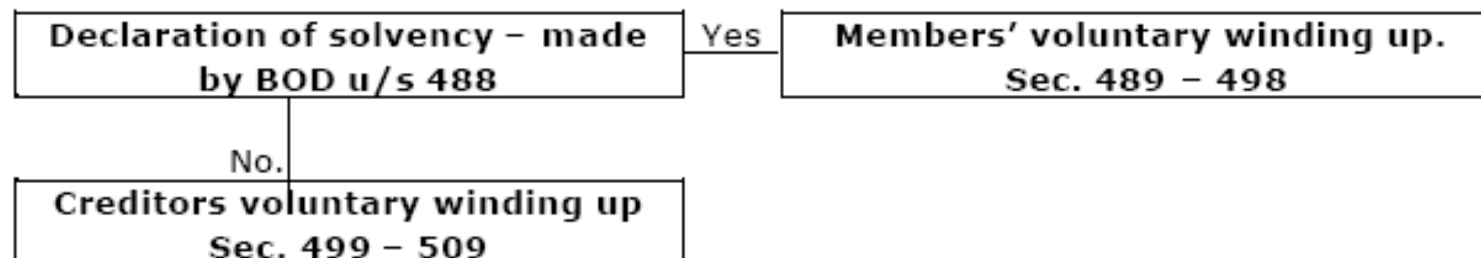
Affairs of the company **are** conducted in
a manner prejudicial to public /
members interest.

The Company is deemed to be
dissolved on the date of such report

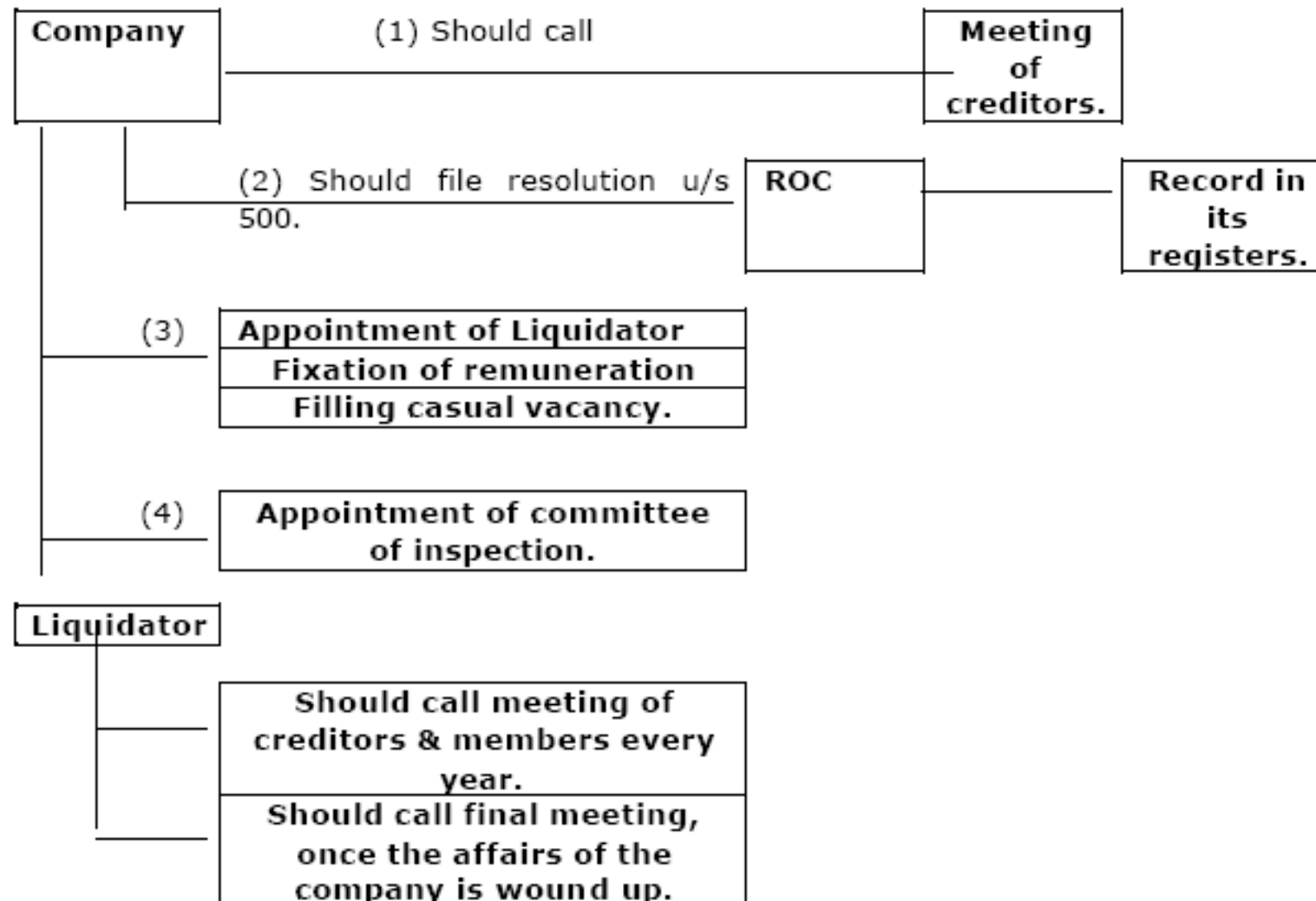
The NCLT may order the official
liquidator to conduct further inquiry &
report.

On receipt of such report, the NCLT may
pass such order as it deems fit.

**(4) PROVISIONS APPLICABLE TO CREDITOR'S VOLUNTARY WINDING UP
(SEC. 499 – 509)**



a) Pictorial representation of the procedure followed in creditors voluntary winding up:



b) **Meeting of creditors:(Sec. 500)**

(i) **When creditor's meeting is necessary:** When the BOD is not able to make declaration of solvency u/s 488; the company should call a meeting of creditors.

(ii) **When such meeting should be called:**

On the date of Sec. 484 meeting	Or	On the next day
---------------------------------	----	-----------------

(iii) **Notice of such meeting:**

- * **Who is entitled to such notice: All creditors.**
- * *Manner of service:* By Post.
- * *When notice should be sent:* It should be sent along with notice of member's meeting.

* **Publication of the notice:**

In the official gazette	In two newspapers.
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(iv)

Duty of BOD

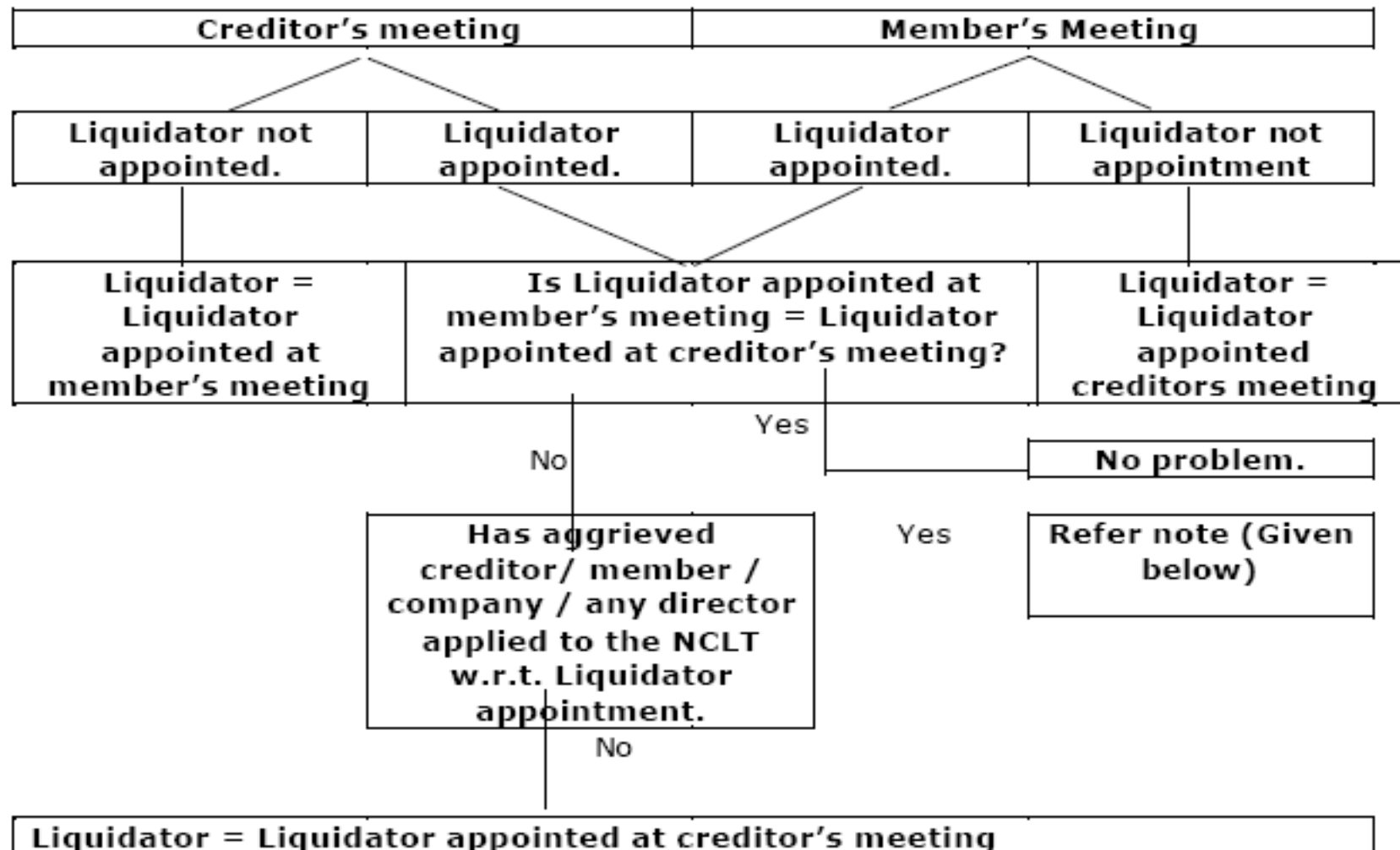
Laying before the creditors meeting * Full statement of company's affairs. * List of creditors. * Estimation of their claims.	Appointing a director to act as chairman for the meeting.
---	---

(v) **Position of creditor's meeting if Sec. 484 Meeting is adjourned:**

The resolution passed at the creditor's meeting shall have effect as if it had been passed immediately after the Sec. 484 resolution.

- c) **Filing of a copy of resolution with ROC: (Sec. 501)** Aforesaid resolution should be filed with ROC within 10 days of the resolution.

d) **Appointment of Liquidator: (Sec. 502)**



Note:

The NCLT can pass any of the following order.

Liquidator = Liquidator appointed at members meeting.	Liquidator = Official Liquidator.	Some other Person should be appointed as Liquidator.	Liquidator = Liquidator appointed at creditors meeting + Liquidator appointed at member's meeting

Note: Only Individual shall be appointed as Liquidator. (Sec. 513)

e) Fixing of remuneration to liquidator (Sec. 504)

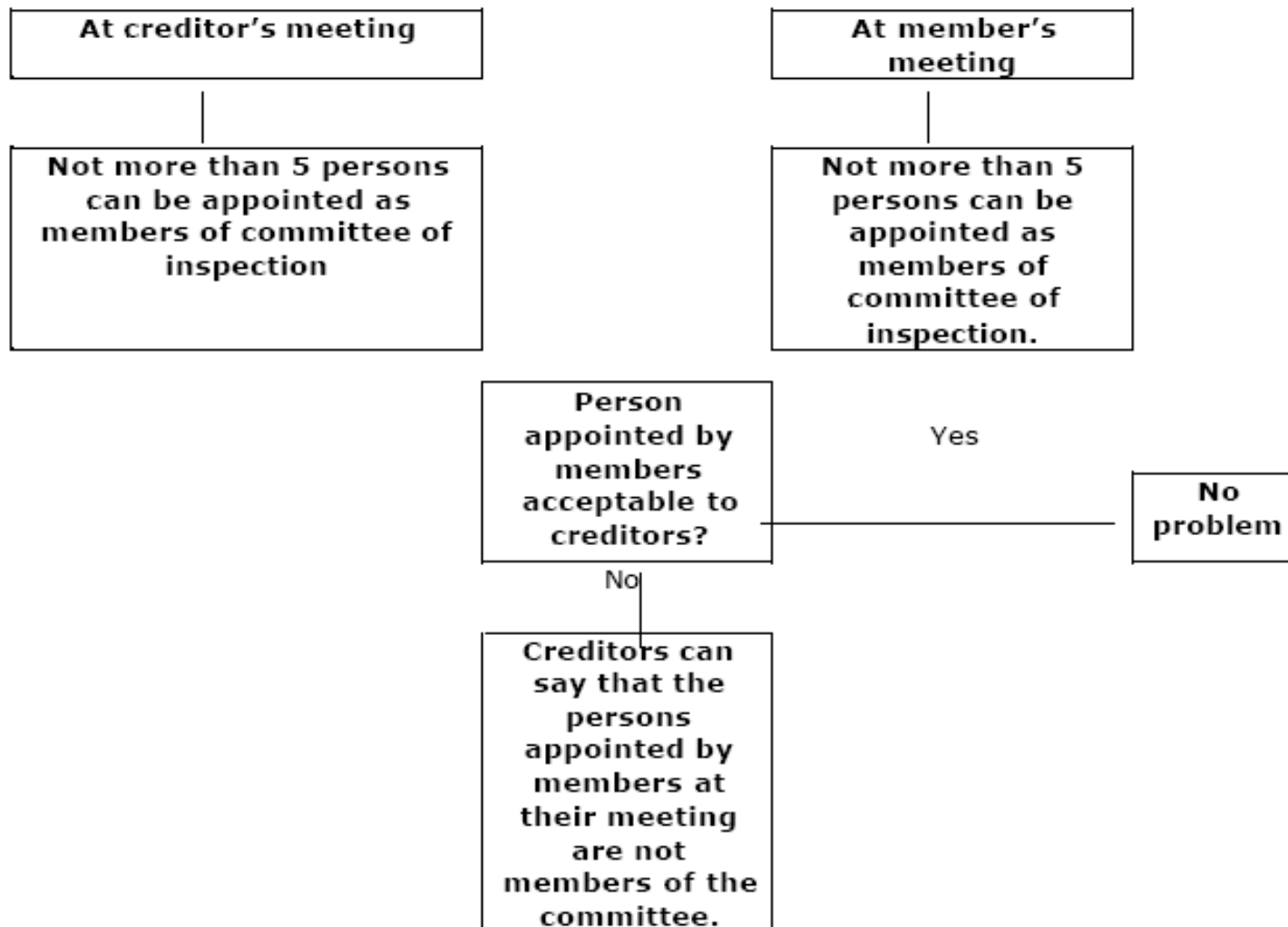
Remuneration fixing authority		
Committee of inspection	Creditors at their meeting	NCLT
	Can fix remuneration only if not fixed by committee.	Can fix only if the committee or creditors fail.

Note: Remuneration once fixed cannot be increased.

f) Filling of vacancy (Sec. 505)

Liquidator was appointed by	
NCLT	Others
Vacancy Filled by NCLT	Vacancy Filled at creditor's meeting.

Appointment of committee of inspection (Sec. 503)



Powers of the NCLT in this regard:

The NCLT can say that the persons appointed by members shall also be members of the committee.	The NCLT can say that persons appointed by creditors shall not be members of the committee.
--	---

Note: All provisions relating to committee of inspection under compulsory winding up, to the extent applicable applies here also.

g) Cessation of BOD's power after Liquidator's appointment (Sec. 505)

Powers of the BOD

w.r.t. which sanction of:	
* The committee of inspection	Others
Or	
* Creditors is available	
These powers are exercisable.	These powers are not exercisable.

h) Duty of Liquidator to call meeting of members & creditors (Sec 508):

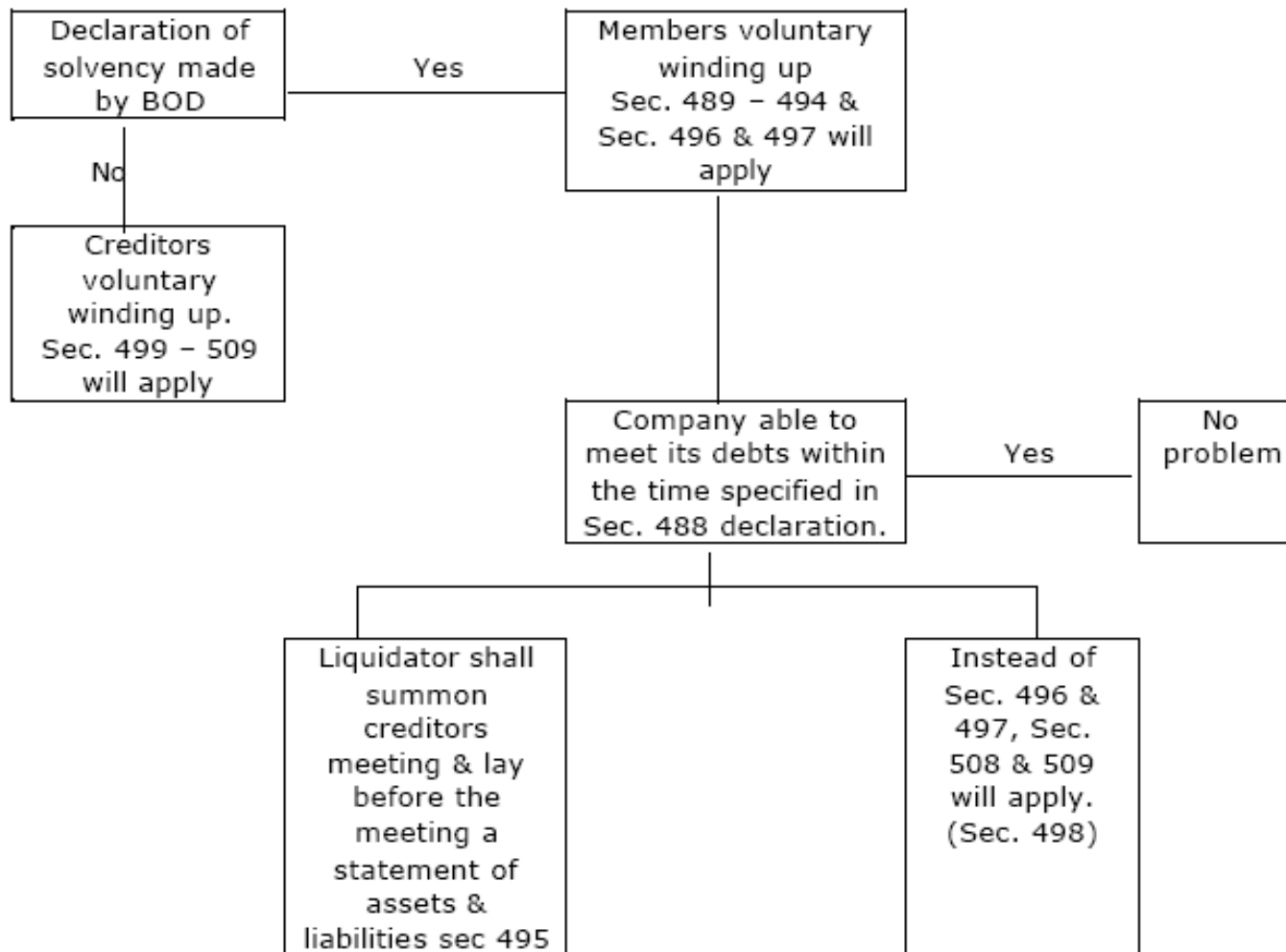
Refer Sec. 496 (exactly the same).

Note: In addition call creditor's meeting.

- i) **Final Meeting & dissolution (Sec 509):** Refer Sec. 497 (exactly the same).
The term official liquidator in this section refers to official liquidator who is an officer of central government.

Note: In addition, call creditor's meeting.

**(5) PROVISIONS APPLICABLE WHEN MEMBER'S VOLUNTARY WINDING UP IS
CONVERTED INTO CREDITOR'S VOLUNTARY WINDING UP.
(Sec. 495 & 498)**

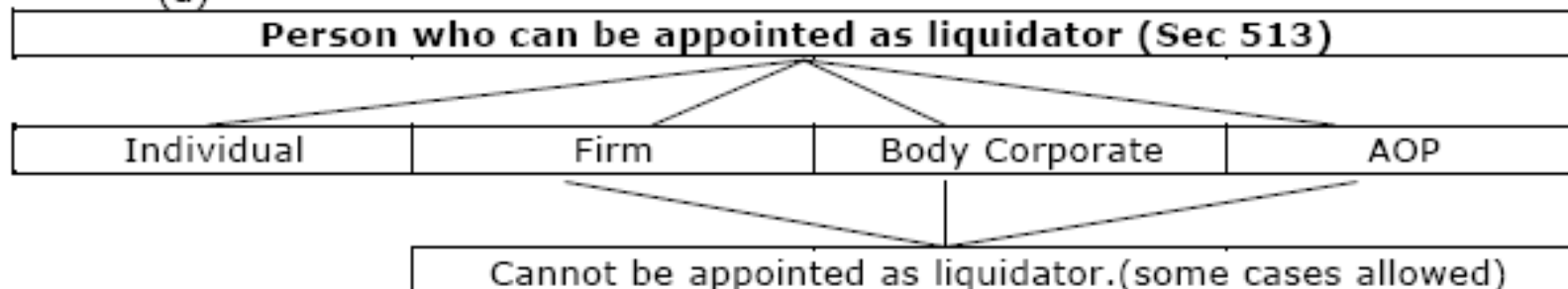


(6) COMMON PROVISIONS (PART – II – SEC. 510 – 521)

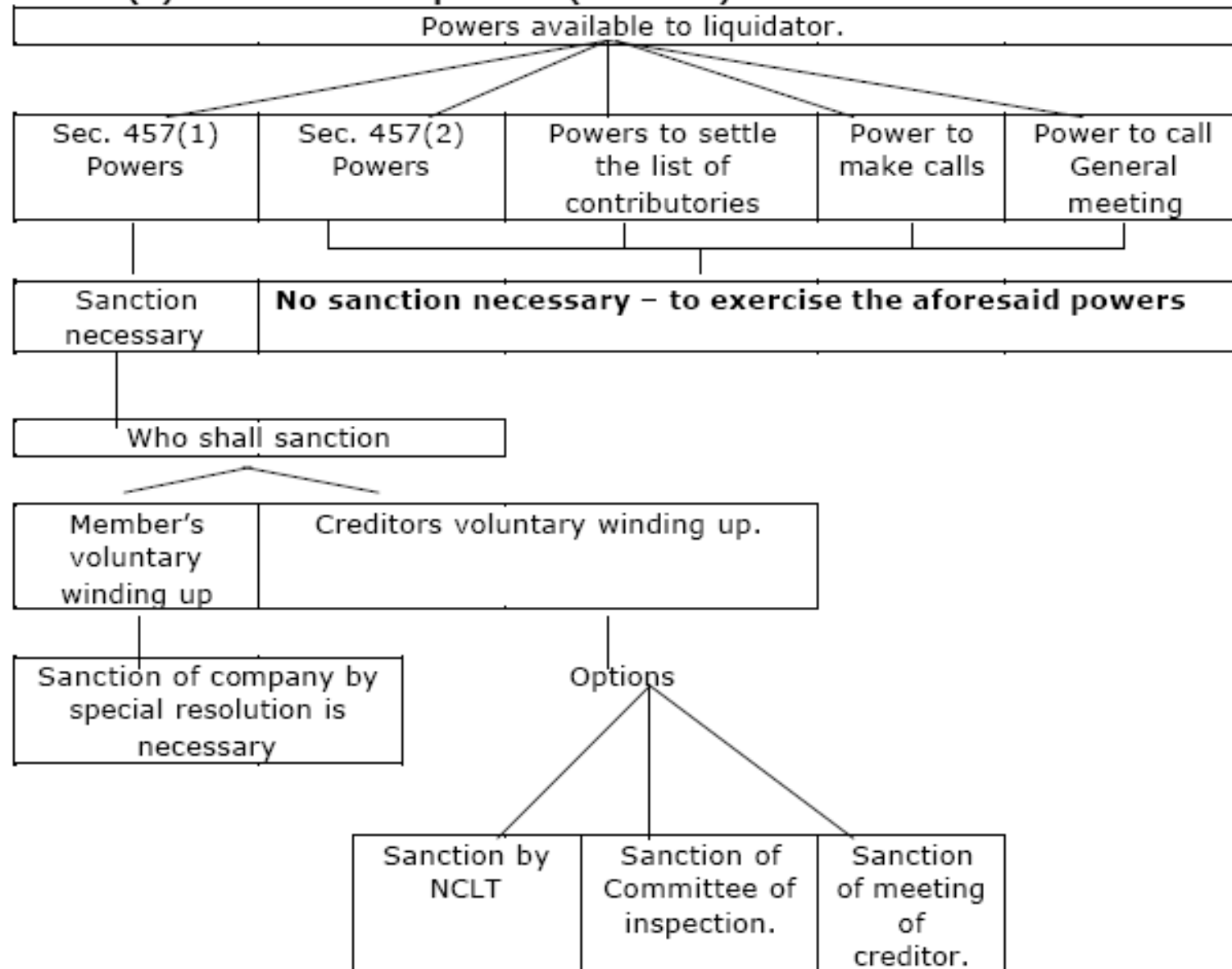
Provisions relating to liquidator	Application of Sec. 454 to voluntary winding up.	Applicability of Sec. 478 (i.e., ordering public examination)	Power of NCLT to determine certain things.	Cost of winding up.
Sec. 512 – 516	Sec. 511A	Sec. 519	Sec. 518	Sec. 520

A) Provisions relating to Liquidator:

(a)

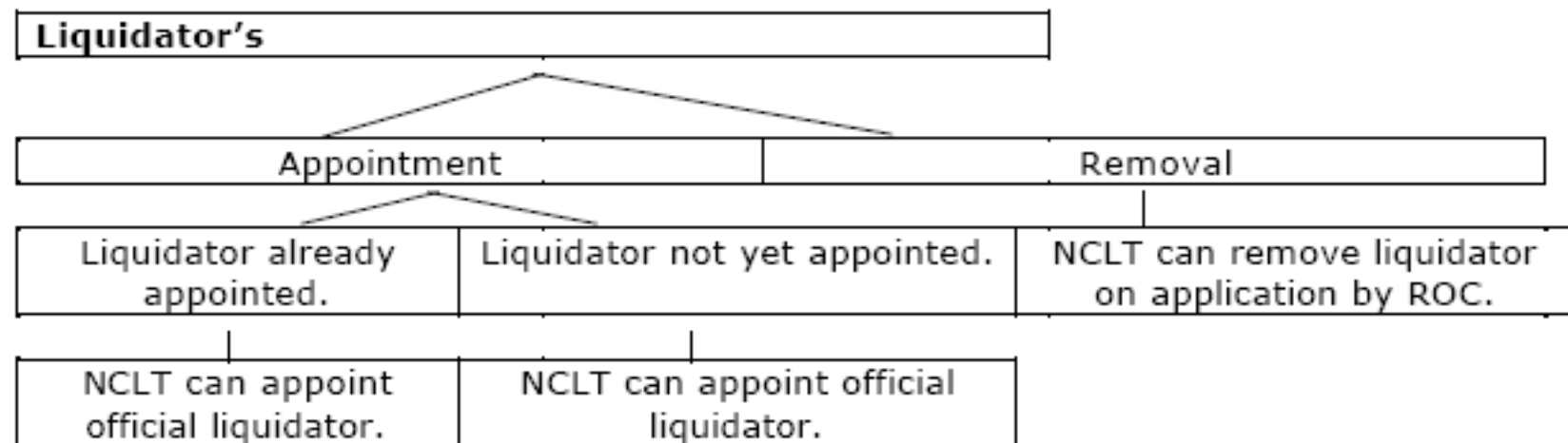


(b) Powers of Liquidator (Sec. 512)



Note: If more than one Liquidator is appointed then their powers – will be determined by the resolution appointing them.

(c) Power of NCLT to appoint & remove Liquidator Sec. 515



(d) Notice of appointment to be given to ROC

Liquidator shall within 30 days of his appointment

- * Publish in official gazette, the notice of his appointment
- * Deliver to ROC, the aforesaid notice.

B) Application of Sec. 454 to voluntary winding up: (Sec. 511A)

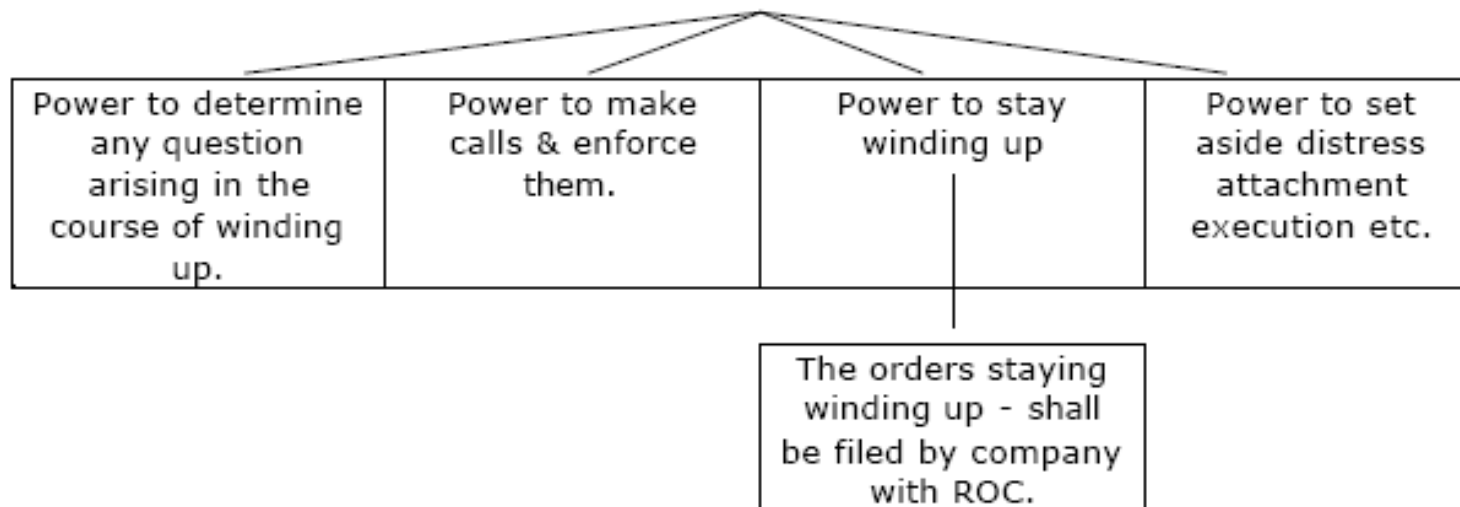
Changes:

- * Relevant date – Date of Sec. 484 resolution
- * Instead of the term "official Liquidator" – substitute the term "Liquidator"
- *

C) Application of Sec. 478 to voluntary winding up (Sec. 519)

Sec. 478 mutatis mutandis applies.

D) Power of NCLT to determine certain things (Sec. 518)



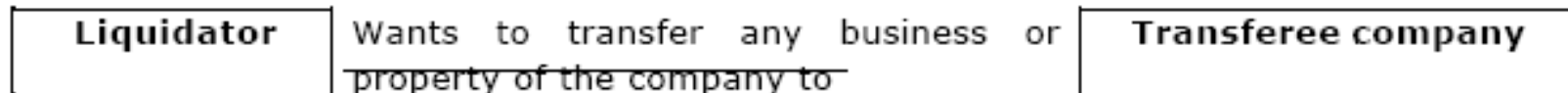
E)

F) Power to order cost: (Sec. 520)

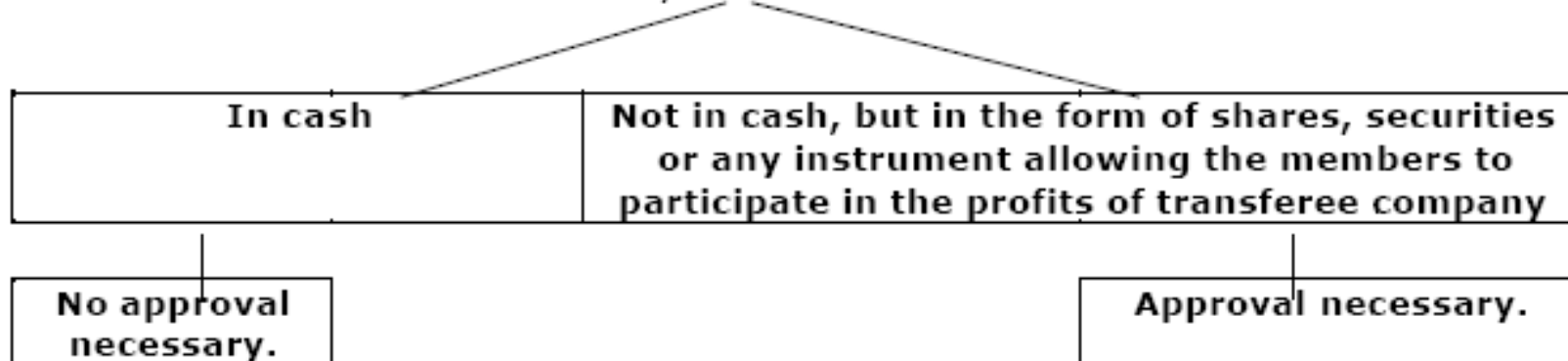
- Priority given to Liquidation expenses – in case of insufficiency of assets.

G) **Power of Liquidator to accept shares etc. as consideration for sale of property of company.**

Voluntary winding up

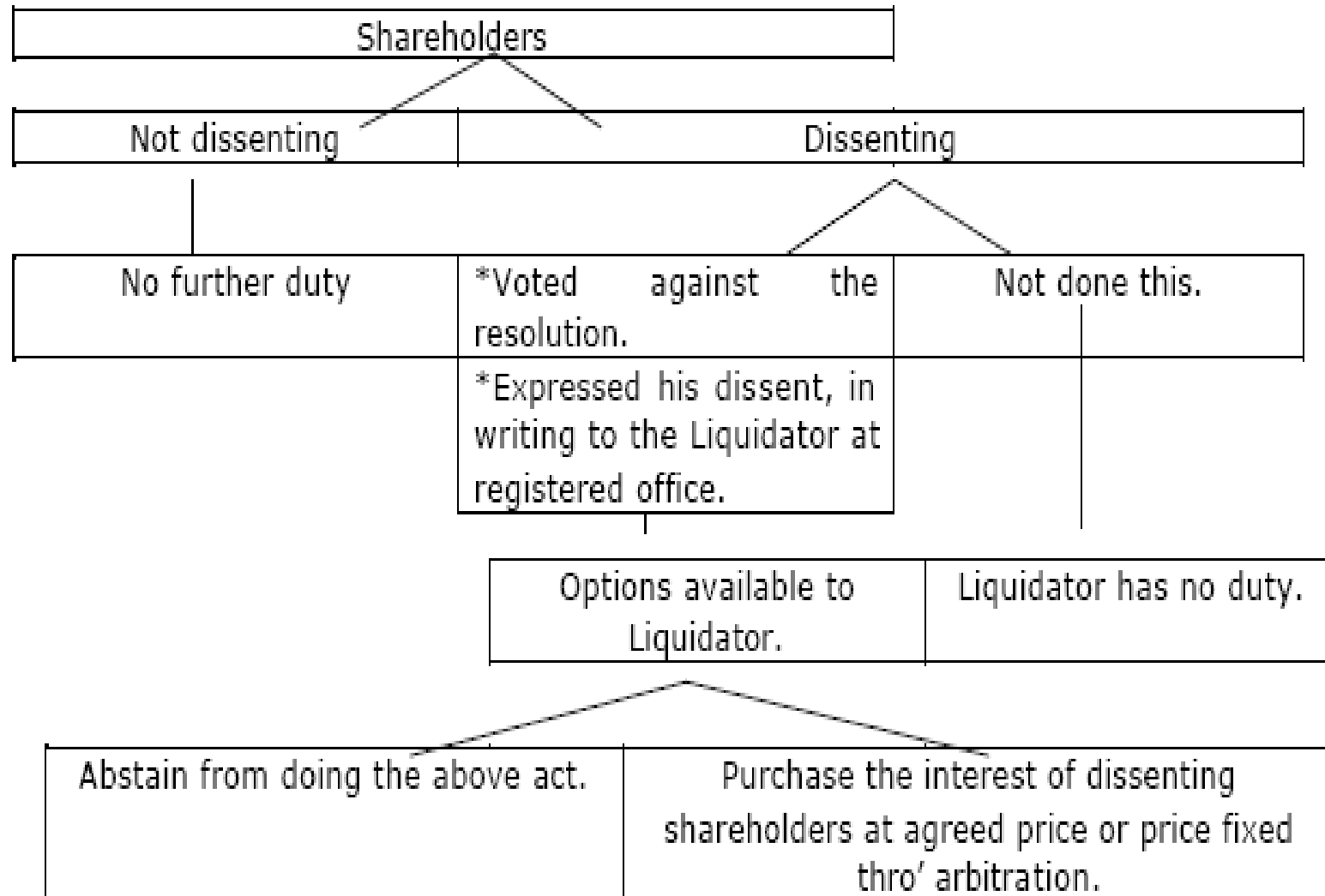


Consideration may be received



Approval required:
Special resolution of the company.

Duty of Liquidator w.r.t. Dissenting shareholders:

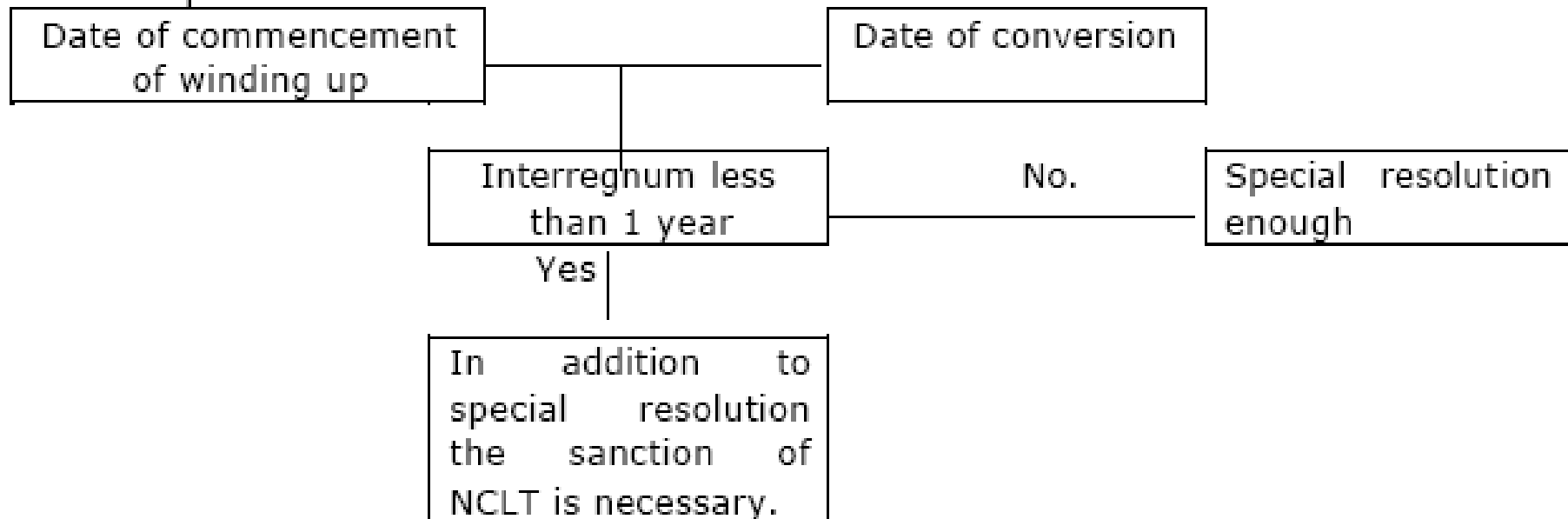


Note 1: The purchase consideration should be paid before dissolution.

Note 2: In case of creditor's voluntary winding up (Sec. 507) the liquidator can make the aforesaid transfer only after obtaining:

- * The sanction of the NCLT or
- * The sanction of committee of inspection.

Note 3: Voluntary winding up converted into compulsory winding up / winding up under supervision of NCLT:



**IV PROVISIONS RELATING TO ALL MODES OF WINDING UP
(SEC. 528 – 560)**



Sec. 528 to Sec 530	Sec. 531 to Sec 537	Sec. 538 to Sec 545	Sec. 546 to Sec 556	Sec. 557 & Sec 558	Sec. 559 & Sec 560
Proving & Ranking of claims.	Effect of winding up on antecedent and other transactions.	Offences by officers in the course of winding up	Miscellaneous provisions.	Supplementary Powers of NCLT	Provisions w.r.t Dissolution.

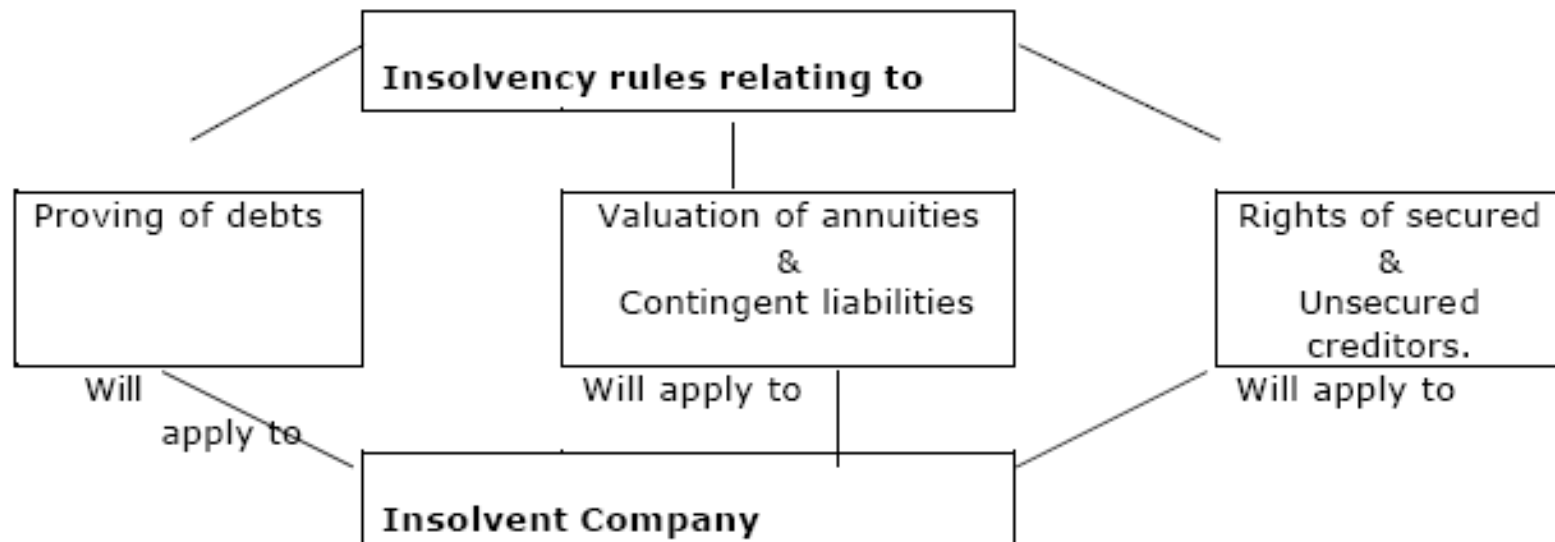
1) Proving and ranking of Claims (Sec. 528 – 530)

- a) Debts of all description should be admitted to proof.

Note: In case of debts which are contingent or which may sound only in damages, a just estimate should be made (**Sec. 528**)

b) Winding up of an insolvent company (Sec. 529)

- (i) Applicability of insolvency rules.



(ii) **Position of secured creditors:**

Options available to secured creditors

Options – 1	Option – 2
Relinquish the security & Prove & rank their debts	Realise the security

Important points w.r.t. Option – 2

- (i) The secured creditors are not entitled to the entire amount of security realised.
- (ii) The workmen are also entitled to a proportionate share in the proceeds of realisation. (Provision as per Sec. 529(1))
- (iii) The disadvantage suffered by the secured creditors due to participation of workmen in such proceeds will be made good, by including such amount as over-riding preferential payment. (u/s 529A)

Illustration: (1)

- ⇒ Amount due to secured creditor (Mr.S) – Rs. 300000/-
 - ⇒ Amount due to workmen – Rs. 100000/-
 - ⇒ Value of security – Rs.100000/- (realised)
- Application of amount realised Rs. 100000/-

Workmen Rs. 25000	Secured Creditor Rs. 75000
-------------------	----------------------------

Working note:

Proportion of realised amount due to workmen

$$\frac{[\text{Amount due to workmen}]}{[\text{Amount due to workmen and secured creditors}]} * [\text{Amount realized}]$$

$$[100000 / 400000] * 100000 = 25000/-$$

Proportion of realised amount due to secured creditors = [Amount realized - Amount due to workmen]

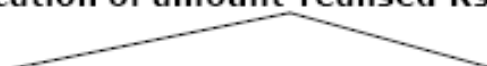
$$\text{i.e., Rs. } 100000 - 25000 = 75000/-$$

Note: The disadvantage suffered by Mr.S is Rs. 25000/-. This will be treated as overriding preferential payment u/s 529A.

Illustration: - (2)

Assume the facts of Illustration (1) except that the value of security realised is Rs. 360000/-

Application of amount realised Rs.360000/-



Secured creditors Rs.270000	Workmen's due / claim Rs.90000
-----------------------------	--------------------------------

Working note:

$\left[\frac{300000}{400000} \right] \times 360000 = \text{Rs.} 270000/-$	/
$\left[\frac{100000}{400000} \right] \times 360000 = \text{Rs.} 90000/-$	/

Note: The disadvantage suffered by Mr.S is not Rs.90000, but Rs.30000/- only. Therefore Rs.30000, will alone be treated as over-riding preferential payment u/s 529A.

Conclusion:

The amount of disadvantage suffered by the secured creditor is Amount payable to workmen or Amount that he could not recover (Which ever is less)

Note:

- (i) The proceeds of realisation that is available to secured creditors & workmen – is net of the expenses incurred by the liquidator in maintaining such assets before sale.

(ii) **Meaning of workmen's dues:**

- a) **Salaries & wages**
- b) Compensation payable under the Industrial dispute Act 1947.
- c) Accrued holiday remuneration.
- d) Compensation payable under the workmen Compensation Act. 1923:
 - But the following amount should be excluded:
 - (i) Amount to the extent insured
 - (ii) If winding up is for reconstruction / amalgamation .
- e) Pension.
- f) PF dues.
- g) Gratuity fund.
- h) Any other fund for the welfare of workmen.

c) **Over-riding Preferential payments (Sec. 529A):**



Workmen's due	Secured creditors. (To the extent of disadvantage suffered u/s 529(1) proviso)
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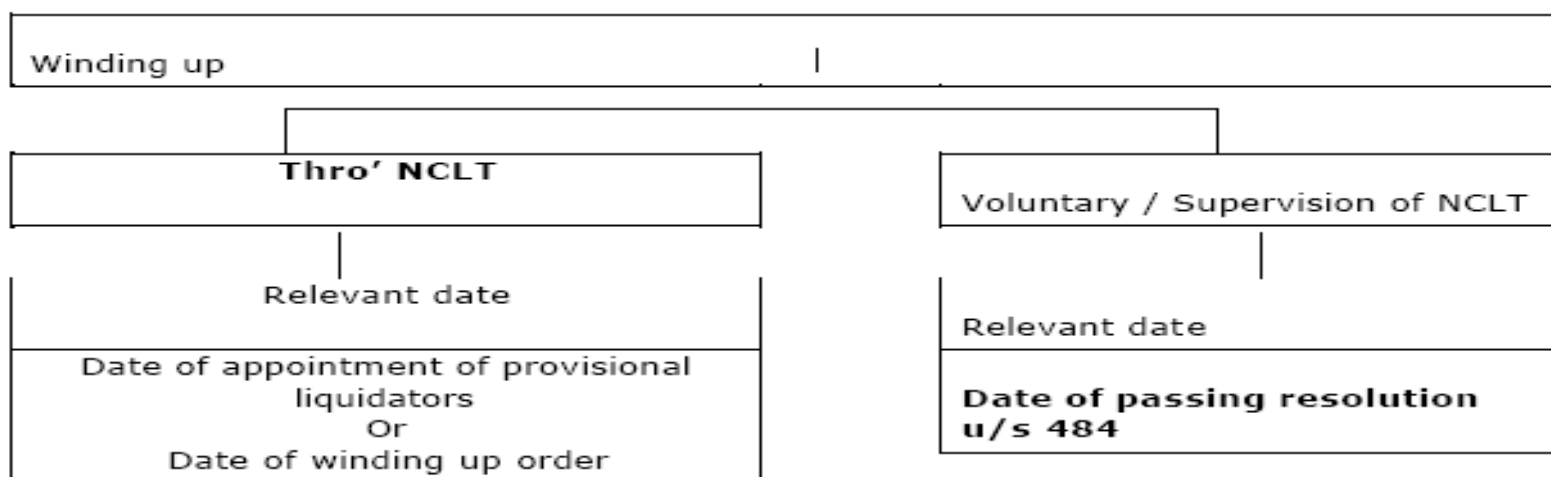
Note: These over-riding preferential payments should be paid in full, before the payment of any other debts.

d) **Preferential payments (Sec. 530):**

- (i) Revenues, tax, cess etc. payable to Central Government, State Government and Local authority, within 12 months before the 'relevant date'.
- (ii) Wages, salaries payable to employees (it is employees and not workmen)
- (iii) Accrued holiday remuneration – less advance if any availed against this.
- (iv) Contribution to ESI – during 12 months before the relevant date:
- (v) Payment under workmen's compensation Act.
- (vi) PF dues
- (vii) Pension Fund
- (viii) Gratuity Fund
- (ix) Any other fund – for the welfare of employees.
- (x) Expenses of investigation u/s 235, 237

Note:

- (i) Meaning of relevant date.



- (ii) All the preferential payments will be ranked equally

SUMMARY

Sequence of payments

- (i) Secured creditors & workmen sharing the realisation proceeds.
- (ii) Over-riding preferential payments u/s 529A.
- (iii) Cost of winding up. (u/s 520 & 476)
- (iv) Income tax & Central sales tax dues (if informed u/s 178 of Income tax Act or Sec. 17 of Central sales Tax Act.)
- (v) Preferential payments u/s 530
- (vi) Unsecured creditors.
- (vii) Preference shareholders.
- (viii) Equity shareholders.

EFFECT OF WINDING UP ON ANTECEDENT & OTHER TRANSACTIONS

Section 531: FRAUDULENT PREFERENCE

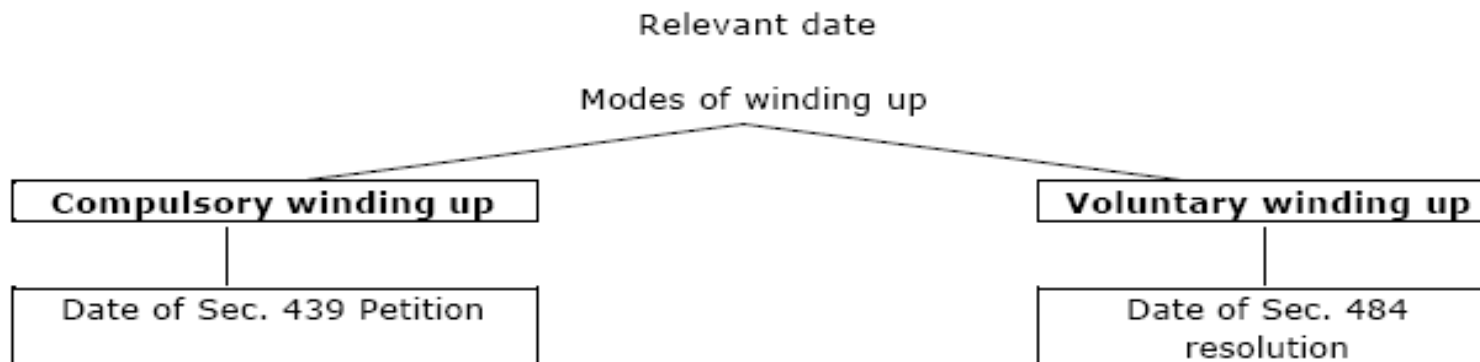
Certain persons by virtue of their position will have access to inside information about the company. Naturally, they will be aware of the solvency position of the company well ahead of others and so they may take certain steps to mitigate their losses in the event of company being wound up so they stand to unduly gain at the expense of others.

Thus the lawmakers have framed Sec. 531 to avoid the fraudulent preference being made to such persons.

If a company makes any transfer of immovable properties/delivery of goods/payment/execution/ any other act relating to property, within 6 months before the date of commencement of winding up, then it will be treated as fraudulent preference, if the aforesaid acts are treated as fraudulent preference in case of an insolvency proceeding initiated against an individual.

Section 531A: AVOIDANCE OF VOLUNTARY TRANSFER

- a) Ascertain the mode of winding up.
- b) Ascertain the relevant date.



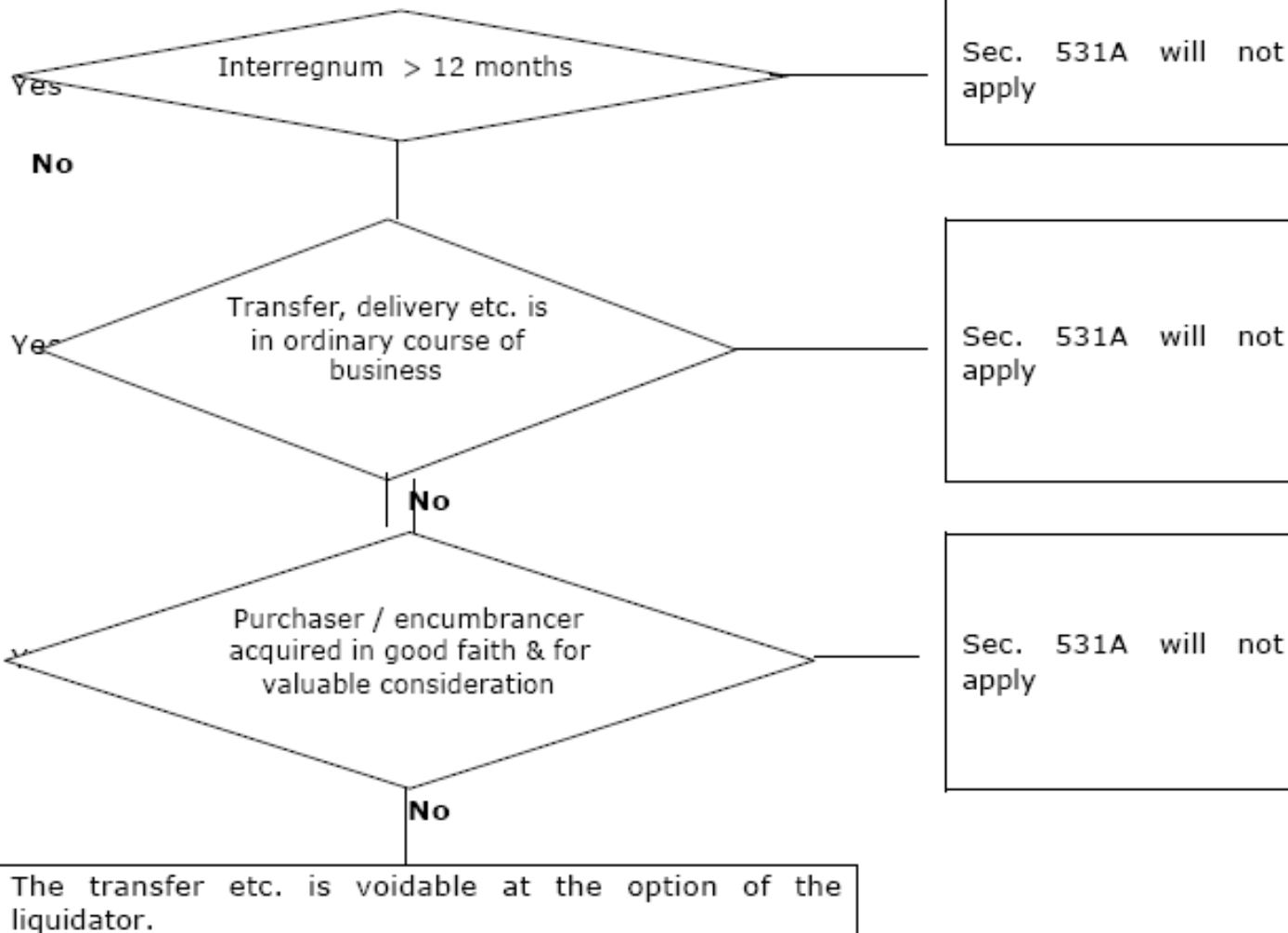
c)

Date of:

- * Transfer of immovable / movable property
- * Delivery of goods

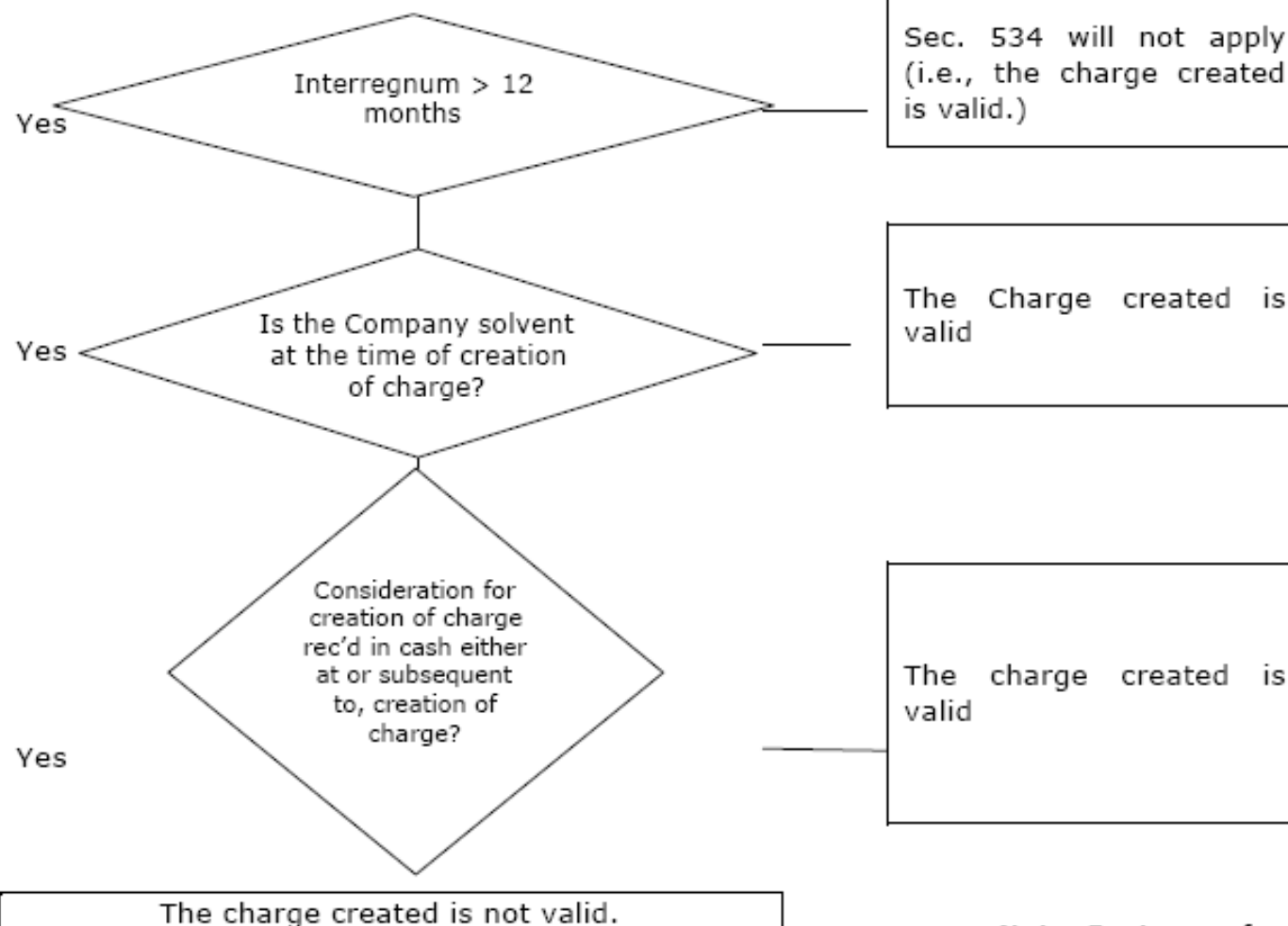
Interregnum

Relevant date



Section 534: EFFECT OF FLOATING CHARGE:-

Ascertain the interregnum between the date of creation of charge & the date of commencement of winding up.



Note: Features of a floating charge:

- (i) Not on a particular assets.
- (ii) Also on prospective assets.
- (iii) Subsequent charge > earlier charge.

A	Loan	A Ltd	5/11/2000 (no charge created for the loan)
B	Loan	A Ltd.	6/12/2000 (Floating Charge created in favour of B)

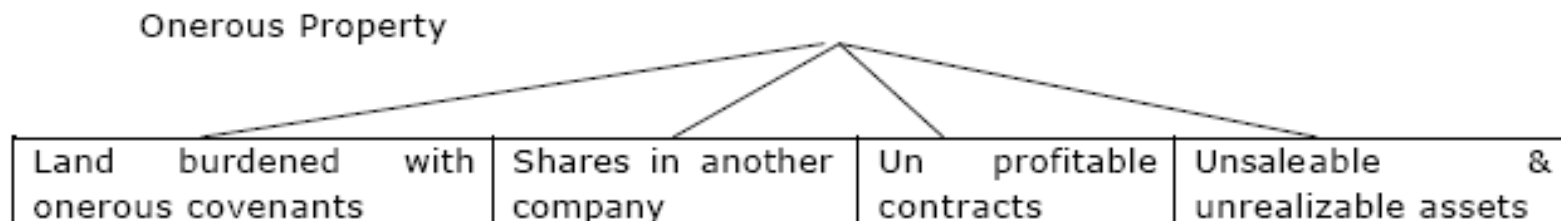
Date of commencement of winding up is 31.12.2001.

The Company became insolvent on 31.3.2001

A obtained this secret information on 31.3.2001.

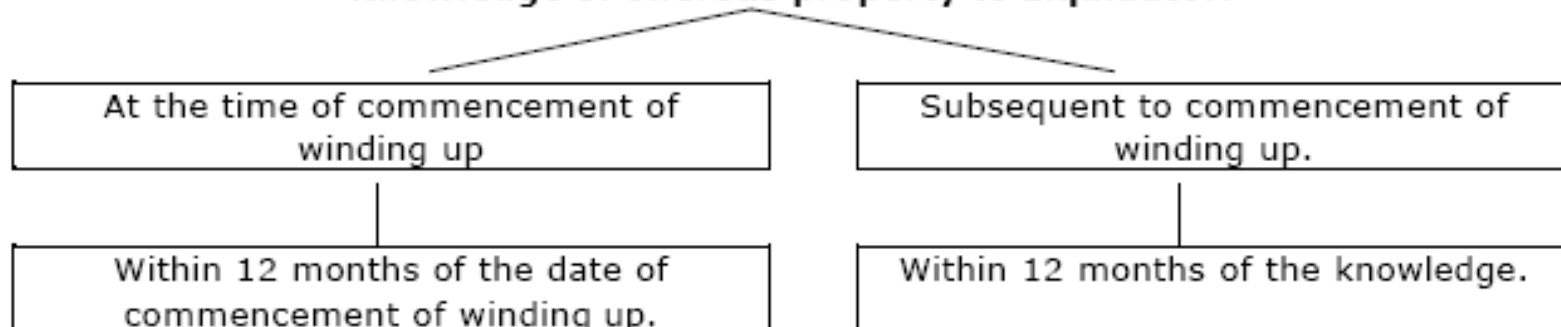
He required the company to create a floating charge in his favour. But for Sec. 534, this charge > charge in favour of B. (thus B loses because of not having access to inside information)

Section 535: DISCLAIMER OF ONEROUS PROPERTY IN CASE OF A COMPANY WHICH IS BEING WOUND UP

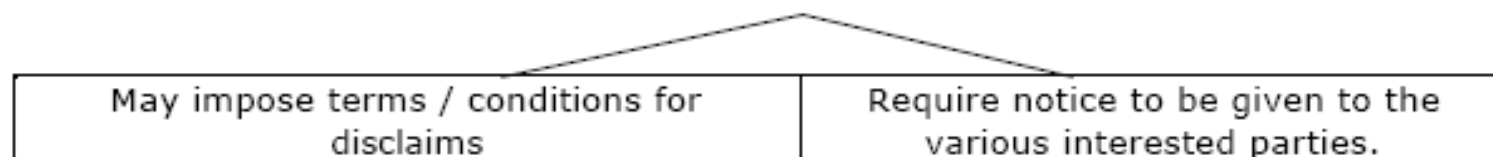


Time limit for disclaimer:

Knowledge of onerous property to Liquidator.

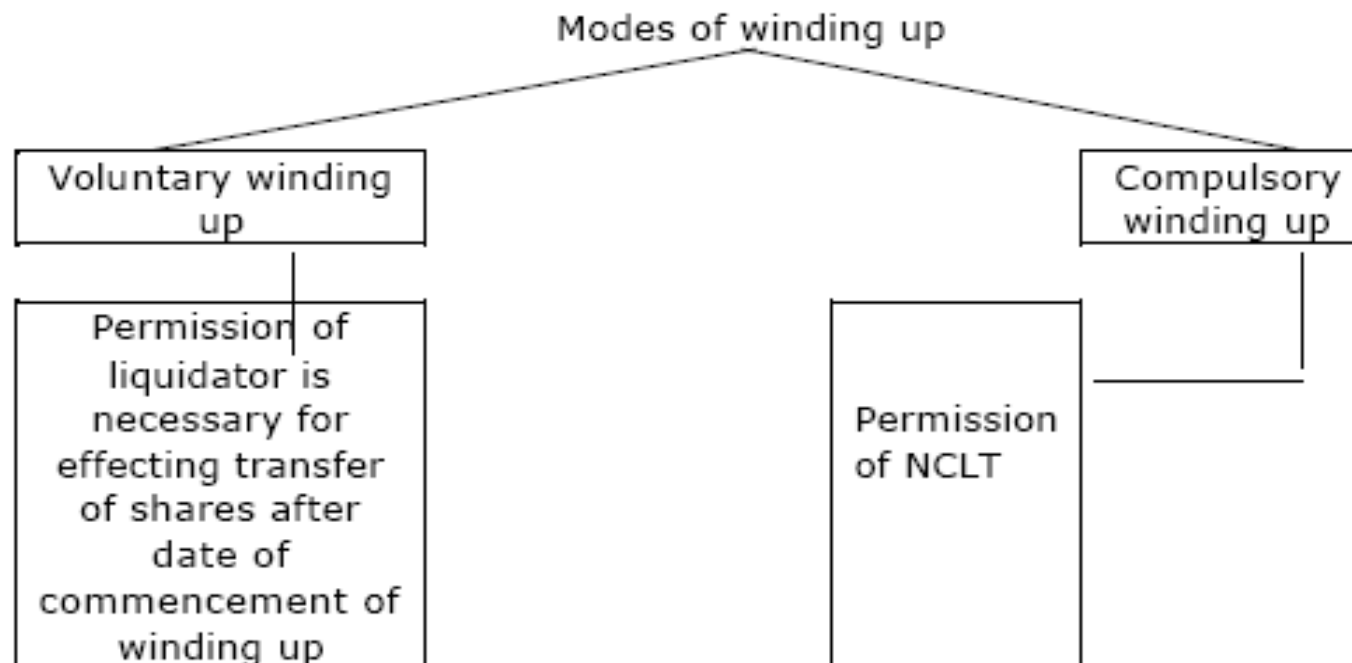


⇒ NCLT's sanction necessary
NCLT



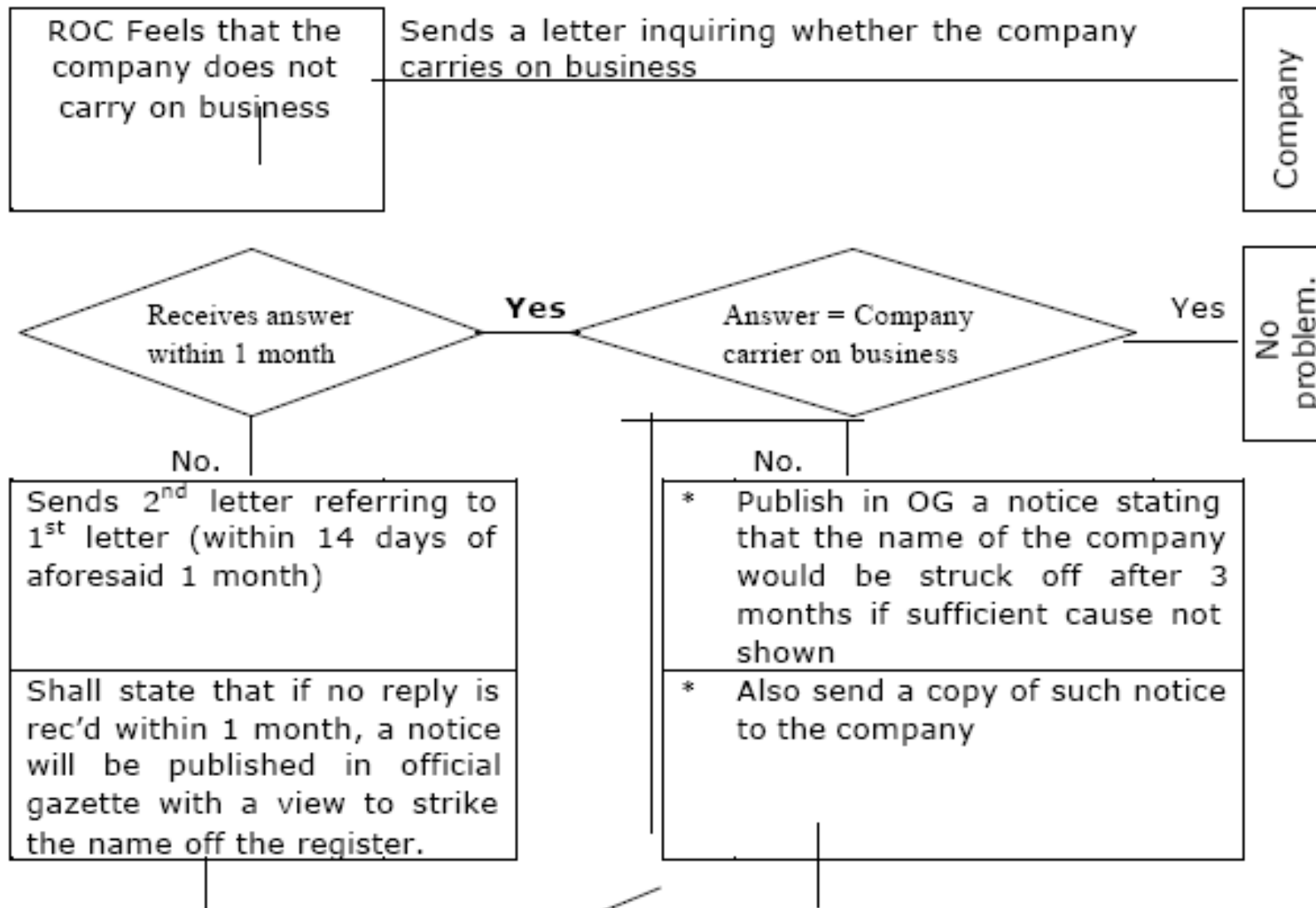
- ⇒ Interested parties can approach Liquidators to know whether, he is going to disclaim the property.
He should reply within 28 days. Otherwise, he loses his right to disclaim.
- ⇒ The NCLT can order damages to be paid to the interested parties.
- ⇒ The NCLT can also require the Liquidator to transfer the property concerned to the interested parties. But the property transferred will be transferred only along with the onerous covenants.

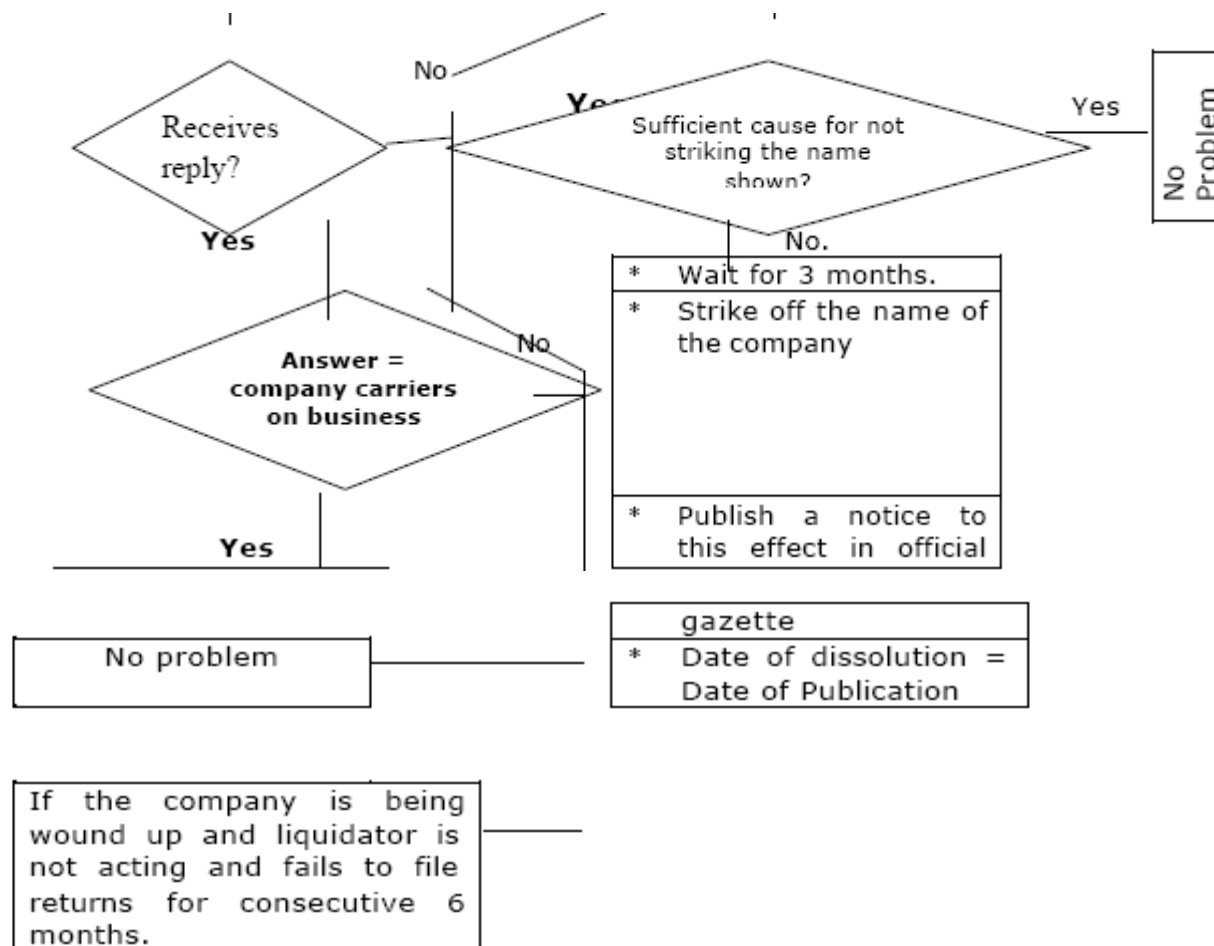
Section 536: AVOIDANCE OF TRANSFERS ETC AFTER COMMENCEMENT OF WINDING UP



PROVISIONS RELATING TO DISSOLUTION

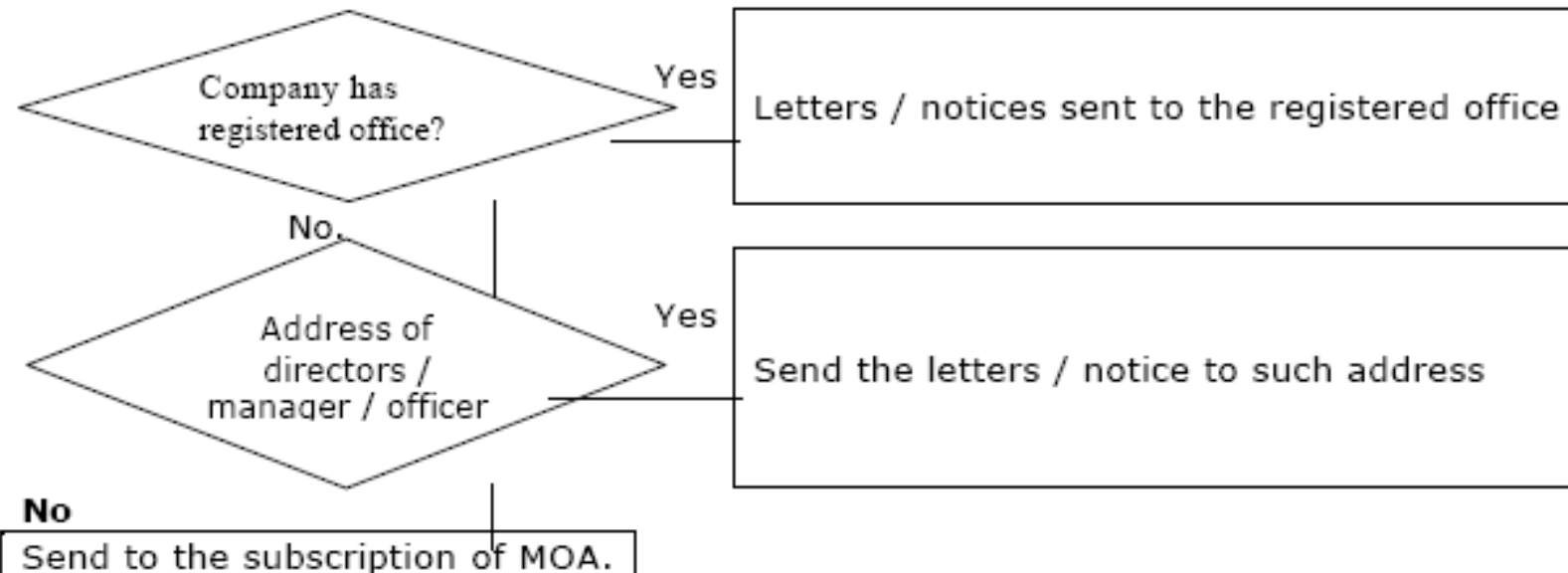
Section 560: POWER OF ROC TO STRIKE DEFUNCT COMPANY OFF REGISTER





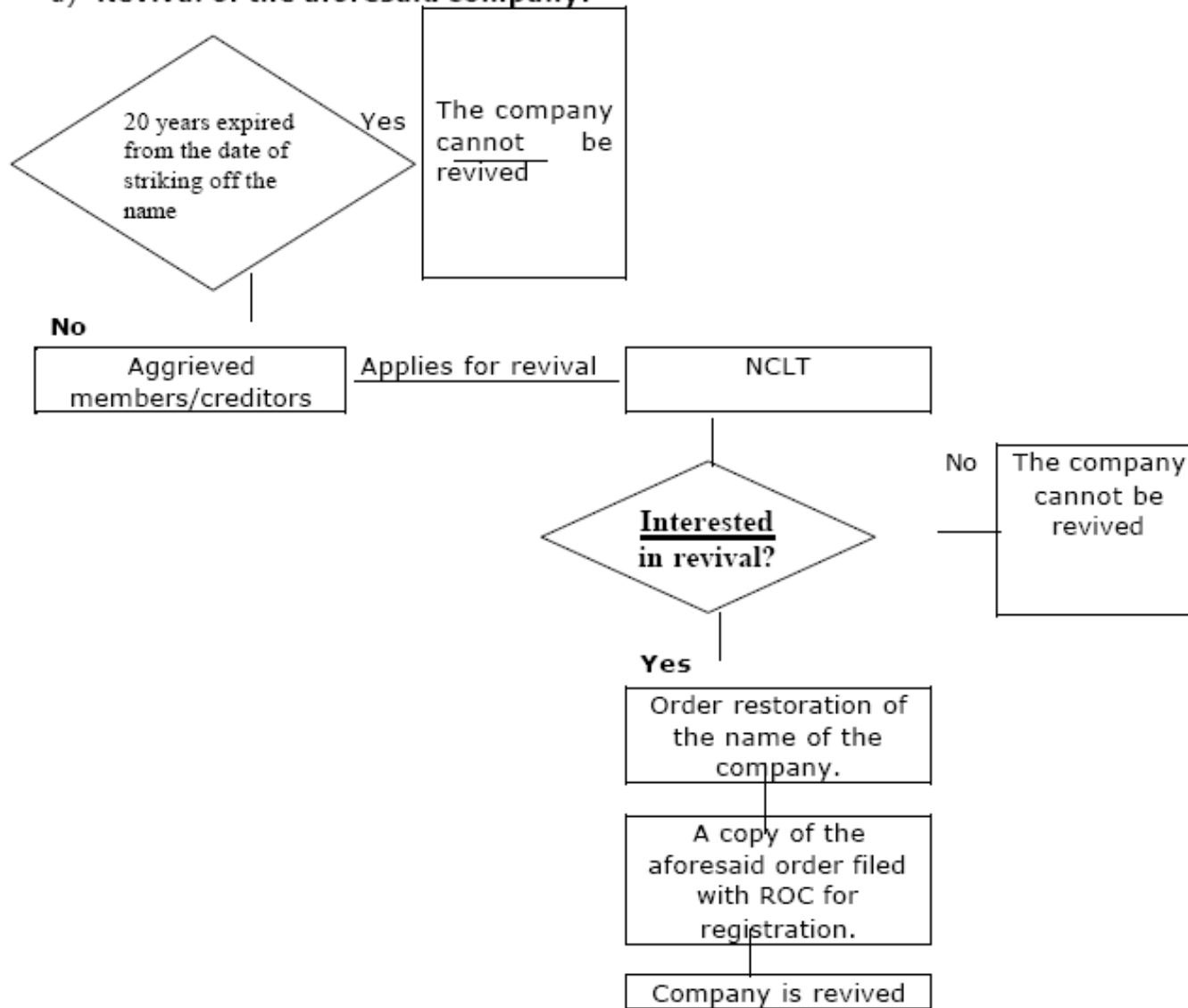
SPECIAL POINTS:-

a) To whom the aforesaid letter / notices – should be addressed



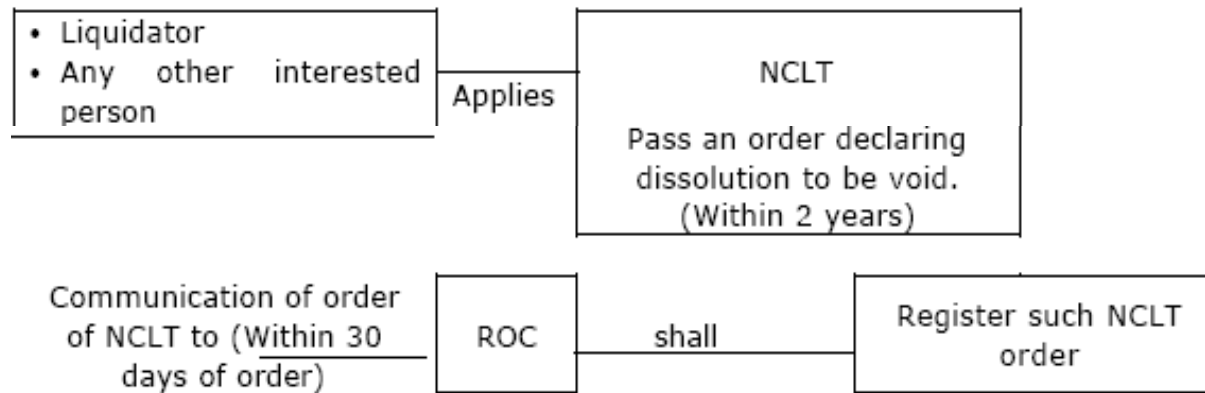
- b) Liability of director / manager etc will continue even if the company is dissolved in the aforesaid manner.
- c) Even if the company is dissolved in the aforesaid manner still it can be wound by NCLT.

d) **Revival of the aforesaid company:**



Note: Status quo of the company & various interested parties is protected by NCLT order.

REVIVING THE DISSOLVED COMPANY (SEC. 559)



WINDING UP OF UNREGISTERED COMPANY

Section 582: MEANING OF UNREGISTERED COMPANY

Includes:

Any partnership	Consisting of more than seven members, at the time when winding up petition is presented before the NCLT.
Any association	
Any company	

Section 583: WINDING UP OF UNREGISTERED COMPANY

- 1) **Mode of winding up:** Only winding up thro' NCLT (i.e. compulsory winding up) is possible.
- 2) **Grounds for winding up**
 - a) Company is dissolved.
 - b) Company ceases to carry on business.
 - c) Company carries on business for the purpose of winding up.
 - d) Company is unable to pay debts
 - e) Just & equitable clause.

3) **Relevant provisions governing winding up:**

All provisions relating winding up of a company applies (subject to the provisions of this part)

Section 584: POWER TO WINDUP FOREIGN COMPANY ALTHOUGH DISSOLVED

A Foreign Company, which is carrying on business in India, could be wound up as an unregistered company even though it has been dissolved as per foreign law.

Chapter *17*

**COMPANIES INCORPORATED OUTSIDE INDIA
(FOREIGN COMPANIES)**

(Section 591 to Section 608)

Section 591: SECTION 592 –SECTION 602 APPLIES TO FOREIGN COMPANY

Provisions of Section 592 to Section 602 apply to a Company incorporated outside India & having a place of business in India.

Exception:

The aforesaid provisions will not apply to a Company incorporated outside India & having a place of business in India, in which at least 50% of paid up Capital (Equity or Preference) is held singly / jointly by

- ⇒ Indian citizens
- ⇒ Body corporate incorporated in India

Note: Place of business includes, share transfer office or share registration office (Sec602)

Section 592: DOCUMENTS ETC THAT ARE TO BE DELIVERED TO ROC BY A FOREIGN COMPANY CARRYING ON BUSINESS IN INDIA.

1) Documents etc to be delivered:

- i. Certified copy of the charter / memorandum defining the constitution of the company in English language. If it is not in English language, then a certified translation.
- ii. Address of its Registered Office.
- iii. Address of Principal place of business in India
- iv. Name & address of person resident in India to whom all communication is to be sent
- v. Particulars regarding

Directors and Secretary

- | | |
|-------------------------------------|-------------------|
| a) Name / surname | a) Name / surname |
| b) Address | b) Address |
| c) Nationality | |
| d) Occupation | |
| e) Directorships in other concerns. | |

Section 593: RETURN TO BE DELIVERED TO ROC BY FOREIGN COMPANY WHERE DOCUMENTS ETC TO BE ALTERED

If alteration is made with respect to (i) to (v) above, then a return should be filed with ROC incorporating the details of such alteration.

Section 594: ACCOUNTS OF FOREIGN COMPANY

- 1) Every foreign company should make out a Balance sheet and profit and loss a/c along with annexures & attachments (as required by companies act) – For every calendar year.
- 2) Three copies of above should be filed with ROC.
- 3) Along with the above documents, the company should file three copies of a list containing the places of business established by the company in India
- 4) CG has power to modify/ exempt any of the above requirements

Note:

- If documents are not in English, then a Certified translation should be annexed.
- The documents should be filed with ROC within 9 months.
- Where the foreign company has only a liaison office in India & does not carry on any trading, manufacturing or commercial activities in India, then it is enough if the following documents are filed:
 - a) Copy of RBI letter giving it permission to open such office.
 - b) Receipts & payments a/c relating to Indian operations (duly audited).
 - c) Assets & liabilities in India (duly audited).
 - d) Certificate that company doesn't carry any manufacturing / trading / business activity.

Section 595: OBLIGATION TO STATE THE NAME, COUNTRY, and LIABILITY ETC.

Document	Particulars
i. Prospectus	* Country in which the company is incorporated. * The fact that the liability of the company is limited. (In case of a limited Company)
ii. Billheads, letter paper, business letter, notices & other official publications & advertisements.	* Name of the Company * Country in which the Company is incorporated * The fact that the liability of the Company is limited (In case of a limited Company) (In legible English characters)
iii. Outside every office / place of business in India	* Name * Place of incorporation * Liability limited (in case of limited Company) * In addition to local languages also in English.

Section 596: SERVICE ON FOREIGN COMPANY

- 1) Notice, process or documents should be served on the person, who is authorised on behalf of the company to receive them.
- 2) But in the following situation, serving on the company at any place of business established in India is sufficient service:
 - a) Company has not delivered to ROC, the name & address of the person to whom notice etc are to be served (or)
 - b) Such person is dead (or)
 - c) Such person has ceased to be in such address (or)
 - d) Such person refuses to accept the notices etc served.

Section 597: OFFICE WHERE DOCUMENTS TO BE DELIVERED

Above documents should be delivered to

- ROC (New Delhi)
- ROC (State where principal place of business situate.)

Note: If a company ceases to have place of business in India, Notice should be given to ROC. Thereafter the company has no obligation to file any document with ROC.

Section 599: EFFECT OF NON-COMPLIANCE WITH SECTION 591 –603

- (a) Contracts etc entered by the company is still valid and the Company can be sued with respect to such contracts but
- (b) The Company cannot sue or initiate legal proceedings in respect of such contracts.

Section 600: REGISTRATION OF CHARGES, APPOINTMENT OF RECEIVER & BOOKS OF A/C

- 1) **Section 124 to 145** relating to registration of charges applies mutatis mutandis to foreign company also
- 2) **Section 118** Right to obtain copies of and inspect trust deed applies mutates mutandis to foreign company also
- 3) **Section 209, 209A, 233A, 233B, 234 and 246** applies to Indian business of foreign company. The books should be kept at the principal place of business in India.
- 4) **Section 159** relating to filing of annual return applies to foreign Company also.

Prospectus Section 603 to 608

Section 603: DATING OF PROSPECTUS & PARTICULARS TO BE CONTAINED THEREIN

- 1) Offering shares / Debentures for public subscription by a foreign company is prohibited.
- 2) But if the following conditions are fulfilled, then it is allowed:
 - a) Prospectus should be dated.
 - b) Prospectus should contain the following particulars:
 1. Instrument defining the constitution of the company.
 2. Enactment under which the company is incorporated
 3. Address in India where the above documents /instruments could be seen.
 4. Date of incorporation.
 5. Country in which the company is incorporated.
 6. Address of principal place of business in India.
 7. Matters specified in Schedule II Part I
 8. Reports specified in Schedule II Part II

Note: If the company is issuing prospectus after 2 years from the date on which the company is entitled to commence business, then it need not contain the particulars mentioned in (i) (ii) & (iii) above.

- 3) Any condition in prospecting requiring the applicants of shares/debentures to waive the above requirements is void.
- 4) Application form should be issued only along with prospectus.
- 5) Directors/ other persons, responsible for issue of prospectus are not liable for non-disclosure of the above particulars in the following cases: -
 - a) If they prove that they have no knowledge of non-disclosure
 - b) If non-compliance was due to a honest mistake on their part.
 - c) If non-compliance was with respect to immaterial matters. (According to court)
- 6) This Section does not apply to: -
 - a) Rights issue (whether shareholder has right to renounce rights issue or not)
 - b) Issue of shares, which are same in all respects to previously, issued shares, which are listed in recognized stock exchange.

Section 604: PROVISION AS TO EXPERTS CONSENT AND ALLOTMENT

- 1) If any prospectus is issued containing a statement purporting to be made by an expert then, care should be taken to ensure that:
 - a) The consent of the Expert is obtained to include such statement in the prospectus and
 - b) It has been included in the prospectus in the correct form & context.

2) **Note:** Meaning of expert

Expert includes

- | |
|--|
| <ol style="list-style-type: none">a) Engineerb) Valuerc) Accountant ord) Any other person |
|--|

Whose profession gives authority to a statement made by him?

Section 605: REGISTRATION OF PROSPECTUS

- a) Prospectus should be certified by the chairman, and two other directors authorised by the BOD.
- b) Certified copy of prospectus should be delivered to ROC for registration
- c) Every copy of prospectus should state on its face that a copy has been delivered to ROC.
- d) The following should be attached to prospectus:
 - i) Expert's consent.
 - ii) Copy of contract required under Schedule II
 - iii) Copy of Report under Schedule. II along with details of adjustments made & the reason for making them.

Note: All the above should be in English/ at least been translated.

Section 607: CIVIL LIABILITY FOR MISSTATEMENTS IN PROSPECTUS

Provisions of Sec 62 apply also to a prospectus issued by a foreign company.

Section 608: Provisions relating to deemed prospectus applies also to foreign Company.

Chapter *18*

PRODUCER COMPANIES

(1) Introduction:

A Company is an association formed for the purpose of business or gain. The voting power in a company is proportionate to the shareholding of its members. The company is a Union subject covered in entries 42 & 44 of list-1 (Union List).

As against a company, a Co-operative Society is formed for the purpose of mutual assistance based on Co-operative principles. Here, every member is having only one vote irrespective of the shareholding. It is a state subject covered in entry 32 list-2 (State list)

Reasons for enactment of Multiple State Co-operative Societies Act:

Cooperative principles have considerably helped the growth of rural economy in India. Since cooperative society is a state subject, its activities are required to be restricted to one state. This had all along been an impediment to the growth of the societies, which intends to extend its objective beyond one state. This was the reason, why precisely, the multi-state cooperative society Act was enacted in 1942. This Act had undergone changes twice (1984 & 2002).

Need for insertion of Part IX A in Companies Act.

Since the rural economy is growing and the technology is changing fast, there is a need to link the rural economy to the emerging opportunities. Thus it was felt the cooperative enterprises should have an alternative form to grow (i.e., a corporate form of organisation). This has made the parliament to insert. Part IX A in the companies Act (consisting of Sec 581A – 581ZT).

Constitutional background for insertion:

Entry 43 list-1 provides for incorporation & regulation of trading corporations but not cooperating societies. But entry-44 list-1 provides for incorporation of corporations, whether trading or not, with objects not confined to one state. Thus insertion & part IX-A in Companies Act (regarding cooperative enterprises) is constitutionally valid (as per entry-44, Supra).

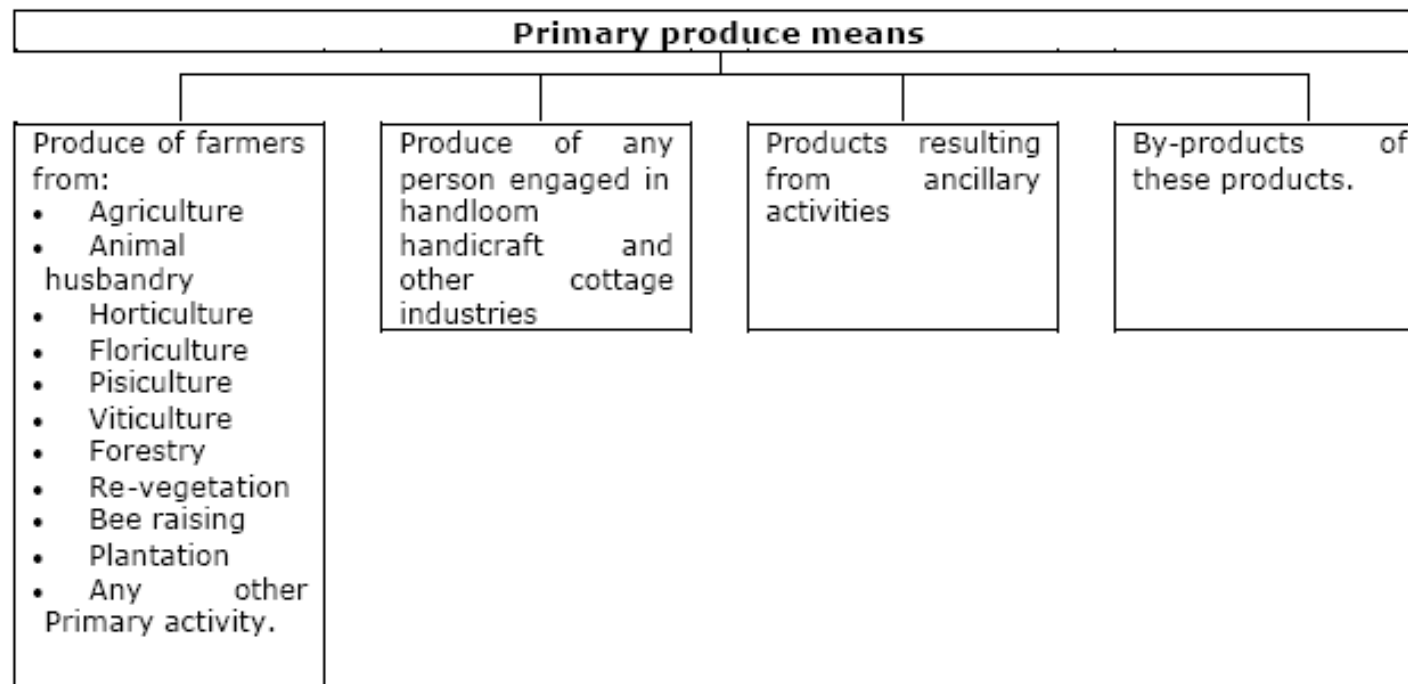
(2) **Meaning of Producer Company: -**

A Producer company means a body corporate registered as such under Companies Act. It should have objects specified in Sec.581B. It is formed by producers / producer institutions.

Meaning of producer:

Person engaged in any activity connected with primary produce.

Meaning of Primary Produce:



Note: Primary activity will include any activity intended to increase production or improve quality of the primary produce.

Producer institution: **A producer institution means Producer Company or any other institution having only producers or producer companies as its member.**

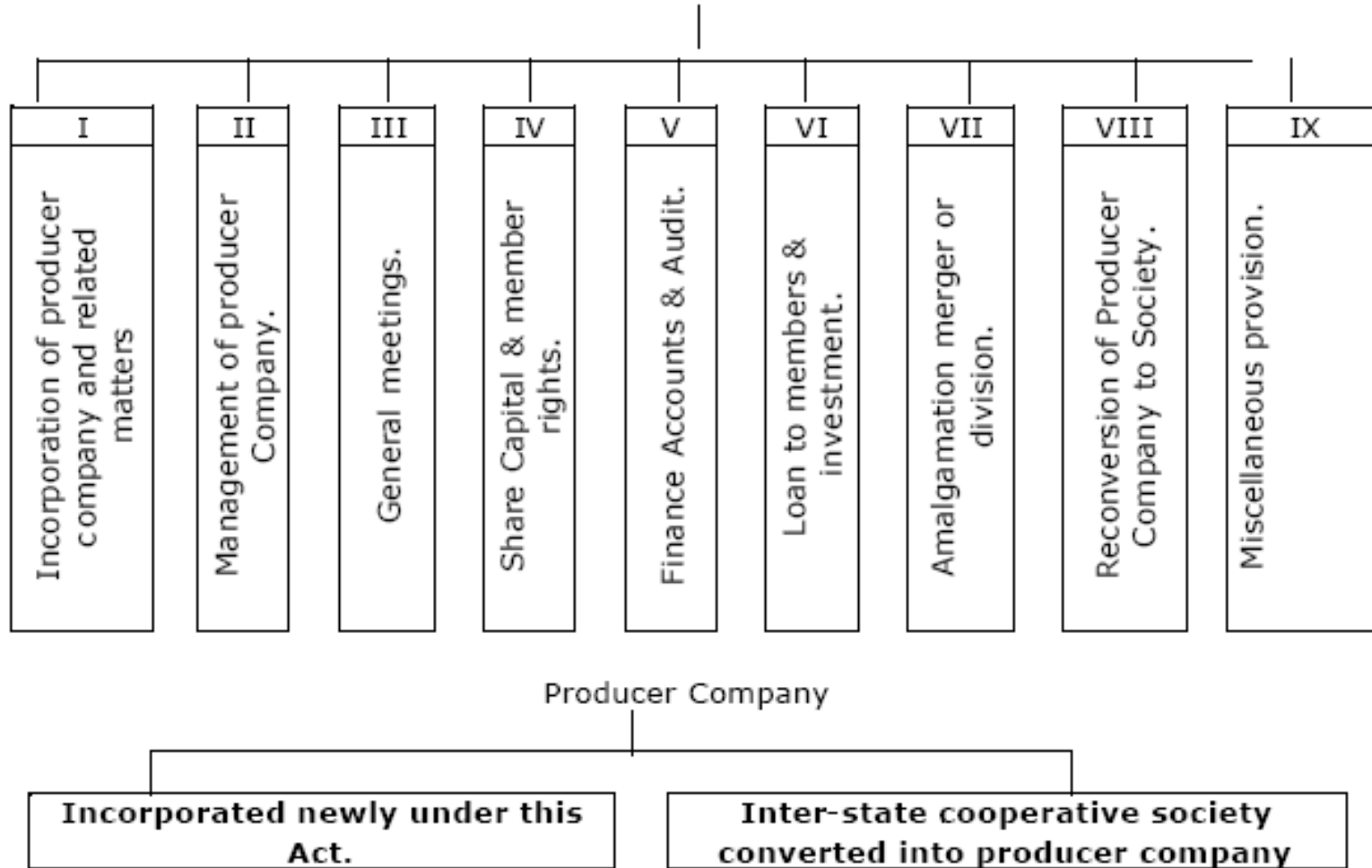
Note: The other institutions may or may not be incorporated but these should have any of the objects specified in Sec. 581B and should agree to make use of services of producer companies.

(3) Objects of Producer Company (Sec. 581-B)

Objects of a producer company may relate to any or all of the following matters:

- Production, grading, marketing, harvesting, pooling, selling, procurement and handling export / import of primary produce of its members. These activities may be carried on directly or indirectly.
- **Processing including preserving, drying, distilling, brewing, vinting, canning packing of produce of its members.**
- Manufacture, sale or supply of machinery, equipment or consumable to its members.
- Providing education on the mutual assistance principles to its members & others.
- Rendering technical services, consultancy services, training, research and development for the promotion of the interests of its members.
- Generation, transmission and distribution of power, revitalization of land and water resources (for the purpose of primary produce)
- Insurance of producers or primary produce.
- Promoting techniques of mutuality and mutual assistance.
- Welfare measures for the benefit of members.
- Any other incidental activities.
- Financing of aforesaid activities.

(4) Scheme of part IX –A.



(5) **Incorporation and related matters.**

a) **Formation & registration: - (Sec. 581C)**

Minimum number of persons required for formation:

Producer company will be having only individuals.		Producer company will be having only producer institution.		Producer company will be having both.	
Minimum persons = 10 producers		Minimum Persons = 2 Producer institutions		Minimum Persons = 10 Producers & Producers institutions.	

Issue of certificate of incorporation by ROC: -

- If ROC is satisfied with all the formalities it shall register MOA, AOA & all other documents filed with it and issue a certificate of incorporation.
- These should be done within 30 days of filing of documents.

Re-imbursement of incorporation expenses: -

- The producer company shall reimburse all expenses of and incidental to promotion & registration of it. (e.g. Legal fees, registration fees, printing charges of AOA / MOA)
- The above payment should be approved in the 1st GM of members.

b) Contents of MOA (Sec. 581F)

- Name with "producer company Limited" as the last words.
- State in which the registered office is to situate.
- Main objects (from sec. 581B)
- Names & addresses of subscribers to MOA and shares taken by them.
- Share Capital and its division.
- Name, addresses and occupation of subscribers (being producers) who shall act as first director of the company.
- Limited liability.
- States to whose territories the objects extend.

c) Amendment of MOA: (Sec. 581H)

- Amendment is allowed only to the extent and in the manner specified in the Act.
- Alteration of objects needs special resolution and such alternation should not be inconsistent with the Sec. 581B.
- Alteration of location of registered office from one state to another requires confirmation by tribunal.
- A copy of amended MOA, along with the special resolution should be certified by two directors and a certified copy should be then filed with ROC within 30 days of passing the aforesaid resolutions.

- As a result of change in the registered office of the Producer Company, there may be changes in the jurisdiction of ROC, in such case, a copy of special resolution certified by two directors, shall be filed with both the ROC's. (Within 30 days). Thereafter the ROC losing jurisdiction shall forward all the documents relating to such producer company, to the ROC gaining jurisdiction.

d) **Contents of AOA: - (Sec. 581G)**

(i) **Mutual assistance principles: -**

- The membership shall be voluntary and available to all eligible persons, who can participate or avail of the facilities or services of the producer company and are willing to accept the duties of membership.
- **Each member shall have only one vote, irrespective of the shareholding.**
- BOD shall administer Producer Company and BOD is accountable to members.
- There shall be limited return on share capital.

Note: Limited return means maximum dividend specified in AOA.

- Surplus arising out of operations:
 - ⇒ Shall be used for development of its business.
 - ⇒ Shall be used for providing common facilities
 - ⇒ Shall be distributed among its members based on their participation in the business.
- Education of members, employees and others, on the principles of mutuality and techniques of mutual assistance.
- The Producer Company shall cooperate with other producer companies, operating at local, national or international level.

(ii) **Other Contents:**

Details regarding members:

- Qualifications for membership
- Conditions for continuance.
- Conditions for Cancellation.
- Terms, conditions & procedure for transfer of shares.
- Manner of ascertaining patronage.
- **Determination of voting right based on patronage.**

Note: Patronage means the use of services provided by producer companies to its members by participation in its business activities.

- Manner of disbursement of patronage bonus

Note: Patronage bonus means payment to the members out of surplus income in proportion to their respective patronage.

- Conditions for grant of credit to members.
- Matters relating to issue of bonus shares out of general reserve
- Manner of allotment of equity shares to the members in lieu of the sale proceeds of the products supplied by them.
- Manner of voting at General /Special Meetings.

Details regarding BOD

- Manner of constitution of BOD
- Minimum / maximum number of directors.
- Manner of election & appointment of directors.
- Retirement by rotation and term of office of directors
- Qualification for election.
- Powers & Duties of directors.
- Power to appoint additional directors
- Removal procedure.
- Procedure for filling vacancies.
- Procedure for appointment of chief executive.
- Procedure for voting in directors meeting.
- Election of chairman.
- Powers of Chairman.
- Circumstances under which he can exercise casting vote.

Details regarding raising funds:-

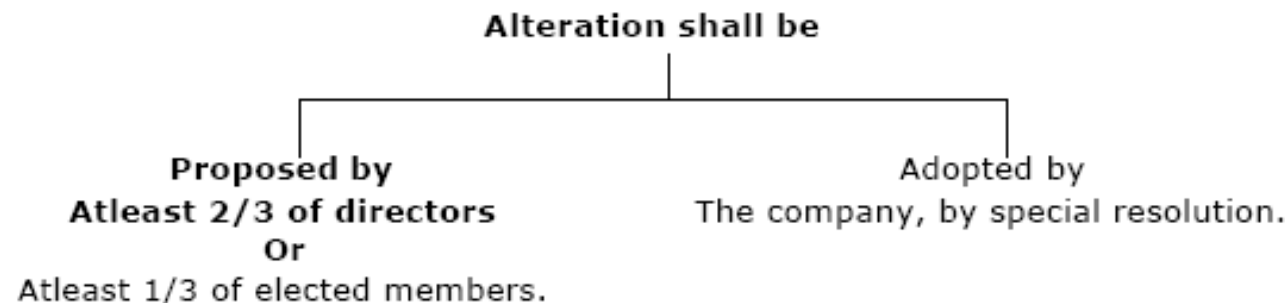
- Amount / ceiling on raising funds.
- Sources
- Restriction on usage of such funds.
- Conditions for raising debt & its extent.

Miscellaneous contents:

- Manner of sharing surplus after winding up.
- Authorisation for Demerger, Merger, Flotation of subsidiaries, Amalgamation, Entering into joint ventures.
- Laying down of MOA / AOA within 90 days of registration.
- Determination of withheld price & its distribution.

Note: withheld price means, part of the price payable to the goods supplied by any members, retained by Producer Company for payment on a subsequent date.

e) Alteration of AOA (Sec. 581-I)



- 2 directors should certify altered AOA. It shall along with a certified copy of SR be, filed with ROC within 30 days of adoption.

6) Conversion of inter-state Co-operative society into producer companies.
(Sec. 581J)

a) Eligibility for conversion.

Any inter state cooperative society with objects extending beyond one state may make an application to ROC for registration as Producer Company.

b) Annexures to application.

- A copy of special resolution agreeing for conversion into Producer Company (approved atleast by 2/3 members).
- A statement containing names, addresses and occupation of directors & chief executives.
- A list of members.
- A statement showing that it has any one of objects mentioned in Sec. 581B.
- Declaration as to the correctness of the aforesaid details.

Note: atleast 2 directors should sign declaration.

c) Issue of certificate of incorporation.

Once all the formalities are completed, ROC shall issue the COI (within 30 days of receipt of application).

d) Intimation to registrar of co-operative societies.

On incorporation, ROC shall intimate immediately to registrar of co-operative societies for cancellation of its name from the register.

e) Effects of registration:- (Sec 581-J, 581-K, 581-L, 581-M, 581-N)

- On incorporation "the words producers company limited" shall be added to its name in the last (Sec. 581J)
- Provisions of part IX-A shall apply. (Sec. 581J)

Effects of registration:-

- **Shareholders of the society will become shareholders of Producer Company without any change in their interest. (Sec. 581K)**
- All assets of the society shall vest with the Producer Company (Sec. 581L)

Note: Assets = movable + immovable + actionable claims.

- All rights, debts, liabilities, interest, privileges and obligations of the Society shall vest with the Producer Company (Sec. 581L)
- All contracts to which the society was a party will instead now, have Producer Company as party. (Sec. 581L)
- The producer company shall, now manage every organisation managed earlier by the society. (581 L)
- Every organisation getting financial, managerial or technical assistance from the society may continue to get such assistance from the Producer Company. (Sec. 581L)
- Capital of Producer Company = Capital of society (Sec. 581 L)
- Any reference to the society in any law, any contract or instrument shall be deemed to refer the Producer Company. (Sec. 581L)
- Legal proceedings by / against the society shall continue by / against the producer company (Sec. 581L)
- Fiscal and other concession, licenses, benefits exemption and privileges granted to society shall be available to Producer Company. (Sec. 581M)
- All the directors in the society shall continue as directors in the Producer Company for a period of 1 year. (Sec. 581N)
- **Every officer / employee of the society shall continue as officer/ employee of the producer continue on same terms & conditions. (Sec. 581N)**

Note: If an employee decides otherwise, he shall be deemed to have resigned the office.

Effects of registration:-

- No compensation shall be legally enforceable, for transfer of services from the society to the Producer Company (Sec. 581N)
- Officers / employees who retired before conversion, are entitled to receive the retirement benefits from the company (which they were receiving from the society) (Sec.581-N)
- PF & other welfare funds created for the welfare of the employees by the society shall be entrusted with the Producer Company. (Sec. 581-N)
- No director / MD / Chairman / any other managerial personnel shall be entitled for any compensation from the society / company for the premature termination of their office. (Sec. 581-N)

7) **General meeting: - (Sec. 581ZA)**

a) **Deadline for holding AGM:**



First AGM: should be held within 90 days from the date of incorporation.

Subsequent AGM

- 31st December of each year (because the word used is "each year" year = calendar year)
- Gap between two AGMs should not be more than 15 months.

b) **Power of ROC to extend the dead line:**



c) **Time, day, place of AGM:**

Time – business hours.

Day – any day other than a public holiday.

Place – Registered office/any place within the same city, town or village.

d) **Notice:**

- ⇒ Contents of notice: date, time & place
- ⇒ Documents to be accompanied with the notice:
 - Agenda
 - Minutes of previous AGM/EGM.
 - Names, qualification etc of candidates standing for director's post.
 - Audited B/S & P&L account.
 - BOD's report.
 - Text of draft resolution for auditor's appointment
 - Text of draft resolution for amending MOA/AOA.
- ⇒ **Length of notice:** 14 days.

Note: BOD report's contents:

- The state of affairs of Producer Company.
 - Amount proposed to be carried to reserves.
 - Amount to be paid as limited return on share capital.
 - Amount proposed to be disbursed as patronage bonus.
 - Material changes & commitments.
 - Details regarding energy conservation, environmental protection, Forex inflow / outflow.
 - Any other matters.
- e) **Quorum:** $\frac{1}{4}$ (of total members) for AGM. (AOA can provide higher quorum)
- f) **Business at AGM:** adoption of AOA; appointment of directors.
- g) **Filing of annual accounts minutes & annual return with ROC:** Within 60 days of AGM date.

h) Appointment of representatives by producer institution:

- ⇒ Chairman / chief executive can be appointed as representative.
- ⇒ Producer institutions cannot appoint a representative if the following situations:
 - If it commits default in filing its annual accounts & returns for a period specified in sec. 581Q.
 - If it fails to repay deposits, withheld price, patronage bonus etc for a specified period.
 - If it fails in conducting election of directors.
 - If it fails to call AGM/EGM in accordance with the provisions of the Act.

i) Provisions relating to EGM:

- BOD can call EGM on receipt of requisition from requisite number of members.
- Requisite number of members = 1/3 (members entitled to vote)
- Provisions of sec. 169-186 will apply to holding EGM.
- Quorum = 1/4 of total number of members (unless to AOA specifies higher quorum. (Sec. 581Y))

8) **Share capital and member's right**

9)

a) **Share capital (section 581ZB)**

- Only equity shares can be issued.
- Shares held by a member in Producer Company shall be in proportion to the patronage.

b) **Transferability of shares (Sec. 581ZD)**

- Members can transfer shares only to an active member at par value.
- For the above, previous approval of the BOD is necessary.
- Within 3 months of becoming a member, the member shall appoint a nominee.
- On the death of a member, his shares shall vest the nominee.
- If the nominee is not a producer, the BOD shall direct the surrender of such shares at par value or such other value as may be determined by the BOD.
- If a member has ceased to be a primary producer or has failed to retain the prescribed qualification, the BOD shall direct the surrender of shares to the company at the par value or such other value as may be determined by it.

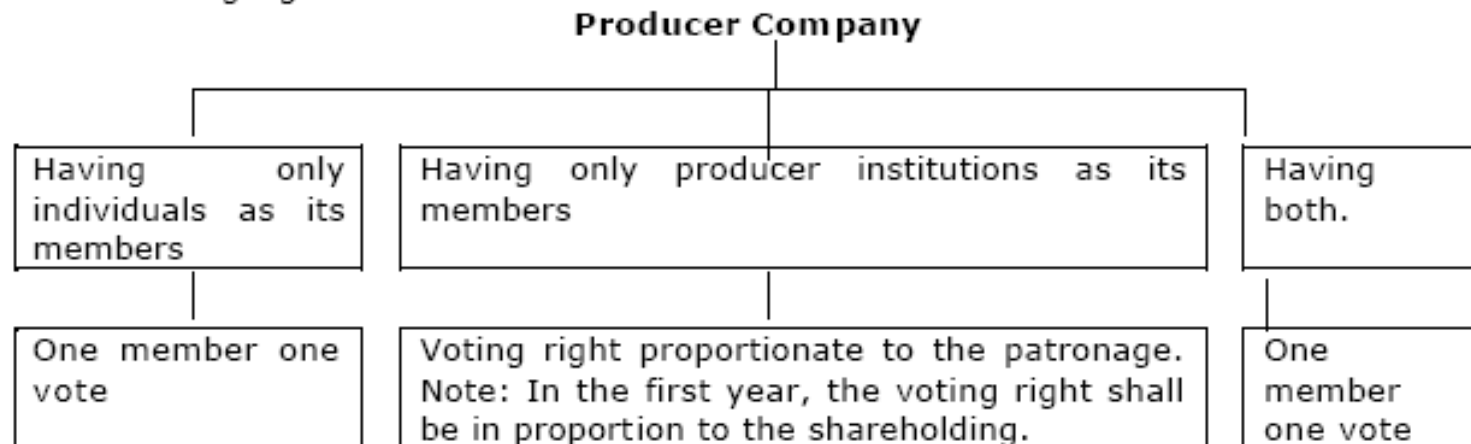
Note: opportunity of being heard should be given, before the BOD gives the aforesaid direction.

c) **Special user rights: (Sec. 581ZC)**

- Meaning: Special uses right means and right relating to supply of additional produce / or any other right relating to produce.
- Person entitled to it: only active members.
- Special uses rights can be conferred only when there is specific authorization in AOA.
- Provisions relating to transfer, nomination & surrender of shares apply mutatis mutandis to instruments conferring special rights.

d) **Membership & Voting rights: (Sec. 581D)**

⇒ Voting rights



⇒ AOA can restrict the voting rights to active members.

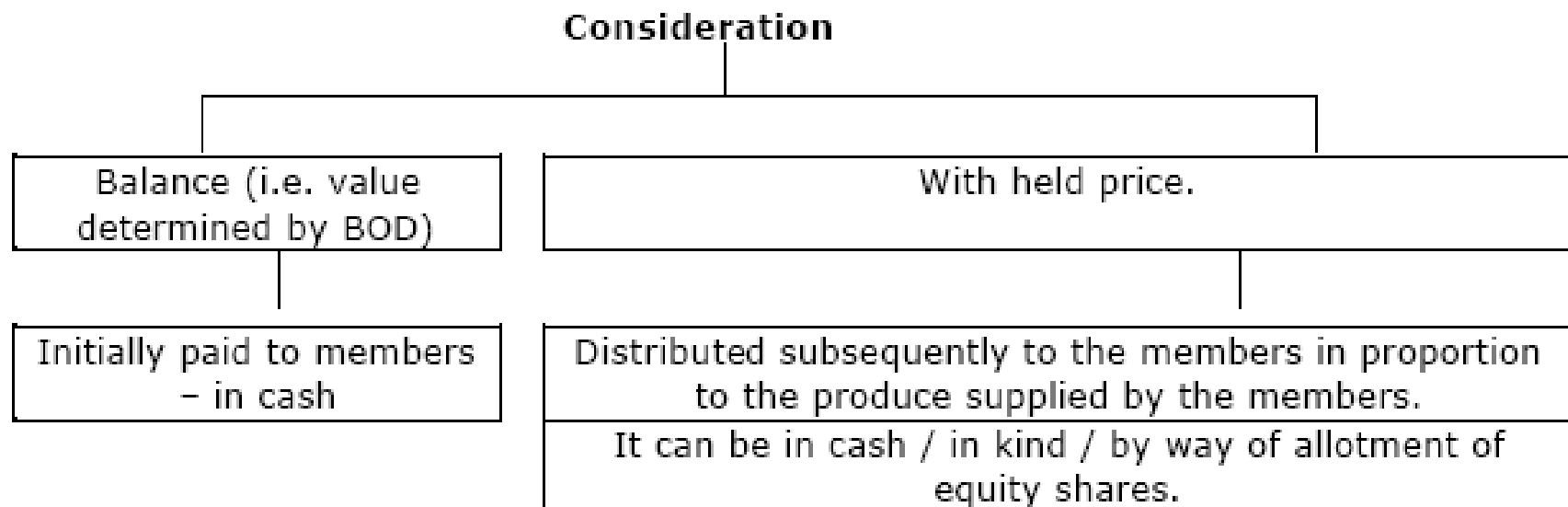
Note: The term active member means, the member who fulfils the quantum and period of patronage fixed by AOA.

⇒ **Qualification of membership:**

- AOA may prescribe qualification for becoming / continuation as members.
- Person having conflicting business interest with that of the producer company cannot become a member.
- On acquisition of the business interests that conflicts with that of the Producer Company, the member will cease to be so.

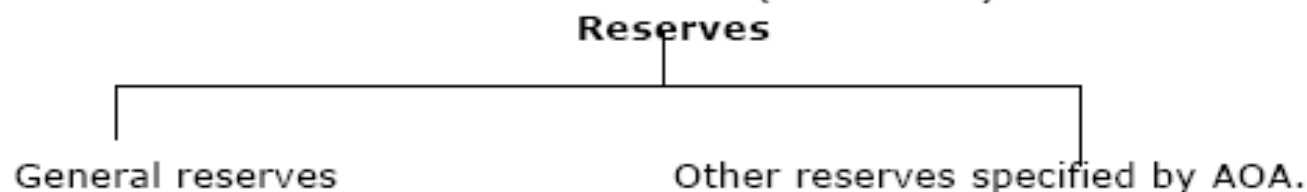
e) **Benefits to members. (Sec. 581 E)**

⇒ **Payment of consideration to members for produce supplied:**



- ⇒ **Limited return:** Every member shall receive only a limited return (on the capital contributed by him).
- ⇒ **Bonus shares:** The company may allot bonus shares out of its general reserves in accordance with Sec. 581ZJ
- ⇒ **Condition for bonus issue: (sec. 581ZJ)**
 - BOD should recommend.
 - Resolution should be passed in the GM.
 - Bonus shares shall be issued in proportion to the shares held by the members.
- ⇒ **Patronage bonus:**
 - The company may pay patronage bonus to its members.
 - It shall be in proportion to their participation in the business.
 - It can be in cash / in kind / by way of allotment of equity shares.
 - It should be only out of the surplus remaining after payment of limited return and transferring amount required to the general reserve.

⇒ **Note:** General & other reserves (Sec. 581ZI)



In case of insufficiency of funds, members shall contribute to such reserves in proportion to their patronage.

10) Finance, accounts and audit (Sec. 581ZE – 581ZI)

a) **Books of accounts:** (Sec. 581ZE)

⇒ **Books should relate the what:**

- Receipts & payments
- Assets & Liabilities
- Sales & Purchases
- Instruments of liability executed on behalf of Producer Company.
- Cost accounting records (if it happens to be a production company engaged in processing and manufacture)

⇒ **Location:** Registered office.

⇒ **B/S & P/L accounts:** should be as per sec. 211.

b) **Compulsory internal audit:** (Sec. 581ZF)

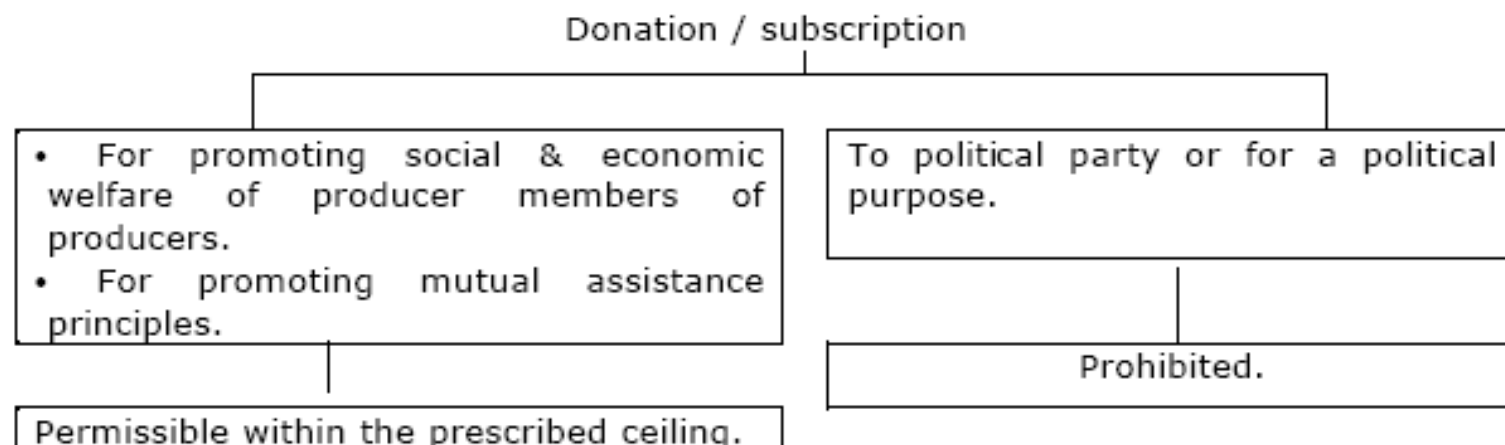
- Compulsory internal audit at such intervals and in such manner as prescribed by AOA.
- It shall be conducted by a chartered Accountant.

c) **Duties of auditor.** (Sec. 581ZG)

- ⇒ Sec. 227 duties applicable here also
- ⇒ Additional matters to be reported upon.
 - Amount of debts due (with particulars of bad debts)
 - Verification of cash balance and securities.
 - Details of assets & liabilities.
 - All transactions, which are contrary to this part.
 - Loans to directors.
 - Donations given by the company.
 - Such other matters. (Considered necessary by the auditors)

d) **Donations by Producer Company.** (Section 581ZH)

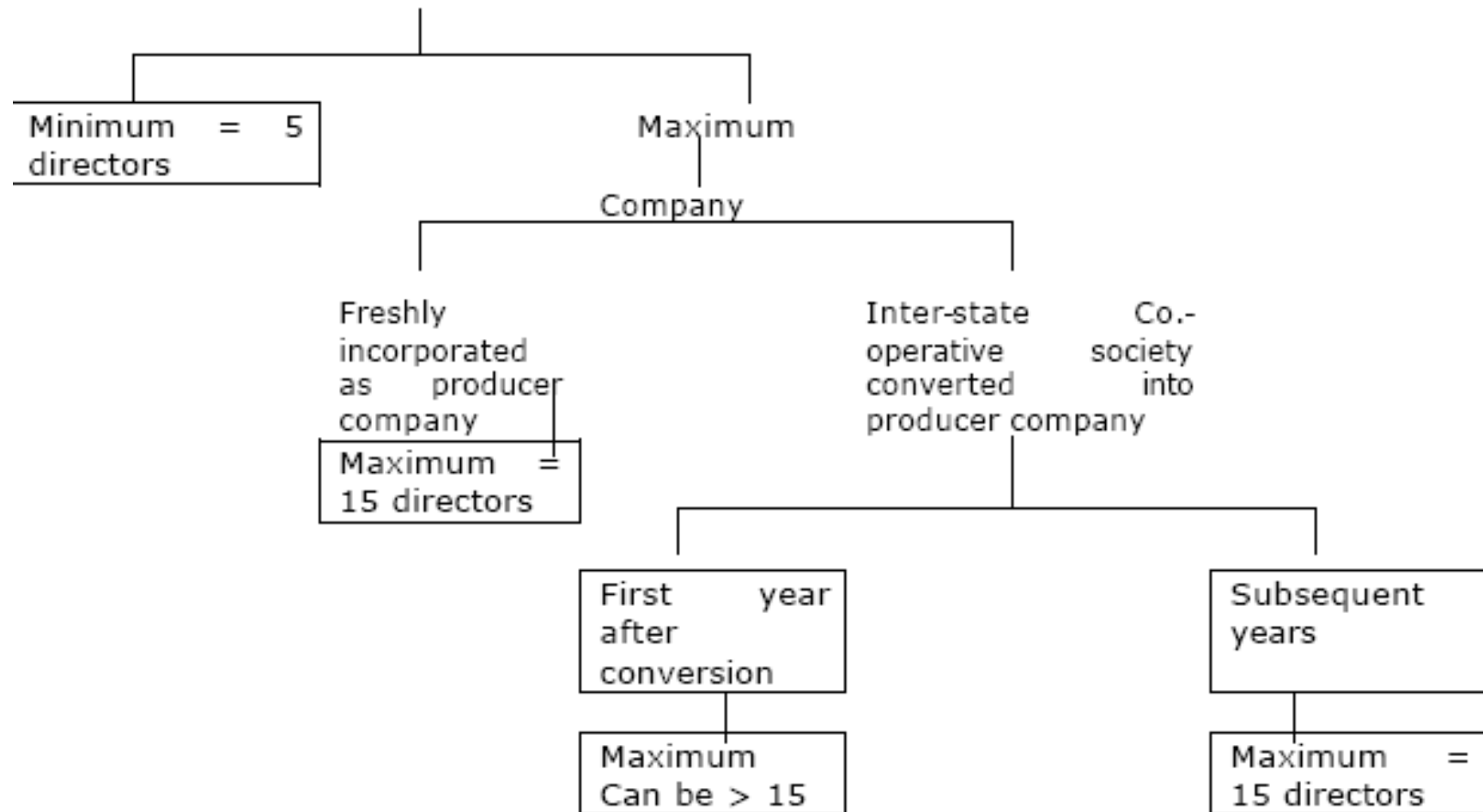
- ⇒ **Nature of eligible donation.**



- ⇒ **Prescribed ceiling:** 3% of net profit of Producer Company in the financial year immediately preceding the year of donation.

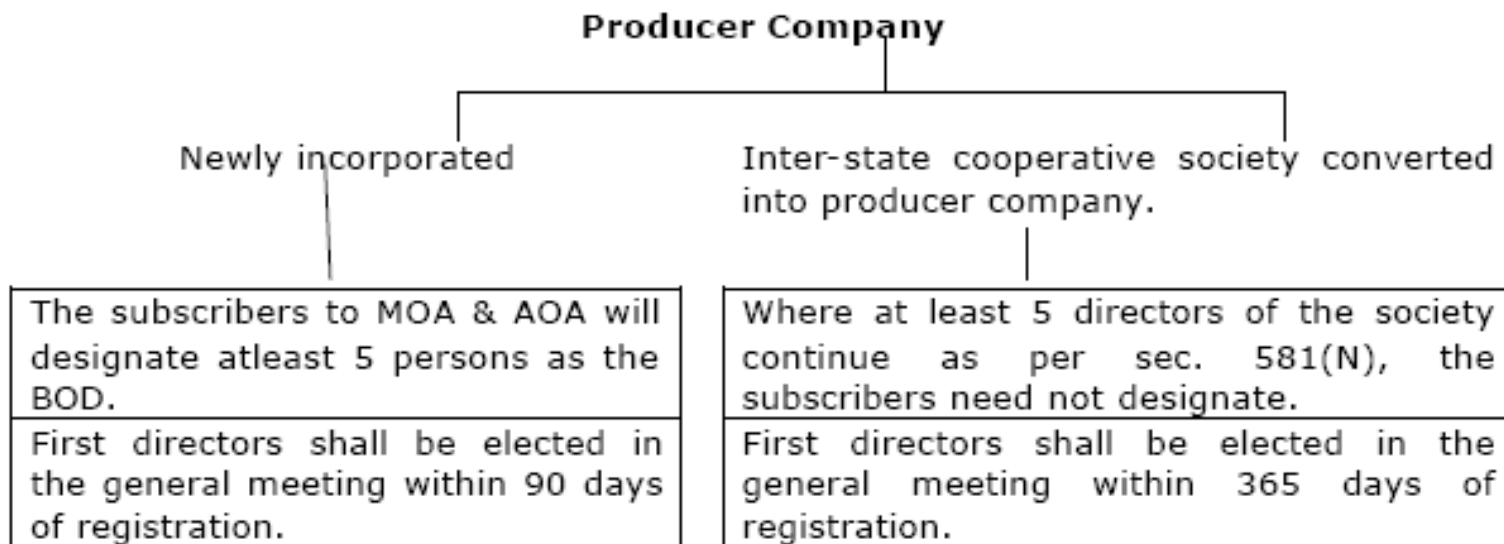
10) Management of Producer Company (Section 581O to 581 Z)

(a) Number of directors (Sec. 581O)



(b) **Appointment of directors. (Section 581P)**

(i) **Designated directors.**



(ii) **First directors:** Shall be appointed at GM (Within 90/365 days of registration as the case may be)

(iii) **Subsequent directors:**

- Appointed in AGM.
- Term should be specified by AOA. (Minimum – 1 year; maximum – 5 years)
- On retirement, eligible for re-appointment.

(iv) **Power of the BOD to appoint expert directors or additional directors**

- [Expert directors + additional directors] $\leq 1/5^{\text{th}}$ of total directors.
- Term of office fixed by BOD (within the maximum period fixed by AOA)
- Expert directors can be elected as chairman
- But he cannot vote in the election of chairman.

(c) Grounds for vacation: (Section 581Q)

- ⇒ Convicted for an offence involving moral turpitude & sentenced to imprisonment by the court for atleast 6 months.
- ⇒ Committed default in repayment of loans & advances taken from a producer company in which he is a director.
- ⇒ If the producers company in which he is a director commits default:
 - In repayment of loans / advances.
 - In filing annual accounts / annual returns for a period of 3 consecutive financial years.
 - In repayment of deposits / withheld price / patronage bonus / interest thereon within the due date and the default continues for one year.
 - In conducting election of directors in accordance with the provisions of the Act.
 - In calling AGM/EGM in accordance with the provisions of the Act.

(d) Power and functions of BOD (Section 581R)

The BOD has whatever powers which the company has and such powers shall be exercised within the framework of the Act, AOA & MOA.

Illustrative list of powers duties

- Determination of dividend payable.
- Quantification of with-held price.
- Recommendation of patronage bonus.
- Admission of new members.
- Formulation of organizational policies, objectives (long term as well as short term) & strategies.
- Appointment of chief executive and other officers.
- Exercising superintendence, direction & control over chief executive and other officers.
- Maintenance of proper books of accounts.
- Preparation of annual accounts & placing it before AGM.
- Answering audit qualifications.
- Acquisition & disposal of property in ordinary course of business.
- Investment of funds of the company.
- Sanction of loans or advances to any members (not being director/relative).
- Such other powers (necessary to discharge its duties)

The BOD shall exercise its powers only thro' its resolution passed at its meeting.

(e) BOD's powers exercisable only on approval by members at AGM. (Section 581S)

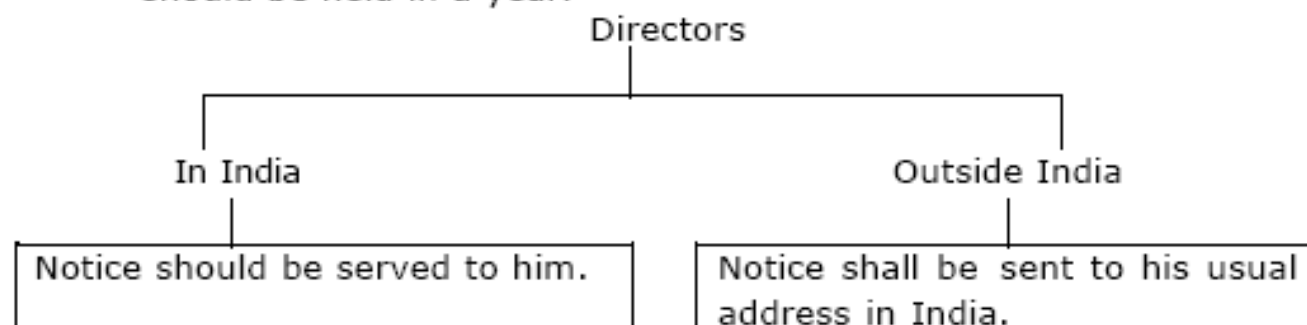
- Approval of budget.
- Adoption of accounts.
- Approval of patronage bonus
- Issue of bonus shares.
- Declaration of limited return.
- Determination of terms & conditions for loans to directors.
- Any transaction (which as per AOA requires approval act AGM).

(f) Committee of directors: (Section 581U)

- The BOD can constitute such number of committees as it considers necessary if such committees could assist the BOD in discharge of its duties.
- The BOD shall neither delegate its power of that of the chief executive.
- The committee should necessarily have a directors or chief executive.
- It shall function under the direction & control of the BOD (for such duration specified by the BOD).
- Remuneration to committee members shall be determined by BOD.
- Minutes of each committee meeting should be placed before the BOD. (In the next BOD meeting)

(g) Meeting of BOD & Quorum (Section 581V)

- Should be held atleast once in every 3 months and atleast four such meetings should be held in a year.



- Length of notice = 7 days.
- Shorter notice possible (Reasons shall be recorded in writing by the BOD.)
- $\frac{1}{3}^{\text{rd}}$ of total strength or three whichever is higher
- Sitting fees to directors including Co.-opted directors shall be determined at the GM.

(h) Liabilities of directors (Section 581T)

- Directors are jointly and severally liable to make good the loss to the company for any approval to things in contravention of this Act or any other law or AOA.
- If due to any contravention, a director makes profit, that should be surrendered to the company.
- The liability specified in this section shall be in addition to, not in derogation of a liability imposed on such directors under this Act or any other law.

(i) Chief executive and his functions: (Section 581W)

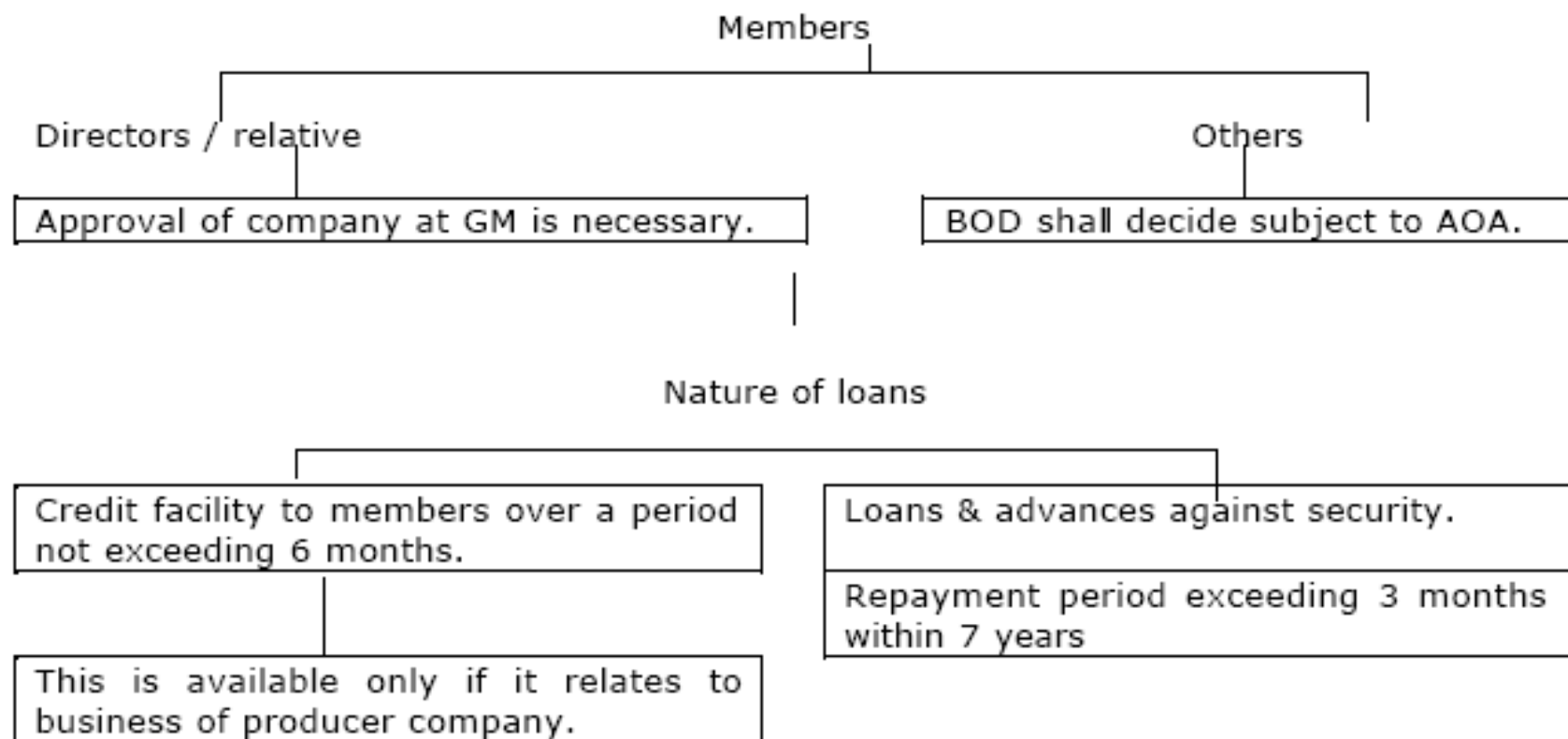
- Every producer company should have a chief executive.
- He shall be a non-member.
- He shall not retire by rotation. He is an ex-officio director of the BOD.
- The BOD shall determine the qualification, experience & terms & conditions of service (Subject to the provision of AOA)
- He is entrusted with substantial powers of management. He functions subject to the super intendence & Control of BOD.

• Illustrative Powers & Duties

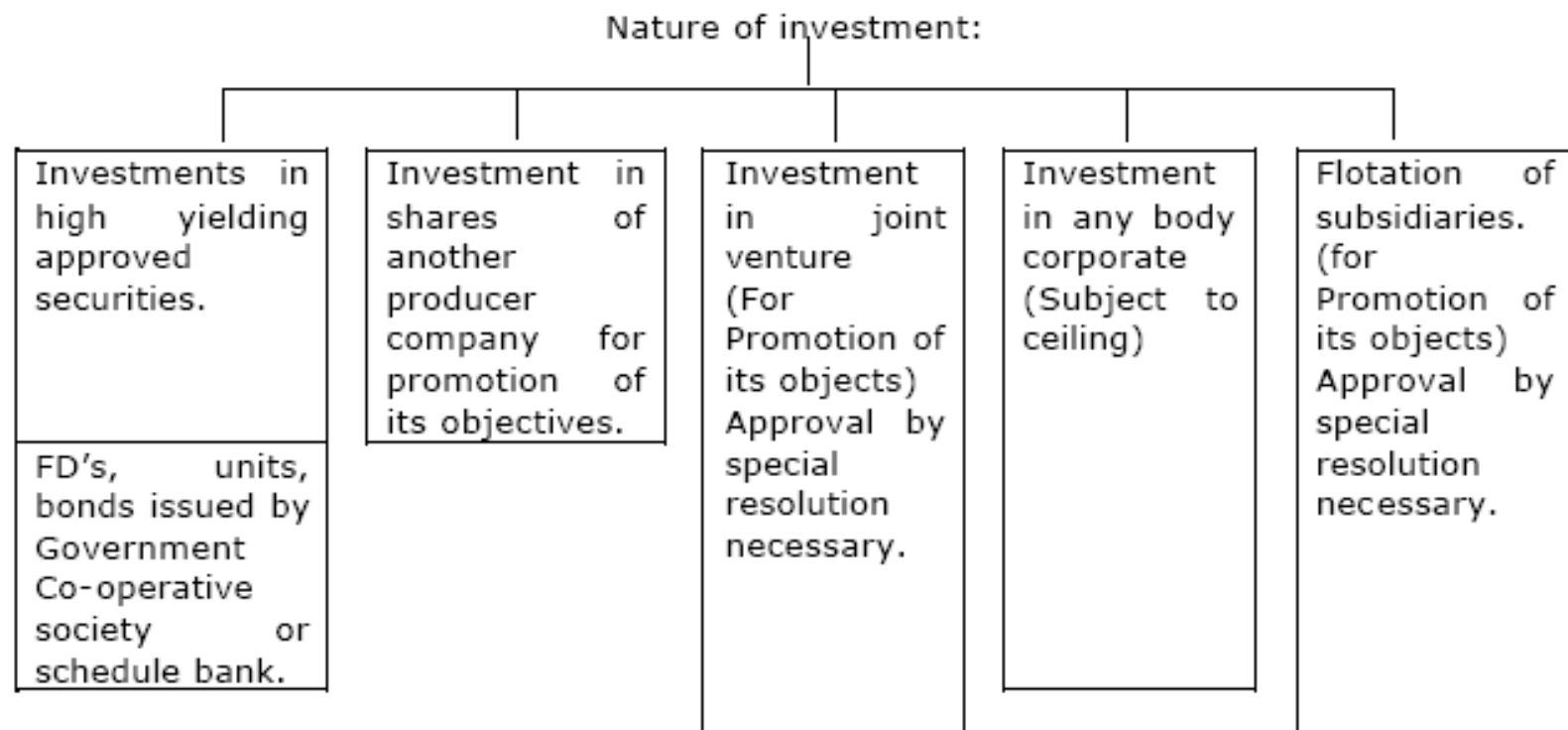
- Day – to – day administration.
- Operation of bank accounts.
- Custody of cash & other assets.
- Signing on behalf of BOD.
- Maintenance of proper books of accounts.
- Preparation of annual accounts & getting it audited.
- Placing it before BOD & GM.
- Supply of periodic information to members.
- Appointment of employees.
- Assisting BOD in formulation of policies, objective plans etc.
- Advising BOD on legal & regulatory matters etc.

11) Loans to members & investments (Section 581ZK and 581ZL)

(a) Loans etc. to members:



(b) Investment in companies, formation of subsidiaries etc.



Note:

$\text{Ceiling} = [\text{Paid up capital} + \text{free reserves}] \times 30\%$

If investments are to be made in excess of the ceiling, special resolution at GM & prior approval of CG is required.

- Disposal of investments possible only by passing prior special resolution in the GM.

Register of investments.

⇒ Contents

- Names of investees
- Number and value of shares.
- Date of acquisition.
- Manner and price of disposal.

⇒ Place of register. Registered office.

⇒ Inspection & taking extracts:

- The register is open to inspection of members.
- Extracts can be taken.

chapter *19*

**REVIVAL & REHABILITATION OF
SICK INDUSTRIAL COMPANIES**

(1) Meaning of the term industrial undertaking:

Any undertaking defined in section 3(aa) of IDRA. It means precisely, ancillary industrial undertaking.

The term does not include small-scale industrial undertaking.

Note: U/S 11B of IDRA, the CG has power to notify certain undertaking as

(a) Ancillary as industrial undertaking.

(b) The term industrial undertaking has been defined in a narrow sense, so as to exclude all other Industrial undertakings. This narrows down the scope of sec. 424A-424L.

(2) Meaning of the term industrial company:

First of all, it should be a company as per Section 3 of companies Act.

It should own one or more industrial undertakings.

(3) Meaning of sick industrial company: (2 (46AA))

It should an industrial company.

It should satisfy any of the following two criteria:

(a) Accumulated losses $\geq$ 50% of average net worth of preceeding four years.

(b) Default in debt servicing for 3 consecutive quarters. (i.e. repayment to creditors on specific demand made in writing.)

Note:

- (a) What is important is the default in debt servicing and ability not a criteria.
- (b) Quantum of debt is immaterial (contrast with sec. 434)
- (c) The term creditor includes both secured as well as unsecured creditors.
- (d) The term 'quarter' though not defined, in common parlance, it means 3 months.
- (e) Net worth: Paid up capital + free reserves – provisions or expenses as may be prescribed.
- (f) Preference share capital should also be included for computation of net worth.
- (g) Free reserves = All reserves created out of profit & includes share premium account. (Note: Not securities premium)

The term does not include

- * Revaluation reserve

(4) Reference to tribunal: (Section 424A)

(a) Who shall make a reference to tribunal if a company becomes sick:

Board of directors shall make reference (mandatory).

RBI, Central Government, State Government, Public Financial Institution, State Level Institution, Scheduled banks may make reference (not mandatory).

Note:

- (i) State Government can make reference only if atleast one of the industrial undertaking of the company is situated in that state.
- (ii) Public Financial Institutions, State Level Institutions, Scheduled banks can make reference only if they had provided financial assistance to such company and so interested in it.
- (iii) Reference is not necessary in case of Government companies. If reference is to be made, approval of CG/SG is necessary.

(b) Duty of BOD with regard to reference:

A scheme of revival and rehabilitation should be prepared and submitted along with the application.

A certificate should be obtained from an auditor, as to the reasons for erosion of net worth or default in debt servicing.

Auditor here, means auditor from a panel of auditors set up by the tribunal.

The certificate should accompany the application.

(c) Time limit for making reference:

Reference as aforesaid shall be made within earlier of the following dates:

- 180 days from the knowledge about the sickness.
- 60 days of the final adoption of accounts.

(d) Final order by tribunal:

On receipt of reference, NCLT shall pass an order declaring the company as sick.

(5) Inquiry by Tribunal: (Section 424B)

a) Purpose:

On receipt of reference or upon its own knowledge as to the financial position of the company concerned the tribunal may order inquiry into the working of such company. The purpose of inquiry is to determine whether the company is sick or not.

b) Engaging operating agency for inquiry:

The tribunal may engage an operating agency to conduct the aforesaid inquiry. It may also require it to scan thro' the scheme of revival filed u/s 424A.

Note: Operating agency means any group of experts consisting of persons having special knowledge of business or industry in which the sick company is engaged and includes Public Financial Institutions, State Level Institutions, Scheduled bank and any other person authorised by tribunal.

Operating agency shall complete the inquiry & submit its report as quickly as possible. In any case, it should submit its report within 21 days of the order and for special reasons; the time limit can be extended up to 40 days.

c) Time limit for tribunal to conclude the inquiry & pass final order.

Within 60 days of commencement of inquiry, it should be completed. Under special circumstances extension up to 90 days possible.

Inquiry commences on receipt of reference or on possession of knowledge of the financial position of the company.

d) Appointment of special directors:

Purpose:

- * To safe guard the financial / other interest of the company.
- * To safe guard public interest.

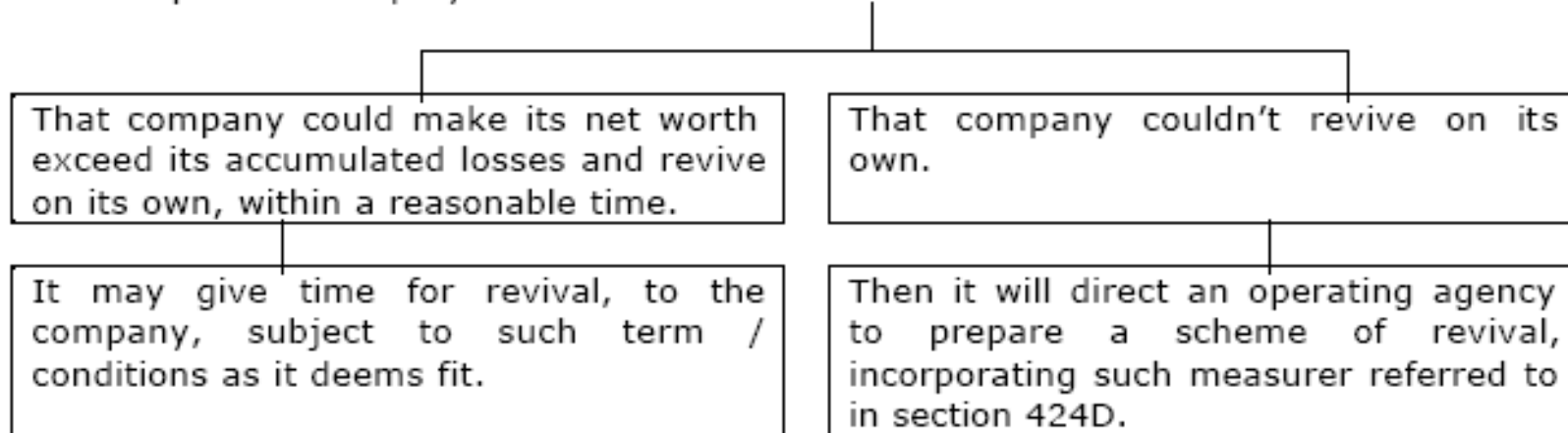
Privileges of special director:

- * Appointment of special director overrides any provision in this Act, MOA, AOA etc.
- * No age limit.
- * No share qualification.
- * No ceiling on number of director ship.
- * Not to retire by rotation. (Not to be considered for determination of rotational directors)
- * Remains in office at the pleasure of tribunal
- * Not liable for acts done in good faith.

Duty of special director: They should submit a report, as to the state of affairs of the company, to the tribunal. The time limit for submission of such report is 60 days.

(6) Order by tribunal: (Section 424C)

On Completion of inquiry the tribunal feels



If the company which was given time for revival, could not revive within the time granted or has contravened the terms / condition specified by the tribunal then it may direct on operating agency to prepare a scheme of revival for it also.

(7) Preparation and sanction of scheme of revival. (Section 424D)

(i) Time limit for operating agency to prepare a scheme of revival.

- * Within 60 days of section 424C(3) order. RBI guidelines should be considered.
- * Extension up to 90 days possible for special reasons.

(ii) Measures for revival.

- (a) Financial reconstruction of the company.
- (b) Proper management of the company, by change in the management of the company.

- (c) Amalgamation of the sick company with any other company or vice versa.
- (d) Sale/lease of whole/part of any industrial undertaking of the company.
- (e) Rationalization of managerial personnel, supervisory personnel and workmen.
- (f) Such other preventive, ameliorative & remedial measures.
- (g) Repayment of debt.
- (h) Such other incidental, consequential & supplemental measures.

(iii) **Such other matters that could be provided in the scheme.**

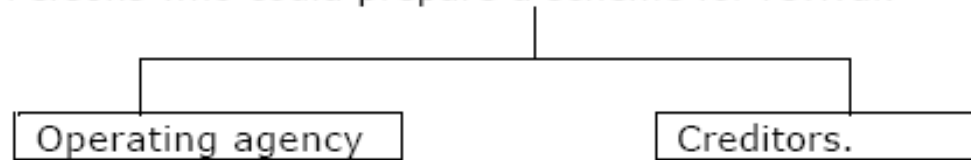
- (a) In case of amalgamation, the constitution, name, capital, assets, registered office, power, rights, interests, duties, authority, privileges etc. of the resulting company.
- (b) Terms & condition for transfer of business, property and assets / liabilities.
- (c) Change in BOD, clearly specifying the authority who could effect change, terms & conditions on which new appointments can be made and term of office of new director.
- (d) Alteration of MOA / AOA of sick company / transfer company for the purpose of altering the capital structure or for any other purpose to facilitate amalgamation / reconstruction.
- (e) Continuation of legal proceedings by / against the company pending immediately before the date of sec 424C order.

Such other matters that could be provided in the scheme.

- (f) Reduction in the interest of shareholders, in the sick company, to such extent the tribunal considers necessary to facilitate revival, rehabilitation and reconstruction.
- (g) Allotment of shares to the shareholders of sick company, in the company resulting from amalgamation. If the shareholders claim cash or if it not possible to allot shares, provision for payment of cash, in full satisfaction of their claim or to their reduced claim (where there is reduction in the interest).
- (h) Sale of the industrial undertaking, free from all encumbrances or with such encumbrances as may be specified, to any person (including a cooperative society formed by the employees of the sick company.)
- (i) Lease of industrial undertaking to any person (including the aforesaid Co-operative society)
- (j) Manner of sale of assets of industrial undertaking (e.g. Public auction, invitation of tenders etc.)
- (k) Issue of shares at face value / intrinsic value which may be discount value to any company or any person (including employees of sick company)
- (l) Any other terms & condition to facilitate revival, reconstruction & amalgamation.

(iv) **Procedure involved in getting the scheme sanctioned.**

- (a) Persons who could prepare a scheme for revival.



- (b) Examination of the scheme by the tribunal.
- (c) Modification of the scheme if tribunal deems fit.
- (d) Sending a copy of Draft scheme to
- Sick Company.
 - The transferee Company.
 - The operating agency.
- (e) Publication of the draft scheme, in the newspaper for receiving suggestion and objections from the persons concerned.
- (f) Making available, a copy of the scheme referred above at the registered office for inspection by interested parties.
- (g) Modification of the scheme in the light of suggestions and objections from
- The sick company
 - Transferee Company
 - Operating agency
 - Employees
 - Creditors
 - Shareholders.
- (h) The tribunal will thereafter sanction the scheme within 60 days, extension up to 90 days possible.
- (i) A copy of sanctioned scheme should be filed with ROC.

(v) **Consequences of sanctioning the scheme:**

- a) The property, assets & liabilities of the sick company vests with the company resulting from amalgamation.
- b) The scheme, thereafter is binding on
 - The sick company.
 - Transferee Company.
 - Shareholders
 - Creditors and guarantors of the said companies.
- c) It is a conclusive evidence of compliance of all the required formalities.
- d) A certified copy of the scheme is evidence in all legal proceedings. (An officer of the tribunal should make Certification).

(8) Rehabilitation by giving financial assistance Section 424E

(a) Circulation of scheme among financial assistance – providers:

Where the scheme provides for financial assistance for rehabilitation from CG, SG, SB, other banks, PFI, SLI or any other authority then a copy of the scheme should be circulated among them.

(b) Nature of financial assistance.

- * Loans, advances, guarantees, relief's, concessions sacrifices etc.

(c) Deemed consent:

These persons should give consent within 60 days of circulation but extension possible by 60 more days. If these persons do not respond within the specified period, then the consent is deemed to have been given.

(d) Appointment of lead financial institution:

The providers of financial assistance shall designate one among them as the lead financial institution for disbursement of financial assistance to the rehabilitation programme.

Such institution is responsible for coordinating such disbursement.

(e) Action when consent is not given:

Where the consent to provide financial assistance is not given then the tribunal may adopt such measures as it deems fit including the winding up of the sick industrial company.

(10) Winding up of sick industrial company. (Section 424G)

(a) When can tribunal order winding up:

After enquiry u/s 424B, if the tribunal comes to the following conclusions, it may order winding up of the sick industrial company.

- (a) It is not possible for the sick company to make its net worth exceed the accumulated losses after meeting its entire financial obligation.
- (b) It is not likely, that the company will be viable in the future.
- (c) It is just and equitable to windup the company.

(b) Opportunity of being heard:

In deciding the matter supra, opportunity of being heard should be given to parties concerned.

(c) Officer of operating agency as Liquidator:

The tribunal can appoint an officer of an operating agency as the liquidator. He shall have all the powers of official liquidator under the Act.

(d) Time Limit for completion of winding up:

The winding up proceedings should be completed within 1 year of passing winding up order.

(e) Distribution of precedes u/s 529A:

(11) Duty of operating agency to prepare a complete list of inventory. (Section 424H)

The tribunal may require an operating agency to prepare a complete list of the following.

- (a) All assets & liabilities.
- (b) Books of accounts, registers, maps, plans, records, documents of title, etc.
- (c) Shareholder & creditors (classified into secured & unsecured).
- (d) A valuation report (in respect of shares & assets)
- (e) An estimate of reserve price, lease rental & exchange ratio.

Note:

It helps in arriving at the resolve price for sale of an industrial undertaking of the company.

It may also help in fixation of lease – rental for lease of the aforesaid undertaking.

Using it, exchange ratio for shares can be fixed.

- (f) Proforma accounts, (where no up-to-date accounts are not available).

(12) Directions not to dispose of assets. (Section 424I)

Directions: The tribunal can direct that the assets of the company should not be disposed without its consent.

When it can be issue: When directions can be issued.

- (a) During the pending of inquiry u/s 424-B.
- (b) During the preparation of scheme u/s 424-B.

Purpose of directions: To safeguard the interest of the company, its shareholders, creditors, or public in general.

(13) Power of tribunal to call for periodic information:(Section 424J)

After the receipt of the reference u/s 424A, the tribunal has got the power to call period information relating to the steps taken by the company:

- To make its net worth > accumulated losses.
- To repay its debts.

(14) Misfeasance Proceeding: (Section 424K)

In the course of inquiry or implementation of the scheme it is possible for the tribunal to become knowledgeable of the fact that persons who were actively engaged in promotion, formation or management of affairs of the sick company, or past or present directors, officers, employees etc, were guilty of:

- Misapplication of assets of the company
- Misfeasance, negligence or breach of trust,

In such case, the tribunal can order them to restore back the property so misapplied. In addition to this, it may also require such person to pay compensation to the affected parties. It may also report the matter to the central government for further actions.

It may also find that the funds of the company had been diverted for non-bonafide purposes or the affairs of the company had been managed in a manner highly detrimental to the public interest. In such case, it may direct PFI, SB or SLI not to provide any sort of financial assistance to such persons (who were guilty) for a period of 10 years.

Note: opportunity of being heard should be given before passing order.

