

Calling of extraordinary general meeting.

¹**100.** (1) The Board may, whenever it deems fit, call an extraordinary general meeting of the company.

(2) The Board shall, at the requisition made by,—

(a) in the case of a company having a share capital, such number of members who hold, on the date of the receipt of the requisition, not less than one-tenth of such of the paid-up share capital of the company as on that date carries the right of voting;

(b) in the case of a company not having a share capital, such number of members who have, on the date of receipt of the requisition, not less than one-tenth of the total voting power of all the members having on the said date a right to vote,

call an extraordinary general meeting of the company within the period specified in sub-section (4).

(3) The requisition made under sub-section (2) shall set out the matters for the consideration of which the meeting is to be called and shall be signed by the requisitionists and sent to the registered office of the company.

(4) If the Board does not, within twenty-one days from the date of receipt of a valid requisition in regard to any matter, proceed to call a meeting for the consideration of that matter on a day not later than forty-five days from the date of receipt of such requisition, the meeting may be called and held by the requisitionists themselves within a period of three months from the date of the requisition.

(5) A meeting under sub-section (4) by the requisitionists shall be called and held in the same manner in which the meeting is called and held by the Board.

²(6) Any reasonable expenses incurred by the requisitionists in calling a meeting under sub-section (4) shall be reimbursed

1. Except sub-section (6), section 100 enforced with effect from 12-9-2013. Sub-section (6) enforced with effect from 1-4-2014.

2. Enforced with effect from 1-4-2014.

to the requisitionists by the company and the sums so paid shall be deducted from any fee or other remuneration under section 197 payable to such of the directors who were in default in calling the meeting.

RELEVANT RULE: RULE 17 OF THE COMPANIES (MANAGEMENT AND ADMINISTRATION) RULES, 2014

Calling of extraordinary general meeting by requisitionists.

Rule 17 : (1) The members may requisition convening of an extraordinary general meeting in accordance with sub-section (4) of section 100, by providing such requisition in writing or through electronic mode at least clear twenty-one days prior to the proposed date of such extraordinary general meeting.

(2) The notice shall specify the place, date, day and hour of the meeting and shall contain the business to be transacted at the meeting.—

Explanation.—For the purposes of this sub-rule, it is hereby clarified that requisitionists should convene meeting at Registered Office or in the same city or town where Registered Office is situated and such meeting should be convened on working day.

(3) If the resolution is to be proposed as a special resolution, the notice shall be given as required by sub-section (2) of section 114.

(4) The notice shall be signed by all the requisitionists or by a requisitionists duly authorised in writing by all other requisitionists on their behalf or by sending an electronic request attaching therewith a scanned copy of such duly signed requisition.

(5) No explanatory statement as required under section 102 need be annexed to the notice of an extraordinary general meeting convened by the requisitionists and the requisitionists may disclose the reasons for the resolution(s) which they propose to move at the meeting.

(6) The notice of the meeting shall be given to those members whose names appear in the Register of members of the company within three days on which the requisitionists deposit with the Company a valid requisition for calling an extraordinary general meeting.

(7) Where the meeting is not convened, the requisitionists shall have a right to receive list of members together with their registered address and number of shares held and the company concerned is bound to give a list of members together with their registered address made as on twenty first day from the date of receipt of valid requisition together

with such changes, if any, before the expiry of the forty-five days from the date of receipt of a valid requisition.

(8) The notice of the meeting shall be given by speed post or registered post or through electronic mode. Any accidental omission to give notice to, or the non-receipt of such notice by, any member shall not invalidate the proceedings of the meeting.

COMMENTS

100.1 Legislative history

100.1-1 Corresponding provisions of the 1956 Act

This section corresponds to section 169 and Regulation 48(1) of Table A of Schedule I of the 1956 Act.

100.1-2 Comparative study : 2013 Act vis-a-vis the 1956 Act

The differences between the 2013 Act and the 1956 Act are as under:

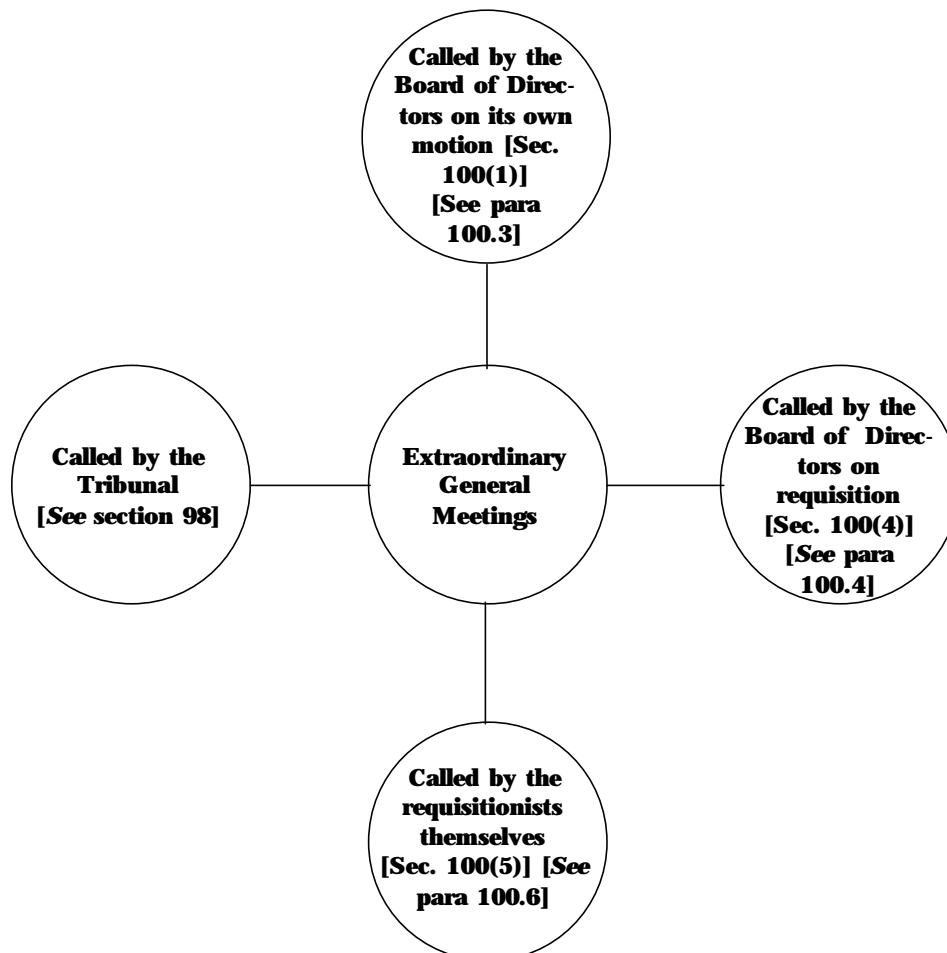
- ◆ The provisions of Reg. 48(1) of Table A of Sch. I to 1956 Act are now engrafted in the 2013 Act as section 100(1). Section 100(1) of the 2013 Act provides that the Board may, whenever it deems fit, call an extraordinary general meeting of the company.
- ◆ *Explanation* to Rule 18 of the Companies (Management and Administration) Rules, 2014 notified under the 2013 Act clarifies that the extraordinary general meeting shall be held at a place within India. There was no provision along the lines of the above *Explanation* in the 1956 Act or the rules thereunder. Rule 17(2), *Explanation* also provides that requisitionists should convene meeting at Registered office or in the same city or town where Registered office is situated and such meeting should be convened on working day.
- ◆ Rule 17 of the Companies (Management and Administration) Rules, 2014 notified under the 2013 Act contains provisions as regards procedure for calling of extraordinary general meeting by requisitionists on failure of Board of Directors to call such meeting on requisition. The 1956 Act contained no such provisions along the above lines as regards calling of meeting by requisitionists.
- ◆ Section 169 of the 1956 Act provided that in case of jointly held shares, a requisition signed by one or some only of the joint shareholders shall be as valid as if it had been signed by all of them. Section

100 of the 2013 Act omits this provision regarding signing of requisition by joint holders.

- ◆ Section 169 of the 1956 Act categorically provided that if meeting called by the requisitionists themselves shall not be held after the expiration of three months from the date of the requisition. However, a meeting commenced within 3 months may be adjourned to a date after the said 3 months. The 2013 Act omits these provisions of the 1956 Act. There is nothing in section 100 of the 2013 Act which says categorically that a meeting called by the requisitionists themselves shall not be held after the expiration of three months from the date of the requisition. So, it appears that under the 2013 Act, there is no bar on holding such meeting after expiration of 3 months period as aforesaid. In other words, the 3-months time-limit in 2013 Act appears to be directory and not mandatory.

100.2 Overview of section 100

TYPES OF EXTRAORDINARY GENERAL MEETINGS



Section 100 makes provisions as regards:

- ◆ Power of Board of Directors to call EGM [sub-section (1)] **[Para 100.3]**
- ◆ BOD legally bound to call EGM on receiving valid requisition from members [sub-section (4)] **[Para 100.4]**
- ◆ Ingredients of a valid requisition [sub-sections (2) and (3)] **[Para 100.5]**
- ◆ Power of requisitionists to call EGM if board of directors do not proceed to call an extraordinary general meeting within 21 days of the receipt of a valid requisition [sub-sections (4), (5) and (6)] **[Para 100.6]**

100.2A Extraordinary general meeting - Connotation of

All general meetings other than annual general meeting shall be called extraordinary general meeting. [Article II(42) of Table F of Schedule I]

Extraordinary general meeting cannot be called to discuss authenticity of appointment of directors - The combined appreciation of sections 173 and 186 of the 1956 Act [corresponding to sections 102 and 98 of the 2013 Act] reveals that appointment of directors in the place of those retiring shall be made only in the annual general meeting and appointment of respondents in the place of retiring directors by rotation, which is impugned herein, cannot be transacted in the extraordinary general meeting; as such, the relief sought for in the company petition calling for extraordinary general meeting to discuss the authenticity of the appointment of respondents is not maintainable - *Kumbakonam Mutual Benefit Fund Ltd. v. S. Kalyanasundaram* [2013] 37 taxmann.com 444/123 SCL 1 (Mad.)

100.3 Powers of board of directors to call EGM [Section 100(1)]

The Board may, on its own, whenever it deems fit, call an extraordinary general meeting in regard to any matter [Section 100(1)]. If at any time directors capable of acting who are sufficient in number to form a quorum are not within India, any director or any two members of the company may call an extraordinary general meeting in the same manner, as nearly as possible, as that in which such a meeting may be called by the Board [Article II(42 and 43) of Table F of Schedule I].

An extraordinary general meeting may be convened by the directors if some business of special importance requires approval from members and it cannot wait till the next annual general meeting. The Act itself provides instances where EGM will have to be convened by the Board to transact businesses which cannot wait till next AGM:

- (i) The first auditor of a company, other than a Government company, shall be appointed by the Board of Directors within thirty days from

the date of registration of the company. In the case of failure of the Board to appoint such auditor, it shall inform the members of the company, who shall within ninety days at an extraordinary general meeting appoint such auditor [*Section 139(6)*]

- (ii) In the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government, or Governments, or partly by the Central Government and partly by one or more State Governments, the first auditor shall be appointed by the Comptroller and Auditor-General of India within sixty days from the date of registration of the company. In case the Comptroller and Auditor-General of India does not appoint such auditor within the said period, the Board of Directors of the company shall appoint such auditor within the next thirty days. In the case of failure of the Board to appoint such auditor within the next thirty days, it shall inform the members of the company who shall appoint such auditor within the sixty days at an extraordinary general meeting [*Section 139(7)*]
- (iii) Any casual vacancy in the office of an auditor shall in the case of a company other than a company whose accounts are subject to be audited by an auditor appointed by the Comptroller and Auditor-General of India, be filled by the Board of Directors within thirty days, but if such casual vacancy is as a result of the resignation of an auditor, such appointment shall also be approved by the company at a general meeting convened within three months of the recommendation of the Board and he shall hold the office till the conclusion of the next annual general meeting [*Section 139(8)*].

100.4 BOD legally bound to call EGM on receiving valid requisition from members [*Section 100(4)*]

The Board shall within 21 days from the date of receipt of a valid requisition (see **para 100.5**) from members in regard to any matter, proceed to call an extraordinary general meeting for the consideration of that matter on a day not later than 45 days from the date of receipt of such requisition. [*Section 100(4)*]

100.4-1 Right of members to requisition a EGM

Shareholders have a right to requisition an extraordinary general meeting subject to statutorily prescribed procedural and numerical requirements and it is not necessary for them to disclose reasons for resolution they propose to move at meeting. Nor are the reasons for the resolutions subject to judicial review.

When the State or an instrumentality of the State (such as LIC) ventures into the corporate world and purchases the shares of the company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management by a resolution of the company, like any other shareholder - *Life Insurance Corpn. of India v. Escorts Ltd.* [1986] 59 Comp. Cas. 548 (SC). When a requisitionist calls for an extraordinary general meeting under section 169 of the 1956 Act [corresponding to section 100 of the 2013 Act], there is no obligation on requisitionist to annex an explanatory statement to notice of meeting. The obligation to annex an explanatory statement to the notice of the meeting is only on the company when it calls for a meeting to transact special business. - *S. Varadarajan v. Venkateswara Solvent Extraction (P.) Ltd.* [1994] 80 Comp. Cas. 693 (Mad.)

Members of a company cannot use the statutory powers to requisition EGM if the subject matter of requisition is a matter of management exclusively vested in the directors - It is no part of the function of the members of a company in general meeting to express an opinion, by resolution, as to how a power vested by the company's Constitution in the directors ought to be exercised by them.- *National Roads and Motorists' Association Ltd. v. Parker* (1986) 6 NSWLR 517. Executive Committee of an incorporated association is not bound to convene EGM requisitioned by members to decide on matters entrusted by the Articles to the Executive Committee - *Bagga v. The Sikh Association of Western Australia Inc.* [2012] WASC 193.

Other instances - Court [now NCLT] cannot prevent shareholders from requisitioning a meeting, discussing and passing a resolution, proposing a modification to amalgamation scheme, even when scheme is pending for sanction before Court [now NCLT]. Section 392 of the 1956 Act [corresponding to section 231 of the 2013 Act] gives wide powers to the Court [now NCLT] to give such directions in regard to any matter or make such modification in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement, arrived at. Under the said section any such modification in the scheme could be considered by the Court [now NCLT] even at the instance of any shareholder. In that event, a mere discussion by the shareholders at a properly requisitioned meeting about the proposed modification [for example, modification to the share exchange ratio] to the scheme pending before the Court [now NCLT] for sanction and if approved, passing a resolution to that effect, would not by itself affect either the scheme or the Court's [now NCLT's] powers to consider the modification and sanction the scheme with or without modification. The shareholders could requisition the meet-

ing for proposing a modification to the scheme pending for sanction before the Court [now NCLT]. - *Pravin Kantilal Vakil v. Mrs. Rohini Ramesh Save* [1985] 57 Comp. Cas. 31 (Bom.)

It would be for shareholders to decide in meeting whether to amend articles of company or not. No injunction could be granted to restrain holding of proposed meeting. - *K.G. Khosla v. Rahul C. Kirloskar* [2002] 35 SCL 546 (Delhi)

Where there was no material to show that there was any dominant group or minority group, plaintiff, holding miniscule shares, could not claim to represent minority shareholders and could not stop implementation of resolution passed by general body unanimously authorising board of directors to make allotment - *N. Jagan v. Investment Trust of India Ltd.* [1996] 8 SCL 98 (Mad.). In the said case majority of shareholders of the defendant-company passed two resolutions, one for issue of equity share of ₹ 10 at a premium of ₹ 30 on right basis and another for issue of shares to the promoters in order to enhance their interest in the company. The plaintiffs, holding .0007 per cent of the shares in the defendant-company, challenged the resolutions passed by the company in extraordinary general meeting. They filed suit praying for injunction restraining the company from giving effect to resolutions. The Court held that the question whether the resolution would lead to a heavy loss to the company, would depend on the evidence and it was not a matter which could be decided without any materials before the Court. The plaintiff was holding only minuscule shares. The plaintiff could not claim to represent the minority shareholders, though there was an allegation that minority shareholders were sought to be dwarfed by the dominant group. There was no material before the Court to show whether there was any dominant group or minority group. At any rate, the plaintiff could not claim to represent them. Further, the plaintiff could not stop the implementation of the resolution passed by the general body unanimously. There was no substance in the contention that the board had no power to make allotment of shares as it was seen that the resolution was a special one contemplated under section 81(1A) of the 1956 Act and it had authorised the board of directors to make allotment.

100.5 Ingredients of a valid requisition [Section 100(2)/100(3)]

Section 100 provides as under:

- ◆ In the case of a company having a share capital, the requisition should be made by such number of members as hold 10% or more of the paid up share capital of the company having a right to vote as at the date of deposit of the requisition.

- ◆ In the case of a company not having a share capital, the requisition should be made by such number of members as have 10% or more of the total voting power of all the members as at the date of deposit of the requisition.
- ◆ The requisition shall set out the matters for the consideration of which the meeting is to be called.
- ◆ The requisition shall be signed by the requisitionists.
- ◆ The requisition shall be sent to the registered office of the company.

100.5-1 The words "valid requisition" in section 100(4)

Word 'valid' has no reference to objects of requisition but to compliance of requirements of section itself. All that is required to be seen before the provisions of the section become applicable would be to consider whether the requisition deposited was in accordance with the provisions of the section as to its contents, the number of signatories and similar matters, and it would not be open to the board of directors of a company to refuse to act on a requisition on the grounds that, although such requisition was in accordance with the requirements of the section, it was otherwise invalid. - *Cricket Club of India Ltd. v. Madhav L. Apte* [1975] 45 Comp. Cas. 574 (Bom.)

What section 169(6) of the 1956 Act [corresponding to section 100(4) of the 2013 Act] provides is that requisitionists may themselves call a meeting, if the board does not call a meeting within 21 days from date of deposit of a valid requisition. The word 'valid' provided in this sub-section clearly indicates that the requisition which was made must be valid and lawful. In other words, such a requisition was for consideration of a resolution which would amount *per se* to a valid requisition; otherwise, it would clearly mean that the directors were not required to call a meeting - *B. Sivaraman v. Egmore Benefit Society Ltd.* [1992] 75 Comp. Cas. 198 (Mad.)

100.5-2 Numerical majority required for a valid requisition (10% or more of paid-up capital of the company)

In order to be entitled to requisition a meeting, the requisitionists must, on the date of the deposit of the requisition, hold not less than one-tenth of the paid-up capital of the company. - *Queens Kuries & Loans (P.) Ltd. v. Sheena Jose* [1993] 76 Comp. Cas. 821 (Ker.). In the said case the company's authorized share capital was ₹ 5 lakhs divided into 50 equity shares of ₹ 10,000 each. But the paid-up value of each share was only ₹ 8,000. This made the total paid-up share capital ₹ 4 lakhs. Ten per cent of this value was ₹ 40,000. The company had increased the number of members to 52 by allotting two additional shares. The issue was whether the requisitionists who were eight in number held qualifying number of shares prescribed

by section 169(4) of the 1956 Act [corresponding to section 100 of the 2013 Act]. The Court held that the issue of two more shares having been done without raising the share capital was illegal. Therefore, the authorized share capital of the company remained at ` 5 lakhs and the paid-up share capital at ` 4 lakhs. The eight requisitionists together held share capital worth ` 64,000 ($8,000 \times 8 = 64,000$) which exceeded 10 per cent of ` 4,00,000. Therefore, they were qualified to requisition the meeting.

Requirements of section 100 would be satisfied even if one member holding requisite number of shares or voting rights makes requisition.

- Though the section uses the expression 'such number of members of the company' in the plural, yet the requirements of the section would be satisfied even if one member holding the requisite number of shares or voting rights makes the requisition, as it is well-settled that words in the plural include the singular. - *S. Varadarajan v. Venkateswara Solvent Extraction (P.) Ltd.* [1994] 80 Comp. Cas. 693 (Mad.)

Where the articles of association of a company prohibited any defaulting shareholder from exercising his right to vote at any general meeting, shareholders who have not paid calls made on them, are not entitled to requisition an extraordinary general meeting - Section 169 of the 1956 Act [corresponding to section 100 of the 2013 Act] says that the number of members entitled to requisition a meeting in regard to any matter shall be in the case of a company having a share capital, such number of them as hold at the date of the deposit of the requisition, not less than one-tenth of such of the paid-up capital of the company as at that date carry the right of voting in regard to that matter. Only those shareholders who have a right of voting can requisition a meeting. Section 181 of the 1956 Act [corresponding to section 106 of the 2013 Act] provides that the articles of a company may bar a member from exercising any voting right in respect of any shares registered in his name on which any calls or other moneys presently payable by him have not been paid. - *Col. Kuldip Singh Dhillon v. Paragaon Utility Financiers (P.) Ltd.* [1986] 60 Comp. Cas. 1075 (Punj. & Har.)

100.5-3 "Signed by the requisitionists"

In *IFCI Ltd. v. TFCI Ltd.* [2011] 107 SCL 512/11 taxmann.com 186 (Delhi) it was held that law does not prescribe any particular form of requisition. In the said case appellant-company (IFCI), holding 37.85 per cent shares in respondent company (TFCI), on 26-11-2010, sent a requisition to respondent for convening an EOGM with objective of reconstitution of board of respondent. Respondent questioned validity of requisition on ground that though it was signed by company secretary of IFCI, but specific authorization/board resolution to file such requisition had not been annexed. Subsequently, on not getting any information, TFCI, through its board

meeting held on 14-12-2010, decided not to convene EOGM of TFCI. On receiving that information, IFCI, on 15-12-2010, initiated process under section 169(6) of the 1956 Act for convening an EOGM on 17-1-2011 and on same day filed petition under sections 398 and 402 of the 1956 Act against respondent. On 16-12-2010, CLB passed an interim order directing to maintain *status quo* on board of directors. Thereafter, on 22-3-2011, CLB passed final order wherein it held requisition dated 26-11-2010 issued by IFCI as invalid on ground that it did not bear signature of requisitionist. It further held that IFCI issued notices dated 15-12-2010 for convening EOGM on 17-1-2011 subsequent to passing of order dated 16-12-2010 and same was a fraudulent act in utter violation of directions contained in order dated 16-12-2010. The Court held that when board of IFCI, vide its resolution, had given specific authority to its company secretary to sign all legal documents and even TFCI had no doubt that requisition dated 26-11-2010 was signed by company secretary of IFCI, finding of CLB to contrary in impugned order was unsustainable and was to be set aside. When, on facts, it had been proved that IFCI had issued notices for EOGM to be convened on 17-1-2011 prior to passing of interim order by CLB, reasoning given by CLB in impugned order that issuance of notice was in violation of directions contained in its interim order, was unsustainable. Therefore, requisition dated 26-11-2010 as well as EOGM dated 17-1-2011 were to be held to be legal and valid.

100.6 Calling of extraordinary general meeting by requisitionists [Section 100(4)/100(5)/100(6)]

If the Board does not, within twenty-one days from the date of receipt of valid requisition in regard to any matter, proceed to call a meeting for the consideration of that matter on a day not later than forty-five days from the date of receipt of such requisition —

- ◆ The meeting may be called and held by the requisitionists themselves within a period of three months from the date of the requisition.
- ◆ A meeting called and held by the requisitionists themselves as above shall be called and held in the same manner in which the meeting is called and held by the Board
- ◆ Any reasonable expenses incurred by the requisitionists in calling a meeting shall be reimbursed to the requisitionists by the company.
- ◆ The sums so paid to requisitionists shall be deducted from any fee or other remuneration payable to such of the directors who were in default in calling the meeting.

100.6-1 Procedure to be followed by requisitionists for convening EGM

Rule 17 of the Companies (Management and Administration) Rules, 2014 contains the following provisions as regards calling of extraordinary general meeting by requisitionists on failure of Board of Directors to call such meeting on requisition :

- ◆ The members may requisition convening of an extraordinary general meeting in accordance with sub-section (4) of section 100, by providing such requisition in writing or through electronic mode at least clear twenty-one days prior to the proposed date of such extraordinary general meeting.
- ◆ The notice shall specify the place, date, day and hour of the meeting and shall contain the business to be transacted at the meeting. Requisitionists should convene meeting at Registered office or in the same city or town where Registered office is situated. Such meeting should be convened on working day [*Explanation* to rule 18 provides that EGM shall be held at a place within India].
- ◆ If the resolution is to be proposed as a special resolution, the notice shall be given as required by sub-section (2) of section 114.
- ◆ The notice shall be signed by all the requisitionists or by a requisitionists duly authorised in writing by all other requisitionists on their behalf or by sending an electronic request attaching therewith a scanned copy of such duly signed requisition.
- ◆ No explanatory statement as required under section 102 need be annexed to the notice of an extraordinary general meeting convened by the requisitionists and the requisitionists may disclose the reasons for the resolution(s) which they propose to move at the meeting.
- ◆ The notice of the meeting shall be given to those members whose names appear in the Register of members of the company within three days on which the requisitionists deposit with the company a valid requisition for calling an extraordinary general meeting.
- ◆ Where the meeting is not convened, the requisitionists shall have a right to receive list of members together with their registered address and number of shares held and the company concerned is bound to give a list of members together with their registered address made as on twenty first day from the date of receipt of valid requisition together with such changes, if any, before the expiry of the forty-five days from the date of receipt of a valid requisition.
- ◆ The notice of the meeting shall be given by speed post or registered post or through electronic mode. Any accidental omission to give notice to, or the non-receipt of such notice by, any member shall not invalidate the proceedings of the meeting.

100.7 Venue for EGM

The extraordinary general meeting shall be held at a place within India- [Explanation below Rule 18 of the Companies (Management and Administration) Rules, 2014. Explanation to rule 17(2) provides that requisitionists should convene meeting at Registered office or in the same city or town where Registered office is situated and such meeting should be convened on working day.] Under the 1956 Act there was no requirement of holding EGM at place of registered office of company- *Ram Prasad Somani v. Bank of Rajasthan Ltd.* [2001] 34 SCL 750 (Raj.)/ *Bharat Commerce & Industries Ltd. v. Registrar of Companies* [1973] 43 Comp. Cas. 275 (Cal.)

100.8 No further dividend at EGM

Once a final dividend is declared at an annual general meeting, no further dividend can be declared at an extraordinary general meeting- Sections 166, 186, 210, 211, 217 of the 1956 Act [corresponding to sections 96, 98, 128, 129 and 134 of the 2013 Act] indicate that the declaration of the dividend is a business of annual general meeting. It is, therefore, manifest that interim dividends and dividends proposed at the annual general meeting exhaust the dividends for the year. Further, section 173 of the 1956 Act [corresponding to section 102 of the 2013 Act] makes declaration of dividend a business of the ordinary general meeting. - *Biswanath Prasad Khaitan v. New Central Jute Mills Co. Ltd.* [1961] 31 Comp. Cas. 125 (Cal.)

100.9 Secretarial Standards

Relevant extracts of SS-2 issued by the ICSI under the 1956 Act is given below :

Convening a Meeting - Authority

A General Meeting should be convened on the authority of the Board.

The Board of its own accord or on the requisition of Members should, either at a Meeting of the Board or by passing a resolution by circulation, convene or authorize the convening of a General Meeting.

If, on a requisition having been made in this behalf, the Board fails to call a Meeting, the requisitionists may themselves call the Meeting in the same manner, as nearly as possible, as that in which Meetings are to be called by the Board.

Distribution of Gifts

No gifts, gift coupons, or cash in lieu of gifts should be distributed to Members at or in connection with the Meeting.

Adjournment of Meetings

A duly convened Meeting should not be adjourned arbitrarily by the Chairman. The Chairman may adjourn a Meeting with the consent of the Members and shall adjourn a Meeting if so decided by the Members.

Meetings may be adjourned for want of requisite Quorum. The Chairman may adjourn a Meeting in the event of disorder or other like causes, where it becomes impossible to conduct the Meeting and complete its business.

If a Meeting is adjourned sine-die or for a period of thirty days or more, a Notice of the adjourned Meeting should be given in accordance with the provisions contained hereinabove relating to Notice.

If a Meeting is adjourned for a period of less than thirty days, in the case of listed companies with more than 5,000 Members, Notice thereof specifying the day, date, time and venue of the Meeting should be published immediately in a newspaper having a wide circulation within such States of India where more than 1,000 Members reside.

If a Meeting, other than a requisitioned Meeting, stands adjourned for want of Quorum, the adjourned Meeting should be held on the same day, in the next week at the same time and place or on such other day and at such other time and place as may be determined by the Board. In the case of listed companies with more than 5,000 Members, Notice thereof, specifying the day, date, time and venue of the Meeting, should be published immediately in a newspaper having a wide circulation within such States of India where more than 1,000 Members reside.

If, at an adjourned Meeting, a Quorum is not present within half an hour from the time appointed, the Members present, being not less than two in number, will constitute the Quorum.

If, within half an hour from the time appointed for holding a requisitioned Meeting, a Quorum is not present, the Meeting shall stand dissolved.

At an adjourned Meeting, only the unfinished business of the original Meeting should be considered.

Any Resolution passed at an adjourned Meeting would be deemed to have been passed on the date of the adjourned Meeting and not on any earlier date.

100.10 Listing Agreement

Clause 31 of the Listing Agreement provides that the Company will forward to the Exchange promptly and without application copy of the proceedings at all Annual and Extraordinary General Meetings of the Company;

Notice of meeting.

¹**101.** (1) A general meeting of a company may be called by giving not less than clear twenty-one days' notice either in writing or through electronic mode in such manner as may be prescribed:

1. Enforced with effect from 1-4-2014.

Provided that a general meeting may be called after giving a shorter notice if consent is given in writing or by electronic mode by not less than ninety-five per cent of the members entitled to vote at such meeting.

(2) Every notice of a meeting shall specify the place, date, day and the hour of the meeting and shall contain a statement of the business to be transacted at such meeting.

(3) The notice of every meeting of the company shall be given to—

- (a) every member of the company, legal representative of any deceased member or the assignee of an insolvent member;
- (b) the auditor or auditors of the company; and
- (c) every director of the company.

(4) Any accidental omission to give notice to, or the non-receipt of such notice by, any member or other person who is entitled to such notice for any meeting shall not invalidate the proceedings of the meeting.

RELEVANT RULE: RULE 18 OF THE COMPANIES (MANAGEMENT AND ADMINISTRATION) RULES, 2014

Notice of the meeting

Rule 18: (1) A company may give notice through electronic mode.

Explanation.—For the purpose of this rule, the expression “electronic mode” shall mean any communication sent by a company through its authorized and secured computer programme which is capable of producing confirmation and keeping record of such communication addressed to the person entitled to receive such communication at the last electronic mail address provided by the member.

(2) A notice may be sent through e-mail as a text or as an attachment to e-mail or as a notification providing electronic link or Uniform Resource Locator for accessing such notice.

(3) (i) The e-mail shall be addressed to the person entitled to receive such e-mail as per the records of the company or as provided by the depository :

Provided that the company shall provide an advance opportunity atleast once in a financial year, to the member to register his e-mail address and changes therein and such request may be made by only those members who have not got their e-mail id recorded or to update a fresh e-mail id and not from the members whose e-mail ids are already registered.

(ii) The subject line in e-mail shall state the name of the company, notice of the type of meeting, place and the date on which the meeting is scheduled.

(iii) If notice is sent in the form of a non-editable attachment to e-mail, such attachment shall be in the Portable Document Format or in a non-editable format together with a 'link or instructions' for recipient for downloading relevant version of the software.

(iv) When notice or notifications of availability of notice are sent by e-mail, the company should ensure that it uses a system which produces confirmation of the total number of recipients e-mailed and a record of each recipient to whom the notice has been sent and copy of such record and any notices of any failed transmissions and subsequent re-sending shall be retained by or on behalf of the company as "proof of sending".

(v) The company's obligation shall be satisfied when it transmits the e-mail and the company shall not be held responsible for a failure in transmission beyond its control.

(vi) If a member entitled to receive notice fails to provide or update relevant e-mail address to the company, or to the depository participant as the case may be, the company shall not be in default for not delivering notice *via* e-mail.

(vii) The company may send e-mail through in-house facility or its Registrar and transfer agent or authorise any third party agency providing bulk e-mail facility.

(viii) The notice made available on the electronic link or Uniform Resource Locator has to be readable, and the recipient should be able to obtain and retain copies and the company shall give the complete Uniform Resource Locator or address of the website and full details of how to access the document or information.

(ix) The notice of the general meeting of the company shall be simultaneously placed on the website of the company if any and on the website as may be notified by the Central Government.

Explanation.—For the purpose of this rule, it is hereby declared that the extraordinary general meeting shall be held at a place within India.

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| COMMENTS |
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101.1 Legislative history

101.1-1 Corresponding provisions of the 1956 Act

This section corresponds to sections 171 and 172 of the 1956 Act.

101.1-2 Comparative study : 2013 Act vis-a-vis the 1956 Act

The changes made by the 2013 Act are as under:

New provisions introduced by the 2013 Act

- ◆ The 1956 Act did not permit giving notice of general meetings through electronic mode. Section 101 of the 2013 Act permits giving notice of the general meetings of the company through electronic mode.
- ◆ Rule 18 of the Companies (Management and Administration) Rules, 2014 provides that a company may give notice through electronic mode. The expression “electronic mode” shall mean any communication sent by a company through its authorized and secured computer programme which is capable of producing confirmation and keeping record of such communication addressed to the person entitled to receive such communication at the last electronic mail address provided by the member. [*Explanation* below Rule 18(1)] Rule 18(2) provides that a notice may be sent through e-mail as a text or as an attachment to e-mail or as a notification providing electronic link or Uniform Resource Locator for accessing such notice.
- ◆ The following procedure shall be followed if company opts to send notice through e-mail :
 - The e-mail shall be addressed to the person entitled to receive such e-mail as per the records of the company or as provided by the depository. The company shall provide an advance opportunity at least once in a financial year, to the member to register his e-mail address and changes therein and such request may be made by only those members who have not got their e-mail id recorded or to update a fresh e-mail id and not from the members whose e-mail ids are already registered.
 - The subject line in e-mail shall state the name of the company, notice of the type of meeting, place and the date on which the meeting is scheduled.
 - If notice is sent in the form of a non-editable attachment to e-mail, such attachment shall be in the Portable Document

Format or in a non-editable format together with a 'link or instructions' for recipient for downloading relevant version of the software.

- When notice or notifications of availability of notice are sent by e-mail, the company should ensure that it uses a system which produces confirmation of the total number of recipients e-mailed and a record of each recipient to whom the notice has been sent and copy of such record and any notices of any failed transmissions and subsequent re-sending shall be retained by or on behalf of the company as "proof of sending".
- The company's obligation shall be satisfied when it transmits the e-mail and the company shall not be held responsible for a failure in transmission beyond its control.
- If a member entitled to receive notice fails to provide or update relevant e-mail address to the company, or to the depository participant as the case may be, the company shall not be in default for not delivering notice *via* e-mail.
- The company may send e-mail through in-house facility or its registrar and transfer agent or authorise any third party agency providing bulk e-mail facility.
- ◆ The notice made available on the electronic link or Uniform Resource Locator has to be readable, and the recipient should be able to obtain and retain copies and the company shall give the complete Uniform Resource Locator or address of the website and full details of how to access the document or information.
- ◆ The notice of the general meeting of the company shall be simultaneously placed on the website of the company if any and on the website as may be notified by the Central Government.

Changes made by the 2013 Act

- ◆ Section 101(1) provides for not less than clear 21 days notice to be given for general meetings. Section 171(1) of the 1956 Act only provided not less than 21 days notice. The word 'clear' wasn't there in section 171(1). However, in *Bharat Kumar Dilwale v. Bharat Carbon and Ribbon Manufacturing Co. Ltd.* (1973) 43 Comp. Cas. 197 (Delhi), the expression "not less than 21 days" in section 171(1) of the 1956 Act was interpreted as a notice of 21 or more whole or clear days, *i.e.*, 21 days excluding the date of posting the notice, 48 hours (2 days) deemed transit period under section 53 of the 1956 Act and the date of the meeting. Thus, section 101(1) of the 2013 Act engrafts the decision of *Bharat Kumar Dilwale* (supra) by incorporating the word "clear" before the words "twenty-one days". Section 20 of the 2013 Act [corresponding to section 53 of the 1956 Act] does not

incorporate the 48 hours deemed transit period rule. However, the same finds a place in Rule 35(6) of the Companies (Incorporation) Rules, 2014. Hence, the ratio in *Bharat Kumar Dilwale* holds good under the 2013 Act also.

- ◆ The 1956 Act did not specify the mode in which consent for shorter notice for the meeting (*i.e.*, less than 21 clear days notice) should be accorded. The 2013 Act requires that consent for shorter notice should be given in writing or by electronic mode.
- ◆ Under the 1956 Act, consent for shorter notice was required to be given by all the members entitled to vote thereat (for AGM) and by not less than 95% of the members entitled to vote at such meeting (for meetings other than AGM). Under the 2013 Act, consent for shorter notice is required from not less than 95% of the members entitled to vote at such meeting (irrespective of whether it is AGM or EGM).

101.2 Overview of section 101

Section 101 makes provisions as regards notice of general meetings. Section 101 contains provisions as under :

- ◆ Length of the notice [section 101(1)] [**Para 101.4**]
- ◆ Mode of giving notice [section 101(1)] [**Para 101.5**]
- ◆ Contents of the notice [section 101(2)] [**Para 101.6**]
- ◆ Persons entitled to notice [section 101(3)] [**Para 101.7**]
- ◆ Effect of accidental omission to give notice of meeting [section 101(4)] [**Para 101.8**]

101.2A Non-applicability of provisions to Private Company or applicability of provisions to Private Companies with modifications

Vide Draft Notification F.No. 1/1/2014-CL.V, dated 24-6-2014 it is proposed as under :

| Sl. No. | Chapter/section number/sub-section(s) in the Companies Act, 2013 | Exceptions/Modifications/Adaptations |
|----------------|---|--|
| 1 | Chapter VII, sections 101 to 107 and section 109 [All whole] | Shall apply unless <ul style="list-style-type: none"> ◆ otherwise specified in respective sections or ◆ unless articles of the private company otherwise provide. |

101.3 Meaning of 'notice'

Notice is simply an intimation to all concerned that a particular body is going to meet at a particular place, time and date for transacting a par-

ticular business - *Seth Sobhag Mal Lodha v. Edward Mills Co. Ltd., Bedwar* [1972] 42 Comp. Cas. 1 (Raj.).

101.3-1 Notice should be issued under proper authority

The notice convening the meeting must be issued by the proper authority which would normally be the Board of Directors. Section 100(4) empowers the requisitioning members to call the extraordinary general meeting on their own if the Board of Directors do not comply with their requisition. Sections 97 and 98 empower the Tribunal to convene the annual general meeting and extraordinary general meetings of the company respectively. If notice has been issued without authority, the requisite authority may be given by ratification by the proper summoning authority before the meeting is held - *Hooper v. Keir Stuart & Co.* (1900) 83 L.T. 729.

101.4 Length of the notice [Section 101(1)]

Section 101(1) provides that a general meeting of a company may be called by giving not less than **clear 21 days' notice**.

A shorter notice may be given if consent is given **in writing or by electronic mode** by not less than 95% of the members entitled to vote at such meeting. [*Proviso to section 101(1)*]

101.4-1 Meaning of 'clear 21 days'

The members must receive notice of the meeting sufficiently in advance so that they can make it convenient to attend the meeting. With this in view, section 101(1) requires notice of at least clear 21 days before the meeting for calling a general meeting of the company.

Clear twenty one days means 21 days exclusive of the day of service, and exclusive of the day on which the meeting is to be held - *Hector Whaling Ltd., In re* [1937] 7 Comp. Cas. 22 (Ch. D)/*N.V.R. Nagappa Chettiar v. Madras Race Club* [1949] 19 Comp. Cas. 175 (Mad.). In *Bharat Kumar Dilwale v. Bharat Carbon and Ribbon Manufacturing Co. Ltd.* (1973) 43 Comp. Cas. 197 (Delhi).

In *Bharat Kumar Dilwale v. Bharat Carbon & Ribbon Mfg. Co. Ltd.* [1973] 43 Comp. Cas. 197 (Delhi) it was held that the expression 'not less than 21 days' notice used in section 171 of the 1956 Act normally implies a notice of 21 whole or clear days. Part of the day, after the hour at which the notice is deemed to have been served, cannot be combined with the part of the day before the time of the meeting on the day of the meeting to form one day. Each of the 21 days must be a full or a calendar day, so that the notice can be said to be 'not less than 21 days' notice. The day of service of the notice of the general meeting and the day of the meeting have to be excluded, while counting twenty-one days, the period of notice prescribed under section 171.

In *Bharat Kumar Dilwale v. Bharat Carbon & Ribbon Mfg. Co. Ltd.* [1973] 43 Comp. Cas. 197 (Delhi), the expression “not less than 21 days” in section 171(1) of the 1956 Act was interpreted as a notice of 21 or more whole or clear days, i.e., 21 days excluding the date of posting the notice, 48 hours (2 days) deemed transit period under section 53 of the 1956 Act and the date of the meeting.

Example-For a meeting scheduled to be held on 28th September, 2014 notice must be posted on 4th September, 2014. This gives us 21 days excluding 4th September, 2014 (date of posting), 5th and 6th September (transit in post) and 28th September (date of meeting).

The words “clear days” were not there in section 171 of the 1956 Act. Section 101(1) of the 2013 Act engrafts the decision of *Bharat Kumar Dilwale* (*supra*) by incorporating the word “clear” before the words “twenty one days”. Section 20 of the 2013 Act [corresponding to section 53 of the 1956 Act] does not incorporate the 48 hours deemed transit period rule. However, the same finds a place in Rule 35(6) of the Companies (Incorporation) Rules, 2014 which provides that in case of delivery by post, such service shall be deemed to have been effected—(i) in the case of a notice of a meeting, at the expiration of forty eight hours after the letter containing the same is posted; and (ii) in any other case, at the time at which the letter would be delivered in the ordinary course of post. Hence, the ratio in *Bharat Kumar Dilwale* holds good under the 2013 Act also.

101.4-2 Requirement of 21 days whether mandatory or directory

Provisions of section 171(1) of the 1956 Act are merely directory in nature and unless and until it is established that shorter duration of notice has caused prejudice to substantial number of shareholders, it is not permissible to declare meeting illegal and strike down resolutions passed therein - In section 171 of the 1956 Act period of 21 days for giving notice, is provided to enable the shareholders to campaign and canvass the proxies if they so desire. The shareholders required reasonable time to canvass opinion in favour or against the particular resolution proposed to be considered at the meeting of the company. The object, therefore, is obviously to give proper and reasonable opportunity to the shareholders for participating effectively in the meeting. The length of notice, the contents and the manner of service of notice have all been prescribed with this end in view. The fact that sub-section (2) of section 171 of the 1956 Act enables the shareholders to consent to a shorter duration of notice is an indication that the Legislature never thought the length of notice sacrosanct. Sub-section (2) of section 171 of the 1956 Act indicates that it is for the shareholders to consider and decide whether they have got necessary opportunity of properly participating in a meeting. Sub-section (3) of section 172 of the 1956 Act is an indicator that the Legislature never desired

that the proceedings of the meeting should be invalidated merely because notice as prescribed under sub-section (1) of section 171 of the 1956 Act is of insufficient duration. Sub-section (3) of section 172 of the 1956 Act provides that the accidental omission to give notice to, or the non-receipt of notice by, any member should not invalidate the proceedings and that clearly indicates the anxiety of the Legislature not to invalidate the proceedings, even though no prejudice whatsoever is caused to the interest of the shareholders.

To hold that the provisions of section 171(1) of the 1956 Act are mandatory would lead to very unusual results making it difficult for large public companies to effectively function. A couple of shareholders cannot be permitted to defeat the interest of a large body of shareholders by raising the contention that the duration of notice is not sufficient and, even though such complaints do not indicate any prejudice by service of notice of shorter duration. Looking to the object, purpose and scope of provisions of section 171(1) of the 1956 Act the conclusion is inescapable that the provision is merely directory and not mandatory.

Provisions of section 171(1) are merely directory in nature and unless and until it is established that shorter duration of notice has caused prejudice to substantial number of shareholders, it is not permissible to declare the meeting illegal and strike down the resolutions passed therein - *Shailesh Harilal Shah v. Matushree Textiles Ltd.* [1995] 82 Comp. Cas. 5 (Bom.).

Provision of section 171 of the 1956 Act is not so imperative that requirement thereof cannot be waived at all and is not mandatory in sense that any breach thereof will necessarily and invariably invalidate meetings and proceedings thereat - Provision of section 171 of the 1956 Act is not so imperative that requirement thereof cannot be waived at all. It is not mandatory in sense that any breach thereof will not necessarily and invariably invalidate meetings and proceedings thereat. Non-compliance with the statutory requirement of section 171 of the 1956 Act may render the proceedings voidable and in appropriate cases any such breach may have the effect of invalidating the meeting and the proceedings thereat.

Even if the provision of section 171 is held to be directory, that does not confer a charter on the company to serve notice of any duration according to their choice. Even if the provision is directory, it does not permit the company to bypass the statutory requirement and in every case where a breach is complained of, the Court will have to examine whether the proceedings should be invalidated or otherwise.

The Court will not proceed to invalidate the proceedings on the ground of insufficient duration of notice only when it is established that defect is not intentional or deliberate and no prejudice whatsoever is caused to a particular case by shorter duration of notice. It would be necessary for a

party complaining of insufficient duration of notice to plead prejudice caused and in case such prejudice is established, then, even though the provision is directory, the Court would grant the relief. - *Shailesh Harilal Shah v. Matushree Textiles Ltd.* [1995] 82 Comp. Cas. 5 (Bom.).

Requirement of 21 days' notice is not mandatory and accidental omission to give a notice of not less than 21 days does not invalidate meeting. The contention could not be accepted that a short notice (*i.e.*, less than 21 days notice) served on a member will invalidate a meeting altogether but non-receipt of the notice by a member will not have the same effect. Such a construction of section 172(3) of the 1956 Act [corresponding to section 101(4) of the 2013 Act] would lead to absurdity and should be avoided. - *Calcutta Chemical Co. Ltd. v. Dhiresh Chandra Roy* [1985] 58 Comp. Cas. 275 (Cal.)

When notice satisfies requirements of the section and is served on shareholder and after service if he has reasonable time before meeting, it would be substantial compliance with provisions of the section. - *Somalingappa Shiva Putrappa Mugabasav v. Shree Renuka Sugars Ltd.* [2002] 38 SCL 1084/110 Comp. Cas. 371 (Kar.)

The notices of the meeting should be sent to all the directors; otherwise, the resolutions passed in such meetings are invalid. Where notices of the meeting were not entered in the dispatch register and there was no reliable evidence on record to prove that notices had been sent by messengers, it cannot be held that notices were given to the directors and resolutions passed at the meeting were invalid. - *Col. Kuldip Singh Dhillon v. Paragaon Utility Financiers (P.) Ltd.* [1988] 64 Comp. Cas. 19 (Punj. & Har.)

Late delivery of notice due to postal delays cannot invalidate meeting- Late delivery of notice of meeting of shareholders for approval of scheme of amalgamation due to postal delays or omission on part of postal authorities would not invalidate meeting. - *Maknam Investments Ltd., In re* [1995] 6 SCL 93 (Cal.) [Approved in *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* [1996] 87 Comp. Cas. 792 (SC)].

101.4-3 Shorter Notice

Under the proviso to section 171(2) of the 1956 Act, it would be seen that the requirement as to 21 days' notice may be dispensed with by an agreement of all the members, *entitled to attend and vote* and not merely of all the members *entitled to vote and present in person or proxy* at the meeting. It requires, therefore, an agreement of all the members of the company in order to dispense with the requirement of 21 days' notice.

Even though consent of shareholders to shorter notice for meeting at which a special resolution is passed, is not obtained prior to meeting, consent obtained thereafter would validate resolution. Where majority of the members of the company holding more than 95 per cent of such part of the

paid up share capital as gave them a right to vote at the meeting, had given their consent, subsequent to the meeting, to a shorter notice and had ratified and accepted the special resolutions passed at the meeting and the company had stated on affidavit that not a single objection was received from any of the other members, it was held that in view of the subsequent consent obtained by the company from its members who formed a majority and held more than 95 per cent of the paid up share capital which gave them a right to vote, the resolutions must be deemed to be valid. - *Parikh Engg. & Body Building Co. Ltd., In re* [1975] 45 Comp. Cas. 157 (Pat.)

Shareholders may validate by post consent a resolution passed at a meeting called on shorter notice. It is open to the shareholders to give their consent subsequent to the meeting. The object underlying the requirement of giving a particular period of notice is to enable the shareholders to consider the proposal, to discuss among themselves and to canvass for proxies if they so desire. It is open to them to waive the notice, if, in their opinion, the resolution, though it was passed without satisfying the length of notice, is for the benefit of the company. The only requirement is that the shareholders should give their consent with full knowledge of the implications of the resolution.-*Self Help Private Industrial Estate (P.) Ltd., In re* [1972] 42 Comp. Cas. 605 (Mad.)/*Express Engg. Works, In re* [1920] 1 Ch. 466 (CA)/*Pearce Duff & Co. Ltd., In re* [1960] 1 WLR 1014 (Ch. D)

Where notice given was of less than 21 days and there was no indication that consent to short notice had been obtained, it was held that the resolution passed at the meeting was not valid. - *Col. Kuldip Singh Dhillon v. Paragaon Utility Financiers (P.) Ltd.* [1988] 64 Comp. Cas. 19 (Punj. & Har.).

101.5 Modes of giving notice of general meetings

According to section 101(1), notice of general meeting shall be given :

- ◆ either in writing
- ◆ or through electronic mode in the manner prescribed

101.5-1 Giving notice of general meetings through electronic mode

Rule 18 of the Companies (Management and Administration) Rules, 2014 provides as under:

101.5-1a Definition of ‘electronic mode’

A company may give notice through electronic mode. The expression “electronic mode” shall mean any communication sent by a company through its authorized and secured computer programme which is capable of producing confirmation and keeping record of such communication addressed to the person entitled to receive such communication at the last electronic mail address provided by the member.

101.5-1b Notice through electronic mode through e-mail as text or as attachment or as notification with URL

A notice may be sent

- ◆ through e-mail as a text or as
- ◆ an attachment to e-mail or
- ◆ as a notification providing electronic link or Uniform Resource Locator (URL) for accessing such notice.

101.5-1c Notice through e-mail - If notice is sent through e-mail it shall comply with following requirements :

- ◆ *Addressee of e-mail* - The e-mail shall be addressed to the person entitled to receive such e-mail as per the records of the company or as provided by the depository. The company shall provide an advance opportunity atleast once in a financial year, to the member to register his e-mail address and changes therein and such request may be made by only those members who have not got their e-mail id recorded or to update a fresh e-mail id not from the members whose e-mail ids are already registered.
- ◆ *Subject-line of e-mail* - The subject line in e-mail shall state the name of the company, notice of the type of meeting, place and the date on which the meeting is scheduled.
- ◆ *If notice sent as attachment to e-mail, it shall be in PDF* - If notice is sent in the form of a non-editable attachment to e-mail, such attachment shall be in the Portable Document Format (PDF) or in a non-editable format together with a 'link or instructions' for recipient for downloading relevant version of the software.
- ◆ *Nature of system to be used for e-mailing* - When notice or notifications of availability of notice are sent by e-mail, the company should ensure that it uses a system which produces confirmation of the total number of recipients e-mailed and a record of each recipient to whom the notice has been sent and copy of such record and any notices of any failed transmissions and subsequent re-sending shall be retained by or on behalf of the company as "proof of sending".
- ◆ *Company not liable for transmission failure beyond its control* - The company's obligation shall be satisfied when it transmits the e-mail and the company shall not be held responsible for a failure in transmission beyond its control.
- ◆ *When member fails to provide or up-date e-mail id* - If a member entitled to receive notice fails to provide or update relevant e-mail address to the company, or to the depository participant as the case may be, the company shall not be in default for not delivering notice via e-mail.

- ◆ **Bulk e-mail facility in-house facility or third party** - The company may send e-mail through in-house facility or its Registrar and transfer agent or authorise any third party agency providing bulk e-mail facility.

101.5-1d Notice made available on the electronic link or URL - The notice made available on the electronic link or Uniform Resource Locator (URL) has to be readable, and the recipient should be able to obtain and retain copies and the company shall give the complete URL or address of the website and full details of how to access the document or information.

101.5-1e Notice to placed on company's website - The notice of the general meeting of the company shall be simultaneously placed on the website of the company if any and on the website as may be notified by the Central Government.

101.6 Contents of the notice [Section 101(2)]

Notice shall specify the place, date, day and the hour of the meeting and shall contain a statement of the business to be transacted at such meeting. [Section 101(2)]

The following principles regarding contents of notice can be culled out from various Court ruling :

- ◆ Notice should give all necessary information to members to enable them to judge for themselves whether they would assent to resolution - *Pacific Coast Coal Mines Ltd. v. Arbuthnot* [1917] AC 607

In the said case a meeting was convened to pass a resolution to adopt and ratify an agreement which had been filed with the Registrar. The agreement contemplated giving up of the shareholders' claims against the directors in the matter of promotion of the company, and would have enabled one of them to quit the company with large profits in his pocket. The notice to the shareholders did not disclose this important fact. Also, at the meeting proxies were used which had been obtained from the shareholders even prior to the date of the agreement, when they could have known nothing of what the agreement was to contain. The question was whether notice was a valid notice. The Court held that the notice ought to have told the shareholders including those who had given proxies more than what it did. It ought to have put them in a position in which each of them could have judged for himself whether he would consent to the matters mentioned in the agreement. It did not do so. The notice was bad and what was done in pursuance thereof was *ultra vires*.

- ◆ Notice should give all necessary information to members to enable them to judge for themselves whether they would assent to resolution. If time of holding meeting and other essential particulars

required by section are not specified in notice, meeting will be invalid, and all resolutions passed thereat will be of no effect - *Prachi Insurance Co. Ltd. v. Chaudhury Madhusudandas* [1964] 2 Comp. LJ 157.

- ◆ Board of directors must tell shareholders precisely or approximately that on which they are to vote. The doctrine of indoor management involves as a necessary corollary the proposition that the vote of the majority at a general meeting, as it binds both dissentient and absent shareholders, must be a vote given with the utmost fairness; that not only must the matter be fairly put before the meeting, but the meeting itself be conducted in the fairest possible manner. A shareholder may properly and prudently leave matters in which he takes no personal interest to the decision of the majority. But in that case he is content to be bound by the vote of the majority, because he knows the matter about which the majority are to vote at a meeting. If he does not know that, he has not a fair chance of determining in his own interest whether he ought to attend the meeting, make further inquiries or leave others to determine the matter for him. It is the duty of the board to tell the shareholders precisely or approximately about which they are to vote - *Tissen v. Henderson* [1899] 1 Ch. 861 (Ch. D)
- ◆ A notice must not be misleading or equivocal and matters needing to be pointedly brought to notice of members should be disclosed - *Biswanath Prasad Khaitan v. New Central Jute Mills Co. Ltd.* [1961] 31 Comp. Cas. 125 (Cal.)
- ◆ When important alterations are to be made to articles, shareholders should be given an indication of them in notice of meeting. In the instant case, the directors told the shareholders nothing, except that there were to be new regulations substituted for the old and there was no indication that the new regulations differed in important matters affecting the shareholders. The notice was not, therefore, 'sufficient' as to general nature of the business to be transacted - *Normandy v. Ind. Coope & Co. Ltd.* [1908] 1 Ch. 84 (Ch. D)
- ◆ Of course, it is not necessary for a notice to give full information as to the business to be transacted; but a fair and candid and reasonable explanation of the purpose or purposes for which the meeting is called must be given - *Kaye v. Croydon Tramways* [1898] 1 Ch. 358
In the said case a meeting was called to approve an agreement for the sale of the undertaking. Though the agreement also provided that the purchasing company will, in addition, pay the directors of the selling company, certain amounts as compensation for loss of office, no mention of this was made in the notice. The question was whether

the notice was in order and the meeting was properly held. The Court held that anybody who was not behind the scenes would understand from the notice that whatever the purchasing company was going to pay for the undertaking and assets, would be paid to the vendors, e.g., the selling company. That would not be true because a part of the consideration was not to be paid to the vendors, but to the directors. It was a tricky notice and it would be playing with words to tell the shareholders that they were meeting to consider a contract for the sale of the undertaking and concealing from them that a large portion of that was not to be paid to the vendors. The notice, therefore, did not disclose the purpose for which the meeting was being held. A further meeting was, therefore, to be ordered by the Court.

- ◆ It is not necessary that notice should contain every information to meet any technical objections regarding validity of meeting. - *Topandas Mohanlal Advani v. Yeotmal Electric Supply Co.* [1940] 10 Comp. Cas. 133 (Sind)
- ◆ A shareholder, who by his conduct shows that he knew the real effect of the work to be transacted at a meeting, cannot complain of a notice on the ground of insufficiency. - *Maharani Lalita Rajya Lakshmi v. Indian Motor Co. (Hazaribagh) Ltd.* [1962] 32 Comp. Cas. 207 (Cal.) / *Mackinnon Mackenzie & Co. (P.) Ltd., In re* [1967] 37 Comp. Cas. 516 (Cal.).
- ◆ If a shareholder is aware of facts, he cannot complain of insufficiency of notice or any irregularity. If he is present at the meeting, he must point out to the chairman about the irregularity before the meeting proceeds with the agenda. - *K. Meenakshi Amma v. Sreerama Vilas Press & Publications (P.) Ltd.* [1992] 73 Comp. Cas. 285 (Ker.)
- ◆ In the notice, only the material facts are to be given and not the particulars. In a case of great complexity all details would not be stated because a lengthy circular would sometimes defeat its own object. It is always a question of fact in each case as to whether notice has properly been given. - *Mackinnon Mackenzie & Co. (P.) Ltd., In re* [1967] 37 Comp. Cas. 516 (Cal.) / *Dorman Long & Co., In re* [1934] Ch. 635.
- ◆ *If notice says that meeting is for appointment of chairman, and shareholders appoint a person other than nominee of directors, it would not be outside scope of notice* - Where the notice suggested that the meeting was called for the appointment of the chairman, managing director, etc., the directors could not have bound the company to appoint only the person nominated by the directors and fettered its discretion. It was within the discretion of the sharehold-

ers to make appointment of a person of their choice for the above post. Notice is simply an intimation to all concerned that a particular body is going to meet at a particular place, time and date for transacting a particular business. Where the particular subject according to the notice was the appointment of a chairman, etc., simply because the shareholders appointed another person for the post did not mean that the meeting went beyond the notice. - *Seth Sobhag Mal Lodha v. Edward Mills Co. Ltd.* [1972] 42 Comp. Cas. 1 (Raj.)

- ◆ Where item of fresh issue of shares was not mentioned on agenda of annual general meeting but issue of shares at par was ratified, issue could not be invalidated. Section 172 of the 1956 Act [corresponding to section 101 of the 2013 Act], which deals with the meetings of the company, requires that the notice of the meeting shall contain a statement of the business to be transacted at the meeting. The respondents certainly committed an irregularity in not mentioning this item on the agenda of the annual general meeting. But this irregularity did not vitiate the decision which was taken. The Court will not interfere in case of irregularities which can be cured.- *Dr. (Mrs.) Banoo J. Coyajee v. Shanta Genevieve Pommeret Parulekar* [1995] 84 Comp. Cas. 534 (Bom.)

101.7 Persons to whom notice of general meetings to be given [section 101(3)]

The notice of every meeting of the company shall be given to—

- (a) every member of the company, legal representative of any deceased member or the assignee of an insolvent member;
- (b) the auditor or auditors of the company; and
- (c) every director of the company.

If a meeting is called without notice to a shareholder (omission not being accidental), it is invalid and all proceedings therein are also invalid. - *Eastern Linkers (P.) Ltd. v. Dina Nath Sodhi* [1984] 55 Comp. Cas. 462 (Delhi). In the said case a meeting was convened for December 1969 but notice of the meeting was not sent to S and his wife, deliberately and designedly. At that meeting B and S were elected as directors, but were to hold office only till April 1970 when an extraordinary general meeting was directed to be called. At the meeting of April 1970 S was not elected and B and his wife were elected as directors. The contention of S was that since the meeting of December 1969 was invalid, the meeting of 1970 was also invalid and so were the appointments of B and his wife. The omission to send the notice was not accidental.

The Court held that all the proceedings of April 1970 meeting suffered from the infirmity of December 1969 meeting being invalid, and could not confer any legitimacy on the proceedings held at the alleged meeting of April 1970. Any proceedings at this meeting of April 1970 would be obviously unauthorised and illegal.

An omission to give notice to any one of members or other persons to whom it should have been given, shall not invalidate proceedings at meeting of company - *Bikkina Gopalakrishna Rao v. Seavalley Resorts (P.) Ltd.* [2000] 27 SCL 242 (AP)

101.7-1 Notice to legal representatives of deceased members

To hold that the meetings of companies could not be properly held unless the notices convening them were given to the unregistered legal representatives of all deceased members would be to paralyse the transaction of business - *Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656 (CA)

101.7-2 Onus of proof as to fact that notice is not given

A contributory who claims that notice of a meeting was not given to all directors must prove to the satisfaction of the Court that notice was in fact not given to the absent directors. Generally the Court is entitled to assume that everything has been done regularly and in due course. - *Peninsular Life Assurance Co., In re* [1936] 6 Comp. Cas. 32 (Bom.)

101.8 Effect of accidental omission to give notice of meeting [Section 101(4)]

Any accidental omission to give notice or the non-receipt of such notice by any member or other person who is entitled to such notice for meeting shall not invalidate the proceedings of the meeting. [Section 101(4)]

Non-issue of the notice to the auditors, would also be covered by subsection (3) of section 172 of the 1956 Act [corresponding to section 101 of the 2013 Act] since the provision also refers to "other person who is entitled to notice" - *Maneckchowk & Ahmedabad Mfg. Co. Ltd., In re* [1970] 40 Comp. Cas. 819 (Guj.)

An accidental omission to give notice to a member shall not invalidate proceedings at meeting. The late delivery of the notice to a shareholder due to postal delay and/or omissions on the part of the postal authorities cannot be treated as a ground to invalidate the meeting. - *Maknam Investment Ltd., In re* [1995] 6 SCL 93 (Cal.). Company has only to prove posting of notice, non-receipt or late receipt by member does not invalidate meeting. - *Maharaja Exports v. Apparels Exports Promotion Council* [1986] 60 Comp. Cas. 353 (Delhi)

101.8-1 Meaning of 'Accidental omission'

'Accidental omission' means omission was not deliberate. The 'accidental omission' means that the omission must be not only not designed but also not deliberate. This expression implies absence of intention or deliberate design. - *Maharaja Exports v. Apparels Exports Promotion Council* [1986] 60 Comp. Cas. 353 (Delhi).

Failure to serve notice on misapprehension of law/fact cannot be said to be an accidental error; meeting held would be a nullity. - *Mussel White v. C.H. Mussel White & Son Ltd.* [1962] 32 Comp. Cas. 804 (Ch.D)

In *West Canadian Collieries Ltd., In re* [1962] 32 Comp. Cas. 303 (Ch.D.) article 74 of the Articles of Association of the company, which was identical in form with article 51 of Table A in Schedule I to the English Companies Act, 1948 provided that the accidental omission to give notice by a company to, or the non-receipt of a notice of meeting by any person entitled to receive a notice would not invalidate the proceedings at that meeting. By an error, notice of the meeting to pass a special resolution for reduction of capital was not served on nine of the members of the company. The question was whether the special resolution for the reduction of capital was duly passed.

The Court held that the notice of the meeting was to be deemed to have been duly given for the purposes of section 141 of the English Companies Act, 1948/corresponding to section 101 of the 2013 Act. The meeting notwithstanding the omission to give notice to members was to be deemed to have been duly convened.

In *Calcutta Chemical Co. Ltd. v. Dhiresh Chandra Roy* [1985] 58 Comp. Cas. 275 (Cal.) it was held that section 172(3) of the 1956 Act makes it abundantly clear that it is not a condition precedent to the holding of the annual general meeting of a company that a clear 21 days' notice must be given to each and every member of the company. The accidental omission to give notice to any member or non-receipt of notice by any member shall not invalidate the proceedings at the meeting.

In the said case the annual general meetings for 1980-81 and 1981-82 were convened for 7-10-1983 belatedly and with great difficulty. The notice of the meeting was published in a newspaper of Calcutta on 12-9-1983. The shareholders received the notice on 22-9-1983 which was shown to have been posted on 16-9-1983. The notice was dated 9-9-1983. D sought an injunction that the resolutions passed at the meetings be not given effect to, on the ground that the notice was received by him on 22-9-1983. D held only seven shares of Rs. 10 in the company and was a resident of Calcutta where the meeting was to be held. He was not prejudiced by the short notice in any way. The question was whether the shortness of the notice invalidated the meeting.

The Court held that if the contention of D was to be upheld it would mean that whereas if the notice to a shareholder was not accidentally posted at all, the proceedings at the annual general meeting of a company would be valid, but if the notice was posted accidentally less than 21 days before the meeting, the proceedings at the meeting will be void even though the shareholder received the notice in good time before the meeting was held and actually attended the meeting. Hence, such a construction would lead to absurdity and should be avoided. The contention could not, therefore, be accepted that a short notice served on a member will invalidate a meeting altogether but non-receipt of the notice by a member will not have the same effect. In view of the clear provisions of section 172(3) of the 1956 Act, it cannot be said that the requirements of section 171 of the 1956 Act are mandatory and a short notice given to any member will render the entire meeting void and of no legal consequence even if that member has not suffered any prejudice in any way. On the facts of the case, the notice of the meetings was published in a newspaper in good time; the shareholder was a resident of Calcutta; advertisement was given in a newspaper having circulation in Calcutta; the two annual general meetings were held at Calcutta; the shareholder had not been able to make out any case of any prejudice at all; the two annual general meetings were at last held after protracted litigations; and there was no reason why the resolutions passed at the annual general meetings should not be given effect to merely because one shareholder having seven shares of Rs. 10 each actually received the individual notices less than 21 days in advance. The balance of convenience did not require an order of injunction.

101.9 Construction/interpretation of notice

In construing a notice for a meeting Court protects interests of absentee-shareholders. In *Bharat Commerce & Industries Ltd. v. Registrar of Companies* [1973] 43 Comp. Cas. 275 (Cal.) company B passed a special resolution for the shifting of the registered office from Calcutta to Delhi. In the explanatory statement to the notice it was not disclosed that the company had declared a closure of its registered office and stopped payment of salaries to its employees. The company Judge had held that the company was guilty of suppression of material facts. It was held that the Court in construing a notice for meeting of a company only tries to protect the interest of the absentee members. The omission to state the aforesaid facts in the said notice or the explanatory statement thereto did not mislead any of the absentee members. In fact, none of the members came to oppose the application for sanction. The omission of the said fact to be stated in the notice or the explanatory statement thereto did not in any way vitiate the said notice or the meeting or the resolution. In fact, if the said grounds were stated in the notice or the explanatory statement, the same would have

been stronger grounds for the members to decide for the removal of the registered office from Calcutta to New Delhi. The notice, therefore, was not bad.

101.10 Service of notice

If a person on whom notice is served by registered post, refuses to accept it, under section 27 of the General Clauses Act, such tender of the registered cover and his refusal to accept same is valid service, in accordance with law. - *Joginder Singh Palta v. Time Travels (P.) Ltd.* [1984] 56 Comp. Cas. 103 (Cal.)

101.11 Validity of notice

101.11-1 Where suit to declare notice invalid liable to be dismissed

Where laches are deliberate and purpose is to disturb annual general meeting, suit to declare notice as invalid must be dismissed. - *Maharaja Exports v. Apparels Exports Promotion Council* [1986] 60 Comp. Cas. 353 (Delhi)

101.11-2 Tricky notices - Validity of

In *Bimal Singh Kothari v. Muir Mills Co. Ltd.* [1952] 22 Comp. Cas. 248 (Cal.) company M circulated a resolution to the shareholders proposing the appointment of company T as 'managing agent'. A majority of shares of company M were held by a partnership of 3 men, who also held majority of shares in company T and controlled it. One of these three was a director of M. Their interest in T was not disclosed to shareholders. The question was whether this amounted to suppression of true facts.

The Court held that it was quite possible to argue in this case that the notice in question was a 'tricky' notice. It was necessary for the defendant-company to disclose to the shareholders the controlling interest of the partners in T. But that was not done. An argument was quite plausible that the notice deliberately withheld material facts from the knowledge of the shareholders including the plaintiffs and committed fraud on the plaintiffs. In this case it may be fairly argued that not only there had been a suppression of true facts, but also a false suggestion.

Where a notice for an extraordinary general meeting omitted to mention important amendments carried out, notice was insufficient. To put the matter as simply as possible, if the directors issue a circular in which they refer to certain alterations, and say that the only important alteration is with regard to clause X, whereas there are equally important alterations in clause Y, can it be said that the shareholders have sufficient notice of the proposed alteration in clause Y? They have not - *Narayanlal Bansilal v. Maneckji Petit Mfg. Co. Ltd.* [1931] 1 Comp. Cas. 377 (Bom.)

101.11-3 Other illustrations

In *V.S. Krishnan v. Westfort Hi-Tech Hospital Ltd.* [2008] 83 SCL 44/142 Comp. Cas. 235 (SC) it was held that section 172 of the 1956 Act as well as section 53 of the 1956 Act emphasize 'giving notice'. Where the company had placed materials to substantiate that notices, in terms of the above provisions, were given, statutory presumption under section 53 of the 1956 Act would apply though the said act was rebuttable. Where there were materials to show that notices were sent, the burden was on the addressee to rebut the statutory presumption.

In the said case since first petitioner was party to board meeting, wherein date, place and agenda of AGM were fixed and further, respondents had produced certificates of posting to establish service of notice of AGM on directors and other shareholders, it was held by the Supreme Court that the High Court was justified in rejecting complaint of petitioners that they did not receive notice of AGM and holding that AGM was legal and it was held with due notice.

Since the first petitioner was party to board meeting, wherein date, place and agenda of AGM were fixed and further, the respondents had produced certificates of posting to establish service of notice of the AGM on directors and other shareholders, the High Court was justified in rejecting complaint of the petitioners that they did not receive notice of AGM and holding that AGM was legal and it was held with due notice.

101.12 Secretarial Standards

Relevant extracts of SS-2 issued by the ICSI under 1956 Act are as under :

Notice

Notice in writing of every Meeting should be given to every Member of the company. Such Notice should also be given to the Directors and Auditors of the company, to the Practising Company Secretary, to Debenture Trustees, if any, and, wherever applicable or so required, to other specified recipients.

Notice should be given to all persons entitled to receive such Notice, at the address provided by them in India or outside India. In the case of joint-shareholders, the Notice should be given to the person whose name appears first in the Register of Members or in the records of the depository, as the case may be.

On receipt of intimation of death of a Member, the Notice of a Meeting should be sent to the surviving first joint-holder or to the nominee of the sole shareholder or to the person entitled to a share in consequence of the death of the Member. In case of insolvency of a Member, the Notice should be sent to the assignees of the insolvent or to the person entitled to a share in consequence of the insolvency of the Member.

The Notice should specify the day, date, time and venue of the Meeting with complete address.

Meetings should commence during business hours, on a working day, at the Registered Office of the company or at some other place within the city, town or village in which the Registered Office is situated.

If the venue of the Meeting is not a prominent place, a site map of the venue should be enclosed with the Notice.

The Notice should prominently contain a statement that a Member entitled to attend and vote is entitled to appoint a Proxy to attend and vote instead of himself and that, except in the case of a private company and company not having a share capital where the Articles may provide otherwise, a Proxy need not be a Member.

Notice and accompanying documents should be sent at least twenty-five days in advance of the Meeting.

Where the Notice also is to be published in a newspaper, it should appear at least twenty-one days before the date of the Meeting and such Notice need not be accompanied by an explanatory statement.

Notice and accompanying documents may be given at a shorter period of time if consent in writing, [or by electronic mode] is given thereto by [not less than 95% of the members entitled to vote at such meeting].

Consent for shorter Notice may be given before or at the Meeting.

No business should be transacted at a Meeting if Notice in accordance with this Standard has not been given.

No items of business other than those specified in the Notice should be taken up for consideration at the Meeting.

No Resolution shall be valid if it is passed in respect of an item of business not contained in the Notice convening the Meeting.

Where Special Notice is required of any Resolution and Notice of the intention to move such Resolution is received by the company at least fourteen days before the Meeting, such item of business should be placed for consideration at the Meeting after giving Notice of the Resolution to members in the manner specified.

Any amendment to the Notice, including the addition of any item of business, can be issued provided the notice of amendment is sent to all persons entitled to receive the Notice of the Meeting and is sent within the time limit prescribed for giving of the original Notice.

The Notice should be accompanied by an attendance slip and a Proxy form with clear instructions for filling, stamping, signing and depositing the Proxy form.

A Meeting convened upon due Notice should not be postponed or cancelled.

If, for reasons beyond the control of the Board, a Meeting cannot be held on the date originally fixed, the Board may defer the Meeting. The Meeting should be reconvened after giving not less than seven days fresh Notice published

in a newspaper having a wide circulation within such States of India where more than 1,000 Members reside.

101.13 Listing Agreement

Clause 34(g) of the Listing Agreement provides that when notice is given to its shareholders by advertisement it will advertise such notice in at least one leading Mumbai daily newspaper.

Statement to be annexed to notice.

¹**102.** (1) A statement setting out the following material facts concerning each item of special business to be transacted at a general meeting, shall be annexed to the notice calling such meeting, namely:—

- (a) the nature of concern or interest, financial or otherwise, if any, in respect of each items of—
 - (i) every director and the manager, if any;
 - (ii) every other key managerial personnel; and
 - (iii) relatives of the persons mentioned in sub-clauses (i) and (ii);
- (b) any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.

(2) For the purposes of sub-section (1),—

- (a) in the case of an annual general meeting, all business to be transacted thereat shall be deemed special, other than—
 - (i) the consideration of financial statements and the reports of the Board of Directors and auditors;
 - (ii) the declaration of any dividend;
 - (iii) the appointment of directors in place of those retiring;
 - (iv) the appointment of, and the fixing of the remuneration of, the auditors; and

1. Enforced with effect from 12-9-2013.

(b) in the case of any other meeting, all business shall be deemed to be special:

Provided that where any item of special business to be transacted at a meeting of the company relates to or affects any other company, the extent of shareholding interest in that other company of every promoter, director, manager, if any, and of every other key managerial personnel of the first mentioned company shall, if the extent of such shareholding is not less than two per cent of the paid-up share capital of that company, also be set out in the statement.

(3) Where any item of business refers to any document, which is to be considered at the meeting, the time and place where such document can be inspected shall be specified in the statement under sub-section (1).

(4) Where as a result of the non-disclosure or insufficient disclosure in any statement referred to in sub-section (1), being made by a promoter, director, manager, if any, or other key managerial personnel, any benefit which accrues to such promoter, director, manager or other key managerial personnel or their relatives, either directly or indirectly, the promoter, director, manager or other key managerial personnel, as the case may be, shall hold such benefit in trust for the company, and shall, without prejudice to any other action being taken against him under this Act or under any other law for the time being in force, be liable to compensate the company to the extent of the benefit received by him.

(5) If any default is made in complying with the provisions of this section, every promoter, director, manager or other key managerial personnel who is in default shall be punishable with fine which may extend to fifty thousand rupees or five times the amount of benefit accruing to the promoter, director, manager or other key managerial personnel or any of his relatives, whichever is more.

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| COMMENTS |
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102.1 Legislative history

102.1-1 Corresponding provisions of the 1956 Act

This section corresponds to section 173 of the 1956 Act.

102.1-2 Comparative study : 2013 Act vis-a-vis the 1956 Act

The differences between the 2013 Act and the 1956 Act are as under:

- ◆ While section 173 of the 1956 Act did not define or clarify what facts are 'material facts', section 102 of the 2013 Act clarifies that material facts are those that may enable members to understand the meaning, scope and implication of the items of business and to take decision thereon.
- ◆ Section 102 of the 2013 Act goes much further than section 173 of the 1956 Act when it provides that where as a result of the non-disclosure or insufficient disclosure in any Explanatory statement, being made by a director, manager, if any, or other key managerial personnel, any benefit accrues to such director, manager or other key managerial personnel or his relatives, the director, manager or other key managerial personnel, as the case may be, shall hold such benefit in trust for the company, and shall be liable to compensate the company to the extent of the benefit received by him.
- ◆ Section 102 of the 2013 Act provides that where any item of special business relates to or affects any other company, the extent of shareholding interest in that other company of every director, manager, if any, and of every other key managerial personnel of the first mentioned company shall be disclosed in the Explanatory Statement if the extent of such shareholding is 2% or more of the paid-up share capital of that other company. Under the 1956 Act, such disclosure of shareholding interest in the explanatory statement was required if the extent of such shareholding interest was 20% or more of the paid-up share capital of that other company.
- ◆ Where any default is made in complying with section 102 of the 2013 Act, every officer of the company who is in default shall be punishable with fine which may extend to ` 50,000 or 5 times the amount of benefit accruing to the director, manager or other key managerial personnel or any of his relatives, whichever is more. Penal provisions along the above lines were not there in the 1956 Act.

102.2 Overview of section 102

Section 102 of the Act makes provisions:

- ◆ defining 'ordinary business' and 'special business' [Section 102(2)] [Para 102.4]
- ◆ setting out requirements in respect of special business including Explanatory Statement annexed to notice [Section 102(1)/(2)/(3)] [Para 102.5]
- ◆ non-disclosure or insufficient disclosure by director, manager or KMP [Section 102(4)] [Para 102.6]
- ◆ penalties [Section 102(5)] [Para 102.7]

Circular No. 15/2013, dated 13-9-2013 provides that all companies which have issued notices of general meeting on or after 12-9-2013, the statement to be annexed to the notice shall comply with additional requirements as prescribed in section 102.

102.2A Non-applicability of provisions to Private Company or applicability of provisions to Private Companies with modifications

Vide Draft Notification F.No. 1/1/2014-CL.V, dated 24-6-2014 if is proposed as under :

| <i>Sl. No.</i> | <i>Chapter/section number/sub-section(s) in the Companies Act, 2013</i> | <i>Exceptions/Modifications/Adaptations</i> |
|-----------------------|--|--|
| 1 | Chapter VII, sections 101 to 107 and section 109 [All whole] | Shall apply unless <ul style="list-style-type: none"> ◆ otherwise specified in respective sections or ◆ unless articles of the private company otherwise provide. |

102.3 Object of section 102

The object underlying the section is that the shareholders may have before them all facts which are material to enable them to form a judgment on the business before them-*Firestone Tyre & Rubber Co. v. Synthetics & Chemicals Ltd.* [1971] 41 Comp. Cas. 377 (Bom.)

The object of enacting the section is to secure that all facts which have a bearing on the question on which the shareholders have to form their judgment are brought to the notice of the shareholders so that the shareholders can exercise an intelligent judgment. The idea being that the shareholders may not be duped by the management and may not be persuaded to act in the manner desired by the management unless they

have formed their own judgment on the question after being placed in full possession of all the material facts and apprised of the interest of the management in any particular action being taken.

Thus, failure to append an explanatory statement to the notice is not only defective but also fatal and an incurable defect. Once the notice is held to be defective, no business can be transacted at the meeting held in pursuance of such notice. Having regard to the whole purpose and scope of the provision enacted in the section, it is mandatory and not directory and that any disobedience to its requirements must lead to be nullification of the action taken - *V.G. Balasundaram v. New Theatres Carnatic Talkies (P.) Ltd.* [1993] 77 Comp. Cas. 324 (Mad.)

102.4 Special business [Section 102(2)]

Section 102 defines the term “Special business” as under:

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| In case of annual general meeting | All business to be transacted thereat shall be deemed special, <i>other than—</i> <ul style="list-style-type: none"> ◆ the consideration of financial statements and the reports of the Board of Directors and auditors; ◆ the declaration of any dividend; ◆ the appointment of directors in place of those retiring; ◆ the appointment of, and the fixing of the remuneration of, the auditors |
| In case of any other meeting | All business shall be deemed to be special. |

Section 102 classifies business to be transacted at a general meeting into:—

- (a) Ordinary business
- (b) Special business.

102.4-1 Distinction between ordinary business and special business

The distinction between ‘ordinary business’ and ‘special business’ is as under:

- ◆ **DEFINITION:** According to section 102(2), *in the case of an annual general meeting*, all business to be transacted at the meeting shall be special, except the following business-
 - the consideration of financial statements and the reports of the Board of Directors and auditors;
 - the declaration of a dividend;
 - the appointment of directors in the place of the retiring directors; and

- the appointment of and the fixing of the remuneration of the auditors

The above four items of business are ordinary business.

In case of any other meeting, all business shall be deemed special.

In other words, ordinary business shall always be transacted only at AGMs. Special business may be transacted at AGM or at EGM.

- ◆ **NEED FOR ATTACHING EXPLANATORY STATEMENT TO NOTICE :** In case of ordinary business, the members are familiar with them. This is because they are transacted at every annual general meeting. Hence, the Act does not require any explanatory statement to be annexed to the notice convening the meeting for any item of ordinary business. As regards items of special business, members are not likely to have that much familiarity. They would like to have sufficient information to form an informed judgment before taking a decision. To enable them to do so, the Act requires that an explanatory statement shall be annexed setting out the material facts for each item of special business.

- **TYPE OF MEETING AT WHICH BUSINESS CAN BE TRANSACTED :** Special business may be transacted at any general meeting of the company/EGM. Ordinary business may be transacted only at annual general meeting.

The distinction between ordinary business and special business has to do with familiarity of members with the businesses. It has nothing to do with the majority required to pass resolutions pertaining to that item of business. It is not proper to say that all items of special business require special resolution.

102.4-2 Reappointment of additional directors - Whether ordinary business or special business

The appointment of directors in the place of those retiring is an item of ordinary business to be transacted at the annual general meeting of a company, *vide* section 173(1)(a) of the 1956 Act [corresponding to section 102 of the 2013 Act]. The retirement of directors as contemplated by the said section may be by rotation, efflux of time or otherwise. *If, therefore, an additional director appointed by the board of directors ceases to hold office under section 260 of the 1956 Act [corresponding to section 161 of the 2013 Act] and if such director is to be re-appointed as director at the annual general meeting, the provisions of section 173(1)(a) of the 1956 Act would become attracted in the matter and the same would be ordinary business.* [MCA's Letter : No. 8/53(173)/65-CL-V, dated 1-9-1965.]

102.5 Requirements as regards special business [Section 102(1)/102(2)/102(3)]

Section 102 provides as under:

- ◆ A statement setting out all the material facts concerning each item of special business to be transacted at a general meeting shall be annexed to the notice calling such meeting. (This statement is called 'Explanatory Statement'). [Section 102(1)]
- ◆ 'Material' facts to be set out in the Explanatory Statement, are as under :
 - (a) the nature of the concern or interest, financial or otherwise, if any, in respect of each items of—
 - (i) every director and the manager, if any,
 - (ii) every other key managerial personnel ; and
 - (iii) relatives of the persons mentioned in (i) and (ii) above
 - (b) any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon. [Section 102(1)]
- ◆ Where any item of special business to be transacted at a meeting of the company relates to or affects any other company, the extent of shareholding interest in that other company of every director, manager, if any, and of every other key managerial personnel of the first mentioned company shall also be disclosed in the Explanatory Statement if the extent of such shareholding is 2% or more of the paid-up share capital of that company [Proviso to section 102(2)]
- ◆ Where any item of business refers to any document, which is to be considered at the meeting, the time and place where such document can be inspected shall be specified in the Explanatory Statement. [Section 102(3)]

It must be noted that section 102 dealing with explanatory statement annexed to notice for items of special business is not exhaustive as regards the contents of the explanatory statement. Other provisions of the Act and the Rules set out special requirement as regards the contents of explanatory statement [see **Para 102.8**].

The following clarification of MCA is noteworthy

Query : Under section 173 of the 1956 Act [corresponding to section 102 of the 2013 Act], for any item of business to be treated as special business, a statement is to be annexed setting out material facts concerning such item. Is it correct to suggest that annexation of the relevant particulars is sufficient compliance with the law and no specific mention in the notice that the item is a special item is necessary ? Whether the explanatory statement for any such special item is a part of the notice itself ?

Answer : Mention of full relevant particulars in the explanatory statement annexed to the notice would be sufficient compliance with the law. The answer to second query is in affirmative. [MCA's Letter : No. 8/16(1)/61-PR, dated 19-5-1961]

Relevant extracts of SS-2 issued by the ICSI under the 1956 Act are given below :

The Notice should clearly specify the nature of the Meeting and the business to be transacted thereat. In respect of items of Special Business, each such item should be in the form of a Resolution and should be accompanied by an explanatory statement which should set out all such facts as would enable a Member to take an informed decision on the matter. In respect of items of Ordinary Business, Resolutions are not required to be specified in the Notice except where the appointment of Auditors has to be made by a Special Resolution, or where the Auditors or Directors to be appointed are other than the retiring Auditors or Directors, as the case may be.

All Resolutions and the explanatory statement should be framed in simple and intelligible language so as to enable Members to understand the meaning, scope and implications of the proposed items of business.

The nature of the concern or interest, if any, of Directors in any item of business or in a proposed Resolution should be disclosed in the explanatory statement, along with the extent of such concern or interest where the item relates to transactions with any other company.

Where reference is made to any document, contract, agreement or the Memorandum of Association and Articles, the relevant explanatory statement should state that such documents are available for inspection and such documents should be so made available for inspection for not less than two hours during business hours at the Registered Office of the company and copies thereof should also be made available at the head/corporate office of the company, if such office is situated elsewhere, and also at the Meeting.

In all cases relating to the appointment or reappointment of Directors, details of each such Director should be given, including age, qualifications, experience, date of first appointment on the board, shareholding in the company, relationship with other Directors of the company, other Directorships, membership/Chairmanship of Committees of other Boards and the number of Meetings of the Board attended during the year.

In the case of appointment/re-appointment or varying of the terms of remuneration of managerial personnel of the company, their personal resume, terms and conditions of appointment/re-appointment including full details of remuneration sought to be paid and the remuneration last drawn by such person should be stated in the explanatory statement.

102.5-1 Material facts

There was no definition of 'material facts' in section 173 of the 1956 Act. Section 102 defines it as covering (a) the nature of the concern or interest, financial or otherwise, if any, in respect of each items of director/manager/KMP and relatives of director/manager/KMPs and (b) any other

information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon. Thus, the section engrafts the ratio in *Firestone Tyre & Rubber Co. v. Synthetics & Chemicals Ltd.* [1971] 41 Comp. Cas. 377 (Bom.) wherein it was held that any fact which would influence them (members) in making up their minds, one way or the other, would be a material fact and has to be set out in the explanatory statement to the notice of the meeting.

A notice issued and explanatory statement attached to it can be condemned as tricky, if same is likely to mislead shareholders or if there is omission to state facts which would enable shareholders to decide if they would attend meeting or not - *M.R. Goyal v. Usha International Ltd.* [1998] 18 SCL 159 (Delhi). Interim injunction was also sought for the Court passed *ad interim* order stating that EGM may take place as scheduled but any decision in meeting shall not be given effect to till next date. Since, explanatory statement, *prima facie* did not lack requisite particulars; *ad interim* order passed was to be vacated.

The following judicial decisions are noteworthy:

- ◆ Where approval of Central Government is pre-requisite to a proposal, notice for general meeting must say whether such approval has been obtained or not as this is a 'material fact' - *Banwarilal Jaipuria v. Sitaram Jaipuria* [1972] 42 Comp. Cas. 29 (Cal.)
- ◆ All that is necessary for a notice to do is to specify the nature of the business and the material facts concerning it and there is no obligation to state the terms of the specific resolutions which are going to be proposed. Accordingly, where calling an ordinary general meeting contained the proposal to select A, B and C as directors and the meeting elected not only A, B and C but also M and R, it could not be said that there was any irregularity in the notice - *Betts & Co. Ltd. v. Macnaghten* [1970] 1 Ch. 430 (Ch. D)
- ◆ Resolution can be amended at meeting, and need not be identical with that as given in notice. If proper and sufficient notice of the intention to propose the resolution is given, the resolution is not invalidated if, owing to an amendment, the resolution passed is not identical with that of the notice. - *Torbock v. Westbury (Lord)* [1902] 2 Ch. 871
- ◆ **Material facts will not necessarily include reasons** - It will all depend upon the nature of the subject-matter which constitutes the special business. Sometimes the facts stated are sufficiently eloquent and there is no need to justify the proposed action by giving reasons - *Laljibhai C. Kapadia v. Lalji B. Desai* [1973] 43 Comp. Cas. 17 (Bom.)
- ◆ **Where Explanatory statement in aid of a resolution wanting bare power to amalgamate did not indicate whether amalgamation**

was financially advisable - In *Hari Krishna Lohia v. Hoolungooree Tea Co. Ltd.* [1970] 40 Comp. Cas. 458 (Cal.) the notice stated that the company proposed to amalgamate with other companies and the company gave the names and the company also issued circulars giving information and the appellant contended that the notice in the present case did not indicate as to whether the amalgamation was financially advisable or whether it was commercially proper. The Court held that the explanatory statement that was given was in aid of the resolution which wanted a bare power to amalgamate. When the company would make the necessary scheme for amalgamation, the company would have to give proper and sufficient materials in order to enable the shareholders to express their views. The entire scheme then would come before the Court. The Court would scrutinise it and the statute recognises adequate safeguards as to whether the scheme should be accepted. Therefore, the notice could not be impeached at this stage.

- ◆ **Amendments proposed to articles** - If set of proposed amendments to articles of association was not annexed to notice of meeting but was despatched shortly afterwards, notice was not bad. Where a large number of alterations have to be made, it is generally more convenient to adopt a new set of articles altogether. Where this course is adopted, a copy of the new regulations should lie for inspection at the office, and the notice convening the meetings should state the fact; and in some cases it may be deemed expedient to send printed copies of the proposed new articles with the notices. In the instant case, the notice clearly stated that a print of proposed amended articles of association would follow shortly. From the 22nd to 7th of November the members had ample time to consider the proposed amended articles. There was, thus, sufficient compliance with the requirement of law, and the notice was not bad. - *N.V.R. Nagappa Chettiar v. Madras Race Club* [1949] 19 Comp. Cas. 175 (Mad.)
- ◆ Even if proposed amendments to articles are large in number, printed copies thereof should be sent to shareholders along with notice, especially to shareholders reside at a great distance from head office; if this is not done it would be a case where notice did not disclose fully and frankly facts upon which shareholders were asked to vote. It will not in all cases be sufficient in India to leave a copy at the registered office and state that fact in the notice, inviting the shareholders to inspect the proposed changes at the registered office. The travelling facilities here are not the same as in England, neither the country is so small as England. There are various difficulties that prevent the shareholders from going to the registered office and

having inspection. Besides whether such a course should be adopted or not depends on the facts of each case. For example, it may be that the shareholders of a company live very near the registered office. In such a case possibly it would be sufficient to give them notice that the proposed changes could be inspected at the registered office.

But, where there is a large body of shareholders who reside at great distances from the registered office of the company, it would not be fair on the part of the company to leave the proposed regulations at the registered office and give the shareholders notice of that fact. In a case like this, printed copies of the proposed new articles should be sent with the notice. In this case that was not done, and, therefore, the notice did not disclose fully and frankly the facts upon which the shareholders were asked to vote. - *Bimal Singh Kothari v. Muir Mills Co. Ltd.* [1952] 22 Comp. Cas. 248 (Cal.)

102.5-1a Material facts relating to appointment of managing/whole-time/technical directors - Important material facts such as those relating to the quantum of remuneration payable, academic/technical qualifications and business experience of the proposed appointee, the necessity of his appointment, etc., must be set out in the respective explanatory statements attached to the notices of the meetings at which the appointments of managing/whole-time/technical directors or payment of remuneration to them were to be considered. Details of the quantum of remuneration payable should be disclosed in the explanatory statement itself. It is not sufficient if the explanatory statement merely indicates that relevant documents/agreements relating to the appointments and/or remuneration were available for inspection at the registered office of the companies concerned. [*Circular : No. 1(38)-CL-VI/65, dated 21-10-1965.*]

102.5-2 Requirements, whether mandatory or directory

Section 173 of the 1956 Act [corresponding to section 102 of the 2013 Act] is mandatory and not directory, and furnishing a statement of material facts is necessary. There are two ways in which the mandatory provisions contained in the section may be contravened. It may be a case where no explanatory statement is at all appended to the item of a special business, or it may be a case where the statement is incomplete, misleading or tricky. The contravention may be the result of an act of omission or an act of commission. Whatever be the nature of the contravention, the question always is a mixed question of fact and law. - *Laljibhai C. Kapadia v. Lalji B. Desai* [1973] 43 Comp. Cas. 17 (Bom.)

Provision of section 173 of the 1956 Act [corresponding to section 102 of the 2013 Act] is mandatory and any disobedience of its requirements must lead to nullification of action taken. The object of enacting the section is to secure that all facts which have a bearing on the question on which the

shareholders have to form their judgment are brought to the notice of the shareholders so that the shareholders can exercise an intelligent judgment. The idea being that the shareholders may not be duped by the management and may not be persuaded to act in the manner desired by the management unless they have formed their own judgment on the question after being placed in full possession of all the material facts and apprised of the interest of the management in any particular action being taken. Thus, failure to append an explanatory statement to the notice is not only defective but also fatal and an incurable defect. - *V.G. Balasundaram v. New Theatres Carnatic Talkies (P.) Ltd.* [1993] 77 Comp. Cas. 324 (Mad.)

Under section 173 of the 1956 Act [corresponding to section 102 of the 2013 Act] with regard to appointment of directors, there should have been an explanatory statement which is mandatory. Failure to append an explanatory statement is not only defective but also fatal and an incurable defect. - *V.G. Balasundaram v. New Theatres Carnatic Talkies Pvt. Ltd.* [1993] 77 Comp. Cas. 324 (Mad.)

A resolution passed without disclosing material facts in explanatory statement in flagrant violation of requirement of section 173 of the 1956 Act [corresponding to section 102 of the 2013 Act] is void resolution. Where a resolution is passed without disclosing material facts in explanatory statement in flagrant violation of requirement of the section, it cannot be anything but a void resolution and an agreement on the strength of a void resolution, if permitted, would defeat the provisions of law - *Sunil Mills Ltd. v. Official Liquidator of Shri Ambica Mills Ltd.* [2000] 24 SCL 455 (Guj.)/
Y. S. Spinners Ltd. v. Official Liquidator of Shri Ambica Mills Ltd. [2000] 25 SCL 26 (Guj.)

The notice has to be construed in a realistic and business-like manner and if it satisfies the essence of section 173 of the 1956 Act [corresponding to section 102 of the 2013 Act], the meeting should not be invalidated on the technical ground that the notice has not complied, with the provisions of section 173(2) of the 1956 Act [corresponding to section 102 of the 2013 Act]. The intention behind the provisions contained in the section has to be understood in a meaningful manner. Of course, if a transaction of business has not been sufficiently notified or which is substantially different from the notification, it would be invalid. Beyond that on technicalities the meeting should not be invalidated - *K. Meenakshi Amma v. Sreerama Vilas Press & Publications (P.) Ltd.* [1992] 73 Comp. Cas. 285 (Ker.)

A very minor defect in complying with section 173(2) of the 1956 Act [corresponding to section 102 of the 2013 Act] may not render resolution null and void. - *Joseph Michael v. Travancore Rubber & Tea Co. Ltd.* [1986] 59 Comp. Cas. 898 (Ker.)

102.5-3 Interpretation of Explanatory Statement

Section 173 of the 1956 Act [corresponding to section 102 of the 2013 Act] should not be interpreted rigidly. The requirement of the section is that the members of the company should be informed truly of the nature of business to be transacted at the general meeting. Too rigid an interpretation would not advance the object of the provision which will only hamper the conduct of business. - *K. Meenakshi Amma v. Sreerama Vilas Press & Publications (P.) Ltd.* [1992] 73 Comp. Cas. 285 (Ker.)

Explanatory statement is not to be read in isolation. It has to be read along with special resolution included in agenda. - *Rajiv Nag v. Quality Assurance Institute (India) Ltd.* [2002] 37 SCL 25 (Delhi)

It is a settled-law that the notice must specify the business to be done. The object of the notice is to be a fair notice, intelligible to the minds of the ordinary men, the class of men who are the shareholders in the company and to whom it is addressed. Section 173(2) of the 1956 Act should not be construed in a rigid manner and should not be made to hamper the conduct of business. The notice has to be construed in a realistic, business like manner and if it satisfies the essence of section 173(2), the meeting should not be invalidated on the technical ground that the notice has not complied with section 173(2). If the shareholder is aware of the material facts pertaining to the transaction to be carried out at the meeting, he cannot reasonably complain of any insufficiency of notice. If he is present at the meeting, he must point out to the Chairman about the irregularity before the meeting proceeds with the agenda. - *C.R. Priyachandrakumar v. Purasawalkam Permanent Fund Ltd.* [1996] 7 SCL 61 (Mad.)

In the said case the plaintiffs filed suit for a permanent injunction restraining the company in considering item Nos. 7 and 8 of the notice issued for the annual general meeting on the ground that the notice insofar as the said items were concerned, was illegal and void. While item No. 7 proposed the appointment of second defendant/respondent as a director of the company, item No. 8 related to waiver of the recovery of remuneration and sitting fee paid to the second defendant/respondent for the period during which he was director of the company but his appointment was later found to be defective for non-compliance of provisions of section 257 of the 1956 Act. The plaintiffs' allegations were that all the material facts relating to defect in appointment of the director were not stated in explanatory statement and, as such, provisions of section 173 of the 1956 Act were not complied with. As regards item No. 8, it was pleaded that the waiver sought for was *ultra vires* the company and, therefore, could not be permitted. The plaintiffs sought interim stay and the Court permitted the defendant/respondent to consider the disputed items in the annual general meeting but restrained the implementation of the results. In the annual general meeting the items in questions were considered and both the resolutions were adopted with overwhelming majority. While the respondents/defen-

dants filed application for vacating the interim stay granted and, thus, permission to the company to implement the resolutions, the plaintiffs resisted the same contending that since the notice in respect of items 7 and 8 was illegal for non-compliance with section 173(2) of the 1956 Act, the resolutions would be void and, therefore, should not be permitted to be given effect to.

The Court held that the plaintiffs being shareholders were aware of the material facts pertaining to the transactions to be carried out at the annual general meeting and, as such, they could not reasonably complain of insufficiency of notice nor did they, having been present at the meeting, point out to the Chairman about the irregularity before the meeting proceeded with the agenda, nor did they participate in the deliberations and bring to the notice of the shareholders who attended the meeting, the facts which, according to them, were material facts which influenced the shareholders in exercising their rights on the subject. Therefore, it could not be said that there was non-compliance with the provisions of section 173(2) of the 1956 Act. As regards waiver of remuneration paid during holding of directorship which was defective, once his actions as director were found to be valid, the remuneration payable to him during the said period would be only in the capacity as director and it was only with that object that the approval of the Central Government was sought by the first respondent. The Central Government had also considered the request made by the first respondent and ordered waiver of recovery, which was paid to the second respondent as a remuneration subject to the approval of the general body as required by sub-section (2) of section 309 of the 1956 Act. So, it was for the shareholders to consider whether the recovery should be made or the recovery should not be made and it was the internal management of the first respondent. The board of directors had also approved and passed the resolution. If the resolution passed by the majority of shareholders was not given effect to, great prejudice would be caused to the second respondent, who was validly elected as a director at the annual general meeting, where the majority of shareholders had approved of his appointment. Therefore, the interim stay granted was vacated and the defendants were permitted to give effect to the resolutions passed in the general body meeting, subject to the final outcome of the suit.

Where the special resolution passed at AGM on 30-9-1999 authorised the issue of "fully paid bonus shares to such members holding equity shares as per the register of equity shareholders at date determined by the board of directors of the company" (and based on the resolution passed at AGM, the date determined by the Board of Directors for this purpose (at Board Meeting held on 14-1-2000) was 1-2-2000 but the explanatory statement annexed to notice stated that "In view of the excellent working of the company, it is planned to reward the existing shareholders by way of issue of bonus shares in such ratio as the board of directors may deem fit." As the explanatory statement did not say that the company planned to reward the

existing shareholders as on the date of the AGM, there was no inconsistency or contradiction between the resolution and the explanatory statement as no date for giving effect to the decision to allot bonus shares was mentioned in the explanatory statement while it was specifically stated in the resolution that the bonus shares would be allotted and distributed to such members who would be holding equity shares as on a date determined by the board of directors of the company - *Rajiv Nag v. Quality Assurance Institute (India) Ltd.* [2002] 37 SCL 25 (Delhi)

102.5-4 Statement not disclosing all material facts - Registrar's power to call additional information

Where a special resolution does not, on the face of it, disclose all material facts relating thereto, the Registrars have been instructed to obtain, in exercise of the powers conferred on them by section 234 of the 1956 Act [corresponding to section 206 of the 2013 Act], copies of the statement prescribed by section 173(2) of the 1956 Act [corresponding to section 102 of the 2013 Act], and any other information necessary to see that the resolution is complete in accordance with the law. [Source : *Press Note issued by Department of Company Law Administration, dated 25-7-1956.*]

102.6 Non-disclosure or insufficient disclosure by a director, manager, if any, or other key managerial personnel [Section 102(4)]

Where as a result of the non-disclosure or insufficient disclosure in any explanatory statement, being made by a promoter, director, manager, if any, or other key managerial personnel, any benefit which accrues to such promoter, director, manager or other key managerial personnel or their relatives, either directly or indirectly, the promoter, director, manager or other key managerial personnel, as the case may be, shall hold such benefit in trust for the company, and shall, without prejudice to any other action being taken against him under this Act or under any other law for the time being in force, be liable to compensate the company to the extent of the benefit received by him.

102.7 Default in complying with above provisions [Section 102(5)]

Where any default is made in complying with the above provisions, every officer of the company who is in default shall be punishable with fine which may extend to ₹ 50,000 or 5 times the amount of benefit accruing to the director, manager or other key managerial personnel or any of his relatives, whichever is more.

102.8 Contents of explanatory statement - Special requirements

Apart from complying with the requirements of section 102 of the 2013 Act, the explanatory statement annexed to the notice of the meeting will

have to comply with the special requirements of other provisions as tabulated below:

| <i>Section</i> | <i>Contents of explanatory statement</i> |
|-----------------|---|
| 8(4)(ii) | <p>Conversion of a company registered under section 8 into a company of any other kind.</p> <p>A company registered under section 8 which intends to convert itself into a company of any other kind shall pass a special resolution at a general meeting for approving such conversion.</p> <p>The explanatory statement annexed to the notice convening the general meeting shall be set out in detail the reasons for opting for such conversion including the following, namely:—</p> <ul style="list-style-type: none"> (a) the date of incorporation of the company; (b) the principal objects of the company as set out in the memorandum of association; (c) the reasons as to why the activities for achieving the objects of the company cannot be carried on in the current structure <i>i.e.</i> as a section 8 company; (d) if the principal or main objects of the company are proposed to be altered, what would be the altered objects and the reasons for the alteration; (e) what are the privileges or concessions currently enjoyed by the company, such as tax exemptions, approvals for receiving donations or contributions including foreign contributions, land and other immovable properties, if any, that were acquired by the company at concessional rates or prices or gratuitously and, if so, the market prices prevalent at the time of acquisition and the price that was paid by the company, details of any donations or bequests received by the company with conditions attached to their utilization etc. (f) details of impact of the proposed conversion on the members of the company including details of any benefits that may accrue to the members as a result of the conversion. <p>[Rule 21 of the Companies (Incorporation) Rules, 2014]</p> |
| 42 | <p>Special resolution authorizing private placement of securities</p> <p>A company shall not make a private placement of its securities unless the proposed offer of securities or invitation to subscribe securities has been previously approved</p> |

| Section | Contents of explanatory statement |
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| | <p>by the shareholders of the company, by a Special Resolution, for each of the Offers or Invitations. In the explanatory statement annexed to the notice for the general meeting the basis or justification for the price (including premium, if any) at which the offer or invitation is being made shall be disclosed. [Proviso to Rule 14(2)(a) of the Companies (Prospectus and Allotment of Securities) Rules, 2014]</p> |
| 43(a)(ii) | <p>Resolution authorizing issue of equity shares with differential rights as to dividend, voting or otherwise</p> <p>The explanatory statement to be annexed to the notice of the general meeting in pursuance of section 102 or of a postal ballot in pursuance of section 110 shall contain the following particulars, namely:—</p> <ul style="list-style-type: none"> (a) the total number of shares to be issued with differential rights; (b) the details of differential rights; (c) the percentage of the shares with differential rights to the total post issue paid up equity share capital including equity shares with differential rights issued at any point of time; (d) the reasons or justification for the issue; (e) the price at which such shares are proposed to be issued either at par or at premium; (f) the basis on which the price has been arrived at; (g) (i) in case of private placement or preferential issue— <ul style="list-style-type: none"> ◆ details of total number of shares proposed to be allotted to promoters, directors and key managerial personnel; ◆ details of total number of shares proposed to be allotted to persons other than promoters, directors and key managerial personnel and their relationship if any with any promoter, director or key managerial personnel; (ii) in case of public issue - reservation, if any, for different classes of applicants including promoters, directors or key managerial personnel; (h) the percentage of voting right which the equity share capital with differential voting right shall carry to the total voting right of the aggregate equity share capital; |

| Section | Contents of explanatory statement |
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| | <p>(i) the scale or proportion in which the voting rights of such class or type of shares shall vary;</p> <p>(j) the change in control, if any, in the company that may occur consequent to the issue of equity shares with differential voting rights;</p> <p>(k) the diluted Earning Per Share pursuant to the issue of such shares, calculated in accordance with the applicable accounting standards;</p> <p>(l) the pre and post issue shareholding pattern along with voting rights as per clause 35 of the listing agreement issued by Security Exchange Board of India from time to time.</p> <p>[Rule 4(2) of the Companies (Share Capital and Debentures) Rules, 2014]</p> |
| 54 | <p>Special resolution authorizing the issue of sweat equity shares</p> <p>The explanatory statement to be annexed to the notice of the general meeting pursuant to section 102 shall contain the following particulars, namely:—</p> <p>(a) the date of the Board meeting at which the proposal for issue of sweat equity shares was approved;</p> <p>(b) the reasons or justification for the issue;</p> <p>(c) the class of shares under which sweat equity shares are intended to be issued;</p> <p>(d) the total number of shares to be issued as sweat equity;</p> <p>(e) the class or classes of directors or employees to whom such equity shares are to be issued;</p> <p>(f) the principal terms and conditions on which sweat equity shares are to be issued, including basis of valuation;</p> <p>(g) the time period of association of such person with the company;</p> <p>(h) the names of the directors or employees to whom the sweat equity shares will be issued and their relationship with the promoter or/and Key Managerial Personnel;</p> <p>(i) the price at which the sweat equity shares are proposed to be issued;</p> <p>(j) the consideration including consideration other than cash, if any to be received for the sweat equity;</p> |

| Section | Contents of explanatory statement |
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| | <p>(k) the ceiling on managerial remuneration, if any, be breached by issuance of such sweat equity and how it is proposed to be dealt with;</p> <p>(l) a statement to the effect that the company shall conform to the applicable accounting standards; and</p> <p>(m) diluted Earning Per Share pursuant to the issue of sweat equity shares, calculated in accordance with the applicable accounting standards.</p> <p>[Rule 8(2) of the Companies (Share Capital and Debentures) Rules, 2014]</p> |
| 62 | <p>Special resolution approving the issue of employees stock options</p> <p>The company shall make the following disclosures in the explanatory statement annexed to the notice for passing of the resolution—</p> <p>(a) the total number of stock options to be granted;</p> <p>(b) identification of classes of employees entitled to participate in the Employees Stock Option Scheme;</p> <p>(c) the appraisal process for determining the eligibility of employees to the Employees Stock Option Scheme;</p> <p>(d) the requirements of vesting and period of vesting;</p> <p>(e) the maximum period within which the options shall be vested;</p> <p>(f) the exercise price or the formula for arriving at the same;</p> <p>(g) the exercise period and process of exercise;</p> <p>(h) the lock-in period, if any ;</p> <p>(i) the maximum number of options to be granted per employee and in aggregate;</p> <p>(j) the method which the company shall use to value its options;</p> <p>(k) the conditions under which option vested in employees may lapse e.g. in case of termination of employment for misconduct;</p> <p>(l) the specified time period within which the employee shall exercise the vested options in the event of a proposed termination of employment or resignation of employee; and</p> |

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| | <p>(m) a statement to the effect that the company shall comply with the applicable accounting standards [Rule 12(2) of the Companies (Share Capital and Debentures) Rules, 2014]</p> |
| 62 | <p>Special resolution authorizing the issue of shares by an unlisted company in any manner whatsoever including by way of a preferential offer, to any persons whether or not those persons include the persons referred to in clause (a) or clause (b) of sub-section (1) of section 62</p> <p>The company shall make the following disclosures in the explanatory statement to be annexed to the notice of the general meeting pursuant to section 102 of the Act :</p> <ul style="list-style-type: none"> (i) the objects of the issue; (ii) the total number of shares or other securities to be issued; (iii) the price or price band at/within which the allotment is proposed; (iv) basis on which the price has been arrived at along with report of the registered valuer; (v) relevant date with reference to which the price has been arrived at; (vi) the class or classes of persons to whom the allotment is proposed to be made; (vii) intention of promoters, directors or key managerial personnel to subscribe to the offer; (viii) the proposed time within which the allotment shall be completed; (ix) the names of the proposed allottees and the percentage of post preferential offer capital that may be held by them; (x) the change in control, if any, in the company that would occur consequent to the preferential offer; (xi) the number of persons to whom allotment on preferential basis have already been made during the year, in terms of number of securities as well as price; (xii) the justification for the allotment proposed to be made for consideration other than cash together with valuation report of the registered valuer; (xiii) The pre issue and post issue shareholding pattern of the company in the specified tabular format |

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| | [Rule 13(2)(d) of the Companies (Share Capital and Debentures) Rules, 2014] |
| 67(3)(b) | <p>Special resolution authorising provision of money for the purchase of, or subscription for, shares in the company or its holding company, if the purchase of, or the subscription for, the shares by trustees is for the shares to be held by or for the benefit of the employees of the company</p> <p>The explanatory statement to be annexed to the notice of the general meeting to be convened pursuant to section 102 shall, in addition to the particulars mentioned in sub-rule (1) of rule 18, contain the following particulars, namely:—</p> <ul style="list-style-type: none"> (a) the class of employees for whose benefit the scheme is being implemented and money is being provided for purchase of or subscription to shares; (b) the particulars of the trustee or employees in whose favour such shares are to be registered; (c) the particulars of trust and name, address, occupation and nationality of trustees and their relationship with the promoters, directors or key managerial personnel, if any; (d) the interest of key managerial personnel, directors or promoters in such scheme or trust and effect thereof; (e) the detailed particulars of benefits which will accrue to the employees from the implementation of the scheme; (f) the details about who would exercise and how the voting rights in respect of the shares to be purchased or subscribed under the scheme would be exercised; <p>[Rule 16(2) of the Companies (Share Capital and Debentures) Rules, 2014]</p> |
| 68(3) | <p>Special resolution authorizing buy-back of securities</p> <p>The notice of the meeting at which the special resolution authorizing buyback of securities is proposed to be passed shall be accompanied by an explanatory statement stating—</p> <ul style="list-style-type: none"> (a) a full and complete disclosure of all material facts; (b) the necessity for the buy-back; (c) the class of shares or securities intended to be purchased under the buy-back; |

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| | <p>(d) the amount to be invested under the buy-back; and (e) the time-limit for completion of buy-back.</p> <p>The explanatory statement to be annexed to the notice of the general meeting pursuant to section 102 shall contain the following disclosures, namely:—</p> <p>(a) the date of the Board meeting at which the proposal for buy-back was approved by the Board of directors of the company;</p> <p>(b) the objective of the buy-back;</p> <p>(c) the class of shares or other securities intended to be purchased under the buy-back;</p> <p>(d) the number of securities that the company proposes to buy-back;</p> <p>(e) the method to be adopted for the buy-back;</p> <p>(f) the price at which the buy-back of shares or other securities shall be made;</p> <p>(g) the basis of arriving at the buy-back price;</p> <p>(h) the maximum amount to be paid for the buy-back and the sources of funds from which the buy-back would be financed;</p> <p>(i) the time-limit for the completion of buy-back;</p> <p>(j) (i) the aggregate shareholding of the promoters and of the directors of the promoter, where the promoter is a company and of the directors and key managerial personnel as on the date of the notice convening the general meeting;</p> <p>(ii) the aggregate number of equity shares purchased or sold by persons mentioned in sub-clause (i) during a period of twelve months preceding the date of the Board meeting at which the buy-back was approved and from that date till the date of notice convening the general meeting;</p> <p>(iii) the maximum and minimum price at which purchases and sales referred to in sub-clause (ii) were made along with the relevant date;</p> <p>(k) if the persons mentioned in sub-clause (i) of clause (j) intend to tender their shares for buy-back—</p> <p>(i) the quantum of shares proposed to be tendered;</p> <p>(ii) the details of their transactions and their holdings for the last twelve months prior to the date</p> |

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| | <p>of the board meeting at which the buy-back was approved including information of number of shares acquired, the price and the date of acquisition;</p> <p>(l) a confirmation that there are no defaults subsisting in repayment of deposits, interest payment thereon, redemption of debentures or payment of interest thereon or redemption of preference shares or payment of dividend due to any shareholder, or repayment of any term loans or interest payable thereon to any financial institution or banking company;</p> <p>(m) a confirmation that the Board of directors have made a full enquiry into the affairs and prospects of the company and that they have formed the opinion—</p> <p>(i) that immediately following the date on which the general meeting is convened there shall be no grounds on which the company could be found unable to pay its debts;</p> <p>(ii) as regards its prospects for the year immediately following that date, that, having regard to their intentions with respect to the management of the company's business during that year and to the amount and character of the financial resources which will in their view be available to the company during that year, the company shall be able to meet its liabilities as and when they fall due and shall not be rendered insolvent within a period of one year from that date; and</p> <p>(iii) the directors have taken into account the liabilities (including prospective and contingent liabilities), as if the company were being wound up under the provisions of the Companies Act, 2013</p> <p>(n) a report addressed to the Board of directors by the company's auditors stating that—</p> <p>(i) they have inquired into the company's state of affairs;</p> <p>(ii) the amount of the permissible capital payment for the securities in question is in their view properly determined;</p> <p>(iii) that the audited accounts on the basis of which calculation with reference to buy-back is done</p> |

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| | <p>is not more than six months old from the date of offer document; and</p> <p>(iv) the Board of directors have formed the opinion as specified in clause (m) on reasonable grounds and that the company, having regard to its state of affairs, shall not be rendered insolvent within a period of one year from that date.</p> <p>[Rule 17(1) of the Companies (Share Capital and Debentures) Rules, 2014]</p> |
| 150(2) | <p>Resolution appointing Independent Director</p> <p>The appointment of independent director shall be approved by the company in general meeting as provided in sub-section (2) of section 152 and the explanatory statement annexed to the notice of the general meeting called to consider the said appointment shall indicate the justification for choosing the appointee for appointment as independent director.</p> |
| 152(5), proviso | <p>In the case of appointment of an independent director in the general meeting, an explanatory statement for such appointment, annexed to the notice for the general meeting, shall include a statement that in the opinion of the Board, he fulfils the conditions specified in this Act for such an appointment.</p> |
| Para IV(3) of Schedule VI | <p>The explanatory statement attached to the notice of the meeting for approving the appointment of independent director shall include a statement that in the opinion of the Board,</p> <p>(i) the independent director proposed to be appointed fulfils the conditions specified in the Act and the rules made thereunder, and</p> <p>(ii) that the proposed director is independent of the management.</p> |
| 188(1), first proviso | <p>Special resolution to approve related party transactions</p> <p>For the purposes of first proviso to sub-section (1) of section 188, except with the prior approval of the company by a special resolution—</p> <p>(i) a company having a paid-up share capital of ten crore rupees or more shall not enter into a contract or arrangement with any related party; or</p> <p>(ii) a company shall not enter into a transaction or transactions, where the transaction or transactions to be entered into—</p> |

| Section | Contents of explanatory statement |
|---------|--|
| | <p>(a) as contracts or arrangements with respect to clauses (a) to (e) of sub-section (1) of section 188 with criteria, as mentioned below—</p> <ul style="list-style-type: none"> (i) sale, purchase or supply of any goods or materials directly or through appointment of agents exceeding twenty five per cent of the annual turnover as mentioned in clause (a) and clause (e) respectively of sub-section (1) of section 188; (ii) selling or otherwise disposing of, or buying, property of any kind directly or through appointment of agents exceeding ten per cent of net worth as mentioned in clause (b) and clause (e) respectively of sub-section (1) of section 188; (iii) leasing of property of any kind exceeding ten per cent of the net worth or exceeding ten per cent of turnover as mentioned in clause (c) of sub-section (1) of section 188; (iv) availing or rendering of any services directly or through appointment of agents exceeding ten per cent of the net worth as mentioned in clause (d) and clause (e) of sub-section (1) of section 188; <p>(b) appointment to any office or place of profit in the company, its subsidiary company or associate company at a monthly remuneration exceeding two and half lakh rupees as mentioned in clause (f) of sub-section (1) of section 188; or</p> <p>(c) remuneration for underwriting the subscription of any securities or derivatives thereof of the company exceeding one per cent of the net worth as mentioned in clause (g) of sub-section (1) of section 188.</p> <p>[Rule 15(3) of the Companies (Meetings of Board and its Powers) Rules, 2014]</p> <p>In case of wholly owned subsidiary, the special resolution passed by the holding company shall be sufficient for the purpose of entering into the transactions between wholly owned subsidiary and holding company. [Explanation (2) to Rule 15(3)]</p> |

| Section | Contents of explanatory statement |
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| | <p>The explanatory statement to be annexed to the notice of a general meeting convened pursuant to section 101 shall contain the following particulars, namely:—</p> <ul style="list-style-type: none"> (a) name of the related party; (b) name of the director or key managerial personnel who is related, if any; (c) nature of relationship; (d) nature, material terms, monetary value and particulars of the contract or arrangement; (e) any other information relevant or important for the members to take a decision on the proposed resolution. [Explanation (3) to Rule 15(3)] |
| 196(3)(a), first proviso | <p>Appointment of one who attained age of 70 years as MD/ whole-time director or manager</p> <p>Appointment of a person who has attained the age of seventy years may be made by passing a special resolution in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person.</p> |

102.9 Sections 230 and 231 vis-à-vis section 102

A combined reading of sections 391 and 393 of the 1956 Act [corresponding to section 230 of the 2013 Act] and their comparison with provisions of section 173 of the 1956 Act [corresponding to section 102 of the 2013 Act] shows that former sections deal with a specific situation to exclusion of general provisions made by section 173 of the 1956 Act [corresponding to section 102 of the 2013 Act]. The provisions of section 173 of the 1956 Act are general provisions pertaining to the meetings of a company, whether an annual general meeting or an extraordinary general meeting. Furthermore section 173 of the 1956 Act postulates a meeting of a company whereas sections 391 and 393 of the 1956 Act contemplate convening of a meeting of members or a class of members. It is true that any meeting of a company is factually also a meeting of the members of that company but the thrust of the two sets of sections clearly establishes a different legal identity of such meetings.- section 393(1)(a) of the 1956 Act does not ordain disclosure of all material facts. Clause (a) of section 393(1) of the 1956 Act not only enumerates the categories of particulars, but it deliberately makes a departure by omitting any reference to material facts. It was further held that the Legislature having used a different phraseology in the said two provisions, it must be held that the legislative intent under the said section 393 of the 1956 Act was not to provide for disclosure of all material fact - *Khandelwal Udyog Ltd. & Acme Mfg. Co. Ltd., In*

re [1977] 47 Comp. Cas. 503 (Bom.)/*Tata Oil Mills Co. Ltd.*, *In re* [1994] 81 Comp. Cas. 754 (Bom.)

102.10 Section 102 vis-à-vis section 160

Section 257 of the 1956 Act [corresponding to section 160 of the 2013 Act] is not controlled by section 173 of the 1956 Act [corresponding to section 102 of the 2013 Act]. When a special subject were to be included in the agenda for the general meeting, the notice itself should contain an explanation, while when the company was found to act under section 257(1A) of the 1956 Act [corresponding to section 160 of the 2013 Act], it is enough if the later notice issued contained the explanatory note. - *S. Pazhamalai v. Aruna Sugars Ltd.* [1984] 55 Comp. Cas. 500 (Mad.)

102.11 Challenges to validity of meeting/suits for injunction a company from holding a general meeting

Where no ground was available to High Court to grant injunction restraining company from holding extraordinary general meeting on ground that notice lacked explanatory statement being attached with it - In P. Rajan Rao v. B.G. Somayaji [1995] 5 SCL 125 (SC) the respondent-bank had, by a notice, convened an extraordinary general meeting of the shareholders to remove two of its directors. The two directors contended that quite apart from certain *mala fide*, the requirements of law prescribed in convening of such a meeting was not complied with as notice of meeting had to be accompanied by an explanatory statement under section 173 of the 1956 Act [corresponding to section 102 of the 2013 Act], but a cryptic explanatory statement had been annexed to the notice which stated that the other directors have no interest in the item of business and a requisition had been received for the convening of the meeting. On the other hand, the company took plea that they had already proposed to the RBI for removal of these two directors and in this letter reasons for such proposal were already stated. However, the High Court granted injunction restraining company to hold the proposed meeting on ground that the notice for convening the meeting was bad, in law, as the explanatory statement communicating the notice did not set out the requisite material that the law obligates. The Supreme Court held that there was no ground available to the High Court to grant the injunction for holding the extraordinary general meeting of the company. The injunction granted by the High Court was, therefore, vacated.

Where first petitioner was party to board meeting, wherein date, place and agenda of AGM were fixed and further, respondents had produced certificates of posting to establish service of notice of AGM on directors and other shareholders, High Court was justified in rejecting complaint of petitioners that they did not receive notice of AGM and holding that AGM was legal and it was held with due notice - *V.S. Krishnan v. Westfort Hi-Tech Hospital Ltd.* [2008] 83 SCL 44/142 Comp. Cas. 235 (SC).

Where grounds mentioned in petition for an order of injunction for holding annual general meeting lacked credibility and balance of convenience was not in favour of petitioner, same was to be dismissed. - Gopal Das Gujarati v. Titagarh Paper Mills Co. Ltd. [1986] 60 Comp. Cas. 920 (Cal.). In the said case the petitioner-shareholder, who was holding 0.006 per cent of the total shares, brought a suit challenging the validity of a notice convening an annual general meeting on 30-9-1983, *inter alia*, on the ground that an agenda in the notice related to authorising the board to have the power to borrow money to the tune of rupees forty crores; the explanatory statement relating to the said item was misleading and did not disclose material facts. The petitioner challenged that the ground on the basis of which the borrowing power was sought by the board was a sort of conferring a blanket power to borrow a huge sum of forty crores without disclosing any particulars. The mere statement that it was required for the reconstruction and/or rehabilitation scheme could not in any way be said to be explanatory. An order for restraining the defendants by a temporary order of injunction from holding the said annual meeting on 30-9-1983 was sought on that very day, *i.e.*, the date of the meeting, and the application for *ad interim* injunction was sought for after the meeting was over. The petitioner did not appear in the said meeting.

The Court held that the application for making any order of injunction was to be dismissed on the following grounds :

- (1) that balance of convenience was not in favour of the petitioner as he was holding only a minimal amount of shares,
- (2) that the grounds mentioned in the petition lacked credibility,
- (3) that explanatory statement did not lack the particulars,
- (4) that it had not been explained why he came on the last date even at a time when the meeting was over although he had the chance to come before,
- (5) that the next annual general meeting was going to be held shortly, and
- (6) that the conduct of the petitioner was not such as to justify grant of an order of injunction which after all is an equitable relief.

A shareholder has a legal right to bring an action for restraining company from doing an illegal act or for questioning sufficiency or validity of notice of a resolution. In the instant case, what the petitioner was asking for was not an injunction restraining the respondent-company from acquiring shares of the other company; but what he was contending was that the notice of the meeting at which the resolution proposing the acquisition of shares was passed was invalid and, therefore, he was asking for an injunction restraining the respondent-company from implementing the resolution. - *Banwarilal Jaipuria v. Sitaram Jaipuria* [1972] 42 Comp. Cas. 29 (Cal.)

Where Court had injuncted company to preserve its property for discharging dues of a creditor, but without disclosing this fact, in a general meeting resolution was passed to sell property, purchaser of property could not enforce specific performance of sale agreement, if subsequently company was ordered to be wound up. As the resolution passed in the general meeting was in flagrant violation of section 173 of the 1956 Act [corresponding to section 102 of the 2013 Act], it was void. Further, the entire action on basis of such resolution was also void. - *Sunil Mills Ltd. v. Official Liquidator of Shri Ambica Mills Ltd.* [2000] 24 SCL 455 (Guj.)/*Y.S. Spinners Ltd. v. Official Liquidator of Shri Ambica Mills Ltd.* [2000] 25 SCL 26 (Guj.)