Memorandum of Association (Sec 4) Part-2

(Continued from Geeta Saar 93)

3.1 Name on change of activity

According to Rule 8(3), if any company has changed its activities which are not reflected in its name, it shall change its name in line with its activities within a period of six months from the change of activities after complying with all the provisions as applicable to change of name.

In the present rules, name of the company need not represent the objects of the Company. However, if name reflects an object, it should be in line with activities of the company and if such Company changes its objects, it shall change its name in line with changed activities.

3.2 Name of other person

According to Rule 8(4), in case the key word used in the name proposed is the name of a person other than the name(s) of the promoters or their close blood relatives, no objection from such other person(s) shall be attached with the application for name. In case the name includes the name of relatives, the proof of relation shall be attached and it shall be mandatory to furnish the significance and proof thereof for use of coined words made out of the name of the promoters or their relatives.

For the purpose of this clause, relative as defined in the clause (77) of Section 2 be treated as “close blood relative”, and “relative” referred about in this sub – rule.

3.3 Prior use of name

As per Rule 8(5), the applicant shall declare in affirmative or negative (to affirm or deny) whether they are using or have been using in the last five years, the name applied for incorporation of company or LLP in any other business constitution like Sole proprietor or Partnership or any other incorporated or unincorporated entity and if, yes details thereof and No Objection Certificate from other partners and associates for use of such name by the proposed Company or LLP, as the casemay be, and also a declaration as to whether such other business shall be taken over by the proposed company or LLP or not.

3.4 Name with Government Approval

Sub-section (3) of Section 4 provides that, a company shall not be registered with a name which contains any word or expression which may give impression that company is connected with any government or authority or any such word or expression as prescribed unless the previous of the Central Government has been obtained.

As per Rule 8(6), the following words and combinations thereof shall not be used in the name of a company in English or any of the languages depicting the same meaning unless the previous approval of the Central Government has been obtained for the use of any such word or expression: –

(a) Board;
(b) Commission;
(c) Authority;
(d) Undertaking;
(e) National;
(f) Union;
(g) Central;
(h) Federal;
(i) Republic;
(j) President;
(k) Rashtrapati;
(l) Small Scale Industries;
(m) Khadi and Village Industries Corporation
(n) Financial, Corporation and the like;
(o) Municipal;
(p) Panchayat;
(q) Development Authority;
(r) Prime Minister or Chief Minister;
(s) Minister;
(t) Nation;
(u) Forest corporation;
(v) Development Scheme;
(w) Statute or Statutory;
(x) Court or Judiciary;
(y) Governor;
(z) the use of word Scheme with the name of Government(s), State, India, Bharat or any government authority or in any manner resembling with the schemes launched by Central, state or local Governments and authorities; and (aa) Bureau

3.5 Name of Non – Profit Companies

According to Rule 8(7), for the Companies under section 8 of the Act, the name shall include the words foundation, Forum, Association, Federation, Chambers, Confederation, council, Electoral trust and the like etc. Hence, it seems that the intention is to demarcate such type of Companies by name itself. The interpretation of the phrase 'and the like' shall be done by the principle of ejusdem generis which will lead to inclusion of only those words which give indication of the Company being a Section 8 Company.

3.6 Name of Nidhi Company

Every company incorporated as a "Nidhi" shall have the last words 'Nidhi Limited' as part of its name.

3.7 Data base of name

The names released on change of name by any company shall remain in data base and shall not be allowed to be taken by any other company including the group company of the company who has changed the name for a period of three years from the date of change subject to specific direction from the competent authority in the course of compromise, arrangement and amalgamation. There is no apparent prohibition on the same Company reverting to its old name within this period of three years.

7. Form of Memorandum

As per sub-section (6) of Section 4, the memorandum shall be in respective form specified in Table A, B, C, D and E in Schedule I of the Companies Act, 2013.

- Table A - Memorandum of association of a company limited by shares
- Table B - Memorandum of association of a company limited by guarantee and not having a share capital
- Table C - Memorandum of association of a company limited by guarantee and having a share capital
- Table D - Memorandum of association of an unlimited company and not having share capital
- Table E - Memorandum of association of an unlimited company and having share capital

An existing company incorporated under any earlier Act is not mandatorily required to alter its Memorandum.

Further as per sub-section (7) of Section 4, any provision in the memorandum or articles, in the case of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void. Though this section is silent on the unlimited company, if the unlimited Company is a guarantee Company and not having share capital, the same prohibition would apply.

The right to participate in divisible profit of a company is essentially a right of members. Implication of sub-section (7) of section 4 is to permit a company having share capital may give right to participate in divisible profit of a company to any person other than members subject to provision of Memorandum or Articles. One example of such person may be an executive director who is not a member but may have percentage of divisible profit.

8. Doctrine of Ultra Vires

Objects of company are important not only to define scope of activities a company may undertake but also to give a general notice to general public. A company is not allowed to do any act which is not permitted in its objects and necessary in furtherance of its objects. Any act of a company beyond the objects of the company is called ultra vires to its objects clause. An act ultra vires to its objects shall be void and cannot be ratified even if all the members wish to ratify it. This is called the doctrine of ultra vires, which has been firmly established in the case of Ashbury Railway Carriage and Iron Company Ltd v. Riche *[(1875) L. R.7HL 653]*. Any act ultra vires to the object clause, shall be null and void. An ultra vires act is void and cannot be ratified even if all the directors wish to ratify it.

In the case of Attorney General v. Great Eastern Railway Co. *[4[1880]5 AC 473 (HL)*, this doctrine was made clearer. In this case the House of Lords affirmed the principle laid down in Ashbury Railway Carriage and Iron Company Ltd v. Riche but held that the doctrine of ultra vires "ought to be reasonable, and not unreasonable understood and applied and whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not to be held, by judicial construction, to be ultra vires."

The doctrine of ultra vires was recognised in Indian case of Jahangir R. Modi v. ShamjiLadha and have been well established and explained by the Supreme Court in the case of A. LakshmanaswamiMudaliar v. Life Insurance Corporation of India *[AIR1963SC 1189]*. Even in India it has been held that the company has power to carry out the objects as set out in the objects clause of its memorandum, and also everything, which is reasonably necessary to carry out those objects.

According to clause (a) of sub-section (1) of Section 245 of the Act a class action suit may be filed to restrain the company from committing an act which is ultra vires the articles or memorandum of the company.

In Ashbury Railway Carriage and Iron Co. vs. Riche *[[1875] L.R.7HL653]*, it was held that when an act is performed or a transaction is carried out, which, though legal in itself, is not authorised by the object clause, in the memorandum of association, such an act is null and void.

The court in Attorney General vs. Great Eastern Railway Co.,(supra) said, "Whatever may fairly be regarded as incidental or consequential upon those things specified in the memorandum of association as object ought not to be held ultra vires unless expressly prohibited."

Further, in Rolled Steel Products (Holdings) Ltd v British Steel Corporation *[[1986] Ch 246]* it was decided that a company has power to do only those things which are within, or reasonably incidental to, its stated objects. If an act is capable of being in

pursuance of, or incidental to, the stated objects, it could not be ultra vires and void because of the purpose or state of mind of the directors who authorised it.

Court discussed the doctrine of ultra vires in Radhabari Tea Company Private Limited vs. Mridul Kumar Bhattacharjee and Other *[2009 Indlaw GUW 44]*. The doctrine of ultra vires provides that an action, taken by the board of directors of a company or the company itself beyond the powers conferred on the company and/or its directors by the memorandum of association of the company, is ultra vires.

Further, in White and another v South Derbyshire District Council *[[2013] P.T.S.R.536 90]*, it was held that an ultra vires act is not necessarily void for all purposes and the law would strive to protect innocent third parties who had relied upon the apparent validity of such an act. In this case, a public authority issued a license for proper management and in public interest but the Act was ultra vires to its power. Singh J in its order said that it was clear that, once a court of competent jurisdiction had decided that an act was ultra vires, it would normally be treated as having no legal effect. However, the court would invalidate an order only if the right remedy was sought by the right person in the right proceedings and circumstances.

(Concluded)

Contents of Geeta Saar, as extracted from ICSI Premier on Company Law, is as per notified law as on 30th September, 2016.